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GADAMER/STATUTORY INTERPRETATION

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INTRODUCTION

In 1964, the Immigration and Naturalization Service (INS) ordered the deportation of Clive Michael Boutilier, a Canadian citizen, because he was gay. Boutilier had first entered the United States in 1956, and after 1959 he had lived continuously in the United States as a productive resident. When he applied for citizenship in 1963, Boutilier admitted in an affidavit that he had been arrested in New York in 1959 on a charge of homosexual sodomy. Although the charge was ultimately dismissed on default of the complainant, Boutilier further admitted in a second affidavit that for five years prior to his initial entry into the United States and for the eight and one-half years after that entry, he had engaged in sexual relations with other men on an average of three or four times per year.¹

Boutilier's affidavits were sent to the Public Health Service (PHS) for its opinion as to whether Boutilier was excludable at the time of entry. Qualified psychiatrists retained by Boutilier advised the PHS that Boutilier had been a "homosexual for a number of years" but that he did not have a "psychopathic personality," either because of his sexual orientation or for any other reason.² Notwithstanding the affidavits of the examining psychiatrists, and without directing its own personnel to examine Boutilier, the PHS issued a certificate to the INS stating that in the opinion of its physicians, Boutilier "was afflicted with a class A

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1. The facts of Boutilier's case, set out in this and subsequent paragraphs, come from *Boutilier v. INS*, 363 F.2d 488, 490-92 (2d Cir. 1966), and from the Supreme Court's affirmation of the court of appeals opinion, *Boutilier v. INS*, 387 U.S. 118, 119-20 (1967).

2. See *Boutilier*, 387 U.S. at 120. "The government noted, however, that it considered the phrase 'psychopathic personality' appearing in [the psychiatric reports provided by Boutilier] to be used in a medical frame of reference and not as a legal term of art." *Boutilier*, 363 F.2d at 491 n.7.

condition, namely, psychopathic personality, sexual deviate."³ The INS and the Board of Immigration Appeals accepted the PHS finding as sufficient reason to exclude Boutilier based upon section 212(a)(4) of the Immigration and Nationality Act, which in 1964 excluded from admission "[a]lliens afflicted with psychopathic personality, epilepsy, or a mental defect."⁴ Because Boutilier was excludable, he not only could not become a citizen, but was also subject to deportation by the INS.⁵

Boutilier appealed the order of exclusion and possible deportation to the Second Circuit. A divided panel agreed with the INS interpretation of section 212(a)(4).⁶ In 1967, a divided Supreme Court affirmed, in *Boutilier v. INS*.⁷ Was the Court's holding—that Congress used the phrase "psychopathic personality" as a term of art to exclude homosexuals⁸—a correct interpretation of the Act in 1967? If the issue were one of first impression, would it be a correct interpretation today? Having been decided, does *Boutilier* remain a correct interpretation of the statute?

As a matter of theory, several systematic methodologies have been developed to approach these questions. Each of these theories has accumulated academic and judicial defenders, and each presents useful insights about the process of statutory interpretation. For example, a "textualist" approach, associated with Justice Scalia, among others,⁹ would ask what the statutory text of section 212(a)(4) most likely signifies, given accepted definitions of its terms, rules of grammar, the structure of the statute, related statutory provisions, and canons of statutory construction.¹⁰ In 1962, the Ninth Circuit in *Fleuti v. Rosenberg*¹¹ followed this approach in holding that the term "psychopathic personal-

3. See *Boutilier*, 363 F.2d at 491.

4. Immigration and Nationality Act of 1952, § 212(a)(4), 66 Stat. 163, 182, amended by Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (current version at 8 U.S.C. § 1182(a)(4) (1988)).

5. 8 U.S.C. § 1251(a)(1) (1988) (effective 1952).

6. *Boutilier*, 368 F.2d at 492-94.

7. 387 U.S. 118 (1967).

8. *Id.* at 122.

9. See Eskridge, *The New Textualism*, 37 UCLA L. Rev. 621 (1990) (forthcoming).

10. For applications of a "textualist" approach, see, e.g., *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring in judgment) (role of Court is to give effect to statutory language); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-55 (1987) (Scalia, J., concurring in judgment) (role of Court is not to enforce unenacted legislative "intentions"); *In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989) (Easterbrook, J.) (clear legislative history cannot displace clear statutory language); *Wallace v. Christensen*, 802 F.2d 1539, 1559-60 (9th Cir. 1986) (Kozinski, J., concurring in judgment) (discrediting use of legislative history as source that "support[s] almost any proposition"); Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J.L. & Pub. Pol'y 59, 59 (1988) (constitutional and political theory arguments for interpreting text of statute without reference to legislative history).

11. 302 F.2d 652, 657-58 (9th Cir. 1962), vacated and remanded on other grounds, 374 U.S. 449 (1963).

ity" was too vague to be constitutionally applied to "homosexuals."¹²

Another approach, an "archaeological"¹³ one recently associated with Judge Posner and others, would examine the background and public deliberation preceding the statute's enactment to reconstruct the probable "intent" of Congress as to the application of section 212(a)(4) to gay men and lesbians.¹⁴ This is the approach taken by the Supreme Court in *Boutilier*. Ignoring the statutory language, the Court found that "[t]he legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals such as [Boutilier]."¹⁵ In contrast, a "present-minded" approach such as that developed by Professor Aleinikoff would ask what section 212(a)(4) *ought* to mean in light of its current legal and social context.¹⁶ Aleinikoff argues that current medical thinking about the mental health of gay men and lesbians makes it inappropriate to exclude them on grounds of affliction with a "psychopathic personality," and he would overrule *Boutilier*.¹⁷

Each of these theories presents us with essential truths, both generally and in regard to *Boutilier*, yet none presents us with a completely satisfying picture of statutory interpretation. Previously, I have suggested the outlines of a theory of dynamic statutory interpretation, in which textual, archaeological and present-minded arguments are considered by the statutory interpreter.¹⁸ As tentatively formulated, however, my theory of dynamic statutory interpretation raises as many questions as it answers. How does it actually work in cases such as *Boutilier*? Why is it ever necessary to look beyond a statute's text (Justice Scalia)? Is it legitimate for nonelected statutory interpreters to

12. *Id.* at 658. Three years after the decision in *Fleuti*, Congress amended the text of § 212(a)(4) to exclude aliens "afflicted with psychopathic personality, or sexual deviation, or a mental defect." Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (amending 8 U.S.C. § 1182 (a)(4) (1988)) (emphasis added).

13. The term "archaeological" was suggested to me by Professor Aleinikoff. See Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va. L. Rev. 275, 275 n.1 (1988).

14. See, e.g., R. Posner, *The Federal Courts: Crisis and Reform* 286-89 (1985); Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 Tul. L. Rev. 1, 3-6 (1988); see also Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 3-7 (1985) ("federal common law" includes, among other things, an intentionalist view of statutory interpretation).

15. *Boutilier*, 387 U.S. at 120. The legislative history of the 1952 Act and its 1965 revision are discussed in detail later in this Article. See *infra* notes 146-158 and accompanying text.

16. Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20, 47-54 (1988). Aleinikoff calls his approach "nautical," which he contrasts with other approaches that he calls "archaeological," but also describes his approach as "present-minded." *Id.* at 49-50.

17. See *id.* at 52.

18. Eskridge, *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479, 1483 (1987).

consider nonoriginalist evidence (Judge Posner)? If so, why should historical evidence even be considered (Aleinikoff)?

The debate about dynamic statutory interpretation challenges us to consider the nature of interpretation itself. What is "interpretation"? What *should* it be? There is a vast extra-legal literature on the topic and it is time for theorists of statutory interpretation to explore it more systematically.¹⁹ The purpose of this Article is to explore and apply to statutory interpretation one corner of that literature: Hans-Georg Gadamer's *Truth and Method*²⁰ and the philosophical debate over his hermeneutical theory of interpretation. One theme of Gadamer is that method—whether text-based, archaeological or present-minded—does not tightly constrain or even guide the interpreter in the way the legal literature seems to assume. Whatever the method that is purportedly being followed, interpretation is a search for a common under-

19. Most of the exploration has focused on constitutional interpretation. See, e.g., Interpretation Symposium, 58 S. Cal. L. Rev. 1 (1985); Symposium: Law and Literature, 60 Tex. L. Rev. 373 (1982). The best collection to date is *Interpreting Law and Literature: A Hermeneutic Reader* (S. Levinson & S. Mailloux eds. 1988) [hereinafter *Interpreting Law and Literature*]. Several recent articles have applied hermeneutics theory, and specifically Gadamerian theory, to issues of legal (mainly constitutional) interpretation. See Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321, 321-24 (1990); Hermann, *Phenomenology, Structuralism, Hermeneutics, and Legal Study: Applications of Contemporary Continental Thought to Legal Phenomena*, 36 U. Miami L. Rev. 379, 398-409 (1982); Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. Cal. L. Rev. 135 (1985) (a critique of Hoy can be found at Chevigny, *Why the Continental Disputes are Important: A Comment on Hoy and Garet*, 58 S. Cal. L. Rev. 199, 208 (1985) (discussing validity of Gadamer's views and how hermeneutic approach "may lead to changes in interpretation of law as it leads to reinterpretation of values")); McIntosh, *Legal Hermeneutics: A Philosophical Critique*, 35 Okla. L. Rev. 1 (1982); Mootz, *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, 527-56 (1988); Phelps & Pitts, *Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation*, 29 St. Louis U.L.J. 353, 363-82 (1985); White, *Law as Language: Reading Law and Reading Literature*, 60 Tex. L. Rev. 415 (1982).

20. H.-G. Gadamer, *Truth and Method* (J. Weinsheimer & D. Marshall trans. 2d rev. ed. 1989) [hereinafter *Truth and Method*]. This book was originally published in 1960 under the title *Warheit und Methode*. A second, revised edition was published in 1965 and was translated into English in 1975. The translation cited here and used in this Article is the second English translation and is a translation of the fifth German edition.

Much, but by no means all, of Gadamer's subsequent work has been an elaboration or defense of the points made in *Truth and Method*. Gadamer's main works pertinent to this Article that have been translated into English are: *Dialogue and Dialectic* (P. C. Smith trans. 1980); *Philosophical Hermeneutics* (D. Linge ed. & trans. 1976); *The Relevance of the Beautiful and Other Essays* (R. Bernasconi ed., N. Walker trans. 1986) [hereinafter *Relevance of the Beautiful*]; *The Problem of Historical Consciousness*, 5 Graduate Fac. Phil. J. 1 (Fall 1975) (J. Close trans.); *The Continuity of History and the Existential Moment*, 16 Phil. Today 230 (1972) (T. Wren trans.); Letter from Hans-Georg Gadamer to Richard J. Bernstein (June 1, 1982), reprinted in R. Berustein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* 261-65 (1983).

standing of truth by the text and interpreter, mediated by historical tradition. Part I of this Article explores Gadamer's thesis, as well as leading philosophical objections to it.

Part II takes Gadamer's hermeneutics as an insightful starting point and uses it as a way to think about dynamic statutory interpretation. Section 212(a)(4) is the text.²¹ The hermeneutical approach suggests that we do not discover the truth of the provision by limiting our vision to the bare text, or to the original legislative expectations, or to current policy. All of these perspectives work together, and each teaches us something. Thus, the different interpretations of section 212(a)(4) found in *Fleuti*, *Boutilier* and *Aleinikoff* only appear to be different and are, upon analysis, not so distant from one another. A Gadamerian approach to statutory interpretation views the enterprise as a conversation between the current perspective of the interpreter and the textual and historical perspective of the statute. The dialectic of statutory interpretation is neither the imposition of an archaeological or textualist view upon the interpreter, nor the interpreter's substitution of her perspective for that of the statute. Instead, it is the productive dialogue of these perspectives. At the level of metatheory, Gadamerian hermeneutics provides a significant philosophical underpinning for dynamic statutory interpretation, helps explain how interpretation works, and provides a fascinating viewpoint for thinking about specific doctrinal issues of statutory interpretation such as the canons of statutory construction, the use of legislative history and the role of statutory precedents.

Part III asks what we can learn from the main normative arguments against a Gadamerian approach to statutory interpretation. Reflecting the philosophical objections to Gadamer's theory, there are three types of legal objections to Gadamer-inspired dynamic statutory interpretation. The first involves the much-noted "countermajoritarian difficulty" and argues that dynamic interpretation slights the constitutional role of the legislature as the primary or exclusive source of law. A problem with this objection, however, is that hermeneutics demonstrates the inevitability of judicial creativity—and the desirability of it—as the statutory text is interpreted over time. Of course, concern for the countermajoritarian difficulty is an important pre-understanding shared by judges within our legal culture and as such plays a role in any responsible judge's encounter with a statute. But hermeneutics teaches that we do not really ameliorate the countermajoritarian difficulty by purporting to adopt a "constraining" methodology.

A second objection to Gadamerian statutory interpretation charges that it defers too much to an often biased and polluted tradition. Gadamer emphasizes the need for critical dialogue, but his emphasis on tradition as the starting point and his pessimism about our ability to

21. See *supra* note 4 and accompanying text.

find an objective point from which to criticize tradition from outside the tradition, render his theory a potentially conservative one. Although Gadamer correctly asserts that we can never entirely transcend our historical situation and its accompanying traditions, his theory does run the risk of being too deferential to those traditions. An important goal of dynamic statutory interpretation is to work out critical tools with which illegitimate traditions can be evaluated. One promising inquiry is whether a given tradition reflects the perspectives of different interests and whether the tradition arbitrarily excludes some interests.

Finally, critical theorists object that Gadamer's hermeneutics is essentially a coherence theory and that such a theory is impossible. Influenced by deconstructionism, critical theory emphasizes the "rupture" involved in interpretation: Rather than a genteel, intellectual conversation between text and interpreter, interpretation is a battle of wills—a power struggle—in which there is no determinate underlying meaning. Critical theory highlights the discontinuities that underlie much legal interpretation and insightfully directs our attention to the power games attendant to those discontinuities. But critical theory overstates the discontinuities and does not give enough credit to the productivity of a normative presumption of coherence that usefully informs our "rule of law."

1. GADAMER'S HERMENEUTICS

I draw three central propositions from *Truth and Method* and the philosophical debate it has stimulated. One is that interpretation is ontological. Interpretation is intertwined with our being-in-the-world: We grow as human beings through our interpretation of the world, and our thrownness in the world affects our every interpretive activity. Given the ontological nature of interpretation, the method we ostensibly follow does not necessarily influence the nature of interpretive activity. A second proposition is that interpretation is a dialogue between the current interpreter and an historic text. Each speaks to the other, learns from the other, seeks a common understanding about truth. Such truth finding is made possible by the common ground of interpreter and text in history. The third proposition is that interpretation is not merely an exercise in discovery, but involves a critical approach to the text. The interpreter questions the text, the presuppositions of which may be attenuated or undermined over time. In turn, the interpreter uses the experience to re-evaluate her own pre-understandings, to separate the enabling, truth-seeking ones from the disabling, false ones.

This Part sets forth a critical exegesis of *Truth and Method*, developing these themes of the ontological, dialectical and critical nature of interpretation. I shall first situate the book in the several historical debates to which it contributed, for that helps explain Gadamer's seemingly unusual terminology and discursive style. Situating Gadamer

entails a brief outline of his critiques of scientific, aesthetic and historicist theories. After these critiques follows an explanation of Gadamer's positive theory of hermeneutical understanding. That theory has itself been subject to critique, and the lessons of three such analyses are explored.

A. Gadamer's Critiques

Truth and Method may seem a very strange book to many American lawyers. Although interested in legal hermeneutics, Gadamer is very much a philosopher and historian and very much not a lawyer. This is most evident in the book. The heart of *Truth and Method* finds Gadamer questioning the long-accepted idea that a rigorous scientific "method" of inquiry will better lead us to the discovery of "truth." Gadamer claims that truth is largely independent of method. This is a radical claim, yet Gadamer never "proves" it. Indeed, to prove his claim would be oxymoronic: If truth is independent of method, there is no point in using methodological demonstrations, for they are by assertion not probative. Thus, rather than advancing arguments and rebutting counterarguments, as a lawyer might do, Gadamer presents his thesis through a critical historical exposition of how interpretation has traditionally been viewed and practiced. If we accept Gadamer's claim, we do so because we believe that Gadamer has accurately retrieved the interpretive tradition most meaningful to us, or has told a story we find believable, not because he has presented irrefutable arguments for his position.

This discursive historical approach is related to Gadamer's concept of "truth." Gadamer does not believe there are transcendental natural law truths "out there" waiting to be discovered, nor does he believe that truth is entirely relative. Rather, he appears to view truth as intersubjective, namely, that which "can be argumentatively validated by the community of interpreters who open themselves to what tradition says to us."²² This idea is suggested by Gadamer's emphasis on *Verständigung*, which means "coming to an understanding with someone." As the translators of *Truth and Method* put it: "Instead of the binary implication of 'understanding' (a person understands something), Gadamer pushes toward a three-way relation: one person comes to an understanding with another about something they thus both understand. When two people 'understand each other' (*sich verstehen*) they always do so with respect to something."²³

Thus, Gadamer's historical approach retrieves the essential lessons of two hundred years of German Continental philosophy, listening to what different thinkers have told us and evaluating their thoughts criti-

22. Bernstein, *From Hermeneutics to Praxis*, in *Hermeneutics and Praxis* 272, 284 (R. Hollinger ed. 1985).

23. *Truth and Method*, supra note 20, at xvi (Translators' Preface).

cally.²⁴ In this approach, Gadamer practices what he advocates: Knowledge grows out of our conversation with past traditions, and the passing of time helps us separate the truth from the errors in those traditions. Similarly, Gadamer builds his theory by seeking the truth within the views of those whom he disputes. His theory claims that we find truth through the mediation of past and present—the hermeneutic of interpretation—and his exposition exemplifies the operation of that process. In this as in his other writings Gadamer establishes his thesis as much by doing as by arguing.²⁵ If we are to understand Gadamer today, it is useful to situate *Truth and Method* in three intellectual debates to which it contributed in 1960.

1. *Critique of Scientific Method.* — An original impetus for *Truth and Method* was the longstanding debate between the natural sciences and the human sciences.²⁶ Ever since Descartes explicitly borrowed from the scientific method to establish philosophy on a firmer footing, there has been in Western thought an intellectual linkage between truth and the scientific method. Some philosophers have resisted this impulse in the belief that the human sciences could discover truth through their own approach, namely, hermeneutics.²⁷ Gadamer agrees with this belief in that he is “concerned to seek the experience of truth that transcends the domain of scientific method,” through inquiry into “modes of experience that lie outside science . . . of philosophy, of art, and of history itself. These are all modes of experience in which a truth is communicated that cannot be verified by the methodological means proper to science.”²⁸ This feature of *Truth and Method* is almost quaint,

24. One difficulty in approaching Gadamer is that he draws on the work of many thinkers—such as Chaldenius, Ranke and Droysen—not commonly read by American intellectuals. For this reason, reading one of the excellent commentaries on *Truth and Method* in tandem with the text itself is almost required for a full appreciation of Gadamer's work. These commentaries are G. Warnke, *Gadamer: Hermeneutics, Tradition and Reason* (1987); J. Weinsheimer, *Gadamer's Hermeneutics: A Reading of Truth and Method* (1985).

25. See H.-G. Gadamer, *The Idea of the Good in Platonic-Aristotelian Philosophy* (P. C. Smith trans. 1986).

26. See J. Weinsheimer, *supra* note 24, at 1–4; Gadamer, *Hermeneutics and Social Science*, 2 *Cultural Hermeneutics* 307 (1975) (discussing role and relevance of hermeneutics for problems of society and social life); see also the discussion in Palmer, *Responses to “Hermeneutics and Social Science,”* 2 *Cultural Hermeneutics* 317 (1975).

27. The leading supporters of this view were Friedrich D.E. Schleiermacher, see F. Schleiermacher, *Hermeneutik und Kritik* (M. Frank ed. 1977); F. Schleiermacher, *Hermeneutics: The Handwritten Manuscripts 1–15* (H. Kimmeler ed., J. Duke & J. Forstman trans. 1977), and Wilhelm Dilthey, see *Die Entstehung der Hermeneutik*, in 5 *Gesammelte Schriften* 326 (1958–60), translated in W. Dilthey, *Selected Writings* 235 (H. Rickman ed. 1976); see also W. Dilthey, *Der Aufbau der geschichtlichen Welt in den Geisteswissenschaften* (1970). Accessible English translations of representative passages from these writers can be found in *The Hermeneutics Reader: Texts of the German Tradition from the Enlightenment to the Present* 72–97, 148–64 (K. Mueller-Vollmer ed. 1985) [hereinafter *Hermeneutics Reader*].

28. *Truth and Method*, *supra* note 20, at xxii.

not because its claims for the human sciences have been discredited, but because its assumptions about the scientific method are no longer made. When Gadamer published his tome in 1960, scientific positivism—the belief that appropriate use of the scientific method yields objectively truthful facts—was already on the wane. In its place have emerged many explicitly hermeneutical views of science: No longer the imperial source of method-driven certainty, science now accepts its role as a study of phenomena itself situated in its own conventions and time.²⁹

Hence Gadamer's critique of the scientific method carries less intellectual bite for current readers, because the critique is so widely assumed. What does retain intellectual bite is Gadamer's disagreement with those philosophers who hoped to establish the truth value of the human sciences by setting up hermeneutics itself as a method of discovering objective truth.³⁰ Gadamer denies that hermeneutics is a "method" and returns to an essential insight about understanding made by early hermeneutics, one retrieved by Martin Heidegger—the historicity of our being-in-the-world.³¹ We are thrown into a world whose context molds us and limits our imagination and, hence, our options. Our very being is a process of interpreting our past, which is projected onto us and to which we respond. As Gadamer later put it, Heidegger's central lesson is "not in what way being can be understood but in what way understanding *is* being."³²

The implication of this point for Gadamer is that interpretation is neither the discovery of the text's intended meaning, nor the imposition of the interpreter's views upon the text; rather, interpretation is the common ground of interaction between text and interpreter, by which each establishes its being. This reflects Gadamer's radical critique of the scientific method and the misplaced philosophizing it has inspired. Gadamer rejects the notion that the interpreter is alien from

29. J. Weinsheimer, *supra* note 24, at 2–3, 15–36; see Suppe, *The Search for Philosophic Understanding of Scientific Theories*, in *The Structure of Scientific Theories* 3, 3–4 (F. Suppe 2d ed. 1977) (overview of history and philosophy of science); see also Taylor, *Understanding in Human Science*, 34 *Rev. Metaphysics* 25, 26 (1980) (arguing that while natural and human sciences retain their duality, "none of the features [of] scientific positivis[m] hold" for either).

30. *Truth and Method*, *supra* note 20, at 173–242, analyzes this move by Dilthey, see *supra* note 27, and his antecedents, Schleiermacher, Ranke and Droysen; see also the excellent account of Gadamer's "Critique of Romantic Hermeneutics" in G. Warnke, *supra* note 24, at 5–34.

31. M. Heidegger, *Being and Time* 32–33 (J. Macquarrie & E. Robinson trans. 1962).

32. H.-G. Gadamer, *On the Problem of Self-Understanding*, in *Philosophical Hermeneutics*, *supra* note 20, at 44, 49; see *Truth and Method*, *supra* note 20, at 259. Consider G. Warnke, *supra* note 24, at 39: "The way in which we anticipate the future defines the meaning the past can have for us, just as the way in which we have understood the past and the way in which our ancestors have projected the future determines our own range of possibilities."

the text and, therefore, needs a method to connect with the text. Instead, interpreter and text are indissolubly linked as a matter of being; the text is part of the context that has formed the interpreter, and the interpreter is the agent of the text's continued viability.³³ Hence, if we seek truth—the goal of inquiry in general and of hermeneutics in particular—we do not need method, for we find truth in the world that exists between text and interpreter. The implications of this view are spelled out in Gadamer's critiques of aesthetics and of historicism.

