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## Where is My Body? Stanley Fish's Long Goodbye to Law

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# WHERE IS MY BODY? STANLEY FISH'S LONG GOODBYE TO LAW

*Richard Delgado\**

THE TROUBLE WITH PRINCIPLE. By *Stanley Fish*. Cambridge, Massachusetts, and London: Harvard University Press. 1999. Pp. vi, 328. \$24.95.

## THE TROUBLE WITH PRINCIPLE

Stanley Fish,<sup>1</sup> author of *Doing What Comes Naturally*,<sup>2</sup> *Is There a Text in This Class?*,<sup>3</sup> *There's No Such Thing as Free Speech, and It's a Good Thing, Too*,<sup>4</sup> and other paradigm-shifting books, and who recently left law teaching for a position in university administration,<sup>5</sup> has written one last volume giving his colleagues in the profession he left behind something to think about. In his previous work, Fish, who taught English and law at Duke University, addressed central legal issues such as meaning, communication, and textual interpretation, challenging such received wisdoms as that every text has a single, determinate meaning, or that a regime of free speech is the best guarantor of truth and democratic government.

In *The Trouble with Principle*, the celebrated iconoclast takes on another of law's most basic premises, namely, that legal reasoning can attain any measure of certainty greater than that with which the reasoner began (pp. 3-4, 9-10, 43-45). The structure of most legal discourse, Fish writes, is irreducibly rhetorical. Appeals to principle serve only as covert argumentative strategies, and persons who begin an argument by saying, "Let's be fair," or "We must be consistent," are merely postponing the moment when they must put their cards on the table and tell us the cash value of their current platitudes (p. 3).

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1. Dean, College of Liberal Arts and Sciences, University of Illinois at Chicago.

2. STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989).

3. STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

4. STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO* (1994).

5. See Alison Schneider, *Stanley Fish, as a College Dean, Makes a Big Splash and Spares No Expense*, CHRON. HIGHER EDUC., Feb. 4, 2000, at A16.

This Review begins by summarizing *The Trouble with Principle*, paying particular attention to passages that show Fish at his anti-foundationalist best — sections on hate speech (pp. 75-150), affirmative action (pp. 4, 20-21, 26-33, 310), academic freedom (pp. 34-45), and religion (pp. 153-284). Because Fish's prose is elegant but his argument demanding, I offer a metaphor designed to help readers understand Fish's insight.<sup>6</sup> I then show that the defect Fish highlights is part of a larger disconnection that afflicts legal discourse, looming up not only when we discuss affirmative action, hate speech, and other controversial public-law issues, but also when we try to fit ordinary private-law rules into a coherent system.<sup>7</sup> In short, Fish exposes only part of a more general self-delusion running throughout our system of legal thought. In a concluding section, I recommend a pragmatic, anti-normative approach, similar to Fish's, but applied more broadly, to guard against thuggery operating under the guise of principle. Such an approach, tied closely to our deeply held moral convictions, I argue, can help us remember to support what we need to support, resist what we need to resist, and avoid losing our way, like a proprioceptively handicapped patient,<sup>8</sup> in the "body of law."

### I. CATCHING A BIG ONE: FISH ON PRINCIPLE

Consider the controversy that broke out when civil rights activists demanded that South Carolina stop flying the Confederate flag over its statehouse on the ground that it insults African Americans by gratuitously recalling the evil regime of slavery.<sup>9</sup> For their part, a number of South Carolina citizens retorted that the flag has nothing to do with slavery or white supremacy, but merely symbolizes regional pride and tradition.<sup>10</sup> They marshaled, in other words, the very same principles — respect for history and the feelings of a social group — that blacks and their supporters invoked to retire the flag.

Or, consider the controversy that broke out on January 17, 2000, General Robert E. Lee's birthday, when an unknown person set fire to a banner of the Confederate general in Richmond, Virginia.<sup>11</sup> The Sons of Confederate Veterans immediately demanded that the police

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6. See *infra* Parts II-III.

7. See *infra* Part III.

8. See *infra* notes 45-59 and accompanying text (explaining and applying this metaphor).

9. See David Firestone, *South Carolina Votes to Remove Confederate Flag from Dome*, N.Y. TIMES, May 19, 2000, at A16.

10. See *id.*

11. See Craig Timberg, *Group Calls Banner Burning a Crime*, BOULDER (COLO.) DAILY CAMERA, Jan. 19, 2000, at A-3.

treat the torching as a hate crime.<sup>12</sup> As with the first example, forces on either side of the controversy cited the same principle — anti-bigotry — in support of their position.

Over the course of sixteen short but tightly woven chapters, Stanley Fish documents how paying attention to the way language works in controversies like these enables us to avoid ensnarement in traps of our own — or our adversaries' — making. He shows how arguments from principle almost always conceal, in fact presuppose, politics and self-interest. He explains how we can avoid having principles we hold up on one occasion turned against us on another.

Consider a widely held principle of ethics: that one should keep one's word. In an early passage, Fish mentions an episode from the classic western movie *The Wild Bunch*, which features an outlaw gang led by two grizzled veterans, played by William Holden and Ernest Borgnine (pp. 1-2). At one point in the movie, the two characters are sitting around discussing a one-time comrade-in-arms who has gone straight and now rides at the head of a band of railroad enforcement officers bent on bringing his former friends to justice. The Borgnine character muses that he cannot believe their old friend changed sides and wonders why he does not return to the gang, where the stakes are higher and the life more exciting. The Holden character reminds Borgnine that the turncoat undoubtedly gave his word to the railroad. So what? Borgnine replies. It's not giving your word that is important — it is whom you give your word to (pp. 1-2).

The exchange makes plain that Fish sides with the “contextualizer” — the Borgnine character. Principles rarely guide us in the abstract; only in their use. Always stated at such a high level of generality that a speaker can use them to arrive at whatever conclusion he wants, their very point, according to Fish, is to make discourse appear inevitable and high-minded, when it is the social and political commitments of the speaker that allow them to gain any purchase (e.g., pp. 3, 8-10, 44-45, 115-17, 142-46). And, if we had the courage of our convictions, we would do away with the overlay of appeals to principle that litter so much of legal and social discourse and amount to little more than noise.<sup>13</sup>

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12. *Id.* As everyone knows, civil rights groups have been urging enactment of hate-crime statutes that criminalize burning crosses and other acts that send messages of hate to minority communities.

