IF IT AIN'T BROKE, DON'T FIXATE ON IT: GADAMER, GEDICKS, AND ORIGINAL PUBLIC MEANING

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In *The "Fixation Thesis" and Other Falsehoods*,[1] Professor Frederick Mark Gedicks argues that public meaning originalists are mistaken in their claim that the Constitution today means just what it meant when it was adopted. Unlike living constitutionalists who say that the document's meaning has changed to keep up with the times,[2] Gedicks denies that we have unmediated access to an original public meaning relative to which we could even identify or measure departure. Leaning on a theory of hermeneutics developed by philosopher Hans-Georg Gadamer,[3] Gedicks takes aim at the *fixation thesis*—Professor Lawrence Solum's term for the proposition that the meaning of any constitutional text was fixed at the time of its adoption.[4]

Gedicks critiques a core premise of originalists like Solum and Professors Keith Whittington and Randy Barnett, who, he says, think that "original public meaning is an object existing independently of the present, always 'there' in the past to be found."[5] Moreover, Gedicks argues that public meaning originalists have erred in responding to criticisms like his, mistaking an ontological objection—one about the nature of textual meaning—for an epistemological concern about obstacles to our fully recapturing original meaning.[6] That response fails, Gedicks says, because the problem is not our inability to see what is out there; the problem is that there is no *there* out there, at least not in the sense of a meaning that exists independent of anyone's role in producing it.[7]

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1. 72 FLA. L. REV. 219, 219 (2020).

2. Gedicks calls living constitutionalists "bogeys," *id.* at 275, that is, straw persons largely imagined into being by originalists seeking easy foils. I generally agree. *See* Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2011 (2012) (book review) ("originalism's supposed archenemy, the living Constitution, has never been much more than a placeholder.").

3. *See* HANS-GEORG GADAMER, TRUTH AND METHOD 335 (Joel Weinsheimer & Donald G. Marshall trans., Bloomsbury Acad. paperback ed. 2013) (1975).

4. *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015).

5. Gedicks, *supra* note 1, at 223 (disagreeing with Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 416 (2013)); *see also* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 403 (2013).

6. Gedicks, *supra* note 1, at 219, 226.

7. Gedicks does not claim that public meaning originalists see something where there is nothing. The *text* of the Constitution as an artifact surely exists. Gedicks can be read to accuse his interlocutors of failing to recognize their own role in creating meaning. *Cf.* GADAMER, *supra* note 3, at 421 ("The interpreter does not know that he is bringing himself and his own concepts into the interpretation.")

Gedicks's argument is elegant and erudite. I nonetheless fear that his intervention could do more harm than good. As I shall explain, the company that the ontological argument keeps, if not the argument itself, risks reinforcing a caricature of nonoriginalism as relativism.

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Gedicks argues that two leading public meaning originalists—Solum and Whittington—make the same mistake: they "respond[] to hermeneutic ontology with mostly epistemological arguments," thus misreading "two crucial parts" of Gadamer's opus, *Truth & Method*.[8] I lack the relevant training to referee a dispute over whose reading of Gadamer is better. Fortunately, my limited expertise has no bearing on the ultimate disagreement, for two reasons.

First, there would be something ironic, if not self-defeating, about arguing over what Gadamer really meant when one party to the debate takes the view that the meaning of a text written by a now dead author does not simply exist in the past but is a coproduct of the author, all of subsequent history, and contemporary readers. If that is true of constitutional provisions adopted in 1789, 1791, and 1868, it is likewise true of *Truth & Method*, published in 1960. If the view that Gedicks identifies as due to Gadamer is right, then we cannot say that this view is what Gadamer meant.[9]

Second, there is no good reason why constitutional scholars should care whether Gedicks, Solum, Whittington, or anyone else has the best reading of Gadamer. To state the obvious, Gadamer did not play any role in writing or ratifying any constitutional provision. We might have good reason to care about whether the view for which Gedicks finds support in Gadamer is *true*. But constitutional scholars, lawyers, and judges (as opposed to, say, historians of philosophy) have no reason to care whether it is Gadamer's view.

And to be clear, Gedicks is not chiefly interested in whether he or the public meaning originalists better understand Gadamer. He aims to persuade the reader that meaning is not the kind of thing that can be simply out there in the past, unmediated by all that has happened since to create the world in which we now live and in which we effectively construct it.