2. *Critique of Aesthetics.* — After briefly discussing the humanist tradition, Gadamer starts his book with a critique of Kantian aesthetics.³⁴ Gadamer appreciates Kant's demonstration that aesthetics cannot be evaluated by the scientific method yet is an important arena of knowledge and inquiry but wonders whether Kant's emphasis on the genius of the artist does not render aesthetic appreciation too subjectivist. It appears to Gadamer that Kant was too willing to consign art to the realm of self-improvement and subjective enjoyment, because Kant assumed that scientific method is the hallmark of objective truth. Once we abandon that assumption, we come to see that our experience of art is one way we understand truth.³⁵ Viewed in this way, art is a "hermeneutical phenomenon,"³⁶ and a theory of aesthetics becomes a way of thinking about hermeneutics.

For Gadamer the concept of "play" is essential to understanding a work of art.³⁷ Kant used the concept to discuss the states of mind of the creator or of the persons enjoying her art, but Gadamer uses it to explore "the mode of being of the work of art itself."³⁸ Roughly speaking, play is the interaction between the work and the audience. Interacting with a work of art is like playing a game: Although it has rules and apparatus, the game exists only when the participants have given themselves over to the "to-and-fro" movement, the dynamics, of the game.³⁹ The concept of game-playing exposes the interdependence of interpreter and text; once the player becomes engaged in the play, she cannot become the subject of the game any more than the game itself can become the subject. Both the player and the game are transformed

33. Truth and Method, *supra* note 20, at 259–62.

34. *Id.* at 42–100.

35. *Id.* at 98. "We do not ask the experience of art to tell us how it conceives of itself, then, but what it truly is and what its truth is," claims Gadamer. "In the experience of art we see a genuine experience . . . induced by the work, which does not leave him who has it unchanged . . ." *Id.* at 100.

36. *Id.*; see Relevance of the Beautiful, *supra* note 20, at 105 (discussing "the contribution of poetry to the search for truth," and arguing that it is "incontrovertible" that "poetic language enjoys a particular and unique relationship to truth").

37. Truth and Method, *supra* note 20, at 101–34.

38. See *id.* at 101 (Gadamer distinguishes his concept of "play" from Kantian concept involving states of mind).

39. *Id.* at 105–06 ("This suggests a general characteristic of the nature of play that is reflected in playing: all playing is a being-played.").

in the process of playing, and the result is something more than, or different from, either the subject or the object.

In art, the audience completes the work by a similar to-and-fro interaction with it.⁴⁰ Aesthetics is inherently interactive. "[T]he presentation or performance of a work of literature or music is something essential, and not incidental," and aesthetic interaction is a way we understand art, "for it merely completes what the works of art already are—the being there of what is presented in them."⁴¹ Thus, surprisingly, we are led to the conclusion that aesthetics is part of hermeneutics, as an effort to understand the world from historical texts, and to the further conclusion that aesthetics has much to teach hermeneutics.⁴² Art exemplifies the possibility of alienation between two worlds—the past world of the artist and the present world of the audience—and our impulse to escape that alienation through understanding. Because "art is never simply past but is able to overcome temporal distance by virtue of its own meaningful presence," it offers "an excellent example of understanding Even though it is no mere object of historical consciousness, understanding art always includes historical mediation. What, then, is the task of hermeneutics in relation to it?"⁴³

3. *Critique of Historicism.* — This last question sets up the main analytic of *Truth and Method*, namely an inquiry into the direction hermeneutics should take in its effort to repair the "loss and estrangement [of the interpreter] in relation to tradition."⁴⁴ Some thinkers favored reconstruction, claiming that we can know a work of art, or a text, by recreating the world to which it originally belonged.⁴⁵ This is the path of romantic hermeneutics in general, namely the reconstruction of "the conditions in which a work passed down to us from the past was originally constituted."⁴⁶ Gadamer is sharply critical of this path, viewing it as being "as nonsensical as all restitution and restoration of past life What is reconstructed, a life brought back from the lost past, is not the original. In its continuance in an estranged state it acquires only a derivative, cultural existence." For Gadamer, "a hermeneutics that regarded understanding as reconstructing the original would be no

40. Id. at 116. This metaphor of art-as-a-game works best for theatrical art (drama), but Gadamer claims that it applies to literature and visual art as well. Id.

41. Id. at 134.

42. See id. at 164 ("Every work of art . . . must be understood like any other text that requires understanding This gives hermeneutical consciousness a comprehensiveness that surpasses even that of aesthetic consciousness. . . . Conversely, hermeneutics must be so determined as a whole that it does justice to the experience of art.").

43. Id. at 165.

44. Id. at 165–66.

45. See, e.g., F. Schleiermacher, *Compendium of 1819*, reprinted in *Hermeneutics Reader*, supra note 27, at 72, 83 ("Before the art of hermeneutics can be practiced, the interpreter must put himself both objectively and subjectively in the position of the author.").

46. *Truth and Method*, supra note 20, at 166–67.

more than handing on a dead meaning."⁴⁷

The other path for hermeneutics is integration: The truly "historical spirit consists not in the restoration of the past but in *thoughtful meditation with contemporary life*."⁴⁸ Gadamer argues for a thinking attitude toward the past, which acknowledges both the impracticability and the foolishness of reconstruction. Most of *Truth and Method* is devoted to an exposition of an integrative hermeneutics.

B. Gadamer's Hermeneutics

The three critiques in *Truth and Method* work together in a productive way: The critique of the scientific method demonstrates that the human sciences are wrong to follow the natural sciences and, indeed, that the inquiry of the human sciences may have much to teach the natural sciences. But what is the inquiry of the human sciences, or hermeneutics? Gadamer's critique of historicism suggests that hermeneutics is *not* the recapturing of a past meaning. That is impossible, because our thrownness in the current world disables us from reconstructing the past. What, again, is hermeneutics? The critique of historicism suggests that hermeneutics is an integrative and dialectical approach, and the critique of aesthetics suggests that its dynamics require a to-and-fro "play" between text and interpreter. In this account, hermeneutics is the means by which the alienating distance between past and present is not only ameliorated, but rendered productive.

Gadamer's central affirmative theme is the "historicity" of understanding.⁴⁹ "*Understanding is, essentially, a historically effected event.*"⁵⁰ To explain why we can never reconstruct a past intent (the critique of historicism) and to enable us to understand the truth of the past text (the positive point), Gadamer develops the phenomenon of "horizon."⁵¹ Horizon is context, "the range of vision that includes everything that can be seen from a particular vantage point."⁵² Our vision might be focused on one thing, but we also have a field of vision, a horizon, that conditions what we see when we focus.⁵³ Thus, an author's text can say

47. *Id.* at 167; see J. Weinsheimer, *supra* note 24, at 141-42.

48. *Truth and Method*, *supra* note 20, at 168-69.

49. "Real historical thinking must take account of its own historicity. Only then will it cease to chase the phantom of a historical object that is the object of progressive research, and learn to view the object as the counterpart of itself and hence understand both." *Id.* at 299.

50. *Id.* at 300.

51. *Id.* at 302-07; see also *id.* at 245-46. Gadamer follows Edmund Husserl in his phenomenology, which coined the concept of horizon. Gadamer cites to 6 Husserliana—*Gesammelte Werke* 267; see also Kuhn, *The Phenomenological Concept of "Horizon," in Philosophical Essays in Memory of Edmund Husserl* 106 (M. Farber ed. 1940).

52. *Truth and Method*, *supra* note 20, at 302.

53. *Id.* at 245 ("Every experience has implicit horizons of before and after, and finally fuses with the continuum of the experiences present in the before and after to form a unified flow of experience."); J. Weinsheimer, *supra* note 24, at 157 ("[Horizon] in-

much more than what the author intends that it say.⁵⁴ Conversely, when a subsequent interpreter or historian approaches the text, she will bring to bear her own horizon, or context.

This analysis is related to another important phenomenon, namely, "history of effect,"⁵⁵ the situatedness of our understanding. If, as Heidegger taught, our existence is inherently contextual—we are "thrown" into a pre-existent world—our understanding is conditioned by the traditions of the world into which we are thrown. A consequence of this is the critical importance of precommitted structures of understanding: An interpreter will approach a text with certain "pre-understandings" about the text.⁵⁶ "A person who is trying to understand a text is always projecting. He projects a meaning for the text as a whole as soon as some initial meaning emerges in the text."⁵⁷ But interpretation is not the confirming of pre-understandings; it is the discrimination among competing pre-understandings, with some being discarded because they do not "work out" in connection with the text as a whole.⁵⁸

A lesson of Heidegger for Gadamer is the central role that pre-judgment—our pre-understandings, conditioned by the world and its traditions into which we are thrown—plays in interpretation.⁵⁹ A truly historical consciousness recognizes that one's prejudgments, products of one's very existence in the world, very much affect one's understanding of a text. History of effect explains why historicist objectivism does not work: "[W]e are always . . . affected by history," writes Gadamer. "It determines in advance both what seems to us worth inquiring about and what will appear as an object of investigation . . ."⁶⁰ History of effect also counsels us to be critical of our initial approach to the text.

cludes everything of which one is not immediately aware and of which one must in fact remain unaware if there is to be a focus of attention; but one's horizon is also the context in terms of which the object of attention is understood.").

54. See *Truth and Method*, supra note 20, at 306–07; see also R. Posner, *Law and Literature: A Misunderstood Relation* 229–36 (1988) (literary work can have meanings other than those intended by author).

55. See *Truth and Method*, supra note 20, at 299–300 (Gadamer defines "history of effect").

56. *Id.* at 265–71.

The second English translation of *Truth and Method* uses the terms "fore-conception" and "fore-meaning" instead of "pre-understanding," which was used in the first English translation. The second translation is the more reliable of the two, and philosophers may prefer its locutions, but I still prefer "pre-understanding" because it is generally more comprehensible.

57. *Id.* at 267.

58. *Id.* at 269 ("The hermeneutical task becomes of itself a questioning of things," and "[a] person trying to understand something will not resign himself from the start to relying on his own accidental fore-meanings" but will instead be "prepared for it to tell him something.").

59. *Id.* at 277–307; see *id.* at 271–77 (the Enlightenment misdirected us away from importance of tradition in understanding).

60. *Id.* at 300.

To take the whole truth of a text as that which we view as its immediate truth—a view conditioned by our inevitable pre-understandings—is to comprehend a distorted picture of the truth that lies between text and interpreter.⁶¹

Gadamer's history of effect suggests that to fix upon one timeless recreation of an historical intent in text is impossible. Thus, a critic analyzing Dickens's *David Copperfield* in 1880 will inevitably draw different insights from the novel than would a critic in 1960. The latter critic has been thrown into a different world, and her horizon is conditioned by vastly different pre-understandings because of cultural developments since 1880, her own intellectual interests and metatheories, and prior Dickens scholarship itself. For example, the latter critic might apply Freudian psychology to explore young David's threatening relationships with older men (e.g., Murdstone) and his much warmer relationships with older women (e.g., Peggotty and Aunt Betsey Trotwood). While the earlier critic is obviously closer in time to Dickens himself, and perhaps for that reason more likely to reflect Dickens's own conscious design in writing the novel, it seems quite possible that the latter critic's different views are not only defensible, but are in fact more insightful about the "truth" of the novel. What Dickens himself consciously intended thus becomes only a portion of what the text comes to mean.

The example can be taken one step further. The meaning of *David Copperfield* will also change for the same reader over time. The twenty-year-old critic in 1960 will probably view David differently from the same critic thirty years later. The critic's pre-understandings will change, and that will change the way she views the novel. For example, the critic's own life experiences may influence the way she views the characters, as will her subsequent reading about Dickens, other theories of *David Copperfield* and intellectual interests. Gadamer explains this phenomenon by reference to the dynamic nature of horizons. "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," writes Gadamer. "The historical movement of human life consists in the fact that it is never absolutely bound to any one standpoint, and hence can never have a truly closed horizon."⁶²

From the Dickens example above and the dynamic nature of an interpreter's horizon, one might be tempted to conclude that reliable interpretation is impossible. But according to Gadamer, the dynamic nature of horizons is actually what makes interpretation truly possible. Just as the interpreter's horizon changes over time, so too "the horizon of the past, out of which all human life lives and which exists in the

61. *Id.*62. *Id.* at 304.

form of tradition, is always in motion." For this reason, "[w]hen 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."⁶³ While Dickens and his 1960 interpreter are separated by the gulf of 100 years, their horizons are not completely exclusive: Dickens's horizon is expanded by 100 years of interpretation and testing of the truth-value of his work, and the interpreter's horizon is very much informed by tradition, including Dickens and his commentators.

Hence, interpretation as re-creation-of-the-past is not only impracticable, it is an impoverished view of the activity. Interpretation is the way we evolve. "In fact the horizon of the present is continually in the process of being formed because we are continually having to test all our prejudices. An important part of this testing occurs in encountering the past and in understanding the tradition from which we come."⁶⁴ The interpreter is not adrift in an alienated present, but is linked to the past through the medium of tradition. Interpretation involves the "fusion of horizons," the way in which the "old and new are always combining into something of living value."⁶⁵

Fusion of horizons, a central metaphor for interpretation in *Truth and Method*, is a highly abstract concept. More concrete is Gadamer's analogy to conversation.⁶⁶ Interpretation is a conversation between interpreter and text, in which both participants are led to an understanding that transcends either, in the same way that players' "playing" the game of Parchesi transcends both the players and the game. Thus, the interpreter does not take the text at face value, or seek refuge in its original context, but instead challenges and questions its assumptions to get at its truth value. Similarly, the interpreter places her own prejudgments at risk, by opening them to questions and challenges from the text. "The task of hermeneutics is to transform fixed assertion into conversation and to bring the bygone and static past back into the process of history."⁶⁷ The dialectical "play" that Gadamer sees is an inquiry in which the interpreter doubts some of the text's assertions, those that have been undermined by changed circumstances, while at the same time questioning her own assumptions by reference to the text. Note the contribution of Gadamer's critique of aesthetics: Suc-

63. Id. "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." Id.

64. Id. at 306.

65. Id.

66. See id. at 362-69; J. Weinsheimer, *supra* note 24, at 209-12.

67. J. Weinsheimer, *supra* note 24, at 209.

cessful interpretation involves the interpreter's giving herself over to play—the to-and-fro movement of genuine interaction—with the text.

C. Gadamer's Critics

In true Gadamerian style, the insights of *Truth and Method* have evolved since the book's original publication because of the scholarly debate the book has aroused. While philosophers, historians and literary critics have recognized the book as a brilliant and insightful analysis of interpretation, it has also been criticized as incomplete. I cannot capture the contours of this rich intellectual debate here⁶⁸ and only want to touch upon the three principal objections to *Truth and Method*, because these objections—and Gadamer's responses to them—have deepened our view of his hermeneutics.

1. *Relativism and Subjectivism (Betti and Hirsch)*. — The first objection is that made by Emilio Betti, E.D. Hirsch and other prominent literary theorists.⁶⁹ By ignoring authorial intent, Gadamer removes from interpretation the possibility of unchanging objective meaning for texts. In the tradition of romantic hermeneutics, Betti and Hirsch desire that hermeneutics seek out the "verifiable meaning" of texts, that meaning which is objectively determinable. To be objectively determinable means that the text's meaning can be determined by different people at different times by reference to a criterion that seems subject to the broadest agreement. That criterion, writes Hirsch, is "the old-fashioned ideal of rightly understanding what the author meant."⁷⁰ While the "significance" of a text, its usefulness and application in the present, is variable, Hirsch maintains that its "meaning" is not.⁷¹ These critics fault Gadamer's theory for rendering meaning variable over time (relativism) and dependent upon the views of the interpreter (subjectivism).

The difficulty with focusing on authorial intent, Gadamer responds, is that it is not objectively determinable, nor is such a focus

68. Instead see *Hermeneutics and Praxis*, supra note 22; D. Hoy, *The Critical Circle: Literature, History, and Philosophical Hermeneutics* (1978); G. Warnke, supra note 24, at 42–138. A bibliography of Gadamer's own post-*Truth and Method* writings (translated into English) can be found in *Relevance of the Beautiful*, supra note 20, at 183–86.

69. See E.D. Hirsch, *Validity in Interpretation* (1967); E.D. Hirsch, *The Aims of Interpretation* (1976); Betti, *Die Hermeneutik als allgemeine Methodik der Geisteswissenschaften*, 78/79 *Philosophie und Geschichte* 1, 43–46 (1962); Knapp & Michaels, *Against Theory*, 8 *Critical Inquiry* 723 (1982); Knapp & Michaels, *Against Theory 2: Hermeneutics and Deconstruction*, 14 *Critical Inquiry* 49 (1987) [hereinafter *Against Theory 2*]; see also R. Palmer, *Hermeneutics: Interpretation Theory in Schleiermacher, Dilthey, Heidegger, and Gadamer* (1969).

70. E.D. Hirsch, *Validity in Interpretation*, supra note 69, at 26. Hirsch has "elaborated" upon (i.e., changed) his original position in response to his debate with Gadamer. See Hirsch, *Meaning and Significance Reinterpreted*, 11 *Critical Inquiry* 202, 210–12, 223–24 (1984) [hereinafter *Meaning Reinterpreted*]; Hirsch, *Critical Response: Coming with Terms to Meaning*, 12 *Critical Inquiry* 627, 630 (1986).

71. *Meaning Reinterpreted*, supra note 70, at 202–05.

even true to the author herself unless "intent" is defined quite broadly. Recall Gadamer's insights into the horizons of interpreter and author. In discerning the "intent" of the author, the interpreter's inquiry will of necessity be influenced by her own pre-understandings and her own horizon; therefore, how can she ever faithfully recreate the horizon of the author? Even if the object of the inquiry were the intent of the author, Gadamer's critics neglect the ambiguous nature of authorial "intent."⁷² They seem to assume that intent means specific intent, or how the author specifically intended a case to be resolved, given the author's historical situation. But that is by no means the best meaning of authorial intent. Why not consider the author's general intent, namely, the overall goals, purposes and assumptions underlying her text? As conditions change, the meaning of her text, applied to new circumstances, changes as well. Yet the changes in the text's interpretation are themselves consistent with the author's general intent, her overall purpose of communicating.⁷³ The further point suggested by Gadamer is that the author also had a "meta-intent," the complete horizon or range of vision when she wrote the text. Much of her meta-intent was not consciously "in mind" when she wrote the text, but this does not render it irrelevant; it is this full range of assumptions that permits the text's horizon to evolve, to breathe, over time.

Thus, Gadamer accepts the charge of relativism, that his theory renders textual meaning variable across different interpreters and different contexts.⁷⁴ But this is inevitable if interpretation is a dialogue between the interpreter and the text and is, in any event, not inconsistent with a realistic view of authorial intent. Moreover, Gadamer considers *this* sort of relativism a virtue of interpretation rather than an objection. The main reason interpretation changes is the role of temporal distance, which affects the horizon of the text in productive ways.⁷⁵ Most of us have had the experience of writing some text which

72. See generally Eskridge, *Spinning Legislative Supremacy*, 78 Geo. L.J. 319, 323-30 (1989) (arguing that passage of time inevitably renders original "intent" ambiguous).

73. Note that Hirsch now recognizes future-oriented components of authorial intent, but seeks to limit the implications of this recognition. See *Meaning Reinterpreted*, supra note 70, at 204-06, 210.

74. "According to Gadamer, the historicity of human nature causes meaning to change in its different actualizations." *Meaning Reinterpreted*, supra note 70, at 216. Hirsch contrasts this historicity with "the principle of *historicality*, which asserts that a historical event, that is to say, an original communicative intent, can determine forever the permanent, unchanging features of meaning." *Id.* Knapp & Michaels, *Against Theory* 2, supra note 69, at 53, view Gadamer's dynamic interpretation as "changing" the text, writing a "new" text, rather than "interpreting" the existing text.

75. See P. Ricoeur, *The Hermeneutical Function of Distanciation*, in *Hermeneutics and the Human Sciences: Essays on Language, Action and Interpretation* 131-44 (J. Thompson ed. & trans. 1981) (dominant role played by "distanciation" in text is to serve as paradigm of "positive and productive function of distanciation at the heart of the historicity of human experience").

we thought truly insightful and then returning to it years later, only to find that most of what we originally thought were insights appear in retrospect to be trivial or slightly wrong. Yet often, after time has passed, one of the original insights will appear even more striking—"truer"—than it did originally. Time and the changed circumstances it brings subject texts to rigorous testing. The truth of the text (if any) thus emerges more clearly over time.

The productivity of temporal distance might obviate the objection of relativism but does not address the related objection of subjectivism: The shared language will depend in part on the subjective views of the interpreter, thereby rendering meaning not only variable over time, but idiosyncratic across different interpreters.⁷⁶ This is a more important objection. Just as Gadamer disagrees with the Betti-Hirsch effort to give primacy to the author's views, so he disagrees with reader-response critics who give primacy to the interpreter's views.⁷⁷ Both schools misunderstand the dialectical nature of interpretation and deflect our attention from the role of interpretation in self-understanding and truth seeking.

Gadamer rejects the idea that idiosyncratic personal beliefs will usually dominate interpretation. "All correct interpretation must be on guard against arbitrary fancies and the limitations imposed by imperceptible habits of thought, and it must direct its gaze 'on the things themselves' . . ."⁷⁸ Thus Gadamer argues that the interpreter's horizon is dominated by traditions, not by idiosyncratic prejudices. Because we are always affected by history, the ways in which the text has previously been understood condition our understanding. The history of effect not only suggests that all knowledge is historically mediated, but also that tradition constrains the subjectivity of interpretation. "The focus of subjectivity is a distorting mirror. The self-awareness of the individual is only a flickering in the closed circuits of historical life."⁷⁹

Gadamer's generalized reliance on tradition is not entirely persua-

76. Meaning Reinterpreted, *supra* note 70, at 218 ("[I]n the Gadamerian mode of interpretation, meaning is *made* to conform to the critic's view about what is true.").

77. See, e.g., S. Fish, *Is There a Text in This Class?* 16 (1980) (collection of essays on theme "that interpretation is the *source* of texts, facts, authors and intentions" (emphasis added)).

78. *Truth and Method*, *supra* note 20, at 266-67. The points that follow were made in response to Betti's criticism of *Truth and Method*. Gadamer, *Replik*, in *Hermeneutik und Ideologiekritik* 283-317 (K.-O. Apel ed. 1971); see G. Warnke, *supra* note 24, at 73-106 (discussion of charge of subjectivism); see also Wright, *On a General Theory of Interpretation: The Betti-Gadamer Dispute in Legal Hermeneutics*, 32 *Am. J. Juris.* 191 (1987) (contrasting works of Betti and Gadamer within larger scholarly effort to work out theory of interpretation).

79. *Truth and Method*, *supra* note 20, at 276; see G. Warnke, *supra* note 24, at 79 ("Indeed, part of Gadamer's point is how little interpreters and their personal points of view matter, for even where interpreters attempt to break with tradition and approach their subject-matter without preconceptions, the tradition retains its normative force.").

sive, because neither it nor the linguistic conventions of the text can produce complete closure.⁸⁰ Surely the text and its tradition are not so constraining that they do not give rise to more than one approach to a textual issue; in such cases, the interpreter's personal beliefs certainly could prove decisive.⁸¹ Gadamer responds to this by invoking the "hermeneutical circle."⁸² Just as the horizon of the text changes over time, partly through interpretive encounters, so too the interpreter's viewpoint, or horizon, is transformed in the encounter. The historical conditioning of our understanding does not preclude revising our pre-understandings in light of the text. The dynamic process of interpretation works thus: Upon our first approach to the text, we project our pre-understandings onto it. As we learn more about the text, we revise our initial projections, better to conform with the presumed integrity of the text as it unfolds to us. Essential to the interpreter's conversation with the text is her effort to find a common ground that will both make sense out of the individual parts of a text and integrate them into a coherent whole.⁸³ The assumption that the text has something to teach us, therefore, exercises a constraining influence on interpreters. This does not eliminate the problem of subjectivism, but does ameliorate it.

2. *Incoherence (Derrida)*. — Gadamer's response to the charges of relativism and subjectivism opens up his theory to further objections from the perspectives of deconstructionist and critical thought. Deconstructionists such as Jacques Derrida would criticize Gadamer for assuming the integrity of texts and continuity in interpretation. Based upon his general theory and his much-noted "encounter" with Gadamer in 1981, Derrida would seem to argue that texts are themselves fraught with inconsistencies and that interpretation involves disruption rather than mediation.⁸⁴ Gadamer is fully aware that any text can be readily deconstructed, but he does not find the deconstructive approach productive. The hermeneutical task is one of self-under-

80. See *Against Theory* 2, *supra* note 69, at 54–59, 67–68.

81. See G. Warnke, *supra* note 24, at 81; see also *id.* at 82–91 (Warnke's analysis of Gadamer's response to this quandary).

