

Scholarly Commons @ UNLV Boyd Law

Scholarly Works

Faculty Scholarship

1993

Rethinking the Rule of Law: A Demonstration that the Obvious is Plausible

Francis J. Mootz III

University of Nevada, Las Vegas – William S. Boyd School of Law

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Jurisprudence Commons](#), and the [Legal History Commons](#)

Recommended Citation

Mootz, Francis J. III, "Rethinking the Rule of Law: A Demonstration that the Obvious is Plausible" (1993). *Scholarly Works*. 95.

<https://scholars.law.unlv.edu/facpub/95>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

RETHINKING THE RULE OF LAW: A DEMONSTRATION THAT THE OBVIOUS IS PLAUSIBLE*

FRANCIS J. MOOTZ III**

* I have paraphrased the subtitle of an essay by William H. Poteat entitled *For Whom Is the Real Existence of Values a Problem: Or, An Attempt to Show That the Obvious Is Plausible*, in *MIND, VALUE AND CULTURE: ESSAYS IN HONOR OF E.M. ADAMS* 147 (David Weissbord ed., 1989). Poteat's ambitious goal is to jar the reader into an awareness of the dislocation of self experienced in the act of reflection, and to connect this dislocation with the ubiquitous madness of modernity. According to Poteat, it is not the philosophically posited radical doubt of the Cartesian tradition that issues in the contemporary madness, although this tradition certainly played a part, *id.* at 150-51, but rather the existential loss of self in reflection. "[W]hen we set ourselves a particular problem for reflection, we will, without reflecting upon it, cast that problem in a theater of solitude Thus do we fatefully dissemble our radical and ingenuous semantic covenant with all that is richly over-against us as the world." *Id.* at 154-55. The semantic covenant binding humankind to the world is not in the first instance linguistic; instead, our "mindbodily" presence in the world is a "radical . . . datum" from which language generally, and reflection specifically, issues. *Id.* at 163.

I try, as does Poteat, to locate a new "ontology" that can provide the means for encountering our mindbodily implantation. Whereas Poteat bravely seeks to "subvert the entire economy of concepts of the philosophic tradition," *id.* at 169 n.5, my more humble task is to relocate legal theory in the practice of law. This requires both destroying certain beliefs about law, as well as reconstructing what is in fact always there.

For an interesting foray by Poteat into legal scholarship, see William H. Poteat, *Iowa Supreme Court v. Wild Oats*, 18 ME. L. REV. 173 (1966).

** Associate Professor of Law, Western New England College School of Law. B.A., University of Notre Dame; A.M. (Philosophy), Duke University; J.D., Duke University School of Law. I benefitted from the written commentary, suggestions, and criticisms offered by Jack Balkin, Pierre Schlag, and George Wright. Jim Gardner and Don Korobkin demonstrated to me the value of collegiality by providing endless supportive conversation and comments on several earlier drafts of this Article. I owe my greatest debt, though, to Caren.

Work on this Article was supported by a research stipend provided by Western New England College School of Law, Howard Kalodner, Dean. I greatly appreciate the technical assistance cheerfully provided by Carmen Alexander and Nancy Hachigian, and the help obtaining source materials provided by Michelle Dill LeRose, Head of Reader Services at the law library.

Table of Contents

I. INTRODUCTION	71
II. WHY THE RULE OF LAW IS DEEMED IMPLAUSIBLE	83
A. <i>The Problem of Constraint</i>	84
1. Indeterminacy and Political Critique	85
2. Indeterminacy and Deconstructive Politics	92
3. Indeterminacy and Radical Deconstruction	98
4. Assessing the Radicalization of the Indeterminacy Critique	108
B. <i>The Problem of Innovation</i>	118
1. The Unwritten Constitution and Innovation	119
2. The Unwritten Constitution and the Limits of Interpretation	126
3. Assessing the Unwritten Constitution Thesis	128
C. <i>Rethinking the Rule of Law Hermeneutically</i>	131
III. WRITTENNESS AND THE RULE OF LAW	132
A. <i>A Parable of Writtenness</i>	133
B. <i>The Important Contribution of Philosophical Hermeneutics</i>	135
1. Heidegger's Hermeneutic Phenomenology	137
2. Gadamer's Philosophical Hermeneutics	142
C. <i>Critical Hermeneutics: Acknowledging Constrained Innovation</i>	149
1. Escaping Enlightenment Metaphysics	149
2. Avoiding Radical Deconstruction	153
3. The Rule of Law: Writtenness and Critique	159
D. <i>The Limits of Dialogue: Are We Ever Beyond Hermeneutics?</i>	164
E. <i>Critical Hermeneutics and the Rule of Law: Who is a Person?</i>	176
1. <i>Roe</i> and the Question of Personhood	178
2. The Hermeneutics of Personhood	183
IV. CONCLUSION	193

All these parables really set out to say merely that the incomprehensible is incomprehensible, and we know that already. But the cares we have to struggle with every day: that is a different matter.

FRANZ KAFKA, ON PARABLES¹

I. INTRODUCTION

In my experience, practicing lawyers have embraced the lessons of legal realism. No lawyer really believes that judges and administrators can apply rules derived from neutral premises without implicating their own values and perspectives. And yet, most practicing lawyers believe that our legal system is defined by the Rule of Law. Friedrich Hayek, a prominent political theorist, succinctly defined the Rule of Law as the requirement "that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances."² Defined in this way, the Rule of Law seems to be an obvious, if imperfectly attained, feature of our political system. Lawyers plan strategy and construct arguments based on interpretations of relevant law, and they regard it perfectly sensible to characterize a judicial opinion as wrong or to describe an agency action as illegal.³

Some contemporary legal theorists challenge the common-sense idea of the Rule of Law that is shared by the majority of lawyers, judges, and

1. FRANZ KAFKA, *On Parables*, in THE COMPLETE STORIES AND PARABLES 459 (Nahum N. Glatzer ed., Willa & Edwin Muir trans., 1971).

2. FREIDRICH A. VON HAYEK, THE ROAD TO SERFDOM 54 (1944). For recent detailed discussions of various attempts to define the Rule of Law, see Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249 (1993) [hereinafter Mootz, *Postmodern World*] and Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989) [hereinafter Radin, *Reconsidering*]. See also 2 *RATIO JURIS* 1-120 (1989) (symposium on the Rule of Law in which contributors discuss and critique leading traditional accounts such as those offered by A.V. Dicey, F.A. Hayek, and Michael Oakeshott).

3. See, e.g., Micheal Janofsky, *Tobacco Groups Sue to Void Rule on Danger in Secondhand Smoke*, N.Y. TIMES, June 23, 1993, at A1 (quoting Phillip-Morris's attorney's accusation that the Environmental Protection Agency was "cherry-picking" data, such that the Agency's designation of secondhand smoke as a carcinogen should be declared "wrong as a matter of law and science"). The dramatic expansion of the power of administrative agencies in this century has placed considerable theoretical strain on the idea of the Rule of Law, see Mootz, *Postmodern World*, *supra* note 2, at 90, and yet the invocation of law even in this context is assumed by lawyers to make real demands upon judges reviewing agency actions.

citizens, generally by adopting one of two critical perspectives. For some theorists, restricting the exercise of power with the narrow dictates of pre-existing legal rules threatens to thwart effective, progressive governance.⁴ These critics challenge the Rule of Law as conservative dogma and argue in support of the authority of democratically empowered officials to implement desirable social regulation.⁵ Strong (Neo-Marxist) versions of this critique of the Rule of Law probably would enjoy only marginal support today, even among academics, but weaker (progressive) versions of the critique persist.

A different challenge comes from legal theorists committed to an antiformalist jurisprudence. These theorists debunk what appears obvious to practicing lawyers and judges by insisting that the Rule of Law is an implausible, if not impossible, state of affairs.⁶ From this perspective, the everyday experiences of lawyers, judges, and citizens conforming their conduct to the law amount to illusions at best, and deception at worst. In contrast to those theorists who challenge the Rule of Law tradition as a conservative, stifling reality, antiformalist theorists contend that the Rule of Law is premised on a metaphysical mirage, and that the doctrine obscures the reality of the legal system.

Although many lawyers regard the Rule of Law as an obvious feature of the legal system, it is easy to pinpoint why our faith in the Rule of Law is rendered vulnerable in the hands of legal theorists. The word "faith" suggests something other than blind faith and also something other than logical or empirical knowledge. It is uncontroversial to reject blind faith in the Rule of Law because only the most naive and foolhardy person is content to assume that those in power are not pursuing an extra-legal agenda, even in our ostensibly free and democratic society. Lurking within

4. As the legal historian Morton J. Horwitz declared in his review of a book by progressive historian E.P. Thompson,

I do not see how a Man of the Left can describe the rule of law as "an unqualified human good"! It undoubtedly restrains power, but it also prevents power's benevolent exercise. . . .

. . . It may be true that restraint on power (and simultaneously on its benevolent exercise) is about all that we can hope to accomplish in this world. But we should never forget that a "legalist" consciousness that excludes "result-oriented" jurisprudence as contrary to the rule of law also inevitably discourages the pursuit of substantive justice.

Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) (reviewing E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975)).

5. *Id.* at 562 (reviewing DOUGLAS HAY ET AL., *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (1975)).

6. See, e.g., Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 10 (1984) [hereinafter Singer, *Nihilism*] (contending that legal doctrine is "indefinitely manipulable" and thus indeterminate).

the apparently benevolent traditional practices of Western democracies may be the masked domination strategies of those purportedly bound by the Rule of Law. The aspirations embodied in the doctrine of the Rule of Law, then, demand a critical engagement with legal practice rather than placid and blind acceptance of that practice.

If we must eschew blind faith, a rational scientific inquiry would appear to be an appropriate strategy for discovering whether the Rule of Law is a feasible political objective. However, our faith in the Rule of Law cannot be secured in the manner of scientific inquiry. We cannot reduce the Rule of Law to an empirically verifiable set of procedures and institutions that permit only rule-governed behavior. The formal ideal of the Rule of Law as a "rule-book," or a self-contained system of perspicuous rules, is an indefensible simplification. Individuals must always administer the rules that comprise the system, and it is the community's practices that shape the individual's application of the rules. Consequently, it is impossible to ensure that rules will be enforced in a manner that is accepted as being formally rule-governed.⁷ The pithy encapsulation of the Rule of Law as a

7. As Fred Dallmayr notes, "Ever since Wittgenstein's observations on 'rule-following,' it has been acknowledged that the application of rules cannot in turn be strictly rule-governed—without conjuring up an infinite regress of stipulated rules (for their own application)." Fred Dallmayr, *Hermeneutics and the Rule of Law*, 11 CARDOZO L. REV. 1449, 1449 (1990) [hereinafter Dallmayr, *Hermeneutics*]. Wittgenstein's well-known investigations into rule-governance are brought to bear with greater specificity on the Rule of Law in Radin, *Reconsidering*, *supra* note 2.

The result of [a Wittgensteinian] skeptical deconstruction of the formalist notion of rules is that rule-following must be understood to be an essentially social phenomenon. . . . Only the fact of our seemingly "natural" agreement on what are instances of obeying rules permits us to say there are rules. The rules do not cause the agreement; rather, the agreement causes us to say there are rules. . . .

Once we admit that rules are mutable and inextricable from material social practice, we will at least experience a psychological change in the way we perceive our roles as legal actors. . . .

In the view of law as a pragmatic normative practice, law does not disappear. But it is always open to people to recognize, in various ways, that the law in the statute books is not the real law. . . . We must know that each time we feel ourselves to be rule-followers we are rule-creators as well.

. . . If law cannot be formal rules, its people cannot be mere functionaries.
Id. at 799-800, 809, 819 (footnotes omitted).

Scholars adopting a Wittgensteinian perspective have produced a growing body of law review articles. For a particularly dogged emphasis, see Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169 (1989); Dennis M. Patterson, *Interpretation in Law—Toward a Reconstruction of the Current Debate*, 29 VILL. L. REV. 671 (1984); Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and*

government "of laws and not of men"⁸ is hopelessly formalistic. The government is necessarily one of persons; the question is whether there is sense in the idea of the Rule of Law as constraint and inspiration to these persons.

The idea that our faith in the Rule of Law lies somewhere between uncritical blind faith and objective scientific truths troubles many theorists because our Enlightenment heritage construes knowledge to be the substitution of reason for faith. The Enlightenment ethos of rigorously critiquing tradition and replacing conventional practices with practices justified by rational and detached inquiry is so deeply embedded that it seems impossible to theorize about legal practice without employing such critical insight. However, when we undertake the task of critiquing current legal practices in this manner, the Enlightenment prejudices in which we are enmeshed sabotage our efforts. The Enlightenment spirit rests on metaphysical assumptions that devolve from the philosophical project initiated by Descartes to locate an indubitable ground for knowledge. This "Cartesian legacy includes a conception of the world as consisting of minds and matter, a picture of truth as correct representation, and a belief that intelligibility is to be rooted in rationality."⁹ The problem we confront is that Cartesian

Enforcement Under Article Nine, 137 U. PA. L. REV. 335 (1988). However Patterson more recently has admitted the need to go beyond the "pure Wittgensteinian framework" to describe the character of legal practice. Dennis M. Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937, 940 n.11 (1990) (using Wittgenstein's approach to rule-following as a starting point for discussing the narrative character of legal practice).

8. The lineage of this familiar phrase can be traced to the historical battle to develop and preserve the Rule of Law in England as a political reality.

[S]peaking for a rising middle class anxious for peace and prosperity, James Harrington in his 1656 work *The Commonwealth of Oceana* defined good government (and particularly British government) as an "empire of laws and not of men." While still contested in Harrington's time, lawfulness or rule-governance was the motto of the post revolutionary settlement and generally emerged as the mainstay of modern liberalism or liberal regimes.

Dallmayr, *Hermeneutics*, *supra* note 7, at 1452 (footnote omitted). Of course, Chief Justice John Marshall reiterated this common phrase as a central tenet of American jurisprudence in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

9. CHARLES B. GUIGNON, HEIDEGGER AND THE PROBLEM OF KNOWLEDGE 13-14 (1983) [hereinafter GUIGNON, HEIDEGGER]. The heart of the Cartesian tradition is revealed in Descartes' reflections on his methodological approach to obtaining accurate knowledge. Descartes contends that four fundamental laws of inquiry, scrupulously observed, will produce limitless accurate knowledge. Indeed, he claims that, following these methodological principles, "there can be nothing so remote that we cannot reach to it, nor so recondite that we cannot discover it." RENE DESCARTES, *Discourse on the Method of Rightly Conducting the Reason and Seeking for Truth in the Sciences*, in 1 THE PHILOSOPHICAL WORKS OF DESCARTES 79, 92 (Elizabeth S. Haldane & G.R.T. Ross trans., 1972). Descartes identifies the four methodological principles as (1) avoiding all prejudice by accepting as true only that which is "presented to my mind so clearly and distinctly that I could have no occasion to

thought is unable to justify our faith in the Rule of Law, but the power of our Cartesian predisposition warps all attempts to develop alternative justifications. This predicament is no small matter; it constitutes a challenge to the Rule of Law, the presumed bedrock of our political-legal system.¹⁰

doubt it;" (2) dividing all problems into solvable parts; (3) carrying out the inquiry in a logical order according to degree of complexity; and (4) rendering all "enumerations so complete and reviews so general that I should be certain of having omitted nothing." *Id.* It is this methodological attitude that appears implausible to contemporary thinkers. Hans-Georg Gadamer uses Descartes's methodological premises, and the unsatisfactory response of German romanticism, as the foil for developing his philosophical hermeneutics. HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1989) [hereinafter GADAMER, *TRUTH AND METHOD*].

In many respects, though, Descartes is unfairly branded as a Cartesian. In his brilliant attack on the emergence of modern scepticism, Søren Kierkegaard notes that no participant in "the significant march of modern philosophy" remains "content with doubting everything"; instead, each self-styled philosopher "goes further." SØREN KIERKEGAARD, *FEAR AND TREMBLING AND THE SICKNESS UNTO DEATH* 22 (Walter Lowrie trans., 2d ed. 1954). Kierkegaard argues that philosophers who justify their thoroughgoing doubt by claiming, "But Descartes did it," are mistaken. *Id.* (footnote omitted).

Descartes, a venerable, humble and honest thinker, whose writings surely no one can read without the deepest emotion, did what he said and said what he did. Alas, alack, that is a great rarity in our times! Descartes, as he repeatedly affirmed, did not doubt in matters of faith. . . .

....
In our time nobody is content to stop with faith but wants to go further. It would perhaps be rash to ask where these people are going, but it is surely a sign of breeding and culture for me to assume that everybody has faith, for otherwise it would be queer for them to be . . . going further.

Id. at 22-23. Kierkegaard's theme that "faith begins precisely there where thinking leaves off," *id.* at 64, is analogous to my use of "faith" in this Article to rehabilitate knowledge lacking full epistemic justification under the Enlightenment conception of rational thought.

10. The Rule of Law is imperiled not only as a result of criticisms offered by radical theorists, but also as a result of mainstream jurists recognizing that the traditional accounts of the Rule of Law are inadequate. *See, e.g.,* STEVEN J. BURTON, *JUDGING IN GOOD FAITH* at xi, 19 (1992) (arguing that criticism of the Rule of Law is misplaced and carries "tragic" consequences, and noting, "The stakes are great. We should get it straight.").

In a recent article, Gregory Keating surveys the positivist account of formal adjudication (represented by H.L.A. Hart and Frederick Schauer, among others) and the idealist account of the grand style of adjudication (represented by Lon Fuller and Ronald Dworkin, among others) and concludes that neither theory provides a convincing account of adjudication as the application of pre-existing norms to the case at hand. Gregory C. Keating, *Fidelity to Pre-existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1 (1993). Keating concludes that the

inescapable task facing the theory of legal decision is to show how the authority of courts might be legitimate.

Theoretically, at any rate, this task is fairly urgent. If the requirement that cases be decided in accordance with pre-existing norms constrains and legitimates the practice

Margaret Radin recently reconsidered the Rule of Law from a Wittgensteinian perspective, arguing that the doctrine should be reinterpreted rather than mistakenly discarded as being inconsonant with the anti-foundational tenets of postmodern thought.¹¹ If rules are social relations that are always subject to change and are always determined only by their application within a specific social context, Radin argues, then certainly the traditional version of the Rule of Law as a system of objective rules must be discarded.¹² Radin believes, however, that the Rule of Law should be reconceived along hermeneutic lines that emphasize the interpretive community in which the law is created and applied.¹³ Her perspective acknowledges our experience of some degree of certainty and continuity in legal practice even as it undermines traditional conceptions of rule-following.¹⁴ Radin's call for a hermeneutics that can describe legal practice in satisfactory terms sounds a familiar note. I answer Radin's call in this Article first by identifying the Enlightenment prejudices that render the Rule of Law problematic, and then by outlining a critical legal hermeneutics that recasts and moves beyond these unhelpful prejudices in a manner that permits an accurate description of legal practice.¹⁵

of legal reasoning as incompletely as this Article argues, then the critical work of constraint and legitimation must be done by other ideals. Practically, the task is not trivial. Our conclusion leaves the question of how best to discharge judicial duty wide open.

Id. at 54.

11. Radin, *Reconsidering*, *supra* note 2, at 783.

12. *Id.* at 785-86. Radin contends that judges are not rule-applying automatons because it is in application that the rules are created. *Id.* at 816-17 (distinguishing between judging and legislating by using the common law as a paradigm of judging). *Contra* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

13. Radin, *Reconsidering*, *supra* note 2, at 813.

14. *Id.* at 813-14. Radin correctly notes that modern hermeneutics sees interpretation as "holistic, pragmatic, and historically situated." *Id.* at 814. She views hermeneutics as a more promising avenue of inquiry than resurgent theories of natural law, such as Michael Moore's, which argue "that even though law is an interpretive activity, there can be authoritatively correct interpretations of it because texts have a metaphysically real meaning." *Id.* at 811 n.106 (citing Michael S. Moore, *The Interpretative Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989)).

15. I am well aware that Radin's call for a hermeneutical account of the Rule of Law implicates difficult issues even if one is committed to a hermeneutical approach. Hermeneutics has a history as varied and contentious as any other philosophical tradition. Moreover, contemporary hermeneutics simply has been misunderstood even by sophisticated legal commentators. For example, Mark Tushnet discusses hermeneutic approaches to historical knowledge in which the "historian must enter the minds of his or her subjects, see the world as they saw it, and understand it in their own terms." Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 798 (1983) [hereinafter Tushnet, *Following the Rules*]. Tushnet only notes in passing that Jürgen Habermas and Hans-Georg Gadamer use "a different style of philosophical

In this Article, I defend the Rule of Law from its detractors in the academy by uncovering and criticizing the unsound presuppositions driving their critiques. I acknowledge that these critiques raise two different problems for those who defend the plausibility of the Rule of Law: The problem of ensuring legal innovation and the problem of supplying effective constraint. In response to these problems, I locate our faith in the Rule of Law in the hermeneutical practice in which we are engaged as lawyers. Jurisprudential characterizations of the problems of constraint and innovation are misguided reactions to the narrow Enlightenment conception of knowledge and understanding, which, when exposed as such, lose their disconcerting power.

The problem of constraint is the legacy of the indeterminacy critique.¹⁶ The ideal of the Rule of Law is a fantasy under this view because those in positions of power are never truly constrained by precepts clearly stated in advance within governing legal texts. Political commitments, conscious or not, always motivate the decision-maker, and legal rhetoric can dress up any decision to make it appear to be in accord with the hypostatized "law."

writing" in the hermeneutic tradition. *Id.* at 798 n.46. Later he amends his analysis to note the stark differences between Gadamer and Habermas, but again views hermeneutics as a methodological struggle (always unsuccessful) to bridge the gap of past and present by empathetically recalling the past. MARK V. TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 39-46 (1988) [hereinafter TUSHNET, RED, WHITE AND BLUE]. Gadamer's hermeneutics in fact is a sharp rebuke to romantic historicism, and the famous Gadamer-Habermas debate is not easily reconciled. Francis J. Mootz III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur*, 68 B.U. L. REV. 523, 584-96 (1988) [hereinafter Mootz, *Ontological Basis*].

Thomas Grey's discussion of contemporary hermeneutics similarly is off base. Grey argues that Gadamer's "sophisticated" hermeneutics is untenable because it draws comparisons between literary and legal texts. Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 2 (1984) [hereinafter Grey, *Scripture*]. Grey's efforts to delineate a separate interpretive methodology for law reveal a deeper desire to avoid the fundamental character of interpretation. In short, Grey mistakenly reads Gadamer methodologically rather than ontologically. *See id.* at 2-3.

Finally, the dean of the modern legal hermeneutics movement, Robert Cover, disparaged *Truth and Method* as "entirely statist" and "in large part addressed to a set of operational problems" in which "the problem of application is seen as the characteristic difficulty." Robert M. Cover, *The Supreme Court 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 6 n.11 (1983) [hereinafter Cover, *Narrative*]. This disappointing misreading of Gadamer is perplexing, especially given that Cover's thesis is quite compatible with Gadamer's philosophy. *See discussion infra* notes 388-98 and accompanying text. In a later article Cover more accurately describes Gadamer's project, but he does so within the context of an argument that runs counter to Gadamer's philosophy in some respects. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1610-11 n.24 (1986) [hereinafter Cover, *Violence*].

16. *See* Singer, *Nihilism*, *supra* note 6.

These critics regard our shared faith in the Rule of Law as a misplaced naïveté that must be swept away to expose the exercise of social, economic, and political power by a ruling elite who are guided not so much by tyrannical self-interest as by ideological commitments to the status quo. The result of the indeterminacy critique of legal doctrine is a call to reorient our attention to means of empowerment, since the only game in town is power politics. As one commentator argues, "If traditional legal theorists are correct about the importance of determinacy to the rule of law, then—by their own criteria—the rule of law has never existed anywhere. This is the real bite of the critique."¹⁷ Critics not only reject Enlightenment conceptions of legal subjects controlled by free-standing legal rules, they seek to exorcise the deceptive and incoherent Rule of Law traditions in an attempt to enable a genuine political engagement. The indeterminacy critique seeks to make the "obvious" force of legal rules appear to be an implausible account of how the legal system operates.

Although exposing the obvious as in fact being implausible is a time-honored critical function of philosophy, it often is the case that exuberant critique overrides this useful function and obscures more than it reveals. In this Article I argue that postmodern extensions of the indeterminacy critique fail to demonstrate that the Rule of Law is unattainable. I reaffirm that the obvious everyday experience of the Rule of Law is plausible, even from the perspective of postmodern jurisprudence.¹⁸ Rejecting overreaching deconstructive critique does not mean returning to the sterile formalism associated with the traditional jurisprudence of the Rule of Law, an intellectual tradition that we now recognize as a misguided, if not pernicious, dogma. Quite the contrary. Indeterminacy theorists seek to uncover and confront the phenomenological reality of the legal system and to demystify lingering formalist jurisprudence, but I argue that the idea of the Rule of Law is deeply entrenched in legal theory because it accords with the practice of law and is not just an expression of dogmatic and false hopes for the legal system. Recovering this dimension of legal practice in a sophisticated manner is one of the great, pressing demands of contemporary

17. *Id.* at 14.

18. In this sentence I generally am equating "postmodern" with antifoundational styles of contemporary jurisprudence. Postmodernism is a complex and contested term. Various approaches to defining postmodern legal practice and postmodern jurisprudence are spelled out in J.M. Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966 (1992) [hereinafter Balkin, *Postmodern Constitutionalism*]; Mary J. Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992); Francis J. Mootz III, *Postmodern Constitutionalism as Materialism*, 91 MICH. L. REV. 515 (1992) [hereinafter Mootz, *Materialism*]; Dennis M. Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992); *Postmodernism and Law: A Symposium*, 62 U. COLO. L. REV. 439 (1991); Symposium, *The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991). I have introduced my defense of the Rule of Law against the challenges by some postmodern scholars in Mootz, *Postmodern World*, *supra* note 2.

legal theory.¹⁹ The process of recovery promises to be difficult because it requires a transformation that eclipses traditional legal theory.

Seemingly opposed to the problem of constraint is the problem of innovation. The problem of innovation stems from the belief that it is unwise to premise legal decision-making solely on authoritative texts. When deciding what the law is, a judge or agency official may find that pressing demands of evolving social conditions cannot be met within the narrow confines of a legal text. Along these lines, Thomas Grey discusses the "unwritten" constitution and the need in certain instances to move beyond a model of judicial review based on textual interpretation.²⁰ This move poses a challenge to the traditional understanding of the Rule of Law because the legal decision-maker ostensibly is freed from the limitations of the legal text and enabled to roam at will through a distinct unwritten body of social conventions and morals to find a justification for the exercise of power.²¹ Grey's thesis is alluring: an unwritten constitution seems to be the only basis for several progressive constitutional decisions that many commentators regard as being correctly decided as a matter of law.²² The unwritten constitution promises to be a contemporary source of law that is not trapped within the historical confines of a particular legal text. I criticize Grey's position, though, because he argues that it is desirable, if not necessary, to move beyond the text.²³ Grey's view, like the indeterminacy critique, precludes an appreciation of the rich dimensions of legal practice while at the same time obscuring the inherent limits of interpretation.

The problems of constraint and innovation can be brought into sharper focus by considering an example. The Fourteenth Amendment to the United States Constitution guarantees that a person's life may not be taken except by due process of law.²⁴ It is by no means self-evident what the Constitution means when it provides that only "persons" must be afforded due process. Prior to deciding that a woman's interest in terminating her pregnancy will at certain times during the pregnancy outweigh a state legislature's interest in ensuring that the pregnancy is carried to term, the Supreme Court in *Roe v. Wade* first considered whether any constitutional rights extended to the conceptus prior to birth.²⁵ *Roe* is a controversial

19. See *supra* note 10.

20. Grey, *Scripture*, *supra* note 15, at 1; see also Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) [hereinafter Grey, *Unwritten Constitution*] (laying the foundations of this argument).

21. Grey, *Unwritten Constitution*, *supra* note 20, at 706-14.

22. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); see also *infra* subpart III.E.

23. See Grey, *Unwritten Constitution*, *supra* note 20, at 714-17.

24. U.S. CONST. amend. XIV, § 1.

25. *Roe*, 410 U.S. at 156-59. Throughout this Article, I will use the term "conceptus" as a generic description of the various stages of development from the moment of conception to the moment of birth. See Alan Brownstein & Paul Dau, *The Constitutional Morality of*

decision involving deeply held views on legal rights and freedoms, but the particularly politically charged atmosphere surrounding the case should not deflect attention from the fact that rendering a decision as to whether a conceptus is a "person" is a representative, if not altogether commonplace, example of legal decision-making. Considering this legal problem can bring focus to the wide array of issues implicated by asserting faith in the Rule of Law.

If the Rule of Law has any content we must presume that the Justices deciding *Roe* were not making an ad hoc policy choice based on their subjective views of the appropriateness and desirability of the legislation in question, but instead were testing the legislation according to law. It is not clear what we mean by a legal decision, though, given that social mores must necessarily define our understanding of who counts as a person in our political community. The relevance of the indeterminacy critique is immediately apparent: the word "person" does not define its own scope, and deciding whether a conceptus is a person requires a decision that is not dictated by the text of the Fourteenth Amendment.²⁶ More troubling is the fact that whatever decision is reached can plausibly be reconciled with the person requirement in a manner that hides the fact that the actual decision is not compelled by an authoritative text. A person might be defined as a certain collection of genetic material that is classified *homo sapiens*,²⁷ or a person might be defined as a physically autonomous organism of the species *homo sapiens*.²⁸ The implications of the indeterminacy critique are less apparent. The Enlightenment critical spirit leads some scholars to cast away the charade of legal analysis and substitute in its stead a critical inquiry into the social forces played out in the legal arena. Under this view, the law as an autonomous model of rationality is nonexistent, and so criticism must find its anchor in the social sciences. A judicial determination of what personhood entails becomes the subject of a sociological, economic, or psychological inquiry. In contrast, deconstructionist scholars eschew Enlightenment strategies entirely and revel in the absence of any critical heuristic that can guide the free play of the text. The Rule of Law is viewed as a smoke screen that obscures an authentic and uncompelled dialogue about personhood.

The pertinence of Grey's unwritten constitution thesis is equally apparent. Regardless of whether the word "person" has an uncertain application to the case at bar, the important social issues at stake in deciding

Abortion, 33 B.C. L. REV. 689, 698 n.24 (1992) [hereinafter Brownstein & Dau, *Constitutional Morality*] (describing proper physiological terms for the developing zygote, and electing to use the generic term "conceptus").

26. *Roe*, 410 U.S. at 157. "The Constitution does not define 'person' in so many words." *Id.*

27. See Brownstien & Dau, *Constitutional Morality*, *supra* note 25, at 706.

28. See *id.* at 710-11.

this question do not seem amenable to adjudication under the terms of a generally worded clause drafted more than a century earlier.²⁹ Articulating the appropriate social policy in this case is a political function, and it can be argued that the Supreme Court should simply choose to supplant a legislative policy choice with its own determination of the rights involved. The Justices would not look to the text of the Constitution in this case because the text can only remain silent in the face of this problem. If the Supreme Court is restricted to enforcing only the written Constitution it will be unable to deal with the ever-changing demands of social organization.

The problems endemic to deciding whether a conceptus is a Fourteenth Amendment "person" highlight why the doctrine of the Rule of Law has lost its lustre, if it has not in fact become irremediably tarnished. On one hand indeterminacy theorists attack the idea that a legal text can guide a decision, while on the other hand Professor Grey argues that the legal text is at times unhelpful, if not stifling, in its contribution to decision-making. The cumulative effect of these paradoxical critiques is that we lose our faith in the Rule of Law.

This Article argues that the Rule of Law should continue to play a central role in jurisprudence because it captures an important feature of legal practice. However, the doctrine must be transformed from its unsatisfactory current articulation to conform to legal practice. Although efforts to effect this transformation do not culminate in a method for reaching the correct result when confronted by a particular legal question, it is possible to reaffirm that our faith in the Rule of Law is not just the result of conceptual confusion or political delusion. Our faith in the obvious can be redeemed, but the ritualistic ways in which we invoke the Rule of Law are unproductive and anachronistic, and therefore must be revised.

I have organized this Article in two Parts. In Part I, I set out the problems of constraint and innovation by describing the legacy of the indeterminacy critique and Grey's developing extra-textualist approach. The indeterminacy critique began as a political practice with uncertain and partially unexamined foundations. Tensions between carrying out the Enlightenment project of social critique and post-Enlightenment deconstruction have by no means been overcome, but I focus on the radical deconstructionist voices increasingly dominating the debate. I argue that radical deconstruction is an unfruitful path and that the critical project is more realistically seated in a hermeneutical understanding of the practice of law, an understanding that overcomes the falsely conceived problem of constraint. I then describe Grey's extra-textual approach to certain problems in constitutional law. I contend that a hermeneutical approach bypasses

29. See Grey, *Unwritten Constitution*, *supra* note 20, at 709 (noting that "[o]ur characteristic contemporary metaphor is 'the living Constitution'—a constitution . . . sufficiently unspecific to permit the judiciary to elucidate the development and change in the content of . . . rights over time").

Grey's unsatisfactory efforts to resolve the falsely conceived problem of innovation. In Part I, therefore, I demonstrate the need to move beyond the problems of constraint and innovation that subtend contemporary discourse about the Rule of Law.

In Part II, I emphasize the textual character of the Rule of Law. After providing a succinct genealogy of contemporary hermeneutics by describing the innovative work of Martin Heidegger and Hans-Georg Gadamer, I demonstrate that contemporary hermeneutics responds to the problems of constraint and innovation by recasting them. I argue that our faith in the Rule of Law is seated in the constrained innovation of our encounter with the textual tradition that informs the exercise of legal power.³⁰ I then anticipate a potential criticism of my hermeneutical approach: Although the ideal of hermeneutical discourse overcomes the perceived problems of constraint and innovation, a unifying hermeneutic discourse becomes impossible if members of the legal practice are speaking "different languages." I argue against the premise of this criticism, namely that conflicting meta-interpretive paradigms can never be subsumed in a discourse that enables the participants to create a shared tradition. I conclude Part II by returning to the legal problem raised by the United States Supreme Court's determination in *Roe v. Wade*³¹ that a conceptus is not a "person" protected by the Fourteenth Amendment to the United States Constitution. Addressing this legal problem focuses the discussion and demonstrates a practical engagement of the hermeneutical perspective of the Rule of Law.

The style I have adopted in writing this Article is appropriate to its topic.³² I strive to be attentive to several of the intellectual currents that make up an increasingly stormy jurisprudential sea. My intent is to give a charitable reading of these currents, each of which contributes features to the dialogue. Some might argue that it is senseless to take seriously deeply opposed positions. However, the goal is not to mediate an ongoing conflict, but rather to demonstrate that the perceived debilitating conflict is illusory. Others might argue that this approach is counterproductive because it precludes "original" thinking and effaces my own perspective. However, the

30. To avoid a possible misunderstanding of this sentence I make an important caveat: Determining whether a legal actor has conformed to the requirements of the Rule of Law in a particular instance is beyond the scope of my discussion. Clearly, a judge who accepts a bribe to induce her to dismiss what she would otherwise agree is a proper and warranted criminal indictment can not be said to have exercised power after having been informed by the textual tradition. In such a case there has been a deviation from the hermeneutical practice that constitutes what is known as the Rule of Law. Before we can seek to realize the Rule of Law in practice it is important to distill from our practice the possibilities that we designate by the term "Rule of Law."

31. *Roe*, 410 U.S. at 113.

32. Cf. Mootz, *Ontological Basis*, *supra* note 15, at 523 (admitting to "searching for the truth of legal hermeneutics by way of exegesis").

hermeneutical inquiry undertaken in this Article is intended to be a model of its thesis. We must begin rethinking what it means to discover the "truth" and to be "original." This demands renewed attentiveness to our creative encounter with tradition that never permits us to stand outside and grasp the tradition, and that always supports and makes possible our claim to originality.³³

II. WHY THE RULE OF LAW IS DEEMED IMPLAUSIBLE

The Rule of Law is problematic under the Enlightenment model of knowledge, which is limited to the achievements of a subject presumed to be capable of deciphering the freestanding objects of experience in a manner that does not reduce to the subject's individual preferences or value commitments. However, legal "rules" do not exist as objects arrayed before an insular legal subject, ready to be interpreted much as one might interpret an object by measuring its length. The inadequacies of Enlightenment rationalism to secure the Rule of Law engender two vastly different responses. These responses gravitate around the problem of constraint and the problem of innovation. In this Part of the Article, I consider these responses that, taken together, render the Rule of Law implausible.

The problem of innovation plagues traditional scholars who regard legal texts, even generously interpreted, as substantial constraints on official behavior. Thomas Grey concludes that constitutional practice necessarily

33. This is Heidegger's manner of thinking. Gabriel Marcel notes that Heidegger's method consisted precisely in clarifying his own thought through the encounter with great philosophers he had studied carefully. Of course it is important to see that such efforts by a man of Heidegger's originality always issue in a creative reinterpretation of the philosopher in question

In any case it seems that philosophical experience, even if it necessarily begins as an instrumental solo, needs to become part of a whole symphony.

GABRIEL MARCEL, *TRAGIC WISDOM AND BEYOND* 8 (Stephen Jolin & Peter McCormick trans., 1973).

By not proclaiming to have solved the riddles of philosophy with a new approach, contemporary hermeneutics suffers from a lack of self-promotion. Consequently, a legal traditionalist will argue that my presentation is too abstract—it does not tell us what to *do*, nor does it provide us with enough comfort. Some postmodern thinkers, especially those fond of Wittgenstein's ordinary language philosophy, will argue that my Article does not tell us what to do, *nor could any theory*, and that theorizing is therefore useless. This latter view is taken to the extreme in Stanley Fish's indefatigable argument that legal theory is a practice rhetorically distinct from legal practice. STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989). One of the themes of this Article is that the traditionalists' plea for a directive is misplaced, but that the postmodern tendency to obliterate critique is equally unrealistic. Pondering the proper questions is intrinsically valuable even if the discussion does not provide a stunning conclusion or lead to definitive proof.

goes beyond the confines of the constitutional text in order to accommodate the requirements of fundamental justice without entirely abandoning rule-governance. In contrast, the problem of constraint plagues post-Enlightenment thinkers who reject an objective, determinate view of the legal text; the Rule of Law is considered implausible to the extent that linguistic indeterminacy precludes formal decidability. Although the problems of constraint and innovation appear daunting, upon closer examination they collapse into each other in a manner suggesting that the Rule of Law might be rehabilitated, although it must radically be reconceived.

A. The Problem of Constraint

The indeterminacy critique bears a deceptively descriptive name that suggests a unified position. In fact, the critique gives rise to a wide range of conflicting perspectives that lead to significant intellectual battles between partisans who otherwise are allies in the fight against residual commitments to legal formalism and epistemological foundationalism. The most promising extension of the indeterminacy critique comes from post-structuralist, or deconstructive, theorists who relate the indeterminacy critique to a post-Enlightenment metaphysics. In the following three sections, I explore in some detail the history of, and tensions within, the deconstructive development of the indeterminacy critique. This description traces the increasing intensity of the indeterminacy critique as it rapidly evolved from its original and perhaps still primary manifestation as a political critique to a radical critique of metaphysics that, at most, has political repercussions rather than its own politics. The point of this detailed review is to lay the groundwork for the claim that philosophical hermeneutics is a more productive post-Enlightenment philosophy than deconstruction for helping to clarify the status of the Rule of Law.

In the first section, I review the broad contours of the political critique that lies at the heart of the indeterminacy thesis, primarily by assessing Mark Tushnet's articulation of the classic critical legal studies (cls) position. Tushnet recognizes that the critique is deconstructive, but he lodges this deconstructive enterprise in the critique of society. This is a classic position because it draws on familiar themes of social critique: social relations are not what they appear to be, in law no less than in other areas, and it is the charge of the critic to expose the mystifications, reifications, and endemic alienation that works against authentic social relations. In the second section, I discuss Jack Balkin's careful attention to deconstructive practice as the culmination of the indeterminacy critique. Balkin views deconstruction as a means of political engagement that centers on the textuality of law and the need for a critique of ideology. Given his commitments to deconstruction, though, Balkin is wary of the status of critique even as he accepts its necessity. In the third section, I contrast Balkin's development of the indeterminacy critique with the more radical deconstruction espoused by Allan Hutchinson and Pierre Schlag. Radical

deconstructionists reject critique as an intellectual activity by pushing the indeterminacy critique to extreme conclusions; in doing so they unhinge the deconstructive enterprise by forgetting the site of deconstructive activity.

Finally, in the concluding section, I review the significance of the evolving indeterminacy critique for the Rule of Law. The indeterminacy critique is a necessary corrective to traditional jurisprudence because it embraces post-Enlightenment metaphysics and remains attentive to the contours of post-Enlightenment politics, but the critique threatens to devolve of its own weight into radical claims that obscure the practice of law. Radical deconstruction gives false counsel to those seeking to recover the experience of the Rule of Law and to resituate the doctrine in a realistic setting. I suggest that a critical hermeneutical approach embraces doctrinal indeterminacy without careening away from legal practice, but this promissory note for a full reassessment of the Rule of Law must await Part II before being paid in full.

