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The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur

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THE ONTOLOGICAL BASIS OF LEGAL HERMENEUTICS:  
A PROPOSED MODEL OF INQUIRY BASED ON THE WORK  
OF GADAMER, HABERMAS, AND RICOEUR† 

FRANCIS J. MOOTZ, III* 

PREFACE 

This book, once begun, is not a certain set of ideas; it constitutes for me  
an open situation, for which I could not possibly provide any complex  
formula, and in which I struggle blindly on until, miraculously, thoughts  
and words become organized by themselves. 

—Maurice Merleau-Ponty1 

This Article is an example of its thesis. What I do with the texts that I have  
gathered in support of my argument reveals the ontological basis of legal  
interpretation. What follows is not only an exposition of what happens when  
a reader interprets legal texts, but also an actual case of a reader seeking to  
solve a legal problem by interpreting both legal and non-legal texts. I believe  
that this strategy of searching for the truth of legal hermeneutics by way of  
exegesis is appropriate: if my thesis is to be taken seriously, it must  
exemplify the hermeneutical activity that I am attempting to explain.  

This Article is also a contradiction of its thesis. The ontological basis of  
legal hermeneutics is obscured by the second-order account that follows.  
That is, my hermeneutical activity is conceptualized into a hermeneutical  
theory; action is replaced by contemplation, reality by abstraction. I do not  
believe, however, that abstraction results from simply talking about action,  
because talking in particular, and the development and use of language in  
general, are also activities. Instead, abstraction results from thinking about  
action. More precisely, abstraction is thinking about action. This Article is  
an abstraction from the underlying hermeneutical activity, despite my at-
tempts to write an article that embodied the act of interpretation without  
explaining my thoughts on interpretation. 

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recognize in these pages their lasting influence on me, although the reader should not  
impute my failings to them. Finally, my wife Caren has been indispensable during the  
writing of this Article, providing both editorial suggestions and moral support.  
1 M. MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION 369 (C. Smith trans.  
1962). 

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Unfortunately, the strictures of academia conspire against those who prefer not to be abstract. It is my hope that the exemplificative nature of this Article is sufficiently strong to counteract the abstract "noise" of my theoretical argument. If so, then you, the reader, might see in these pages how much fun I had "playing" this Article, in addition to benefiting from your own playful encounter with the printed residue of what was once mine.

Art is not so confining. Cezanne shows us something about the activity of perception, just as James Joyce shows us something about the activity of language.
Because there is something simple to be thought in this thinking it seems quite difficult to the representational thought that has been transmitted as philosophy. But the difficulty is not a matter of indulging in a special sort of profundity and of building complicated concepts; rather, it is concealed in the step back that lets thinking enter into a questioning that experiences—and lets the habitual opining of philosophy fall away.

—Martin Heidegger

I. WHAT IS HERMENEUTICS?

The Western legal tradition is composed of written artifacts. As a result, any attempt to formulate a legal theory is inherently parasitical upon presuppositions about the interpretation of texts. One cannot theorize about the meaning of a legal document—whether it be a statute, constitution, or judicial opinion—without at least implicitly invoking a theory of interpretation, for interpretation precedes and makes possible the recognition of meaning in a written work. Legal hermeneutics is the exploration of this interpretive reality, which is always anterior to the conceptual formulations used in making any legal argument or rendering any legal judgment.

Yet hermeneutics is not exclusively concerned with legal interpretation. Indeed, hermeneutics embraces all scientific, humanistic, and artistic endeavors, and entails a general philosophical attitude about the way in which a meaningful world is lived through. For post-Heideggerian philosophers,


4 The Heideggerian tradition is not dominant in America, but scholars are increas-
hermeneutics is an inquiry into the modalities of "being-in-the-world" that allow all meaning to emerge, and is thus ontological. In this Article, I argue that legal theorists must remain attentive to this hermeneutical reality if they are to provide a satisfactory account of the legal system.

The failure of legal theorists to admit or remember this reality is the reason for much of the confusion now plaguing their attempts to critically analyze the coherence of what judges do. This confusion has grown into a crisis of confidence among the scholars who attempt to demonstrate the rationality of the legal order as it is interpreted and applied by judges, a crisis that is, at least implicitly, a reaction to the troubling proposition that a given legal text may be as "unknowable" as a literary work, that legal interpretation may be as "unscientific" and "subjective" as literary criticism. Considering the elementary identity of both novels and constitutions as written texts, this suggestion is by no means without merit. Nor is it unimportant in the wake of the Warren Court's alleged judicial activism. Critics increasingly tend to view constitutional adjudication as a freewheeling activity that can endow a text with any meaning whenever the (political) need arises.

Countering this pessimistic retreat into subjectivism is the equally improbable view that the words of a legal document have an objective, univocal meaning that is not to be found in the contrived ambiguity of a novel or poem. Under this view, a legal text has one clear and precise meaning that is conveyed "on its face," rather than several "competing" meanings. That the President must be thirty-five years of age is a proposition that admits of no interpretation, but is it not equally clear that Raskolnikov lives in small quarters, or that Ahab is a one-legged whaler? The fact remains that the textual whole is not merely a composition of discrete parts with unambiguous meanings; it is not at all clear why Raskolnikov commits the murder, nor is it clear what due process of law means.

In order to resolve this conflict, to explicate the manner in which the meaning of a text is encountered, it is necessary to move beyond the simplistic dichotomy between "objectivity" and "subjectivity." To recover some notion of legal objectivity without either making the ludicrous suggestion that legal texts are wholly unambiguous or simply surrendering to subjectivism requires an examination of the ontological question which Hans-Georg Gadamer's hermeneutics poses: how is it that the world reveals meaning to its inhabitants? It is not necessary to fully develop an insight recognizing that contemporary continental thought has tremendous importance for legal philosophy. See, e.g., Chevigny, Why the Continental Disputes are Important: A Comment on Hoy and Garet, 58 S. CAL. L. REV. 199 (1985); Hoy, Interpreting the Law: Hermeneutical and Poststructuralist Perspectives, 58 S. CAL. L. REV. 135 (1985); Phelps & Pitts, Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation, 29 ST. LOUIS U.L.J. 353 (1985); Hermann, Phenomenology, Structuralism, Hermeneutics, and Legal Study: Applications of Contemporary Continental Thought to Legal Phenomena, 36 U. MIAMI L. REV. 379 (1982); Schiff, Phenomenology and Jurisprudence, 4 LIVERPOOL L. REV. 5 (1982).
ontology—that is a task reserved for the Heideggers of the world—but only
to bring Gadamer’s ontology to bear on the problem of legal interpretation.

My thesis is that although a legal text has an objective meaning to the
extent that the reader is bound by the text and prevented from creating a
meaning ex nihilo, any attempt to discover the meaning of a text is a
misguided project that ignores both the dynamic interaction of the reader
and the text, and the implications of the reader's finite and temporal nature.
The organizational structure of this Article is based upon two distinct proj-
ects. Part II is concerned with the philosophical writings of Hans-Georg
Gadamer and Paul Ricoeur as they bear on the discussion of humankind’s
hermeneutical nature, our openness to meaning. Gadamer’s aesthetic theory
establishes the concept of “play” as the central feature of all interpretation
and serves as the basis for explicating both Gadamer’s and Ricoeur’s philos-
ophy of the text. In light of this general framework for understanding the
interpretive act, I explore the specific problem of legal interpretation. Using
constitutional interpretation as a paradigm, I rely on Gadamer’s philosophy
to discuss specific cases that pose difficult problems of interpretation. Fi-
ally, I investigate and critique modern legal theory. Using a symposium
that appeared in the Texas Law Review, I explore the current subjective/objec-
tive dilemma facing modern legal theorists. The (intended) import of
this Article is the rejection of this dilemma as it is posed.

In Part III, I develop a model of inquiry. On a definitional level, I distin-
guish between a model and a methodology. On a substantive level, Part III
rescues the hermeneutics of meaning developed in Part II from relativism
and nihilism by a philosophical justification of the practice of critique.
Having shown in Part II that legal interpretation is a form of ontological play,
I examine the work of Jürgen Habermas and Paul Ricoeur in Part III in order
to establish that although judicial interpretations of legal texts are essentially
“playful” rather than timeless and objective, it is nevertheless possible to
justify evaluating the normative status of judicial decisions. I contrast the
critical theory of Habermas with Gadamer’s hermeneutical ontology and
then put both theories into perspective according to Ricoeur’s critical her-
meutics. Part III presents a different approach to the problem of legal
interpretation and indicates areas in which further research would be pro-
ductive. Answers to the traditional problems in legal theory are not provided
because the traditional questions are rejected as constituting an improper
inquiry.

II. HERMENEUTICS AND THE PROBLEM OF LEGAL INTERPRETATION

A. Philosophical Underpinnings

1. The Ontological Significance of the Concept of “Play”

Hans-Georg Gadamer begins his comprehensive study of hermeneutics in
Truth and Method\(^5\) with the assertion that “[t]he hermeneutic phenomenon

\(^5\) H.-G. GADAMER, TRUTH AND METHOD (1975). This English translation of
is basically not a problem of method at all.' As Gadamer explains, "[t]he hermeneutics developed here is not, therefore, a methodology of the human sciences, but an attempt to understand what the human sciences truly are, beyond their methodological self-consciousness, and what connects them with the totality of our experience of world." Although social scientists and natural scientists attempt to formulate and apply methodological rules that transform discrete raw data into theoretical pictures of our interaction with the world, the hermeneutical inquiry goes behind these cognitive strategies and explores the immediacy of this interaction. By distinguishing between the methodological approach of the various so-called "human sciences" (Geisteswissenschaften) and the hermeneutical inquiry into the existential precondition of meaning, Gadamer rescues hermeneutics from its limited role as a tool of textual exegesis and imbues the discipline with fundamental philosophical importance. Thus, Gadamer's purpose

is not to develop a procedure of understanding, but to clarify the conditions in which understanding takes place. But these conditions are not of the nature of a 'procedure' or a method, which the interpreter must of himself bring to bear on the text, but rather they must be given.

Gadamer's thesis is that we are all inextricably situated in an historical and linguistic reality that shapes our Weltfahrung, or "experience of the world." However, Gadamer does not embrace an historicist view: each apparent historical epoch is simply a different manifestation of the continuing tradition that binds the individual to a cultural heritage. Tradition is maintained by the constancy of language and the experience of belonging to a preexisting culture; only against this backdrop of tradition does humankind adopt a subjective attitude toward the world. This deep-seated traditional existence is the ground of all methodology. Yet, paradoxically, the central metaphor of methodology—the opposition of subject and object—is disproved by this existence. Meaning is not distilled from an object by a wholly independent subject, but rather it is a relation between an historical being and the continually manifested being of the artifact as it is experienced through tradition.

_Warheit und Methode_ (2d ed. 1960) contains a second supplement not found in the original text, a translation of Gadamer's essay, _To What Extent Does Language Preform Thought?_

6 Id. at xi.
7 Id. at xiii. See also id. at 433.
8 Id. at 263. See also Phelps & Pitts, _supra_ note 4, at 353-55, 378.
9 Gadamer follows Heidegger's rejection of the superficial relationship between the individual and the world of objects that is "present-at-hand." Scientific thought reduces the world to its most crude manifestation, a collection of objects. Gadamer's ontology looks to the deeper experience of the world as a disclosure of Being through the awareness of the meaning of various beings. J. BLEICHER, _CONTEMPORARY HERMENEUTICS_ 119 (1980).
The purpose of my investigation is not to offer a general theory of interpretation and a differential account of its methods ... but to discover what is common to all modes of understanding and to show that understanding is never subjective behaviour toward a given 'object,' but towards its effective history—the history of its influence; in other words, understanding belongs to the being of that which is understood.  

The truth of tradition is never purely relativistic because tradition is the shared ground of all objective experience. Nor is the truth of tradition merely a subjective attitude toward a long-dead culture, because tradition grips the individual despite his subjectivity. Gadamer analyzes this thesis from the perspective of the "human sciences" in order to demonstrate that their methodological self-consciousness obscures the way in which human beings actually come to understand the truths that speak through artifacts of the past.

Dividing his analysis between the study of art, history, and linguistics, Gadamer seeks to uncover the aesthetic, historical, and communicative modalities of being that make these academic fields possible. Gadamer's purpose is to show that these modalities are part of our relation to the world, a relation that subtends all methodology.

The understanding and the interpretation of texts is not merely a concern of science, but is obviously part of the total human experience of the world.

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10 H.-G. Gadamer, supra note 5, at xix.

11 Truth and Method is divided into three parts: The Question of Truth as it Emerges in the Experience of Art, The Extension of the Question of Truth to Understanding in the Human Sciences, and The Ontological Shift of Hermeneutics Guided by Language.

12 A student of Heidegger, Gadamer readily challenges the fundamental Cartesian assumption, the subject/object dichotomy. For Gadamer, the hermeneutical experience is the constitutive reality in human existence, a claim developed at length in his discussion of language. See H.-G. Gadamer, supra note 5, at 345-447. As hermeneutical beings we always belong to and are involved in a tradition, thereby precluding the ideal of objective scientific knowledge. Meaning is only possible because there is an ontological openness to the world that brings the prejudiced horizons of individuals together in a playful loss of subjectivity. Knowledge, therefore, is seated in a precognitive dimension of experience. Maurice Merleau-Ponty offers a paradigmatic assault on Cartesian intellectualism by emphasizing the phenomenological and hermeneutical world that is lived-through:

To return to the things themselves is to return to that world which precedes knowledge, of which knowledge always speaks, and in relation to which every scientific schematization is an abstract and derivative sign-language, as is geography in relation to the countryside in which we have learnt beforehand what a forest, a prairie or a river is.

M. Merleau-Ponty, Phenomenology of Perception, supra note 1, at ix (emphasis in original). Cf. infra note 184.
... If we make understanding the object of our reflection, the aim is not an art or technique of understanding, as traditional literary and theological hermeneutics sought to be. Such an art or technique would fail to recognise that, in view of the truth that speaks to us out of tradition, the formalism of artistic ability would arrogate to itself a false superiority.\textsuperscript{13}

Gadamer begins his inquiry with a discussion of aesthetics, for "the experience of art issues the most pressing challenge to the scientific consciousness to acknowledge its own limits."\textsuperscript{14} Artistic truth is neither capable of being posited nor is it cumulative, rather it is part of a pervasive presence in the world that underlies all science, including the "science of artistic meaning."\textsuperscript{15} Thus, Gadamer’s aesthetics deals with the artistic truth that is independent of rationalist methodologies, thereby establishing the tension that the title, \textit{Truth and Method}, implies.

To understand Gadamer’s aesthetic theory, it is essential to appreciate his break from the rationalist theory of art found in Kant’s \textit{Critique of Judgment}.\textsuperscript{16} Kant justified aesthetic judgment at the expense of delegitimizing philosophy of art.\textsuperscript{17} That is, Gadamer contends that Kant rendered artistic truth impossible by viewing aesthetics as a wholly subjective enterprise.\textsuperscript{18} According to Kant, the artist uses "genius" to communicate his aesthetic insight;\textsuperscript{19} the interpreter, in turn, uses his own "genius" to decode the work of art and revive the aesthetic response.\textsuperscript{20} Kant’s "genius" theory denies that such responses are knowledge; instead, the critic’s interpretive genius is the result of an a priori feeling of pleasure that is independent of scientific truth.\textsuperscript{21} Kant differentiates the results of this subjective application of "genius" from the knowledge of the work of art that is the product of a methodology modeled on the natural sciences. In contrast to subjectivism, the scientific methodology attempts to remove the impact of the investigator by ignoring the subjective qualities of "genius."\textsuperscript{22} The purpose of methodology is to deliver up objective data about a work of art rather than engendering an empathetic response.

\begin{itemize}
\item \textsuperscript{13} H.-G. \textsc{Gadamer}, \textit{supra} note 5, at xi-xiii.
\item \textsuperscript{14} \textit{Id.} at xiii.
\item \textsuperscript{15} Gadamer uses the term "aesthetic differentiation" to refer to the "process of abstraction" by which an individual displaces a work of art from its original contexts and functions in an attempt to secure objective knowledge about the work of art. \textit{Id.} at 76.
\item \textsuperscript{16} I. \textsc{Kant}, \textit{Critique of Judgment} (N. Smith trans. 1965).
\item \textsuperscript{17} \textit{Id.} at 51.
\item \textsuperscript{18} See \textit{id.} at 39-72.
\item \textsuperscript{19} \textit{Id.} at 49.
\item \textsuperscript{20} "Genius in understanding corresponds to genius in creation." \textit{Id.} at 52.
\item \textsuperscript{21} \textit{Id.} at 40.
\item \textsuperscript{22} "The scientific nature of modern science consists precisely in the fact that it makes tradition objective and methodically eliminates any influence of the interpreter on understanding." H.-G. \textsc{Gadamer}, \textit{supra} note 5, at 297.
\end{itemize}
This bifurcation of the subjective aspects of aesthetics and the objective qualities of the artwork directly contradicts our experience of art. Consequently, Gadamer critiques Kant by examining the way in which we are aesthetic beings. Going beyond and behind the positivist methodologies of determining objective truth-content in art, Gadamer demonstrates that the experience of art is philosophically important because it asserts the truth of itself "against all reasoning." Gadamer focuses on this problem of aesthetics because he sees Kant's contention that aesthetic appreciation is merely subjective as symptomatic of the ascendance of the scientific method as the paradigm of all knowledge. Gadamer insists on the importance of the truth that is beyond scientific methodology, the truth of a tradition that is meaningful to its participants.

The radical subjectivisation involved in Kant's new basis for aesthetics was a completely new departure. In discrediting any kind of theoretical knowledge apart from that of natural science, it compelled the human sciences to rely on the methodology of the natural sciences in self-analysis...

If we want to show the inadequacies of this kind of self-interpretation on the part of the human sciences and open up more appropriate possibilities, we shall have to proceed with the problem of aesthetics.

Gadamer uses the concept of Spiel, or "play," to express the mode-of-being of the work of art, and he investigates this ontological dimension of all aesthetic experience as a manifestation of the mode of being-in-the-world that he explores with his general hermeneutical theory. The proposition that an individual is "at play" with a work of art is not as innocuous as it may appear, for it takes issue with the Western philosophical tradition and its central belief in the subject/object dichotomy. Gadamer contends that a work of art is not something that a viewer makes sense of by organizing his subjective feelings or by ingeniously decoding the meaning created by the artist. Nor does the work of art stand as a distinct object that admits of empirical verification and logical consistency. To be at play with a work of

23 Id. at xiii.
24 "The shift of the ontological definition of the aesthetic to the sphere of aesthetic appearance has its theoretical basis in the fact that the domination of the scientific epistemological model leads to the discrediting of all the possibilities of knowing that lie outside this new method." Id. at 75.
25 Id. at 39. Gadamer's project does not "ask the experience of art to tell us how it thinks of itself, but what it is in truth and what its truth is, even if it does not know what it is and cannot say what it knows—just so Heidegger has asked what metaphysics is, in contrast to what it thinks itself to be." Id. at 89.
26 See id. at 91-119.
27 See supra note 12.
28 Gadamer thus rejects the intellectualist-empiricist debate. Each "side" is really propounding a misconceived inquiry that is ultimately reducible to the univocal view of an explicit "world-in-itself." See supra notes 10-12 and accompanying text.
art is to relinquish the pretense of subjectivity and to follow the possibilities offered by the work, without losing one's individuality or perspective (an impossibility!) or wholly subordinating the meaning of the artifact to one's creative powers. The work of art has an autonomous existence apart from the viewer's subjective aims, and like two dancers who are given over to the dance, the artwork and the individual each make claims of meaning upon the other.

Gadamer's point is conveyed more readily through an example. The game of “patty cake” takes both players beyond their individual intentions; neither person is able to assert herself as the “player” and make the other a mere “playee.” There is a degree to which each player is outside herself in the communion of playing with another, and the coordination of their clapping is akin to a dance. It is neither trite nor imprecise to say that our ability to play patty cake is the sine qua non of our ability to appreciate and understand art, for it is this mode of being—our givenness to play—that characterizes the aesthetic experience. It is important to recognize, however, that “the mode of being of play is not such that there must be a subject who takes up a playing attitude in order that the game may be played.” An individual neither induces nor creates play, rather it occurs “not only without goal or purpose but also without effort. It happens, as it were, by itself.” In short, human beings are ontologically playful.

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29 See P. RICOEUR, HERMENEUTICS AND THE HUMAN SCIENCES 186 (J. Thompson trans. & ed. 1981) (“Play is thereby close to dance, which is a movement that carries away the dancer.”).

30 I am indebted to Professor William H. Poteat of Duke University’s Department of Religion for this example.

31 H.-G. GADAMER, supra note 5, at 93. Before the viewer is conscious of the possibilities of the artwork he has already engaged in play. Indeed, Merleau-Ponty shows that perception itself is an antepredicative play with the world of meaning and therefore that the hermeneutical inquiry is radically ontological.

M. MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION, supra note 1, at 214 (emphasis in original). Merleau-Ponty contends that to hallucinate is to get a grip on the world in a new way, to playfully take up the possibilities of pre-cognitive reality. He concludes that “hallucination and perception are modalities of one single primordial function,” id. at 342, and therefore that “to have hallucinations and more generally to imagine, is to exploit this tolerance on the part of the antepredicative world, and our bewildering proximity to the whole of being in syncretic experience.” Id. at 343.

32 H.-G. GADAMER, supra note 5, at 94. Gadamer also succinctly states that “[p]lay is more than the consciousness of the player; and so it is more than a subjective attitude. . . . This is what may be described as an experience of the subject and has nothing to do with ‘mythology’ or ‘mystification.’” Id. at xxiv (footnote omitted).
Yet this playfulness is not unsituated. It takes place within the parameters of a structure that the participants establish; there are "rules" to the game that constitute a setting or context for play.\textsuperscript{33} Art is play that has been transformed into a particular structure—a painting, sculpture, or symphony—that engages the spectator with each viewing or presentation.\textsuperscript{34} Because of the nature of play, the artist can never concretize a single given meaning, nor can the spectator freely ascribe any meaning to the artifact. The play is beyond both the creator and the interpreter; through its structured presentation "what is emerges."\textsuperscript{35} Though works of art lack any timeless, objective meaning, play does culminate in an answer to its implicitly posed question: one recognizes and appreciates the dramatic contrasts of a painting, or the subtle nuances of a symphony.

\textit{One fails to appreciate the compelling quality of the work of art if one regards the variations possible in the representation as free and optional. In fact, they are all subject to the supreme criterion of the 'right' representation.}

\textit{... Thus we do not allow the interpretation of a piece of music or a drama the freedom to take the fixed 'text' as a basis for a lot of ad-lib effects, and yet we would regard the cannonisation of a particular interpretation ... as a failure to understand the actual task of interpretation.}\textsuperscript{36}

The to-and-fro that characterizes play reveals our ontological openness to the world. Just as Gadamer uses this concept in his investigations of the hermeneutical dimension of art and the human sciences, this Article analyzes the way in which we interpret legal texts by reference to the play between the interpreter and the text.

2. What is a Text?

If a reader and a text are at play during reading, the recovery of the author's intended meaning can never be the goal of the hermeneutical act. "Not occasionally only, but always, the meaning of a text goes beyond its author."\textsuperscript{37} The interpretive interaction occurs between the reader and the text rather than between the reader and the author. Consequently, "understanding is not merely a reproductive, but always a productive attitude as well."\textsuperscript{38} The words on the page invite the attention of the reader, and as

\textsuperscript{33} In the Third Part of \textit{Truth and Method}, Gadamer argues that all human experience is ontologically structured through language (both verbal and potentially verbal). Language is not a tool for consciousness to exploit but is a lived-through reality that structures our playful existence. \textit{Id.} at 404.

\textsuperscript{34} See \textit{Id.} at 99.

\textsuperscript{35} \textit{Id.} at 101.

\textsuperscript{36} \textit{Id.} at 106-07.

\textsuperscript{37} \textit{Id.} at 264.

\textsuperscript{38} \textit{Id.} See also \textit{Id.} at 356.
meaning begins to coalesce in response to this invitation, interpretation occurs.  

Gadamer finds the dialectic of question and answer to be an implicit structure of all human experience.  

As a result, he views textual interpretation as a dialogue (Gespräch) wherein the text "speaks." This dialogue does not begin when the reader formulates explicit questions to ask of the text; on the contrary, the text engages the reader's horizon before the reader is able to question consciously. The interpreter comes to the text with his own horizon, or "forestructure of meaning," which is a "meaning and a possibility that one brings into play and puts at risk" before the horizon of meaning that is the text. Reading involves the fusion of these indeterminate horizons (Horizontverschmelzung) and approaches "the full realisation of conversation, in which something is expressed that is not only mine or my author's, but common." That common something is the meaning of the text.

39 Jacques Derrida has also recognized the text as a source of meaning independent of its author.

One of the most important ideas that Derrida's work demonstrates is that if (as everyone thinks) we mean more than we say, we also say more than we mean. Our words seem to perform tricks that we had not intended, establish connections that we had not considered, lead to conclusions that were not present to our minds when we spoke or wrote. . . . This curious habit of our words to burst the seams of our intentions and to produce their own kind of logic is what Derrida labels the free "play" of text.


40 H.-G. GADAMER, supra note 5, at 325. See Phelps & Pitts, supra note 4, at 365-68.

41 H.-G. GADAMER, supra note 5, at 340 (noting that "making the text speak," is not an arbitrary procedure that we undertake on our own initiative but that, as a question, it is related to the answer that is expected in the text").

42 Here Gadamer invokes Heidegger's notion of a "forestructure" of understanding that is always engaged in the interpretive act. Because we are finite and temporal beings, it is futile to attempt a truly "objective" inquiry; the Enlightenment's glorification of such a goal projects an envy of god-like qualities. It is imperative to see that "interpretation begins with fore-conceptions that are replaced by more suitable ones" as the reader encounters the text in play. Id. at 236. This forestructure that each interpreter brings to the text is not chosen arbitrarily by the interpreter. Rather, it is given by his historical situation; it is a non-optional dimension of his being.

43 Id. at 350. The interpreter's horizon is put at risk because the meaning of the text may cause him to reassess his traditional beliefs. A reader is thus always at risk in reading because he cannot insulate his prejudiced "forestructure of meaning" from the power of the text. The "questioning interpreter allows his own opinions to be undercut by the questions the text poses. The dialectic [play] confuses the interpreter's opinions and presuppositions and thereby clarifies meaning, 'for it opens one's eyes to the thing.' " Phelps & Pitts, supra note 4, at 381 (quoting H.-G. GADAMER, supra note 5, at 422) (footnotes omitted).

44 H.-G. GADAMER, supra note 5, at 350.
The central task of the interpreter is to find the question to which a text presents the answer; to understand a text is to understand the question. At the same time, a text only becomes an object of interpretation by presenting the interpreter with a question. In this logic of question and answer a text is drawn into an event by being actualized in understanding which itself represents an historic possibility. The horizon of meaning is consequently unlimited, and the openness of both text and interpreter constitutes a structural element in the fusion of horizons.\footnote{J. BLEICHER, supra note 9, at 114.}

Gadamer chose the term "horizon" carefully. The image of a horizon implies the limited perspective of the reader. No one can arrive at a detached, timeless vantage point from which to view the world: there is always something beyond one's horizon, including the past and the future. At the same time, a horizon is not a fixed boundary but rather is open to expansion and contraction in response to the positioning of the individual. The forestructure of meaning that an individual embodies is ontologically open to the world of meaning that he encounters and thus does not form a determinate, concretized subjectivity so much as an habitual nexus of past interpretations.

