Essays

Law, Hermeneutics, and Public Debate

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For Hans-Georg Gadamer, the task of any historical hermeneutics is "to consider the tension that exists between the identity of the common object and the changing situation in which it must be understood."[1] With regard to legal hermeneutics this task issues from the circumstance that "[a] law does not exist in order to be understood historically, but to be concretized in its legal validity by being interpreted . . . . [T]he text . . . if it is to be understood properly—i.e., according to the claim it makes—must be understood at every moment, in every concrete situation, in a new and different way."[2] Gadamer concludes that this combination of identity and change is the sense to be given to Aristotle's conception of natural law. On the one hand, the idea of natural law indicates that "despite all the

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1. HANS-GEORG GADAMER, TRUTH AND METHOD 309 (Joel Weinsheimer & Donald G. Marshall trans., 2d ed. 1989) (1960).

2. *Id.*

variety of moral ideas in the most different times and peoples . . . there is still something like the nature of the thing."[3] On the other hand, "the nature of the thing" does not determine an unvarying content that is the same as a fire that "burns everywhere in the same way, whether in Greece or in Persia."[4] In this Essay, I want to consider this claim not by considering natural law directly but by looking at certain of our current debates over the meaning of universal principles we think are embedded in the U.S. Constitution. I shall begin by underlining what I take to be relevant aspects of Gadamer's hermeneutics and then turn to disputes, such as those over abortion and affirmative action, that seem to divide Americans' understanding of constitutional principles in increasingly bitter ways.

MEANING AND HISTORY

In Gadamer's view, the understanding, interpretation, and application of meaning all define the same process. Understanding is always understanding *as*. It is interpretive insofar as it appropriates meaning through a particular set of categories that indicate a particular "horizon" of expectations and presumptions. Heidegger famously refers to this horizon as the "forestructure" of understanding,[5] while Gadamer grounds it in "prejudice."[6] But the point of both descriptions is that we always understand or appropriate meanings from a particular point of view with particular concerns, frameworks, and assumptions. Our understanding of meaning is neither unconditioned nor objective but directed by an anticipation of meaning that, insofar as it conceives of that which is to be understood from a particular horizon, is also interpretive and, indeed, applicative. It understands in terms of anticipations or prejudices rooted in particular situations and circumstances and reflects the meaning a text or text-analogue such as an action, social practice, or norm has for the interpreter, given his or her situation.

Emma Thompson's cinematic interpretation of Jane Austen's *Sense and Sensibility* offers a case in point.[7] However forcefully one argues that the film is faithful to the text, it is clear that the film *interprets* the text and does so from a particularly contemporary point of view. What is striking from this point of view is the propriety with which Elinor Dashwood (the woman whom Thompson portrays) acts. As

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3. *Id.* at 320.
4. *Id.* (paraphrasing ARISTOTLE, NICOMACHEAN ETHICS, bk. 5, § 7, ll. 26-27).
5. *See* MARTIN HEIDEGGER, BEING AND TIME 192-95 (John Macquarrie & Edward Robinson trans., 1962).
6. GADAMER, *supra* note 1, at 277.
7. SENSE AND SENSIBILITY (Columbia Pictures 1995).

Thompson understands it, her character's propriety is not simply a superficial conformity to established conventions, but rather an attempt to act in a way that is most conscious of one's ethical duties towards others. In particular, Elinor's sense of propriety requires her to be sensitive to the feelings of others by not overwhelming them with her own feelings if those feelings would sadden or worry them. Hence, she tells no one when she discovers that Edward Ferrars, whom she loves, is already betrothed to Lucy Steele. Because of his own ethical propriety, Elinor knows that Edward is committed to marrying Lucy even though he now loves Elinor. Moreover, it is in part because of his ethical propriety that Elinor loves him. Hence, the situation is not one that can be helped and, for this reason, Elinor declines to burden her family with her despair.

The film version of the novel emphasizes the contrast between Elinor's behavior and the self-absorbed exuberance of her sister, Marianne, who attempts to witness, feel, and express her life in all its emotional range as well as to have her family and friends witness, feel, and express it with her. In its presentation of the contrast, the film highlights the effort that an ethical propriety requires, inserting a scene in which Elinor begs her ill sister not to die since without her Elinor does not think she will be able to bear her life. The film also treats with sympathy and indulgence a scene depicting Elinor's final deviation from propriety in which she bursts into uncontrollable and public tears upon discovering that Edward has not married Lucy after all and, in addition, has been released from the engagement through no act of betrayal of his own.

