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Work-in-Progress: Gadamer, Tradition and The Common Law

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> [T]he conversation that we are in is one that never ends. No word is the last word, just as there is no first word. Every word is itself always an answer and gives rise always to a new question.
>
> —Hans-Georg Gadamer[1]

INTRODUCTION

The influence of Hans-Georg Gadamer's writings on American legal theory is both peripheral and profound. It is peripheral in that, as with most continental scholarship, overt reference to it is limited and begrudging. Manifesting an all too familiar intellectual xenophobia, few jurists have given his extensive *oeuvre* of hermeneutical critique the kind of thorough and critical attention that it warrants. On the other hand, Gadamer's influence is profound in that many jurists offer an account of law and adjudication that is heavily indebted to the general insights and inspiration of his work. Mediated through the vicarious writings of some American philosophers, the understanding of law as an interpretive exercise in which judges must grapple with fixed texts in a changing historical context has become a matter of trite learning. It is appropriate, therefore, on Gadamer's centenary that there should be a symposium that not only will increase the general awareness of Gadamer's ideas and their influence on American jurisprudential thinking, giving them the respect and recognition that they merit, but also will provide an opportunity to subject those ideas to the kind of searching and sustained scrutiny that has hitherto been largely lacking. Accordingly, in this Article, I provide an account of the common law tradition of judging that draws upon Gadamer's writings in advancing

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1. Letter from Hans-Georg Gadamer to Fred Dallmayr (1985), *in* DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER 95 (Diane P. Michelfelder & Richard E. Palmer eds., 1989).

the intellectual project of critical legal theory. In developing and substantiating the claim that "law is politics," my interpretation of Gadamer will be controversial and not to everyone's taste. However, mindful of the concluding words of Gadamer's *Truth and Method* that "[i]t would be a poor hermeneuticist who thought he could have, or had to have, the last word,"[2] I celebrate Gadamer in what I believe is the best and most respectful way. Challenging the textual letter of Gadamer's writings in the subversive spirit of Gadamer's hermeneutics, I treat Gadamer's answers as provoking, not precluding new questions and, perhaps, inviting and producing new answers.

I. WORK-IN-PROGRESS

The particular questions and answers that I want to explore are those that concern the defense of common law adjudication as an institutional tradition of bounded and neutral decision making. The so-called hermeneutical turn in jurisprudence—the acknowledgment that, insofar as law concerns texts, adjudication is an interpretive exercise—has obliged theorists and lawyers to take seriously (again) the idea that law is a rhetorical tradition of specialized arguments. While this greater hermeneutical awareness has strengthened the jurisprudential project and rendered the resulting theories more plausible and cogent, it has also revitalized and strengthened the subversive force of the critical claim that law is not the bounded and objective process that the mainstream project of jurisprudential theorizing demands it to be. Once it is conceded that law is a more vital and less closed affair than was traditionally supposed, the fear resurfaces that the law will collapse into politics and that there will be no way to distinguish adjudication from more open-ended processes for the resolution of moral and political disputes. Moreover, jurisprudential accounts will themselves run the risk of being treated as simply an exercise in political rather than philosophical analysis in which truth and reason are not so much constraints on debate, but constructs of it. It is this effort to take on board the hermeneutical insight in order to salvage the jurisprudential project without also fatally undermining its traditional ambitions that is at the heart of this Article. In most general terms, my critical claim is that, once history is included in the task of understanding and justifying the adjudicative process (as the hermeneutical insight insists that it must be), there is

2. HANS-GEORG GADAMER, TRUTH AND METHOD 579 (Joel Weinsheimer & Donald Marshall trans., Crossroads 2d rev. ed. 1989) (1960).

no effective way to keep the larger forces of ideological contestation out of the jurisprudential frame. Despite jurists' best efforts to the contrary, it is my contention that this effort to historicize law and adjudication in the name of rhetorical knowledge cannot be done without also politicizing them: the performance of legal adjudication will be revealed as a thoroughly and unavoidably ideological exercise. As I will seek to explain, however, this is not the deathblow for law and adjudication that many believe it to be—it is possible to understand law and adjudication as thoroughly political without recommending its complete abandonment.

In contrast to most contemporary jurisprudential scholarship, I want to contend that utilization of Gadamer's hermeneutics may offer a more radical and transformative reading of the common law tradition. In his introduction to *Truth and Method*, Gadamer cautions that, while people exist and thrive within a tradition, "it still is part of the nature of [people] to be able to break with tradition, to criticize and dissolve it."[3] Indeed, Gadamer concedes that his hermeneutic universalism, in emphasizing and giving priority to the past and tradition, does run the risk of having "a lack of ultimate radicality."[4] However, Gadamer insists that this may be the price that has to be paid in order to establish meaning in people's lives—"[w]hat [people] need[] is not just the persistent posing of ultimate questions, but the sense of what is feasible, what is possible, what is correct, here and now."[5] In my view, this is both an unnecessary and unwise concession: the fear that radicality must be synonymous with "the nihilism that Nietzsche prophesied"[6] is unwarranted. On the contrary, it is both possible and desirable to run the risk of "ultimate radicality."[7] Rather than seek to confront the ever intensifying "criticism of what has gone before"[8] with "something of the truth of remembrance: with what is still and ever again real,"[9] it is better to abandon truth and remembrance entirely. So disencumbered, people might step forward into the real and the what-is-yet-to-come in the exciting hope of contributing to the work-in-progress of law, tradition, and politics. Accordingly, I offer an account of what

3. *Id.* at xxxvii.
4. *Id.*
5. *Id.* at xxxviii.
6. *Id.* at xxxvii.
7. *Id.*
8. *Id.* at xxxviii.
9. *Id.*

hermeneutical tradition and legal practice might look like and how it might be appreciated if the radicality of the hermeneutical insight was not cabined or contained. Although Gadamer tries to resist the charge that his work has "legitimated a prejudice in favor of existing social relations,"[10] I maintain that Gadamer and his juristic followers, no matter how noble or progressive their intentions, have managed to curb rather than cultivate the "critical and emancipatory" instinct.[11]

In this Article, therefore, I want to follow through on where Gadamer's hermeneutical critique, if pursued rigorously and unconditionally, might take law and jurisprudence. I explore what it means to treat law seriously as a living rhetorical tradition or a work-in-progress. Of course, the idea of understanding law as a social practice or tradition is not new and the appreciation that law is always changing is hardly novel. Nevertheless, the received wisdom remains that, while law and adjudication are squarely situated in the historical flow of social life, they march largely to the uniform beat of a different drummer than society's competing and cacophonous percussionists; that drummer and that beat are contended to be distinctly legal rather than insistently ideological. In contrast, my critical response is that, because law is a social practice and society is in a constant state of agitation and movement, law is always a work-in-progress that is not only never complete or finished, but is always situated inside and among, not outside and beyond, the ideological forces at work in society. Insofar as adjudication is a bounded tradition, it is one in which those bounds are part and parcel of the political contestation from which they are intended to insulate the law. There are no solid and secure footings for law and legal theory that are not themselves inside the very political and situated debate that they are intended to ground and underwrite: there is no escape from the messy and contingent facts of social living. And, insofar as it is possible to think critically about law, it cannot be done by escaping the concrete and ideological circumstances of law and legal theorizing: law is a political enterprise and theory is a specialized form of politics.

In order to address these difficult and hotly debated issues, I intend to address them through a particular reading of Gadamer's ideas. I say "through" rather than "with" because I want to suggest the indeterminacy and dynamism of interpretive work, whether in law

10. *Id.* at 566.
11. *Id.* at 567.

or scholarly endeavour. As I will explain, my approach to the conundrum of explaining change and continuity in the law is influenced by my reading of Gadamer. It is neither determined by my reading of Gadamer, nor does it claim to be the definitive reading of Gadamer because, like the common law itself, the hermeneutical genius of Gadamer defies easy understanding or simple elucidation. So grasped, I intend to utilize the work of Gadamer as part of a suggestive account of how the common law develops and functions. Throughout, I want to insist that Gadamer, tradition, and the common law are best understood as works-in-progress, each of which whose meaning is never fixed or determined, but is constantly and continually open to appropriation and transformation. This is not to say that "anything goes" or that the perceived postmodern nightmare has become a waking reality. It is intended as an acknowledgment that there is no master narrative that can explain or do away with the need or responsibility for choice: what counts as meaning is always unstable and cannot be a foundation for anything, let alone the legitimacy of common law adjudication as a mode of objective and nonideological decision making. Moreover, my own view on what is and is not a cogent or useful account of law and adjudication is also a work-in-progress in that this Article acts as a series of glosses and shifts on the basic themes that my work has hitherto comprised; it develops and elaborates on earlier ideas as it interrogates and alters them.[12]

The remainder of the Article is divided into eight main parts. The first two parts set the scene by introducing the jurisprudential debate on legal hermeneutics that has been played out through the recent U.S. Supreme Court physician-assisted suicide decision in *Washington v. Glucksberg*.[13] After isolating some of the more pertinent critical commentary, I map out the general contours of the decision, particularly the pivotal and much-heralded opinion written by Justice Souter. In the next part, I step back and provide a broader intellectual context for the hermeneutical turn in modern jurisprudential scholarship. I follow that with two parts on Gadamer. Whereas the first part offers a basic introduction to the main themes

12. The most recent and most sustained account of my ideas on law, politics, and adjudication can be found in ALLAN C. HUTCHINSON, IT'S ALL IN THE GAME: A NONFOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION (2000).

13. 521 U.S. 702, 735 (1997) (determining that the state of Washington's law against assisted suicide did not violate the Due Process Clause of the Fourteenth Amendment of the Constitution).

in Gadamer's work, the second part challenges the jurisprudential effort to insist upon a conservative reading of Gadamerian hermeneutics and its relevance to the common law tradition; the important interventions of Jay Mootz will be used as a critical foil. Consequently, the next part proposes a much less conservative and more radical explication of Gadamer's value to contemporary jurisprudential endeavours. The final two parts explore the implications of this more subversive approach to common law adjudication. After revisiting Justice Souter's *Glucksberg* opinion and reassessing it from a more critical perspective, I trace the more general repercussions of my insistence that the historicization of law and adjudication must also entail its politicization. Throughout the Article, I rely upon the notion of "work-in-progress" as a productive optic through which to view and appreciate the dynamic and unfinishable quality of law, interpretation, and criticism. I want to recommend an approach to the common law adjudicative tradition that will abandon once and for all the misguided effort to treat it as if it were a significantly bounded and largely neutral tradition of argument that is something other than one more site for the encounter, albeit stylized and staged, between contesting ideological forces. For me, the common law is an organic and messy practice that is always moving and, like the society in which it moves, is never capable of being subsumed under any one theory that can transcend or finesse ideological contestation. Also, when looked at in the way that I suggest, the common law is exactly the kind of practice that might lend itself well to the local, episodic, contextualized, focused, and work-in-progress kind of politics that is required and possible.

II. THE *GLUCKSBERG* OPENING

Rather than pursue these issues in the abstract, it is more instructive to place them in the practical and focused context of an adjudicated dispute. There is always some danger in concentrating on one case because no decision can withstand the full force of jurisprudential scrutiny. However, such a way of proceeding is preferable to a more sprawling and less detailed approach that is open to the allegation that discussion is pitched at too abstract and impractical a level, thereby permitting jurists to get by with vague generalities and broad statements. Accordingly, in order to focus my discussion and join issue with those who insist on enlisting Gadamer in support of a traditional defense of adjudication and jurisprudence,

I will work through the familiar judgments in the U.S. Supreme Court decision in *Washington v. Glucksberg*. Faced with a challenge to Washington's legislative prohibition of assisted suicide, the Supreme Court had to grapple with the Due Process Clause of the Fourteenth Amendment, which declares that states may not "deprive any person of life, liberty or property, without due process of law."[14] The Court decided that such a right was not presently so fundamental a liberty that was protected by the Due Process Clause and, therefore, its infringement by government was permissible.[15] Although the Supreme Court was unanimous in its decision, it was divided over the appropriate reasoning for this decision.[16] The *Glucksberg* opinion has predictably engendered much debate and disagreement. However, apart from the popular and strictly ethical discussion about the propriety of statutes addressing the right to die, the *Glucksberg* decision has become the focus of considerable jurisprudential engagement. Although there were several concurring decisions, the majority opinion written by Justice Rehnquist and the concurring opinion written by Justice Souter have commanded the most attention; each represents a very different approach to due process analysis and, thereby, to the freighted and fraught judicial task of charting the connection between legal analysis and ethical or political values in constitutional and common law decision making generally. In short, jurists have examined critically the jurisprudential basis on which the competing judges approach that task and the overall style of adjudicative reasoning.

For example, Ronald Dworkin has chastised the court for its failure to understand fully the philosophical dimension of adjudication and the ethical responsibilities of judges in interpreting the Constitution.[17] Having joined with other leading liberal philosophers including Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thompson in submitting an amicus brief, Dworkin was not pleased with the Supreme Court's

14. U.S. CONST. amend. XIV, § 1.

15. *See Glucksberg*, 521 U.S. at 735.

16. *Id.* at 704. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. Justice O'Connor wrote the concurring opinion, in which Justices Ginsburg and Breyer joined in part. Justices Stevens, Souter, Ginsburg, and Breyer also wrote concurring opinions.

17. *See* Ronald Dworkin, *Assisted Suicide: What the Court Really Said*, N.Y. REV. BOOKS, Sept. 25, 1997, at 40, 40-44 [hereinafter Dworkin, *Assisted Suicide*]; *see also* Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718 (1998) [hereinafter Dworkin, *Darwin's New Bulldog*].

decision.[18] Dworkin's displeasure was not simply because the Court found resoundingly against his particular views on the best moral and constitutional position on assisted suicide, but because he considered that the judges had not properly appreciated their sophisticated task as constitutional interpreters. Dworkin had little good to say about Justices Rehnquist, Scalia, and Thomas who, in taking an entirely historicist approach and insisting that what has been accepted as politically fundamental is what is legally fundamental, ignored the philosophical and critical element of constitutional adjudication; they reduced it to a crass and conservative enterprise in empirical inquiry. On the other hand, although Justice Souter's judgment was "reasonable in principle,"[19] Dworkin remained unconvinced that the facts were so sufficiently in dispute as to warrant a hands-off approach by the courts. Nevertheless, with characteristic ingenuity, Dworkin refused to accept that all was lost and, arguing that five of the six justices who wrote opinions did not reject his ethical stance out-of-hand, hoped that the Court might well come to its constitutional senses in the future and validate a constitutional right to die.[20]

Taking the *Glucksberg* bait, Richard Posner took Dworkin to task for his views on how the right to die claims should be resolved and what valid constitutional adjudication should comprise.[21] For Judge Posner, Dworkin was barking entirely up the wrong tree in insisting that such disputes require the court to participate in moral theory; this is the problem, not the solution, in understanding the

18. *See* Dworkin, *Assisted Suicide*, *supra* note 17, at 40-44.

19. *Id.* at 42. Dworkin also wrote:

> The main moral claims of that brief were, first, that competent dying individuals have, in principle, a right to decide for themselves how to die, and, second, that even if recognizing that right would to some degree increase the risk that other patients would be pressured into choosing death against their will, that increased risk does not justify refusing to recognize the right at all.

Dworkin, *Darwin's New Bulldog*, *supra* note 17, at 1729; *see* Dworkin, *Assisted Suicide*, *supra* note 17, at 41-47. *See generally* Ronald Dworkin, *The Fifth Annual Fritz B. Burns Lecture, November 22, 1996: Euthanasia, Morality, and the Law, Transcript*, 31 LOY. L.A. L. REV. 1147 (1998). According to Dworkin, "None of the Justices 'ducked' both of these claims; three of them decided against [his] position on the first and five on the second." Dworkin, *Darwin's New Bulldog*, *supra* note 17, at 1729. *See* Ronald Dworkin, *Order of the Coif Lecture: Reply*, 29 ARIZ. ST. L.J. 431 (1997); Ronald Dworkin, *Assisted Suicide and Euthanasia: An Exchange*, N.Y. REV. BOOKS, Nov. 6, 1997, at 68-69 (replying to Yale Kamisar) [hereinafter Dworkin, *An Exchange*].

20. *See* Dworkin, *An Exchange*, *supra* note 19, at 69.