The nature of the individual's forestructure or horizon of meaning is best captured by Gadamer's use of the terms "pre-judgments" or "prejudices" (Vorteilsstruktur).\footnote{Prejudices compose the reader's horizon or forestructure of meaning and define that reader's openness to interpretation and appropriation (as prejudices are borne out or not). Prejudices make the attempt to bridge time and seize the author's meaning, or the meaning of the "text itself," an impossible task. Gadamer's philosophy is a revolt against the Enlightenment and its fundamental prejudice, "the prejudice against prejudice itself, which deprives tradition of its power." H.-G. GADAMER, supra note 5, at 240. See generally id. at 235-74.} The interpreter is always situated and therefore always has a personal history (biases, experiences, expectations) that is distinct from the traditional questions posed by the text. Through the dialogical relationship of play, the horizons of both are fused in understanding.

The interpreter is, therefore, first aware of a distance between the text and his own horizon which leads, in the process of understanding, to a new, comprehensive horizon transcending the initial question and prejudices. The experience he makes in the course that leads to a new understanding is a hermeneutic one . . . \footnote{J. BLEICHER, supra note 9, at 112-13.}

The reader's prejudices shape what Gadamer calls the effective-history (Wirkungsgeschichte) of the text.\footnote{See generally H.-G. GADAMER, supra note 5, at 258-74. Because there is no univocal, objective meaning disclosed by the text, the interpreter has no choice but to "let[] the text become present." Phelps & Pitts, supra note 4, at 364 (emphasis omitted). Gadamer terms this phenomenon "effective-history." The text's meaning...} No text has an essential meaning; in-
stead, the text is appropriated continually by historically situated readers. As a result, the meaning of the text can never be determined by its placement in a supposedly closed and objective culture in the past; the text is always involved in a dialogue with a prejudiced reader. The text's tradition is not limited or absolute, but effective-historical. "Just as the individual is never simply an individual, because he is always involved with others, so too the closed horizon that is supposed to enclose a culture [in the past] is an abstraction."49

Thus,

if we are trying to understand a historical phenomenon from the historical distance that is characteristic of our hermeneutical situation, we are always subject to the effects of effective-history. It determines in advance both what seems to us worth enquiring about and what will appear as an object of investigation . . . .50

It is important to remember that neither the interpreter's prejudices nor the effective-history of the text are incorrigible: interpretation is neither a clash of these prestructures nor a mere amalgamation of them. Instead, the give-and-take of play resides at the heart of the hermeneutical experience, so that interpretation is literally a "hermeneutical circle."

The process of interpretation itself has a hypothetical and circular character. From the perspectives available to him, the interpreter makes a preliminary projection [Vorentwurf] of the sense of the text as a whole. With further penetration into the details of his material, the preliminary projection is revised, alternative proposals are considered, and new projections are tested.51

As the text becomes present, the reader also undergoes a transformation: his initial prejudices are revised in light of the pull of the text.

It is only by virtue of this limited horizon that an individual can make sense of history. The constitutive feature of humankind's historical nature is that the past is understood only in terms of the play begun with one's prejudiced horizon. The individual is enmeshed in the undulating flux of a hermeneutical horizon that is constantly exposed to the effects of tradition and that constantly adapts to, and appropriates meaning from, the past.

In our continually manifested attitude to the past, the main feature is not, at any rate, a distancing and freeing of ourselves from what has been transmitted. Rather, we stand always within tradition, and this is no objectifying process, ie [sic] we do not conceive of what tradition says as something other, something alien. It is always part of us, a

is nothing more than the tradition of meaning it held for previous interpreters in play with a modern reader.

49 H.-G. Gadamer, supra note 5, at 271.
50 Id. at 267-68.
model or exemplar, a recognition of ourselves which our later historical judgment would hardly see as a kind of knowledge, but as the simplest preservation of tradition.\textsuperscript{52}

In other words, "[t]o stand within a tradition does not limit the freedom of knowledge but makes it possible."\textsuperscript{53} Without this indeterminate openness, the individual—even a "genius"—could never bridge the gulf of historical distance.

The confrontation between one's traditional horizon and the hermeneutical demands of the present constantly forges a new tradition. A written text from the past is made new again by speaking to a modern interpreter's horizon, which has evolved from the same tradition as the text; the reader's traditional horizon thereby "anticipates meaning" in the text.

The anticipation of meaning that governs our understanding of a text is not an act of subjectivity, but proceeds from the communality that binds us to the tradition. But this is contained in our relation to tradition, in the process of education. Tradition is not simply a precondition into which we come, but we produce it ourselves, inasmuch as we understand, participate in the evolution of tradition and hence further determine it ourselves.\textsuperscript{54}

Although there is a temporal gap between the reader's horizon and the creation of the text, this does not preclude understanding. Historical distance is bridged by the experience of tradition in the interpretive act. Meaning is established in the playful encounter of a present horizon and the effective-history of the text. The notion of a "temporal gap" that is "bridged" by a "playful encounter" reaffirms the substantive circular structure of appropriation. As a result, the reader's interpretation is itself a reappropriation, a further development of the very tradition to which both he and his object belong. In Gadamer's view, this substantive circle has a positive significance, for it ensures that there is some common ground between the interpreter's horizon of expectations and the material that he is studying, that his points of reference for understanding the tradition have a basis in that tradition itself.\textsuperscript{55}

A text, then, must be regarded as a potential meaning offered to any of a number of anonymous future readers who bring to the conversation their own prejudiced horizons. At a precognitive level, there is a playful reading wherein the reader and the text address each other. A preliminary level of meaning is established in the form of further, explicit questions that the reader asks of the text. Interpretation has occurred on an ontological plane.

\textsuperscript{52} H.-G. Gadamer, supra note 5, at 250.
\textsuperscript{53} Id. at 324.
\textsuperscript{54} Id. at 261.
\textsuperscript{55} T. McCarthy, supra note 51, at 175.
before the reader is sure of what the text means; even when a reader is entirely confused after reading a text, the reality of his interpretation is revealed in the fact that he is confused about something. That inanimate words on a page can spring to life and puzzle a reader is possible only because the horizons of both have met in play and drawn upon a common tradition. In the "deciphering and interpretation of a text] a miracle takes place: the transformation of something strange and dead into a total simultaneity and familiarity."

As hermeneutical beings, we are always interpreting, even in so-called pure perception. The sophisticated cognitive processes involved in making the text fully coherent are premised on a long interpretive relation with the text that has determined the possibilities open to this process of rationalization. Meaning "charms" us in a pre-rational way, whether it is the meaning of a text or a work of art. By the time that reader brings rational analysis to bear on the text, the important work has already been playfully accomplished.

When we understand a text, what is meaningful in it charms us just as the beautiful charms us. It has asserted itself and charmed us before we can come to ourselves and be in a position to test the claim to meaning that it makes. What we encounter in the experience of the beautiful and in understanding the meaning of tradition has effectively something about it of the truth of play. In understanding we are drawn into an event of truth and arrive, as it were, too late, if we want to know what we ought to believe.

Paul Ricoeur develops this notion of the text as potential meaning in some detail. Like Gadamer, Ricoeur regards the text as an artifact that is distinct from the subjective intentions of its author. Recognizing the distanciation of the text from the author is not a methodological move to aid interpretation, "and hence something superfluous and parasitical; rather it is constitutive of the phenomenon of the text as writing." The author's discourse has been "fixed" by his act of writing his words down; as such, the matter of the text supersedes the author's intention.

Bringing a text to language is always something other than hearing someone and listening to his speech. Reading resembles instead the performance of a musical piece regulated by the written notations of the

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56 H.-G. GADAMER, supra note 5, at 145.
57 See supra note 31. "Pure seeing and pure hearing are dogmatic abstractions which artificially reduce phenomena. Perception always includes meaning." H.-G. GADAMER, supra note 5, at 82. The "idea of pure perception as a response to a stimulus" is an "epistemological dogmatism." Id. at 81 (footnote omitted).
58 Id. at 446.
59 P. RICOEUR, supra note 29, at 139.
60 Id. at 145.
61 Id. at 111.
score. For the text is an autonomous space of meaning which is no longer animated by the intention of its author; the autonomy of the text, deprived of this essential support, hands writing over to the sole interpretation of the reader.62

Although the reader, and not the author, is wholly responsible for the interpretation, Ricoeur joins with Gadamer and rejects the notion that the reader discovers meaning by applying his subjective virtuosities to a passive text (Kant’s “genius” theory). Instead, Ricoeur sees the text as the forum for the presentation of “proposed worlds” that are offered for the reader’s appropriation and that actively guide the reader’s formulation of meaning. “Interpretation thus becomes the apprehension of the proposed worlds which are opened up by the non-ostensive references of the text.”63 The reader’s subjective aims are as unrealizable as the author’s aims, for there is a playing during which the reader tests the “worlds” proposed by the text before formulating a self-understanding that renders the meaning of the text cognizable.64

To understand oneself in front of a text is quite the contrary of projecting oneself and one’s own beliefs and prejudices; it is to let the work and its world enlarge the horizon of the understanding which I have of myself. . . . [This places the act of understanding on] an ontological plane.65

The ontological dimension of interpretation is the play that makes possible the eventual appropriation of the text by the reader. To assume that the reader alone creates meaning is to abstract from the ontological reality of the individual’s finite, situated and temporal existence characterized by the term “belonging.”66 No reader can exercise complete control over the meaning of a text because the act of reading entails a fusion of horizons. The play that produces such a fusion involves equal partners, each unable to render the other subservient, but this play is finally resolved in an articulation from the reader’s perspective as proffered meanings of the text are “appropriated.” The key is to remember that “[a]ppropriation loses its arbitrariness insofar as it is the recovery of that which is at work, in labour, within the text.”67

62 Id. at 174.
63 Id. at 177.
64 Id. at 142-44.
65 Id. at 178.
66 [Our] ontological condition can be expressed as finitude. This is not, however, the concept that I shall regard as primary; for it designates, in negative terms, an entirely positive condition which would be better expressed by the concept of belonging. The latter directly designates the unsurpassable condition of any enterprise of justification and foundation, namely that it is always preceded by a relation which supports it.

Id. at 105.
67 Id. at 164.
B. The Exemplary Status of Legal Hermeneutics

Legal interpretation is the clearest manifestation of the hermeneutical reality that allows texts to speak to the present in a meaningful way. Because it is necessary for judges to decide specific cases, there is little threat that legal adjudication will degenerate into a methodology detached from the practical goal of reaching a decision. Whereas literary and theological hermeneutics have often adopted the posture of methodologies in their search for the original, objective meaning of given texts, a judge must understand the text only in relation to the case at hand. As Justice Brennan recently noted,

This is precisely the point that Gadamer takes to be fundamental:

The interpreter dealing with a traditional text seeks to apply it to himself. But this does not mean that the text is given for him as something universal, that he understands it as such and only afterwards uses it for particular applications. Rather, the interpreter seeks no more than to understand this universal thing, the text; ie [sic] to understand what this piece of tradition says, what constitutes the meaning and importance of the text. In order to understand that, he must not seek to disregard himself and his particular hermeneutical situation. He must relate the text to this situation, if he wants to understand at all.

Clearly, the institutional practice of legal hermeneutics conforms to the operative hermeneutical reality that makes all texts meaningful. In con-

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68 See H.-G. Gadamer, supra note 5, at 289-305. Gadamer's point is that, because of the pragmatic interest of law, "[[legal hermeneutics is able to point out what the real procedure of the human sciences is." Id. at 292. Gadamer realizes that the model of legal hermeneutics is useful to his general theory because "[w]hen a judge regards himself as entitled to supplement the original meaning of the text of a law, he is doing exactly what takes place in all other understanding." Id. at 305. Cf. Dworkin, Law as Interpretation, 60 Tex. L. Rev. 527, 529 (1982) ("[L]awyers must not treat legal interpretation as an activity sui generis. We must study interpretation as a general activity, as a mode of knowledge, by attending to other contexts of that activity.'").


70 H.-G. Gadamer, supra note 5, at 289.

71 The critical word in this sentence is "practice." Judges often explain their
Contrast, the legal historian (or philosopher) who is discharged from the practical constraints of judicial decisionmaking often follows the path of some literary critics by attempting to explicate the meaning of “the law” outside of any practical context.\(^7\)

Because the law is composed of written texts, it is possible for Gadamer to extend his general philosophical discussion of interpretation to reach some important conclusions about the legal system. To believe that a law’s “legal meaning is clear and that the legal practice of the present simply follows the original meaning”\(^7\) is to subscribe to a “legally untenable fiction.”\(^7\) The normative content of a statute or constitution is revealed only when the horizon of a situated interpreter confronts the effective-history of the legal text. Thus, an “originalist” methodology is inappropriate: the text as written in the past no longer exists but rather is part of a legal tradition that is linked to the present.\(^7\) Similarly, there is no unbiased observer who can say what the author's original intent was, for interpretation is always informed by the limited horizon of the interpreter. Yet neither is the law whatever a judge wishes it to be:

decisionmaking in the language of legal or political theorists, removed from the reality of adjudication. An examination of what judges actually do, apart from their theoretical self-understanding, underscores the need for a model of inquiry that incorporates the ontological basis of legal hermeneutics. See infra notes 82-137 and accompanying text.

\(^7\) Gadamer asserts that the movement away from commissioned art only superficially liberated artists. In fact, this historical development uprooted both artists and their artifacts from their dogmatic context. “Thus, through ‘aesthetic differentiation’ the work loses its place and the world to which it belongs insofar as it belongs to aesthetic consciousness. . . . [T]his is paralleled by the artist also losing his place in the world.” H.-G. GADAMER, supra note 5, at 78. Legal hermeneutics avoids the mistaken attempt by literary and theological hermeneutics to disavow their dogmatic purposes and to follow the historical method. Id. at 290. Gadamer argues against the historicist approach to law because it ignores practical application, which makes the text meaningful. This is not a critique of legal historians per se, however. Quite the contrary, Gadamer urges a reexamination of the historical method and a reformulation of the historian's task according to hermeneutical principles. Id. at 302-04.

\(^7\) H.-G. GADAMER, supra note 5, at 291.

\(^7\) Id.

\(^7\) Id. See H. FINK & M. TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE vii (1984):

The words of article III, providing for the jurisdiction of the federal courts, are opaque—the meaning that has been given to them by the courts and by Congress is not the only possible one. Understanding of the implications of article III and the jurisdictional statutes Congress has enacted will not, in our opinion, be found through a search in history for a “true meaning.” Rather, the search is for the choices that were open to the drafters of the Constitution and the Judiciary Act of 1789 and for the changes in the interpretations given to the written language. Our history could have been different, our future can be different, depending on the interplay of the courts and Congress, the judicial and the political processes.
The judge who adapts the transmitted law to the needs of the present is undoubtedly seeking to perform a practical task, but his interpretation of the law is by no means on that account an arbitrary re-interpretation. Here again, to understand and to interpret means to discover and recognise a valid meaning. He seeks to discover the "legal idea" of a law by linking it with the present.\textsuperscript{76}

The canons of legal interpretation that erect a methodology of discovering the intent of Congress or of the framers require special attention. Although the goal of discerning the framers' intent is unattainable, this methodology of interpretive inquiry has dominated American jurisprudence for two centuries. Indeed, advocates of this method voice one prevalent criticism of the hermeneutical ontology outlined in this Article. Put simply, they contend that legal interpretation is not a playful encounter but rather an attempt to understand what the author of a given legal text intended. There are two responses to this criticism. First, the "feeling" that we recover the author's intended meaning points to an essential feature of what actually happens in interpretation (and thus is a harmless misunderstanding most of the time). Second, an examination of problematic issues in legal interpretation quickly reveals the limitations of the originalist project. In practice, legal interpretation is not confined to the elusive intent of a particular document's author because this pure intent can never be recovered; instead, judges seek to articulate what the document means.

Judges resolve many legal problems by looking to the legislative history or to past decisions construing the same textual passage. As a result of this methodology of legal decisionmaking, it appears that a judge is able to recover successfully the author's intended meaning. This misconception of the act of interpretation occurs as a result of the "fusion of horizons," the constitutive feature of all interpretation. The legal text forms a part of the tradition that the judge embodies, and so the reliance on previous interpretations of the text is a recognition that the interpreter cannot stand outside of his limited, traditional horizon.\textsuperscript{77} An interpretive appropriation of a text further develops the tradition that grips the interpreter. The continuity of the legal system, as expressed by the desire to recover the original meaning of legal texts, is possible only because the interpreter stands within the same tradition as the text.

Applying Gadamer's hermeneutical approach, conventional methods of legal decisionmaking are revealed to be appropriate attitudes toward the text. Stare decisis is the formalized recognition that the tradition that the interpreter brings to the text is of utmost importance. The Constitution is never read anew but is always read within the context of its legal history. Similarly, the non-binding status of judicial dictum is the institutionalized attempt to retain the dogmatic quality of law, as well as the recognition that

\textsuperscript{76} H.-G. Gadamer, \textit{supra} note 5, at 292-93.

\textsuperscript{77} T. McCarthy, \textit{supra} note 51, at 179.
the decision made about the case at hand is more important than the analysis offered by a particular judge.

Common Law is founded on precedent. In deciding a case today the Courts will follow the example of other courts which have decided similar cases in the past, for in these actions they see embodied the rules of the law. This procedure recognizes the principle of all traditionalism that practical wisdom is more truly embodied in action than expressed in rules of action. Accordingly, the Common Law allows for the possibility that a judge may interpret his own action mistakenly. The judicial maxim which sometimes goes by the name of the "doctrine of the dictum" lays it down that a precedent is constituted by the decision of a court, irrespective of its interpretation implied in any obiter dicta of the judge who made the decision. The judge's action is considered more authentic than what he said he was doing.\textsuperscript{78}

Stare decisis, then, countenances the judgments of the past as traditional activities but accords little weight to the theoretical or justificatory passages of an opinion. Though judges often find that a precedent is a suitable articulation of the answer to the case at hand,\textsuperscript{79} the meaning of a legal text is never bounded completely by previous interpretations, even when the previous interpretation is that of the text's author.\textsuperscript{80} A developing tradition at play with the text can inspire new ""worlds"" of meaning. Legal change occurs when the tradition brought before the text is no longer similar to the tradition at the time of the precedent, when the fusion of horizons opens up new ""worlds"" proposed by the text. The embeddedness in tradition that allows meaning to emerge, however, may convince legal scholars that they can know the past unambiguously and that judges merely restate the meaning intended by the authors. Because the force of tradition is strong, this mistaken view of legal interpretation is often harmless. When legal change occurs, however, the text's meaning no longer coincides with past interpretations. ""The essence of the practice of professional competence is conformity with a tradition of behavior. It is nevertheless inevitable that as the full implications of that tradition are revealed, the members' own sense of what

\textsuperscript{78} M. Polanyi, Personal Knowledge: Towards a Post-Critical Philosophy 54 (1958) (footnote omitted).

\textsuperscript{79} Gadamer recognizes that judges will properly rely on the legal tradition in many situations, but he emphasizes that judges ""cannot let [themselves] be tied by what, say, an account of the parliamentary proceedings tells [them] about the intentions of those who first worked out the law."" H.-G. Gadamer, supra note 5, at 291.

\textsuperscript{80} ""[T]he idea of a perfect legal dogmatics, which would make every judgment a mere act of subsumption, is untenable."" Id. at 294. See also Ockelton, How to be Convinced, 2 Liverpool L. Rev. 65 (1980) (arguing that it is impossible to design a computer such that a future legal proceeding might involve nothing more than inputting the facts of a case and waiting for a computer-generated judgment).
that tradition entails will change.\textsuperscript{81} When this occurs, the limited relevance of the originalist theory of meaning becomes quite evident.

A recent Supreme Court case, \textit{Smith v. Wade},\textsuperscript{82} illustrates the breakdown of originalist methodology that occurs when a Justice finds that she cannot reconcile the meaning of a statute with any clear "original meaning." In \textit{Wade}, the Court held that punitive damages are recoverable against a state employee in an action brought pursuant to 42 U.S.C. § 1983.\textsuperscript{83} Justice Brennan, writing for the majority, noted that punitive damages were generally available as a tort remedy at the time of the statute's enactment and concluded that such damages were therefore contemplated as a potential remedy by Congress.\textsuperscript{84} In dissent, Justice Rehnquist engaged in an equal display of "admirable skills in legal research and analysis of great numbers of musty cases\textsuperscript{85} to reach the conclusion that punitive damages were not widely allowed at common law in 1871.\textsuperscript{86} In response to these hopeless attempts to decipher the feelings of the 42nd Congress toward punitive damages, Justice O'Connor filed a stinging dissent in which she abruptly asserted that "[o]nce it is established that the common law of 1871 provides us with no real guidance on this question, we should turn to the policies underlying § 1983 to determine which rule best accords with those policies.\textsuperscript{87} Although Justice O'Connor continued to support the originalist approach to interpreting § 1983, she recognized that such a methodology was useless for interpreting the statute in the case at hand:

In interpreting § 1983, we have often looked to the common law as it existed in 1871, in the belief that, when Congress was silent on a point, it intended to adopt the principles of the common law with which it was familiar. . . . But when a significant split in authority existed, it strains credulity to argue that Congress simply assumed that one view rather than the other would govern. . . . The battle of the string citations can have no winner.\textsuperscript{88}


\textsuperscript{82} 461 U.S. 30 (1983).

\textsuperscript{83} 42 U.S.C. § 1983, derived from Section 1 of the Civil Rights Act of 1871, reads in relevant part:

\begin{quote}
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
\end{quote}

\textsuperscript{84} \textit{Wade}, 461 U.S. at 34-38.

\textsuperscript{85} Id. at 92 (O'Connor, J., dissenting) (referring specifically to Justices Brennan and Rehnquist).

\textsuperscript{86} Id. at 78-84 (Rehnquist, J., dissenting).

\textsuperscript{87} Id. at 93 (O'Connor, J., dissenting).

\textsuperscript{88} Id. at 92-93 (O'Connor, J., dissenting).
The importance of Justice O'Connor's opinion is easily underestimated. Her actual decision—that the incremental deterrence value punitive damages might provide in these cases is outweighed by the chilling effect such damages would have on public officials in the performance of their duties—explicitly seeks the meaning of § 1983 for the present. Her decision in Wade thereby undercuts her own originalist methodology. The doctrine of stare decisis and the notion of dictum conjoin to emphasize the importance of the tradition that subtends a present appropriation. Similarly, Justice O'Connor's dissent recognizes that while preexisting tradition will settle many legal issues, some issues invite an application of the text that has not been contemplated in this tradition and therefore leads to a creative development of the constantly growing tradition.

Though Smith v. Wade is a useful example of the inability of the originalist methodology to produce satisfactory resolutions of difficult issues, the failure of the originalist methodology is even more evident in constitutional interpretation. The texture of constitutional language is on the whole more open than statutory language, and its interpretation is more prone to result in new "worlds" of meaning proposed by the text. The words have remained the same, but even a superficial survey of legal history reveals that the meaning of various constitutional provisions has changed over time. The originalist methodology is unable to provide a rational explanation for this change, and its proponents are forced to argue against the interpretive reality from their abstract—and untenable—conceptions of interpretation. The hermeneutical perspective developed in this Article justifies judicial restraint by recognizing the force of tradition, but it also recognizes that meaning emerges from a dynamic interaction that is beyond the control of the author's intentions. Constitutional adjudication is philosophically justified rather than simply dismissed as "politics."

The momentous decision in Brown v. Board of Education provides an

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89 Id. at 93 (O'Connor, J., dissenting).
90 The most frequently cited defense of originalism is R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977). But see Perry, The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation," 58 S. Cal. L. Rev. 551, 569-71, 597-602 (1985) (arguing that originalism is not the most appropriate approach to legal interpretation but recognizing in an appendix that "Originalism Is a Real Option") (emphasis in original). In contrast, several commentators agree with Gadamer and reject originalism as a methodology that is in principle unworkable. See, e.g., Richards, Interpretation and Historiography, 58 S. Cal. L. Rev. 489, 512 (1985) (recognizing that history must be taken seriously but contending that Berger "distorts the historian's task" because he "asks the wrong questions in ways that disable the historian from assisting the legal interpreter in understanding the meaning of his legal tradition"); Bennett, The Mission of Moral Reasoning in Constitutional Law, 58 S. Cal. L. Rev. 647, 648 (1985) ("Originalism is, if not exactly incoherent, an utterly impoverished way of thinking about constitutional law.").
excellent example. Brown has been the focus of a great deal of legal philosophy, and this Article reaffirms that case's theoretical significance. Chief Justice Warren's relatively short opinion is a triumph of honest judicial craftsmanship. The hermeneutical basis of the decision is fully revealed in a manner that validates the foregoing discussion. Brown exemplifies the true nature of the hermeneutical act because the Court was faced with a situation in which the originalist methodology probably would have led to a result in dramatic conflict with the meaning of the fourteenth amendment. Brown is a key to interpretive practice because, as Gadamer recognizes, "[i]n situations in which understanding is disrupted or made difficult, the conditions of all understanding emerge with the greatest clarity."  

The plaintiffs in Brown invoked the equal protection clause of the fourteenth amendment in an effort to secure admission to the public schools of their community on a nonsegregated basis. The case was first argued in the 1952 Term, but the Justices set the case for reargument and directed both sides to address the question of what the framers had intended the fourteenth amendment’s impact to be on segregated schools. Upon review of these arguments, Chief Justice Warren concluded that although the proffered historical sources do "cast some light, [they are] not enough to resolve the problem with which we are faced. At best, they are inconclusive." In short, the Court determined the meaning of the text in regard to the question presented, rather than trying to elucidate what the text in itself meant by investigating its authors' intentions. The text, no longer an object to be examined, became a source of meaning at play with the Justices as they sought to make a practical judgment. It was this posture that allowed the Court to tackle Plessy v. Ferguson directly and avoid the distinctions made in the graduate school segregation cases. In Gadamer's terms, the fourteenth amendment is meaningless without a reader whose situated interests playfully engage the amendment's language, bridging the expanse of time as the fusion of horizons make the text meaningful to the present. Chief Justice Warren recognized this interpretive reality:

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of

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92. H.-G. GADAMER, supra note 5, at 346. Gadamer makes this point as a preface to his analysis of the translation of foreign languages.
93. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
97. 163 U.S. 537 (1896). Plessy held that Louisiana could statutorily require segregated railway cars so long as the separate accommodations were "equal." Id. at 548-52.
98. See Brown, 347 U.S. at 491-93.
its full development and its present place in American life throughout the Nation.  

The "beautiful" language of the amendment had "charmed" the Justices—clearly, segregated schools violated the guarantee of equal protection laws. The opinion does not speak of the essence of the Constitution but only of the meaning that the Constitution had for the case the Court was addressing. As Chief Justice Warren stated, the Plessy formulation no longer comportted with the amendment's meaning: "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." Yet the Plessy rule was not objectively wrong. The text embodies different proposed worlds for different readers, and it is clear that the horizon or forestructure of meaning that the Warren Court put at risk in playfully reading the amendment was vastly different from that of the Plessy Court sixty years earlier. Chief Justice Warren's prose succinctly expressed the hermeneutical situation: we simply cannot turn the clock back—meaning, as the force of tradition speaking to a contemporary reader, is for the present.

Brown has been sharply criticized for initiating what has been termed an activist jurisprudence of the fourteenth amendment. Interestingly, Chief Justice Warren's opinion is labeled an "activist" opinion not because of its method of decision but because of the outcome of the case. Critics may argue that Warren looked beyond the constitutional text and used social science to buttress the implementation of a public policy to his liking rather than following the framers' intentions. Yet the Supreme Court had drawn upon the prevailing social science in the years before Brown, albeit upon an unenlightened and racist social science. Thus, the Warren Court did not effect a radical break with tradition by drawing upon contemporary social science but merely decided Brown in the context in which it was presented.