Yet the film's focus on Elinor's heroic struggle to maintain her own self-restraint is not one that Austen herself would necessarily share. Indeed in the novel, Elinor is quite able to control herself until she has left the room; she weeps only in private. But the movie's interpretive attention both to Elinor's propriety in trying to hide her feelings from those who can do nothing to ease them and the strength of those feelings themselves does reveal for a contemporary audience a facet of Austen's work that is important for us: namely, the idea that an ethically grounded propriety is not the same as conventionality and that our own assumptions as to the value of emotional expression have their limits. If other epochs do not share our sense of the meaning of Austen's novel, the divergence does not mean that our understanding is any less legitimate for us.

What is meant by this sort of legitimacy? Thompson's cinematic version of *Sense and Sensibility* both admires Elinor's self-restraint and smiles at the lengths to which she assumes she ought to take it. Why not, thinks a more contemporary consciousness, express your emotions, at least those that threaten to debilitate you, even if they

embarrass others or burden them with matters they cannot resolve? What Austen considers ethical propriety in general we recognize as a peculiarly English version of it. Therefore, although Thompson shows us we can learn from Austen's depiction of English propriety to question some of our own emotional expressiveness and self-absorption, the way we understand this propriety necessarily differs from the way in which Austen understood it.

Here the equal legitimacy of our understanding with Austen's own of a text that is meant to be our "common object," to use Gadamer's terminology, depends upon history. Austen had no basis for contextualizing English self-restraint or at least could not look at it as we might, as both an instructive and a somewhat sweet and old-fashioned ethnic trait. We cannot understand Austen the way she understood herself because history has proceeded, because circumstances elicit a coarseness Elinor could not have had, because the twentieth century has publicly witnessed events to which a self-restrained response would be horrible, and because we take ourselves more seriously as individuals rather than as parts of family and community networks to which we have certain obligations. To tie a legitimate understanding of *Sense and Sensibility* to its original audience's or Austen's own understanding would thus be a fruitless exercise in trying to get out of our own historical situation.[8] Moreover, it would limit the meaning of the text in an equally misconceived attempt to sever understanding and interpretation from application. An author's or a period's understanding of a text or of itself cannot be the only legitimate understanding for a different age with different experiences. Rather, as Gadamer writes, "Every age has to understand a transmitted text in its own way, for the text belongs to the whole tradition whose content interests the age and in which it seeks to understand itself."[9]

At work here is what Gadamer calls a "fusion of horizons."[10] On the one hand, Austen's text provides an object of interpretation common to Emma Thompson and to other interpreters. On the other hand, Thompson's interpretation fuses with the text as the meaning the text possesses. One might follow E.D. Hirsch, Jr., and claim that the issue here is not the meaning of Austen's text but its significance. Meaning, Hirsch insists, must be determinate and this determinacy can be guaranteed only by equating meaning with an author's or agent's intention.[11] What can change historically is not meaning, then, but

8. *See* RICHARD RORTY, CONSEQUENCES OF PRAGMATISM (1982).
9. GADAMER, *supra* note 1, at 296.
10. GADAMER, *supra* note 1, at 306.
11. *See* E.D. HIRSCH, JR., VALIDITY IN INTERPRETATION (1967).

the importance or relevance of a text for us. But this distinction misses the point. For the question Thompson seeks to answer is what the book says, not what the significance of what it says may be for us. In other words, if the book says anything at all it must say something to us, but because we are historically situated, what it says to us in our circumstances and given our attitudes, culture, and experience will reflect a fusion of our historical horizon and that of the book as the book's meaning for us.

Yet, it is not clear that only historical differences in interpretation are legitimate. While each generation must understand a given text in its own way, not all parts of a single generation need understand those texts in the same way. If historical distance explains the possible legitimacy of different understandings of the meaning of the same text or common object, the same factors that explain the legitimacy of these differences also explain the legitimacy of our non-historical differences. We differ in the experiences we have had, the concerns we possess, the motives and expectations we bring to a given work, and in the cultural attitudes, individual sensibilities, and heritages that provide our context for understanding. Thompson's understanding of *Sense and Sensibility* is not the only understanding that can make sense or speak to a modern consciousness. An alternative interpretation might focus on Marianne's behavior and try to make sense out of the circumstances under which the excesses of a first love could almost kill a person. In pursuit of such an interpretation, Tony Tanner refers to Foucault's account of the increase of nervous diseases in the later part of the eighteenth century and stresses the extent to which the illness Marianne contracts is psychosomatic.[12] In doing so, he understands Austen to be criticizing the sort of society where social form and masquerade dominate and where the sincere expression of feeling gives rise to both physical and mental illness. Indeed, we might argue that it is Marianne's very sincerity and unwillingness to mask her feelings that attracts the man she eventually marries and that this man has far more substance than Edward whose appeal seems, in fact, limited to his ethical propriety.[13]

An interpretation of *Sense and Sensibility* that focuses on Marianne will thus be importantly different from and even opposed to one that focuses on Elinor. While one teaches us to respect and even perhaps

12. *See* Tony Tanner, *Introduction* to JANE AUSTEN, SENSE AND SENSIBILITY 7, 15-22 (Tony Tanner ed., Penguin Books 1978) (1811).