82. The hermeneutical circle is the notion that one understands "the whole in terms of the detail and the detail in terms of the whole. . . . It is a circular relationship The anticipation of meaning in which the whole is envisaged becomes actual understanding when the parts that are determined by the whole themselves also determine this whole." *Truth and Method*, *supra* note 20, at 291.

83. See G. Warnke, *supra* note 24, at 83. See generally *id.* at 82–91 (addressing "hermeneutic circle of whole and part").

84. I use the conditional mood in text because Derrida has been elliptical in his approach to Gadamer's theory, as reflected in the odd Gadamer-Derrida "Encounter" in April 1981. See *Dialogue and Deconstruction: The Gadamer-Derrida Encounter* 1–10 (D. Michelfelder & R. Palmer eds. 1989) [hereinafter *Dialogue and Deconstruction*]; see also F. Dallmayr, *Critical Encounters: Between Philosophy and Politics* 130–58 (1987). For explications of Derridean deconstruction, see J. Culler, *On Deconstruction: Theory and Criticism After Structuralism* (1982); Peller, *The Metaphysics of American Law*, 73 *Calif. L. Rev.* 1152 (1985).

standing, which comes from our linking up with, drawing connections to, and being affected by our own encounters with texts.⁸⁵

Gadamer's different focus is illustrated by his concept of "anticipation of completeness."⁸⁶ If one sets out, as the deconstructionists do, to find incoherence in a text, one can succeed. Gadamer does not begrudge that reality. But because hermeneutics, properly considered, is an inquiry into truth, we must in our inquiry assume that the text is true and work from that assumption to figure out the most coherent vision we can draw from the text. Thus, we "anticipate" the "completeness" of the text, by our receptiveness to being educated by the text, which will illuminate our own pre-understandings. "[J]ust as we believe the news reported by a correspondent because he was present or is better informed, so too are we fundamentally open to the possibility that the writer of a transmitted text is better informed than we are, with our prior opinion," Gadamer argues. "The prejudice of completeness, then, implies not only this formal element—that a text should completely express its meaning—but also that what it says should be complete truth."⁸⁷

Derrida disputes what he calls Gadamer's "good will" toward the text.⁸⁸ Derrida argues that the anticipation of completeness, like Gadamer's whole critique of romantic hermeneutics, rests upon a nostalgic, outdated metaphysical view of truth. Derrida views incoherence rather than truth as the natural assumption in dealing with texts. For him, the insight of textual analysis lies in recognizing the many ways in which texts subvert their own truth claims, instead of providing a harmonious process of coming to see the truth in what another has said. In that event, "one needs to ask whether the preconditions for *Verstehen* [understanding], far from being the continuity of *rapport* [agreement] (as it was described [by Gadamer]), is not rather the interruption of *rapport*, a certain *rapport* of interruption, the suspending of all mediation?"⁸⁹

Gadamer convincingly denies that the history of interpretation is a return to an essentialist metaphysics that believes in an objectively determinate reality, and defends his good will to the text as the best way

85. Truth and Method, *supra* note 20, at 260; see Gadamer, Reply to Jacques Derrida, in *Dialogue and Deconstruction*, *supra* note 84, at 55–57; Gadamer, *Destruktion and Deconstruction*, in *id.* at 102–13.

86. See Truth and Method, *supra* note 20, at 293–94 (translating *der Vorgriff der Vollkommenheit* as "fore-conception of completeness"); G. Warnke, *supra* note 24, at 82–91 (excellent discussion of "anticipation of completeness").

87. Truth and Method, *supra* note 20, at 294.

88. Derrida, Three Questions to Hans-Georg Gadamer, in *Dialogue and Deconstruction*, *supra* note 84, at 52–54; see also G. Warnke, *supra* note 24, at 87–91 (discussing Derrida's questions).

89. Derrida, *supra* note 88, at 53; see G. Warnke, *supra* note 24, at 88 ("In other words, what assures us that the truth we find in the object is a truth we ought to substantiate or affirm?").

toward illumination.⁹⁰ Gadamer does not disagree that an encounter with a text produces a "*rupture*," a transformation of the interpreter.⁹¹ But he emphasizes a continuity between the text and the interpreter that Derrida denies. Gadamer claims that we miss an opportunity to learn if we view the text as a riddle rather than as a way of exploring truth. "Just as in the case of presuming coherence, it is only by presuming truth that what may appear first as a 'rupture' in the text can be seen to require not only a new textual interpretation but a new understanding of the subject-matter at issue."⁹²

Gadamer's encounter with Derrida illuminates an explicitly normative feature of Gadamer's theory. Most of *Truth and Method* sounds descriptive (this is what interpretation essentially is), but there is an element of choice and normative prescription in Gadamer's advice: "A person trying to understand something will not resign himself from the start to relying on his own accidental fore-meanings, ignoring as consistently and stubbornly as possible the actual meaning of the text *Rather, a person trying to understand a text is prepared for it to tell him something.*"⁹³ Gadamer's disagreement with Derrida rests upon his prescriptive endorsement of the hermeneutical spirit of constructive inquiry.

What is missing in Gadamer, however, is a convincing demonstration that his assumption of continuity between text and interpreter is a better working assumption than the Derridean one of rupture and discontinuity (though the opposite demonstration is equally missing in Derrida).⁹⁴ Gadamer's assertion that our understandings about a text are decisively influenced by tradition is plausible, but it does not suggest why a *coherence*-based theory of interpretation is more productive than a *rupture*-based theory. Perhaps more persuasive is Gadamer's aesthetic theory and its emphasis on play: Only when an interpreter throws herself into a work—and subjects herself to it even as she imposes upon it—does insight into truth emerge.⁹⁵ This aspect of ethical engagement in Gadamer's aesthetics of play presupposes a certain coherence, limited at its boundaries by the traditions surrounding the work. By engaging oneself in the to-and-fro movement with the text,

90. See Gadamer, Reply to Jacques Derrida, *supra* note 85, at 55–57; Gadamer, Text and Interpretation, *in* Dialogue and Deconstruction, *supra* note 84, at 21–51.

91. Gadamer, Reply to Jacques Derrida, *supra* note 85, at 56.

92. G. Warnke, *supra* note 24, at 89.

93. Truth and Method, *supra* note 20, at 269 (emphasis added). "The important thing is to be aware of one's own bias, so that the text can present itself in all its otherness and thus assert its own truth against one's own fore-meanings." *Id.*

94. But when applied to statutory interpretation, it is clear that the Gadamerian assumption of coherence makes more sense than the Derridean assumption of rupture; one can assume with little difficulty that legislators presume that the statutes they write are coherent. See *infra* text at notes 115–116.

95. See Truth and Method, *supra* note 20, at 132–34; G. Warnke, *supra* note 24, at 56–64.

the interpreter is indeed transformed, but from within a tradition.⁹⁶

3. *Conservatism (Habermas)*. — Gadamer's responses to objections of subjectivism and incoherence appeal to tradition and history. The interpreter is constrained by traditions that are inherently central to her own horizon, and that are the only means of communication with the text's horizon. And Gadamer appeals to history as the filtering mechanism for the truth claims of a text. These features of Gadamer's thought suggest a certain conservatism, which Gadamer resists. "However much it is the nature of tradition to exist only through being appropriated, it still is part of the nature of man to be able to break with tradition, to criticize and dissolve it," writes Gadamer. "[I]s not what takes place in remaking the real into an instrument of human purpose something far more basic in our relationship to being?"⁹⁷

Thus Gadamer recognizes that many pre-understandings are disabling ones; interpretation is one way we criticize both our pre-understandings and the pre-understandings within a given text. The passage of time gives us a critical distance from the text that permits us to evaluate its truth claims better. Also, Gadamer emphasizes that understanding a text is inseparable from applying the text to a specific question. The novel context of the present question itself forces us to re-evaluate the assumed truths of the text, and indeed our own assumed truths as well.

In short, Gadamer propounds a critical hermeneutics. But it has been objected, most prominently by Jürgen Habermas, that Gadamer's hermeneutics is not critical enough. The celebrated Gadamer-Habermas debate⁹⁸ focuses on the objection that tradition can systematically distort meaning. Habermas agrees with Gadamer that tradition exercises a strong influence on interpretation, but he recoils at its mortmain. Normatively, tradition is objectionable because it is conditioned by social and economic structures that exclude voices and "interests" from the hermeneutical process. For Habermas, what is needed is a critique of tradition that uncovers its deep structural biases.⁹⁹ Gadamer's claim that hermeneutics criticizes prejudices is unsatisfac-

96. See Dallmayr, *Prelude—Hermeneutics and Deconstruction: Gadamer and Derrida in Dialogue*, in *Dialogue and Deconstruction*, supra note 84, at 75, 89–91.

97. *Truth and Method*, supra note 20, at xxxvii (Foreword to the Second Edition).

98. Responding to the second edition of *Truth and Method*, published in 1965, Habermas questioned Gadamer's rehabilitation of prejudice and tradition in *Zur Logik der Sozialwissenschaften* (1967). Gadamer responded with an essay called "Die Universalität des hermeneutischen Problems" in his *Kleine Schriften* (1967), which has been translated as *The Universality of the Hermeneutical Problem*, in *Philosophical Hermeneutics*, supra note 20, at 3. Further essays back and forth between Gadamer and Habermas are collected in *Hermeneutik und Ideologiekritik*, supra note 78, at 45–82, 120–59, 283–317. Habermas's main response is his *Erkenntnis und Interesse*, appendix (1968), translated in 1971 as *Knowledge and Human Interests* (J. Shapiro trans. 1971).

99. See J. Habermas, *Knowledge and Human Interests*, supra note 98, at 316–17.

tory, because any critique from within tradition is unable to expose the depth of the bias. What Gadamer would characterize as disabling pre-understandings Habermas would characterize as pathological distortion.¹⁰⁰

Gadamer responds to Habermas by denying that hermeneutics ignores the assumptions and social relations that lay beneath traditional views. Hermeneutics is, according to Gadamer, well-suited to the task of reconstructing a distorted dialogue, because of its own traditions of probing beneath and beyond text to expose hidden meaning and unexpected connections.¹⁰¹ Indeed, Gadamer in the 1970s acknowledged the existence of distorting structures in modern society and urged that conditions undermining true reciprocity—preconditions for dialogue—be considered in interpretation.¹⁰² Nonetheless, this response fails to satisfy Habermas, who insists that Gadamer's tradition-linked hermeneutics cannot perform a reconstructive dialogue, because it has no theory of society from which to start.¹⁰³ What is needed, at least, is a "meta-hermeneutic,"¹⁰⁴ a zero-point, from which to criticize society.

Gadamer's ultimate problem with Habermas's position is that there is no "zero point" from which to accomplish Habermas's reconstructive work, because hermeneutics is "universal."¹⁰⁵ Starting from the proposition that human reflection is finite and bounded, Gadamer despairs that we can ever get entirely "outside" the tradition that Habermas and others criticize as coerced and oppressive. Indeed, given that our very concept of rationality is historically conditioned, how can we reliably prove, as Habermas seeks to do, that our critical

100. Habermas, *Summation and Response*, *Continuum*, Spring-Summer 1970, at 125 (critical hermeneutics teaches us that "the repressivity of a relationship of force . . . deforms the intersubjectivity of an agreement as such and systematically distorts colloquial communication"); see also Habermas, *A Review of Gadamer's Truth and Method*, in *Understanding and Social Inquiry* 335 (F. Dallmayr & T. McCarthy eds. 1977) [hereinafter *Habermas Review*].

101. See Gadamer, *On the Scope and Function of Hermeneutical Reflection*, in *Philosophical Hermeneutics*, *supra* note 20, at 18; G. Warnke, *supra* note 24, at 113–14; Ingram, *Hermeneutics and Truth*, in *Hermeneutics and Praxis*, *supra* note 22, at 32, 44–49.

102. See Gadamer, *supra* note 26, at 314; H.-G. Gadamer, *Vernunft im Zeitalter der Wissenschaft* (1976), discussed in Ingram, *supra* note 101, at 47; see also *id.* at 49 (quoting Gadamer's recent endorsement of "a shared life under conditions of uncoercive communication" as a worthy aspiration for hermeneutics).

103. Habermas, *Summation and Response*, *supra* note 100, at 127–28; see J. Habermas, *Communication and the Evolution of Society* 1–69 (T. McCarthy trans. 1979) (description of his "universal pragmatics").

104. The term is taken from P. Ricoeur, *Hermeneutics and the Critique of Ideology*, in *Hermeneutics and the Human Sciences*, *supra* note 75, at 63, 95–97.

105. *Truth and Method*, *supra* note 20, at 474–91; Gadamer, *The Universality of the Hermeneutical Problem*, *supra* note 98, *passim*; see G. Warnke, *supra* note 24, at 135–36 (summarizing part of Gadamer's critique of Habermas as the lack of "independent grounds either for legitimating or for criticizing authority").

conclusions are valid?¹⁰⁶ Because we can never clearly escape the force of tradition, Gadamer claims that we should defer to it, seek to deal with it on its own terms.

Thoughtful philosophers otherwise sympathetic to Gadamer have not followed his impulse to fall back upon a self-critical tradition and have sought more common ground between Gadamer and Habermas. Paul Ricoeur rejects the stark dichotomy between Gadamer's "hermeneutics of tradition" and Habermas's "critique of ideology" and argues that we have much to learn from each.¹⁰⁷ Georgia Warnke's sympathetic analysis of Gadamer takes him to task for pushing his hermeneutical reflections in a direction they need not go. Even if Habermas's critics are correct that there is no zero-point from which to criticize tradition, that still does not explain why we must adhere to it.¹⁰⁸ If we are, as Gadamer repeatedly insists, reflective enough to criticize our traditions and pre-understandings, then why must we privilege the past by insisting that it be the starting point? Both Ricoeur and Warnke insist that there is no reasonable Gadamerian objection to a severely "critical hermeneutics," one that de-privileges traditions and subjects them to aggressive questioning.

II. IMPLICATIONS OF GADAMER'S HERMENEUTICS FOR THEORIES OF STATUTORY INTERPRETATION

Even though Gadamer's hermeneutics is vulnerable to some of the critical questions posed above, it has proved robust in the face of intelligent critique and remains an important theory of interpretation. The question remains whether it has application to statutory interpretation and, if so, what its implications might be. This Part suggests that Gadamer's hermeneutics contributes significantly to our thinking about statutory interpretation. I shall use *Boutilier*, described in the Introduction to this Article, as the example through which to explore the implications of Gadamerian hermeneutics. The three most striking general implications are the following:

First, there is no single foundation, criterion or method for statutory interpretation. Hermeneutics is a way of criticizing the closure suggested by the three theories of statutory interpretation mentioned at the beginning of this Article—textualism (Justice Scalia), intentional-

106. Gadamer, *On the Scope and Function of Hermeneutical Reflexion*, in *Philosophical Hermeneutics*, supra note 20, at 18, 26; see also *id.* at 42 (Habermas's "emancipatory reflection" generates an "anarchistic utopia"); cf. Giurlanda, *Habermas' Critique of Gadamer: Does It Stand Up?*, 27 *Int'l Phil. Q.* 33 (1987) (concluding that critique does not stand up).

107. P. Ricoeur, supra note 104, at 97; see *id.* at 100 (finding a "false antinomy" between Gadamerian "ontology of prior understanding" and Habermasian "eschatology of freedom").

108. G. Warnke, supra note 24, at 136-38 ("Failure to find axiomatic grounds for our criticism of authority does not mean that we must submit dogmatically to it.").

ism (Judge Posner) and present-mindedness (Aleinikoff). According to Gadamerian hermeneutics, none of the theories is wrong so much as each is incomplete. In true Gadamerian style, at least two of the theorists mentioned here seem to recognize that incompleteness, as they have sought to apply their respective theories. Hermeneutics stresses the multidimensional complexity of statutory interpretation and, even more, the importance of an interpreter's attitude rather than her method. The hermeneutical attitude is open rather than dogmatic, critical rather than docile, inquiring rather than accepting.

Second, statutory interpretation—the “fusion of horizons”—is dynamic. It is dynamic both in the sense that the interpreter's horizon changes over the years, as our legal culture changes over time, and in the sense that the text's horizon changes as well, since every new application of the text draws out new possibilities from it. It is dynamic in the sense that the interpretive process should be an effort to approach the values of both text and interpreter critically. It is dynamic in the sense that each application of an historic text by a current interpreter to a factual setting brings its own surprising twists.

Third, several musty and much criticized doctrines associated with statutory interpretation—the canons of construction, the use of legislative history and stare decisis for statutory precedents—can be viewed in an interesting new way. These traditional aids to interpretation are now under attack by theorists as being marginally relevant to statutory interpretation. To the contrary, these traditions form much of the historical context that conditions the interpreter's approach to statutes: The canons represent widely shared conventional pre-understandings about linguistic, procedural and policy presumptions that judges bring to interpreting statutes. Legislative history and statutory precedents provide instruction about what the statute is all about and are formal means by which the text's horizon connects with that of the interpreter.

A. Relevance of Gadamerian Hermeneutics for Statutory Interpretation

Gadamer himself raises the question of the relevance of his theory for law. “It is by no means self-evident that legal hermeneutics belongs within the context of the problem of general hermeneutics. . . . It is not its task to understand valid legal propositions but to discover law—i.e., to so interpret the law that the legal order fully penetrates reality,” he writes. “Because interpretation has a normative function here, it is sometimes . . . entirely separated from literary interpretation, and even from that historical understanding whose object is legal (constitutions, law, and so on).”¹⁰⁹ This concern has more recently been raised by Judge Posner,¹¹⁰ and it stands at the threshold of our inquiry.

109. Truth and Method, *supra* note 20, at 517 (Supplement I to the Second Edition: “Hermeneutics and Historicism” (1965)).

110. See Posner, Law and Literature: A Relation Reargued, 72 Va. L. Rev. 1351,

Gadamer begins to address the relevance of his theory by outlining the apparent difference between understanding an historical text (including legal texts) and judicial statutory interpretation.¹¹¹ When a judge interprets a statute, her activity involves normative dimensions not involved in the historian's task. A statutory interpretation directly affects our lives and has a coercive force at least for the parties who have sought the judge's interpretation. Hence, it is not clear that insights about historical, literary and aesthetic interpretation are relevant to legal interpretation. Yet to the assertion that "legal hermeneutics has a special dogmatic task that is quite foreign to the context of historical hermeneutics," Gadamer responds that "the situation seems . . . just the opposite. Legal hermeneutics serves to remind us what the real procedure of the human sciences is. Here we have the model for the relationship between past and present that we are seeking."¹¹²

Gadamer makes several claims here that need to be separated. To begin with, he contends that statutory interpretation is subject to the same hermeneutical phenomenology as other types of interpretation.¹¹³ This is hardly surprising, given Gadamer's belief in the "universality" of the hermeneutical phenomenon. Thus, the fusing of horizons metaphor seems applicable to statutory interpretation: The horizon of the jurist, conditioned by traditions of both law and society, seeks a common ground with the statute's horizon, the ongoing tradition of the statute. "The judge who adapts the transmitted law to the needs of the present is undoubtedly seeking to perform a practical task, but his interpretation of the law is by no means merely for that reason an arbitrary revision," Gadamer writes. "Here again, to understand and to interpret means to discover and recognize a valid meaning. The judge seeks to be in accord with the 'legal idea' in mediating it with the present."¹¹⁴

In connection with this first claim, note that two of the three critiques of Gadamer analyzed at the end of Part I¹¹⁵ seem somewhat less persuasive in the context of statutory interpretation. In a representative democracy such as ours, statutes enacted by the legislature are unusually authoritative texts. Hence, Gadamer's willingness to assume that the text has something true to teach us seems uniquely well suited to statutory interpretation. Derrida may be correct that statutory texts, like other texts, are filled with contradictions, but the importance of legislative supremacy in our polity suggests the wisdom of Gadamer's good will toward texts. So, too, Habermas's criticism pales in statutory

1360-74 (1986) (no useful analogy between literary and legal techniques of interpretation).

111. Truth and Method, *supra* note 20, at 324-28; *id.* at 517-19 (Supp. 1 1965).

112. *Id.* at 327-28.

113. See *id.* at 324-41 (Gadamer's treatment of "legal hermeneutics").

114. *Id.* at 328.

115. See *supra* notes 68-108 and accompanying text.

cases. If Gadamer's critical approach to texts errs on the side of conservatism in deferring to the values embedded in the text, this may be preferable to Habermas's more aggressive questioning if we accept the premise of legislative supremacy.¹¹⁶

Only the subjectivism critique retains its full vitality once the debate has shifted to statutory interpretation. Given legislative supremacy, one might argue that the most legitimate criterion for textual meaning is the original intent of the drafters.¹¹⁷ But even this criticism loses some cogency when one considers that the relevant "intent" is the collective intent of the legislature. It is hard enough to say precisely what an individual's intent is about an issue; to say anything meaningful about the intent of hundreds of individuals, most of whom speak on the issue only by their votes for the statutory language ultimately enacted, seems all the more difficult.¹¹⁸

In addition to his claim for the relevance of hermeneutics for statutory interpretation, Gadamer further asserts that statutory interpretation itself serves as a model for hermeneutics. The reason is that statutory interpretation epitomizes the link between understanding and application. "The work of interpretation is to *concretize* the law in each specific case—i.e., it is a work of *application*."¹¹⁹ The Aristotelian concept of application—we do not understand concepts in the abstract, but understand them only in concrete application to a problem or an issue¹²⁰—is as fundamental to Gadamer's hermeneutics as it is to statutory interpretation.

Application helps Gadamer avoid the objection of subjectivism because the jurist's dialogue with the text is rooted in an actual set of facts and a specific historical moment. "It is part of the idea of a rule of law

116. Compare Farber, *Statutory Interpretation and Legislative Supremacy*, 78 Geo. L.J. 281, 283–94 (1989) (legislative supremacy limits courts' policy making) with Eskridge, *supra* note 72, at 343–51 ("anti-theory" of legislative supremacy, based upon primary importance of interpretation).

117. Maltz, *supra* note 14, at 6–13 (only an interpretive system based on intentionalism is consistent with legislative supremacy); Merrill, *supra* note 14, at 32–46 (legitimacy of federal common law troublesome without judicial consideration of "specific intentions of the draftsmen of authoritative texts"). This view is hotly contested by judges and scholars who deny that statutory interpretation is a search for legislative intent. See Eskridge, *supra* note 9.

118. The classic here is Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 870 (1930) (legislative intent is "transparent and absurd fiction"), to which Landis, A Note on "Statutory Interpretation," 43 Harv. L. Rev. 886 (1930), is the classic rejoinder (legislative intent is significant and not to be dismissed merely because difficult to discover). See generally Eskridge, *Legislative History Values*, 66 Chi.-Kent L. Rev. (forthcoming 1990), for a critical history of the concept that statutory interpretation is the reconstruction of the legislature's specific intent as to an interpretive issue.

119. Truth and Method, *supra* note 20, at 329 (footnote omitted).

120. Aristotle, *Nicomachean Ethics*, bk. VI, chs. 5–11 (D. Ross trans. 1980); see R. Beiner, *Political Judgment* 72–82 (1983) (analyzing Aristotelian concept of *phronesis* as knowledge of right action).

that the judge's judgment does not proceed from an arbitrary and unpredictable decision, but from the just weighing up of the whole. Anyone who has immersed himself in the particular situation is capable of undertaking this just weighing-up."¹²¹ Aristotle's concept of practical reasoning (*phronesis*) posits that we can know the right answer in a specific set of circumstances even though we have no general theory to explain why it is right.¹²² For Gadamer, the jurist's situatedness in society, her situatedness in the particular case and her situatedness in a well-known tradition of laws and interpretations, ensure "legal certainty—i.e. [that] it is in principle possible to know what the exact situation is. Every lawyer and every counsel is able, in principle, to give correct advice—i.e., he can accurately predict the judge's decision on the basis of the existing laws."¹²³

At the same time, application also confirms the impossibility of predetermined textual meaning. When a statute enacted some years earlier must be applied to a modern case, the temporal distance not only renders the search for original meaning misguided,¹²⁴ but also may enable us to understand the truth of the text better.¹²⁵ This is what Gadamer calls the "hermeneutical productivity" of historical distance.¹²⁶ Legal hermeneutics draws strength and insight from this temporal distance and, further, relies on the productivity of the distance between the general (statute) and the applied particular (case). It is impossible for lawmakers to work out every issue in advance, and "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."¹²⁷ No amount of legal codification could anticipate all possible applications. "To be 'elastic' enough to leave this kind of free play seems rather to be in the nature of legal regulation as

121. Truth and Method, *supra* note 20, at 329.

122. See *supra* note 120.

123. Truth and Method, *supra* note 20, at 329–30.

124. "But [the judge] cannot let himself be bound by what, say, an account of the parliamentary proceedings tells him about the intentions of those who first passed the law. Rather, he has to take account of the change in circumstances and hence define afresh the normative function of the law." *Id.* at 327.

