

GREGORY LEYH'S APPROACH TO CONSTITUTIONAL HERMENEUTICS: A CRITICAL ANALYSIS OF LEGAL HERMENEUTICS ACCORDING TO HANS-GEORG GADAMER

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Abstract

Constitutional interpretation is a crucial and evolving field that extends beyond judges, involving legal scholars, citizens, and political theorists. It encompasses various methods such as originalism, textualism, moral reasoning, structural reasoning, and comparative constitutional law, each offering distinct approaches to understanding the Constitution. These methods are often categorized into two schools of thought: originalist and non-originalist. The debate between these two approaches has been a source of recurring controversy, with originalism advocating for adherence to the framers' intentions and non-originalism promoting a more dynamic, "living" interpretation. Terence Ball emphasizes the significance of constitutional interpretation, dubbing it "deadly hermeneutics," as a nation's fate hinges on how its Constitution is understood and applied. While traditional theories focus on textual meaning or historical context, this article proposes that constitutional interpretation must also be approached ontologically—understanding the very essence of interpretation. Drawing on Gadamer's philosophical hermeneutics, this study suggests that constitutional interpretation should be viewed as a dynamic process influenced by historical understanding, language, and societal context. Constitutional hermeneutics, as a theoretical framework, opposes rigid methodologies and emphasizes the role of language, historical context, and prejudices in shaping meaning. It offers a more holistic understanding, allowing for the Constitution to evolve with societal changes, ensuring its relevance in modern governance. This approach provides a more comprehensive solution to the challenges posed by the debate between originalism and non-originalism.

Keywords: Constitutional Interpretation; Originalism; Non-originalism; Hermeneutics; Legal Philosophy.

A. Introduction

Constitutional interpretation is a subject for those who study how the Constitution can be applied (Bobitt, 1996). Those who study the Constitution are not just judges. However, constitutional interpretation has two dimensions: the application of the constitution by authorized officials and academic analysis in education (Barak, 2006). The task of interpreting the constitution is not only for legal scholars, lawyers, and judges, but also for citizens in general (Ball, 1992). These arguments are presented not to argue that everyone has the authority to interpret the Constitution, but to show that constitutional interpretation evolves and develops.

To understand the meaning of the constitution, it is essential to construct a foundation for interpretation and argumentation. The meaning derived from this process reflects the underlying thought process used in deciding constitutional issues. Therefore, the question at hand is not just about what the constitution means, but also how it should be interpreted. Various theories of constitutional interpretation have emerged, each emphasizing different aspects of the constitution. Some theories focus on the history, depending on the original intentions of the framers, while

others concentrate on the text itself, analyzing the meaning of the words within the constitution. Some interpret the constitution through the lens of its structure, reasoning from its functional components, while others rely on doctrine, deriving rules from precedents. Additionally, there are interpretations based on the ethos of the constitution, deriving rules from the moral and political commitments reflected in it, or on prudence, balancing the consequences and benefits of proposed rules. These approaches have been further categorized into textualism, originalism, moral reasoning, structural reasoning, comparative constitutional law, and common law reasoning (Bobbitt, 1996; Friedman, 2012).

From all these theories, a single belief emerged regarding the interpretation of the constitution, known as the school of constitutional interpretation. This school is divided into two main camps: originalists and non-originalists, both of which provide answers to the question of what the constitution means and how it should be interpreted. Originalists and non-originalists, however, base their interpretations on different foundations. Their differing approaches often lead to opposing theories, and this divide has become a recurring source of controversy. Both perspectives have been at the heart of ongoing constitutional debates (Perry, 1992; Ball, 1992; Walker, 1990). The individuals involved in this debate are driven by the belief in a single approach to constitutional interpretation, seeking a universal answer to all constitutional questions, which they regard as having absolute truth. Originalists are often viewed as conservative jurists, committed to rejecting the legitimacy of the living constitution concept. In contrast, non-originalists are typically associated with the theory of a living constitution, which views the law as evolving alongside the constitution (Bowser, 1997; Fallon, 1987).

Therefore, constitutional interpretation is crucial because the resolution of constitutional issues relies heavily on how the constitution itself is interpreted. Recognizing its importance, Terence Ball referred to it as “deadly hermeneutics,” stating that a nation’s fate is determined by the interpretation of its constitution (Ball, 1992). From a modern perspective, constitutional interpretation should not be seen merely as a “cognitive” debate, but rather as an “ontological” one. It must be acknowledged that some aspects of constitutional interpretation cannot be resolved through theoretical frameworks alone. These issues require deeper analysis, one that transcends theoretical discourse and is rooted in fundamental philosophical inquiry. Conflicts in constitutional interpretation cannot simply be addressed through existing theories. A clash between these theories alone will not resolve constitutional issues (Hermawan, 2016). Thus, the solution lies within a deeper, ontological realm. The goal is not to create a set of rules or methods for interpreting texts as mere “cognitive” procedures, but to seek answers to the very essence of interpretation itself—“ontis.”