13. Pp. 142-43, 146 (urging that we make decisions “nakedly” — without dressing them up in abstractions). To be sure, in other places Fish argues that we are quite unlikely to go this far, and so ends up recommending that we argue principles for all they are worth. See *infra* note 39 and accompanying text. Fish's suggestion is typical of anti-foundationalists generally, who maintain that foundations, like theories and principles, give us nothing that we did not have already, and that we can reason, understand, communicate, and have knowledge perfectly well without them. See, e.g., p. 14 (“[Y]ou are on your own . . . the resources you need are within you if . . . anywhere.”); Stephen M. Feldman, *The Supreme Court in a Postmodern World: A Flying Elephant*, 84 MINN. L. REV. 673, 676 (2000).

Part I of Fish's book sets out the case against neutral principles, including their inability to appear in any guise "not hostage to [a] partisan agenda."<sup>14</sup> Imagine that someone says: "Let's be fair." Fine, but what kind of fairness? Fairness of equality? Fairness of result? Fairness as merit? Fairness of equal opportunity? Taking into account disadvantage? (pp. 2-3). Abstractions like fairness, reasonableness, and mutual respect only gain content by proceeding "from the vantage point of some currently unexamined assumptions about the way life is or should be" (pp. 2-3). When someone begins an argument by invoking a principle of some sort, we only learn where he is going a little later, when we find out what he *means* by fairness or equality or due process. "[T]hat someone is invoking neutral principles will give you no clue as to where he is likely to come out until he actually arrives there and reveals his substantive positions" (p. 8).

One cannot avoid, then, getting substantive and engaging in frankly partisan, ends-based reasoning. Moral commitments are all we really know; principles only help "partisan agents to attach an honorific vocabulary to their agendas" (p. 7). Throughout history, some of the worst cruelty has been carried out in the name of principle — eugenics,<sup>15</sup> Manifest Destiny,<sup>16</sup> converting souls to Catholicism.<sup>17</sup> One sometimes cannot avoid resorting to principle in making one's point.<sup>18</sup> But one should do so for consciously acknowledged rhetorical reasons — to advance one's cause, to provide a judge an excuse for ruling in one's favor — while fully aware that one's opponent will be trying to do the same thing.

By the same token, one should be wary of the many ways arguments from principle can serve ignoble ends. For example, Fish notes that for conservatives, "the basic move is to turn historically saturated situations into [ones] detached from any specific historical circumstance and then conclude that a proposed policy either follows from this carefully emptied context or is barred by it."<sup>19</sup> Thus, when

14. Pp. 2-3. For Fish, this is their most serious drawback. The next most important is that they hide what is really going on; bad things are done in their name.

15. That is, purification of the human race. See, e.g., DANIEL J. KEVLES, *IN THE NAME OF EUGENICS* (1985).

16. See ROBERT A. WILLIAMS JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 142, 185, 233-80 (1990).

17. On the Inquisition, see, e.g., *id.* at 85, 94, 155. On the North American version, see JUAN PEREA, RICHARD DELGADO, ANGELA HARRIS & STEPHANIE WILDMAN, *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 173-78 (2000).

18. For example, courts often expect lawyers to recite cases (a type of principle) in support of their position, and in close cases tolerate arguments based on public policy. See *infra* note 41 and accompanying text.

19. P. 4; see also p. 43 (arguing that the ACLU style of thinking is often parroted by individuals with definite goals — not free speech "but sales of pornography, maintenance of lily-white construction crews, the disadvantaging of minority religions, and so on").

Justice Brown in *Plessy v. Ferguson* approved a railroad's "separate but equal" law that consigned blacks to certain designated cars, on the disingenuous ground that it treated black and white passengers "the same," he detached a rule or act from its historical meaning — indeed, from any meaning at all.<sup>20</sup> Any principle, Fish writes, even that of non-discrimination, arises in response to historical circumstances. In 1954, society came to believe that discrimination is wrong;<sup>21</sup> before that, it did not. The principle, then, has no inherent meaning; that comes only from the substantive issues with which it has been associated.

Left of center on most (not all) issues, Fish makes many of his points in the first part, entitled "Politics All the Way Down," at the expense of conservatives. For example, he points out that writers of this persuasion are prone to decry current "circumstances," complaining that the country has gone to the dogs, liberals are running the campuses, barbarians are at the gates, and they — the right — are the brave defenders of value in a wilderness increasingly devoid of it (pp. 20-21). But at the same time, they insist that Hispanics and blacks should rise above "circumstances," unaided by affirmative action or special measures aimed at redressing past disadvantage.<sup>22</sup> The same crowd at one time draws attention to circumstances, and at another dismisses their relevance.

Neutral principles not only provide feeble guidance, they disable us from seeing differences that matter, such as those between pornography and Michelangelo, between oppression and the relief of it, between advocacy of racial reform and Nazis marching in Skokie.<sup>23</sup> ("Nazism is an idea, after all, is it not?"). After *Brown v. Board of Education*<sup>24</sup> was decided, Herbert Wechsler wondered whether the case was principled, since it seemed arbitrarily to trade the right of blacks to associate with whites for the right of whites *not* to associate with blacks (p. 26). But equations like that one, Fish writes, empty desires of any historical content and equalize them when they are far from morally equivalent (pp. 26-27). For example, a legal test that asks whether a measure displays race-consciousness and, if so, mechanically strikes it down, "displaces history and morality."<sup>25</sup> One that helps

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20. P. 4; *see also* pp. 5-15 (questioning whether any policy can treat fairly and equally groups with radically different histories and current situations).

21. *See* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); pp. 4-7.

22. Pp. 29-33.

23. Pp. 21-27. That is, principles do not enable us to do what their proponents argue they can: adjudicate impartially among competing views, desires, and interest groups. Pp. 21-26.

24. 347 U.S. 483 (1954).

25. Pp. 26-28. "This is the trouble with principles determined to be neutral: they operate by sacrificing everything people care about to their own purity." P. 28. By investing too much in these meaningless concepts — meaningless save any association they have with po-

a disadvantaged group advance is a radically different one from one that allows white males to sue to stop them.<sup>26</sup> Neutral principles do not tell us this — they cannot — but morality and history do.<sup>27</sup> In a remarkable tour de force, Fish concludes an early chapter by critiquing nine arguments, each impeccably principled, against affirmative action, showing that each collapses on examination, revealing the poverty and churlishness in the hearts of those who deploy them (pp. 29-33).