13. Thompson's film version adds a beginning sequence at Norland Park to give Edward more depth, evidently because he is so slight a character in the novel, at least for contemporary readers. But Marianne's eventual husband, Colonel Brandon, has both ethical propriety and a depth of experience and sorrow that makes him more credible, at least to us, as someone Marianne or Elinor might love.

emulate an ethical propriety our culture has lost, the other asks us to explore the relation between madness and the forms and constraints of civilization. Nonetheless, the difference and even opposition between the two interpretations renders neither illegitimate. Rather, we look forward to different interpretations of the texts of our tradition just because of the different light a new interpretation might shed on them and because of the way attention to a different part of the text allows us to rethink our understanding of both the text and ourselves. Austen's novel has a different meaning if it is understood as reminding us of the virtues of self-restraint than if it is understood as reminding us of the social construction of reason and illness. One might try to synthesize the two understandings and claim that Austen sees virtues and vices in both ethical propriety and emotional expression and thinks that each might be tempered by the other. But it is equally important that precisely our interpretive differences foster the discussion of the novel and lead to new syntheses in an ongoing way that our discussion will never exhaust. Literary discussion does not disclose the one true sense of a text but rather exhibits its different aspects and the different perspectives under which it can be validly understood, as a self-identical "common object" that "according to the claim it makes . . . must be understood at every moment, in every concrete situation, in a new and different way."[14]

The specter that looms here is obviously that of relativism. I have argued that different interpretations of meaning can be equally illuminating and legitimate. Moreover, I have suggested that their legitimacy is tied not only to differences in historical perspective but to differences in cultural and even personal perspective. But if the legitimacy of an interpretation does not preclude the legitimacy of other interpretations dependent on different historical, cultural, or subcultural perspectives, this lack of exclusiveness does not support an indiscriminate inclusiveness. Rather, one can surely argue that differences in interpretation are tied to different perspectives and concerns without assuming that all sources of understanding are equally legitimate or that all interpretations are equally good. Before pursuing this point, I want to turn to a current controversy over a constitutional issue to indicate how we can tolerate and even learn from different interpretations of our principles even if we need not tolerate and learn from all interpretations of them.

14. GADAMER, *supra* note 1, at 309.

CONSTITUTIONAL DEBATES

Clearly, part of constitutional adjudication involves applying constitutional principles to a changed and changing world. If we are to understand the meaning of the First Amendment's protection of free speech, we must do so, at a minimum, in light of changed and changing attitudes towards women and in light of increased concern about violence against them. Similarly, if we are to understand the Fourteenth Amendment's guarantee of equal protection we must do so in the light of our particular history, a history that includes discrimination and segregation as well as an increasingly multi-ethnic and multi-cultural society. The force of the "must" at stake here is an epistemological rather than a moral one. Just as we cannot understand *Sense and Sensibility* in the way either Jane Austen or her original audience understood it, we cannot understand the Constitution according to the "original intent" of its framers. In the first place, we have to apply its principles to issues that could not have come up for those framers: what equality means or requires in a country that has had the history we have had; what respect for the sanctity of life means given new birth technologies and ways of sustaining life; what freedom of speech means with regard to women's equality; and so on. In these cases, the principles embedded in the Constitution must be applied to new issues.

One might claim that we should decide them in terms that the framers could have accepted if they had been aware of them. But this sort of speculation itself seems to involve interpretive decisions. We must try to figure out what aspect of the new issues or situations would have been important to the framers, how it would have been important, and how they would have thought of it if they could have. We must decide how the principles with which we are concerned are relevant to the new situations in which we find ourselves, but this means we must understand the principles themselves in terms of the perspective the new situation sheds on them. Gadamer thus rejects a division between understanding, interpretation, and application in legal hermeneutics just as he does in textual hermeneutics. The tasks of judge and legal historian are complementary: While the judge must understand and interpret the law to apply it, the legal historian must know how it is to be applied in order to interpret and understand what it says.

But what if current interpretive differences over the meaning of constitutional principles extend from differences between generations of interpreters to differences among them? What if we can understand the principles that we think are embedded in the Constitution in

different legitimate ways just as members of the same generation can understand *Sense and Sensibility* in different legitimate ways? Our divisions over abortion are a case in point and I shall try to show how in part by relying on two sociological studies, *Abortion and the Politics of Motherhood* by Kristin Luker[15] and *Contested Lives: The Abortion Debate in an American Community* by Faye D. Ginsburg.[16] Both studies are important insofar as they indicate the different interpretive horizons within which pro-life and pro-choice groups approach the issue of abortion. I shall be trying to tie these horizons to differing interpretations of the principles of liberty and respect for the sanctity of individual human life.