125. Oddly, Gadamer waffles on this point. "I am not so bold as to decide whether . . . a legal order which historical change has rendered in need of interpretation . . . contributes to a more just application in general, namely to a refinement of the feeling for law that is guiding interpretation," he remarks. "In other fields, however, the matter is clear. It is beyond all doubt that the 'significance' of historical events or the rank of works of art becomes more apparent with the passage of time." *Id.* at 520–21 (Supp. I 1965). I do not share this reservation.

126. "[I]n addition to this essential distance between the universal and the concrete, there is also the historical distance, which has its own hermeneutical productivity." *Id.* at 520 (Supp. I 1965).

127. *Id.* at 518 (Supp. I 1965).

such, indeed of legal order generally.”¹²⁸

Gadamer’s final, but implicit, claim is that application of and interpretation of legal texts are not rendered different from treatment of historical texts because of the coercive effect of laws. Gadamer would find odd the lawyer’s focus on the unique way statutes “change our lives” by forcing us to conform our activity to an authoritative interpretation. Every interpretative encounter changes our lives, Gadamer would respond, because interpretation is the way we continually integrate past and present in our being-in-the-world. The different effects statutes have on our lives, compared with the effects of other texts, is only a matter of degree.

Nonetheless, Gadamer might concede that there is one true difference between statutory interpretation and literary interpretation: Statutory interpretation requires a mediator (a judge), while other types of interpretation do not. Those of us subject to statutes interpret them, but this leads to a plurality of interpretations (especially when interpreters, driven by obvious self-interest, are unable to rise above their own pre-understandings). The judge stands as the arbiter of this pluralism—the official whose special role is interpretation or, more precisely, validating one interpretation among several alternatives. Unlike even a super-literary critic (whose view of a text may be quite authoritative), the judge is both interpreter and censor: She chooses one interpretation and suppresses others. Her role in the legal hierarchy gives her interpretation a formal effect quite different from that of a literary critic.

The importance of a third party and her hierarchical position in the coercive state suggest that statutory interpretation differs from other types of interpretation. This difference does not render Gadamer’s hermeneutics irrelevant to statutory interpretation but does suggest that the hermeneutical inquiry has special features in statutory interpretation. For example, the judge needs to bridge the gulf not only between the statute and the case, the past and the present, but also between herself and the case, because the case and its parties come as strangers to her court. Also, the judge must consider that her interpretation will have consequences for other people and other situations, apart from those before her. All of this suggests the greater moral responsibility the judicial interpreter has in statutory interpretation. That moral responsibility makes it especially important for judges (and of course other legally authoritative interpreters) to reflect upon the Gadamerian nature of their enterprise.

*B. Implications of Gadamer’s Hermeneutics for a
General Theory of Statutory Interpretation*

Assuming that Gadamer’s hermeneutics represents a robust theory

128. *Id.* at 518–19 (Supp. I 1965).

of interpretation *and* that his hermeneutics is applicable to statutory interpretation, at least three implications follow for theories of statutory interpretation. The first implication, primarily descriptive, is a skepticism that any one of the "foundationalist" theories of statutory interpretation fully captures what is going on in that endeavor.¹²⁹ Applying Gadamer's insights to the *Boutilier* problem suggests that none of the foundationalist theories can effectively exclude considerations which they purport to eschew. A second implication, also descriptive, is that statutory interpretation is dynamic. As a conversation between text and interpreter about a case, statutory interpretation is necessarily evolutive yet bounded. The horizons of both text and interpreter change over time, as do the factual settings of the cases presented; as a result, the statute will grow and evolve as it is interpreted. The third implication is explicitly normative—law "should" be dynamic and not stagnant. Gadamer's theory suggests several powerful metaphors for refining and defending normative theories of dynamic statutory interpretation.

1. *Abandonment of Foundationalist Method.* — The first, and most important, implication of Gadamer's hermeneutics is to liberate statutory interpretation from the fetishism of foundationalism.¹³⁰ Most of the general theorizing about statutory interpretation is an effort to assert the primacy of one method or another for interpreting statutes. The debate in the 1980s saw Justice Scalia argue for textualism, as the only method consistent with the formal structures of the legislative process; Judge Posner argue for imaginative reconstruction, as the most uncontroversial evidence of what a directive utterance means; and Aleinikoff argue for a present-minded approach, as leading to the most sensible policy results. Using *Boutilier* as the case for discussion, Gadamerian hermeneutics suggests that none of these "methods" tells us all that is going on in statutory interpretation, or even operates as a serious constraint on the interpreter. Indeed, a careful reading of these apparently foundationalist theorists indicates that they ought to be, and probably are, amenable to Gadamerian analysis of their theories.¹³¹

Consider first Justice Scalia's theory that a reading of the statutory text, including its structure and related statutes, is the only legitimate way for nonelected judges to interpret statutes enacted by the elected legislature in our representative democracy.¹³² Gadamer would find such a "textualist" approach curious, as it seems to deny or circum-

129. See *supra* text accompanying notes 10–16.

130. This is a central point of Eskridge & Frickey, *supra* note 19.

131. After I wrote the sentence in text, I received written comments on this Article from Judge Posner and Professor Aleinikoff. The former suggested (to me) some of the ways his own theory and practice had moved in Gadamerian directions, and the latter explicitly claimed that his theory (as he understands it) is quite similar to Gadamer's theory.

132. See A. Scalia, Speech on Use of Legislative History, delivered between Fall 1985 and Spring 1986 at various law schools (on file at Columbia Law Review); see Eskridge, *supra* note 9; Farber & Frickey, Legislative Intent and Public Choice, 74 Va. L.

scribe the horizons of either the text or the interpreter. Justice Scalia seems to believe that the only relevant context in statutory interpretation is that of statutory text, which will yield determinate statutory meaning in most cases. Justice Scalia also seems to be horrified by the possibility that a statutory interpreter will exercise judgment or that the text may have a broader horizon than the plain meaning of its words. Yet Gadamer's hermeneutics suggests that even the most avid textualist will not be able to avoid the influence of contextual considerations Justice Scalia denounces. The horizon of the interpreter—the pre-understandings of a judge who approaches a statutory text—will inevitably color the way in which the interpreter reads the purportedly bare words of the text.

In *Boutilier*, the relevant text (section 212(a)(4) before its 1965 amendment) excluded entrants "afflicted with psychopathic personality, epilepsy, or a mental defect."¹³³ Whether that includes gay men and lesbians depends on whom you ask and when you inquire. On the one hand, medical literature from the 1940s and 1950s found "psychopathic personality" a "practically meaningless" diagnostic term¹³⁴ and even the PHS (which suggested the term to Congress) conceded it was "vague and indefinite."¹³⁵ That would suggest that the statutory language might not, on its own, apply to gay men and lesbians without something more specific. On the other hand, many medical professionals in this period believed that homosexuality was pathological, and the 1952 edition of psychiatry's standard diagnostic manual characterized homosexuality as a "sociopathic personality disturbance."¹³⁶ Within this context, homosexuality might readily be viewed as psychopathic.

On yet another hand, the current majority view within the psychiatric community is that homosexuality per se is not a psychopathic condition,¹³⁷ and the standard diagnostic manual deleted such references to

Rev. 423, 425–27 (1988) (discussing theoretical bases for such skepticism over finding meaningful legislative intent).

133. Immigration and Nationality Act of 1952, § 212(a)(4), 66 Stat. 163, 182 (current version at 8 U.S.C. § 1182(a)(4) (1988)).

134. Guttmacher, *Diagnosis and Etiology of Psychopathic Personalities as Perceived in Our Time*, in *Current Problems in Psychiatric Diagnosis* 139, 154 (Hoch & Zubin eds. 1953), quoted in *Fleuti v. Rosenberg*, 302 F.2d 652, 658 n.19 (9th Cir. 1962), vacated and remanded on other grounds, 374 U.S. 449 (1963). Footnote 19 of this opinion quotes several other medical authorities to the same effect.

135. Report of the Public Health Service on the Medical Aspects of H.R. 2379, in H.R. Rep. No. 1365, 82d Cong., 2d Sess. 46, 46–47, reprinted in 1952 U.S. Code Cong. & Admin. News 1653, 1699–1700 [hereinafter 1952 House Report].

136. American Psychiatric Ass'n, *Diagnostic and Statistical Manual: Mental Disorders* 38–39 (1952).

137. See A. Bell & M. Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* 197 (1978) ("Numerous investigations have failed to show any consistent or clear-cut differences between homosexuals and heterosexuals in terms of their psychological adjustment."); Smith, *Psychopathology, Homosexuality, and Homophobia*, in *The Treatment of Homosexuals with Mental Health Disorders* 59, 63 (M.

homosexuality in the 1970s after explicitly concluding that it is not pathological.¹³⁸ The PHS followed the medical community in 1979 when it abandoned its view that gay men and lesbians could be considered inherently psychopathic; as a result, in 1979 the PHS stopped automatically issuing certificates of "class A disorder" necessary for the INS to exclude gay men and lesbians under section 212(a)(4).¹³⁹ Given *this* context, one could argue that the statutory text does not apply to gay men and lesbians. There is virtually no way to predict how a Scalia-textualist judge would choose among the many possible interpretations of the statutory language, for the judge's choice will depend critically on what horizon she finds in the text and what horizon she brings to the statute.

The original text of section 212(a)(4) interpreted in *Boutilier* might be viewed as unusually open ended. Could the same Gadamerian analysis be applied to the text as amended in 1965? Aliens are now excludable if they are "afflicted with psychopathic personality, or *sexual deviation*, or a mental defect."¹⁴⁰ Again, whether this includes gay men and lesbians depends upon whom you ask, when you inquire, and the level of generality at which you peg the key term, for "sexual deviation" is as much a socially constructed term as "psychopathic personality" is a medical catch-all term.¹⁴¹ Many intelligent people today, for example, would classify gay men and lesbians as "sexual deviates," based upon the following line of reasoning: Most people do not have re-

Ross ed. 1988) ("It is difficult to imagine any difference in psychopathology between the homosexually oriented and the heterosexually oriented in the group of organic mental disorders."); see also R. Friedman, *Male Homosexuality: A Contemporary Psychoanalytic Perspective* 184-86 (1988); J. Marmor, *Homosexual Behavior* (1980); *Contemporary Perspectives on Psychotherapy with Lesbians and Gay Men* (T. Stein & C. Cohen eds. 1986).

138. This move came in two stages. In 1973, the American Psychiatric Association (APA) deleted reference to homosexuality as a pathology from the 1968 version of its Diagnostic and Statistical Manual (DSM-II) but created a new category of "sexual orientation disturbance." See R. Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* 101-78 (1981). The APA found this to be "'distinguished from homosexuality, which by itself does not necessarily constitute a psychiatric disorder.'" *Id.* at 137 (quoting APA Press Release (Dec. 15, 1973)). This move by the APA was quite controversial, yet was ratified by an unusual referendum of the psychiatric community. *Id.* at 138-54. In 1978, the APA issued a third edition of its manual (DSM-III), which not only ratified the 1973 decision to delete homosexuality from its list of pathological disturbances, but also eliminated the "sexual orientation disturbance," replacing it with the even more anodyne "ego-dystonic homosexuality," which dealt with the distress-causing desire of some gay men and lesbians to have heterosexual relations. *Id.* at 176-78.

139. See *infra* notes 211-214 and accompanying text.

140. 8 U.S.C. § 1182(a)(4) (1988) (emphasis added). See *infra* text accompanying notes 149-151 (discussing genesis of this amendment).

141. "Before any act can be viewed as deviant, and before any class of people can be labeled and treated as outsiders for committing the act, someone must have made the rule which defines the act as deviant." H. Becker, *Outsiders: Studies in the Sociology of Deviance* 162 (1963).

peated sexual activity with those of the same sex. This is the sexual "norm." Gay men and lesbians "deviate" from the sexual norm by having repeated sexual activity with persons of the same sex. Yet other intelligent people, including many medical professionals, would focus on the type of sexual activity: "Sexual deviation" has strong moral connotations and suggests practices that are hurtful to vulnerable partners—for example, pedophilia as hurtful to children—or an inability to form mature relationships. To the extent that they practice "normal" and nonhurtful practices, gay men and lesbians would not be "sexual deviates" under the statute.

How does the interpreter choose between these two plausible definitions, and indeed other available definitions, of sexual deviation? Justice Scalia's theory provides no reliable criterion for choice, and it is readily apparent that choice will be conditioned by the larger horizons of the historical text and of the current interpreter. Indeed, Justice Scalia's approach, albeit subconsciously, recognizes the inevitability of context and the necessity of choice, because it liberally applies background canons of interpretation, including several controversial ones, to interpret statutory texts.¹⁴² Use of the canons is distinctly evolutive, enabling older statutory horizons to evolve over time.¹⁴³ And the interpreter's choice among canons is a well-recognized way in which her own horizon influences statutory interpretation.¹⁴⁴

In short, textualism alone cannot provide the interpretive closure usually expected of foundationalist theories, and it is to be hoped that even Justice Scalia would recognize that. Taking another approach, Judge Posner in his early works on statutory interpretation argued that such closure could usually be provided by an "imaginative reconstruction" of the original legislative intent.¹⁴⁵ The historical context of the

142. Examples of this approach in Justice Scalia's opinions include *Chan v. Korean Air Lines*, 109 S. Ct. 1676, 1682–83 (1989) (applying the universally criticized *expressio unius* canon); *Pierce v. Underwood*, 108 S. Ct. 2541, 2550–51 (1988) (presumption of approval of previous lower court interpretations, notwithstanding specific committee language to contrary, under re-enactment canon); *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2514 (1988) (creating common law to protect "uniquely federal interests," notwithstanding Congress's refusal to create statute); *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239, 2247–49 (1988) (Scalia, J., dissenting) (massaging text with principles of federalism); *Kungys v. United States*, 108 S. Ct. 1537, 1546 (1988) (*in pari materia* canon); *Business Elecs. Corp. v. Sharp Elec. Corp.*, 108 S. Ct. 1515, 1523 (1988) (common law fills in statutory gaps); *United States v. Fausto*, 484 U.S. 439, 447–49 (1988) (applying *expressio unius* canon but refusing to apply canon presuming availability of judicial review or canon disfavoring implied repeals); see also *Davis v. Michigan Dep't of Treasury*, 109 S. Ct. 1500, 1507–08 (1989) (Kennedy, J.) (applying Justice Scalia's textualism but emphasizing as "backdrop" judicially created intergovernmental immunity doctrine).

143. See Eskridge, *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007, 1042–44 (1989).

144. See Eskridge, *supra* note 9 (demonstrating that Justice Scalia is sometimes highly selective as to which canons he will emphasize).

145. See R. Posner, *supra* note 14, at 286–93 (apply rule of reason when legislative

statute, the text's horizon, not only narrows the range of choices, but does so in a way that seems consistent with our majoritarian traditions by focusing on Congress's original expectations. The Gadamerian objections to reconstruction are that it is pointless to recreate the past because any such attempt is an unrealistic denial of the text's own expanding horizon, and that by focusing only on the horizon of the text the theory ignores the horizon of the interpreter, which plays a critical role in statutory interpretation.

Notwithstanding Gadamer's objections, however, *Boutilier* seems at the outset like a case in which Judge Posner's theory is useful. The Court found a clear original legislative intent—to exclude gay men and lesbians from entering the United States. Prior to the 1952 Act, immigration law excluded "persons of constitutional psychopathic inferiority."¹⁴⁶ In the early 1950s, many members of Congress wished to broaden this exclusion to include gay people, and bills were introduced in the Senate explicitly excluding "homosexuals." The PHS favored use of a more generic term, "psychopathic personality," which it represented to Congress would include "such . . . behavior as homosexuality or sexual perversion."¹⁴⁷ Following the advice of the PHS, both the Senate and House reports on the bill posited that its language, "psychopathic personality," was "sufficiently broad to provide for the exclusion of homosexuals and sex perverts."¹⁴⁸ After the Ninth Circuit interpreted section 212(a)(4) not to apply to gay men and lesbians because "psychopathic personality" was so broad as to be void for vagueness,¹⁴⁹ Congress responded in 1965 by amending the statute to exclude "sexual deviat[es]," to ensure that gay men and lesbians would be excluded.¹⁵⁰ Although the 1965 revision did not apply to *Boutilier*'s case, the committee reports suggest that Congress thought it was only reasserting its "original" intent.¹⁵¹ Given this evidence, in 1967, six

intent unclear); see also Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & Econ. 875 (1975) (independent judiciary essential to interest group theory of government because judges act to enforce "legislative deals"); Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263 (1982) (economic view of legislation similar to courts' actual "public interest goal" approach to statutory interpretation).

146. Act of Feb. 5, 1917, § 3, Pub. L. No. 64-301, 39 Stat. 874, 875 (1917), repealed by Immigration and Nationality Act of 1952, § 403(a)(13), 66 Stat. 163, 279.

147. 1952 House Report, *supra* note 135, at 47, reprinted in 1952 U.S. Code Cong. & Admin. News 1653, 1701.

148. S. Rep. No. 1137, 82d Cong., 2d Sess. 9 (1952) [hereinafter 1952 Senate Report]; see also 1952 House Report, *supra* note 135, at 42-48, reprinted in 1952 U.S. Code Cong. & Admin. News 1653, 1701 (adopting PHS view).

149. *Fleuti v. Rosenberg*, 302 F.2d 652, 658 (9th Cir. 1962), vacated and remanded on other grounds, 374 U.S. 449 (1963).

150. See S. Rep. No. 748, 89th Cong., 1st Sess. 18-19 (1965), reprinted in 1965 U.S. Code Cong. & Admin. News 3328, 3337.

151. The Senate Report in 1965 noted that § 212(a)(4) used the term "psychopathic personality" based upon "representations" by the PHS that the term "would en-

Justices in *Boutilier* found that "[t]he legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended" to exclude gay men such as *Boutilier*.¹⁵²

Yet even this unusually strong historical record failed to persuade three Justices in 1967 that gay men and lesbians must be excluded, under an original intent approach.¹⁵³ Were those Justices just stubbornly resisting the apparent legislative intent? That is not at all clear. While the majority focused on the final reports of the House and Senate Judiciary Committees, the dissenters looked at the broader background record. The Senate bill introduced in 1950 provided for the exclusion of aliens who are "homosexuals or sex perverts."¹⁵⁴ When the bill was reintroduced in 1951, that phraseology was dropped and "psychopathic personality" used as a catch-all provision, apparently at the urging of the PHS. In a letter appended to the final committee reports, the PHS explained at length what it meant by psychopathic personality. It is characterized by "developmental defects or pathological trends in the personality structure manifest by lifelong patterns of action or behavior Individuals with such a disorder may manifest a disturbance of intrinsic personality patterns, exaggerated personality trends, or are persons ill [adapted to] society and the prevailing culture."¹⁵⁵ The PHS went on to say that "[o]rdinarily, persons suffering from disturbances in sexuality are included within the classification of 'psychopathic personality with pathologic sexuality.' This classification will specify such types of pathologic behavior as homosexuality or sexual perversion which includes sexual sadism, fetishism, transvestism, pedophilia, etc."¹⁵⁶ From this evidence, the *Boutilier* dissenters argued that section 212(a)(4) could only be applied where the alien revealed a

compass homosexuals and sex perverts." *Id.* at 18, reprinted in 1965 U.S. Code Cong. & Admin. News 3328, 3337. The Report then noted the *Fleuti* decision of 1962, which found the term too vague to encompass "homosexuality." Its discussion ended: "To resolve any doubt the Committee has specifically included the term 'sexual deviation' as a ground of exclusion in this bill." *Id.* at 19, reprinted in 1965 U.S. Code Cong. & Admin. News 3328, 3337 (emphasis added). H.R. Rep. No. 745, 89th Cong., 1st Sess. 16 (1965), contains exactly the same language.

152. *Boutilier*, 387 U.S. at 120.

153. See *id.* at 125 (Brennan, J., dissenting for the reasons stated by Judge Moore of the Second Circuit, *Boutilier v. INS*, 363 F.2d 488, 496-99 (1966)); *id.* at 134-35 n.6 (Douglas, J., joined by Fortas, J., dissenting). I used a variation of *Boutilier* as the problem in my final examination in my Spring Term 1989 Legislation class at the Georgetown University Law Center, and made the historical evidence for exclusion stronger. About 40% of the students nonetheless failed to exclude *Boutilier* under § 212(a)(4).

154. S. 3455, 81st Cong., 2d Sess. § 212(a)(7) (1950).

155. 1952 House Report, *supra* note 135, at 46, reprinted in 1952 U.S. Code Cong. & Admin. News 1653, 1700.

156. *Id.* at 47, reprinted in 1952 U.S. Code Cong. & Admin. News 1653, 1701. The House Report incorporated the PHS report and said that the "recommendations contained in the . . . report have been followed." *Id.* at 48, reprinted in 1952 U.S. Code Cong. & Admin. News 1653, 1702.

"consistent, lifelong pattern of behavior conflicting with social norms without accompanying guilt."¹⁵⁷ It is very unclear that this characterized Clive Michael Boutilier, who engaged in only occasional sexual activities with other men, who engaged in sexual activities with women as well, and who was examined by qualified psychiatrists and found *not* to be sociopathic, psychopathic or hurtfully deviant.¹⁵⁸

Determining which of the two readings of the legislative history more "truthfully" meets the expectations of those drafting the statute very much depends upon the level of generality at which the interpreter poses the question and selects or organizes the evidence. If the interpreter asks whether Congress in 1952 expected gay men and lesbians to be excluded, given the contemporary understandings of the medical community, *and* focuses on the general language in the PHS report and the committee reports targeting gays, the interpreter is more likely to agree with the *Boutilier* majority. If the interpreter asks the same question *but* focuses on the Senate's deletion of references to "homosexuals and sex perverts" in the bill that actually became law and on the general policy in the Act to exclude aliens who have socially destructive medical problems we do not want to import into our country, she might well vote with the *Boutilier* dissenters. If the interpreter asks whether exclusion of all gay men and lesbians, even if they are demonstrably mentally healthy, is consistent with Congress's general purpose in enacting the statute, *and* focuses on the changing medical understandings of sexual deviation and on the specific medical evidence that Boutilier was mentally healthy and productive, she probably will vote with the *Boutilier* dissenters.

This exercise suggests that an interpreter who "thinks" she is merely reconstructing original legislative intent may actually be projecting her own pre-understandings about the case onto the statutory text by the questions she asks, the evidence she emphasizes and the way she organizes the evidence.¹⁵⁹ For these Gadamerian reasons, even a superficially "easy" case for intentionalism, such as *Boutilier*, turns out to be frustratingly complex. Perhaps reflecting this phenomenon, Judge Posner's own judicial opinions follow an eclectic, discursive approach to issues of statutory interpretation, and his judicial experience working with statutory cases has pushed his theory decidedly toward recognition of the complex and dynamic nature of statutory interpretation.¹⁶⁰ Given the practical reasoning he has evidenced as he has

157. *Boutilier*, 387 U.S. at 134 (Douglas, J., dissenting).

158. See *id.* at 134-35.

159. This hermeneutical insight is borne out, too, by modern theories of historiography. See the analyses in Nelson, *History and Neutrality in Constitutional Adjudication*, 72 Va. L. Rev. 1237, 1240-45 (1986) (discussing critical legal studies notion that history is contextualization and hence necessarily subjective); White, *The Text, Interpretation, and Critical Standards*, 60 Tex. L. Rev. 569 (1982) (critiquing notion of all textual interpretation as radically subjective).