Sections on multiculturalism (Chapter Four), hate speech (Chapter Five), affirmative action (Chapter One), academic politics (Chapter Two), and the Western canon (Chapter Three) drive home that “[l]iberal neutrality does political work so well because it has assumed the mantle of being above politic[s]” (p. 44), so that “if you don’t like the political work it is doing, you must labor to take the mantle away, strip off the veneer of principle so that policies that wear the mask of principle will be forced to identify themselves for what they are and what they are not” (p. 44). Affirmative action, for example, is good or bad, not because it violates or legitimates some principle. Reasonable arguments may be made about it — Does it work? Does it stigmatize its intended beneficiaries? — but these are the right ones to ask. “[T]he debate is always between competing structures of exclusion” (p. 44). Principles and abstractions have no independent moral force “except as the rhetorical accompaniments of practices in search of good public relations” (p. 45). Fish cautions his readers to beware of moments when one’s opponents “have a public relations machine so good that it’s killing you, for then you’re going to have to stop and try to take it apart” (p. 45).

But Fish is not only hard on conservatives. In the middle sections of his book, he examines some items of faith dear to the left, including multiculturalism, whose advocates, according to Fish, are rarely prepared to follow it to its logical conclusion. They quickly pull back when one of the cultures they have been defending engages in something they consider barbaric (such as female genital surgery or *fatwahs*

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sitions that they have previously been connected with — we become bogged down, tricked into inaction and complacency. *See infra* notes 31-35 and accompanying text.

26. Pp. 26-28, 79-82, 287. By allowing ourselves to be led off into a search for something other than our substantive convictions, by claiming to rely on a higher force, we suffer a “forced inability to make distinctions that would be perfectly clear to any well-informed teenager.” P. 43 (going on to cite as an example the difference between a lynching and a minority set-aside).

27. Pp. 3, 4-7, 9, 12-14, 146, 242, 287, 293. When an argument is framed in a way that “labels itself a higher morality [it ends up being] so high that, from its lofty perspective, we are unable to see either the forest or the trees.” P. 29; *see also* p. 14 (equating morality with taking a stand).

aimed at writers who challenge religious orthodoxy) or begin denying the legitimacy of other cultures or religions.<sup>28</sup>

Chapter Five, entitled “The Rhetoric of Regret,”<sup>29</sup> skewers a second liberal platitude, free speech, which Fish considers yet another perverse manifestation of proceduralism. The American Civil Liberties Union, for example, imagines itself bravely standing up for Nazis and other unpopular speakers, and rising above mere preference (pp. 78-79). Society is supposed to be even-handed as among speakers, preferring none and disadvantaging none, not even ones voicing ideas we justly despise (pp. 76-79). But as later chapters point out, every speech act discriminates against ones left unsaid; every utterance aims at killing another, countervailing one. That is what speech does; its very conditions entail selection among points of view (pp. 93-94, 98, 122-24). The idea of a perfectly free marketplace of ideas in which uncommitted observers dispassionately sample and choose ideas, somewhat in the manner of a diner selecting from a restaurant menu, is conceptual nonsense.

The notion of pre-normative tolerance is not only impossible, the argument that it is the cornerstone of Western democracy is demonstrably false. The United States fought World War II not because Nazis were intolerant of free speech, but of Jews (pp. 83-85). If anything, “[I]t is the habit of framing everything in terms of principle that makes people confused about what they really want and renders them vulnerable to certain argumentative ploys” (pp. 88, 20-21). Speech is always coercive. “You go to the trouble of asserting *X* because some other persons have been asserting *Y*” (p. 93). One speaks not to encourage others to speak but to change something in the world, to bind others to one’s point of view (p. 93). All speech is action; all free speech defenders (even self-professed absolutists) admit exceptions corresponding to that which they politically detest (p. 94).

The way to resolve most speech controversies is to consider one’s substantive commitments and apply ordinary common sense. For ex-

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28. Pp. 56-59. This superficial, or “boutique,” multiculturalism illustrates the shallowness of reducing everything to an abstract notion of individual rights. A boutique multiculturalist respects another culture and takes an interest in it until he or she gets to the core or substance of it. The multiculturalist does not embrace the substance of the religion, the part those who follow it feel most strongly about, particularly if the religion denies the legitimacy of other religions. This is so because the multiculturalist is caught up, not in human rights, but in the capacity to exercise those rights. Fish further explores this problem in his discussion of academic freedom: “What you are is your capacity for speech, belief, and choice and not what is believed and spoken and chosen, then you are obligated, as a mark of self respect — since you define yourself by general capacities that belong equally to everyone — to respect the beliefs, utterances, and choices of others.” This focus on capacity rather than substance renders one, “morally thin.” P. 41. In the end, multiculturalism turns out to be “an incoherent concept that cannot be meaningfully affirmed or rejected.” P. 66.

29. P. 75. The term comes from the ACLU’s frequent soulful professions that it detests Nazis, pornographers, and utterers of hate speech, but must defend them anyway, for the sake of principle. Pp. 78-79.



ample, what is the difference between having Marxists or bigots speak on campus? Easy — Marxists are educationally useful, bigots are not (p. 89). What is the difference between a law prohibiting demonstrators from harassing women seeking abortion counseling and a hunter's rights bill that penalizes animal rights activists who approach hunters with picket signs? Also easy — history discloses no great need to protect hunters, but more than one thousand acts of violence at abortion clinics made a protective bill for women going there necessary (p. 89). What is the difference between early civil rights bills and recent race-conscious efforts to ease college admissions for blacks and Hispanics? Nothing — the early bills were aimed not at producing a colorblind society but at improving conditions for blacks, just as the current measures are.<sup>30</sup>

Who is to decide speech controversies — judges, college presidents? Where does one draw the line? Sometimes the consequences of *not* drawing the line are intolerable (pp. 91-92). As an example of a case where the judiciary backed away from an opportunity to draw a clear normative line, Fish gives the case of Skokie. Other examples might be hate speech, pornography, and violent TV programming aimed at young children. “[R]egulation [which draws lines] is a constitutive feature of social life, not a deformation of it” (p. 127). Speech and censorship are inseparable. In the final pages of Part II, Fish turns to the work of First Amendment theorists such as Robert Post, Richard Abel, and Judith Butler, all of whom criticize the legal system for invoking medieval formulas and would-be universalisms, but end up either not going far enough or shrinking from their own conclusions and embracing some new universalism (pp. 126-42). Fish concludes by urging that we make decisions “nakedly” — by resort to substantive visions of what is good and desirable, not from theory purporting to have erased substance.<sup>31</sup> If one's substantive convictions already tell one what to do, why invoke an abstraction? Doing so just invites the other side to invoke a countervailing one, so that the rest of the conversation is framed in terms of bloodless entities, when the situation (in the words of the title of one of Fish's chapters) is “fraught with death.”<sup>32</sup>

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30. P. 89. By the law's logic, however, all these groups — Marxists and bigots, hunters and abortion providers — stand on the same footing, smashed together by an overarching principle, with the result that “in our own history, procedural justice has been contaminated by the very value judgments it supposedly brackets.” P. 75.