The debate over abortion is often conceived of as what Laurence Tribe calls a "clash of absolutes," as a controversy over moral and legal principle that pits those adhering to a principle of sanctity of human life against those who adhere to a conflicting principle of liberty.[17] Conceived of in this way, resolving the public controversy depends upon determining which of these principles should have either moral or legal priority. Thus, pro-life advocates are said to insist that respect for the principle of the sanctity of human life with regard to "unborn children" must precede a respect for the principle of liberty with regard to women, because the right to life is the basis upon which a right to liberty can exist at all. Conversely, pro-choice advocates are said to argue that a woman's right to determine her own destiny, including the question of when or if she is to be a mother, is the only right at issue. But Luker's and Ginsburg's research indicates that pro-life and pro-choice groups *agree* in the principles to which they appeal: Both pro-choice and pro-life advocates invoke the principle of liberty and the principle of respect for the dignity of individual human life. Their differences are not differences over principle. Instead, I shall suggest that they bear greater similarity to our interpretive differences over the meaning of a work of literature.

For pro-life advocates all human life is to be respected as sacred, as is the very act of intercourse through which new life begins. Sexual intercourse is meant primarily for procreation and should therefore be engaged in only when one is married and, moreover, open to the possibility of becoming pregnant. Indeed, pro-life advocates are as typically against artificial means of contraception as they are against abortion for, in their view, such means undermine a reverence for the act of sexual intercourse and reduce it from an act connected to the

15. KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984).

16. FAYE D. GINSBURG, CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY (1989).

17. *See* LAURENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990).

potential creation of human life to an act that is merely healthy or fun. Hence, pro-life advocates tend to view Natural Family Planning (NFP), a method of unassisted birth control in which couples abstain during fertile periods of the woman's cycle, quite differently from the way in which pro-choice advocates typically view various methods of birth control. According to Luker, what is important about NFP for pro-life advocates is neither its effectiveness nor its reliability, precisely the characteristics pro-choice couples stress in their estimation of various birth control techniques.[18] Rather, pro-life advocates stress the sacred quality sexual intercourse has precisely because without highly efficient means of contraception it always involves the possibility of creating life. As one of the respondents in Luker's study claims, "The frame of mind in which you know there might be a conception in the midst of a sex act is quite different from that in which you know there could not be a conception . . . I don't think that people who are constantly using physical, chemical means of contraception really ever experience the sex act in all of its beauty."[19]

Consistent with this view of contraception is a view of parenthood that rejects the idea that it must be planned for, prepared for, or fit into one's overarching life plan. Rather, what pro-choice women call "unwanted pregnancies" are for pro-life women "surprise pregnancies" and there is always room in one's life for the child that results. For some pro-life advocates, the capacity to accommodate unplanned pregnancies issues from the contours of a woman's life, at least if she is married and has children. From this vantage point, a woman's life is one devoted primarily to raising children, managing a household, and attending to the needs of her husband. To refuse to allow room in this scenario for one more child is simply selfish and self-indulgent. For other pro-life advocates, this priority of caring for others over selfish concerns holds even when a woman's life is not yet arranged so that an unanticipated pregnancy can be easily integrated into it. For this group, a woman's unwillingness to change her life to accommodate a baby or to struggle through less than optimal circumstances for raising children serves as a sign of a growing materialism and lack of generosity in American life.[20] An interest in money, career-prestige, and social advancement outweigh care and concern for others. As Ginsburg puts the point, for pro-life groups abortion often reflects "a social denial of nurturance."[21]

18. LUKER, *supra* note 15, at 168.
19. *Id.* at 167-68.
20. GINSBURG, *supra* note 16, at 127-29.
21. *Id.* at 185.

From a pro-choice perspective, the pro-life position on the sanctity of human life and even human sexual intercourse is simply "medieval"[22] while its view of pregnancy and childbirth is irresponsible. Sexual intercourse can be "amative" as well as procreative and when it possesses a "transcendent" character, it does so, not because of any potential connection to pregnancy and childbirth but because of its actual connection to intimacy.[23] Moreover, one's responsibility to children means that there is not always "room for one more" or even for one. Parenthood is no longer part of a supposedly natural scheme of things but is rather optional and therefore special, requiring special preparations. Children need the best set of resources in terms of emotional, psychological, social, and financial stability one can provide for them and, hence, if one is responsible, one will become a parent only when one is emotionally, psychologically, socially, and financially ready to be one and to care for children in an appropriate way.[24] As one pro-choice minister responded to Luker, "I remember giving a talk [in which I said] that I thought one of my roles was to be an advocate for the fetus, and for the fetus' right not to be born . . . I think if I had my druthers I'd probably advocate the need for licensing pregnancies."[25]

Both pro-life and pro-choice advocates thus appeal to the values of nurturance and care in appealing, jointly, to a principle of the sanctity of human life. At the same time, they understand this principle in very different ways: Whereas pro-life advocates link it to the idea of appreciating and accommodating new human life in all its forms and in all circumstances, pro-choice women stress the need to be responsible, careful, and considerate of both the human life that already exists and that could potentially exist.