1. Indeterminacy and Political Critique

In a recent retrospective essay, Mark Tushnet notes that the Conference on Critical Legal Studies is not an intellectual school of thought as much as a “political location” that emerged to provide a community within the traditional legal academy for diverse thinkers on the Left.³⁴ Nevertheless, Critics share a political orientation that has several key defining characteristics, one of which is that the law is in “some interesting sense” indeterminate.³⁵ The Critics first argued that “within the standard resources of legal argument were the materials for reaching sharply contrasting results in particular instances,” but this commonplace insight has gradually “mutated” into a philosophically more sophisticated deconstructive practice.³⁶ At the most basic level, the claim that law is indeterminate is simply a claim that legal doctrine never supplants choice with mechanical decision-making. At some level *every* legal decision is open to argument, every legal text is open to manipulation to achieve a contrary result, and every legal argument is subject to a reworking that allows one’s opponents to claim the same argument as their own. The thesis that legal reasoning is a myth and that adjudication consists simply of a decision that then is fitted into the traditional vocabulary obviously discredits the notion that the Rule of Law as constraint can be realized in practice.

34. Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1516 (1991) [hereinafter Tushnet, *Political History*]; see also John H. Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984).

35. Tushnet, *Political History*, *supra* note 34, at 1518.

36. *Id.* at 1524.

Early cls pieces attributed doctrinal indeterminacy to a fundamental contradiction subtending all social relations; authors of these articles argued that legal texts can never delineate the one appropriate response to every imaginable legal issue because the texts reflect a tension between deep-seated and yet contradictory values.³⁷ The early emphasis on structuralist arguments has been tempered within the cls literature, and Tushnet recently noted that the source of indeterminacy is now disputed.³⁸ Questioning the source of indeterminacy is not idle speculation; rather, it goes to the heart of the cls project. Simply asserting that legal rules are indeterminate does not by itself stake out a revolutionary position. After all, the Realist movement not only advocated this same position,³⁹ it in fact triumphed over the forces of formalism and established (weak) indeterminacy as mainstream dogma. However, Tushnet argues that the Critics are carrying the Realist program forward in a different and important way.⁴⁰ It is not enough to demonstrate that legal principles neither determine the outcome of cases nor explain the bulk of existing legal practice.⁴¹ What is neces-

37. In an early and influential article, Duncan Kennedy utilized structuralist analysis to posit a fundamental contradiction in common-law adjudication between two rhetorical modes of substantive lawmaking: individualism and altruism. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Every attempt to solidify a common-law doctrinal rule along the principles of one value was unavailing, Kennedy noted, because a counterargument could always be constructed from the remaining corpus of legal materials to reanimate the suppressed value. For example, in contract law, economic individualism (freedom to contract) is tempered by various defenses based on one party's lack of capacity or the other party's wrongdoing. More importantly, every legal rule offers a potential reading from the perspective of each rhetorical mode, and the adoption by a judge of one mode over the other in a particular case is not a legal decision that is rule-governed. "The judge cannot, any more than the analyst, avoid the moment of truth in which one simply shifts modes. . . . The only thing that counts is this change in attitude, but it is hard to imagine anything more elusive of analysis." *Id.* at 1776.

38. Tushnet, *Political History*, *supra* note 34, at 1538. Earlier Tushnet recognized that the developing debate between structuralist critique and decentering deconstruction "has no termination," Mark V. Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505, 513 (1986) [hereinafter Tushnet, *Introduction*], but at the moment it appears that the opponents of structuralism have prevailed. See Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 471-85 (1987) [hereinafter Williams, *New Langdells*] (arguing that the structuralist phase of cls critique was an insufficiently radical approach wedded to the old epistemology).

39. See, e.g., Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 710-11 (1931) (essaying "a program of relativist-realist jurisprudence" including the idea of recognizing "a plurality of elements in all situations and of the possibility of dealing with human relations in more than one way").

40. Mark V. Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 626-27 (1984) [hereinafter Tushnet, *Deconstruction*].

41. For example, the sociological jurisprudence characterizing the early stages of the

sary and vital is to show *why* this is the case, to undertake a critical inquiry that rejects in its entirety the bankrupt liberal framework in which both formalist and realist scholars operated.⁴² The indeterminacy of legal rules is thereby broadened to a full-scale political attack on liberalism by demonstrating that liberalism cannot solve the problem of constraint.

The thrust of Tushnet's deeper argument is to accuse liberal scholars of making an illegitimate move when they regard the political determination of the guiding principles of society (individual libertarianism versus communitarian republicanism, for instance) as occurring prior to and separate from the day-to-day activities of legal officials.⁴³ Liberalism seems committed to the fairy tale that political commitments to sufficiently vague principles like "freedom" are enshrined and enforced in a neutral and fair manner.⁴⁴ Neutral principles are viewed as objective things that exist independently of a judge, and so the application of a neutral legal rule becomes nothing more than self-effacement in the presence of an object.⁴⁵ In fact, political struggle does not leave its muddy shoes at the door of legal process: society's continuing political self-definition pervades the development and application of legal rules. Legal reasoning is not a separate discourse consisting of strategies for rule application. Instead, legal reasoning is just a different and less genuine way of talking about the manner in which social reality is being constructed by the members of society. There is a continuum between social and legal life, and between

legal realism movement can be characterized as an attempt to disavow the potentially destabilizing indeterminacy of legal rules in favor of the supposedly determinate rules of the social sciences. See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1-3), 24 HARV. L. REV. 591 (1910), 25 HARV. L. REV. 140, 489 (1911). This move is being played out today along conservative lines in the law and economics literature. For Richard Posner, the recognition "that if we give a legal problem to two equally distinguished legal thinkers chosen at random we may get completely incompatible solutions" leads to the conclusion that "we cannot rely on legal knowledge alone to provide definitive solutions to legal problems" and should therefore look to the rigorous and empirical science of economics for the desired answers. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 767 (1987).

42. Tushnet, *Deconstruction*, *supra* note 40, at 623-29; see also Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1152, 1219-59 (1985). Peller argues that realism was co-opted and failed because it invoked the same mistaken metaphysics of traditional liberalism and merely reversed the priorities of the subject/object distinction rather than pursuing the "deconstructive, debunking strand of realism." *Id.* at 1223. Tushnet argues that the Critical Legal Studies movement will not be co-opted precisely because it deconstructs the entirety of liberalism. Tushnet, *Deconstruction*, *supra* note 40.

43. Tushnet, *Following the Rules*, *supra* note 15, at 785, 821-24.

44. *Id.*

45. *Id.*

legislative efforts and judicial efforts, such that the same political struggles are carried on in different venues.

In two highly regarded works, Tushnet links the indeterminacy critique to these broader themes in the context of constitutional law.⁴⁶ American constitutionalism seeks to constrain the leviathan that is necessary to quell private violence. However, judges are political actors, and Tushnet points out that the separation of powers alone is insufficient to legitimize their activity.⁴⁷ Traditional liberal theory responds with the doctrine of neutral principles.⁴⁸ Judges are able to constrain legislative and administrative excesses with political legitimacy because they are in turn constrained by their narrow institutional role of applying neutral and general legal principles to disputes rather than engaging in a political assessment of the needs of the parties before them.⁴⁹ However, Tushnet argues that the theory of neutral principles never obtains in reality.⁵⁰ First, there are institutional practices that contradict the ideology of neutral principles, such as concessions being made in the writing of an opinion in order to hold a majority or to achieve unanimity.⁵¹ More importantly, language is such that neutral principles can never be articulated in a way that will govern future action; the contours of a supposed principle are always open to debate and interpretation in the context of unforeseen factual settings.⁵² Attempts to retrench the liberal defense of judicial review with arguments that the practice of judging is a shared craft that maintains consistency in result similarly fail.

The difficulty then is to specify the limits to permissible craftiness. . . .

. . . [H]owever, it turns out that the limits of craft are so broad that in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants. The craft interpretation thus fails to constrain the results that a reasonably skilled judge can reach, and leaves the judge free to enforce his or her personal values, as long as the opinions enforcing those values are well written.⁵³

46. See TUSHNET, RED, WHITE AND BLUE, *supra* note 15; Tushnet, *Following the Rules*, *supra* note 15.

47. Tushnet, *Following the Rules*, *supra* note 15, at 783-85.

48. *Id.* at 783.

49. *Id.* at 784.

50. *Id.* at 806-21.

51. *Id.* at 808-10.

52. *Id.* at 808-18.

53. *Id.* at 819 (footnote omitted). Tushnet defines an "interesting" case as "one that some lawyer finds worthwhile to pursue," *id.* at 819 n.119, and as an example he notes that the result in *Roe v. Wade*, 410 U.S. 113 (1973), can be achieved by any of a number of doctrinal means, Tushnet, *Following the Rules*, *supra* note 15, at 820-21.

Legal doctrine, then, is wholly incompetent to channel judicial decision-making, and so the entire liberal edifice must crumble under the weight of the problem of constraint.⁵⁴

Even if doctrinal indeterminacy leads to a full-scale indictment of liberal political theory, there still exists the nagging question of why the effects of doctrinal indeterminacy are unavoidable. Earlier attempts to discover the contradictory deep structure of legal discourse are now regarded as epistemologically flawed because they presumed the existence of a social critic who could rise above her situation and discern the deeper, true state of affairs.⁵⁵ Tushnet adopts the unfolding poststructuralist articulation of the indeterminacy critique in his response to traditional legal theorists who commonly point to the existence of "easy cases" and shift the burden to the Critics to demonstrate that "hard cases" in which the outcome is unpredictable outnumber the easy cases.⁵⁶ Tushnet's rejoinder is two-fold. First, he asserts as an empirical matter that at any given moment easy cases comprise only five to fifteen percent of the litigated cases rather than the forty to sixty percent assumed by traditional scholars who have assimilated but domesticated the Realist movement.⁵⁷ Second, and more important, Tushnet contends that the distinction between an easy case and a hard case in this context has no objective referent and is always subject to revision.⁵⁸ Under the proper circumstances, any easy question may prove to be quite problematic. This leads Tushnet to conclude "that 'easiness' is not a property of words alone, but is a property of words in particular communities under particular circumstances."⁵⁹ It is nonsensical to claim that any legal dispute intrinsically is easy. Regularity and certainty in legal practice results from a temporary and unstable acceptance of political truces that are played out in the community's interpretive practices. At any time and at any point in the doctrinal matrix a claim might be raised and accepted that renders a previously accepted tenet problematic, and there is no rational

54. Tushnet, *Following the Rules*, *supra* note 15, at 818.

55. See Williams, *New Langdells*, *supra* note 38, at 472-85 (citing earlier attempts).

56. Kenney Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203, 1204 (1985) (acknowledging that legal doctrine cannot determine the decision in hard cases does not mean that all cases are hard); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 296-97 (1989) (only moderate indeterminacy exists as demonstrated by the prevalence of easy cases); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 407 n.18 (1985) (contending that demonstrating that easy cases are harder to resolve than we intuitively recognize should not obscure the fact that they are still a lot easier to decide than hard cases); Lawrence R. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 470-84 (1987) (rejecting "strong indeterminacy").

57. Mark V. Tushnet, *A Critical Legal Studies Perspective*, 38 CLEV. ST. L. REV. 137, 138 (1990) [hereinafter Tushnet, *Perspective*]; Tushnet, *Political History*, *supra* note 34, at 1538. No empirical basis for this assertion is provided, however.

58. Tushnet, *Perspective*, *supra* note 57, at 137-41.

59. *Id.* at 141.

decision-making procedure that can insulate any part of legal practice from this instability.⁶⁰ As a provocative example, Tushnet purports to demonstrate that the Constitution can be read as mandating a socialist economic system.⁶¹

Tushnet argues that judges can manipulate legal principles in infinite ways to allow them freedom of action, but he acknowledges that judges are in fact severely constrained from attempting to legitimize radically new principles through legal reasoning.⁶² He contends that the source of restraint is not the later added window dressing of legal reasoning, but instead is found in the broader social forces to which all members of society are subject.⁶³ Although not foreclosed as an interpretive option as a matter of logic or linguistic competence, the Supreme Court will not conclude in the near future that the Constitution requires a socialist economic system because the Justices are socialized beings for whom such a choice appears illegitimate or nonsensical.⁶⁴ Judicial "choice is constrained, but explaining the constraints demands a sociological explanation of the ways in which the system within which they operate is deeply entrenched and resistant to change."⁶⁵ It is this condition that forces traditional liberals to confront a dilemma: Either judges are believed subject only to mythical neutral principles, in which case the Rule of Law is an illusion and virtually anything goes due to the infinite manipulability of doctrine; or judges are operating under very real social limitations that exist outside the realm of legal discourse, in which case "we abandon the notion of rule-following as a neutral enterprise with no social content."⁶⁶

60. Joseph Singer makes this argument with the greatest clarity. Claiming that legal doctrine is indeterminate is not equivalent to claiming that legal decision-making is arbitrary. Singer, *Nihilism*, *supra* note 6, at 20, 24. Obviously there are severe limits on what a judge will perceive to be acceptable rationales, but these limits are not defined by a rational explication of legal rules. *Id.* at 21, 24. The indeterminacy of the rules does not preclude predictable results because judgments are "conditioned by legal culture, conventions, 'common sense,' and politics. Custom, rather than reason, narrows the choices and suggests the result." *Id.* at 25.

61. Mark V. Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694, 696-98 (1980) (reviewing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978)).

62. Tushnet, *Following the Rules*, *supra* note 15, at 823.

63. *Id.*

64. *Id.* at 823.

65. *Id.* at 825.

66. *Id.* at 824. Tushnet does not regard the social content of legal decision-making as the benign force of tradition. Social inequities and oppression preclude the Rule of Law because laws can never be applied generally and equally. Mark V. Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1308 (1979) [hereinafter Tushnet, *Truth*]. Tushnet contends that "the inability of intelligent people to develop a theory that has any staying power suggests that the social basis for such a theory is lacking." *Id.* at 1314 n.26.

Tushnet is not content merely to dismantle the liberal edifice; he also asserts the positive value of legal critique.⁶⁷ The indeterminacy critique undermines liberalism by focusing on social context, and therefore is closely connected to the cls clarion call that "law is politics."⁶⁸ Once the social locus of restraint is recognized, it is then imperative to uncover subterranean political choices and seek to redeem them in legitimate political discourse. Although Tushnet employs a deconstructive approach, his vision of critique strongly resembles the Frankfurt School's efforts to continue the project of Enlightenment in the social sciences by refining Marxist analysis.⁶⁹ Social constraints are the temporarily frozen results of past conflicts that are always potentially subject to a meltdown, in which case indeterminate legal principles can be molded to support any of a variety of "sharply contrasting results."⁷⁰ The Critics' political program is urgent due to the fact that society is now experiencing a restructuring under which indeterminate legal principles serve to cloak the resettlement of important social issues along conservative lines.⁷¹ Commenting on then Justice Rehnquist's willingness to use the same legal doctrine inconsistently in certain prisoner's rights cases,⁷² Tushnet argues that "it is hard to avoid the suspicion that an important element in what is going on is a fairly cynical manipulation of the appeal [to a supposed neutral principle] as a mask for a 'prisoners lose' policy," and that one purpose of critically examining the real workings of the Supreme Court is to demonstrate that with five votes the Court can "lie."⁷³

67. See, e.g., Tushnet, *Truth*, *supra* note 66, at 1342-59 (arguing for the utility of nihilism and Marxist thought).

68. See, e.g., Tushnet, *Political History*, *supra* note 34, at 1517 (noting that while little is common even in cls jurisprudence, one "common proposition" exists: "law is politics").

69. Tushnet characterizes the public law jurisprudence of the 1970s as an incommensurable babble sliding toward nihilism. Nihilism can be avoided, Tushnet argues, only by recognizing that our fragmented society precludes acceptance and recognition of coherent, unified legal principles. "The social fragmentation against which liberal law must be articulated, and which purely intellectual analysis cannot overcome, has repeatedly confounded constitutional law scholarship." Tushnet, *Truth*, *supra* note 66, at 1339. The response to nihilism is a Marxist analysis of society, not as an intellectual endeavor, but as a component of "significant and organized efforts to supplant existing institutions." *Id.* at 1359, 1346-59.

70. Tushnet, *Political History*, *supra* note 34, at 1524, 1518-26.

71. Tushnet argues that a Marxist analysis of society reveals the underlying repressive nature of the legal system, a revelation that has the potential for an important contribution to social restructuring. "My thesis is that law in a class society is one form of the incomplete hegemony of the ruling class." Tushnet, *Truth*, *supra* note 66, at 1346.

72. See, e.g., *Atiyeh v. Capps*, 449 U.S. 1312 (1981); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977).

73. Tushnet, *Deconstruction*, *supra* note 40, at 635 n.47, 633.

The important feature of Tushnet's work, though, is that he realizes the ability to lie about doctrinal precedent (and facts of a case) is not the ultimate focus of the indeterminacy critique; the compelling program carried out by the critique is to "penetrat[e] the surface" structure of the clash between the majority and dissent in a given case (after all, indeterminacy permits both to lie) and "to discover the unexpressed assumptions on which the entire Supreme Court and most commentators are agreed."⁷⁴ It is this tacit and ubiquitous agreement that generates the context in which the relatively minor skirmishes before the Supreme Court occur. Doctrinal indeterminacy requires that the Critic undertake a never-ending sociological critique to expose the unarticulated basis of the exercise of legal power.⁷⁵ This critique will always be politically motivated, although the critique cannot legitimate its own motivating politics.⁷⁶ Tushnet envisions critique as political praxis but nevertheless he appears to remain enamored of a picture of the critic as decoding a subject who incisively unravels and interprets the social flux.⁷⁷

2. Indeterminacy and Deconstructive Politics

Tushnet develops the cls position as a sociopolitical critique in a most impressive manner, but Jack Balkin has profitably advanced Tushnet's themes by approaching the critique from a different tradition.⁷⁸ CIs critique was linked to philosophical structuralism in its origins,⁷⁹ and the traces of this intellectual legacy remain despite Tushnet's move toward a

74. *Id.* at 627.

75. Tushnet cryptically concludes his recent book with: "Critique is all there is." TUSHNET, RED, WHITE AND BLUE, *supra* note 15, at 318. No deep structure will be discovered that will yield the ultimate answer to problems of social life, and so the point of the cls project is "to continue the critique of existing society The program consists of shattering congealed forms of life by showing that they have no particular integrity." Tushnet, *Introduction*, *supra* note 38, at 511, 517. In his early writings Tushnet openly espoused a form of social critique that draws on the tradition of Western (nonscientific) Marxism. See Tushnet, *Truth*, *supra* note 66, at 1347.

76. Tushnet notes that while deconstructionists destroy the possibility that social theory can determine political questions, the deconstructionist first adopts a political position. Tushnet, *Introduction*, *supra* note 38, at 517. Tushnet admits that if he were appointed to the bench he would not wallow in a deconstructionist collapse of all meaning, but rather he would first adopt a "currently fashionable theory" of adjudication and then use it to advance the cause of socialism. Mark V. Tushnet, *Does Constitutional Theory Matter?: A Comment*, 65 TEX. L. REV. 777, 782 (1987).

77. See, e.g., Tushnet, *Political History*, *supra* note 34, at 1518.

78. See, e.g., J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987) [hereinafter Balkin, *Deconstructive Practice*].

79. See Tushnet, *Introduction*, *supra* note 38.

more deconstructive practice.⁸⁰ Balkin undertakes a thoroughly deconstructive rereading of the indeterminacy critique with the goal of explaining why pervasive doctrinal indeterminacy necessarily exists and yet why legal practice is inevitably predictable.⁸¹ Balkin proceeds first by extending the insight of Derridean deconstruction to the legal system and then by drawing out the implications for political practice.⁸² Balkin ties Tushnet's insights together as part of his attempt to define a deconstructive practice that promotes critique and yet at the same time accords with a contemporary understanding that all individuals, including social critics, are socially defined beings.⁸³

Balkin contends that legal doctrine is indeterminate because it is subject to deconstruction.⁸⁴ Deconstruction is a politically charged practice that exposes ideology, destabilizes existing legal doctrine, and points the way toward a new interpretive methodology.⁸⁵ Deconstruction inverts hierarchies implicit in the status quo interpretation of a text to demonstrate that the privileged principle is in fact dependent upon and wrapped up within a suppressed principle.⁸⁶ Balkin uses the work of contract theorist Patrick Atiyah as an example.⁸⁷ Atiyah argues that contractual obligation is founded upon principles of unjust enrichment and justified reliance, and he demonstrates that the prevalent promissory theories of liability that focus on the will or intention of the promisor are in fact dependent upon these deeper justifications, as evidenced by the "objective" theory of contract.⁸⁸ Balkin contends that Atiyah misses the mark, though, when Atiyah concludes that reversing the hierarchy reveals the true nature of contractual obligation.⁸⁹ Atiyah's newly formulated position then becomes subject to a deconstructive reading that reverses Atiyah's own hierarchy by pointing to the enforcement of executory promises prior to any reliance or unjust enrichment,⁹⁰ revealing that Atiyah's new hierarchy is as unstable as that which he toppled.

80. See, e.g., TUSHNET, RED, WHITE AND BLUE, *supra* note 15.

81. See Balkin, *Deconstructive Practice*, *supra* note 78, at 744.

82. *Id.* at 746-72.

83. *Id.* at 786 (noting that "deconstructive readings of legal texts can be a tool of analysis for the right as well as for the left").

84. *Id.* at 761-64.

85. *Id.* at 744-46.

86. *Id.* at 746-51.

87. *Id.* at 767-72. Atiyah does not explicitly employ a Derridean critique, but one of Balkin's themes is that deconstruction is first and foremost a practice, not a conscious intellectual endeavor. *Id.* at 744.

88. *Id.*

89. *Id.* at 770-71.

90. *Id.* at 771.

The point is not to establish a new conceptual bedrock, but rather to investigate what happens when the given, "common sense" arrangement is reversed. . . .

. . . .
. . . [Deconstruction] is a means of intellectual discovery, which operates by wrenching us from our accustomed modes of thought. . . .

. . . .
. . . Proposed foundational terms all depend ultimately upon the subordinate concepts we would like to depend upon those foundational terms. Derrida is denying the validity of the Cartesian project of discovering an unquestionable, self-sufficient ground for philosophy.⁹¹

Deconstruction is a liberating practice that exposes the fragile stability of current interpretations, but which never claims to establish a single, timeless, correct interpretation.

Balkin locates the source of pervasive (though often suppressed) instability in interpretation in the character of language.⁹² Meaning is necessarily divorced from specific subjective intentions because words are iterable: they can be used in any of a number of situations by any of a number of speakers for any of a number of purposes. Words achieve a life apart from our intentions and embody a "free play" that condemns us always to say both less and more than we mean.⁹³ Accepting free play does not entail a nihilistic rejection of meaning, but instead engenders an awareness of the rich possibilities embedded in present practice. Deconstruction is best viewed as a critical theory that "deconstructs *ideologies*, which are manifested in particular legal doctrines. By challenging what is 'given,' deconstruction affirms the infinite possibilities of human existence. By contesting 'necessity,' deconstruction dissolves the ideological encrustations of our thought."⁹⁴ Balkin takes legal texts seriously because the Rule of Law requires that we are ruled by texts rather than by those who created the texts or those who now interpret them.⁹⁵ Balkin plainly regards the Rule of Law as an essential feature of our textual practice.⁹⁶ However, legal

91. *Id.* at 746-47, 753.

92. *Id.* at 749-51, 777-85.

93. Balkin elaborates:

Derrida's aphorism, "iterability alters," is a shorthand way of saying that once the signifier leaves the author's creation and is let loose upon the world, it takes on a life of its own in the other contexts in which it can be repeated. The liberation of the text from the author at the moment of creation results in the free play of the text.

Id. at 780 (footnotes omitted) (quoting Jacques Derrida, *Limited Inc a b c . . .*, 2 GLYPH 162, 200 (1977), reprinted in JACQUES DERRIDA, *LIMITED INC* 29, 62 (Samuel Weber trans., 1988)).

94. *Id.* at 764.

95. *Id.* at 781-84.

96. Balkin offers the following example of the Rule of Law as a textually defined relation rather than fidelity to a framer's original intention:

texts cannot be viewed as incorrigible, objective things because they are subject to inevitable, ongoing, and cumulative “misreadings” that constantly reshape the text.

[T]he very thing that makes the Rule of Law possible—the iterability of legal texts to decide new cases—creates the possibility for partial or even incorrect readings. . . .

. . . .
. . . [These readings] add to and alter what has come before, and in so doing raise new issues which in turn give rise to new readings, and so on. Successive readers of the ever increasing text of constitutional law provide later readers with a vast array of conflicting interpretations in which they will find the bases for their own later interpretations, which will also become part of the dialectical tradition of constitutional interpretation.

. . . .
. . . We preserve stare decisis only by abandoning any hope of a consistent, coherent theory of correct interpretation. . . .

. . . .
. . . What constitutes a correct interpretation of the Constitution will then become the result of moral and political debate *within* the framework of the constitutional tradition itself, a tradition that develops even as one finds oneself within it and living through it.⁹⁷

The text of the Constitution provides the site for this ongoing development because its language is always inviting a heretofore suppressed reading even as it invites a traditional reading that is the product of two centuries of practice.

Balkin’s deconstructive practice emphasizes the same conclusion that Tushnet suggests, and the problem of constraint is thereby reformulated in a paradoxical and surprising way. Because the idea of individual subjectivity is no longer convincing, the primary problem is not preventing tyrannical

Assume that the sole purpose of price control regulation is to benefit the airline industry. After intense lobbying, the legislators are convinced that they need to outlaw “cutthroat competition” among the airlines. Suppose that economic conditions then change, and the airlines will lose revenue unless they can increase volume by dropping their prices below the minimum price levels. We would not read the statute to mean that minimum prices no longer control, even though that would achieve the authors’ purpose of benefiting the airline industry. Rather, we must admit that the text of the statute has taken on a life of its own, apart from the original purpose of the legislators who created it.

. . . The Rule of Law presupposes that the only legitimate solution to the change in economic conditions is to pass a new statute repealing the old price support legislation. *Id.* at 783-84.

97. J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 933, 938, 941, 942 (1988) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987)) [hereinafter Balkin, *Constitutional Interpretation*].

judges from enforcing their subjective values.⁹⁸ The real problem of constraint is to free judges and society from the lock of ideology that precedes and shapes any later attempt to posit a subjective will. By rejecting liberalism's presumed individual monads in favor of socially constructed personalities that arise in a holistic social setting, Balkin emphasizes the warping *determinacy* that is characteristic of legal practice despite the linguistic *indeterminacy* of legal doctrine.⁹⁹ With this move Balkin picks up Tushnet's argument at a critical juncture: legal rules are wholly indeterminate, but the lesson to be drawn is that we should focus our attention on the very real social factors that render legal practice predictable.¹⁰⁰ With this shift in focus, "the problem of the rogue judge would fade into the background of jurisprudential concern. It would be replaced by the problem of the sincere judge, who desires to interpret the law faithfully, but nevertheless is destined to see the law according to her own ideological perceptions and beliefs."¹⁰¹

Balkin seeks to define a practice that will dislodge some of these stifling perceptions and beliefs. Tushnet's Marxist leanings suggest a lingering commitment to the Enlightenment project by proposing the social sciences as a model, if not the substance, of effective legal critique.¹⁰² In contrast,

98. As Balkin quite properly notes that "the idea of autonomous individuals deliberately choosing what texts will mean is quite foreign to the theory of poststructuralism." J.M. Balkin, *Ideology As Constraint*, 43 STAN. L. REV. 1133, 1136 n.19 (1991) (reviewing ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990)) [hereinafter Balkin, *Ideology*].

99. *Id.* at 1138.

100. *Id.* at 1139-45. John Stick criticizes Joseph Singer's irrationalism by arguing that Singer's view of rationality is quite limited. See Singer, *Nihilism*, *supra* note 6. Stick argues that "Singer's distinction between reason and legal custom depends upon a very narrow definition of reason," and that the determinacy afforded legal reasoning by our nonreflective embeddedness in linguistic and social contexts may be characterized as rational under a modern understanding of rationality. John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 355-56 (1986).

101. Balkin, *Ideology*, *supra* note 98, at 1142. Balkin recognizes that some feminist and critical race theorists have succeeded in reorienting the cls project along these deeper and yet still more pragmatic lines. *Id.* at 1133-34. With this move Balkin joins in the new focus on the legal subject, a position that is staked out most definitively by Pierre Schlag:

[T]he most significant problem for rule-of-law thinking is not that some deviant subject may get out of control—but rather that there is no longer a subject on the scene who is normatively and epistemically competent to practice and realize the rule-of-law vision in the first place. The mistake of rule of law was in presupposing the continued presence of a competent subject in the first place.

Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1726-27 (1991) [hereinafter Schlag, *Subject*]. For a critique of Schlag's stronger position, see *infra* notes 137-56 and accompanying text.

102. See generally TUSHNET, RED, WHITE AND BLUE, *supra* note 15 (arguing that normative constitutional theory must be considered in light of empirical political science);

Balkin strives to develop a politics that is consonant with post-Enlightenment metaphysics.¹⁰³ Balkin turns to the practice of reading and describes an effective critical theory that is akin to psychoanalytic therapy.¹⁰⁴ The model of psychoanalytic critique is an apt analogy. An analyst works with dreams and other manifestations of the unconscious problems that beset the patient, and she attempts to help the patient achieve the best resolution of these deeper problems. Deconstruction is not a vicious circle of collapsing hierarchies because it always has a therapeutic purpose: exposing illegitimate ideology and pointing the way to a new social vision.

Whether a new reading of a legal text will result from the deconstruction cannot be declared in advance. At some point that cannot be preordained, the therapy comes to a temporary conclusion and the deconstructionist finds that she has assimilated insight from the playful attack on ensconced interpretations and now inhabits a new world not wholly of her own making. Deconstruction is not nihilistic, its goal

is not the destruction of all possible social visions. By recalling the elements of human life relegated to the margin in a given social theory, deconstructive readings challenge us to remake the dominant conceptions of our society. We can choose to accept the challenge or not, but we will no longer cling to our social vision blindly.¹⁰⁵

Deconstructive critique can never be unleashed with the preordained goal of disrupting at all costs the traditional reading, even though, and because, ideology maintains its grip on every person in society. Traditional theories of the Rule of Law assume that meaning is fixed in a manner that precludes uncertainty and arbitrariness, but the iterability of the language upon which the Rule of Law is based eliminates this possibility. The meaning of a text is always divorced from the intentions of the author, but this reality does not lead to the conclusion that there is no meaning or that all interpretations have equal validity.¹⁰⁶

In sum, Balkin looks to the underlying social forces that motivate the judge to read doctrinal texts only in certain ways. The decision to manipulate doctrine is not a free act of subjectivity, but "is shaped and structured before the individual begins her conscious deliberation, and before she experiences the pull of conscience. Social constraint has already, always, and also existed, even before the liberal theorist begins her work."¹⁰⁷ Whether Chief Justice Rehnquist consciously manipulates the plasticity of legal doctrine is not as important as uncovering the precognitive forces that

supra notes 69, 71.

103. See, e.g., Balkin, *Deconstructive Practice*, *supra* note 78.

104. *Id.* at 765-67.

105. *Id.* at 763.

106. *Id.* at 781-85.

107. Balkin, *Ideology*, *supra* note 98, at 1149.

shape and compel the conservative viewpoint that is expressed in this doctrinal gameplaying. However, any critical investigation must seek out the textual inspiration for these (mis)readings because the text contains the seed for what may be judged as more appropriate (mis)readings. Both legal doctrine and social values must be subject to a critical practice that has the potential of reorienting dysfunctional ideological commitments into a more genuine social practice. Balkin differs from Tushnet in that critique is a wholly deconstructive practice of interpreting and applying legal texts in novel ways, rather than the act of a social critic. The goal is not to look behind legal practice to the *real* structure of legal dialogue, comprised of social structures, but rather to invigorate the role that legal dialogue plays in defining social structures by thawing its frozen platitudes about the Rule of Law.

3. Indeterminacy and Radical Deconstruction

Radical deconstructionists contend that Balkin has broken faith with the principle themes of deconstruction. While in agreement with Balkin's emphasis on the social context that animates and constrains the individual, they reject Balkin's textual model of deconstructive practice and attempt to carry forward the deeper critique of metaphysics implied in Derrida's work.¹⁰⁸ Under this more radical view, deconstruction is a complete break from Enlightenment strategies of critical theory and liberalism's hopes for rule-bound decision-making. In this section, I describe the different styles of radical deconstruction exemplified in the work of Allan Hutchinson and Pierre Schlag. Hutchinson rejects Balkin's continued emphasis on textuality and recommends that we reject the practice of judicial review in light of the hopelessly indeterminate meaning of the deconstructed text.¹⁰⁹ Schlag takes the opposite view and agrees generally with Balkin's attention to the character of textuality, but Schlag then challenges whether Balkin's idea of critical theory is possible without first metaphysically positing both a reader and a text that stand independent of the situation in which they are constituted.¹¹⁰

As Hutchinson puts it, Balkin provides a "more technical and less radical account" of deconstructive practice than is suggested by Derrida's work.¹¹¹ What makes Hutchinson's own work so interesting is that over the last decade he has argued for a concrete political response to the

108. See, e.g., Allan C. Hutchinson, *Democracy and Determinacy: An Essay on Legal Interpretation*, 43 U. MIAMI L. REV. 541 (1989) [hereinafter Hutchinson, *Determinacy*].

109. *Id.* at 543.

110. See, e.g., Pierre Schlag, "Le Hors de Texte, C'est Moi": *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990) [hereinafter Schlag, *Politics of Form*].

111. Hutchinson, *Determinacy*, *supra* note 108, at 567 n.82.

relentless grip that he believes Enlightenment thought holds on legal theory. Hutchinson argues that under no circumstances can judicial review be retained as a legitimate and efficacious practice.¹¹² The political lesson to be drawn from radical deconstruction is that we must build a truly participatory democracy as the only authentic way of living in a post-Enlightenment world. By relying on a practice of judges applying rules, legal actors not only demonstrate that they are misguided and naive, they also supplant democratic decision-making. Metaphysical delusions propagate political abdication.

In typical cls fashion, Hutchinson anchors his political critique in the lessons to be drawn from doctrinal indeterminacy. Arguing that with "imagination and industry, legal materials can be organized so as to support radically inconsistent positions," Hutchinson locates the source of indeterminacy in the inability of language to overcome the "pervasive matrix of contradictory forces which prevents the establishment of a sufficiently full tradition of shared understandings."¹¹³ The Rule of Law is never more than an illusion due to the deep indeterminacy of legal doctrine. Every legal text is a spurious attempt to settle what in fact will never be settled, to convert temporary historical political gains into timeless rules. "By obscuring the value choices inherent in the application of rules, the liberal model of adjudication makes it possible to believe that existing social hierarchies are not just the result of interrupted fighting. In the process, a world of deals begins to be transformed into a world of rights."¹¹⁴ Radical doctrinal indeterminacy renders forever impossible the liberal's ultimate faith that the law, although admittedly not merely a system of rules, can still retain an essential degree of hermeneutical autonomy.¹¹⁵

The Rule of Law is a sham; the esoteric and convoluted nature of legal doctrine is an accommodating screen to obscure its indeterminacy and the inescapable element of judicial choice. Traditional lawyering is a clumsy and repetitive series of bootstrap arguments and legal discourse is only a stylized version of political discourse.¹¹⁶

When contemporary liberal theorists set out to explain how judges can make the law responsive to constantly changing social conditions and still lay

112. Allan C. Hutchinson, *Alien Thoughts: A Comment on Constitutional Scholarship*, 58 S. CAL. L. REV. 701 (1985); Allan C. Hutchinson & Patrick J. Monahan, *Democracy and the Rule of Law*, in THE RULE OF LAW: IDEAL OR IDEOLOGY 97 (Allan C. Hutchinson & Patrick J. Monahan eds., 1987) [hereinafter Hutchinson & Monahan, *Democracy*].

113. ALLAN C. HUTCHINSON, DWELLING ON THE THRESHOLD: CRITICAL ESSAYS ON MODERN LEGAL THOUGHT 90 (1988) [hereinafter HUTCHINSON, DWELLING].

114. 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, 210 (1984) [hereinafter Hutchinson & Monahan, *Unfolding Drama*].

115. Hutchinson, *Determinacy*, *supra* note 108, at 541-49.

116. HUTCHINSON, DWELLING, *supra* note 113, at 40.

claim to democratic legitimacy, Hutchinson believes that they face the impossible task of delineating how judges can engage in politics in a distinctly legal manner.¹¹⁷

Hutchinson brings this critique home in his discussion of the judicial review of administrative agencies.¹¹⁸ In *Bromley London Borough Council v. Greater London Council* (G.L.C.),¹¹⁹ the House of Lords determined that an agency decision to reduce transportation fares was ultra vires because it violated the statutory requirement that the agency promote "economic" transport services.¹²⁰ Hutchinson mocks the attempt by the Law Lords to attach a specific and objective meaning to the word "economic" as an exercise that predictably ignored the agency's legitimate right to view transportation services as social services and instead concluded "that the 'economic' restraint on the G.L.C. meant that it must act in accordance with ordinary business principles; transport was to be run as a cost-effective business enterprise."¹²¹ The issue in *Bromley* could be resolved only by rendering a decision on matters of social policy (whether transportation services were to be regarded at least to some degree as social services), and the pretense that the Court was simply applying a legal rule obscured the fact that the decision was at bottom "a blatant attempt to frustrate the socialist ambitions of an elected local authority."¹²²

Hutchinson believes that *Bromley* is paradigmatic of statutory interpretation.¹²³ Statutes are passed to mediate the conflicts arising from the flux of competing interests, but every law immediately becomes obsolete because, having concretized a legal resolution, the statute is unable to deal with the continuing clash of interests that it was intended to resolve. The courts then assume Parliament's role and render political decisions that either reaffirm or challenge Parliament's original resolution of the conflict between competing interests, but they do so under the guise of elaborating the intention of Parliament.¹²⁴ In short, when the Law Lords determined the meaning of "economic" in *Bromley* they were engaging in an activity identical in all relevant respects to that of Parliament when it drafted the statute in the first instance.¹²⁵

117. *Id.* at 125-42 (critiquing James Boyd White's defense of judicial review as a systematic decontextualization of legal texts reminiscent of New Criticism); Hutchinson, *Determinacy*, *supra* note 108, at 549.

118. See, e.g., HUTCHINSON, DWELLING, *supra* note 113, at 104.

119. [1982] 2 W.L.R. 62 (1981).

120. HUTCHINSON, DWELLING, *supra* note 113, at 104-14 (discussing *Bromley*, [1982] 2 W.L.R. at 92-130).

121. *Id.* at 106.

122. *Id.* at 109.

123. *Id.*

124. *Id.* at 107-14.

125. *Id.* at 114.

Hutchinson does not reduce his critique to the simple conclusion that courts inevitably usurp Parliament's authority in the act of interpretation. Such a conclusion would not be particularly unsettling since Parliament always can overrule the courts to enforce majoritarian principles, and by constantly amending regulatory programs Parliament can limit the room for elaboration by courts. The deeper problem posed by judicial review is that it sustains a powerful ideology of social organization that in turn delimits the perceived boundaries of legislative discourse. Parliament later reaffirmed and solidified the rationale in *Bromley*, although Hutchinson believes that there is serious question whether the agency was to be so constrained in its operation under the original law.¹²⁶ The effect of judicial review is not simply to contest the political settlements articulated by Parliament, but also to shape the world in which future issues will be presented to Parliament.

Hutchinson does not succumb to simplistic conspiracy theories or scientific Marxism to explain the bias of Courts, nor does he believe that courts will inevitably be conservative.¹²⁷ Although judicial review often serves as a "conservative brake" on the "liberal accelerator of legislation,"¹²⁸ Hutchinson's concern lies not with the results of judicial review but with the fact that political decisions are relegated to an elite practice insulated from democratic participation in decision-making.¹²⁹ Once an

126. *Id.*

127. Hutchinson notes that the Greater London Council decided after *Bromley* to put into effect an alternative rate reduction program. In *R v. London Transport Executive (Ex parte Greater London Council)*, [1983] 2 All E.R. 262, the court purported to follow the rule of *Bromley* but decided that the new rate reduction scheme was legal because it "had been arrived at after an informed and considered balancing of the transport users' and ratepayers' interests." HUTCHINSON, DWELLING, *supra* note 113, at 111. This decision undercut the argument that *Bromley* was simply a symbol of "reactionary politics" by judges: "If *Bromley* marks a success for individualism, *Ex parte G.L.C.* scores an equally famous victory for communitarianism or, at least, for the forces of anti-individualism. . . . Moreover, it shows that the dust of visionary conflict never settles. It is constantly blown around by the cross-currents of social struggle." *Id.*

128. HUTCHINSON, DWELLING, *supra* note 113, at 120.

129. Hutchinson & Monahan, *Democracy*, *supra* note 112, at 117-19. Hutchinson and Monahan write:

The reasons for discussing the impact of court decisions is not to suggest that the . . . decisions were somehow "wrong". Such a conclusion would be beside the point. The meaningful issue is why an elite judiciary should have responsibility for making such decisions in the first place. Reliance on the Supreme Court undermines popular control and participation in the policy-making process. . . .