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8. Gedicks, *supra* note 1, at 241.

9. One might think that discerning the meaning intended by a single author or speaker is possible, while aggregating the expressive intentions of a multimember body—like a legislature or the whole of the ratifying public—presents insuperable challenges. *See* Michael C. Dorf, *Even a Dog: A Response to Professor Fallon*, 130 HARV. L. REV. F. 86, 87 (2016) (referring to the "familiar . . . notion that the intent of a multimember body is unknowable"). Gedicks does not appear to invoke any such distinction, however.

Is Gedicks persuasive? I confess that I feel unqualified to answer that question as well, mostly because I do not understand what Gedicks and his interlocutors are arguing about. An example may illustrate my puzzlement.

Suppose that instead of legal scholars arguing about meaning, we imagine philosophers of science arguing about dinosaurs. Using the dispute between Gedicks and the public meaning originalists as a template, I envision a dialogue like this:

Epistemologist: Dinosaurs existed millions of years ago. By studying the fossil record, we can reconstruct their appearance, their behavior, and other facts about what dinosaurs were like. Our understanding will not be perfect, but that is because of the limits of what we can know, not because of anything about dinosaurs as they once were.

Ontologist: So you claim that dinosaurs are just out there in the past, waiting for us to discover them?

Epistemologist: Well, yes and no. The past no longer exists in the way that the present does. That is simply what it means to say some event occurred in the past. But dinosaurs once existed, and we use the record left to us to get as clear a picture of them as we can.

Ontologist: Well, yes and no, yourself. Our understanding of dinosaurs is a coproduct of the lives they led, the ensuing millions of years of deterioration of the record they left, and the way in which we are situated within our own culture shapes our encounter with that record. We do not directly observe dinosaurs living in the past, nor do we find perfectly preserved dinosaurs. We find bone fragments, which we piece together based on theories and data that humans have developed over centuries of scientific refinement. The very category of "dinosaur" to the extent that it excludes modern birds is an artifact of our own culture and what shaped it.[10]

I find the foregoing dispute puzzling because I agree with everything said on each side of it. I do not see that the ontologist really disagrees with anything the epistemologist says or vice versa. To be sure, each side needs to clarify its position in response to potential misunderstandings by the other, but in the end, the epistemologist does not deny that we lack unmediated access to dinosaurs, nor does the ontologist deny that dinosaurs once existed. They might disagree about what to call their inability to perfectly reconstruct the dinosaurs' world, but that is a matter of semantics.

My befuddlement in the face of my made-up non-debate debate about dinosaurs tracks my frustration with a well-known argument in the

10. Sort of. *See* Joel Cracraft, *Foreword, Beyond Bird-Like Dinosaurs: The Emerging Evolutionary History of Modern Birds*, *in* LIVING DINOSAURS: THE EVOLUTIONARY HISTORY OF MODERN BIRDS vii, vii (Gareth Dyke & Gary Kaiser eds., 2011) ("As every school-child now knows, birds are related to some dinosaurs.").

philosophical literature. Invoking the work of philosopher Hilary Putnam, Gedicks denies that there is some "'God's Eye' point of view of [any] text from which we might understand it 'as it really is.'"[11] Although Gedicks thus appears to limit his invocation of Putnam to disputes over the nature of meaning, Putnam himself was after physical reality. After all, the first and best-known chapter of the Putnam book that Gedicks cites, addresses (and purports to refute) the possibility that we do not experience the physical world we think we experience but are really all brains in vats[12] (much like the characters who have not swallowed the red pill in the film *The Matrix*[13]). Meanwhile, the phrase "as it really is" calls to mind philosopher Richard Rorty's seeming acceptance that "mountains . . . were here before we talked about them" but simultaneous disclaimer that talking about mountains as real objects "has nothing to do with the question of whether Reality as It Is In Itself, apart from the way it is handy for human beings to describe it, has mountains in it."[14] As a legal scholar, my principal response is to wonder what difference it could make to the sorts of practical problems in which the law traffics whether mountains merely exist or exist in Reality as It Is In Itself.[15]

Likewise for dinosaurs. Nothing of any practical consequence seems to be at stake in a dispute over whether dinosaurs are "out there" in the past though somewhat obscured from view by an epistemological haze or only a coproduct of their time, the ensuing eons, and our own culture.