The same holds for pro-life and pro-choice appeals to a principle of liberty. In the view of the pro-life advocates that Luker studied, women are free to choose different sorts of lives but these lives bring different commitments with them. Thus, while women can freely choose to pursue careers and should be paid as well as men if they do so, they should also recognize that the choice of marriage and sexual activity bring with them the serious responsibilities of caring for children, husbands, and homes and that this care and concern for others comprises a full-time job on its own. In this regard private and public spheres are equal and complementary. By denying this complementary relation, pro-life groups think that pro-choice views

22. LUKER, *supra* note 15, at 178.
23. *See id.* at 176-78.
24. *Id.* at 181.
25. *Id.* at 182.

leave a desert where the province of care and concern for others ought to be.[26]

Pro-choice advocates, in contrast, conceive of a principle of liberty in terms of women's opportunities. For pro-choice advocates, men and women can occupy the same worlds; both can work and ought to be involved in raising their children. Moreover, they think that women who do not work are inviting disaster, that they are only "one man away" from a life of poverty in which they cannot care for their children at all, much less devote their lives to accomplishing this task.[27] For pro-choice women, caring for one's family is only one of the roles women can perform and, given the ability to control their reproductive lives, it need not limit their options any more than it limits those of men.

Thus, again if pro-life and pro-choice advocates commonly refer to a principle of liberty, they understand this liberty in different ways: pro-life groups as the liberty to choose a life with all the responsibilities that potentially arise out of it; pro-choice groups as the ongoing ability to determine the contours of one's life and the responsibilities one will accept. Hence, as in the case of the common appeal of pro-life and pro-choice groups to the principle of respect for the intrinsic value of human life, their common appeal to a principle of liberty overlays a perspectival difference in terms of which, as Luker points out, our differences over abortion are only "the tip of the iceberg."[28] People differ on the legal question of whether abortion should be accessible because they inhabit different interpretive communities: They differ in their life circumstances and resources, in the choices they have made, in their orientation toward life, their attitudes toward parenthood, and their understanding of the meaning of sexual intercourse itself. Not only do they differ; they are also mutually suspicious. From a pro-choice point of view, the pro-life position is not only medieval but ideologically designed to maintain traditional gender roles and to eliminate women from public life. From the pro-life point of view, the pro-choice perspective is equally frightening in its ability to undermine a way of life that pro-life advocates find not only satisfying and meaningful but the last defense against the crass materialism of modern life. For Luker, both factors—the entirely different cultures in which pro-life and pro-choice advocates live and the threats to their way of life that each position finds in the other—make it clear "why the abortion debate

26. I have extrapolated here from the findings Luker reports. *See id.* at 159-63.
27. *See id.* at 176.
28. *Id.* at 158.

is so heated and why the chances for rational discussion, reasoned arguments, and mutual accommodation are so slim."[29]

But are they so slim? Pro-life and pro-choice advocates refer to what in Gadamer's terms would be self-identical common objects and even principles referring in the end to natural law: to a respect for the sanctity of individual human life and to a principle of liberty. In the case of literary texts, the conjunction of a common object and different perspectives revealing different aspects of it leads to fruitful discussion. In Emma Thompson's interpretation of *Sense and Sensibility*, we learn the limits of our self-absorption, while in Tony Tanner's interpretation we learn the limits of social form. But we are led by the difference between the two interpretations to attempt a synthesis or accommodation that signals a more moderated response to both our self-absorption and our dependence on social forms. Moreover, this accommodation serves as a basis for further interpretive discussion. But why should we not conceive of our differences over abortion in the same way, not as applications of incompatible principles, but as different, equally legitimate interpretations of common principles. Why not conceive of them as the basis for fruitful discussion, moderation, and mutual accommodation together with an openness to further interpretive possibilities?

Were we to conceive of our debate over abortion in this way, it might become clear to each side what it might learn from the other. By taking seriously the pro-choice understanding of a respect for the sanctity of life, the pro-life view might learn to find dimensions in the meaning of this principle that center on the particularity of different family and therefore life circumstances. Most obviously, it might learn to consider the level of social services required if women and children are to have what the pro-life position might understand as a decent life. As many pro-life groups already acknowledge, one cannot be consistently pro-life only up to the point of birth. Rather, a pro-life position might learn to concern itself with pre-natal care, child-care, and the poverty in which many families, with their children, live. On the other side, however, the pro-choice position has a similar opportunity to learn once it understands that its claims about the sanctity of life reflect an interpretation of principle for which other interpretations are available as well. By taking seriously a pro-life view of the meaning of a respect for human life, pro-choice groups might learn to acknowledge, as many, again, already do, that the recourse to abortion remains a serious undertaking, one which raises

29. *Id.* at 191.

questions about one's life and one's relations to others that cannot be answered simply by claiming a woman's right to control her own body.