Even in the so-called "progressive" constitutional decisions, the difficult question is whether the elimination of popular control in favour of an elite institution like the Supreme Court will actually promote the long-term cause of justice and equality. . . .

issue is removed from public debate and decided by fiat, the exact same issue can never again be addressed in political discourse because the judicial decision has forever altered the manner in which that issue will be perceived. Numerous judicial decisions have the cumulative effect of reshaping the social world in which political questions are entertained.¹³⁰ Judicial review is inherently bankrupt because it warps the democratic process.

Hutchinson's faith in democracy faces an obvious challenge. If judges ultimately are constrained by fundamentally contradictory social values that suggest alternative readings of an indeterminate text, it is not apparent why it is worth the trouble of initiating a democratic dialogue that inevitably will be shaped by the same social constraints.¹³¹ Hutchinson acknowledges this potential criticism and defends his faith in democracy in several ways. At a general level, Hutchinson believes that individuals become virtuous by

Values such as justice and equality are the products of politics, not its antecedents. They take root in a public that engages in debate and argument and that is given the opportunity to nurture notions of reasonableness and commonality. Deprived of such empowerment, public values corrode and civic energy dissipates. Deferring to "specialists", citizens lose the capacity to define their own values and traditions. Public morality will atrophy rather than be energized. The appointment of the judicial philosopher king exacerbates the problem it was intended to remedy.

Id. But see Allan C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 NEW ENG. L. REV. 1173, 1206-09 (1992). In this recent article Hutchinson presents an account of judging closer to the hermeneutical account that I develop in this Article.

[A] postmodern understanding of judging rejects entirely [the objective/subjective] epistemological paradigm Legal doctrine is not simply "out there," but is always in need of collective retrieval and re-creation. . . . Contrary to most mainstream critics' views, judgment is neither the intelligible articulation of objective truths nor the chaotic fantasizing of subjective experience. . . . While [postmodernism] incorporates the judges' sense of felt boundedness, it exposes and challenges that deep set of contestable values on which judges claim to rest their decisions.

Id. at 1209 (footnote omitted).

130. This point explains an apparent contradiction in Hutchinson's articles. On one hand, judicial review is regarded as the great evil of liberalism, but on the other hand, judicial review is regarded as tangential to social life. HUTCHINSON, DWELLING, *supra* note 113, at 86, 114-17; see also Hutchinson & Monahan, *Democracy*, *supra* note 112, at 114-17. For Hutchinson, these two positions not only are consistent, they are closely related. The poverty of adjudication is that it separates political decision-making from social discourse, such that it appears that no political decision has been made. Deep social concerns are not raised to the level of a community-wide moral discourse and therefore adjudication does not imprint on or reflect fundamental beliefs. "Judicial musing, enforced by fiat, is no substitute for civic deliberation," both in terms of effectiveness and political legitimacy. *Id.* at 121.

131. Hutchinson criticized the early cls romanticism which seemed to suggest that the deconstruction and elimination of all ideology was possible, especially to the extent that cls thinkers believed that the state could offer the vehicle for change. Hutchinson & Monahan, *Unfolding Drama*, *supra* note 114, at 235.

actively participating in a democratic regime. Only in this way can citizens "develop[] a moral sense and a practical experience of community."¹³² Hutchinson's concept of citizenship relates to a deeper theme that breathes life into Hutchinson's goal of constructing a better social world in the wake of eliminating existing power structures. Simply put, Hutchinson wants to save the individual from the postmodern tendency to obliterate any notion of the individual in favor of socially constructed persons that are the aggregation of complex and contradictory patterns of social life. "The individual subject is always in the process of being overwhelmed, but is never completely overwhelmed."¹³³ The web of historical power relationships has seams that can be exploited by individuals who are never able to break entirely free, but who can reshape social reality through the liberating power of deconstruction.¹³⁴

Deconstruction need not lead to moral despair or political quietism: it can be incorporated within a mode of political life that is organised in accordance with a radical form of democracy. . . . The challenge is to conceive of a social structure and political lifestyle that respects the dictates of social contingency and resists the temptation to see solid ground where there is only sea and sky, while, at the same time, providing the possibility of a communal context in which people can experiment and experience fulfilling intersubjective relationships.¹³⁵

132. Hutchinson & Monahan, *Democracy*, *supra* note 112, at 114. Thus, in the context of allocating responsibility and risk for accidents, Hutchinson argues that only the implementation of democracy can overcome the individualist ethic that pervades even the most welfare-minded liberal agendas. Provision of welfare benefits by a bureaucratized state does not ennoble citizens, regardless of the inequities that the system is designed to address.

Instead of social policies being imposed by social administrators, no matter how beneficent, citizens must be entrenched within local centres of bureaucratic power; they must experience and control social programs as an integral part of their local and personal life. . . .

. . . We must not relegate the welfare recipient to the status of client or claimant. The need for a sense of belonging is never more urgent than when misfortune strikes. . . .

. . . .

In all this, a central villain of the piece is the general tendency to professionalize the policy-making process and devolve decisional authority to "experts".

HUTCHINSON, DWELLING, *supra* note 113, at 317-18.

133. HUTCHINSON, DWELLING, *supra* note 113, at 280.

134. Hutchinson rejects a nihilistic deconstruction that admits of no potential for positive development. He regards Derrida's project as too philosophical and therefore politically inconsequential. "The challenge is to reintroduce the liberating dynamic of history and to politicise the polysemic quality of texts and interpretive practice." *Id.* at 38. Deconstruction must not collapse into insulating the individual from change by regarding change as impossible due to social constraints. *Id.* at 143-62 (critiquing Stanley Fish).

135. *Id.* at 264; *see also* Hutchinson, *Determinacy*, *supra* note 108, at 574.

"Democracy is [an] appropriate institutional complement to deconstruction" because it respects the intersubjective nature of knowledge that, by virtue of language, is always historically situated and value-laden.¹³⁶ Deconstruction never ends with foundational truths; it fosters dialogue. Hutchinson sings the praises of the robust dialogue of democracy as opposed to the debilitated dialogue of judicial review. The curious upshot of Hutchinson's efforts is a deconstruction so pervasive that it destroys everything except a muted humanism, in which all faith must be placed.

Hutchinson's radical approach leads him to reject entirely Balkin's textual model of critique. In contrast, other radical deconstructionists claim that Balkin has not taken textuality seriously enough, arguing that Balkin's critical approach is predicated on a lingering commitment to the idea of self-directed individuals who use theoretical deconstruction like an engineer uses dynamite to clear the way for later construction. Pierre Schlag has engaged in the most trenchant criticism of Balkin on this score. Schlag argues that Balkin converts a potentially radical subject-decentering deconstructive practice into merely a tool or technique to be used by a presumed competent subject, thereby co-opting deconstruction and pressing it into service on behalf of the Cartesian project.¹³⁷ In Schlag's view, Balkin errs by relapsing into a traditional form of legal thinking in which "the self of the legal thinker remains autonomous, self-directing, coherent, integrated and originary—in short, as if it were the autonomous author of its very own thoughts."¹³⁸ Balkin concedes the force of social context but still attempts to insulate the self, trafficking in what Schlag refers to as the "relatively autonomous self."¹³⁹ Schlag argues that this lingering affinity for self-directing subjectivity dramatically conflicts with Derrida's emphasis that deconstruction is not simply a new hermeneutic method for understanding discourse between subjects, but instead is meant to be a subversion of the discursive practices that constitute the very self.¹⁴⁰ Deconstruction

136. HUTCHINSON, DWELLING, *supra* note 113, at 290.

137. See, e.g., Schlag, *Politics of Form*, *supra* note 110, at 1641-44, 1669-70; Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 890-91 (1991) [hereinafter Schlag, *Normativity*]; Schlag, *Subject*, *supra* note 101, at 1695-96. Schlag argues that an instrumental reading of deconstruction "is at once ironic and perverse because, as Derrida makes clear, deconstruction is not just some *technique, theory, tool* to be deployed by self-directing *privileged individualist selves* whenever and wherever they choose." Schlag, *Politics of Form*, *supra* note 110, at 1645.

138. Schlag, *Politics of Form*, *supra* note 110, at 1639.

139. Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37, 45 (1987) [hereinafter Schlag, *Fish*] (arguing that Stanley Fish uses interpretive communities to provide "the self a *formal closure* against the claims of theory, reason, and history. But at the same time, the concept is *substantively empty*, so that the self can project into 'interpretive communities' just about anything it wants," thereby remaining *relatively* autonomous).

140. Schlag, *Politics of Form*, *supra* note 110, at 1635.

initiates a dramatically new politics by exploiting the instabilities that reside at the heart of the presumed coherent self.¹⁴¹

What is required is nothing less than the decentering of the disciplinary subject and hence the “deconstruction” of precisely the form of disciplinary thinking that repeatedly situates the conscious autonomous individual legal thinker as the privileged adjudicator of the truth of propositional content and as the independent wielder of instrumental power.¹⁴²

In American law, deconstruction must thus displace and subvert this relatively autonomous self and its rhetorical supports. This rhetorical self must be displaced because it is implicated in the maintenance and reproduction of a rhetorical form of thought that is *at once aesthetically boring, intellectually stagnant, and politically conservative*.¹⁴³

Schlag argues that Balkin’s focus on textuality is only facially responsive to Derrida’s guiding aphorism that there is nothing outside the text, and that Balkin fails to interrogate conventional patterns of legal thought.¹⁴⁴

Schlag criticizes Balkin as part of his broader critique of the majority of legal thinkers still wholly trapped in the Enlightenment delusions that an ethically coherent self is capable of autonomous rational choice. In response to the revelation that texts do not order experience by providing rational subjects with direction, traditional legal thinkers inevitably look for guidance outside the text in order to reaffirm the self as a competent subject. Schlag regards this rhetorically inscribed move within traditional legal discourse as the essence of normative legal thought, which by constant repetition delimits politics.¹⁴⁵ The autonomous, objective legal text having been deconstructed by the indeterminacy critique, normative legal thought responds (implicitly) by preserving the autonomous legal subject. This is the defensive move that Schlag deconstructs by radicalizing the insights expressed by the indeterminacy critique.

Schlag’s attack on normativity presents an interesting contrast to Hutchinson’s normative arguments on behalf of participatory democracy. On one hand, Hutchinson’s normative arguments are simply that—normative

141. *Id.* at 1647.

142. Pierre Schlag, *Foreword: Postmodernism and Law*, 62 U. COLO. L. REV. 439, 447 (1991) [hereinafter Schlag, *Postmodernism*]; see also Schlag, *Subject*, *supra* note 101, at 1742–43 (stating the same Langdellian subject is constantly reproduced even in ostensibly different theoretical perspectives as part of the politics of form that elide the subject formations that we have been constructed to be).

143. Schlag, *Politics of Form*, *supra* note 110, at 1669.

144. See, e.g., *id.* at 1641.

145. *Id.* at 1658–65; Schlag argues that the idea that normative legal thought guides the development of law is about as meaningful as “7-11 sells freedom” or “Pepsi brings you the downfall of the Berlin Wall.” Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 191 (1990) [hereinafter Schlag, *Nowhere*].

arguments—although they perhaps are more interesting because they claim to derive from radical deconstruction. On the other hand, it is unclear how Schlag envisions deconstructing the legal subject without joining Hutchinson in accepting that individuals (socially constructed or not) push at the seams of enveloping ideology.¹⁴⁶ Schlag argues that the cls fascination with demonstrating that “objective” legal texts are indeterminate has often resulted in inattention to the fact that constraint is achieved

through the (thus far) eclipsed routines of socially constructed subjects. For cls thinkers, this recognition means that the cls critiques of objectivity, neutrality, etc., will always fall short of the project of “transformation.” Indeed, even if critical legal thinkers were completely successful in “demystifying,” “deconstructing,” and “contextualizing” *objectivist* legal doctrine and orthodox legal theory, they would still find themselves in the faculty lounges, in the legal theory workshops, in the classrooms, and in the courts confronting *the same* unreconstructed cast of characters, *the same* unmodified assembly of constructed subjectivities doing their *same old* routines under a *new* set of names—really neat names like “neo-pragmatism,” “contextualism,” “anti-formalism,” and “anti-foundationalism.”¹⁴⁷

The question of *who* or *what* can dislodge the postmodern subject from its social situatedness sufficiently to be considered a *political* development beyond the repetitive politics of form is a “very difficult question[]” that Schlag addresses only generally.¹⁴⁸

Schlag purports to deconstruct the legal subject resting at the heart of the Langdellian paradigm, for it is this subject that continually is reinscribed in legal scholarship even after the deconstruction of determinate legal rules.¹⁴⁹ The post-realist legal subject is problematic because her norma-

146. Schlag desperately wants to avoid Stanley Fish’s conclusion that theory can have no impact on practices that are always already sedimented in a social world that renders practice intelligible in the first instance. Schlag argues that Fish insulates the self from further deconstruction by privileging “interpretive communities” as pretheoretical situations immune to theoretical inquiry, and contends instead that these conservative loci of power and oppression must be deconstructed, as must the “self.” Schlag, *Fish*, *supra* note 139, at 47-50. The questions confronting Schlag are *who* continues the deconstruction and *how* do they accomplish it? Fish continues to haunt (and taunt) him by demonstrating that the deconstructionist is always lodged within the “rhetorical structures of [her] own professional expertise.” Schlag, *Nowhere*, *supra* note 145, at 176 n.26. Schlag merely *asserts* that self-consciousness and the critique of ideology can shape practice, although in itself it is never sufficient. Schlag, *Politics of Form*, *supra* note 110, at 1646 n.41.

147. Schlag, *Postmodernism*, *supra* note 142, at 445-46 (footnote omitted).

148. *Id.* at 450. “There is no doubt that at least some forms—I would argue, the most interesting forms—of postmodern thought place the possibility and the character of ethics in question.” *Id.*

149. See, e.g., Schlag, *Subject*, *supra* note 101; Pierre Schlag, *Writing for Judges*, 63 U. COLO. L. REV. 419 (1992).

tive prescriptions about how best to read indeterminant legal texts have already been “pre-scripted” in the “aesthetic *pre-figurations*” that define her subjectivity.¹⁵⁰ Although it “would seem . . . that there is no getting away from *pre-figuration*,”¹⁵¹ in Schlag’s view this is precisely the value that deconstruction holds for law. As pre-figured subjects, we will be politically transformed only if we try “to understand our own pre-figurations—the pre-figurations that shape our selves, our thinking, and our intellectual and political orientations.”¹⁵² This transformation in turn amounts to the realization that all normative legal discourse is pre-figured by an embedded ideology that can evidence “bias, intolerance, authoritarianism—even cruelty.”¹⁵³ Radical deconstruction seeks nothing less than to displace the stagnant pre-figuration that guides normative legal scholarship and reaffirms the Langdellian legal subject.¹⁵⁴ This project does not annihilate the self, but instead raises to consciousness and thereby subverts traditional pre-figurations.¹⁵⁵

Schlag’s radical deconstruction threatens to eliminate political theory, a particularly disturbing prospect if one is willing to accede to the cls central argument that law is nothing other than politics. Schlag wants to go behind normativity and reveal the interlocking web of routinized ideological behavior that constitutes the subject. Schlag concludes that there is no individual who can carry out the necessary sociological analysis of society, there is no individual who can serve as the psychoanalyst of society’s governing texts, and there is no individual who can constitute her own life through participating in collective decision-making. These options all, to varying degrees, reflect a commitment to the possibility of subjective self-determination that is not borne out in reality. Schlag sets out to reveal that there is no individual who successfully can devise or implement a grand program spelling out the way things should be done.¹⁵⁶ Schlag’s critical

150. Pierre Schlag, *Pre-Figuration and Evaluation*, 80 CAL. L. REV. 965, 967 (1992) [hereinafter Schlag, *Pre-Figuration*] (comparing the pre-figurations of leading Continental philosophers).

151. *Id.*

152. *Id.* at 977.

153. *Id.* at 970.

154. See, e.g., Schlag, *Politics of Form*, *supra* note 110, at 1635-47. “[D]econstruction seeks to displace our pre-formed view of the identity, the form, and the location of the political.” *Id.* at 1635. Deconstruction will facilitate “serious consideration of the social, the psychological, and the rhetorical context” in which the Langdellian subject is reproduced. *Id.* at 1637. It must not be “re-enveloped within the same old cognitive practices.” *Id.* at 1647. “[D]econstruction seeks to engage and subvert” the totality of “mutually supportive . . . hierarchical dualities” that define our logocentric pre-figuration. *Id.* at 1649.

155. *Id.* at 1671 (arguing that displacement and decentering will lead the “prototypically academic self . . . to recognize that it is largely a language game run by bureaucratic, institutional, and linguistic practices”).

156. See, e.g., Schlag, *Politics of Form*, *supra* note 110, at 1670-73.

exploration may have an indirect impact on practice through the revelatory deconstruction of the assumed (relatively) autonomous self, but his relentless attack on our pre-scripted normativity undercuts any "goal" for deconstruction.

4. Assessing the Radicalization of the Indeterminacy Critique

The indeterminacy critique begins with the linguistic indeterminacy of the legal text but quickly moves to a focus on the very real constraining social forces that constitute legal subjects and shape legal practice. This progression reflects ever more radical attempts to disavow the Cartesian metaphysical assumption of an independent, egocentric subject. The indeterminacy critique undoubtedly raises the discussion of the problem of constraint to a much higher level of sophistication than is evident in traditional jurisprudence. In this section, I assess whether the indeterminacy critique overcomes the metaphysical deficiencies of contemporary Rule of Law jurisprudence, thereby providing a better understanding of legal practice. As related above, it would be a mistake to assume that there is a single deconstructionist voice. Therefore, my assessment will take into account the different deconstructive approaches.

The overriding concern of contemporary legal theory is tying the Rule of Law to the contemporary social context in which it is experienced. However, many contemporary theorists only begin to explore the deep connections between social life and the replication of social life in the legal system. For example, Andrew Altman recently defended the Rule of Law while also recognizing that "any liberal who would believe that legal rules can by themselves operate effectively in the teeth of all other relevant social norms has wildly exaggerated the power of law."¹⁵⁷ Altman cogently argues that the Rule of Law is real because social constraint operates in a manner that is not reducible to the rule of individuals on the one hand, or to the playing out of an immutable "fundamental contradiction" on the other hand.¹⁵⁸ Individuals are neither completely context-dependent nor entirely context-transcendent; they cannot interpret legal rules with unguided discretion because the social context provides constraint, yet at the same time the legal rules stand distinct from social norms, such that the law can restrain oppressive power embedded in social norms and can be a force of change in the development of social norms.¹⁵⁹

Altman does not clear the indeterminacy hurdle. In his review of Altman's book, Balkin criticizes the romantic tendency evident in Altman's bifurcation of social norms and the subjective aims of individuals.¹⁶⁰ It

157. ALTMAN, *supra* note 98, at 198.

158. *Id.* at 196-201.

159. *Id.* at 199-200.

160. Balkin, *Ideology*, *supra* note 98, at 1141.

is insufficient to view constraint as a limitation on the individual's free choice to follow social norms or attempt to change social norms. More often constraint is lodged in ideology, a prereflective disposition from which all individual choices later emanate and which therefore is relatively immune to later reflective efforts. Balkin agrees that a conventionalist approach to rule-following is correct, but he stresses that legal theorists and practitioners must look beyond norms implicit in social intercourse to the antepredicative forms of behavior and structures of meaning and perception that gird the later formalization of social norms.¹⁶¹ In short, the deconstructive variant of the indeterminacy critique challenges an uncritical use of social norms to supply the constraint that is absent in linguistic formulations, because these social norms are never placed at risk in discourse since illegitimate and even contradictory normative impulses are able to find articulation in the language of legal doctrine. In short, the indeterminacy critique demonstrates the need for a critique of ideology.

The powerful effects of ideology are underscored by considering the historical claim that the Rule of Law has served well in the fight against arbitrary assertions of power and has worked to shape the political theory that supported this fight.¹⁶² No one would dispute the fact that constrained decision-making is an appropriate goal, but that is the very point that Critics wish to make. Deep-seated political beliefs are in turn founded on more basic perceptions of self and others. The liberal political program has been effectuated to a large extent due to pervasive ideological commitments to the metaphor of individual persons choosing to join together in society in accordance with predetermined rules. The issue is not whether the legal system has responded with regularity in articulating the liberal position. The question is whether the law could do otherwise in the face of dominating ideology and what potential exists for dislodging this ideology.

The indeterminacy critique leads to a critique of the subject as a socially constructed product of ideology, but it is unclear whether the indeterminacy critique necessarily undermines the Rule of Law in order to describe legal practice accurately and to provide a persuasive account of ideology critique. The four theorists that I have discussed—Tushnet, Balkin, Hutchinson, and Schlag—each assess the possibility and potential of critique in light of the thorough indeterminacy of legal language. In varying degrees, each theorist

161. *Id.* at 1148-53.

162. Donald Herzog, *As Many as Six Impossible Things Before Breakfast*, 75 CAL. L. REV. 605 (1987). Herzog argues that the *cls* diatribe against liberalism misses the point that liberalism essentially was a political movement aimed at unseating the hierarchical power relations of Christianity and feudalism in order to foster individual autonomy. Admittedly, ideology should not be regarded in a wholly negative manner. Critics would respond, however, that the presumptions involved in undoing subjective domination of other persons have tended to reinforce the view that members of society are wholly distinct subjects and that it is this ideological base that now constrains social relations.

faces the problem of situating critique by contending that the grip of ideology is never total, although they view critique as a complex and ambiguous project in the wake of the deconstruction of the subject/object metaphysics of the Enlightenment. Each theorist is hesitant to prescribe a method of legal criticism in light of obvious epistemological limitations.

At this point it is prudent to restate the significance of the problem of critique to the project of exploring our faith in the Rule of Law. Legal theory has come full circle from the Legal Realism movement in developing the implications of the indeterminacy of legal texts. The problem of constraint is that there is too much constraint imposed by ideological instantiation, not that there is too little constraint imposed by doctrinal statements of the law. The problem of constraint articulated by the indeterminacy critique has devolved into the problem of innovation. The Rule of Law requires that behavior is law-governed rather than ideologically driven. Ideology—a constraining feature of social life partially articulated through manipulable legal doctrine—must be challenged. Critical theory seeks to outline legitimate forms of social constraint by deconstructing illegitimate ideology and thereby reconstructing the social world. Deconstructive practice challenges ideology, but it is unclear whether deconstructive practice is a critical *project*, or whether we must place our faith in a self-generating process of mysterious, organic change in the face of the unassailable force of ideology. This amounts to asking whether deconstruction will admit of a science of critique or is consigned to nihilistic paralysis. The more probing question is whether it is possible to avoid this false choice entirely.

Tushnet's early writing offered a Marxist-inspired sociopolitical critique of the legal system designed to effect progressive changes.¹⁶³ However, Tushnet well recognizes that the deconstructive roots of the indeterminacy critique destabilize not only traditional legal conventions but also the critical enterprise.¹⁶⁴ Efforts to decode ideological belief structures by relating them to deeper, historically conditioned social forces manifest the spirit of the Enlightenment project. And yet, the only apparent alternative—focusing on the power of individuals to transcend their context and overcome ideology—manifests the equally unsatisfactory Romantic response to the Enlightenment.¹⁶⁵ The social sciences, including economics and sociology,

163. See *supra* notes 67-71 and accompanying text.

164. See, e.g., Tushnet, *Political History*, *supra* note 34.

165. Balkin notes that cls has always included competing strands of inquiry on the central question of critical methodology. On one hand some critics propound a critique of ideology that has been associated with structuralism and variants of the Frankfurt School; on the other hand some critics take a more existential path and attempt to define the means by which individuals can effect change. Balkin, *Ideology*, *supra* note 98, at 1168. The familiar contrasting visions of freedom and determinism lie at the core of attempts to justify and carry out a critique of ideology.

cannot inform or legitimize law from a privileged perspective because the social scientist is always a participant in the meaning structures that are under study.¹⁶⁶ Although Tushnet once argued that the specter of nihilism raised by deconstructive indeterminacy can be overcome with neo-Marxist social theory, in a recent article he concedes that attempts to implement "leftist commitments" seem inexorably to "lead by a complex route back to the project of comprehensive normative rationality" that is undermined convincingly by deconstructive theorists.¹⁶⁷ Tushnet attempts to steer clear of metaphysical paralysis by insisting in minimalist fashion that critique "is all there is," even if there no longer is any way to ground the critique.¹⁶⁸ Tushnet's social critique unravels because a neo-Marxist approach cannot insulate critique from radical deconstruction.¹⁶⁹

In overcoming one tendency, critics tend to lapse into the other. For example, in her critique of cls theory, Joan Williams notes that the structuralist approaches adopted by many cls scholars are a reaction to the demise of the "picture theory" of knowledge and language that serves to reinforce the very assumptions purportedly put into question. Williams, *New Langdells*, *supra* note 38, at 472-85. Cls remains locked in the old epistemology of Enlightenment rationalism even as it struggles to integrate the new epistemology symbolized by quantum mechanics into legal analysis. Using the later Wittgenstein's philosophy as a starting point, Williams argues that although legal doctrine does not compel specific answers to questions, it does provide a discursive world in which the range of possible answers are delimited. "Doctrine, in other words, describes the scope of the conversation, not its outcome. . . . The ultimate message of the new epistemology is not ethical relativism, but that ethical choices are ours to make, and that we must accept responsibility for the constraints and choices we have embodied in our law." *Id.* at 494-95. Williams contends that structuralist arguments that rational critique is impossible due to the embeddedness in prerational forms of life are the flip side of an outmoded world-view. However, her response, that the new epistemology demands that ethical individuals take responsibility for their world and reshape the legal dialogue that they have constructed, itself runs counter to the new epistemology in its simple glorification of the power of individuals to rise above and reconstruct their forms of life as acts of will. Williams does not follow the real lesson of the new epistemology and attempt to steer a course between a vision of social life that views individuals as slaves to the structures they inhabit and the equally illegitimate vision of ethically autonomous and self-conscious individuals redefining social life. For my discussion of postmodern philosophy and the "new physics" paradigm represented by quantum theory, see Mootz, *Postmodern World*, *supra* note 2.

166. See, e.g., Mootz, *Ontological Basis*, *supra* note 15, at 568-96 (critiquing Jürgen Habermas's attempt to build a critical theory on the model of the Enlightenment).

167. Compare Tushnet, *Truth*, *supra* note 66, at 1309 with Mark V. Tushnet, *The Left Critique of Normativity: A Comment*, 90 MICH. L. REV. 2325, 2344-45 (1992) [hereinafter Tushnet, *Normativity*].

168. Tushnet, *Normativity*, *supra* note 167, at 2347; see TUSHNET, RED, WHITE AND BLUE, *supra* note 15, at 318.

169. Curiously, even while despairing of the apparent forced choice between radically particularized narratives and a unified, coherent and comprehensive normative rationality, Tushnet lets slip his own hopes for critical theory: "If normative discourse is to be displaced

Balkin argues that accepting individuals as trapped in social relations that are never the conscious design of members of society does not preclude the belief that we "could eventually learn to look at the world in different ways" through the encounter with texts, thereby curbing the potentially absolute effects of ideology.¹⁷⁰ In opposition to Tushnet's traditional conceptions of critique as the work of a critic, Balkin argues that deconstruction is a playful decentering that occurs within textual practice.¹⁷¹ At some point, the interpretation of a text settles into a legitimate conventional understanding for the simple reason that no subject can relentlessly push the critique farther from a supposed position outside the text. Deconstructive practice has boundaries because it is a historical practice, not because the "true" interpretation can ever be stated. Balkin wants to facilitate this bounded play of legal texts so that deconstructive practice might make inroads against the most pervasive debilitating effects of ideology. This goal of facilitation implies a general framework of action.¹⁷² However, in an effort to describe a critical practice that survives the unrelenting lessons of radical deconstruction, Balkin's latest work appears to fall back on a conception of social critique reminiscent of Tushnet's approach.¹⁷³ In a recent essay Balkin argues that a postmodern constitutionalism should be driven by an inquiry into the material determinants of social life embodied in the cultural era of postmodernity rather than becoming overly concerned with the epistemological themes of postmodern thought.¹⁷⁴ Balkin recoils from radical deconstruction by attempting to articulate a Tushnet-style critique that Tushnet himself has trouble describing.¹⁷⁵

Hutchinson and Schlag represent two very different perspectives that one seems compelled to choose between, given that there is no apparent means of avoiding the radicalization of the deconstructive attack on determinacy.

entirely, it will be replaced by something like sociology." Tushnet, *Normativity*, *supra* note 167, at 2330. Tushnet's conception of sociology appears woefully inadequate. See Mootz, *Materialism*, *supra* note 18, at 519 n.13 (citing MAURICE MERLEAU-PONTY, *The Philosopher and Sociology*, in SIGNS 98 (Richard C. McCleary trans., 1964)).

170. Balkin, *Ideology*, *supra* note 98, at 1157.

171. See, e.g., Balkin, *Deconstructive Practice*, *supra* note 78.

172. For instance, Balkin's critical review of Raoul Berger's defense of originalism seems premised on a belief that it is beneficial to abandon a theory that is impossible to carry out in practice, because this abandonment can itself affect practice. Balkin, *Constitutional Interpretation*, *supra* note 97. For my own discussion on this point, see Mootz, *Ontological Basis*, *supra* note 15, at 553-56.

173. See, e.g., Balkin, *Ideology*, *supra* note 98.

174. J.M. Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966 (1992). I criticize Balkin's approach in Mootz, *Materialism*, *supra* note 18.

175. See also J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105 (1993) [hereinafter Balkin, *Coherence*] (articulating a critique of ideology that would correct the co-optation of the legal subject).

Hutchinson argues against the view that ideology is a seamless web and promotes a democratic dialogue that will enable individuals to push against the seams of the oppressive matrix of power and domination.¹⁷⁶ Defiance by progressive individuals, ungrounded in a comprehensive normative critique, is all that the theorist can hope to inspire. Schlag is much more circumspect in drawing conclusions about critique. Because our world is a pre-given construct of social action, there is no means to transcend this situation through individual will. Yet, Schlag believes that cultivating a self-consciousness appreciation of social situatedness has political implications because the disruption of routinized behavior has the potential to be liberating.¹⁷⁷ Schlag regards the deconstructive displacement of the Langdellian subject as a prerequisite of liberating politics, and therefore as an event that should be fostered.¹⁷⁸

My assessment of the indeterminacy critique is that Balkin's efforts come closest to moving beyond the traditional problem of constraint. Balkin's deconstructive attention to legal texts promises to chart a path between privileging social scientific inquiry or surrendering to radical deconstruction. Balkin's failure to delineate this path more clearly arises from his failure to look deeper within the deconstructive experience and to recall that the Critic is always propelled out of an enveloping traditional pre-understanding that provides the backdrop for subsequent deconstruction. With this in mind, Balkin's project is best effectuated by concentrating first on our historical situatedness and then developing deconstructive critique as

176. HUTCHINSON, DWELLING, *supra* note 113, at 280. Hutchinson's critique of Stanley Fish relies on the effectiveness of theory to provide an account of the dynamics of power and ideology, and thereby to counsel both a political response (intersubjective dialogue in a participatory democracy) and an individual response (accepting the heretofore unexamined yet pervasive force of status quo prejudices in daily life). *Id.* at 154-57.

177. See Schlag, *Fish*, *supra* note 139.

178. I recognize that attributing to Schlag an implicit suggestion that we *should* do something would be rejected as misreading his attack against normativity, but the fact that Schlag continues to write law review articles establishes his commitment, at a minimum, to raising a critical self-consciousness of our inescapable situatedness in habit. See Margaret J. Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1020-27 (1991) [hereinafter Radin & Michelman, *Pragmatist*]. Richard Delgado defends Schlag and others with the claim that there is nothing self-contradictory about destroying normativity in a normative fashion because this strange state of affairs merely underscores that normativity is deeply inscribed in contemporary thought. Richard Delgado, *Moves*, 139 U. PA. L. REV. 1070, 1072-73 (1991). Delgado suggests that abstract normative legal thought should be replaced by particularized, concrete engagements with the exercise of bureaucratic control, again, of course, a normative injunction. Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 959-62 (1991). What I make of all this is that Schlag refuses to join Stanley Fish's lonely insulated outpost, and that at least to some degree Schlag's theoretical efforts must lead him to draw some conclusions about *appropriate* means of facilitating politics.

a feature of our historical character that also is a praxis that transforms the situation. By beginning with deconstructive practice rather than the condition of belonging that subtends and is never overwhelmed by deconstruction, Balkin commits a common error. Despite his awareness that all predispositions are not "ideological false consciousness" in need of enlightenment, his approach evokes a characterization of ideology as something to be eradicated, despite our inability to do so.¹⁷⁹

Balkin is not led astray too far by adopting this focus, but his work has proven vulnerable to radical deconstructionist challenges that are seriously deficient in describing legal practice. Hutchinson's advocacy of participatory democracy is forceful and appealing, but his vision of a democratic dialogue unmediated by texts appears quite naive. For example, in a recent article Hutchinson deconstructs the English Court of Appeal's decision in *Miller v. Jackson*¹⁸⁰ as revealing that even a clearly stated common-law rule—coming to the nuisance is no defense to the nuisance—in the end is utterly indeterminate.¹⁸¹ In *Miller*, the owners of a recently constructed home sought injunctive relief against an adjacent, long-established cricket club after being besieged by errant balls in their garden, but the plaintiffs were only awarded damages.¹⁸² Hutchinson deconstructs the three opinions to demonstrate that "legal doctrine is another combat zone over the terms and arrangements of social life."¹⁸³ The three judges strove mightily to disengage their rhetorical analysis from the political confrontation over which they presided,¹⁸⁴ but Hutchinson believes that their failure is transparent.¹⁸⁵

However, Hutchinson counsels against a "cheerless cynicism" in the wake of the indeterminacy of legal doctrine and instead seeks to transfer power from the purported autonomous citadels of reason, the courts, to the

179. Balkin properly notes that "ideological thinking is largely unavoidable for social beings" (why the qualifier "largely"?), because ideology "makes the content of legal doctrine intelligible to us and binding upon us." Balkin, *Ideology*, *supra* note 98, at 1138 & n.25. Later he is careful to note that, despite giving examples of dysfunctional "racial and sexual attitudes, I do not mean to suggest that all ideological structuring of thought and perception is in some way malignant." *Id.* at 1148 n.59. In personal correspondence Balkin has reaffirmed his rejection of the "pathological conception" of ideology, but my point is that Balkin's approach inevitably assumes what he knows to be untrue. Balkin focuses on deconstructing illegitimate ideological commitments and does not begin by attending to the ideological situatedness that, after all, will of necessity be the source of critique. See, e.g., Balkin, *Coherence*, *supra* note 175.

180. 1977 Q.B. 966 (C.A.).

181. Hutchinson, *Determinacy*, *supra* note 108, at 562.

182. *Id.* at 563.

183. *Id.* at 572.

184. *Id.* at 563.

185. *Id.*

“popular assemblies of democratic politics”¹⁸⁶ where “public policymaking can become a treasured creation of people’s own craft, and not the glossy product of legal chicanery.”¹⁸⁷ In Hutchinson’s view, the democratic solution to the problem in *Miller* had already been determined before the case reached the Court of Appeal.

Before the developers could proceed, they had to obtain planning permission. *This would have had to be granted in accordance with established regulations, formulated policies, and required procedures.* By ignoring this fact, the court substituted its own decision for that of the planning authorities. Moreover, it did so without troubling itself with either the details or reasoning of the planning authorities. The point, however, is not who made the “correct” or “right” decision; it is which is the most appropriate body, in terms of institutional competence and democratic legitimacy, to do the necessary balancing and compromising of competing interests. On both counts, a “less-than-ideal” municipal board is preferable to an “ideal-as-possible” judicial bench.¹⁸⁸

But this “solution” raises obvious problems. Hutchinson does not explain how the planning commission can determine what the “established regulations, formulated policies, and required procedures”¹⁸⁹ provide. To the extent that bureaucrats seek to apply various texts to a given situation they are subject to the same infirmities as judges. Nor does he explain, in the event that judicial review of the planning commission is required, how the judge can refrain from substituting his own opinion for that of the commission, when both the commission’s opinion and its conformity with established regulations are hermeneutically opaque. Planning commission members, like judges, profess to exercise discretion only in accordance with certain defined principles and within the ambit of authority established by governing rules. If Hutchinson’s argument simply is that indeterminacy leads him to prefer that political judgments be made by relatively local administrative boards rather than more distant judges, he still faces the problem that a hierarchical system of appeals to ensure the integrity of the political process at some point becomes judge-like in its form. The plea for judges not to substitute their judgment for that of administrative boards sounds as implausible to a modern scholar as the injunction that judges should implement the original intent of the provisions of the Constitution.¹⁹⁰ It is reckless to discard the textual tradition that is the source of

186. *Id.* at 574.

187. *Id.* at 575.

188. *Id.* at 575-76 (emphasis added).

189. *Id.* at 575.

190. Hutchinson’s rejection of the antidemocratic and elitist practice of judging is a response to a perceived indeterminacy that affects purely political actors no less than judges who pretend to be autonomous and neutral. Hutchinson’s critique would carry more weight if he proposed extremely localized units of government in which the community at large

the attributes of the Rule of Law, a tradition that we would still find necessary under a utopian democratic regime.¹⁹¹

Schlag's rejection of deconstructive practice in favor of a radical deconstruction that undermines all manner of jurisprudential normative commitment¹⁹² is even less helpful than Hutchinson's approach for describing legal practice. Schlag is unwilling to allow the play of the text to settle, because he views any such stasis as a relapse to an unreflective lethargy on the part of a sedimented subject.¹⁹³ Schlag regards the Rule of Law emphasis on good judgment with disdain. "Is good judgment here something more than a nice name for arresting certain potentially problematic lines of inquiry?"¹⁹⁴ Schlag's view is thus symptomatic of the false move of privileging the deconstructive moment rather than viewing deconstruction as emerging from a more fundamental mode of being. He regards the situated, historical interpreter with suspicion by emphasizing deconstructive transformation. Schlag's vague description of deconstructive politics provides no alternative to the conclusion that, when all is said and done, he too must be presuming an egocentric individual that unceasingly commits to push the deconstruction further, a conclusion that Schlag properly would reject as positing a context-free super critic.

Schlag contends that Langdellian subjectivity is embedded in prereflective cognitive structures that pre-figure our normative aspirations for legal practice,¹⁹⁵ but he does not make clear where he is standing when he makes this argument. If Schlag is constituted differently than other legal thinkers because the insatiable, co-opting Langdellian pre-figuration has loosened its grip on him, the important question is: What deconstructive event led to this transformation? Schlag's thesis is plainly, and ironically, stated: We must understand the unraveling Langdellian paradigm by trying

would gather as an Athenian super jury and decide all matters in dispute by equitable balancing, without reference to guiding texts. Otherwise, I am not sure that I see the difference between an elitist judge pretending to be neutral and an overtly political hack sitting on a town commission who equally pretends to act "in accordance with the established regulations." *Id.*

191. See Hutchinson & Monahan, *Democracy*, *supra* note 112, at 122 (arguing that general laws applied in a nondiscriminatory fashion are necessary to democracy, but drawing "a distinction between constitutional safeguards which constrain democratic activity in the name of democracy and those which constrain democratic activity in the name of 'right answers'").

192. See *supra* text accompanying notes 137-56.

193. Schlag scolds critical thinkers for reproducing a traditional liberal subject within their articulation of a critique, because the resulting relatively autonomous self then seeks refuge from the implications of the critique by "stopping" the critique like it would stop banging its head on the wall. "[T]he arrest of this critique always leaves a *stabilized, untroubled, unexamined* subject in place." Schlag, *Subject*, *supra* note 101, at 1643.

194. *Id.* at 1665.

