elitists and cracked eggheads in universities. What is obvious is that many people, including scholars, are polarized over the issues of gun control, crime control, and the strategies for achieving each.

The greater the disagreements, the more strident the arguments, the more likely it is that evidence, reason, and compromise will give way to slogans, hatreds, and ultimatums. What the Constitution means is not only what the founders thought and wrote (history records the fact that slavery was once constitutional), but also what we today, after our best efforts to understand the aspirations embodied in the document, make of it. The Constitution and its history constitute common ground, disputed but still shared by those who would limit and by those who would extend the right to keep and bear arms.

*That Every Man Be Armed* challenges the constitutional interpretation of gun prohibitionists. Halbrook's evidence cannot be ignored, nor can his arguments be dismissed. Those who choose to go on believing prohibitionist pronouncements about the meaning of the second amendment will have to do so in spite of the facts.

## CONTEMPORARY CONSTITUTIONAL LAWMAKING: THE SUPREME COURT AND THE ART OF POLITICS.

By Lief H. Carter.[1] New York: Pergamon Press. 1985. Pp. xviii, 216. Cloth, $29.50; paper, $12.95.

*Gregory Leyh*[2]

> If a play is any good, any act of it, any scene of it, any character of it, can be interpreted fifteen different ways, each one as good as the other. . . . The script itself is merely the raw material on which a group of collaborators have got to work. It is not the finished article. That idea is merely the invention, for the most basely materialistic reasons, of literary professors.
>
> Tyrone Guthrie

This is a time of political and intellectual ferment in constitutional theory. Several impressive books arguing for one or another preferred theory of constitutional jurisprudence have recently caught our attention. Increasingly, also, constitutional scholars are turning to philosophy for clarification of the central issues in constitutional interpretation. The general effort to forge a conscious

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merger between contemporary philosophy and modern jurisprudence is altogether commendable.

In this wide-ranging book, Professor Carter sets out to survey recent constitutional scholarship in light of what he considers to be a consensus among contemporary philosophers. Carter launches a critique of a dozen or so modern constitutional theorists predicated on his understanding of this consensus. The philosophical consensus itself turns out to revolve around hermeneutics. Drawing inspiration from sentiments such as that expressed above by Tyrone Guthrie, Carter sees Supreme Court decisionmaking in constitutional cases as a kind of "play" or "performance," which is best evaluated according to the "fit" the Court manages to achieve given the legal, political, and artistic materials with which it must work.

Carter describes the current state of constitutional theory as one of paradox. In his view,

> Modern jurisprudence is in a bind. The century of Western social philosophy that has included American pragmatism, German hermeneutics, and French deconstruction has severely weakened the building blocks of jurisprudence. The determinateness of legal texts, the intelligibility of the intent or the goals of lawgivers, and the attainability of a national consensus about fundamental political values all appear as naive pipedreams.

According to Carter, "the modern philosophical consensus" is so clear and so powerful that constitutional theory can no longer afford to ignore it.[3] At the very core of this "modern philosophical consensus" is the absence of an epistemic rock on which to ground our knowledge of the world. Under these conditions meaning is said to be set adrift. Carter describes the lack of an objective footing from which to determine meaning as a genuine constitutional dilemma. Attempts to escape the dilemma by grounding constitutional meaning in the four corners of the document, in the intent of the framers, in a theory of legal precedent, or in a normative political theory are valiant but ultimately ineffectual efforts to locate meaning where in principle it cannot be found. These efforts represent a stubborn refusal to learn what "the modern philosophical consensus" has to teach us. What is to be done?

> The standard for evaluating the Court is thus not the intellectual proof of the rightness of one answer as against all others. There may be fifteen different right ways to perform *Hamlet* and the equal protection clause as well. The search for the one proper answer has brought jurisprudence to its present dead end. Rather, we

3. In Carter's words, "I assume without extended argument that the modern philosophical consensus is so broad and, within current frames of reference, so powerful, that nothing can be gained by ignoring it or challenging it." One wonders, however, if something might not have been gained by more carefully explaining "it."

> should evaluate the quality of a legal performance, using the same aesthetic guides we use to judge theatrical performances and other artistic acts.

