The New Metaphysics: The Interpretive Turn in Jurisprudence

Stephen M. Feldman, University of Wyoming

Available at: https://works.bepress.com/stephen_m_feldman/31/
The New Metaphysics: The Interpretive Turn in Jurisprudence

Stephen M. Feldman*

At least since Cartesian times, a debate between realists and antirealists has characterized western metaphysics. While metaphysical realists ground existence on an objective world, antirealists ground existence on a thinking subject and human culture. The realist-antirealist debate thus reflects the Cartesian opposition between a thinking subject and an external, mechanistic world of objects. This fundamental Cartesian dichotomy of subject and object supports other well-worn, characteristic dichotomies of western thought, such as fact versus value, mind versus body, and free will versus determinism. In jurisprudence, the subject-object dichotomy starkly manifests itself in the tension between, on the one hand, the Langdellian claim that a judge discovers and applies objective legal rules to reach the correct judicial result, and, on the other hand, the American legal realist claim that a judge is largely unconstrained and decides cases based on intuitive

*Associate Professor, University of Tulsa College of Law. I thank Bill Eskridge, Mark Tushnet, Tom Arnold, Linda Lacey, and Laura Feldman for their helpful comments on earlier drafts.

2. See T. Nagel, The View From Nowhere 90-99 (1986); Moore, The Interpretive Turn in Modern Theory: A Turn for the Worse?, 41 Stan. L. Rev. 871, 872 (1989) [hereinafter Moore, Turn for the Worse]. This Article uses the term “realist” to refer to philosophical realism. Philosophical realism is in stark constrast to realist jurisprudence, which has much more in common with “antirealism.”
4. See R. Bernstein, supra note 1, at 17; F. Copleston, supra note 3, at 8-12, 20-23, 55-56.
5. Langdell writes:

Law, considered as a science, consists of certain principles or doctrines . . . . Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases . . . . But the cases which are useful and necessary for this purpose [of study to master the doctrines of the law] at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless, and worse than useless, for any purpose of systematic study. Moreover, the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.

hunches. Although almost nobody today categorically admits to being either a Langdellian or a legal realist, these opposed positions echo in modern legal debates. In constitutional law, for example, the question is whether we accept the strict constructionism of Robert Bork or the irrationalism of some critical legal scholars.

The argument in jurisprudence, as elsewhere, is that either we are capable of objective knowledge or we are doomed to free-floating subjectivism. We demand the impossible—absolute objectivity—to avoid the catastrophic—unconstrained subjectivity. The interpretive turn attempts to move beyond this insoluble dilemma, the either/or of objectivity and subjectivity. Thus, in jurisprudence, the interpretive turn is well worth taking if only because it offers the possibility of transcending realism and antirealism.

Professor Michael S. Moore, however, recently has called into question the jurisprudential worth of the interpretive turn. In his article, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, Moore argues that the defining characteristic of interpretivism is a rejection of all metaphysics. Thus, according to Moore, interpretivism renders all metaphysical debate irrelevant to modern jurisprudence, including debate between realists and antirealists. Moore’s purpose is to rescue the realism-antirealism controversy from the interpretivist trash heap. Moore is an avowed realist, but insists that his aim in this article is not to defend realism. Rather, it is to defend the significance of the debate between realists and antirealists. Insofar as interpretivists reject the importance of this debate, they turn jurisprudence, according to Moore, in an ill-chosen direction.

To develop his argument, Moore states that he needs to “wander far from legal theory to get at the interpretivist views themselves, not their

---


9. See R. Bernstein, supra note 1, at 1-7; cf. Feldman, Republican Revival/Interpretive Turn, 1992 Wis. L. Rev. ____ (forthcoming) [hereinafter Feldman, Republican Revival/Interpretive Turn] (uses interpretivism to avoid this dilemma in constitutional law).

10. Moore, Turn for the Worse, supra note 2.

11. Id. at 873 n.5, 890-91.


13. Moore, Turn for the Worse, supra note 2, at 889-90.
applications to legal theory. [He does] this because legal theory has been a borrower here, and it is best to go back to the philosophical positions it has borrowed from." Consequently, Moore analyzes the thought of interpretivists such as Richard Rorty, Stanley Fish, Martin Heidegger, Hans-Georg Gadamer, and Ronald Dworkin. After analyzing these philosophers, Moore concludes by rejecting the interpretive turn because, in his opinion, it rejects all metaphysics, including realism and antirealism.

My purpose in this Article is to argue that Moore misreads the philosophical hermeneutics of Heidegger and Gadamer, which provide the foundation for an entire school of hermeneutical thought. I agree with Moore that the metaphysical debate underlying the interpretive turn in jurisprudence is of essential importance and must be discussed. As Moore suggests, metaphysics "influences the theory and practice of law and even determines what sort of activity thinking about law can be." I further agree with Moore that the metaphysical debate is best approached through the interpretivist philosophers themselves, not through legal theorists. Whereas Moore, however, seeks to rescue the realist-antirealist metaphysical debate from the interpretivist trash heap, I seek to rescue hermeneutics from Moore's realist trash heap. Indeed, if Moore's reading of the interpretivist philosophers is correct, the interpretive turn would be a dead end, thus a turn not worth taking. We would forever be locked in the throes of the realist-antirealist struggle, with hollow echoes of Langdell and legal realism sounding in the legal academy.

The thrust of this Article is that philosophical hermeneutics does not reject all metaphysics, but instead rejects the traditional subject-object metaphysics of Cartesianism. In Moore's terminology, it rejects the metaphysical debate between realists and antirealists. Although Moore correctly characterizes some interpretivists—such as those practicing pragmatic hermeneutics, including Rorty and Fish—as rejecting all metaphysical positions and not solely traditional subject-object metaphysics, Heidegger and Gadamer develop a radically different position. Their philosophical

14. Id. at 892.
15. Stanley Fish, by profession, is not technically a philosopher. He is currently a professor of English and Law at Duke University, but his writing is philosophical in nature. See, e.g., S. Fish, Doing What Comes Naturally (1989). Richard Rorty recently left a position in Princeton's philosophy department to become a professor of Humanities at the University of Virginia. See Hutchinson, Book Review, 103 Harv. L. Rev. 555, 556 n.8 (1989).
16. Moore, Turn for the Worse, supra note 2, at 889.
17. On the distinction of pragmatic hermeneutics from philosophical hermeneutics, see R. Bernstein, What is the Difference that Makes a Difference? Gadamer, Habermas, and Rorty, in Philosophical Profiles 80-83 (1986). Most interpretivists, including Rorty and Fish, agree that interpretivism takes us beyond the traditional metaphysics of the subject-object dichotomy. See, e.g., Fish, Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases, in Interpretive Social Science—A Reader 243-85 (P. Rabinow & W. Sullivan eds. 1979). A premise of this Article is that interpretivists disagree on whether interpretivism takes us beyond the traditional metaphysics of the subject-object dichotomy to a new metaphysics or to no metaphysics at all. For examples of pragmatic hermeneutics and the rejection of all metaphysics, see R. Rorty, supra note 1; Fish, With the Compliments of the Author: Reflections on Austin and Derrida, 8 Critical Inquiry 693, 710 (1982); Fish, Dennis Martinez
hermeneutics is founded upon a new metaphysics, one that grounds being in understanding. In other words, Heidegger and Gadamer reject the traditional metaphysical debate between realists and antirealists without rejecting all metaphysics. Specifically because they reject the traditional metaphysical debate and offer instead a metaphysics that goes beyond the subject-object dichotomy, philosophical hermeneutics is able to bypass the traditional paradoxes—including jurisprudential paradoxes—that have riddled western thought since the time of Descartes.  

Part I of this Article briefly traces Moore’s rejection of the interpretive turn, focusing on his analysis of Heidegger’s and Gadamer’s philosophical hermeneutics. Although this Article is intended to be far more than a critique of Moore’s position—indeed, it is intended to be a defense of the interpretive turn from its metaphysical foundation—Moore provides an excellent springboard for this argument because he crystallizes the underlying metaphysical issues. Part II explores the new metaphysics that supports the interpretive turn in jurisprudence. The best way to understand philosophical hermeneutics and its metaphysics is to trace its historical development. Thus, Part II begins with a discussion of Husserl’s transcendental phenomenology, continues with the transition to Heidegger’s existential phenomenology and incipient philosophical hermeneutics, and concludes with the movement to Gadamer’s fully developed philosophical hermeneutics. Part III examines how philosophical hermeneutics can transform discussions of interpretation in constitutional jurisprudence. Philosophical hermeneutics repudiates the claim that constitutional interpretation is either, on the one hand, objectively right or wrong, or, on the other hand, arbitrary, relative, or subjective. Instead, according to philosophical hermeneutics, constitutional interpretation is an ontological event in which the meaning of the Constitution comes into being.  

I. Moore’s Rejection of the Interpretive Turn

Moore’s aim is to rescue the metaphysical debate between realists and antirealists. To understand his argument, we must begin with his definition of metaphysics. Moore offers the following broad definition: “a metaphysical theory [is] (1) an ontology, that is, a theory of what there is . . . , (2) a theory of truth, (3) a theory of logic, (4) a theory about the meaning of sentences, and (5) a theory about the meaning of the words used in
sentences." Moore clarifies this definition when he adds: "I take [metaphysics] principally to be the study of ontology, of what exists (and secondarily a study of the corollaries of ontological commitment, namely, what must also be said about truth, logic, meaning, and reference). Thus, the focus of metaphysics, according to Moore, is ontology, the study of what exists.

Since Moore's definition of metaphysics is essentially ontological, his division of the world into metaphysical realists and antirealists is unsurprising, as it reflects the existence of the traditional Cartesian subject and object. According to Moore, realists—focusing on the object—"emphasize the world's independence from our concepts and language," while antirealists—focusing on the subject—"deny that the 'furniture of the universe' exists in any way independent of us." To elaborate his definition of realism, Moore identifies three stages or levels of metaphysical realism in law. At the first stage, a metaphysical realist believes in moral and scientific realism: moral and natural kinds exist. This first stage is the core of realism. Moore gives the example of death: "[A] realist theory asserts that 'death' refers to a natural kind of event that occurs in the world and that it is not arbitrary that we possess some symbol to name this thing." In other words, there is actually some thing in the world, independent of our minds and cultures, that is death. As Moore adds, "We will guide our usage [of the

25. Moore, Turn for the Worse, supra note 2, at 874-75.
26. Id. at 874 n.6.
27. The other aspects of metaphysics, according to Moore, are the theories of truth, logic, meaning, and reference that flow from one's initial ontological commitment. Id. at 874-75. Moore argues that his definition of metaphysics is controversial. Id. at 874 n.6. Any definition of metaphysics is controversial, however, insofar as there is more than one definition. Antony Flew writes:

A central element in Western philosophy from the Greeks onwards, 'metaphysics' has meant many different things. It can be an attempt to characterize existence or reality as a whole, instead of, as in the various natural sciences, particular parts or aspects thereof. Materialism and idealism, Spinoza's monism and Leibniz's monadology, are examples of metaphysics in this sense. It can also be an attempt to explore the realm of the suprasensible, beyond the world of experience; to establish indubitable first principles as a foundation for all other knowledge; to examine critically what more limited studies simply take for granted.

A. Flew, A Dictionary of Philosophy 212-13 (2d ed. 1979). Thus, while Moore's definition of metaphysics is not uncontroversial, it also is not uncommon. For example, Richard Taylor's most succinct definition of metaphysics—thinking about "the most basic problems of existence"—has an unmistakable ontological ring. R. Taylor, Metaphysics 2 (2d ed. 1974). Moore cites Taylor's definition as being inconsistent with his own. Moore, Turn for the Worse, supra note 2, at 874 n.6. A similar definition with an ontological ring is the following: "Metaphysics is the branch of philosophy that is concerned with trying to discern the fundamental nature of reality as it really is, as opposed to as it appears to be." J. Shaffer, Reality, Knowledge, and Value 5 (1971).