What about meaning? Is the meaning of a text different from dinosaurs and mountains? We might think so. Meaning requires both a speaker and a listener. It seems inherently intersubjective in a way that physical objects such as dinosaurs or the fossils they leave behind are not. So perhaps we might draw different conclusions about the *out-there-ness* of past meanings from those we draw about dinosaurs.

Yet that line of argument proves too much or proves the wrong thing, namely, that intersubjectivity renders meaning impossible, which Gedicks quite rightly does not say. Linguistic ambiguities have always existed, but for the most part communication—including about legal rights and duties—has been possible. Cases like *Raffles v. Wichelhaus*,[16] concerning the validity of a contract referring to a ship called "Peerless" when two ships bore that name, and *White City Shopping Center, LP v.*

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11. Gedicks, *supra* note 1, at 240 (quoting HILARY PUTNAM, REASON, TRUTH, AND HISTORY 50 (1981)).

12. *See* PUTNAM, *supra* note 10, at 1–21.

13. THE MATRIX (Warner Bros. 1999).

14. Richard Rorty, *Does Academic Freedom Have Philosophical Presuppositions?*, *in* THE FUTURE OF ACADEMIC FREEDOM 21, 30 (Louis Menand ed., 1996).

15. *See* Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 95–96 (1996) (doubting that "mountains exist" means anything different from "mountains exist" in "Reality as It Is In Itself.").

16. 2 H. & C. 906, 159 Eng. Rep. 375, 375 (1864).

PR Restaurants, LLC,[17] addressing the question whether a burrito is a "sandwich," are well known precisely because the ambiguities they involve can usually be avoided by careful drafting.

To be sure, our constitutional disagreements usually involve vaguer terms—like "unreasonable searches and seizures" and "equal protection of the laws"—but that is a feature of the particular language, not the fact that the key texts were written long ago. Even legal texts that are vague in many applications typically have a core of settled meaning.[18] Meanwhile, more rule-like textual provisions—like the one giving each state two senators—have stable meaning over time.

In response to that example, Gedicks says that "numbers are a special case,"[19] but he does not back up that claim (other than by citing Gadamer), nor does it ring true. Consider the "tsunami stones"—some centuries old—that dot the Japanese coast, warning inhabitants: "Do not build your homes below this point."[20] The warning need not include any numbers; yet the stones were intended as and succeed at inter-generational communication. So do the "hard-wired" provisions of our Constitution, whether or not they contain numbers.[21]

For his part, Gedicks waffles on the question whether his view about the out-there-ness of past meanings reflects a broader set of commitments that extends to physical reality as well. In a footnote, he suggests that there is a difference in degree that arguably amounts to a difference in kind between the "hermeneutical challenges" involved in "investigation of physical reality" and the "greatly multiplied" such challenges in "investigations of textual meaning."[22] Yet the overall thrust of his argument has understandably led his interlocutors to regard the gauntlet Gedicks lays down as an assault on physical reality itself.

Gedicks places Gadamer's views about language in the context of an intellectual tradition that aims at human understanding more broadly—including understanding of the physical world. I have already noted Gedicks's reliance on Putnam. In addition, Gedicks describes Gadamer's

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17. 21 Mass. L. Rptr. 565, 566–67 (Mass Super. Ct. 2006).

18. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) (describing legal rules as encompassing "a core of settled meaning" and "a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.").

19. Gedicks, *supra* note 1, at 265.

20. Martin Fackler, *Tsunami Warnings, Written in Stone*, N.Y. TIMES (Apr. 20, 2011), https://www.nytimes.com/2011/04/21/world/asia/21stones.html?pagewanted=1&_r=1&hp [https://perma.cc/8CTX-S2KG].

21. *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 553, 585 (2009) ("Sometimes drafters choose to express themselves in clear rules, creating hard-wired features that are relatively determinate.").

22. Gedicks, *supra* note 1, at 233 n.69.

debt to philosopher Martin Heidegger,[23] who, Gedicks states, developed "an ontology that denied that subjects and objects exist apart from each other."[24] To similar effect, Gedicks uses Gadamer's metaphor of a horizon, which, Gedicks observes, was itself drawn from philosopher Edmund Husserl.[25] Gedicks then practically invites the reader to treat his and Gadamer's views as of a piece with a phenomenology of physical objects by explaining them this way: "Husserl noted that when we directly observe an object in three-dimensional space, we can literally see only a part of it at any one time."[26]

Gedicks thinks that it is "a gross misreading of" anti-foundationalists like Heidegger and especially Rorty to accuse them of "denying that physical reality exists independently of human thought,"[27] but it is a fairly common misreading. And for good reason. If the anti-foundationalists are not denying the independent existence of physical reality, it is difficult to see how their views differ from a much more conventional view about the limits of knowledge—the one I attributed to the Epistemologist in the dialogue on dinosaurs.