Following a general discussion of the dilemma currently facing constitutional theorists and a quick review (designed to "bring novices up to the speed at which this book travels), Carter embarks on a critical analysis of several recent contributions to constitutional law. This section of the book includes an examination of "preservatism,"[4] a designation that embraces the writings of Walter Berns, Gary McDowell, John Agresto, Christopher Wolfe, and Robert Bork. Next Carter undertakes to show the inadequacies of "political alternatives to interpretivism." Among those said to offer constitutional theories of this kind are Herbert Wechsler, Alexander Bickel, Jesse Choper, John Hart Ely, and Michael J. Perry. Finally, Carter assesses the adequacy of "normative alternatives to interpretivism" by discussing briefly the work of John Rawls, Ronald Dworkin, Walter F. Murphy, and the Critical Legal Studies movement. The book's final two chapters purport to identify and defend a "jurisprudence of performance."

Carter thinks that preservatism—which is the view "that the Constitution, if only we would treat it as a legal document, does yield demonstrably correct legal conclusions to litigated cases"—is the least serious contender among the proposals for resolving the constitutional dilemma. With characteristic bravado, he says that "[t]he case for constitutional interpretation bound strictly to text and history is only slightly stronger than the case for the proposition that we inhabit a flat earth." The basis for this unflattering appraisal of originalist constitutional theory is provided by modern philosophy: "[n]o branch of contemporary scholarship seem [sic] more obviously, sometimes ludicrously, out of touch with the mainstream of modern political and social philosophy" (p. 42).[5] In the

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4. Carter prefers "preservatism" to either "interpretivism" or "originalism." The latter terms, in his view, are misleading.

> "Interpretivism" takes for granted the proposition that the justices could interpret if they wished. It criticizes them for failing to choose this option, which misleads because the justices do not have this option in the first place. "Originalism" also misleads, both because it implies that constitutional clauses had original meanings with reference to contemporary constitutional issues and because I, at least, associate originality with "creativity," something originalists condemn.

Originalists, of course, are not opposed to creativity as such. They oppose *judicial* creativity when it extends beyond legitimate constitutional authority.

5. It is not clear that Professor Carter speaks with much authority about what is in the mainstream of political and social philosophy. In a recent article, for example, he urges readers seeking "an accessible introduction to this philosophical mainstream," to read Richard Bernstein's *Beyond Objectivism and Relativism*. Bernstein's book is a superb study of the work of Gadamer, Rorty, Habermas, and Arendt. As good as this book is, I doubt that it is fair to describe it as "mainstream." *See* Carter, *"Die Meistersinger von Nurnberg" & the*

book's first extended discussion of philosophy's potential contribution to jurisprudence, Carter argues that the presuppositions of preservatism are fatally inconsistent with "modern theories of interpretation itself—hermeneutics."

The flaw in preservatism seems to be its implicit commitment to an objectivist conception of truth. Preservatism is presented as presupposing that truth is a property of the text or of its immediate historical context. The discovery of constitutional truth requires only a careful study of the text and its immediate history. This objectivist conception of truth is exploded by hermeneutics. For Carter informs readers that "recent members of the German school (Mannheim, Wittgenstein, Gadamer, and Habermas . . .)" have taught us that "what you or I believe is real depends not on realities or truths 'out there' but on the nature of the social communications, the conversations about reality, that we experience." In short, Carter tells us that we cannot ever really recover the historical horizons of the founding period. This judgment is partly attributed to the hermeneutical insight that "[w]hat we know from our own experience is all we can ever know." Believers in preservatism have apparently not yet been awakened by the light of hermeneutics.

Political alternatives to interpretivism share a preoccupation with the justification of judicial review. Advocates of this way out of the constitutional dilemma seek to present a rationale for the legitimacy of judicial review. When, they ask, is it legitimate for the Court to make policy? Carter regards this preoccupation as "just as fruitless as the preoccupation with preservatism, and ultimately for the same reasons." The legitimacy problem, moreover, "is the most overrated problem in social philosophy." These comments notwithstanding, Carter finds Michael Perry's nonoriginalism particularly appealing. He notes, for example, that

> Perry's position is close to my own. If he had proceeded to define and illustrate the standards by which we might assess how well or badly the Court deepens our moral understanding in specific cases, I might not have bothered to write this book. Instead, Perry reverts to the standard forms of arguments of his community of legal scholars: the preoccupation with political legitimacy and the demonstration, despite what he has just written, that *his* position possesses the greatest logical elegance of them all.