160. See R. Posner, *The Problems of Jurisprudence* 225-81 (forthcoming 1990,

gained judicial experience and his recent theoretical writing on the subject, Judge Posner can no longer be counted as an advocate of a foundationalist approach; other statutory intentionalists would do well to follow his lead.

The foregoing Gadamerian critique of textualism and intentionalism emphasizes the importance of the interpreter's horizon and her interaction with that of the text. Aleinikoff's present-minded approach makes the interpreter's horizon central, by treating all statutes as "enacted recently."¹⁶¹ But in so doing, it seems to neglect the text's horizon, its own situatedness in time. Even a "present-minded" interpreter carries within her all manner of historically conditioned pre-understandings. As Gadamer argues, there can be no interpretation without such a link to the past within the present-day interpreter; there is no escape from the past. Indeed, Aleinikoff cannot mean that he would ignore history entirely, since he nowhere disclaims the importance of precedent in statutory interpretation; rather than declaring *Boutilier* irrelevant, as it would be if the statute were recently enacted, Aleinikoff subjects the precedent to keen analysis.

Aleinikoff argues that the statutory language and structure of section 212(a)(4) evidence a current purpose to exclude persons with demonstrable physical or mental problems.¹⁶² Since current medical practice suggests that homosexuality is not "pathological" in any inherent way,¹⁶³ he argues, the law ought to follow practice and theory, and the Supreme Court should overrule *Boutilier*.¹⁶⁴ But because Aleinikoff attempts to cut *Boutilier* off from its history, his present-minded arguments for overruling *Boutilier* do not ring entirely true. Were we to join Aleinikoff in treating section 212(a)(4) as recently enacted, he gives us little reason to join his conclusion that it is limited to "'deviations' that are currently considered pathological (perhaps pedophilia or exhibitionism)."¹⁶⁵ To reach that interpretation, Aleinikoff argues *both* that *Boutilier*'s definition of "psychopathic personality" be overruled *and* that "sexual deviation" (added in 1965) be very narrowly construed.

Harv. U. Press); Posner, *The Jurisprudence of Skepticism*, 86 Mich. L. Rev. 827 (1988); Posner, *The Decline of Law as an Autonomous Discipline*, 100 Harv. L. Rev. 761, 774-77 (1987) [hereinafter Posner, *Decline of Law*] (deconstructing Supreme Court's imaginative reconstruction in *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979)).

161. Aleinikoff, *supra* note 16, at 49-50 ("By treating the statute as if it had been enacted recently, we are attempting to weave it into today's legal system to make it responsive to today's conditions.").

162. *Id.* at 50.

163. Indeed, since 1979, the PHS has refused to issue the requisite certificate of pathological condition for gay immigrants, because the medical community has rejected the assumptions of the PHS position in 1952. Memorandum from Julius B. Richmond, Assistant Secretary for Health and Surgeon General, to Dr. William H. Foege, Director, Centers for Disease Control, and Dr. George I. Lythcott, Administrator HSA (Aug. 2, 1979) [hereinafter 1979 PHS Memorandum] (on file at Columbia Law Review).

164. See Aleinikoff, *supra* note 16, at 47-54.

165. *Id.* at 50.

It seems quite unclear whether all "present-minded" interpreters would agree with Aleinikoff. Many present-minded interpreters bring with them the same pre-understandings about homosexuality that the Court brought to the recent case of *Bowers v. Hardwick*.¹⁶⁶ For many people, to deny that "sexual deviation" includes homosexuality is not only to deny "millennia of moral teaching,"¹⁶⁷ but also to deny prevailing attitudes in today's America, which in turn are conditioned by historical prejudice against such conduct.¹⁶⁸ Even the medical community remains divided on the issue of whether homosexuality is a pathological disturbance, notwithstanding the official position of its leading organizations.¹⁶⁹ Upon what present condition can Aleinikoff rely without substituting his views for those of the text? It is far from clear.

In short, Aleinikoff's present-minded approach suffers essentially the same problem as Judge Posner's imaginative reconstruction and Justice Scalia's textualism. All three approaches initially appear to use a foundational method to improve judicial decision making, yet upon careful examination none of the proposed approaches closes out other evidence even as practiced by their main proponents, none yields a determinate answer to the *Boutilier* issue, and none appears to be a "method" that constrains the interpreter and improves the odds that a correct interpretation will emerge. Stated another way, Gadamer seems essentially correct in saying that our efforts at defining a single, overarching method seem misdirected. What is important in statutory interpretation is a more complex process than that captured in the single-focus theories. It is to that complex, and in my view dynamic, process that I now turn.

2. *A General Theory of Statutory Interpretation.* — Gadamer's hermeneutics not only provides a way to criticize prior theories of statutory interpretation, but also suggests the contours of a positive theory of statutory interpretation. Two recent theories escape the main problems of foundationalism: Professor Ronald Dworkin's theory of "law as integrity"¹⁷⁰ and my theory of "dynamic statutory interpreta-

166. 478 U.S. 186 (1986). The Court's opinion upheld a statute that prohibited sodomy between people of different sexes as well as that between people of the same sex, Ga. Code Ann. § 16-6-2 (1984) (interestingly, the statute was amended in 1967 to expand its scope to heterosexual as well as homosexual sodomy, see Note, The Crimes Against Nature, 16 J. Pub. L. 159, 167 n.47 (1967)). The Supreme Court's opinion treats the case as a referendum on homosexuality, however, and by so limiting the issues found that "a right to engage in such conduct . . . is, at best, facetious." *Hardwick*, 478 U.S. at 194.

167. *Hardwick*, 478 U.S. at 197 (Burger, C.J., concurring) ("To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.").

168. See *infra* note 204.

169. See, e.g., C. Socarides, *Homosexuality* (1978); see also R. Bayer, *supra* note 138, at 100-54 (recounting bitter debate within psychiatric community over medical status of homosexuality).

170. See R. Dworkin, *Law's Empire* (1986); Dworkin, *Law as Interpretation*, 60 *HeinOnline* -- 90 Colum. L. Rev. 646 1990

tion.”¹⁷¹ Not coincidentally, both theories are influenced by Continental hermeneutics in general and by Gadamer in particular.¹⁷² These theories suggest the special cogency that Gadamerian hermeneutics has for statutory interpretation. Each theory, in turn, can profit from the more systematic examination of Gadamer’s hermeneutics in this Article.

I start with my theory of dynamic statutory interpretation, for it identifies situations in which a hermeneutical understanding is most likely to differ from a traditional understanding. In the case of a detailed, recently enacted statute, the horizons of the interpreter and the text all but converge, and interpretation will involve analysis of the text, the history behind the statute, policy presumptions and clear statement rules.¹⁷³ When the statute is an older one or when legal or societal circumstances have significantly changed, the current interpreter’s horizon will often diverge significantly from that of the text, and “evolutive” considerations—prior interpretations and applications of the text, new statutory policies, unforeseen factual developments—become critically important.¹⁷⁴ As a result, the best answer will be less clear, the interpretive inquiry more complex and difficult.

My theory attempts to encapsulate Gadamer’s insights about historical distance, and about the ability of interpretation not only to ameliorate the alienation of that distance, but to render it productive. Thus, my theory, like Gadamer’s, does not focus on recent, detailed statutory schemes, even though such statutes typically contain more than enough ambiguities that must be unravelled.¹⁷⁵ Instead, my theory focuses on statutory questions in which the horizons of the text and

Tex. L. Rev. 527 (1982), reprinted in 9 Critical Inquiry 179 (1982) and in *The Politics of Interpretation* 249 (W. Mitchell ed. 1983).

171. See Eskridge, *supra* note 18, at 1497–1538 (justification for reading statutes dynamically); Eskridge & Frickey, *supra* note 19, at 324–45 (discussing failure of main foundationalist theories—intentionalism, purposivism and textualism—to yield determinate or exclusive results; challenging assumptions that underlie these theories).

172. I explicitly draw inspiration for my theory from Gadamer and other hermeneutics scholars. See Eskridge, *supra* note 18, at 1498 n.67, 1508–10. The same link has been argued for Dworkin’s work by Note, *Dworkin and Subjectivity in Legal Interpretation*, 40 Stan. L. Rev. 1517, 1535–38 (1988), but this view is disputed in Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 Stan. L. Rev. 871, 945 n.308 (1989). My view is that Dworkin is influenced by Gadamer and Habermas but seems to depart from their metaphor of interpretation-as-conversation by taking the position that interpretation is constructive—the interpreter’s *making* the text the best it can be. See R. Dworkin, *supra* note 170, at 51–52 & n.2, 61–62 & n.13, 64–65.

173. See Eskridge, *supra* note 18, at 1496–97, 1542–43; Eskridge, *supra* note 143, at 1017–61 (analysis of clear statement rules and policy presumptions in statutory interpretation).

174. See Eskridge, *supra* note 18, at 1483–97.

175. Indeed, Gadamer might be read to suggest that in such cases, there is no “interpretation” in the hermeneutical sense, because the horizons of the text and the interpreter are the same. There is no sufficient historical distance requiring a translation of the signals sent by one era to another.

the interpreter have diverged and in which evolutive considerations are critical. As originally developed, however, my theory only begins to suggest how an evolutive perspective—the perspective of hermeneutics—actually works. Although Dworkin's theory suggests a powerful operational metaphor, I have been reluctant to adopt it.¹⁷⁶

Dworkin's theory of law as integrity asks the interpreter to assume that law is a coherent text.¹⁷⁷ Hence, the role of the interpreter is to fit each interpretive answer into the broader text of law. Dworkin views statutory interpretation as a chain novel, in which the statute is the first and foremost chapter and subsequent authors (judges and agencies) are called upon to add new chapters.¹⁷⁸ The goal of the seriatim contributors is to make the novel the "best," most internally coherent and fair, work of its kind it can be. Clearly inspired by hermeneutics, and perhaps by Gadamer, Dworkin posits that the statutory interpreter "interprets not just the statute's text but its life, the process that begins before it becomes law and extends far beyond that moment. He aims to make the best he can of this continuing story, and his interpretation therefore changes as the story develops."¹⁷⁹

What the chain novel metaphor brilliantly suggests is the way in which Gadamer's theory illuminates what is going on in statutory interpretation. Essential to Gadamer, and to the evolutive perspective, is the way in which traditions connect past and present. In statutory interpretation, that historical connection is made in an unusually formal and explicit way: One way the interpreter (judge or agency) understands the past text is through reading the precedents interpreting that text. The string of precedents, customs and practices are, as Dworkin suggests, like a chain of meaning connecting past and present. The interpreter considers the life of the statute as well as its origins, its morphogenesis as well as its genesis.

This is an important contribution, but the chain novel metaphor

176. Eskridge, *supra* note 18, at 1549–54.

177. See R. Dworkin, *supra* note 170, at 19–20, 225–28.

178. Dworkin, *supra* note 170, at 542–43, introduces the "chain novel" concept, as particularly pertinent to a judge's decision of common law cases:

Each judge is then like a novelist in the chain. He or she must read through what other judges in the past have written not simply to discover what these judges have said, or their state of mind when they said it, but to reach an opinion about what these judges have collectively *done* . . . Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future through what he does on the day.

R. Dworkin, *supra* note 170, at 228–75, sets forth the metaphor in greater detail and argues more specifically for its application to statutory interpretation.

179. R. Dworkin, *supra* note 170, at 348; see also Mootz, *supra* note 19, at 605 (describing a theory of constitutional interpretation explicitly based on Gadamer in which "[t]he right interpretation can tentatively be identified as the interpretation that allows the text to be most fully realized in the present situation").

does not adequately capture what is going on in statutory interpretation, either as a matter of description or as a normative matter. The notion that the statutory interpreter is the next in a chain of novelists, writing a new chapter that is coherent with the earlier ones and contributing to making the whole novel the best it can be, is misleading in three separate ways. First, as a descriptive matter, the chain novel metaphor misunderstands the goal of the chapter being written—the chapter is not mainly the story of the statute, but is mainly the story of the case being decided. This is the great insight of Aristotle's emphasis on application.¹⁸⁰ Hence, the interpreter writes most of the story in the chapter, not in light of the previous chapters, but instead in consideration of her interaction with the facts of the case and her projections onto the statute in the context of the case. Those projections—the interpreter's anticipated meaning—are themselves a product of the interpreter's own, historically situated horizon, not just the product of the horizon presented to her in previous chapters of the novel.

Also as a descriptive matter, to the extent the chapter is "about" the statute, it is as much "about" the original truth of the statute, as it is the next step in the statute's lifetime. The application of the statute to the specific case is a way to seek the best answer to the case, but it is also a way we might learn more about the truth of the statute. Hence, the interpreter is not simply adding on another chapter to the statute's picaresque story (more characters, more things happen), but is constantly circling back to understand that first chapter, in the context of new and perhaps enlightening circumstances. While Dworkin himself may be sympathetic to this idea, because his goal is to make the overall story of the statute the "best" story it can be, his emphasis on the constructive role of the interpreter tends to marginalize the truth that might be quarried out of the original text.¹⁸¹

Third, as a normative matter, Dworkin's chain novel metaphor may lack the critical bite of some versions of Gadamerian hermeneutics. Although Dworkin asks the interpreter to make the text the best of its genre it can be, his emphasis is still on the best justification that nonetheless makes the system of law coherent. Coherence drives Dworkin's theory. But coherence theory may tend, as Habermas argues, to perpetuate outmoded prejudices, and thinkers such as Ricoeur and Warnke convincingly argue that the hermeneutical enterprise should be an occasion for us to question the text's assumptions, as well as for the text to question ours.¹⁸² Thus, the writer of the most recent chapter in

180. See *supra* notes 119–128 and accompanying text (discussing importance of application to Gadamerian hermeneutics).

181. R. Dworkin, *supra* note 170, at 49–53, 65–68, emphasizes the role of the interpreter who creatively and constructively approaches the text. The interpreter Dworkin uses in his work is usually called Hercules, certainly suggesting a strong figure.

182. See *supra* notes 98–108 and accompanying text (discussing Habermas's criticism of Gadamer).

Dworkin's chain novel should not just accept the assumptions of the first chapter, but should consider whether they might be questioned in light of new circumstances, further reflection resulting from the progress of the story and the facts of the instant case, and outside criticism. Here, the chain novel idea completely falls apart, since it becomes apparent that the critical progression of the life story of a statute depends less upon having a new author for each chapter (Dworkin's insight), and more on the passing of time that illuminates the meaning of the text (Gadamer's insight).

Although Dworkin's elaborate chain novel concept is helpful, it ultimately will not do either as a description or as an aspiration for statutory interpretation. More useful are the simpler metaphors suggested by Gadamer—conversation, fusion of horizons and the hermeneutical circle. Interpretation is a conversation between the interpreter and the text about a specific situation. The conversation should be an open one and a critical one. It should be open in that the interpreter seeks to learn from the text, and the text seeks guidance from the interpreter; the horizons intermingle productively. It should be critical in that the conversation and the situation are an occasion to question the assumptions of both the text and the interpreter. Each, therefore, learns not only from the other, but also from the situation, the new context. The object of the conversation is to reach agreement about the situation, to fuse the two horizons. The conversation's productive use of intervening history, such as precedent, to demonstrate common concerns makes this possible.

The productivity of the conversation is assured only if the interpreter brings to it a hermeneutical attitude of throwing herself completely into the play of her horizon with that of the text. This play is captured by the metaphor of the hermeneutical circle.¹⁸³ The circle tells us that we do not understand the whole without understanding the parts, which in turn depends upon our understanding of the whole. As the interpreter learns about the case (the people involved, the equities) and the statute (its language, structure, legislative history, prior interpretations), she forms tentative impressions about the best interpretation. These conclusions, though, are tested against the things she learns upon further inquiry and reflection and, indeed, call upon her to engage in further inquiry to answer questions raised by the information. This process of impression-inquiry-new impression is the to-and-fro movement in statutory interpretation.

In the easy cases, the to-and-fro process quickly crystallizes around a widely acceptable resolution, a consensus. The easiest cases are those in which the apparent answer suggested by the statute's bare text (Justice Scalia) is backed up by specific legislative expectations (Judge

183. See *supra* notes 82–83 and accompanying text for an exposition of the “hermeneutical circle.”

Posner) and seems fair in light of current policy (Aleinikoff) and the facts of the case (Aristotle); that is when the pre-understandings of the interpreter are congruent with those of text. The hard cases are those in which there is a tension that must be resolved, not by the imposition of one perspective over the other, but by the to-and-fro dialectical play.

3. *Application of the General Theory: Boutilier Revisited.* — As Gadamer emphasizes, general theory is not comprehensible in the abstract, without application and illustration. To illustrate this general theory, consider the following present-day application of section 212(a)(4).¹⁸⁴ Jean Deau, a French citizen, was admitted to the United States in 1968 as a permanent resident. When he entered the United States, he answered “no” to the question whether he was “afflicted with a psychopathic personality, sexual deviation, or mental defect.” Deau then set up a business in the United States and in 1990 applies for citizenship. The INS examining officer finds that Deau has never been charged with any offense, except traffic offenses, and that Deau has had a productive life in this country. In the course of the interview, Deau admits to the examiner that he is gay. The examiner refers Deau to the PHS, which refuses to issue a certificate of “class A disorder,” pursuant to its 1979 policy.¹⁸⁵ Nonetheless, the examiner concludes that Deau was excludable upon entry under section 212(a)(4) in 1968 and, hence, that he cannot be naturalized.¹⁸⁶ Is this a correct interpretation of section 212(a)(4) today?

Since 1965, section 212(a)(4) has excluded aliens “afflicted with psychopathic personality, or sexual deviation, or a mental defect.” The bare text of section 212(a)(4) suggests no clear answers.¹⁸⁷ I do not readily see any connection between homosexuality and “psychopathic personality,” which is a term almost no one understands in any concrete way. In colloquial use, homosexuality may connote “sexual deviation,” but the statute does not define the term, and the dictionary definition is woefully broad.¹⁸⁸ At first blush, I should be cautious about applying the vague terminology in the statute to a whole class of productive individuals.¹⁸⁹ Surely it is absurd to attribute to Congress a

184. This “hypothetical” is based on *In re Longstaff*, 716 F.2d 1439 (5th Cir. 1983), and is an updated version of the *Boutilier* facts. See also *Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983).

185. See *supra* note 139 and accompanying text; *infra* notes 211–214 and accompanying text (explaining rationale behind 1979 PHS policy).

186. 8 U.S.C. § 1429 (1988) (applicant for citizenship has burden of proving she was “lawfully admitted” into United States).

187. See *supra* text accompanying notes 134–145 for textual analysis of section 212(a)(4).

188. Webster’s New International Dictionary 713 (2d unabridged ed. 1954), defines “deviation” as a “variation from the common . . . rule, standard, position, etc.” It does not define “sexual deviation.” While homosexuality seems to be a “variation” from the usual sexual practice, so are many heterosexual practices. See *supra* text accompanying notes 140–142.

189. One should recognize that this is a pre-understanding *I* bring to the statute. I

desire to exclude W.H. Auden, André Gide, Ludwig Wittgenstein, Marcel Proust, John Maynard Keynes and millions of others based merely upon their sexual preference. No other country in the world excludes people because of their sexual preference.¹⁹⁰ I should be even more reluctant to interpret the exclusion provision expansively in a case in which the alien is subject to deportation after long residence in the United States.¹⁹¹

My initial reaction to the text creates a conundrum: The statutory text is broad enough to include at least some gay men and lesbians but does not target them, and the broad reading seems unreasonable. Given Congress's primary lawmaking role in our representative democracy, and its virtually plenary authority in immigration and naturalization matters,¹⁹² I very much want to know whether Congress expected the exclusion to apply so broadly as the INS claims. The background of the 1952 Act specifically mentions gay men and lesbians as afflicted with "psychopathic personality," the broader of the two excluding factors.¹⁹³ I still wonder why the Senate dropped Senator McCarran's original reference to "homosexuals and sex perverts" and am not persuaded that the committee did not share my reservations against excluding whole categories of people for irrational reasons. My doubts about the vague text and less vague legislative history were echoed in the Ninth Circuit's interpretation of the 1952 Act in *Fleuti v. Rosenberg*.¹⁹⁴ Notwithstanding the suggestive legislative history, the Ninth Circuit held that interpreting "psychopathic personality" to include homosexuality per se presented constitutional due process problems (void for vagueness), and it therefore interpreted the statute to be inapplicable to gay men and lesbians as a group.¹⁹⁵

can imagine what I consider good reasons why Congress would want to exclude sexual deviates who molest minors or who are violent or who engage in any number of other deviations that have demonstrably harmful third-party effects. To exclude so many people based upon mere sexual preference, however, strikes me as an irrational, even bigoted policy. It is not one that I should readily attribute to Congress.

190. See Green, "Give Me Your Tired, Your Poor, Your Huddled Masses" (of Heterosexuals): An Analysis of American and Canadian Immigration Policy, 16 *Anglo-Am. L. Rev.* 139, 157 (1987) (citing Record of the Association of the Bar of New York (1985)).

191. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (discussing "long-standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien").

192. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (Congress's plenary power to exclude noncitizens "largely immune from judicial control"); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) ("over no conceivable subject is the legislative power of Congress more complete" than it is over admission of noncitizens).

193. See *supra* text accompanying notes 146-148.

194. 302 F.2d 652 (9th Cir. 1962), vacated and remanded on other grounds, 374 U.S. 449 (1963).

195. *Id.* at 658 ("The conclusion is inescapable that the statutory term 'psychopathic personality,' when measured by common understanding and practices, does not

Yet Congress responded to the doubts raised in *Fleuti* by amending section 212(a)(4) in 1965 to add "sexual deviation" as one of the afflictions requiring exclusion.¹⁹⁶ It did so as a conscious reaction to *Fleuti*: If "psychopathic personality" were not specific enough to exclude gay men and lesbians from the United States, then "sexual deviation" ought to be.¹⁹⁷ Two years after that, the Supreme Court in *Boutilier* repudiated *Fleuti* and interpreted "psychopathic personality" to be a term of art intended by Congress to exclude gay men and lesbians. The Supreme Court considered most of the textual and legislative history arguments assembled above.¹⁹⁸

Section 212(a)(4)'s exclusion of aliens afflicted with "sexual deviation" takes on much more specific meaning after reading *Boutilier* and the legislative history of the 1952 and 1965 statutes. The story of the statute thus assembled might seem to point to closure, a fusion of horizons: If I am committed to applying policies Congress made to specific facts, and to following binding Supreme Court precedents, I should exclude Jean Deau. As a descriptive matter, this is where many interpreters *would* stop, having satisfied themselves that this apparently antihomosexual focus of the curiously broad exclusion was contemplated, discussed and enacted by Congress, not once, but twice (1952 and 1965).¹⁹⁹ This is where *Boutilier* and traditional statutory interpretation stop. But the normative facets of Gadamer's theory suggest that my inquiry should not stop with this evidence and should question it in light of what we have learned in the forty years since the statute was enacted, and in the twenty years since *Boutilier* was decided. What factors in the text's horizon suggest that Jean Deau should be excluded? What reasons does the text suggest for exclusion? Do the reasons continue to make sense? These are important inquiries, and unexpectedly difficult ones.

The apparent reason for the exclusion of at least many gay men and lesbians was the belief, widely shared by medical professionals as well as politicians in 1952 and in 1965, that gay men and lesbians are medical risks.²⁰⁰ The three categories of afflictions in section 212(a)(4)—"psychopathic personality, sexual deviation, or mental defect"—may indicate the desire of our political community to exclude

convey sufficiently definite warning that homosexuality and sex perversion are embraced therein.").

196. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (amending 8 U.S.C. § 1182(a)(4)). "Sexual deviation" replaced "epilepsy" as an affliction requiring exclusion.

197. S. Rep. No. 748, 89th Cong., 1st Sess. 18-19 (1965), reprinted in 1965 U.S. Code Cong. & Admin. News 3328, 3337.

198. See *supra* text accompanying notes 134-141, 146-158, 187-197.

199. As noted earlier, see *supra* notes 153-158 and accompanying text, I think there are good counterarguments to be drawn from the statutory text, legislative history and constitutional policy.