28. Moore, Turn for the Worse, supra note 2, at 872.
29. Id. Moore acknowledges, however, that many people are sometimes realist and sometimes antirealist. Id. at 881.
30. Id. at 881-88.
31. Id. at 882-83.
32. Moore, Natural Law, supra note 12, at 294.
word death] not by some set of conventions we have agreed upon as to when someone will be said to be dead; rather, we will seek to apply 'dead' only to people who are really dead . . . ."33 Similarly, a realist would argue, for instance, that temperature exists regardless of the existence of thermometers to identify the temperature34 and that squares exist regardless of their appearances to us.35 Natural kinds exist regardless of whether or how we perceive or describe them. While these examples focus on natural kinds, Moore argues that the same is true of moral kinds. Thus, for example, terms such as "culpability" and "good faith" refer to real things that exist in the world. As Moore states, "it is reality, not convention, that fixes the meaning of terms like 'intend,' 'cause,' or 'culpability.'"36

At the second stage, a metaphysical realist in law believes the legal system contains certain concepts or kinds that truly exist, although they are not natural or moral kinds.37 An example of a legal kind is malice. Moore argues that there is a right answer to the legal question, "What is malice?" That right answer is based on the nature of malice and not on mere "conventional definitions or exemplars."38 The essence of a legal kind is, according to Moore, its functions. For example, just as we can define "stomach" by its functions within the human body,39 we can define malice by its functions within the legal system—to differentiate "between killings deserving the most serious punishment (murder) and killings deserving significantly less punishment (manslaughter)."40 At the third stage, the realist believes that law itself is a functional kind and that general jurisprudence studies its nature.41 At this level, the realist focuses on the nature of law in general, regardless of culture or community.

A prototypical example of a metaphysical realist in law is Langdell. Langdell argues that law is a science composed of a small number of indubitable, axiomatic, and high-level principles as well as more numerous, concrete, certain, and low-level rules. These legal principles and rules are conceptually ordered in a logically coherent and pyramidal framework whereby all low-level rules can be deduced from the high-level principles. Most important, judges never make law: judges discover the principles and rules, which always govern every case that arises. According to Langdell, legal principles and rules really exist, waiting to be discovered. A judge who reasons logically, who discovers the proper principle or rule, and who

33. Id.
34. T. Nagel, supra note 2, at 109.
35. Id. at 101.
36. Moore, Turn for the Worse, supra note 2, at 883.
37. Id. at 884-86.
39. Moore, Turn for the Worse, supra note 2, at 885.
40. Id. Moore adds, "[T]he nature of malice is: whatever makes one properly liable for the punishment fixed for murder." Id. at 886.
41. Id. at 886-87.
dispassionately applies it inevitably reaches the correct result.\textsuperscript{42}

An antirealist is, of course, one who rejects the tenets of realism. For example, an antirealist might argue that temperature does not exist unless a person perceives it or measures it with a thermometer. Moore divides antirealists into two groups: skeptics and idealists. Skeptics "deny the existence of some class of entities . . . ."\textsuperscript{43} In law, the metaphysical skeptic claims that statutes, precedents, and the Constitution are indeterminate; the judge finds "what he wants in them."\textsuperscript{44} A prototypical example of a metaphysical skeptic is Joseph Hutcheson, a member of the inopportune named American legal realist movement. Hutcheson argues that a judge—and Hutcheson himself was a federal judge—decides each case by brooding over the dispute until experiencing an intuitive spark, thus suddenly seeing the result. At that point, the judge turns to legal rules and principles and attempts to construct a post hoc rationalization of the already-chosen result. According to Hutcheson, a judge constantly makes law because legal rules and principles are indeterminate and do not causally determine judicial outcomes.\textsuperscript{45}

Unlike skeptics, idealists—the second group of antirealists—"grant the existence of . . . entities but deny their independence from our minds or conventions."\textsuperscript{46} According to Moore, one form of idealism, namely conventionalism, attracts attorneys. Under conventionalism, the existence of entities depends on social conventions; thus, Moore argues, "social convention does the work for the conventionalist that convention-independent reality does for the realist."\textsuperscript{47} A prototypical example of a conventionalist is H.L.A. Hart. Hart argues that a legal text has a core of clear meaning where its applications are determined by conventions. Hart continues, however, by adding that sometimes the conventions "run out" so that the meaning and hence the application of the legal text is unclear. Indeed, in this "penumbral" area around the core of clear meaning, there is no single right answer or correct interpretation of the legal text.\textsuperscript{48} To Moore, a distinct advantage of realism over conventionalism is that reality, unlike social conventions, never "runs out." According to the realist, a right answer

\textsuperscript{42} See C. Langdell, supra note 5, at viii-ix; see also Grey, supra note 5 (discussing Langdell's classical orthodoxy); supra note 5 (quoting Langdell).
\textsuperscript{43} Moore, Turn for the Worse, supra note 2, at 880.
\textsuperscript{44} Id. at 888.
\textsuperscript{45} Hutcheson writes:
[A]fter canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.
Hutcheson, supra note 6, at 278; see J. Frank, supra note 6; Cohen, supra note 6.
\textsuperscript{46} Moore, Turn for the Worse, supra note 2, at 880.
\textsuperscript{47} Id. at 881. Because conventionalism parallels realism, except that conventions substitute for reality, Moore analyzes conventionalism with the same three stages or levels that he uses to analyze realism. See id. at 888; supra notes 30-41 and accompanying text.
\textsuperscript{48} H. Hart, The Concept of Law 120-32 (1961); see Moore, Turn for the Worse, supra note 2, at 887-88.
always exists.49

After painstakingly defining realism and antirealism, Moore characterizes interpretivism as rejecting all metaphysics, including the debate between realists and antirealists. Because Moore obviously believes the realist-antirealist metaphysical debate is of paramount importance for jurisprudence, his purpose is immediately evident: to insistently attack interpretivism until he can proclaim its death, before interpretivism can itself proclaim "the death of all metaphysics."50

To facilitate his attack, Moore divides interpretivists into three groups: very ambitious, merely ambitious, and modest.51 Very ambitious interpretivists, such as Fish52 and Rorty,53 claim that "all knowledge is interpretive in character—physics as much as sociology."54 Merely ambitious interpretivists, such as Owen Fiss55 and James Boyd White,56 are dualistic: they claim that knowledge in the humanities and the social sciences is interpretive, but that knowledge in the natural sciences is not.57 Finally, modest interpretivists, such as Dworkin,58 argue that interpretation is a "method appropriate to certain specific activities, such as understanding a dream, a novel, or a statute; [but] it is not a method appropriate to all knowledge, to all knowledge in the human sciences, nor even to all the activities carried on in a discipline."59

This Article focuses on Moore's treatment of the philosophical hermeneutics of Heidegger and Gadamer.60 Moore categorizes philosophical hermeneutics as "merely ambitious," that is, as dualistic interpretivism. While Heidegger and Gadamer might themselves be willing to accept this characterization of philosophical hermeneutics, it is contestable. For example, many have noted the parallels between Gadamer's position and Thomas Kuhn's hermeneutics of the natural sciences.61 In any event,

49. See Moore, Natural Law, supra note 12.
50. Moore, Turn for the Worse, supra note 2, at 890.
51. Id. at 890-92.
52. See, e.g., S. Fish, Doing What Comes Naturally (1989).
53. See, e.g., R. Rorty, supra note 1.
54. Moore, Turn for the Worse, supra note 2, at 891.
55. See, e.g., Fiss, Conventionalism, 58 S. Cal. L. Rev. 177 (1985); Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739 (1982).
57. Moore, Turn for the Worse, supra note 2, at 891.
59. Moore, Turn for the Worse, supra note 2, at 891.
60. Id. at 923-27.
Moore's categorization of philosophical hermeneutics as dualistic is much less important than Moore's analysis—or lack of analysis—of the metaphysics of philosophical hermeneutics. Indeed, what is most surprising about Moore's discussion of philosophical hermeneutics is its brevity—a brevity that belies the significance of Heidegger and Gadamer in the field of hermeneutics.62

Moore begins his brief discussion by asserting that philosophical hermeneutics "radically rejects all metaphysical positions . . . ."63 According to Moore, Heidegger wants to leave behind any debate about individual things or beings, their qualities, and their relations, and instead wants to focus on the "being of beings," also called "Being."64 In Heidegger's words, he wants to focus on the ontological, not the ontic.65

Moore, at this point, insightfully observes that "[t]his seems to be an extraordinarily metaphysical ("Metaphysical?") way to write off all metaphysics."66 Yet, Moore immediately and expressly bypasses this insight, claiming that Heideggerians would "undoubtedly" reject it.67 Thus, even though the thrust of Moore's attack on interpretivism is that it rejects all metaphysics, Moore fails to consider the possibility that while Heidegger may indeed reject traditional (realist-antirealist) metaphysics, he does not necessarily reject all metaphysics. Moore declines to pursue Heidegger at exactly the point where Heidegger may be responding to Moore's attack—the point where Heidegger may suggest a radically different approach to metaphysics.

Instead of exploring Heidegger further, Moore turns abruptly to Gadamer and his brand of philosophical hermeneutics.68 As Moore emphasizes, Gadamer argues that all understanding "is built on our own prejudices, or prejudices."69 Prejudice, according to Gadamer, is not something that distorts understanding; rather, it is what makes understanding possible. If one did not approach a text with certain prejudices, one could not even try to interpret that text. Moore briefly acknowledges Gadamer's argument that we must distinguish legitimate prejudices from arbitrary ones.70 Instead of pursuing this point, however, Moore turns to another aspect of Gadamer's thought: Gadamer rejects the Diltheian pursuit of objective interpretations rooted in the intentions of the author.

62. In an 87 page article, Moore devotes less than four and one-half pages to philosophical hermeneutics. See Moore, Turn for the Worse, supra note 2, at 923-27. This lack of depth contributes to Moore's failure to appreciate the metaphysical implications of Heidegger and Gadamer. For discussions of hermeneutics that more accurately reflect the importance of Heidegger and Gadamer in the field, see J. Bleicher, supra note 61, at 95-140; R. Palmer, Hermeneutics 124-217 (1969).
63. Moore, Turn for the Worse, supra note 2, at 923.
64. Id.
65. Id. at 923-24; see infra note 125.
66. Id. at 924.
67. Id.
68. Id. at 924-27.
69. Id. at 925.
70. Id.
and instead seeks to understand understanding itself. Moore immediately pursues this point towards one of the standard criticisms of Gadamer: that he fails to provide a method for determining the correctness of an interpretation of a text—a failure a realist can, of course, not allow.

