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Gary C. Leedes

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BOOK REVIEW

THE LATEST AND BEST WORD ON LEGAL HERMENEUTICS: A REVIEW ESSAY OF *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER*.

Gary C. Leedes*

I. Opening Statement

*Interpreting Law and Literature: A Hermeneutic Reader*¹ contains several splendid essays discussing relationships among law, literature, literary criticism, and hermeneutics.² The essays describe methods for “giving meaning to the black ink on the white page.”³ Editors Sanford Levinson and Steven Mailloux remind us that hermeneutics is “the theory or art of explication, of interpretation. Its lineage goes back to ancient attempts to construct general rules for understanding religious texts such as the Bible.”⁴

Legal scholars are concerned with “safe rules” of interpretation, which distinguish the impartial reader’s perspective from “political and other ‘interested’ perspectives.”⁵ The editors, however, ask the following hard questions about the legal method:

Are we really saying anything of substance when we register an expectation that judges “stay within” the constraints provided by the constitutional text? Can one speak meaningfully of a “method” (much less a “science”) of interpretation, or at most, are there only looser “modes” or “approaches.”? Is there only *one* legitimate mode of interpretation, such as original intent? If there is more than one . . . , is there any principled way of choosing among them?⁶

These vexing questions and others⁷ divide the legal community into competing schools of thought. Similarly, literary experts disagree vehemently with each other about the nature and functions of interpretation.

* Professor of Law, University of Richmond.

1 Sanford Levinson, a Professor of Law, and Steven Mailloux, a Professor of English, are the *Reader*’s editors and both have contributed essays to the book.

2 Hermeneutics is frequently divided into several fields, *e.g.*, theological, literary, historical, and legal hermeneutics. The *Reader* emphasizes legal and literary hermeneutics, which to some extent overlap with the hermeneutics of history. The roots of the word “hermeneutics” point back to the mythical messenger-god, Hermes, who was credited by the early Greeks with the discovery of language and writing.

3 *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* — (S. Levinson & S. Mailloux eds. 1988) [hereinafter *READER*].

4 *Id.* at ix-x (citing H. G. GADAMER, *REASON IN THE AGE OF SCIENCE* 93 (1986)).

5 *Id.*

6 *Id.* at 10-11.

7 Among many other perplexing hermeneutic/philosophical questions are the following: What is denoted and connoted by the words “objective understanding”? What does a successful understanding of a text entail? Does and should our understanding of a text change because of our historical experience? If an author’s intention is not a key factor for clarifying obscure meaning, how is a text to be understood?

The deconstructionist, Jacques Derrida, for example, does not always agree with the famed hermeneuticist, Hans Georg-Gadamer.⁸

Gadamer describes and explains what happens when we interact with a text and successfully gather its meaning.⁹ The social process of coming to an understanding involves a dialogue among the members of an interpretive community (readers who share many beliefs).¹⁰ Gadamer takes the position that the concept of objectivity useful in the natural sciences is not applicable for evaluating the truth of texts.¹¹

According to Gadamer, readers approach texts with presuppositions and prejudices. To some extent, the reading experience confirms or subverts these prejudgments, which have been formed in our culture by its traditions. Gadamer, however, stresses the need for the reader to approach a text in good faith, rather than to misappropriate its meaning for partisan purposes.¹² But he is not always critical of our traditions, which he believes cannot be completely transcended and placed aside during the reading experience.

Because Gadamer is not primarily concerned with the reader's emancipation from often unsuspected ideological delusions, Jurgen Habermas, of the Frankfurt School, argues that Gadamer's hermeneutics should be supplemented.¹³ One idea behind the Frankfurt School's critical theory movement is that unreflective and uncritical readings perpetuate hidden ideological support for the existing political power structure.¹⁴

Many lawyers can live with Gadamer's description of the reading process, but they have great difficulty accepting deconstruction,¹⁵ which the editors describe (following Jacques Derrida) as an "undoing,"¹⁶ or an

8 A recent debate between Gadamer and Jacques Derrida revealed their inability to communicate well with each other. They were on different wave lengths. See *DIALOGUE & DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER* (D. Michelfelder & R. Palmer eds. 1989).

9 H. G. GADAMER, *TRUTH AND METHOD* (1975).

10 G. WARNKE, *GADAMER: HERMENEUTICS, TRADITION AND REASON* 111 (1987).

11 Michael Polanyi stresses how scientific analysis is historically situated and writes that the perceptions and discoveries of scientists are "impelled by the imagination and controlled by plausibility, which in turn depends upon our general view about the nature of things." M. POLANYI & H. PROSCH, *MEANING* 144 (1975). In other words, successful and convincing science depends in part on the rules of practice and the shifting theoretical attitudes that discipline the scientific community. The paradigms and practices of scientists are not as objective as they once appeared. See generally T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

12 The deconstructionists' encounters with texts are confrontational, and Derrida regards references to interpretations in good faith as a throwback to outmoded metaphysical concepts of truth. See Derrida, *Three questions to Hans-Georg Gadamer*, in *DIALOGUE & DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER*, *supra* note 8, at 53-54.

13 David Hoy's essay in the *Reader* compares Gadamer's views with his critic, Jurgen Habermas. Hoy brings the post-structuralist perspectives of deconstruction into clearer view. *READER*, *supra* note 3, at 319-38.

14 See generally R. GEUSS, *THE IDEA OF A CRITICAL THEORY* (1987); see also J. HABERMAS, *A REVIEW OF GADAMER'S TRUTH AND METHOD IN UNDERSTANDING AND SOCIAL INQUIRY* (1977).

15 Deconstruction, as the editors point out, is "[o]ne of the most influential approaches to literary analysis." *READER*, *supra* note 3, at x. Like it or not, the editors' judgment on this point is clearly correct.

16 The usefulness and value of deconstruction is often questioned. See, e.g., J. ELLIS, *AGAINST DECONSTRUCTION* (1989). Derrida has explained that "deconstruction used as a French word, means not 'destroying' but 'undoing,' while analyzing the different layers" of text(s). *READER*, *supra* note 3, at x.

unraveling of the threads of textual discourse. Deconstruction is, at best, a fragmented school of thought, and Derrida himself frequently revises his own explanations, which do not always clarify deconstruction. He is unapologetic and claims that language is inadequate for describing his approach to language.¹⁷

Deconstruction is more of an interpretive style than a method. It has relevance to law because deconstructionists closely read texts to spot the points in which texts conceal their own incoherence and inconsistencies.¹⁸ Deconstructionists expose gaps and discrepancies between textual meaning and authorial assertions. Derrida claims he is "closer to the interpretive style of Nietzsche than to the other interpretative tradition stretching from [Friedrich] Schliermacher to Gadamer."¹⁹ He experimentally restructures the context of the text in order to raise never-ending questions about our lack of complete understanding. Gadamer disassociates himself with deconstruction,²⁰ but he agrees that "interpretation is always on the way,"²¹ because context must be taken into account by interpreters, and the question of the relevant context is often up for grabs.

Differences of opinion over hermeneutics became politicized and more widely publicized when conservative officials during the Reagan presidency ferociously attacked judges who were expanding the zone of privacy rights. Former Attorney-General Edwin Meese, condemns "an activist jurisprudence, one which anchors the Constitution only in the consciences of jurists . . ."²² He urges the Supreme Court to follow the approach of Justice Story who once explained that "[t]he first and fundamental rule in the interpretation of all instruments is to construe them according to the sense of the terms, and the intentions of the parties."²³ This explanation by Story, according to Meese, captured the spirit of the Reagan Administration's position.²⁴ Meese argues that the Framers intended a role for the Court that is more modest than the role embraced by activist judges like Justice Brennan, for example, who stresses concepts of human dignity. If such concepts are embodied in the Constitution, Meese cannot find them.