[T]he law of race relations during [the pre-Brown] period was a product of the period's social science, just as the law of race relations developed by the Warren Court during the Brown era was a product of the social science of that period. More importantly, the dramatic revolution in the law of race relations that culminated in the Brown decision was caused by an equally dramatic revolution in American social science.

... In few areas of the law has the Court responded more quickly and

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99 Id. at 492-93.
100 See supra note 58 and accompanying text.
101 Brown, 347 U.S. at 495.
102 See Levinson, Law as Literature, 60 Tex. L. Rev. 373, 386 (1982) ("One no longer would say, for example, that Dred Scott or Lochner v. New York, or any other case, was 'wrongly' decided, for that use of language presupposes belief in the knowability of constitutional essence.").
103 See, e.g., R. Berger, supra note 90, at 166-92.
decisively to a radical and controversial transformation in the social sciences. \textsuperscript{104}

Indeed, \textit{Brown} was decided in the same way as \textit{Plessy}. \textit{Plessy} is ostensibly irreconcilable with the \textit{Brown} analysis because it held that Louisiana’s statutory requirement that railroads provide “separate but equal” traveling accommodations did not violate the equal protection clause. \textsuperscript{105} Moreover, the \textit{Plessy} Court reached this decision by analogizing the challenged statute to the long recognized right of the states to maintain segregated public schools. \textsuperscript{106} But \textit{Plessy} was not premised on the framers’ intent. Instead, the court drew upon the legal tradition (precedent)\textsuperscript{107} and upon its own view of what constituted sound public policy. The only difference between \textit{Plessy} and \textit{Brown} was that the \textit{Plessy} Court’s social policy required no deviation from tradition. The reliance upon conceptions of social dynamics is evident in the language of the \textit{Plessy} majority opinion:

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. . . . The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits and a voluntary consent of individuals.\textsuperscript{108}

The \textit{Brown} decision merely reflects a reformation of these wrong-headed notions of equality and social reality. Justice Harlan’s dissent in \textit{Plessy} was a prescient intimation of the decision that was ultimately handed down in \textit{Brown}. Justice Harlan did not propose a different way of deciding the dispute but rather concentrated on the fallacies inherent in the majority’s reasoning. According to Harlan, “The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.”\textsuperscript{109} Thus, it is difficult to construe the \textit{Brown} decision as a radical departure in the manner of judicial decisionmaking, because the case was decided in precisely the same manner as \textit{Plessy}. The effective-history of the

\textsuperscript{104} Hovenkamp, \textit{Social Science and Segregation Before Brown}, 1985 DUKE L.J. 624, 627, 672 (footnotes omitted).

\textsuperscript{105} \textit{Plessy}, 163 U.S. at 548-52.

\textsuperscript{106} See id. at 544-45.

\textsuperscript{107} See id. at 544-48.

\textsuperscript{108} Id. at 551.

\textsuperscript{109} Id. at 562. (Harlan, J., dissenting).
Constitution is always informed by the conceptions of the day: the difference between *Plessy* and *Brown* is merely a difference as to what equality means in light of these conceptions. Chief Justice Warren could not help but conclude that segregated school facilities were inherently unequal, given the more enlightened perspective of his day.

The undaunted originalist, however, may still argue that regardless of whether the *Plessy* Court also decided that case for the wrong reasons, *Brown* is still starkly opposed to what the framers of the fourteenth amendment intended. In his critique of originalist jurisprudence, Mark Tushnet articulates the problem that *Brown* admittedly poses for originalists:

As Michael Perry puts it, "segregated public schooling was present to the minds of the Framers; they did not intend that the [equal protection] clause prohibit it; and no historical evidence suggests that they meant to leave open the question whether the clause should be deemed to prohibit the practice." If noninterpretivist [non-originalist] constitutional interpretation must rest on an interpretive warrant, then *Brown v. Board of Education* seems unjustifiable.10

Thus, *Brown* presents a more difficult problem than *Wade* because the intention of the framers is not a matter of pure speculation. An historical inquiry suggests that the fourteenth amendment was written by men who did not believe that their action required the desegregation of public schools.11 But there is a straightforward way out of this dilemma: regardless of what the amendment’s framers believed about the impact of their amendment on segregated public schools, the equal protection clause means that states may not brutally stigmatize their young citizens. The framers are held to their words, not to their intentions. As Justice Holmes noted some time ago, when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us

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11 In a recent article, Raoul Berger characterizes the reaction to his argument in *Government by Judiciary*, supra note 90, that the framers of the Fourteenth Amendment intended neither to extend equal voting rights to blacks nor to end segregation: "there is no ‘tremendous controversy’ as to my central thesis but rather an admission of the historical facts I collated." Berger, *Lawyering vs. Philosophizing: Facts or Fancies*, 9 *U. Dayton L. Rev.* 171, 178 (1984). Berger rails against the "philosophers" who fail to take notice of this "fact" as they struggle to justify *Brown’s* ideologically desirable outcome. See infra note 115.
must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.\textsuperscript{112}

When pressed on this point, the intellectually honest originalist will agree that a modern reader would accept the Brown Court's interpretation of what the Constitution means. But the originalist will argue further that present meanings of constitutional terms are irrelevant, that the established rule requires that those words be given the meaning they had for those who used them. Because the meaning of words may change over the years, it does not follow that we may saddle the framers with our meanings.\textsuperscript{113}

The appeal to "the established rule" is political in nature. Abandoning the philosophical premise that a reader passively extracts from a text meanings that are placed there by the author, the last line of defense for the originalist is to argue that it is better to administer the fundamental law of the land according to outmoded and no longer meaningful traditions than to risk judicial tyranny. "Linkage of the present with the past is a sugar-coated device for devolving upon the Court the task of keeping the Constitution in tune with changing times . . . ."\textsuperscript{114}

Refuting the originalists' political theory is beyond the scope of this Article, but there are obvious problems with an offhand dismissal of "meaning" as a "linkage of the present with the past."\textsuperscript{115} Because such linkages

\textsuperscript{112} Missouri v. Holland, 252 U.S. 416, 433 (1920). Does one look to the intent of those in Congress who wrote the amendment, those who voted on it in committee, or those who adopted it, or does one look to the intent of the various state legislatures that ratified it? White, Law as Language: Reading Law and Reading Literature, 60 Tex. L. Rev. 415, 418 (1982).


\textsuperscript{114} Id. at 547-48 (emphasis supplied) (footnote omitted).

\textsuperscript{115} My hope is that this analysis will inspire an attack on the originalist political argument against meaning. Berger incisively describes Tushnet's failure to confront the real issue: "The fourteenth amendment's history dispels any indeterminacy about the framers' meaning respecting their clear intent to exclude suffrage and segregation from the amendment's coverage; and it is a grave flaw in Tushnet's philosophizing that he never really comes to grips with this problem." Id. at 545 n.114. To overcome this "flaw," one must first develop a coherent theory of meaning and a philosophical justification of critical inquiry into what constitutes meaning. This Article is a first step toward this goal. But one must also show that the adjudicative goal should be to elucidate and enforce what the law means, not what the authors of a particular legal text intended the provision to mean. Although this second issue is really subsumed by the first—because a coherent theory of meaning establishes that the author's intention is unknowable in principle—the inveterate originalist will argue for the political wisdom of ignoring meaning by rejecting the need for a general theory of interpretation. See Berger, Lawyering vs. Philosophizing, supra note 111, at 173. Thus, the battle against originalist theory must be waged on this second front as well.
are constitutive of meaning, that is, ontological and therefore unavoidable, a prudent political system would empower judges to enforce the Constitution’s meaning. Rather than requiring a plethora of amendments to deal with the results of the framers’ unavoidably limited foresight, it is sensible to reserve the amendment process for those rare instances when the Constitution’s meaning is no longer desirable. The Constitution has meaning only for the contemporary reader, and so the political supremacy of meaning will minimize the number of structural changes required to keep the Constitution current.

To advocate a political system that respects the framers’ intent, even while admitting that the Constitution’s meaning is at odds with this intent, is to succumb to the grossest form of conservatism: a blind adherence to a tradition that is no longer meaningful. More importantly, determining the framers’ intent is itself a hermeneutical activity. Twentieth-century judges are in principle unable to determine what a text meant to past generations; they can only assess what the text means in the context of the present.

Originalism, however, was not put to rest by Brown. Chief Justice Warren, like Justice O’Connor in Wade, explicitly accepted the originalist methodology in Brown but decided that an inquiry into the authors’ intentions would prove fruitless in the case confronting him. As a result, Brown is open to criticism by scholars who persuasively demonstrate that a careful application of the originalist methodology would have resulted in the case being decided the other way. Because scholars do still seriously question Brown, an explicit and formal recognition of the ontological basis of legal hermeneutics is essential; Brown exemplifies legal hermeneutics in practice, but it remains theoretically indefensible.¹¹⁶ Both the majority opinion and Justice Rehnquist’s dissent in Wade, written thirty years after Brown, continue to adhere to an originalist methodology that only obscures their real decision: an interpretation of the damages allowable under § 1983. Only Justice O’Connor’s dissent gives an explanation and justification for her decision. The ontological basis of hermeneutics is not merely a possible theory of interpretation—human beings are condemned to the dynamic relation of meaning captured by the phrase “fusion of horizons” notwithstanding their mistaken understanding of how they acquire meaning. In the interest of clarity, precision, and honesty in judicial decisionmaking, actual practice should be reflected in the theoretical model.

Chief Justice Warren did display a sophisticated understanding of the hermeneutical basis of meaning when he interpreted the “cruel and un-

¹¹⁶ Laurence Tribe argues that “it may be possible to justify constitutional adjudication not by its method, but by its results. Decisions are legitimate, on this view, because they are right.” L. TRIBE, AMERICAN CONSTITUTIONAL LAW 52 (1978). Although Tribe is correct in his assessment that Brown is legitimized “in fact” rather than as “a product of method,” id., it is vitally important to demonstrate why methodologies are inadequate to explain why Brown is right.
usual" standard of punishment in the eighth amendment. Just three years after his opinion for the unanimous Court in Brown, Warren authored a plurality opinion in Trop v. Dulles.

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . The Court recognized in [Weems v. United States, 217 U.S. 349 (1910)] that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

With this statement, Warren abandoned an originalist pretense in favor of an intuitive recognition of the hermeneutical circle as the true source of meaning. As a result, subsequent adjudication of eighth amendment claims has avoided the originalist quagmire that inspired Justice O'Connor's dissent in Wade by focusing on the eighth amendment's meaning rather than on what the framers intended it to mean.

The controversial death penalty case, Gregg v. Georgia, illustrates the

117 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Berger vilifies the Court's interpretation of the "cruel and unusual punishment" standard in recent cases testing the constitutionality of the death penalty. Berger's strict originalist view leads him to conclude that the eighth amendment does not bar the imposition of the death penalty. See R. Berger, Death Penalties: The Supreme Court's Obstacle Course (1982).

118 356 U.S. 86 (1958) (holding that forfeiture of citizenship for military desertion is a penalty that, even if within the powers of the government to impose, is unconstitutional because it constitutes cruel and unusual punishment).

119 Id. at 100-01 (footnote omitted). Cf. Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (holding that the equal protection clause of the fourteenth amendment forbids the states from mandating payment of a state tax as a prerequisite to voting). Harper quoted Brown in deciding that

the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.

. . . . Our conclusion . . . is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires. Harper, 383 U.S. at 669-70 (emphasis in original) (citation omitted). Accord, Dillenburg v. Kramer, 469 F.2d 1222, 1226 (9th Cir. 1972) (insisting that "constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber").

120 428 U.S. 153 (1976) (holding that the imposition of the death penalty for murder does not violate the cruel and unusual punishment clause of the eighth amendment in every circumstance).
degree to which the Court has internalized Chief Justice Warren’s insight.
Justice Stewart’s plurality opinion cites the language from Trop v. Dulles
quoted above and reinforces the idea that the amendment must comport with
both the evolving, contemporary values in society and the inherent dignity of
all individuals.121 The concurring opinions did not challenge these prem-
ises.122 The plurality opinion examined the tradition of eighth amendment
jurisprudence123 but did not accept precedent and history as the ultimate
guides to answering the question of whether the death penalty is in all cases
unconstitutional. Although Justice Brennan dissented, he began with the
same point as the plurality: “This Court inescapably has the duty, as the
ultimate arbiter of the meaning of our Constitution, to say whether . . . the
law has progressed to the point where we should declare that the punishment
of death . . . is no longer morally tolerable in our civilized society.”124 The
fractured majority and the dissenters do not engage in a meaningless battle
of string citations; instead, each side draws upon the legal tradition to answer
the problem presented by the case at hand. For this reason, Gregg v. Georgia
is indicative of how cases would be decided if the members of the
Supreme Court were consciously attentive to the reality of interpretation.125
A perceptive critic might rely on Gadamer to challenge my argument that
judges should eschew the originalist methodology.126 Gadamer contends that
even an incorrect methodology is unable to corrupt the ontological relation
of meaning. As such, it is not immediately apparent why the originalist
 methodology is undesirable. What concern is it of the philosophical commu-
nity if judges don’t understand what they are doing? Or, more importantly,
even if the philosophical community does have a legitimate concern, does
this philosophical issue have any impact on the activity of judging?
Stanley Fish has voiced this critique for a number of years.127 Essentially,
Fish argues that judges can neither choose nor change their hermeneutical
horizons.128 That is, no theory of legal hermeneutics can influence the activ-

121 Id. at 173.
122 See id. at 207-26 (White, J., concurring) (finding that the statutory criteria
provided by the Georgia legislature adequately prevented the wanton or freakish
imposition of the death penalty); id. at 230 (Blackmun, J., dissenting) (noting that
“[t]he calculated killing of a human being by the State involves, by its very nature, a
denial of the executed person’s humanity”).
123 Id. at 176-78.
124 Id. at 229 (Brennan, J., dissenting) (footnote omitted).
125 For further discussion of the importance of Gregg, see infra notes 342-86 and
accompanying text.
126 See supra notes 115-16 and accompanying text.
127 See, e.g., Fish, Dennis Martinez and the Uses of Theory, 96 YALE L.J. 1773
(1987); Fish, Consequences, in AGAINST THEORY (W.J.T. Mitchell ed. 1985); Fish,
Fish v. Fiss, 36 STAN. L. REV. 1325, 1347 (1984) (concluding that whether he or Fiss
has the right theory of interpretation “has no consequences for the process [they] are
both trying to describe”).
128 Fish, Dennis Martinez and the Uses of Theory, supra note 127, at 1796.
ity of judging, which is always an expression of the judge's hermeneutical horizon. Fish's response to the ontological basis of legal hermeneutics is one of complete reverence, and his devotion leads him to promote a legal theory that denies the practical usefulness of legal theory. Fish suggests that because we are unable to alter the ontological situatedness of the judge, we should field the best team available and simply let them play to the best of their abilities. Although his analogy to pitching in the major leagues is quite entertaining, it is unacceptable. In reality, Fish is arguing against the methodological aims of legal theory, in accord with the thesis of this Article. But Fish's position does not render legal theory moot. Would a judge have decided a case in the same way had he never developed a legal theory, never attended law school, or never even attended college? Clearly, the hermeneutical horizons of judges encompass their approach to interpreting texts, even though such horizons can never provide a formula for reaching a particular decision. By emphasizing the importance of hermeneutics to the legal culture, the legal tradition is both continued and supplemented, and this activity can affect future cases.

As this section of the Article has indicated, there are important reasons for "trashing" originalist methodology. First, there is a need to protect the Constitution from cynical judges who will disregard its meaning in order to obtain inconsistent political goals. To ensure that judges are constrained by the text's meaning, the legal system should require judges to justify their decisions explicitly with reference to their actual hermeneutical activity rather than masking the reality of their decision with an abstract formalism. Originalist legal theory is "abstract" in the sense of that word's etymological root, abstrahere ("to draw away"); the methodology of determining the meaning of a legal text by recovering the author's intended meaning draws away from the playful engagement of interpretation. As long as judges may justify their decisions without exposing their hermeneutical basis, there is

129 For example, Fish's argument against a "general hermeneutics" is actually an argument against methodological hermeneutics. See Fish, Consequences, supra note 127, at 110.

130 Laycock, Constitutional Theory Matters, 65 Tex. L. Rev. 767 (1987). Laycock points out that the dramatic shift in legal theory in 1937 produced "fundamentally different results in real cases . . ." Id. at 770 & n.17. He further notes that Justice Brennan is explicitly guided by a group of legal theorists when he confronts issues before the Court. Id. at 771 & n.20.

131 Cf. Kelman, Trashing, 36 Stan. L. Rev. 293, 293 (1984) (describing the technique of trashing legal texts or theories as examining "specific arguments very seriously in their own terms: discover[ing] they are actually foolish . . . and then look[ing] for some . . . order (not the germ of truth) in the internally contradictory, incoherent chaos" excavated by such examination) (emphasis in original).

132 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 8 (Unabridged 1976).
room for political manipulation of cases by judges who choose to ignore meaning.\(^ {133} \)

There is also a great deal at stake at the theoretical (academic) level. When scholars conclude that the current practice of the Supreme Court is unprincipled and that reference to the discipline "constitutional law" is "sheer habit and is perhaps self-deceptive,"\(^ {134} \) there is cause for alarm. Within such a framework, the goal of discovering the correct rule is replaced by attempts to secure partisan victories for one's chosen ideology. Once scholars believe that the Supreme Court is unconstrained, they too are freed from the duty to critically assess the Court's actions. Paul Brest has embraced this condition openly, arguing that constitutional scholars prepare their manuscripts not as "political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt [their] various notions of the public good."\(^ {135} \) This denigration of constitutional scholarship results from the inability of legal scholars to come to grips with the true nature of interpretation and can be remedied by a return to the fundamental issue of legal hermeneutics: how legal texts convey meaning. The importance of legal theory cannot be overemphasized because it is the forum for a great deal of constitutional critique, a practice that is legitimized in Part III below.

Finally, fundamental legal landmarks like Brown must be justified if the recent legal past is to be fully accepted into the evolving legal tradition. Present practice is destabilized to the extent that this tradition is viewed as illegitimate.\(^ {136} \) Put simply, judges who believe that they need justify their

\(^{133}\) Of course, even if judges base their decisions on the meaning of particular legal texts, political considerations will still impact on the enforcement of these judicial decisions. The famous "with all deliberate speed" mandate of Brown v. Board of Education (Brown II), 349 U.S. 294, 301 (1955), certainly reflects an awareness by the Court that the reaction in the South to its decision would be volatile, but this has no bearing on a determination of what the law is, or what the Constitution means. This Article is concerned with an ontology of meaning rather than a political theory of legal reform. Cf. Graff, "Keep off the Grass," "Drop Dead," and Other Indeterminacies: A Response to Sanford Levinson, 60 TEX. L. REV. 405, 412 (1982). "In any case, the special problems occasioned by legal interpretation in the area of application are essentially, as I have said, problems of ethical and political application. They are not epistemological problems, problems of how we are able to determine what texts mean." Id. at 412 (emphasis supplied).


\(^{136}\) Former Attorney General Edwin Meese argues that the proper role of the Court is to "resurrect the original meaning of constitutional provisions and statutes as the only reliable guide to judgment." Shenon, Meese and His New Vision of the Constitution, N.Y. Times, Oct. 17, 1985, at 14, col. 3 (quoting a speech Meese delivered on July 9, 1985). For the full text of this speech, see Meese, The Supreme Court of the United States: Bulwark of a Limited Constitution, 27 S. TEX. L. REV. 455 (1986).
decisions only with reference to a presumed framers' intent can turn a deaf ear to the hermeneutical reality presented by Brown and remain uninterested in what the text means.

The decision in Brown is a poignant critique of the originalist model: the hermeneutical act, no longer glossed over by conceptual justifications, is elevated to the status of unadorned judgment. And certainly there is a great deal to be gained by the increased use of judicial and theoretical strategies that comport so well with our ontological openness to meaning.

American constitutional theory faces a dilemma. The United States Supreme Court has decided a large number of cases that commentators intuitively feel are "right," but that cannot be justified under the orthodox theory of judicial review. Either the Court's behavior or the orthodox theory will have to change.\(^1\)

C. Law and Literature: The Challenge of Subjectivism

The legal academic community has not embraced the hermeneutical principles outlined above. At the same time, however, the failure of originalist jurisprudence to avert the growing recognition that interpretation is not a passive extraction of meaning from a text has led to a crisis of confidence in the academy that can be overcome only by focusing on the ontological basis of legal hermeneutics. Legal scholars have been unable to provide a theoretically rigorous defense of legal hermeneutics because they are unable to meet the challenge of subjectivism; there seems to be no way to escape the idea that once the originalist methodology is debunked, interpreters can make the text mean what they want it to mean. Under this view, Justices Justice Brennan, widely regarded as a judicial "activist," responded with a public speech deriding the originalist conception of interpretation. See Taylor, Brennan Opposes Legal View Urged by Administration, N.Y. Times, Oct. 13, 1985, at 1, col. 1. Brennan eloquently noted the hermeneutical reality that renders the originalist's project futile:

We current Justices read the constitution in the only way that we can: as 20th century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time.

N.Y. Times, Oct. 13, 1985, at 20, col. 3 (quoting Brennan, supra note 69, at 7.)

Such a profound ideological clash is bound to draw others into the fray, resulting in a fragmented consensus as to the locus and legitimacy of judicial authority. See, e.g., Taylor, Justice Stevens in Rare Criticism, Disputes Meese on Constitution, N.Y. Times, Oct. 26, 1985, at 1, col. 1. As long as this debate challenges the theoretical underpinnings of legal hermeneutics, political instability will continue.

Rehnquist and Brennan propose equally valid interpretations of the Constitution—each merely creates the meaning that he wants the text to embody. After all, critics might say, *Brown* would have been decided differently if the Justices on the Court at that time had been conservative, so that in fact *Brown* is really no more justifiable than an interpretation of a great novel by a literary scholar with certain predispositions and biases. Adherence to the positivist fact/value dichotomy leads scholars to believe that the goal of legal theory is to establish law as an "objective" or "factual" discipline. Yet each attempt to establish a science of interpretation inevitably ends with the recognition that the prejudices of the interpreter influence interpretation. Though most scholars firmly believe that there is something to legal interpretation beyond the implicit and explicit subjective designs of the interpreter, there is little in the way of hard scholarship that makes good on this belief. The threat of subjectivism is most readily acknowledged when theorists consider the relationship and similarity of legal texts and works of literature.138 "If we consider law as literature, then we might better understand the malaise that afflicts all contemporary legal analysis, nowhere more severely than in constitutional theory."139

Sanford Levinson's *Law and Literature* appeared as the lead article in a symposium devoted to examining the profound implications that follow from the idea that legal interpretation is as subjective as literary interpretation.140 Citing the "centrality to law of textual analysis," Levinson argues that there "is less of a gap between contemporary legal theory and literature than we might suppose..."141 Levinson quickly acknowledges that the academic legal community is increasingly rejecting originalist legal theory, whether premised on the plain meaning of legal texts or the original meaning

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139 Levinson, *supra* note 102, at 377 (emphasis supplied).

140 Symposium, *supra* note 138.

141 Levinson, *supra* note 102, at 377 (footnote omitted).
as recovered through historical reconstruction.\textsuperscript{142} That is, scholars now admit that legal texts, like novels or poems, are fraught with ambiguities.

In Levinson's view, theorists who abandon originalism but remain faithful to the goal of interpreting the text are left with two options. The "weak textualist" argues that through a properly formulated methodology, jurists can extract the essential meaning of a legal text even though this meaning is neither plain on its face nor immediately comprehensible in light of historical research.

A "weak" textualist "is just doing his best to imitate science—he wants a method of criticism and he wants everybody to agree that he has cracked the code. He wants all the comforts of consensus, even if only the consensus of readers of the literary quarterlies" (or law reviews).\textsuperscript{143}

The "strong textualist" disavows this search for ultimate truth and argues that the reader constructs a meaning that is only a temporal sense of what is currently acceptable, rather than one that genuinely mirrors the essential characteristics of the text being discussed.\textsuperscript{144} The strong textualist believes that the never-ending debate among weak textualists about the essential meaning of the Constitution is no more subject to resolution than literary scholars' debates about the essential meaning of Hamlet.\textsuperscript{145} Each attempt to crack the mysterious textual "code" is a creation rather than a discovery of meaning.\textsuperscript{146}

Levinson reaches the troubling conclusion that regardless of which theory is correct, both weak and strong textualism preclude the possibility of a legitimate critique of judicial decisionmaking because neither theory provides critical standards. Strong textualists are committed to the proposition that there are no right interpretations because interpretation is a subjective and creative activity. Weak textualists are able to criticize a scholarly article or judicial opinion only to the extent that everyone else accepts their "solution" to the problem of what a legal rule or doctrine means.\textsuperscript{147} When multiple interpretive strategies exist, weak textualists have no means of demonstrating the superiority of their view; they cannot "slay the nihilist dragon."\textsuperscript{148}

\textsuperscript{142} Id. at 378-79.
\textsuperscript{143} Id. at 380 (quoting R. RORTY, Nineteenth-Century Idealism and Twentieth-Century Textualism, in CONSEQUENCES OF PRAGMATISM 139, 152 (1982)) (emphasis in original).
\textsuperscript{144} Levinson, supra note 102, at 381-84.
\textsuperscript{145} Id. at 391 & n.64.
\textsuperscript{146} See id. at 381-84.
\textsuperscript{147} Levinson considers Fiss’s attempt to criticize Justice Rehnquist as an example of groundless constitutional theorizing: "The inability of Fiss and his co-author to mount a persuasive attack on Justice Rehnquist in anything other than political terms reveals the parlous state of contemporary constitutional discourse. The united interpretive community that is necessary to Fiss' own argument simply does not exist." Id. at 401 (emphasis omitted).
\textsuperscript{148} Id. at 396 (footnote omitted).
It would obviously be nice to believe that my Constitution is the true one and, therefore, that my opponents' versions are fraudulent, but that is precisely the belief that becomes steadily harder to maintain. They are simply different Constitutions. There are as many plausible readings of the United States Constitution as there are versions of Hamlet, even though each interpreter, like each director, might genuinely believe that he or she has stumbled onto the one best answer to the conundrums of the texts. 149

Levinson appears willing to allow literary criticism to remain this indeterminate, but he emphasizes that because of the coercive impact it has on the lives of people, the legal order should not be equated with a free-flowing "conversation" that has no right answers. 150 Levinson is unable to provide a solution, however. The strong textualist has openly embraced the subjectivist thesis. The weak textualist proffers theories with the hope that they will provide the methodological key to unlock the Constitution's meaning, only to find that the fragmented community of interpreters becomes even more polarized as a result. After setting up the problem properly, Levinson's article concludes with an anguished tone. All that is left is to think, to write, and to hope that the future will provide a "common language of constitutional discourse . . . ." 151

Levinson indicates the fundamental challenge to legal theory that subjectivism poses: if interpretation is nothing more than the expression of an interpreter's personal biases, the legal system is inherently arbitrary and capricious. However, his thesis misses the mark because he takes the subjectivist critique as an indictment of the nature of law rather than of the subject/object framework. Other participants in the symposium acknowledge the force of the subjectivist critique but argue that Levinson fails to see that subjectivism is a threat only if one wants to sustain law as an objective activity. The answer to the subjectivist challenge that Levinson struggles—unsuccessfully—to formulate is to recognize that interpretation is neither subjective nor objective; legal scholars must radically reorient the terminology of the discussion so that it is compatible with the reality of interpretation.