At this point, Moore strangely fails to take two possible steps forward in his argument and instead takes one big step backward. First, Moore fails to return to the point he earlier acknowledged—that Gadamer argues that we must distinguish legitimate prejudices from arbitrary ones. Since Moore attacks Gadamer for not providing a method to determine the correctness of an interpretation, Moore's failure to return to this part of Gadamer's argument is conspicuous. Gadamer here seems to be at least hinting that there is some sort of critical bite embedded in his philosophical hermeneutics; that is, some way to determine the correctness of an interpretation. Second, as Moore has done with Heidegger, Moore refuses to consider the possibility that Gadamer's philosophical hermeneutics is based on a new metaphysics, one beyond the traditional realist-antirealist metaphysics. Again, Moore's failings in this regard seem especially strange when the thrust of his argument against hermeneutics is that it rejects all metaphysics. Finally, instead of pursuing these two possible lines of argument, Moore asserts that Gadamer's hermeneutics "is empty of implications for interpretation's practice in law [because it] has nothing to say about when an interpretation . . . is a good one." Even if Moore is correct in his claim that Gadamer fails to explain how to determine the correctness of an interpretation, this assertion fails to demonstrate that Gadamer has nothing important to say about jurisprudence. If, for example, Gadamer's philosophical hermeneutics correctly describes the phenomenon of interpretation in law, then his thought can (and perhaps must) serve as a foundation for further discussion. Legal theorists may need to accept Gadamer's insights and then attempt to enrich his philosophical hermeneutics by adding some sort of critical bite. In any event, Moore's criticism of Gadamer in the end seems to boil down to the correct but trivial assertion that Gadamer is not a realist. Moore writes: "How could [philosophical interpretivists answer the question of validity] when each, like Gadamer, thinks of interpretation as a kind of conversation that is not about anything whose nature can be used as a check on accuracy?"

71. Id. at 925. For a discussion of Dilthey, see R. Palmer, supra note 62, at 98-123.
72. See infra notes 249-57 and accompanying text.
73. See supra note 70 and accompanying text.
74. See infra notes 249-57 and accompanying text.
75. See supra note 67 and accompanying text.
76. Moore, Turn for the Worse, supra note 2, at 926.
77. Id. at 927.
II. The New Metaphysics of Interpretivism

Moore's dedication to realism and to saving the metaphysical debate between realists and antirealists appears to have prevented him from fairly and completely reading Heidegger and Gadamer. This section provides that fair and complete reading. It begins with a discussion of Husserlian phenomenology, the genesis for Heidegger's and Gadamer's philosophical hermeneutics.

A. Husserl

Husserlian phenomenology is founded on the premise that all consciousness is intentional: consciousness is always consciousness of something. Husserl writes that "perceiving is the perceiving of something . . . ; judging, the judging of a certain matter; valuating, the valuing of a value; wish, the wish for the content wished, and so on." While earlier philosophers had argued similarly about consciousness, Husserl elaborates his notion of consciousness by adding an important and distinctive component to his concept of intentionality: "Every intentional experience . . . is noetic, it is its essential nature to harbour in itself a 'meaning' . . . ." In other words, each act of consciousness is meaningful. Husserl calls the meaning of each act of consciousness its "noema."

The noema or noemata—the plural of noema—of consciousness must be distinguished from the object of consciousness. For example, if I see a tree, then the tree is an object of consciousness, but that object is not the same as the noema. The noemata can be conceived of as my expectations about the tree. Even if I see the tree from only one side and as being green and brown, my expectations about or experiences of the tree are simply not of a one-sided figure constituted by green and brown splotches. Instead, I experience the tree as a tree. I experience, or expect to find, something with a front, back, top, roots, leaves, and bark. I experience something that throws shade in the sunlight, can be climbed, and loses its leaves in the

78. Moore actually accepts begrudgingly a most modest form of interpretivism. He admits that sometimes legal practice is interpretive: those times when an authoritative text must be interpreted. Id. at 945-48. Thus, according to Moore, his most modest interpretivism is limited to a small number of situations, and, indeed, his interpretivism is realist in nature. Id. at 934-41, 955.


80. E. Husserl, Ideas, supra note 79, at 243.

81. See A. Wedberg, supra note 79, at 1-50; Follesdal, supra note 79, at 418-19.

82. E. Husserl, Ideas, supra note 79, at 257.

83. Id. at 272-73.
autumn. These expectations about the tree constitute the noemata or meanings of my act of seeing the tree. Consequently, the tree—the object itself—can burn in a fire or be otherwise destroyed, but its noema—its meaning—cannot similarly burn. In effect, Husserl interjects the noema between an intentional act and its object and thus creates a trichotomy to describe experience: act-noema-object. Every act has a noema, but every act does not necessarily have an object. For example, when one thinks of a centaur, the experience has a noema, but the centaur as an object does not exist.

This trichotomy leads Husserl to his phenomenological method, which describes the noema of consciousness. The phenomenological method is also called a reduction or epoche. The first stage of the epoche is to bracket the objects of the world. Bracketing an object means placing it off to one side. Husserl is not denying that the objects exist, rather he is saying that we must turn our attention away from them and instead focus on the noemata, the meanings of the objects in consciousness. Thus, through the epoche, one replaces the objects of the world with “the respective meaning of each [object] in consciousness . . . in its various modes (perceptual meaning, recollected meaning, and so on).” Husserl refers to the objects as transcendent because there is more to an object than one experiences. Consequently, when one brackets the objects of the world, one brackets the transcendent, and what remains is the transcendental. Since Husserl is focusing on the transcendental, his philosophy is called transcendental phenomenology.

The second stage of the epoche or reduction is to faithfully describe the noemata or meanings of consciousness—to describe the transcendental. Through this description, one identifies the structures of consciousness: the pure essences of experience. Significantly, Husserl does not seek to describe the world in terms of natural science. Indeed, by bracketing the world of objects, Husserl also intends to bracket scientific theories so that he can describe the noemata “with an entire absence of all prejudice, and indifference to all current and borrowed theories.”

84. See id. at 258-61; Follesdal, Husserl's Notion of Noema, 66 J. Phil. 680, 686-87 (1969); Follesdal, supra note 79, at 423.
85. See Follesdal, supra note 79, at 421-23.
87. See Husserl, Phenomenology, supra note 79, at 53.
88. Id. (emphasis omitted).
90. See E. Husserl, Ideas, supra note 79, at 260-66.
91. See id. at 119-20; Follesdal, supra note 79, at 424-25. Husserl writes that he is seeking to describe something like an “a priori form-system” without which “mental being as such would be inconceivable.” Husserl, Phenomenology, supra note 79, at 55.
92. E. Husserl, Ideas, supra note 79, at 256; accord id. at 110-11.
In sum, an epoche requires one to choose an act of consciousness, bracket its object, and describe the noemata of the act. One can perform an epoche on any act of consciousness, such as one’s experience of a sofa. One must first bracket the object; thus, the phenomenological description would not include statements such as the sofa is six feet long and four feet high. Instead, one must describe the noemata or meanings of the experience of the sofa. Such a phenomenological description might include the following: the sofa is something that can be the centerpiece of a room or pushed against the wall; the sofa can be used for sitting, lying down, relaxing, and reading; and the sofa can comfortably seat between one and three people. Thus, one is not concerned with the mere physical characteristics of the sofa or of any other objects; rather, one is concerned with the objects only “as [they are] intended to in one’s awareness of them.”

Phenomenological descriptions become more significant as we focus on more important objects of consciousness, such as the self and sociality. For example, one can do a Husserlian description of the upright posture of human beings. Erwin Straus observes that the upright posture is “pregnant with . . . meaning.” For instance, the upright posture distinguishes the human from other living creatures; the upright posture determines the shape and function of the human body; the upright posture opposes humans to nature because humans must overcome gravity in order to stand; the upright posture means freedom because it allows one to stand and to walk; and the upright posture distances one from fellow humans because, unlike horizontals, verticals never meet.

Eventually Husserl turns his phenomenological method on consciousness itself. Husserl argues that when he brackets his “natural human Ego,” he finds a transcendental ego. Through the epoche, Husserl describes the structures of this transcendental ego. According to Husserl, the transcendental ego is, of course, intentional. Furthermore, the transcendental ego has some content or substance insofar as “it” is behind

93. Aron Gurwitsch gives a familiar example of a phenomenological description of a tree: Let the thing perceived be a tree. This tree, at any rate, presents itself in a well-determined manner: it shows itself from this side rather than from that; it stands straight before the observer or occupies a rather lateral position; it is near the perceiving subject or removed from him at a considerable distance, and so on. Finally, it offers itself with a certain prospect, e.g., as giving shade, or, when the subject perceiving the tree recalls to his mind his past life, the tree perceived appears in the light of this or that scene of his youth. What has been described by these allusions is the noema of perception—namely, the object just (exactly so and only so) as the perceiving subject is aware of it, as he intends it in this concrete experienced mental state.


96. Id. at 292-59.


98. Id. at 65.
consciousness. The transcendental ego somehow draws from its own content to constitute the world and all its objects by giving or creating meaning.\textsuperscript{99} Moreover, the transcendental ego not only constitutes the world, it also constitutes itself,\textsuperscript{100} and in so doing, it constitutes itself as a unity, as an "I" with a continuous identity.\textsuperscript{101} Thus, because the transcendental ego constitutes itself and the world, Husserl writes, "[N]othing exists for me otherwise than by virtue of the actual and potential performance of my own consciousness."\textsuperscript{102}

Husserl intends his phenomenology to avoid the metaphysical problems inherent in the Cartesian separation of the subject and object.\textsuperscript{103} By bracketing the objects of the world, Husserl attempts to skirt many traditional philosophical problems, particularly epistemological ones. He seeks neither to bridge the gap between the subject and the object, nor to show that the subject can somehow know the object by mirroring its image.\textsuperscript{104} Instead, Husserl turns his attention to consciousness as it constitutes meaning. Thus, Husserl not only attempts to avoid scientific descriptions and presuppositions, as already discussed, but also attempts to avoid metaphysics. He argues that his phenomenological investigations "aspire solely to such freedom from metaphysical, scientific and psychological presuppositions."\textsuperscript{105} Consequently, if Moore would have turned his criticism of interpretivism—that it rejects all metaphysics—against Husserl, his point would have been well taken.

Another of Moore's criticisms of interpretivism can also be applied to Husserl. Moore argues that many interpretivists are actually disguised

\textsuperscript{99} Husserl writes:

The Objective world, the world that exists for me, that always has and always will exist for me, the only world that ever can exist for me—this world, with all its Objects, I said, derives its whole sense and its existential status, which it has for me, from me myself, from me as the transcendental Ego, the Ego who comes to the fore only with transcendental-phenomenological epoche.

Id. at 26 (emphasis in original); see Follesdal, supra note 79, at 425; Husserl, Transcendental Phenomenology, supra note 89, at 125. Sartre focuses on and criticizes this Husserlian concept of the ego. J. Sartre, The Transcendence of the Ego (1957).

\textsuperscript{100} See E. Husserl, Cartesian Meditations, supra note 89, at 66; Follesdal, supra note 79, at 425-26.

\textsuperscript{101} See E. Husserl, Cartesian Meditations, supra note 89, at 66. Husserl also describes the transcendental ego as being habitual, or in other words, as having a personal character. See id. at 66-67.

\textsuperscript{102} Husserl, Transcendental Phenomenology, supra note 89, at 122 (emphasis omitted). Husserl writes that consciousness "is 'consciousness' through and through, the source of all reason and unreason, all right and wrong, all reality and illusion, all value and disvalue, all deed and misdeed." E. Husserl, Ideas, supra note 79, at 251.

\textsuperscript{103} See Cairns, supra note 94, at 43 (Husserlian phenomenology rejecting Kantian dualism); Gurwitsch, supra note 93, at 108-13 (Husserlian phenomenology rejects Hume); cf. Husserl, Transcendental Phenomenology, supra note 89, at 120 (rejects consciousness as mirror of nature).

\textsuperscript{104} See Husserl, Transcendental Phenomenology, supra note 89, at 120.

\textsuperscript{105} E. Husserl, supra note 86, at 265.
idealists, despite the interpretivist claim of rejecting metaphysics. Husserl's method of bracketing the objects of the world, and his eventual focus on the transcendental ego, led many to criticize his transcendental phenomenology as "[turning] to the subject" and having idealist tendencies. In other words, although Husserl attempts to reject the traditional subject-object dichotomy of Cartesianism, in the end he can be characterized as succumbing to the allure of the subject. As shall be discussed, one of Heidegger's central themes arises from the criticism that Husserl is a latent subjectivist, or, in Moore's terms, a disguised idealist.