21. *See* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 133, 227 (1999).

constitutional role of courts in such ethical controversies.[22] In contrast, Posner is adamant that the Supreme Court must deliberately and steadfastly refuse to become bogged down in such philosophical quagmires.[23] His pragmatic commitments advise that courts best fulfill their institutional roles when they "ground policy judgments on facts and consequences [rather] than on conceptualisms and generalities."[24] Accordingly, in *Glucksberg*, the Supreme Court was correct to stay out of the moral debate around the right to die and to prefer the solid earth of policy analysis to the soggy turf of moral philosophy—there was no obviously shared or objective moral resolution available; democracy was at work and seemed to be proceeding satisfactorily without judicial interference, and the issue demanded very complex rules of implementation which courts are ill-equipped to draft. In advocating such a consequentialist approach to decision making, Posner it seems does not intend to abandon principled adjudication in favor of ad hoc calculation. Posner claims that it is simply mistaken to equate "moral principle to principle, and morality to normativity."[25] For Posner, therefore, *Glucksberg* is a prime example of the benefits and legitimacy of construing constitutional (and general common law) adjudication as a practical task of institutional instrumentalities rather than as an abstruse exercise in philosophical reflection: the former is something that most judges can and should do, whereas, the latter is something that most judges cannot and should not do.

While the spat between Dworkin and Posner goes to the contemporary heart of much jurisprudential debate, there is another take on the *Glucksberg* decision that is worthy of serious consideration. It is Francis J. Mootz's suggestion that Justice Souter's judgment ought to be celebrated as a paradigm example of what it means to take a sophisticated and Gadamerian-inspired approach to the judicial task.[26] Mootz states that, "[Justice] Souter's opinion

22. *Id.* at 133.

23. *Id.* at 130-34.

24. *Id.* at 227.

25. *Id.* at 133. For a critique of this approach, see Dworkin, *Darwin's New Bulldog*, *supra* note 17. Justice Souter has also been taken to task for his inability to justify the exclusion of economic liberties from substantive due process doctrine. *See* Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 44-45, 52-53 (1999). For other critiques, see Bruce Jennings, *The Liberal Neutrality of Living and Dying: Bioethics, Constitutional Law, and Political Theory in the American Right-to-Die Debate*, 16 J. CONTEMP. HEALTH L. & POL'Y 97 (1999); *Symposium on Physician-Assisted Suicide*, 109 ETHICS 497 (1999).

26. *See generally* Francis J. Mootz III, *Law in Flux: Philosophical Hermeneutics, Legal*

persuasively describes the adjudication of fundamental rights as a hermeneutical-rhetorical project in terms that Gadamer . . . would endorse, even though Justice Souter articulates his reasoning in the idiom of contemporary constitutional discourse."[27]

Moreover, Mootz maintains that Justice Souter's legal pragmatism taps into the natural law tradition, albeit in a nontraditional and new form. At the heart of Justice Souter's approach is alleged to be not only the outright denial of adjudication as a technical and pseudoscientific exercise in textual exegesis, but also an enthusiastic embrace of the hermeneutical idea that adjudication involves immersion in an organic tradition of reasoned judgment and principled argumentation in which a balanced mediation of past commitments and present concerns is negotiated. Inspired by the work of Lon Fuller and Lloyd Weinreb, Mootz puts together a plausible case for his informed assessment that "[Justice] Souter's practice affirms that rhetorical knowledge is possible and that human understanding is dialogical"[28] and that "this mode of conversational understanding acknowledges the natural law groundings of legal practice while simultaneously rendering the law current by means of application and judgment."[29] Accordingly, Justice Souter's opinion warrants a close and critical reappraisal in light of these ambitious claims.

Nevertheless, although Justice Souter's judgment and its thoughtful reflection on adjudicative legitimacy are a vast improvement on the other judicial approaches on offer, I do not believe that it can bear the jurisprudential weight that hermeneutical jurists like Mootz wish to place on it. As with my treatment of Gadamer and legal hermeneutics generally, I intend to take the basic claims that Justice Souter makes and, rather than hedge on their radical import as Gadamer, Mootz, and Justice Souter do, push through on them in an unconditional and uncompromising manner. When this is done, Mootz and Justice Souter appear quite conservative in that they are shown to be unwilling to take seriously the radical implications of their own views. However, my quarrel with Justice Souter and Mootz is less with how they depict the operation of the common law, but more with the claims that they

Argumentation, and the Natural Law Tradition, 11 YALE J.L. & HUMAN. 311 (1999).

27. *Id.* at 326.

28. *Id.* at 377.

29. *Id.* at 381.

make for this account. Indeed, while I agree in large part with their description of the common law method, I disagree that this hermeneutical method can live up to the traditional expectations that are placed upon it; it fails to deliver on the formalist promise that common law adjudication is a bounded and objective process that can give rise to relatively determinate and predictable resolutions of disputed controversies in a way that distinguishes legal decision making from overtly political or ideological disputation. Consequently, rather than offer a compelling illustration of Gadamerian-inspired legal argumentation, Justice Souter's judgment actually gives credence to the alternative hermeneutical account of the common law that I intend to propose—there is no method that can absolve people from the responsibility and challenge of constantly arguing what should and should not be done in particular contexts at particular times and there is no escaping politics to a technical or sanitized conversation in which the basic struggle over whose interests count and what they count for can be sidestepped. Of course, such a debate will itself be ungrounded and political: there is no way to talk about politics that is not itself political. Politics, like the law in which it plays itself out, is a work-in-progress. In short, I maintain that "law is politics" in that, far from being a check on or remove from political debate, adjudication is another site, albeit stylized and technical, for political confrontation in which "anything might go."

III. THE SOUTER MOVE

In writing for the majority in the *Glucksberg* opinion, Chief Justice Rehnquist relies on a fairly predictable approach to the substantive due process doctrine.[30] While he accepts that the Fourteenth Amendment's protection of "liberty" is broader than a mere absence of physical restraint, he insists that the limits of such fundamental values must be studiously noted and observed.[31] In order to ensure that there is a requisite degree of objectivity to the recognition of such values, Rehnquist demands that only those values that are deeply rooted in the nation's history and traditions can be accorded constitutional sanction.[32] Accordingly, he holds that,

30. Washington v. Glucksberg, 521 U.S. 702, 705-37 (1997) (Rehnquist, C.J.).

31. *Id.* at 719-20 ("The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint.") (quoting Collins v. Harker Heights, 530 U.S. 115, 125 (1992)).

32. *Id.* at 720-21 ("Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially

because "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide,"[33] there is no legitimate ground on which to recognize a protected right to assisted suicide.[34] Indeed, Rehnquist is so opposed to a balancing of competing interests that he is prepared to concede that there might not be any "principled basis" for defining the actual reach and extent of the fundamental rights that are protected.[35] For him, the vaunted objectivity of the traditional process outweighs any perceived gains to be made by a more nuanced, yet less neutral, approach to substantive due process.[36] In going out of his way to defend the traditional analysis, the Chief Justice clearly and expressly has the alternative method of Justice Souter in his jurisprudential sights.[37] In contrast, Souter's approach to the substantive due process doctrine is much less as a historicist and more critical than Rehnquist's. He is not prepared to treat what is historically rooted as being constitutionally decisive; while the embeddedness and longevity of a particular social practice is an important factor in determining its constitutional protection, it is not the exclusive or necessarily decisive one.[38]

Justice Souter offers a plausible telling of the doctrine in which the absolutism of *Dred Scott v. Sandford*[39] and *Lochner v. New York*[40] has given way to a more restrained approach that favors legislative intervention and curbs only arbitrary and egregious exercises of that power. For Souter, this entails the "scrutiny of a legislative resolution (perhaps unconscious) of clashing principles, each quite possibly worthy in and of itself, but each to be weighed within the history of

protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'") (quoting Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977)).

33. *Id.* at 711.

34. *Id.* at 719.

35. *Id.* at 785. Justice Souter wrote in the concurring opinion:

> The case for the slippery slope is fairly made out here, not because recognizing one due process right would leave a court with no principled basis to avoid recognizing another, but because there is a plausible case that the right claimed would not be readily containable by reference to facts about the mind that are matters of difficult judgment, or by gatekeepers who are subject to temptation, noble or not.

Id.

36. *Id.* at 721.

37. *Id.* at 721 n.17 (Rehnquist, C.J.).

38. *Id.* at 756, 761.

39. 60 U.S. (19 How.) 393 (1856).

40. 198 U.S. 45 (1905).

our values as a people."[41] Rather than a logical deduction from some textual first premise, Souter treats the doctrine as demanding "a comparison of the relative strengths of opposing claims,"[42] that empowers the courts not to "substitute one reasonable resolution of the contending positions for another, but . . . to supplant the balance already struck between the contenders only when it falls outside the realm of the reasonable."[43] The judicial challenge is to avoid "the absolutist failing of many older cases without embracing the opposite pole of equating reasonableness with past practice described at a very specific level."[44] To achieve this, Souter draws upon the idea of "ordered liberty" that consists of a continuum of rights to be free from "arbitrary impositions or purposeless restraints."[45] As the source for the legitimacy of this balancing approach to substantive due process analysis, Souter points to the celebrated dissent of Justice Harlan in *Poe v. Ullman*,[46] in which he states:

> Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court, which radically departs from it, could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[47]

41. *Glucksberg*, 521 U.S. at 764.

42. *Id.*

43. *Id.*

44. *Id.* at 765.

45. *Id.* at 752.

46. 367 U.S. 497 (1961).

47. *Id.* at 765-66 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961)). *Glucksberg* is not the first time that Justice Souter has taken such an approach to substantive due process. He began to develop his "reasoned judgment" line in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). However, in speaking for the Court, along with Justices O'Connor and Kennedy, Justice Souter made a couple of remarks that strike a discordant note. First, he said that "consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw." *Id.* at 870. This can only make sense in those areas where constitutional liberties are not at stake. Second, he observed that "even when jurists reason from shared premises, some disagreement is inevitable. That is to be expected in the application of any legal standard which must

There are many motifs in these famous dicta—no formulaic solutions, the balancing of interests, a rational process, the caution against roaming judges, the lessons of history, the force of tradition, the organic quality of tradition, and restrained judgment—that Souter seeks to draw together into an integrated and dynamic account of what substantive due process analysis demands and has become. Justice Souter, however, is much more ambitious in the claims that he makes for this style of judicial practice. In stressing that "[t]his approach calls for a court to assess the relative 'weights' or dignities of the contending interests,"[48] he underlines the fact that "[this] judicial method is familiar to the common law."[49] This, of course, is not surprising. Indeed, it would be odd if the difference between the styles of constitutional and common law adjudication were substantial or striking, as it is exactly the same judges that engage in both. Nevertheless, Souter is quick to point out that there are two important constraints in constitutional matters, particularly when undertaking substantive due process review. First, there must be some objective basis to the values protected that go beyond the "merely personal and private notions"[50] of justice of any particular judge. Second, having identified the existence of fundamental values, it must be determined whether "the legislation's justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way."[51] It is not enough to simply locate "a reasonable resolution of contending values that differs from the terms of the legislation under review."[52] Notwithstanding these riders, Souter is clear and open that he believes that substantive due process analysis is simply a particular kind of common law adjudication: the basic components of the common law mindset are adapted to the specialized demands of the constitutional context.[53]

In undertaking this general adjudicative task, Souter urges there has to be an "explicit attention to detail that is no less essential to the intellectual discipline of substantive due process review than an understanding of the basic need to account for the two sides in the

accommodate life's complexity." *Id.* at 878. This seems to be right, but undermines severely the confidence that Souter has in "exact" analysis.

48. *Glucksberg*, 521 U.S. at 767.

49. *Id.*

50. *Id.*

51. *Id.* at 768.

52. *Id.*

53. *Id.* at 767.

controversy and to respect legislation within the zone of reasonableness."[54] Again, drawing on Harlan's dissenting opinion, Souter observes that:

> Just as results in substantive due process cases are tied to the selections of statements of the competing interests, the acceptability of the results is a function of the good reasons for the selections made. It is here that the value of common-law method becomes apparent, for the usual thinking of the common law is suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples. The "tradition is a living thing," albeit one that moves by moderate steps carefully taken. "The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take its place in relation to what went before and further [cut] a channel for what is to come." Exact analysis and characterization of any due process claim is critical to the method and to the result.[55]

Having laid out what he believes to be the best and most appropriate approach to substantive due process analysis in particular and common law adjudication in general, Justice Souter turns to the resolution of the concrete dispute before the Supreme Court. In line with his defended approach, he asks whether, as part of the traditionally recognized claims to autonomy in deciding how human bodies and minds should be treated, a patient's request to obtain the services of a physician in committing suicide "is said to enjoy a tradition so strong and so devoid of specifically countervailing state concern that denial of a physician's help in these circumstances is arbitrary when physicians are generally free to advise and aid those who exercise other rights to bodily autonomy."[56] After engaging in a close and contextual survey of the law, practices, and arguments in play, Justice Souter concludes that, although the importance of the individual interests are substantial,

> [w]hether that interest might in some circumstances, or at some time, be seen as "fundamental" to the degree entitled to prevail is not, however, a conclusion that I need draw here, for I am satisfied

54. *Id.* at 765.

55. *Id.* at 770. In reaching this decision, Souter seems to be following very closely the advice offered by Cass Sunstein on how to decide the issue. *See* Cass R. Sunstein, *The Right to Die*, 106 YALE L.J. 1123 (1997). Souter does not mention Sunstein in his judgment.

56. *Glucksberg*, 521 U.S. at 774.

> that the State's interests . . . are sufficiently serious to defeat the present claim that its law is arbitrary or purposeless.[57]

In reaching this conclusion, Souter accepts the practical difficulties in controlling or limiting the exercise of the alleged right. Indeed, he is very concerned to ensure that the courts do not step on the toes of legislatures who have a much greater claim to the open floor of political dancing and are authorized to take the choreographic lead in deciding what is the style and direction of political movement. When it comes to recognizing the existence and scope of the unenumerated rights of the Due Process Clause, it will not be arbitrary for the legislature to act when the "facts necessary to resolve the controversy are not readily ascertainable through the judicial process; but they are more readily subject to discovery through legislative factfinding and experimentation"[58] and to answer otherwise "would simply create a constitutional regime too uncertain to bring with it the expectation of finality that is one of this Court's central obligations in making constitutional decisions."[59] Nevertheless, in line with the contextually nuanced imperative of Harlan's favored methodology, Justice Souter concludes that "I do not decide for all time that respondents' claim should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time."[60]

In many ways, Justice Souter's judgment is a jurisprudential tour de force; he takes the opportunity presented by the particular dispute to offer a reflective and expansive general justification of adjudicative responsibilities in a constitutional democracy. As such, Souter attempts to provide little less than a comprehensive theory of common law decision making that, in its emphasis on attention to detail, historical erudition, conceptual flexibility, and critical insight, is as ambitious as it is sophisticated. It is not surprising, therefore, that his judgment—not for the jurisprudentially timid at heart—should have received such critical attention and lively debate. While there is much to comment on Souter's judgment (and its general

57. *Id.* at 782.

58. *Id.* at 785-87.

59. *Id.* at 789.

60. *Id.* While Justice Souter traces the idea of "reasoned judgment" to the dissenting judgment of Justice Harlan in *Poe v. Ullman*, 367 U.S. 497, 522-55 (1961), it has been remarked that, while Harlan talks about reason and judgment, he does not mention "reasoned judgment" as such. *See* Stephen M. Feldman, *The Supreme Court in a Postmodern World: A Flying Elephant*, 84 MINN. L. REV. 673 (2000). Also, although Justice Souter took a similar pragmatic approach to substantive due process analysis in his majority opinion in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), it was chastised by Justice Scalia for being overly subjective and having been rejected by the Court in *Glucksberg*. *See Glucksberg*, 521 U.S. at 860-61.

jurisprudential reception), I will restrict my response to an effort to treat it as an exemplary illustration of philosophical practice in the mode of Gadamerian hermeneutics. That having been said, such a response will touch upon a wide range of theoretical issues and practical controversies. Accordingly, as part of that critique, I will utilize Souter's sophisticated opinion as a convenient route into three of the central problems that define and dog contemporary jurisprudence: (1) that there is some objective basis to the protected values and the methods used to ascertain them that goes beyond the "merely personal and private notions"[61] of justice of any particular judge; (2) that it is possible for judges to identify "arbitrary impositions and purposeless restraints"[62] by legislative bodies in a strictly legal as opposed to openly political way; and (3) that there exist recognizable traditions in law which allow judges to engage in contested matters of social, legal, and judicial practices in a determinate and defensible way. Or, to put it more bluntly, that there is a viable way of resisting the critical claim that "law is politics." I will begin this task of insisting that there is no viable way to so resist by stepping back and exploring the contemporary relation between jurisprudence and hermeneutics.