195. See, e.g., Schlag, *Politics of Form*, *supra* note 110.

to understand our pre-figurations.¹⁹⁶ By effort of will, the theorist attacks her own (or preferably, some other theorist's) pre-figurations, resulting in a liberating deconstruction. As Balkin points out,

Deconstruction, which seems to efface the self, ultimately depends upon what it deemphasizes or denies—that is, the self. For only selves can put the self in question—there is quite literally no one else to do it. . . . Without preexisting values, purposes, or commitments, deconstruction cannot begin. With them, it can never be other than logocentric.¹⁹⁷

Schlag contends that traditional scholars, cls critical theorists, neo-pragmatists and neo-Burkeans similarly expose (by eliding) the “problem of the subject” because each presumes an epistemically, ethically, and politically competent Langdellian subject in their representations of legal practice.¹⁹⁸ The “problem,” of course, arises because Schlag rejects this image of a competent legal subject “operating the levers” of the legal system and suggests instead that the legal subject “*may* simply be rehearsing and reproducing the instrumentalist logic of bureaucratic practices” and thereby rehearsing “a false aesthetic of social life.”¹⁹⁹ Schlag ostensibly claims only to raise the problem of the subject, and not to provide a more realistic portrayal that would have political implications, because he believes that affirmative (normative) portrayals follow the deep prescribed ruts of traditional jurisprudence.²⁰⁰

Schlag attempts to radicalize cls-style deconstruction by subverting its continued reliance on outmoded images of the legal subject, but he begins and (never?) ends with deconstructive displacement. Balkin's sharpening focus on ideology critique exemplifies the repetitive subject/object dynamic criticized by Schlag, but also makes inroads in describing the situated experience of understanding. Balkin acknowledges that the opportunities opened up by any text are inevitably limited although theoretically unlimited, and he undoubtedly rejects the idea that self-contained subjects

196. Schlag, *Pre-Figuration*, *supra* note 150, at 977.

197. J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1629 (1990).

198. Schlag, *Subject*, *supra* note 101, at 1729 (“In each case, we find that the problem of the subject arises in the unwelcome recognition that the approach already presupposes the existence of a particular subject—and that this subject is nowhere to be found.”)

199. *Id.* at 1739.

200. This is symptomatic of Derrida's work, which implicates ethical and political questions, but (until recently) scrupulously insulates its core from the subterranean normative commitments underwriting his thinking. See RICHARD J. BERNSTEIN, *THE NEW CONSTELLATION: THE ETHICAL-POLITICAL HORIZONS OF MODERNITY/POSTMODERNITY* 172-229 (1991) [hereinafter BERNSTEIN, *CONSTELLATION*]. There is always a great deal to be gained by a startling challenge to complacency, but the ethical-political demands implicit in social action will not be put off forever. It is now time to begin working through these issues. This Article is a step down that path.

choose to deconstruct particular legal doctrines.²⁰¹ Although our pre-figurations evolve, Balkin would argue, we can never step outside of them and experience a purposeless deconstruction that does not bear the mark of the selves involved.²⁰²

The problem of constraint that challenges our faith in the Rule of Law is now in sharp focus. Tushnet's indeterminacy critique is insufficiently radical,²⁰³ but Hutchinson and Schlag derail our understanding of legal practice by radically undermining the textual practice of lawyering and judging.²⁰⁴ The problem of constraint leads us to question how the legal subject can create tradition rather than just passively mirror it, and how the theorist can promote a more authentic practice through critique. The critique of ideology must start with the ideological embeddedness that Schlag emphasizes in describing the problem of the subject²⁰⁵ and find a path to the deconstructive textual practice that Balkin outlines.²⁰⁶ This is the contribution of critical hermeneutics.²⁰⁷ Before pursuing the contribution of critical hermeneutics, though, I must introduce additional complexity by considering the problem of innovation.

B. *The Problem of Innovation*

The indeterminacy critique originated as a statement of the problem of constraint, but has now collapsed through radical deconstruction into a statement of the problem of innovation. Correspondingly, the problem of

201. It is instructive to consider Balkin's efforts to outline a legal semiotics. Balkin cautions against anxiety on the part of progressive thinkers at the thought that any rhetorical move in response to a legal issue can quickly be thematized as an utterly predictable invocation of a ubiquitous form of argument. In his view, legal semiotics simply acknowledges the *sine qua non* of the use of language, embeddedness in a particular language game, and does not undo the progressive impulse toward critique. At the same time, he cautions against conservative complacency because in fact we inhabit multiple "rhetorizable forms of normative discourse" that constantly present us with alternative perspectives that can be translated to new rhetorical structures within the legal language game, innovations that overcome and respond to the sudden recognition that legal discourse is in some way impoverished. J.M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831, 1846-52 (1991). Balkin's legal semiotics thus appear to embrace linguistic structuralism without embracing philosophical (ontological) structuralism.

202. See, e.g., Balkin, *Ideology*, *supra* note 98.

203. See generally discussion *supra* section II.A.1.

204. See generally discussion *supra* section II.A.3.

205. See, e.g., Schlag, *Subject*, *supra* note 101.

206. See generally discussion *supra* section II.A.2.

207. See Mootz, *Ontological Basis*, *supra* note 15 (developing a critical hermeneutics as a response to the subject/object bifurcation that was particularly evident in the law and literature movement of the 1980s).

innovation raised by Professor Grey²⁰⁸ ultimately reveals its core to be the problem of constraint. The problem of innovation is premised on the inability to discover or even to justify appropriate legal action on the basis of governing legal texts in certain cases. Grey provides an intriguing analysis of the problem of innovation in the context of constitutional law by arguing that it is only by recourse to an unwritten constitution that the constitutional project can sustain itself, at least with respect to certain kinds of constitutional disputes.²⁰⁹ Grey's thesis is straightforward: innovation is made possible by unleashing the interpretive project from the constitutional text.²¹⁰ In this section, I outline Grey's argument and then critically analyze it. On the basis of my assessments of the problem of constraint raised by the indeterminacy critique and of the problem of innovation raised by Grey's thesis on the unwritten constitution, in Part II I shall develop a critical hermeneutical approach to the Rule of Law.

1. The Unwritten Constitution and Innovation

The idea that judges simply use the legal values embodied in the constitutional text to resolve disputes is a foundational tenet of traditional legal theory that Grey first called "interpretivism" and now characterizes as "textualism."²¹¹ The countermajoritarian problem is no problem at all if judges merely interpret and carry out the commands of the people speaking through the Constitution or through their representatives in the legislature. Grey explains that the "great power and compelling simplicity" of this theory of adjudication derives from its ability to support "judicial review while answering the charge that the practice is undemocratic,"²¹² but he argues in response that it is too narrow and fails to "capture the full scope of judicial review."²¹³ Grey contends that legitimate constitutional adjudication properly goes beyond the interpretation of the constitutional text and involves the "judicial development of an unwritten, common law constitution."²¹⁴ Grey accepts the textualist's view that the written

208. See Grey, *Unwritten Constitution*, *supra* note 20, at 703.

209. *Id.*

210. *Id.*

211. Grey, *Scripture*, *supra* note 15, at 1. Grey replaced his earlier use of the term "interpretivism" with "textualism" to emphasize that the question is not *whether* judges should interpret, but *what* they should interpret. *Id.* Contemporary constitutional scholars distinguish the primary approaches to interpretation as originalism (the meaning of the Constitution is the meaning intended by the framers) and nonoriginalism (the Constitution has meaning only for the contemporary interpreter). Grey's use of "textualism" cuts across this distinction because whether or not one seeks out the framer's intent, one may remain committed to interpreting the *written* Constitution.

212. Grey, *Unwritten Constitution*, *supra* note 20, at 705.

213. *Id.*

214. Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 234 (1988) [hereinafter Grey, *Uses*]. Grey writes that "much American constitutional adjudication, including but not limited to decisions under due process liberty and the right

Constitution embodies certain normative values, but he contends that judges properly look to an "unwritten constitution" to elucidate and enforce normative values that are not found in the text of the Constitution.²¹⁵ The normative values of the unwritten constitution "come from such extra-textual sources as judicial precedent and the practices and ideals of social life."²¹⁶

Grey believes that it is critically important to justify judicial recourse to the unwritten constitution as a legitimate exercise of judicial review.²¹⁷ Otherwise, many cherished constitutional doctrines would be vulnerable in the face of a strict textualist philosophy of judicial review that requires the expression of constitutional values to be frozen by the text.²¹⁸ Grey finds the fact that practice has deviated so significantly from textualist theory to be revealing.²¹⁹ Because judges do in fact look beyond the constitutional text in constitutional adjudication, their practice should be acknowledged openly and its legitimacy defended. Judges currently feel compelled to hide their practice behind unconvincing uses of legislative history and strained readings of the constitutional text, but this serves only to destabilize and render even more vulnerable a large body of important constitutional doctrine.²²⁰ The principal advantages of openly embracing an unwritten constitution are twofold: To do so allows progressive thinkers to challenge conservative thinkers on the merits of their respective visions of social life, and also connects constitutional adjudication with contemporary social values by freeing the judge from the limitations of the text.

Given the recent rise of conservative constitutionalism, Grey argues that the survival of progressive legal thought depends on abandoning the deceptive belief that all constitutional adjudication is and must be textualist.

Post-New Deal liberals can argue against this right-wing constitutional vision on the ground that it gives a bad version of our *unwritten* constitution, one grossly inconsistent with our present best aspirations for the American future. Or we can confine ourselves to an interpretive debate within the terms of the *written* constitution, a constitution that was written by men who did regard

of privacy, involves the interpretation of an unwritten and essentially common law constitution, which supplements the primarily authoritative and essentially statutory written one." *Id.* at 211.

215. *Id.*

216. Grey, *Scripture*, *supra* note 15, at 5. Grey also describes the unwritten constitution as being "made up of certain constitutional customs and practices, and their associated values and ideals." Grey, *Uses*, *supra* note 214, at 211.

217. Grey, *Unwritten Constitution*, *supra* note 20, at 706.

218. *Id.* at 710-13. Of course, the line of cases uppermost in Grey's mind are the privacy cases culminating in *Roe v. Wade*. Grey, *Scripture*, *supra* note 15, at 5; Grey, *Unwritten Constitution*, *supra* note 20, at 703-04. Grey's question of whether we have an unwritten constitution was first posed in 1975 in the wake of the critical reception of *Roe v. Wade* by constitutional commentators. *Id.*

219. *Id.* at 710-14.

220. *Id.* at 705-06. *Contra* Andrew Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990).

private property rights as sacred, and redistributive democratic excesses as a primary threat to republican forms of government. . . . [A]ny approach that confines itself to the text as the exclusive source of constitutional rights is handicapped in debating against libertarian activist constitutionalism.²²¹

This is the point that Grey makes against Richard Epstein's controversial interpretation of the Fifth Amendment requirement of just compensation for governmental takings.²²² Epstein purports to employ a strict constructionist methodology that looks to the literal meaning of the words in the text, when in fact he reads into the constitutional text a Malthusian tenet that the poor are simply to be left to their fate.²²³ If one accepts Epstein's claim that the text is the sole source of the applicable normative values to be employed by judges then it might be difficult to counter his stringent prescriptions, but this is precisely the concession that Grey is unwilling to make. It is not irrelevant that there is an "unbroken consensus of American constitutional history in favor of public duties to the poor,"²²⁴ and Grey criticizes Epstein for ignoring this "complex tradition—one that includes, beyond constitutional text and case law, American constitutional theory, common law doctrine, and the principles of private right as the theorists of classical liberalism expounded them."²²⁵ Released from the obligation to couch his arguments in textualist language, Grey believes that he can demonstrate the poverty of Epstein's constitutional understanding and his lack of constitutional vision.²²⁶

The desire to advance the cause of progressive politics is insufficient to justify judicial recourse to the unwritten constitution, but Grey also makes a stronger claim. Grey views the unwritten constitution as the only legitimate means of connecting constitutional decision-making with current social values.

When we connect governmental processes to common understanding in this way, we take a step in the direction of making government less opaque, and hence toward pulling elites and masses together into a genuine public. The concept of the unwritten constitution can supply a modest nudge toward achieving or restoring this connection²²⁷

Grey's pragmatic political aim is to foster a convergence between the law and community values. Using an activist judiciary to accomplish this goal is necessary only in the short term. Judicial enforcement of the unwritten constitution is a prelude to the republican ideal of a citizenry directly engaged in a community discourse that determines matters of public morality and justice.²²⁸

221. Grey, *Uses*, *supra* note 214, at 235-36.

222. Thomas C. Grey, *The Malthusian Constitution*, 41 *MIAMI L. REV.* 21 (1986) [hereinafter Grey, *Malthusian Constitution*] (reviewing RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985)).

223. *Id.* at 25-27, 47.

224. *Id.* at 44.

225. *Id.* at 48.

226. *Id.*

227. Grey, *Uses*, *supra* note 214, at 234.

228. *Id.* at 237-38.

Limiting constitutional discourse to the text of the Constitution would create an expanding gap between citizens and the increasingly technical and arcane divination of constitutional meaning.

Grey recognizes that his argument for explicit innovation by judges in response to changing social contexts is dramatically opposed to the received wisdom of textualism. It is not enough to argue that the ground rules of constitutional discourse should be changed so as to give the upper hand to progressive thinkers, nor is the linkage of law and current social values a self-evident goal when such a linkage threatens to dissolve the textual restraint that serves to defuse the countermajoritarian difficulty. Traditional legal thinkers would assert that Grey ventures down the wrong path on the very first page of his seminal article on the unwritten constitution, where he describes the question of whether judges can enforce normative principles not found in the constitutional text as second in importance only to justifying the very practice of judicial review.²²⁹ That, critics would argue, is the point of textualism: judicial review is justified only on interpretive grounds; by looking to an unwritten constitution a judge surrenders any claim to legitimacy in our democratic polity. Grey's response to this foundational question is ironic. He asserts that the constitutional text itself authorizes resort to an unwritten constitution, although the written text cannot guide the resulting articulation of extra-textual constitutional principles.²³⁰

Grey acknowledges that the legitimacy of the unwritten constitution is a historical question about constitutional text and practice, but argues that the evidence supports the view that "there was an original understanding, both implicit and textually expressed, that unwritten higher law principles had constitutional status."²³¹ Grey argues convincingly that American revolutionary constitutionalism was influenced heavily by the English tradition of fundamental law as well as Enlightenment legal and political philosophy centered on the natural rights of citizens to consent to the terms of governance.²³² Grey views the strong textualist tenor of Chief Justice Marshall's opinion in *Marbury v.*

229. See Grey, *Unwritten Constitution*, *supra* note 20, at 703.

230. Grey, *Uses*, *supra* note 214, at 211-12, 221 (arguing that the Ninth Amendment, properly read, authorizes resort to unwritten normative values as part of constitutional adjudication). The Ninth Amendment is not sufficient authority on its face, however, because an argument can be made that the rights reserved to the states and the people respectively were not intended to be judicially enforced. See Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 850 n.24 (1978) [hereinafter Grey, *Origins*]. Grey then moves outside the text again and uses the practice and theory of constitutional adjudication in pre- and post-revolutionary America to justify his reading of the text. Grey ultimately argues that the constitutional text, interpreted in light of extra-textual factors, legitimizes extra-textual interpretation. This certainly is not a powerful argument justifying his approach on traditional grounds. Grey, *Malthusian Constitution*, *supra* note 222, at 25-27, 47.

231. Grey, *Unwritten Constitution*, *supra* note 20, at 717.

232. See Grey, *Uses*, *supra* note 214, at 211-12.

*Madison*²³³ as an aberration that has slowly come to represent the prevailing ideology of judicial review.²³⁴ This move to textualism runs contrary to the framers' dedication to fundamental law and is tempered by the fact that the courts have continued to enforce unwritten fundamental law in spite of the textualist dogma.²³⁵ Although religious-based natural law principles have yielded over time to socially contingent secular values, the fundamental law tradition is carried forward today in the "acceptance of the courts' additional role as the expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution."²³⁶ Grey presents textualism as a deviant view of constitutional practice that has never successfully ousted underlying support for the enforcement of fundamental law. After reviewing the historical record, Grey argues that it is

233. 5 U.S. (1 Cranch) 137 (1803).

234. Grey, *Unwritten Constitution*, *supra* note 20, at 707; Grey, *Uses*, *supra* note 214, at 217-20; Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1167-76 (1987) (tracing this evolution in much greater detail). Sherry's article was written in response to a question explicitly left open by Grey: the impact that the "new practice of establishing a written constitution" had on the undeniable "place of unwritten law in constitutional theory" at the time of the revolution. Grey, *Origins*, *supra* note 230, at 893. Sherry acknowledges that the birth of true constitutionalism in 1787 somewhat tempered the fundamental rights legacy of the "English opposition theory and post-Revolutionary American practice," but argues that the historical record is plain that the framers "never intended to displace the prior tradition of multiple sources of fundamental law" with a written Constitution bearing exclusive legitimate authority. Sherry, *supra*, at 1128. "The innovation of the summer of 1787 was to explain why a written constitution was a part of fundamental law, not to redefine the whole of fundamental law." *Id.* at 1157.

235.

The Aristotelian dialogue [between appealing to the written law and appealing to unwritten notions of justice] in our constitutional law is played out around the issue of whether the formal enacted Constitution, conceded to be legally supreme, is the *exclusive* legitimate source of judicially enforceable constitutional law. Our judges have, as a matter of unarguable historical fact, developed a body of unwritten constitutional law—doctrine whose normative content cannot be derived from examining the language of the Constitution or investigating the intent of its framers.

Grey, *Origins*, *supra* note 230, at 844.

236. Grey, *Unwritten Constitution*, *supra* note 20, at 706. Grey distinguishes his view from the textualist position by comparing the legal effect of written contracts and written wills. Grey, *Uses*, *supra* note 214, at 223-30. Courts regard written contracts as a memorialization of an unwritten agreement, and, subject to the strictures of the parol evidence rule, they will look beyond the writing to find what the Uniform Commercial Code terms the "bargain of the parties in fact." U.C.C. § 1-201(3) (1990). In contrast, courts view the written will as the sole source of determining the testator's intentions, and will rarely look to the unwritten intent even if it is proven with clear and convincing evidence. Grey, *Uses*, *supra* note 214, at 221-30.

The analogy illuminates Grey's thesis, but it is misleading. Contract interpretation goes beyond the writing because courts are searching out the intent of the parties at the time they entered into an agreement. This analogy to the Constitution would suggest that judges properly look outside the words of the text to recover the framers' values, and that the unwritten constitution is properly used only to enforce original intent. Beyond the analogy to contract interpretation it is necessary to defeat originalism which, like textualism, offers a deceptively strong argument to address the countermajoritarian problem.

the proponents of textualism, and not the proponents of an unwritten constitution, who must meet the heavy burden of justifying their position.

Having established the unwritten constitution as a legitimate source of constitutional law both historically and in current practice, Grey pulls back from the obvious conclusion to his argument: that the courts are always empowered to enforce the fundamental law of the unwritten constitution. Characterizing textualists as those who assert that the constitutional text is the sole legitimate source of operative norms for constitutional decision-making, Grey characterizes his own position as something less than a negation of textualism. He views judges as "supplementers" who must always start with the text but may find the need to later move beyond the text.²³⁷ Supplementers searching for the normative basis of a decision see the text

as the overriding source where it speaks clearly, but supplemented by an unwritten constitution made up of principles that underlie precedent and practice as seen from the perspective of the present. The text itself authorizes resort to these unwritten sources through provisions like the ninth amendment and the due process clauses.²³⁸

To clarify the limited scope of supplementation, Grey draws an analogy to the parol evidence rule in contract law and argues that the courts should supplement the Constitution as they would any partially integrated writing.²³⁹ Because the Constitution serves as a final statement of at least some terms of the fundamental law, the judge must determine whether the alternatives offered by extrinsic sources contradict the text or merely supplement the text.²⁴⁰ If the former holds, supplementation is illegitimate; if the latter holds, supplementation is appropriate.

The judge, then, must first interpret the written text to determine if she is permitted to consider the unwritten constitution. Grey does not address the complex problem raised by this interpretive two-step: ensuring that the values contained in the text are not contaminated in the first instance by the judge's vision of contemporary values. Grey has no dispute with theorists who view interpretation broadly, but he insists that there is a limit to interpretation and that it is only when textual interpretation runs out that the judge is empowered to look to precedent, policy, and contemporary social values in reaching a decision. An originalist would argue that all terms of the written text carry a certain meaning, namely the meaning that the drafters intended to convey when they used the terms, but Grey disavows originalism even after expending a great deal of energy

237. In Grey's view, the question is "whether at some point judges rightly shift their interpretive focus outside the text altogether." Grey, *Uses*, *supra* note 214, at 221.

238. *Id.* at 221.

239. *Id.* at 223-33.

240. The parol evidence rule prevents a party from introducing evidence of an alleged term of an agreement if the term is not reflected accurately in a writing that either constitutes the complete and exclusive statement of the agreement of the parties, or that sets out the final expression of that term of their agreement, unless the term to be proven by the proffered evidence is consistent with the terms set out in the writing. U.C.C. § 2-202 (1990); RESTATEMENT (SECOND) OF CONTRACTS § 216 (1979).

to demonstrate that the founders did not envision the written Constitution as a complete enumeration of fundamental law.

Grey would permit a common-law-style inquiry into fundamental law by reconciling past decisions and the practices and ideals of contemporary social life only if interpretation does not reveal a governing textual meaning. But it seems clear that past decisions and contemporary values inform every interpretation, and that recourse to the unwritten constitution adds nothing. The explicit debate with conservatives on the merit of their vision of social life is just as easily carried out in the process of interpretation—assuming the rejection of both the plain meaning doctrine and originalism—as it is in reference to the unwritten text of fundamental law. As Grey's critics argue, once the values that Grey ascribes to the unwritten constitution are deemed legitimate considerations for interpreting the text, the idea of then turning to the unwritten constitution appears pointless.²⁴¹ Grey's approach seems to add nothing to the usual work of interpretation.

241. Michael Moore contends that by retreating to merely supplementing the text rather than ignoring it, Grey admits that there is an important difference between interpretive review and noninterpretive review and that noninterpretive review is not really legitimate. Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 110-14 (1989) (claiming that Michael Perry also has recanted his noninterpretivist position). Moore argues that even vague terms like "liberty" implicate a limited range of values—the court cannot talk about just any values—and, as a moral realist, he believes that "courts ought to seek the true nature of equality and liberty when they interpret clauses referring to such values." *Id.* at 138; see Michael S. Moore, *The Interpretive Turn in Modern Theory, A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989). Although Moore's focus on the text is correct, his attempt to defend the theory that there is some state of affairs in the world that is captured by the use of the word "liberty" obviously is not responsive to the lessons of postmodernism. Radin, *Reconsidering*, *supra* note 2, at 810-12.

In an exchange with Grey in a symposium on the Ninth Amendment, Andrzej Rapaczynski argues that Grey finds the need for an unwritten constitution only because he narrowly defines what constitutes the text. Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI.-KENT L. REV. 177, 190-91 (1988). Supplementers are just "true interpreters," and Grey's concern with maintaining the integrity of the written text by positing the unwritten constitution is the result of misplaced fear: "To say that there are no absolute constraints, or that the text *by itself* does not constrain, does not mean that 'anything goes.'" *Id.* at 198-99.

Finally, Michael Perry defends the similarities of legal and biblical hermeneutics in the wake of Grey's critique by arguing that the text is the site for the mediation of tradition and community. Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551, 566-68 (1985) [hereinafter Perry, *Authority*]. Perry's focus on the text is part of his own retreat from the noninterpretivist thesis of MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 101 (1982) (arguing that judicial review is the "institutionalization of prophecy" that goes beyond the realm of text and history and into the realm of articulating fundamental social values). Both scripture and the Constitution share the qualities that all texts have; they are at once prophetic and commemorative. "The polity must respond to the incessant prophetic call of the text, must recall and heed the aspirations symbolized by the text, and thus must create and give (always-provisional, always-reformable) meaning to the text, as well as take meaning from it." Perry, *Authority*, *supra*, at 564.

I share these commentators' response to Grey's approach: the unwritten constitution thesis doesn't do any work for us and it only raises problems. It is better to confront head-on the hermeneutical issue that forms the core of the question of legitimacy in constitutional law, and to let the chips fall where they may.

2. The Unwritten Constitution and the Limits of Interpretation

Grey distinguishes his position from other apologies of expansive judicial review because he takes the idea of an unwritten constitution seriously. Judges do not divine particular constitutional decisions from the broad provisions of the text; instead, they simply look elsewhere when the text is insufficient to provide guidance. Grey challenges hermeneutical approaches to interpretation that struggle mightily to trace progressive decisions to the constitutional text as a means of legitimating judicial exercise of power. Grey does not quarrel with the political goal of advancing the legitimacy of judicial protection of individual rights, but he believes that modern theories of interpretation simply are incapable of bringing the full range of judicial practice under the rubric of interpreting the written text. Hermeneutics attempts to achieve too much in the battle against narrow textualism. Supplementing the written Constitution does not displace the text as a repository of values, but instead merely grafts onto constitutional adjudication a distinct source of decision-making that assists judges in keeping the law in touch with deep-seated community values.

Grey recognizes that contemporary hermeneutics rejects the stark distinction between the textualist's claim that the text is the sole legitimate source of operative norms and the supplementer's claim that there is an unwritten constitution implicit in the precedent, practice, and conventional morality surrounding the text.²⁴² Rejectionists want to expand the conventional understanding of interpretation, thereby broadening the possibilities of meaning opened by the text, but Grey believes that these unrealistic efforts are counterproductive.²⁴³ The hermeneuticist argues that constitutional doctrines

that lack obvious support in the text are not drawn from outside it; they come from it, but in a *sophisticated* way. And those who cannot follow the subtle exegetical path from the doctrines back to the text are disabled by interpretive attitudes that are rigid, mechanical, crabbed and arid.

242. See Grey, *Scripture*, *supra* note 15, at 1-2 (discussing Hans-Georg Gadamer's sophisticated hermeneutics). The rejectionist position in legal theory is similar to the rejectionist position in religious interpretation that seeks to mediate the interpretive disputes between Catholics, who view tradition as a separate source of revelation, and Protestants, who view scripture as the sole legitimate source of revelation.

Constitutional rejectionists urge a similarly ecumenical dissolution of the dispute over whether judges should recognize an unwritten constitution. Rejectionists say that it is wrong to imagine the text as a source of law separate from case law and public morality. In their view, all constitutional law is founded on exegesis of the text (scripture); yet that text is always read in a context established by precedent and the shared ideals of the community (tradition). There is no way to separate the two "sources", hence no way to exclude the second.

Id. at 13.

243. *Id.*

But somewhere in the development of flexible, organic, expansive, lush modes of interpretation comes the transformation of the textualist into a rejectionist. The point is no longer that the interpreter must stick to the text because nothing justifies going beyond it, but rather that the text, read with sufficient interpretive imagination, supplies all that anyone could possibly need. The interpreter begins to justify in textual terms results that so little follow from any ordinary meaning of the words that critics increasingly see not interpretation of any kind, but concealed legislation.²⁴⁴

Grey believes that the rejectionist approach developed in literary criticism is not fruitfully applied to legal texts because legal texts play different roles in society than literature.²⁴⁵ Similarly, he discounts the once budding movement to draw an analogy between the Constitution and religious scripture, under which judges act as “a guild of priests, who draw out the deep meanings of the sacred document by esoteric hermeneutic methods,” due to the fundamental differences between scripture and Constitution as texts.²⁴⁶ At bottom, Grey’s argument against the hermeneutical attempt to revise and loosen traditional textualism rests on his belief in the hermeneutical autonomy of legal texts.

Rejectionists adopt the commonsense view that “all constitutional law is founded on exegesis of the text (scripture); yet that text is always read in a context established by precedent and the shared ideas of the community (tradition).”²⁴⁷ Neither source of meaning lays claim to sole authority because “[t]here is no way to separate the two ‘sources’, hence no way to exclude the second.”²⁴⁸ But Grey rejects the rejectionist perspective when applied to legal texts. Unlike literature and scripture which are viewed as figurative or symbolic works, legal texts are written to provide relatively definite and certain guidance and are intended to be interpreted literally. Grey argues that legal texts simply are not susceptible to the playful exploration of ambiguities that take place when reading literature, nor to the elucidation of the “mythical expression of a fundamentally mysterious and

244. *Id.* at 8-9 (footnotes omitted).

245. *Id.* at 2. As discussed below, Grey badly misreads Gadamer when he presumes that Gadamer is simply comparing literary and legal hermeneutics. Gadamer’s project is to look behind the presumed separate modalities of interpretation to the nature of the interpretive activity itself, and Gadamer specifically rejects the methodological self-understanding of literary as opposed to legal hermeneutics. Of course, Gadamer readily accepts that there are differences between legal and literary texts. See Hans-Georg Gadamer, *Text and Interpretation* (Dennis J. Schmidt & Richard E. Palmer trans.) [hereinafter *Gadamer, Text*], in *DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER* 21 (Diane P. Michelfelder & Richard E. Palmer eds., 1989) [hereinafter *DIALOGUE AND DECONSTRUCTION*]; Francis J. Mootz III, *Legal Classics: After Deconstructing the Legal Canon*, 72 N.C. L. REV. (forthcoming 1994).

246. Grey, *Scripture*, *supra* note 15, at 23; see also Grey, *Uses*, *supra* note 214, at 222.

247. Grey, *Scripture*, *supra* note 15, at 13.

248. *Id.*

literally inexpressible reality” that constitutes biblical hermeneutics.²⁴⁹ Judicial review is premised on the “definite and objective character of a written constitution.”²⁵⁰ Literary and biblical hermeneutics suggests a model for a capacious reading of the Constitution, but such an approach ignores the legal significance of the text and the requirement that it be read literally.²⁵¹ Consequently, hermeneutics cannot save legal texts by enlarging our conception of interpretation. In some cases it will be necessary to move outside the legal text to a nonlegal and unwritten social repository of values in order to articulate the proper legal rule.

3. Assessing the Unwritten Constitution Thesis

Grey’s project ostensibly is an attempt to address the problem of innovation, a problem that plainly was the motivation for the first article in which he advocated the unwritten constitution thesis. The then recently decided case of *Roe v. Wade*²⁵² was igniting a firestorm because it was perceived to be an illegitimate exercise of judicial authority, albeit an exercise of authority that could be defended on social policy grounds. Grey’s response was a simple one. When the courts define and protect fundamental rights, they properly are developing sound social policy on the basis of tradition and current social values, and so a decision like *Roe* is justified regardless of the fact that it lacks any basis in the text of the Constitution.²⁵³ Grey believes that single-minded reliance on a text for the source of legal norms plays into the hands of conservative forces who seek to maintain a legal structure out of touch with developing community values. Because rendering the law contemporary is something other than applying the written rule, the Rule of Law must be abandoned to some degree in order to preserve the legitimacy of government. By shifting the interpretive focus to an unwritten constitution, innovation is facilitated and legitimacy is preserved.

It is apparent that Grey’s use of an unwritten constitution to secure innovation is a limited strategy that on its own terms will be unsuccessful. First, Grey’s thesis extends only to constitutional interpretation because he believes that the constitutional text authorizes the use of an unwritten constitution. Grey does not address how statutory interpretation or common-

249. *Id.* at 16.

250. *Id.* at 15.

251. Grey acknowledges by reiterating a few “banal slogans” that interpretation is always contextual and purposive, Grey, *Uses*, *supra* note 214, at 214, but views this process of interpretation as being distinct from supplementing the Constitution’s meaning with modern values. “Supplementing the written constitution is something more than reading it in context.” *Id.* at 234.

252. 410 U.S. 113 (1973).

253. See, e.g., Grey, *Unwritten Constitution*, *supra* note 20.

law interpretation should be conducted in a manner that fosters innovation. In support of the unwritten constitution Grey dismisses the usefulness of contemporary hermeneutics, but it seems clear that there is no "unwritten statute" or "unwritten precedent" that obviates the need for a sophisticated understanding of statutory and common-law interpretation. Curiously, Grey contends that the unwritten constitution is interpreted in a common-law manner, but he does not explain how the common law innovates in the face of precedent or maintains doctrinal coherence over time. Grey's thesis defers the problem of innovation and legitimizes only the most rarified exercise of judicial power in articulating fundamental constitutional rights. The difficult hermeneutical work remains to be completed after Grey is finished.

Additionally, Grey contradicts his underlying premise when he pulls back to the position that the unwritten constitution can only supplement but not displace the written Constitution. A strong motivating factor for adopting the view that interpretation at times will move outside the text was Grey's effort to circumvent the conservative values ensconced in the constitutional text. Grey contends that if the interpretive debate is carried out only within the confines of the text, modern social values will not be realized in the law.²⁵⁴ However, by limiting the use of the unwritten constitution to cases where the constitutional text is silent, no ground is gained in the battle against conservatism. Because the unwritten constitution can never supplant outmoded values supposedly expressed in the text, one must question its usefulness as a method of dealing with the problem of innovation. More importantly, in every case the more fundamental interpretive question will remain: does the text embody values that must be given preference over extrinsic values? In modern contract law analysis the parol evidence rule has been largely displaced by the question of interpretation,²⁵⁵ but Grey attempts to employ a model based on the parol evidence rule without first addressing what it means to interpret the Constitution.

Grey rejects a hermeneutical approach to legal texts only because he has an unrealistic conception of the nature of legal texts. Just as the early indeterminacy critique proclaimed the indeterminacy of law based on a narrow view of law in contradistinction to society, so too Grey construes legal texts as words on a page that import certain values.²⁵⁶ Grey draws

254. See Grey, *Scripture*, *supra* note 15, at 15.

255. See, e.g., *Hershon v. Gibraltar Bldg. & Loan Ass'n*, 864 F.2d 848 (D.C. Cir. 1989) (Williams, J. dissenting); *Berg v. Hudesman*, 801 P.2d 222 (Wash. 1990).

256. See *supra* note 60. Grey defends the distinct character of legal documents in terms of the need to legitimate judicial review. "Much of the rhetoric justifying judicial review invokes the definite and objective character of a written constitution," and although one cannot ignore the inevitable complex impact of context and purpose in interpretation, the interpretive conventions surrounding the Constitution ensure that it will never be an open-

a clear distinction between the world of the text and the social world, but he does not discuss how certain norms are “in” the text, “outside” the text, or even if some norms exist only in the mind of the interpreter. Grey regards the written Constitution as only a partial elucidation of the unwritten constitution of society.²⁵⁷ Grey errs by concluding that the text and social values are distinct realms, requiring the judge at some point to redirect her interpretive focus away from the text. Although it would be foolish to argue that the text is coextensive with social values such that it serves as a transparent lens on society for the reader, it is equally suspect to claim that an interpreter will first work with the text to the extent possible and only then turn to nontextual sources of values. The legal text is not just read within a particular context and against a particular tradition, it is constituted by context and tradition in a way that renders the text inseparable from them. The problem with the unwritten constitution is that there is no there there.

Although ostensibly addressed to the problem of innovation, Grey’s work reveals at its core the problem of constraint. He argues against hermeneutical approaches that undermine the distinct character of legal texts and proposes instead a separate unwritten constitution that serves as the safety valve of innovation without disturbing the textual core of restraint. The problem of innovation arises because the text embodies values that restrict the judge’s ability to render the law contemporary. However, lurking in the background is Grey’s real concern: addressing the problem of constraint by preserving the defining characteristics of legal texts. This preservation is accomplished by directing the interpretive focus outside the autonomous text. In Grey’s estimation, modern interpretive strategies threaten to turn the Constitution into a symbol that is at once expressive of everything and nothing.²⁵⁸ He believes that this may be acceptable for religious and literary texts,²⁵⁹ but argues that legal texts are different.²⁶⁰ Ultimately, the lack of constraint threatened by the indeterminacy critique of language leads Grey to justify innovation with an unwritten constitution. Despite this unstated motivation, Grey’s thesis in fact exacerbates the problem of constraint because he offers no guidance to judges about how they can determine whether the text embodies certain values that supersede the unwritten constitution. Because there is no determinate rule governing the judge’s decision to shift her interpretive focus outside the text, the abandonment of the text can never be criticized. Grey’s use of the unwritten constitution does not secure a stable role for the written Constitution.

ended symbolic gesture like a poem or scripture. Grey, *Scripture*, *supra* note 15, at 15.

257. Grey, *Scripture*, *supra* note 15, at 16.

258. See, e.g., Grey, *Unwritten Constitution*, *supra* note 20.

259. See, e.g., Grey, *Scripture*, *supra* note 15.

260. See, e.g., Grey, *Uses*, *supra* note 214.

Instead, it undermines his attempt to maintain the integrity of the written text separate from the vagaries of recognizing fundamental rights.

C. Rethinking the Rule of Law Hermeneutically

The problems of constraint and innovation are complex and paradoxical. Deconstructive readings of the indeterminacy critique begin with a critique of objective legal doctrine and undercut the possibility that the legal system can be sustained in a neutral manner. However, the indeterminacy critique grows ever more corrosive by displacing the legal subject entirely and contending, in its most radical form, that the ideological instantiation of the individual in a constitutive network of social relations virtually precludes the possibility of effective critical theory and authentic interpretive practice. Professor Grey's defense of the unwritten constitution as a legitimate focus of interpretation follows a similar path. Grey's thesis grapples with the problem of innovation, but at bottom his approach is premised on the need to preserve the legal text as a distinct form of text that embodies values apart from those suggested by the historical development of precedent and social values. The problems of constraint and innovation, then, collapse into one another. The apparent freedom of doctrinal indeterminacy leads to the recognition of the stifling constraints of ideology, while demand for a legitimate means of innovating within the law by drawing upon the unwritten social text of normative values appears to privilege the written text so as to sustain it as a separate repository of constraining values.

Grey and the deconstructionists reflect two different currents in contemporary legal theory that are unsatisfactory responses to the destabilizing import of post-Enlightenment thought. Grey acknowledges that the written Constitution is incapable of serving as a self-contained rule-book, and so he promotes the unwritten constitution as a safety valve that preserves the written Constitution as a determinate, if not comprehensive, set of rules. Deconstructionists, on the other hand, openly embrace post-Enlightenment conceptions by arguing that the text is utterly indeterminate, although the interpreter is a product of constraining social forces. Neither approach assimilates post-Enlightenment thought to the practice of law in a manner that provides a realistic description. It is important to reconcile the antifoundationalist premises of post-Enlightenment thought with the practice of law in a more satisfactory way. In doing so it will become apparent that the Rule of Law is not undermined, although the traditional understanding of the Rule of Law must be corrected. In Part II, I describe the usefulness of critical hermeneutics for pursuing this task.

With the problem identified and my goal established, it is appropriate that I offer a more detailed justification for my project. Why bother to rethink the Rule of Law, a critic might ask, given that the Rule of Law is a prominent relic of the Enlightenment predisposition that I am placing in question? It is necessary to *rethink* the Rule of Law because it is impossible to *abandon* it, just as we must rethink our Enlightenment predispositions

because it is impossible to discard them as if they were yesterday's news. The citizens of the West are, one and all, children of the Enlightenment. Post-Enlightenment thinking is an effort to rethink the encrusted concepts of the Enlightenment, and in that respect carries forward the Enlightenment.²⁶¹ I find it to be absolutely mystifying that any legal scholar would question the value of discussing the Rule of Law (as opposed to questioning the value of the received wisdom), as if we might begin to practice law oblivious to the concept of the Rule of Law. A critic who argues that my desire to recuperate the Rule of law displays ideological bias would be correctly describing the situation, but, as I shall discuss in the next Part, would also be missing the point entirely. The question is not *whether* we should rethink the Rule of Law, but rather *how* we should press forward on a path of thinking already long underway.

III. WRITTENNESS AND THE RULE OF LAW

In Part II, I undertake my affirmative project of rethinking the Rule of Law hermeneutically. I demonstrate that contemporary hermeneutics is a challenging post-Enlightenment philosophy that holds particular significance for jurisprudence. I begin with a parable about the power of the written word and then present a brief intellectual history of Hans-Georg Gadamer's philosophical hermeneutics.²⁶² Philosophical hermeneutics provides the

261. Hans-Georg Gadamer, *Letter to Dallmayr* (Richard E. Palmer & Diane P. Michelfelder trans.), in *DIALOGUE AND DECONSTRUCTION*, *supra* note 245, at 93, 99-100 [hereinafter Gadamer, *Letter*].

In Heidegger, the word "*Destruktion*" never means destruction but rather dismantling [*Abbau*]. Its purpose is to take concepts that have become rigid and lifeless and fill them again with meaning. . . .

. . . *Destruktion* is always a process of criticism directed at concepts that no longer speak to us. . . .

. . . .

The goal of *Destruktion* is to let the concept speak again in its interwovenness in living language.

Id.; see also OTTO PÖGGELER, *MARTIN HEIDEGGER'S PATH OF THINKING* 37 (Daniel Magurshak & Sigmund Barber trans., 1987) (characterizing Heidegger's analytic of experience in *Being and Time* as concluding, "If Dasein is essentially historical, then . . . only in recapitulating tradition does the question of Being achieve its 'true concretion'. . . . This recapitulation is 'destruction,' an exposing of the primordial experiences and the secret prejudices of the traditional interpretation of Being." (footnote omitted)); David E. Linge, *Editor's Introduction* [hereinafter Linge, *Introduction*] to HANS-GEORG GADAMER, *PHILOSOPHICAL HERMENEUTICS* at xi-lv (David E. Linge ed. & trans., 1976) [hereinafter GADAMER, *PHILOSOPHICAL HERMENEUTICS*] (arguing that Gadamer establishes that the task of hermeneutical reflection "is to hearken to and bring to language the possibilities that are suggested but remain unspoken in what the tradition speaks to us. This task is not only universal—present wherever language is present—but it is also never finished.").