200. See *supra* notes 134-136 and accompanying text.

those who are so mentally disturbed that they are likely to become wards of the state or to disturb the peace. My reaction to this reason is that classifying *all* gay men and lesbians as medical risks is a prejudgment whose truth value has, to say the least, not been robust over time.²⁰¹ While many or most medical professionals believed this in the 1950s, the belief was intellectually discredited by reliable scientific studies published after 1948.²⁰² In the 1970s, the official position changed, removing virtually all gay men and lesbians from the mentally disabled list, and a large majority of experts rejected the idea that *all* gay men and lesbians are pathological. The horizon I share with the statutory text is considerably narrowed: The text's assumption that gay men and lesbians are usually, or always, pathologically deviant is now quite controversial, and it now appears to be the minority view among the medical community. Its horizon updated, the text therefore joins me in rejecting the broad view set forth in *Boutilier*.

This is where Aleinikoff stops, and he would simply overrule *Boutilier*. There is much to be said for his position; *Boutilier* not only rests upon questionable (if not discredited) medical assumptions, but probably has resulted in the exclusion of very few gay men and lesbians and certainly has generated few reliance interests that would prevent its overruling. Nonetheless, Gadamer normatively directs me not to stop here, either. My reconciliation of the text's horizon with my own must be tested, and it faces the following problem: Another likely reason for the exclusion of at least some gay men and lesbians was anti-homosexual feelings within Congress and the American public.²⁰³ In this way, applying section 212(a)(4) to exclude gay men and lesbians might reflect a public policy that this nation does not want to increase the number of gay men and lesbians within its borders, simply because Americans morally disapprove of them and even fear them. This is a

201. Note, however, that the INS and the PHS now have explicit authority to exclude people afflicted with the AIDS virus as "[a]liens who are afflicted with any dangerous contagious disease" under § 212(a)(6). See Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, § 518, 101 Stat. 391, 475 (amending 42 C.F.R. § 34.2(b)) (adding AIDS virus to list of "dangerous contagious diseases").

202. The classics are A. Kinsey, W. Pomeroy & C. Martin, *Sexual Behavior in the Human Male* 659-66 (1948); Hooker, *The Adjustment of the Male Overt Homosexual*, 21 *J. Projective Techniques* 18 (1957). See generally I. Bieber, T. Bieber, H. Dain, P. Dince, M. Drellich, H. Grand, R. Gundlach, M. Kremer, A. Ritkin & C. Wilbur, *Homosexuality: A Psychoanalytic Study* 3-18 (1988) (describing the various studies available in the early 1960s).

203. For example, Senator McCarran's original bill and the committee reports speak of "homosexuals and sex perverts." See S. Rep. No. 1515, 81st Cong., 2d Sess. 345 (1950) (subcommittee recommended that "constitutional psychopathic inferiority" of 1917 Act be replaced by "psychopathic personality" and class of mental defectives enlarged to include "homosexuals and other sex perverts"); S. 3455, 81st Cong., 2d Sess. § 212(a)(7) (1950) (bill accompanying subcommittee report). The 1952 statute was enacted at the height of the McCarthy era, which targeted gays for all sorts of persecution and exclusions.

meaning suggested by the text's current exclusion of those afflicted with "sexual deviation," which is as much a lay term as a medical one. This meaning is coherent with several of the other exclusions in section 212(a), which exclude people in large part because of popular disdain for them. Notwithstanding the gay rights movement, antihomosexual sentiment remains very strong in America today.²⁰⁴ Much of the antihomosexual sentiment is based upon people's unreflective dislikes and fears, but much is based upon carefully articulated and intelligent moral beliefs. For example, the 1980s witnessed intense debate within the Christian tradition over the morality of homosexual relations.²⁰⁵ Some Christian groups have moved toward moral acceptance of homosexuality, but others have not, most notably the Catholic Church.²⁰⁶ If section 212(a)(4) can be read to reflect a moral judgment rather than a medical one, it has greater current relevance.

This reading of section 212(a)(4) is fraught with its own problems, however. There are problems of textual coherence. The first seven subsections in section 212(a) are quite clearly "medical" and not "moral" grounds for exclusion, and other provisions in section 212(a) explicitly and more specifically deal with our community's moral judgments, including judgments that people committing certain types of sexual acts be excluded.²⁰⁷ Furthermore, there are constitutional problems that would trouble any interpretation penalizing people simply because of their status. The Supreme Court has suggested that "some objectives—such as 'a bare . . . desire to harm a politically unpopular group'—are not legitimate state interests."²⁰⁸ Even the much-

204. A. Klassen, C. Williams & E. Levitt, *Sex and Morality in the U.S.: An Empirical Enquiry Under the Auspices of the Kinsey Institute* 165–224 (1989), found that its 1970 sample overwhelmingly held negative feelings toward gay men and lesbians. Although many in the sample favored civil rights for gay men and lesbians, *id.* at 174–76, their emotional aversion might suggest some sympathy for an exclusionary policy.

205. Much of the debate focuses on J. Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (1980). For a review of Boswell's book, see Williams, *Homosexuality and Christianity: A Review Discussion*, 46 *The Thomist* 609, 625 (1982) (criticizing Boswell for "trying to prove too much . . . without sufficient theological expertise," but agreeing with Boswell that Christian tradition "does not provide the warrant commonly attributed to it for the homophobic hostilities which persist in Christian and secular society"); see also J. McNeill, *The Church and the Homosexual* (1976).

206. See *The Pastoral Care of Homosexual Persons*, 16 *Origins* 377, 382 (1986) [hereinafter *Pastoral Care*] (letter from Congregation for the Doctrine of the Faith to Catholic Bishops, urging them to exclude from their pastoral programs organizations in which homosexuals participate "without clearly stating that homosexual activity is immoral").

207. See 8 U.S.C. § 1182(a)(9) (1988) (excluding aliens who admit committing a "crime involving moral turpitude," unless considered a petty offense); *id.* § 1182(a)(11) (excluding polygamists); *id.* § 1182(a)(12) (excluding prostitutes); *id.* § 1182(a)(13) (excluding aliens "coming to the United States to engage in any immoral sexual act").

208. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446–47

criticized *Hardwick* case does not subject gay men and lesbians to blatant discrimination based upon status alone.²⁰⁹ And there are moral problems with the blanket exclusion of gay men and lesbians, even from the perspective of those disapproving of homosexual activity. The Catholic Church, for example, has been clear that its disapproval of homosexual activity does *not* justify exclusion of men and women from the community because of their sexual preferences.²¹⁰

The more I consider the application of section 212(a)(4), as interpreted in *Boutilier*, to exclude Jean Deau, the less sense it makes to me. Ironically, and unlike Aleinikoff, I am still not prepared to overrule *Boutilier*, though I am prepared to interpret section 212(a)(4) to be inapplicable to Jean Deau. Recall a difference between Clive Michael Boutilier's case and Jean Deau's case—namely, the intervening change in attitude by the PHS. In the former, the PHS issued a certificate of "class A disorder" that Boutilier was afflicted with "psychopathic personality, sexual deviate," while in the latter case the PHS refused to issue the medical certificate, based upon its 1979 policy. More narrowly formed, the issue today is not whether *Boutilier* should be overruled, but whether the PHS policy of nonenforcement is permissible.

The PHS in August 1979 gave as its primary reason for nonenforcement the medical consensus that homosexuality is "not considered to be a mental disorder."²¹¹ The INS turned to the Office of Legal Counsel of the Department of Justice, which declared the PHS "without authority" to remove gay men and lesbians from section 212(a)(4) and instructed the INS to enforce the exclusion with or without the cooperation of the PHS.²¹² In 1980, the INS promulgated guidelines whereby it would exclude gay men or lesbians if they made an unsolicited declaration of their sexual preference.²¹³ A few people

(1985) (citation omitted) (striking down exclusionary zoning aimed at mentally handicapped people).

209. *Hardwick* might be distinguished, since the sodomy law upheld related to *actual conduct* considered immoral by the people in Georgia. Penalizing people based solely on their sexual *orientation*, rather than conduct, raises a different constitutional issue.

210. See Pastoral Care, *supra* note 206, at 382 ("Today the church provides a badly needed context for the care of the human person when she refuses to consider the person as a 'heterosexual' or a 'homosexual' and insists that every person has a fundamental identity: the creature of God and . . . his child and heir to eternal life.").

211. The PHS relied on the 1974 and 1979 editions of the *Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association*, which stated that "homosexuality per se is one form of sexual behavior, and with other forms of sexual behavior which are not by themselves psychiatric disorders are not listed in this nomenclature." 1979 PHS Memorandum, *supra* note 163.

The PHS's second reason for its current policy is that "the determination of homosexuality is not made through a medical diagnostic procedure." *Id.*

212. Memorandum Opinion for the Acting Comm'r, INS (No. 79-85), 3 Op. Off. Legal Counsel 457, 462 (1979).

213. See 62 Interpreter Releases 166, 166-67 (1985); 2 C. Gordon & S. Mailman, *Immigration Law and Procedure* § 2.38b(1) at 2-274 (1989).

have been excluded under this policy, but the Ninth Circuit has invalidated such exclusion in light of the refusal of the PHS to cooperate.²¹⁴

The Ninth Circuit position—the INS cannot exclude someone under section 212(a)(4) if the PHS refuses to issue the requisite medical certificate—appears to be the correct one. The text and structure of the 1952 statute lend some support to the PHS view that noncitizens should not normally be excluded under the first seven “medical bases” for exclusion²¹⁵ if the PHS thinks they present no medical danger. Section 232 of the Act states that in order to determine whether aliens arriving in the United States are excludable on medical grounds, “such aliens *shall be detained . . .* for a sufficient time to enable the immigration officers and *medical officers* to subject such aliens to observation and an examination sufficient to determine whether or not they belong to the excluded classes.”²¹⁶ Section 234 then specifies that “[t]he physical and mental examination of arriving aliens . . . shall be made by medical officers of the United States Public Health Service, who shall conduct all medical examinations and shall certify, for the information of the immigration officers . . . any physical or mental defect or disease observed . . . in any such alien,” with specific reference to the medical bases for exclusion, including section 212(a)(4).²¹⁷ Most important, section 236(d) states that if the PHS certifies that “an alien is afflicted with . . . any mental disease, defect, or disability” excludable under section 212(a)(1)–(5), the INS decision to exclude “shall be based *solely* upon such certification” by the PHS.²¹⁸ While this statutory language does not say what discretion the INS has if the PHS fails to issue such a certification, the language and the entire statutory scheme at least suggest that Congress expected the PHS to determine whether a noncitizen is excludable under one of the specified “medical” grounds.²¹⁹

214. *Hill v. INS*, 714 F.2d 1470, 1479–80 (9th Cir. 1983). *Contra In re Longstaff*, 716 F.2d 1439 (5th Cir. 1983). See generally 62 Interpreter Releases 166–167 (1985) (INS exclusion policy not followed in Ninth Circuit, where gay men and lesbians are referred to PHS).

215. The first six bases for exclusion relate to aliens who (1) are mentally retarded, (2) are insane, (3) have had one or more attacks of insanity, (4) are afflicted with psychopathic personality etc., (5) are drug addicts or alcoholics, or (6) are afflicted with a dangerous contagious disease. The seventh exclusion applies to “[a]liens not comprehended within any of the foregoing classes *who are certified by the examining [PHS] surgeon as having a physical defect, disease, or disability*,” if the INS officer determines that it may affect the alien’s ability to earn a living. 8 U.S.C. § 1182(a)(1)–(7) (1988) (emphasis added).

216. *Id.* § 1222 (emphasis added).

217. *Id.* § 1224.

218. *Id.* § 1226(d) (emphasis added).

219. Contrast *id.* § 1225(a) (“The inspection, *other than the physical or mental examination*, of aliens . . . seeking admission or readmission to or the privilege of passing through the United States shall be conducted by the immigration officers, except as otherwise provided in regard to special inquiry officers.” (emphasis added)).

and that the PHS would apply the only expertise it has—application of medical standards.

The inference I draw from these provisions is that Congress set up an elaborate procedure for medical examination and certification that it expected would be used when a noncitizen is excluded for one of the medical reasons. The legislative history of the 1952 statute lends some support to this inference,²²⁰ and the INS itself traditionally deferred to the PHS as the sole judge of exclusions for medical reasons. According to its General Counsel in 1979, “every alien who is suspected of being a homosexual, and certainly this would include an individual who makes such a declaration [admission of being a homosexual] to an immigration officer, must be referred to a medical officer of the Public Health Service for examination before he may be excluded.”²²¹

There is no firm evidence, however, that Congress in 1952 would have tolerated no exceptions to this procedure; surely it is clear that Congress would not have predicted that the PHS would ever completely reverse its original support for excluding gay men and lesbians on medical grounds. Thus, the Office of Legal Counsel makes a valid dynamic interpretation argument that if the PHS were in blatant disregard of the statute the INS might legitimately follow new ad hoc procedures.²²² But it is unclear in 1990 whether the PHS position is in blatant disregard of the statute, for the reasons presented in the foregoing discussion. Moreover, it appears that the PHS has always administered the seven medical exclusions and has made decisions based on medical standards which, in a sense, “alter” the strict terms of the statute. For example, section 212(a)(6) excludes aliens “afflicted with any dangerous contagious disease.”²²³ The list of diseases considered “dangerous contagious diseases” has changed over the years—from the PHS’s original list of nineteen, to the 1961 list of twenty-one, to a svelte

220. See 1952 House Report, *supra* note 135, at 54, reprinted in 1952 U.S. Code Cong. & Admin. News 1653, 1709:

Every alien arriving at a port of entry must be examined by an immigration officer before he may enter, and such officers are empowered to detain the aliens on board the arriving vessel or at the airport of arrival for observation if suspected of being afflicted with mental or physical defects and may order the temporary removal of the alien for examination and inspection. Medical examinations are to be made by at least one qualified medical officer of the United States Public Health Service or by a qualified civil surgeon.

The House Report goes on to say that the INS officer “must base his decision solely upon such [PHS] certification” for one of the medical bases of exclusion. *Id.* at 56, reprinted in 1952 U.S. Code Cong. & Admin. News 1653, 1711; see also 1952 Senate Report, *supra* note 148, at 8–9 (Senate defers to PHS in revision of earlier provisions).

221. *In re Longstaff*, 716 F.2d 1439, 1446 n.43 (5th Cir. 1983) (quoting letter from INS General Counsel) (emphasis added); see *Hill v. INS*, 714 F.2d 1470, 1477 n.9 (9th Cir. 1983) (collecting INS decisions deferring to PHS).

222. See Memorandum Opinion for the Acting Comm’r, INS (No. 79-85), 3 Op. Off. Legal Counsel 457, 462–63 (1979); see also *Longstaff*, 716 F.2d at 1449–50.

223. 8 U.S.C. § 1182(a)(6) (1988).

list of only seven in 1970.²²⁴ Also, the PHS traditionally has not certified a noncitizen for exclusion so long as she is receiving adequate "treatment" for her disease,²²⁵ arguably a policy-based narrowing of the statute. In short, the PHS's 1979 decision not to certify all gay men and lesbians as medical risks is not a departure from its traditional role of enforcing the statute's medical exclusions dynamically and in light of its understanding of medical standards and developments.

The problem with interpreting the Act to require a medical certificate before exclusion under section 212(a)(4) is that the new PHS position does undermine *Boutilier*'s interpretation of section 212(a)(4), even if it does not actually overrule the precedent. This does not trouble me very much, for *Boutilier* is not a statutory precedent that should be expanded beyond its facts. Although the Court wrote the opinion very broadly, the opinion relied heavily upon now-questionable medical assumptions and upon the PHS certification in that case.²²⁶ My ultimate fusion of horizons with the text is the following: The main point of the text is that the implementation of its exclusion of gay men and lesbians should be left to the PHS to administer flexibly and according to medical standards, just as it administers the other medical exclusions. The story of this statute is that in 1952 both Congress and the PHS were committed to excluding at least some gay men and lesbians on medical grounds. The PHS persuaded Congress to define the exclusion broadly and leave virtually all the enforcement to the PHS. The PHS has changed its mind, in response to new medical developments. Interpretation of the statute should now follow the PHS's direction.²²⁷

C. *Implications of Gadamerian*

Hermeneutics for Statutory Interpretation Doctrine

Gadamer's hermeneutics provides fresh ways of thinking about and

224. See Note, The Immigration and Nationality Act and the Exclusion of Homosexuals: *Boutilier v. INS* Revisited, 2 Cardozo L. Rev. 359, 385 (1981) (history of PHS contagious disease listings). Note that the 1961 list picked up tuberculosis and leprosy when Congress deleted them from the text of § 212(a)(6).

225. See PHS, Dep't of Health & Human Services, Guidelines for Medical Examination of Aliens in the United States 12-17 (June 1985).

226. The Court emphasized the PHS examination in its statement of facts and in its response to *Boutilier*'s argument that he was not "afflicted" with a psychopathic personality. *Boutilier*, 387 U.S. at 120, 122-23. The Court emphasized the PHS certificate as the necessary proof of *Boutilier*'s longstanding homosexuality at the time of entry, and treated his admission as merely supporting evidence. "Having substantial support in the record [i.e., the PHS certificate], we do not now disturb that finding, especially since petitioner admitted being a homosexual at the time of his entry." *Id.* at 122-23.

227. For others urging movement in this direction, see Committee on Immigration & Nationality Law, The Exclusion of Homosexuals Under the Immigration Law, 40 Rec. A.B. City N.Y. 37 (1985); Fowler & Graff, Gay Aliens and Immigration: Resolving the Conflict Between *Hill* and *Longstaff*, 10 U. Dayton L. Rev. 621 (1985); Note, The Propriety of Denying Entry to Homosexual Aliens: Examining the Public Health Service's Authority Over Medical Exclusions, 17 U. Mich. J.L. Ref. 331 (1984).

evaluating more particular doctrinal issues, as well as the general theories of statutory interpretation already discussed. Again using section 212(a)(4) and the *Boutilier* issue as a focal point of discussion, I want briefly to visit current doctrinal controversies concerning the role of precedent in statutory cases, the oft-criticized canons of statutory construction, and the legitimacy of relying on legislative history. In each case, Gadamer's theory of interpretation provides a new perspective from which both to appreciate the usefulness of traditional doctrine, and to criticize that doctrine.

1. *Stare Decisis in Statutory Cases.* — Anglo-American law has traditionally viewed prior judicial precedent as binding upon subsequent judicial interpreters. Even if the precedent is one with which the subsequent judge disagrees, and even if most judges disagree with the reasoning and result of the precedent, it should be applied to current cases. The doctrine of stare decisis counsels overruling precedent only in the exceptional case.²²⁸ Stare decisis appears to be even more important for statutory precedents than for common law and constitutional precedents; statutory precedents are often given a "super-strong presumption of correctness" not quite afforded other types of precedents.²²⁹

Defenders of stare decisis point to its role in preserving public respect for judicial decision making, as well as maintaining predictability and certainty in the law. Gadamerian hermeneutics suggests that stare decisis is also important as an intrinsic part of the interpretive process; precedent acts as a central medium through which the present interpreter speaks with the past text. Precedent facilitates Gadamer's fusion of horizons, for it is one way in which the text's horizon continues to expand through history (as the text is applied to new and often unforeseen situations), and is part of the interpreter's present-day horizon. Hence, today's interpreter cannot think about section 212(a)(4) without thinking about *Boutilier*; whatever the correctness of *Boutilier*'s interpretation, it is a part of the statute's history that we must understand if we are to understand the statute.

The super-strong presumption of the correctness of statutory precedents has become a controversial proposition among commentators in recent years,²³⁰ and Justice Scalia has agitated for a relaxation of that presumption in a series of Supreme Court cases.²³¹ Gadamerian hermeneutics would support a reflective use of precedent, but not nec-

228. See, e.g., B. Cardozo, *The Nature of the Judicial Process* 150 (1921); Moore & Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 *Tex. L. Rev.* 514, 539-40 (1943).

229. See Eskridge, *Overruling Statutory Precedents*, 76 *Geo. L.J.* 1361, 1362-69 (1988).

230. See *id.* at 1385-1409; see also Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 *Cornell L. Rev.* 422, 427-29 (1988); Maltz, *The Nature of Precedent*, 66 *N.C.L. Rev.* 367, 388-89 (1988).

231. Mainly his dissenting opinions in *United States v. Johnson*, 481 U.S. 681,

essarily the confrontational approach of actually overruling precedents. Like statutes themselves, statutory precedents are legal texts subject to dynamic interpretation over time and have varying truth values. While the interpreter must show good will toward precedents, as she must show toward other texts, that good will does not have to blink reality; the passage of time and experience will reveal mistaken assumptions in some precedents, or their mischief, or both. *Boutilier* is a precedent whose truth value has not been robust over time. Its exclusion of a bisexual man on medical grounds strikes us twenty years later as unjust or worse, and indeed the bad impression left by *Boutilier* extends to section 212(a) as a whole. Especially in light of *Boutilier*, one begins to see section 212(a) as a sort of satanic Christmas tree, on which was hung almost every bigoted feeling held during the McCarthy era.²³²

Notwithstanding any doubts about *Boutilier*, it is an integral part of the ongoing history of section 212(a)(4) and will probably not be overruled, in part because the Court is inclined to let Congress overrule statutory precedents. Indeed, Congress is considering just that course of action in 1990.²³³ But *Boutilier*'s deficiencies do and should affect its influence on the interpreter. If a statutory precedent like *Boutilier* is fraught with problems, it should be expanded beyond its circumstances only with great caution. To the extent that Gadamerian hermeneutics requires a critical examination of a text's (and by extension a precedent's) assumptions, problems with those assumptions should influence current application. It is for this reason that I should decline to apply *Boutilier* to a current case in which the PHS refuses to certify an alien as afflicted with psychopathic personality or sexual deviation. The new case is "distinguishable" from *Boutilier*, and the difference is critical, for it lets us escape the unhappy assumptions of *Boutilier*.

In short, Gadamerian hermeneutics suggests an interesting rationale for the reluctance to overrule statutory precedents: Those precedents are not just interpretations that may be right or wrong, but are part of an interpretive tradition that itself must be interpreted as well as

702-03 (1987) (Scalia, J., dissenting); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 671-73 (1987) (Scalia, J., dissenting).

232. The 1952 statute, 66 Stat. 163, 182-85, also excluded the "feeble-minded" (§ 212(a)(1)); epileptics (§ 212(a)(4) (repealed 1965)); alcoholics and addicts (§ 212(a)(5)); people afflicted with tuberculosis or any other "dangerous contagious disease" (§ 212(a)(6)) (tuberculosis repealed 1961); "paupers" (§ 212(a)(8)); polygamists (§ 212(a)(11)); stowaways (§ 212(a)(18)); illiterates (§ 212(a)(25)); "anarchists" (§ 212(a)(28)(A)); members of the Communist Party or similar groups (§ 212(a)(28)(C), (E)); and persons advocating world communism (§ 212(a)(28)(D)). Most of these exclusions strike me as bigoted or xenophobic, and I doubt that many of them are much enforced today.

233. See S. 953, 101st Cong., 1st Sess. § (c)(3), 135 Cong. Rec. S5040-42 (daily ed. May 9, 1989) (statement of Sen. Simpson) ("This bill would end the exclusion of homosexual aliens merely because of their homosexuality, although they would remain excludable if they were infected with AIDS or other contagious diseases."); H.R. 1280, 101st Cong., 1st Sess., noted in 135 Cong. Rec. H544 (daily ed. Mar. 7, 1989).

respected. Yet *stare decisis* does not insulate precedents from criticism, for the productivity of hermeneutical distance will help us evaluate the truth values of the precedents themselves. Consequently, one lesson of Gadamer is that the important issue in dealing with precedent is not whether it should be overruled (rarely), but whether it should be read broadly (its truth value is robust over time) or narrowly (not so robust a truth value). This is indeed an important insight about the Supreme Court's treatment of statutory precedents in the last twenty-five years: The Court rarely overrules a statutory precedent explicitly but, instead, narrows precedents and their reasoning as subsequent experience suggests problems.²³⁴

2. *The Canons of Statutory Construction*. — The canons of statutory construction are a homely and somewhat disorderly collection of rules of thumb for interpreting statutes. One paradox about the canons is that they are the mainstay of general treatises about statutory interpretation and are constantly invoked by courts,²³⁵ even while they are almost universally reviled by scholars. The academic criticisms are that the canons are indeterminate (every canon has a counter-canon in any given case),²³⁶ that they do not reflect actual legislative deliberation,²³⁷ and that they are often outdated or biased.²³⁸

A Gadamerian understanding of interpretation would view the canons as important dialectical tools. As Gadamer teaches, interpretation always occurs against a background, a horizon of norms and assumptions. The canons are a public, albeit imperfect, way of expressing common assumptions about drafting, institutional roles and public values, and they form the background for almost any hard case of statutory interpretation.²³⁹ As such, they provide a potential link between the horizons of the statutory text and the statutory interpreter, since both are potentially aware of and formed by the relevant canons when they draft and interpret the statute. Although the canons do not necessarily mandate determinate answers in the hard cases, they do pose many of the inquiries.