As a philosophical dilettante, I could be wrong.[28] Perhaps the anti-foundationalists are neither denying physical reality's independent existence nor merely restating a conventional view in different words. Or perhaps Gedicks is right that the hermeneutics of text are so much more difficult than the hermeneutics of physical reality as to render the skeptical *reductio* of Rorty inapplicable to Gadamer.

Nonetheless, Gedicks has not chosen the most advantageous ground on which to combat public meaning originalism. By relying on Gadamer and associated anti-foundationalist philosophers,[29] Gedicks plays into the

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23. *See id.* at 231 (observing that Gadamer drew on "Heidegger's ontology").

24. *Id.* at 232 n.60 (citing MARTIN HEIDEGGER, THE METAPHYSICAL FOUNDATIONS OF LOGIC 160–61, 167 (Michael Heim trans., 1984)).

25. *See* Gedicks, *supra* note 1, at 244 ("Gadamer drew the horizonal metaphor from the founder of the phenomenological movement, Edmund Husserl.")

26. *Id.* (citing EDMUND HUSSERL, IDEAS PERTAINING TO A PURE PHENOMENOLOGY AND TO A PHENOMENOLOGICAL PHILOSOPHY § 44 at 94–95 (F. Kersten trans., 1982) (1913)).

27. Gedicks, *supra* note 1, at 233 n.69.

28. If so, at least I am in good company. *See supra* note 15.

29. The association arguably involves guilt by association. Gadamer himself eschewed skepticism in the natural sciences, whose methods he recognized as a "proper" means of acquiring scientific truth, and saw his hermeneutics as delineating the somewhat different methods needed to discover truth in such fields as philosophy, art, and history. GADAMER, *supra* note 3, at xii. He can be understood to reject the skeptics' view because "from Gadamer's perspective, Rorty's hermeneutics is mutilated or castrated, for it is a hermeneutics without the claim to knowledge or truth." Richard J. Bernstein, *What is the Difference That Makes a Difference? Gadamer, Habermas, and Rorty*, 1982 PHI. SCI. ASS'N 331, 333 (1982). Yet if Gadamer might therefore be seen as resisting the postmodernist spirit that "pervades the writings of Rorty, Feyerabend, and Derrida," *id.* at 332, "what at first appear to be dramatic and consequential differences [may be] more like differences of emphasis." *Id.* at 333. Whether any association of Gadamer with more

hands of originalists who would portray nonoriginalism as a form of radical skepticism about reality or at least about meaning. The originalists then offer original public meaning as a commonsense alternative to the ostensibly nihilistic "gobbledygook" proposed by "[s]ophisticated academics."[30]

If Gadamer's hermeneutics or a more full-throated version of meaning-skepticism[31] were the best available response to originalism, we would have to patiently explain why that is an unfair mischaracterization of the critique. Fortunately, we need not rely on easily caricatured philosophy. We have at our disposal a number of other familiar and decisive critiques of originalism.

Gedicks himself highlights one such familiar critique: when push comes to shove, the public meaning originalists do not really care about original public meaning. As Gedicks explains,[32] like all contemporary participants in contemporary constitutional discourse, public meaning originalists must proclaim the correctness of *Brown v. Board of Education*.[33] Thus, they grab whatever originalist-sounding support they can, even if the arguments they endorse cannot fairly be described as rooted in original public meaning.[34]

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clearly skeptical postmodernists fairly treats Gadamer's work is beyond the scope of this essay and my expertise. My core point is simply that the association exists and will be exploited.

30. Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L. J. 1823, 1825–26 (1997).