Justice Brennan believes that a controlling premise of the eighth and fourteenth amendments is the intrinsic worth of the human being, and

17 See generally J. DERRIDA, *THE EAR OF THE OTHER* (1985).

18 READER, *supra* note 3, at 329-34. See also Spivak, *Preface* to J. DERRIDA, *OF GRAMMATOLOGY* lxxv (1976). This lucid preface is an extremely helpful introduction to the deconstructive project and procedure.

19 Derrida, *Three Questions to Hans-Georg Gadamer*, in *DIALOGUE & DECONSTRUCTION*, *supra* note 8, at 53.

20 Many post-structuralist critics are occupied, if not preoccupied, with the fragmentation of understanding, and they are subverting the notion that the black ink on a page has a literal meaning that constrains an interpreter in a significantly meaningful way. See M. SARUP, *AN INTRODUCTORY GUIDE TO POST-STRUCTURALISM AND POSTMODERNISM* 55-56 (1989).

21 H. G. GADAMER, *REASON IN THE AGE OF SCIENCE* 105 (1986).

22 READER, *supra* note 3, at 32.

23 *Id.* at 28.

24 *Id.* The Reader also includes excerpts from a fine essay by Charles Fried, a former Solicitor-General for the Reagan Administration, who urges us not to diminish our efforts to understand and interpret the black ink in good faith. *Id.* at 50-51.

that capital punishment is "utterly and irreversibly degrading to the very essence of human dignity."²⁵ The conception of a human being's intrinsic worth, a vision that permeates the entire Bill of Rights, "will never cease to evolve."²⁶ The nagging question suggested by Meese's critique of the interpretive strategy used by Justice Brennan is whether it enables unelected judges to exploit opportunistically the Constitution's ambiguity.

Owen Fiss, who often defends Justice Brennan's approach, believes that "[i]nterpretation, whether it be in the law or literary domains is . . . a dynamic interaction between reader and text."²⁷ Fiss believes that most judges (with exceptions such as Robert H. Bork, against whom he testified during a senate confirmation hearing) have a "special competence" to interact with and interpret texts.²⁸

According to Fiss, the competent judge takes an approach to reading texts that is neither wholly discretionary or wholly mechanical. This middle way "affords a proper recognition of both the subjective and objective dimensions of human experience."²⁹ Fiss cites the "disciplining rules" that act as constraints on the judge's discretion. They supply a "bounded objectivity."³⁰ But as Stanley Fish's argumentative essay points out, "rules *are* [also] texts . . . in need of interpretation and cannot themselves serve as constraints on interpretation."³¹

Fish reasons that a judge is "[a]t no time free to go his 'own way,' for he is always going in a way marked out by the practice or set of practices of whose defining principles (goals, purposes, interdictions) he is a moving extension. . . ."³² For example, the judge's interpretation of a text must be plausible, and what counts as a plausible interpretation depends on the current beliefs of leading members of the legal community who generate a consensus of opinion.

An analogy can be drawn to a game played without officials. When we play a game like "stickball" without an umpire, rules constitute the game, but, as we play, the concrete application of these rules by the players (who reach a consensus) constantly changes the specific content of the game and the tactics of the players. In a similar way, the game of rugby was fashioned. In 1823, one William Webb Ellis picked up the ball and ran with it during a soccer game—thereafter called rugby football. Ellis could not have extended the rules, an action which was later authoritatively condoned, "apart from the rules of the game as they then existed."³³ Even if we believe that William Webb Ellis exercised brute force rather than pre-existing authority, the assent of the other players made the rule change authoritative. Similarly, the legal method allows

25 *Id.* at 23.

26 *Id.*

27 *Id.* at 229.

28 *Id.* at 241.

29 *Id.* at 251.

30 *Id.* at 234.

31 *Id.* at 252.

32 S. FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989).

33 R. S. PETERS, "AUTHORITY" IN *POLITICAL PHILOSOPHY* 108 (A. Quinton ed. 1967).

the rules of law to change after judges exert their will. For the better or worse, most judges have been conditioned to accept professional norms that diminish the frequency of rule changes.

It is difficult to describe the processes of interpretation without cryptic references to some of the most confusing and widely debated theoretical concepts in legal and literary hermeneutics; namely, "intention, formalism, and objectivity."³⁴ The editors clarify what they mean by these concepts. They write:

In one of its senses, the term *formalism* refers to a theory of interpretation that sees the meaning of a text as inherent in the words on the page, independent of authorial intent, reader response, and historical context. *Intentionalism* defines itself against this kind of formalism by asserting that textual meaning is inseparable from authorial intention, usually going on to argue that evidence outside the text is crucial to any correct interpretation of meaning as intention.

Scholarly arguments over intentionalism and formalism "are usually arguments about interpretive objectivity."³⁵

Interpretive objectivity, in one of its purest and hypothetical senses, presupposes that something called meaning exists in a text independently of our reading experience. But contemporary hermeneuticists, like Gadamer, "overcome the positivistic hubris of assuming we can develop an 'objective' knowledge" of texts, history, and our world.³⁶ Richard Rorty writes: "By now, words like 'scientific' or 'objective' have been worn down to the point where most people are content to let them mean 'the way we do things around here.'"³⁷ If Rorty is right, the phrase "objective interpreter of law" is a tri-oxymoron.

The concepts, intentionalism, formalism, and objectivity, are presented in separate subsections in the *Reader*, followed by a section entitled "Rhetorical Politics." The remaining sections of this review essay are similarly organized.

II. Intentionalism

Few jurists want to freeze the meaning of the Constitution because many constitutionalized principles are capable of growth as they are applied to new concrete situations. Therefore, it is dogmatic to insist that the Framers' original intent must always be followed when judges interpret an ambiguous constitutional provision. Lawyers, who actually believe that the specific intentions of the Framers are ascertainable in any truthful sense, also probably believe that George Washington chopped down his father's cherry tree. But there is an important difference between ascribing (or imputing) and actually "finding" the Framers' intent. Ascribing intent to legislative bodies is part of the art of judging. Judge

34 *READER*, *supra* note 3, at 37.

35 *Id.* at 41.

36 G. WARNKE, *supra* note 10, at 1.

37 Rorty, *Deconstruction and Circumvention*, 11 *CRITICAL INQUIRY* 16 (September 1984).

Learned Hand wrote, "[n]obody does this exactly right; great judges do it better than the rest of us."³⁸

Intentionalism, in the parlance of constitutional law, "is . . . a way of thinking about constitutional 'meaning' that follows from the basic concepts that legitimate judicial review."³⁹ In many cases, however, the Court does not know how the Framers would resolve the contemporary controversy.⁴⁰ Nevertheless, if we can ascertain their general concerns, this will provide us with clues as to the types of practices that the constitutional draftsmen and ratifying conventions wanted to encourage or prohibit. The Framers' intentions can be plausibly ascribed because, in some cases, the written evidence of their concerns and objectives are abundant.⁴¹ It is clearly not illegitimate for courts to use historical materials in their research.⁴²

The editors, however, refer to influential literary essays entitled "The Intentional Fallacy" and its companion piece "The Affective Fallacy."⁴³ These essays are significant because their authors, William Wimsatt and Monroe Beardsley, were among the first literary critics who effectively argued against reliance upon authorial intent. Wimsatt and Beardsley, however, were convinced that "literary and legal interpretation have little in common."⁴⁴

Wimsatt and Beardsley were wary of reliance upon authorial intentions because they believed that extra-textual information about a poem's creation does not help interpreters understand the poem's aesthetic contribution. But lawyers and judges, in practice, are not usually evaluating the aesthetic contributions of a last will and testament or the fourteenth amendment. Therefore, to some extent, Wimsatt's and Beardsley's views are not directly relevant to legal hermeneutics.