B. Heidegger

Husserl's transcendental phenomenology provides a framework for Heidegger's philosophy. In particular, Heidegger follows two of Husserl's central and related themes: meaning, and phenomenology as the general method for approaching meaning. Nonetheless, Heidegger departs radically from many of Husserl's particular methods, concerns, and conclusions.

One significant difference between Husserl and Heidegger lies in their respective conceptions of phenomenological method. Husserl's phenomenology consists of a two-stage epoche or reduction. The first stage requires one to bracket the objects of the world; the second stage requires one to describe the noemata or meanings of acts of consciousness. Heidegger's phenomenology, on the other hand, eliminates the first stage. Heidegger insists that we can describe the meanings of experience without first bracketing the objects, and indeed, according to Heidegger, bracketing renders faithful description impossible. Despite this significant difference between Husserl and Heidegger, Heidegger nonetheless seeks to perform phenomenological descriptions. In other words, even though Heidegger fails to bracket the objects of the world, he does not merely seek to describe the physical or scientific characteristics of those objects: he still seeks to describe constituted meanings.

Heidegger's rejection of the Husserlian bracketing of objects is one reason that Heidegger's phenomenology is called existential, not transcen-
Husserl distinguishes the transcendent—the objects—from the transcendental—that which remains after bracketing the objects.\textsuperscript{112} Heidegger denies the possibility of the transcendental and declares instead that phenomenology means, "To the things themselves!"\textsuperscript{113} Whereas Husserl argues that we must focus on acts of consciousness, isolated from their objects, Heidegger insists that we must focus on practical activities. Thus, Heidegger often phenomenologically describes the use of a tool, such as a hammer or a piece of chalk, because using a tool is an archetypal practical activity. For example, Heidegger writes the following about a piece of chalk:

This piece of chalk has extension; it is a relatively solid, grayish white thing with a definite shape, and apart from all that, it is a thing to write with. This particular thing has the attribute of lying here; but just as surely, it has the attribute of potentially not lying here and not being so large. The possibility of being guided along the blackboard and of being used up is not something that we add to the thing by thought. Itself, as this essent [or thing], is in this possibility; otherwise it would not be chalk as a writing material.\textsuperscript{114}

Heidegger focuses on the use of tools because he wants to turn attention to how one experiences and deals with the world and ordinary entities in day-to-day life, not in theoretical analysis. Heidegger notes, for instance, that when one first encounters a hammer, one does not experience it as a thing with a long handle and a heavy metal head. Instead, one deals with its use—to hammer nails or crush something. Before one begins reflective or theoretical activity, one conceives of, or theorizes about, the hammer as having a certain size, shape, and weight only if one reflects on its practical use.\textsuperscript{115}

Heidegger's refusal both to bracket the objects of the world and to focus on the transcendental leads him to reject another fundamental tenet of Husserlian phenomenology: the transcendental ego. Husserl brackets his "natural human Ego" and finds a transcendental ego, which constitutes the world and itself by giving meaning.\textsuperscript{116} To Heidegger, one can neither bracket one's natural ego nor find a transcendental ego standing behind consciousness.\textsuperscript{117} The world, according to Heidegger, is not constituted by consciousness alone, but by an ego that is both body and consciousness. Heidegger consequently focuses on what he calls "Dasein"—human Being-in-the-world.\textsuperscript{118}

A Dasein is the way that humans exist, the Being of humans.

\textsuperscript{112} See supra notes 86-90 and accompanying text.

\textsuperscript{113} M. Heidegger, Being and Time, supra note 111, at 50.

\textsuperscript{114} M. Heidegger, An Introduction to Metaphysics 30 (R. Manheim trans. 1959) [hereinafter M. Heidegger, Introduction].


\textsuperscript{116} See supra notes 97-102 and accompanying text.

\textsuperscript{117} See supra note 109.

\textsuperscript{118} See generally M. Heidegger, Being and Time, supra note 111, at 32, 67, 169-72.
Heidegger writes, "The essence of *Dasein* lies in its existence." And indeed, according to Heidegger, only humans "exist"; other entities are, but they do not exist in the way humans do. Humans *exist*, according to Heidegger, because *Dasein* has a dual nature. On the one hand, *Dasein* is directed towards the world; it constitutes the world and the things in the world. Here, Heidegger agrees with Husserl's conception of the intentionality of consciousness. On the other hand, *Dasein* simultaneously is an entity amongst other entities; like rocks and hammers, it is a thing in the world. Heidegger sharply diverges from Husserl at this point. Husserl argues that human consciousness constitutes the world by giving meaning, while Heidegger argues that human Being-in-the-world—*Dasein*—both constitutes the world and is an entity in the world. Heidegger's choice of the word "*Dasein*" itself underscores his conception of the dual nature of human Being-in-the-world. *Dasein* literally means being (*sein*) there (*da*). Humans are just there—like any other entity—but they are also the source of all Being; they constitute the world by giving meaning. 

Thus, when Heidegger focuses on the use of tools, he does not do so because he is especially interested in such mundane entities as hammers or pieces of chalk. To the contrary, by focusing on tools and practical everyday activities, Heidegger seeks to uncover the meaning of *Dasein*—human Being-in-the-world. And the understanding of *Dasein* is the only way to attain Heidegger's ultimate goal, to understand the meaning of Being itself. A phenomenological description of a hammer, a piece of chalk, or some other tool reveals something that is essential to the human experience of that tool, but that nonetheless ordinarily remains hidden or obscure. And Heidegger insists that what remains hidden or obscure is Being itself.

Thus, the ultimate theme of Heidegger's phenomenology is Being; he
searches for the structures of Being. The recognition of this theme underscores how Heidegger radically transforms phenomenology by taking an ontological turn. Whereas Husserl seeks to avoid metaphysics, Heidegger seeks to create a new metaphysics. Heidegger argues that understanding is the most basic structure of Being-in-the-world: understanding itself distinctively characterizes Dasein. That is, Dasein is understanding because Dasein cannot get behind or exist before understanding. Significantly, Heidegger does not equate understanding with conceptual or theoretical analysis, rather understanding is how one immediately experiences Being-in-the-world. By understanding how humans understand and experience meaning, one understands human Being-in-the-world and ultimately Being itself. Thus, Heidegger equates Dasein with understanding, and in so doing, he necessarily transforms ontology—the study of being or of what exists—into phenomenology—the study or description of understanding and meaning—and likewise transforms phenomenology into ontology.

Moreover, Heidegger merges phenomenology with hermeneutics. Before Heidegger, hermeneutics focused primarily on identifying methods for the correct interpretations of texts, or, in other words, the purpose of hermeneutics was to uncover the meanings of texts. Just as Heidegger radically transforms phenomenology, however, he also radically transforms hermeneutics. Heidegger argues that interpretation is the disclosure of Being: Being is not simply there, waiting to be labeled, rather Being is disclosed through interpretation. Things appear or arise through the processes of understanding and interpretation. Thus, a person does not merely give meaning to a waiting and initially meaningless object. Instead, meaning arises from the encounter between the person and the object. Understanding is embedded in the concrete interaction of the person and the object, and interpretation is the “rendering explicit of that


127. See M. Heidegger, Being and Time, supra note 111, at 169-72.

128. As Heidegger says, “Understanding of Being is itself a definite characteristic of Dasein’s Being.” Id. at 32 (emphasis omitted).

129. Richard Palmer writes:

   Being can perhaps, then, be interrogated by an analysis of how appearing occurs. Ontology must become phenomenology. Ontology must turn to the processes of understanding and interpretation through which things appear; it must lay open the mood and direction of human existence; it must render visible the invisible structure of being-in-the-world.

   R. Palmer, supra note 62, at 129.


131. See R. Palmer, supra note 62, at 129.

132. Heidegger is not here retreating to the traditional metaphysical separation of the subject and the object. Rather, ordinary language, according to Heidegger, fails to capture the radical nature of his thought. See M. Heidegger, Being and Time, supra note 111, at 63.
understanding." Heidegger writes:

In interpreting, we do not, so to speak, throw a 'signification' over some naked thing which is present-at-hand, we do not stick a value on it; but when something within-the-world is encountered as such, the thing in question already has an involvement which is disclosed in our understanding of the world, and this involvement is one which gets laid out by the interpretation.

Therefore, the phenomenology of Dasein necessarily becomes hermeneutics: the study and understanding of interpretation, which is the disclosure of Being. And hermeneutics, like phenomenology, takes an ontological, and thus metaphysical, turn. Hermeneutics is no longer concerned only with the correct interpretation of texts, rather hermeneutics is the study of the disclosure of Being. Hermeneutics is concerned not only with uncovering the meanings of texts, but also with uncovering the meaning of Being. Heidegger writes:

Our investigation itself will show that the meaning of phenomenological description as a method lies in interpretation. The logos of the phenomenology of Dasein has the character of a hermeneuein [to interpret], through which the authentic meaning of Being, and also those basic structures of Being which Dasein itself possesses, are made known to Dasein's understanding of Being: The phenomenology of Dasein is a hermeneutic . . . .

Heidegger’s new metaphysics rejects the traditional subject-object metaphysics of Descartes—and thus rejects the realism-antirealism debate defended by Moore. Heidegger denies that the subject is a transcendent ego that serves as the foundation of existence and knowledge, but he does not then become an empiricist, positivist, or objectivist. Instead, Heidegger simultaneously denies that the object is a separate thing that can be bracketed from human Being-in-the-world. Being is disclosed or exists through the interpretation and understanding of Dasein.

133. R. Palmer, supra note 62, at 134.
134. M. Heidegger, Being and Time, supra note 111, at 190-91.
138. Heidegger occasionally talks of the end of metaphysics or the overcoming of metaphysics (which supports Moore's interpretation of philosophical hermeneutics). One must, however, carefully analyze Heidegger's meaning when he makes these assertions, but this analysis is difficult because Heidegger's use of the word "metaphysics" is often ambiguous and, at times, deliberately so. See M. Heidegger, Introduction, supra note 114, at 17-19. Insofar as Heidegger talks of the end of metaphysics, he equates metaphysics with a traditional metaphysics of the subject and object. That is, he rejects a metaphysics that focuses on the human will as controlling nature through a technological attitude. See R. Bernstein, Heidegger on Humanism, in Philosophical Profiles 203-08 (1986) [hereinafter R. Bernstein, Heidegger on Humanism]; see, e.g., M. Heidegger, Overcoming Metaphysics, in The End of Philosophy 84-85 [hereinafter M. Heidegger, Overcoming Metaphysics]; Heidegger, Letter on Humana
Heidegger's rejection of the subject-object dichotomy is evident in his discussion of language. Heidegger writes, "[W]ords and language are not wrappings in which things are packed for the commerce of those who write and speak. It is in words and language that things first come into being and are." In other words, interpretation does not involve an independent and unconnected subject intervening with an independent and unconnected object. Instead, there is, in a sense, a fore-understanding or pre-understanding embedded in language that is disclosed whenever one turns to something. Heidegger crystallizes the concept of pre-understanding when he writes: "Whenever something is interpreted as something, the interpretation will be founded essentially upon fore-having, fore-sight, and fore-conception. An interpretation is never a presuppositionless apprehending of something presented to us."