For G. Edward White, Levinson's conclusions are the results of "epistemological overkill." According to White, Levinson properly recognizes that the Constitution is not a set of unambiguous and timeless meanings but forgets that judges engaged in constitutional analysis attempt to ascertain the

149 Id. at 391 (emphasis in original) (footnote omitted).
150 "As Chairman Mao pointed out, a revolution is not a tea party, and the massive disruption in lives that can be triggered by a legal case is not a conversation." Id. at 386.
151 Id. at 402-03.
meaning that the text of the Constitution holds for the particular case.\textsuperscript{153}

Similarly, Gerald Graff argues that Levinson’s alternatives are “misleadingly formulated” and arise from the mistaken assumption that a legal text cannot be deciphered if there is no universally accepted method for reconstructing the original meaning.\textsuperscript{154}

Levinson has merely inverted the gesture of the interpretive absolutist, who insists that there is One True Meaning and that he alone possesses it. Levinson turns this absolutism upside-down and comes out with an equally prescriptive No True Meaning. The alternatives he gives are simply unreal.\textsuperscript{155}

In this way, “Levinson actually makes the same mistake committed by those whom he is attacking.”\textsuperscript{156}

Stanley Fish reiterates this theme but also contends that the activity of interpretation can be understood affirmatively rather than just negatively (as in the case when one says that interpretation is not objective and not subjective).

[I]t is neither the case that interpretation is constrained by what is obviously and unproblematically “there,” nor the case that interpreters, in the absence of such constraints, are free to read into a text whatever they like. . . . Interpreters are constrained by their tacit awareness of what is possible and not possible to do, what is and is not a reasonable thing to say, what will and will not be heard as evidence, in a given enterprise; and it is within those same constraints that they see and bring others to see the shape of the documents to whose interpretation they are committed.\textsuperscript{157}

White, Graff, and Fish all insist that Levinson’s failure to free himself from the grip of his subject/object perspective is what leaves him without a response to subjectivism. Two other contributors to the symposium also register their dissatisfaction with the either/or approach adopted by Levinson in a manner that is clearly reminiscent of the hermeneutical ontology developed above. James Boyd White argues that legal scholarship is not condemned to the same “subjective” status that literary scholarship allegedly exemplifies. Only when law and literature are viewed within the context of the subject/object differentiation does this wrong-headed notion arise:

The view that the legal text ought to have a clear and restatable meaning, and the subsequent collapse into nihilism or “legal realism” upon

\textsuperscript{153} See id. at 572-73.
\textsuperscript{154} Graff, supra note 133, at 407.
\textsuperscript{155} Id. at 410-11.
\textsuperscript{156} Id. at 406. See also Fish, Interpretation and the Pluralist Vision, 60 Tex. L. Rev. 495, 495 (1982) (quoting Graff).
\textsuperscript{157} Fish, Working on the Chain Gang: Interpretation in Law and Literature, 60 Tex. L. Rev. 551, 562 (1982).
the discovery that it does not, arises from a mistaken attitude about law that resembles the mistaken attitude underlying the similar response among readers of literature.\textsuperscript{158}

For White, understanding interpretation requires a recognition that “[o]ne can neither disregard the independent force of the text, nor assume that all one’s questions are unambiguously answered within it.”\textsuperscript{159} Indeed, “it is always the meaning of the document, not our wishes or preferences, that we are determining.”\textsuperscript{160} White cites the dogmatic application of legal texts in specific cases as an example of this tension between reader and text: “The traditional conception of the judiciary as working from case to case (rather than legislatively) can be seen as a method by which the past is regularly tested against the present, the inherited language against the demands of actual circumstance, and intelligent change made possible.”\textsuperscript{161} This analysis is really a paraphrasing of Gadamer’s emphasis on the dogmatic nature of legal interpretation.

William Nelson also advocates the abandonment of the subjective/objective debate. Urging legal scholars “to construct new thought patterns to replace the notion of objectivity,”\textsuperscript{162} Nelson borrows from the work of sociologist-philosopher Jürgen Habermas and linguist-philosopher Ludwig Wittgenstein to construct his legal theory.\textsuperscript{163} Interpretation, says Nelson, occurs only within the context of a linguistic community, and meaning is experienced as a linguistic relation rather than as an objective entity.\textsuperscript{164} Like White, Nelson points to a new view of legal interpretation that focuses on the play between a text and a reader, play that is situated in a linguistic and historical setting.

That Levinson’s article catalyzed these anti-Cartesian views is hardly surprising. The symposium’s “law and literature” theme focused attention on the real problems of legal interpretation and prevented the authors from falling back on political or historical arguments about the legal system as an institution. Kenneth Abraham has also used this productive comparison of legal and literary interpretation quite successfully.\textsuperscript{165} In a now familiar fashion, Abraham explores the failure of the Cartesian tradition of objective inquiry and rejects both objectivism and subjectivism:

\textsuperscript{158} White, \textit{Reading Law and Reading Literature, supra} note 112, at 436. \textit{See} R. \textit{BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS} 19 (1983) (“Only if we implicitly accept some version of Cartesianism does the exclusive disjunction of objectivism or relativism become intelligible . . . .”).

\textsuperscript{159} White, \textit{Reading Law and Reading Literature, supra} note 112, at 417.

\textsuperscript{160} \textit{Id.} at 440.

\textsuperscript{161} \textit{Id.} at 444.


\textsuperscript{163} \textit{See} \textit{id.} at 478 n.141.

\textsuperscript{164} \textit{Id.} at 478.

\textsuperscript{165} Abraham, \textit{Statutory Interpretation, supra} note 138, at 679.
Those who suggest that a text is an object entirely independent of its readers are ignoring the sense in which the bedrock beliefs of its readers actually constitute the text. Those, however, who suggest that reading is an individual, subjective activity equally ignore the idea that the reader is always within a community of interpretation, the acceptance of whose beliefs affects the meaning he attributes to a text. Our very selves, then, are the product of shared understandings. Under this view the notion of individual subjectivity in interpretation would become empty.\(^\text{166}\)

Although interpretation can never be wholly objective, the shared interpretations of a cultural tradition lend validity to the search for the correct interpretation. As Abraham puts it, interpreters encounter the text in a situation, which unavoidably includes the beliefs that the reader holds. When the interpreter has these beliefs in common with others, then they are, for that community, "facts." These facts are not immutable, as the objectivist would have it, nor individual or arbitrary in the sense that the subjectivist or radical realist might suggest. They do provide objectivity, however, within a community of interpretation where they need not be questioned.\(^\text{167}\)

Abraham answers the subjectivist challenge by agreeing that interpretation is never objective—even in so-called "easy cases"\(^\text{168}\)—but arguing further that reading a text according to one's own prejudices is not really "subjective" in the way that the subjectivists maintain.\(^\text{169}\) The prejudices of readers are always informed by the tradition of which they are a part and which they share with others in their linguistic community. By focusing strictly on the fundamental similarities of law and literature, radical conclusions about the nature of interpretation are unavoidable. On the other hand, a perfunctory acknowledgment that interpretation is not susceptible to categorization in the traditional subject/object paradigm, together with an attempt to demonstrate that legal interpretation is still somehow different from literary interpretation, will inevitably result in a reconstitution of the subject/object framework.

Owen Fiss's *Objectivity and Interpretation*\(^\text{170}\) exemplifies the theoretical backslide that occurs when one harbors a secret belief that legal texts have objective meanings. Fiss begins his article by purportedly rejecting the subject/object framework. Fiss tells us that "[a]djudication is interpretation," that in turn "is neither a wholly discretionary nor a wholly mechanical activity. It is a dynamic interaction between reader and text, and meaning[,] the product of that interaction."\(^\text{171}\) Like the contributors to the

\(^{166}\) Id. at 686.

\(^{167}\) Id. at 688.

\(^{168}\) See Abraham, *Three Fallacies*, supra note 81, at 772.

\(^{169}\) Id. at 777.


\(^{171}\) Id. at 739.
Texas law and literature symposium discussed above, Fiss wants to respond to the subjectivist critique of interpretation.\textsuperscript{172} For Fiss, "the question is whether any judicial interpretation can achieve the measure of objectivity required by the idea of law."\textsuperscript{173} Fiss believes that legal interpretation is objective to a much greater extent than literary interpretation, primarily because of the institutional hierarchy of the decisionmaking process and the binding force of interpretive rules.

 Judges do not belong to an interpretive community as a result of shared views about particular issues or interpretations, but belong by virtue of a commitment to uphold and advance the rule of law itself. They belong by virtue of their office. There can be many schools of literary interpretation, but as Jordan Flyer put it, in legal interpretation there is only one school and attendance is mandatory.

\ldots The presence of \ldots procedures and a hierarchy of authority for resolving disputes that could potentially divide or destroy an interpretive community is one of the distinctive features of legal interpretation.\textsuperscript{174}

 Critics have charged that Fiss is really nothing more than an objectivist who looks to the structure of legal decisionmaking as the source of objectivity in law.\textsuperscript{175} In his response to Fiss, Paul Brest contends that Fiss’s desire to combat nihilism has led him to seek "to insulate the legal culture against the radical attacks on conventional notions of understanding and interpretation."\textsuperscript{176} Brest suggests that this line-drawing is a political move to reaffirm the legitimacy of "our law" rather than "the rule of law."\textsuperscript{177} and goes on to expose Fiss’s misguided attempt to keep law "objective" while claiming to discard traditional objectivity.\textsuperscript{178} Stanley Fish also attacks Fiss’s notion of objective adjudication. Fish makes the useful observation that rules of interpretation cannot provide the external constraint on subjective interpretation that Fiss desires because these rules would have to be reinterpreted with each application, as would any text.\textsuperscript{179} A rule cannot tell a judge how to decide a particular case any better than the "plain meaning" of the Constitu-

\textsuperscript{172} \textit{Id.} at 740-41.
\textsuperscript{173} \textit{Id.} at 744 (emphasis in original).
\textsuperscript{174} \textit{Id.} at 746-47.
\textsuperscript{177} \textit{Id.} at 772.
\textsuperscript{178} \textit{Id.} at 772-73.
\textsuperscript{179} Fish, \textit{Fish v. Fiss}, \textit{supra} note 127, at 1326-32. See Abraham, \textit{Three Fallacies}, \textit{supra} note 81, at 779-80 (noting that rules are always ambiguous in the abstract and acquire meaning only with regard to the case at hand).
tion; judges must interpret rules as well as relevant legal texts. Nevertheless, says Fish, the reality of interpretation stands as its own critique of subjectivism. Fiss’s attempt to render adjudication objective by reference to hypothesized rules of interpretation is not only unwarranted but also reverts back to the inadequate distinction between subjects and objects.

All of which is to say that, while I stand with Fiss in his desire to defend adjudication in the face of “nihilist” and “subjectivist” arguments, I do not believe that this defense need take the form of asserting a set of external constraints, because the necessary constraints are always already in place.180

Subjectivism poses no serious problem in law because the conditions necessary to make subjectivism a reality—the “condition of free subjectivity, of ‘naturally’ indeterminate texts, of unprincipled authority—could never obtain...”181

Paradoxically, then, the only way to overcome the challenge of subjectivism is to concede that the traditional model of “objective” interpretation is indefensible. Attempts to reformulate the objective status of legal interpretation fail to defuse nihilism. Faced with the reality that the Constitution is not a repository from which meanings may be withdrawn for use by the Supreme Court, constitutional scholars must explore the activity of interpretation in order to understand how we encounter meaning. Legal theorists who admit that we interpret legal and non-legal texts in the same way have contributed the most to the philosophical effort to deny the validity of subjectivism.182

Following Gadamer, legal scholars should recognize that the theoretical and abstract notions of “objective texts” and “subjective interpreters” must be replaced with a more accurate account of the playful relation between humankind and the world. In this Article, I examine the relevance and limitations of ontological hermeneutics for developing satisfactory and legitimate ways of talking about our hermeneutical nature and its relation to law. Consequently, this Article provides a second-order account of the

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180 Fish, Fish v. Fiss, supra note 127, at 1345.
181 Id.
182 As a result of this ground-breaking scholarship, several legal theorists have recently focused on Gadamer’s ontological hermeneutics. See, e.g., Phelps & Pitts, supra note 4 (contrasting Gadamer’s hermeneutics with current theories of legal interpretation). Simeon McIntosh has written a useful piece on legal hermeneutics in which he develops Gadamer’s thesis at some length, but McIntosh displays a narrow understanding of Gadamer’s radical claims, especially when discussing the importance of an author’s intent. See McIntosh, Legal Hermeneutics: A Philosophical Critique, 35 Okla. L. Rev. 1, 36 (1982). Finally, Dennis Patterson applies Wittgenstein’s later philosophy to the problem of legal interpretation. See Patterson, supra note 175, at 682-88 (using Wittgenstein’s theory of meaning as an analytical framework for the nihilist-objectivist debate).
capacity for interpretation that we use every day. Ontological hermeneutics
does not tell the reader how to read. Reading occurs with or without an
explanatory hypothesis of how the reader interprets texts. Nevertheless, this
second-order account is important, for it offers a way out of the subjectivist
dilemma and serves as a guide to judicial decisionmaking.

III. A Proposed Model of Inquiry

A. The Function of a Model

In Part Two, the ontological basis of hermeneutics was revealed: interpre-
tation is a mode of existence rather than a conceptual exercise. It is our
openness to meaning, through which our horizons fuse with those of the
text, that dispels all subjectivist theories of interpretation. The failure to
acknowledge this reality has resulted in fundamentally distorted views of
how judges decide cases and how scholars evaluate judicial decisions. The
purpose of Part Three of this Article is to provide a model of contemporary
legal hermeneutics that allows the development of critical standards for
assessing judicial decisionmaking.

It is important to distinguish a model of legal hermeneutics from a meth-
odology for acquiring legal knowledge. A methodology is a conceptual
strategy designed to facilitate the subject's efforts to decode a given object
and thus is intimately tied to the now discredited subject/object differentia-
tion. Hermeneutics depends on no such methodology; the hermeneutical act
occurs without an all-powerful subject or an incorrigible, unambiguous text.
Unlike a methodology, the following model is not offered as a formula for
scholars—no formula would ever work to establish the "proper" way to
interpret. Rather, I suggest that scholars adopt the following model as an
attitude that they should bring to bear on their evaluations of law and
judicial decisionmaking.

The starting point for constructing a model of legal interpretation must be
the hermeneutical act. As we have seen, that act is ontological in nature.
Gadamer's hermeneutics explores what actually (phenomenologically) oc-
curs in interpretation rather than what ought to occur through the proper

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183 This point has been repeatedly emphasized by Stanley Fish, most recently in
Dennis Martinez and the Uses of Theory, supra note 127, at 1778 (recognizing that
"no one follows or consults his formal model of the skill he is exercising in order to
properly exercise it").

184 Cartesian Rationalism is evident in all theories of methodological hermeneutics:
the underlying assumption is that an objective meaning is expressed through the
non-substantive medium of language in the form of an autonomous text and is
received in its objective entirety by an ahistorical and value-free interpreter. Phelps
& Pitts, supra note 4, at 356-57. To counter this metaphysical system of assumptions,
Gadamer performs an "ontology of the event of understanding." Id. at 363. Cf. supra
note 12.
application of a methodology. "The main concern of hermeneutics, [which]
Truth and Method affirms, is 'not what we do or what we ought to do, but
what happens to us, over and above our wanting and doing . . . .'"\footnote{185} The
same hermeneutical reality is operative whether a federal judge reads a
detective novel or a provision of the Constitution. Ontological hermeneutics
turns the fear of legal scholars on its head: law is not as subjective as
literature, but rather literature is as objective as law. It is only when legal
historians and legal philosophers begin the hopeless quest for the meaning of
"the law" that their discourse takes on the appearance of subjective opin-
ion, just as a purely abstract treatment of a novel or poem is nothing more
than an opinion about a hopelessly ambiguous entity. Such legal theorists fail
to understand that interpretation is only possible from the limited perspec-
tive of a reader. Rather than fearing the degeneration of law into literature,
philosophers of interpretation should work to restore the explicit pragmatic
aims of literary hermeneutics, thereby reinvigorating a discipline that has
long suffered the problems now facing legal theorists.\footnote{186}

Acceding to the ontological character of the hermeneutical act does not
demonstrate a naivete about political aims in the interpretation of texts.\footnote{187} A
judge may disregard the meaning of a text so as to achieve subjective
political goals. Nevertheless, prior to any such political decision, meaning is
made known to the judge by his interaction with the text. Moreover,
Gadamer’s perspective brings a judge’s prejudices to the forefront of discus-
sion more explicitly than any formalist or traditional theory of interpretation.
It is a prerequisite of legal meaning that judges have particular political
values, for it is only in the interaction with a situated, prejudiced and
dogmatic horizon that the text can "speak." The Enlightenment’s glorifica-
tion of the completely value-free interpreter is an absurd fantasy. Not only
are the necessary conditions for obtaining objective knowledge absent, they
would actually render the acquisition of meaning impossible. A text is not
meaningful in itself; to acquire meaning, words must speak \textit{to} something or
someone.

Gadamer’s discussion of "play" captures the pre-predicative, pre-cogni-
tive character of interpretation. Because an individual is not free to create

\footnote{185}{F. DALLMAYR, Twilight of Subjectivity: Contributions to a Post-
note 5, at 173).}

\footnote{186}{See, e.g., Abraham, Statutory Interpretation, supra note 138, at 690-94.
Gadamer considers legal hermeneutics exemplary because it continues to recognize
application "as an integral element of all understanding." H.-G. GADAMER, supra
note 5, at 275. Literary hermeneutics became "detached" from this recognition when
it established itself "as the methodology for research in the human sciences." Id.
Gadamer is not content to demonstrate the basis of legal hermeneutics; his project
works to reintegrate literary hermeneutics with legal hermeneutics, thereby overcom-
ing the methodological schism of the eighteenth and nineteenth centuries. Id.}

\footnote{187}{See supra note 133.}
the meaning of a text but rather is open to the possibilities of meaning that the text proposes, subjectivism is an untenable thesis. However, this model of legal interpretation also discredit the belief that texts have unambiguous, fixed meanings, and thus raises the question of whether there is any guarantee that each individual who encounters the text will discover a meaning that is equally valid for other individuals. Gadamer's theory must be defended against the inevitable charge that his theory is reducible to "nihilism" or "relativism." The hermeneutical model of legal interpretation must confront the challenge of delineating critical standards of legal interpretation that can ensure judicial compliance with the meaning of legal texts.

B. Critical Standards of Legal Interpretation

1. The Purpose of and Need for Critique

Gadamer recognizes that the experience of legal certainty and the criterion of legal truth both derive from the existence of an interpretive community of similarly situated communicative beings. This objectivity, of course, is not the timeless objectivity mistakenly ascribed to the natural sciences and unsuccessfully applied by the positivists to the social studies. Instead, objectivity is a lived reality occurring within a particular historical situation. The tradition that links each person to the past also horizontally links each person to his contemporaries. The bonds that are necessary for the existence of a communicative community serve as implicit, fundamental bridges between each situated horizon. Judges decide particular cases by bringing the shared legal tradition that they embody into play with the relevant legal texts.

But Gadamer's account of shared meaning is open to criticism on several levels. Admittedly, there are tremendous communal ties that guarantee to some extent that legal meaning will be intersubjective. Nevertheless, judges continue to dispute the meaning of legal texts. Justices Rehnquist and Brennan are contemporaries, both intelligent and well-versed in the American legal tradition, and yet they sharply disagree about the Constitution's meaning.\footnote{For example, in the 1984-85 term, Justices Brennan and Rehnquist wrote or adopted conflicting opinions in nine instances. See, e.g., Aguilar v. Felton, 473 U.S. 402 (1985) (construing the first amendment establishment clause); Grand Rapids School District v. Ball, 473 U.S. 373 (1985) (same); NLRB v. Longshoreman's Assoc., 473 U.S. 61 (1985) (interpreting the National Labor Relations Act); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (addressing first amendment freedom of speech); Francis v. Franklin, 471 U.S. 307 (1985) (addressing fourteenth amendment due process clause); Wainwright v. Witt, 469 U.S. 412 (1985) (treating jury selection in capital cases); Evitts v. Lucey, 469 U.S. 387 (1985) (considering fourteenth amendment due process right to effective counsel on appeal).} Assuming that neither Justice is being dishonest in his account of
meaning—for politically motivated reasons, for example—each reads the relevant legal text with his own forestructure of meaning and thus encounters a different "world" of meaning proposed by the text. Gadamer fails to tell us whether one of these interpreters is "right," whether the "right" meaning is merely the interpretation that rings true for at least four other Justices, or whether there is no "right" interpretation. It is imperative that a modern model of legal hermeneutics grapple with the intersubjective dimension of meaning.

Even more troubling is the possibility that the interpretive community is held captive by a defective tradition that continually distorts interpretive efforts. Although Gadamer emphasizes the positive significance of prejudices as the traditional force of "pre-judgments," he provides no adequate standard for determining when "prejudices" in the negative sense of the word—irrational ideology—exist. The conservative implications of Gadamer's thesis result from his focus on the transmission of tradition through history without the possibility of critique. As Fred Dallmayr puts it, "Compared with a rootless rationalism, Gadamer's outlook clearly proves itself superior to his detractors. However, the question remains whether his argument makes sufficient room or provides criteria for critique, that is, for the differentiation between prejudgments and corrigible prejudices, or between legitimate authority and repression."180 The sociologist-philosopher Jürgen Habermas has explored in depth the question of whether critique may be justified philosophically. Though his work presents a complex array of ideas and jargon, his philosophy is a necessary starting point for understanding the legitimacy of the critique of any interpretation of a text. Habermas does not focus on the particular problem of legal hermeneutics, but Gadamer's theory makes it clear that the nature of interpretation is not parochial but ontological. Consequently, any resolution of the issue of the legitimacy of critique is equally valid in assessing judges' interpretations of law as well as political philosophers' interpretations of social reality.191

2. Jürgen Habermas and Critical Theory

Jürgen Habermas pursues an ambitious goal: the development of a philosophically defensible critical theory of society that can identify the need for

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189 T. McCarthy, supra note 51, at 170.
190 F. Dallmayr, Twilight of Subjectivity, supra note 185, at 288.
191 Though Habermas never explicitly discusses the problem of legal interpretation, universal pragmatics pertains to all communicative action, including that of interpreting a written text. See J. Habermas, What is Universal Pragmatics?, in Communication and the Evolution of Society 1, 11 (T. McCarthy trans. 1979). When he discusses the distinction between deep and surface structures of meaning, Habermas lists the various domains in which this is evident: "the meaning of a written sentence, action, gesture, work of art, tool, theory, commodity, transmitted document, and so on . . . ." Id.
and guide political change. Habermas's position has developed and changed a great deal during the last twenty years. Early in his career, he developed his theory of human interests and concentrated on justifying critical theory as knowledge. Habermas's attention then turned to the problem of finding a normative foundation for critical theory. Working from a theory of universal pragmatics, Habermas developed the notion of "ideal speech" and attempted to draw the outlines of a rational critique of society. Habermas's latest work, however, retreats from many of his earlier positions and sets forth a theory of communicative action as the framework for social critique. Although Habermas now rejects a significant portion of his earlier writings, this section of the Article provides a comprehensive account of his philosophy by tracing the stages of his development. There are two justifications for this approach. First, many legal theorists are unfamiliar with Habermas's work. Consequently, it is necessary to provide a general description of his thought and to clarify the developmental stages of his program so that they are not simplistically reduced and thereby misunderstood. In addition, a comprehensive treatment is pedagogically justified: the recent developments in Habermas's philosophy constitute a response to his recognition that Gadamer's radically ontological perspective is an appropriate challenge to all theoretical perspectives. Habermas demonstrates that critical theory is unavoidable, but the failure of his initial formulations illustrates the limitations of critical theory.

(a) *The Theory of Human Interests.* In *Knowledge and Human Interests,* Habermas justifies critical theory by reformulating the foundations of all knowledge. Responding to the failure of modern thought to sustain an adequate epistemology, Habermas argues that "a radical critique of knowledge is possible only as social theory." Habermas begins his critique by postulating the existence of three cognitive interests, each with its own "logical-methodological rules" that underlie knowledge: "The approach of the empirical-analytic sciences incorporates a technical cognitive interest; that of the historical-hermeneutical sciences incorporates a practical one; and the approach of critically oriented sciences incorporates the emancipatory cognitive interest ...." These "interests" correspond to "the basic

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192 See infra notes 196-205 and accompanying text.
193 See infra notes 206-56 and accompanying text.
194 See infra notes 287-92 and accompanying text.
196 Id. at vii.
orientations rooted in specific fundamental conditions of the possible reproduction and self-constitution of the human species . . . ."\textsuperscript{198} That is, our need to adapt in order to survive forces us to orient our existence according to these three cognitive interests. Habermas asserts that these human interests have "quasi-transcendental" status; they are the presupposed conditions of objective experience, and yet they are rooted in man's empirical existence. "Although the sciences must preserve their objectivity in the face of particular interests, the conditions of possibility of the very objectivity that they seek to preserve include fundamental cognitive interests."\textsuperscript{199} Epistemology is thus a social theory because knowledge can be traced to primordial interests that are manifested in our struggle to live in the human and natural environment in which we find ourselves.\textsuperscript{200}

Habermas, like Gadamer, is committed to preserving the status of hermeneutics as knowledge, albeit knowledge that is guided by a different human interest than that of the empirical sciences.\textsuperscript{201} In his earlier works,
Habermas believed that the search for the cognitive interest underlying hermeneutical knowledge revealed no standards by which to adjudicate among competing interpretations. In contrast to Gadamer, however, Habermas posits the existence of an emancipatory interest subtending critical knowledge. The process of reflection, through which we discover our cognitive orientations, is itself rooted in a knowledge-constitutive interest. "In self-reflection, knowledge for the sake of knowledge comes to coincide with the interest in autonomy and responsibility. . . . We can say that [reason] obeys an emancipatory cognitive interest, which aims at the pursuit of reflection." By postulating a tripartite structure of human interests, Habermas legitimizes rational critique above and beyond the knowledge generated by either empirical science or social studies. This structure marks a significant break with Gadamer's conception of dual realms of knowledge supported by the unified, ontological condition of existence, and Gadamer participated in a lively debate with Habermas over the legitimacy of rational critique as knowledge. "Gadamer's universalization of hermeneutics rests on a logical argument against the possibility of methodologically transcending the hermeneutical point of view: any attempt to do so is inconsistent with the very conditions of possibility of understanding: the linguisticality and historicity of human existence." It is in the fires of this fundamental debate with Gadamer that Habermas forges his critical theory.

(b) The Theory of Universal Pragmatics. Habermas reformulated his position in a way that directly challenges Gadamer's assumptions. Responding to criticism that the emancipatory interest lacked any discernible normative standards, Habermas took a "linguistic turn." While retaining the emancipatory inquiry, but instead seeks to show that all knowledge—including the "truth" of hermeneutics—is made possible by our openness to meaning.

The methodical spirit of science permeates everywhere. Therefore I did not remotely intend to deny the necessity of methodical work within the human sciences (Geisteswissenschaften). Nor did I propose to revive the ancient dispute on method between the natural and the human sciences. It is hardly a question of a contrast of methods. . . . The difference that confronts us is not in the method, but in the objectives of knowledge. The question I have asked seeks to discover and bring into consciousness something that methodological dispute serves only to conceal and neglect, something that does not so much confine or limit modern science as precede it and make it possible. . . .

... [The following investigation] asks (to put it in Kantian terms): How is understanding possible?

Id. at xvii-xviii (emphasis supplied).

202 R. Bernstein, supra note 201, at 209.

203 J. Habermas, Knowledge and Human Interests, supra note 195, at 197-98 (emphasis in original) (footnote omitted).

204 See generally Hoy, supra note 4, at 153-64 (summarizing the Habermas-Gadamer debate); T. McCarthy, supra note 51, at 415 n.50 (listing sources of written arguments and replies between Gadamer and Habermas).