IV. THE HERMENEUTICAL INSIGHT

As traditionally understood, jurisprudence applies to all those efforts to step back from the actual practice and operation of law in order to make some general sense of it all. As Karl Llewellyn phrased it, "jurisprudence is as big as law, and bigger."[63] This venture can be carried out from all perspectives and indeed has been. Economists, sociologists, literary critics, anthropologists, political scientists, psychologists, and many others have sought to place the world of law under closer critical scrutiny. However, in recent years, jurisprudence has been hijacked by philosophers. Apart from their usual imperialist claims that philosophy is the intellectual discipline that is assumed and incorporated by all others, legal philosophers claim to be first among jurisprudential equals. They insist that, while there is much of value to be learned about law when viewed from the outside as a social or political activity, the effort to understand law in its own terms and as a viable internal operation is entitled to

61. *Glucksberg*, 521 U.S. at 767.
62. *Id.* at 790 (quoting Poe v. Ullman, 367 U.S. 497 (1961)).
63. KARL N. LLEWELLYN, JURISPRUDENCE 372 (1962).

theoretical priority. It is not so much that they dismiss other types of study, but that they claim that they are of a secondary and derivative character for lawyers. While such jurists concede that not all problems and issues in law are philosophical, they do contend that all of those problems and issues are capable of becoming philosophical ones and that they are premised on some inescapable philosophical assumptions. Construed in this way, jurisprudence soon found itself on the familiar terrain of many traditional philosophical conundrums, and jurists have considered a central part of the jurisprudential project to develop an epistemology of law: How is it possible to have knowledge about law or to know what counts as knowledge of or about law? And what counts as good and bad knowledge about law? As such, jurisprudence has adopted a traditional and philosophical stance in developing a series of truth claims about the legal enterprise. All of the problems of legal philosophy or jurisprudence have tended to begin and, in some cases, to end with this inquiry: "Most of the important arguments in legal thought are epistemological in nature."[64]

However, as jurisprudence has become increasingly philosophical in style and ambition, the discipline of philosophy has been experiencing a certain crisis of confidence in its own status and performance: there is widespread uncertainty over the academic viability and intellectual legitimacy of the whole philosophical enterprise, especially in its epistemological mode. Recent debates have moved beyond traditional exchanges over the merits of one theory of truth or another and, instead, have begun to focus upon the very idea and possibility of truth itself. There is a growing insistence that the traditional theoretical effort to distinguish between "what the world seems like to us" and "what the world really is" and whether such a distinction will pay practical dividends must be abandoned. There is no worthwhile or sustainable distinction between what is thought to be the case about the world and what is the case about the world, between what seems to be right and what is right, and between what is believed about the world and the way the world really is. Despite philosophers' and jurists' best efforts, they have been thwarted in their attempts to demonstrate that there is some critical distance between the world and our thoughts about it such that the world cannot only be what people think it is. Under this critical

64. James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 779 (1985).

anxiety, to say something true and objective about the world is to do no more than report on what people presently believe or accept to be true and objective about the world. This is not to deny that there is a reality or to fall into some absurdly solipsistic understanding of the world; it is simply to accept that there is no way of stepping outside our perceptions about the world to determine whether those perceptions correspond with what is really the case. The critical idea is that a theory of truth is a theory of meaning and no more; it is offered as "an explanation of what people *do*, rather than of a non-causal, representing, relation in which they stand to non-human entities."[65] There is no truth about what is really there over and above what are treated as the best prevailing beliefs about what is really there. And what is best is whatever has managed to get itself accepted in the relevant community of inquiry.

Accordingly, spreading through the academic community at large, there is a growing lack of faith in the capacity of scholars to live up to the expectations that they have created in reason being able to confront power and to deliver general truths that can ground specific efforts at human improvement.[66] Although this critique has come from several quarters, a major source of this challenge has been the field of hermeneutics.[67] Scholars have begun to take seriously the idea that truth is beholden to the discursive regimes through which it is apprehended and validated.[68] Concepts such as truth, coherence, and objectivity, it is suggested, are best understood as internal to historical debate over theory and not as some external set of discursive categories available to validate any such debate.[69] As such, theorizing does not become an attempted escape to some esteemed realm of pure thinking, but rather an engaged effort to understand the social entanglement and linguistic situation of thinking itself. In advocating a shift from epistemological truth to rhetorical knowledge, this hermeneutical critique of the traditional philosophical enterprise has been developed and expressed in many different ways. Nevertheless, a central division between these critics is the extent and force of the hermeneutical insight. Having set in motion a powerful antidote to traditional thinking, is it possible to contain it such that it

65. RICHARD RORTY, *Objectivity, Relativism, and Truth*, *in* 1 PHILOSOPHICAL PAPERS 151, 154 (1991).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

does not impugn and invalidate the whole theoretical exercise? This is because, in its more extreme form, the charge is that, under the tutelage of a postmodern sensibility, philosophy has become a pasquinade of itself in which reason is reduced to customary ways of thinking, truth has become opinion, and objectivity is no more than consensus.[70]

In jurisprudence, this diffidence has caused jurists to question not only the truth of legal nature and its objective ascertainment but the nature of truth and objectivity themselves. With little enthusiasm and considerable reluctance, jurists have been obliged to shelve their traditional efforts to engage in "a continuing dialogue with reality"[71] and, instead, to interrogate the operative notions of dialogue, reality and, as importantly, their relation.[72] Indeed, because the stakes are relatively high, jurisprudence has become one of the important battlegrounds for this theoretical war. Predictably, its waging has been particularly hostile. This combative encounter has taken place on the site of the common law. By this, I mean that jurists have locked philosophical horns over the nature of law in a system in which responsibility for its ascertainment and development, even in matters of constitutional doctrine, is entrusted to judicial officials. As such, the adjudicative function has become the main focus of jurisprudential energies and its legitimacy has become its main problem. In a social world in which legal adjudication is increasingly asked to wrestle with and resolve some of the most morally contentious and politically fraught issues of the day, it is considered as important as it has ever been that law is able to claim an institutional and intellectual authority for itself that will be respected by the competing moral and political factions: there must be something objective and neutral about adjudication and law that sets it apart, however slightly, from the partisan conditions of moral and political debate. And the central question for contemporary jurisprudence is whether this traditional project of mainstream theorizing can withstand the corrosive implications of the hermeneutical insight.

Against this backdrop, it can easily be appreciated why the

70. *See* FELIPE FERNANDEZ-ARMESTO, TRUTH: A HISTORY AND A GUIDE FOR THE PERPLEXED 120-29 (1997).

71. Ellen A. Peters, *Reality and the Language of the Law*, 90 YALE L.J. 1193, 1193 (1981).

72. *Id.* at 1193-95. This sense of crisis is periodic and seems to occur on a generational basis. For an earlier effort to assess the last crisis, see Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 199-201 (1984).

broad-based challenge to philosophy has been such a threat to the jurisprudential project. Deprived of a philosophical recourse to the reassuring epistemological terrain of objective truths, mainstream jurists have been obliged to reassess their whole intellectual strategy. The response has been predictably varied—some have imitated the camel and stuck their heads deeper in the philosophical sand; some have redoubled their epistemological efforts and defended the philosophical establishment against the hermeneutical menace; others have seized the opportunity to utilize the hermeneutical insight as further grist for the nihilistic mill; and still others have actually taken the hermeneutical insight seriously. These are each interesting responses and reveal much about the state of law and jurisprudence; they each deserve a full and sustained treatment.[73] However, in this Article, I will be concentrating on only one kind of reaction. I want to explore the response that claims to have taken the hermeneutical insight seriously and attempted to develop a jurisprudential account of law and adjudication that places it at the center of its efforts. These jurists do not shun or shudder at the implications of the hermeneutical insight, but embrace it as providing an exciting opportunity to place the adjudicative and jurisprudential enterprises on a much more secure and defensible footing. While there are obvious differences and emphases among these hermeneutical converts, they are united in their conviction that hermeneutics demonstrates that it is no longer tenable to view the common law as a static source of institutional norms.

Rather than represent law as an entity and adjudication as a science, these hermeneutical jurists are adamant that the common law is as much a process or practice as anything else—it is an argumentative tradition which can not only balance the competing demands of stability and change, but can also do so in a way that respects the important distinction between law and politics. Although many would not go so far as to assert that "law is something we do, not something we have as a consequence of something we do,"[74] there is a general acceptance that the depiction of the common law as a vital practice of lawmaking is as important as the body of legal decisions that it produces. For them, the hermeneutical claim that rhetorical knowledge must replace epistemological truth as the touchstone of

73. For an initial attempt to map and criticize these approaches, see Allan C. Hutchinson, *Casaubon's Ghosts: The Haunting of Legal Scholarship*, 21 LEGAL STUDIES (forthcoming 2000).

74. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 24 (1991).

valid theorizing is the making, not the breaking, of the jurisprudential project. Although Justice Souter might never have heard of, let alone read Gadamer, his opinion in *Glucksberg* is seen as not only the best example of such a pragmatic approach to law and adjudication, but also as a passable defense of the propriety of so proceeding. Like Molière's Monsieur Jourdain, he might be forgiven for exclaiming "*Par ma foi! Il y a plus quarante ans que je dis de Gadamer sans que j'en susse rien.*"[75] It is to an introduction of Gadamerian hermeneutics that I now turn.

V. TRUTHS AND METHODS

Who can disagree with the advice to "say what you mean and mean what you say"? Whether proffered by way of admonition or encouragement, it is sterling counsel. Everyone would do well to aspire to such transparency and to efface the space between his or her words and thoughts in which confusion and misunderstanding can take hold. Yet, as almost everyone has to concede at some time or other, the ambition can be frustratingly elusive. In short, the encouragement to "say what you mean and mean what you say" is quite deceptively simple and quite simply deceptive—the effort to pin down language so that its intended meaning shines pellucidly through, is forever fixed, and is transported undistorted to the minds of others is both a worthy goal and an impossible achievement. It is not only that there is an ineradicable gap between ideas and utterance, it is that each seems to inhabit the other so thoroughly that one does not stand prior to or independent from the other: ideas and words are, if not entirely reducible to each other, so intertwined that any attempt to concentrate on one without the other is destined to result in less, not more understanding. All of this would be difficult enough if such efforts took place in immediate, face-to-face encounters in a static world, but they become even more fraught when it is remembered that they occur in a world that is constantly on the move. This means that intentions, words, meanings, and ideas begin to slip and slide. As communication is a social practice, efforts to "say what you mean and mean what you say" are held hostage to the social and political forces that are in play as history moves onwards. In a manner of speaking, because history never sleeps, "you," "say," and "mean" are always

75. JEAN-BAPTISTE POQUELIN (MOLIÈRE), LE BOURGEOIS GENTILHOMME act 2, sc. 4, at 163-64 (Yves Hucher ed., Librarie Larousse 1989) (1670) (the traditional translation is "Good Heavens! For more than 40 years I have been speaking Gadamer (prose) without knowing it.").

works-in-progress such that attempts to treat them as finished or finishable are misguided and misleading.

This, of course, is where hermeneutics enters the picture. While the difficulty of expressing oneself with clarity and certainty is a stiff enough challenge, talking about hermeneutics is a doubly difficult endeavour. As an area of study that might broadly be understood as being concerned with the principles of (once specifically Biblical, now generally textual) interpretation, there is the delicious and frustrating problem of interpreting the meaning of work that is itself about the task of interpreting meaning. However, the self-referential and subversive dimension of this challenge is too often ignored or elided by many of those working in the field. Indeed, in law and jurisprudence, it is frequently ignored altogether: jurists continue unabashed in their insistence upon interpreting hermeneutical texts in the most unsubtle and simplistic ways. Scholarship that seeks to disturb traditional attitudes and approaches to texts as repositories of the authors' meaning waiting to be disclosed is read and received (and, it must be added, is often written and defended) in the most traditional of ways. In arguing for greater openness and indeterminacy in interpreting texts, such work is addressed as if it itself had a closed and determinate meaning to be revealed: any fuzziness or imprecision is counted as a mark against it. Of course, this is not to suggest that there ought not to be a premium on scholarship that is accessible, understandable, and lucid. But it is surely inappropriate to expect that a piece of scholarship that argues for the instability and work-in-progressness of language and communication will itself not be subject to those very forces that it illuminates and emphasizes. Accordingly, in entering the field of hermeneutical scholarship, a certain willingness to put in play one's basic ideas about language and meaning seems to be a necessary price of admission. Unfortunately, too many see this less as an inexpensive opportunity for enlightenment and more as a costly toll on clear thinking. To my mind, this begrudging and frankly insecure way of proceeding is especially evident in the jurisprudential reception given to the writings of Hans-Georg Gadamer. Rather than recognizing the nontraditional and critical thrust of his work, jurists contrive to interpret and utilize him in the most traditional and uncritical fashion.

Nevertheless, whatever might be made of Gadamer's writings and ideas, it seems to be almost universally accepted that his work has a central place in the extant canon of hermeneutical writings. Writing in midcentury, he set himself the daunting task of confronting the

imposing German tradition of hermeneutical scholarship and of wresting it from the suffocating grip of its metaphysical mindset. Much of his argumentation is devoted to engaging with central ideas and thinkers in the German tradition, especially Wilhelm Dilthey, Immanuel Kant, G.W.F. Hegel, Edmund Husserl and Martin Heidegger and latterly, Jürgen Habermas.[76] Gadamer's basic objective is to demonstrate that scientific method is neither the controlling, nor even a helpful model for hermeneutical understanding. He does not offer a competing metric for hermeneutical understanding that can direct or control in the same way as the reputed scientific method, but insists that "[h]ermeneutics is an art and not a mechanical process."[77] Instead of trying to construct a critical rationality that will do service in the humanities in the same way and to the same effect as in the sciences,[78] his work is presented as more a methodical corrective than a correct method in which "[p]erhaps there is, properly speaking, no method, but rather a certain way of acting."[79] Although his work is obscure in parts and highly philosophical in scope, Gadamer's ideas are (or, at least, should be) of particular interest to jurists and lawyers. Rather than treating the problems of legal interpretation as secondary or exceptional aspects of the hermeneutical enterprise, he places the interpretive problems of jurisprudence squarely at the heart of his own hermeneutical project: "[L]egal hermeneutics is no special case but is, on the contrary, capable of restoring the hermeneutical problem to its full breadth"[80] and the "texts . . . [of law] are the preferred objects of hermeneutics . . . [because they] present the problem of awakening a meaning petrified in letters from the letters themselves."[81] Accordingly, Gadamer's approach to law promises to be as stimulating and challenging as it is suggestive and disturbing.

76. *See* GADAMER, *supra* note 2, at xxxv-xxxvii, 545-46, 566.

77. *Id.* at 191.

78. Recent scholarship has cast considerable doubt on whether science is as scientific as is traditionally understood: the methodological contrast between science and the humanities is less stark and more subtle than many traditional thinkers, including Gadamer, allow. *See generally* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962); RICHARD RORTY, PHILOSOPHY AND SOCIAL HOPE (1999). Nevertheless, I do not believe that this is particularly damaging to Gadamer's claims about the hermeneutical project. Although it might undercut his rhetorical contrast with the supposed certainty and mechanicalness of the scientific method, it does not reduce the force or cogency of his general ideas. For similar overstatements about the reach and objectivity of (social) science, see POSNER, *supra* note 21, at 206-26.

79. GADAMER, *supra* note 2, at 26.

80. *Id.* at 328.

81. HANS-GEORG GADAMER, *Semantics and Hermeneutics* (1972), *in* PHILOSOPHICAL HERMENEUTICS 82, 90 (David E. Linge ed. & trans., 1976).

For Gadamer, language is the key to a proper understanding of the human predicament and condition. Arguing that "language speaks us, rather than we speak it,"[82] Gadamer maintains that "language and thinking about things are so bound together"[83] that it is impossible to conceive of one without the other or to imagine that language is a "pre-given system of possibilities of being for which the signifying subject selects corresponding signs."[84] Although Gadamer commits himself to such a boldly discursive understanding of the human situation, he does not fall back into the stifling embrace of a metaphysical approach that views language as the fixed or stable grounding for human knowledge. Instead, he allies this basic insight to an equally important commitment to "the historical movement of . . . things."[85] For Gadamer, language is a socially situated practice that can never escape entirely the historical confines of its usage either as an originating act or an interpretive apprehension. When this attachment to both language as the fundamental medium of human existence and historical contingency as a compelling feature of human existence are grasped in their general force and detailed operation, it becomes clear that Gadamer's account of the hermeneutical process is very different than the traditional one. Emphasizing the dynamic quality of both text and interpretation, Gadamer adopts an approach that is both dialogic and dialectical—it is dialogic in that it involves an active engagement between text and reader, and it is dialectical in that it demands a vigorous interplay between past and present: hermeneutics is in the job of "bridging of personal or historical distance between minds."[86]

As such, the effort to achieve hermeneutical understanding is not a passive reflection on a completed object, but is "an encounter with an unfinished event and is itself part of this event."[87] Consequently, there is no completed object of interpretation that is waiting to be discovered or revealed in its wholeness, but only the invitation to engage and play with it in the hope that meaning will be forged in that encounter. Accordingly, "understanding is to be thought of less as a subjective act than as participating in an event of tradition, a process

82. GADAMER, *supra* note 2, at 463.

83. *Id.* at 417.