Similar potential for mutual learning lies in our differing understandings of the principle of liberty. From a pro-life point of view, pregnancies happen and one's life adjusts to loving and caring for the children that result. A pro-choice point of view need not accept all the fatalism this life-orientation implies or the idea that the province of loving and caring for children belongs only to women. Still, there is a dimension of this view that seems important: Namely, that technology is not always tied to human freedom and that particularly new reproductive technologies bring with them a focus on control and life-management that can blind us to other possibilities. This blindness seems obvious with regard to new birth technologies, which can lead couples to be so intent on technologically conquering their infertility that they overlook the parenting opportunities that exist through adoption.[30] It seems to me that some of the same might be said for attempts to control the effects of our fertility. We do not have to give up all attempts to control fertility or infertility to see the point that not all aspects of love or life are ones for which we can completely plan. Instead, we might hold onto two ideas: First, the idea that nurturance is a value that may require us to change our lives while enriching them in the process and, second, the idea that recourse to technological control can imprison our lives as much as it may seem to liberate them.

Of course, if those who are pro-choice can learn to modify their equation of liberty with control from the attitude pro-life advocates take towards the meaning of liberty, pro-life advocates might learn from a pro-choice understanding to see the raising of children as a grave responsibility for both men and women. They might learn to understand it not as simply a natural consequence for women of certain actions they take, but as a journey the implications of which redound upon both men and women and are awesome enough to legitimate the idea that certain medical, emotional, psychological, social, and financial circumstances preclude the possibility of preparing adequately for it. Here parenthood is no longer conceived of as an inevitable part of life but as an opportunity while liberty means the freedom of families to decide for themselves when and if they *cannot* pursue it.

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30. *See* ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING (1993).

Thus, we might overcome a "clash of absolutes" in the debate over abortion by recognizing the different positions as alternative, legitimate interpretations of the meaning of norms and principles that both sides in the debate take seriously. The point of such debate is not to prove the exclusive legitimacy of one set of arguments but to come to appreciate, to learn from, and even to accommodate different ways of understanding common objects: in this case, principles of life and liberty. In the end, pro-life and pro-choice advocates might agree to a moderate position. They might mutually acknowledge the danger in linking individual liberty so closely to individual control over all life's consequences that we ignore the possibilities for changing and enriching our lives that lie in certain events that happen to us. Moreover, both pro-life and pro-choice advocates might acknowledge the way in which aspects of modern life threaten values of nurturance. At the same time, they might agree that if we are to rethink our equation of individual liberty and technological control, the consequence of doing so cannot effect women alone but must move the society as a whole to establish the institutional conditions necessary for protecting values of nurturance. Further, pro-life and pro-choice advocates might agree to remove childbirth and child care from the domain of simply natural occurrences and acknowledge circumstances under which neither children nor families can flourish. The result of such a reciprocal learning process might well be a synthesis of interpretations in which, as a society, we actively encourage values of nurturance and promote the opportunities for enriching one's life that a pregnancy can offer while agreeing that families themselves must finally decide the conditions under which they cannot pursue such opportunities. Moreover, we might agree to foster and fund the kind of social and cultural institutions that would minimize the circumstances in which such a decision would have to be made. Hence, we might agree to support pre-natal care, paid parental leaves, decent and affordable child care, and flexible work schedules, on the one hand and teen-age abstinence, sex education, and easy access to reliable birth control, on the other.

There is an obvious danger, however, with this sort of synthetic solution. For surely not all interpretations of our principles are ones we should try to appreciate or to accommodate. The interpretation of the Fourteenth Amendment expressed in *Plessy v. Ferguson*,[31] for example, would seem to be simply racist. Are we to take seriously sexist or racist interpretations of our moral and constitutional principles, and if not, what are the criteria to distinguish legitimate

31. 163 U.S. 537 (1896).

interpretations, from which we ought to try to learn, from illegitimate interpretations, which we ought simply to dismiss? Even if we concede that more than one understanding of principles we share may be valid, surely there are some understandings that remain invalid.