Perry's nonoriginalism comes up short both because it "operates on such a high level of abstraction" and because of "his overly simple distinction between interpretive and noninterpretive review." Once again, the claim is put forth that "the hermeneutic philosophers"

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*United States Supreme Court: Aesthetic Theory in Constitutional Jurisprudence*, 18 POLITY 273 n.2 (1985).

have added to (clouded?) our understanding of interpretation to such a degree that the sharp distinction between originalism and nonoriginalism—a peg on which Perry hangs his hat—can no longer be maintained.

Carter is more generous in his treatment of normative alternatives to interpretivism. This is partly due to his view that "[c]onstitutional lawmaking correctly done makes statements about the normative character of the polity. It is a struggle to identify what sort of a community the United States is and what it might become." Thus Carter is sympathetic with a constitutional jurisprudence that yields a central place to normative theory. Normative theories, however, are valid only insofar as they are consistent with the claims about knowledge and truth expressed by the alleged "modern philosophical" consensus." Following a brief analysis of Ronald Dworkin's jurisprudence, including a review of the pointed exchange between Dworkin and Stanley Fish over objectivity in interpretation, Carter predictably lowers the hermeneutical boom: "Dworkin's distinction between explaining and changing must assume that there is a concrete, indisputable, and immutable essence in the text itself. This holding runs Dworkin directly into the wall of postpositivist philosophy."

Carter does not find contemporary constitutional jurisprudence completely wanting. He is attracted by the normative vision and poetic style of Walter F. Murphy.[6] More importantly, the Critical Legal Studies movement offers a ray of light in what otherwise appears as a sea of constitutional darkness. Part of the appeal of CLS lies in its opposition to objectivism, convention, and authority. Critical legal theory is chiefly concerned with politics. Carter suggests that "[i]ts attentiveness to political experience . . . allows it to develop aesthetically appealing legal theories." Indeed, we find in the Critical Legal Studies movement the intellectual precursor of the aesthetic model of jurisprudence Carter outlines in the book's closing chapters.

Readers hoping to find a detailed presentation of Carter's "jurisprudence of performance" will be disappointed. Carter is content to offer a sketch of his aesthetic approach along with some suggestive remarks. According to Carter, constitutional lawmaking is fundamentally aesthetic insofar as the lawmaker seeks to construct a normative vision that harmonizes the relevant political and legal facts. The Court works with raw disputes and actual political expe-

6. Carter explains: "I suspect my preference for Murphy's more descriptive and poetic style has a great deal to do with my training in, and professional identity with, political science."

rience rather than with abstract theories or objective truths. It seeks to mold these raw political facts into a coherent whole in a way persuasive to its audience. In Carter's words,

> A performance is aesthetically good because it persuades us that acts of ordering the chaos are doable and meaningful. This is why the essence of a good performance is that the elements of the vision it creates appear to us to be well-ordered or well-fitted together. Hence a majority and a dissenting opinion in the same case may both be constitutionally good if both create different but well-ordered political visions.

The "goodness" of constitutional opinions, that is, their normative value for our community, is a function of the way they meaningfully order our political experience for us. Good constitutional opinions—like good art—orders our reality in meaningful ways. Carter submits *Sweatt v. Painter*[7] as an illustration. In Carter's judgment, Chief Justice Vinson's opinion

> fits together the equal protection clause, precedents, the particular facts of the funding of legal education in Texas in 1946, the social facts about the nature of legal practice, and the fundamental norm of equality of opportunity. But it does not do so as a purely logical matter. It is a typical example of practical legal reasoning. Other fits reaching the opposite conclusion might have worked. For me, at least, this fit works because it builds directly on its reading of the experiences of citizens in a world of political power. It moralizes power. Like Lyndon Johnson's southern speeches in 1960, it claimed to harmonize a world that the members of its audience—law school administrators and black citizens of Texas in this case—shared.