84. *Id.*

85. *Id.* at 285.

86. HANS-GEORG GADAMER, *Aesthetics and Hermeneutics* (1964), *in* PHILOSOPHICAL HERMENEUTICS, *supra* note 81, at 95, 95.

87. GADAMER, *supra* note 2, at 99.

of transmission in which past and present are constantly mediated."[88] Indeed, performance is not peripheral or secondary to the text, but it is "essential"[89] to any genuine attempt to understand the text's meaning; "every performance is an event, but not one in any way separate from the work—the work itself is what 'takes place' . . . in the event . . . of performance."[90] In the same way that "reading music is [not] the same as listening to it,"[91] so reflecting on law is not the same as applying it. Moreover, when this dynamic is properly understood, it will be appreciated that the occasion and site for its performance will become highly unstable and political in that the values and commitments that frame the interpretive act—what Gadamer calls "prejudices"—can never be ignored or disregarded. The task of the interpreter, as opposed to the prophet or proselytizer, is to gain some critical distance from one's own prejudices, not so that they can be left behind as "there is undoubtedly no understanding that is free of all prejudices,"[92] but so that they can be understood and recognized. However, consistent with his general hermeneutical schema, Gadamer emphasizes that there is no algorithm to "distinguish the true prejudices, by which we *understand*, from the *false* ones, by which we *misunderstand* . . . so that the text, as another's meaning, can be isolated and valued on its own,":[93] the best that can be done is to "guard against over hastily assimilating the past to our own expectations of meaning"[94] and "arbitrary fancies."[95] For Gadamer, therefore, it is a constant struggle to identify those "fore-conceptions" or prejudices so that interpretation does not become enslaved to "the tyranny of hidden prejudices that makes us deaf to what speaks to us in the tradition."[96] For Gadamer, therefore, this contextualized awareness will result in a shift in focus from technique and reflection to participation and engagement in which "[f]rom the hermeneutical standpoint, rightly understood, it is absolutely absurd to regard the concrete factors of work and politics as outside the scope of hermeneutics."[97] This hermeneutical performance functions

88. *Id.* at 290.
89. *Id.* at 134.
90. *Id.* at 147 (internal parenthetical information omitted).
91. *Id.* at 148.
92. *Id.* at 490.
93. *Id.* at 298-99.
94. *Id.* at 305.
95. *Id.* at 266.
96. *Id.* at 270.
97. HANS-GEORG GADAMER, *On the Scope and Function of Hermeneutical Reflection*

as a kind of play in the sense of a "to-and-fro movement that is not tied to any goal that would bring it to an end . . . ; rather, it renews itself in constant repetition."[98] When understood in terms of legal interpretation where application is front and center, this playful encounter ensures that "[the] gap [between the text and its application] can never be completely closed"[99] and works to establish "a certain area of free-play"[100] which "always and necessarily breaks off in an open indeterminacy."[101] Indeed, for Gadamer, it is "thanks precisely to its open indeterminacy [that law] is able to produce constant new invention from within itself."[102] In fulfilling their central task of deciding cases, judges must understand that there is not a two-step process of first understanding and then application; the latter is part of the former because we cannot understand in the abstract or general, but only in concrete and particular situations. Consequently, "judging the case involves not merely applying the universal principle according to which it is judged, but co-determining, supplementing, and correcting that principle"[103] such that a "text must be understood at every moment, in every concrete situation, in a new and different way."[104] In this way, Gadamer drives home his fundamental hermeneutical point that "the law is always deficient, not because it is imperfect in itself but because human reality is necessarily imperfect in comparison to the ordered world of law, and hence allows of no simple application of the law."[105] Law and adjudication are both made possible and made problematic by the normative dimension of interpretation; the common law gains its constancy and growth from the same source of interpretive performance.

An important corollary of Gadamer's general theoretical position is that he has little truck with any metaphysical claims to the dominant authority of authorial intention in the hermeneutical engagement. It follows from his general orientation that "[e]very age

(1967), *in* PHILOSOPHICAL HERMENEUTICS, *supra* note 81, at 18, 31.

98. GADAMER, *supra* note 2, at 103. While the notion of "play" is a significant component in a full understanding of Gadamer's hermeneutical approach, I do not intend to deal with it at extended length. This is not because I do not believe it to be worthy of deeper consideration and critique, but because I have already offered my own extended reflection on "play." *See* HUTCHINSON, *supra* note 12, at 162-79.

99. GADAMER, *supra* note 2, at 384.

100. *Id.* at 519.

101. *Id.* at 340.

102. *Id.* at 498.

103. *Id.* at 39.

104. *Id.* at 309.

105. *Id.* at 318.

has to understand a transmitted text in its own way."[106] A text's meaning does not depend on the contingent situation of authors and their original audiences because those contingencies must themselves always be open to interpretation by the text's subsequent readers. Constituted in a dynamic context and reconstituted in an equally dynamic, but different context, "the meaning of a text goes beyond its author . . . [and t]hat is why understanding is not merely a reproductive but always a productive activity as well."[107] For Gadamer, therefore, the passage of time or history is not so much the enemy of meaning, but its enabling source: "The hermeneutic task consists in not covering up . . . [the tension between the text and the present] by attempting a naive assimilation of the two but in consciously bringing it out."[108] This being the case, no text can be created so closed so that the space between "saying" and "meaning" can be entirely effaced such that there will be no room for future engagement. Nor can there be a fixed or canonized performance that demands no future reinterpretation. Accordingly, while every interpretation strives to be correct, "in view of the finitude of our historical existence, it would seem that there is something absurd about the whole idea of a unique, correct interpretation."[109] In Gadamer's hermeneutical universe, the work presents and re-presents itself in its continuing performance such that its meaning will present itself "so differently in the changing course of ages and circumstances."[110] When it comes to meaning, Gadamer is adamant that "in truth, there is nothing that is simply 'there' . . . [because e]verything that is said and is there in the text stands under anticipations."[111]

VI. LOOKING FOR GADAMER

So far, my presentation of the general themes in Gadamer's work—the importance of historical context and its contingency; the abandonment of scientific methodology in the humanities; and the performative dynamism of hermeneutical activity—will hopefully go largely unchallenged. Perhaps naively in light of the topic, I have

106. *Id.* at 198.
107. *Id.*
108. *Id.* at 306.
109. *Id.* at 120.
110. *Id.* at 120-21.
111. HANS-GEORG GADAMER, *The Philosophical Foundations of the Twentieth Century* (1962), *in* PHILOSOPHICAL HERMENEUTICS, *supra* note 81, at 121.

sought to provide an introduction to Gadamer's ideas that is sufficiently general to garner broad approval. However, from a jurisprudential point of view, the subversive effect of such a basic approach to legal interpretation ought not to be underestimated. Gadamer has traditional jurists squarely in his sights when he insists upon the entirely fluid, adamantly nonscientific, thoroughly contextual, and wholly performative quality of legal hermeneutics. The claim that valid or worthy legal work can be done in an exclusively mechanical or technical manner is rendered hopelessly inadequate. Although technical skills have their role, they can do little on their own. All interpretation has a social and political aspect that can only be hidden or ignored, not done away with. In this sense, "we are all interpretists now"—originalism, textualism, and literalism are each different and unconvincing ways of denying the interpretist imperative. Whatever else he may be saying, Gadamer is telling lawyers that interpretation is an inevitably active and, therefore, political process; lawyers cannot avoid working with and among the social forces that both make interpretation possible and problematic. It is not so much that the instability of those social practices and forces renders communication impossible, but that it ensures that the establishment of meaning will never be without difficulty or uncertainty; the foundations of language and, therefore, law will always be as contingent and shifting as the foundations of society and history.

Nevertheless, any attempt to provide a more nuanced and less sweeping account of Gadamerian hermeneutics and its implications for jurisprudence soon finds itself in more contested hermeneutical waters. Beneath the relative calm of the surface, there is a seething mass of contending hermeneutical forces at work: this is where the courage and strength of different scholars' hermeneutical convictions are tested. When it comes to Gadamer's work, the central point of division is around how far it is possible or desirable to take his critical insights. Although there are a variety of possible interpretations, there are two general positions that can be taken. Is it that Gadamer has loosened the constraints on interpretation and, while forsaking the idea of a unique interpretation, remained within the gravitational pull of the metaphysical tradition that holds on to a traditional notion of hermeneutical truth, albeit more pluralistic and less hegemonic? Or is it that he has broken open the hermeneutical process to such an extent that any notions of truth are left in disarray and that, cut free from the metaphysical tradition, the interpretive process is not so

much about truth and correctness as usefulness and persuasion? The pertinence of this division for jurisprudential debate is acute and obvious. On one side are those who believe that it is still viable to talk about law and adjudication as separate from broader political debate: I will call this the *conservative* approach. On the other side are those, like myself, who maintain that law and adjudication is one more site for political debate to take place: I will call this the *radical* approach. Again, this radical stance does not mean that "anything goes"; it recognizes that there are bounds to the hermeneutical enterprise, but that those bounds are always in play as part of the larger political game of life.

The most well known exponent of the conservative approach is Ronald Dworkin. Although his references to Gadamer are few and far between, it is apparent that his overall hermeneutical approach owes much to Gadamer's writings. Indeed, Dworkin gladly acknowledges as much when he notes that, in constructing his interpretive account of law and adjudication, "I appeal to Gadamer, whose account of interpretation as recognizing, while struggling against, the constraints of history strikes the right note."[112] While he has some reservations about whether Gadamer places the interpreter in too much of a subordinate position to the author and offers too passive and unidirectional view of the hermeneutical encounter, many of the central motifs and ideas of Gadamer pervade Dworkin's own *oeuvre*.[113] However, Dworkin relies upon a very conservative reading of Gadamer.[114] While Dworkin has done sterling work in demonstrating that adjudication is an inevitably creative and political undertaking, he insist that judges can still act in a way that is neither partisan nor unbounded; adjudication is (or ought to be) a principled affair in which intellectual coherence triumphs over ideological partiality.[115] Dworkinian judges have considerable leeway in their work, but they are ultimately bound by the "brute facts of legal history"[116] and, in placing the legal past in the best political light possible, they are to operate "on the assumption that [the legal rights and duties were] created by a single author–the community personified."[117] In this way, Dworkin puts Gadamer to work in the

112. RONALD M. DWORKIN, LAW'S EMPIRE 55, 62, 420 (1986).
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 255.
117. *Id.* at 225. For further elaborations of these claims, see RONALD M. DWORKIN,

central contemporary jurisprudential problem of establishing the democratic legitimacy of legal adjudication on the basis of its being both institutionally constrained and politically just. As such, Dworkin's theory is the flagship of liberal legalism; it claims to offer a stable method by which to keep the law up to date and by which to distinguish right from wrong answers.[118]

A less celebrated, but more explicit effort to utilize Gadamer's work in jurisprudence is that of Francis Jay Mootz III. In a series of learned and lengthy pieces, he has striven to present a sophisticated account of legal hermeneutics that plays out in more detail and rigor the implications of Gadamer's approach for law and adjudication. The great strength of Mootz's scholarship is that it has familiarized American theorists with Gadamer's work and has made a forcible case for its relevance to current problems of legal knowledge and judicial method; he makes Gadamer's work accessible and useful, but retains its subtlety and richness.[119] For Mootz, Gadamer's major contribution to jurisprudence is the insistence that law is a rhetorical practice and that any effort to appreciate adjudication must recognize the important role that rhetoric plays in fashioning and critiquing legal knowledge.[120] Nonetheless, although his earlier work retained the possibility of a more radical reading of Gadamer, his most recent essays have taken a distinctly conservative turn.[121] For all the good work that Mootz's efforts do, they are overshadowed by his willingness to put them in the service of an epistemological project that still clings to the possibility of reliable methods and dependable truths. According to Mootz, while Gadamer has decisively demolished any possibility for a science of correct interpretation and loosened the reins of hermeneutical authority, he has not abandoned the hope of developing a rigorous logic or art of rational interpretation that will be able to sanction some interpretations as clearly better than others by stint of its own rhetorical standards.[122] In making a plea for greater attention to rhetoric in jurisprudential inquiry, Mootz contends that "rhetoric is defined not as a grudging resignation from the false hopes of a rigorous philosophy of truth, nor as a celebration of boundless

FREEDOM'S LAW 1-39 (1996).

118. *Id.*

119. *See* Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Theory*, 6 S. CAL. INTERDISC. L.J. 491 (1998).

120. *See id.*

121. *See id.*

122. *See id.*

and playful irrationalism, but instead as a disciplined encounter with the activity of rhetorical knowledge."[123]

In a particularly arresting and ambitious essay, Mootz seeks to stake out and colonize this middle ground between the barren conceptualism of legal positivism and the excesses of a postmodern critique. Drawing directly on the work of Gadamer as well as Chaim Perelman to substantiate the claim that "natural law philosophy and philosophical hermeneutics have significant points of convergence,"[124] he proceeds to propose a defense of legal hermeneutics that is committed to "reinvigorating (even if in dramatically new form) the natural law tradition."[125] By this, Mootz intends to portray legal practice as a hermeneutical conversation that contains the conditions and resources for its own legitimate elaboration and critique: law is both a rationally bounded and politically responsive enterprise in which issues of legal validity and moral acceptability are blended rather than separated.[126] Picking up where Lon Fuller left off and Lloyd Weinreb has recently taken up, Mootz leaves little doubt about the breadth or depth of his intellectual ambitions to construct a full-blown theory of law and justice from the generous quarry of Gadamer's hermeneutics:

> Gadamer's hermeneutical ontology implies a rhetorically based epistemology, a set of guiding principles by which legal practice can be assessed and criticized, even if without scientific precision and determinacy. Gadamer provides the theoretical backing for the practices that constitute law within flux; not in the sense of authorizing those practices from a privileged perch of reason, but in the sense of drawing general conclusions about the contours of those practices and describing how those practices may be fostered.[127]

In an important sense, Mootz's "natural law" move should come as no surprise. After all, Dworkin has been profitably pursuing a

123. *Id.* at 497. In taking this line, Mootz draws heavily on the work of Gary Madison and Georgia Warnke. *See* GARY MADISON, THE HERMENEUTICS OF POSTMODERNITY: FIGURES AND THEMES (1990); GEORGIA WARNKE, GADAMER: HERMENEUTICS, TRADITION AND REASON 79 (1987); GEORGIA WARNKE, JUSTICE AND INTERPRETATION (1993); Georgia Warnke, *Law, Hermeneutics and Public Debate*, 9 YALE J.L. & HUMAN. 395 (1997).

124. Mootz, *supra* note 26, at 313.

125. *Id.* at 312.

126. *See id.* at 312-14.

127. *Id.* at 378. Other works of Mootz include: Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249 (1993); Francis J. Mootz III, *Law and Philosophy, Philosophy and Law*, 26 U. TOL. L. REV. 127 (1994). *See also* LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969); LOYD L. WEINREB, NATURAL LAW AND JUSTICE (1987); Lloyd L. Weinreb, *The Moral Point of View*, *in* NATURAL LAW, LIBERALISM AND MORALITY 195 (Robert P. George ed., 1996).

similar line for the past two decades. But, apart from the candor and naiveté of Mootz's approach, it is the fact that he uses Gadamer as his primary grounding source that startles. There can be no doubt that there is ample textual support for this particular conservative reading of Gadamer; *Truth and Method* is replete with references and remarks that give support to such an interpretation.[128] Notwithstanding the dynamic and dialogic quality of interpretation, Gadamer contends that there are occasions on which interpreters will be "pulled up short by the text":[129] "[T]he important thing is to be aware of one's own bias, so that the text can present itself in all its otherness and thus assert its own truth against one's own fore-meanings."[130] Although a perfect legal dogmatic is untenable, legal certainty and predictability can exist because "it is in principle possible to know what the exact situation is."[131] This is because, according to Gadamer, the text has a certain "obligatoriness" that ensures that its interpretation cannot be "free and arbitrary,"[132] but is "subject to the supreme criterion of 'right' representation"[133] which enables "the meaning of the text to assert itself."[134] In this sense, Gadamer's own writings provide textual reassurance to the idea that interpretive creativity has its limits and they are to be found in the text itself; "neither the doctrinal authority of the pope nor the appeal to tradition can obviate the work of hermeneutics, which can safeguard the reasonable meaning of a text against all impositions."[135] It is on these textual resources that Mootz anchors his conservative rendition of both Gadamer and the jurisprudential project. For all the touted experimental and inventive possibilities of interpretation, Mootz still presents legal hermeneutics as a conversational activity in which deferential interpreters await hermeneutical revelation from textual authorities: "the interpreter does not adopt a subjective attitude of dominance over the text, but rather suppresses her subjective aims and attends to 'the saying' of the historically effective texts as it is revealed in the particular circumstances."[136]

128. *See* GADAMER, *supra* note 2.
129. *Id.* at 268.
130. *Id.* at 269.
131. *Id.* at 329.
132. *Id.* at 118.
133. *Id.*
134. *Id.* at 465.
135. *Id.* at 277.
136. Mootz, *supra* note 26, at 318.