31. Pp. 67-71, 142-46, 149 (pointing out that many liberals see hate speech as a problem of disrespectful communication, when it is in fact an evil to be confronted and extinguished).

32. Chapter 6 (pp. 93-114) (analyzing the Skokie case and the impossibility of free speech). This maneuver often works: “In recent years, liberals have been discombobulated when a practice they abhor is defended by invoking the same principle they had themselves invoked in order to argue for a position they favor.” P. 88.

In Part III (“Reasons for the Devout”), Fish, somewhat surprisingly, takes up the cause of religion. Liberal reasoning always fails to come to terms with that institution, in part because the devout believer places his values over “fairness,” “dialog,” and “tolerance of other points of view,” principles the liberal relies on to keep everything more or less in line (p. 208-09). For example, liberals would like to rein in religiously motivated abortion protesters who hound women at clinics (pp. 89, 297). But their arguments fall on deaf ears because the protesters consider that they are protecting human life, the highest principle of all (pp. 187, 209). Any principle the liberal holds up, such as “dialog,” or “consideration of other people’s point of view,” will make little impression on the ardent believer, for that is the nature of religious belief — to be intolerant of other systems (p. 297). Religion is not like a graduate seminar, where every point of view is considered on its own merits.<sup>33</sup> “[T]here are no reasons you can give to the devout, not because they are the kind of people who don’t listen to reason but because the reasons you might give can never be reasons for them unless they convert to your faith or you . . . to theirs” (p. 209).

In short, religion, like “every discourse, even one filled with words like ‘fair’ and ‘impartial,’ is an engine of exclusion and therefore a means of coercion” (p. 223). The very way we frame controversies — for example, as viewpoint censorship (in case one is disposed to grant funding of some religious group) *versus* establishment of religion (if one is negatively disposed) — determines the outcome (p. 228). “Liberalism’s attempt to come to terms with illiberal energies . . . cannot succeed without enacting the illiberalism it opposes” (p. 242). Fish finds fault with contemporary writers such as Daniel Conkle (pp. 187-88), Thomas Nagel (pp. 181-85), Amy Gutmann (pp. 65-70), Kent Greenawalt (pp. 211-20), and Steven Smith (pp. 229-33), each of whom attempts to come to terms with illiberal energies but ultimately ends up reinscribing some version of current practice.<sup>34</sup> He then turns the usual wisdom on its head and argues that “[i]mmorality [affirmatively] resides in the mantras of liberal theory — fairness, impartiality, and mutual respect — all devices for painting the world various shades of gray” (p. 242) and rendering us confused, ambivalent puppets ready for takeover by determined adversaries or faceless bureaucrats.<sup>35</sup>

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33. Pp. 40, 68, 297; *see also* p. 185 (positing that recent writers are guilty of this confusion and, as a result, end up privileging one regime or another under the guise of some favorite — usually high-sounding — principle).

34. Or, in short, liberalism — precisely that which strong religions want to topple and resist.

35. Pp. 241-42; *see also* pp. 2, 43, 103, 310-12. On the critique of normativity as posing some of the same dangers, *see* Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933 (1991).

Beliefs do change, Fish says, not by resort to arguments from principle, but by pointing out to the adversary that the consequences of his or her belief conflict with something dear to him.<sup>36</sup> Fish recounts the experience of a devotee of human eugenics who heard a speech by a leading white supremacist. Among other things, the speaker railed at society's unwillingness to rid itself of misfits such as children born with cleft palates (pp. 281-82). The listener, who had a child with cleft palate of whom he was very fond, immediately reconsidered his position — not as a result of any argument from principle, but rather upon learning that his fellow travelers espoused something he could not support because of something in his life (pp. 282-83).

In a final section, entitled "Credo," Fish gives his readers a glimmer of what he does believe.<sup>37</sup> The list will come as no surprise: antiracism, affirmative action, legal protection for the environment and for historically disadvantaged groups such as gays and lesbians, and toleration for radical or marginalized religions.<sup>38</sup> In deciding how to advance one's commitments, Fish recommends the approach known as pragmatism: decide particular courses of action in light of current and historical circumstances, including the probability of success, the likelihood of backlash, and the range of options available.<sup>39</sup> It is these midlevel, local, and historical concerns — the very ones that arguments from principle claim to transcend — that should guide us.<sup>40</sup> Nothing is wrong with rhetoric and persuasion, Fish says, even including arguments from principle, if one thinks these will wound one's adversary or give him pause. But in trying to decide, for ourselves, what to *do*, where to throw our weight, we need more compelling material than that.

Thus, although Fish first suggests we abandon principle, he later offers this more pragmatic approach (pp. 8, 44-45, 126-42). In the first part of the book he suggests fairly explicitly that we jettison principle: "What's a liberal to do? My answer is simply: forget about the principle (and therefore stop being a liberal), which was never what you were interested in the first place, and make an argument for the policy on policy grounds, that is, on the grounds that you think it is good and right" (p. 89). But the use of principle is not only an approved, but a necessary move, so that Fish cheerfully acknowledges that his original

36. Pp. 301, 307-08; *see also* pp. 282-83.

37. Part IV (pp. 279-312). He believes that his beliefs rest on no foundation. Pp. 279-80. "[B]elief is prior to rationality." P. 284.

38. Pp. 285, 291, 310-12; *see also* pp. 148-49.

39. Pp. 293-308.

40. P. 312; *see also* p. 63 (approving a version of Charles Taylor's "inspired adhocery": "What [I] mean is that the solutions to particular problems will be found by regarding each situation-of-crisis as an opportunity for improvisation and not as an occasion for the application of rules and principles. . . .").

suggestion collapses “in the wake of formalism’s failure — the failure of the search for neutral principles — everything remains as it was” (p. 294). Ultimately, then, Fish’s solution is to embrace the rhetorical value of principle and exploit it for all its worth: “You are free to deploy it (or not) when the occasion suggests it would be good to do so. . . . Since they won’t commit you to acting in any particular way, you can traffic in them without worrying that some bad residue will be left on your skin” (p. 295). Fish comes full circle, yet at the end of our journey we are better off: we no longer need to feel the internal conflict that ensues from adhering to a certain principle in one situation and arguing against it in another. Because we are no longer duped by principles — understanding them for what they are and are not — “[r]hetorics in long, short, and middle versions are already there for the quarrying; and what’s even better, using them in a moment of need commits you to nothing, necessarily, in the next moment. After you have gotten from one what you want, you can just put it back on the shelf” (p. 296). Fish is offering awareness of the rhetorical power of principle as a tool for effectively dealing with conservatives who use liberal principles, but “repackaged and put in the service of the very agenda [we] once fought” (p. 312). In short, pragmatism.