As noted in the introduction, I share Carter's enthusiasm for exploring the intersections between constitutional lawmaking and hermeneutics. Indeed, the book's central contribution is in its unswerving focus on the capacity of philosophy to clarify and potentially dissolve problems besetting constitutional theory. I shall return to this theme in the next section.

Unfortunately Carter's understanding and presentation of the relevant philosophical literature is often imprecise, misleading, exaggerated, or just plain wrong. It was once said that political scientists are always "the last to hear the war news from the philosophical front."[8] Carter has heard some interesting news recently, but he hasn't understood it very well.

This would not be so serious were it not for the centrality of the "modern philosophical consensus" in Carter's argument. To take one example, Carter observes that "[i]n the late twentieth century a consensus in social philosophy and social science" has devel-

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7. 339 U.S. 629 (1950).

8. Terence Ball, in a review of M. SHAPIRO, LANGUAGE AND POLITICAL UNDERSTANDING: THE POLITICS OF DISCURSIVE PRACTICES, in 76 AM. POL. SCI. REV. 735 (1982).

oped which holds that "what you or I believe is real depends not on realities or truths 'out there' but on the nature of the social communications, the conversations about reality, that we experience." This hermeneutic consensus is "the position that nothing is knowable, that everything is relative and recreated moment by moment."[9]

Here and elsewhere Carter's characterization of contemporary social philosophy might lead one to the false belief that realism, *viz.*, the view that the world exists independently of our minds, is no longer taken seriously among philosophers. Realism, though perhaps not held in high esteem by all philosophers (what is?), is surely not subject to the universal rejection implied by Carter's claim. If philosophical realism is dead, one need only consult some of the writings of Hilary Putnam for proof that as far as philosophical doctrines are concerned, there is life after death.[10] And while it is true to point out that twentieth century philosophers generally agree that individual perceptions play a necessary role in the constitution of knowledge, it is flatly misleading to say that "all understanding is personal." Quite the contrary, at least according to the contemporary social philosophers who regard shared languages or shared traditions as generative of truth (a group which includes Wittgenstein, Heidegger, Gadamer, Habermas, MacIntyre, and Kuhn). The "modern philosophical consensus" which undergirds Carter's critique of contemporary constitutional scholarship is a considerably more complicated affair than he lets on. In effect, Carter illicitly seizes the authority of a "philosophical consensus" that is nowhere to be found.

Carter's philosophical confusions are most apparent as he discusses hermeneutics. Here his commentary is excessively dependent on secondary materials. He explains his heavy debt to Richard Bernstein's excellent book, *Beyond Objectivism and Relativism*, by observing that "what is in the original [is] sometimes obscure." Obscure or not, Carter has not done the philosophical homework nec-

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9. Elsewhere Carter says that "I do not challenge the conclusions of modern linguistics, hermeneutics, and perceptual psychology. 'Truth,' defined as it is by personal experience, varies according to each of our separate and unique experiences. Truth is private. . . . To an unprecedented degree, people make and live in different worlds."

10. H. PUTNAM, MEANING AND THE MORAL SCIENCES (1978), and REASON, TRUTH AND HISTORY (1981). *See also* Lilla, *On Goodman, Putnam, and Rorty: The Return to the "Given,"* 51 PARTISAN REV. 220 (1984).

And consider the following statement by Anthony Kenny in a review of T. NAGEL, THE VIEW FROM NOWHERE. After describing Nagel as standing "in the mainstream of the philosophical tradition," Kenny writes that "Mr. Nagel defends realism in epistemology and ethics: the world is independent of our minds, and we need detachment from self to make room for the claims of impersonal values," New York Times Book Rev., Feb. 23, 1986, at 14.

essary to persuade readers that his claims concerning the "modern philosophical consensus," and especially concerning hermeneutics, are valid. Indeed, many of these claims are suspect, others are simply false.

For example, he repeatedly characterizes hermeneutics as limiting knowledge to what individuals can learn from their own personal experiences: "[W]hat we know from our own experience is all we can ever know." Gadamer is wrongly said to regard understanding as that which occurs through a "mediation in the mind of the interpreter." From this Carter concludes that the ways different Justices come to understand the issues of a case "are necessarily personal." It is even possible that the Justices "lack . . . a common starting point" for understanding. All of this culminates in the epistemological howler—offered in the name of hermeneutics—that "[t]ruth is private."