Nevertheless, there is much to applaud in Mootz's account. In concentrating on the vitality and motility of law as a professional practice and social phenomenon, he gives cogent voice to the rejection of "the scientific impulse to reduce law to a disciplined methodology of deductive application,"[137] the embrace of "the give-and-take experience of the interpreter within a given historical and social situation,"[138] and the emphasis on "the interpenetration of the universal and the contextual."[139] But Mootz cannot or will not resist the almost overwhelming urge to shackle Gadamerian hermeneutics to the conservative wagon of mainstream jurisprudence. Indeed, Mootz takes for granted the central issue that divides conservative and radical jurists: "Lawyers know very well that argumentation is a bounded and rational enterprise that nevertheless cannot aspire to process of deduction from principles, even though the rhetorical conventions of legal practice and judicial opinion-writing ironically work to conceal this (supposedly dangerous) fact."[140] It is this very idea of boundedness and rationality that goes to the crux of the jurisprudential debate. To varying degrees, mainstream jurists (of whom Dworkin is the leading example) cling to the idea that the political debate that goes on within law is rendered bounded by the resources of law and disciplined by the universal constraints of rationality. In hewing such a rhetorical line, Mootz is a vast improvement on Dworkin as he is much less attached to truth and method. Indeed, for all his hermeneutical huff and puff, Dworkin is keen to develop an algorithm by which to approve of some readings over others. Mootz has challenged those assumptions and shown that, as a rhetorical practice, law generates its own conventions of argumentation that establish the bounds of its own jurisdiction and the nature of its own rationality. As he puts it, "rhetorical knowledge is a practical achievement that neither achieves apodictic certitude nor collapses into relativistic irrationalism; rhetorical knowledge therefore sustains legal practice as a reasonable—even if not thoroughly rationalized—social activity."[141]

Nevertheless, although Mootz has managed to break free of the epistemological grip of traditional philosophizing, he refuses to take the necessary steps to get beyond its cramping confines. In short,

137. *Id.* at 317.
138. *Id.* at 315.
139. *Id.* at 377.
140. *Id.* at 327.
141. *Id.* at 323-24.

Mootz is still very much in the conservative game of looking for "theoretical backing" and establishing "disciplined encounters": "rhetorical knowledge is a constitutive feature of legal practice that grounds any theoretical reconstruction and critique of that practice."[142] Like Dworkin, Mootz wants to make law safe for lawyers by making legal practices understandable in their own right: "viewing law as intrinsically and irredeemably rhetorical reaffirms its integrity and legitimacy as a practice of securing reasonable adherence."[143] Indeed, Mootz manages to put Gadamer to work in exactly the kind of foundational tradition that Gadamer purportedly criticizes and rejects. This turn to natural law, "even if in dramatically new form,"[144] is exactly the wrong way to go; it emphasizes and works with those conservative elements of Gadamer's texts that comprise part of his approach, but are by no means exclusive or exhaustive in their interpretation. Moreover, Mootz runs with those ideas into far-off places. It is not that I am claiming that Mootz has got Gadamer wrong—a very non-Gadamerian idea. Instead, I argue that it is not a helpful place to take Gadamer; it tends to head toward the very locations of essentialism, rationalism, and foundationalism that much of Gadamer's work seems best interpreted to abandon. Mootz seems to want to foundationalize Gadamer and use his hermeneutical account as a ground from which to defend the legal enterprise against "the celebration of boundless and playful irrationalism."[145]

In addressing this issue, it is instructive to note the views of Gadamer himself on the subversive and nontraditional aspects of his

142. Mootz, *supra* note 119, at 566.

143. *Id.* at 568.

144. Mootz, *supra* note 26, at 312. For a critique of Gadamer's lingering foundationalism, see HORACE L. FAIRLAMB, CRITICAL CONDITIONS: POSTMODERNITY AND THE QUESTION OF FOUNDATIONS (1994); DAVID COUZENS HOY & THOMAS MCCARTHY, CRITICAL THEORY 188-200 (1994); John D. Caputo, *Gadamer's Closet Essentialism: A Derridean Critique*, *in* DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER, *supra* note 1, at 258-64 (1989). Although I will not pursue the matter here, it is very questionable how new this new form of natural law actually is. Indeed, it only seems new because of the limited memories of the jurisprudential community. *See, e.g.*, RUDOLF STAMMLER, A THEORY OF JUSTICE (Isaac Husik trans., 1925). At one point in Mootz's argument, he asserts that Fuller and Weinreb's natural law philosophies "are best viewed as elaborating the implications of philosophical hermeneutics in the context of legal theory," Mootz, *supra* note 26, at 314, and as proceeding "in a manner that echoes Gadamer's postmodern philosophical claims," *id.* at 337. This is wild stuff because either Fuller and Weinreb have become postmodernists (an unlikely possibility) or "postmodern" has become distinctly un-postmodern in Mootz's hands (a more likely possibility). Indeed, Mootz seems to want to have it both ways—to open up the hermeneutical process to more pluralistic and historically engaged possibilities and to limit that process so that interpretation is not open ended.

145. Mootz, *supra* note 119, at 497.

own writings. Presumably, in light of Gadamer's own arguments, the authority of the text's author is severely diminished. Indeed, it is surely a staple of Gadamerian hermeneutics that the author has little authority in controlling or constraining the future interpretation given to the text and that the reader's own prejudices or fore-conceptions are inevitably in play. He insists that "every age has to understand a transmitted text in its own way"[146] such that its meaning does not depend on "the contingencies of the author and his original audience . . . for it is always co-determined also by the historical situation of the interpreter."[147] Accordingly, "not just occasionally but always, the meaning of a text goes beyond its author" and "that is why understanding is not merely a reproductive but always a productive activity as well."[148] This does not mean that Gadamer has no part to play in the unfolding debate over the meaning of Gadamer's hermeneutical texts, only that he must engage with the debate and his own texts as a future reader, not as their past author. Moreover, it seems odd that those scholars who claim to be disciples of Gadamer's hermeneutics should read Gadamer's text in such an un-Gadamer-like way. As Gadamer insists, the meanings of texts do not present themselves for inspection, but must be created in the encounter between the text and its interpreter: "[T]he hermeneutic task consists in not covering up [the tension between the text and the present] by attempting a naive assimilation of the two but in consciously bringing it out."[149] As I understand it, this is not to claim that the reader is sovereign and unconstrained, only that the reader has an inevitable and decisive part to play in the hermeneutical encounter. Neither the text, nor its author can have the last word in what their texts will come to mean. And that insight must be as apposite for interpreting hermeneutical texts as it is for interpreting any other kind of text.

The problem is that, while Mootz (and Gadamer to some extent) have historicized law and adjudication, they have only politicized it in the most superficial and sanitized way. If Gadamer (and Mootz) are right to chastise traditional philosophers and jurists for their failure to recognize the inevitable historicization of interpretation and dialogue, then I am right to chastise Gadamer (and Mootz) for their failure to politicize that inevitable historicization of interpretation and

146. GADAMER, *supra* note 2, at 296.
147. *Id.*
148. *Id.*
149. *Id.* at 306.

dialogue.[150] There is something missing from such jurisprudential accounts and that something is the matrix of ideological forces that drive this historical process of rhetorical tradition. In a manner of speaking, Mootz has identified the Gadamerian vehicle and traced its hermeneutical route, but has offered no explanation of how it moves and what determines that route; it is a road show without gas or drivers. While Gadamer and Mootz each incorporate values into their rhetorical account of law, they do so in such a way that the passion and commitment with which they are held and presented are filtered out and converted into rational entities to be weighed and balanced on the rhetorical scales. The world of Gadamerian politics is a sterile and barren world in which the material dirt of ideological politics and interests has been washed off so that judges and rhetoricians do not get their hands soiled with life as it is actually lived. But this sanitization misrepresents the grubbiness and messiness of the real social world. In so doing, Mootz and other conservative jurists ensure that such an hermeneutical approach can only succeed by pretending that it is operating in a nonideological environment in which the reasonable has already been distinguished from the arbitrary, the disciplined from the anarchical, the stabilized from the fluxed, the authoritative from the irrational, and the playful from the serious. Mootz's Gadamer-inspired natural law program is abstract and arid; it is as much an escape from social life as the traditional philosophies that it claims to reject and replace.

At the root of this problem is the central notion of tradition. For Mootz, the confrontation between text and reader takes place within a tradition or conversation that obliges the interpreter to filter out the productive and approved prejudices from the unproductive and arbitrary ones. In this sense, the tradition has a tendency to engulf and swamp the interpreter to such an extent they become part of it. As Gadamer puts it, the hermeneutical game has a spirit of its own that "masters" the players and holds them in its thrall.[151] Explaining that "the player experiences the game as a reality that surpasses him,"[152] he goes so far as to conclude that "the players no longer exist, only what they are playing."[153] However, these Gadamerian claims

150. For a general critique along similar, but not the same, lines, see generally, THOMAS B. FARREL, NORMS OF RHETORICAL CULTURE (1993); PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS (1987).

151. GADAMER, *supra* note 2, at 106.

152. *Id.* at 109.

153. *Id.* at 112.

only have any jurisprudential purchase or plausibility if it is assumed that the rhetorical tradition of law is sufficiently coherent and homogenous to underwrite the evaluative claims that he makes for it. For instance, it is Mootz's assertion that, while legal practice is far from "a technique that delivers exact knowledge,"[154] it can and does generate "rhetorical principles to serve as aids in exercising good judgment when choosing between competing interpretations."[155] In order to fulfill this critical function, these principles must be sufficiently ordered, expansive, and determinate to do the work that is asked of them. But, in modern society, law, and jurisprudence, there are simply too many traditions and none that receive the general approval or sanction that would enable Mootz's proposal to fly. While Mootz is right to advance the argument that "a just legal practice, like a life well lived, does not circle around a determinate ground of truth,"[156] he is mistaken to conclude that such a practice "spirals forward from a shared tradition in the form of reasonable judgments about how to proceed."[157] When it comes to adjudication, difficulties tend to arise in those circumstances when there is no shared tradition and people are divided in their reasonable commitments. It seems a little hollow to recommend that such division should be mended or mediated through a resort to law's rhetorical traditions when the very existence of multiple or fractured traditions is what caused the problem in the first place. Consequently, tradition is not a grounding for anything if that means it can afford a solution rather simply provide a site for competing views. As I will seek to demonstrate, there is another reading of Gadamer that plays down its foundational side and plays up its more radical possibilities.

VII. TRADITION AND TRANSFORMATION

There are two general notions of tradition that tend to dominate and organize debate. One is premised on the unstated notion that there is something normatively compelling or worthy about what has come before; the past is not followed simply because it precedes, but because it is superior to present understandings. Accepted by earlier

154. Mootz, *supra* note 26, at 378.

155. *Id.*

156. Mootz, *supra* note 119, at 583.

157. *Id.* For another critique of Gadamer that holds him to a monolithic and authority-imposing view of historical tradition, see TERRY EAGLETON, LITERARY THEORY 70-74 (1983).

generations and having withstood the test of time, tradition binds not simply because it has not been replaced or altered, but because it has its own normative force. The past is not simply a store of information and materials, but an obligatory source of value and guidance that is entitled to be given normative preference over present understandings and uninhibited ratiocination; the past is what makes society into what it is today and the decision to respect it is what gives meaning to the lives of future generations. Viewing people as custodians rather than creators of tradition, this conservative Burkean approach talks in terms of "the great primeval contract of eternal society" in which "the partnership . . . between those who are living and those who are dead, and those who are to be born."[158] The other approach maintains that, if there is to be genuine progress and emancipation, there must be a complete break from that past. This revolutionary stance is given expression in Marx's warning that "the tradition of all the dead generations weighs like a nightmare on the brains of the living"[159] and that progressive activity "cannot draw its poetry from the past . . . [but] must let the dead bury their dead."[160] On this view, whatever is normatively compelling about the past is oppressive and, to escape its baleful influence, people must become the undertakers, not the custodians of the past; there must be a complete rescission of the contractual partnership between past and future generations.

Predictably, both these polarized approaches are overstated and miss the mark. Burke's reverence for the past is as complacent as it is unrealistic, and Marx's condemnation of the past is as paralyzing as it is unrealizable. Both divert attention away from the available possibilities for change and transformation that always already exist within traditions and that cannot be expunged by even the most exhaustive or authoritative analysis. Marx's warning must be taken seriously in that the deadening force of tradition can cast a disabling pall over living efforts to improve the future, as must Burke's recommendation in that the past has much to offer that can be worthy of selective preservation. Although the Burkean appeal to tradition must be approached with skepticism and caution, Marx's plea is both

158. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 85 (John G.A. Pocock ed., 1987); *see also* FRIEDRICH A. VON HAYEK, THE POLITICAL ORDER OF FREE PEOPLE 153-76 (1979); ALAN WATSON, THE EVOLUTION OF LAW (1985); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1037 (1990).

159. KARL MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE 13 (C.P. Dutt ed., 1957).

160. *Id.* at 16.

impossible and unnecessary. It is impossible in that there is no language or materials in the present from which to imagine a better future that are not passed on from the past; there is no way for people to step outside themselves to some elusive site or state of mind that is untouched by the past. However, fortunately, it is unnecessary to attempt such a prodigious feat because the past is neither so dead nor so determined as to occlude its poetic revitalization in aid of future imaginings; there is no shortage of opportunities for transformative creativity. As such, there is no need to embrace either the Burkean traditionalist or the Marxian antitraditionalist stance; the celebration of tradition for its own sake or its condemnation for any other sake is a false dichotomy. And this is where Gadamer enters the picture. He offers an account of tradition—or, at least, the radical one that I intend to offer—that is much more nuanced and, therefore, much less dogmatic. On a more critical and suggestive account, tradition and transformation do not stand opposed, but each feeds off and complements the other. As such, mindful that "tradition is the living faith of the dead, [whereas] traditionalism is the dead faith of the living,"[161] my approach is about tradition, but it is not traditionalist (i.e., in which continuity is valued over change) and is about transformation, but is not revolutionary (i.e., in which change is preferred to continuity).

The fact that there is no choice other than to follow and therefore live, at least in part, in the past says nothing about what it is in the past that we must follow or respect. To uphold a tradition does not mean that it has to be done in an uncreative or uncritical way; there is choice and, therefore, there are always politics in play. As Jacques Derrida puts it:

> That we *are* heirs does not mean that we *have* or that we *receive* this or that, some inheritance that enriches us one day with this or that, but that the *being* of what we are is first of all inheritance, whether we like it or know it or not.[162]

Inheritance is an undertaking that those in the present are obliged to perform, but there is no one or only way to fulfill that definitive responsibility. What is given about any tradition is always open to appropriation and contestation; resort to the past is, therefore, always and unavoidably political. There is no one monolithic and unified

161. JAROSLAV J. PELIKAN, THE VINDICATION OF TRADITION 65 (1984).

162. JACQUES DERRIDA, SPECTERS OF MARX: THE STATE OF THE DEBT, THE WORK OF MOURNING, AND THE NEW INTERNATIONAL 54 (Peggy Kamuf trans., 1994); *see also* EDWARD A. SHILS, TRADITION 44 (1981).

account of the past that stands in for history or that can claim to be the past's ineffable bruteness. Any attempt to justify a master-narrative of the past (from a materialist right, a socialist left, a liberal center or anywhere else) is destined to fail; it will be either so abstract as to ignore the contingent and nuanced facts or so detailed as to be little more than a literal recounting of those facts. Although the appeal to tradition is only meaningful if that tradition is sufficiently determinate and discrete, history shows that traditions are notoriously imprecise and that they are infuriatingly difficult to pin down. Like anything and everything else, traditions are not so much discovered as constructed in the act of following them. Moreover, because so much of the debate around tradition is less about its heterogeneity and more about the features that are seen to hold it together and which define its homogeneity, the ideas of tradition and transformation have come to be seen as antithetical. However, in most of life (and law), "breaking with tradition" is as traditional as it gets. Indeed, although offered more by way of caution than encouragement, Gadamer notes that, while people exist and thrive within a tradition, "it is still in the nature of [people] to be able to break with tradition, to criticize and dissolve it."[163] Whereas Gadamer works to contain that instinct, I work to nourish it.