262. Gadamer's principal works are HANS-GEORG GADAMER, *DIALOGUE AND*

framework for critiquing and moving beyond the approaches adopted by Grey and the radical deconstructionists. Constraint and critique both are features of our written legal practice. Critical legal hermeneutics highlights these features as part of an inquiry into the manner of understanding. I then address a challenge confronting my hermeneutical perspective. Against the criticism that hermeneutics presumes a hermeneutically unified community, I assert the ubiquity of our linguistically mediated tradition, which in principle admits of no boundaries or closed horizons. Finally, the question of personhood raised in *Roe v. Wade*²⁶³ serves as an illustration of the lessons of critical hermeneutics.

A. A Parable of Writtenness

The Rule of Law is realized in the writtenness of law. Before reflecting on this idea it might be helpful to relate a parable about the power of the written word. The parable is borrowed from Aleksandr Solzhenitsyn's thoughtful novel, *The First Circle*.²⁶⁴ The events in Solzhenitsyn's story occur in post-World-War-Two Soviet Russia. The protagonists are prisoners in the Soviet prison camp system (the "Gulag Archipelago"). The prisoners are not confined to a Siberian work camp, but instead are being forced to work at a scientific research facility on the outskirts of Moscow. The Mavrino Special Prison is the "first circle" of the Gulag hell: extremely well-educated men with adequate provisions and housing are incarcerated and compelled to perform cutting-edge scientific research for their jailers, primarily to perfect the grip of the secret police on society. In this hell, combative debate serves as both a pastime and a therapeutic catharsis. The prisoners engage in endless philosophical discussions that lead "nowhere, certainly not to angry outbursts."²⁶⁵ A petty argument over the type of stove used in a particular prison exemplifies the situation that the debaters find themselves in: "Each of the disputants suffered from the indignity of being unable to prove himself in the right."²⁶⁶ And yet, throughout the novel these serious and intelligent men do conduct a spirited search for truth amid the chaos of their personal and social lives.

One evening, Lev Rubin is engaged in debate by Dmitiri Sologdin, his erstwhile opponent. Rubin is a committed communist who continues to

DIALECTIC: EIGHT HERMENEUTICAL STUDIES ON PLATO (P. Christopher Smith trans., 1980) [hereinafter GADAMER, PLATO]; HANS-GEORG GADAMER, PHILOSOPHICAL APPRENTICESHIPS (Richard Sullivan trans., 1985) [hereinafter GADAMER, APPRENTICESHIPS]; GADAMER, PHILOSOPHICAL HERMENEUTICS, *supra* note 261; GADAMER, TRUTH AND METHOD, *supra* note 9.

263. 410 U.S. 113 (1973).

264. ALEXANDER SOLZHENITSYN, *THE FIRST CIRCLE* (T.S. Whitney trans., 1968).

265. *Id.* at 365.

266. *Id.*

proclaim the received ideology, including Stalin's greatness, even as he sits in prison as a victim of the regime's paranoia. Rubin does not seek the truth; he knows the truth. Sologdin too is extremely strong willed and closed minded in his beliefs. Sologdin's invitation to debate comes with a curious proposal for the "rules" to be followed by the contestants:

Sologdin said softly, "I can tell you from experience that a real debate is carried out like a duel. We agree on a mediator. We could even invite Gleb right now. We take a sheet of paper and draw a line down the middle of it. Across the top we state the argument. Then, each expresses his views on the question as clearly and concisely as he can on his own half of the page. The time allowed for writing is unlimited, so there won't be accidental mistakes."

"You're kidding me," Rubin objected sleepily, his wrinkled eyelids sagging. Above his beard, his face showed extreme fatigue. "What are we going to do, argue till morning?"

"Quite the contrary!" Sologdin exclaimed, his eyes a gleam. "That is, in fact, the remarkable thing about a real man-to-man debate. Beating the air with empty words can go on for weeks. But a debate *on paper* is sometimes over and done with in ten minutes: it immediately becomes obvious that the opponents are talking about totally different things or that they don't disagree at all. If it turns out that there is any point in continuing the debate, then they proceed, in turn, to write down their arguments on their respective halves of the page. Just as in a duel: A thrust! A reply! A shot! A return shot! There is no possibility of evasion, of denying what has been said, of changing words. And after two or three statements, the victory of one and the defeat of the other becomes clear."

"There's no time limit?"

"For upholding the truth? No!"²⁶⁷

Unfortunately, the ensuing debate over the laws of Marxist dialectics does not proceed on paper. Instead the debate drags on interminably, and ultimately degenerates into familiar accusations by each of them that his previous statements have been mischaracterized. "Their long argument, certainly not their first, had only begun. They realized they must leave the room, since they were unable either to quiet down or to break it off. They went out, hurling words back and forth on the way until the door into the hallway closed behind them."²⁶⁸

Solzhenitsyn's story is ironic. Rubin and Sologdin were not really searching for truth or a determination of any sort; what they sought was verbal battle for the sake of battle, all the better if they achieved no resolution. But the notion of a debate carried out by the "rules" of writing holds a certain power.²⁶⁹ Sologdin's proposal is not only premised on the

267. *Id.* at 440.

268. *Id.* at 447.

269. *Cf.* Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751, 756 (1987) (reinforcing the constraint afforded by texts by considering

belief that one's written words will serve to constrain one's own argument and may even prove one to be wrong, but also that the exchange of written volleys will take on a life separate from the two debaters and will constitute something more than simply "hurling words" at each other. Victory is not the domination of one author over the collective writing, but the domination of the writing over the debaters in a way that validates one of their positions. Even more apparent is that the writing will not necessarily validate the position held by the victor at the time the debate commenced.

Beyond the idea that the writing embodies a dynamic constraint on the debate, Sologdin's proposal raises the specter that haunts all hermeneutical inquiry: the debaters may in fact come to "one" (temporary) conclusion through the engagement of writing (the "truth"?), but they also might find that they are "talking about totally different things." In the latter case all talking must cease, for there can be no possibility of resolution. If two readers truly are speaking different languages it seems improbable that a text will provide the necessary unity to foster a hermeneutic dialogue.²⁷⁰

B. The Important Contribution of Philosophical Hermeneutics

Our faith in the Rule of Law is grounded in a legal tradition composed of written artifacts, and in a legal practice that involves understanding these artifacts.²⁷¹ Hermeneutics originally was viewed as a discipline concerned

Shakespeare's faith that the "implacable potency of time, of change, and of decay" overpowers an ephemeral quality like love, but is itself "overcome by a miraculous force: [the] 'black ink'" of the written poem). Professor Fried shares this starting point with me, but he draws different theoretical and political conclusions.

270. Sanford Levinson voiced the fear 10 years ago that constitutional scholars are now talking about totally different things and there is nothing that the text of the Constitution can do to remedy this situation; all the scholar can do is to work toward a future "common language of constitutional discourse" that does not yet exist. Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 402-03 (1982).

271. *Contra* Robin L. West, *Adjudication Is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 TENN. L. REV. 203 (1987). Professor West argues that law is not simply reasoned interpretation but instead is an "imperative act" of creation backed by force. *Id.* at 205. West's target is the false conception of the interpretive model that achieved some prominence in the early "law as literature" movement, namely that the collapse of the belief in objective interpretation leads to a condition of relativism in which every interpretation amounts to a subjective act of power. This is the same bifurcation that I have attacked elsewhere. *See* Mootz, *Ontological Basis*, *supra* note 15. However, West does not provide a more realistic appraisal of interpretation. Instead, she seeks to step outside the interpretive relation in order to preserve a critique that is not bound by interpretive constraints. *E.g.*, West, *supra*, at 238, 245, 269. West concludes that legal practice, unlike art, is not merely the free play of interpretation but is the use of force, and that a critical appraisal of legal practice from outside the interpretive strictures of the historically contingent text is required. *Id.* at 277-78.

with the exegesis of the true meaning of written texts, and was most notably developed in the perceived separate disciplines of literary and biblical hermeneutics. Legal hermeneutics similarly developed principles of interpretation germane to the particular subject matter of law, and many time-honored legal maxims are simply interpretive guides. In this century, however, hermeneutics largely has become identified with more far-reaching philosophical concerns. Philosophical hermeneutics represents a break with earlier hermeneutical modes of inquiry because its focus is not the parochial hermeneutical concerns of various disciplines but rather the hermeneutical mode of being that underlies all inquiry and understanding. Philosophical hermeneutics derives its name from its claim to ontological status. Rather than offering techniques of interpretation, it explores the phenomenological situations of the interpreter and the text as the basis for all understanding. From this starting point, important attitudes about interpretation are engendered that align with our faith in the Rule of Law. It is important first to explore the ontological status of hermeneutics before undertaking an inquiry into writtenness as the source of the Rule of Law.

It is almost embarrassingly passé to describe the impact of contemporary hermeneutics on legal theory. Certainly, hermeneutics has been one of a number of "hot" topics for the past several years, although the legal literature is often generated by political theorists and literary scholars.²⁷²

In this Article, I demonstrate that West's perspective is fundamentally misplaced, and that the fears that drive her to hope for an interpretation-independent critique are equally ill-founded. For example, West contends that "the strength of the opinion [in *Brown v. Board of Education*, 347 U.S. 483 (1954),] lies more in its willingness to *ignore* the community's texts rather than its willingness to read them," West, *supra*, at 278, whereas I draw precisely the opposite conclusion regarding the hermeneutical status of *Brown*. Mootz, *Ontological Basis*, *supra* note 15, at 545-51.

My emphasis on written legal texts should not be misinterpreted as an ontological claim that the written word holds a certain primacy for our hermeneutical condition. Gadamer stresses that the truth of tradition is linguistic, and that language—oral or written—is the medium of our knowledge. GADAMER, TRUTH AND METHOD, *supra* note 9, at 381-91 (pt. 3, "The Ontological Shift of Hermeneutics Guided By Language"). It certainly is conceivable that our legal system could be based on a developing oral tradition, but in fact our complex legal system is based on written texts. Writtenness is the source of what we call the Rule of Law because that has been our practice, not because writtenness is a logical requirement. See Gadamer, *Text*, *supra* note 245, at 33-41.

272. See sources cited in Mootz, *Ontological Basis*, *supra* note 15, at 525-26 n.4 (includes both hermeneutics and phenomenology). Additional sources include INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds., 1988); LAW, INTERPRETATION, AND REALITY: ESSAYS IN EPISTEMOLOGY, HERMENEUTICS, AND JURISPRUDENCE (Peter Nerhot ed., 1990); LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE (Gregory Leyh ed., 1992); Emilio Betti, *On a General Theory of Interpretation: The Raison D'Etre of Hermeneutics*, 32 AM. J. JURIS. 245 (1987); Dallmayr, *Hermeneutics*, *supra* note 7; William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90

More embarrassing still, hermeneutics apparently is no longer fresh and provocative. Under the ill-defined banner of postmodern thought,²⁷³ attention increasingly has turned to pragmatism²⁷⁴ and deconstruction²⁷⁵ as approaches that provide insight into the experience of law by disavowing foundational truths. Nevertheless, the tradition of philosophical hermeneutics, which is best read as being both pragmatic and deconstructive, is an important source from which to draw. Its lessons bear repeating, and, of course, constant reexamination. More importantly, it is not clear that the sudden incorporation of contemporary hermeneutics into legal theory was sufficiently appreciated or understood.²⁷⁶ Hans-Georg Gadamer, whose work largely has defined contemporary philosophical hermeneutics, discusses the ontology of understanding in a manner that poses subtle yet dramatic issues for legal theorists. In order to establish the revolutionary character of this ontological approach, I situate Gadamer's efforts by describing the early thinking of his teacher, Martin Heidegger.

1. Heidegger's Hermeneutic Phenomenology

In *Being and Time* Heidegger sets the agenda for twentieth century Continental philosophy by pointing the way beyond the traditional Cartesian metaphysics that subtends the Western philosophical tradition.²⁷⁷ Philosophy, after Descartes, has been regarded as an individual project of reflection

COLUM. L. REV. 609 (1990) [hereinafter Eskridge, *Gadamer*]; William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) [hereinafter Eskridge & Frickey, *Practical Reasoning*]; Stephen M. Feldman, *Republican Revival/Interpretive Turn*, 1992 WIS. L. REV. 679; Stephen M. Feldman, *The New Metaphysics: The Interpretive Turn in Jurisprudence*, 76 IOWA L. REV. 661 (1991) [hereinafter Feldman, *New Metaphysics*]; Kenneth Henley, *Protestant Hermeneutics and the Rule of Law: Gadamer and Dworkin*, 3 RATIO JURIS 14 (1990); Gregory Leyh, *Dworkin's Hermeneutics*, 39 MERCER L. REV. 851 (1988); Dennis M. Patterson, *Authorial Intent and Hermeneutics*, 2 CAN. J.L. & JURIS. 79 (1989); William W. Quinn, Jr., *Rudolf Bultmann's "Demythologization" Hermeneutic as Applied to New Testament and Constitutional Exegesis*, 6 J.L. & REL. 297 (1988); George Wright, *On a General Theory of Interpretation: The Betti-Gadamer Dispute in Legal Hermeneutics*, 32 AM. J. JURIS. 191 (1987).

273. See *supra* note 18. Two commentators broadly define postmodern jurisprudence as a general description of "those styles of thought sharing philosophical commitments to anti-foundationalism, immanence, [and] historicity As they are practiced now, poststructuralism [deconstruction] and pragmatism are postmodernist jurisprudences, as (largely) are feminism and critical race theory." Radin & Michelman, *Pragmatist*, *supra* note 178, at 1024 n.30.

274. See, e.g., *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990).

275. See, e.g., *Symposium, Deconstruction and the Possibility of Justice*, 11 CARDOZO L. REV. 919 (1990).

276. See *supra* note 15.

277. MARTIN HEIDEGGER, *BEING AND TIME* (John Macquarrie & Edward Robinson trans., 1962) [hereinafter HEIDEGGER, *BEING AND TIME*].

upon the manner in which subjects constitute their world by transcendently mediating the world of objects and the subject. The effort in *Being and Time* is to break the grip of this metaphysical assumption and return to the primordial focus of philosophy: the being who is open to the questioning of Being. For Heidegger, Cartesian metaphysics represents an after-thought. The project of Heidegger's ontology is to explore what comes before thought, to uncover the pre-predicative forms of life that constitute human existence.²⁷⁸ In contrast to the Cartesian grounding of all knowledge in the rational subject, Heidegger demonstrates that our picture of the rational subject is parasitic on the subject's prior involvement in the world. In this way, Heidegger follows the phenomenologist Edmund Husserl's famous injunction that philosophy must return to the things themselves, but he rejects Husserl's Kantian glorification of the transcendental ego that presents objects to the subject.²⁷⁹ Heidegger attempts to develop a phenomenology that remains rooted in the temporal finitude of existence rather than aspiring to the timeless transcendence of a constituting subject. This is accomplished by rendering phenomenology hermeneutical.

Heidegger's project appears to have an ethereal quality to it, when quite the opposite is true. Exploring the mode of being of human beings is the most concrete of inquiries, and is a "necessary precondition for pursuing the question of Being."²⁸⁰ The foundational premise of modern philosophy—that consciousness as "subject" is radically distinct from the objects of the world and works to build accurate representations of these objects by thematizing raw data—in fact conceals the experience of existence. Heidegger characterizes existence as *Dasein*, which literally translated means "there-being," emphasizing his intention to dislocate the Cartesian constituting consciousness by recognizing that *Dasein* can never be fully present at

278. The distinctive feature of human life is its historicity.

The shortcoming of metaphysics—this was Heidegger's decisive insight—is that it conceives of thinking as a "seeing" and of Being as a constant being-in-view, a constant presence; thus it cannot ascertain the realization of factual-historical life itself which cannot be brought to a standstill. . . .

....

Sein und Zeit develops the question as to how time belongs to the sense of Being. *Sein und Zeit* attempts to recover through thinking that which has remained unthought, the forgotten ground of metaphysics upon which everything that has been thought certainly rested.

PÖGgeler, *supra* note 261, at 33-34 (discussing HEIDEGGER, BEING AND TIME, *supra* note 277).

279. For a discussion of the relationship between Husserl and Heidegger, see Feldman, *New Metaphysics*, *supra* note 272, at 671-81.

280. Kurt Mueller-Vollmer, *Introduction: Language, Mind, and Artifact: An Outline of Hermeneutic Theory Since the Enlightenment*, in THE HERMENEUTICS READER: TEXTS OF THE GERMAN TRADITION FROM THE ENLIGHTENMENT TO THE PRESENT 1, 34 (Kurt Mueller-Vollmer ed., 1985) [hereinafter Mueller-Vollmer, *Introduction*].

hand. Dasein is not an ontic being that exists in the world like a rock or a stick, but instead is embodied in ontological beings characterized by their involvement with the world and attentiveness to the meaning of Being.

To be human, in Heidegger's view, is to be a place-holder in a network of internal relations, constituted by a public language, of the communal world into which Dasein is thrown.

Heidegger's goal in describing Being-in-the-world is to recapture a "natural conception of the world" prior to scientific abstraction or philosophical reflection.²⁸¹

Heidegger challenges the Cartesian retreat to reflection by recalling the everyday experience of being-in-the-world from which reflection issues.

Rejecting the traditional philosophical quest for absolutes, Heidegger attempts to think within the historical contingency of existence to uncover an authentic mode of being. Authenticity for Heidegger involves the pull of both the past and the future. Dasein is temporal and finite, rooted in a facticity as a situation of possibility. Yet at the same time, Dasein is projected toward a new situation. Understanding is a constitutive existential category of Dasein because the possibility of projection is grounded in a pre-understanding arising out of rootedness.

On the one hand, as situated, Dasein is disclosed as thrown into a definite range of pre-given, shared possibilities which determine how entities can matter to it. . . . As understanding, on the other hand, Dasein takes up the possibilities it discovers in its situatedness and projects itself onto some range of goals for its life as a whole.²⁸²

Projection, then, should not be taken as the grasping of something entirely novel. "Heidegger and, following him, Gadamer insist that all forms of interpretation in real life and in the human sciences are grounded in understanding and are nothing but the explication of what has already been understood."²⁸³

Heidegger's philosophy extends well beyond the concerns of textual interpretation but his work has a significant impact on the way in which textual interpretation can be viewed. Heidegger rejects the idea of interpretation as "the acquiring of information about what is understood" and

281. GUIGNON, HEIDEGGER, *supra* note 9, at 86, 94.

282. *Id.* at 111.

Dasein is a Being-in-the-world in that it has always been "thrown" into the world, but has taken over this thrownness in the "projection" and has "articulated" the thrown projection as an articulated totality of meaning. . . .

The fact that Dasein exists is not based upon a free projection of itself; rather Dasein has always been delivered over to its "that it is."

PÖGgeler, *supra* note 261, at 41.

283. Mueller-Vollmer, *Introduction*, *supra* note 280, at 35.

instead sees interpretation as the “working-out of possibilities projected in understanding.”²⁸⁴ Heidegger uses “understanding” to refer to one of the ways we exist in the world, rather than to denote one of many self-conscious activities in which we might choose to engage. The object of interpretation is never truly an object in the sense of standing distinct from the interpreter because understanding is always rooted in a pre-involvement that does not admit of separate subjects and objects.

For example, Heidegger rejects the idea that we experience the world through pure perceptions that only later are “interpreted” to be meaningful sounds that we are capable of understanding. Instead, it is our pre-understanding that opens us to the experience of listening rather than simply hearing.

Dasein, as Being-in-the-world, already dwells *alongside* what is ready-to-hand within-the-world; it certainly does not dwell proximally alongside “sensations”

. . . [W]hen we are explicitly hearing the discourse of another, we proximally understand what is said, or—to put it more exactly—we are already with him, in advance, alongside the entity which the discourse is about. On the other hand, what we proximally hear is *not* what is expressed in the utterance. Even in cases where the speech is indistinct or in a foreign language, what we proximally hear is *unintelligible* words, and not a multiplicity of tone-data.

. . . .
. . . Only he who already understands can listen [zuhören].²⁸⁵

The belief that we hear tone data that is only later interpreted to be discourse is symptomatic of the wrong-headed Cartesian metaphysical assumption that subjects must constitute the objects of the world by piecing together the brute data of sensory perception. Heidegger demonstrates that the very idea of sensory “tone data” is an abstraction from and neglect of our mode of being as understanding. Our primary involvement with the world precedes the later philosophical effort to disentangle the “subject” from the world of distinct, empirical “objects.”

Heidegger relates the existential category of understanding to interpretation by characterizing interpretation as the working-out of the possibilities that result from the projection of understanding.²⁸⁶ This working-out is never the activity of a self-contained subject, but is always founded on the pre-understanding that is being-in-the-world. In the following important passages from *Being and Time*, Heidegger emphasizes the notion of pre-

284. HEIDEGGER, BEING AND TIME, *supra* note 277, at 188-89.

285. *Id.* at 207-08 (footnote omitted); *see also* GADAMER, TRUTH AND METHOD, *supra* note 9, at 90-91. Maurice Merleau-Ponty follows a similar tack in his phenomenology of perception. *See* Mootz, *Ontological Basis*, *supra* note 15, at 586; Mootz, *Postmodern World*, *supra* note 2, at 297.

286. HEIDEGGER, BEING AND TIME, *supra* note 277, at 188.

understanding by distinguishing that which is “ready-to-hand” from the abstract conception of freestanding objects that are “present-at-hand.” In the course of doing so he outlines the hermeneutical turn of his ontological efforts to encounter the meaning of Being, and describes the place of interpretation within this ontology.

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

The ready-to-hand is always understood in terms of a totality of involvements. This totality need not be grasped explicitly by a thematic interpretation. Even if it has undergone such an interpretation, it recedes into an understanding which does not stand out from the background. . . . In every case this interpretation is grounded in *something we have in advance*—in a *fore-having*. . . . When something is understood but is still veiled, it becomes unveiled by an act of appropriation, and this is always done under the guidance of a point of view, which fixes that with regard to which what is understood is to be interpreted. In every case interpretation is grounded in *something we see in advance*—in a *fore-sight*. . . . Anything understood which is held in our fore-having and towards which we set our sights “foresightedly”, becomes conceptualizable through the interpretation. In such an interpretation, the way in which the entity we are interpreting is to be conceived can be drawn from the entity itself, or the interpretation can force the entity into concepts to which it is opposed in its manner of Being. In either case, the interpretation has already decided for a definite way of conceiving it, either with finality or with reservations; it is grounded in *something we grasp in advance*—in a *fore-conception*.

Whenever something is interpreted as something, the interpretation will be founded essentially upon fore-having, fore-sight, and fore-conception. An interpretation is never a presuppositionless apprehending of something presented to us. If, when one is engaged in a particular concrete kind of interpretation, in the sense of exact textual Interpretation, one likes to appeal [beruft] to what “stands there”, then one finds that what “stands there” in the first instance is nothing other than the obvious undiscussed assumption [Vormeinung] of the person who does the interpreting.²⁸⁷

Heidegger’s discussion raises the famous “problem” of the hermeneutical circle to new prominence: if interpretation is merely the explication of what is already understood, then interpreting texts will not result in a linear acquisition of knowledge. Instead, interpretation must be limited to a retelling of something within our pre-understanding. Such circularity is

287. *Id.* at 190-92 (footnotes omitted).

repugnant to Enlightenment consciousness and therefore has simply been ignored.

In a scientific proof, we may not presuppose what it is our task to provide grounds for. But if interpretation must in any case already operate in that which is understood, and if it must draw its nurture from this, how is it to bring any scientific results to maturity without moving in a circle . . . ?

But if we see this circle as a vicious one and look out for ways of avoiding it, even if we just "sense" it as an inevitable imperfection, then the act of understanding has been misunderstood from the ground up. . . . If the basic conditions which make interpretation possible are to be fulfilled, this must rather be done by not failing to recognize beforehand the essential conditions under which it can be performed. What is decisive is not to get out of the circle but to come into it in the right way. This circle of understanding is not an orbit in which any random kind of knowledge may move; it is the expression of the existential *fore-structure* of Dasein itself.²⁸⁸

Heidegger does not delegitimize the traditional hermeneutical focus on the proper methods of explicating the meaning of texts so much as he goes behind these methodological strategies to uncover understanding and interpretation as constitutive categories of Dasein.

2. Gadamer's Philosophical Hermeneutics

Hans-Georg Gadamer recalls that his first exposure to Heidegger's writing "affected me like an electric shock."²⁸⁹ Gadamer emphasizes that Heidegger's significance is in having demonstrated "convincingly that understanding is not just one of the various possible behaviors of the subject but the mode of being of Dasein itself. . . . It denotes the basic being-in-motion of Dasein that constitutes its finitude and historicity, and hence embraces the whole of its experience of the world."²⁹⁰ Gadamer carries forward Heidegger's lesson that the traditional problem of the hermeneutical circle in interpretation—that one cannot understand a part of the text without first understanding the whole, and that one cannot understand the whole of the text without first understanding the parts—derives from our fundamental character as interpretive beings.²⁹¹ Gadamer's central importance to

288. *Id.* at 194-95.

289. GADAMER, APPRENTICESHIPS, *supra* note 262, at 46-47; GADAMER, PHILOSOPHICAL HERMENEUTICS, *supra* note 261, at 198-240 (describing the importance of Heidegger's philosophy).

290. GADAMER, TRUTH AND METHOD, *supra* note 9, at xxx.

291. "The hermeneutic circle says that in the domain of understanding there can be absolutely no derivation of one from the other, so that here the logical fallacy of circularity does not represent a mistake in procedure, but rather the most appropriate description of the structure of understanding." Gadamer, *Text*, *supra* note 245, at 22.

contemporary hermeneutics stems from his careful efforts to bring Heidegger's philosophy to bear on pragmatic questions of how culture is reproduced and transmitted through history.²⁹²

Gadamer's crowning achievement, *Truth and Method*, directly considers whether it is sensible to believe that textual traditions—including the legal tradition—bear truth, given that any such truth can never be secured by the method of the natural sciences. Gadamer believes that the ascendance of the scientific method, and the corresponding reduction of philosophy to epistemology, has led to unfortunate attempts to develop methodologies of the human sciences that will establish prescriptions for how to do history, philosophy, or literary criticism.²⁹³ In contrast, Gadamer explores “the experience of truth that transcends the domain of scientific method” by developing a hermeneutics that is not “a methodology of the human sciences, but an attempt to understand what the human sciences truly are, beyond their methodological self-consciousness, and what connects them with the totality of our experience of world.”²⁹⁴

Natural science, no less than historical writing or literary exegesis, is predicated on our manner of existence as identified by Heidegger, and so philosophical hermeneutics abandons disciplinary turf wars by seeking to discover what enables and subtends all these interpretive efforts. Gadamer does not establish the proper methods to be utilized by the investigator in a given field because he believes that the interesting question is “not what

292. My discussion of Gadamer is a brief recapitulation of some of the themes I have previously discussed more thoroughly and with full documentation in Mootz, *Ontological Basis*, *supra* note 15, at 525-56.

293. Gadamer chronicles the displacement of “the experience of the world that is linguistically sedimented” by the mathematical “univocal notation” of scientific discourse. Gadamer, *Text*, *supra* note 245, at 28. “The assumption in this starting point is that the subject takes hold of empirical reality with methodological self-certainty by means of its rational mathematical construction, and that it then expresses this reality in propositional statements.” *Id.* at 29.

294. GADAMER, TRUTH AND METHOD, *supra* note 9, at xxii-xxiii. Gadamer continues: If we make understanding the object of our reflection, the aim is not an art or technique of understanding, such as traditional literary and theological hermeneutics sought to be. Such an art or technique would fail to recognize that, in view of the truth that speaks to us from tradition, a formal technique would arrogate to itself a false superiority. Even though in the following I shall demonstrate how much there is of *event* effective in all *understanding*, and how little the traditions in which we stand are weakened by modern historical consciousness, it is not my intention to make prescriptions for the sciences or the conduct of life, but to try to correct false thinking about what they are. *Id.* at xxiii. Gadamer's philosophical hermeneutics begins with the simple premise that hermeneutics and its methodological consequences have more to learn from the truths of long-standing traditions than from the scientific model of knowledge. HANS-GEORG GADAMER, *On the Origins of Philosophical Hermeneutics*, in PHILOSOPHICAL APPRENTICESHIPS 177-93 (Robert K. Sullivan trans., 1985) [hereinafter GADAMER, *Origins*].

we do or what we ought to do, but what happens to us over and above our wanting and doing.”²⁹⁵ This having been said, Gadamer’s approach holds important practical implications for legal practice, if only because the corrective of exposing fundamental misconceptions about that practice can have a stimulating and liberating effect.

Gadamer joins Heidegger by insisting that Dasein is not a distinct subject but rather is being-in-the-world; consequently, Dasein is always already rooted in a situation of pre-understanding that enables Dasein’s projection to the future. Gadamer explores this ontological condition in the context of an interpreter’s confrontation with a text. Gadamer intentionally characterizes the pre-understanding subtending textual interpretation in a provocative way, referring to the “prejudices” that the interpreter brings to a text. Gadamer rejects the overriding prejudice of Enlightenment thought, namely “the prejudice against prejudice itself, which denies tradition its power.”²⁹⁶ Prejudices, or prejudgments, constitute the “horizon” of the interpreter, which is an openness to the other. In Gadamer’s words, “To be situated within a tradition does not limit the freedom of knowledge but makes it possible.”²⁹⁷ Becoming a value-free interpreter is not a proper goal that we regrettably admit can never be realized in practice; it is an illegitimate and unthinkable condition that would render understanding impossible by eliminating the forestructure of prejudices that is a condition of knowledge and understanding. The interpreter’s prejudices are not stagnant and rigid limitations but instead constitute an opening to the world that invites a reassessment of the interpreter’s unproductive prejudices. Although prejudices can never be eliminated by the conscious efforts of a subject to scrupulously adhere to a scientific methodology, it is a mistake to equate prejudices with a determinate, concretized subjectivity. The interpreter’s prejudicial horizon is a habitual nexus of past interpretations that constantly is in flux.

Just as the interpreter is involved with and committed to the world by virtue of prejudices, the text also is part of a constantly developing tradition and never stands distinct from the interpreter as an object wholly defined by a closed culture in the past. Gadamer uses the term “effective-history” (*Wirkungsgeschichte*) to capture the dynamic quality of the text as it continually manifests itself in the present. The prejudiced reader is engaged by the traditionary text, which is constituted by the history of the effects and uses of the text. We can never read a text for the first time, so to speak, because the way in which the text will speak to us is already shaped by the tradition. The effective-history of the text “determines in advance both what seems to us worth inquiring about and what will appear as an object of investigation,” and therefore “working out the hermeneutical situation means

295. GADAMER, *TRUTH AND METHOD*, *supra* note 9, at xxviii.

296. *Id.* at 270; *see also id.* at 271-77.

297. *Id.* at 361.

acquiring the right horizon of inquiry for the questions evoked by the encounter with tradition."²⁹⁸ However, the text can never be relegated solely to a fixed collection of past interpretations because it is always a contemporary force effecting a pull on future-projecting Dasein.²⁹⁹ Hence, the text is as open to the future as the interpreter.

The unavoidability of the prejudices of the interpreter and the effective-history of the text leads to Gadamer's famous argument that understanding and application are never fundamentally distinct activities. There is no essential text-in-itself that can be understood in the abstract and then only later applied to a given situation. Instead, understanding occurs only by virtue of application. To emphasize this point Gadamer rehabilitates the Aristotelian notion of phronesis as a model of understanding as application.³⁰⁰ Phronesis is perhaps best characterized as pragmatic-deliberative wisdom. Phronesis is the capacity to converse with another and to make practical-moral judgments on the basis of a common, historically transmitted tradition, despite the lack of any firm rules guiding these judgments.³⁰¹ Gadamer concludes that Aristotle's description of ethical judgment

in fact offers a kind of *model of the problems of hermeneutics*. We too determined that application is neither a subsequent nor merely an occasional part of the phenomenon of understanding, but codetermines it as a whole from the beginning. Here too application did not consist in relating some pregiven universal to the particular situation. The interpreter dealing with a traditionary text tries to apply it to himself. But this does

298. *Id.* at 300, 302.

299. Gadamer asserts the "normative character of the text vis-a-vis the interpreter and his changing interpretations." Mueller-Vollmer, *Introduction*, *supra* note 280, at 41.

300. GADAMER, TRUTH AND METHOD, *supra* note 9, at 312-24 (subsection 2.II.2.B, "The Hermeneutic Relevance of Aristotle").

301. *Id.* at 317 ("The task of making a moral decision is that of doing the right thing in a particular situation—i.e., seeing what is right within the situation and grasping it."). William Eskridge and Phillip Frickey have articulated an approach to legislation and statutory interpretation that draws heavily on Gadamer's use of Aristotelian practical reasoning. See Eskridge, *Gadamer*, *supra* note 272; Eskridge & Frickey, *Practical Reasoning*, *supra* note 272; Phillip Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990). Traditional scholars might regard Gadamer's reliance on Aristotelian ethics as demonstrating that his concerns are far removed from the particular problem of describing the Rule of Law. However, Lon Fuller's famous definition of the Rule of Law is interesting regarding this point. See LON L. FULLER, *THE MORALITY OF LAW* 33-94 (1964). Fuller describes the characteristics of a legal system that must be met at least to some degree if the Rule of Law is to prevail. He qualifies his definition, however, by citing Aristotle's *Nicomachean Ethics* in support of the idea that it is in practical application that the Rule of Law is achieved. *Id.* at 94. "It is easy to see that laws should be clearly expressed in general rules that are prospective in effect and made known to the citizen. But to know how, under what circumstances, and in what balance these things should be achieved is no less an undertaking than being a lawgiver." *Id.*

not mean that the text is given for him as something universal, that he first understands it per se, and then afterward uses it for particular applications. Rather, the interpreter seeks no more than to understand this universal, the text—i.e., to understand what it says, what constitutes the text's meaning and significance. In order to understand that, he must not try to disregard himself and his particular hermeneutical situation. He must relate the text to this situation if he wants to understand at all.³⁰²

In this regard legal interpretation has exemplary significance for hermeneutics.³⁰³ Gadamer argues, "A law does not exist in order to be understood historically, but to be concretized in its legal validity by being interpreted."³⁰⁴ Judges always must rule on the meaning that texts hold for a given practical situation, and therefore must always allow the text to speak to the present by exhibiting prudential judgment that is much more akin to moral reasoning than to scientific reasoning. Legal interpretation always constitutes an application of the text to the problem at hand, and so judging is never limited to a codicological endeavor. This is not to say that judges engage in a special form of interpretation that should be mimicked, but rather that legal interpretation in adjudication reveals the nature of all interpretation.³⁰⁵ Legal interpretation epitomizes the open situation that

302. GADAMER, TRUTH AND METHOD, *supra* note 9, at 324; Mootz, *Postmodern World*, *supra* note 2.

303. GADAMER, TRUTH AND METHOD, *supra* note 9, at 324-41 (subsection 2.II.2.C, "The Exemplary Significance of Legal Hermeneutics").

304. *Id.* at 309.

305.

It is by no means self-evident that legal hermeneutics belongs within the context of the problem of general hermeneutics. . . . [Because legal interpretation is realized only in application] it is sometimes—for example by Betti—entirely separated from literary interpretation, and even from that historical understanding whose object is legal (constitutions, laws, and so on). . . .

. . . .
 . . . [However,] both codified law and written tradition point to a deeper connection that is concerned with the relation between understanding and application, as I think I have shown.

Id. at 517, 520. Thus, Gadamer rejects a fundamental distinction between the practical work of the judge and the efforts of the legal historian. In fact, both the judge and the legal historian confront the effective-history of the law from their prejudiced perspective and thereby shape the developing tradition and effective-history of the text. To believe that the historian transcends history and seizes the original meaning of the law rather than understanding the law only by applying it to the present is to succumb to a gross historicism that renders real interpretation impossible.

The text that is understood historically is forced to abandon its claim to be saying something true. We think we understand when we see the past from a historical standpoint—i.e., transpose ourselves into the historical situation and try to reconstruct the historical horizon. In fact, however, we have given up the claim to find in the past any truth that is valid and intelligible for ourselves.

every interpretive encounter presents because we keenly experience the fact that there can be no calculus that foretells in advance all future explications of a law.

That the interpretation of the law is, in a juridical sense, an act that creates law cannot be contested. . . .

. . . It is obviously an entirely lay idea to regard applying the law to a concrete case as the logical process of subsuming the individual under the universal.

Legal positivism, which would like to limit legal reality entirely to the established law and its correct application, probably has no supporters today. The distance between the universality of the law and the concrete legal situation in a particular case is obviously essentially indissoluble. . . . What is remarkable about the situation is this: that the hermeneutical task of bridging the distance between the law and the particular case still obtains, even if no change in social conditions or other historical variations cause the current law to appear old-fashioned or inappropriate. The distance between the law and the individual case seems to be absolutely indissoluble. . . . It is no mere unavoidable imperfection in the process of legal codification when it leaves free play for its application to concrete instances, as if this free play could, in principle, be reduced at will. To be "elastic" enough to leave this kind of free play seems rather to be in the nature of legal regulation as such, indeed of legal order generally.³⁰⁶

Gadamer's philosophical hermeneutics is not a rarified philosophy having little to do with the practice of law. In fact, Gadamer's argument draws its metaphoric force from the practice of law in an effort to disrupt the embedded Cartesian metaphysics of modernity.

Gadamer denies that subjects interpret distinct, freestanding objects because both the interpreter and the text meet within, and are the product of, the defining context of a tradition.

Indeed, as Gadamer tries to show in two fine pieces of phenomenological analysis, the process of understanding that culminates in the fusion of horizons has more in common with a dialogue between persons or with the buoyancy of a game in which the players are absorbed than it has with the traditional model of a methodologically controlled investigation of an object by a subject.³⁰⁷

Gadamer characterizes interpretation as a playful encounter in which both the interpreter and the text are challenged and transformed in the process of reconstituting the tradition from which they both issue. The interpreter's horizon, or forestructure of meaning, is always at risk in the play of interpretation because it fuses with the horizon, or effective-history, of the text. Moreover, in the fusion of these indeterminate horizons there is an

Id. at 303.

306. *Id.* at 517-19; see Gadamer, *Text*, *supra* note 245, at 35-36.

307. Linge, *Introduction*, *supra* note 261, at xix-xx.

intimation of "conversation, in which something is expressed that is not only mine or my author's, but common."³⁰⁸ The model of conversation is a central theme of Gadamer's philosophical corpus.

The dialogical character of language . . . leaves behind it any starting point in the subjectivity of the subject, and especially in the meaning-directed intentions of the speaker. What we find happening in speaking is not a mere reification of intended meaning, but an endeavor that continually modifies itself, or better: a continually recurring temptation to engage oneself in something or to become involved with someone. But that means to expose oneself and to risk oneself. Genuinely speaking one's mind has little to do with a mere explication and assertion of our prejudices; rather, it risks our prejudices—it exposes oneself to one's own doubt as well as to the rejoinder of the other.³⁰⁹

Gadamer emphasizes the model of conversation (or dialogue) that is implicated by the use of language, which always simultaneously is the arena of free play (innovation) and the embodiment of our cultural traditions (constraint).³¹⁰ Rejecting the subject/object distinction of Cartesian metaphysics is central to recovering the truth that speaks from our legal tradition. On one hand, the limitless subjectivity implied by the fear that "anything goes" in legal interpretation is not a realistic portrayal. On the other hand, an unthinking acceptance of current legal practice as the articulation and enforcement of rules that bind interpreters is similarly misguided.

Having reviewed the fundamental significance of Gadamer's philosophical hermeneutics, it is now possible to recast the problems of constraint and innovation. It makes sense to continue talking about the Rule of Law because the hermeneutical situation of legal practice transcends the subjective designs of the decision-maker without collapsing into utter indeterminacy and also without relying on foundational "truths" to guide the legal enterprise. Gadamer's ontological descriptions provide a new understanding of understanding that demonstrates the inadequacies of both traditional Rule of Law jurisprudence and the emerging postmodern critiques.

308. GADAMER, TRUTH AND METHOD, *supra* note 9, at 388.

309. Gadamer, *Text*, *supra* note 245, at 26. Gadamer rejects Heidegger's portrayal of Platonism as the univocal birth of metaphysics, choosing instead to rehabilitate the rhetorical power of conversation that forms the heart of the Socratic dialogues. See GADAMER, PLATO, *supra* note 262; HANS-GEORG GADAMER ON EDUCATION, POETRY, AND HISTORY: APPLIED HERMENEUTICS 71 (D. Misgeld & G. Nicholson eds., L. Schmidt & M. Reuss trans., 1990) [hereinafter GADAMER, EDUCATION] ("It is more important to find the words which convince the other than those which can be demonstrated in their truth, once and for all. We can learn this from the Platonic dialogues."); Gadamer, *Letter*, *supra* note 261, at 101;

310. GADAMER, TRUTH AND METHOD, *supra* note 9, at 381-491 (pt. 3, "The Ontological Shift of Hermeneutics Guided by Language").