But for Gadamer it is our shared traditions and common language that serve as vehicles for mediating past and present. These are part of our historical experience, they are *not* personal. Hence to suppose the Court lacked "a common starting point" is to falsely suppose the Justices lack common traditions and historical experiences. When Carter suggests that "[h]ermeneutic appreciation requires scholars to try to see the world independently from and liberated from any conventional frameworks,"[11] he turns the truth squarely on its head. For on Gadamer's account it is only through conventional language and shared frameworks that the world can be construed at all. As David Ingram observes, "Gadamer argues that human understanding is not to be conceived as an act of psychological transposition, but is rather like a conversation in which a shared understanding (agreement) is reached that resists reduction to either of the interlocuters' privileged intentions."[12]

Part of Carter's misunderstanding of hermeneutics is due to his inability to extricate himself from the view—a view of which he is critical—that unless we can ground truth claims in an objective reality, we are left floating in an epistemological sea without any oars. Bernstein characterizes this perspective as the "Either/Or. *Either* there is a universal, objective moral law, *or* the concept of morality

11. Carter continues this mistaken line of interpretation when, during a summary of what is to be learned from "modern hermeneutic thought," he observes that "[t]he interpreter cannot transcend the present, cannot bring past and present together into a higher fusion." Gadamer is committed to the idea that interpreters seek a fusion of horizons between past and present.

12. David Ingram, "Hermeneutics and Truth," in HERMENEUTICS AND PRAXIS 41 (R. Hollinger ed. 1985).

is groundless and vacuous."[13] As we've seen, Carter is highly critical of the objectivist side of this distinction. Yet if there are "fifteen different ways to perform . . . the equal protection clause," perhaps Carter too readily accepts the lack of any moral or legal standards whatsoever. Following Gadamer, Bernstein maintains that the "Either/Or" is a misleading characterization of the available options. Philosophical hermeneutics offers a critique of objectivism without lapsing into the subjectivism that afflicts Carter's conception of truth. "In effect," writes Bernstein,

> I am suggesting that Gadamer is appealing to a concept of truth that (pragmatically speaking) amounts to what can be argumentatively validated by the community of interpreters who open themselves to what tradition "says to us." This does not mean that there is some transcendental or a historical perspective from which we can evaluate competing claims to truth. We judge and evaluate such claims by the standards and practices that have been hammered out in the course of history.[14]

The standards for evaluating truth claims involve an appeal to what communities have come to regard as persuasive reasons and arguments. These standards are identifiable for any given community. Carter, however, finds all of this too constraining on the need to "perform." Hence he tells readers that truth, like justice, "exists in the making . . . How much you accept [of this book] depends on your own beliefs and experiences."

It is useful to remember that Gadamer's philosophical hermeneutics purports to operate on an ontological plane. It is not a design for methodology. In Gadamer's own words, his aim is to identify "not what we do or what we ought to do [in interpretation], but what happens to us over and above our wanting and doing."[15] Thus it is a mistake to see philosophical hermeneutics strictly in terms of the rules or procedures appropriate for the interpretation of texts. What philosophical hermeneutics offers is a standard for evaluating all methodological practices whose aim is the understanding of texts. Carter fails to see this basic point. Hence one finds in his book oxymoronic phrases such as "the methodology of hermeneutic inquiry."

Finally, Carter's discussion of the theoretical basis for his preferred aesthetic model of jurisprudence is undeveloped and incomplete. Beyond a few references to the work of Nelson Goodman, readers find very little in the way of careful philosophical discussion of aesthetics and its relationship to law. The book's impressions of aesthetics lack conceptual bite and explanatory power.

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13. R. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM 13 (1983).
14. R. BERNSTEIN, *supra* note 13, at 154.
15. H. GADAMER, TRUTH AND METHOD at xvi (1982).