The canons can provide some structure for our interpretation of section 212(a)(4). Some of the canons provide evidence of what the integrity of the statutory text suggests. For example, the rule *noscitur a*

234. See the three appendices in Eskridge, *supra* note 229, at 1427–39.

235. See generally 2A J. Sutherland, *Statutes and Statutory Construction* (N. Singer rev. 4th ed. 1984).

236. See, e.g., Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401–06 (1950).

237. See, e.g., Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 805–14 (1983).

238. See, e.g., Eskridge, *supra* note 143, at 1083–91.

239. See *id.* at 1017–19; Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 411–12, 423–24, 451–60 (1989).

socii ("it is known by its associates")²⁴⁰ suggests that "psychopathic personality" in the 1952 statute might be read to cover only demonstrable medical afflictions, since its "associates" in section 212(a)(4)—epilepsy and mental defect—might be so characterized. This tentative conclusion is strengthened by the whole act rule, the canon suggesting that a single word or clause will be read in the context of the entire statute.²⁴¹ The other terms in the first seven "medical" exclusions in the 1952 version of section 212(a) exclude aliens who are "feeble-minded," "insane," "drug addicts or chronic alcoholics," "afflicted with tuberculosis in any form, or with leprosy, or any other dangerous contagious disease."²⁴² These are all either medical terms or are lay terms with medical analogues. Now that the PHS and the medical profession have concluded that homosexuality per se is not a medical illness, it no longer "fits" in the statute, unless it is related to another mental or emotional dysfunction.

Other canons reflect procedural policies that have grown up over time, and which encourage coherent and reasoned evolution of statutory policy. The super-strong presumption against overruling statutory precedents, discussed above, is an example of this type of canon.²⁴³ The Court's interpretation in *Boutilier* is entitled to great deference, which cuts against most of the textual arguments. Also supporting textual caution is another canon, namely, the rule that courts should defer to interpretations of statutes offered by administrative agencies charged with enforcing such statutes.²⁴⁴ The PHS and the INS are the agencies charged with enforcing the statute, and any view they share would be quite important in understanding section 212(a)(4), as they did at the time of *Boutilier*. Of course, they now differ as to the *Boutilier* issue. Arguably, the view of the PHS deserves more weight, since the PHS was the key agency in the drafting of the exclusion in both 1952 and 1965 and since the exclusion is one of the medical bases for exclusion.

Yet other canons represent policy preferences that have evolved over time from constitutional law, statutes and the common law. For example, the canon that statutes should be construed to avoid troublesome constitutional questions²⁴⁵ has some application to section 212(a). If the PHS sought to exclude heterosexual married couples

240. Black's Law Dictionary 1209 (5th ed. 1979); see also W. Eskridge & P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 639-41 (1988).

241. W. Eskridge & P. Frickey, *supra* note 240, at 645-46.

242. Immigration and Nationality Act of 1952, § 212(a)(1), (2), (5)-(6), 66 Stat. 163, 182 (current version at 8 U.S.C. § 1182(a)(1), (2), (5)-(6) (1988)).

243. See *supra* notes 228-230 and accompanying text.

244. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); see also Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, 559-67 (1985).

245. See W. Eskridge & P. Frickey, *supra* note 240, at 676.

who engage in oral sex on grounds that they are afflicted with "sexual deviation" under the 1965 statute, the courts might well give the statute a narrowing construction to avoid right to privacy problems.²⁴⁶ In light of *Hardwick*, this argument is weak if not nonexistent for gay men and lesbians seeking to enter the country. Once they are here, though, another canon might be helpful. In cases like *Boutilier's*, where a noncitizen was subject to deportation and not just exclusion, the Court has adverted to what it calls "the longstanding principle of construing any lingering ambiguities . . . in favor of the alien."²⁴⁷ This pre-understanding might counsel against an expansive reading of section 212(a) when the consequence is not just exclusion but also deportation.

The canons of construction provide a potentially rich source of connection between the text's horizon and that of the current interpreter. As with precedents, however, Gadamer would caution against a mechanical or uncritical application of the canons. The canon that statutes should be construed to avoid constitutional questions, for example, has been cogently criticized as often inconsistent with legitimate legislative expectations.²⁴⁸ Particularly when the canon is applied to a statute whose broad construction would clearly survive constitutional questioning, one might be cautious about applying this canon. A congeries of policy canons can readily be attacked as obsolescent in their policy guidance.²⁴⁹

3. *The Use of Legislative History*. — It is no secret that the Supreme Court's statutory opinions are chock full of legislative history discussion. The Court's frequent reliance on legislative history as background context for interpreting statutes has traditionally been defended as good evidence of legislative "intent," which is considered relevant to statutory interpretation in light of our polity's commitment to legislative supremacy.²⁵⁰ Justice Scalia and others have questioned the Court's use of legislative history. Justice Scalia argues that only the statutory text (when it is reasonably clear), and *not* any intent of the legislature, is relevant to statutory interpretation, and that there is little reason to believe that legislative history really reflects the intent of Congress.²⁵¹

246. I say this even though it is true that the fifth amendment right to personal privacy is not necessarily applicable to aliens seeking to enter the country. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (alien seeking to enter this country is seeking a "privilege"; hence, no constitutional rights govern her application or limit this country's ability to exclude her). The "public value" is implicated nonetheless, and I think that the Court would find some way to narrow the statute accordingly.

247. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

248. See H. Friendly, *Benchmarks* 210-12 (1967); R. Posner, *supra* note 14, at 285.

249. See Eskridge, *supra* note 143, at 1083-88; Sunstein, *supra* note 239, at 506-07.

250. For an historical analysis of this point, see Eskridge, *supra* note 118.

251. See A. Scalia, *supra* note 132 (discussed and criticized in Farber & Frickey, *supra* note 132, at 442); see also *United States v. Taylor*, 108 S. Ct. 2413, 2423 (1988)

Gadamerian hermeneutics suggests a different reason for the Court's use of legislative history, and its willingness to look at such history even when the statutory text is relatively clear.²⁵² The legislative discussion—including hearings, committee reports, floor debate, even subsequent legislative history—provides information that is often useful in figuring out what the statute is all about, what policies it purports to incorporate, and indeed what the truth of the statute is. If legislative supremacy means anything, it at least means a willingness, indeed an eagerness, of the interpreter to listen to what our elected representatives had to say about a text, even if the record is incomplete or biased. Or, put in Gadamerian terms, legislative history reveals more completely than the bare text itself the horizon of that text. The legislative history of section 212(a)(4), for example, helps us understand the odd choice of terminology used in the statute (“psychopathic personality”); the reasons Congress included this exclusion; the critical role Congress expected the PHS to play; and so forth. While one may not agree with much of what the legislative history says, a commitment to the text requires the interpreter to listen in good faith to what the history has to teach.

On the other hand, Gadamerian hermeneutics argues that the interpreter ought to approach legislative history critically. Thus, she should not accept the legislative history at face value. The interpreter should beware of legislative history that seems manipulative, such as “planned colloquies” and “packed committee reports,”²⁵³ and should not treat legislative history as authoritative in the same way that a statutory text is authoritative. More important, the interpreter should look *beneath* and *beyond* the reliable legislative history to retrieve the background assumptions and norms underlying the statutes. These background assumptions should then be tested against the current circumstances of the case to determine their robustness. From a hermeneutical perspective, the best lesson to draw from the legislative history of the 1952 and 1965 statutes is not their targeting of gay men and lesbians for exclusion, but the underlying bases for their assumption that gay men and lesbians would often, or always, be medical risks.

(Scalia, J., concurring in part); *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring in judgment).

252. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 199 (1983); see, e.g., *TVA v. Hill*, 437 U.S. 153 (1978) (a leading plain meaning case, but Court nonetheless examined legislative background at length).

253. Compare the two contrasting Ninth Circuit opinions in *Montana Wilderness Ass'n v. United States Forest Serv.*—one published at 655 F.2d 951, 955–57 (9th Cir. 1981), cert. denied, 455 U.S. 989 (1982), and the other unpublished, No. 80-3374, slip op. (9th Cir. May 14, 1981), but reprinted in W. Eskridge & P. Frickey, *supra* note 240, at 743–49—in which the judges were probably “tricked” not once but twice by funny legislative history. See also *Monterey Coal Co. v. Federal Mine Safety & Health Rev. Comm'n*, 743 F.2d 589 (7th Cir. 1984).

Similar background assumptions may have been critical to the Court's opinion in *Boutilier*. But the background assumptions of these authorities have not been robust over time, and the considerable medical and other evidence to the contrary is part of our current horizon. Gadamerian hermeneutics suggests that our current application of section 212(a)(4) to Jean Deau's case (or other similar ones) should critically evaluate, and update, those background assumptions.

III. NORMATIVE ISSUES RELATING TO GADAMERIAN HERMENEUTICS AND STATUTORY INTERPRETATION

Gadamer's theory of interpretation provides a useful perspective for thinking about statutory interpretation in general and the *Boutilier* issue in particular. In my experience teaching statutory interpretation from Gadamer's perspective at the Georgetown University Law Center, I find that students "recognize" the descriptive truth of Gadamer's theory—it really has much to say about how judges actually *do* think when they interpret statutes.²⁵⁴ Also, in its mandate of a critical approach to the horizons of both text and interpreter, the theory has something to say about how judges *should* approach statutory interpretation. This "hermeneutical spirit" of bounded inquiry and criticism from within a tradition is Gadamer's main normative contribution to statutory interpretation theory. While the descriptive dimension of dynamic statutory interpretation seems intuitively appealing, many have normative problems with this dynamic theory.

The possible normative problems with dynamic statutory interpretation mirror similar problems raised by philosophers questioning Gadamer's hermeneutics. On the one hand, one might argue that dynamic statutory interpretation tolerates too much judicial creativity and therefore violates principles of legislative supremacy—a willingness to confine *Boutilier* to its facts and to construe section 212(a)(4) conserva-

254. This Article's exclusive focus on *Boutilier* should not obscure the applicability of hermeneutical analysis to most of the hard cases decided by the Supreme Court. See, e.g., *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (§ 1981 claim, analyzed in Eskridge, *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67 (1988)); *McNally v. United States*, 483 U.S. 350 (1987) (mail fraud case, analyzed in Eskridge & Frickey, *supra* note 19, at 367–71); *Smith v. Wade*, 461 U.S. 30 (1983) (punitive damages available under § 1983, analyzed in Eskridge, *supra* note 18, at 1484–88, and in Mootz, *supra* note 19, at 544–45); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) (case holding that plain meaning denies discretion to trial court to limit wage penalty, analyzed in Eskridge & Frickey, *supra* note 19, at 337–39, 348–53); *TVA v. Hill*, 437 U.S. 153 (1982) (case involving impact of Endangered Species Act of 1973 on dam construction, analyzed in R. Dworkin, *supra* note 170, at 20–23, 313–54); *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (affirmative action case, analyzed in Eskridge, *supra* note 18, at 1488–94); *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979) (case holding that there is no implied easement across federal land grant, analyzed in Posner, *Decline of Law*, *supra* note 160, at 774–77).

tively by requiring PHS certification for exclusion under section 212(a)(4) may be subject to the "countermajoritarian difficulty." On the other hand, it may also be argued that a Gadamerian model of dynamic interpretation, with its emphasis on pre-understandings and tradition, might be too conservative—by declining to repudiate *Boutilier* and the legislative history of the statute entirely, the interpreter tolerates a socially oppressive antihomosexual tradition. I consider the latter criticism the more troubling.

A. Hermeneutics and the Countermajoritarian Difficulty

A central insight of Gadamerian hermeneutics is that method is not the critical dimension of interpretation and does not necessarily "constrain" the interpreter. This is an alarming point for most traditional legal theory and judicial rhetoric in statutory interpretation, both of which cling to the metaphor that all a judge does when she interprets a statute is implement the will or directives of the legislature.²⁵⁵ At the root of this traditional mythology is the "countermajoritarian difficulty": Whenever unelected judges go beyond or against the commands of the elected branches of government, their action might be subject to doubt in a representative democracy such as ours.²⁵⁶ In prior publications, I have defended dynamic statutory interpretation against this difficulty.²⁵⁷ Gadamerian hermeneutics adds to that response, because it suggests that the countermajoritarian difficulty, as typically deployed in statutory interpretation cases, is intellectually incoherent.

Consider the Second Circuit's decision in *Boutilier*, which was the decision affirmed by the Supreme Court in that case.²⁵⁸ Judge Moore wrote a thoughtful dissenting opinion in which he expressed a reluctance to read section 212(a)(4) to reach not only people such as Clive Michael Boutilier but also people like Leonardo da Vinci and Michelangelo, who were probably gay but were by no account medically "psychopathic."²⁵⁹ Judge Kaufman, the author of the Second Circuit's opinion, replied that he was doing nothing more than his duty to "reconstruct the past solution imaginatively in its setting and project the purposes which inspired [the law]."²⁶⁰ Dismissing Judge Moore's reasoned dissent, Judge Kaufman argued: "Although his plea for 'clem-

255. See, e.g., *Boutilier*, 387 U.S. at 120. See generally Eskridge, *supra* note 118 (jurisprudential history of this metaphor, 1890s–present).

256. See A. Bickel, *The Least Dangerous Branch* 16 (1962).

257. See Eskridge, *supra* note 18, at 1523–38; Eskridge & Frickey, *supra* note 19, at 378–80.

258. *Boutilier v. INS*, 363 F.2d 488 (2d Cir. 1966), *aff'd*, 387 U.S. 118 (1967).

259. *Id.* at 497–98 (Moore, J., dissenting); see also 387 U.S. at 125 (Brennan, J., dissenting for the reasons stated by Moore, J.).

260. 363 F.2d at 496 (quoting L. Hand, *The Contribution of an Independent Judiciary to Civilization*, in *The Spirit of Liberty* 172, 174 (1952)).

ency' is quite moving, it is illustrative of the ease with which one can succumb in a case such as this to the temptation of permitting the emotions to overwhelm reason and enacted law." Judge Kaufman then concluded that "Congress has made its judgment, for better or for worse, respecting the exclusion of homosexuals which we are not at liberty to alter."²⁶¹

Judge Kaufman's opinion appeals to the countermajoritarian difficulty in statutory cases and reflects a normative attitude at odds with the hermeneutical spirit. He refuses to engage the material, to press beyond his own pre-understandings about the case. In defense of his position, Judge Kaufman makes three contrasts—between an imaginatively reconstructed decision made long ago by Congress and current policy; between the judgment of Congress, "which we are not at liberty to alter," and justice in a particular case; and between valid objective interpretation and invalid subjective interpretation. The correctness of Judge Kaufman's defense depends upon the validity of all three contrasts. Gadamerian hermeneutics suggests that none of the contrasts is coherent.

I. *The Incoherence of Imaginative Reconstruction.* — Favored rhetoric inspired by the countermajoritarian difficulty is that all the court does is implement the policy chosen by Congress. Hence, Judge Kaufman assumes that the role of interpreters is not "to sit in judgment on Congress' wisdom in enacting the law," but instead to "'reconstruct the past solution imaginatively.'"²⁶² As we have seen above, Gadamer considered the exercise of imaginative reconstruction a contradiction in terms—we cannot completely reconstruct the past without being influenced by our own current views, and all that imaginative reconstruction seeks is a dead meaning.²⁶³ Thus, while Judge Kaufman made quite a show of merely bending his will to that of Congress, his imaginative reconstruction may have revealed more about his own imagined preferences than about those reconstructed preferences of Congress.

The critical move in the legislative history was the decision by the Senate and House Judiciary Committees to reject Senator McCarran's provision, which explicitly excluded "homosexuals and sex perverts," and to accept the PHS recommendation only to exclude persons "afflicted with psychopathic personality," a medical term. Whether this phrase excludes each and every gay person depends upon the evidence emphasized and the level of legislative intent on which the inquiry focuses. Judge Kaufman emphasized language in the committee report saying that the "change in nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates."²⁶⁴ This may support his broad interpretation of section

261. *Id.* at 496 n.15.

262. See *supra* text accompanying note 260.

263. See *supra* text accompanying notes 64–67.

264. 363 F.2d at 493 (quoting 1952 Senate Report, *supra* note 148, at 9).

212(a)(4) if one assumes that the only relevant inquiry is Congress's "specific intent," namely, the probable answer to the interpretive question which Congress specifically anticipated and put in the statute on the date of enactment; *and* that a focused committee report, as opposed to the statutory text, is sure evidence of Congress's specific intent; *and* that the quoted passage was the only relevant evidence of specific intent (and, of course, that each and every gay person is a "sexual deviate"). As a matter of statutory interpretation theory, the first two assumptions are now considered highly questionable.²⁶⁵

Judge Moore focused on the third assumption. His dissent emphasized the PHS report, appended to the House Report, which envisioned a narrower view of "psychopathic personality," that is, a personality disorder characterized by "developmental defects or pathological trends in personality structure manifest by lifelong patterns of action or behavior"; such personalities "ill primarily in terms of society and the prevailing culture . . . frequently include those . . . suffering from sexual deviation."²⁶⁶ This may support a more cautious interpretation of section 212(a)(4), one that excludes only those gay men and lesbians whose sexual preference is pathological in their ability to adapt to society. On the whole, the specific "intent" of Congress on this issue is by no means clear. The doubt-free quality of Judge Kaufman's opinion is just as much the result of his own choice of assumptions and his own editing as of the actual historical record.

Another reason imaginative reconstruction is incoherent is the Gadamerian insight that "understanding" a statute cannot be divorced from "applying" it to a fact situation. While Clive Michael Boutilier had engaged in sexual relations with other men, these relations had not been frequent, and they were mixed with periods of abstinence and equally occasional intercourse with women.²⁶⁷ It is not even clear that Boutilier was gay, much less psychopathic. This point becomes even more significant when one recalls that the 1948 Kinsey study found that 37 percent of Americans had taken part in at least one homosexual experience.²⁶⁸ To interpret section 212(a)(4) to exclude anyone who has had a homosexual experience—people similar to almost 40 percent of our own population—seems absurd and far beyond Congress's specific intent. Recall, finally, that Boutilier, who seemed hardly committed to homosexuality, might well have altered his conduct had the statute

265. See Eskridge, *supra* note 118, for a detailed historical and jurisprudential analysis of these assumptions.

266. 363 F.2d at 498 (Moore, J., dissenting) (quoting 1952 House Report, *supra* note 135, at 48, reprinted in 1952 U.S. Code Cong. & Admin. News 1653, 1700).

267. Professor of Psychiatry Dr. Montague Ullman's affidavit found: "The patient has sexual interest in girls and has had intercourse with them on a number of occasions. . . . His sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interests as well as abstinence with almost equal facility." *Id.* at 499 (Moore, J., dissenting).

268. A. Kinsey, W. Pomeroy & C. Martin, *supra* note 202, at 623.

given him clearer warning before he came to the United States that "psychopathic personality" in reality meant "any homosexual experience."²⁶⁹

In short, to find the certitude in Congress's "judgment" about Boutilier that Judge Kaufman does, one must be certain not only that Congress intended for "psychopathic personality" to mean "homosexuality" (even though the latter was explicitly dropped from the final text of the statute), but also that Congress intended "afflicted with psychopathic personality" to mean "has sometimes engaged in homosexual acts even though showing no long-term personality neuroses or commitment to homosexual practices." Finally one must believe that Congress intended the alien to be excluded whether or not there was any fair warning of this meaning, and regardless of the alien's ability to have changed his or her conduct before entering the United States, and regardless of whether the exclusion served any rational immigration policy. To assert all this demands an omniscience Congress surely does not have and a level of antihomosexual feeling beyond that revealed in the record underlying the 1952 statute.

2. *The Incoherence of Static Horizons.* — Arguments grounded upon the countermajoritarian difficulty typically assume that the enacting Congress somehow "put" a result in the statute and that such result is the same twenty years later as it is the day Congress enacted the law. The role of the interpreter is the essentially mechanical one of discovering the answer that has been in the statute from its incipience. "Congress has made its judgment, for better or worse," Judge Kaufman said, "which we are not at liberty to alter," whatever current policy might teach us.²⁷⁰ This assumption is erroneous if interpretation is, as Gadamer posits and as it appears to be, a fusion of horizons, neither of which is static.²⁷¹

Thus, Judge Kaufman is wrong, both in thinking that Congress in 1952 made an unchanging "judgment" about this issue, and that this judgment does not evolve over time. It may be, as Judge Kaufman thought, that Congress in 1952 was targeting gay men and lesbians in section 212(a)(4). If so, Congress's horizon included representations to it by the PHS that gay men and lesbians were medically deranged and that such derangement was equivalent to a psychopathic personality; widely held beliefs about gay men and lesbians in the medical community, based upon unrepresentative and unscientific clinical studies, if not upon raw prejudices and ignorance; and a xenophobic, almost paranoid, mood in the country as a whole. As time passes, that original

269. 363 F.2d at 499 (Moore, J., dissenting).

270. *Id.* at 496 n.15 ("Thus, while the house of horrors erected by our dissenting brother stimulates the imagination and arouses our sympathy, it is largely irrelevant.").

271. The assumption that a text has a singular "truth" buried in it runs at odds with Gadamer's insight that truth itself is not static, but instead involves a search for consensus that changes over time. See *supra* notes 22-23 and accompanying text.

horizon changes as we come to learn that the medical link between homosexuality and pathology is questionable. The horizon of the interpreter, even in 1966–67 when *Boutilier* was decided, could better appreciate the confused presuppositions held by Congress in 1952. By 1966–67, the Kinsey study, which shocked the medical community when it was released in 1948, had been backed up and elaborated on by several rigorous clinical studies, most notably those of Dr. Evelyn Hooker, who first demonstrated that a representative sample of gay men had no more psychopathology than a sample of other men.²⁷²

As a result of these developments, the horizon of the interpreter in 1966–67 was substantially expanded, as was that of the 1952 Congress, which made the choice of tying the exclusion to medical knowledge and of leaving its enforcement to medical officials. Under this view, the common ground between the text's horizon and that of the interpreter *might* legitimately be an interpretation that demands more of section 212(a)(4) than the noncitizen's bare sexual preference.²⁷³ Under a sophisticated view of interpretation, this is not "countermajoritarian," because there was no static "judgment" of Congress which has been "altered."

3. *The Incoherence of the Subject/Object Dichotomy.* — A final rhetorical move often made by someone arguing the countermajoritarian difficulty is to claim that she is choosing her interpretation based on the "objective" rule of law, while a competing interpretation can only be accepted if one is willing to allow her "subjective" preferences to override the objective evidence of what Congress put into the statute. Judge Kaufman made this argument with unusual clarity in *Boutilier*. In dismissing the dissent's "plea for 'clemency,'" Judge Kaufman cautioned against "the ease with which one can succumb in a case such as this to the temptation of permitting the emotions to overwhelm reason and enacted law."²⁷⁴ Many illegitimate contrasts, such as the reason-emotion dichotomy, are tied up in this rhetoric.²⁷⁵ The key to such rhetoric, and indeed to Judge Kaufman's whole argument, is the subject-object dichotomy.²⁷⁶

In the context of statutory interpretation, the dichotomy posits that the "subject" (the interpreter) retrieves meaning that it finds in the "object" (the text). Those concerned with the countermajoritarian difficulty warn that the unelected subject must not let her values intrude

272. See Hooker, *supra* note 202, *passim*.

273. I am not certain that all hermeneutical interpreters would have reached this result in 1966–67, for many of the presuppositions mentioned in text were widely held then. Even liberal jurists such as Chief Justice Warren joined *Boutilier*.