C. Critical Hermeneutics: Acknowledging Constrained Innovation

Gadamer's philosophical hermeneutics provides the starting point for defining a critical hermeneutics.³¹¹ Critical hermeneutics acknowledges ontological situatedness but focuses on the historical experience of truth as a process of continually acknowledging unproductive prejudices. Critical hermeneutics makes sense of our faith in the Rule of Law by rebuking misguided conceptions of what we must obtain for the Rule of Law to be realized. In this subpart, I first examine the differences between Gadamer's hermeneutics and the approaches taken by Grey and the deconstructionists. Grey formulates his unwritten constitution thesis in response to the collapsing belief in the legal "object" of the text, but his response reinforces the distinction drawn between the subjective aims of the interpreter and the objective fact of the text. In contrast, deconstructionists undermine our pictures of the text and the interpreter by describing the linguistic indeterminacy of legal texts and the social situatedness of interpreters, but radical deconstructionists view situatedness as an ideological trap against which the written word holds little, if any, power. The manner in which critical hermeneutics is able to overcome both the subject/object distinction and radical deconstruction reveals its affirmative value for Rule of Law jurisprudence. Critical hermeneutics fleshes out the contours of a legal practice founded on written texts, a founding that is the core of the Rule of Law.

1. Escaping Enlightenment Metaphysics

Under close examination, Grey's attempt to secure innovative judicial decision-making in fact revealed a deeper commitment to the objective character of the legal text. Contemporary legal theorists invariably respond to the collapse of the rule-book conception of law by relying both on objective rules and on subjective skill in applying the rules to the case at hand. Elsewhere I have characterized this approach as an "intellectual thaumatrope."³¹² A thaumatrope consists of a card mounted on a stick, with a different picture on each side of the card. For example, there might be a picture of a bird on one side and a picture of a cage on the other. The fun begins when the thaumatrope is spun quickly, because to the viewer it appears that there is just one picture, that is, a bird *in* a cage. If the objective text alone cannot sustain the Rule of Law, many theorists argue that the interpreter's skill buttresses the text and maintains the Rule of Law. Text and interpreter are separate entities that together create a picture of the Rule of Law.

311. Mootz, *Ontological Basis*, *supra* note 15.

312. Mootz, *Postmodern World*, *supra* note 2.

Grey rejects the jurisprudential thaumatrope that alternatingly relies on the text and the interpreter to create principled decision-making. Grey undoubtedly fears acknowledging that the interpreter is part of every interpretive picture, for this concession would remove any manner of limitation on the interpreter's influence. The unsatisfactory attempt in contemporary jurisprudence to incorporate innovation within the Rule of Law leads Grey to segregate innovation completely in the hope of better preserving the objective rule of the text while still allowing innovation. In many respects Grey's work renders explicit the subconscious fears of contemporary legal theorists. Grey acknowledges that linking laws with contemporary social values often will require extra-textual decision-making, but he contends that we should be honest and up front about this political fact of life. Why spin the thaumatrope, asks Grey, rather than simply admit that there are two different pictures?

Gadamer's response to Grey would be straightforward. Grey looks to judicial precedent and social values as appropriate extra-textual guides for a judge, but Gadamer would question how these features can ever be separated from the text and interpreter. An individual cannot draw upon these extra-textual resources as an alternative strategy to following the text because these features of the social world comprise part of the intersubjective world that makes interpretation in general and reading in specific possible. Grey's position is wholly committed to Enlightenment metaphysics: the fundamental distinction between subjects and objects. Grey does not sufficiently appreciate that texts exist for us only by virtue of their effective-history and never as distinct timeless objects. The unwritten constitution can never exist because it is always being written: a judicial opinion writes the unwritten and thereby indelibly, although not permanently, shapes the issues of concern and the possibilities for further developing the text. To view the Constitution as separate from the judicial explications of its meaning is to abstract from the very heart of the interpretive reality that Gadamer captures with his idea of effective-history.

Anticipating Gadamer's response to Grey does not ensure that the response is adequate. At bottom, Grey's reaction to the problem of innovation is premised on the felt need to overcome relativism. Grey believes that we must divorce innovation from the text because otherwise textual meaning would constantly be up for grabs. His strategic retreat from complete noninterpretive review to viewing judges as "supplementers" confirms that his concern is to permit fundamental extra-textual law only to supplement but never to displace the bedrock meaning of the text. Therefore, Grey's use of the unwritten constitution to support the decision in *Roe v. Wade* might be seen not as an example of embracing innovation so much as a matter of ensuring that innovation does not undermine the authority of the written text. Apparently Grey believes that our political system might be able to deal with the uncertainties of relatively isolated instances of extra-textual decision-making, but that the Rule of Law will be eclipsed if the text becomes indeterminate.

Gadamer is frequently, though unfairly, challenged for introducing a mode of thinking that inexorably leads to relativism. Detractors argue that Gadamer's approach precludes the possibility that a text has one true interpretation, or that there is a means of adjudicating between competing interpretations. If competing interpretations of a legal text will always exist and they will always have equal truth status under Gadamer's view, traditional legal theorists would be correct to argue that the Rule of Law becomes unattainable. However, dismantling the unhelpful subject/object metaphysics of the Enlightenment does not mean that objectivity must be surrendered to an arbitrary choice between unlimited potential meanings for a text. Gadamer rejects scientific certainty as the criterion for truth because it implies an absolute and ahistorical standard for measure. Nevertheless, the historical process of practically distinguishing legitimate from illegitimate prejudices in the ongoing dialogue of interpretation reveals that there is an illuminating truth at work in history.³¹³ "To make room for objectivity within hermeneutics is not to commit oneself to an absolutist perspective, but only to recognize that some claims to knowledge and interpretations are more reliable than others."³¹⁴ Gadamer's guiding premise—existence as being-in-the-world—runs directly counter to relativism, which always assumes the person's ability to rise above their situated horizon and to treat it as just another world-view that can be chosen arbitrarily.³¹⁵

No interpreter ever approaches a text as if it contains an infinite number of equally plausible readings. Such an attitude would require a presuppositionless interpreter acting independently of the prejudices of tradition, a situation that can never obtain in reality. For a given reader of a given text

313. Felix Ó Murchadha, *Truth as a Problem for Hermeneutics: Towards a Hermeneutical Theory of Truth*, 36 PHIL. TODAY 122, 129 (Summer 1992) ("Hermeneutics guarantees truth by exploring how truths are produced and developed in specific practices and specific cultures and, through such exploration, insists on the historicity and linguisticity of truth; the universality of its specificity.")

314. Jean Grodin, *Hermeneutics and Relativism*, in FESTIVALS OF INTERPRETATION: ESSAYS ON HANS-GEORG GADAMER'S WORK 53 (Kathleen Wright ed., 1990).

315. Richard Bernstein has defended Gadamer ardently along these lines:

The varieties of relativism constantly flirt with the suggestion that what we take to be real, or true, or right is arbitrary, as if we could somehow simply decide by an act of will what is real, true, and right. But historicity is not to be confused with arbitrariness. Gadamer reminds us that we belong to tradition, history, and language before they belong to us. We cannot escape from the dynamic power of effective-history, which is always shaping what we are becoming. We become fools of history if we think that by an act of will we can escape the prejudgments, practices, and traditions that are constitutive of what we are, and that in Rorty's phrase have been "hammered out" in the course of history. But we are also always in the process of modifying and shaping what we are becoming.

RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 167 (1983).

at a given time it is always the case that there are better and worse readings of the text.³¹⁶ Gadamer's title, *Truth and Method*, reaffirms his belief in the truth of tradition despite his disavowal of the methodological strategies spawned by Enlightenment epistemology. To understand why Grey's reaction to the threat of relativism is misplaced it is necessary to describe more fully the character of this "truth" that renders relativism impossible.

Truth is not an absolute quality that stands outside of our tradition. Instead, truth is the unfolding of tradition in play.

What we mean by truth here can best be defined again in terms of our concept of *play*. The weight of the things we encounter in understanding plays itself out in a linguistic event, a play of words playing around and about what is meant. *Language games* exist where we, as learners—and when do we cease to be that?—rise to the understanding of the world. . . .

. . . When we understand a text, what is meaningful in it captivates us just as the beautiful captivates us. It has asserted itself and captivated us before we can come to ourselves and be in a position to test the claim to meaning that it makes. What we encounter in the experience of the beautiful and in understanding the meaning of tradition really has something of the truth of play about it. In understanding we are drawn into an event of truth and arrive, as it were, too late, if we want to know what we are supposed to believe.³¹⁷

Gadamer's truth is "the truth of remembrance," a truth that is both renewed and created in the never-ending appropriation of tradition, rather than the truth espoused by the philosopher-social critic purporting to put the tradition into perspective.³¹⁸

Gadamer's philosophy is ever humble but never unconcerned. The "dialogical unendingness" in which truth is encountered does not signify a "complete relativism" any more than a person's life is an arbitrary collection of life experiences.³¹⁹ In both cases we are not only already committed in certain ways, we also strive for a coherence and closure that we know will never be achieved absolutely. Just as a conversation has a history and develops a topic, so all human understanding is enmeshed in an ongoing project. Gadamer emphasizes, though, that this project does not circle around a determinate ground of truth but rather spirals forward from a shared tradition.

Now certainly I would not want to say that the solidarities that bind human beings together and make them partners in a dialogue always are sufficient to enable them to achieve understanding and total mutual agreement. Just between two people this would require a never-ending

316. David C. Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135, 164 (1985).

317. GADAMER, *TRUTH AND METHOD*, *supra* note 9, at 490.

318. *Id.* at xxxviii.

319. GADAMER, *Origins*, *supra* note 294, at 188-89.

dialogue. And the same would apply with regard to the inner dialogue the soul has with itself. Of course we encounter limits again and again; we speak past each other and are even at cross-purposes with ourselves. But in my opinion we could not do this at all if we had not traveled a long way together, perhaps without even acknowledging it to ourselves. All human solidarity, all social stability, presupposes this.³²⁰

Truth unfolds historically.

Gadamer's historical conception of truth contrasts with the teleology that appears to lurk within Heidegger's later attempt to recover a pre-Socratic innocence that purportedly existed prior to the disastrous rise of metaphysics.³²¹ "In this Gadamerian picture of history, our dialogue with the past is not so much the pursuit of a concealed *arché* as it is creative reinterpretation which carries forward the flow of tradition without any pretence that there is an ultimate, final truth that unifies the whole."³²² Relativism is the expression of angst by disappointed absolutists, but Gadamer insists that absolutism from the beginning has been the antithesis of truth. The collapse of absolute objectivity therefore poses no problem for truth.

2. Avoiding Radical Deconstruction

For the radical deconstructionists, Gadamer's simultaneous assertion of truth against relativism and his effort to undermine the objectivism of traditional legal thought promises more than it can deliver. Because no interpretation can stake a claim to privileged status, radical deconstructionists openly embrace the relativism that Grey attempts to overcome. They argue that we are condemned to a radically free play, which, if acknowledged, might lead to our situation being transformed.³²³ Truth is abandoned in the face of the irreducible "other," who can never be

320. Hans-Georg Gadamer, *Reply to Jacques Derrida* (Diane P. Michelfelder & Richard E. Palmer trans.), in *DIALOGUE AND DECONSTRUCTION*, *supra* note 245, at 55, 57 [hereinafter Gadamer, *Reply*].

321. G.B. MADISON, *THE HERMENEUTICS OF POSTMODERNITY: FIGURES AND THEMES* 122 n.50 (1988) [hereinafter MADISON, *FIGURES*]. Gadamer rejects this reading of Heidegger, characterizing it as a "fatal misunderstanding." Gadamer, *Letter*, *supra* note 261, at 99. However, he does insist that Heidegger's effort to overcome the "language of metaphysics" after his celebrated *Kehre* wrongly objectified philosophical discourse as a concretized historical artifact and constituted "an adventurous journey into error." Hans-Georg Gadamer, *Destruktion and Deconstruction* (Geoff Waite & Richard E. Palmer trans.), in *DIALOGUE AND DECONSTRUCTION*, *supra* note 245, at 102, 104 [hereinafter Gadamer, *Destruktion*].

322. GUIGNON, *HEIDEGGER*, *supra* note 9, at 239.

323. Derrida writes that deconstruction is never content to deliver us to the force of tradition, but instead is "the joyous affirmation of the word and of the innocence of becoming, the affirmation of a world of signs without fault, without truth, and without origin which is offered to an active interpretation." JACQUES DERRIDA, *WRITING AND DIFFERENCE* 292 (1978).

assimilated entirely to the interpreter's prejudices. From this perspective, Gadamer's work is sometimes disparagingly viewed as the "last, rather desperate, attempt to save the notions of objectivity and truth" in the face of a relentlessly radical deconstructive attitude.³²⁴ Radical deconstructionists would concede that Gadamer properly avoids Grey's misguided attempts to preserve a relatively determinant text, but would argue that Gadamer then pursues the same misplaced agenda of securing some notion of objectivity, albeit with a higher degree of philosophical sophistication.

In response, Gadamer convincingly demonstrates that deconstruction is always played out against a broader tapestry of belonging and commitment. Building a political or philosophical practice on the deconstructive event inevitably will result in the same kind of fruitless circle that the metaphysics of the subject/object distinction engenders. Positing the deconstructive element of play as the fundamental feature of our existence in an effort to overcome both objectivism and subjectivism is a distorting overkill that runs contrary to everyday experience.³²⁵ Although Gadamer acknowledges that the deconstructive moment plays an important role in our hermeneutical experience, he regards it as a grave error to celebrate deconstruction as the groundless ground of the human condition.³²⁶ Gadamer provides a more

324. COSTAS DOUZINAS ET AL., POSTMODERN JURISPRUDENCE: THE LAW OF TEXT IN THE TEXTS OF LAW 30 (1991) [hereinafter DOUZINAS ET AL., POSTMODERN JURISPRUDENCE]; Schlag, *Pre-Figuration*, *supra* note 150, at 966 (arguing that Gadamer's approach is "far more congenial to the confident self-image of conventional legal thought").

325. In his reply to Derrida during their 1981 encounter, Gadamer argued that the attitude of seeking to make the assertions of another illuminating for oneself is an essential feature of understanding. "I cannot believe that Derrida would actually disagree with me about this. Whoever opens his mouth wants to be understood; otherwise, one would neither speak nor write." Gadamer, *Reply*, *supra* note 320, at 55. Gadamer insists that this is a mere "observation" rather than a normative claim for an ethical principle, inasmuch as "[e]ven immoral beings try to understand one another." *Id.*

326. Gadamer defended his reading of the later Heidegger against Derrida's critique in the paper that he presented during his 1981 encounter with Derrida in Paris:

I find that the French followers of Nietzsche have not grasped the significance of the seductive in Nietzsche's thought. Only in this way, it seems to me, could they come to believe that the experience of Being that Heidegger tried to uncover behind metaphysics is exceeded in radicality by Nietzsche's extremism. . . . Heidegger's attempt to think Being goes far beyond such dissolving of metaphysics into values-thinking: or better yet, he goes back behind metaphysics itself without being satisfied, as Nietzsche was, with the extreme of its self-dissolution. . . .

Thus, my own efforts were directed toward not forgetting the limit that is implicit in every hermeneutical experience of meaning.

Gadamer, *Text*, *supra* note 245, at 25. After Derrida refused to engage Gadamer in discussion, and in fact appeared to ignore what Gadamer quite plainly was saying, Gadamer replied by characterizing this nondialogical exchange as an insulation of the monological metaphysical subject that Derrida purports to subvert.

convincing description of legal practice than the radical deconstructionists because he situates rather than venerates the deconstructive innovation facilitated by linguistic indeterminacy.

Balkin's deconstructive approach provides a promising starting point because it strikes a course between Tushnet's social critique and the excesses of radical deconstructionist thought. Tushnet at once exemplifies the power of the cls critique of legal practice and the growing self-awareness of the problem of describing the status of this critique. Critique modeled on the social sciences buys into the metaphysics of the Enlightenment, even when skillfully executed.³²⁷ Tushnet's approach is reminiscent of Grey's to the extent that he believes it necessary to move outside the text, although Tushnet is more precise in defining the critical heuristic that will guide him. And yet, Tushnet's work does evidence deconstructive tendencies that are best amplified in Balkin's attempt to define a critical deconstructive practice.

Balkin's corrective faces a radical challenge, however. If we abandon the Enlightenment model by discarding both fixed objects and autonomous subjects able to impose order, how can we avoid a radical deconstruction that precludes not only the Rule of Law but also a theory of critique? The indeterminacy critique first undermined the textual object, but radicalizing this deconstructive subversion calls into question the integrity of the legal subject as interpreter-critic. Balkin embraces the free play of the text, and, countering radical excesses, originally asserted that our continual articulation of truth is not an act of bad faith. Balkin's increasing focus on ideology critique might signal a retreat to Tushnet's unsatisfactory approach as an antidote to the nihilism implied in the most radical extensions of deconstructive critique.³²⁸ In contrast, Gadamer's philosophical hermeneutics meets the challenge of radical deconstruction by recalling the pre-understanding that suffers and renews the deconstructive event. Rather than choosing between a methodological critique of interpretive (legal) practice or a deconstructive abandonment of critique, Gadamer attempts to recover the hermeneutical reality that subtends these attitudes.

Balkin's deconstructive practice is buttressed by recalling that deconstruction always involves an element of application. Deconstruction is situated within our hermeneutical condition inasmuch as every interpreta-

Is he really disappointed that we cannot understand each other? Indeed not, for in his view this would be a relapse into metaphysics. He will, in fact, be pleased, because he takes this private experience of disillusionment to confirm his own metaphysics. But I cannot see here how he can be right only with respect to himself, be in agreement only with himself.

Gadamer, *Reply*, *supra* note 320, at 56-57.

327. See Mootz, *Ontological Basis*, *supra* note 15, at 568-96 (critiquing Jurgen Habermas's social theory from a Gadamerian perspective).

328. See *supra* notes 173-75 and accompanying text.

tion of a text involves an application of the text by the interpreter. Application is never the blind adherence to a traditional rule but instead is always the recontextualization of text and interpreter. Application entails the deconstruction of the text as an historical artifact and also the deconstruction of the interpreter's horizon. Balkin recognizes that at some point the deconstruction stops, and that both the text and the interpreter are recontextualized in an unstable confrontation with the present. Gadamer's philosophical hermeneutics develops the basis of this insight by emphasizing that the deconstructive application of the text is always accomplished within the wider pre-understanding that defines the questions to which the interpretive application responds. Gadamer cautions against the tendency to focus on the liberating experience of change rather than on our primordial belonging that precedes and makes change possible.³²⁹ Overcoming radical deconstruction is not so much a matter of positing a subject who can arbitrarily stop deconstruction as it is recognizing that deconstruction in practice is only one feature of our hermeneutical situation. Although in *principle* all texts are subject to endless deconstruction, in *practice* no interpreter encounters a text in this way.

Radical deconstructionists regard Gadamer's effort to contain or delimit deconstruction as a return to the metaphysics of subjectivity in which the individual asserts authority over the free play of the text. Radical deconstructionists foreclose any experience of truth within the textual tradition. Schlag sees every assertion of the truth of tradition as a misplaced assertion of the legal subject's integrity and power, while Hutchinson views any claim to truth within the textual tradition as a confused relinquishment of direct political participation. In response to Balkin's contention that the deconstruction at some point settles into understanding, Schlag properly retorts that the idea of a legal subject choosing the target and extent of deconstruction is quite mistaken.³³⁰ Gadamer is not subject to this criticism, though, because he presents a plausible account that rejects Cartesian subjectivity without eradicating the individual subject. Gadamer plainly rejects the egocentric premises of the Enlightenment by arguing that the experience of playing a game reveals the ontology of understanding.³³¹

329. GADAMER, *TRUTH AND METHOD*, *supra* note 9, at xxiii-xxiv.

330. Schlag, *Politics of Form*, *supra* note 110, at 1670 n.99.

331. Gadamer writes, "Play is more than the consciousness of the player, and so it is more than a subjective act. Language is more than the consciousness of the speaker; so also it is more than a subjective act." GADAMER, *TRUTH AND METHOD*, *supra* note 9, at xxxvi. Gadamer concludes *Truth and Method* by reemphasizing this theme, noting that it is worth recalling what we said about the nature of play, namely that the player's actions should not be considered subjective actions, since it is, rather, the game itself that plays, for it draws the players into itself and thus itself becomes the actual subjectum of the playing. . . . [This corresponds to] the play of language itself, which addresses us, proposes and withdraws, asks and fulfills itself in the answer.

Rejecting subjectivism does not entail a rejection of the subject, though, and Gadamer emphasizes that being-in-the-world implies a dynamic play in which finite, historical individuals are always defined by a situation that they not only inhabit but also shape. Individuals never are merged wholly into the tradition because it is the dynamic relationship of the individual to the tradition that makes history possible. Gadamer provides a convincing solution to Schlag's "problem of the subject" by abandoning subjectivity defined as self-sustaining rational consciousness without abandoning the interpreting subject. This parallels Gadamer's abandonment of the notion of objectivity as essential qualities existing independent of the subject without abandoning truth.

Gadamer and radical deconstructionists both claim to follow the path of the later Heidegger.³³² Heidegger abandoned the philosophical project of describing the structures of experience that he outlined in *Being and Time* and turned to the event of Being that is beyond the hermeneutical self-constitution of temporal individual beings.³³³ In his quest to encounter the

Id. at 490; *see also id.* at 293 (the hermeneutical circle is neither subjective nor objective); *id.* at 358, 383 (conversation is always an I-thou event in which there is no subjectivity); MADISON, FIGURES, *supra* note 321, at 117 (Gadamer differs from the later Heidegger, and Derrida's extension of the later Heidegger, in that he does not reject the subject as such, but only the Cartesian conception of the subject).

332. P. CHRISTOPHER SMITH, *HERMENEUTICS AND HUMAN FINITUDE: TOWARD A THEORY OF ETHICAL UNDERSTANDING* at xviii (1991) [hereinafter SMITH, *FINITUDE*] (describing Gadamer's exposition of Heidegger's break with any manner of transcendentalism).

333. John Caputo describes hermeneutics after *Being and Time* in terms of three guiding interpretations. Caputo contends that Gadamer unevenly focuses on the restorative moment of hermeneutics, while Derrida unevenly focuses on the deconstructive moment. JOHN D. CAPUTO, *RADICAL HERMENEUTICS: REPETITION, DECONSTRUCTION, AND THE HERMENEUTIC PROJECT* 95-119 (1987) [hereinafter CAPUTO, *RADICAL*]. In contrast, the later Heidegger abandoned the two "sides" of hermeneutics, which he viewed as inevitably bound up with notions of individual subjects. Heidegger's rejection of the subjectivity implicit in the hermeneutical circle leads to a view of thinking as a

means to restore a unity which precedes objectification. . . .

. . . And the work of hermeneutics is to recover that sense of the world before it was disrupted by objectifying thinking, to restore the sense of what is close before it was made distant by objectification.

. . . .

. . . [G]enuine thinking, according to Heidegger after *Being and Time*, is effected only by relinquishing horizontal projectiveness, which means willing, constructing, projecting horizontal schemes.

Id. at 96, 102.

As explained in this Article, I believe that Caputo puts an unfairly narrow reading on Gadamer's work, particularly by ascribing to Gadamer Heidegger's inclinations toward recovery of a truth lost in tradition rather than recognizing Gadamer's historical conception of truth. *See* MADISON, FIGURES, *supra* note 321, at 122 n.50.

primordial, Heidegger turned from philosophy to poetry, and he rejected the individual subject who must play a part in any philosophical enterprise.³³⁴ Unlike Heidegger's attempts to encounter Being, though, radical deconstructionists claim philosophical status for the effort to subvert the legal subject. Radical deconstructionists err by incorporating Heidegger's rejection of the subject into a philosophical program.³³⁵ In contrast, Gadamer continues to do philosophy, but he does so with an awareness of philosophy's limitations. Our givenness to play is both behind and beyond philosophy; Gadamer recognizes that philosophical reflection must acknowledge this power although it can never capture it.³³⁶ Gadamer charts a path between the *serious* philosophy of the great metaphysicians like Hegel and the *frivolity* of poststructuralist challengers like Derrida by arguing that it is unnecessary for the philosopher "to abandon the notions of knowledge and truth, that it is in fact fully possible to extricate them from any and all metaphysical-epistemological contexts. To so extricate them is to point the way beyond both objectivism and relativism, beyond both 'seriousness' and 'frivolity.'" ³³⁷ Gadamer's ontological hermeneutics is a philosophical recovery of the experience of understanding and truth rather than a poetic approach to the truth of Being. While radical deconstruction might produce good poetry, Gadamer would contend, it is bad philosophy.³³⁸

From a Gadamerian perspective, radical deconstructionists glorify the legal subject that they ostensibly are subverting. Schlag argues that stopping the deconstructive critique is a means of insulating the subject by allowing

334. See MARTIN HEIDEGGER, *POETRY, LANGUAGE, THOUGHT* (Albert Hofstadter trans., 1971). Gadamer argues that this radicalization of Heidegger's *Kehre* "led into impassable regions." Gadamer, *Destruktion*, *supra* note 321, at 104.

335. Recent examples of this in the legal literature include Boyle, *Is Subjectivity Possible? The Post-Modern Subject in Legal Theory*, 62 U. COLO. L. REV. 489 (1991) and Schlag, *Subject*, *supra* note 101.

336. Gadamer's practical concern with application leads him to state that he simply bypasses the "problem of Being" addressed most intensely by the later Heidegger. MADISON, *FIGURES*, *supra* note 321, at 122 n.50. Madison properly argues that Gadamer's commitment to the ontological primacy of tradition and effective-history unnecessarily denigrates consciousness as having primary methodological importance. *Id.* at 37-38 n.6. My effort to define a critical legal hermeneutics makes the same point: Gadamer's ontology provides important lessons for critical methodology. Mootz, *Ontological Basis*, *supra* note 15, at 597-605.

337. MADISON, *FIGURES*, *supra* note 321, at 108.

338. Cf. Dale Jamieson, *The Poverty of Postmodernist Theory*, 62 U. COLO. L. REV. 577, 581, 595 (1991) ("As a way of reading texts, [postmodern deconstruction] can be liberating. As a philosophy, forget it."). For a recent scathing indictment of the use of deconstruction in the legal context, see Arthur Austin, *A Primer on Deconstruction's "Rhapsody of Word-Plays"*, 71 N. CAR. L. REV. 201 (1992). "Other than as a source of amusement, deconstruction has no relevance to law. . . . Legal interpretation is *not* fun and games." *Id.* at 232-33 (footnote omitted).

it to remain "stabilized, untroubled, [and] unexamined," but in fact it is only a mythical, decontextualized subject who could endlessly push the deconstructive critique against the situation of belongingness and the attitude of seeking to understand.³³⁹ Interpretation is the working out of our pre-understanding through a concrete application that occurs in the present. The decentering, deconstructive experience identified by Schlag is never a self-sustaining play that the subject arrests. Tradition continually is deconstructed by being pulled forward to a new resolution, but the result is not an absolute answer immune from further interpretation (and therefore further deconstruction). The deconstructive event is simply the power of belonging to a tradition that constantly is creatively renewed. Endless deconstructive critique is possible only if the subject could prevent the deconstruction from settling into an application of tradition, which of course would require that the subject exist beyond the embedded horizon of tradition.³⁴⁰

3. The Rule of Law: Writtenness and Critique

Our faith in the Rule of Law is redeemed in Gadamer's philosophy, although we must correct the traditional understanding of the Rule of Law. The problems of constraint and innovation are opposite sides of the same counterfeit metaphysical coin. Gadamer describes our finite, historical existence as constrained innovation, a playful experience that is not orchestrated by secure subjects but instead is a being-played. The result of play is never pre-ordained nor a matter of choice.

The attraction of a game, the fascination it exerts, consists precisely in the fact that the game masters the players. Even in the case of games in which one tries to perform tasks that one has set oneself, there is a risk that they will not "work," "succeed," or "succeed again," which is the attraction of the game. Whoever "tries" is in fact the one who is tried. The real subject of the game (this is shown in precisely those experiences in which there is only a single player) is not the player but instead the game itself. What holds the player in its spell, draws him into play, and keeps him there is the game itself.³⁴¹

339. See Schlag, *Subject*, *supra* note 101, at 1643 (emphasis omitted); see also *supra* note 193.

340. Similarly, Hutchinson's prescription for radical democracy is premised on a romantic view of the subject. Cf. Jennifer Wicke, *Postmodern Identity and the Legal Subject*, 62 U. COLO. L. REV. 455, 468 (1991) (critiquing postmodern glorification of participatory democracy). The unmediated encounter between citizens that a radical democracy is intended to foster appears to rely on the powers of the subject and to neglect the degree to which we are all given over to the written tradition that we presently are remaking.

341. GADAMER, *TRUTH AND METHOD*, *supra* note 9, at 106.

Gadamer's use of play as an ontological description of our hermeneutical situation overcomes the Enlightenment metaphysics underlying Grey's concern about distancing the problem of innovation from the legal text. Gadamer also uses play as a central metaphor to preserve philosophy in the face of radical deconstruction, even as he rejects the foundationalism of traditional philosophy. The Rule of Law is plausible because it speaks to the human condition, whereas an unconstrained free play appears as a contrived abstraction in relation to our situation.

The doctrine of the Rule of Law is based on the adherence by judges to the truth of a written tradition rather than their exercise of political power as self-satisfied subjects. Actualizing the Rule of Law requires that we never take for granted our hermeneutical openness to tradition, which must carefully be nurtured and realized in our political life. The politics implied by Gadamer's philosophy is one of relentless opposition to assertions of subjective will by those in power, assertions that amount to refusing to place themselves at risk before tradition.

Hermeneutical mediation comes to an end whenever one party arrogates to itself a sovereign prerogative, that is, the capacity to determine the meaning of legal and other texts unilaterally in a binding fashion. . . . This alternative is fully recognized by Gadamer in his stress on the shared meanings of a legal community. Where such a shared fabric is lacking, he observes, where—as in the case of royal absolutism—“the will of the absolute ruler is above the law,” stated simply “hermeneutics cannot exist” Instead, “the will of the absolute ruler [who] is above the law” can effect or implement his preferences or views of justice “without regard for the law—that is without the effort of interpretation.” Needless to say, these observations can be extended beyond the range of royal absolutism to any kind of sovereign privilege—whether the latter be claimed by an intellectual elite, a radical party, or a class.³⁴²

The Rule of Law demands that the interpreter relinquish the pretense of subjectivity and suffer the effort of interpretation. Gadamer regards legal hermeneutics as exemplifying our hermeneutical condition because it is the arena in which the concrete-practical application of tradition against a background of collective understanding is most clearly experienced.

Gadamer does not counsel blind faith in the Rule of Law because the political imperative that those in power be at risk in a playful interpretation of the textual tradition is not guaranteed. Although Gadamer's ontological hermeneutics discredits the Enlightenment's model of methodology, critical reflection must still play an active role in the hermeneutical enterprise by facilitating the realization of the hermeneutical community.³⁴³ Critique is

342. Dallmayr, *Hermeneutics*, *supra* note 7, at 1466-67 (quoting GADAMER, *TRUTH AND METHOD*, *supra* note 9, at 294) (alteration in original).

343. See MADISON, *FIGURES*, *supra* note 321, at 122 n.50; Mootz, *Ontological Basis*, *supra* note 15, at 597-605.

not founded in a calculus external to the problems at hand, nor is it a normative question of articulating fixed and general principles that ought to guide us. Instead, critique is lodged in the practice which it seeks to secure. Putting oneself at risk before the tradition also puts the tradition at risk before oneself. It is only in this risky play that the dysfunctional features of the community's discourse are illuminated. The legal critic will never succeed in telling the judge beforehand the correct decisions to reach in all potential legal disputes, but the legal critic can participate in efforts to undo the defensive posturing of what Schlag refers to as the relatively autonomous self.

Perhaps the point is best made by returning to Solzhenitsyn's parable of writtenness. Solzhenitsyn tells the story of two prisoners who consider conducting their debate over the laws of Marxist dialectics on paper rather than engaging yet again in an inconclusive argument. Conducting a debate on paper is presumed useful because the debaters are firmly hemmed in by their dialogue in what amounts to a paradigmatic give-and-take. Gadamer would not contend that written words have a magical effect on account of their writtenness; indeed, he champions the model of face-to-face conversation.³⁴⁴ However, the practice of law is textual; the character of textual interpretation unavoidably shapes legal practice. Solzhenitsyn's description of a debate on paper captures the commitment to language-in-use that underlies the experience of understanding a text. After a point, the debators cannot fall back on conscious argumentative strategies without forsaking the text that is evolving before them. Legal decision-makers effectuate the Rule of Law by remaining committed to legal texts.³⁴⁵

344. Gadamer, *Text*, *supra* note 245, at 34. In this sentence I am not equating "written words" with "text" since a community subsisting on an oral tradition can be said to interpret oral texts. Moreover, Gadamer contends that an exchange of written words can sometimes be more closely related to a conversation than to an exchange of texts, as in the case of personal letters. *Id.* at 33. Generally speaking, though, written documents are textual in a way that oral conversation is not textual.

345. Although Gadamer regards face-to-face communications (in which "one always has the opportunity to clarify or defend what was meant on the basis of some response") superior to textual interpretation as a means for reaching understanding, *id.* at 34, this should not be taken to mean that Gadamer regards written communications as deficient. Gadamer regards conversation as a model of understanding, not a prerequisite, and he views texts as presenting special interpretive problems that derive from the universality of the hermeneutical situation. Gadamer regards the interpretation of written texts as a more expansive encounter than conversational dialogue, because

a "virtual" horizon of interpretation and understanding must be opened in writing the text itself, one that the reader must fill out. Writing is more than a repetition in print of something spoken. To be sure, everything that is fixed in writing refers back to what was originally said, but it must equally as much look forward; for all that is said is always already directed toward understanding and includes the other in itself.

Id. The experience of interpreting a text, removed from the immediacy of a direct communicative encounter draws the text and the interpreter into a fusion of horizons. In interpretation

the tension between the horizon of the text and the horizon of the reader is dissolved. I have called this a "fusion of horizons" [*Horizontverschmelzung*]. The separated horizons, like the different standpoints, merge with each other. And the process of understanding a text tends to captivate and take [the] reader up into that which the text says, and in this fusion the text too drops away.

Id. at 41. Gadamer readily agrees that legal practice is textual, I would argue, not because it is a relapse from conversational immediacy, but because it operates in the social realm that must always be idealized beyond any immediate conversations.

In *Truth and Method*, Gadamer reaffirms the ontological status of interpretation, even though it is manifested in different venues in various ways.

This is not to say, of course, that the hermeneutic situation in regard to texts is exactly the same as that between two people in conversation. Texts are "enduringly fixed expressions of life" that are to be understood; and that means that one partner in the hermeneutical conversation, the text, speaks only through the other partner, the interpreter. Only through him are the written marks changed back into meaning. Nevertheless, in being changed back by understanding, the subject matter of which the text speaks itself finds expression. It is like a real conversation in that the common subject matter is what binds the two partners, the text and the interpreter, to each other. When a translator interprets a conversation, he can make mutual understanding possible only if he participates in the subject under discussion; so also in relation to a text it is indispensable that the interpreter participate in its meaning.

Thus it is perfectly legitimate to speak of a *hermeneutical conversation*. . . .

. . . I have described this above as a "fusion of horizons." We can now see that this is what takes place in conversation, in which something is expressed that is not only mine or my author's, but common.

GADAMER, *TRUTH AND METHOD*, *supra* note 9, at 387-88 (footnote omitted) (quoting DROYSEN, *HISTORIK* 63 (Hübner ed., 1937)).

Within legal practice, Gadamer's description of dialogical understanding through conversation probably is experienced most clearly in the exchange between lawyer and client in the formulation of goals and strategies. This direct communicative encounter involves a hermeneutical circle: the lawyer is able to advise the client about pertinent legal considerations only on the client's description of the situation, but the client can describe the situation accurately only on the basis of the lawyer's advice about the controlling legal criteria. In dialogue both participants come to an understanding of the client's legal situation. In a excellent essay, Amy Gutman suggests that legal education should develop a deliberative capacity in all law students inasmuch as deliberating with clients is an important virtue for all lawyers. Amy Gutman, *Can Virtue Be Taught to Lawyers*, 45 *STAN. L. REV.* 1759 (1993). As Gutman explains:

Complex professional decisions typically require deliberation between professional and client, if only (but not only) to figure out what a client wants, and how a professional can best help the client Deliberation is a constitutive part of practical judgment with regard to complex professional decisions that affect the interests of other people, and practical judgment is . . . an indispensable virtue of good lawyering.

Id. at 1769.

American legal practice is committed firmly to the elucidation of law on paper. The goal of this practice is to put the participants at risk before the challenges of the text such that they relinquish false assertions of control. Any lawyer who has appeared in court well understands the very different dynamics when a judge immediately responds during the course of an oral argument as opposed to when a judge drafts a memorandum of decision based on the papers submitted. The same hermeneutical reality is operative but most lawyers feel that the written practice is more genuine because it is less the word of the judge and more the word of the law. This experience is not at all contradicted by the fact that most lawyers and judges would reject the formalist view that adjudication is simply "following the rules."

It is easy to understand why legal practice commonly is characterized as the constraint of a judge by an immutable written rule, but a hermeneutical rejection of traditional conceptions of rule-governance allows for a more complete description of the critical, or deconstructive, character of practice. Solzhenitsyn's debaters will find it harder to ignore the force of each other's arguments when their own argument must be assimilative even while responsive. Critique is not the practice of an observing third party, it is the shift in the conversation that the debaters experience. Gadamer challenges us to recall that this is in fact how we experience life:

Who has not had the experience—especially before the other whom we want to persuade—of how the reasons that one had for one's own view, and even the reasons that speak against one's own view rush into words. The mere presence of the other before whom we stand helps us to break up our own bias and narrowness, even before he opens his mouth to make a reply. That which becomes a dialogical experience for us here is not limited to the sphere of arguments and counterarguments the exchange and unification of which may be the end meaning of every confrontation. Rather, as the experiences that have been described indicate, there is something else in this experience, namely, a potentiality for being other [*Andersseins*] that lies beyond every coming to agreement about what is common.³⁴⁶

The only tasks for a critical theorist are to help mine the language-in-use for its undisclosed potential meanings and to describe the parameters of the conversation in which critique of the tradition can be realized most vividly.

Gadamer's approach is at once challenging and comforting, bizarre and mundane. Common sense tells us that we live in a finite historical world and are always animated by prejudices that shape our growth. Common sense also tells us that the tradition sustaining us is neither a fixed body of learning nor an entirely random free play. What Gadamer hopes to achieve is to defend this common sense from both the insular subjectivism that has gripped our self-conception in the wake of the Enlightenment and the radical deconstruction of all notions of truth. A common sense view of legal

346. Gadamer, *Text*, *supra* note 245, at 26.

interpretation easily falls prey to the fears of nihilism or the exuberance of radical deconstruction because our inherited philosophical assumptions run counter to common sense and render it vulnerable.

To some, Gadamer's approach may appear to be an idyllic and naive portrayal of the human condition: revamp your metaphysics and, presto!, all is well again. This certainly is not Gadamer's view. By issuing a challenging rebuke to the "will of man,"³⁴⁷ philosophical hermeneutics merely lays the groundwork for the ongoing human drama of creating and sustaining a community. Gadamer's hermeneutics is a rousing call to arms, not a comforting rationalization of present practices. But there is perhaps even a more fundamental claim that Gadamer's approach is idyllic, idyllic in the sense that it presumes a coherent community within which the interpretive efforts of its members are truly bound by a common pre-understanding. Is it possible that we might find ourselves beyond this shared community, beyond hermeneutics?

D. The Limits of Dialogue: Are We Ever Beyond Hermeneutics?

Even accepting that critical hermeneutics overcomes the excesses of deconstruction by emphasizing the agreement that precedes and is presupposed by every disagreement, it is still open to question whether the notion of traditional pre-understanding has any application in the face of the radical rupture of contemporary life. Today there no longer seem to be communities whose members carefully cultivate their tradition with a charitable willingness to learn, and to the extent that such communities do exist they are extremely localized. Modern society increasingly is divisive and disjointed, with multiplying lines of fracture following class, race, status, age, and gender. The impact of this problem on the Rule of Law is most acute when considering international law. How can a destitute third-world country in Africa and a rich, powerful first-world country in Western Europe draw upon and nurture a common evolving tradition that will enable some semblance of the Rule of Law?