All of this can only be achieved through hermeneutics, as it is intrinsically linked to ontological concerns (Sumaryo, 1999). Hermeneutics recognizes the unchangeable relationship between the reader and the text, bridging the past and the present where understanding first emerges. In essence, hermeneutics is not just concerned with the text but with existence itself. It represents the intersection of philosophy and human existence, forming the foundation of hermeneutics (Jaramillo & Vanegas, 2018). The true value of hermeneutics lies in its ability to provide constitutional interpreters with a deeper understanding, helping them grasp the evolving interpretations of the Constitution. This perspective aligns with Gregory Leyh’s 1988 article *Toward a Constitutional Hermeneutics*, published in the *American Journal of Political Science*. Leyh argues that hermeneutics offers a solution to the ongoing debate over constitutional interpretation, and his admiration for hermeneutics is evident. He states, “The adoption of a hermeneutical perspective allows constitutional theorists to address the salient problems in a new and beneficial light. The chief virtue of constitutional hermeneutics is that of deepening the self-understanding of constitutional interpreters who seek to gain a better grasp of the philosophical presuppositions of their practical activity” (Leyh, 1988, p. 369).

Leyh's beliefs were then translated into a practice of constitutional interpretation known as "Constitutional Hermeneutics," which was derived from Hans Gadamer's concept of thought. Through Gadamer, Leyh analyzed the contemporary uncertainty in constitutional interpretation. Leyh's appropriation of Gadamer's ideas was not misguided; Gadamer's thought is regarded as the pinnacle of hermeneutic theory, emerging from a range of ideas spanning from epistemology to ontology, as summarized in his work *Wahrheit und Methode*. Gadamer openly declared that hermeneutics is a philosophy, not just a methodology for the science of interpretation. It does not align itself with any specific discipline, nor is it confined to a rigid form of interpretation. Rather, it offers a comprehensive ontological understanding — that human beings understand themselves as historical beings and give meaning to their lives in relation to their world (Gusmao, 2013). Gadamer's work on reconstructing the meaning of ancient philosophy explores human existence, the problem of conditions, and the possibility of understanding, which must be considered in the domain of ontology (Vira, 2019).

The main line of Leyh's understanding of Gadamer's hermeneutics is the concept of "the nature of historical understanding." Leyh (1988) emphasizes that constitutional theorists often overlook the conditions that make historical knowledge possible. He argues that the traditional approach to historical understanding is overly simplistic, assuming that acquiring historical knowledge is epistemologically straightforward. Instead, Leyh advocates for a more critical examination of the premises underlying current interpretive theories. According to Leyh, constitutional theory should not merely accept the framers' intentions or the original meaning of the Constitution as self-evident, but rather engage in a deeper reflection on the historical and philosophical foundations of constitutional interpretation. This critical approach, rooted in Gadamer's hermeneutics, calls for a more nuanced understanding of how historical knowledge and context shape constitutional interpretation.

Starting from an analysis of Leyh's thought, this article aims to explore how Leyh engages with Gadamer's ideas to identify the convergence between philosophical hermeneutics and constitutional theory. This convergence offers a broader understanding, challenging the narrow "myth" that accuses Hans-Georg Gadamer's hermeneutics of being inapplicable to legal science, particularly constitutional law. By examining this intersection, the article argues that Gadamer's hermeneutics can provide valuable insights into constitutional interpretation, countering critiques that dismiss its relevance to the legal field.

B. Discussion

1. Constitutional Interpretation Through Gadamer's Lens: Language, History, and Preconceptions

In his engagement with Gadamer's philosophical hermeneutics, Gregory Leyh borrows two crucial aspects of Gadamer's thought: his view of language and his concept of preconceptions, or *preunderstanding*. These two elements are fundamental to Gadamer's hermeneutical framework, serving as essential entry points to the process of interpretation. Gadamer emphasizes that language is not merely a tool for communication but is inextricably linked to our understanding of the world. According to Gadamer, language shapes our experience and the way we interpret reality, as it is through language that we engage with texts, history, and each other. Leyh builds on this idea, asserting that understanding is always mediated through language, which is not static or neutral but deeply embedded in historical contexts. This historical embeddedness means that all knowledge is shaped by the structures and concepts that have evolved over time, influencing the way we interpret and understand the world around us.

For Leyh, Gadamer's view on the role of language in understanding highlights the necessity of recognizing the historical conditions that shape our knowledge (Mootz, 2016; Mootz III, 1994). Language, according to Gadamer, is not a mere vehicle for conveying fixed meanings; instead, it

is a dynamic force that evolves within specific historical, cultural, and social contexts. This means that any interpretation of a text or historical event is inevitably shaped by the interpretive traditions and historical structures in which the interpreter is situated. Leyh emphasizes that an interpreter must acknowledge these historical structures because they influence not only the meaning of the text but also the very process of understanding itself. Ignoring the historical context in which language is rooted would lead to a distortion of meaning and a failure to grasp the full depth of the text.