“[M]inds [including legal ones] are never open except [with respect to] matters of indifference. . . .”<sup>41</sup> Is this cynicism? No, only apt description. Religion *cannot* be tolerant — that is a contradiction in terms, a little like a veggie burger. Liberalism *cannot* deal sensibly with affirmative action, hate speech, or academic freedom — it ends up tying itself in knots.<sup>42</sup> Near the end of his book, Fish addresses the question many readers might be wondering about, namely, if principle offers no safeguard against tyranny and raw power, what does? Fish answers that the best weapon we have — aside from our own moral convictions and well-honed rhetoric — is a constitutional structure that includes separation of powers.<sup>43</sup> This structure erects a barrier against official oppression, namely a system of “checks and balances” that divides government, assures slow change, and discourages spontaneous action aimed at hurting small groups or the sorts of “conflicts that tore English society apart in the seventeenth century” (p. 301). “These virtues [depriving people and state actors of opportunities for oppression] are the properties of the system, not of those who live un-

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41. P. 289. In law, the question is “what will go” in this case or that — which courses of action, which rulings, will be perceived as respectable and familiar (“We’ve seen this before”). Lawyers’ stock-in-trade is finding and putting forward “something people like us say when issues like this come up” — in short precedent. Judging is rhetoric of a certain stylized, conventional kind. Pp. 288-89; *see also* Feldman, *supra* note 13, at 692 (observing that the public needs to believe that judges act on the basis of constitutional principles).

42. Pp. 63-66, 71, 79, 187. And, if it doesn’t, its conservative enemies quickly accomplish that through a series of standard moves.

43. P. 301; *see also* p. 306 (reiterating role of founding documents).

der it.”<sup>44</sup>

After a brief excursion into the role of *metaphor*, this Review examines whether Fish’s faith in constitutional structure as a safeguard against tyranny is warranted.

## II. A METAPHOR FOR STANLEY FISH: THE BODY OF LAW AS PROPRIOCEPTIVELY DERANGED

Fish’s prose style is clean and lucid. But his argument is so intricate, demanding, and, at times, counterintuitive that many readers may fail to grasp its full sweep.<sup>45</sup> As an aid to the lost (or time-pressured) reader, consider the metaphor of the legal system as a proprioceptively damaged human body.

In recent years, legal commentators have called attention to the way certain features of legal reasoning resemble patients who suffer a type of neurological impairment, namely damage to the body’s proprioceptive centers.<sup>46</sup> For the reader unfamiliar with it, proprioception is the name for the human faculty — a sort of sixth sense — that informs us about our bodily position and location of our limbs in relation to each other.<sup>47</sup> It tells us whether we are standing straight or leaning forward, without having to look. Patients who lose this sense, through injury or illness, feel disembodied.<sup>48</sup> Unable to locate their

44. P. 306. Fish appears to recognize that deconstruction of principle, even if it makes liberals feel better about adhering to one principle for one agenda and abandoning it the next, does little for the disenfranchised suffering from, e.g., affirmative action’s demise or the law’s toleration of hate speech. Merely showing that the sources of one’s misery lies in conservatives’ better use of rhetoric is little solace. Thus, Fish recognizes that other safeguards are needed and that they may be found, perhaps, in the structure of the Constitution.

45. Fish himself appears to recognize his own thesis’s counterintuitive nature. See Stanley Fish, *Children and the First Amendment*, 29 CONN. L. REV. 883, 891 (1997) (noting that desires and principles are inversely related, not the way most people think). Desires come first and last, and we carefully choose principles in between that will bridge them. Instead of following our principles wherever they may lead, we “figure out what [we] think should happen and then look around for principles, First Amendment or any other, that will help [us] to get there.” *Id.*

46. E.g., Julia E. Hanigsberg, *Homologizing Pregnancy and Motherhood: A Consideration of Abortion*, 94 MICH. L. REV. 371, 382 n.50 (1995); Jeffrey Brand-Ballard, *Reconstructing MacKinnon: Essentialism, Humanism, Feminism*, 6 S. CAL. REV. L. & WOMEN’S STUD. 89, 170 (1996); Lisa Fry, *Finding the Body* (unpublished, 1997, on file with author). Proprioception is used to provide our internal body image — that is, the way (in addition to visual stimuli) in which our brain receives information about the position of our body. Proprioceptors are sense organs buried deep in the tissues of muscles, tendons, and joints that give rise to the sensations of weight, positions of the body, and the amount of bending in various joints. When this system sustains an injury, one literally loses touch with one’s body.

47. See STEDMAN’S MEDICAL DICTIONARY 1458-59 (Maureen Barlow Pugh et al. eds., 27th ed. 1995).

48. See *infra* text accompanying notes 50-59.

bodies in relation to themselves and to objects in the external world, they describe themselves as bodiless or “pithed.”<sup>49</sup>

In a chapter of his book, *The Man Who Mistook His Wife for a Hat*,<sup>50</sup> neurosurgeon Oliver Sacks describes a patient named Christina, the “disembodied lady.”<sup>51</sup> Christina, who until that time had been a robust, self-assured young woman who worked as a computer programmer and liked hockey and riding, was admitted to the hospital for a gallstone operation.<sup>52</sup> On the day of the operation, perhaps as a reaction to routine antibiotic treatment, Christina had a disturbing dream, in which she swayed wildly, could not feel the ground underneath herself, and kept dropping things because she could hardly feel anything in her hands.<sup>53</sup> A psychiatrist diagnosed her as suffering from pre-operative anxiety (“we see it all the time”),<sup>54</sup> but later that day Christina’s dream came true. She found herself unsteady on her feet, in danger of toppling over, and could hold nothing in her hands, which “wandered” unless she kept an eye on them.<sup>55</sup> On testing, her parietal lobes turned out to be working, but “had nothing to work with.”<sup>56</sup> She had lost all proprioception and had no muscle, tendon, or neuroskeletal sense whatever. Her position sense was entirely gone, never to return.<sup>57</sup>

Christina is condemned to live in an indescribable, unimaginable realm — though ‘non-realm’, and ‘nothingness’, might be . . . better words for it. At times she breaks down — not in public, but with me: ‘If only I could *feel!*’ she cries. ‘But I’ve forgotten what it’s like . . . I was normal, wasn’t I? I *did* move like everyone else?’<sup>58</sup>

Sacks took to showing Christina home movies of herself with her children, taken just before the onset of her condition, before she became “pithed,” “disembodied,” “a sort of wraith.”<sup>59</sup>

The plight of the proprioceptively impaired individual is similar to the predicament Fish diagnoses in the person who approaches real-world problems by first asking what principle commands and ends up

49. See *infra* text accompanying notes 57-59.

50. OLIVER SACKS, *THE MAN WHO MISTOOK HIS WIFE FOR A HAT, AND OTHER CLINICAL TALES* (1985).

51. *Id.* at 42-52 (ch. 3, “The Disembodied Lady”).