205 T. McCarthy, supra note 51, at 193.

206 R. Bernstein, supra note 201, at 206.
icipatory interest's distinct status as a cognitive pursuit, Habermas attempted to locate the substantive and normative standards of the emancipatory critique within the practical interest of the historical-hermeneutical sciences.\(^{207}\)

Drawing on the Hegelian and Marxian insight that norms are inextricably bound up with the empirical reality of what is, "Habermas argues that human discourse or speech—even in its systematically distorted forms—both presupposes and anticipates an ideal speech situation in which both the theoretical and practical conditions exist for unrestrained communication and dialogue."\(^{208}\) Because the standards and grounds of rational critique are found in the act of communication, Gadamer's hermeneutical inquiry must be supplemented by a "depth hermeneutic" that is designed to uncover the universal structure of speech and the normative implications of that structure. Habermas characterizes this program of research as a theory of "universal pragmatics."\(^{209}\)

Habermas succinctly states that the "task of universal pragmatics is to identify and reconstruct universal conditions of possible understanding."\(^{210}\) Because he considers "the type of action aimed at reaching understanding to be fundamental,"\(^{211}\) he eschews the epistemological limitations placed on formal linguistic theory by the logical empiricists. These limitations have served only to insulate important linguistic issues from rational investigation.\(^{212}\)

The logical analysis of language . . . delimits its object domain by first abstracting from the pragmatic properties of language . . . . This abstraction of language from the use of language in speech . . . is not sufficient reason for the view that the pragmatic dimension of language from which one abstracts is beyond formal analysis.\(^{213}\)

\(^{207}\) T. McCarthy, supra note 51, at 27. After this "linguistic turn," the foundation of a normative basis of critical theory "was to be recast in communications-theoretic terms." Id.

\(^{208}\) R. Bernstein, supra note 201, at 210 (emphasis in original). "Habermas' argument is, simply, that the goal of critical theory—a form of life free from unnecessary domination in all its forms—is inherent in the notion of truth; it is anticipated in every act of communication." T. McCarthy, supra note 51, at 233.


\(^{210}\) Id. at 1 (footnote omitted).

\(^{211}\) Id.

\(^{212}\) T. McCarthy, supra note 51, at 273-74. Cf. P. Ricoeur, Structure, Word, Event, in The Philosophy of Paul Ricoeur 109 (C. Reagan & D. Stewart eds. 1978). Ricoeur argues that the bifurcation of speech from language—and more generally of action from system—is an intellectual fiction. Ricoeur recognizes the potential of Chomsky's theory of "generative grammar" to correct the structuralist attempt to dissect communication into empirical and non-empirical qualities: Id. at 116-17.

\(^{213}\) J. Habermas, What is Universal Pragmatics?, in Communication and the Evolution of Society, supra note 191, at 5-6 (emphasis in original).
It is epistemologically legitimate to reconstruct the conditions of understanding because universal pragmatics is a project of the emancipatory interest. Whereas logical empiricism limits rationality to what Habermas terms the technical interest, Habermas argues that he can scientifically reconstruct communicative action so as to reveal a normative standard for assessing all interpersonal relationships.

The research program of universal pragmatics is premised on the belief that the conditions of understanding are "general and unavoidable," that all speakers must, at least implicitly, raise certain "universal validity claims" and suppose that either the communicative act itself or subsequent discourse will vindicate those claims.\(^{214}\) Speech acts have a two-tiered structure: at the deep level there are the universal conditions of all understanding, while at the surface the speaker conveys the variable meanings that are understood by the participants. Consequently, the philosopher can adopt two different attitudes toward communicative action. Because Gadamer focuses on the interpretive act of recovering meaning from the text (surface structure), he is content to merely identify our ontological openness (or intuitive capacity). As a result, Gadamer has no way to critically analyze the surface structure of meaning and adjudicate between competing meanings. Habermas, on the other hand, "tries not only to apply this intuitive knowledge but to reconstruct it."\(^{215}\) Though he appreciates Gadamer's contribution to hermeneutics, Habermas wants to distinguish between practical know-how, the ability of an interpreter to understand a text, and know-that, the explicit knowledge of how it is that the interpreter reaches such understanding.\(^{216}\) Hermeneutical know-how is guided by the practical interest in intersubjective (speaker/listener, text/interpreter) understanding, whereas theoretical know-that is guided by the emancipatory interest in removing all obstacles to individual freedom and dignity.

Habermas's goal is to provide an epistemological justification for social

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\(^{214}\) Id. at 2. Habermas uses the term "discourse" to signify the "argumentative speech" that would be used to identify problematic validity claims in any speech situation where the validity claims of the speaker are not accepted. Id. at 2-3. See R. Bernstein, supra note 201, at 212. For a discussion of Habermas's approach to "discourse," see T. McCarthy, supra note 51, at 291-310.

\(^{215}\) J. Habermas, What is Universal Pragmatics?, in Communication and the Evolution of Society, supra note 191, at 12 (emphasis in original). Habermas wants to go behind the meaning of the social situation to a rational critique and demystification of the distorted communicative exchange. T. McCarthy, supra note 51, at 183.

\(^{216}\) J. Habermas, What is Universal Pragmatics?, in Communication and the Evolution of Society, supra note 191, at 12. Universal pragmatics is a research program aimed at uncovering the universal conditions of the pragmatic use of language. "Its goal is not a paraphrase or a translation of an originally unclear meaning, but an explicit knowledge of rules and structures, the mastery of which underlies the competence of a subject to generate meaningful expressions." T. McCarthy, supra note 51, at 277 (footnote omitted).
critique by demonstrating that meaning is revealed on both of these levels. While Gadamer emphasizes the way in which tradition is meaningful for the people who inherit and continue it, Habermas asserts that tradition is also meaningful to the extent that it is subject to critique rather than blind adherence. For example, a cultural tradition of denigrating black citizens may be hermeneutically appropriated by a society to the extent that it is understood from generation to generation, but the deeper meaning offered by the tradition is that the society exhibits a pattern of power and domination.

Critical sociology guards itself against reducing the meaning complexes objectified within social systems to the contents of cultural tradition. Critical of ideology, it asks what lies behind the consensus, presented as a fact, that supports the dominant tradition of the time, and does so with a view to the relations of power surreptitiously incorporated in the symbolic structures of the systems of speech and action.217 Habermas’s radical claim is that universal pragmatics reveals the existence of an intersubjective relationship that anticipates an ideal speech situation, and that this relationship provides a normative ground for philosophical critique.218 Underlying communicative action is the presupposition of an ideal speech situation. “Habermas thinks that such an ideal is presupposed and anticipated in all inquiry—even deformed inquiry—and that it serves as the critical standard for any given inquiry.”219 An interpretation of human rights and the political program that it generates are subject to criticism to the extent that they conflict with the human dignity and interpersonal relationships that Habermas envisions as the ideal speech situation.

With the groundwork laid, it is now possible to sharpen the focus on the central elements of Habermas’s provocative thesis: the substantive character of ideal speech and the scientific status of universal pragmatics. Clearly, if Habermas is able to sustain his thesis against the fundamental objections raised by philosophers such as Gadamer, his work will have important ramifications for legal hermeneutics.

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217 J. Habermas, Theory and Practice, supra note 197, at 11-12.
218 [Universal pragmatics] raises the claim to reconstruct the ability of adult speakers to embed sentences in relations to reality in such a way that they can take on the general pragmatic functions of representation, expression, and establishing legitimate interpersonal relations. This communicative competence is indicated by those accomplishments that hermeneutics stylizes to an art, namely paraphrasing utterances by means of context-similar utterances of the same language or translating them into context-comparable utterances in a foreign language.

J. Habermas, What is Universal Pragmatics?, in Communication and the Evolution of Society, supra note 191, at 32-33. This intersubjective relationship is established even if an interpreter is “actually alone with a book, a document, or a work of art.” Id. at 9.
219 R. Bernstein, supra note 201, at 212 (emphasis in original).
Habermas contends that communicative action\textsuperscript{220} raises precisely four “validity claims” that are universally presupposed: that the utterance is \textit{comprehensible}, that the utterance is \textit{true}, that the speaker is \textit{truthful}, and that the utterance is the \textit{right} one for the situation.\textsuperscript{221} These inescapable validity claims constitute a relationship between the communicants that, although not fully realized in practice, serves as a binding standard for all interaction.\textsuperscript{222} “Ideal speech” refers to the communicative interactions that would ensue if this interpersonal relationship were fully realized; the “ideal speech situation” refers to the mutual respect and attentiveness that allows ideal speech.

To claim that “the design of an ideal speech situation is necessarily implied in the structure of potential speech,” is to claim that every speech act implicitly makes a claim to validity—a claim which can be rationally assessed in ideal speech.

\ldots\textsuperscript{10} Ideal speech is that form of discourse in which there is no other compulsion but the compulsion of argumentation itself; where there is a genuine symmetry among the participants involved, allowing a univer-

\textsuperscript{220} Habermas recognizes that some speech situations, such as when someone is lying in order to manipulate another individual, do not presuppose an ideal speech situation. Habermas would characterize these situations as \textit{strategic action}, or “modes of action that correspond to the utilitarian model of purposive-rational action,” rather than \textit{communicative action} involving validity claims. J. HABERMAS, \textit{What is Universal Pragmatics?}, in \textit{COMMUNICATION AND THE EVOLUTION OF SOCIETY}, \textit{supra} note 191, at 41. This linguistically-mediated strategic action is derivative of communicative action or “action oriented to reaching understanding.” \textit{Id.} at 1. That judges may disregard meaning does not discredit the \textit{fact} of meaning. Similarly, the rejection of communicative action in favor of strategic action does not render insignificant the normative implications of communicative action. \textit{See supra} text at note 187. Habermas’s analysis is confined to those situations in which communicative action is present.

Since I have restricted my examination from the outset to communicative action—that is, action oriented to reaching understanding—a speech act counts as acceptable only if the speaker not merely feigns but sincerely makes a serious offer. A serious offer demands a certain engagement on the part of the speaker. J. HABERMAS, \textit{What is Universal Pragmatics?}, in \textit{COMMUNICATION AND THE EVOLUTION OF SOCIETY}, \textit{supra} note 191, at 59-60.

\textsuperscript{221} \textit{Id.} at 2-3.

\textsuperscript{222} \textit{Id.} at 34-35. “To be understood in a given situation, every utterance must, at least implicitly, establish and bring to expression a certain relation between the speaker and his counterpart.” \textit{Id.} at 34. Habermas goes beyond traditional speech act theory by recognizing not only that the hearer engages in a relationship with the speaker as a result of the illocutionary and perlocutionary aspects of the speech act but also that the speaker’s utterances demonstrate an engagement with the hearer that underlies the acceptability of his utterance. \textit{Id.} at 61.
sal interchangeability of dialogue roles; where no form of domination exists.\textsuperscript{223}

The ideal speech situation is a formal ideal insofar as it is a framework for undistorted communication rather than a substantive theory of what the communicants would come to know in such dialogue. Nevertheless, the theoretical positing of the ideal speech situation does have the practical effect of implicating a substantive social ideal. Consequently, Habermas rejects a sharp distinction between theory and practice. The ideal speech situation presupposes a congenial matrix of institutional and normative realities; ideal speech is possible only in an ideal social structure. It is this “practical turn in Habermas’s grand argument” that injects substance into the regulative ideal of communication without distortion or domination.\textsuperscript{224}

Although critical theorists cannot determine the content of ideal speech, they may critique the social order by testing whether its institutions and norms inhibit the realization of ideal speech. The critical theorists’ task is to demonstrate that a social norm is wrong because it systematically distorts communication between citizens.\textsuperscript{225} Simply put, Habermas argues that intersubjective reasons must replace unacknowledged relations of domination as the foundation for the development of social norms and that this goal is the basis for a philosophically rigorous critique of society.

Having explored Habermas’s conception of the ideal speech situation, it is

\textsuperscript{223} R. Bernstein, supra note 201, at 212 (quoting Habermas, Towards a Theory of Communicative Competence, 13 Inquiry 372 (1970)) (emphasis in original).

\textsuperscript{224} R. Bernstein, supra note 201, at 212. Habermas borrows from Austin’s critique of the “descriptive fallacy” to establish the substantive relationship produced through communication. Austin contends that the premise that language does nothing more than impart meaning by describing things is a fallacy. \textit{See} Austin, \textit{How to Do Things With Words}, in \textit{Readings in the Philosophy of Language} 560, 563 (J. Rosenberg & C. Travis eds. 1971). Habermas rejects the common but mistaken view that “communication processes take place at a single level, namely that of transmitting content (i.e., information).” J. Habermas, What is Universal Pragmatics?, in \textit{Communication and the Evolution of Society}, supra note 191, at 43. Instead, Habermas sets the task of universal pragmatics as “the rational reconstruction of the double structure of speech.” \textit{Id.} at 44. The double structure of speech is expressed by distinguishing between “(1) the level of intersubjectivity on which speaker and hearer, through illocutionary acts, establish the relations that permit them to come to an understanding with one another, and (2) the level of propositional content which is communicated.” \textit{Id.} at 42 (emphasis in original).

\textsuperscript{225} Habermas’s later political writings include: J. Habermas, Legitimation Crisis (T. McCarthy trans. 1975); J. Habermas, Historical Materialism and the Development of Normative Structures, Toward a Reconstruction of Historical Materialism, and Legitimation Problems in the Modern State, in \textit{Communication and the Evolution of Society} 95, 130, 178 (T. McCarthy trans. 1979). See also Lichterman, Social Movements and Legal Elites: Some Notes From the Margin on The Politics of Law: A Progressive Critique, 1984 Wis. L. Rev. 1035 (analyzing Habermas’s writings on political action).
necessary to assess the way in which his theory of universal pragmatics delivers theoretical knowledge about this ideal practical situation. To secure the foundation of his research program against charges of arbitrariness, Habermas adopts a weak Kantian perspective that he guardedly admits could be termed transcendental.\(^{226}\) Noting that the theory of language has not found its Kant,\(^{227}\) Habermas models his approach on Noam Chomsky's attempt to reconstruct the implicit, universal rule-consciousness that is manifested by each individual's ability to employ grammar creatively.\(^{228}\) Universal pragmatics, which investigates the deep structure of communication, cannot be reduced to an empirical-analytic science; its program of looking behind everyday dialogue (empirical surface structure) in order to reconstruct the conditions of meaningful communication has a quasi-transcendental status. "The aim of rational reconstruction is precisely to render explicit, in 'categorical' terms, the structure and elements of such 'practically mastered, pretheoretical' know-how."\(^{229}\) Yet universal pragmatics is clearly intended to participate in the modern break with epistemological rationalism. Reconstructive sciences reject the Kantian categorical distinction between theoretical a priori knowledge and empirical a posteriori knowledge. "On the one hand, the rule consciousness of competent speakers is for them an a priori knowledge; on the other hand, the reconstruction of this knowledge calls for inquiries undertaken with empirical speakers—the linguist procures for himself a knowledge a posteriori."\(^{230}\)

Just as Gadamer argues that hermeneutics imparts knowledge despite its incongruity with empirical methodology, Habermas demonstrates that the task of rational reconstruction is "scientific" despite its differences with empirical-analytic science. "[R]econstructive procedures are not characteristic of sciences that develop nomological hypotheses about domains of observable events; rather, these procedures are characteristic of sciences that systematically reconstruct the intuitive knowledge of competent subjects."\(^{231}\) Distancing himself from the rationalist model of scientific inquiry, Habermas does not propose to remove himself methodologically from the experience of communicative competence in order to seize its essential


\(^{228}\) Id. at 14.

\(^{229}\) T. McCarthy, supra note 51, at 276.


\(^{231}\) J. Habermas, What is Universal Pragmatics?, in Communication and the Evolution of Society, supra note 191, at 9 (emphasis in original).
objectivity. A program of rational reconstruction tacitly accepts that communication is a lived-through, pretheoretical reality that is beyond the ken of a scientific method. This is why a reconstructive effort "can represent pretheoretical knowledge more or less explicitly and adequately, but can never falsify it." Reconstruction requires a rigorous science because the descriptive account must "correspond precisely to the rules that are operatively effective in the object domain—that is, to the rules that actually determine the production of surface structures." When Habermas claims that universal, intersubjective validity claims have a "rational basis" and are therefore "cognitively testable," he invokes a model of scientific inquiry that remains attentive to the prelogical status of communication as a creative activity but that also recognizes the proper role of reason in pursuing the emancipatory interest in self-knowledge.

In Knowledge and Human Interests, Habermas uses Freud's psychology as a model of reconstructive science. Freud's concept of a hermeneutical psychology exemplifies the project of the emancipatory interest because it, "unlike the cultural sciences, aims not at the understanding of symbolic structures in general. Rather the act of understanding to which it leads is self-reflection." Like Marx, however, Freud displays a positivistic misunderstanding of his own insight into the emancipatory interest, and so the "language of the theory is narrower than the language in which the technique was described." Ironically, then, "the structural model denies the origins of its own categories in a process of enlightenment." Thus, to understand the nature of the reconstructive sciences, the practice of psychoanalysis is more relevant than the theory. Psychologists never dominate their patients like a scientist dominates the world of objects, nor do they initiate recovery according to a predetermined logos. Instead, therapists remain open to their patients in order to diagnose their problems properly. Therapists then help patients reconstruct the distorted development of their personalities, so that the patients recover a previously hidden sphere of personal autonomy through self-reflection.

Following Freud, Habermas seeks to ground such reconstructive therapy in a universal dimension of experience. In this way he is able to put forth a reconstruction and critique of false consciousness. Critical theory is legitimizes by the emancipatory interest in self-reflection that lies at the heart of psychoanalytic therapy.

From this perspective, critical social theory can be seen to belong

\[\text{\footnotesize{\textsuperscript{232}}} \textit{Id.} \text{ at } 16.\]
\[\text{\footnotesize{\textsuperscript{233}}} \textit{Id.} \text{ (footnote omitted).}\]
\[\text{\footnotesize{\textsuperscript{234}}} \textit{J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS, supra note 195, at 214-301.}\]
\[\text{\footnotesize{\textsuperscript{235}}} \textit{Id.} \text{ at 228 (emphasis in original).}\]
\[\text{\footnotesize{\textsuperscript{236}}} \textit{Id.} \text{ at 245 (emphasis in original).}\]
\[\text{\footnotesize{\textsuperscript{237}}} \textit{Id.}\]
essentially to the self-formative process on which it reflects. . . . In
unmasking the institutionally anchored distortions of communication
that prevent the organization of human relations on the basis of uncon-
strained intersubjectivity, the subject of critical theory does not take up
a contemplative or scientistic stance above the historical process of
human development. Knowing himself to be involved in this develop-
ment, to be a result of the "history of consciousness in its manifesta-
tions" on which he reflects, he must direct the critique of ideology at
himself. In this way critical theory pursues self-reflection out of an
interest in self-emancipation.\footnote{238}

Even after his "linguistic turn," this model of psychoanalytic therapy re-
 mains central to Habermas's conception of a reconstructive science desig-
nated to promote emancipation.

When psychoanalysis is interpreted as a form of language analysis, its
normative meaning is exhibited in the fact that the structural model of
ego, id, and superego presupposes unconstrained, pathologically undis-
torted communication. In psychoanalytic literature these normative
implications are, of course, usually rendered explicit in connection with
the therapeutic goals of analytic treatment.\footnote{239}

Of course, Habermas recognizes that a theoretical reconstructive science
modeled on Freud's psychoanalytic techniques is in itself insufficient to rid
society of its pathologies. While a theorist may be able to reconstruct the
implicit rule system governing communication, thereby raising an implicit
universal competence to the level of consciousness, "this theoretical knowl-
edge has no practical consequences."\footnote{240} A carefully worked out theory of
universal pragmatics can no more point the way to rational social organi-
sation than a psychological theory can cure a patient. Psychoanalysis is not
just the act of using theory to decode the patient's neuroses; therapists use
their theoretical insights to draw patients into an emancipatory dialogue.
Because therapists have reconstructive knowledge of each patient's situa-
tion that that patient may lack, the psychoanalytic dialogue is not one of
equal participation. Nevertheless, therapists guide patients to recovery by
suggesting a discourse of self-reflection.\footnote{241} Thus, psychoanalysis is really
two distinct projects: the scientific formulation of a theoretical understand-
ing of the patient's problems and the emancipatory application of the theory
through teaching. This framework subtends all of Habermas's writings.

I can apply theories such as psychoanalysis . . . in order to guide
processes of reflection and to dissolve barriers to communication; the

\footnote{238} T. McCarthy, supra note 51, at 88. See J. Thompson, Critical Hermeneu-
tics 83 (1981).

\footnote{239} J. Habermas, Moral Development and Ego Identity, in Communication and
the Evolution of Society 69, 70 (T. McCarthy trans. 1979) (footnote omitted).

\footnote{240} J. Habermas, Theory and Practice, supra note 197, at 23.

\footnote{241} Id. at 23-24.
authenticity of the recipient in his relations with himself and with others is an indicator of the truth of the interpretation which the analyst . . . has suggested. But I can also use this same theory to derive an explanatory hypothesis, without having (or taking) the opportunity of initiating communication with those actually concerned, and thus confirm my interpretation by their processes of reflection.242

Hence, the truth of critique is exhibited in the practical effects it has in aiding emancipation, but the theory is also subject to validation at a theoretical level by scientific reasoning.

Yet Habermas is not so naive as to equate his project with a notion of ultimate truth. Because universal pragmatics is validated only by the emancipatory interest that subtends it, Habermas claims no more than interest-relative truth for his theory. For Habermas, truth is not encountered at the level of constituted reality (the explication of quasi-transcendental categories) but rather is exhibited by the manner in which interest-relative knowledge is redeemed in theoretical discourse.243 Because truth is one of the four validity claims underlying communicative action, the discourse that occurs when the claim to truth is put into issue is itself the realization of truth.

The logic of theoretical discourse is an analysis of the structure and conditions of that form of communication in which (hypothetical) truth claims are argumentatively examined and rejected, revised, or accepted. As such it is a "logic of truth," an examination of how claims about the world can be rationally settled.244

Truth claims cannot be settled by a direct appeal to sense certainty; there is always linguistic mediation wherever there is a "claim." As such, Habermas concludes "that ultimately there can be no separation of the criteria for truth from the criteria for the argumentative settlement of truth claims."245 Truth becomes possible only in the ideal speech situation, where theoretical discourse is structured to permit argumentative justifications of repeatedly reflected truth claims.246

The consensual theory of truth developed by Habermas in connection

242 Id. at 30-31.
243 T. McCarthy, supra note 51, at 293. Even though Habermas connects all forms of knowledge to a set of "deep-seated imperatives" of human existence, this does not negate the unconditional character of truth associated with claims to truth. Hence, although the basic categories and principles through which [any given object] is formed—and thus the fundamental truth claims referring to it, do indeed reflect an underlying cognitive interest, the testing of these claims in argumentative discourse warrants attaching to those that emerge unscathed the honorifics: "true," "objective," "valid," and so forth.

Id. at 293-94.
244 Id. at 299.
245 Id. at 303.
246 Id. at 308.
with his discussion of theoretical discourse has substantive implications. "[N]ot only is an account of theoretical discourse itself a sine qua non of an adequate theory of truth, but it provides important clues to the structure of practical discourse."\(^{247}\) In theoretical discourse, the truth-claim under question is the claim that a theory is a true representation (reconstruction) of the natural or social world. Pragmatic discourse, on the other hand, concerns moral-political norms and the "rightness" and "propriety" of particular actions.\(^{248}\) Yet, because both theoretical and practical discourse share the same pattern of justification and legitimation, Habermas asserts that moral and political disputes, as well as "scientific" issues, "can be decided 'with reason,' through the force of the better argument."\(^{249}\)

In the context of [practical] interaction, challenges to the rightness or appropriateness of a given speech act can be met by indicating the relevant norms, by clarifying misunderstandings in respect to accepted conventions, in short, by providing a justification for one's actions within an established normative framework. If the disturbance persists, if the legitimacy of norms invoked is itself called into question, we are faced with the familiar alternative of breaking off communication, switching over to various forms of strategic interaction, or attempting to continue interaction on a consensual basis by entering into a critical discussion for the purpose of arriving at rational agreement. Adopting this last option involves—as in the case of theoretical discourse—a willingness to put out of play all forces except the force of the better argument and all motives except the cooperative search for the "right" solution. The aim of practical discourse is to come to a rationally motivated agreement about problematic rightness claims, an agreement that is not a product of external or internal constraints on discussion but solely of the weight of evidence and argument.\(^{250}\)

Practical as well as theoretical discourse embodies communicative rationality.

Truth is arrived at in practical discourse through the intersubjective grounding of claims to rightness. The encounter with truth is a dialogical praxis (*phronesis*) rather than the result of a theoretical (*episteme*) or poietic (*techne*) attitude. Putting one's normative claims before the community and into unfettered discourse, rather than masking them with strategies of deceit and domination, is a risk that has no parallel in a monological rationality.\(^{251}\)

\(^{247}\) Id. at 293.

\(^{248}\) Id. at 314.

\(^{249}\) Id. at 311. For a discussion of Habermas's attempt to expand the notion of communicative rationality beyond the cognitive-instrumental realm of theoretical discourse, see R. Roderick, Habermas and the Foundations of Critical Theory 112-23 (1986).

\(^{250}\) T. McCarthy, supra note 51, at 312.

\(^{251}\) A monological rationality is the rationality of theory, where there need be only a single theorist to think through the answers. In contrast, communicative rationality
Therefore, practical discourse is the sole mode for arriving at legitimate social norms.

Practical discourse directed toward political action cannot be reduced to technical control or the technical application of theoretical knowledge, for this distorts human social life and the medium of communicative action. All the lines of Habermas's investigations converge in emphasizing that the most urgent practical problem of our time is to oppose all those intellectual and material tendencies that undermine or suppress practical discourse, and to work toward the achievement of those objective institutions in which such practical discourse can be concretely realized.  

In theoretical discourse, the right answer will emerge when a consensus develops that a particular theory reflects reality. In contrast, practical discourse has no referent. The participants are creating, through their discourse, their normative reality. The only guide is the fulfillment of the standards of communicative rationality that are implied in all communicative actions; within this framework the play of pragmatic discourse follows its own dynamic.

Unlike its propositional or transcendental counterpart, the logic of discourse is a pragmatic logic. It rejects the assumption that argumentation consists in the provision of a sequence of statements which can be formally deduced from one another. On the contrary, it regards an argument as a series of speech-acts, and it fully accepts that "the transition between these pragmatic units of speech can neither be grounded entirely logically ... nor can [they] be grounded empirically."

The relationship of the truth arrived at in theoretical discourse with the truth arrived at in practical discourse has always been a central concern for Habermas. In Theory and Practice, Habermas concedes that the truth of critical theory can be verified only in the successful process of enlightenment, and that means: in the practical discourse of those concerned. Critique renounces the contemplative claims of theories constructed in monologic form, and in addition, discerns that all philosophy up till now, in spite of all its claims, also only presumes to have such a contemplative character.

is a pragmatic rationality that can be developed only through intersubjective dialogue.

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252 R. Bernstein, supra note 201, at 219.
253 T. McCarthy, supra note 51, at 314. Habermas directly challenges Kant's view, asserting that a "rational will is not something that can be certified and secured privatim; it is inextricably bound to communication processes in which a common will is both 'discovered' and 'formed'." Id. at 326-27.
254 J. Thompson, supra note 238, at 88 (quotation omitted).
255 J. Habermas, Theory and Practice, supra note 197, at 2 (footnote omitted).
Developing a critique that explains our social world is altogether different from enlightening others and formulating a strategy for political action. "Decisions for the political struggle cannot at the outset be justified theoretically and then be carried out organizationally. The sole possible justification at this level is consensus, aimed at in practical discourse . . . ." The theory of universal pragmatics, even if it is successfully defended in theoretical discourse as a true reconstruction of communicative action, will never make practical discourse unnecessary or superfluous. Just as the psychoanalyst cannot provide ready-made answers to the patient but can only facilitate a therapeutic dialogue, Habermas recognizes that the theory of universal pragmatics will never provide a blueprint for the perfectly rational society. Critique, never possible from a theoretical perspective, is always the by-product of an unfettered dialogue.