Concerning authorial intentions, neither the editors nor Wimsatt and Beardsley carefully distinguish the "unknowability problem" from the "undesirability problem," but this distinction is often useful.⁴⁵ It may be undesirable to follow the author's intent even when we know it; in other cases, we wish we could discern an author's intent, but we are unable to do so with confidence because we are too worried about the danger of error. The danger of distortion lies in the ambiguity of the

38 Proceedings of a Special Session of the United States Court of Appeals for the Second Circuit to commemorate Fifty Years of Federal Judicial Service by the Honorable Learned Hand 37 (Apr. 10, 1959).

39 Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 (1981).

40 D. DREISBACH, *REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT* 161 (1987).

41 In *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), Chief Justice Marshall explained that the underlying reason of a constitutional provision governs situations unanticipated when the text was framed. *Id.* at 644.

42 See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983). If historical guideposts are abandoned or ignored, the temptation is great for judges to "[roam] at large in the constitutional field." *Griswold v. Connecticut*, 381 U.S. 479, 502 (1965) (Harlan, J., concurring). The law's appearance of continuity is one of its important characteristics, which is not to say that its discontinuities lack hermeneutic relevance.

43 READER, *supra* note 3, at 37-42.

44 *Id.* at 41. Today, many literary theorists have narrowed, if not closed, the gap between literary and legal interpretation.

45 G. GRAFF, *PROFESSING LITERATURE* 202-03 (1987).

documents from which we need to gather the author's intentions. In some cases, the ambiguity of the documents relevant to the Framers' intent exceeds the ambiguity of the Constitution. Needless to say, the project of generalizing what was intended by the people who participated, two hundred years ago, in all the ratifying state conventions is mind boggling. However, even when we cannot know exactly what the Framers intended, we can sometimes fairly state, with reasonable hermeneutic certainty, what they did *not* intend to accomplish.

A long view of history often helps reconcile a conflict between the Framers' specific intentions and a particular case holding.⁴⁶ For example, E.D. Hirsch, Jr., an intentionalist, writes—convincingly in my view—that the dominant intention of the equal protection clause was captured by *Brown v. Board of Education*⁴⁷ not *Plessy v. Ferguson*.⁴⁸ In legal hermeneutics, “[t]he 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.”⁴⁹

Dean Paul Brest writes that “one can better protect fundamental values and the integrity of the democratic processes by protecting them than by guessing how other people meant to govern a different society a hundred or more years ago.”⁵⁰ But the question admittedly unanswered by Brest, and not answered effectively by any other scholar, is how we can legitimately derive fundamental values from a text that does not list or rank them. This question, in part, relates to political theory. Legal hermeneutics, however, may help us think more clearly about political theory.

The meaning of a constitutional provision becomes more complete “by seeing the past in its continuity with the present.”⁵¹ Recall that, according to Gadamer, hermeneutic understanding is the generation of a shared meaning, and this “sharing involves more than either a knowledge of what an author's intentions were or a capacity to reconstruct them.”⁵² Gadamer's notion of shared meaning refers to *communis sensus* (a common sense view) that emerges in the community as people engage in dialogues about their understanding of textual content. The implications for political theory lie in the notion of a emergent shared meaning that is dynamic. This communal notion is in tension, if not opposition, with the view that the Framers or an elite group of judges should have the final word on textual meaning.

46 In the 18th century, “[n]orms generally seemed to those times and their representative thinkers to be the more important and valuable, the more general they were.” C. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* (2d ed. 1963). This is a comforting thought to those of us who connect case rulings to enduring general norms.

47 347 U.S. 483 (1954).

48 163 U.S. 537 (1896).

49 H. G. GADAMER, *supra* note 9, at 292 (1975).

50 READER, *supra* note 3, at 96.

51 H.G. GADAMER, *supra* note 9, at 292.

52 G. WARNKE, *supra* note 10, at 47.

III. Formalism

In his essay on constitutional language, Frederick Schauer warns us "to look at the words of the Constitution as *language*, and . . . to examine closely some of our rarely questioned presuppositions about constitutional language."⁵³ We are told that "constitutional language acts as a significant constraint on constitutional decision."⁵⁴ If constitutional language performs its delimiting functions, there will be more easy cases and fewer abuses of power by officials.⁵⁵

Schauer directs our attention to the question of how meaning is produced by language. He points out that jurists who focus on language tend to avoid the lures of "free-wheeling theories."⁵⁶ He clings to the idea that the inclusions and exclusions of the Constitution's text rule out pursuing whatever appears to be "the Good."⁵⁷ Schauer even rejects the guidance of original intent because, in his view, the text, not the Framers, is the primary object of reference for interpreters seeking the Constitution's contemporary meaning.⁵⁸

Schauer reasons that we need a theory of constitutional language in order to understand why some clauses of the Constitution are clear and others are vague.⁵⁹ This is the typical approach of the linguist.⁶⁰ Linguists want "to shed light upon the functioning of language as such."⁶¹ Unlike the hermeneutical approach, where context-situated comprehension is the primary concern, the linguist "instead asks how it is possible to communicate anything at all."⁶² Schauer's hope is that a pre-theoretical focus on the nature of language will rein in theories that presuppose "a *carte blanche* for moral philosophizing."⁶³

If the wording of the text presents interpretive problems, formal semantic analysis⁶⁴ does not settle disputes over the theory of meaning that

53 READER, *supra* note 3, at 133.

54 *Id.* at 134. In some of his other work, Schauer focuses on several of the philosophical underpinnings of the political principles referred to by the Constitution. See, e.g., F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982).

55 Schauer, *The Constitution as Text and Rule*, 29 WM. & MARY L. REV. 41, 50 (1987).

56 READER, *supra* note 3, at 152.

57 Schauer, *supra* note 55, at 50.

58 *Id.* at 44. Schauer writes that "our touchstone must be the rules of language rather than the largely futile explorations into the mind of the communicator." READER, *supra* note 3, at 140. We are reminded that justifiable interpretations "derive originally from some particular portion of the text [under examination]." *Id.* at 152.

59 READER, *supra* note 3, at 133.

60 Stanley Fish explains that "[m]eaning is always a function of the interpretive conditions of production and reception and never a function of formal linguistic structures." Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L. J. 1773, 1774 n.2 (1987).

61 Gadamer, *Text and Interpretation*, in *DIALOGUE & DECONSTRUCTION*, *supra* note 8.

62 *Id.*

63 READER, *supra* note 3, at 141. Schauer realizes that communication is a joint venture, and that therefore the meaning of a law is not merely a function of its constituent sentences, words, and syllables. See also S. FISH, *supra* note 32.