Philosophical hermeneutics is the study of the conditions of all human understanding. Gadamer believes that juridical or legal hermeneutics supplies the best model for identifying these conditions.[16] The contribution of philosophical hermeneutics to constitutional interpretation lies in its power to reveal the philosophical implications of the practical activity of interpreting legal texts. What constitutional theory needs at the present time is not more knowledge of the framers' intentions, or the Constitution's original meaning, or thin analogies with aesthetic theories, but a self-critical examination of the underlying premises of prevailing conceptions of interpretation itself. Philosophical hermeneutics invites us to begin this task.

Two aspects of philosophical hermeneutics seem especially useful for constitutional jurisprudence. First, Gadamer emphasizes the role of language in understanding and reminds us to be keenly aware of the historical structures constitutive of all knowledge. Second, historical knowledge is dependent on our prejudgments and preconceptions which serve as critical windows to the past. Interpretive theories designed to suppress these prejudgments misconceive of the character of interpretation.

It is now almost a cliche to point out that twentieth-century philosophy has taken a linguistic or interpretive turn.[17] Language is foundational to the way we act, know, and interpret. Yet language has no intrinsic properties capable of yielding meaning. Meaning is a function of the way words are used.[18] Determining the meaning of a text, therefore, is "a messy business of guesswork predicated on practical knowledge of language, conventions, and the situations in which they operate."[19] The virtue of Gadamer's philosophical hermeneutics is that it offers a powerful account of the role of language, conventions, and tradition in understanding, and thus serves as a philosophical observation point from which to examine the practical task of constitutional interpretation.

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16. Legal hermeneutics is able to point out what the real procedure of the human sciences is. Here we have the model for the relationship between past and present that we are seeking. The judge who adapts the transmitted law to the needs of the present is undoubtedly seeking to perform a practical task, but his interpretation of the law is by no means on that account an arbitrary re-interpretation. Here again, to understand and to interpret means to discover and recognize a valid meaning. He seeks to discover the "legal idea" of a law by linking it with the present.

H. GADAMER, *supra* note 15, at 292-93.

17. *See Introduction*, in B. FLATHMAN, CONCEPTS IN SOCIAL AND POLITICAL PHILOSOPHY (1973); and F. DALLMAYR, LANGUAGE AND POLITICS: WHY DOES LANGUAGE MATTER TO POLITICAL PHILOSOPHY? (1984).

18. Gerald Graff observes that "the meaning of an utterance isn't a function of the words themselves or even of the sentences, but of the *use* to which the words and sentences are put to the speakers and writers." Graff, *"Keep Off the Grass," "Drop Dead," and Other Indeterminacies: A Response to Sanford Levinson*, 60 TEX. L. REV. 407 (1982).

19. *Id.* at 410.

Gadamer illustrates what occurs as we seek to understand historical texts through the suggestive example of translation. The aim of translation is not merely to reproduce meanings discovered in historically remote books. The translator has the additional obligation of making textual messages meaningful to those for whom he is translating:

> Here the translator must translate the meaning to be understood into the context in which the other speaker lives. This does not, of course, mean that he is at liberty to falsify the meaning of what the other person says. Rather, the meaning must be preserved, but since it must be understood within a new linguistic world, it must be expressed within it in a new way.
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> . . . .
>
> [T]he translator must respect the character of his own language, into which he is translating, while still recognizing the value of the alien, even antagonistic character of the text and its expression.[20]

Accordingly, constitutional hermeneutics conceives of interpretation as the attempt to translate meaning from an older linguistic world into terms intelligible in the present. It provides what constitutional theory presently lacks: a theory of conceptual change. The important political and moral terms in the Constitution, terms such as "due process," "cruel and unusual," "freedom of speech," and others are, like all language, vulnerable to change. How is such conceptual change to be understood? In what ways are these changes not merely things to be described, but themselves constitutive of political and legal practice? What are the outer parameters that serve to limit conceptual change? These are questions at the heart of a jurisprudence that is sensitive to the linguistic constitution of its object. Philosophical hermeneutics offers one possible set of answers to these key questions.

*Truth and Method* rehabilitates the concept of prejudice. Prejudice serves as an enabling instrument for the acquisition of historical meaning. Here, "prejudice" refers to our prejudgments and preconceptions. No text simply sits before us and announces its meaning. Readers must first pose questions to the text and its tradition, and must be conscious of the ways a text may be faithfully applied before any meaning can be construed. These questions, aspects of tradition, and possible forms of application comprise our prejudice. Without prejudice we could hardly understand at all.[21]

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20. H. GADAMER, *supra* note 15, at 346, 348-49.