Based on the foregoing discussion, it is possible to summarize the critical theory of Jürgen Habermas. Communicative action is a dynamic interpersonal relationship that girds the surface structure of meaning. These reciprocal bonds have a rational basis; as a consequence, the hermeneuticist's concern with meaning must be supplemented by a reconstructive science. Universal pragmatics reconstructs the validity claims that are implicitly made by every competent speaker and examines the normative implications of those claims for social critique as well as the theoretical implications for truth. The validity claims underlying speech acts presuppose an ideal speech situation, in which every act of communication approximates a condition of equality between the communicants. In ideal speech, no form of socio-political domination (ideology) warps the participants' discussion, speakers are always prepared to justify their claims to validity by unrestrained argumentative discourse.

At the practical level, ideal speech anticipates an ideal life form—the goal of the "good life." At the theoretical level, ideal speech anticipates the attainment of truth through argument resulting in consensus. As a project of the emancipatory interest, universal pragmatics explores this inherent connection between truth and politics without attempting to subject it to an external, reified logic. Universal pragmatics, as a reconstructive science, is not grounded in the technical or practical interests and therefore is not oriented toward the manipulation of nature or the explication of meaning. Rather, Habermas legitimates universal pragmatics as an expression of the emancipatory interest in self-understanding and thus imbues it with a cognitive status equal to that of the natural sciences. The relationship between critical theory and pragmatic issues of social organization is not reducible to the scientism of Marxist-Leninism, but the insights of critical theory do hold substantive significance for practical discourse.

This comprehensive yet intricate philosophical project has clearly established Habermas as one of the most important living political philosophers.

256 Id. at 33.
257 See R. Bernstein, supra note 201, at 210-11.
Disregarding the narrow parochialism that increasingly characterizes academia, his wide-ranging inquiry has captured the imagination of intellectuals concerned about human beings and their place in the world. Consequently, Habermas's work provides assistance in confronting the problems facing Gadamer, justifying the intersubjectivity of knowledge and developing a defensible critique of irrational tradition (prejudices).

Before hurrying to appropriate Habermas into the problematic of legal interpretation, however, it is important to understand the nature and extent of Gadamer's disagreement with Habermas's conception of critical theory. In the following analysis, I will suggest that although Habermas has been overly ambitious in his attempt to locate the foundations for a rational critique, he has succeeded in avoiding the limited and conservative self-understanding that Gadamer's theory engenders. By synthesizing the work of Gadamer, Habermas, and Paul Ricoeur, I will develop at least a tentative model of legal interpretation.

(c) The Gadamer-Habermas Debate. Thomas McCarthy succinctly summarized Gadamer's opposition to critical theory with his statement that, for Gadamer, "[r]eflection is no less historically situated, context-dependent, than other modes of thought. In challenging a cultural heritage one presupposes and continues it."258 In Gadamer's view, the promise held out by the concept of "ideal speech" is illusory if the theorist proposes to adjudicate "objectively" among competing interpretations; because the adjudication is itself an interpretation of the tradition and each of the competing claims, it necessarily suffers from the same infirmities as the interpretations that are being assessed. Put simply, Gadamer doubts "our capacity for openness to a reality which does not correspond to our opinions, our fabrications, our previous expectations."259 Hence, Gadamer deems futile the attempt to step outside of the context of competing interpretations in order to demonstrate that the dialogue is "systematically distorted." Gadamer's philosophical importance lies in his radicalization of the historical trend toward deregionalization in hermeneutics; he moves from a universal (epistemological) perspective to a fundamental (ontological) perspective.260 Habermas agrees with Gadamer's critiques of positivism261 and the pluralist/relativist implications of Wittgenstein's philosophy of language,262 but the core of Habermas's philosophy is the rejection of Gadamer's assertion that ontological

258 T. McCarthy, supra note 51, at 188.
259 H.-G. Gadamer, supra note 5, at 491.
260 P. Ricoeur, Hermeneutics and the Human Sciences, supra note 29, at 44. "The presupposition of hermeneutics construed as epistemology is precisely what Heidegger and Gadamer place in question." Id. at 53.
262 J. Thompson, supra note 238, at 81-82.
reality consists of situated belonging that admits of no critique. In response, Gadamer steadfastly maintains that the truth of his ontological theory requires us to discard our rationalist belief in the possibility of "objective" critique. "Akin in this respect to existentialism (and to some of Marcuse's arguments), [Gadamer's] ontological or anti-Cartesian turn has meant primarily the abandonment of cognitive subjectivity and a focus on evolving life-contexts as experienced by concrete-historical or embodied subjects."

In *Truth and Method*, Gadamer directly criticized the development by Dilthey and Schleiermacher of a universally valid methodology of hermeneutics. Habermas's attempt to decode play and render it cognizable in terms of universal categories is no less subject to this critique. Habermas, however, is sophisticated enough to avoid the methodological model of the empirical-analytic sciences that dominated hermeneutics in the nineteenth century. His program of emancipation is rational, yet it implicates none of the gross objectifications of the natural sciences. His reconstructive science is epistemologically distinct from the natural and human sciences because it does not work to obscure our pretheoretical existence. Whereas natural science empties perceptual experience of its tension and replaces it with an abstract theory of "objective" reality, reconstructive science recognizes the givenness of our pretheoretical life and concedes that radical "openness" cannot be falsified by reason. A reconstructive science can help to liberate

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263 Habermas recognizes the force of Gadamer's argument and readily concedes that empiricism delivers only an abstract account of reality. J. HABERMAS, *Legitimation Problems in the Modern State*, in *COMMUNICATION AND THE EVOLUTION OF SOCIETY*, supra note 225, at 204. While Gadamer's neo-Aristotelean position upholds an "unchangeable core of substantial morality," it does so only to the extent that it is practically mastered and known in "prudent application." *Id.* at 202. Habermas demands a reconstructive approach after rejecting Gadamer's metaphysical argument as "untenable." *Id.* at 204. "[I]f philosophical ethics and political theory can know nothing more than what is anyhow contained in the everyday norm consciousness of different populations, and if it cannot even know this in a different way, it cannot then rationally distinguish legitimate from illegitimate domination." *Id.* at 202. Thus, Habermas eschews the radical situatedness espoused by Gadamer and finds the standards for reason lodged in historically developed communicative competences that always anticipate ideal speech. This is where Habermas errs. Conceding that critical insight is gained only through prudent application does not preclude making a distinction between legitimate and illegitimate prejudices; critical inquiry is made possible only because legitimate prejudices are always already distinguished from illegitimate prejudices in play. See infra notes 300, 310-14 and accompanying text.

264 F. DALLMAYR, *Twilight of Subjectivity*, supra note 185, at 289.

265 H.-G. GADAMER, supra note 5, at 164. See generally *id.* at 162-73 (discussing Schleiermacher's project of a universal hermeneutics); *id.* at 192-214 (discussing Dilthey's inability to overcome the impasses of historicism).
play from external constraints not by looking at play but looking within the playful encounter.

Habermas, however, has failed to recognize that despite their very real differences, reconstructive science and empirical-analytic science are both subordinate to an ontological situatedness. In a recent essay, Habermas addressed the subsequent revolution in the philosophy of science precipitated by scholars such as Thomas Kuhn and Paul Feyerabend.266 He first admits that “[i]n the light of the debate set off by Kuhn and Feyerabend, I see that I did in fact place too much confidence in the empiricist theory of science in Knowledge and Human Interests.”267 Having made this admission, Habermas concedes that the natural sciences are hermeneutically mediated at the theoretical and metatheoretical levels, and thereby recognizes the insight that inspired Gadamer’s ‘‘ontological turn.’’ Still, Habermas is hesitant to surrender the fundamental status of the natural sciences. He undoubtedly understands that if the natural sciences are wholly subordinated to ontological situatedness, then the reconstructive sciences must be subordinated as well. As a result, Habermas argues that a radical attack on the dualism of the natural and human sciences overshoots the mark. Although empirical-analytic sciences are hermeneutically grounded at the level of theory and metatheory, he contends that ‘‘they do not have first to gain access to their object domain through hermeneutical means.’’268

I believe that Habermas is courting an unsatisfactory minimalist empiricist position. Although Habermas’s philosophy of science is not directly relevant to legal hermeneutics, it does provide a concise example of how the pursuit of methodological goals can easily derail even a brilliant philosopher schooled in the hermeneutical tradition of Heidegger and Gadamer. Habermas is correct to point out that perceptual experience is not mediated through other individuals. But Habermas fails to recognize that all experience, even ‘‘pure’’ perception, is situated, historical ‘‘play’’; the hermeneutical act is only one mode of being in which this playful encounter is experienced. In a manner that complements Gadamer’s theory, Maurice Merleau-Ponty argues compellingly that the approach now taken by Habermas is untenable because perception is interpretation.269 Empirical-analytic science is always parasitical on perceptual play, wherein individuals find a world and a world finds them. At the phenomenological level, an encounter with nature is no more determinate than an encounter with a text. In the former instance, methodological abstraction is embodied in the natural sci-

266 Habermas, A Reply to My Critics, in HABERMAS: CRITICAL DEBATES (J. Thompson & D. Held eds. 1982). See also T. McCarthy, supra note 51, at 61 (discussing Habermas’s views of Kuhn and Feyerabend).
267 Habermas, A Reply to My Critics, supra note 266, at 274.
268 Id. This belief is also expressed by Habermas’s bifurcation of ‘‘observation’’ and ‘‘understanding.’’ See J. Habermas, What is Universal Pragmatics?, in COMMUNICATION AND THE EVOLUTION OF SOCIETY, supra note 191, at 9.
269 See supra notes 31, 57.
ences; in the latter, methodological abstraction is embodied in the human sciences. Both kinds of "sciences" are completely derivative of a playful encounter that Gadamer terms an ontological openness. Reconstructive sciences are no less subject to this ontological condition.

Although Habermas has unambiguously rejected empiricism, his attempt to differentiate the "interest" in the natural sciences from that in reconstructive sciences obscures the truly radical critique of classical empiricism: that our relationship with the world is a unified, hermeneutical openness. Habermas ostensibly disavows his empiricist past, but the retention of epistemologically distinct "interests" as the guiding structure of his philosophy indicates his continuing belief in empiricism. As Fred Dallmayr notes, "Habermas' outlook—as portrayed especially in more recent writings—reflects a growing fondness for a quasi-Cartesian or quasi-Kantian (though linguistically revised) rationalism." Habermas's recent concessions to developments in the philosophy of science must be radicalized in order to support more strongly both his own insightful recognition that truth claims can never be settled by a direct appeal to perceptual certainty and his argument for a consensual theory of truth.

Habermas is aware of the problem. In his Reply to My Critics, Habermas states that "[p]ost-empiricist philosophy of science has provided good rea-

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270 Gadamer anchors his discussion of ontological openness in language, arguing that the pretheoretical creativity of communication can never be reduced to a rational construct. Only in passing does he refer to perception as an equally unconstrained "play." See supra note 57. Merleau-Ponty's phenomenology, on the other hand, is centered on the act of perception, particularly on one's visual action with the world. See, e.g., M. MERLEAU-PONTY, Eye and Mind, in THE PRIMACY OF PERCEPTION AND OTHER ESSAYS 159 (J. Edie ed., C. Dallery trans. 1964) (noting that the eye "is that which has been moved by some impact of the world, which it then restores to the visible through the offices of an agile hand") (emphasis omitted). However, he does recognize that language is also a "play": "In trying to describe the phenomenon of speech and the specific act of meaning, we shall have the opportunity to leave behind us, once and for all, the traditional subject/object dichotomy." M. MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION, supra note 1, at 174. Merleau-Ponty and Gadamer explore the same radical notion of an ontological openness to the world, but each focuses on a separate modality (language/speech) in his investigation. Thus, I suggest that a "Merleau-Ponty style" critique of Habermas's conception of the natural sciences is a legitimate reading of Gadamer's ontology.


272 Cf. T. MCCARTHY, supra note 51, at 301-02 (reconciling Habermas's view that claims founded in experience are not necessarily grounded or warranted claims with Popper's statement that "[i]t is only in the course of critical discussion that observation is called in as a witness") (quoting K. POPPER, OBJECTIVE KNOWLEDGE 348 (1974)).
sons for holding that the unsettled ground of rationally motivated agreement among participants in argumentation is our only foundation—in questions of physics no less than in those of morality." 273 The conclusion that theoretical and practical discourse are both forms of communicative rationality is correct only because the "unsettled ground" is the playful interaction of being-in-the-world, which is constitutive of reflection (theory of truth) only because it is constitutive of all experience. This unity of communicative rationality is rooted in ontological openness. Habermas's modes of knowing can be distinguished conceptually as different interests, but such distinctions lack the universal-epistemological significance that Habermas gives them. Habermas's slow-moving relinquishment of his tripartite theory of interests, even after following Gadamer's lead by locating a unified source of meaning and truth in language, may very well reflect an attempt to secure the legitimacy of critical theory by placing it beyond the ontological limits identified by Gadamer. In this respect, Habermas's program is as deficient as all other methodologies of society.

Yet Habermas's philosophy is not rendered unimportant by virtue of this deficiency. Habermas's insights, when viewed methodologically and not universally (in quasi-transcendental terms), comport with Gadamer's ontology.274 Indeed, "the complexity of the debate [between Gadamer and Habermas] derives from the lack of bipolarity, from the intricate mixture of conflict and consensus between the two contestants." 275 Once Habermas's theory is reformulated in accordance with Gadamer's ontological argument, it becomes a necessary and presupposed aspect of Gadamer's philosophy of interpretation. Universal pragmatics is a methodology, but Gadamer's philosophy does not require a rejection of its principles any more than his philosophy requires a rejection of empirical-analytic methodology. All that is required is a more careful attentiveness to the limitations of all methodology. Empirical science is derivative of and wholly subordinated to our ontological condition; reconstructive science is similarly rooted. Habermas recognizes this obvious fact, but it has taken some time to reform his initial unsatisfactory approach.

It is important to rework Habermas's philosophy because Gadamer's preoccupation with combatting the Cartesian and Kantian legacy of rationalism has led him to an overly conservative emphasis on the force of tradition. It is clear, however, that the overbearing theoretical claims of rationalism are not the only problems confronting us. The cultural matrix in which we are situated also affects our phenomenological existence, and the transmission of culture through tradition is neither benign nor always benevolent. The ascendance of science as the sole mode of rationality has denigrated our political nature, but

273 Habermas, A Reply to My Critics, supra note 266, at 238.
274 See contra T. McCarthy, supra note 51, at 191 (arguing that it is Gadamer who must be viewed methodologically).
275 F. Dallmayr, Twilight of Subjectivity, supra note 185, at 284.
Science and technology ... are not the only factors impinging on ordinary life; their impact is matched and perhaps overshadowed by the chronic effects of power and domination. Far from representing a uniform natural ecology, the life-world implies vastly different experiences for people at different levels of the social and political hierarchy. In an age of world-wide social ferment, phenomenology [and ontological hermeneutics] can ill afford to indulge in idyllic portrayals and "picture book" illustrations of the human condition.276

While Gadamer's emphasis on play poses an appropriate challenge to positivist epistemology, an idyllic portrayal of the give-and-take of interpretation would indeed offer little help in our quest to eliminate illegitimate social power structures. Habermas emphasizes the necessity of examining the presuppositions of unfettered play as a normative basis from which to criticize social reality. Clearly, it would be naive for Gadamer to ignore how interpretation is affected by social power structures. Blind acceptance of a traditional horizon subjects readers to irrational prejudices that distort their encounters with meaning. The real issue is not whether ideology is undesirable and subject to critique but rather how far a methodology of critique can go before it oversteps its mandate. When does the eradication of structural ideology cease to be a liberation of an antecedential mode of being (play) and become instead a hopeless attempt to decontextualize the interpreter and to universalize his knowledge?

Habermas attempts to do too much with his methodological investigations. The methodological goal of reconstructive science is to delve deeply into the experience of truth that is approximated in every conversation and in every encounter with a text. This technique is oriented toward the realization of an institutionalized discourse in which the playful practice of communication is not constrained by ideology or social hierarchy but rather is always open to justification by the force of the better argument.277 However, this methodological program is necessarily limited, for the pragmatic justification of truth claims can never be accomplished according to methodological rules. The "better argument" can never be preordained. That is, the pragmatic nature of speech is no different than the pragmatic nature of interpretation. Interpreters are at play with a text because they cannot determine its meaning by the force of their subjectivity. Nor does the text clearly establish its meaning as if it were a static object. Play is indeterminate; no hermeneutical methodology can predict the meaning that will result from play.

Habermas concedes that ideal speech would be a pure praxis beyond the scope of any logic or science. Reconstructive efforts are always hypothetical and provisional because communicative action cannot be seized with theoretical certainty, even by the participants themselves.278 Consequently, any

277 J. HABERMAS, THEORY AND PRACTICE, supra note 197, at 25.
278 Habermas, A Reply to My Critics, supra note 266, at 234.
attempt to extend the rational powers of methodology to the substance of ideal speech is as inappropriate as an attempt to rationally delineate the way in which a text should be interpreted. Such methodological excesses serve only to "short-circuit" the encounter with meaning and obscure the discovery of truth in pragmatic discourse. More importantly, these excessive claims contradict humankind's situated place in history. What appears to be the "final answer" will always be reformulated when society, according to a wordless and pragmatic logic, outstrips the frail power of reason.

In a work on "Reason, Emancipation and Utopia," Albrecht Wellmer criticises the short-circuiting that occurs when one ignores the mediations between the ethic of discourse and the practice of life and thinks one can directly take from this ethic the standards for something like an ideal form of life. . . . With the discourse ethic as a guiding thread, we can indeed develop the formal idea of a society in which all potentially important decision-making processes are linked to institutionalised forms of discursive will-formation. This idea arose under specific historical conditions, together with the idea of bourgeois democracy. But it would be a short-circuit of the type Wellmer criticises to think "that we have thereby also formulated the ideal of a form of life which has become perfectly rational—there can be no such ideal."279

Hence, critical theory cannot posit a timeless ideal but can only expose the ideology at work in a particular historical situation. Although this critique is never exhaustive, it can reveal the existence of restraints on communication whose removal would facilitate a more genuine discourse and provide the basis for a continuing radical critique.280

279 Id. at 261-62 (emphasis in original) (footnotes omitted).
280 The development of economic critique clearly evidences the historical situatedness of critique. In his first book, Habermas links the development of capitalism with the Enlightenment ideal of public discussion. See Editors' Introduction to HABERMAS: CRITICAL DEBATES 4 (J. Thompson & D. Held eds. 1982). Habermas's point is that the tremendous productive potential unleashed by the adoption of free markets powerfully demonstrated that the past was little more than a conservative obstacle to the aspirations of human progress. Free trade engendered a public sphere of discourse that sought to topple the ideological restraints on progressive social organization, namely the ideologies of the ancient regime, of the church, and of hierarchical privilege. In short, Habermas argues that the eighteenth century engendered discursive justification because the validity claims of tradition were not followed blindly, just as economic principles were democratized by reliance upon the mental arbiter of the "invisible hand."

However, the critique engendered by this radical shift in economics was ultimately tied to a certain form of life and therefore itself subject to critique. Marx was the presager of the modern situation. Advanced capitalism, however, no longer operates as a progressive and liberating force. The market forces of supply and demand are possible rules of justice, but the marketplace is not a communicative encounter where this theory of justice is in principle subject to vindication through discourse. The "invisible hand" has assumed the status of technocratic rationality: there is no
We are never in a position to know with absolute certainty that critical enlightenment has been effective—that it has liberated us from the ideologically frozen constraints of the past, and initiated genuine self-reflection. The complexity, strength, and deviousness of the forms of resistance; the inadequacy of mere "intellectual understanding" to effect a radical transformation; the fact that any claim to enlightened understanding may itself be a deeper and subtler form of self-deception—these obstacles can never be completely discounted in our evaluation of the success or failure of critique.\footnote{281}

Habermas's display of a lingering affinity for rationalism despite his acceptance of the historical and pragmatic qualities of communication is evidenced by his celebrated "as if" clause in \textit{Legitimation Crisis}.\footnote{282}

A social theory critical of ideology can, therefore, identify the normative power built into the institutional system of a society only if it . . . compares normative structures existing at a given time with the hypothetical state of a system of norms formed \textit{ceteris paribus}, discursively. Such a counterfactually projected reconstruction . . . can be guided by the question (justified, in my opinion, by considerations from universal pragmatics): how would the members of a social system, at a given stage in the development of productive forces, have collectively and bindingly interpreted their needs (and which norms would they have accepted as justified) if they could and would have decided on organization of social intercourse through discursive will-formation, with adequate knowledge of the limiting conditions and functional imperatives of their society?\footnote{283}

"good" or "bad," only "efficient" or "inefficient." Technocratic rationality \textit{insulates} the logic of the market from discussion and reserves policymaking for an elite body of experts. And only resort to political intervention—manipulation of the not-so-invisible invisible hand—can sustain this technocratic legitimacy in the face of economic crises. Habermas's political writings revolve around an analysis of this transference of economic crises to the political system and the resulting challenge to the legitimacy of the state. \textit{See} J. \textsc{Habermas}, \textit{Legitimation Crisis}, supra note 225, at 24-31; J. \textsc{Habermas}, \textit{Legitimation Problems in the Modern State}, in \textit{Communication and the Evolution of Society}, supra note 225.

The liberating promise of eighteenth-century capitalism has become the stifling dysfunctionalism of the modern welfare state. This dialectic is not peculiar to economics but rather is an unavoidable consequence of our historical nature. The goal is never \textit{the} critique, but only \textit{a} critique. Never will the forces of liberation avoid becoming forces of repression; never will an exhaustive critique reveal a social order that is perfectly rational in itself.

\footnote{281} R. \textsc{Bernstein}, supra note 201, at 218-19.  
\footnote{282} J. \textsc{Habermas}, \textit{Legitimation Crisis} (T. McCarthy trans. 1975).  
\footnote{283} \textit{Id.} at 113. John Thompson expresses Habermas's point perhaps more clearly: "Habermas currently propounds the view that such relations of power may be identified by comparing the prevailing normative structures on the one hand with the hypothetical system of norms which would result from a discursive will formation on the other." J. \textsc{Thompson}, supra note 238, at 95. \textit{See} T. \textsc{McCarthy}, supra note 51, at 332.
This "as if" clause suggests that the critical theorist is capable of penetrating a social system regardless of its stage of development and of delineating the pragmatic discourse that would have occurred if the society were in the ideal speech situation. This bold claim is problematic in two respects. First, it ignores the careful distinctions between theory and practice that Habermas makes elsewhere. Second, it is premised on the belief that it is possible to develop an ahistorical critical theory that may be applied trans culturally.

If the critical theorist can predict the content of hypothetical ideal speech by way of a counterfactually projected reconstruction, a practical discourse need never be entered into because there would be nothing left for the participants to establish. Issues of social and political organization would be settled in theoretical discourse by social theorists, obviating the need for further discussion. Yet Habermas himself precludes this possibility when he states that

the theory that creates consciousness can bring about the conditions under which the systematic distortions of communication are dissolved and a practical discourse can then be conducted; but it does not contain any information which prejudges the future action of those concerned. The psychoanalyst does not have the right, either, to make proposals for prospective action; the patient must draw his own conclusions as far as his actions are concerned.  

To the extent that the political struggle often requires the leadership of an insightful theorist who has penetrated the situation (Lenin is the perfect example), Habermas admits the need for some degree of elitism. Nevertheless, he contends that there is no substitute for practical discourse. "[T]he vindicating superiority of those who do the enlightening over those who are to be enlightened is theoretically unavoidable, but at the same time it is fictive and requires self-correction: in a process of enlightenment there can only be participants."  

In short, it appears that Habermas was carried away by the rationalist tendencies of his own theory when he proposed his "as if" clause. Indeed, Habermas recently recanted his excessive claims for the power of critical theory, stating that "an ideal form of life" can never be deduced from the formal idea of legal speech and that any attempt to bypass practical discourse will result in a "short-circuit."  

Moreover, Rick Roderick interprets

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284 J. Habermas, Theory and Practice, supra note 197, at 38-39.
285 Id. at 40.
286 See supra note 279 and accompanying text. Habermas believes that political inquiry is "short-circuited" when the theorist posits the ideal form of life that would be arrived at through ideal speech, because the "ideal" is always limited by the society's current stage of historical development. This inquiry, however, is also "short-circuited" when the theorist posits an ideal speech situation as a concrete social relation that can be known universally and applied by the all-knowing philosopher to all social systems, regardless of their development. With the adoption of the
Habermas's latest two-volume book, *Theorie des kommunikativen Handelns*, as an explicit break with any attempt to apply substantively the formal idea of ideal speech.

Habermas no longer claims that the ideal speech situation, or any other feature of communicative rationality, directly represents the 'image' or the 'anticipation' of a concrete form of life. The perfectly rational society is an illusion...

Habermas's latest attempt to provide a normative foundation for critical theory rests on the more general concepts of "communicative action" and "communicative rationality":

[Communication rationality represents neither a resurrected transcendental deduction of a utopian critical standard capable of judging concrete forms of life as a whole, nor a telos for a resurrected philosophy of history. Understood formally as a procedural concept, communicative rationality involves an attempt to characterise universal features of communication in their structure and development that remains open to empirical-reconstructive test and refutation.]

Once universal pragmatics is stripped of any substantive implications,

"there remains only the critique of deformations inflicted, in two ways, on the life forms of capitalistically modernized societies, through devaluation of their traditional substance and through subjection to the "as if" clause, Habermas aligns himself with classical Liberalism, despite his Continental roots. Cf. J. Rawls, *A Theory of Justice* 183-92 (1971) (arguing that the political philosopher must adopt an impartial and objective approach to society in order to determine what a just situation would entail). This more subtle short-circuiting can be avoided if Habermas accepts "play" as the universal condition of communication. Play does not reveal an ideal speech situation that can be logically reconstructed like a puzzle before the theorist, but it does give hints that certain social structures are ideological impediments to free play.

A good example of such an impediment is racial prejudice. The give-and-take of dialogue, the playful loss of subjectivity, is thwarted when one participant denigrates the other's human qualities and speaks at him as if he were an object. A critical theorist could legitimately argue, on the basis of his methodological inquiry, that racial segregation and prejudices are removing the communication between members of different races from a playful encounter. This critique has substantive implications—desegregation and equal opportunity laws, for example—but it does not presume to know the structure that pure play would take.

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287 J. Habermas, *Theorie des kommunikativen Handelns* (2 vols. 1981). Volume One has appeared in English translation as J. Habermas, *Reason and the Rationalisation of Society* (T. McCarthy trans. 1984). It is important to remember that while Habermas himself has retreated from his earlier positions, the development of his thought remains informative. See supra text accompanying notes 192-95.


289 Id. at 111-12.
imperatives of a one-sided rationality limited to the cognitive-instrumental.” Habermas attempts to provide a foundation for this more limited conception of critique in his work on communicative action and communicative rationality . . . . 290

Whether this reformulation of his theory has enabled Habermas to sustain his critical inquiry within the limits that he himself recognizes remains to be seen.