52. See *id.* at 43.

53. See *id.* at 43-44.

54. *Id.* at 44.

55. *Id.*

56. *Id.* at 45.

57. See *id.* at 45-52 (describing how she recovered some of her ability to function by learning to examine herself closely every few seconds).

58. *Id.* at 50.

59. *Id.* at 44, 50, 52.

paralyzed, disconnected from the very sources of information that could tell him or her what to do (pp. 20-21, 67-71, 88, 142-49, 241-42). In some respects, his fate is even worse than that of Christina, who only needed to open her eyes to see where her hands were.<sup>60</sup> One who puts his faith in principle sees an infinitude of hands, with little way of telling which are his own. Like a pithed patient, he is doomed to inhabit a body of law filled with myriad, often contradictory, principles, each with a seemingly equal claim to his allegiance and pointing in different directions.<sup>61</sup>

When Fish writes that substantive commitments are more important than neutral principles, when social scientists point out that high scores on the Graduate Record Exam are negatively correlated with social empathy,<sup>62</sup> and when a recent book documents that higher levels of education were inversely related rescue behavior toward Jews during the Holocaust,<sup>63</sup> he is highlighting different aspects of the same

60. See *id.* at 46-49.

61. See *supra* notes 30, 32, 34 and accompanying text. Like the patient whose proprioception is compromised, legal thinkers can go through their professional lives slightly (or in some cases, greatly) “out of touch,” but unable to quite put their fingers on why. Like the patient, their sense of self is skewed, their positional senses dictated by principles that, rather than being full of meaning and, therefore, providing some semblance of guidance, are literally empty — waiting to be spewed to fit any agenda, waiting to be filled in the blank to justify whichever outcome is sought. The contradictory results that Fish cites — restrictions on affirmative action, protecting speech that ends up suppressing other voices, the hypocrisy of academic freedom, our schizophrenic view of religion — are each a result of this artificial guidance system. See Jack M. Balkin, *The Court Defers to a Racist Era*, N.Y. TIMES, May 17, 2000, at A23 (noting that the Supreme Court and Congress view much of civil rights legislation as based on the Interstate Commerce Clause, when a more natural home would be the Fourteenth Amendment). Just as Sacks’s Christina “consciously or automatically adopted and sustained a sort of forced or wilful or histrionic posture to make up for the continuing lack of any genuine, natural posture,” SACKS, *supra* note 50, at 48, by relying on a flawed guidance system, the legal actor backs into awkward, inauthentic results.

Who, then, will be the neurologist for our society? We will have to dismantle our rhetoric, suggests Fish, and realize that to hide behind principle is like kicking someone underneath a glass table — you are fooling no one. When we step away from the constraints of principle, we will walk straight again. For example, when we step back from the notion of a colorblind Constitution we will recognize that it does make a difference if the active party is the KKK or the NAACP. Similarly, when we are free from the clutches of a lofty but empty notion of individual rights we will see that a Shakespearean sonnet and hard-core pornography are distinct. By recognizing that one cannot have a procedural mechanism that is not hostage to judgments of substance, one will no longer be forced to defend speech acts one despises, or brush one’s values aside for the sake of procedural purity. Pp. 2, 75, 117.

62. The exam measures ability to reason abstractly, i.e., from principle. This ability often correlates incorrectly with social empathy. See Leonard L. Baird, *Biographical and Educational Correlates of Graduate and Professional School Admissions Test Scores*, 36 EDUC. & PSYCHOL. MEASUREMENT 415, 417-18 tbl. 1 (1976). The same author found that LSAT scores correlate negatively with the ability to relate to others on an individual basis. *Id.* at 419. They do, however, correlate positively with a self-oriented, hedonistic personality. See ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE 213 (1993). For a discussion of the different types of mental ability, see DANIEL GOLEMAN, WORKING WITH EMOTIONAL INTELLIGENCE (1998).

63. SAMUEL P. OLINER & PEARL M. OLINER, THE ALTRUISTIC PERSONALITY: RESCUERS OF JEWS IN NAZI EUROPE (1988).

phenomenon: abstraction and principle cause human beings to behave like decerebrates and to display less, rather than more, intelligence in ordering their own affairs.<sup>64</sup> “This [then,] is the trouble with principles . . . they operate by sacrificing everything people care about to their own purity. [They] become[ ] ‘an end in itself’ that blithely disregard[ ] any other value.”<sup>65</sup>

Fish is right about the unreliability of principle and also about what we should depend on in our personal lives, instead. But what of his suggestion that, with law and politics, we look not to principle, but to the structure of our Constitution, including separation of powers, for guidance? Unfortunately, that feature turns out to offer no more protection than does our current fascination with principle.

### III. DISCONNECT — HOW OUR SYSTEM OF PUBLIC AND PRIVATE LAW OPERATES AT CROSS-PURPOSES

According to Fish, we should abjure principle as a guide to personal action and look instead to two other sources — our own moral commitments, in the personal realm,<sup>66</sup> and the principle of separation of powers, which assures that governmental authority is weakened and subject to constant checks and balances, including popular will, in the political one.<sup>67</sup> Nothing is wrong with relying on one’s own substantive moral commitments. But with his second prescription, Fish falls into the same proceduralist trap he warns against elsewhere. Government has even fewer scruples than individual actors do; indeed, the hope that it will restrain itself for reasons of morality is probably the most classic category mistake of all.<sup>68</sup> Even more than individual actors, governments have readily accessible a panoply of principles — sovereignty, national interest, free trade, manifest destiny, even human rights — to rationalize what they really want to do.<sup>69</sup>

Fish believes that, even if government is inclined to act badly, our constitutional principles of limited government, separation of powers, and checks and balances, will guard against overreaching (p. 301). But consider how readily government can find ways around these limiting principles. Congress is supposed to be the only branch of government able to declare war.<sup>70</sup> Yet, the president is the commander-in-chief of

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64. See Delgado, *supra* note 35, at 938-59.

65. P. 28 (quoting Charles Krauthammer); see also Delgado, *supra* note 35.

66. Pp. 2, 7-8, 43, 93-114, 242-43, 310-12; see also *supra* note 39 and accompanying text.

67. See *supra* notes 42-43 and accompanying text.

68. By the term “category mistake,” I mean the practice of attributing meaning or efficacy to a category or thing that cannot have it (e.g., What is the flavor of yellow?).