Heidegger's ontological turn allows him to phenomenologically describe structures of Dasein other than understanding. One significant structure of Dasein is "care." Heidegger writes that "the being of Dasein is care." A person constantly cares about or is concerned with his or her own being and the being of other entities. People demonstrate the significance of care with their use of tools. A person typically cares about or is concerned with some tool because he or she is using it to accomplish something while achieving some purpose. A person cares about a hammer because he or she is using it to drive nails and build a house. Yet,
according to Heidegger, "care" is possible only because of temporality;¹⁴³ a person can be concerned with his or her Being-in-the-world only because of the existence of time—past, present, and future.¹⁴⁴ For example, one uses the hammer because of a need for a new and larger house in the future. Therefore, temporality is another structure of Dasein: "whenever Dasein tacitly understands and interprets something like Being, it does so with time as its standpoint."¹⁴⁵ Thus Dasein is always situated in history.¹⁴⁶ Yet, Dasein itself constitutes time, or as Heidegger states, "[T]ime fashions itself into a time only as a human, historical being-there."¹⁴⁷

In short, Heidegger radically redirects Husserlian phenomenology and thus Western thought itself. Heidegger rejects the transcendental for the existential, focusing on Dasein and its structures. He introduces hermeneutics to phenomenology and gives them both an ontological turn. In so doing, Heidegger rejects the traditional subject-object metaphysics rooted in Descartes and presents a new metaphysics grounded in understanding.

C. Gadamer

The differences between Gadamer and Heidegger result, to a great extent, from their different purposes. Heidegger seeks to transform transcendental phenomenology into existential phenomenology, and in so doing, he finds that he needs hermeneutics. Gadamer, on the other hand, seeks to transform hermeneutics itself. That is, Heidegger, in a sense, appropriates hermeneutics only to help develop the ontology of his existential phenomenology, but Gadamer is primarily concerned with the field of hermeneutics.¹⁴⁸

Hermeneutics was traditionally tied to the subject-object metaphysics


 143. See M. Heidegger, Being and Time, supra note 111, at 372; Floistad, supra note 142, at 444.

 144. See M. Heidegger, Being and Time, supra note 111, at 349-82 (on temporality in general). The argument of anthropologist Benjamin Lee Whorf that the concept of time (with a past, present, and future) is specific to certain cultures and is essentially absent in other cultures, appears to present serious problems to this aspect of Heidegger's theory. See B. Whorf, Language, Thought, and Reality 57, 216-17 (1956).


 146. Id. at 41.

 147. M. Heidegger, Introduction, supra note 114, at 84.

 148. Gadamer writes:

 Heidegger entered into the problems of historical hermeneutics and critique only in order to explicate the fore-structure of understanding for the purposes of ontology. Our question, by contrast, is how hermeneutics, once freed from the ontological obstructions of the scientific concept of objectivity, can do justice to the historicity of understanding.

characteristic of Western thought. As discussed above, before Heidegger, hermeneutics focused primarily on identifying methods for the correct interpretations of texts. The "correct" interpretation was correct in an objective sense: the text was an object separate and independent from, yet somehow accessible to, the perceiving subject. Thus, to interpret the text correctly, the subject needed a technique or method that could bridge the gap to the objective text or, at least, could mirror in consciousness the content of the text. A theory familiar to attorneys, for instance, is that the subject—the reader of the text—must reconstruct in his or her own consciousness the intent of the author, as memorialized in the text.

Gadamer, however, recognizes the devastating implications of Heidegger's existential phenomenology for traditional subject-object metaphysics. Gadamer writes: "Heidegger's existential analysis of Dasein implies many new perspectives... for metaphysics... Heidegger resurrects the problem of Being in a form which goes far beyond all traditional metaphysics..." Consequently, like Heidegger, Gadamer rejects the subject-object metaphysics that underlies traditional hermeneutics. For example, Gadamer rejects the possibility that the subject can mirror the object: "[O]ur perception is never a simple reflection of what is presented to the senses." Likewise, Gadamer rejects the argument that an interpreter should seek to understand only the intent of the author and argues instead that "the sense of a text in general reaches far beyond what its author originally intended."

The rejection of traditional metaphysics leads Gadamer to two immediate conclusions, which serve as foundational premises for the remainder of his discussion. First, hermeneutics cannot merely be a search for a technique or method to make objectively correct interpretations. Indeed, Gademeuheit cannot merely be a search for a technique or method to make objectively correct interpretations. Indeed, Gadamer writes: "The hermeneutic phenomenon is basically not a problem
of method at all."156 Thus, the title of Gadamer's major work, *Truth and Method*, is ironic: according to Gadamer, a method cannot lead to truth or to understanding in interpretation. The search for the proper method of interpretation—what might be called methodological hermeneutics—must fail because it is grounded on subject-object metaphysics; methodological hermeneutics assumes that a subject needs a method or technique for knowing an objective text. But if interpretation does not involve an independent subject coming to know an independent and objective text, the search for a method is ill founded.157

Gadamer's second foundational premise is that hermeneutics itself is ontological.158 Thus, Gadamer follows Heidegger, not only in rejecting the traditional subject-object metaphysics, but also in developing a new metaphysics based on understanding and interpretation. Our very Being-in-the-world is interpretive, and, hence, we can never escape interpretation and understanding. Moreover, each interpretive encounter is itself ontological. For example, Gadamer argues that when one views a picture, one does not approach it as a subject to an object, rather the picture is an "ontological event"159 in which "being appears, meaningfully and visibly."160 Gadamer's ultimate purpose then is to transform methodological hermeneutics into a philosophical hermeneutics that is no longer grounded on subject-object metaphysics, and in so doing, to develop hermeneutics as an ontology.

As an ontological event—not a method—the hermeneutical act is a process in which meaning "comes into being."161 Gadamer emphasizes the unity of this process. Others have argued that interpretation, understanding, and application are all separate events: one understands an objective text by interpreting it, and then one applies this interpretation in new situations.162 The lawyer, for example, attempts to understand the legal document by interpreting it and then applies that interpretation to a new case. Gadamer, on the other hand, insists that understanding, interpretation, and application all comprise "one unified process,"163 the hermeneuti-

---

156. Id. at xxi; accord id. at 295, 309.
157. Gadamer writes:
   [U]nderstanding is not a method which the inquiring consciousness applies to an object it chooses and so turns it into objective knowledge; rather, being situated within an event of tradition, a process of handing down, is a prior condition of understanding. Understanding proves to be an event . . . .

158. See id. at 137, 159, 477-91.
159. Id. at 140; accord id. at 144.
160. Id. at 144; see id. at 489.
161. Id. at 462; accord id. at 164-65 ("Understanding must be conceived as a part of the event in which meaning occurs, the event in which the meaning of all statements . . . is formed and actualized.").
162. See id. at 307-08.
163. Id. at 308. Gadamer writes:
   The meaning of application involved in all forms of understanding is now clear. Application does not mean first understanding a given universal in itself and then afterward applying it to a concrete case. It is the very understanding of the
cal act. Thus, when Gadamer discusses interpretation, he also discusses understanding and application, thereby discussing the entire hermeneutical act or process.

Gadamer argues that the hermeneutical process resembles a conversation because the interpretation of a text is dialectical and dialogical. In a dialogue, meaning and understanding arise in the give and take between the two speakers. A dialogue, Gadamer reasons, is not a process in which one person tries to win an argument. Rather, the two participants listen to and gradually change each other’s understanding. Gadamer writes: “To reach understanding in a dialogue is not merely a matter of putting oneself forward and successfully asserting one’s own point of view, but being transformed into a communion in which we do not remain what we were.” Likewise, when one interprets or reads a text, meaning and understanding arise through an interplay—or in Gadamer’s words, a “play”—between the interpreter and the text. The interplay requires the interpreter to question the text, to probe for its meaning. But the meaning of the text is not an object waiting to be appropriated or discovered by the interpreter. Rather, the meaning of the text arises or opens only through the dialectical process itself: through asking tentative questions, listening to answers, shifting one’s perspective, asking new questions, and so on. The “reciprocal relationship” between the interpreter and the text allows the dialectical “working out” of the meaning.

Gadamer elaborates this dialectical process when he writes: [T]he dialectic of question and answer that we demonstrated makes understanding appear to be a reciprocal relationship of the same kind as conversation. It is true that a text does not speak to us in the same way as does a Thou. We who are attempting to understand must ourselves make it speak. But we found that this kind of understanding, ‘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. Gadamer thus recognizes that a text does not literally speak to one as another person might speak in a genuine dialogue, yet the interpreter who makes the text speak is not unconstrained, arbitrary, or irrational. Instead, whenever one turns to a text and begins questioning it, one already expects or anticipates an answer: “a person trying to understand a text is prepared for it to tell him something.”

Gadamer here draws upon Heidegger’s universal—the text—itself. Understanding proves to be a kind of effect and knows itself as such.

Id. at 340-41.
164. See id. at 362-79.
165. Id. at 379.
166. See id. at 101-69. Gadamer explains that play is not an activity of a subject, rather the “subject of play is . . . the play itself.” Id. at 104.
167. Id. at 387.
168. Id. at 368.
169. Id. at 377.
170. Id. at 269.
insight that a fore-understanding or pre-understanding is embedded in language and is disclosed whenever one turns one's attention to something. Gadamer writes:

[The reader] projects a meaning for the text as a whole as soon as some initial meaning emerges in the text. [But] the initial meaning emerges only because he is reading the text with particular expectations in regard to a certain meaning. Working out this fore-projection [or fore-understanding], which is constantly revised in terms of what emerges as he penetrates into the meaning, is understanding what is there.

The dialectical process assures that one's answer changes as often as meaning emerges, but nonetheless, one already expects a certain answer as soon as interpretation begins. Interpretation always begins with some fore-understanding.

Gadamer illustrates the significance of fore-understanding by comparing how a Christian theologian and a Marxist would understand a religious text. The Christian theologian, who presupposes or fore-understands that human life is moved by the question of God, will likely read the religious text as answering the question of God. The Marxist, with a radically different fore-understanding, is likely to read the text as a reflection of economic class interests. The meaning that emerges from the text changes with the reader's fore-understanding.

Since one always anticipates some answer in the dialectic of interpretation, Gadamer continues by seeking the source of this anticipated answer. In other words, how does one develop fore-understandings? Again, Gadamer draws heavily from Heidegger, particularly Heidegger's discussion of temporality. Gadamer writes: "Anticipating an answer itself presupposes that the questioner is part of [a] tradition . . . ." That is, humans are historical beings, situated in a historical context, and because of our historicity, we live in tradition. Tradition is not a thing of the past, but something that each person constantly participates in. Through this participation in tradition, one develops fore-understandings and inherits prejudices. As Gadamer states, "[T]here can be no doubt that the great horizon of the past, out of which our culture and our present live, 

---

171. See id. at 266-67; supra text accompanying notes 139-40.
173. See id. at 332.
174. See R. Palmer, supra note 62, at 161; supra text accompanying notes 143-47.
176. Gadamer writes: "[W]e are always situated within traditions, and this is no objectifying process—i.e., we do not conceive of what tradition says as something other, something alien. It is always part of us, a model or exemplar . . . ." Id. at 282.
Gadamer adds:

Our historical consciousness is always filled with a variety of voices in which the echo of the past is heard. Only in the multifariousness of such voices does it exist: this constitutes the nature of the tradition in which we want to share and have a part.
influences us in everything we want, hope for, or fear in the future." 177

Indeed, understanding is impossible unless one is "situated within a tradition" 178 because fore-understandings and prejudices are prerequisites to interpretation and understanding. "[T]he historicity of our existence entails that prejudices, in the literal sense of the word, constitute the initial directedness of our whole ability to experience. Prejudices are biases of our openness to the world." 179 Gadamer is famous for attempting to resurrect prejudice from its attack and defeat by the Enlightenment. The Enlightenment celebrated abstract reason as the ultimate source of truth and viewed prejudice as a poison that distorts reason. Therefore, according to Enlightenment beliefs, one must purify oneself of all prejudices to attain understanding and truth. 180 Gadamer responds with the counterintuitive claim that truth and understanding actually depend on having legitimate prejudices. 181 Prejudices open one to the possibility of understanding: 182

This formulation certainly does not mean that we are enclosed within a wall of prejudices and only let through the narrow portals those things that can produce a pass saying, 'Nothing new will be said here.' Instead we welcome just that guest who promises something new to our curiosity. But how do we know the guest whom we admit is one who has something new to say to us? Is not our expectation and our readiness to hear the new also necessarily determined by the old that has already taken possession of us? 183

Prejudices do not limit one to understanding what is already understood. Rather, prejudices prepare one for change, new questions, and new answers. Without prejudices, one would lack the direction even to pursue understanding.