21. Thus Gadamer:

> This is the point at which the attempt to arrive at an historical hermeneutics has to start its critique. The overcoming of all prejudices, this global demand of the enlightenment, will prove to be itself a prejudice, the removal of which opens the way to an appropriate understanding of our finitude, which dominates not only our humanity, but also our historical consciousness. *Id.* at 244.

Gadamer argues that historical knowledge is possible only by "seeing the past in its continuity with the present."[22] Prejudice enables us to maintain our hallowed constitutional tradition.

The role of prejudice in understanding is illustrated by legal interpretation. A jurist's purpose in interpretation is to validate the meaning of the law by applying it to the concrete present represented by the case at hand. Judicial interpretation does not seek meaning for its own sake, but out of an interest in adjudicating actual disputes. In constitutional hermeneutics interpretation is not one thing and application another.[23] The facts of a case are partly constitutive of the interpretation rendered. That is, facts and disputes in law serve as guideposts for a judge's account of constitutional meaning. In this way, legal hermeneutics illustrates the constitutive character of present conditions, including prejudices, on our reconstructions of the past.

In sum, philosophical hermeneutics suggests that a full appreciation of constitutional meaning requires an awareness of our prejudices and a sensitivity to the mutable nature of the language through which the text makes its appearance. In Gadamer's idiom, we might say that the aim of constitutional interpretation is to achieve a "fusion of horizons" between past and present. That is, we seek to fuse the historical horizon of the text with the historical horizon of the concrete present into which we must always translate its meaning.

Contemporary philosophy, notably philosophical hermeneutics, does indeed have something valuable to offer students of constitutional law. Professor Carter clearly agrees. Yet his attempt to deploy philosophy against constitutional theory misfires for the reasons offered above. In addition, Carter's argument for an aesthetic jurisprudence is superficial and unsupported by a genuine understanding of the philosophical literature on which it claims to rest.

There is a useful lesson to be learned here. The lesson is that although philosophy should be seen as a valuable resource for constitutional theory, philosophy cannot provide answers to all of the most intractable problems in law. A sense of humility about the uses of philosophy is appropriate. Such humility is entirely absent from the book under review.

Referring to the various disciplines that interpret texts, David Hoy has perceptively noted that "hermeneutics must be modest about what it can do for the practical disciplines themselves . . . .

22. *Id.* at 292.

23. Gadamer thinks that the hermeneutical distinction between establishing an original meaning and applying that meaning "is a legally untenable fiction." *Id.* at 291.

[P]hilosophical hermeneutics may try to clarify these debates about method, but it should not expect to lead to a total change in the empirical practices of the discipline."[24] Philosophical hermeneutics may be of some value to those disciplines like constitutional theory whose thinking about interpretation is somewhat muddled. The value of philosophical hermeneutics is in its ability to root out inconsistencies and expose the lacunae in prevailing theories of constitutional interpretation. Beyond that a constitutional hermeneutics has little to offer constitutional lawyers. To suppose that contemporary philosophy might offer us an "exit from the bind" we presently find ourselves in, a bind which is in important respects politically and historically determined, is to make both a political and a philosophical mistake.

**CASES LOST, CAUSES WON: THE SUPREME COURT AND THE JUDICIAL PROCESS.** By Alice Fleetwood Bartee.[1] New York: St. Martin's Press. 1984. Pp. xiii, 207. Paper, $10.95.

**THE LAW AND POLITICS OF CIVIL RIGHTS AND LIBERTIES.** By Richard Morgan.[1] New York: Random House. 1985. Pp. 600. $22.00.

**FREEDOM OF SPEECH IN THE UNITED STATES.** By Thomas L. Tedford.[1] New York: Random House. 1985. Pp. xvii, 473. $29.95.

*John Moeller*[2]

Most of us who teach constitutional law to undergraduates—whether at state universities or private liberal arts colleges—regard

24. Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Prespectives*, 58 S. CAL. L. REV. 135, 137 (1985).

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