In addition to language, Leyh also draws on Gadamer's concept of *preunderstanding*—the idea that every interpreter brings a set of preconceptions to the act of understanding. These preconceptions, or prejudices, are not necessarily negative or obstructive but are an inherent part of the interpretive process (Champlin-Scharff & Hagen, 2013). Gadamer argues that these preconceptions serve as a lens through which we view the world, and they are shaped by our cultural, historical, and social backgrounds. Leyh agrees with Gadamer that these preconceptions are not to be eliminated or disregarded, but rather understood and interrogated. They serve as a “window” into the past, providing a connection between the present moment and the historical context of the text or event being interpreted. Through this lens, the interpreter can engage with the historical layers embedded in the text and arrive at a deeper understanding of its meaning.

Leyh takes Gadamer's ideas further by critiquing certain approaches to interpretation that seek to suppress contemporary ways of thinking in favor of recovering the “original” meaning of a text. He argues that such approaches, often associated with historical or originalist methods of interpretation, misunderstand the nature of hermeneutics. These methods attempt to retrieve a “pure” interpretation of the past, disregarding the fact that every act of understanding is inevitably shaped by the interpreter's present historical context. Leyh asserts that hermeneutics is not about stripping away the contemporary context to reveal a static, timeless truth, but rather about engaging with the historical and cultural context in which both the text and the interpreter are situated. This view aligns with Gadamer's belief that understanding is always situated within a tradition and that meaning is not fixed but continually evolving as it is reinterpreted in new contexts.

By emphasizing the role of language and preconceptions, Leyh's interpretation of Gadamer's hermeneutics offers a more nuanced understanding of constitutional interpretation. Rather than attempting to recover an original, static meaning of the Constitution, hermeneutics encourages a dialogue between the past and present, acknowledging the historical conditions that shape our understanding while remaining open to evolving interpretations. In this way, constitutional theory can remain dynamic and responsive to the changing needs and values of society.

According to Leyh (1988), the fundamental character of language in human affairs leads to two key conclusions. First, it becomes evident that our concepts do not possess stable, immutable meanings. Language, by nature, lacks intrinsic properties that convey unchanging content. Second, meaning in human affairs is deeply historical. As language evolves, so too must the categories available to us for understanding our practical relationships with others in society (p. 373). This implies that language is not a static entity but a dynamic system that reflects the evolving nature of human thought, communication, and societal values.

Leyh further argues that language does not inherently convey a fixed meaning; rather, it is always in flux, and the categories we use to interpret it must adapt to this evolution. Written language, composed of words, functions as a collection of symbols that require interpretation (Hadiman, 1991). These symbols are the foundation of Gadamer's philosophical hermeneutics, which views language as a medium through which understanding is achieved. For Gadamer, language is not just a tool for communicating ideas but a means by which we engage with the world and shape our understanding of it (Vira, 2019).

Leyh highlights that in constitutional interpretation, we should not focus exclusively on the framers' original intentions as the sole means of determining constitutional meaning. Instead, we must also consider the evolving context in which the text is interpreted. Understanding a

constitutional text requires recognizing the mutable nature of its language and meaning. Interpretation involves more than recovering the framers' intent; it also entails situating the text within a new linguistic and cultural context, where its meaning is continually reinterpreted. Essentially, this process is akin to translation—a dynamic act that involves rendering a text into a new context, thereby allowing it to resonate with contemporary values and issues.

Gadamer's concept of *Zeitenabstand* (temporal distance) is central to this idea of linguistic understanding. Gadamer asserts that history is a time in which humans discover themselves as already situated within it. History does not begin with us; rather, we emerge from history, which carries with it its legacy and traditions. However, Gadamer argues that this temporal distance does not lead to misunderstanding. Instead, it fosters a renewal of understanding. As he writes, "Every age has to understand a transmitted text in its own way, for the text belongs to the whole tradition whose content interests the age and in which it seeks to understand itself. The real meaning of a text, as it speaks to the interpreter, does not depend on the contingencies of the author and his original audience" (Gadamer, 2004, p. 296).

In this context, Gadamer emphasizes that understanding is not a simple retrieval of the author's or original audience's intentions. Instead, each era must interpret a text in its own way, influenced by its own historical and cultural circumstances. The meaning of a text is not fixed by the author's original intent but is continually shaped by the present context in which it is read. Thus, interpretation is a dynamic process that bridges the past and the present, allowing the text to remain relevant and meaningful across time. This perspective challenges the idea that interpretation can ever be purely objective or fixed, reinforcing the importance of understanding texts in relation to the evolving historical and linguistic contexts.