One's prejudices constitute the "horizon" of the present. 184 One can


Gadamer writes:

Contrary to what we often imagine, time is not a chasm which we could bridge over in order to recover the past; in reality, it is the ground which supports the arrival of the past and where the present takes its roots. "Temporal distance" is not a distance in the sense of a distance to be bridged or overcome . . . . It is not a distance to be overcome, but a living continuity of elements which cumulatively become a tradition, a tradition which is the light wherein all that we carry with us from our past, everything transmitted to us, makes its appearance.

Gadamer, The Problem, supra note 61, at 155-56.

178. H. Gadamer, Truth and Method, supra note 148, at 361; accord id. at 309 ("[T]he situation within an event of tradition, a process of handing down, is a prior condition of understanding.").

179. Gadamer, The Universality, supra note 177, at 133.

180. See H. Gadamer, Truth and Method, supra note 148, at 270-77.

181. See id. at 277.


183. Gadamer, The Universality, supra note 177, at 193.

184. "[T]he range of vision that includes everything that can be seen from a particular vantage point." H. Gadamer, Truth and Method, supra note 148, at 302; see id. at 306.
never see beyond the horizon: it is the limit of one's potential vision or understanding. The horizon, being constituted by one's prejudices, arises from tradition since one's prejudices arise from tradition. Nevertheless, tradition does not render one's horizon static. As Gadamer explains, the horizon of the present constantly reforms:

The historical movement of human life consists in the fact that it is never absolutely bound to any one standpoint, and hence can never have a truly closed horizon. The horizon is, rather, something into which we move and that moves with us. Horizons change for a person who is moving. Thus the horizon of the past, out of which all human life lives and which exists in the form of tradition, is always in motion.

One reason the horizon moves is interpretation. The interpretation of a text is an encounter with the past and with one's own tradition. Such an interpretation requires one to put his or her prejudices into play, to risk them, to move closer to the edge of one's horizon, and to strain to see and to understand the new. Through the dialectical play of interpretation, one's horizon shifts to encompass the meaning of the text that emerges from the interpretive encounter. In effect, the interpretation of a text requires the fusion of one's horizon of the present with the horizon of the text and, consequently, the transformation of the present horizon.

Furthermore, the constant movement of the horizon of the present necessitates that "the discovery of the true meaning of a text ... is never finished; it is in fact an infinite process." As one's horizon shifts, various encounters with the same text open different meanings. A text does not have one objective meaning, and indeed, "[e]very age has to understand a transmitted text in its own way."

Heidegger also introduces the concept of horizons. See, e.g., M. Heidegger, Being and Time, supra note 111, at 39 ("Time [is] the horizon for all understanding of Being and for any way of interpreting it."). Husserl also eventually developed the concept of horizon. See H. Gadamer, Truth and Method, supra note 148, at 245-46.

185. "[T]he horizon of the present cannot be formed without the past." H. Gadamer, Truth and Method, supra note 148, at 306. Gadamer writes:

In fact the horizon of the present is continually in the process of being formed because we are continually having to test all our prejudices. An important part of this testing occurs in encountering the past and in understanding the tradition from which we come. Hence the horizon of the present cannot be formed without the past. There is no more an isolated horizon of the present in itself than there are historical horizons which have to be acquired. Rather, understanding is always the fusion of these horizons supposedly existing by themselves ... In a tradition this process of fusion is continually going on, for there old and new are always combining into something of living value, without either being explicitly foregrounded from the other.

Id. at 306.

186. Id. at 304.

187. See id. at 306.

188. See id. at 306, 377-78.

189. See id. at 377-78; R. Palmer, supra note 62, at 190, 201.


191. Id. at 296.
According to Gadamer, the “medium” of tradition and understanding is language. Tradition exists and is handed down to us in and through language. Consequentially, understanding, which is possible only because of tradition, must itself be linguistic in character. Moreover, since understanding is ontological, each person in effect “lives in a language.” Gadamer writes: “Language is the fundamental mode of operation of our being-in-the-world and the all embracing form of the constitution of the world.” Therefore, humanity does not simply use or possess language; rather, one experiences the world linguistically. “Being that can be understood is language.” One cannot view the linguistic world from some external vantage point, some ultimate reality. Hermeneutics, according to Gadamer, is “universal”: the hermeneutical experience of understanding through language “is the mode of the whole human experience of the world.”

Gadamer’s ontological transformation of hermeneutics leads him to reconsider the so-called hermeneutic circle. Gadamer begins with a traditional statement of the circle: “[T]he anticipated meaning of a whole [text] is understood through the parts, but it is in light of the whole that the parts take on their illuminating function.” Gadamer illustrates this conception of the circle in the context of translating a foreign language. As one attempts to translate the individual words of a foreign text, one is guided by

192. Id. at 384.
193. See id. at 384, 389, 475; Gadamer, The Universality, supra note 177, at 139.
194. Gadamer asserts that there is a “unity between language and tradition.” H. Gadamer, Truth and Method, supra note 148, at 441.
195. Id. at 401; accord Gadamer, The Universality, supra note 177, at 139.
196. Gadamer, The Universality, supra note 177, at 128; accord id. at 136-37.
199. Gadamer writes: “We cannot see a linguistic world from above in this way, for there is no point of view outside the experience of the world in language from which it could become an object.” Id. at 452.
200. Gadamer, The Universality, supra note 177, at 134-36. Benjamin Lee Whorf writes: “We cut nature up, organize it into concepts, and ascribe significances as we do, largely because we are parties to an agreement to organize it in this way—an agreement that holds throughout our speech community and is codified in the patterns of our language. The agreement is, of course, an implicit and unstated one, BUT ITS TERMS ARE ABSOLUTELY OBLIGATORY; we cannot talk at all except by subscribing to the organization and classification of data which the agreement decrees.

B. Whorf, supra note 144, at 213-14 (capitalization in original).
an expected meaning for the particular sentence as well as by an expected meaning for the entire text. But the anticipated meanings of the sentence and the whole must be adjusted as one understands the meanings of the individual words.\textsuperscript{203} Gadamer, however, finds this traditional approach to the hermeneutic circle to be inadequate. He reformulates the circle to account for his ontological view of hermeneutics:

The circle . . . is not formal in nature. It is neither subjective nor objective, but describes understanding as the interplay of the movement of tradition and the movement of the interpreter. The anticipation of meaning that governs our understanding of a text is not an act of subjectivity, but proceeds from the commonality that binds us to the tradition. But this commonality is consistently being formed in our relation to tradition. Tradition is not simply a permanent precondition; rather, we produce it ourselves inasmuch as we understand, participate in the evolution of tradition, and hence further determine it ourselves. Thus the circle of understanding is not a "methodological" circle, but describes an element of the ontological structure of understanding.\textsuperscript{204}

Gadamer is broadening the hermeneutic circle to account for two sides of understanding.\textsuperscript{205} On the one side, tradition, through one's prejudices, constrains the possibilities for understanding because "the interpreter [is not] in control of what words of tradition reach him."\textsuperscript{206} Although one's horizon constantly shifts, it always limits what one can see and understand. A person cannot envision anything that is not opened by his or her tradition and culture. As Gadamer states, "[W]e are always situated within traditions . . . [which are] always part of us."\textsuperscript{207} On the other side, tradition does not exist unless people constantly create and recreate it through the hermeneutical process itself. Tradition is created as meaning comes into being. Gadamer writes: "Even the most genuine and pure tradition does not persist because of the inertia of what once existed. It needs to be affirmed, embraced, cultivated."\textsuperscript{208} As we interpret, shift our horizons, and participate in tradition itself, we constantly construct and transform tradition. In short, tradition and prejudices always shape one's horizon, limiting and thus directing one to meaning. Yet, tradition and one's horizon constantly shift as an ever new meaning of the text comes into being. These two sides of understanding are not separate and do not function independently. To the contrary, they are simultaneous and interrelated. They resonate together as meaning comes into being and understanding occurs within the

\textsuperscript{203} See H. Gadamer, Truth and Method, supra note 148, at 291; Gadamer, The Problem, supra note 61, at 146.
\textsuperscript{204} H. Gadamer, Truth and Method, supra note 148, at 293. Gadamer here is again drawing on Heidegger. See J. Bleicher, supra note 61, at 102-03; Gadamer, The Problem, supra note 61, at 148.
\textsuperscript{205} Gadamer writes: "[I]n tradition there is always an element of freedom and of history itself." H. Gadamer, Truth and Method, supra note 148, at 281.
\textsuperscript{206} Id. at 461.
\textsuperscript{207} Id. at 282.
\textsuperscript{208} Id. at 281; see id. at 462.
In sum, Gadamer's picture of philosophical hermeneutics consists of many complex parts or concepts, such as dialogue, play, fore-understanding, tradition, prejudices, horizons, linguisticity, and the hermeneutic circle. These concepts, however, are not discrete pieces that methodically fit together as if in a puzzle. Rather, the various concepts overlap, interact, and interrelate as if they were rich colors in a heavily textured painting. Gadamer's picture of hermeneutics comes into focus—indeed, comes into being—as we gaze at the patterns and relationships of these colors. Gadamer rejects traditional subject-object metaphysics and instead describes a new metaphysics grounded in understanding. Our Being-in-the-world is interpretive, and each hermeneutic act is an ontological event. Understanding is the process by which meaning comes into being and the mode through which one constitutes and experiences the world, all of which occurs through the medium of language. This phenomenon occurs as one's horizon, formed by prejudices, fuses with the horizon of the text, thus transforming the horizon of the present and tradition itself. Truth, knowledge, and meaning are not understood through some method, but through the dialectic of the hermeneutic circle. The final section of this Article explores the significant implications of this complex picture of philosophical hermeneutics for constitutional jurisprudence.

III. PHILOSOPHICAL HERMENEUTICS AND CONSTITUTIONAL JURISPRUDENCE

As already discussed, Professor Moore argues that the key to unlocking the future of jurisprudence lies in continuing the metaphysical debate between realists and antirealists, thereby reflecting the Cartesian subject-object dichotomy. Moreover, according to Moore, interpretivism is defined by its rejection of all metaphysics, including the realist-antirealist debate. Consequently, Moore argues that we must repudiate the interpretive turn in jurisprudence and instead maintain our focus on the realist-antirealist debate. This metaphysical debate has structured constitutional jurisprudence for many years, with realism and antirealism translating into repetitive argumentative positions. Thus, if Moore successfully "rescues"

209. Gadamer writes: "[The] reciprocal relationship between the individual and language ... allows man a certain freedom with respect to language ... [though] this freedom is limited ..." Id. at 441. Clifford Geertz, the cultural anthropologist, succinctly evokes the two sides of understanding and culture: "Without men, no culture, certainly; but equally, and more significantly, without culture, no men." C. Geertz, The Impact of the Concept of Culture on the Concept of Man, in The Interpretation of Cultures 49 (1973).