Habermas's ill-fated attempt to connect theory and practice more directly with the "as if" clause was the natural result of his refusal to interpret his program methodologically. There is some indication that Habermas is moving toward such an interpretation with the introduction of the concept of "lifeworld" (Lebenswelt) into his theory.291 Reminiscent of Gadamer's idea of ontological situatedness, the lifeworld is a resource for what goes into explicit communication which can become subject to criticism. The lifeworld itself, however, always remains implicit, pre-reflexive and pre-critical. Its characteristics are 'certainty, background character, impossibility of being gone behind.' . . . As the unexceedable context for co-ordinating the three 'worlds' [or characteristics], the lifeworld supports social collectives and cultural groups by providing a resource of meaning and situation definitions that are drawn upon for social reproduction. Thus, for Habermas, the lifeworld is crucial for the reproduction of culture, society and personality in so far as it is the carrier of personal, social and cultural tradition.292

If Habermas were to extend this analysis and eschew his earlier foundationalism, his methodological program would be correctly premised on the ontological condition that underlies it.293 Unfortunately, Habermas has so

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290 Id. at 161 (quoting J. Habermas, Reason and the Rationalisation of Society, supra note 287, at 73-74).
292 Id. (footnote omitted).
293 Thomas McCarthy notes that Habermas is still directed against "hermeneutic idealism" (an unmistakable reference to Gadamer) and that he is intent on carrying out a "methodological objectification" of the lifeworld. McCarthy, Translator's Introduction to Reason and the Rationalisation of Society, supra note 287, at xxiv-xxvii. For Habermas, the lifeworld is an ever-shrinking pre-rational horizon that is increasingly "colonized" by the systems of rationality. The advance of rationality engenders dysfunctional crises, see supra note 225, but the logic of the development of rationally motivated systems provides a basis for, and is itself a proper subject of, critical inquiry. J. Habermas, Reason and the Rationalisation of Society, supra note 287, at 56-74. Critique tries not to liberate the lifeworld from rationalization but rather to demystify the lifeworld through a process of rational will-formation in accordance with communicative rationality. McCarthy, Translator's Introduction, supra, at xxxvii. Habermas's approach raises the question of whether one engaged in critique is privy to a universalist conception of communicative rationality. Habermas disavows this kind of utopian view. J. Habermas, Reason and the Rationalisation of Society, supra note 287, at 56-74. Critique tries not to liberate the lifeworld from rationalization but rather to demystify the lifeworld through a process of rational will-formation in accordance with communicative rationality. McCarthy, Translator's Introduction, supra, at xxxvii. Habermas's approach raises the question of whether one engaged in critique is privy to a universalist conception of communicative rationality. Habermas disavows this kind of utopian view.
far retained his belief in the ahistorical and trans-cultural nature of the
critique. According to Habermas, the ideal speech situation, though approxi-
imated in varying degrees in different cultures, is equally presupposed by all
societies.\(^2\)

Habermas's insistence that the approximation of commu-
nicative rationality has a developmental logic that can be identified and recon-
structed fuels his desire to establish a truly universal foundation for critique.

It is here that Habermas's thought takes a 'Hegelian' turn: reason
does not appear at one blow; it has a history, both in the individual and
in the species . . . . To put it succinctly, Habermas has to show that the
ability to act communicatively (in his strong sense) and to reason argu-
mentatively and reflectively about disputed validity claims is a
developmental-logically advanced stage of species-wide competences,
the realisation and completion of potentialities that are universal to
humankind.\(^2\)

Moreover, Habermas's effort to "reconstruct" Marx's theory of historical
materialism is motivated by his belief that there is a "developmental logic
inherent in cultural traditions and institutional change."\(^2\) The net result of
this theoretical position is the elevation of the powers of the critical theorist
above the context of ontological situatedness.

If the case could be made that the mastery of the ability to reason
arguementatively and reflectively about truth and rightness claims repre-
sents a developmental-logically advanced stage of species-wide cogni-
tive and moral competences, then it seems that the social investigator

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\(^{294}\) T. McCarthy, supra note 51, at 322.

\(^{295}\) McCarthy, Rationality and Relativism, supra note 261, at 65-66. Habermas's
developmental approach preserves the universal applicability of his argument, but he
still maintains that his project is rooted in empirical reality rather than metaphysics.

By exploring communication, universal pragmatics
can locate a gentle but obstinate, a never silent although seldom redeemed claim
to reason, a claim that must be recognized de facto whenever and wherever there
is to be consensual action. If this is idealism, then idealism belongs in a most
natural way to the conditions of reproduction of a species that must preserve its
life through labor and interaction, that is, also by virtue of propositions that can
be true and norms that are in need of justification.

J. Habermas, Historical Materialism and the Development of Normative Struc-
tures, in Communication and the Evolution of Society, supra note 225, at 97
(emphasis in original) (footnotes omitted).

\(^{296}\) Id. at 98 (emphasis in original). Unlike Marx, however, Habermas focuses on
the range of variations that are open to a given level of social organization rather than
the mechanism of development. Id.
would be justified in applying standards of critical rationality in interpreting any system of beliefs and practices.\textsuperscript{297}

Habermas has continued this line of thought in his recent writings. As Roderick points out, Habermas's lingering rationalism results in the same problems of denigrating practical discourse and legitimizing the elitism of the critical theorist.

To the extent that the critical standards of Habermas's theory stand abstractly above [the] context of human social practice, they cannot reclaim the 'practical intentions' which give critical social theory its point. Critical standards which are 'unavoidable' cannot help but impinge on the very freedom and autonomy Habermas wants to defend. In spite of all his precautions, Habermas's 'general and unavoidable' critical standards contain the implicit danger of being imposed upon social actors who do not have the 'competencies' of their leaders. This is a subtle form of the danger faced by all 'scientific' Marxism. A social theory based on a critical appropriation of Marx escapes this danger because internal criticism can only succeed if it clarifies to social actors the meaning of their own critical standards, standards which must unequivocally be in social and historical reality.\textsuperscript{298}

Thus, the dangers posed by the more subtle implication of the "as if" clause are just as serious as those that naturally followed from Habermas's inattentiveness to the incompetence of theory to anticipate practice.

Clearly, Habermas errs to the extent that his theory does not conform to Gadamer's ontological premise. Nevertheless, I believe that it is not only productive but also necessary to recast Habermas's critical theory as a component of legal hermeneutics. Gadamer himself readily points out that the limits of method are not limits to all inquiry: "[W]hat the tool of method does not achieve must—and effectively can—be achieved by a discipline of questioning and research, a discipline that guarantees truth."\textsuperscript{299} If there is a discipline of questioning that seeks the truth of play beyond all hermeneutical methodology, is there not also a discipline that looks within the experience of play in order to provide the kind of life-world (ideal speech situation) in which Gadamer's questioning is more fully realized? Following Paul Ricoeur's analysis, I will show that Gadamer's ontological position necessarily leads to Habermas's critical approach. Once Habermas's theory is revised so that it does not run afoul of ontological situatedness, it is a vital component of the philosophical inquiry into the birth of meaning in communication.

\textsuperscript{297} T. McCarthy, supra note 51, at 321.

\textsuperscript{298} R. Roderick, supra note 249, at 166 (emphasis in original).

\textsuperscript{299} H.-G. Gadamer, supra note 5, at 447.
3. Paul Ricoeur and Critical Hermeneutics

Paul Ricoeur performs a vital function by mediating the Gadamer-Habermas dispute. Ricoeur contends that Gadamer's radical notion of situatedness does not entail an acceptance of ideology as yet another unavoidable prejudice. Instead, Ricoeur argues that even under Gadamer's theory, ideology should be viewed as an inauthentic situatedness in a distorted mode of being. But it is equally clear that Habermas's attempt to identify and expurgate ideology should never be so vain as to aspire to pristine pure interpretations free from any prejudices—and therefore free from an historically situated reader. Gadamer's writings clearly demonstrate that such a program is nothing more than the false hope of the Enlightenment, and Habermas readily acknowledges this limitation. Yet it must be possible for readers to distance themselves from their prejudiced forestructures of meaning in order to come to grips with the effects of ideology that threaten to render them deaf to the multiplicity of meanings offered by a text. Although such distance can never yield a value-free appraisal of one's prejudices, it can open up the requisite space within which to recognize the manifestation of ideology in oneself. Akin to psychoanalysis in this regard, a proper critical inquiry is directed toward facilitating the recognition of ideology—dysfunctional neuroses and psychoses—without purporting to make the individual entirely "objective"—free from the common, everyday neuroses and rationalizations.

As we have seen, Gadamer premises understanding on a deep-seated commonality of text and reader. This shared situation is incorrigible: a
david Fraser's provocative attack on the institutional hierarchy of the American legal system adopts a "seemingly eclectic methodology" that blends the approaches of Gadamer and Habermas. See Fraser, Truth and Hierarchy: Will the Circle be Unbroken?, 33 BUFFALO L. REV. 729, 731 (1984). Fraser notes that his view on the conflict between critical theory and hermeneutics is the same view proposed by Paul Ricoeur, "that the common ground between the two schools is greater than the area of disagreement." Id. at 731 n.4. However, Fraser does not provide an analysis of Ricoeur's mediative efforts, and his argument does not consider Ricoeur's emphasis on textual interpretation. When Fraser deconstructs the Constitution, id. at 750-54, one must question whether he disregards the constitutional text in favor of an inquiry into social and political morality:

Since there is no theoretical construct which will enable us to discover the truth, we must resort to belief.

Rather than worry about discovering truth and meaning in semantic textual analysis aided by historical sources, we must constitute truth and morality in the practice of law—or, better still, in the practice of life.

The canonical text of society is society itself. Id. at 753-54 (emphasis supplied). His position, then, may differ from the themes developed by Ricoeur that I have emphasized in this Article.

See supra notes 234-42 and accompanying text.
The reader is situated by her existence, and an external ideology can never "unsituate" her.

The struggle against methodological distanciation transforms hermeneutics into a critique of critique; it must always push the rock of Sisyphus up again, restore the ontological ground that methodology has eroded away. But at the same time, the critique of critique assumes a thesis which will appear very suspect to "critical" eyes: namely that a consensus already exists, which founds the possibility of aesthetic, historical and lingual relations. To Schleiermacher, who defined hermeneutics as the art of overcoming misunderstanding, Gadamer ripostes: "is it not, in fact, the case that every misunderstanding presupposes a 'deep common accord'?" 302

Ricoeur redesignates Gadamer's notion of consensus as "belonging." 303 Because texts and readers belong to the same tradition, the two are able to meet in a fusion of horizons. It is because readers "belong" that a consensus already exists between them and a text. Their later efforts to come to an understanding of what a text means are derivative of this commonality.

Ricoeur also redesignates Habermas's concept of the emancipatory interest in critique as "alienation." Critical theorists strain at the tethers of everyday existence, seeking to free themselves from their immediate, unreflective situation so as to understand the deficiencies of their social world. Under this view, interpretation is an act of "suspicion" that eliminates the "illusions and lies of consciousness." 304 Tradition is considered a false idol that, though it can never be entirely discarded, must be reformed by a process of never-ending critique. Only through alienation from a defective and ideological tradition can we come to a better understanding of ourselves and our world.

Even if Ricoeur's contention that belonging does not rule out some degree of alienated critique is correct, it remains true that these two conditions are fundamentally opposed. Yet Ricoeur deems this very tension the central hermeneutical experience:

Would it not be appropriate to shift the initial locus of the hermeneutical question, to reformulate the question in such a way that a certain dialectic between the experience of belonging and alienating distanciation becomes the mainspring, the key to the inner life, of hermeneutics? 305

For Ricoeur, hermeneutics is animated by this double motivation:

willingness to suspect, willingness to listen; vow of rigor, vow of obedi-

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302 P. Ricoeur, Hermeneutics and the Human Sciences, supra note 29, at 77.
303 See supra note 66.
305 P. Ricoeur, Hermeneutics and the Human Sciences, supra note 29, at 90.
ence. In our time we have not finished doing away with *idols* and we have barely begun to listen to *symbols*. It may be that this situation, in its apparent distress, is instructive: it may be that extreme iconoclasm belongs to the restoration of meaning.\textsuperscript{306}

Just as the artificial distinction between subject and object must be discarded if the activity of interpretation is to be understood, so too must the falsely conceived antinomy between belonging and alienation be overcome if the hermeneutical act is to be fully explained.\textsuperscript{307} One need not choose sides: the fundamental gesture of philosophy is neither “an avowal of the historical conditions to which all human understanding is subsumed under the reign of finitude,” nor “an act of defiance, a critical gesture, relentlessly repeated and indefinitely turned against ‘false consciousness,’ against the distortions of human communication which conceal the permanent exercise of domination and violence[.]”\textsuperscript{308} Both of these seemingly contradictory motivations animate philosophy; interpretation—of a text, a society, or even of oneself—is itself a dialectic between them. The tension between belonging and alienation is the tension of existence: we are never slaves to the past, nor are we ever freed from its grip.

Ricoeur’s suggestion that play involves a dialectic of belonging and alienating distanciation requires a reexamination of the concept of play. Playful readers neither “discover” the objective meaning of texts nor “invent” wholly subjective interpretations. This model of play serves as an effective critique of objectivist and subjectivist theories of meaning. Interpretation is premised on both the situatedness of the reader and the reader’s alienation from this situatedness.\textsuperscript{309} A playful encounter with the proposed “worlds” of meaning embodied by the text transcends the prejudiced forestructure of meaning that one brings to the hermeneutical situation. In play one experiences alienated distanciation from oneself. This is the true nature of the risk involved in remaining attentive to meaning: one may come to see that one’s prejudiced horizon is flawed, and the play may initiate a profound reordering of one’s habitual prejudices. Ideological prejudices are not identified theoretically, by way of a critical inquiry, but rather are identified through hermeneutical activity itself.

The distanciation inherent in interpretation is sufficient to legitimize the critique of ideology. Because “distanciation is a moment of belonging, the
critique of ideology can be incorporated, as an objective and explanatory segment, in the project of enlarging and restoring communication and self-understanding. There is no reason to universalize or give scientific status to critical inquiry as an epistemological category unto itself. Habermas errs because he seeks to formalize what occurs beyond methodology; he fails to appreciate the subtle potential of justifying critique as a moment of playful belonging. Hermeneutics "can demonstrate the necessity of a critique of ideology, even if, in virtue of the very structure of pre-understanding, this critique can never be total. Critique rests on the moment of distanciation which belongs to the historical connection [or, in Gadamer's words, the play with an effective-history] as such." Habermas justifiably relies on communication as the normative basis for critique, but his goal of developing a universal reconstructive science that will expose all ideology is unfortunate. While such a methodology may be a necessary fiction for constructing a rationally-based political program unilaterally, the truth of critique will arise only from dialogue. Gadamer's general insight holds true for social critique: methodology must give way to intersubjective play. Critique will be genuine and lasting only if it is the experience of critique in dialogue rather than a theoretical and methodological critique worked out by the archetypal lonely philosopher.

In addition to drawing Habermas's independent critique back into the hermeneutical experience, Ricoeur also wants to draw the moment of critique out of Gadamer's emphasis on belonging. Hence, Ricoeur poses a question: "[H]ow is it possible to introduce a critical instance into a consciousness of belonging which is expressly defined by the rejection of distanciation?" As we have seen, Ricoeur overcomes this obstacle by showing that distanciation is essential to play and therefore already presumed by Gadamer.

Ricoeur lays down a formidable challenge to Gadamer's rejection of critique by asserting that it is the intersubjective experience of "play" itself that allows recourse against the situated and historical reality in which the reader is enmeshed. To read is to place one's ego in play. Thus, Gadamer is correct to call reading a "risk." Readers learn and grow as a result of reading because the complex web of prejudices that they bring to a text are left behind when they are at play. Likewise, the text moves beyond its original

310 P. Ricoeur, Hermeneutics and the Human Sciences, supra note 29, at 111.
311 See supra note 263.
312 P. Ricoeur, Hermeneutics and the Human Sciences, supra note 29, at 110 (emphasis in original).
313 See supra text accompanying note 285.
314 P. Ricoeur, Hermeneutics and the Human Sciences, supra note 29, at 61.
315 Id. at 91. See also Chevigny, supra note 4, at 207 (emphasizing that through interpretation, "we start from our own point of view, and try to step outside it").
316 P. Ricoeur, Hermeneutics and the Human Sciences, supra note 29, at 94.
context and meaning, leaving behind its "history" only to be reborn in terms of an effective-history. "In short, the work decontextualises itself, from the sociological as well as the psychological point of view, and is able to recontextualise itself differently in the act of reading." These corresponding transformations of text and reader are central to Gadamer's explication of the concept of play. As such, the foundation for critical theory lies at the core of its opponent's thesis. Reading "is not so much an act of possession as an act of dispossession, in which the self-understanding of the immediate ego is replaced by a self-reflection mediated through the world of the text."

These dispossession or alienation "demands that the appropriation of the proposed worlds offered by the text passes through the disappropriation of the self. The critique of false consciousness can thus become an integral part of hermeneutics, conferring upon the critique of ideology that meta-hermeneutical dimension which Habermas assigns to it." Although Gadamer and John Thompson steadfastly maintain that this line of thinking undermines Gadamer's ontological claim, I will show that Ricoeur has succeeded in demonstrating that Gadamer's aversion to critical theory has been an unwarranted and dogmatic misapplication of Gadamer's own ontological insights. Just as Habermas's original ambitions must be reassessed and reformulated to take into account the insights of ontological hermeneutics, so too must Gadamer's exaggerated claims of the impossibility of critique give way to Ricoeur's more thoughtful analysis.

In Truth and Method, Gadamer recognizes that the possibilities of meaning in a text render some of the reader's prejudices impotent. Gadamer likens [the] process of actualization to Gadamer's "fusion of horizons," in that the appropriation takes place within the common horizon of the reader and that projected by the text. Insofar as "I" follow the sense of the text, I bring my world to bear on the meaning; but insofar as I respond to the appearance of the referent, the linguistic world projected by the text redetermines my own world.

D. KLEMM, THE HERMENEUTICAL THEORY OF PAUL RICOEUR 148-49 (1983). See J. THOMPSON, supra note 238, at 163. Thompson argues that Ricoeur displaces the primordial bond between subject and object which underlies the writings of Heidegger and Gadamer; the primitive hermeneutical phenomenon is no longer belonging as such, but rather the interplay between participatory belonging and alienating distanciation. However, the displacement of the primordial bond undermines the ontological basis for Heidegger's rejection of the quest for foundation, and for Gadamer's dissociation of method and truth. Id. However, the primordial bond that Gadamer stresses is not an ontologically static picture. Rather, despite himself, Gadamer is continually reminding the reader that the ontological condition is one of dynamic playing.

See supra notes 42-43 and accompanying text.
then goes on to demonstrate that it is the set of illegitimate prejudices that is abandoned in play. Of course, the "prejudices and fore-meanings in the mind of the interpreter are not at his free disposal. He is not able to separate in advance the productive prejudices that make understanding possible from the prejudices that hinder understanding and lead to misunderstandings."\textsuperscript{322} The positive force of tradition derives from its status as the living repository of legitimate prejudices that have withstood the test of time. Tradition, however, is far from infallible. Consequently, it is constantly put at risk and tested by each succeeding generation and therefore is always developing. Only temporal distance

lets the true meaning of the object emerge fully. But the discovery of the true meaning of a text or a work of art is never finished; it is in fact an infinite process. Not only are fresh sources of error constantly excluded, so that the true meaning has filtered out of it all kinds of things that obscure it, but there emerge continually new sources of understanding, which reveal unsuspected elements of meaning. The temporal distance which performs the filtering process is not a closed dimension, but is itself undergoing constant movement and extension. And with the negative side of the filtering process brought about by temporal distance there is also the positive side, namely the value it has for understanding. It not only lets those prejudices that are of a particular and limited nature die away, but causes those that bring about genuine understanding to emerge clearly as such.

It is only this temporal distance that can solve the really critical question of hermeneutics, namely of distinguishing the true prejudices, by which we understand, from the false ones by which we misunderstand.\textsuperscript{323}

In this passage, Gadamer fully accepts the implications of his thesis that Ricoeur wants to develop. Gadamer's insistence that meaning is possible only for a historically situated reader does not mean that readers must blindly accept traditional ideology. The truth of tradition can speak through a text only when readers have overcome their illegitimate prejudices. Moreover, the truth of tradition is constantly made current by the interpreter's appropriation of the most valuable world of meaning offered by the text. Thus, the hermeneutical encounter is always already a forum for the separation of legitimate from illegitimate prejudices.

If a person is trying to understand something, he will not be able to rely from the start on his own chance previous ideas, missing as logically and stubbornly as possible the actual meaning of the text until the latter becomes so persistently audible that it breaks through the imagined understanding of it. Rather, a person trying to understand a text is prepared for it to tell him something. That is why a hermeneutically

\textsuperscript{322} H.-G. GADAMER, supra note 5, at 263.
\textsuperscript{323} Id. at 265.
trained mind must be, from the start, sensitive to the text's quality of newness.\textsuperscript{324}

In other words, "interpretation begins with fore-conceptions that are replaced by more suitable ones."\textsuperscript{325} With this statement, Gadamer essentially summarizes Ricoeur's thought. For Gadamer, as well as Ricoeur, [t]he only "objectivity" [in interpretation] is the confirmation of a fore-meaning in its being worked out. The only thing that characterises the arbitrariness of inappropriate fore-meanings is that they come to nothing in the working-out. But understanding achieves its full potentiality only when the fore-meanings that it uses are not arbitrary. Thus it is quite right for the interpreter not to approach the text directly, relying solely on the fore-meaning at once available to him, but rather to examine explicitly the legitimacy, ie [sic] the origin and validity, of the fore-meanings present within him.\textsuperscript{326}

While Gadamer denies that readers can or should consciously and methodologically examine their prejudices, he believes that remaining open to the text in the spirit of play requires readers to examine explicitly the legitimacy of their prejudices.

This unambiguous commitment to critical distanciation in play is made even more explicit in Gadamer's essay entitled "To What Extent Does Language Preform Thought?"\textsuperscript{327} Gadamer wrote this essay to refute Habermas's suggestion that systematically distorted communication, in which "at least one of the participants deceives himself about the fact that the basis of consensual action is only apparently being maintained,"\textsuperscript{328} is a social reality that can and must be corrected through critical theory (or "depth hermeneutics").\textsuperscript{329} Gadamer rejects the notion that linguistic situatedness is a form of domination—that distorted language relations preform thought and are therefore immune to change—because it is linguistic situatedness that makes emancipatory change possible.

The fact that it is in the midst of a linguistic world and through the mediation of an experience pre-formed by language that we grow up in our world, does not remove the possibilities of critique. On the contrary, the possibility of going beyond our conventions and beyond all those experiences that are schematised in advance, opens up before us once we find ourselves, in our conversation with others, faced with opposed thinkers, with new critical problems, with new experiences.

\textsuperscript{324} Id. at 238.
\textsuperscript{325} Id. See supra notes 42-43.
\textsuperscript{326} Id. at 236-37.
\textsuperscript{327} Id. at 491-98 (Supplement II).
\textsuperscript{328} J. Habermas, What is Universal Pragmatics?, in Communication and the Evolution of Society, supra note 191, at 210 n.2.
\textsuperscript{329} See McCarthy, Translator's Introduction to Communication and the Evolution of Society xii-xiii (1979).
Fundamentally in our world the issue is always the same: the verbalisation of conventions and of social norms behind which there are always economic and dominating interests. But our human experience of the world, for which we rely on our faculty of judgment, consists precisely in the possibility of our taking a critical stance with regard to every convention. In reality, we owe this to the linguistic virtuality of our reason and language does not, therefore, present an obstacle to reason.\textsuperscript{330}

For Gadamer, language is neither a trap that ensnares the human race in relations of domination nor the pre-established boundary of what is possible for a given linguistic community. Rather, "language is the single word whose virtuality opens up the infinity of discourse, of discourse with others, and of the freedom of 'speaking oneself' and of 'allowing oneself to be spoken.' "\textsuperscript{331} As was the case with Habermas, Gadamer's later writings are more aware of the real point of critique: it is legitimized in practice even if a theoretical program is unable to define and direct it.

Without Ricoeur's idea of a "critical hermeneutics,"\textsuperscript{332} an idea implicitly accepted in Gadamer's later writings, Gadamer would be unable to make good on his claim that play resolves itself in a non-arbitrary fashion. Without the ontological space for critique, Gadamer's claim that there is a "supreme criterion of the 'right' representation"\textsuperscript{333} would lack substance. The "right representation" is not merely the representation intended by the author—such a "cannonisation of a particular interpretation"\textsuperscript{334} is impossible as well as undesirable. As such, we must look for the criterion of the right representation in the ever-changing give-and-take of play. Appeals to this hermeneutical criterion are made whenever the validity of an interpretation is challenged. Arguments for a "better" interpretation represent critical insights into the possibilities of meaning that best comport with the case at hand and the natural unfolding of the text's effective history into the present. "[W]hile

\textsuperscript{330} H.-G. GADAMER, supra note 5, at 495-96.

\textsuperscript{331} Id. at 498. See also P. RICOEUR, HERMENEUTICS AND THE HUMAN SCIENCES, supra note 29, at 97 (emphasis in original):

The task of the hermeneutics of tradition is to remind the critique of ideology that man can project his emancipation and anticipate an unlimited and unconstrained communication only on the basis of the creative reinterpretation of cultural heritage. . . . Distortions can be criticised only in the name of a consensus which we cannot anticipate merely emptily, in the manner of a regulative idea, unless that idea is exemplified; and one of the very places of exemplification of the ideal of communication is precisely our capacity to overcome cultural distance in the interpretation of works received from the past. He who is unable to reinterpret his past may also be incapable of projecting concretely his interest in emancipation.

\textsuperscript{332} See P. RICOEUR, HERMENEUTICS AND THE HUMAN SCIENCES, supra note 29, at 87.

\textsuperscript{333} See supra quotation accompanying note 36.

\textsuperscript{334} See supra quotation accompanying note 36.
a text may allow of several interpretations, it does not follow that all of these interpretations are of equal status; and the elimination of inferior interpretations is not an empirical matter of verification and proof, but a rational process of argumentation and debate.  

But how do we evaluate and choose between competing interpretations? Having established the possibility of critique without sacrificing the ontological foundation of hermeneutics, how do we decide which critiques are correct? If there is to be a practice that ensures that a judge reaches the right decision, it will require a new perspective on legal hermeneutics. In the next section, I focus on the question of how we can determine which interpretation of a given legal text is the "right" one.

4. Toward a New Model of Legal Interpretation

The right interpretation can tentatively be identified as the interpretation that allows the text to be most fully realized in the present situation. If two readers come to different conclusions about the meaning of the text, their discussion about which interpretation is better is really a discussion about which interpretation freely allows the text to become what it is. Unfettered play with a text requires alienation from one's situation and a corresponding appropriation of the effective-history of the text. It is an act of coming to an understanding about the text and about oneself. Hermeneutical appropriation discards some of the "worlds" of meaning proposed by the text as well as some of the prejudices held by the reader. In interpretation both the reader and the text become recontextualized in reference to the demands of the case at hand: it is just as impossible for the reader to secure his prejudices against change as it is for the text always to offer the same meaning. The metaphor of play is a powerful one. Interpretation is not of the reader or of the text but rather is between a reader who comes to a new understanding and a text that becomes current.

Ricoeur reformulates Habermas's critical theory to emphasize that the play of interpretation is never a blind recovery of tradition. Judges cannot decide cases by simply recovering "the answer" from the past, for pure recovery is impossible without a reader who is ahistorical and emptied of all prejudices. Instead, judges critically appropriate the legal tradition; suspicious of prejudices that are no longer useful in interpreting the text, they seek to allow the text to speak to the legitimate prejudices of the present. Even Gadamer admits that "[u]nderstanding certainly does not mean merely the assimilation of traditional opinion or the acknowledgment of what tradition has made sacred." Thus, it would be a mistake to reduce Gadamer's hermeneutics to the conservative recovery of tradition, and Ricoeur's focus on the experiences of belonging and alienation corrects Gadamer's one-sidedness.