64 Semantics is, *inter alia*, the study of words and sentences. Different semantic theories explain what meaning is and what is a meaningful expression. Gerald Graff, a literary theorist, writes critically about what is often called the fallacy of semantic immanence, and states "much thinking about meaning and interpretation among legal professionals is badly outmoded, and . . . it remains intact only for fear of the Pandora's box that would be opened if more up-to-date theories were admitted into court." READER, *supra* note 3, at 176. In his essay, Schauer follows a pragmatic, ordinary language approach and he regards law as a "use of natural language for a particular purpose, in accord-

an interpreter should adopt. To further complicate matters, in constitutional cases, judges customarily consider not only specific textual provisions, but the Constitution as a whole, its structure, precedent, the Framers' intent, notions of formal justice, federalism, the separation of powers, rules of justiciability, the presuppositions of democracy and basic societal values. Therefore, the hermeneutic problem is how the context-situated judge can "do justice to the multivocality of language while striving at the same time to overcome the trivial fixation of words and meanings."⁶⁵ Schauer attempts to overcome formalism and conceptualism by widening his focus to include the distinctive, if not unique, presuppositions of specialized language which set the Constitution apart from the social rules governing "ordinary language."⁶⁶ Schauer, nevertheless, posits a "meaning" of the Constitution that exists apart from moral philosophy, theory, an author's intent, or a reader's state of mind.⁶⁷ Whence does this meaning derive?

According to Schauer, constitutional language can "set the boundaries of theory-construction without otherwise directing its development."⁶⁸ Although many areas of uncertainty are eliminated by Schauer's boundary-setting principles, other uncertainties enter the picture since boundary-setting devices also require interpretation. Nevertheless, Schauer argues that the constitutional text and its boundary-setting constraints provide "the contours of permissible moral arguments."⁶⁹

Schauer admits that various provisions of the Constitution "send us outside of the legal domain and into the moral and political."⁷⁰ In order to prevent judges from endorsing a particular moral premise to serve as a foundation for an all-encompassing moral theory, Schauer argues that several open-textured provisions in the Constitution are based on a plurality of several different independent principles.⁷¹ This concession, however, opens up many additional areas of interpretive uncertainty when there is a dispute about a text's meaning.

Although there is not a complete fusion of constitutional law and moral philosophy, many judges (for example, Justice Brennan) bring into play their concerns about society's morality when making a decision. Indeed, for Edwin Meese, the example of Justice Brennan's fusion of his ideological viewpoints (about capital punishment, abortion, and obscen-

ance . . . with certain social (rather than semiotic) conventions." B. JACKSON, SEMIOTICS AND LEGAL THEORY 13 (1985).

65 Gadamer, *Hermeneutics and Logocentrism*, in *DIALOGUE & DECONSTRUCTION*, *supra* note 61, at 124. "It is the meaning of a communication in words that engages our attention and interest, not the words as such." H. PROSCH & M. POLANYI, *MEANINGS* 71 (1975).

66 READER, *supra* note 3, at 134.

67 I hasten to add that Schauer gladly concedes that "an interpretation cannot be uniquely derived from the text . . . alone." *Id.* at 152. Schauer also notes that constitutional language is not given its due by interpretations that are too literal. *Id.* at 135. He also emphasizes how conventions change the meaning of language over time, but even here he seems relieved that these changes take place in small incremental steps. *Id.* at 151.

68 *Id.* at 150.

69 *Id.* at 141.

70 *Id.* at 150.

71 See F. SCHAUER, *FREE SPEECH: A PHILOSOPHIC ENQUIRY* (1982).

ity) with the Constitution demonstrates the wisdom of Schauer's less freewheeling constitutionalism.⁷² Schauer's choice of metaphors often disguises how he artfully transplants his prudential concerns into the text. In short, Schauer fears the opening of Pandora's box. His risk-averse strategy is intentionally devised to reduce the perils created by [missing something]

Schauer's essay includes the metaphor that constitutional language is a frame.⁷³ The metaphor of the frame creates the illusion of closure around a comprehensive unity. But the reader should be aware that such illusions often distort reality. As Schauer admits elsewhere,⁷⁴ words do not frame themselves. Words "inside a text"⁷⁵ remain completely inoperative until readers, like Justice Brennan, bring to bear their own frames of reference. A reader's mind determines what counts as text, frame, and context. One might prefer to say that words are tools rather than frames. As tools, the words are used in accordance with the reader's purposes. For example, you, not the hammer, decide whether it is used as a paper-weight or as a nail driver. The functional test is whether a tool works to suit the user's purposes.⁷⁶

Schauer also uses the trope that the text is like a blank canvas that reminds us when we go well over the edge; but interpretation determines the size of the canvas, how far it can be stretched, and whether it is part of a triptych or a mosaic. Schauer's trope brings to mind the idea that language is an "abstract system that is prior to any occasion of use,"⁷⁷ and that this system formally constrains the abuse of words by willful interpreters.⁷⁸ But Schauer's edged canvas is not as blank as he pictures it to be. As he himself admits, the canvas upon which constitutional lawyers draw contains numerous social rules, presuppositions of law, and constitutionalized canons of interpretation. These unwritten rules can be used to extend the previously accepted boundaries of textual understanding.

Another metaphor of Schauer's suggests that several discrete clauses in the Constitution "are like a series of funnels, separate from each other, but open to receive anything of the right size that may be poured into

72 Constitutionalism for Justice Brennan entails respect for human worth and dignity. This ingredient is in tension with Schauer's boundary-setting notion, which restricts the discretion of activist jurists who build moral theories upon the premise of irrepressible human dignity.

73 READER, *supra* note 3, at 151.

74 Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 430-31 (1985).

75 Schauer argues that "before we can argue intelligently about whether to go outside of the text, we ought to explore the meaning of the words *inside* the text" in order to know what counts as going *outside*. READER, *supra* note 3, at 133.

76 If the reader's purpose is to ascertain if the evolving standards of human dignity disclose whether capital punishment is unconstitutional, the reader's frame of reference already lies beyond the words in the eighth amendment. If judges get away with substituting words like *human dignity* for *cruel and unusual punishment*, they escape from the prison-house conception of the Constitution's language. Schauer seeks to prevent this escape by rejecting metaphors picturing "a Constitution sufficiently plastic and porous that a wide range of different meanings can be attached to the text." Schauer, *supra* note 55, at 41.

77 S. FISH, *supra* note 32, at 6.

78 Schauer observes in passing that the examination of the Constitution's language "logically is prior to any broader interpretation of the Constitution." READER, *supra* note 3, at 133.

them.”⁷⁹ But judges regularly expand and contract meaning as they periodically combine and rearrange these “funnels” into new constellations and sizes. Certainly we have to keep the words of the Constitution in mind or they become superfluous. Schauer not only keeps the words in mind, but is also able to isolate words inside a text that supposedly has “independent interpretive force.”⁸⁰ The language of the text is, for Schauer, an interpreter’s starting point and a constant check point.⁸¹ But from a less formal, hermeneutic standpoint, a text is not merely “a given object but a phase in the execution of a communicative event.”⁸²

The words inside the Constitution may in a particular case be the interpreter’s most useful starting point. This eventuality depends upon the method of interpretation that is being employed by the purposeful reader. As Walter Benn Michaels writes: “To read is always already to have invoked the category of the extrinsic, an invocation that is denied . . . not only by avowedly formalist critics but by all those who think of textual meaning as in any sense intrinsic.”⁸³ In other words, “there is no text independent of some interpretation, and what counts as relevant in the text is dependent on the interpretation.”⁸⁴

Schauer’s pre-theoretical focus on language informs us that legal texts are “real” and tell their “own story.”⁸⁵ Michaels objects to this vestige of text fetishism pointing out that the notion of a “text by itself” is oxymoronic because a text in isolation is actually no text at all without people who agree about its meaning and function.⁸⁶

We can sum up our analysis of Schauer’s semi-formalism by recalling his interpretive strategy. He wants to exclude wrong answers to easy cases. He also wants to manage our uncertainty more effectively.⁸⁷ Finally, he wants to prevent abuses of judicial power. Schauer concedes that his emphasis on text is merely a means to further inculcate his interpretive strategy.⁸⁸ This weakens his argument that the text has real

⁷⁹ *Id.* at 152.