274. 363 F.2d at 496 n.15.

275. Based upon the arguments made above, I suggest that Judge Moore's dissenting opinion is the voice of reason, if anything written in *Boutilier* is, and that Judge Kaufman's opinion is as emotionally inspired as it is stylistically overwrought.

276. The leading deconstruction of this dichotomy, albeit from a Derridean rather than Gadamerian perspective, is Peller, *supra* note 84, at 1191–1259.

into the values she is supposed to draw from the object, which has been enacted by the majoritarian legislature. Method is the way to prevent this unholy intrusion. Gadamer provides a more sophisticated thought system that denies the dichotomy. For Gadamer, neither the text nor the interpreter is the "object" of interpretation; if there be an object it would be the truth that is sought by both interpreter and text. It is blinking reality to think that the text has a pre-existing meaning that one can retrieve through any methodology. The interpreter, therefore, is not constrained by method. She is, instead, constrained by the pre-understandings instilled in her by tradition such as the canons, by precedent and the ongoing story of law, and by her good faith dialogue with the text.

Note that Gadamer's hermeneutics does not entirely exclude the countermajoritarian difficulty from influencing statutory interpretation, and the reason for this suggests a circularity in Gadamer's theory. While method does not constrain the statutory interpreter, she is constrained by her pre-understandings, conventions of interpretation and the text itself. All of these, in turn, are influenced by our society's overall working assumption that the legislature is the supreme lawmaking institution. Hence, only the legislature can author statutory texts like the Immigration and Nationality Act of 1952, and only the legislature can formally amend its statutes, as Congress did in 1965.²⁷⁷ Most of the canons and other conventions of statutory interpretation assume this formal supremacy of the legislature, and that assumption, as expressed in the form of the "countermajoritarian difficulty," might be considered a fundamental pre-understanding of judges as they interpret statutes.

B. *Critical Hermeneutics and Distorted Traditions in Statutory Interpretation*

If it avoids the countermajoritarian difficulty, Gadamerian hermeneutics gives us a vision of the *Boutilier* issue that is at least superficially satisfying. Although Congress enacted a bigoted immigration law in 1952, and the Supreme Court expanded upon the prejudice when it interpreted section 212(a)(4) to exclude gay men and lesbians, the critical interpreter today should interpret the statute to permit the PHS's new policy of nonenforcement. Gadamer or his followers would probably view this as a successful interpretive dialogue, working from within our traditions to improve upon them through critical reflection. It is important, however, that Habermas would find in this story concrete evidence of the incoherence of Gadamer's critical traditionalism.

An issue so far avoided in this Article is whether *Boutilier* was correctly decided in 1966 by the Second Circuit and in 1967 by the

277. See U.S. Const. art. I; also see Eskridge, *supra* note 72, at 330-43 (arguing that legislative supremacy requires only avoidance of unjustified violation of legislative expectations).

Supreme Court.²⁷⁸ However a Gadamerian interpreter resolves this issue, she faces problems. If the interpreter agrees with the judicial resolution, even with the caveat that the issue would ultimately work out well, her position is subject to Habermas's objection that hermeneutics is too conservative and only serves to reify oppressive socio-economic structures by ignoring the fact that traditions reflect the coercive effects of often malignant socio-economic forces.²⁷⁹ Habermas forces us to ask whether it is not true that the 1952 statute is a pathologically distorted communication, especially as regards its oppressive assumptions about gay men and lesbians.

In the 1950s, when the statute was enacted, both the medical and political communities uncritically accepted a bizarre range of stereotypes about gay men and lesbians, including the idea that same-sex attraction is grossly abnormal and is per se evidence of mental illness. These ideas were not supported by very rigorous scientific evidence and ran counter to the findings of the Kinsey Group,²⁸⁰ which was virtually alone in seeking to understand sexuality in a dispassionate manner. Gay men and lesbians were not consulted about the accuracy of these stereotypes and were, instead, subjected to such severe prejudice and discrimination that only a very few openly admitted their sexuality. To the extent that there was any consensus in the 1950s and early 1960s about homosexuality, it was a distorted consensus that served as a coercive mode of social control over a helpless minority.

Habermas's "ideal speech situation"²⁸¹ suggests that our society's traditions concerning homosexuality ought not count for much, because they represent an inherently one-sided, substantially ignorant, distorted conversation about social reality. Under Habermas's therapeutic hermeneutics, the interpreter needs to reconstruct the conversation, to make it what it would be if excluded viewpoints were

278. The main reason I avoid the issue is that there is no way for me to reconstruct the original decision of 20 years ago, given the Gadamerian problems with imaginative reconstruction. The best I can do here is to explore my present-day reactions to the evidence that was before the courts in 1966-67, which is clearly not the same as actually being there.

279. See Habermas Review, *supra* note 100, at 361:

An interpretive sociology that hypostasizes language to the subject of forms of life and of tradition ties itself to the idealist presupposition that linguistically articulated consciousness determines the material practice of life. But the objective framework of social action is not exhausted by the dimension of intersubjectively intended and symbolically transmitted meaning. The linguistic infrastructure of a society is part of a complex that, however symbolically mediated, is also constituted by . . . the constraint of inner nature reflected in the repressive character of social power relations.

280. A. Kinsey, W. Pomeroy & C. Martin, *supra* note 202, at 647-51 (arguing that 18% of men surveyed have as many homosexual as heterosexual contacts).

281. Habermas, *The Hermeneutic Claim to Universality*, in *Contemporary Hermeneutics* 181, 206 (J. Bleicher ed. & trans. 1980).

included.²⁸² Gadamer claims that hermeneutics can perform at least some of the critical therapeutics that Habermas demands, and *Boutilier* gives his theory that opportunity. By questioning the assumptions of Congress in 1952, the interpreter can reform the corrupted dialogue and turn it in precisely the productive direction Gadamer advocates.

But it is not clear whether Gadamer would have been willing to perform this reconstructive dialogue in *Boutilier*. Such a dialogue would have introduced a significant discontinuity in the discussion—indeed, a Derridean *rupture*. From what vantage point could Gadamer in 1966–67 have criticized the medical characterization of gay men and lesbians as “psychopathic”? Although there were some scientific studies questioning stereotypes about gay men and lesbians, the medical community itself was on the whole supportive of those stereotypes until the 1970s.²⁸³ Unless he accepts Habermas’s metacritical ideal speech theory, it is uncertain that Gadamer has a point from which to criticize the norm directly.

But such direct, Habermasian critique is not what Gadamer means when he advocates critique from within a tradition. His critique would be more indirect, yet not for that reason without power. This Gadamerian critique from within helps explain *Fleuti v. Rosenberg*,²⁸⁴ which found section 212(a)(4) too “vague” to embrace gay men and lesbians. While that may seem like a gutless strategy from a Habermasian viewpoint and in light of today’s views, it may have been as far as most Gadamerian interpreters could have gone in the early 1960s. In any event, the *Fleuti* strategy was also unsuccessful, for Congress re-

282. For Habermas’s theory of communicative rationality, see J. Habermas, *Reason and the Rationalization of Society* (T. McCarthy trans. 1984); J. Habermas, *Legitimation Crisis* (T. McCarthy trans. 1975); see also *id.* at xiii–xviii (Translator’s Introduction).

283. E. Bergler, *Homosexuality: Disease or Way of Life* 28–29 (1956), contains some representative views of the scientific community:

Still, though I have no bias, if I were asked what kind of person the homosexual is, I would say: “Homosexuals are essentially disagreeable people . . . [Their unconscious conflicts] sap so much of their inner energy that the shell is a mixture of superciliousness, fake aggression, and whimpering. Like all psychic masochists, they are subservient when confronted with a stronger person, merciless when in power, unscrupulous about trampling on a weaker person. The only language their unconscious understands is brute force. What is most discouraging, you seldom find an intact ego . . . among them.”

See also O. Fenichel, *The Psychoanalytic Theory of Neurosis* 324–41 (1945) (discussing homosexuality in context of perversions and neuroses); C. Socarides, *The Overt Homosexual* 6 (1968) (unattributed quote from a gay man: “Homosexuals are destructive people, even in the actual sex act. In homosexuality, there’s only progressive moral, emotional, and physical deterioration.”). T. Szasz, *The Manufacture of Madness* 170–74 (1970), argued that “psychiatric opinion about homosexuals is not a scientific proposition but a medical prejudice.” This work reflected the movement away from these views in the 1970s (though the movement had supporters at least since the 1948 Kinsey Study).

284. 302 F.2d 652, 654–58 (9th Cir. 1962), vacated and remanded on other grounds, 374 U.S. 449 (1963).

acted by strengthening the statutory message in 1965, and the amendment made the *Boutilier* dissents harder to sustain. The strategy adopted by the dissents was to confront the antihomosexual tradition more directly and to deny a broad enforcement of the apparent congressional mandate. There are plenty of arguments by which this can be accomplished, as demonstrated in the last section, but it is unclear that Gadamer would have found any of them truly persuasive.

Habermas's critique takes on even greater bite if we examine the post-*Boutilier* history of the exclusion. My Gadamerian happy ending—the PHS refuses to cooperate and the interpreter sustains its position—can be viewed as a moral cop-out. While Gadamer would tend to view the PHS's *volte face* as a result of critical dialogue, Habermas might view it as an assertion of power. Through the 1960s, a pretty liberal decade, our nation's public culture remained essentially antihomosexual.²⁸⁵ It was only after Stonewall, a 1969 riot in which people fought back against a police raid of a gay bar and symbolically launched an era of gay activism, that the medical and ultimately the political community paid significant attention to the personhood of gay men and lesbians.²⁸⁶ Once a greater variety of perspectives was heard, and the world came face to face with previously invisible gay men and lesbians, the medical consensus collapsed. Within four years of Stonewall, gay activists and thoughtful psychiatrists not only discredited the previous medical endorsement of homosexual persecution, but obtained official endorsement of a new position, that homosexuality is not a disease.²⁸⁷ Given this evidence—as good an example of an ideal speech situation actually forming around an issue as one is likely to find—Habermas might assert that *Boutilier* should simply be overruled and that a Gadamerian refusal to do so is further evidence of his excessive deference to tradition.

This is the dilemma: Gadamer's desire to root his theory in tradition but to approach tradition critically will end up sacrificing either tradition or critique. Gadamer tends to err on the side of tradition, while his commentators Ricoeur and Waruke are more inclined to critique. Although this is a genuine tension inherent in Gadamer's theory, it does not seem a fatal tension, and in statutory interpretation concerns underlying the countermajoritarian difficulty might justify his intrinsic conservatism: Judges who are not elected and not directly

285. See *supra* note 204.

286. See R. Bayer, *supra* note 138, at 88–100 (Stonewall and emergence of confrontational gay activism in late 1960s); *id.* at 101–38 (ability of gay activists' confrontational tactics to force American Psychiatric Association to reconsider its "medical" position on homosexuality, 1970–72).

287. There was certainly not unanimity in the psychiatric community when in 1973 the APA revised its manual. See, e.g., Socarides, *The Sexual Deviations and the Diagnostic Manual*, 32 *Am. J. Psychotherapy* 414, 414–18 (1978) (arguing that despite widespread incidence, homosexual conduct should be diagnosed and treated as a psychological disease).

accountable to the people are not in the best position to attempt radical critique of the nation's statutes.

That is not to say that Gadamerian interpreters of statutes cannot engage in effective incremental critique. Indeed, the proceduralist techniques of the law suggest one way to reconcile Gadamer's different goals. Thus, the courts in *Boutilier* might well have offered a very narrow fact-based resolution of the issue, in which they would neither reaffirm a distorted tradition nor overturn a still-prevailing medical consensus. I should have interpreted section 212(a)(4) in 1967 not to exclude Clive Michael Boutilier, on the narrow facts of his case: However the statute might be applied to others, it does not exclude a man whose occasional homosexual activity cannot be linked to severe psychological disturbances by an actual medical examination (or something to that effect). Since the only evidence as to Boutilier's psychological state was the medical affidavits he submitted and since the PHS did not actually examine him, I should have refused to exclude him, even in 1967. My resolution has the advantage of avoiding a direct repudiation of apparent congressional expectations, while yielding a fair and just result in the particular case, and leaving to the future a resolution of the exact ambit of section 212(a)(4).

My modest resolution, which would probably not please Habermas, is inspired by the central importance of Aristotelian application, in both hermeneutics and in law. We simply do not know what we think about a text until we grapple with a specific application of it. If a text is problematic, the best way to test it is by application to a specific problem; in questioning a text, it may be better to work incrementally. Given the developing medical debate over homosexuality in the 1960s, dogmatic conclusions were unwise in *Boutilier*. But the facts of the case, which challenged prevailing stereotypes that gay men were incapable or uninterested in having sex with women (as Boutilier did) and that gay men could not be well-adjusted (as Boutilier apparently was), provided an excellent opportunity for a limited critique of the statute and its underlying medical consensus. Such an incremental approach, with its focus on fairness in the individual case, has the advantage of preserving tradition in the short run, while presenting opportunities for its reform in the longer run. This insight has long been the strength of the common law, where different interpreters learn from one another, until they have built a constructive consensus. It can be a strength of Gadamerian hermeneutics in statutory interpretation.

C. *Incoherence and Problematic Consensus:*

The Difficult Task of Practical Reasoning in an Alienated World

A final tension within Gadamer's theory that is illustrated by the *Boutilier* story is the philosopher's ambiguous attitude toward "truth." Throughout *Truth and Method*, Gadamer emphasizes that the purpose of

hermeneutics is truth about the subject matter of the text,²⁸⁸ and that truth lies in a consensus formed among interlocutors.²⁸⁹ The truth of the *Boutilier* issue, as presented here, is that after longstanding discussion and practice, the statute is best interpreted to accept the PHS policy of nonexclusion of gay men and lesbians. While this may be an appealing result, it is also subject to Derridean objections that the dialogue never truly reached closure and that its result is incoherent with the overall text of section 212(a). These objections of artificial closure and incoherence have significance for power relationships involved in statutory interpretation.

Thus, it is not completely clear that my resolution of the *Boutilier* issue rests upon any true consensus; it may be little more than a consensus I have pressed upon the text. Interpreting section 212(a)(4) not to exclude gay men and lesbians is incoherent with antihomosexual attitudes in our society. *Hardwick*, reflecting moral traditions condemning homosexuality, illustrates our society's ambiguity about this issue. Although public opinion polls show greater tolerance of gay men and lesbians by the population,²⁹⁰ they do not reveal toleration, let alone acceptance, by a majority of the population, and antihomosexual violence increased in the 1980s.²⁹¹ The AIDS epidemic has been associated with gay men in particular and may already have triggered a recrudescence of homophobia in Middle America.²⁹² What is most interesting is that even though most Americans are ambivalent about tolerating gay men and lesbians, its professional and intellectual elites are more supportive.²⁹³ And the political culture is more tolerant than it was twenty years ago, because gay men and lesbians are politically well-organized—and very well informed on issues such as the *Boutilier* one. Viewed in this broader context, my approach to the *Boutilier* issue is influenced at every turn by broader socio-economic and political factors which may themselves be distorting. For example, my choosing to write a lengthy law review article about a twenty-three year old case,

288. Truth and Method, *supra* note 20, at 491 ("Rather, what the tool of method does not achieve must—and really can—be achieved by a discipline of questioning and inquiring, a discipline that guarantees truth.").

289. See *supra* notes 22–23 and accompanying text.

290. See E. Rueda, *The Homosexual Network: Private Lives and Public Policy* 6–11 (1982).

291. See D. Greenberg, *The Construction of Homosexuality* 466–67 (1988). Note that the violence reported by Greenberg was apparently sanctioned and encouraged by mainstream middle-class people, such as Anita Bryant ("God puts homosexuals in the same category as murderers") and Jerry Falwell ("Stop the Gays *dead* in their perverted tracks"). *Id.* at 467.

292. *Id.* at 478–80 (one-third of Americans polled in 1986 say they have a less favorable attitude toward homosexuals because of AIDS crisis).

293. See A. Klassen, C. Williams & E. Levitt, *supra* note 204, at 194, 237–38 (significantly fewer antihomosexual attitudes among college-educated sample); see also *id.* at 228 (earlier study suggested low social status correlates with intensely antihomosexual feelings).

and the *Columbia Law Review's* interest in publishing it, is incomprehensible without understanding the importance of gay rights among America's elites, some of whom are openly homosexual.

In this regard, contrast the evolution of section 212(a) to permit gay men and lesbians to enter the country, with the statute's continued exclusion of other noncitizens. Still excluded by the terms of the statute (and probably still enforced to some extent) are the mentally handicapped, the poor and the left-wing.²⁹⁴ The same PHS that now flatly refuses to enforce any statutory exclusion against gay men and lesbians has an elaborate typology of mental handicaps, so that doctors can decide what level of tested intelligence to exclude. My interpretation of section 212(a)(4) to allow gay men and lesbians to enter the United States can be reconciled with these remaining exclusions—for example, some of them can also be interpreted narrowly, and any problems with their application to specific individuals are not on the same level of irrationality as the earlier view that section 212(a)(4) excludes millions of gay men and lesbians for now-discredited medical reasons. But the fact remains that discourse among the nation's elites (doctors, law professors, bureaucrats) is very concerned about the exclusion of gay men and lesbians, well-represented and fairly well-organized among the elites, and not so concerned about the exclusion of the poor, the mentally handicapped and the politically marginalized. I am doubtful that this can be explained by reference to reason and coherence—it is a matter of interest and politics.

This analysis could be spun indefinitely in a series of Derridean contradictions or anomalies, but its point is that Gadamerian hermeneutics cannot easily, if ever, offer us complete interpretive closure. Like most conversations about difficult issues in a pluralist society, the Gadamerian approach remains open ended. This illustrates the difficulty of coherence analysis in a society that is complex and pluralistic, and it points to another central dilemma in Gadamer's hermeneutics: Its basic approach, Aristotelian practical reasoning (*phronesis*), assumes a degree of societal consensus that our society does not have.²⁹⁵ "Indeed, there is a paradox that stands at the very center of Gadamer's thinking about *praxis*," writes philosopher Richard Bernstein. "For on the one hand, he acutely analyzes the deformation of *praxis* in the contemporary world, and shows how the main problem facing our civilization is one in which the very possibility for the exercise of *phronesis* is undermined," Bernstein continues, "and yet on the other hand he seems to suggest that, regardless of the type of community in which we live, *phronesis* is always a real possibility."²⁹⁶

294. 8 U.S.C. § 1182(a)(1) ("[a]llies who are mentally retarded"), (a)(8) ("paupers"), (a)(15) ("likely at any time to become public charges"), (a)(28)(A) ("anarchists"), (a)(28)(C)–(H) ("communists") (1988).

295. Bernstein, *supra* note 22, at 272, 286–87.

296. *Id.* at 287.

Gadamer's response to this dilemma is his faith in the ability of dialogue to create, if only for moments or for certain issues, some sense of community, some common rationality. Again, law offers interesting support for Gadamer's aspiration. When courts construe statutes, they engage in a reflective process of evaluating tradition and applying it to new cases, often over a period of many years as an issue works its way around the lower courts and up to the Supreme Court, whose decision in turn often triggers more litigation. That judges must listen to a variety of points of view (sometimes in amicus briefs) and must write decisions that themselves become objects of scrutiny, makes it at least a bit more likely that their dialogue will be informed, rational within the bounds of discourse, and just under the facts of the case.

CONCLUSION:

GADAMER/THE POLITICS OF STATUTORY INTERPRETATION

Reading Gadamer critically, as I have tried to do in this Article, does not provide many *conventional* legal insights. Gadamer does not tell us what steps to follow when we interpret statutes, what evidence to exclude, what dictionary to use. Hermeneutics is not methodological and directive (as Gadamer sees it, anyway). It is, instead, illuminating and therapeutic. Hermeneutics helps us see what we are already doing, to see behind some of the myths that we have intellectually constructed, and (I hope) to throw ourselves into the process in a less alienated way.

The main positive legal insight that Gadamer offers is the need to free statutory interpretation theory from its fetishism about method. Indeed, Gadamer's critique suggests that using method to constrain interpreters or to assure a certain type of result—libertarian, conservative, progressive—is an uncertain enterprise. Gadamer brings to statutory interpretation the lesson that it is an inherently dynamic enterprise and that a spirit of play and inquiry ought to animate the interpreter's approach to the statute. When read in light of the criticisms of his own theory, Gadamer further suggests a "critical agenda" for statutory interpretation and its scholarship—to be more forthrightly dialectical. The opinions in *Boutilier*, with the exception of Judge Moore's dissent in the Second Circuit, are sadly indicative of the mechanical nature of written decisions involving statutes, which not only obscure what is really going on in the decision-making process but which preclude opportunities for real and meaningful dialogue about what a statute should mean.

For interpretation to have the genuine critical bite that Gadamerian interpreters would seek, the Supreme Court ought to be more candid about the political choices that are being made. A forthrightly dialectical opinion in *Boutilier*, for example, would have admitted substantial indeterminacy in the text; support for exclusion in the legislative history, but support weakened by new medical evidence; and ambivalence about excluding someone whose sexual identity was so

cloudy. The Supreme Court would in all probability have reached the same result in 1967 under such a candid analysis, because it would have deferred to the PHS's medical evaluation. That candor would make easier modern-day litigation over whether a PHS certification is necessary for exclusion, now that the PHS has changed its position.²⁹⁷ By tying its decision to stale legislative history, *Boutilier* stalled critical discussion; a more candid decision would have stimulated such discussion, perhaps even in Congress.²⁹⁸

The critical and dialectical play emphasized by Gadamerian theory, and illustrated by my case study of *Boutilier*, might be faulted for tolerating too much lawmaking power by judges. This problem, traditionally voiced by conservatives, now has a progressive voice as well, given the relatively homogeneous and increasingly conservative composition of the federal judiciary. I concur with those seeking greater diversity; to the extent that judges themselves reflect homogeneous pre-understandings not representative of broader society, the system may not well reflect our pluralism.²⁹⁹ But I should also emphasize the liberating nature of the hermeneutical enterprise. A judge who really commits herself to the to-and-fro play required when encountering a difficult text will usually be able to transcend many of her own prejudices. Even for an unrepresentative group of judges, interpretation may nevertheless be a way for them to escape their own limited horizons over time. In this regard, it is noteworthy that the great statutory interpreters of this century—Judges Learned Hand, Henry Friendly and Richard Posner—were appointed by conservative Republican Presidents and (with the probable exception of Hand) came to the bench with conservative values that did not prevent them from approaching statutes creatively—and humanely. The statutory opinions of these jurists achieve greatness by reason of their hermeneutical spirit of play and relentless inquiry. The hermeneutical enterprise enabled each to escape from his own limited horizon.

It might also be objected, from critical scholars, that Gadamerian theory does not liberate interpreters enough from “oppressive” or “distorted” statutory texts. The hermeneutical therapy is not radical enough. I am open to this objection, as indeed are some of Gadamer's friendly commentators (such as Warnke and Ricoeur). And legal theory provides a striking parallel to Habermas's ideal speech situation: Some constitutional scholars have defended the legitimacy of judicial review when it protects minorities excluded from the political pro-

297. See, e.g., *Hill v. INS*, 714 F.2d 1470, 1477 n.9 (9th Cir. 1983).

298. Legislation to overrule *Boutilier* was introduced in both chambers of Congress in 1989, as part of a comprehensive rewriting of the immigration statute's exclusion policy. See *supra* note 233.

299. See Brest, *Interpretation and Interest*, 34 *Stan. L. Rev.* 765, 771 (1982) (interpreter cannot escape “the perspectives that come with our particular backgrounds and experiences”).

cess.³⁰⁰ So, too, statutory interpretation might present opportunities for interpreters to question the text's assumptions more aggressively if they appear to have been formed through a distorted dialectic in which the voices of affected groups were excluded. Yet Gadamer makes me doubtful that a global "foundationalist" critique of statutory assumptions is possible, given the conventions and pre-understandings driving our judiciary, and indeed our whole polity. Because of the intrinsic conservatism of our democracy, and its traditional commitment to incremental change, it is my judgment that cautious Gadamerian hermeneutics may be as dynamic as statutory interpretation can legitimately be. For now.

300. See, e.g., J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 135-70 (1980).