Following F.D.E. Schleiermacher,[32] Gadamer links the legitimacy of interpretations of meaning to the hermeneutic circle. An adequate understanding of a text works piecemeal by fitting new parts or dimensions of it into a coherent whole one during the process of constructing. An interpreter understands the meaning of the first chapter of a book in a certain way and then tries to find an interpretation for the second chapter that will cohere with the meaning he or she found in the first. If the interpreter cannot find such an interpretation, he or she has to revise the original understanding of the first chapter to find an interpretation that fits both it and the subsequent chapters. Understanding is, thus, a circular movement in which the understanding of the meaning of new chapters of the book proceeds on the basis of the understanding the interpreter has constructed of the meaning and unity of the previous chapters, while at the same time, his or her understanding of the new chapter may require revising the understanding of those previous parts. For Schleiermacher, the endpoint of this process is the "harmony of all the details with the whole," a harmony which is also, for him, "the criterion of correct understanding."[33]

Gadamer suggests that this criterion works, at least, to expose the probable illegitimacy of certain understandings of meaning. An interpretation of a text is at least presumptively illegitimate if it does not admit of a unity between part and whole. One must presuppose that a given text composes a unified whole since only its unity can supply a standard for checking one's interpretations of its various parts and either rejecting those that do not fit with the whole or revising one's conception of the whole. A given interpretation need not integrate every aspect of a text to be legitimate. Nevertheless, it must integrate enough of what it can show to be the text's important aspects to count as an interpretation of the unity of that particular text. For some texts, ultimately no interpretation may prove capable of revealing a coherent whole. Still, as Gadamer puts the point, "when we read a text we always assume its completeness, and only when this assumption proves mistaken—i.e., the text is not intelligible—do we begin to suspect the text and try to discover how it can be remedied."[34]

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32. *See* F.D.E. SCHLEIERMACHER, HERMENEUTIK UND KRITIK (Manfred Frank ed., 1977).
33. *See* GADAMER, *supra* note 1, at 291.
34. *Id.* at 294.

Plessy v. Ferguson seems to fail as an adequate interpretation of the principle of equality or the Fourteenth Amendment on this criterion; that is, it fails to provide an interpretation that gives a unity of meaning to the principle as it is embodied in our Constitution. Instead, it allows one group not only to be separated from another group but to be separated from all access to the benefits and opportunities of the society at large. On this interpretation, the principle of equality would therefore have to encompass the inequality of opportunity and participation. The same might be said for current critiques of affirmative action policies that interpret the Fourteenth Amendment in terms solely of a principle of racial neutrality in order to insure an equality of opportunity based only on merit and qualification. This one-sided interpretation again fails to account for that aspect of the principle of equality that includes the full participation of all in the benefits and opportunities of society. Affirmative action policies cannot be rejected, therefore, simply on the basis that they violate a principle of equality for, at the very least, that principle includes *both* the racial neutrality on which opponents of affirmative action focus *and* the participation of all races in our social and political life.

Still, if *Plessy* and the critique of affirmative action both fail to make a coherent whole out of our principle of equality and fail as legitimate interpretations on this ground, it is not clear that all holistic interpretations of our principles or texts or text-analogues are equally valid. An interpretation of a woman's attempt to reject a man's sexual advance may fit into an interpretive whole in which women typically mean yes when they say no and resist sexual advances only to raise the pitch of sexual excitement. Here we may fit all the details of the woman's speech and action into a coherent whole yet fail to grasp her meaning at least as he understands it. Hence, if discrepancies between part and whole constitute a reason to reject a given interpretation of a text, it is not clear that a lack of discrepancy legitimates understanding. Gadamer himself introduces a second dimension of his "anticipation of completeness": "The prejudice of completeness . . . implies not only this formal element—that a text should completely express its meaning—but also that what it says should be the complete truth."[35] Put otherwise, Gadamer's point is that we must assume not only that a text composes a unity of meaning but that what it claims or expresses might be illuminating. The rationale for this condition is, again, one that involves the possibility of testing the legitimacy of our interpretations. If the text is not meant to say something to us, to

35. *Id.* at 294.

reveal a "truth" or tell us something we did not already know, then it is not clear how we can check the validity of our own understanding of either it or the issues or topics it addresses. We must, Gadamer thinks, treat the text as a partner in dialogue who raises questions about our views and assumptions, questions we could not raise on our own but which remain ones we must answer if we are to retain or develop our own understanding.

Gadamer's basis for the second part of his anticipation or prejudice of completeness is thus the same as for the first: If we are to be able to distinguish between legitimate and illegitimate interpretations of a text, we require non-arbitrary criteria for doing so. Such non-arbitrary criteria are supplied by the text itself insofar as we assume that it constitutes a unity of meaning that is worthy of our decoding efforts. Hence, we assume that it comprises a meaningful whole so that we can discard any interpretations that do not show how it comprises a meaningful whole, where by whole we mean a unity of meaning and by meaningful, we mean meaningful to us. For Gadamer, then, it is incumbent upon interpreters to try to understand a text in such a way that it not only composes a unity of meaning but has something to teach us. Textual understanding becomes a test of our prior opinions. We put them at risk or into play in trying to understand and as long as we remain open to the possibility of "being pulled up short by the text,"[36] our attempts to understand can also raise questions about what we previously thought we knew.