⁸⁰ Schauer writes,

[I]f we take texts as having independent interpretive force, we will at least stay with them longer before searching for something else. We will be inclined to wrestle with the text rather than abandon it. Our inclinations will tend more towards mining everything there is to be mined from the text before moving on.

Schauer, *supra* note 55, at 46.

⁸¹ In the hermeneutic circle, to which Gadamer refers (which has no specified pre-theoretical starting or ending points), one circularity moves between the reader and what is read, and another circularity moves back and forth between parts of the Constitution to the whole corpus of constitutional law. *But see* Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 430-31 (1985).

⁸² Gadamer, *Text and Interpretation*, in *DIALOGUE & DECONSTRUCTION*, *supra* note 61, at 35.

⁸³ *READER*, *supra* note 3, at 223.

⁸⁴ *Id.* at 320.

⁸⁵ Schauer, *The Constitution as Text and Rule*, 29 WM. & MARY L. REV. 41, 44 (1987).

⁸⁶ *READER*, *supra* note 3, at 223.

⁸⁷ *Id.* at 153.

⁸⁸ Schauer concedes that “the appeal of a constitution of frustration and impediment . . . involves the *inculcation* of the [admittedly arguable] view that what seems right or good . . . to the decisionmaker might nevertheless be ruled out by the words of a text or a rule.” *Id.* at 50 (emphasis added). Schauer’s statement, which opposes the right and good with the words of the text, partially undermines itself, since the greater the constraint of the Constitution on the elected officials, the greater the power of the federal judiciary. Although we can agree that Schauer’s semi-formal view of the Constitution makes eminently good sense for commentators for whom “abuse of power” is the

properties that are the interpreter's "ultimate object of reference."⁸⁹ Indeed, it is not the text itself but Schauer's methods of reading that integrate the conventional norms of the legal profession with the text and thereby imbue it with special legal significance and meaning. Schauer's essay, if its repressed meaning is brought out into the open, rather than disguised in semi-formal garb, lends credence to the idea that "there are no longer any constraints on interpretation that are not themselves interpretive."⁹⁰

IV. Objectivity

There is no consensus among lawyers concerning the definitions of subjectivity⁹¹ and objectivity.⁹² "The staunchest positivist must admit some degree of subjectivity in interpretation just as the most committed [realistic] subjectivist must acknowledge the existence of something in the object outside the interpreter's mind."⁹³ Many of "[o]ur ideas as to what constitutes an objective judgment or rational decision are themselves ideas of a particular tradition."⁹⁴

Jurists who insist on a scientific concept of objectivity are unrealistically demanding. Scientific methods for achieving textual understanding do not exist. Indeed, what counts as objective knowledge, even within the natural sciences, depends on practices and narratives intertwined with historically determined norms and conventions.

Gadamer contends that it is virtually impossible to rid our understanding of the attitudes and beliefs that traditionally arise out of our own situation in time (history) and space (place in the world).⁹⁵ These pre-judgments are often called prejudices, but who is authorized to say when the beliefs that we take for granted are not trustworthy convictions? We might answer that the community decides, but a community consensus, concerning acceptable interpretations, is always in the process of formation or disintegration. Under this view, however, we can never know what a text absolutely means because of the changing community consensus.

Editor Sanford Levinson refers to the Constitution as "a linguistic system, what some among us might call a discourse."⁹⁶ He argues that it is "naïve" to believe that the document called the Constitution is a "gen-

"paramount evil," *id.*, it is hard to believe that this is because of properties or essences in the language of the fourteenth amendment.

89 Schauer, *The Constitution as Text and Rule*, 29 WM. & MARY L. REV. 41, 44 (1987).

90 S. FISH, *supra* note 32, at 9.

91 Subjectivity obviously is a complex concept. See generally J. FISHKIN, *BEYOND SUBJECTIVE MORALITY* (1984). Like objectivity, it can mean many things.

92 The claim that the law is objective refers *inter alia* to transcendent natural law, to the use of impartial procedures, or to some impersonal procedure as determined by mathematics or the natural sciences. Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 369 (1986).

93 Note, *Dworkin and Subjectivity in Legal Interpretation*, 40 STAN. L. REV. 1517, 1540 (1988).

94 G. WARNKE, *supra* note 10, at 80 (paralleling Gadamer's views).

95 H.G. GADAMER, *supra* note 9, at 239.

96 Levinson, *Pledging Faith in the Civil Religion: Or, Would You Sign the Constitution?*, 29 WM. & MARY L. REV. 113, 142 (1987).

uine source of guidance" to its interpreters.⁹⁷ Levinson does not believe that "all constitutional approaches are equal," but he "remain[s] troubled as to how one could ever genuinely establish the superiority of any given constitutional theory."⁹⁸ Levinson is frustrated because interpretive truth is or seems to be so elusive.

Levinson writes that "[i]f one takes seriously the views articulated by Nietzsche . . . one must give up the search for principles and methods of constitutional interpretation."⁹⁹ Richard Weisberg claims that the following statement by Levinson distorts Nietzsche's position:¹⁰⁰ "For a Nietzschean reader of constitutions, there is no point in searching for a code that will produce 'truthful' or 'correct' interpretations; instead, the interpreter, . . . 'simply beats the text into a shape which will serve his own purpose.'"¹⁰¹ Weisberg¹⁰² argues forcefully that Nietzsche did not want to become a master over text; he really desired "to comprehend what an author says."¹⁰³ According to Weisberg, relying in part on Hendrik Birus, "Nietzsche's hermeneutics is text-oriented and sharply critical of what today would be called 'reader-response' reactions to written words."¹⁰⁴ Clearly Weisberg's statements about Nietzsche's mode of reading seem to contradict Levinson's statement (which actually included a quotation from Richard Rorty)¹⁰⁵ that readers may beat texts into shapes that suit their purposes.

97 READER, *supra* note 3, at 159. Levinson's sense of "hopelessness" stems from the inability of jurists, including himself, to resolve the dialectical tension in the Constitution, which is a text that "offers no guidance as to the dilemma generated by . . . the multiplicity (and contradictions) of constitutional values." *Id.* at 459 n.110.

98 *Id.* at 457 n.62. Levinson admits that he has no answer at all to anyone who happens to disagree with his methods for interpreting a constitution, and "there is no way to resolve the dispute when interpreters of constitutions disagree." *Id.* at 161.

99 *Id.* at 162.

100 It has been claimed that Nietzsche was a nihilist who viewed life as meaningless, and subscribed to no values whatsoever. See A. DANTO, *NIETZSCHE AS PHILOSOPHER* (1965). But see Schacht, *Nietzsche and Nihilism*, in *NIETZSCHE: A COLLECTION OF CRITICAL ESSAYS* (R. Solomon ed. 1973). Nietzsche, like Levinson, continually questions the premises that are often irrationally taken for granted by the herd, but in Nietzsche's writing, unlike Levinson's "there is a sustained celebration of creativity." M. SARUP, *AN INTRODUCTORY GUIDE TO POST-STRUCTURALISM AND POSTMODERNISM* 96 (1989).

101 READER, *supra* note 3, at 182-83.

102 According to Richard Weisberg, "to confuse for a general relativism what were in fact [Nietzsche's] contemporary dissatisfactions would be a grave error." *Id.* at 185. Nietzsche, according to Weisberg, did not depict textuality "as one more endlessly interpretable, metaphorically fluid notion." *Id.* at 181.