This means that the temporal distance that widens the gap between the interpreter and the text is not an obstacle that causes misunderstandings and should be avoided because it is negative. According to Gadamer, time is no longer the main dividing factor that must be connected because it separates. The temporal distance is not something to be overcome (Gadamer, 2004). The temporal distance is positive and shapes the present. Gadamer firmly states that "the text has become part of the whole tradition" and "the text does not depend on the author or the people for whom the text is intended"; the text reveals itself to the interpreter (Gadamer, 2004). Hermeneutics must show the effect of history that is present in every act of understanding—the whole of history is an active process that is always actualized in that now of understanding (Ostojčić, 2021).

Gadamer states that it is crucial to consider time as something positive and a productive condition for understanding. It is not like a yawning abyss but is filled with continuity and tradition, which, in their entirety, present themselves to us (Gadamer, 2004). It is worth emphasizing Gadamer's statement, "continuity of custom and tradition, in the light of which everything handed down presents itself to us," which means, first, the meaning of the text becomes open. Second, the time becomes a filter to eliminate inappropriate interpretations. The temporal distance ultimately becomes ...obviously means something other than the extinction of our interest in the object. It lets the true meaning of the object emerge fully (Gadamer, 2004).

Leyh borrows Gadamer's insight to explore the evolving journey of language, especially within the context of constitutional interpretation. For Leyh, language is not merely a medium for communicating fixed meanings, but an evolving, historical force that shapes human understanding over time. As Leyh (1988) asserts, "The import for constitutional jurisprudence of the argument that language is the medium of human experience is clear. Constitutional interpretation correctly conceives of itself as it attempts to transpose past meaning into terms intelligible in the present" (p. 374). This means that constitutional interpretation must recognize the dynamic nature of language and its role in shaping meaning across generations.

Leyh highlights that legal interpretation, like any form of textual interpretation, has the responsibility to translate archaic or historical concepts into terms that are relevant and meaningful

in contemporary society (Kusik, 2024; Walshaw, 2013). A “genuinely historical” interpretation does not merely seek to recover the original intent of the framers but instead understands the conceptual differences between the past and the present (Ankersmit, 2012; Gunnell, 1982). The challenge is to bridge the gap between historical contexts and modern understandings, allowing constitutional principles to be applied in ways that resonate with contemporary values and norms.

For Leyh, constitutional jurisprudence is inherently tied to human experience. It involves a process of self-understanding, where interpreters engage with the text and adapt its meaning to the evolving context of the present. As Leyh boldly states, “Present history of necessity includes the concepts and categories of contemporary political and legal thought. Our encounters with the past always occur through the communicative structures of the present” (p. 347). This underscores the idea that legal interpretation is not about resurrecting a fixed, original meaning but about translating and reinterpreting past ideas in ways that remain socially and politically relevant today. The process of interpreting a constitution, therefore, must be dynamic and responsive to the changing societal landscape, ensuring that it continues to serve its foundational purpose while adapting to new contexts.

2. The Role of Prejudice in Constitutional Interpretation: Gadamer and Leyh’s Hermeneutic Approach to Historical Meaning

What about prejudice? For Leyh, understanding historical reality, as discussed above, hinges on the concept of “prejudice.” In this context, “prejudice” does not carry its common negative connotation but refers to the preconceived judgments and preconceptions that influence how we approach a given subject of inquiry. Leyh (1988) argues that no text simply appears before us and announces its meaning. Instead, readers must actively engage with the text, questioning it and its tradition, in order to understand how it can be properly applied to contemporary issues. He states, “the concept of prejudice such that it serves as an enabling instrument for the acquisition of historical meaning. ‘Prejudice’ refers to the existence of prejudgments and preconceptions regarding a given subject of inquiry. No text simply sits before us and announces its meaning. Readers must pose questions to the text and its tradition and be conscious of ways the text may be faithfully applied before any meaning can be construed” (p. 375).

Thus, for Leyh, prejudice is essential for understanding because it helps frame the context in which a text is interpreted. This concept of prejudice was historically rejected during the Age of Enlightenment, which valued reason, objectivity, and the ideal of understanding free from prior assumptions. Enlightenment thinkers, influenced by Cartesian thought, emphasized that understanding should be based solely on reason and empirical evidence, discarding any preexisting beliefs or authorities. The Enlightenment’s focus on objectivity led to a widespread rejection of “prejudice,” viewing it as a barrier to true understanding (Cushing, 2020).