31. Two leading versions are WILLARD VAN ORDEN QUINE, WORD & OBJECT (1960) and SAUL A. KRIPKE, NAMING AND NECESSITY (1972). Perhaps reflecting a taste for continental over analytic philosophy, Gedicks cites neither. Might a critique of public meaning originalism be built on the arguments offered by Quine and Kripke? At a minimum, such a critique would need to respond to the critics of meaning-skepticism. *See*, *e.g.*, Scott Soames, *Skepticism About Meaning: Indeterminacy, Normativity, and the Rule-Following Paradox*, Supp. 23 CAN. J. PHIL. 211, 211 (Supp. 1997) (contending that Quine and Kripke are mistaken in their reasons for doubting the possibility that there can be facts about meaning). However philosophers resolve this contest, I doubt its utility for legal scholars. *Cf.* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 114 (1991) (engaging with Kripke's views on essential properties before distinguishing between philosophical accounts of meaning and the practical imperatives of law).

32. *See* Gedicks, *supra* note 1, at 224–25.

33. 347 U.S. 483 (1954).

34. *See* Gedicks, *supra* note 1, at 266–69 (explaining how Solum endorses an historical argument by Professor Michael McConnell that is, at best, evidence of the subjective views of some proponents of the Fourteenth Amendment, but not evidence of original public meaning) (citing Lawrence B. Solum, *Hearings on the Nomination of the Honorable Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the U.S.*, 31 DPCE ONLINE 575, 577 & n.5 (2017); Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 261–67 (2018) (hereinafter *Surprising Originalism*); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995)).

That criticism dovetails with a broader complaint that public meaning originalism does not name a single methodology[35] and does not constrain judges to any greater degree than do other leading interpretive methodologies[36]—that it is simply a mask for decisions reached on other grounds.[37] In some circumstances, those other grounds could be noble, as when public meaning originalists override their ostensible jurisprudential commitments in order to affirm *Brown*'s correctness. More commonly, originalism simply masks politically conservative ideology.[38]

To be sure, originalism is not inherently politically conservative.[39] Accordingly, some liberals—most notably Professor Jack Balkin—adopt an "if you can't beat 'em, join 'em" approach.[40] I have nonetheless cautioned my fellow liberals against embracing and thereby attempting to neutralize the originalist label because doing so reinforces a harmful misunderstanding. I worry that "judges, elected officials, and the public" will "misuse the credibility that" scholars who define original public meaning very broadly lend it "by relying on evidence about the framers' and ratifiers' expected applications in considering concrete cases"[41] to say things like there is no right to abortion because the framers and ratifiers of the Fourteenth Amendment did not think there was such a right in 1868.

That is an admittedly ideological ground for opposing public meaning originalism, but then, as Professor Jamal Greene observes, "[o]riginalism is an ideology, not a practice."[42] Gedicks confronts the originalists' claim that it takes a theory to beat their theory.[43] Not so, he says: "the right

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35. *See generally* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 239 (2009) (describing the evolution and fracturing of originalism).

36. *See* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 747 (2011) (public meaning originalism "reads the most important rights-granting clauses at broad levels of generality, thus affording judges substantial wiggle room").

37. *See* Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 629 (2021) ("original public meaning at a sufficiently high level of generality [enables] judges and scholars to have their cake and eat it too.").

38. *See id.* at 638 (reporting statistics that show a strong correlation of ideological conservatism with originalism, despite the expectation that originalism ought to have only a modestly and apolitically conservative lean).

39. *See* Solum, *Surprising Originalism*, *supra* note 33, at 250–51.

40. *See* JACK M. BALKIN, LIVING ORIGINALISM 21 (2011) (describing living Constitutionalism and originalism as "two sides of the same coin").

41. Dorf, *supra* note 2, at 2014.

42. Jamal Greene, *A Nonoriginalism for Originalists*, 96 B.U. L. REV. 1443, 1443 (2016). *See also* JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS 3 (2015) (describing originalism as an "ism").

43. *See* Gedicks, *supra* note 1, at 223–24, 223 n.19 (and sources cited therein).

ontology will do."[44] That may be, but I cannot escape the feeling that Gedicks has brought a knife to a gunfight. An ontology will have difficulty beating an ideology, especially one whose proponents (to shift the metaphor) play constitutional hardball.[45]

44. *Id.* at 224. For a somewhat different kind of refutation of the claim that it takes a theory to beat a theory, see Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 83–87 (2009) (questioning the need for a theory, as opposed to a pluralist or pragmatic approach).

45. *See* Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 966 (2018) ("the Republican Party's embrace of originalism and its denigration of living constitutionalism may be relevant to its propensity to play constitutional hardball"); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004) (defining constitutional hardball to comprise tactics "that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing *pre*-constitutional understandings.").