103 *Id.* at 185.

104 *Id.* at 181.

105 In his article, *Nineteenth-Century Idealism and Twentieth-Century Textualism*, 64 *MONIST* 155 (1981), Rorty's glib reference to readers who beat texts into shape makes more sense if we assume that he was not referring to the opportunistic manipulator of words, but to the "strong textualist," a reader who "prides himself . . . on getting more [useful knowledge] out of the text than its author or its intended audience could possibly have found there." *Id.* at 167. Rorty explains that the strong textualist is not a passive receptacle into which information is poured by texts; like the psychoanalyst, the strong textualist wants to discover repressed meanings of texts, for her own therapeutic and pedagogical purposes. See *id.* at 166. It does not appear that either Levinson or Weisberg understood Rorty's reference exactly this way.

Against Levinson, Weisberg cites Nietzsche's "vitalistic notion of justice" which should be administered impersonally once it is codified.¹⁰⁶ But how can the administrator/interpreter be constrained if a codified text of justice is as ambiguous as the American Constitution? The administrator will be stymied, as Levinson is, if the text codifying vitalistic notions of justice offers inadequate guidance.

Weisberg correctly indicates that, for Gadamer and Nietzsche, the reader's primary task is comprehending the subject matter of the text.¹⁰⁷ But what do we mean when we say such things? Gadamer claims that a reader's response to a text "is marked by an ontologically unclarified dependence on the semantic starting point."¹⁰⁸ For Gadamer, "[t]he task of interpretation always poses itself when the meaning content of the printed word is disputable, and it [becomes] a matter of attaining the correct understanding of what is being announced."¹⁰⁹ At this point, if not before, the reader places the text's subject matter within a certain context and tradition.¹¹⁰

There is, however, no algorithm that resolves differences of opinion among readers. Readers themselves must resolve their differences.¹¹¹ But a problem arises when conversing readers who differ with each other cannot find a common language to express themselves. Levinson writes that "there is no reason to believe that the community of persons interested in constitutional interpretation will coalesce around one or another [particular formula (or conceptual framework) for interpreting the Constitution]."¹¹² This "Tower of Babel" type of difficulty presents a challenge and an opportunity for judges who assertively assume creative leadership roles.

Levinson suggests that Chief Justice John Marshall, "the great Nietzschean"¹¹³ judge of our tradition,¹¹⁴ "bent the Constitution" to conform to his political vision.¹¹⁵ Levinson's comparison of Marshall and Nietzsche is provocative. However, Marshall's majestic opinions rarely demystified the law—unlike Nietzsche, who often appears to be a demystifying interpreter clearing away illusions embedded in words.¹¹⁶ The

106 Nietzsche's conception of a vitalistic notion of justice suggests to us that reason and impulse are joined together in a genealogy (power/discourse formation). It seems unlikely that language is adequate to convey, in any exact way, the parameters of such a vitalistic notion.

107 Gadamer also agrees with Nietzsche and Weisberg that there are different kinds of texts that elicit and direct different kinds of reader responses. We do not read humorous texts, ideologically slanted propaganda, constitutions, and poems in the same way. Gadamer, *Text and Interpretation*, in *DIALOGUE & DECONSTRUCTION* (1989), *supra* note 8, at 37-39.

108 Gadamer, *Hermeneutics and Logocentrism*, in *DIALOGUE & DECONSTRUCTION* (1989), *supra* note 8, at 125.

109 *Id.* at 35.

110 G. WARNKE, *supra* note 10, at 77.

111 See [Gadamer's] *Letter to Dallmayr*, in *DIALOGUE & DECONSTRUCTION*, *supra* note 8, at 95.

112 READER, *supra* note 3, at 163.

113 Levinson uses the adjective Nietzschean loosely to signify that "'interpretation' inevitably implies a struggle for mastery in the formation of political consciousness." *Id.* at 162.

114 *Id.* at 165.

115 *Id.* Levinson worries about creative and charismatic "judges who break the bonds of confining legal conventions." *Id.* at 165.

116 A. MEGILL, *PROPHETS OF EXTREMITY* 85 (1985).

Marshall Court assumed a god-like role,¹¹⁷ and the artificial reasoning of the law was sanctified. But Marshall's explications of the Constitution squarely present the question that Nietzsche left open: namely, whether "interpretation is an insertion [*Einlegen*] of meaning and not a discovery [*Finden*] of meaning."¹¹⁸

Nietzsche's attitude about truth—whether it is found, discovered, or created—is ambiguous.¹¹⁹ Nietzsche stated "that every view is only one among many possible interpretations,"¹²⁰ and he undermined the epistemology of his day by writing in the *Gay Science*: "We simply lack any organ for knowledge, for 'truth.'"¹²¹ These statements—admittedly snippets that caricature his world view—tend to support Levinson's statement that "[i]t was Nietzsche, after all who emphasized the reduction of 'truth' to the views of one's perspective."¹²² Perhaps it would be more accurate to say that Nietzsche's writings teach us to consider many perspectives, in order to avoid imprisoning our minds in any one framework of thought.

Because of telling specimens of writing too numerous to cite,¹²³ Levinson uses the word "Nietzschean" as a symbol for the realization that we have no grounds for knowing whether we are deceived by appearances, and that the different ways of seeing and knowing need not ever yield a single unified picture or interpretation. Gadamer also writes, "from Nietzsche, we learned to doubt the grounding of truth in the self-certainty of self-consciousness."¹²⁴ We also learn from Weisberg to be more careful about our citations of Nietzsche, whose texts are often plundered to support so-called "Nietzschean" views that he opposed.¹²⁵

Gadamer and Derrida agree that a text's meaning depends in part on the reader's response, but they disagree over the meaning and significance of Nietzsche's writings.¹²⁶ To some extent, postmodernists, like Derrida, abuse Nietzsche's notion of a text when they "see it as one more endlessly interpretable, metaphorically fluid notion."¹²⁷ Derrida finds in Nietzsche's works¹²⁸ "the systematic mistrust of metaphysics as a whole . . . the concept of the philosopher-artist . . . the suspicion of the values of truth ('well applied convention'), of meaning . . . and the liberation of the signifier from its dependence . . . [on the metaphysical] concept of

117 Marshall, the federalist, is more apollonian than dionysian; his opinions stress restraint, harmony, and measurable law.

118 Gadamer, *Text and Interpretation*, in *DIALOGUE & DECONSTRUCTION*, *supra* note 8, at 30.

119 A. NEHAMAS, *NIETZSCHE, LIFE AS LITERATURE* 173-74 (1985).

120 *Id.* at 1.

121 *Id.* at 45.

122 Reader, *supra* note 3, at 168.

123 See the collection of excerpts in *DECONSTRUCTION IN CONTEXT: LITERATURE AND PHILOSOPHY* 191-219 (M. Taylor ed. 1986).

124 Gadamer, *Text and Interpretation*, in *DIALOGUE & DECONSTRUCTION*, *supra* note 8, at 29.

125 Gadamer believes that Nietzsche is interpreted in fundamentally different ways and that "this cuts the ground out from all efforts at a unitary understanding of Nietzsche." [*Gadamer's*] *Letter to Dallmayr*, in *DIALOGUE & DECONSTRUCTION*, *supra* note 8, at 93.

126 See generally *DIALOGUE & DECONSTRUCTION*, *supra* note 8.

127 Derrida, much to Weisberg's chagrin, claims Nietzsche as a precursor. Spivak, *Translator's Preface*, in J. DERRIDA, *OF GRAMMATOLOGY* xxi (1976).