In the conventional understanding, tradition is held out as a dated accumulation of commitments, customs, and practices that are accepted with little room for critical examination or imaginative reformulation. On a more critical Gadamerian reading, tradition is not a thing of the past, but something that is vital; people constantly participate in it and reconstruct it as they rely upon it. Indeed, traditions survive by adaptation and change. If they do not change, they become ossified and die. As such, traditions are alive, organic, and part of the present; they are not simply the flotsam and jetsam of the forward-moving ship of history as it steams into the future. Moreover, because traditions are understood as organic and social in that they are transmitted from one generation to another, change is at the dynamic heart of a genuine practice of tradition. As participants rely upon the tradition, they are also contributing to and transforming that tradition:

> [T]he circle of understanding . . . 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

163. GADAMER, *supra* note 2, at xxxvii.

> 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 constantly 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.[164]

On this reading of Gadamer, "the circle of understanding" is historical and political. Traditions are neither fixed, nor bounded and, in being passed on and assumed by individuals, they are constantly reworked and remade (as are the individuals who engage with them). As such, the interpretation and application of a tradition is also an act of amending that tradition; "the thing which hermeneutics teaches us is to see through the dogmatism of asserting an opposition and separation between the ongoing, natural 'tradition' and the reflective appropriation of it."[165] This means that following a tradition is not simply a matter of identifying a fixed continuity between the past and present, but also involves certain rearrangements, ruptures, and reversals. This act of reconstruction is both deconstructive and reconstructive. Although there is always the risk of confirming that which is being deconstructed, the most respectful reaffirmation of the past's traditions is realized in constantly placing them under critical scrutiny and transforming their substance as their spirit is observed. If a tradition is to remain alive and relevant, its institutional guardians must negotiate a paradoxical task that is the constant source of both their reassuring empowerment and unsettling usurpation: they must work with and against "the tension between memory, fidelity, the preservation of something that has been given to us, and, at the same time, heterogeneity, something absolutely new, and a break."[166] Like the wicked, there is no rest or respite for these guardians. But this is only a problem for those who mistakenly insist that change or newness is to be feared. Tradition and those assigned the task of interpreting it are works-in-progress whose character, if they have one, is to be always at work and always in progress.

Like all games, law's language game is a vast tradition of almost infinitely possible argumentative moves in which each player must come to a decision as to which move to make. The moment and

164. *Id.* at 293.

165. GADAMER, *supra* note 97, at 28.

166. *The Villanova Roundtable: A Conversation with Jacques Derrida*, *in* J. CAPUTO, DECONSTRUCTION IN A NUTSHELL: A CONVERSATION WITH JACQUES DERRIDA 6 (1997).

nature of the decision made cannot be grounded in anything outside itself; there is no possibility of an acontextual metric for closure. That decision is never entirely justifiable by or reducible to the principles or rules of the tradition alone of which it claims to be an application. A particular performance or move cannot be detached from the general game itself—each can only be fully appreciated in the context of the other. It is the subject or player that both occupies and fills the gap between the game's indeterminate possibilities and the determinate decision made. As such, judges do not stand astride the game, but are altered and shaped by the game's limits as they play to reconstruct those limits; they are influenced by the present contours of the game as they influence the game's continuing performance and possibilities. There is no final or enduring span between the game's general indeterminacy and particular decisions that is not itself destabilized by the constituted and constituting identity of the different players in the game's traditions. Politics is always present and irrepressible because general indeterminacy both gives rise to and continues to permeate the particular decision made. By understanding the move from general indeterminacy in this way, it should be clear why I resist the nihilistic conclusion that "anything goes"; the idea that there is complete freedom to decide makes no sense at all because it is only within a tradition of constraints, albeit thoroughly contingent and revisable in content and direction, that decision making can be comprehended. While this understanding of tradition is to be contrasted to the pedant's or formalist's timidity and dependence on rules, it is also to be set off against the anarchist's bravado in ignoring all rules; freedom and its ultimate exercise in genius is less about divine detachment and more about the transformation of the existing traditions in novel and disruptive ways.

In this transformative account of tradition, there are grounds of and for decisions, but they are contingent and unstable: reasons can be given as to why one decision is better than another, but these arguments are never themselves guaranteed or vouchsafed outside the context of ideological argument. Without some formative structure or informing context, there would be no game as a process of human engagement and reflection. Indeed, the very notion of choice implies a constrained context that identifies what is and is not being chosen between. Moreover, the choice is not, as Mootz and others suppose it to be, between "a disciplined encounter with the activity of rhetorical knowledge" and "a boundless and playful

irrationalism";[167] this is only to reinstall another false dichotomy between reason and nonreason. Consequently, legal reasoning is about the moves that are presently in play and that structure law's reasoning game in such a way as to enable choices between competing definitions of particular rules in light of their general indeterminacy. However, while providing an argumentative context for reasoning and definition, these moves are themselves being contingently reworked. As such, the rules of law's reasoning game or tradition do not so much constrain or cabin judges' room for maneuver as make it possible and operational; "to be situated within a tradition does not limit the freedom of knowledge but makes it possible."[168] Viewed in this way, law is confirmed as a rhetorical activity in which the different techniques of legal reasoning are to be treated less as "rules" and more as moves in a game in which its defining rules are always in play. Legal tradition is not simply a process that is to be known and thereby governed; it is part of an active engagement in which "tradition is a genuine partner in dialogue"[169] with its judicial interlocutors and, in engaging in that dialogue, both the tradition and the interlocutor are "transformed into a communion in which [they] do not remain what [they] were."[170]

When Gadamer states that, in a hermeneutical approach, "understanding is thought of less as a subjective act than as participating in an event of tradition, a process of transmission in which past and present are constantly mediated,"[171] I want to emphasize how the "subjective act" is not consumed by the "tradition," but how the two interact. In the same way that the "subjective act" is not meaningfully comprehended or even possible outside the "tradition," so the "tradition" does not stand independently of the "subjective acts" that create and re-create it. Furthermore, when Gadamer states that the hermeneutical challenge is that of "acquiring an appropriate historical horizon,"[172] I have no quarrels with this as long as "appropriate" is understood in a nonobjective, political, and contingent way. Accordingly, rather than talk about

167. Mootz, *supra* note 119, at 497. This line of argument is developed further in HUTCHINSON, *supra* note 12, at 173-78.

168. GADAMER, *supra* note 2, at 361.

169. *Id.* at 358.

170. *Id.* at 379.

171. *Id.* at 290.

172. *Id.* at 303.

obligation in the sense of a fixed meaning or talk about freedom in the sense of no fixed meaning at all, it is better to

> think of the whole performance in a way that is both bound and free. In a certain sense interpretation probably is re-creation, but this is a re-creation not of the creative act but of the created work, which has to be brought to representation in accord with the meaning the interpreter finds in it.[173]

Although Gadamer is commenting upon festivals, his remarks are apposite to the judicial encounter between law's tradition and the individual judge in reaching a discrete decision in a particular controversy:

> As a festival, it is not an identity like a historical event, but neither is it determined by its origin so that there was once the "real" festival—as distinct from the way in which it later came to be celebrated. From its inception—whether instituted in a single act or introduced gradually—the nature of a festival is to be celebrated regularly. Thus its own original essence is always to be something different (even when celebrated in exactly the same way). An entity that exists only by always being something different is temporal in a more radical sense than everything that belongs to history. It has its being only in becoming and return.[174]

Under my portrayal of the common law tradition, not only is there no compelling justification why judges should rein in their own critical judgments in supposed deference to those implicit in law's substantive traditions, but there is a cogent reason why they should give full and open expression to them: judges respect the common law tradition best when they scrutinize, interrogate, challenge, and make it conform with justice. Of course, they do not do this from outside the tradition, but work with and within the tradition. This idea is perfectly captured by Derrida when he states that

> for a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and destroy it or suspend it enough to reinvent it in each case, rejustifying it, at least reinvent it in the reaffirmation and the new and free confirmation of it principle.[175]

Accordingly, the style of judging that captures most faithfully the cherished traditions of the common law is one that involves both a constant reinterpretation of past decisions and a perpetual openness to future reinterpretation. And, of course, such a style of judging

173. *Id.* at 119.

174. *Id.* at 123.

175. Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* 11 CARDOZO L. REV. 919, 962 (1990).

must equally question its own biases and implications. Nonetheless, if it is to be given its due, each new case is entitled to more than an unthinking reliance on existing doctrine or rules: it requires the judge to make a fresh judgment that actively reappraises as it reaffirms the traditions of legal doctrine. Indeed, contrary to conventional wisdom, it is the relentless critic who most closely grasps and continues the common law tradition than those who insist on a timid acceptance of what has already been decided. To treat the law as static or to adopt an unquestioning posture toward it is to betray, not uphold, the common law tradition.

Some of the best evidence for this claim can be found in the phenomenon and, dare I say, tradition of so-called "great cases." These are cases—*Brown v. Board of Education*,[176] *Roe v. Wade*,[177] *Miranda v. Arizona*[178] and their ilk in American constitutional law—that are regarded by almost all lawyers as landmarks of the common law tradition. While their precise import and reach are continuously contested, any credible account of the common law must be able to incorporate their authoritative, if indeterminate intimations. However, the very existence of such cases, and particularly the circumstances of their origin, seems to confound the legitimacy of the process that they allegedly anchor and from which they purportedly arise. The skeptical observer might be forgiven for thinking that great cases appear to be less a continuation of legal tradition and more of a break with existing traditions; they tend to exemplify a deviation from existing commitments, not a derivation from them. Accordingly, while great cases represent the impressive pragmatic strength of the common law in being able to adapt to fresh challenges and new conditions, they also present jurists with their most pressing jurisprudential challenge in explaining the operation of the common law over time. Insofar as great cases are the heart and soul of the common law, it must be explained why that common law tradition is considered to extol all the virtues of restraint and caution that the creation and acceptance of great cases so gloriously flaunt. Indeed, mindful that the self-imposed task of mainstream jurists, including those of a philosophical as well as a hermeneutical persuasion, is to defend common law adjudication as a rational, disciplined, and bounded process, great cases seem to reveal the common law to be

176. 347 U.S. 483 (1954).
177. 410 U.S. 113 (1973).
178. 384 U.S. 436 (1966).

more of a political, unruly and open-ended process. In contrast, my critical account seeks to demonstrate that the common law's sense of its own tradition is attenuated and impoverished; there is little appreciation of the organic and evanescent character of tradition and its transformative possibilities. Once the incidence, importance, and influence of great cases are conceded, the tradition of the common law is seen to be less about stability and continuity and more about change and transformation. Although lawyers and jurists emphasize the routine, it will be the radical occasions of great cases that the best capture its dynamic spirit.[179]

VIII. *GLUCKSBERG* REVISITED

As I have tried to show, my quarrel with Justice Souter, Mootz and, to a lesser extent, Gadamer is not so much with how they depict the prosaic operation of the common law, but more with the extravagant claims that they make for their account. Indeed, while I agree in large part with their pragmatic description of common law adjudication, I disagree that this hermeneutical method can live up to the traditional expectations that are placed upon it; it fails to deliver on the formalist promise that common law adjudication is a bounded and objective process that can give rise to relatively determinate and predictable resolutions of disputed controversies in a way that distinguishes legal decision making from overtly political or ideological disputation. Accordingly, having offered an alternative and critical hermeneutical account of the common law, it is incumbent on me to make good on my claim that "law is politics." I need to show that, far from being a check on or removed from political debate, adjudication is another site, albeit stylized and technical, for political confrontation in which "anything might go." In short, I must revisit *Glucksberg* and demonstrate that Justice Souter's judgment implodes from the hermeneutical force of his own arguments. Whatever the claims that he or his jurisprudential apologists make for it, his judgment actually confirms rather than refutes that there is no method that can absolve judges or anyone else from the responsibility and challenge of constantly arguing and rearguing what should and should not be done in particular contexts at particular times. As Souter himself said in an earlier judgment, "even when jurists reason

179. For a full development of this theme and its jurisprudential implications, see ALLAN C. HUTCHINSON, *In Praise of Leading Cases*, *in* LEADING CASES OF THE TWENTIETH CENTURY 1, 2-27 (E. O'Dell ed., 2000).

from shared premises, some disagreement is inevitable . . . [but] that is to be expected in the application of any legal standard which must accommodate life's complexity."[180] Moreover, Souter's *Glucksberg* opinion corroborates rather than confutes that there is no escaping politics, especially through a resort to "reasoned judgment" and "tradition," to a technical or sanitized conversation in which the basic struggle over whose interests count and what they count for can be sidestepped. Understood and read with a critical eye, the judgment and its ensuing juristic reception make the critical case that "law is politics" in that adjudication is only bounded and objective insofar as its bounds and values are thoroughly political and revisable.

It will be remembered that, in determining the existence and scope of any constitutionally protected right to die, Souter considered that his judicial task is not to substitute the court's view of what is or is not the most reasonable balance of competing interests, but to check whether the legislative view "falls outside the realm of the reasonable"[181] and imposes "arbitrary impositions and purposeless restraints."[182] To do this, judges must be engaged in "reasoned judgment"[183] that will ensure that they do not indulge the "merely personal and private notions"[184] of justice of any particular judge. This reasoned judgment will eschew all-or-nothing analysis in terms of either textual or extra-textual absolutes. Instead, operating at a "the proper level of generality"[185] and "pay[ing] respect . . . to detail,"[186] judges must restrict those values deserving constitutional protection only to "those exemplified by 'the traditions from which

180. Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992). It is important to stress that it is not part of my critique (nor does such a concession weaken my critique) to demonstrate that Justice Souter got it right or wrong on the particular facts. Properly understood, the central force of my critique is that any resolution of the case and the more general issue of a physician-assisted right to die is a political and contested matter, not a neutral or objective one. Like abortion, the debate is morally difficult and politically fraught and so can be temporarily clarified, but never conclusively settled. However, for the record, I should state that my *present* position is that the recognition of such a right, suitably narrowed and regulated, is warranted; this might well change as circumstances and my response to them shift. And, of course, the right will only extend to the enlisting of willing physicians. While I recognize that there is a pertinent difference between killing and failing to save, I tend to agree with the implied thrust of Oscar Wilde's poem: "Yet each man kills the thing he loves / By each let this be heard, / Some do it with a bitter look, / Some with a flattering word. / The coward does it with a kiss, / The brave man with a sword!" OSCAR WILDE, THE BALLAD OF READING GAOL AND OTHER POEMS 254 (R.E. Adams ed., 1926) (1898).

181. Washington v. Glucksburg, 521 U.S. 702, 764 (1997).

182. *Id.* at 765.

183. *Id.* at 769.

184. *Id.* at 267.

185. *Id.* at 772.

186. *Id.* at 770.

[the Nation] developed,' or revealed by contrast with 'the traditions from which it broke.'"[187] Consequently, after such an "exact analysis,"[188] Justice Souter reached the conclusion that, while "the importance of the individual interest here . . . cannot be gainsaid [and] . . . whether that interest might in some circumstances, or at some time, be seen as 'fundamental' . . . I am satisfied that the State's interests . . . are sufficiently serious to defeat the present claim that its law is arbitrary or purposeless."[189] Although Souter accepted that there is a tradition of extending patients' rights to bodily integrity and to medical care, he maintained that the state's "slippery slope" concern "is fairly made out here, . . . because there is a plausible case that the right claimed would not be readily containable by reference to facts about the mind that are matters of difficult judgment, or by gatekeepers who are subject to temptation, noble or not."[190]

There is no doubt that Souter's judgment is sophisticated and plausible; it offers a reasoned and reasonable intervention in a controversial and continuing debate. Indeed, there is much in Justice Souter's excursus on common law method that emphasizes the Gadamerian themes of historical context, performative dynamism, and organic tradition; "just as results in substantive due process cases are tied to the selections of statements of the competing interests, the acceptability of the results is a function of the good reasons for the selections made."[191] Indeed, there are three particular traditions—social, legal, and judicial—in play in *Glucksberg* and which Souter maintains are receptive to the hermeneutical kind of reasoned judgment that he recommends. However, there are several argumentative maneuvers or rhetorical ruses that rob the judgment of the hermeneutical cogency that it claims and craves. In the Gadamerianesque prose adopted by Souter, "if the acceptability of the result is a function of the good reasons given," then the result is not acceptable because the supporting reasons are wanting and not persuasive. Despite the Gadamerian trappings, there is still the underlying commitment to the idea that adjudication is a largely technical endeavor, which demands rigorous discipline, which lends itself to exact analysis, which is amenable to close criticism, which

187. *Id.* at 767.
188. *Id.* at 770.
189. *Id.* at 782.
190. *Id.* at 785. *See generally* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 65-120 (1991).
191. *Glucksberg*, 521 U.S. at 770.

repays attention to detail, and all of which can be achieved in a politically neutral manner. Contrary to Justice Souter's (and Mootz's, Gadamer's, and most other traditional jurists') fervent hope, it simply is not possible to perform this judicial task in a way that makes the legal outcome completely independent of the "merely personal and private notions"[192] of justice of any particular judge; such notions can be concealed or overlooked, but they cannot be excluded or eliminated. A closer reading and parsing of Justice Souter's arguments make such a critical evaluation both clearer and more convincing.