To this extent, the problem with a sexist interpretation of a woman's rejection of a sexual advance is that while it might competently unify part and whole, it can affirm only our pre-held assumption about what women mean. Similarly, an interpretation of *Sense and Sensibility* that dismisses the book as a novel about outmoded marriage stratagems affirms only our pre-held belief about the progress we have made in providing women with ambitions other than a good marriage. Thompson, however, shows us what we might still learn from an ethical propriety of thought and behavior and the same sort of openness to alternative interpretations seems basic to understanding what someone is saying or thinks she is saying in a sexually heated situation. Insofar as what we can learn about ourselves is inexhaustible, there will be more than one legitimate interpretation of Austen's novel. Similarly, there may be more than one legitimate interpretation of what a particular woman means when she says no. The legitimacy of those that are legitimate, however, will depend in part upon their capacity to unify part and whole and, in

36. *Id.* at 268.

part, upon an openness to the potential illumination that the texts or text-analogues they are trying to understand can shed on our previous assumptions about both them and ourselves. A sexist interpretation of a woman's sexual advance might pass the first test. It does not pass the second.

What relevance does this analysis have to the case of abortion? Neither the pro-life nor the pro-choice view seems to render principles of liberty or the sanctity of human life incoherent. Rather, each illuminates aspects of them from which the other side can learn. While the pro-life understanding of life and liberty illuminates important aspects of our reliance on and assumptions about a technologically based mastery of our lives while re-emphasizing the value of nurturance, the pro-choice understanding illuminates questionable assumptions about the difference between men and women and, furthermore, points to social conditions of care and concern for others. But if pro-choice and pro-life groups illuminate different important dimensions of principles of life and liberty, then the policies in terms of which we apply these principles ought to try to accommodate what each side can learn from the other. We ought to aim for forms of consensus and compromise that will try to synthesize legitimate interpretations. And where we cannot, we ought to concentrate on institutional procedures that will at least allow different legitimate voices to be heard.

This sort of hermeneutic or interpretive debate reflects what Jürgen Habermas, following Nancy Fraser,[37] calls the weak public sphere, a sphere that he defines as "an open and inclusive network of overlapping, subcultural publics having fluid temporal, social, and substantive boundaries."[38] The point of such publics for Habermas consists of discovering and identifying problems or issues and in becoming sensitive to different and new ways of looking at them. But he insists that they are vulnerable "to the repressive and exclusionary effects of unequally distributed social power, structural violence, and systematically distorted communication."[39] For this reason, he argues that in complex societies weak publics must be anchored in stronger, procedurally regulated public spheres that ideally filter out these effects by institutionalizing guarantees of equal access and so on. On this view, the sort of openness to being educated on which a Gadamerian approach rests is simply too weak.

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37. *See* Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, *in* HABERMAS AND THE PUBLIC SPHERE 109, 134 (Craig Calhoun ed., 1992).

38. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 307 (William Rehg trans., 1996).

39. *Id.* at 307-08.

There are, however, two dangers here. The first and perhaps more important is the one on which Habermas focuses: What we take as legitimate interpretations from which we ought at least to try to learn are distorted by unequal relations of power, money, or ideology. Current attacks on affirmative action might fall into this rubric, as an ideological attempt to preserve certain power relations masquerading as a plausible interpretation of equality or equal opportunity. But the view of equal opportunity at the base of criticism of affirmative action also fails on purely hermeneutic grounds. Because it is one-sided, it fails both as a holistic interpretation on its own and as an interpretation that can take the measure of an alternative interpretation of our principles and our history, one that focuses on a record of past discrimination, the struggles of different groups for political and civil rights, and the relation of equality and participation. Moreover, it does so because it assumes that a principle of equal opportunity has a fixed meaning that can be understood in only one way.

This failure points to the second danger: What we take as positions distorted by the effects of power, money, or ideology comprise interpretations from which we might have learned. As Americans we share certain common objects, including principles that we also think are embedded in our Constitution. Our debates, then, might more properly be viewed as debates over meaning rather than debates over principle in which one and only one side can be right. We are historically finite and for this reason no interpretation of our principles can be the last word on meaning. But we are also culturally, experientially, and cognitively finite. For this reason, no understanding can exhaust the possible meanings of our common objects even for us. This admission does not entail that all interpretations of our principles are equally legitimate. Nevertheless, to dismiss the learning potential provided by the legitimate interpretations of others in a dogmatic attachment to what we take to be principle is, I think, to confuse an understanding of law and principle with the fires that burn the same in Persia as in Greece.