However, Gadamer reinterprets this view, transforming prejudice from a negative concept into a positive one. For Gadamer, prejudice is not an obstacle to understanding but an integral part of the interpretive process. Prejudice, in this sense, represents the preconceived ideas and traditions that shape how we approach and make sense of a text. It is through these preconceptions that we can engage with the historical and cultural context of a text, connecting it to our own present understanding. Gadamer’s view allows prejudice to become a bridge between tradition and understanding, enabling us to approach historical texts with the awareness that our interpretations are influenced by our own cultural and historical context. Therefore, rather than seeking to eliminate prejudice, Gadamer and Leyh argue that we must recognize and critically engage with it, as it plays a vital role in deepening our understanding of historical texts.

Prejudice is the basis of human existence that enables humans to understand history as a whole. As also stated by Heidegger when explaining the pre-structure of understanding and the intrinsic historical aspect of human existence, he explains that interpretation is never achieved without prior prejudice (Gadamer, 2004). Heidegger emphasizes that understanding something is

never initiated from an empty consciousness, but rather because, within us, certain intentions or purposes regarding what we want to understand are already stored (Gadamer, 2004). Heidegger focuses solely on “being” within its “existence” (Sitompul, 2009). Throwing or appropriating does not equate to “Being” in its theoretical hypostasis as “Being Itself.” The thrown-openness has always existed—it is inherent to our nature, and nothing can surpass or transcend it (Anam, 2025). Arief Sidarta (2007) also emphasized that the process of absorbing tradition ultimately forms a pre-understanding (*vorverstandnis*) of everything, namely a prejudice in the form of a decision given before all the elements that determine something or a situation are thoroughly examined, and with that also forms a horizon of view including range of vision that contains all things that appear from a certain subjective point of view (vantage point). In addition, it also forms a “fusion of horizons,” which suggests that the interpreter’s understanding is influenced by their own historical and cultural context (Silalahi, 2024).

Gadamer reinforced this concept of prejudice with the concept of impactful history (*wirkungsgeschichte*). Impactful history means the dynamic movement that creates an impact. Humans must be aware that, consciously or unconsciously, in every understanding, they are bound by the power of history. The significance of the concept of *wirkungsgeschichte* is historical awareness, where one cannot be outside of it and therefore will never possess objective knowledge (Muzir, 2008). This concept essentially discusses two interrelated issues. First, in the process of understanding, a person, consciously or unconsciously, is confronted with a historical work or historical data that preceded them. In short, humans already possess the knowledge material. Second, in the process of understanding, humans always find themselves in a certain relationship with what they are trying to interpret (Gusmao, 2013).

Based on the explanation above, prejudice, according to Leyh, is not only the initial gateway to understanding but also a vital means of preserving constitutional tradition. By allowing constitutional texts to speak to us in the present through the medium of prejudice, we engage with the living tradition of constitutional law. Leyh (1988) argues that this process is the only way to maintain the integrity of the rule of constitutional law over time. In this light, both language and prejudice play critical roles in the ongoing understanding of constitutional meaning. To dismiss philosophical hermeneutics as a “fallacy of thinking” would be overly simplistic. Instead, Leyh contends that through philosophical hermeneutics, we can truly grasp what happens when we seek historical knowledge about the fundamental law of our Constitution. As Leyh (1988) asserts:

“Philosophical hermeneutics suggest that a full appreciation of constitutional meaning requires consciousness of our prejudices and of the mutable nature of the language through which the text appears. In practical terms, this suggests that interpreters acknowledge relevant changes in conceptual language and political values and that they apply the constitution's terms and tradition to the case at hand in such a way as to express a faithfulness to the constitution's purposes” (p. 377).

From Leyh’s statement, it is clear that constitutional meaning is produced within the practical realm of interpretation and is inevitably shaped by our historical context. Constitutional hermeneutics, therefore, emphasizes the importance of understanding the text based on current conditions, while also recognizing its historical foundation. Those entrusted with interpreting the Constitution must consider not only the original meaning of the constitutional text but also the environmental, political, and social changes that have occurred since its formulation. This approach involves reconstructing the original meaning in light of these shifts, ensuring that the Constitution remains relevant and effective in addressing contemporary issues. Furthermore, it requires exploring the full breadth of the Constitution's application, recognizing that its meaning evolves as society changes. Ultimately, this perspective allows constitutional law to function in a way that is both faithful to its origins and responsive to the present, ensuring that it serves its

foundational purpose of guiding governance and protecting individual rights in a dynamic and changing world.