The first traditions that Justice Souter looks to are those social practices that surround and inform the particular right claimed; he examines the constitutional, legal, and social history of suicide and physician assistance to the dying. However, as Justice Souter recognizes, there is not only no one tradition, but the several existing traditions are indeterminate in scope and often competing with each other. This will mean that it is crucial to identify a device by which to determine "the proper level of generality"[193] at which these competing traditions are to be characterized so as to ascertain which are entitled to constitutional protection. This, of course, is where reasoned judgment enters the doctrinal picture: "selecting among such competing characterizations demands reasoned judgment about which broader principle, as exemplified in the concrete privileges and prohibitions embodied in our legal tradition, best fits the particular claim asserted in a particular case."[194] To do this with "exactitude,"[195] Souter recommends a number of requirements, such "as applying concepts of normal critical reasoning, as pointing to the need to attend to the levels of generality at which countervailing interests are stated, or as examining the concrete application of principles for fitness with their own ostensible justifications."[196] Mindful that all of this has to be done in an objective and neutral manner without illicit reliance on the "merely personal and private notions"[197] of justice of

192. *Id.* at 767. I do not mean to suggest that the only choice is between "merely personal and private notions" of justice and robustly objective and public notions. In this analysis, my purpose is to demonstrate that there is no objective method available to judges that can enable them to finesse the intrusion of political prejudices. For a fuller treatment of this distinction and connection between personal and objective, see Hutchinson, *supra* note 73.

193. *Glucksberg*, 521 U.S. at 772.

194. *Id.* at 771 n.11.

195. *Id.* at 772.

196. *Id.* at 773.

197. *Id.* at 767.

any particular judge, Justice Souter has sent judges on a sleeveless errand; there is no way that they can complete such an analysis as a purely technical or strictly legal matter. Once it is accepted that reliance on dominant traditions without more is unjustified, Souter is into the political game of deciding which traditions, to paraphrase Justice Harlan, are those "from which the country should develop" and those "from which the country should break."[198] Because "tradition is a living thing,"[199] it is the self-assumed responsibility of judges to decide which parts of the tradition should die in order for the tradition to thrive.[200] This is a profoundly political task. And it becomes more and not less so, when it is allegedly done by deference to existing traditions.

Although the appeal to tradition is only meaningful if that tradition is sufficiently determinate and discrete, history shows that traditions are notoriously imprecise and that they are infuriatingly difficult to pin down. Like anything and everything else, traditions are not so much discovered as constructed in the act of following them. Even when pitched at a classificatory level of great specificity, it does not speak for itself and cannot excuse judges from making critical and contestable choices. Also, this seems to suggest that tradition is one factor in the doctrinal decision as to whether to recognize certain liberties as sufficiently fundamental, but that is not the only and certainly not the decisive criterion. Indeed, although the right claimed in *Glucksberg* is quite discrete as it involves limited groups (i.e., doctors) in limited circumstances (i.e., dying and suffering patients), it is next to impossible to identify a physician-assisted right-to-die tradition in Anglo-American law and society; Chief Justice Rehnquist surely has the best of this argument in *Glucksberg*. While there are incipient signs that such a tradition might be taking shape (e.g., there has been a general decriminalization of suicide), the claim that such a tradition has moved beyond some initial threshold of viability would mean that almost any practice could claim to be a tradition and, therefore, worthy of at least being taken seriously in constitutional discourse, even if not ultimately accepted as a fundamental value. Moreover, if tradition is the decisive test of whether something is a fundamental interest or not, many of the leading cases in the substantive due process tradition

198. *See id.*
199. *Id.* at 765.
200. *See id.* at 771 n.11, 772-73.

would not cut the constitutional mustard. The most spectacular example of this is *Roe v. Wade*.[201] There was no obvious tradition in Anglo-American legal tradition of such a right being recognized; if anything the denial of such a right was more an integral part of any extant tradition.[202]

Justice Souter's efforts to steer clear of this political terrain are based upon the possibility that judges can restrict themselves to policing the boundaries of reasonableness. Rather than argue over whether one approach is more or less reasonable than another, judges can confine their analysis to whether the legislative intervention "falls outside the realm of the reasonable"[203] and whether its "justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied."[204] However, this assumes that what is and is not "arbitrary" and "purposeless" is seen to reside outside the historical flow of social tradition and, therefore, outside politics. But this smacks of the most ahistorical and inorganic approach to tradition. This maneuver only works if the "arbitrary" and the "purposeless" are simply givens that can be discovered, not chosen. Yet, the history of America's social traditions suggests that such assumptions are invalid. There is nothing arbitrary about, for example, bigotry. While racist or sexist prejudice might be unreasonable, it is not arbitrary or purposeless; bigots have as many reasons for their beliefs and actions as liberals. The identity of the arbitrary and purposeless has to be argued for, as it is inside, not outside the political forces that it is meant to regulate and evaluate. The fact that there might be almost complete agreement on certain values or activities being outside the pale of reasonableness does not make such a conclusion any less political. It is not about whether there are reasons: there always are. It is whether those reasons are considered good or bad ones. After all, racism and sexism of the most rampant kind were once, as Justice Souter would surely agree, so broadly accepted and deeply rooted that they brooked little challenge, at least among those with political power and franchise. In the world of the past, it would have been the

201. 410 U.S. 113 (1973).

202. *See id.* at 130-41. Other examples include a right to contraceptives outside of marriage. *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967) (any general right to marry). *See generally* Cass R. Sunstein, *Against Tradition*, 13 SOC. PHIL. & POLICY 207 (1996).

203. *Glucksberg*, 521 U.S. at 764.

204. *Id.* at 768.

abolitionist/antiracist or the feminist who would have been "arbitrary" and "purposeless."

Furthermore, if a reliance on social tradition, albeit in a modified and sensitive manner, is used to identify constitutional rights, it will be those minorities who most need protection against majority views that will be denied constitutional protection. Unless tradition is expanded to include whatever people have done whether in support of or opposition to traditional values, constitutional protection will only extend to those whose values and activities conform with the tradition and who are less likely to require such protection. However, of course, once tradition is interpreted so broadly and indiscriminately, its legal use becomes entirely vacuous because there is no legal test, which is not itself political, to organize social practices into accepted and rejected traditions. Mindful that the level of generality is so vague and so variable, it is possible to use tradition to support all kinds of competing positions.[205] After all, it was not so long ago that the use of racial discrimination was "deeply rooted" in America's constitutional and demographic history. And I suspect that it will not be too long (although still too long) before the Supreme Court accepts that homophobia, while again "deeply rooted" in the nation's constitutional and demographic history, is held to be a tradition from which the courts should break rather than on which they should build. As the split in *Bowers v. Hardwick*[206] evinced, the key as to whether homosexuality can be interpreted as implicit in the concept of ordered liberty or framed as part of those basic fundamental rights already protected, as the doctrine apparently demands, will depend on the level of generality at which such analysis is plausibly made; it is not exactly a stretch to treat private homosexual relations as falling within the established intimacy and privacy concepts of constitutional liberty.[207] What determines the proper level of generality remains as elusive and as crucial as it has always been. There is no proper level of generality without some initial attachment to a preexisting commitment to what liberty might entail. Such a question goes to the very heart of politics, not law. Or, as I have sought to emphasize,

205. For a general critique of using tradition as any kind of foundation, see JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 60-63 (1980); Robert M. Cover, *Foreward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

206. 478 U.S. 186 (1986) (holding that a sodomy statute did not violate the fundamental rights of homosexuals).

207. *See id.* However, the more recent decision in *Romer v. Evans*, 517 U.S. 620 (1996), has already begun the erosion of the *Bowers* holding. On racial discrimination, see *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (Powell, J.).

"law is politics" because the heart and soul of law is politics.

Moving on from social tradition, a similar kind of critique can be applied to reliance on legal tradition. Indeed, the effort to rely on a fixed or determinate tradition of substantive legal doctrine is as weak and unsuccessful as the judicial effort to utilize social tradition to ground constitutional interpretation.[208] Both traditions are so numerous and imprecise that they can justify almost any reading. Indeed, this resort to tradition tends to reinforce than resolve the problem because it is difficult to ascertain what would be the controlling tradition, constitutional or social, over and above a particular judge's honest and evaluative conviction about what is was. Justice Souter only grounds his decision by building a foundation for it and, once history moves, that ground will itself be rendered unstable and disclosed as only the function of Souter's contingent and personal commitments, not its grounding. He fails to grasp that legal tradition is not simply a process that is to be known and thereby governed; it is part of an active engagement in which "tradition is a genuine partner in dialogue"[209] with its judicial interlocutors and, in engaging in that dialogue, both the tradition and the interlocutor are "transformed into a communion in which [they] do not remain what [they] were."[210] And, I want to add, that "communion" is itself temporary, provisional, and contingent; it is a work-in-progress that stands inside, not outside, the matrix of ideological forces that drive the historical process of rhetorical tradition. As Gadamer reminds us (even if he often forgets it himself), "from the hermeneutical standpoint, rightly understood, it is absolutely absurd to regard the concrete factors of work and politics as outside the scope of hermeneutics."[211]

When it comes to legal traditions, it has to be remembered that, as well as being multiple and fractured, they are capable of being abandoned when circumstances demand. Although courts are understandably reluctant to break from a long-standing legal tradition, they are not only prepared to do so, but place an obligation on themselves to so act at times. For instance, in *Planned Parenthood v. Casey*,[212] the Supreme Court divided over whether *Roe* should be overruled.

208. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989); Moore v. City of East Cleveland, 431 U.S. 494, 513 (1977).

209. GADAMER, *supra* note 2, at 358.

210. *Id.* at 379.

211. GADAMER, *supra* note 97, at 31.

212. 505 U.S. 833 (1992).

Speaking jointly for the Court, with Justices O'Connor and Kennedy, Justice Souter stated that there are moments when the Court best fulfills its constitutional duty by repudiating earlier lines of cases: "in constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty."[213] According to Justice Souter, this should occur where the Court would have to pay a "terrible price"[214] for failure to act; this was the case in both *West Coast Hotel v. Parrish* and *Brown v. Board of Education*.[215] However, cautioning that "[e]ach generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one,"[216] he maintained that *Roe* not only did not warrant overruling, but that its repudiation "would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."[217] In short, if the stakes are high enough, the fall-out sufficiently severe, and the judges are so disposed, the breaking with established constitutional tradition will occur; this is exactly what the minority proposed to do. It was not that Souter and his colleagues thought that such a course of action was entirely illegitimate; simply, that *Casey* was not the appropriate occasion. It was an ideological call, not a legal one, about social circumstances and political climate.

If this general critique is pertinent for social and legal traditions, it is doubly valid for the other "judicial tradition" that is in play. Beginning with the decision in *Glucksberg* itself, a cursory familiarity with substantive due process doctrine and constitutional law generally easily confirms that there is no one tradition of judicial justification. Whatever the topic on which they join issue, the judgments of the Supreme Court (and all other inferior courts) are always engaged in a concerted effort to legitimate their decisions by virtue of the method adopted. In Justice Souter's terms, they realize that "the acceptability of the results is a function of the good reasons [given]."[218] Yet what amounts to reasons, let alone good ones, is as divided as almost any

213. *Id.* at 863.

214. *Id.* at 864.

215. *Id*; *see* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling the economic liberty doctrine); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (overruling the separate but equal doctrine).

216. *Casey*, 505 U.S. at 901.

217. *Id.* at 865.

218. Washington v. Glucksberg, 521 U.S. 702, 770 (1997).

other item on the constitutional agenda. Sometimes, the disagreement remains muffled and marginal; at other times, it becomes voluble and central. Indeed, much of the disagreement between Justice Souter and Chief Justice Rehnquist is framed in terms of their respective approaches to the problem of determining which interests are to receive constitutional protection. Nevertheless, although the general formal methodology adopted will lean toward a particular substantive preference, it will not be decisive. To believe otherwise would be to disregard entirely Gadamer's primary insight that there is no necessary connection between truths and methods; whether one is an originalist, a textualist, an interpretivist, or any other stripe of constitutional jurist will not of itself determine the result reached. While the adoption of a specific interpretive approach on a specific occasion will make certain outcomes more likely and more justifiable than others, it is the substantive political prejudices or, Souter has it, the "merely personal and private notions" of justice of any particular judge that begins and ends the process.[219]

At the end of the day, it seems apparent that Justice Souter was not sufficiently enamored of the claimed physician-assisted right to die as to warrant its recognition. But this was not because it failed the "tradition test,"[220] but because it was not fundamental in Souter's scheme of justice. If he had wanted to recognize such a right, there were ample rhetorical resources for him to draw upon in fashioning a hermeneutically adequate argument. However, as with the decision he actually made, the "acceptability of the result will be a function of the good reasons given"[221] and, without some account of the particular prejudices that motivate and constitute him, those reasons are lacking. As Gadamer himself noted, "there is undoubtedly no understanding that is free of all prejudices."[222] Gadamer insisted that a large part of the hermeneutical performance entailed a sustained effort to "distinguish the true prejudices, by which we *understand*, from the *false* ones, by which we *misunderstand*,"[223] even if this cannot be done outside the very historical (and, therefore, political) process at which efforts are being made to understand. Souter seems not to

219. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE (1997). That having been said, I do not want to suggest that all adjudication is simply a hoax or a sham. *See* HUTCHINSON, *supra* note 12, at 180-89.

220. *See Glucksberg*, 521 U.S. at 770.

221. *Id.*

222. GADAMER, *supra* note 2, at 490.

223. *Id.* at 298-99.

take seriously the fact that any method, including his proffered "reasoned judgment," will retain some element of prejudice; what Souter terms the "merely personal and private notions"[224] of justice of any particular judge and what I call simply political commitments. As Gadamer warned, unless there is a constant struggle to identify rather than to ignore those prejudices, interpretation will become enslaved to "the tyranny of hidden prejudices that makes us deaf to what speaks to us in the tradition."[225] It is the act of hiding those prejudices that is the problem, not the acknowledgment of their existence; interpretation is part of, not apart from, political commitments. The refusal to recognize the importance of those political commitments means that tradition loses its vital quality as "a living thing" or, as I put it, a work-in-progress. While Justice Souter, Mootz, and others are content to leave the sources and direction of its development to some almost mystical historical *Volkgeist*, I prefer to see it for what it is—a heuristic device that does the bidding, no matter how tentative and provisional, of its social artisans and judicial arbiters.

In conclusion, therefore, it can be reported that Justice Souter's judgment in *Glucksberg* is not the masterful piece of hermeneutical artistry that he wants it to be or his jurisprudential admirers wish it to be; the reasons given for the result are not good enough to warrant its acceptability. If Mootz's suggestion that "Souter's opinion persuasively describes the adjudication of fundamental rights as a hermeneutical-rhetorical project in terms that Gadamer . . . would endorse"[226] is right, then Gadamer's hermeneutical-rhetorical project is seriously deficient and in need of substantial reformulation. And that is exactly what I have recommended. It is only on a more critical and radical reading of Gadamer that it is possible to provide a compelling account of common law adjudication. While there is some objective basis to the protected values and the rhetorical methods used to develop doctrine and to decide cases, there is none that stands entirely apart from the "merely personal and private notions" of justice of any particular judge; there is a constant "toing" and "froing" between the objective and the personal and between the public and the private that defines and energizes legal and judicial traditions. Understood in this way as works-in-progress, there do not exist recognizable traditions in law, which allow judges to engage with

224. *Glucksberg*, 521 U.S. at 767.
225. GADAMER, *supra* note 2, at 270.
226. Mootz, *supra* note 26, at 326.

contested matters of social practices in an objectively determinate and neutrally defensible way because those traditions are so much part of the very politics that they are claimed to bypass or obviate. However, this assessment does not sound the death-knell for common law adjudication. On the contrary, it can give it a renewed vigor and special relevance. It is to an elaboration of this possibility that I turn in the last part of the Article.

IX. RADICAL REPERCUSSIONS

If law and adjudicative practice is anything to go by, there is, as Gadamer says, "something that hermeneutical reflection teaches us."[227] But it is not "that social community, with all its tensions and disruptions, ever and ever again leads back to a common area of social understanding through which it exists."[228] This is wishful thinking that does much more harm than good; it gives established and dominant values priority over marginalized and subversive ones simply because—and this is the crucial point—they are established and dominant. What hermeneutical reflection might teach us is that the extant traditions of discursive convention that make agreement possible are as much a result of force and power as of consensus and agreement. Commonality is not the same as sharedness; such an equivalence needs to be actively demonstrated rather than passively assumed. There is a politics to all of this that Gadamer either ignores or downplays. It is not so much that values and reason are entirely collapsible into ideology and power; this is a nihilistic scenario that can withstand neither historical scrutiny nor critical analysis. It is that reason and power do not stand separate from or over the other. In a similar way that values and reason operate within the context of ideology and power, so are ideology and power affected by values and reason. To rework Justice Souter's chosen Gadamerianesque line that "the acceptability of the results is a function of the good reasons [given],"[229] it is that the goodness of the reasons (i.e., their rhetorical effectiveness) and the acceptability of the results (i.e., their political resonance) interact and function together; what counts as good reasons are not separate from the political context in which they arise and into which they intervene. Rhetorical knowledge, therefore, functions with, within, and upon political conditions. In legal terms,

227. GADAMER, *supra* note 81, at 42.
228. *Id.*
229. *Glucksberg*, 521 U.S. at 770.

the connection between law as one kind of rhetorical activity and politics as another is one of interpenetration and fluidity, not independence and boundedness.