210. William Outhwaite writes: "Understanding ... is not a matter of simple addition of discrete elements." Outhwaite, supra note 61, at 23.

211. Richard Bernstein summarizes Heidegger and Gadamer as follows:

Implicit in Heidegger and explicit in Gadamer are two central claims: the ontological primacy of hermeneutics and its universality. We are 'thrown' into the world as beings who understand; and understanding itself is not one type of activity of a subject, but may properly be said to underlie all activities.

R. Bernstein, From Hermeneutics, supra note 149, at 96.

212. See supra notes 25-77 and accompanying text.

213. See supra note 51 and accompanying text.
the realist-antirealist debate from the interpretivist attack, constitutional debate will merely continue as it has for years, echoing tired arguments in an endless oscillation between realist and antirealist postures.

These arguments in constitutional jurisprudence are thoroughly familiar. The metaphysical realist argues that constitutional issues have right answers that are objectively correct—not arbitrary, relative, or subjective. The strongest "constitutional realist" contends that constitutional interpretation should be based only on the plain meaning of the text and the intent of the framers. Other constitutional realists acknowledge that the text and the framers' intentions have to be supplemented, but only by some narrow and objective source, such as stare decisis. The weakest constitutional realists admit that the text and intent of the framers are ambiguous, but assert that some particular method exists for identifying the objectively right answer in any constitutional dispute. For example, the method of representation-reinforcement holds that the courts should enforce only those values that are necessary to maintain a fair and open democratic process. Constitutional realism's hallmark, regardless of its form, is always that constitutional disputes have objectively right answers. Therefore, courts should never impose their own personal values on society.

Conversely, the metaphysical antirealist argues that constitutional issues never have objectively right answers. Strong antirealists argue that constitutional adjudication "is simply politics by other means." Discussions of textual language, framers' intentions, or methods such as representation-reinforcement are no more than post hoc rationalizations that disguise, sometimes consciously and sometimes unconsciously, exercises of Nietzschean power. As one constitutional antirealist writes, "[T]he interpreter . . . simply beats the text into a shape which will serve his

214. See supra notes 10-13 and accompanying text.
215. See R. Berger, Government By Judiciary 45, 363-72 (1977); Graglia, "Constitutional Theory": The Attempted Justification for the Supreme Court's Liberal Political Program, 65 Tex. L. Rev. 789, 792 (1987). For an extensive defense of the position that the author's intent is the only legitimate criterion for interpreting a text, see E. Hirsch, Validity in Interpretation (1967).
216. See Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353, 360, 382 (1981). Robert Bork argues that the text and the framers' intentions can be supplemented only by rights that are necessary to the governmental processes explicit in the Constitution. See Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 17 (1971).
219. Sanford Levinson writes: "To put it mildly, there is something disconcerting about accepting the Nietzschean interpreter into the house of constitutional analysts, but I increasingly find it impossible to imagine any other way of making sense of our own constitutional universe." Levinson, supra note 218, at 385.
own purpose.'220 Weaker antirealists maintain that constitutional interpretation is constrained, but only by certain “disciplining rules” or conventions of the legal community.221 An interpretation is correct or incorrect merely because it either fits or does not fit within the currently accepted conventions. Thus, the hallmark of all constitutional antirealism is that constitutional interpretation is always either arbitrary, relative, or subjective.222

If we follow Moore’s rejection of the interpretive turn, constitutional jurisprudence will continue with these same arguments or, at best, slight variations. For example, instead of arguing that courts should enforce only those values that are necessary to maintain a fair and open democratic process—that is, representation-reinforcement—one might argue that the courts should ensure that legislative actions do not reflect “naked preferences,”223 which are “preexisting private interests”224 that are exogenous to social influences and autonomously chosen by individuals.225 In the end, however, these slight variations of the more familiar arguments simply reinvent the wheel in the form of constitutional realism or antirealism. They either seek to show that constitutional interpretations are objectively right or wrong based on the text, the intent of the framers, or some noncontroversial method of interpretation; or they seek to show that constitutional interpretations are hopelessly arbitrary, relative, or subjective.

Philosophical hermeneutics rejects the debate between metaphysical realists and antirealists and offers instead a new metaphysics of understanding. Based on this new metaphysics, philosophical hermeneutics offers a radically different description of interpretation and understanding. In so doing, philosophical hermeneutics suggests an alternative vision of constitutional jurisprudence—a vision that repudiates the opposition between constitutional realists and antirealists. Contrary to the claims of constitu-

220. Id. (quoting R. Rorty, Nineteenth-Century Idealism and Twentieth-Century Textualism, in Consequences of Pragmatism 151 (1982)).
221. Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739, 744 (1982).
222. Fiss argues that legal interpretation is objective, but that an objective interpretation is not necessarily correct. See id. at 748-49. Fiss’s concept of objectivity clearly diverges from a realist’s concept of objectivity. See supra notes 28-42 and accompanying text.
224. Id. at 1731.
225. For a critique of Sunstein’s constitutional theory, see Feldman, Exposing Sunstein’s Naked Preferences, 1989 Duke L.J. 1335. Another variation on the standard arguments is Professor Moore’s natural law theory. Moore argues that adjudication should be guided by our answers to moral questions, which have right answers. Moore writes:

Judges should guide their judgments about the ordinary meanings of words by the real nature of the things to which the words refer and not by the conventions governing the ordinary usage of those words; judges should seek their own best theory of what a prior court did and not rely on what that court said it was doing; and judges should seek answers that are really correct when they rely on values in interpretation and should not feel obesant to the conventional moral judgments of their society.

Moore, Natural Law, supra note 12, at 287-88.
tional realists, interpretations of the Constitution can never be objectively right. As with any other text, the meaning of the Constitution is not constituted by any plain meaning of its words or by the intentions of its authors, the framers. Moreover, no method can lead to the objectively true meaning of the Constitution. Yet, contrary to the claims of constitutional antirealists, neither free and independent subjects nor social conventions merely impose constitutional meaning. Tradition and prejudices always constrain our understanding of the Constitution.

Philosophical hermeneutics asserts instead that the meaning of the Constitution comes into being through the interpretive encounter between the reader and the text. The horizon of the interpreter, arising from prejudices and tradition, must fuse with the horizon of the text through the dialectical play and dialogue of the hermeneutic circle. Thus, as the horizon of the present shifts over time, the meaning of the Constitution is always potentially new and different. An objective meaning, in other words, is not simply waiting to be discovered, yet meaning is not imposed by unconstrained individuals or societal conventions. Instead, constitutional interpretation is an ontological event in which meaning comes into existence. The two sides of understanding resonate within the hermeneutic circle. Tradition, embedded in one's horizon, always limits one's vision of the Constitution and thus directs and constrains understanding and interpretation. Yet, tradition is constantly being created and recreated as the meaning of the Constitution comes into being.\(^2\)

For example, when a justice of the Supreme Court must interpret the equal protection clause of the Constitution, the meaning of that clause comes into being through the interpretive encounter between the justice and the text: "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."\(^2\) The horizon of the justice fuses with the horizon of the text. The horizon of the justice, being his or her prejudices, has developed from the justice's unique life within the traditions of the society. This includes the justice's understandings of the ways that people, including the justice, speak, write, and otherwise interact within the society, and more particularly, within the legal culture (in which, of course, the justice holds a prominent position). Thus, for example, previous interpretations of the equal protection clause, including the justice's own interpretations, significantly shape the justice's horizon.

In 1954, for instance, when Chief Justice Warren wrote the opinion in *Brown v. Board of Education*,\(^2\) the Chief Justice turned within his own horizon to focus on the text of the equal protection clause. The Chief Justice's horizon, reflecting his prejudices, had formed from many sources or traditions, including the traditions of constitutional adjudication in general and equal protection jurisprudence in particular. These traditions enabled the Chief Justice to read the equal protection clause insofar as they directed or opened him to its meaning—they effectively told him at least how to begin reading. For example, the Chief Justice considered case

\(^{226}\) See supra notes 110-211 and accompanying text.

\(^{227}\) U.S. Const. amend. XIV, §1.

\(^{228}\) 347 U.S. 483 (1954).
precedents\textsuperscript{229} and the intent of the framers of the fourteenth amendment.\textsuperscript{230} More specifically, Chief Justice Warren's understanding of previous equal protection decisions, such as \textit{Plessy v. Ferguson},\textsuperscript{231} and their meanings within American society were important prejudices that directed his vision towards equal protection. Thus, Justice Harlan's prescient dissent in \textit{Plessy} shaped in part Chief Justice Warren's understanding of the "separate but equal" doctrine upheld in that earlier case. Justice Harlan wrote:

What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?\textsuperscript{232}

In the many years after \textit{Plessy}, the cold meaning of segregation in American society was a "matter of common knowledge\textsuperscript{233} and clearly part of the American tradition within which Chief Justice Warren lived. As Professor Charles R. Lawrence has emphasized, "[S]egregation was a direct descendant of slavery and the black codes and an 'integral part of the movement to maintain white supremacy.' Segregation was not a case of mutual separation but a system that one group imposed on another."\textsuperscript{234} Shortly after \textit{Brown} was decided, Professor Charles L. Black described American society as follows:

[T]he society that views [the African-American's] blood as a contamination and his name as an insult, the society that extralegally imposes on him every humiliating mark of low caste and that until yesterday kept him in line by lynching—this society, careless of his consent, moves by law, first to exclude him from voting, and secondly to cut him off from mixing in the general public life of the community.\textsuperscript{235}

The Chief Justice's opinion in \textit{Brown} also reveals the importance of social science evidence to his understanding of the equal protection clause and previous equal protection decisions.\textsuperscript{236} According to the Chief Justice, that evidence "amply supported"\textsuperscript{237} the finding that the separate but equal doctrine had "a tendency to [retard] the educational and mental develop-

\textsuperscript{229} Id. at 489-93.
\textsuperscript{230} Id. at 488-89.
\textsuperscript{232} \textit{Plessy}, 163 U.S. at 560 (Harlan, J., dissenting).
\textsuperscript{235} Black, supra note 233, at 426.
\textsuperscript{236} \textit{See Brown}, 347 U.S. at 498 n.11.
\textsuperscript{237} Id. at 493.
ment of negro children." As Professor Derrick Bell subsequently documented:

In 1915, South Carolina was spending an average of $23.76 on the education of each white child and $2.91 on that of each black child. As late as 1931, six Southern states (Alabama, Arkansas, Florida, Georgia, and North and South Carolina) spent less than one-third as much for black children as for whites, and ten years later this figure had risen to only 44 percent. At the time of the 1954 decision in Brown v. Board of Education, the South as a whole was spending on the average $165 a year for a white pupil, and $115 for a black.

These aspects of tradition, together with many others, shaped Chief Justice Warren's prejudices and formed his horizon. Through the dialectic of the hermeneutic circle—through the dialogical play of question and answer—the Chief Justice fused his horizon with the horizon of the text, and the meaning of the equal protection clause in Brown came into being: "Separate educational facilities are inherently unequal." While the Chief Justice's horizon—his prejudices formed from tradition—enabled him to interpret the text of the equal protection clause, it also simultaneously constrained his vision of the possible meanings of the clause. For instance, the tradition of constitutional adjudication pushed the Chief Justice to discuss the intent of the framers, even if he found it inconclusive. Moreover, although the Chief Justice could overrule the "separate but equal" doctrine of Plessy, he could not erase it from his horizon, from the tradition of his society. Indeed, he used the language of equal protection as developed in Plessy and other equal protection precedents. Likewise, the Chief Justice could neither erase the dissent of Justice Harlan in Plessy, nor the specter of segregation in American society, nor the social science evidence of harm to African-American children: these aspects of tradition were within his horizon. All of these factors, as well as many others, simultaneously enabled and constrained Chief Justice Warren's reading of the equal protection clause. Furthermore, and most important, as the meaning of the equal protection clause came into being in Brown, the Chief Justice and the Court recreated tradition: they shifted the horizons of future interpreters of the equal protection clause. Brown itself is now a meaningful event and text that must be interpreted and that shapes prejudices, traditions, and horizons.