For example: the meaning of an article in the 1945 Constitution of the Republic of Indonesia, judges are certain to have a ‘preliminary framework’ for their understanding. It should be remembered that judges grow up in the tradition in which they live, absorbing traditions that form a pre-understanding (*vorverstandnis*) of everything. This is where the concept of prejudice comes in, which shapes a person’s pre-understanding and perspective. These prejudices must be tested so that one’s perspective continues to expand and gain depth of meaning. Therefore, judges must be able to understand the historical context in which the article was formulated, namely the debates that took place during the formulation of the 1945 Constitution, namely the debates of the BPUPKI. Not stopping there, judges must also understand the context of the 1945 Constitution amendments, the debates in the People’s Consultative Assembly, academic document reviews, and the understanding that arose in the post-reform context. This is where the dialogue between the interpreter and the text being interpreted, and between historical understanding and contextualisation, takes place. As a result, the interpretation of articles can be expanded to include current meanings, even if those meanings did not exist when the articles were formulated. In practice, ‘personal protection’ as formulated in Article 28G paragraph (1) of the 1945 Constitution may have the meaning of ‘the right to digital privacy’ even though its original meaning was not like that.

Through hermeneutics, constitutional interpretation is no longer regarded as merely the reproduction of an original meaning. For Dilthey and Schleiermacher, hermeneutics was nothing more than a method for capturing the original meaning of a text (Palmer, 1969). For Gadamer, hermeneutics is a production. An approach that focuses on finding the meaning of a text creates a dilemma for hermeneutics because, as the science of interpretation, it cannot simply be separated from the interpreter or reader themselves, who certainly have their own historical horizon. In this context, Gadamer raises a very extreme thought, that attempts at objectivity will only be futile for anyone who will interpret a text (Mulyono, 2012). It is because between the author and the interpreter there is a gap of tradition that cannot be reconciled, and that the interpreter cannot be emptied of its cultural currents that provide its own character as its hermeneutic capital of “pre-understanding”. Thus, the attempt at pure objectivism in hermeneutics will only be an impossibility, so that what the interpreter can do is produce the meaning contained in the text so that it becomes richer in meaning (Mulyono, 2012). Rich in meaning here means that the meaning becomes broader or that there is an expansion of meaning.

3. Leyh’s Critique of Originalism: Advocating for a Living Constitution

The previous description clearly identifies the target of Leyh’s critique—those who advocate for originalism in constitutional interpretation. Leyh (1988) firmly critiques originalism, asserting that its narrow conception of interpretation has significant practical consequences. He warns that originalism places a “constitutional brake” on the progress of moral and political discourse, effectively constraining the evolution of ideas and societal values. Leyh emphasizes that to control or limit discourse is to control the way we live, and by doing so, originalism undermines the very concept of constitutional fidelity. He argues that the purpose of constitutional hermeneutics is to ensure a faithful interpretation of the law, but originalism, in Leyh’s view, subverts this purpose. By insisting on a rigid adherence to the original meaning of the Constitution, originalism denies the possibility of translating the text’s meaning into the moral language of the present (Leyh, 1988, p. 379).

Leyh’s argument is a bold one, especially since originalism often relies on an almost unquestioning commitment to the framers’ original intentions as the key to upholding constitutional values. According to Leyh, however, originalism does the opposite. It not only stifles the progress of moral and political thought but also undermines the loyalty to the Constitution that

it seeks to protect. In his view, originalism is a hermeneutically inadequate theory because it fails to account for the ontological nature of historical understanding. Leyh (1988) critiques the originalist approach, stating: “The leitmotif of originalist constitutional theory is the idea that textual truth consists in a text’s original meaning... The purpose of interpretation is to recover past meaning that lies in waiting. But as we shall see, such a view fails to notice the ontological character of historical understanding and thus misconceives of and misdescribes interpretive activity” (p. 377).

Leyh argues that originalism fails because it lacks a critical understanding of the historical inquiry process. By focusing exclusively on recovering the original meaning of the text, originalism ignores the historical context in which that meaning was formed. This leads to a fundamentally flawed view of language, texts, and interpretation, one that overlooks the historical development of ideas and values. In other words, originalism ignores its own historicity—it fails to recognize that both the Constitution and the process of interpreting it are embedded in a specific historical context that must evolve over time. Leyh (1988) asserts that originalism does not take history seriously enough, as it disregards the historical nature of both the text and its interpretation. Thus, originalism’s rigidity leads to a distortion of constitutional law, as it fails to adapt to changing political, moral, and social realities, undermining its own claim to fidelity to the Constitution.

The originalist view is adherence to the original understanding of a text as a strong form of protection against abuse of authority with the aim of preserving moral values. This means that the basic principles laid down in the formation of the constitution are fixed and reflect a set of moral values and justice that form the constitution. (Smith, 2008) When understood hermeneutically, Leyh considers that it has failed to protect these moral values. ‘Our moral concepts always change as our social life changes’ (Mulyono, 2012). Because the constitution contains certain moral values (for example, freedom, equality, protection of rights), constitutional meaning must inevitably follow the political, social, legal, and economic dynamics that develop in national life. Therefore, interpretation must be able to capture the moral values surrounding the constitutional text. It is clear, then, that originalist interpretation is very narrow, which has the potential to lead to interpretive misunderstandings. They have unwittingly placed a constitutional ‘brake’ on the wheels of change in moral and political discourse that is a necessity in interpretation itself.