In the particular debate at hand in *Glucksberg*, the quality and ferocity of the political forces at work are much more muted (although not absent) than in other contested areas of constitutional controversy, such as abortion and homosexuality. Like all the related questions of death and dying, assisted suicide provokes an endless debate. It is not unreasonable to assert that, while medical technology has done much to improve health and combat suffering, it has also created entirely new situations that have so affected humankind that it has changed the world. In such a society, the power to define and control this continuing social revolution is inevitably political. In the same way that philosophy has a history and, therefore, a politics, so moral philosophizing about life and death is embedded within certain historical protocols of professional and technological power; medical practice and the health industry begin to construct and validate the rationality by which its problems and their solutions are resolved. As the pace of medical innovation ever quickens, anxiety has become so pervasive and profound that there has come to exist "a state of epistemological turbulence . . . [in which] rather than studying social phenomena as if they were natural phenomena, scientists now study natural phenomena as if they were social phenomena."[230] Against this chilling backdrop, it is naive at best for Justice Souter to maintain that the constitutional dimension of these matters can be settled in an exclusively technical and legal manner that obviates or sidesteps reference to these deeper and more tumultuous debates. Although Souter is not short of company in this conceit, he is no less culpable for his presumption. Reason is as disciplined as disciplining in its interaction with the sociopolitics of bioethics and health care.

In putting forward the account that I have, I am not suggesting that adjudication is somehow an unmitigated sham or that judges are involved in a dark conspiracy to thwart democratic justice. While there are instances when such condemnatory characterization is not far off the mark, I accept that judges do act in good faith in their efforts to meet their professional expectations. Nor am I suggesting

230. BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION 34 (1995). For a broader assessment of this trend, see ULRICH BECK, RISK SOCIETY: TOWARD A NEW MODERNITY 204 (1992). *See generally* IVAN ILLICH, LIMITS TO MEDICINE: MEDICAL NEMESIS, THE EXPROPRIATION OF HEALTH (1976).

that the inexorable consequence of accepting that "law is politics" is to unveil politics and, therefore, law as an exercise in arbitrary and unreasoned decision making. Such an account does justice neither to judges and mainstream jurists nor to me and most other critical scholars. My insistence that "law is politics" is no more (and no less) than a claim that it is not possible to engage in adjudication without also being drawn into and taking a stand on contested political matters. Judges bring to their official duties what Holmes famously called "deep-seated preferences."[231] They do run very deep and are often so seated that their holder has little sense of them. But I do not believe that they "can not be argued about"[232] or that they do not change, even if they sometimes change through nonrational persuasion. And I certainly do not believe that "when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way" or that "his grounds are just as good as ours."[233] While the former response needs little serious rebuttal (and presumably was not intended to be taken literally by Holmes), the latter remark implies that the only alternatives to an objective morality or rationality is a desultory relativism in which "anything goes" or an apocalyptic nihilism in which arbitrariness is the only mark of political commitment. Both of these possible alternatives say more about mainstream jurists and their inability to get beyond their own limited and limiting understandings than anything else. For such judges and jurists, there is no viable or defensible choice other than objectivity or subjectivity; anything that does not live up to the objective standards of truth is *mere* conviction, convention, ideology, and opinion.[234] As Justice Souter puts it, it is a matter of "reasoned judgment" or reliance on the "merely personal and private notions" of justice of any particular judge.[235]

Yet it is completely wrong-headed to insist that the loss of objectivity in the transcendent sense means that all interpretations are subjective and all truths are relative. It is entirely possible and reasonable to insist that, although the traditional search for objectivity is a lost cause, there are not only subjective opinions and

231. O.W. HOLMES, JR., COLLECTED LEGAL PAPERS 312 (P. Smith ed., 1921).

232. *Id.*

233. *Id.*

234. *See* DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 7, 22, 73, 119, 133 (1997); Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUBLIC AFFS. 87 (1996).

235. Washington v. Glucksberg, 521 U.S. 702, 769, 767 (1997).

relative truths. Instead, it might be arguable that one truth is not as good as another if one understands by truth nothing more than that it meets the familiar procedures of justification that hold sway; there are only better and worse views in advancing the substantive cause of political justice. Justification is a hermeneutical practice and what works or counts as good or reasons will depend on the social and, therefore, political context in which justification is sought and offered. Accordingly, in law and life generally, rhetorical success is not vouchsafed by reliance upon a particular method, but by the usefulness of the results arrived at and their effect upon meeting certain objectives that are taken to be morally or politically significant. Preferring hope over knowledge, it insists that moral choice is "always a matter of compromise between competing goods rather than a choice between the absolutely right and the absolutely wrong."[236] Stressing the historical quality of that compromise, this is the unrelenting message of a radical version of Gadamerian hermeneutics. Accordingly, while I believe that such "deep-seated preferences" are not rational in the sense of lending themselves to some objective validation or refutation, I do not believe that they are arbitrary or immoveable; reasoned exchange and argument can occur so long as reason is understood as historically contingent, socially constructed, and politically charged. There is no epistemology or metaphysics that operates as something above rhetoric. Like debates about substance, there is nothing beyond persuasion among real people in real situations. Contrary to much jurisprudential thinking, the problem is not the intervention of power in the halls of reason, but the resilient belief that power can be somehow excluded and that there exists some noncultural and nonsocial standard of reasonableness. Disabused of this notion, the democratic ambition becomes not one of warranting that reason is detached from value or power, but of ensuring that the values and interests that help constitute reason represent and are conducive to a truly democratic society.

The desire of Justice Souter, his colleagues, and most jurists to present adjudication as a bounded and objective enterprise in which

236. RICHARD RORTY, PHILOSOPHY AND SOCIAL HOPE, at xxix (1999); *see* RICHARD RORTY, OBJECTIVITY, REALISM AND TRUTH 22-24 (1991); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 209 (1979); H. PUTNAM, REPRESENTATION AND REALITY 115 (1988); RICHARD RORTY, *Texts and Lumps*, *in* 1 PHILOSOPHICAL PAPERS, *supra* note 65, at 81; Richard Rorty, *Two Dogmas of Empiricism*, *in* W. QUINE, FROM A LOGICAL POINT OF VIEW 20-46 (1953).

reasoned judgment can dissolve and resolve problems that have proved inhospitable to legislative resolution is understandable, but misplaced. Not only is there no way to achieve such an ambition, but the continuing attempts to do so merely exacerbate the problem by rendering the juristic establishment complicitous and culpable, thereby eroding the very confidence that they are trying to build. The best response by judges and jurists would be to acknowledge that adjudication in a society of diverse and conflicting politics is an inevitably political undertaking. Once this is done, courts will not necessarily become otiose or surplus to democratic requirements.[237] Instead, it might be accepted that both courts and legislatures are involved in the same game, namely fashioning and implementing a theory and practice of democracy that can deliver substantive answers to concrete problems. And, in doing that, neither courts nor legislatures have a lock on political judgment about what it is best to do. For example, although Justice Souter states that legislatures are the place to engage in "fact-finding and experimentation"[238] which "should be out of the question in constitutional adjudication,"[239] he does concede that "sometimes a court may be bound to act regardless of the institutional preferability of the political branches as forums for addressing constitutional claims."[240] On the issue in hand in *Glucksberg*, he actually concluded that "I do not decide for all time that respondents' claim should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time."[241] This seems to be right. The respective responsibilities of judges and legislators cannot be defined outside the never ending debate about what democracy demands and is best served by at any particular time. In both judicial and legislative decision making, it is mistaken to allow theoretical principle to be the enemy of pragmatic good or general institutional competence to be the enemy of specific substantive good. What courts and legislatures do, as well as how that work is divided, is a highly political matter whose resolution will inevitably be contingent, contextual, and

237. Of course, such a conclusion might well be reached in determining whether at any particular time courts do more substantive harm than good. *See generally* ALLAN C. HUTCHINSON, WAITING FOR CORAF: A CRITIQUE OF LAW AND RIGHTS (1995).

238. Washington v. Glucksberg, 521 U.S. 702, 787 (1997).

239. *Id.* at 789.

240. *Id.* at 787.

241. *Id.* at 789. For a fuller treatment of the institutional competence issue, see Allan C. Hutchinson, *The Rule of Law Revisited: Democracy and Courts*, *in* RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER 196, 215-23 (David Dyzenhaus ed., 1999).

contested.

While the jurisprudential effort to re-present law and adjudication as hermeneutical practices of rhetorical persuasion is a considerable advance over the traditional classification of them as philosophical exercises in principled ratiocination, jurists are still too willing to ignore the political dimensions of common law adjudication. As I have emphasized throughout this Article, the historicization of common law and adjudication must also entail its politicization. An example of the consequences of failing to politicize as well as historicize is provided by the common law itself. In times past, the legitimacy of the common law and, therefore, the authority of judges were taken as residing in the fact that the common law was an artifact of the community whose values the judges were entrusted to articulate and represent. While judges had considerable discretion in performing this task, they were not completely left to their own devices; the common law comprises a process whereby its rules can be updated and refreshed in accordance with changing social norms.[242] Nonetheless, so long as those customary values were fairly homogeneous and broadly based, the pragmatic judicial effort to combine formal law and customary values appeared to be relatively apolitical and neutral. However, once that fact or pretence is relaxed, the cogency of such a claim soon begins to unravel. In other words, if historicization occurs without politicization, the very quality and character of common law adjudication still remains undisclosed. It is only when a more overtly political inquiry to historical context is made that the adjudicative tradition is understood in more useful and appropriate terms.

In presenting adjudication in this light, it should become clear that it is not that there is no resort to political values, only that the shared nature of those values gives the appearance that the judicial performance is objective. If there is conflict over the values to be incorporated in the law, the political nature of adjudication is simply revealed rather than hidden; it is not that politics somehow begins to intrude in what is otherwise an apolitical process. The choice to uphold the status quo or traditional values is no less (and no more) political than the decision to rupture or reinterpret those values in the name of an emancipatory impulse. As Gadamer is at pains to

242. *See* MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND (2d ed. 1716); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1850 (1977); J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW (1957).

emphasize, "preservation is as much a freely chosen action as are revolution and renewal."[243] *Any* engagement with and within tradition is political in that it involves choice between competing ways of presently making the past the best future that it can be. As such, it is traditionalism that is to be deplored, not tradition itself. The allegedly uncritical preservation of static commitments is bogus because, when understood in the more radical way that I recommend, the tradition itself is so capacious, nuanced, multitextured, motile, diffuse, and irrepressible that there is no one simple given tradition whose name it is possible to be claiming to act in. Accordingly, when the common law is politicized as well as historicized, it becomes clearer that, rather than celebrate tradition as a source of authority and meaning, it is authority that is the source of tradition's meaning; tradition can no more ground authority or meaning than anything else. Authority and meaning, like tradition, are to be earned in the rhetorical give-and-take of hermeneutical exchange. And such a historical exchange is only properly appreciated when its political context is grasped, admittedly in an inevitably partial, incomplete, and contingent way. As such, the common law is more usefully understood as a radical work-in-progress.

Consequently, the emancipatory task of a radical hermeneutics is not exhausted in the important effort of unmasking tradition-following initiatives as inevitable interventions in and of politics. Although the critical significance of this demonstration is not to be underestimated, it is also important to point out the inner contradictions, negations, elisions, and tensions within the tradition so that they can be appropriated, reformulated, and worked to progressive effect. Because adjudicative decision making is context dependent and it will never be possible to delineate the relevant context with sufficient completeness, certainty or detail, the exercise of judicial discretion will always have to be an indispensable dimension of judgment or choice; the judges' moral values and political commitments or, as Justice Souter puts it, the "merely personal and private notions"[244] of justice of any particular judge will confound any attempt to turn legal adjudication into a largely technical and objective reckoning rather than a contestable commitment to particular values and interests. Moreover, even if it were, it is surely the case that "being just is not a matter of

243. GADAMER, *supra* note 2, at 281-82.
244. *Glucksberg*, 521 U.S. at 767.

calculation" and "a democracy or politics that we simply calculate . . . would be a terrible thing."[245] Consequently, rather than view the critical claim that "law is politics" as an indictment of adjudication or as a betrayal of democracy, it is surely better to treat such an assessment as opening up the possibility for law and adjudication to meet its democratic obligations and satisfy the expectations that it places on itself to dispense justice. Judges do this best when, instead of pretending that law is bounded and objective, they neither mask their political commitments nor grind a favored political axe; they must put those values in curial play so as to interrogate and rework them better. Aware that tradition is never statically given, but is always open to dynamic reinterpretation, judges will go on doing what they have always done, albeit more candidly and less cowardly, of seeking to make a critical accommodation with and within legal tradition by "combining heresy and heritage into fruitful tension."[246] However, what is "fruitful" will itself be contingent and contested so that there is no fully settled or adequate combination that can claim to be authoritative by dint of its balance or fruitfulness. To be in a state of tension is not aberrational or anomalous, but is the usual experience of a tradition.

CONCLUSION

In this Article, I have sought to offer a reading of Gadamer, tradition, and the common law as a work-in-progress. In particular, I have put forward *my* Gadamer, not some objective or essential Gadamer who stands over and supervises the meaning of his own text; to think that were possible would be to miss some of the most dominant themes in his work, namely the author's lack of authority, the contingency of the interpretive act, and the applicative indeterminacy of the text. My goal, therefore, has not been to argue over the correct interpretation of Gadamer's text. This would be silly and an insult to Gadamer himself. As he concludes in his masterly work, "it would be a poor hermeneuticist who thought he could have, or had to have, the last word."[247] However, some jurists have not been able to resist that temptation and they have put Gadamer's authority to work in supporting the adjudicative tradition of the common law. That effort has tended to blunt any political edge that a

245. DERRIDA, *supra* note 162, at 17, 19.
246. PAUL A. FREUND, ON LAW AND JUSTICE 23 (1968).
247. GADAMER, *supra* note 2, at 579.

legal hermeneutics might have. When choice and contingency are thrown into the mix, the result is an unstable concoction that challenges all that is taken for granted or assumed. But it is not to be feared. On the contrary, it provides an opportunity for transformation and renewal. What it does not do is render all knowledge illusory, all truths falsehoods, all order chaotic, and all objectivity sham. In contrast to its conservative sibling, a radical jurisprudence does not hedge on the subversive implications of the hermeneutical insight; it makes no artificial distinction between what is and is not up for grabs. Because everything has been constructed, everything can be deconstructed and reconstructed. By failing to politicize the historical imperative of hermeneutics, conservatives apprehend more benign and accidental forces at work in social life than is the case; they mistake commonality for sharedness and acquiescence for acceptance. In law, this means that legal reasoning must be treated as being as much about political power as it is about ethical consensus; it is thoroughly and relentlessly a work-in-progress.

In part, Gadamer is at least partially to blame for this state of affairs. There is a fatalistic as well as a quietistic aspect to Gadamer: he comes close to insisting that things are simply the way they are and that there is little that can be done other than to accept that. I have tried to argue in this Article that not only can Gadamer be read in a more radical and less conservative style, but also that social, legal, and hermeneutical traditions are much more transformative and less determinate than Gadamer or his jurisprudential disciples allow: "[T]he willingness of many social and legal theorists to suppress such dynamism in favor of a 'stable' status quo is itself but a rhetorical device."[248] Contrary to the fearful scholarship of Gadamer and his conservative interpreters, this acknowledgment is not a precursor to chaos or anarchy; it is an invitation to challenge the status quo, to change the world for the better, and to argue constantly about what "better" is and demands. Most importantly, my effort to advocate a radical hermeneutics is most definitely not intended to demonstrate how meaning and understanding are impossible. On the contrary, it is devoted to showing how meaning and understanding are possible at all by elucidating the historical processes, social practices, and material interests within which meaning and understanding arise. The critical dimension is on tracing the political consequences of

248. Mark Burton, *Critique and Comment: Determinacy, Indeterminacy and Rhetoric in a Pluralist World*, 21 MELB. U. L. REV. 544, 582 (1997).

meaning's endless instability, not the frankly ludicrous project of demonstrating meaning's impossibility.