238. Id.
239. D. Bell, Race, Racism and American Law 373 (2d ed. 1980).
240. Id. at 495.
241. Id. at 488-89.
242. The Court did not expressly overrule Plessy, although the Court clearly overruled its holding that "separate but equal" facilities were constitutional. Brown, 347 U.S. at 495.
243. See generally Cover, Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4 (1983) (communities participate in the creation of legal meaning and normative universes); Lawrence, supra note 234, at 324, 328, 362-81 (the Court should focus on the meaning of actions within society to determine if those actions violate equal protection). Approaching constitutional adjudication from the perspective of philosophical hermeneutics supports Professor Lawrence's psychological approach to equal protection and racial discrimination.
Thus, if a new case were to arise in which the petitioner argues that discrimination against homosexuals violates the equal protection clause, Chief Justice Rehnquist would likewise turn within his horizon to the text of the equal protection clause. Furthermore, Chief Justice Rehnquist's horizon would overlap considerably with Chief Justice Warren's horizon of 1954. Even though Warren and Rehnquist sat on the Court during different generations, Rehnquist operates within the traditions of constitutional adjudication in the federal courts just as Warren did a generation earlier. Thus, as was true of Warren, Rehnquist might feel compelled to discuss the intent of the framers and case precedents. Chief Justice Rehnquist's horizon, however, sharply differs from Chief Justice Warren's horizon of 1954; each person has a unique life within the changing traditions of his or her society. Rehnquist's horizon, for example, includes an important element that did not exist for Warren in 1954: the decision and opinion in \textit{Brown}. Because of their different horizons, Rehnquist's vision of equal protection is necessarily different from Warren's vision. Nonetheless, as was true of Warren in \textit{Brown}, Rehnquist would interpret the equal protection clause from the limited viewpoint of his own horizon and prejudices. Thus, the meaning of the clause would once again come into being through the dialogical process of the hermeneutic circle. Rehnquist would question the texts of the clause and the case precedents, including \textit{Brown}, with a particular answer or fore-understanding in mind, but that answer might shift as he reads the clause and precedents. Consequently, Rehnquist might shift his questions in response to the shifting answers. Through this dialectical play of question and answer, the meaning of the text would come into being. And once again, the decision itself would recreate tradition and would shift horizons.

Moore might offer two criticisms of this alternative vision of constitutional jurisprudence. He might first argue that philosophical hermeneutics is merely a disguised conventionalism—a form of antirealism—because tradition is simply another name for convention. This criticism, however, overlooks the radical ontological difference between conventionalism and philosophical hermeneutics. Constitutional conventionalism asserts that interpretation is constrained by disciplinary rules or conventions and that a

For example, Professor Lawrence's explanation of racism sounds remarkably similar to what Gadamer might write about racism:

\begin{quote}
[R]acism in America is much more complex than either the conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots. It is part of our common historical experience and, therefore, a part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities.
\end{quote}

Lawrence, supra note 234, at 330.

244. In Bowers v. Hardwick, 478 U.S. 186 (1986), the Court held that the due process clause does not protect the right to engage in homosexual sodomy, but the Court added that it was not deciding whether such a right might be protected under the equal protection clause. Id. at 196 n.8. For a discussion of this issue, see Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. Chi. L. Rev. 1161 (1988).

245. Moore often criticizes interpretivists as being clandestine idealists. See, \textit{e.g.}, Moore, \textit{Turn for the Worse}, supra note 2, at 874, 892, 957.
correct interpretation is one that merely fits those conventions. If one ignores or misuses the disciplinary rules, then the interpretation is likely to be incorrect. In philosophical hermeneutics, tradition constrains interpretation because one's horizon limits one's vision, but tradition and prejudices also enable one to interpret and understand. Tradition does not impose meaning on the interpreter; rather, interpretation is a dialogical process, an ontological event in which meaning comes into being. One's prejudices are not disciplinary rules that can be ignored, thus leading to an incorrect interpretation. Prejudices are necessarily part of one's being and make understanding possible. Chief Justice Rehnquist, for example, can refuse to follow or can overrule Brown v. Board of Education, but he cannot erase it: Brown is an integral aspect of the tradition of his society, and consequently, it shapes his prejudices and his horizon.

Alternatively, Moore might argue that philosophical hermeneutics is irrelevant to constitutional law because it lacks standards for distinguishing correct interpretations from incorrect ones. According to Moore, philosophical hermeneutics neither tells us whether Plessy v. Ferguson was right or wrong nor how Chief Justice Rehnquist should decide the hypothetical equal protection case concerning discrimination against homosexuals. Gadamer does argue, however, that interpretation requires one to distinguish legitimate prejudices from illegitimate ones. Every interpretive experience is, according to Gadamer, a confrontation with and a "critical challenge" to tradition. To understand a text, an interpreter must put his or her prejudices into play, to risk them as he or she strains close to the edge of the horizon.

Despite Gadamer's claims, many commentators besides Moore argue that Gadamer's philosophical hermeneutics lacks critical bite: Gadamer does not provide standards for evaluating different interpretations. Gadamer fails, for example, to explain adequately how to determine the legitimacy of either Chief Justice Warren's prejudices regarding equal

---

246. See Fiss, Conventionalism, 58 S. Cal. L. Rev. 177, 191-96 (1985); Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739 (1982); supra notes 46-50 and accompanying text.
247. See supra notes 174-209 and accompanying text.
249. See supra text accompanying notes 72, 76.
250. 163 U.S. 537 (1896).
protection and racial discrimination or Chief Justice Rehnquist's prejudices regarding equal protection and discrimination based on sexual preference. Even if this criticism of Gadamer is true, however, it is not reason to reject philosophical hermeneutics as irrelevant to constitutional jurisprudence. To the extent that philosophical hermeneutics accurately describes constitutional adjudication, it must be accepted and accounted for. In effect, it must serve as the foundation for future discussion. Indeed, some commentators—though not in constitutional law—have attempted to elaborate philosophical hermeneutics by introducing standards for criticism. For example, Jurgen Habermas equates truth with the consensus that would be arrived at through dialogue in an "ideal speech situation," which is an idealized condition "of unlimited communication free from domination." According to this view, we can discriminate between various interpretations of the equal protection clause by asking (and answering) the question of how we would interpret the clause if we were free from coercion and domination. Regardless of the attractiveness of Habermas's form of hermeneutics, the point is that philosophical hermeneutics cannot be rejected as irrelevant to constitutional law. To the contrary, the future of constitutional jurisprudence should be philosophical hermeneutics—even if that future requires the further development of some critical bite in constitutional adjudication.257


255. Habermas, supra note 253, at 206.

256. Id. at 205. I do not mean to suggest that Habermas merely intends to supplement Gadamer's philosophical hermeneutics. The relationship between Gadamer and Habermas is complex. See R. Bernstein, supra note 17, at 58-93; G. Warnke, supra note 148, at 107-38. Habermas talks of a "critically enlightened hermeneutic" that incorporates a "meta-hermeneutic awareness." Habermas, supra note 253, at 205. My argument is that the "ideal speech situation" must be understood as existing within tradition—as situated within a concrete context. Thus, I disagree with Habermas's claims to objectivity or to finding universal conditions for understanding. See Giddens, Jurgen Habermas, in The Return of Grand Theory in the Human Sciences 131-32 (Q. Skinner ed. 1985); J. Habermas, What is Universal Pragmatics?, in Communication and the Evolution of Society 1-68 (T. McCarthy trans. 1979) (German texts 1976). Habermas's critiques of Gadamer are in J. Habermas, A Review of Gadamer's Truth and Method, in Understanding and Social Inquiry 335 (F. Dallmayr & T. McCarthy eds. 1977); Habermas, supra note 253. Gadamer's responses are in H. Gadamer, On the Scope, supra note 197; Gadamer, The Universality, supra note 177.

257. See, e.g., Feldman, Republican Revival/Interpretive Turn, supra note 9. Moore might also argue that philosophical hermeneutics is a disguised realism because it claims that its description of understanding and interpretation is true. In other words, how can Heidegger and Gadamer claim that their arguments are true if realism is false? See Moore, Turn for the Worse, supra note 2, at 901-02, 912-13. This argument merely reflects a stubborn clinging to realist-antirealist metaphysics. For the realist, truth cannot exist unless it is tied to reality—that is, unless it is a "view from nowhere." See T. Nagel, supra note 2. Philosophical hermeneutics argues from a different metaphysical position, not from nowhere. Truth is not based on correspondence with some reality. Instead, truth arises through the dialectical play between an interpreter and a text or text-analogue. For philosophical hermeneutics, nowhere is no where. Gadamer himself suggests that the argument that philosophical hermeneutics cannot be true because then that truth claim would be relative is misguided. Gadamer, in effect, turns this argument on its head by arguing that it does not undermine philosophical hermeneutics; rather, it suggests that formal argument does not lead to truth. In other words, if philosophical
The realist-antirealist debate that has characterized traditional western metaphysics reflects the Cartesian opposition of the subject and the object: while metaphysical realists ground existence on an objective world, antirealists ground existence on the thinking subject and human culture. Professor Moore argues that jurisprudence needs this metaphysical debate to continue. According to Moore, however, interpretivism rejects all metaphysical debate, including that between realists and antirealists. Moore consequently attacks interpretivism in an attempt to rescue the realist-antirealist controversy; the interpretive turn, in Moore’s view, is a dead end for jurisprudence.

Moore, however, does not give a fair and complete reading to the philosophical hermeneutics of Heidegger and Gadamer. A careful reading of Heidegger and Gadamer, with the historical background of Husserlian phenomenology, reveals that philosophical hermeneutics does not reject all metaphysics. While it rejects realist-antirealist metaphysics, it develops an alternative metaphysics based on understanding. Grounded on this new metaphysics, philosophical hermeneutics is able to offer a new description of interpretation, far richer than any previous descriptions grounded on the traditional subject-object dichotomy.

Philosophical hermeneutics describes interpretation as an ontological event in which meaning comes into being. We live in tradition, in the form of language, and thus we each have a horizon, formed by our prejudices, that limits our vision and understanding. Interpretation requires one to fuse the horizon of the present with the horizon of the text. This process is dialectical and dialogical: there is a play between the interpreter and the text that resembles a conversation between two speakers. And as meaning comes into being, tradition changes and one’s horizon shifts, thus leading to new meanings for the same text in the future.

In constitutional jurisprudence, philosophical hermeneutics offers the possibility of escaping from the repetitive arguments of metaphysical realists and antirealists. We no longer must demand that constitutional interpretation be objective for fear that it will otherwise be arbitrary, relative, or subjective. Instead, philosophical hermeneutics recognizes that constitutional interpretation is an ontological event in which the meaning of the Constitution comes into being. Thus, contrary to Moore’s argument, the interpretive turn is a turn for the better, not for the worse. Philosophical hermeneutics does not turn jurisprudence onto a dead end, rather it turns jurisprudence onto an open and seemingly endless road, however strange and new that road may be.

Hermeneutics is true, but the formal argumentation of realism does not reflect this, then realism must be false. H. Gadamer, Truth and Method, supra note 148, at 344; see id. at 397-98, 447-48; Gadamer, The Universality, supra note 177, at 189 (rejecting linguistic relativity).