128 *Id.*

truth."¹²⁹ Perhaps Derrida reads too much into Nietzsche, but there is something about Nietzsche's writing that reminds us that there is "no neutral standard which determines in every case which of our interpretations is right and which is wrong."¹³⁰

Some liberal scholars still cling to the model of neutral principles, Owen Fiss, among others. In response to Levinson's essay, Fiss argues that a text communicates signs to objective interpreters who are seekers of true meaning. Fiss is unwilling to equate the rule of law with raw institutional power. He maintains that law is more than "masked power."¹³¹

Levinson's analysis of the hermeneutic problem according to Fiss, "calls into question the very point of constitutional adjudication . . . threatens our social existence . . . and demeans our lives."¹³² Fiss believes that Levinson embraces a nihilistic conception of hermeneutics which drains the Constitution of meaning.¹³³ For Fiss, certain "disciplining rules" transform the "interpretive process from a subjective to an objective one. Presumably, these disciplinary rules "furnish the standards by which the correctness of the interpretation can be judged."¹³⁴ Another constraint is the "idea of an interpretive community which recognizes these rules as authoritative."¹³⁵ Thus, even "for Fiss objectivity in legal interpretation is always relative to the legal community."¹³⁶

Although Levinson's hand-wringing over the divided legal community's "fractured and fragmented discourse"¹³⁷ has caused an uproar, his discomfort should be distinguished from nihilism¹³⁸—a term not ordinarily used with precision and clarity. Professor Levinson obviously "take[s] the constitutional firmament seriously,"¹³⁹ has a world view, subscribes to values, and does not refer with despair to the triviality of human existence. Nonetheless, it is fashionable to call ambivalent scholars "nihilists" when they "argue that law is neither rational nor objective by holding up the impossibly high standards of rationality of the epistemological tradition of philosophy."¹⁴⁰

129 *Id.* (Material within single quotes is Spivak's quotation of Nietzsche's statement.).

130 A. NEHAMAS, *supra* note 119, at 3.

131 READER, *supra* note 3, at 230.

132 *Id.* at 248-49.

133 But Fish writes, "the Constitution cannot be drained of meaning, because . . . meaning is always being conferred on it by the very political and institutional forces Fiss sees as threats." *Id.* at 267.

134 READER, *supra* note 3, at 233.

135 *Id.* To Fiss's criticism, Levinson has responded. He writes: "The united interpretive community that is necessary to Fiss's own argument simply does not exist." *Id.* at 172. All that does exist, right now, is "the fractured and fragmented discourse available to us." *Id.* at 173.

136 Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 351 (1986).

137 READER, *supra* note 3, at 173.

138 Many academic scholars use the word nihilism more loosely than I do. For me, the telltale symptom of widespread nihilism is a totally alienated people who lack public spirit, who are self-centered, and believe in nothing. These people become vulnerable because the vacuum in their lives can be filled by the emotional rantings of a fanatic leader, a totalitarian, who has contempt for enduring Western values and humanitarian and humane ideals.

139 READER, *supra* note 3, at 173.

140 Stick, *supra* note 136, at 342. "Levinson is . . . sensitive to the difficulties of nihilism as an epistemological position . . . and bases much of his own disagreement with liberal legal theorists on more sound political . . . arguments. . . ." *Id.* at 346 n.46.

In sum, despite the inability of legal theory to justify the liberal state, on grounds that are not excessively abstract and meaningless, the legal system remains viable.¹⁴¹ American constitutional law is still considered legitimate and authoritative partly because opinion leaders in the legal profession have mastered the art and technology of political persuasion.

V. Rhetorical Politics

Editors Levinson and Mailloux conclude the *Reader* with several essays that refer to the power of practical reasoning and the technology of political persuasion. The editors ask whether a study of the "rhetorical underpinnings of all interpretive arguments" yields useful insights.¹⁴² The insights that are useful to the student of rhetorical politics pertain to the qualities of interpretations that are well-reasoned, interesting, motivating, otherwise desirable, and somehow ultimately convincing. A hermeneutic emphasis on rhetorical politics is virtually an admission that the search for a fail-safe foundation¹⁴³ for trustworthy interpretations of the Constitution is futile.¹⁴⁴

W.V. Quine writes (with deadpan humor?) that rhetoric "is the rallying point for advertisers, trial lawyers, politicians, and debating teams."¹⁴⁵ Plato illustrated how rhetoric dupes ignorant audiences into believing that they are knowledgeable.¹⁴⁶ Aristotle also condemned rhetoric, but only that kind that "'made the worse argument appear better.'" ¹⁴⁷ Aristotle also emphasized how rhetoric can be used beneficially to help people understand the view that most nearly accords with the facts.¹⁴⁸

But what are we to think of the contemporary neo-Marxist literary critic who uses rhetoric to "appropriate from [words] whatever may be valuable for socialism?"¹⁴⁹ Does our view depend on our commitment to socialism? What are we to think of the argument that the fourth amendment requires warrants for aerial surveillance, notwithstanding the ordinary usage of the word "search"? Does our legal solution to the abortion

141 On the whole, the Court's decisions are regularly obeyed voluntarily, and its role as a respected umpire is settled for the near future. Moreover, its potential arbitrariness is limited by its placement in an interpretative tradition that eventually reins in most Justices. Furthermore, since the Court insists that it gladly accepts the normative authority of the Constitution, which it interprets as the supreme law of the land, we advocates have the opportunity to convince five Justices that any previous decision, that we want reversed, is not authoritative.

142 *READER*, *supra* note 3, at xiii.

143 Foundationalism refers to thought that is based on a firm ground or metaphysical *gründnorm*, which renders an objective aura to our judgments. To achieve objectivity, the thinker attempts to "stand apart from political, partisan, and 'subjective' concerns." S. FISH, *supra* note 32, at 343.

144 Many of the authors of the essays in the section entitled "Rhetorical Politics" have abandoned foundationalism and scientific hermeneutics, and they deny the possibility of a transcendental, politically neutral standpoint for understanding texts. None of the essayists, however, assert that all truth claims are equally worthy of belief.

145 W. V. QUINE, *QUIDDITIES: AN INTERMITTENTLY PHILOSOPHICAL DICTIONARY* 183 (1987).

146 In Plato's *Dialogues*, rhetoricians are made to appear as "relativistic foils for the idealistic Socrates." S. FISH, *supra* note 32, at 472.

147 *Id.* at 472.

148 *Id.* at 476-79.

149 S. FISH, *supra* note 32, at 495 (citing T. EAGLETON, *WALTER BENJAMIN OR TOWARDS A REVOLUTIONARY CRITICISM* 113 (1981)).

controversy depend on whether we want the Constitution to protect a larger zone of privacy? What are the limits within which an intellectually honest advocate works?

When we go public with our judgments, we are usually constrained by folkways, practices, and conventions. Although our judgments are not necessarily verifiable scientifically, we nevertheless resolutely defend them. Justice Holmes, an ethical relativist, was ready to die (and kill) for some of his political beliefs, even as he warned us that "certitude is not the test of certainty."¹⁵⁰ But what makes any of our beliefs and judgments worthy of acceptance by others?