More troubling is the fact that it is unnecessary to stray so far from home before confronting this basic problem. Characterizing the American legal system as a developing tradition in which participants collectively remake the tradition appears to discount the extent to which our legal system encompasses subcommunities or subtraditions that are distinct from, and potentially inaccessible to, each other. Do white male corporate lawyers, indigent minority criminal defendants, lesbians fighting for custody of their children, and life-tenured federal judges really share a tradition? The radical deconstructionist will argue that Gadamer's focus on tradition is correct insofar as it goes, but that the postmodern condition is one of multiple incommensurable traditions struggling simultaneously to assert dominance

347. GADAMER, TRUTH AND METHOD, *supra* note 9, at xxxviii.

in an ever-shifting nexus of social relations. Gadamer argues that language binds us to tradition, but the deconstructionist will contend that members even of the same "community" will be speaking totally different languages at times, rendering the healing power of tradition inert. Under this view, hermeneutics only describes the power of uncontroversial decisions emanating from a common pre-understanding, but hermeneutics does not overcome endemic divisiveness except by papering over the developing fault lines.

In his celebrated book, *After Virtue*, Alasdair MacIntyre raises the question of the incommensurability of different traditions in the course of critically tracing the demise of ethical theory.³⁴⁸ *After Virtue* is the talismanic creed for American legal pragmatists who want to discard the notion that legal practice is the subsumption of particular questions under abstract rules of law. MacIntyre argues that the Enlightenment period (exemplified by and culminating in Nietzsche's philosophy) has been a catastrophic failure that has led to the disintegration of the practical knowledge embodied in ethical judgment. MacIntyre contends that modernity's failure can be overcome only by rejecting the belief that ethical action can ever be dictated by general, rational principles, and that we must return to the ancient model of Aristotelian ethics.³⁴⁹ The similarity between Gadamer's work and MacIntyre's work is immediately apparent.³⁵⁰ Both argue against the overreaching claims of modern technocratic rationality and seek to reinvigorate the status of phronesis by reexamining the important relevance that Aristotle holds for our current dilemmas.³⁵¹

More than one commentator, though, has argued that MacIntyre's contrast between the false promise of modernity and the truth of the ancients is an overly simplistic account that amounts to an impossible nostalgia for the now long-since-passed community of the polis.³⁵² MacIntyre's claim that the great truths of the ancients have been obscured by the unfortunate

348. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984) [hereinafter MACINTYRE, *AFTER VIRTUE*].

349. *Id.* at 110-20, 146-64; FRED R. DALLMAYR, *CRITICAL ENCOUNTERS: BETWEEN PHILOSOPHY AND POLITICS* 189-92 (1987) [hereinafter DALLMAYR, *ENCOUNTERS*].

350. DALLMAYR, *ENCOUNTERS*, *supra* note 349, at 9, 194, 203; *see also* CAPUTO, *RADICAL*, *supra* note 333, at 242-44; SMITH, *FINITUDE*, *supra* note 332, at 1.

351. MacIntyre relates Aristotle's conception of phronesis as "a capacity to judge and to do the right thing in the right place at the right time in the right way. The exercise of such a judgement is not a routinizable application of rules." MACINTYRE, *AFTER VIRTUE*, *supra* note 348, at 150. This is not simply a capacity for decision-making, but comprises part of the "intelligence" of the person. *Id.* at 154-55.

352. DOUZINAS ET AL., *POSTMODERN JURISPRUDENCE*, *supra* note 324, at 5-6; *see also* DALLMAYR, *ENCOUNTERS*, *supra* note 349, at 207 (arguing that "the rigid dichotomy of Nietzsche versus Aristotle emerges as extremely fragile if not entirely untenable"). This same criticism is leveled at Gadamer's extension of Heidegger's thought, but I argue that Gadamer is unfairly accused. *See supra* section II.C.2.

excesses of the Enlightenment has an unrealistic and essentialist ring.³⁵³ In response to these challenges, MacIntyre's most recent book, *Whose Justice? Which Rationality?*, explores "what makes it rational to advance and defend one conception of practical rationality rather than another."³⁵⁴ MacIntyre's unsurprising conclusion is that even for contemporary society the Aristotelian tradition proves superior to the Enlightenment project, despite the fact that this superiority cannot be demonstrated by means of an objective (tradition-independent) proof.³⁵⁵ MacIntyre's claim serves as a useful starting point for discussing the overriding hermeneutic quality of our legal practice even within the dissembled culture of postmodernity.

MacIntyre's guiding premise is that rationality is always "embodied in a tradition" and that the "standards of rational justification themselves emerge from and are part of a history . . . in which they transcend . . . the limitations of and provide remedies for the defects of their predecessors within the history of that same tradition."³⁵⁶ Every tradition faces potential conflict on two levels. Ordinary disputes raise the question of what constitutes good argument according to the standards of rational justification employed by the tradition. However, a more fundamental challenge is posed by "critics and enemies external to the tradition who reject all or at least key parts of those fundamental agreements" constituting the standards of rational justification.³⁵⁷ In this situation we have two models of rationality, two traditions of ethical discourse, that cannot be assessed from an objective standpoint since any standard of rationality must in all cases be the product of its own tradition. Yet, MacIntyre argues that external challenges can be resolved rationally, and he rejects the relativism implied by the incommensurability of traditions.³⁵⁸

Liberalism, as a manifestation of the Enlightenment project, was an attempt to provide tradition-independent grounds for adjudicating conflicts between rival traditions, but MacIntyre argues that this effort must itself be seen as the development of a pre-given tradition that in the end becomes simply another rival in the debate.³⁵⁹ In Gadamer's words, the Enlighten-

353. CAPUTO, RADICAL, *supra* note 333, at 241-48.

354. ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* at ix (1988) [hereinafter MACINTYRE, *WHOSE JUSTICE?*].

355. *Id.* at 402-03.

356. *Id.* at 7.

357. *Id.* at 12.

358. *Id.* at 43. In his *Postscript to the Second Edition of After Virtue*, MacIntyre anticipates the then developing project of *Whose Justice? Which Rationality?* by rejecting the supposition that there must be "some set of rationally grounded principles independent of each of the rivals or no rational resolution of their disagreements is possible . . . [and] in that case we can have no good reason for giving our allegiance to any one particular tradition rather than to any other." MACINTYRE, *AFTER VIRTUE*, *supra* note 348, at 276.

359. MacIntyre writes:

ment evidences a particularly strong prejudice—the prejudice against prejudice—and Enlightenment thought fails in its attempt to escape the hermeneutic dimension of our life. The failure of liberal theory to render different traditions of ethical discourse commensurable suggests a devastating problem for the Rule of Law doctrine. If there simply are a number of hermeneutically distinct traditions, but no means to decide the merits of each tradition in an overriding rational discourse, then law must be regarded as an exercise of brute force by one tradition over another. In response, MacIntyre argues against relativism in much the same way as Gadamer. The doomsayers of relativism presume the interpreter's ability to break free from her pre-understanding and to survey interpretive possibilities from a context-free distance, but MacIntyre insists that it is our very inability to escape tradition that is the basis for rejecting relativism.³⁶⁰ When participants in a tradition are faced with an external challenge, or “epistemological crisis,” they might find it possible to meet the challenge by creatively developing their tradition. However, they might also find it necessary to embrace the competing tradition in order to resolve the crisis.³⁶¹ Relativism is premised on the absurd belief that a community's response to an epistemological crisis is a matter of choice between two or more traditions that are equally plausible or desirable, when in fact we are always open to the adoption of a competing tradition in a way that is context-driven. MacIntyre argues that such a change can be characterized as rational, and he defines how (legal or ethical) philosophers might equip us to embody such a rational decision.³⁶²

MacIntyre notes that competing traditions are never mutually exclusive, as demonstrated by the fact that each tradition can communicate with the other, even if the basic commonality subtending communication is insufficient to provide rational standards for deciding which tradition is

[L]iberalism, which began as an appeal to alleged principles of shared rationality against what was felt to be the tyranny of tradition, has itself been transformed into a tradition whose continuities are partly defined by the interminability of the debate over such principles. An interminability which was from the standpoint of an earlier liberalism a grave defect to be remedied as soon as possible has become, in the eyes of some liberals at least, a kind of virtue.

... And the inconclusiveness of the debates within liberalism as to the fundamental principles of liberal justice (see *After Virtue*, chapter 17) reinforces the view that liberal theory is best understood, not at all as an attempt to find a rationality independent of tradition, but as itself the articulation of an historically developed and developing set of social institutions and forms of activity, that is, as the voice of a tradition.

MACINTYRE, WHOSE JUSTICE?, *supra* note 354, at 335, 345.

360. *Id.* at 366-67; MACINTYRE, *AFTER VIRTUE*, *supra* note 348, at 272-78; *cf.* discussion *supra* section II.C.1.

361. MACINTYRE, WHOSE JUSTICE?, *supra* note 354, at 362-64.

362. *Id.* at 352-59.

superior.³⁶³ Although communication between traditions is important, MacIntyre regards it as a mistake to conclude that “translatability . . . entails commensurability” because a shared language for identifying differences is not equivalent to “share[d] standards of rational evaluation” that can resolve them.³⁶⁴ If one’s tradition cannot be rewritten in a creative and insightful way to deal with a pending epistemological crisis while still exhibiting “some fundamental continuity” of the tradition, then breaking with tradition and adopting an alien tradition might be the appropriate response.³⁶⁵ Adopting an alien tradition requires one to become a traveler who embraces the foreign tradition as a second first language. If the foreign tradition proves better equipped to resolve the epistemological crises facing the traveler at home, the traveler will then prudently decide to exchange citizenships. MacIntyre’s thesis is that a well-tended Aristotelian tradition will prove itself superior to the contemporary alternatives, if only we are willing to respect and develop the distinct characteristics of each tradition and to assess the epistemological crisis of modernity from the perspective of each.³⁶⁶

It should be apparent that Gadamer would regard MacIntyre as having conceded too much by admitting the importance of distinct ethical traditions. MacIntyre’s argument deviates from Gadamer’s central premise that language, as the medium of hermeneutical experience, is at once our embeddedness in tradition and our openness to new worlds.³⁶⁷ Gadamer emphasizes that where

reaching an understanding seems to be impossible, because we “speak different languages,” hermeneutics is not at an end. Here the hermeneutic task poses itself in its full seriousness, namely as the task of finding a common language. But the common language is never a fixed given. Between speaking beings it is a language-at-play, one that must first warm itself up so that understanding can begin, especially at the point where

363. MacIntyre explains:

A precondition of the adherents of two different traditions understanding those traditions as rival and competing is of course that in some significant measure they understand each other.

Id. at 370.

It is not then that competing traditions do not share some standards. All the traditions with which we have been concerned agree in according a certain authority to logic both in their theory and in their practice. Were it not so, their adherents would be unable to disagree in the way in which they do. But that upon which they agree is insufficient to resolve those disagreements.

Id. at 351.

364. *Id.* at 370.

365. *Id.* at 362-65.

366. MacIntyre concludes: “Aristotle’s account of practical reasoning is in essentials surely right.” MACINTYRE, *AFTER VIRTUE*, *supra* note 348, at 161.

367. GADAMER, *Origins*, *supra* note 294, at 179-80.

different points of view seem irreconcilably opposed. The possibility of reaching an agreement between reasonable beings can never be denied.³⁶⁸

The language at play that becomes a common language is only possible because the interpreter and the interpreted (text or other person) are within the same tradition. MacIntyre correctly ascribes importance to the status of competing ethical traditions when they are regarded from their own perspectives as ethical theories, but incommensurability at this level does not establish a fundamental demarcation between two separate traditions.

When postmodern theorists valorize the “other” by asserting that there is an unbridgeable gap between different traditions within our society and that hermeneutics remains impotent to repair the dissension, MacIntyre would agree that there may be incommensurable traditions, but he would respond by arguing that we each must carefully tend to our given tradition, and that in the communicative encounter between these several traditions there will be a winner that is best able to develop responses to the crisis of the day.³⁶⁹ Although adherents of different traditions of ethical thought are able to communicate, MacIntyre believes that they nevertheless remain distinct as ways of life, something other and foreign from each other unless one ethical tradition is willing to subsume itself in the other. This is precisely what Gadamer denies. Tradition can never become self-contained so as to enable communication with another tradition as wholly other.³⁷⁰

368. *Id.* at 180.

369. MACINTYRE, WHOSE JUSTICE?, *supra* note 354, at 401.

370. Gadamer’s critique of historicism is applicable here, and is best quoted at length: We think we understand when we see the past from a historical standpoint—i.e., transpose ourselves into the historical situation and try to reconstruct the historical horizon. In fact, however, we have given up the claim to find in the past any truth that is valid and intelligible for ourselves. Acknowledging the otherness of the other in this way, making him the object of objective knowledge, involves the fundamental suspension of his claim to truth.

... Is it a correct description of the art of historical understanding to say that we learn to transpose ourselves into alien horizons? Are there such things as closed horizons, in this sense? ...

... Just as the individual is never simply an individual because he is always in understanding with others, so too the closed horizon that is supposed to enclose a culture is an abstraction. ...

When our historical consciousness transposes itself into historical horizons, this does not entail passing into alien worlds unconnected in any way with our own; instead, they together constitute the one great horizon that moves from within and that, beyond the frontiers of the present, embraces the historical depths of our self-consciousness. Everything contained in historical consciousness is in fact embraced by a single historical horizon. Our own past and that other past toward which our historical consciousness is directed help to shape this moving horizon out of which human life always lives and which determines it as heritage and tradition.

....

We can never choose between competing traditions, because to understand that there is a choice is already to have assimilated within one's own tradition the competing visions of social life. There is always a fusion of horizons, in which past and present, one ethical tradition and another, become something new in the event of understanding.

Thus, we hold, the fact that our experience of the world is bound to language does not imply an exclusiveness of perspectives. If, by entering foreign language-worlds, we overcome the prejudices and limitations of our previous experience of the world, this does not mean that we leave and negate our own world. Like travelers we return home with new experiences. Even if we emigrate and never return, we still can never wholly forget.³⁷¹

Gadamer stresses the ubiquitous fundamental continuity that defines every individual person as well as every community, even while accepting that there can be apparent epochal changes, as in the case of a shattering-yet-edifying encounter with great artwork in which all pretense of subjectivity is discredited.³⁷²

Gadamer's use of the term "tradition" is more fundamental than MacIntyre's use. In Gadamer's view, we never leave tradition even when there seemingly is a radical break and we ostensibly emigrate to another way of living in the world.³⁷³ Instead, we embody a horizon that carries forward only one tradition, a tradition that constantly is being renewed even if it sometimes develops in radically new ways. The commonality of linguistic openness and the overriding historicity of existence overcome the

Transposing ourselves [into a historical situation] consists neither in the empathy of one individual for another nor in subordinating another person to our own standards; rather, it always involves rising to a higher universality that overcomes not only our own particularity but also that of the other.

GADAMER, *TRUTH AND METHOD*, *supra* note 9, at 303-05.

371. *Id.* at 448. Similarly, David Linge contends that Gadamer's approach proves itself superior to the later Wittgenstein's relativist notion of autonomous language games.

Wittgenstein's worry about the autonomy of language games and his desire to avoid a transcendental position from which the plurality of games might be reduced to the rules of one transcendental game led him to overlook precisely the assimilative power of language as a constant mediation and translation. . . . The analyzer of language games is himself involved in an integration or fusing of language games, not in the form of one transcendental game, but in a finite form appropriate to all human reflection, namely, as insight into how language games, in their actual playing, grow and absorb each other.

Linge, *Introduction*, *supra* note 261, at xxxvi-xxxvii.

372. GADAMER, *PHILOSOPHICAL HERMENEUTICS*, *supra* note 261, at 104 (describing the experience of art as the "shattering and demolition of the familiar"). Gadamer describes great literature as texts that overcome the subjectivism of the reader. "The interpreter, who gives his reasons, disappears—and the text speaks." Gadamer, *Text*, *supra* note 245, at 51.

373. GADAMER, *TRUTH AND METHOD*, *supra* note 9, at 304.

differing horizons that each person, community, or ethical tradition embody. MacIntyre's history of different ethical traditions must be cast against what Gadamer would regard as our singular traditional horizon.³⁷⁴ To go beyond this all-embracing, horizontal tradition is unthinkable and unspeakable.³⁷⁵

Gadamer's emphasis on the singularity of tradition undoubtedly appears to contradict his postmodern attack on foundational accounts of knowledge. One critic charges that Gadamer evidences "highly reactive essentialist misgivings" about his own radically historical account of human existence, which leads Gadamer to attempt to recover some measure of "effective invariance of norms *in* history against the inherently inconstant reality acknowledged" throughout his writings.³⁷⁶ This criticism unfairly attributes to Gadamer the vision of a unified and closed horizon that is shared equally by all persons. Gadamer plainly rejects the idea that history is the playing out of a unified story, or that the ebb and flow of history is contained by a larger, stable repository of traditional archetypes or

374. SMITH, FINITUDE, *supra* note 332, at 63-67. Smith compares the apparent incommensurability of ethical traditions with the apparent chaotic state of American English, for ethical judgment can be reached "only in the medium of the inherited language that we have to talk about it." *Id.* at 88.

Insofar as there is at any point a standard American English, whatever the penumbra of disagreement surrounding it, there are, I would maintain, ethical standards to be discovered in it, ethical standards that are the evolving amalgam of initially conflicting influences that fuse and merge with the mainstream altering its course and enriching its substance. . . . Hence it is one-sided to speak as MacIntyre often does in terms of "rival points of view." For in the end one ethical point of view . . . does not so much drive its "rivals" from the field as embrace and merge with them.
Id. at 278-79.

375. P. Christopher Smith describes the impact of Gadamer's philosophy on ethics specifically by contrasting Gadamer with MacIntyre. In an argument closely resembling my own, Smith argues that MacIntyre seems to adopt a Wittgensteinian pragmatic approach to conflicting traditions that to some extent places the ethical actor beyond the limits of any of the competing traditions.

Indeed, in disregard of whatever tradition I might find myself, in setting it aside as a possibly prejudicial encumbrance, I am now to judge autonomously what means will serve "best" to solve the problem at hand. . . .

. . . MacIntyre . . . plays off Aristotelianism against Nietzscheanism as if he were a detached observer surveying a past in which he is no longer a participant and by which he is no longer conditioned. Anachronistically, he selects those past theories which, from his critical position outside them, he assesses to be "rationally superior" and the "best" he can find "to date." If one thinks about it, his project is hardly less astonishing than if someone were to propose that we disregard the English language we have inherited and try to speak in some other tongue, let us say, ancient Greek.
Id. at 53-54.

376. Joseph Margolis, *Interpretation at Risk*, 73 THE MONIST 312, 322 (1990).

norms.³⁷⁷ But Gadamer simultaneously acknowledges that the irruptions of history always occur within the horizons of historical beings. It is illegitimate in principle to talk of a "complete break" with tradition, or to imagine a confrontation between two wholly distinct traditions, simply because no person experiences life in these ways. Intelligibility involves embracing the interpreter's horizontal tradition, and understanding requires a fusing of horizons. Gadamer's reference to a singular tradition is meant only to acknowledge that understanding belongs to individuals enmeshed in an open hermeneutical circle of understanding.³⁷⁸

The imagery of an open circle underscores one of Gadamer's most important, although often neglected, themes: there is a fundamental distance between the interpreter and the other (text or person) that is never overcome entirely. The whole point of dialogue is to energize this field between individuals and to lead them to a higher universality, not by erasing each conversation partner's individuality, but by respecting it. Gadamer acknowledges that Derrida's attacks on hermeneutics stem from the legitimate concern that Gadamer's attention to dialogical "reciprocal understanding and mutual agreement" denigrates the other person to the conversation.³⁷⁹ "To be in a conversation, however, means to be beyond oneself, to think with the other and to come back to oneself as if to another."³⁸⁰ As summarized by Richard Bernstein, Gadamer paradoxically ties the communion of understanding to the distinctiveness of the other.

The basic condition for all understanding requires one to test and risk one's convictions and prejudgments in and through an encounter with what is radically "other" and alien. To do this requires imagination and hermeneutical sensitivity in order to understand the "other" in its strongest possible light. Only by seeking to learn from the "other," only by fully grasping its claims upon one can it be critically encountered. Critical engaged dialogue requires opening of oneself to the full power of what the "other" is saying. Such an opening does not entail agreement but rather the to-

377. GADAMER, *TRUTH AND METHOD*, *supra* note 9, at 304.

378. *Id.* Gadamer is adamant that criticism directed against his alleged idealism misses the mark.

It seems very misleading to me for someone to say that just because I emphasize the role of tradition in all our posing of questions and also in the indication of answers, I am asserting a super-subject . . . There is no support in *Truth and Method* for this kind of construction. When I speak there of tradition and of conversation with tradition, I am in no way putting forward a collective subject. Rather, "tradition" is simply the collective name for each individual text.

Gadamer, *Destruktion*, *supra* note 321, at 111. A commentator agrees that "Gadamer rejects finality, totality and the very idea of the completed system. . . . [T]he hermeneutic experience of understanding[] is always and necessarily open to further experience; it never completes itself." BERNSTEIN, *CONSTELLATION*, *supra* note 200, at 307.

379. Gadamer, *Letter*, *supra* note 261, at 97.

380. Gadamer, *Destruktion*, *supra* note 321, at 110.

and-fro play of dialogue. Otherwise dialogue degenerates into a self-deceptive monologue where one never risks testing one's prejudices.³⁸¹

Against and through our singular tradition the confrontation with the other occurs. Gadamer broadens the political implications of his anti-Cartesian approach by acknowledging the "otherness" not only of individuals and texts, but also of cultures, religions and even nature.³⁸²

MacIntyre's own work confirms Gadamer's thesis that we never step outside of our tradition. Both *After Virtue*³⁸³ and *Whose Justice? Which Rationality?*³⁸⁴ translate historically situated and competing ethical traditions into a narrative that is not only intelligible but erudite. There is no overriding rational rule that compels MacIntyre's advocacy of Aristotelian ethics over Nietzschean subjectivism, but then neither are there rules that can guide a member of a given ethical tradition to develop that tradition creatively in response to an epistemological crisis. Tradition renders all ethical traditions that speak to us commensurable-in-dialogue, although they are not subject to rational adjudication in the manner of the Enlightenment project. MacIntyre's ironic conclusion is that the decision to reinvigorate Aristotelian ethics rather than continue with liberal ethical theory is rational, but it is rational under the Aristotelian model of practical rationality.³⁸⁵ This obvious bootstrapping would undermine MacIntyre's efforts to bring consensus to ethical theory if he is correct that different ethical traditions are incommensurable. In contrast, Gadamer focuses on the ontological

381. BERNSTEIN, CONSTELLATION, *supra* note 200, at 4; *see also id.* at 57-78 (ch. 3, "Incommensurability and Otherness Revisited"); *id.* at 305 (There must be "a recognition of the irreducible differences among dialogical partners. Otherwise there is no real dialogue, no real *mutual* recognition.") Gadamer accuses Derrida of precisely this type of self-deceptive monologue, although Derrida subverts dialogue ostensibly with the goal of respecting the irreducible other. *See supra* note 326.

382. GADAMER, EDUCATION, *supra* note 309, at 152, 236. Fred Dallmayr skillfully traces Gadamer's recent efforts to discount criticisms of his philosophy as being too idealistic in its emphasis on the fusion of horizons. Fred Dallmayr, *Self and Other: Gadamer and the Hermeneutics of Difference*, 5 YALE J.L. & HUMAN. 507 (1993). Dallmayr demonstrates that Gadamer's most recent writings confirm that his guiding premise is

a disinclination to let rupture or estrangement have the last word. Instead of celebrating the incommensurability of "language games" or "phrase families" (to borrow terms coined by Wittgenstein and Lyotard), Gadamer's account accentuates the open-endedness and at least partial interpenetration of languages and discourses. In lieu of a radical segregation of texts and readers, his hermeneutics tends to underscore their embeddedness in a common world—although this world is not so much a "universe" as a "pluriverse" or a multifaceted fabric of heterogeneous elements.

Id. at 512; *see supra* note 378.

383. *See* MACINTYRE, AFTER VIRTUE, *supra* note 348.

384. *See* MACINTYRE, WHOSE JUSTICE?, *supra* note 354.

385. *Id.* at 144.

foundations for human understanding that render these competing ethical models open to each other by virtue of their linguisticity. Gadamer's references to Aristotle are not references to a separate tradition of inquiry that is true, but instead are meant to draw upon our one tradition in making sense of the experience of understanding.

MacIntyre's claim that the "rootless cosmopolitanism" of modernity has engendered an internationalized language divorced from the historically situated ethical traditions that it has colonized might accurately describe the misplaced hopes of liberal enlightenment, but it certainly cannot be an accurate description of our language in use. As MacIntyre is at great pains to demonstrate, the liberal program of tradition-free knowledge itself is tradition-bound, and so the universal language of liberal enlightenment can never in practice deny tradition. The ostensibly tradition-independent language of liberalism must always be rooted in the community's preceding constitutive tradition and must always amount to a (perhaps unproductive) development of that tradition.³⁸⁶ MacIntyre wants to plot a return to the Aristotelian ethical tradition, but we simply cannot do so by abandoning liberalism and all that it has wrought. The Enlightenment promise of a presuppositionless and universalized ethical inquiry has collapsed, but the reconstruction of ethics will develop within the bounds of a tradition that now envelops both Nietzsche and Aristotle.³⁸⁷

Robert Cover's momentous article, *Nomos and Narrative*,³⁸⁸ exemplifies Gadamer's teachings on the conflict of traditions.³⁸⁹ Cover considers the seemingly insoluble conflicts raised in the *Bob Jones University*³⁹⁰ tax exempt status case by tracing the normative traditions that appear to collide in an incommensurable babble between "the competing claims of the redemptive constitutionalism of an excluded race, on one hand, and of insularity, the protection of association, on the other."³⁹¹ Cover intelligently describes these deeply rooted, fundamental traditions within the American polity and decries the *Bob Jones* opinion for ignoring the conflict between these jurisgenerative traditions and simply upholding the administrative authority of the Internal Revenue Service to invade the *nomos* of the insular religious community.³⁹² By adopting the position that the compet-

386. DALLMAYR, ENCOUNTERS, *supra* note 349, at 114-15.

387. Fred Dallmayr suggests that "the rigid dichotomy of Nietzsche versus Aristotle emerges as extremely fragile if not entirely untenable." *Id.* at 207; see SMITH, FINITUDE, *supra* note 332, at 53-54.

388. See Cover, *Narrative*, *supra* note 15.

389. *Id.* As indicated, Cover inaccurately attributes a statist ideology to Gadamer that admits only of a "gap-filling" function for legal hermeneutics. I believe that Cover's article in fact is quite in sync with Gadamer's work, as evidenced by Cover's invocation of Heidegger's teachings about interpretation. See Cover, *Violence*, *supra* note 15, at 45 n.125.

390. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

391. Cover, *Narrative*, *supra* note 15, at 66.

392. *Id.* at 66-67. Cover regards the case as an example of "jurispathic" behavior

ing normative visions of religious minorities seeking insular autonomy and racial minorities seeking redemptive inclusion are *law*, Cover recognizes that incommensurability is an obvious threat.

[T]he meaning of [our federal constitution] is always “essentially contested,” in the degree to which this meaning is related to the diverse and divergent narrative traditions within the nation. All Americans share a national text in the first or thirteenth or fourteenth amendment, but we do not share an authoritative narrative regarding its significance. . . .

. . . . The challenge presented by the absence of a single, “objective” interpretation is . . . the need to maintain a sense of legal meaning despite the destruction of any pretense of superiority of one *nomos* over another.³⁹³

Cover nevertheless defends the possibility of edifying adjudication and argues that courts fulfill their function only when they engage in the troubling dialogue that seeks meaning by engaging these competing claims rather than merely reinforcing the power of the state and foreclosing “worlds that might be built.”³⁹⁴ There are no shared standards of rationality for judging the claims of different noematic worlds within our polity, but there is language-at-play in which difficult conversations are held.

In *Bob Jones* the Supreme Court avoids the dynamic dialogue of language-at-play, and instead “assumes a position that *places nothing at risk* and from which the Court makes no interpretive gesture at all.”³⁹⁵ Cover’s theme drives to the heart of Gadamer’s project. Normative traditions define ways of life in which appropriate behavior is practically mastered, but the openness of language presents the further possibility of reconciling these noematic traditions within a broader polity, not in accordance with a value-free discourse, but simply as the practical engagement and development of tradition. Cover properly rejects a one-sided view that stale rules of law must be infused with the pluralistic, dynamic morality of society.³⁹⁶ Authentic legal discourse is always an innovative articulation, but equally important is the fact that the discourse limits and shapes the *nomos* embodied in the different communities involved in dialogue.

It is not the romance of rebellion that should lead us to look to the law evolved by social movements and communities. Quite the opposite. Just

designed to limit and ultimately channel the manifold interpretive possibilities raised by the divisive jurisgenerative forces within society.

393. *Id.* at 17, 44 (footnote omitted).

394. *Id.* at 60.

395. *Id.* at 66 (emphasis added). Gadamer’s emphasis on being-at-play as being-at-risk, which is closely related to the deconstructionists’ attack on subjectivity, also appears quite close to Cover’s position that the “uncontrolled character of meaning exercises a destabilizing influence upon power.” *Id.* at 18.

396. Cover, *Violence*, *supra* note 15, at 1617-18.

as it is our distrust for and recognition of the state as reality that leads us to be constitutionalists with regard to the state, so it ought to be our recognition of and distrust for the reality of the power of social movements that leads us to examine the nomian worlds they create. And just as constitutionalism is part of what may legitimize the state, so constitutionalism may legitimize, within a different framework, communities and movements. Legal meaning is a challenging enrichment of social life, a potential restraint on arbitrary power and violence. We ought to stop circumscribing the *nomos*; we ought to invite new worlds.³⁹⁷

We do not invite new worlds by a fiat of will, but only by receding to the practices and commitments that precede willing, and by keeping these practices and commitments at risk in play. The "jurispathic" silencing of a community that occurs when a court rejects its normative vision in favor of another is never simply the violence of the state if the court is at risk before the tradition; the jurispathic is then always bound up with a jurisgenerative event.³⁹⁸

E. Critical Hermeneutics and the Rule of Law: Who is a Person?

The significance of acknowledging the putting-at-risk of language-at-play is not immediately apparent. Pragmatic critics might challenge the project of redeeming our faith in the Rule of Law by questioning what relevance this philosophical dialogue about metaphysics and ontology holds

397. Cover, *Narrative*, *supra* note 15, at 68.

398. For example, Cover notes the relevance of the antebellum debates about whether the Constitution could be redeemed as a statement of political community for people of all races, despite the proslavery history of the document. Cover rejects the Garrisonian "move toward nomian insularity" that regarded the Constitution as irremediably tainted and instead champions the redemptive vision of Frederick Douglass that looked to transform the "general and public *nomos*." *Id.* at 36-38. Cover's later, more brooding attention was drawn to the fact that because total hermeneutical consensus is impossible the dialogic conversation of law ultimately ends with (actual or threatened) violence by the state. Cover, *Violence*, *supra* note 15, at 1628 (reminding scholars that there is a "danger in forgetting the limits which are intrinsic to this activity of legal interpretation; in exaggerating the extent to which any interpretation rendered as part of the act of state violence can ever constitute a common and coherent meaning.")

Cover's later focus need not be viewed as a recantation of his earlier insights. See Drucilla Cornell, *From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation*, in *LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE*, *supra* note 272, at 147, 159-160, 167-70; Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 *YALE L.J.* 1860, 1904-05 (1987). It is no revelation to learn that violence occupies the abyss between the projection of common meaning and the reality of dissension. This is the staple of political theory. I take Cover's important theme to be that we cannot ignore the necessity of politics in favor of an idyllic portrait of fully commensurate social dialogues. However, such a position by no means forsakes the ennobling power of legal discourse to rearticulate and mediate the complex nomian worlds within our polity.

for lawyers and judges. Upon reflection though, it should be apparent that this dialogue cannot help but be relevant. In response to challenges to the Rule of Law courts naturally adopt the idiom of formalism to buttress the legitimacy of their activity. This charade results in a stifled jurisprudence. Practice is both muted and mutated when an obvious feature of our political life is rendered implausible by wrong-headed presuppositions about the character of the practice. Recovering the grounds for our faith in the Rule of Law can invigorate legal practice. This is demonstrated, for instance, by the possibilities opened when a judge rejects the pretense of objectivity that is bound up with originalist jurisprudence as being unnecessary to, and disruptive of, the Rule of Law.³⁹⁹

In this section of the Article, I demonstrate the relevance of critical hermeneutics by considering a specific interpretive problem: the question of personhood presented to the Supreme Court in *Roe v. Wade*.⁴⁰⁰ In *Roe* the Supreme Court confronted the "sensitive and emotional" abortion controversy with full recognition that people's divergent backgrounds and experiences inevitably color their "thinking and conclusions" about abortion, but also with the conviction that the Court was constrained to "resolve the issue by constitutional measurement, free of emotion and predilection."⁴⁰¹ The Court asserts the authority and possibility of the Rule of Law amidst the chaos of political confrontation. However, the Court's opinion does not embody the playful confrontation that girds what we term the Rule of Law. Critical hermeneutics cautions us that it is not possible to prescribe a formula or method of reaching a correct decision in a legal dispute. It is possible, though, to describe the form of life that putting at risk implies. I demonstrate how this form of life can be embodied in legal practice by describing the stifling rhetoric of the *Roe* opinion and by offering an alternative discussion that appears to capture more closely the Court's struggle with the interpretive problems in the case. I argue that *Roe* has unraveled as a statement of constitutional doctrine in part due to the unpersuasive character of the majority opinion.⁴⁰² I do not propose a method for solving the problems considered in *Roe*, but I do emphasize the very real consequences of the rhetorical method employed by the Court in an effort to maintain legitimacy according to a misguided view of the Rule of Law.

399. Mootz, *Ontological Basis*, *supra* note 15, at 554-56.

400. 410 U.S. 113, 156 (1973).

401. *Id.* at 116.

402. Although the plurality in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992), claims to reaffirm the "essential holding" of *Roe*, Justice Scalia emphasizes (accurately, I believe) that by abandoning the trimester framework the plurality has in fact undercut important features of the *Roe* legacy. *Id.* at 2881 (Scalia, J., concurring in the judgment in part and dissenting in part).

1. *Roe* and the Question of Personhood

After deciding that the Fourteenth Amendment's guarantee of personal liberty is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"⁴⁰³ the Court in *Roe* qualified this liberty by recognizing two countervailing "important state interests" in regulation: an interest in protecting the health of a pregnant woman and an interest in protecting the potential life of a conceptus.⁴⁰⁴ These two state interests justify, in differing degrees, limitations on a pregnant woman's liberty to make decisions regarding childbearing free of governmental intervention.⁴⁰⁵ The crucial problem for the Court was to determine when these state interests became compelling so as to justify restrictive anti-abortion statutes.⁴⁰⁶ Thus, *Roe* framed the abortion issue as pitting a woman's right to privacy against the authority of state regulation.⁴⁰⁷ Acknowledging a state interest in preserving the woman's health is unexceptional, but the asserted state interest in the "potential life" of the conceptus is more problematic.

The state interest in protecting "potential life," whatever that curious term might include, plainly is not as compelling as the state interest in protecting actual life. In *Roe* the State of Texas argued that it was justified in making most abortions criminal because a conceptus is a person protected "within the language and meaning of the Fourteenth Amendment."⁴⁰⁸ In the alternative, the State contended that a conceptus is an actual human life, thereby triggering a "compelling interest in protecting that life from and after conception."⁴⁰⁹ The Court rejected both of these arguments, holding that a conceptus is not a person protected by the Fourteenth Amendment and also that the Court could not and "need not resolve the difficult question of when life begins."⁴¹⁰ In contrast to the Court's articulation of the liberty

403. *Roe*, 410 U.S. at 153.

404. *Id.* at 153, 154.

405. In *Roe* the Court balanced these two state interests and the pregnant woman's rights by adopting the now defunct trimester analysis. The legitimate state interest in protecting the health of the pregnant woman became compelling at the end of the first trimester and increased in importance during the course of the pregnancy. *Id.* at 148-50, 163. The legitimate state interest in protecting the potential life embodied by the conceptus became compelling when the conceptus was capable of "meaningful life outside the mother's womb," approximately at the end of the second trimester. *Id.* at 162, 164. The Court has subsequently rejected the trimester approach and now measures state regulation of abortions to determine if an "undue burden" has been placed on women's constitutionally protected liberty. *Casey*, 112 S. Ct. at 2820-21.

406. *Roe*, 410 U.S. at 155.

407. *Id.*

408. *Id.* at 156.

409. *Id.* at 159.

410. *Id.*

interest in reproductive autonomy,⁴¹¹ the Court's discussion of the status of the conceptus invokes a formalist conception of adjudication.⁴¹² The Court's consideration of the question of personhood exemplifies the anemic jurisprudence that animates contemporary legal practice, a practice that is unmindful of the hermeneutical situation described by Gadamer. *Roe* is deficient not because it articulates the "wrong" legal rule, but because the question of personhood is never authentically addressed.

The Court accepted the argument that state laws prohibiting the destruction of a conceptus would be justified by a compelling state interest if a conceptus is a person protected by the Fourteenth Amendment.⁴¹³ However, the Court determined on the basis of a brief three-pronged analysis that a conceptus is not within the meaning of the word "person" as it is used in the Fourteenth Amendment.⁴¹⁴ The Court first considered the apparently consistent use of the term in the constitutional text and concluded that no such use of the word "person" indicated "with any assurance, that

411. *See id.* at 129-46.

412. *See id.* at 156-62.

413. *Id.* at 156-57. Justice Blackmun certainly erred, however, by concluding that in this case of justification only a blanket ban on all abortions would be constitutionally permissible, even when preserving the woman's life required that an abortion be performed. *Id.* at 157-58 n.54. There is no obvious constitutional basis for always weighing the rights of the conceptus-person over the rights of the pregnant woman, and so statutes that effected such a balancing by permitting but limiting abortions might be able to pass constitutional muster. Similarly, a state that effectuated this balancing by criminalizing abortion as an offense less heinous than murder would not invariably be unconstitutional. Moreover, the Court might find that a state statute forbidding abortion in all cases protects the conceptus-person at too great a cost to the pregnant woman's rights. It would be the Court's burden to balance the conflicting constitutional rights of the two persons.

Commentators have long argued that balancing the needs and rights of two persons does not foreclose abortion of the conceptus-person. *See, e.g.,* LAURENCE H. TRIBE, *THE CLASH OF ABSOLUTES* 129-35 (1990) [hereinafter *TRIBE, CLASH*]; Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1641 (1979) [hereinafter *Regan, Rewriting*] (equal protection argument that the personhood of the conceptus, "even if it be conceded, is not an adequate reason (indeed it is no reason at all) for treating the pregnant woman differently from other potential samaritans"); Judith J. Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971) (ethical basis for refusing to aid another). Ronald Dworkin argues that if the conceptus is accepted to be a person, the state legitimately could balance the competing interests by prohibiting an abortion intended to save the life of the pregnant woman. Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 402 (1992) [hereinafter *Dworkin, Unenumerated Rights*]. However, there is no reason to believe that the Constitution means that a state *must* legislate in this way, and any legislative balancing would still be subject to a constitutional measurement of the rights in conflict. Admittedly, Dworkin's hypothetical should weigh heavily in the Court's decision whether to extend legal personhood to a conceptus.

414. *Roe*, 410 U.S. at 157-59.

it has any possible pre-natal application."⁴¹⁵ The Court then looked to the presumed original intent of the Amendment's drafters not to include conceptuses within the protections of the Fourteenth Amendment, as revealed by the fact that abortion was more freely obtained at the time of the Amendment's adoption.⁴¹⁶ Finally, the Court noted that the three lower courts directly addressing this question each had held that a conceptus was not entitled to Fourteenth Amendment protections.⁴¹⁷

Although *Roe* is hailed as a progressive case that breaks free from outmoded forms of decision-making, the opinion appears quite pedestrian in this light. The Court addressed the question of personhood with question-begging textual analysis and (tongue-in-cheek?) reliance on an unexpressed original intent. This approach does not ensure that the decision is made in accordance with the Rule of Law; in fact, the Court's approach inhibits the dynamic reevaluation of tradition that is characteristic of the Rule of Law as putting-at-risk. Whether a conceptus should be regarded as a person protected by the Fourteenth Amendment raises the question whether a conceptus should be regarded as a member of the legal community. The most important question that the Supreme Court can answer is who should be deemed a person under the Constitution, but the *Roe* opinion shunts this question aside in favor of addressing the less troubling problem of balancing abstract state power and the individual rights of pregnant women.⁴¹⁸

415. *Id.* at 157.

416. *Id.* at 158.