335 See J. Thompson, supra note 238, at 53.
336 H.-G. Gadamer, supra note 5, at xxv.
Having thus synthesized the work of Gadamer and Ricoeur, it becomes easy to understand *Plessy* and *Brown*. *Plessy* demonstrates the force of “belonging” to the tradition. The Court did not attempt to recover the framers’ intent but only to make a practical judgment that reanimated the traditional jurisprudence of the equal protection clause. Justice Harlan’s dissent revealed his suspicion that the recovery of tradition was no longer appropriate and suggested a better way to hear what the Constitution was saying. In *Brown*, the Court decided that Harlan’s dissent in *Plessy* was not merely a different interpretation of the Constitution but a better one. *Plessy* and the tradition it embodied were no longer worthy of being recovered. The Constitution itself refused to let its readers make it conform to traditional prejudices: the pull of the text was able to alienate the Justices from their rooted belonging, thereby bringing them to a new understanding. Gadamer’s argument against the idea of one timeless interpretation supports the idea that *Plessy* is not wrong in any objective ahistorical sense. But Gadamer’s argument does not lead to the nihilist position that *Plessy* and *Brown* are equally valid interpretations for the modern reader. It is all too clear to a modern reader that the *Plessy* Court was deaf to the promise of legal equality contained in the equal protection clause. If *Plessy* were decided today, it would be wrong; whether the *Plessy* rationale was wrong in 1896 or would be wrong in 2096 is beyond our competence to decide.\(^{337}\)

The text wields great power in interpretation. From a modern perspective, the transition from *Plessy* to *Brown* is the result of a growing attentiveness to what the promise of equal treatment under the law entails. In effect, the Court slowly came to see what the Constitution meant. From this example, one may infer that the power of the text to alienate the reader from his situation is superior to the rooted sense of belonging that the reader brings to the hermeneutical experience. Interpretation is never frozen in time because the text continually challenges readers to re-examine their traditional prejudices and to come to a new understanding by way of the text. The text holds meaning only for situated readers, but the text continually asserts the power to bring readers to a new situation. It is no accident that great literature never loses a sense of “newness” even after several readings. Indeed, something is considered great literature for this very reason: the text, which never ceases to alienate readers before its meaning is appropriated back to their situation, draws readers to a different experience each time they read the text.

This theory of interpretation is rather unexceptional, for it conforms to the intuition that meaning is somehow “in” the text more than it is “in” the reader. Currently, the sophisticated and intellectualized challenge of subjectivism has disputed this intuition, but the nature of the hermeneutical act is still evident when one speaks about finding new meaning “in” a text or coming to see what the “text really means.” Of course, the reader does not

\(^{337}\) *See supra* note 102.
passively receive the unambiguous meaning contained in the text. Rather, the text is the focal point of interpretation only to the extent that it determines the possibilities open to a situated reader's playful encounter with it.

Although the text and the reader have the same ontological status, neither being subservient to the other, the text nevertheless exerts the greater influence on the resolution of meaning. The power of the text is the source of learning. We are constantly drawn out and projected into the "world" of the text; our situation is redefined through the act of reading.

In the final analysis, Ricoeur holds that of the two aspects involved, the pull of the world projected by the text is dominant over the role of the subject who runs ahead in staking out the contours of that world. For Ricoeur, "it is not the reader who primarily projects himself," but rather the projective power of the texts that can enlarge the reader "in his capacity of self-projection by receiving a new mode of being from the text itself." The primacy of the act of the emergent meaning over the reader's projection is a theme in Gadamer's hermeneutic as well as that of Ricoeur, and it is the trait that confers the specifically "event" [Geschehen] nature upon appropriation. Something comes into language that has been said and assimilated in the tradition, and the reader "suffers" the act of the Sache [saying] itself. Appropriation is an event because of the passivity involved in it.338

Of course, appropriation is only relatively passive. Because the text belongs to the reader's tradition, the reader's sense of belonging is understated and largely presumed in the form of pre-understanding (consensus). What is truly gripping about the hermeneutical act is the alienating power of the text to draw a subject beyond the realm of subjectivity.

A valid model of legal hermeneutics must take the preeminent status of the text into account. The central feature of such a model, therefore, is the attitude of listening. Listening is an attitude in a negative sense rather than a positive sense. It is not a methodological program for extracting meaning from the text but rather a willingness to lower one's defenses and to meet the text in play. The text is recontextualized to one's situation only if one is willing to listen, to put all of one's prejudices in play with the text and to follow the possibilities of meaning. Readers must abandon their attempts to avoid play in favor of putting their ideology at risk by allowing the hermeneutical act to occur.

The further condition of being reached by the tradition in such a way that something new is concretized by the event of appropriation requires that the reader be capable of what Gadamer calls Hören, an ability to listen and to be negative to his or her immediate and surface experience. The reader must be able to disengage his preconceptions by

338 D. Klemm, supra note 319, at 149 (footnotes omitted). Cf. Perry, supra note 90, at 565 ("The disagreement is not whether texts constrain interpretation, but how and to what extent.") (emphasis in original).
allowing the ontological world to open. The event of appropriation happens only if the text is permitted to speak into the openness of the reader's linguistic world.\footnote{D. Klemm, supra note 319, at 149.}

The central issue for legal scholars must be: "Are the judges listening to the text?"

Critical theory is necessary to resolve this issue. Put simply, critical theory is the formalized attempt to expose the ideologies that prevent the reader from listening to the text. This goal of demystification is modest: critical theory can neither establish what the text means nor stand outside the hermeneutical situation as an external critique based upon an ahistorical logic. Rather, the alienating feature of interpretation allows the critical theorist to discard the false ideology of subjectivism and to expose the prejudices that hinder rather than facilitate interpretation. Ricoeur's insight that critical theory, including Habermas's universal pragmatics, must be drawn back into the hermeneutical act is the key to understanding how critique is possible. While the critical theorist's task—to demystify tradition—is ostensibly destructive, it always presupposes the affirmation of interpretation. In a fascinating essay on religious hermeneutics entitled The Language of Faith, Ricoeur points out that critical theory is always premised on restoring the reader's capacity to listen.

I believe that the goal—which I can only catch a glimpse of—is to attain a point where we will understand that there is a profound unity between destroying and interpreting. I think that any modern hermeneutics is a hermeneutics with a double edge and a double function. It is an effort to struggle against idols, and, consequently, it is destructive. It is a critique of ideologies in the sense of Marx; it is a critique of all flights and evasions into otherworlds in the sense of Nietzsche; a struggle against childhood fables and against securing illusions in the sense of psychoanalysis. In this sense, any hermeneutics must be disalienating, aimed at disalienation, at demystification. Long ago this was the task of second Isaiah when he tied the preaching of Yahweh to the fight against the Baals, and consequently joined iconoclasm to preaching.

But we understand better that this task of destruction pertains also to the act of listening, which is finally the positive aspect of hermeneutics. What we wish is to hear through this destruction a more original and primal word, that is, to let speak a language which though addressed to us we no longer hear, which though spoken to us we can no longer speak. It is this access to interpretation which is the driving force of hermeneutics.\footnote{P. Ricoeur, The Language of Faith, in The Philosophy of Paul Ricoeur 223-38, 234-35 (C. Reagan & D. Stewart eds. 1978) (emphasis in original).}

The suspicions of critique must never become the despair of nihilism. Critique implies the positive attitude of listening to the text, freed from the distorting effects of ideology.
The scope of hermeneutics and critical theory is not confined to issues of legal interpretation, nor even to issues of textual interpretation. As Ricoeur states, if "we succeed in understanding that the entirety of human existence is a text to be read, we will be at the threshold of that general hermeneutics, by means of which I have tried to define the task of the next philosophy."\(^{341}\) The expansive theories of Gadamer, Habermas, and Ricoeur are not only important guides for understanding legal hermeneutics; they also underscore the foolishness of attempting to parochialize legal hermeneutics. A new model of legal hermeneutics must not only borrow from the latest developments in hermeneutics and critical theory but also break down the barriers that set legal hermeneutics apart from other hermeneutical concerns. Recognizing this, scholars are beginning to study the fundamental similarities of literary and legal hermeneutics. A new model of legal interpretation must radicalize this initiative by confronting the issues that are common to all hermeneutical disciplines.

The new model of legal interpretation that I am suggesting may perhaps become clearer if I provide a working example. For this purpose, I will return to the Supreme Court opinions in *Gregg v. Georgia.*\(^{342}\) In *Gregg,* the Supreme Court faced the hermeneutical issue of whether the "cruel and unusual punishment" clause of the eighth amendment prohibits the execution of a duly convicted murderer under Georgia's death penalty statute.\(^{343}\) The Georgia statute was written to conform to the decision in *Furman v. Georgia,*\(^{344}\) which invalidated Georgia's previous death penalty statute because of the law's serious procedural defects but did not reach the issue of whether the death penalty itself is unconstitutional.\(^{345}\) The *Gregg* Court squarely confronted this emotional and politically divisive issue, and the Justices reached profoundly different conclusions as to the meaning of cruel and unusual punishment.\(^{346}\) In contrast to the easy and therefore unanimous decision in *Brown,* *Gregg* exemplifies how even sharply opposed textual interpretations may all be premised on the nature of the hermeneutical act.

Justice Stewart's plurality opinion\(^{347}\) clearly presents the interpretive

\(^{341}\) *Id.* at 236.


\(^{343}\) *Gregg,* 428 U.S. at 162. The cruel and unusual punishment clause of the eighth amendment is applicable to the states through the due process clause of the fourteenth amendment and is therefore a basis for invalidating state statutes. *See, e.g.*, Robinson v. California, 370 U.S. 660 (1962) (holding that a California statute criminalizing the status of being addicted to narcotics constitutes cruel and unusual punishment in violation of the eighth amendment).

\(^{344}\) 408 U.S. 238 (1972) (per curiam).

\(^{345}\) *See Gregg,* 428 U.S. at 169.

\(^{346}\) The Court's inability to arrive at a majority opinion echoed its per curiam decision in *Furman,* in which each Justice wrote a separate opinion. The nine opinions totaled 243 pages. Eight of these Justices were also members of the *Gregg* Court, Justice Douglas having been replaced by Justice Stevens.

\(^{347}\) *Gregg,* 428 U.S. at 158-207.
framework that all of the Justices agreed was applicable. A detailed examination of Justice Stewart’s opinion reveals that his approach to the specific problem of interpreting the cruel and unusual punishment clause completely and explicitly conforms to the model of ontological legal hermeneutics. Justice Stewart dutifully inquired into the history of the clause’s adoption and the manner in which the clause had been applied in preceding cases. Yet this attention to tradition and the effective-history of the text did not represent any reliance on originalist methodology; Justice Stewart accepted that history alone could not determine the clause’s meaning. Pointing out that the amendment’s framers were primarily interested in “proscribing ‘tortures’ and other ‘barbarous’ methods of punishment,” Justice Stewart recognized that because modern conceptions of what constitutes torture or barbarity are not confined to those that were prevalent in the eighteenth century, historical research is an insufficient basis for decision. Thus, Justice Stewart argued that the Supreme Court had consistently applied the cruel and unusual punishment clause to the particular cases before it with reference to contemporary values. For Justice Stewart, those cases indicated that the substantive meaning of cruel and unusual punishment derives from contemporary standards of decency as well as from the inherent dignity of human life.

It is clear from the . . . precedents that the Eighth Amendment has not been regarded as a static concept . . . . Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment . . . this assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.

But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with “the dignity of man,” which is “the basic concept underlying the Eighth Amendment.”

In accordance with these standards, Justice Stewart tested the constitutionality of the death penalty by asking whether the death penalty is either “an unnecessary and wanton infliction of pain” or a penalty “grossly out of proportion to the severity of the crime.”

Justice Stewart’s opinion reflects the decision of the Court that the death penalty is not inherently cruel and unusual. In reaching this decision, the Court emphasized that the wisdom or desirability of the death penalty as a
matter of public policy was not an issue—the Court was empowered to
decide only whether the death penalty could pass constitutional muster. In
accordance with this limitation, the Court held that the imposition of the
death penalty against petitioner Gregg was constitutional because the newly
drafted Georgia statute eradicated the procedural problems of a jury having
untrammeled discretion and of the death penalty being “wantonly and
freakishly imposed.”

Gregg is an excellent working example of a new model of legal hermeneu-
tics because the framework established by the plurality decision opened up
the case for a realistic discussion of meaning. Justices Brennan and Marshall
filed impassioned dissents arguing that the death penalty is inherently cruel
and unusual. Yet neither the members of the plurality nor the dissenters
cloaked their interpretations in meaningless battles of string citations or
inquiries into the intention of the framers. Instead, the competing opinions
represent an unfettered discourse in which everything is put aside except
arguments for a better interpretation. Gregg v. Georgia is therefore instruc-
tive; by following the arguments made for and against the constitutionality
of the death penalty, an operative model of legal hermeneutics is established by
example.

Gregg established two criteria for determining what constitutes cruel and
unusual punishment: the contemporary standards of decency and the inher-ent dignity of the person. Justice Stewart first considered the argument
that under contemporary standards of decency any state execution would be
cruel and unusual. In Furman, Justices Brennan and Marshall had accepted
the petitioner’s argument “that standards of decency had evolved to the
point where capital punishment no longer could be tolerated.” Justice
Stewart, however, points out in Gregg that the evidence of public attitudes
towards the death penalty in the years subsequent to Furman indicated that
capital punishment was not an affront to contemporary standards of de-
cency. “The petitioners in the capital cases before the Court today renew
the ‘standards of decency’ argument, but developments during the four
years since Furman have undercut substantially the assumptions upon
which their argument rested.” Thirty-five states as well as Congress had
responded to Furman by enacting procedurally-cured death penalty statutes,
and the voters of California had “adopted a constitutional amendment that
authorized capital punishment, in effect negating a prior ruling by the Su-
preme Court of California.” Justice Stewart emphasized that these objective
indicia of standards of decency were the only basis for principled
constitutional decisionmaking: an assessment of contemporary values "does not call for a subjective judgment."\textsuperscript{361}

In dissent, Justice Marshall stated that reliance upon legislative action alone did not undercut the position he adopted in \textit{Furman} and contended that standards of decency are not reflected accurately when particular attitudes are based on misunderstandings and misinformation. Marshall thus framed the issue in \textit{Furman}: "In other words, the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available."\textsuperscript{362} Justice Marshall urged the Court to decide \textit{Gregg} on the basis of what an \textit{informed} citizenry would regard as "shocking, just, and unacceptable" punishment, rather than on the basis of the enactment of new death penalty statutes.\textsuperscript{363}

The Court's debate about what standards of decency require is reminiscent of Habermas's unsuccessful attempt to develop his "as if" critical inquiry. While Justice Marshall admits that the enactment of new death penalty statutes does have "a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people,"\textsuperscript{364} he argues that the Court should base its decision on the public sentiment that would exist if all the facts about the death penalty were fully understood. In short, he proposes to regard society \textit{as if} it were in a condition of perfect information exchange and only then to reconstruct the standards of decency as they bear on the legitimacy of capital punishment. Justice Stewart sought to avoid the elitism implicit in Justice Marshall's position by referring to the public discussion that had actually taken place. Wary of presuming to know what the public really believed about the legitimacy of the death penalty, Justice Blackmun dissented in \textit{Furman}. Although he agreed that standards of decency do evolve, he expressed concern about "the suddenness of the Court's perception of progress in the human attitude since decisions of only a short while ago."\textsuperscript{365}

\textsuperscript{361} \textit{Id.} at 173.
\textsuperscript{362} \textit{Furman}, 408 U.S. at 362 (Marshall, J., concurring).
\textsuperscript{363} \textit{Gregg}, 428 U.S. at 232 (Marshall, J., dissenting). In \textit{Furman}, Justice Marshall concluded that assuming "knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand." \textit{Furman}, 408 U.S. at 369 (Marshall, J., concurring) (footnote omitted). Marshall agreed with the idea "that judges are not free to strike down penalties that they find personally offensive," but he could not accept "that the American people have been so hardened, so embittered that they want to take the life of one who performs even the basest criminal act knowing that the execution is nothing more than bloodlust. This has not been my experience with any fellow citizens." \textit{Id.} at 370 n.163 (Marshall, J., concurring).
\textsuperscript{364} \textit{Gregg}, 428 U.S. at 232 (Marshall, J., dissenting).
\textsuperscript{365} \textit{Furman}, 408 U.S. at 410 (Blackmun, J., dissenting) (emphasis supplied).
Even Justice Marshall’s strongest supporter, Justice Brennan, conceded in *Furman* that community standards of decency must be determined as objectively as possible. Justice Brennan did not attempt to supplant the expressed preferences of the public; instead, he adopted a far more subtle critical inquiry that avoided the practical and epistemological pitfalls of Justice Marshall’s ideal of an “informed citizenry.” Justice Brennan argued in *Furman* that despite the widespread acceptance of capital punishment in the abstract form of enabling legislation, juries have in practice refused to implement the penalty with any regularity, demonstrating a disdain for the sanction.

When an unusually severe punishment is authorized for wide-scale application but not, because of society’s refusal, inflicted save in a few instances, the inference is compelling that there is a deep-seated reluctance to inflict it. Indeed, the likelihood is great that the punishment is tolerated only because of its disuse. The objective indicator of society’s view of an unusually severe punishment is what society does with it, and today society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute.

Justice Brennan approached the issue with a credible, critical perspective that investigates the deep structure of public attitudes toward capital punishment. Justice Stewart could defend the holding of *Gregg* only by arguing that the hesitancy of jurors to impose the death penalty demonstrated the sober and calculated decisionmaking that is encouraged by constitutional considerations.

The second criterion of cruel and unusual punishment, whether the punishment denigrates human dignity, provoked an equally pointed debate. Justice Stewart contended that there must be some legitimate reason for executing criminals rather than imprisoning them if the death penalty is not to violate human dignity. That is, “the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.” Justice Stewart offered several reasons for his conclusion that the death penalty is justifiable. The death penalty is not disproportionate to the crime of murder because, as Justice Stewart noted, it “is an extreme sanction, suitable to the most extreme of crimes.” Moreover, the plurality could not say that the Georgia legislature’s faith in the death penalty as a more efficient deterrent than alternative means of punishment was clearly wrong.

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366 Id. at 277 (Brennan, J., concurring).
367 Id. at 295-99 (Brennan, J., concurring).
368 Id. at 300 (Brennan, J., concurring).
369 *Gregg*, 428 U.S. at 182.
370 Id. at 183 (citation omitted).
371 Id. at 187.
Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.\textsuperscript{372}

Finally, Justice Stewart articulated a retributive justification for capital punishment, arguing that retribution is not "a forbidden objective nor one inconsistent with our respect for the dignity of men."\textsuperscript{373} Accordingly, the execution of murderers is a legitimate "expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."\textsuperscript{374}

In dissent, Justice Marshall found the retributive justification especially troubling. He asserted that retribution does not require death as a punishment—moral outrage is voiced just as effectively by confining convicted murderers to prison for the remainder of their lives.\textsuperscript{375} Justice Marshall concluded that the retributive theory is ultimately based upon the belief that society's judgment that the murderer "deserves" death must be respected not simply because the preservation of order requires it, but because it is appropriate that society make the judgment and carry it out. It is this . . . notion, in particular, that I consider to be fundamentally at odds with the Eighth Amendment.\textsuperscript{376}

For Justice Marshall, "the taking of life 'because the wrongdoer deserves it' surely must fall, for such a punishment has as its very basis the total denial of the wrongdoer's dignity and worth."\textsuperscript{377}

Justice Brennan's dissent, which summarizes his detailed analysis in \textit{Furman}, augments Justice Marshall's belief that the death penalty violates human dignity.

This court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether, when individuals condemned to death stand before our Bar, "moral concepts" require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society. My opinion in \textit{Furman v. Georgia} concluded that our civilization and the law had progressed to this point and that therefore the punishment of death, for whatever crime and under all circumstances, is "cruel and unusual" in violation of the Eighth and Fourteenth Amendments of the Constitution. I shall not again canvass the reasons that led to that

\begin{footnotesize}
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\item[372] \textit{Id.} at 186-87.
\item[373] \textit{Id.} at 183.
\item[374] \textit{Id.} at 184 (footnote omitted).
\item[375] \textit{Id.} at 237-40 (Marshall, J., dissenting).
\item[376] \textit{Id.} at 240 (Marshall, J., dissenting).
\item[377] \textit{Id.} at 240-41 (Marshall, J., dissenting) (footnote omitted).
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conclusion. I emphasize only that foremost among the "moral concepts" recognized in our cases and inherent in the Clause is the primary moral principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings—a punishment must not be so severe as to be degrading to human dignity. A judicial determination whether the punishment of death comports with human dignity is therefore not only permitted but compelled by the Clause.\footnote{Id. at 229-30 (Brennan, J., dissenting) (footnote and citation omitted).}

Justice Brennan's opinion in \textit{Furman} attempted to set out the "principles recognized in our cases and inherent in the Clause" which could guide a judicial determination of the meaning of the words "cruel and unusual."\footnote{\textit{Furman}, 408 U.S. at 270 (Brennan, J., concurring).} Focusing on whether capital punishment degrades the dignity of human beings, Brennan contended that the death penalty treats "members of the human race as nonhumans, as objects to be toyed with and discarded."\footnote{Id. at 272-73 (Brennan, J., concurring).} As such, he concluded that capital punishment is "inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity."\footnote{Id. (Brennan, J., concurring).} Capital punishment amounts to a state-sanctioned, premeditated infliction of psychological trauma and eventually severe—even if brief—physical pain and therefore violently offends the dignity and worth of the convicted murderer.\footnote{Id. at 284-89 (Brennan, J., concurring).}

Justice Brennan isolated three additional principles that contribute to the determination of whether a punishment comports with human dignity. First, he argued that "the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments," and contended that the enlightened restraint demonstrated by juries deciding whether to apply the death penalty implicitly demonstrated a reaction against such arbitrariness.\footnote{Id. at 272 (Brennan, J., concurring).} Moreover, while the punishment cannot violate the standards of decency held by contemporary society, the death penalty has increasingly been rejected or limited in modern times because of its moral repugnance. "What was once a common punishment has become, in the context of a continuing moral debate, increasingly rare. The evolution of this punishment evidences, not that it is an inevitable part of the American scene, but that it has proved progressively more troublesome to the national conscience."\footnote{Id. at 293 (Brennan, J., concurring).} Finally, the principle that excessive punishment constitutes cruel and unusual punishment is particularly important when the penalty in

\footnote{Id. at 299 (Brennan, J., concurring).}
question is ultimate and irreversible. Because the death penalty is unnecessary to deter criminals or exact retribution, "it is nothing more than the pointless infliction of suffering." Justice Brennan concluded that although the death penalty may not be so obnoxious to a single principle underlying the concept of human dignity as to render it unconstitutional, analysis of the way in which all of the principles implicated by the state’s decision to execute convicted murderers bear on the death penalty is sufficient to decide that capital punishment is by definition cruel and unusual.

Regardless of whether one believes that the death penalty is unconstitutional and that the result reached in Gregg is wrong, the eighty-eight page Gregg decision is a tribute to the type of discussion that hermeneutical differences should encourage. The Justices moved beyond the safe harbor of legal formalism and put their pre-understanding at risk before the alienating force of the cruel and unusual punishment clause. An opponent of the death penalty can take comfort from the knowledge that nothing stands between the evolving standards of decency and the meaning of the Constitutional text. If the clause truly means that capital punishment is unconstitutional, the decisionmaking framework of Gregg will eventually result in a recognition of this fact. Similarly, a supporter of the constitutionality of the death penalty is assured that no judicial sleight of hand will limit the states’ power to impose capital punishment. If the clause truly means that capital punishment is permissible, the decisionmaking framework of Gregg will ensure compliance with this meaning. The "how" and "why" of my faith in the power of the text is difficult to explain in precise terms. I can only say that the Justices have not shunned the unavoidable playful encounter with the eighth amendment but instead have openly embraced play by trying to articulate their appropriation of words on a page into the context of a practical decision. What is ultimately important is not which opinion in Gregg will control in future cases but rather the implicit invitation extended by each of the Justices: "Let’s talk again, I’m willing to listen."

CONCLUSION

When all is said and done, and this Article has been carefully thought out and written, are we any closer to understanding how legal texts convey meaning than we are when we experience the meaning of a legal text? The theoretical arguments of this Article pale before the unthinking, intuitive response: "Of course the equal protection clause means that states cannot force their citizens to remain racially segregated." This verbalization of our intuition is closer to the precognitive play than any of the theoretical approaches to Brown v. Board of Education that have been formulated in the past thirty years. The truth of this interpretation is not arrived at by applying a formula or logical rule. The truth of Brown is validated by the existential recognition that occurs when we read the case. To be a participating member

385 Id. at 279, 300-05 (Brennan, J., concurring).
386 Id. at 281-82 (Brennan, J., concurring).

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of the American social and legal culture is to react to *Brown* and its promise of legal equality in a certain way. As Merleau-Ponty concluded, "In short we experience a *participation in the world*, and ‘being-in-truth’ is indistinguishable from being-in-the-world."\(^{387}\)

Aleksandr Solzhenitsyn brilliantly captured this situation in his masterpiece *The First Circle*.\(^{388}\) The protagonist in the story, a mathematician named Nerzhin, is a prisoner in the Soviet gulag. Because of his intellectual abilities, Nerzhin is sent to a research facility staffed solely by prisoners rather than to a Siberian labor camp. Nerzhin is a true intellectual. Even in the face of his terrible predicament he still ponders highly theoretical questions: who is to say that the Soviet method of social control is not the right way, and what are the criteria for such a judgment? Is it really possible to judge his jailors as evil men, or might he be mistaken about the nature of evil?

Nerzhin goes to see his friend Spiridon, an illiterate janitor at the prison, to discuss these matters. Spiridon’s life has been unusually harsh. Caught between the Nazi forces and the Russian troops during the war, half-blinded by rotgut, his entire family sent to the labor camps, and his health deteriorating rapidly, Spiridon is the quintessential victim of modernity. And yet, the intellectual issues of modern times do not trouble this uneducated farmer. "Not one of the eternal questions about the validity of our sensory perceptions and the inadequacy of our knowledge of our inner lives tormented Spiridon. He knew unshakably what he saw, heard, smelled, and understood."\(^{389}\) Nevertheless, Nerzhin is convinced that Spiridon, as a representative of the "common people," will confirm Nerzhin’s growing skepticism about whether there is any standard by which to judge the meaning of life.

Spiridon’s response to Nerzhin strikes home with the force of a truth that cannot be realized through any theory. Thus, it is fitting to conclude this Article by reproducing that response here.

"I mean, if a person can’t always be sure that he is right then how can he act? Is it conceivable that any human being on earth can really tell who is right and who is wrong? Who can be sure about that?"

"Well, I can tell you!" Spiridon, alight with sudden understanding, replied readily, as if he had been asked which officer would have the morning duty. "I’ll tell you: the wolfhound is right and the cannibal is wrong!"

"What? What?" Nerzhin said, struck by the simplicity and force of the answer.

"That’s how it is," Spiridon repeated with harsh conviction, turning directly toward Nerzhin and breathing hotly into his face: "The wolfhound is right and the cannibal is wrong."\(^{390}\)

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\(^{387}\) M. MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION, *supra* note 1, at 395 (emphasis in original).


\(^{389}\) Id. at 460.

\(^{390}\) Id. at 466.