The editors refer at length to Chaim Perelman's study of practical reasoning, which analyzes argumentation worthy of belief.¹⁵¹ Perelman explains why convincing interpretations are not dependent on definitive, unquestionable, universal truths,¹⁵² formal logic, mathematics, or the natural sciences. To the extent that arguments about interpretation involve assertions that are not demonstrably true, "[t]he domain of argumentation is that of the credible, the plausible, and the probable."¹⁵³ Argumentation is more or less convincing (stronger or weaker) to the extent that it gains the approval of the relevant competent audience. In short, one pragmatic test to distinguish between the exercise of sheer power and the exercise of authority lies in the capacity of the assertion to induce assent.¹⁵⁴

Perelman explains how "legal reasoning [which] is rhetorical through and through"¹⁵⁵ is consistent with the rule of law. Such pragmatic reasoning, however, is too unprincipled for legal theorists who emphasize the integrity of law. Ronald Dworkin, for example, is still concerned with methods for discovering the right answer to questions of law.¹⁵⁶ But Dworkin himself is a master rhetorician and his ambitions about law shape his theory; his theory does not determine his ambitions.

Co-editor Steven Mailloux states that our hermeneutics "cannot be a general account that guarantees correct interpretations."¹⁵⁷ Mailloux observes that there are not any ahistorical, formal methods for deriving an "unchanging" textual meaning, because of the shifting context in which understanding occurs. This is not to say that theories do not have consequences. But the consequences of theory are not indicative of any

150 See Schlesinger, *The Opening of the American Mind*, N.Y. Times, July 31, 1989, at 1, 27.

151 Chaim Perelman writes: "Arguments that in substance and form are appropriate to certain circumstances may appear ridiculous in others. C. PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 25 (J. Wilkinson & P. Weaver trans. 1969).

152 *Id.* at 511.

153 *Id.* at 1.

154 "Authority ends where voluntary assent ends." Winch, "Authority," in *POLITICAL PHILOSOPHY* 102 (1966); R.S. Peters writes: "The concept of 'authority' is necessary to bring out the ways in which behavior is regulated *without* recourse to power-to force, incentives and propaganda." *Id.* at 93.

155 READER, *supra* note 3, at 343.

156 See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 131-49 (1978).

157 READER, *supra* note 3, at 353-54.

idealistically conceived "absolutely correct" answer to a complex, polyvalent interpretive problem.¹⁵⁸

Since the unformalizable historical context is shifting, rhetoric is viewed as a means to help the law shift gears; that is, rhetoric enables a constitutional democracy to adapt to changing circumstances. This thought is nicely developed by James Boyd White.¹⁵⁹ White finds Brandeis's approach superior to Chief Justice Taft's in *Olmstead v. United States*.¹⁶⁰ Taft concluded that the government's wiretapping was not a search or a seizure since the wiretappers did not enter any house, and "[t]he evidence was secured by the sense of hearing and that only."¹⁶¹ White claims that Taft "repeatedly characterizes both the facts [in *Olmstead*] and the [relevant precedent] with a kind of blunt and unquestioning finality, as if everything were obviously and unarguably as he sees them, and in doing this he prepares us for the conclusory and unreasoned characterizations upon which the case ultimately turns."¹⁶²

Moreover, "for Taft, the Constitution is a document that has no higher purposes than to tell us what to do; it has no higher purposes, no discernible values, no aims or context; it is simply an authoritative document, the ultimate boss telling us what to do."¹⁶³

White emphasizes how the Chief Justice tries to convince us that "the Fourth Amendment is [not] about anything important or valuable; it is simply a set of words that tells us what to do."¹⁶⁴ That dictatorial approach, according to White, aims to cut off the kind of participatory dialogue that is necessary in a democracy. White's political rhetoric strikes the intellect, but why should others, who are less worried about privacy rights, reject Taft's literal interpretation of the fourth amendment, especially since Taft's interpretation was then in accordance with ordinary usage? White contends that the dissenting opinion of Brandeis answers the question.

Brandeis tries to erase Taft's distinctions between wiretapping and searches by "mov[ing] us in the direction of enlightenment and justice."¹⁶⁵ White resorts to some evocative rhetoric to convince us that Brandeis's reading captures the "spirit" of the Constitution, its "general principles and aims."¹⁶⁶ Despite some reservations and qualifications on White's part, he basically agrees with Brandeis that wiretapping invades "a right to be let alone—the most comprehensive of rights and the right most valued by civilized men."¹⁶⁷ The rhetorical injection of the "right

158 Mailloux believes that a fully-developed scholarly analysis of interpretation should describe the "ever-changing background of shared and disputed assumptions, questions, assertions, and so forth." *Id.* at 356.

159 *Id.* at 393-410.

160 277 U.S. 438 (1928), *overruled*, *Katz v. United States*, 389 U.S. 347 (1967).

161 *Olmstead*, 277 U.S. at 464.

162 READER, *supra* note 3, at 398.

163 *Id.* at 398-99.

164 *Id.* at 401.

165 *Id.* at 410.

166 *Id.* at 405.

167 *Id.* at 406.

to be let alone" dramatically expands the substantive scope of the Constitution.

Therefore, another question is raised in *Olmstead*, a perennially arising question only indirectly relevant to the substantive fourth amendment issue resolved; *viz.*, who decides what the best understanding of the Constitution is? The Constitution, according to White, "*is made . . . by those who read the language of the Framers well, who translate—carry over its terms to the contemporary world.*"¹⁶⁸ White observes that the judicial role enables the judges to demand from the text the deeply value laden standards of excellence that are shared by all of us.¹⁶⁹ But should courts determine the content of *our shared* deeply-value-laden contemporary standards, and then reconstitute the Constitution accordingly? According to White,

The text [of the Fourth Amendment and presumably other provisions in the Constitution] at once creates and constrains a liberty (or power) in its reader, and in so doing so defines for the reader a particular kind of responsibility. It is in that combination—liberty, constraint, and responsibility, for the reader and maker of texts—that the ethical and intellectual heart of the law can be found.¹⁷⁰

With this last flourish in rhetorical politics, White's essay and the *Reader* conclude. The question is whether White's essay "resolves any of the anxieties" that concern those, like Meese and Schauer, who worry about excessive judicial activism.¹⁷¹ White's essay paradoxically confirms Levinson's skepticism about the absence of demonstrably correct or safe methods of interpretation. His essay has power to persuade the competent audience to which Perelman refers, but in whose hands does he leave the ultimate power of interpretation? White's essay encourages appointed judges to have the last words. Not every judge, however, has the sagacity of Justice Brandeis, and yet White's thesis depends on the availability of judges who are capable of helping the community attain "intellectual and moral self-improvement."¹⁷² I suspect few judges are equal to this responsibility.

VI. A Final Word

The *Reader* edited by Levinson and Mailloux should be placed on the recommended reading list for every law student. It should be required reading for any professor teaching a law and literature course. I know of no other book that so efficiently teaches lawyers the rudiments of law-related hermeneutics. Indeed, judges ought to study the *Reader's* essays and thereby become more knowledgeable about the limits of an interpreter's ability to understand a text.

¹⁶⁸ *Id.* at 408-09 (emphasis added).

¹⁶⁹ Justice White emphasizes the continuities in Western thought, and he describes how rhetoric is equivalent to a dialogue or conversation, which makes and remakes the community over time. *Id.* at 408.

¹⁷⁰ *Id.* at 410.

¹⁷¹ *Id.* at viii.

¹⁷² *Id.* at 408.

I answer the questions presented in the *Reader's* introduction¹⁷³ in the following way: We are not saying anything useful to judges merely by warning them to stay within the constraints provided by the constitutional text. We must, however, admonish judges to stay within the constraints entailed by the role of the judiciary. These constraints are not adequately listed in Article III of the Constitution. They must be spelled out by legal educators, the leaders of the organized bar, the general public, and by officials and leaders of public opinion in positions of political power.

173 See *supra* note 7 and accompanying text.