417. *Id.* The cases cited by the Court address in greater detail the deeper questions that are glossed over in the Court's sparse discussion. In *Byrn v. New York City Health & Hosp. Corp.*, 286 N.E.2d 887, 889-90 (N.Y. 1972), the New York Court of Appeals found that the historical fact that conceptuses have never been considered "whole" persons was not determinative as to whether personhood might be appropriate today, but that this policy decision is best reserved to the legislature to enunciate. In *McGarvey v. Magee-Women's Hosp.*, 340 F. Supp. 751, 754 (W.D. Pa. 1972), the district court similarly found that the legislature was best suited to determining the status of conceptuses, and that making such a determination as a matter of constitutional law would be imprudent. Both *Byrn* and *McGarvey* involved challenges to liberal abortion statutes, and reflect a judicial willingness to defer to the democratic process. In contrast, in *Abele v. Markle*, 351 F. Supp. 224, 232 (D. Conn. 1972), the district court articulated the limits of legislative prerogative by holding that the pregnant women's constitutional right to make decisions regarding childbearing cannot be virtually eliminated by the state's decision to accord statutory rights to conceptuses as part of a conservative abortion statutory scheme. In striking down a Connecticut statute banning most abortions, the court noted that a statute aimed at prohibiting abortions of viable conceptuses would be more likely to pass constitutional muster inasmuch as it would be a limitation on the woman's liberty that is more "generally accepted" as being legitimate. *Id.*

418. In a recent article, Alan Brownstein and Paul Dau describe the moral question posed by the destruction of a conceptus and argue that it

was never adequately addressed, much less persuasively resolved, in Justice Blackmun's *Roe v. Wade* opinion. Instead, the Court deliberately avoided issues of morality and attempted to resolve the abortion debate in an ethical vacuum through the use of

One may recall that in the *Dred Scott* case⁴¹⁹ Chief Justice Taney engaged in deliberations on the question of legal personhood with embarrassing and horrific results.⁴²⁰ Although freed slaves were recognized as human beings, the Court concluded that they could not become members "of the political community formed and brought into existence by the Constitution."⁴²¹ For Taney, deciding whether former slaves were legal persons depended on what the drafters of the Constitution intended because this original intent fixed the meaning of the words used.⁴²² Although Taney concluded that the use of the word "person" in the Declaration of Independence and the Constitution "would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood," the fact remained that the Constitution also sanctioned slavery, revealing what Taney considered to be the founders' intent not to include "the negro race" within the political community.⁴²³ Justice McLean's dissenting opinion vigorously questioned Taney's strong originalism, arguing that it is inappropriate "to draw the sources of our domestic relations from so dark a ground," from a tradition that derives from the "dark ages of the world."⁴²⁴

Those defending *Roe* largely have ignored the claim that the Court's manner of discussing the question of personhood raises the problem of the "jurisprudence of exclusion," and therefore they are unable "to ease the mind of someone who fears that *Roe* is really *Dred Scott* for the unborn."⁴²⁵ In *Roe* the Court deferred to the mythical "plain meaning, original intent, univocal tradition" without directly taking up the question of the legal personhood of the conceptus. The opinion lacks persuasive power because its rhetorical strategy does not establish a productive framework for working through the problem. I shall explore how the opinion could have

ostensibly neutral legal principles. . . . This article directly confronts that moral conflict [between women's reproductive rights and the state's interests in promoting its moral goals] in a way that *Roe* did not.

Brownstein & Dau, *Constitutional Morality*, *supra* note 25, at 697.

419. *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

420. *Id.* at 393.

421. *Id.* at 403.

422. *Id.* at 426.

423. *Id.* at 410-11.

424. *Id.* at 537-38 (McLean, J., dissenting); *cf. id.* at 572-76 (Curtis, J., dissenting) (attacking the majority opinion on its own terms by arguing that the founders intended to include freed slaves within those persons designated as citizens of the United States). This dialogue about the proper interpretive approach to the constitutional text mirrored the antebellum debate over whether the Constitution could be redeemed as a foundational political document for the nation or whether it was irremediably tainted with the historical fact of slavery. Robert Bernasconi, *The Constitution of the People: Frederick Douglass and the Dred Scott Decision*, 13 CARDOZO L. REV. 1281, 1288-90 (1991); *see supra* note 398.

425. Anita L. Allen, *Tribe's Judicious Feminism*, 44 STAN. L. REV. 179, 196 (1991).

been more expressive and at-risk in this regard after first broadening the discussion to consider the Court's response to the alternative argument that a conceptus is a "non-constitutional" person.

The alternative claim advanced by the state in *Roe* was that a conceptus constituted human life which, even if not entitled to full constitutional protection, provided a compelling basis for legislative prohibitions of virtually all abortions.⁴²⁶ Justice Blackmun's opinion in *Roe* appears to be on stronger hermeneutical ground in response to this claim. Noting that "the restrictive criminal abortion laws in effect in a majority of states today are of relatively recent vintage," Blackmun attempted to discern what the medical-legal history "reveals about man's [sic] attitudes toward the abortion procedure over the centuries."⁴²⁷ This encounter with the tradition was utilized effectively to illuminate and assess the nature of the burden placed on the pregnant woman's liberty interest.⁴²⁸ In contrast, the Court's consideration of the historical tradition regarding the status of a conceptus appears to paralyze rather than invigorate the discussion.

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

426. There is an intermediate argument that the conceptus is an actual human life that, while not entitled to full constitutional protection, is protected to some lesser degree as a matter of constitutional law. This distinction draws some support from the text of the Fourteenth Amendment. Section One of the Fourteenth Amendment provides that all persons "born or naturalized in the United States" shall enjoy the privileges and immunities of citizenship. However, the right to due process and equal protection is accorded to all persons rather than just to all citizens. Presumably a court could hold that a conceptus is a person entitled to due process without being a person entitled to all rights of citizenship. Such an approach would be analogous to the line of cases under which corporations have been accorded limited constitutional rights under the Fourteenth Amendment without being accorded the rights and privileges of full citizenship. See, e.g., *Abele*, 351 F. Supp. at 234 (Clarie, J., dissenting). Although corporate persons are not accorded constitutional rights that conflict with "real" persons, as a human life the conceptus might be characterized as a legal person with rights greater than a corporation but lesser than a person who has been born and whose liberty is infringed by the conceptus.

427. *Roe*, 410 U.S. at 150.

428. *Roe*, 410 U.S. at 130-52. The Court could have been much more forceful in drawing attention to the fact that abortion regulation has been utilized as one of a number of means of reinforcing the inferior social status historically accorded to women. This "equal protection" analysis of *Roe* recently was articulated in some detail by Laurence Tribe in *Clash*. In his opinion in *Casey*, Justice Blackmun now agrees that constitutional guarantees of gender equality are implicated in the abortion controversy along with privacy rights. *Casey*, 112 S. Ct. at 2847 n.4 (Blackmun, J., dissenting in part).

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question.⁴²⁹

Without an airtight means of determining when and if a conceptus becomes a person, the Court simply removes the question from discussion. By proclaiming a neutral, liberal tolerance for incommensurable values within the community, the Court eschewed any attempt to bring together the noematic worlds in conflict over the abortion issue by leaving unanswered whether the conceptus should ever be regarded as a person.⁴³⁰ Such a gesture could only presage the increasing intolerance and self-righteousness of those within society who hold strong views on either side of this question.

2. The Hermeneutics of Personhood

It would be beyond arrogance to suggest that a Gadamerian hermeneut could successfully weave a unifying compromise from the competing narratives spoken by those who affirm the sanctity of all life and those who affirm women's independence from the ideology of biological necessity. The abortion issue, like most significant moral issues, tends to inspire intractable commitments that put members of the community sharply at odds with one another. It is precisely this polarization that immediately raises the possibility that combatants will assert their subjective will and refuse to put their prejudices at risk in hermeneutical dialogue.⁴³¹ This has occurred to a large degree in the ongoing public debate, and it threatens to overwhelm judicial deliberation as well.⁴³² However, even if members of the community embody hermeneutical openness and overcome this initial hurdle, it is apparent that the contestants have no access to an independent language in which competing claims can be ordered and critiqued. When they discuss abortion, both the fundamentalist pro-life advocate and the feminist pro-choice advocate lack a standpoint from which to demonstrate that the other is using language improperly in a way that exposes the error in their beliefs.

Critical hermeneutics cannot provide the answer to such intractable debates by prescribing the correct language of moral discourse, but this does not render its insights useless. Critical hermeneutics emphasizes that the interpretive challenge always is to recover the common ground of the language-in-play that is the basis for maintaining an ongoing conversation. "Language-in-play" is a shorthand recognition of the commonality of our linguistic heritage, which of necessity involves belonging to a tradition and

429. *Roe*, 410 U.S. at 159-60.

430. See Brownstein & Dau, *Constitutional Morality*, *supra* note 25, at 697.

431. See Dallmayr, *Hermeneutics*, *supra* note 7, at 1466-67.

432. One can not help but think that perhaps Justices Scalia and Blackmun *are* speaking different languages in *Casey*, if only because each is engaging in a monologue that does not really address the other.

being held open to change. The fundamentalist and feminist begin without a means of securing their respective claims, but this impasse is not ontologically defined as a clash between rigidly circumscribed and mutually exclusive moral traditions. The historical give-and-take of the attempts to reach understanding and consensus slowly transforms each position so long as they remain at risk in play.⁴³³ This type of dialogue regarding abortion is being fostered today by the Public Conversations Project of the Family Institute of Cambridge, and is not just a hermeneutical fantasy.⁴³⁴

433. See SMITH, FINITUDE, *supra* note 332, at 63-67.

434. See Elaine Goodman, *A Demilitarized Zone in the Abortion War*, BOSTON GLOBE, May 31, 1992, at 79. The Public Conversations Project is an attempt by a group of family therapists to take the techniques of "pattern-busting" used to assist dysfunctional families and apply them to the abortion controversy. The Project brings together committed pro-life and pro-choice advocates and seeks to create a space for dialogue. The ground rules of these meetings require participants to talk and listen respectfully and forbids them from making accusatory statements or attempting to convince others of their views. *Id.*; M.A.J. McKenna, *Abortion Combatants Find Civility in Dialogue*, BOSTON SUNDAY HERALD, Apr. 5, 1992, at 3.

The communicative focus adopted by the group is strikingly similar to Gadamer's teachings. As related by members of the Project:

[W]e have been testing the hypothesis that some of the interventions and ways of thinking that therapists use with stuck and conflicted couples and families can be applied effectively to stuck and polarized political conversations among unrelated citizens. Our primary objective has been to develop a replicable dialogue format to help people with opposing views listen to, and learn something new about, each other and themselves. Perhaps people can even discover fruitful questions, ideas, and opportunities for action obscured in the ideological storms that often surround "hot" issues. . . .

. . . . Our goal is . . . [t]o create a safe context for complex, respectful, and heartfelt conversations about the apparent and hidden differences and similarities in participants' views about abortion and other polarized public controversies. In our dialogue work, as in our work with families, we strive to help people move away from ritualistic battles toward exchanges in which listening, learning, and change are possible. We believe that new ideas naturally emerge when people are genuinely interested in, and understood by, one another. In our dialogue work, as in our clinical work, we do not aim to predict or determine what will be included in the new behaviors and ways of thinking that emerge, once the old ones recede.

Carol Becker et al., *The Public Conversation Project Focuses Dialogue on Abortion*, FAMILY THERAPY NEWS, June 1992, at 4, 4, 8.

Margaret Herzig, the Project's executive director, explains that the group wants "to create a context for a different kind of conversation that is respectful and promotes learning." J. Connell, *Foes in Abortion Battle Seek Common Ground*, NEW ORLEANS TIMES-PICAYUNE, Apr. 5, 1992, at A10. The point of dialogue, Herzig emphasizes, is that if "you can have a conversation, you may find there are options for resolution that you never knew existed." M. Hall, *Abortion Adversaries Work to Find Common Ground*, USA TODAY, June 8, 1992, at 7A. The Public Conversations Project is one of several such efforts initiated across the country. See Tamar Lewin, *In Bitter Abortion Debate, Opponents Learn to Reach for*

Freed from anachronistic justificatory language in its opinion, the *Roe* Court might have been able to articulate its decision in a way that conforms to the underlying hermeneutical situation and inspires a continuing public and judicial dialogue. As written, the opinion is destined to offend all concerned by dodging the issue of whether the conceptus is a person. Pro-life advocates are offended because the conceptus is not accorded full rights under the Constitution, nor is the state permitted to enforce a communal definition of personhood arrived at through the democratic process. Pro-choice advocates are offended because a nebulous state interest in "potential life" overrides the woman's right to abort a viable conceptus and provides justification for at least some manner of regulation prior to viability. *Roe*'s seeming incoherence suggests that the decision is predicated on important but unexpressed decisions about the status of the conceptus. Polarization and antipathy might be reduced if these decisions were expressed and explored as part of an ongoing definition of the legal community.

Constrained by traditional conceptions of judicial review and textual interpretation, the Court was unequipped to express and place at risk the complex normative commitments at work in the decision. Accepting that the *Roe* Court suppressed but did not defer the question of personhood, it is instructive to uncover what might be the operative basis for the decision. *Roe* probably is best understood as resting on a conviction that a conceptus qualifies as a legal person properly protected by state law only after reaching viability (regardless of when the conceptus becomes a human life), but also that the conceptus-person cannot be accorded legal rights that override the woman's interest in preserving her life or maintaining her health free from substantial impairment.⁴³⁵ If the opinion in *Roe* had

Common Ground, N.Y. TIMES, Feb. 17, 1992, at A10.

Cf. TRIBE, CLASH, *supra* note 413, at 238-42 (calling for an end to the clash of absolutes by resuming a productive dialogue, but in fact arguing the case for the pro-choice position).

435. *Roe*'s holding is stated in the following manner: "If the state is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." *Roe*, 410 U.S. at 163-64. Justices Blackmun and Stevens both emphasized in *Casey* that there has never been a challenge to the holding that a conceptus is not a person. *Casey*, 112 S. Ct. at 2848-49 (Blackmun, J., concurring in part); *id.* at 2839 (Stevens, J., concurring in part). It is evident that both Justices believe that such recognition would undermine a "fundamental premise of our constitutional law governing reproductive autonomy." *Id.* (Stevens, J., concurring in part).

Roe's refusal to adjudicate when human life begins does not foreclose a decision that a viable conceptus should be regarded as a person for at least some legal purposes. Even if a conceptus is a living human being, whether such a human being should be considered a legal person or accorded constitutional protections as a member of the body politic are different issues that cannot be collapsed into a question of biology. *Byrn v. New York City Health & Hosp. Corp.*, 286 N.E.2d 887, 889 (N.Y. 1972) (quoting John Chipman Gray for the proposition that ultimately it is a matter of policy how to define legal personhood since

openly expressed these convictions, it would have commanded more respect than the statist tenor of the actual opinion, which speaks in broad terms of reproductive freedom but then limits this freedom on account of the *state's* interest in *potential* life.⁴³⁶ Professor Rubenfeld recently argued convincingly that on *Roe's* terms only the conceptus's "status as an actual person, not a potential person, can provide the compelling state interest necessary to support a prohibition of abortion."⁴³⁷ Permitting states to prohibit abortion after viability based only on an interest in what the Court concedes *might* be a person undercuts the entire premise of *Roe*.⁴³⁸

there is very little biological difference between a child five minutes before or five minutes after it is born); Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 599 n.1, 600-01, 605 n.43 (1991) [hereinafter Rubenfeld, *Proposition*] (distinguishing between the biological fact of human life and the contextual determination of legal personhood, and making a further distinction by criticizing the claim of some commentators that the denial of constitutional personhood ends the inquiry into statutorily enacted rights for conceptuses).

Lawrence Solum makes this same point in connection with an interesting problem: how a court should respond if, in the future, an artificial intelligence machine "makes the claim that it is a person, and that it is therefore entitled to certain constitutional rights." Lawrence Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231, 1257 (1992) [hereinafter Solum, *Personhood*]. Solum follows Gray's distinction between human beings and legal persons by considering whether nonhuman artificial intelligences might meet the criteria of personhood. *Id.* at 1238-40, 1260-62.

436. See *Roe*, 410 U.S. at 152-62.

437. Rubenfeld, *Proposition*, *supra* note 435, at 600, 608-13.

438. Rubenfeld concludes that the decision in *Roe* requires that the Supreme Court declare viability as the earliest point in time that a state may accord personhood to the conceptus, and that virtually all pre-viability restrictions on abortion would be outweighed by the woman's constitutionally protected reproductive freedom. *Id.* at 635.

The recent decision in *Casey* demonstrates the logical outcome of recognizing a state interest in potential life as opposed to actual life. The joint plurality opinion makes the legitimate observation that this state interest by definition exists at all times after conception. *Casey*, 112 S. Ct. at 2804 (There is a legitimate state interest "from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child."); see *Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040, 3057 (1990) ("[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability . . ."). Under the rationale in *Casey*, this continuous state interest justifies restrictive abortion legislation so long as no "undue burden" is placed on the pregnant woman's exercise of her constitutional rights. *Casey*, 112 S. Ct. at 2818-21.

Just prior to the Court's decision in *Casey* Ronald Dworkin defended a similar approach. Dworkin rejected a legitimate state "derivative interest" in protecting the conceptus as a person, but he acknowledged a state's legitimate "detached interest" in the sanctity of human life in general, an interest that "is already at stake in a fetus's life." Dworkin, *Unenumerated Rights*, *supra* note 413, at 397. This detached interest justifies legislation designed to foster moral responsibility on the part of pregnant women, but does not legitimate attempts to coerce the woman's choice.

The fundamental right *Roe* upheld is a right against conformity. It is a right that states not prohibit abortion before the third trimester, either directly or through undue burdens on a woman's choice to abort. *Roe* itself did not grant a right, fundamental or otherwise, that states not encourage responsibility in the decision a woman makes or that states not display a collective view of which decision is most appropriate.

Id. at 410, 408-15; *cf. Casey*, 112 S. Ct. 2818 (the state's interest in informed choice permits it to express a preference against abortion). Essentially, Dworkin contends that liberal respect for the individual woman's rights is tempered by communitarian concerns with the impact of individual choices in shaping the contours of the community. Dworkin, *Unenumerated Rights*, *supra* note 413, at 426-27; *cf. Casey*, 112 S. Ct. at 2821 ("What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so.").

Dworkin struggles, though, to justify the *Roe* framework under which the state may ban abortions after, and only after, viability. Although he derides the prevailing view that the interests of the conceptus continue to grow in importance until becoming compelling at viability, Dworkin, *Unenumerated Rights*, *supra* note 413, at 396, Dworkin nevertheless defends the viability standard, in part by tying it to the existence of the conceptus's interests as a sentient non-person, *id.* at 429. In his view, a third trimester abortion is not reprehensible because the conceptus is then a person, it is reprehensible only because the woman's decision to abort after the conceptus acquires "interests" is "contemptuous of the inherent value of life." *Id.* at 430. This tension was evident before *Roe* was decided. At oral argument the Court asked *Roe*'s counsel whether a statute barring only late-term abortions necessarily would be unconstitutional, and on reargument questioned whether any compelling state interest could be acknowledged without acknowledging that the conceptus is a person. Oral Arguments, Dec. 13, 1971 & Oct. 11, 1972, *Roe v. Wade*, 410 U.S. 113 (1973), *reprinted in* 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 790, 812-14 (Philip B. Kurland & Gerhard Casper eds., 1973). *Roe*'s counsel argued that the conceptus had no constitutional status prior to birth but acknowledged that a state might legitimately forbid late-term abortions on the basis of an "emotional response" to the developing conceptus. *Id.*

Dworkin believes, as he must, that there is something about the status of the conceptus after viability that strengthens the state interest in regulation. Recognizing the "interests" of the conceptus serves Dworkin's purpose, but it appears simply to rename the legal personhood issue around which the abortion debate has raged. The fact remains that assumptions about the status of the conceptus reside at the heart of the decision in *Roe*, as was reinforced recently in the *Casey* decision. Compare *Casey*, 112 S. Ct. at 2817 (viability is the appropriate point in time at which "the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman") with *id.* at 2849 (Blackmun, J., concurring in part) (defending the viability line as reflecting "the biological facts and truths of fetal development" (quoting *Webster*, 492 U.S. at 553 (Blackmun, J., dissenting))) and *id.* at 2859 (Rehnquist, J., dissenting) (distinguishing abortion from other privacy issues due to the presence of the conceptus).

As Rubenfeld argues, without "any preconceived idea about fetal status, it becomes quite difficult to explain why abortion differs from contraception. Without more, the claim that abortion differs because of the presence of the fetus simply begs the question. . . ." Rubenfeld, *Proposition*, *supra* note 435, at 603. Two commentators recently argued that early-term abortions and contraception "are morally significant in essentially the same way":

The *Roe* opinion could have been far more productive by reflecting the Court's decision to allow the states to recognize the legal personhood of a viable conceptus. In this way the Court would not be ignoring the reason why many people are deeply troubled by abortion. However, personhood would be defined by critically measuring beliefs about the status of the conceptus against a shared awareness of the crucial importance of self-determination and privacy in our polity. By making the difficult determination of the personhood of the conceptus, the Court would adjudicate the abortion question as a conflict of fundamental rights: a woman's constitutional liberty and a viable conceptus's statutorily defined and judicially accepted status as a person. The Court could thereby avoid characterizing the dispute as one pitting individual liberties against the majoritarian power to define community values.⁴³⁹

Roe did not expressly permit recognition of personhood after the point of viability,⁴⁴⁰ most likely because the Court anticipated rigid results flowing from such an express commitment. Once we abandon the idea that words and texts carry discrete and incorrigible meanings it becomes apparent

by affecting potential life. Brownstein & Dau, *Constitutional Morality*, *supra* note 25, at 728. In my view, this approach confuses an "actual potential person" with a "potential potential person." For instance, they regard the tort of wrongful birth as premised on a claim by a severely handicapped child that she was harmed by being conceived, but then argue that it is "equally plausible to suggest that a healthy child would have been harmed by preventing its conception." *Id.* at 731-32. The authors acknowledge but reject the opposing argument, *id.* at 729 n.94, which strikes me as providing the better framework of analysis. *Cf.* Dworkin, *Unenumerated Rights*, *supra* note 413, at 404 (no person suffers harm by not being conceived, because no person exists "for whom it could have been bad"). What the comparison to contraception underscores is that articulating limitations on women's liberty interest under a "potential life" rubric does not provide strong support for state intervention, or, if it does provide support then the permissible intervention is difficult to cabin and may pose a challenge to all manner of procreative liberty. *See* Rubinfeld, *Proposition*, *supra* note 435, at 612-13.

439. Certainly the Court might still acknowledge a legitimate "detached interest" in preserving communal respect for life that would justify some pre-viability regulation of abortion, but I suspect that *Roe* would not have recognized this interest if it had utilized personhood analysis to sharply restrict post-viability abortion. I believe that this "detached interest" should be regarded as a fairly weak supplement to the "derivative interests" the state has in protecting the viable fetus and the pregnant woman. I would follow Justice Blackmun's analysis in *Casey* in this regard, arguing that such an interest might legitimate state efforts to promote childbirth and to ensure an informed and deliberate consent by women securing abortions, but such an interest would not legitimate state efforts to persuade individual women not to have abortions. *Casey*, 112 S. Ct. at 2840-41 (Blackmun, J., dissenting in part). It is difficult, however, to sort out the question of a detached interest until the derivative interests are considered openly. Although the question of a detached interest is a distinct issue, it most likely would be overshadowed by the definition of the derivative interest for which it now serves as a surrogate.

440. *Id.* at 156-57.

that "legal personhood" is a contextually defined, indeterminate characterization that is conferred on the basis of complex normative judgments.⁴⁴¹ Defining "person" and "liberty" would require nothing less than an articulation of fundamental shared values about social life, and could never be reduced to a lexical inquiry. Deciding that a viable conceptus may be regarded as a legal person does not end the inquiry, it frames the discussion by effecting a temporary resolution of a troubling issue within a broader framework of concerns. Properly framing the inquiry in this way is an important factor in keeping the question in play.

Considering this legal problem underscores how critical hermeneutics differs from Grey's extra-textualism. Although Grey correctly argues that tying *Roe* to the constitutional text in a direct, formal manner is a charade, Grey misses that the Rule of Law is realized in the Court's commitment to the effective-history of the text and the meaning it holds for the dispute at hand. It is counterproductive to counsel the Court to disregard the text and simply declare a decision about the personhood of the conceptus rather than becoming engaged with the tradition by relinquishing subjective designs. Critical hermeneutics also differs from radical deconstruction. Deconstructionists rightfully emphasize that a text is never a causal force in interpretation but instead serves as a politically charged nexus of self-definition. However, efforts to define personhood are not subject to unlimited approaches and resolutions. Legal disputes can be addressed only as part of a bounded practice that always outstrips categorization but never unceasingly deconstructs. The deconstructive critique of ideology should not be seen as a perspective *on* legal practice or as an escape *from* legal practice; it must be viewed as the dynamism *of* legal practice. Gadamer stresses that by consciously accepting the hermeneutical situation that defines textual understanding we might maximize the effect of this critical practice.

The effective history of the Fourteenth Amendment and the commitment to "liberty" for all "persons" embodies a dynamic and unsettling tradition of articulating basic conceptions of human nature and social organization. Testing the legality of abortion legislation invites a critical-deconstructive practice of redefining these terms in a new context. Within this textual play the (partially) illegitimate foundations of each side's views might be exposed and discredited. Pro-life sentiments based in part on discredited ideological conceptions of women's social standing would be challenged no less than pro-choice sentiments that in part elevate individual autonomy to a fundamentalist civic religion. By coming to grips with simultaneous concerns for the conceptus, for individual autonomy, and for the community, the legal discourse on abortion might come to define the parameters of an unstable shared agreement. Defining the point in time that legal personhood

441. Rubenfeld, *Proposition*, *supra* note 435, at 601, 627.

is acknowledged and subject to protection by the states is essential to finding such a shared base line.⁴⁴²

442. In a recent article, two commentators argue that *Roe* fails as an opinion because it does not address the inescapable moral question of abortion, but they do not believe that the moral issues devolve only to a question of when the conceptus becomes a person. Brownstein & Dau, *Constitutional Morality*, *supra* note 25, at 596-97. The authors begin by observing that the result in *Roe* is consistent with "common sense morality," which "views the decision to have an abortion as progressively more problematic in moral terms as gestation continues," *id.* at 702, but they redirect the focus of inquiry from the conceptus becoming a person to the changing nature of the woman's liberty interest.

Brownstein and Dau contend that staunch pro-choice supporters define personhood in a manner that does not admit of any morally relevant distinctions between very late term abortions and infanticide. *Id.* at 714-16, 740-42. In contrast, staunch pro-life supporters define personhood in a manner that does not admit of any morally relevant distinctions between very early term abortions and contraception. *Id.* at 723-28. Even accepting, as the authors plainly do, that shared moral intuitions will lead us to ascribe the moral status of personhood to the conceptus-child during late pregnancy or within a short time of birth, they argue that there is no morally sound and well-reasoned defense of viability as the triggering event. If "personhood" is difficult to pinpoint, and if "potential life" offers only dubious justification for state intervention as against a woman's fundamental liberty interests, our moral intuition that the morality of abortion varies during gestation must be grounded in a careful reconsideration of the pregnant woman's liberty interest in obtaining an abortion.

The authors define the relevant liberty interest as a woman's right to sexual, bodily and psychological autonomy and to bodily and psychological integrity. *Id.* at 749-59. Although Justice Blackmun wrongfully avoided the question of the conceptus acquiring personhood during gestation,

The more fundamental flaw in *Roe* is Justice Blackmun's lack of analytical attention to the woman's interests and rights. . . .

. . . We suggest that the woman's right . . . varies during pregnancy and that this change in interest shifts the balance of state interests against fundamental rights in many cases. . . . In constitutional terms, the state's interest in protecting even potential life may outweigh the woman's interest in terminating a pregnancy late in the gestation period.

Id. at 749. If the interests of the conceptus *increase* during the time that the conceptus is becoming a person, and the interests of the pregnant woman *decrease* during this same period, the state may properly regulate abortions at the point in time that the woman's interests decline to lesser importance than the interests of the conceptus, regardless of whether the conceptus has yet achieved personhood. *Id.* at 759-60. In other words, even the minimal state interest in potential life may justify abortion regulation if we do not regard the woman's interest to be a fixed, fundamental interest of overriding importance.

Although interesting, the authors' approach does not add much clarity to the discussion. First, the argument that a woman's liberty interest is fully operative at the moment of conception, but is diminished when she is eight months pregnant, does not strike me as being in accord with common moral intuitions. Lurking within whatever appeal this approach might hold seems to be the fact that the character of the eight-month-old conceptus is what might lead us to override the woman's obvious interest. Moreover, even accepting this sliding-scale analysis as a phenomenologically correct description of moral decision-making

Debates about the borderlines of status—about abortion, about the termination of medical treatment, and about rights for animals—will not be resolved by deep theories or the intuitions generated by wildly imaginative hypotheticals. . . . Resolution of hard cases in the political and judicial spheres requires the use of public reason. We have no realistic alternative but to seek principled compromise based on our shared heritage of toleration and respect.⁴⁴³

The abortion controversy calls for this probing dialogue, but within the idiom of contemporary legal practice it seems impossible to accomplish. Released from these shackles, *Roe* might have equated legal personhood with viability on the basis of a commitment to shared conflicting values, thereby accomplishing its result in a way that reflects and invites a more complex, troubling, and yet genuine constitutional practice.⁴⁴⁴

in this matter, the authors admit that serious problems for legal decision-makers remain if “the conceptus achieves moral standing during that part of the pregnancy in which the right to an abortion is of vital significance to the woman.” *Id.* at 760. It is precisely this dilemma that the great majority of us undoubtedly would face, a dilemma that demands a resolution of the moral standing of the conceptus.

443. Solum, *Personhood*, *supra* note 435, at 1287. This same argument was made in the pre-*Roe* era against efforts to use the Catholic natural law tradition to establish that an abortion of any conceptus barring special circumstances, is morally wrong. John O'Connor, *On Humanity and Abortion*, 13 NAT. L.F. 127, 131-33 (1968) (critiquing John T. Noonan Jr., *Abortion and the Catholic Church: A Summary History*, 12 NAT. L.F. 85 (1967)). The obvious response is to note that “public reason” frequently has emerged over the course of history in the form of an oppressive and pathologically evil regime. John T. Noonan Jr., *Deciding Who Is Human*, 13 NAT. L.F. 134, 138 (1968) (responding to O'Connor by comparing popular acceptance of abortion to the Nazi's shared belief in the inhumanity of Jews, and arguing that moral legitimation must amount to more than “an appeal to the sensibility of some master group”). Noonan's rejoinder appropriately emphasizes the fragility and contingency of the elucidation of public morality as accurately described by O'Connor, but Noonan's appeal to something beyond a publicly shared reason is unconvincing—principally because his appeal itself is directed to a reasonableness shared by the participants engaged in dialogue.

444. I was fortunate to come across a superb book by Elizabeth Mensch and Alan Freeman that was published as I was reviewing the page proofs of this Article. See ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE?* (1993). Mensch and Freeman pursue a project that superficially bears little resemblance to this Article, but in fact their work is closely related to my themes. The authors contend that we must acknowledge and cultivate the deeply rooted theological bases of our civic-moral discourse if we are to have any hope of overcoming the current abortion quagmire—in which persons who regard themselves as adherents of incommensurable moral traditions engage in implacable protests against each other—and fostering instead an edifying dialogue about questions of civic virtue and shared morality. The authors compare the current abortion stand-off to the debate over whether animals should be accorded legal rights. Persons on both sides of these issues use Nazi Germany and the American Civil Rights movement as metaphors to vilify each other and to claim moral superiority for themselves.

The open-ended dialogue defining personhood and liberty would not yield predetermined conclusions. Although *Roe*'s twenty-year legacy yields strong arguments supporting viability as the best measure of legal personhood,⁴⁴⁵ continued deliberation in the future might result in birth or conception being regarded as the appropriate measure. Additionally, acknowledging that a viable conceptus is a person subject to legal recognition as such by a state holds open the question whether a viable conceptus might be accorded some measure of constitutional protection.⁴⁴⁶ Critical

See id. at 7-27. The point, of course, is that presently there is no national moral consensus about abortion, nor about animal rights.

Mensch and Freeman describe the polarization over abortion as a consequence of the collapse of the post-World War II resurgence of Catholic natural law and the disintegration of the Protestant ethical tradition in favor of a secularized belief in science, technology, and legalism. *Id. passim*. Although both authors are associated with critical legal studies and leftist political commitments, they confess that *Roe* was a political, legal, and social mistake because it stifled rather than stimulated a community dialogue about the important issues at stake in the abortion controversy: "Then came *Roe v. Wade*, ensuring that the defenders of choice would be situated in a context that was almost exclusively legalistic and rights-based. Like all legalisms, it invited interminable legalist debate." *Id.* at 125; *see also id.* at 126-27. Just prior to the *Roe* decision, there was some indication that theological and civic-moral discourse was moving in the direction of a tentative consensus in favor of cautious liberalization of restrictive abortion statutes. If these developments had continued, if the *Roe* Court had been able to reconcile its legal decision with the necessity of fostering a continuing moral discourse, we might have been spared the ensuing post-*Roe* bitter polemics. *Id.* at 127-29, 134-36.

[A]bortion as a morally and theologically debatable subject in our culture was quickly replaced . . . by abortion as a question of medical expertise and personal choice. This move was supported with the language of scientific rationalism and secularized religion. All too quickly, religious opposition then became hostile, defensive, and absolutist, and a dialogue that might really have spoken to Americans from within their own seriously considered religious traditions seemed to be lost.

Although *Roe* secularized the abortion issue through the insulating effect of the privacy right, a growing opposition to *Roe* became ever more resolutely absolutist in theologically defending the pro-life position. Triggered in part by reaction to *Roe* itself, Catholics and fundamentalists formed an alliance (hitherto unheard of) in opposition to abortion

Id. at 109, 125. The authors suggest that the *Casey* plurality opinion might provide the broad outlines of a better judicial resolution of the abortion issue, because it at least offers the possibility that a dialogically developed commonsense on this question might emerge. *Id.* at 148-49.

445. *See* Rubinfeld, *Proposition*, *supra* note 435, at 620-24.

446. According the conceptus some measure of constitutional protection would not be ruled out in advance by a Court committed to an open-ended development of the *Roe* legacy. For example, state statutes that permit the abortion of a viable conceptus when the mother's life or health is not endangered might be viewed as implicating constitutional concerns. *See, e.g.,* UTAH CODE ANN. § 76-7-302(3) (1990 & Supp. 1992) (permitting at any time the

hermeneutics does not provide a method for dealing with the abortion issue more easily, but it does acknowledge that our hermeneutical situation always invites temporary adjudicative and legislative resolutions drawing on a "public reason" grounded in a "shared heritage of toleration and respect."⁴⁴⁷ If *Roe* had provided such a temporary resolution it might have engendered a more authentic and enduring constitutional dialogue—not as a "mere" political accommodation, but rather as the acquiescence by the Justices that they are governed by law. *Roe* and its divisive legacy stand as strong reminders that the Rule of Law is a difficult project rather than a formal algorithm.

IV. CONCLUSION

A conclusion at least should make sense of the title of an article. I have discussed the Rule of Law, but what claim do I make by stating that the Rule of Law is both obvious and plausible? I believe it obvious that the liberal political program of restrained governance has been a beneficial force in modern history. Moreover, notwithstanding the metaphysical presuppositions of liberal theory, it is plausible to accept the aspiration of restrained but dynamic governance as founded in social existence rather than just being an ideological commitment divorced from the human situation. Liberalism is not so much a sad delusion as it is an unproductive prejudice to relate our experience of the Rule of Law. Is it not obvious that we are historically

abortion of conceptuses with grave physical defects). Although the Constitution might not require the criminalization of thoroughly private, post-viability abortions, in most cases it seems clear that there would be requisite state action (through regulation, funding, licensing etc.) to raise a potential constitutional question.

Responding to this difficult question would not demand an all-or-nothing attitude. The Constitution might be read to require that the pregnant woman's life or substantial bodily integrity be preserved even at the expense of the life of the conceptus, thereby invalidating a potential state statute mandating preservation of a viable conceptus at all costs. Donald Regan analyzes one approach justifying this position by comparing pregnancy to other instances where one person is in need of assistance from another. Regan argues that principles of equal protection require that the state not proscribe abortion to an extent greater than it proscribes other efforts by persons to withhold aid to another. Regan, *Rewriting*, *supra* note 413, at 1641.

Regarding a viable conceptus as a constitutionally protected person would not be a radical departure from the broad contours of current legislative regulation of abortion. Connecticut's recently enacted liberal abortion statute prohibits post-viability abortions except when necessary to preserve the life or health of the pregnant woman. CONN. GEN. STAT. ANN. § 19a-602(b) (West Supp. 1993); *see* FEDERAL FREEDOM OF CHOICE ACT, S.25 & H.R.25, 103d Cong., 1st Sess. (1993). In contrast, the recently enacted conservative statute in Louisiana recognizes conceptuses as human beings but nevertheless permits abortions in order to save the pregnant woman's life. LA. REV. STAT. ANN. § 14:87B (West Supp. 1993).

447. Solum, *Personhood*, *supra* note 435, at 1287.

situated beings who are always confined by our context but are also always remaking it? Is it not obvious that this human reality justifies the possibility that faith in the Rule of Law results from something other than empty sloganeering or deceptive dogma?

It is important to render this obviousness plausible. We cannot adopt the perceived neutral methodologies of the natural sciences to prove that the Rule of Law exists in practice or that it can be implemented according to logical dictates. But we can reveal, through a constant engagement in which critique inevitably plays an important part, that the constrained innovation of legal practice exists no matter what skeptical thoughts we may entertain to the contrary. The Rule of Law is plausible, but it is not guaranteed. It is left to constant political struggle to preserve, amplify, and reconstruct this feature of our existence in a way that facilitates communal life.

"Putting at risk" is the guiding normative implication of critical hermeneutics. This normative directive does not require a special methodological suspension of belief, but instead calls only for accepting the force of the other that always pulls us outside of ourselves in spite of ourselves. Gadamer writes that

hermeneutic philosophy understands itself not as an absolute position but as a way of experience. It insists that there is no higher principle than holding oneself open in a conversation. But this means: Always recognize in advance the possible correctness, even the superiority of the conversation partner's position. Is this too little? Indeed, this seems to me to be the kind of integrity one can demand only of a professor of philosophy. And one should demand as much.⁴⁴⁸

Should we not demand as much from legal practice, inasmuch as this is the political prerequisite for sustaining what we refer to as the Rule of Law? The "integrity" called for is more than mere polite listening; it is a self-effacing, self-defining response to the constantly renewed truth of tradition.

The suggestion that this charity embodies a form of conservative traditionalism runs counter to Gadamer's entire thrust and only contributes to our current philosophical stagnation. Gadamer plainly states that we never give ourselves over to a closed traditional view. Instead, we remake ourselves even as we remake tradition. This experience is often obscured by our mistaken theoretical self-understanding, or is thwarted by the often violent and despotic assertion of subjective will by legal authorities. The intricate means by which legal authorities attempt to avoid and minimize the effects of "putting at risk" are the greatest impediments not just to the Rule

448. GADAMER, *Origins*, *supra* note 294, at 189. In New Age terms, one might equate Gadamer's "putting at risk" with the implicit ethic of Eastern philosophy to merge with the flow. Guy Burneko, *It Happens by Itself: The Tao of Cooperation, Systems Theory, and Constitutive Hermeneutics*, 31 WORLD FUTURES 139, 144-45 (1991). In feminist terminology, one might equate Gadamer's approach with "positionality." See Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880-87 (1990).

of Law, but to the maintenance of community. In fact, we can never differentiate the Rule of Law from the existence of community, although the Rule of Law does not require a univocal community to find its expression.

Ultimately, the only real conclusion that I can offer is an inelegant paraphrasing of my invocation of Kafka at the beginning of this Article. A rational inquiry into the foundations of social life is doomed to inadequacy because rationality is predicated on the very social existence that it would be seeking to subjugate and explain. Theory cannot conquer the mystery of life, but it can serve to contain itself and at least in that manner can have a salutary impact on practice. My effort in these pages has been an attempt to recall what we experience in our everyday life as lawyers and to translate this recollection to the jargon of contemporary jurisprudence by means of Gadamer's hermeneutics. This recollection should serve as a caution against the uncritical reification of fixed principles, but also as a caution against relentlessly forgetting the experience of legal practice. It should not be asking too much to require that our sophisticated legal theories speak to the elemental human experience by reconciling the endless critical spirit that thrusts us forward with the never receding grip of tradition that situates us in the realm of the possible. Critical hermeneutics encourages this awareness and renders somewhat inconsequential the now aging undulatory exchange between scholars launching relentless shrill attacks on the Rule of Law and scholars responding by propounding fantastic defensive theories that must increasingly ring hollow even in their own ears.