69. See, e.g., NICCOLO MACHIAVELLI, THE PRINCE AND THE DISCOURSES (Luigi Ricci & E.R.P. Vincent transl., Random House, 1950) (1513).

70. U.S. CONST. art. I, § 8, cl. 11.



the armed forces.<sup>71</sup> Since he is able to deploy troops practically at will, it is easy for the president to circumvent Congress's authority; indeed, most recent wars have been undeclared.<sup>72</sup>

Or, consider the Plenary Power doctrine, under which the judiciary declines to review matters having to do with immigration, even ones presenting clear-cut equal protection issues,<sup>73</sup> or the myriad of related doctrines, including abstention,<sup>74</sup> mootness,<sup>75</sup> and political questions<sup>76</sup> that enable judges to avoid deciding issues that might require politically sensitive interference with another branch of government.<sup>77</sup>

Well-funded interest groups and corporations are able to ensure that all three branches of government favor policies they want advanced,<sup>78</sup> rendering chimerical the hope that any one of them will act as a real check against another in an area vitally affecting the interests of corporate power or the military. When powerful interest groups need immediate action, they increasingly short-circuit the political process by financing referenda and initiative campaigns that mobilize the public on behalf of tax-cutting, nativist, or antiminority measures.<sup>79</sup>

Finally, the very structure of our system of public and private law suffers from such a major disjunction, traceable to our founding documents, that adroit invocation of a high-sounding principle will generally allow one to reach any desired result. This is worth explaining in some detail.

The large ideas underlying American public law — administrative regularity, the equality of all moral agents, one-man one vote, due process/dignity of treatment, dialog/free speech — have always stood in tension with those that govern private law — free accumulation of

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71. *Id.*, art. II, § 2, cl. 1.

72. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-7 at 231 (2d ed. 1988).

73. See THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, AND HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 268-70, 925-85 (4th ed. 1998); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545 (1990).

74. See TRIBE, *supra* note 72, §§ 3-22 to -30.

75. See *id.* §§ 3-11.

76. See *id.* §§ 3-13, 4-16 at 285.

77. In the service of *conservative* ends, the current Court seems quite willing to employ principle, such as a newly limited view of the reach of the Commerce Clause, to reign in Congress's power to regulate. See, e.g., *Printz v. United States*, 527 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).

78. See, e.g., JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* (1996); Alexander Wohl, *Justice for Rent: The Scandal of Judicial Campaign Financing*, *AM. PROSPECT*, May 22, 2000, at 34; Molly Ivins, *Secret Donors Can Buy Elections*, *BOULDER (COLO.) DAILY CAMERA*, June 13, 2000, at 10A.

79. See PETER SCHRAG, *PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE* 139-55, 229-56 (1998), on the way initiative campaigns have transformed California.

wealth, liberty of contract, employment at will, stability of expectations, protection of private property, and the right to leave it all to your children, even if they are no good.<sup>80</sup> This hybrid, which promises radical democracy in our public sphere, and individualistic free market capitalism in the private one, today, even more than formerly, is on a collision course with itself. Until recently, the public side has always managed to counter some of the excesses of aggressive capitalism by assuring that at least a few members of the working class would rise and assume places in government, academia, and the professions.<sup>81</sup>

But now, globalism and the advent of an economy based on computers and information are concentrating capital so rapidly in the hands of a small elite that the uneasy truce that allowed the two-headed system to work is beginning to break down.<sup>82</sup> Already the most economically stratified society in the industrialized world, the United States is increasingly taking on the appearance and structure of an oligarchy.<sup>83</sup> Moreover, the high costs of political campaigns and TV ads guarantee government by the wealthy into the foreseeable future.<sup>84</sup>

Formerly, public education served as an avenue of upward mobility, enabling an occasional poor but bright child to rise. Functioning as a conduit between the private sector — the realm of self-interest — and the public spheres of government, higher education, and the media, free schooling closed some of the gap between the private and the public, enabling a few from the lower economic strata, or their children, to move up.<sup>85</sup> It allowed us to believe that democracy and capitalism were compatible. But now that avenue is narrowing as conservatives realize that today's economy does not need large numbers of

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80. See, e.g., KARL MARX, ON THE JEWISH QUESTION (Ellis Rivkin ed. & Helen Lederer transl., Hebrew Union Coll. — Jewish Inst. Of Religion, 1958) (commenting on this paradox).

81. That is, the gap between the ostensibly egalitarian focus of the public law, and the selfish, individualistic thrust of private law, has been justified by the supposed ability of anyone, regardless of his or her initial economic position, to rise and gain access to the public sphere by dint of hard work. See, e.g., NICHOLAS LEMANN, THE BIG TEST 24-29, 67-78 (1999); David Broder, *Democracy Derailed*, SUNDAY DAILY CAMERA (Boulder, Colo.), Apr. 20, 2000, at E1.

82. See, e.g., Holly Sklar et al., *The Growing Wealth Gap*, Z MAG., May 1999, at 47. Decriing gross inequity as dangerous to democracy, see Jack H. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 WIDENER L. SYMP. J. 167 (1999).

83. See Sklar et al., *supra* note 82; Holly Sklar, *Brother, Can You Spare a Billion?* Z MAG., Dec. 1999, at 23; Roger C. Altman, Editorial, *The Fourth World: On a Global Scale, Technology Has Created a Huge Gap Between the 'Haves' and the 'Have-Nots'*, L.A. TIMES, Dec. 12, 1999, at M1.

84. See Symposium, *Campaign Finance as a Civil Rights Issue*, 43 HOWARD L.J. 1 (1999); Molly Ivins, *Soon the Word 'Politics' Will Mean 'Money'*, BOULDER (COLO.) DAILY CAMERA, Mar. 8, 2000, at 9A.

85. See LEMANN, *supra* note 81, at 24-29, 67-78.

unskilled or semiskilled workers.<sup>86</sup> What manufacturing that is necessary is done more cheaply by moving factories to the Third World, where the cost of labor is lower,<sup>87</sup> while public education can be conducted more cheaply by emphasizing tests,<sup>88</sup> attacking teachers' unions,<sup>89</sup> and offering the illusion of choice through charter schools and vouchers.<sup>90</sup>

At the same time, Congress has been slow to reform elections, either by financing campaigns so that poor but talented candidates have a chance of winning,<sup>91</sup> or by adopting redistricting or voting changes aimed at improving the chances of minority and blue-collar candidates.<sup>92</sup> This inattention to school funding and election reform places enough barriers in the way of the poor that the chances of an inner-city child growing up to be president of the United States seem virtually nil.