According to Leyh, originalism ultimately undermines its own goal of preserving the original meaning of the Constitution and protecting the values it enshrines. By adhering strictly to the framers’ intentions, originalism paradoxically becomes contrary to the very idea of constitutional fidelity. It does so by denying the judiciary the flexibility to translate the text’s meaning into the moral language of the present. Leyh (1988) articulates this critique, asserting: “Constitutional interpretation is the activity of transmitting foundational law into new historical and practical contexts. Interpretation is the putting into practice of ‘the legal idea’ embodied by a written constitutional provision. Such activity is altogether practical insofar as the content of any interpretation is deeply entangled in the contemporary facts, concepts, and categories that initially frame an inquiry” (p. 380).

For Leyh, originalism’s narrow approach to constitutional interpretation, which focuses solely on recovering past meanings, is misguided. He believes the real debate should be centered on the concept of the “living Constitution.” A living Constitution is one that evolves to meet future needs, adapting to changing societal values and circumstances. As David Anders explains, “The phrase ‘living Constitution’ refers to the premise that the Constitution’s meaning should evolve with time” (Dennis J. Goldford, 2005). Supporters of this approach argue that the living Constitution is what best protects fundamental values.

Importantly, the living Constitution does not advocate for unrestricted freedom in interpretation, nor does it imply that the Constitution’s meaning is endlessly malleable. Instead, it allows the Constitution to evolve in ways that preserve its core principles—such as basic rights and values—while making it adaptable to contemporary issues. By recognizing that society and

its moral framework evolve over time, the living Constitution ensures that the foundational principles of the Constitution remain relevant, safeguarding rights and freedoms in the context of modern life. This approach offers a dynamic and pragmatic means of ensuring that constitutional law remains true to its core purposes while addressing the challenges of a changing world.

4. Constitutional Hermeneutics: Bridging the Past and Present in Evolving Interpretations

The next question to address is: what is constitutional hermeneutics? Constitutional hermeneutics is not merely a method for reading constitutional texts; rather, it provides the tools necessary to evaluate arguments for any constitutional interpretation. According to Leyh, constitutional hermeneutics can be defined as the process of translating fundamental law into new historical and practical contexts. Interpretation, in this sense, involves applying the “legal ideal” embodied in written constitutional provisions. Merely explaining the original meaning of a section of the Constitution is not a sufficient interpretation; it sidesteps the judicial responsibility to make the Constitution applicable to contemporary values and conditions. Judges must not only reflect on the text but also strive to provide sound decisions, ensuring that the Constitution remains relevant in modern contexts. As Leyh (1988) asserts, “Constitutional interpretation is the activity of transmitting foundational law into new historical and practical contexts. Interpretation is the putting into practice of ‘the legal idea’ embodied by a written constitutional provision. Such activity is altogether practical insofar as the content of any interpretation is deeply entangled in the contemporary facts, concepts, and categories that initially frame an inquiry... Merely to describe an original meaning or repeat what others have said about a constitutional passage is to avoid the judicial obligation to make the law speak to its contemporary audience” (p. 380-381).

In this way, hermeneutics reveals the Constitution’s characteristics in the present while reconstructing the past. Constitutional meaning, according to Leyh (1988), is not fixed or definite. The meaning evolves because the delivery of constitutional meaning depends on changing structures of language, politics, and morals. Thus, constitutional meaning is inherently dynamic, adapting to the shifting realities of society. Interpretation, therefore, depends on several factors: the interpreter’s experience, knowledge of relevant legal ideas, analytical skills in distinguishing pertinent aspects of a case, and the ability to formulate these components with clarity and coherence. As Leyh (1988) emphasizes, the interpretation process is an ongoing cycle of practical judgment, and this activity is carried out through the hermeneutic circle—*Hermeneutische Zirkel*. This circle represents the back-and-forth movement between understanding the individual parts of a text and seeing the text as a whole, leading to a more complete understanding. According to this model, each part of the text can only be fully understood in the context of the whole, and conversely, the whole can only be understood when its parts are properly interpreted.

This process of understanding is made possible by the interpreter’s horizon of view, shaped by pre-understanding (prejudice), which is developed through interaction with the tradition in which the interpreter lives (Sidharta, 2007). The interpreter brings these prejudices into the interpretive act, acknowledging that they are integral to how the meaning of the Constitution is constructed. These preconceptions, rather than obstructing understanding, provide a starting point for engaging with the text. Thus, constitutional hermeneutics is not simply about recovering the original meaning of the text, but about dynamically interpreting it in a way that connects the historical context of its creation with contemporary understanding and values.