Our public and private systems of law do contain devices to control distortions of various types — but generally only within each system. Our public law contains strict scrutiny, in which courts examine skeptically any restraint on the exercise of a basic (usually political) right, such as speech or association<sup>93</sup> or the rights of minority groups.<sup>94</sup> It also prohibits gross political misbehavior such as the bribery of a public official,<sup>95</sup> while our private law contains other guarantees against

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86. On the loss of industrial jobs and the trend to an economy based on information technology and consumer services, see ROBERT B. REICH, *THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM* (1991).

87. On the export of manufacturing jobs, see *id.* at 171-84.

88. See LEMANN, *supra* note 81. On tests in K-12 schools, see Howard Gardner, *What Do Tests Test?*, N.Y. TIMES, Dec. 4, 1998, at A31; Marisa Treviño, *Standardized Tests Can Be Misleading*, DALLAS MORNING NEWS, Oct. 24, 1999, at 6J.

89. On the attack on teachers' unions, see, e.g., Richard Lee Colvin, *Selling Teachers on School Reform*, L.A. TIMES, May 6, 1999, at A1.

90. On charter and voucher plans, see Edward B. Fiske & Helen F. Ladd, *The Invisible Hand as Schoolmaster*, AM. PROSPECT, May 22, 2000, at 19.

91. E. JOSHUA ROSENKRANZ, TWENTIETH CENTURY FUND WORKING GROUP ON CAMPAIGN FIN. LITIG., *BUCKLEY STOPS HERE* (1998); Curtis K. Tao, Note, *A Compelling Opportunity to Rethink the Flawed Evolution of Contribution Speech*, 51 RUTGERS L. REV. 1345 (1999); see also, *supra* notes 78, 84. On the recent reaffirmance of *Buckley v. Valeo's* ruling on campaign contributions, see *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 381 (2000) (holding that *Buckley* "define[s] the scope of permissible state limitations" on political contributions).

92. See Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589 (1993).

93. E.g., TRIBE *supra* note 72, §§ 16-7 to -12, 16-31 at 1590-93, 16-33 at 1610-13.

94. *Id.* §§ 16-13 to -23.

95. E.g., JOHN NOONAN, JR., *BRIBES* (1984).

distortion in such rules as antitrust,<sup>96</sup> corporate governance law,<sup>97</sup> and bankruptcy.<sup>98</sup>

Yet no comparable feature protects social mobility, the ability of private citizens to gain an education or launch a political campaign. Case law deems education not a fundamental right,<sup>99</sup> poverty not a suspect class;<sup>100</sup> moreover, our society has rebelled, until now, at funding independent candidates for political office.<sup>101</sup> Our system, in short, proceeds like a hydra-headed creature, with one head consisting of a highly idealized system of public law; another, a less idealized private law governing the way we make profits and earn livings, but little to mediate between the two.<sup>102</sup> Like the patient Christina, our private/public law structure is as disconnected and stumbling as any of Oliver Sacks's patients.<sup>103</sup> Fish's solution — that we look to our legal system's broad structure for guarantees against oppression — leads to the very blind alley he describes over the course of 368 pages on the defects of mainstream legal reasoning.

It turns out, then, that our predicament is even deeper than Fish paints. We cannot rely on separation of powers nor on popular will to guard against domination by our own government or by well-financed elites. Furthermore, principle will rarely stop a determined adversary. We are left, then, with little more than the resources we bring to any encounter, primarily our own intuitions, growing out of our life experiences with justice and injustice, and what political alliances we may make with like-minded individuals in support of common ends. For

96. *E.g.*, LAWRENCE ANTHONY SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* §§ 1-2, 5-11, 44-52 (1977) (discussing antitrust doctrines aimed at normalizing economic efficiency and deterring monopolies and price-fixing).

97. *E.g.*, HARRY G. HENN & JOHN R. ALEXANDER, *LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* (3d student ed. 1983) (describing policies against insider trading), §§ 239-40, 298.

98. *E.g.*, DAVID G. EPSTEIN ET AL., *BANKRUPTCY* (1993) (setting out policies of this branch of law, including providing debtors with a fresh start, and creditors an orderly and predictable means of collecting amounts due them).

99. *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *TRIBE*, *supra* note 72, § 16-4, 16-9; *see also Plyler v. Doe*, 457 U.S. 202 (1982) (applying intermediate standard of review to Texas scheme that denied access to public education by the children of undocumented aliens); James E. Ryan, *Schools, Race, and Money*, 109 *YALE L.J.* 249 (1999) (noting that many inner-city schools are both underfunded and segregated, and that remedial schools must address both conditions simultaneously).

100. *E.g.*, *Dandridge v. Williams*, 397 U.S. 471 (1970); *TRIBE*, *supra* note 72, § 16-52; Randall S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 *LAW & INEQ.* 239 (1999).

101. *See supra* notes 78, 84, 90 and accompanying text.

102. That is to say: That structure is not only poorly adapted to counter official oppression, it is unlikely to sustain any sort of coherent social program, at least on its own. *See supra* notes 78-99 and accompanying text.

103. *See supra* notes 50-61 and accompanying text.

Fish, as for this writer, to believe that we have more is a dangerous illusion, one that threatens to disconnect us, in an almost neurological sense, from the sources of action and belief that really matter.

#### CONCLUSION

In the end, Fish simply wants to reveal what principles are not — not so much to get us to abandon them as to alleviate some of the internal anxiety that espousing them creates. If we follow his lead, we will no longer have to feel “pithed,” or disoriented, because of serious flaws in our internal compass. We can use rhetoric to our heart’s content and not feel guilty or hypocritical — because there is no other way.<sup>104</sup>

Yet, a deeper look at the structure of our legal system reveals that our quandary is more profound than Fish exposes. A fundamental contradiction in our system, which throws our public and private law at odds with each other, prevents Fish’s solution — to simply exploit rhetoric (while keeping aware of its traps) and relying on our constitutional structure to safeguard us — from working.

In *The Trouble with Principle*, Stanley Fish reveals only the first stages of an illness endemic in our legal system. Because he fails to recognize how deep the predicament runs, he offers up a solution that cannot be used by a society increasingly mired in self-contradiction. Not until we open up avenues for upward mobility or reconcile the contradiction between public and private law will we be able to orient ourselves in any satisfactory way, or develop defenses against the types of deep, structural inequalities that are developing at such a frightening pace.

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104. “Figure out what you think is right and then look around for ways [i.e., principles, rhetoric] to be true to it.” P. 242; see also pp. 7, 67-71, 75, 89, 91-92, 94, 126-46, 149 (same); *supra* notes 15-18, 30-31, 39 (same).