Therefore, it is clear that constitutional hermeneutics is capable of addressing the challenges posed by evolving interpretations. In principle, constitutional hermeneutics avoids falling into the trap of dogmatic theoretical choices. All theoretical perspectives are considered in the interpretation, and efforts are made to expand the horizons. Dialogue, a concept rooted in philosophical hermeneutics, is also integral. Thus, constitutional interpretation requires the selection of beliefs (or “isms”) that consistently influence the process. These beliefs do not become ensnared in methodological dogma (i.e., the sanctification of a method). Rather, they remain within

the ontological realm, acting as a guiding star in constitutional interpretation. Certainly, this should not involve the choice of “isms” that are overly narrow and closed, such as “originalism,” or those that are excessively liberal, open, and relatively “non-originalist.” Instead, the beliefs should be grounded in a hermeneutic understanding.

Constitutional hermeneutics once again emphasizes that it is never confined to a specific theory in constitutional interpretation. Unlike originalism and non-originalism, constitutional hermeneutics opposes dogmatic methodological approaches. This aligns with Gadamer's view that method limits truth. Dialogue between existing theories must be encouraged so that truth can emerge. A belief in a narrow approach can stifle the truth itself. Theories in constitutional interpretation should be based on an open conscience. Interpretation must incorporate moral values and aim to realize the “ideal of law” in current practices. The “ideal of law” is essential because it is important to recognize that defining constitutional hermeneutics is not ideologically neutral (Jaramillo & Vanegas, 2018). Through constitutional hermeneutics, the constitution is not merely seen as a static, closed text, but as one that evolves and adapts over time to changing circumstances, needs, and societal values. As Goodwin Liu, et al. (2005) state: “The Constitution is understood to grow and evolve over time as the conditions, needs, and values of society change. Proponents of this view argue that such evolution is inherent to the constitutional design because the Framers intended the document to serve as a general charter for a growing nation and a changing world. Thus, constitutional interpretation must be informed by contemporary norms and circumstances, not merely by its original meaning”.

C. Conclusion

The constitutional problem of interpretation, particularly within the context of legal texts such as the Constitution, is profoundly addressed by Gadamer's hermeneutics. Gadamer's philosophy emphasizes the crucial role that language plays in shaping our understanding of the world. According to Gadamer, all knowledge is influenced by historical structures, and this includes the interpretation of legal texts. For Gadamer, understanding any “text” cannot be separated from its historical context; the text must be viewed not only in its original time and place of creation but also through the lens of contemporary concerns and values. Legal texts, such as the Constitution, are not static documents; their meaning is not fixed but evolves over time, reflecting changing social, political, and moral values.

The task of hermeneutics, in Gadamer's view, is not to create a sharp divide between the past and the present. Rather, it aims to bring the past into dialogue with the present. Through this process, hermeneutics offers a window into the past, allowing us to see how historical texts continue to speak to the present. This is where the concept of “prejudices” or “preconceptions” comes into play. Humans naturally approach any text or idea with preconceived notions, shaped by their personal histories, cultural backgrounds, and societal influences. The challenge of hermeneutics, however, is not to eliminate these prejudices but to recognize them and evaluate their legitimacy in the interpretive process. Hermeneutics asserts that these preconceptions are not barriers to understanding but are essential to the act of interpretation. They provide the lens through which we interpret the text, but we must remain aware of them and critically assess their role in shaping our understanding.

For Gadamer, the interpretive process is not about a neutral, detached engagement with a text. It is a dynamic and ongoing process shaped by the historical and cultural context of both the text and the interpreter. Understanding is thus a back-and-forth movement between the interpreter and the text, where the meaning emerges not in isolation but in relation to the broader context in which it is interpreted. The meaning of a legal text, like the Constitution, is not something fixed and immutable but is instead shaped by the interpretive community and its evolving values. Therefore, legal interpretation must be responsive to the contemporary issues and challenges that society faces, even as it remains grounded in the historical foundation of the text.

Leyh builds upon Gadamer's ideas by incorporating them into constitutional hermeneutics. For Leyh, constitutional hermeneutics is more than just a method of reading legal texts. It is a framework for critically engaging with constitutional law, providing the necessary tools for evaluating the many arguments and interpretations that arise when applying the Constitution to contemporary issues. Constitutional hermeneutics does not aim to recover a singular, original meaning of the Constitution; rather, it emphasizes the need to interpret the text in a way that acknowledges the evolving historical, social, and political contexts in which it is applied. Through this approach, legal interpreters can engage with the text not as a static set of rules but as a living document that must be understood in relation to both its historical roots and its relevance to modern society.

In this way, constitutional hermeneutics offers a practical framework for addressing the complexities of legal interpretation. It encourages a deep understanding of both the historical context of the text and the contemporary values that influence its interpretation. By recognizing the role of prejudices, language, and history, constitutional hermeneutics enables a more nuanced and dynamic engagement with legal texts, ensuring that the Constitution remains relevant and responsive to the needs of society.

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