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OWEN M. FISS

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COMMENTS

CONVENTIONALISM

OWEN M. FISS*

Conventionalism is a viewpoint, most closely associated with the later writings of Wittgenstein, that emphasizes practice and context.[1] It holds, for example, that we understand a concept not when we grasp some fact, but when we can successfully use that concept within a language game or a defined context, and that truth is a function of the agreement of those participating within a practice rather than the other way around. There's nothing "out there," and even if there were, we couldn't possibly know it. Stanley Fish has developed a general theory of interpretation that also emphasizes practice and context and accordingly might be seen as a branch of conventionalism. His concern was first with literary texts; he is a Milton scholar and, with the publication in 1980 of *Is There a Text in This Class?*, also established his preeminence as a literary theorist. In a number of recent articles,[2] however, he moved on to legal texts, and in one sought to criticize an account that I gave of constitutional interpretation.[3]

In the spirit of conventionalism, Fish reminds us that both the judge and the Constitution are always contextualized—the judge is a

* Alexander M. Bickel Professor of Public Law, Yale University. I am especially grateful for the research and editorial assistance of Lynn Baker.

1. *See* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G. Anscombe trans. 1953). *See also* S. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982). Conventionalism is a term more commonly used in the philosophy of science for the view that scientific laws are not imposed by nature, but rather are conventions we chose from among the various ways of describing the world. The origin of conventionalism is usually traced to Henri Poincaire, H. POINCAIRE SCIENCE AND HYPOTHESIS (W. Greenstreet trans. 1905), although it is probably better known today through the work of Thomas Kuhn, T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

2. *E.g.*, Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495 (1982) [hereinafter cited as Fish, *Pluralist Vision*]; Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982).

3. Fish, *Fish v. Fiss*, 36 STAN. L. REV. (forthcoming 1984) (a response to Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982)).

thoroughly socialized member of a profession and the Constitution is never "waiting around for interpretation" but is "always an already interpreted object."[4] This claim about the contextualized nature of text and reader seems to me to be entirely correct, and I gladly embrace it, but I do not believe it leads to or in any way supports Fish's theory of constitutional interpretation. One branch of his theory pictures the judge knowing immediately and without reflection what to do, simply by virtue of being a socialized member of the profession; the other denies that the Constitution embodies a public morality or, for that matter, anything else.

I. THE BACKGROUND OF OUR DISAGREEMENT

It is easy to overstate my disagreement with Fish and his theory of interpretation. To avoid this error, I think it best to step back and begin by locating this disagreement within the recent debates in the profession over theories of interpretation. Interpretation has always been a favorite topic for legal academics, but for the most part it has been confined to private law issues, such as wills and contracts. Within the last several years, however, it has moved to the great public law questions of the day and has engaged the attention of constitutional theorists.

A. No Freedom

One group of theorists renders the concept of interpretation in a most deterministic fashion. An example is John Ely, who depicts interpretation as an intellectual process in which outcomes or decisions are determined by the specific words contained in the text (a process he sometimes terms "clause-bound interpretivism").[5] Interpretation, for Ely, is confined to the highly specific clauses of the Constitution, such as the one requiring the President to be at least 35 years old;[6] it cannot be used to characterize judgments under more general provisions such as the equal protection clause.

In his recent book, Michael Perry displays a similar attitude toward interpretation but broadens its application.[7] He too allows the

4. *Id.*

5. J. Ely, Democracy and Distrust 1-41 (1980).

6. U.S. Const. art. II, § 1, cl. 5.

7. *See* M. Perry, The Constitution, the Courts, and Human Rights (1982). In this Symposium, Perry abandons that position and appears to adopt a view of interpretation that is less deterministic and, I think, more acceptable. He calls it "nonoriginalist interpretation." I admire

interpreter virtually no freedom, but, in contrast to Ely, admits that it might be possible to speak of interpreting more general constitutional provisions. All that would be needed is a method of constraining the reader. Perry finds the source of constraint in a highly specific conception of authorial intent and, in the context of the general clauses, sees interpretation as a species of originalism.[8] *Brown v. Board of Education*[9] could be understood as an interpretation of the equal protection clause, Perry argues, only if the framers had intended to prohibit segregated schools and *Brown* was but an implementation of that wish.[10]

On the topic of originalism, Ronald Dworkin has said that the issue in constitutional interpretation is not whether to consider authorial intent, but what should count as intent.[11] Dworkin sees two levels of intent—one denoted a "concept" (an abstract value) and the other a "conception" (a concrete application of that value)—and he argues in favor of the more abstract.[12] He insists that the relevant inquiry in *Brown* is not whether the framers intended to prohibit segregated schools (the conception), but whether they intended to embody a value such as equality (the concept), which, in turn, could be understood by future generations to outlaw segregated schools. Perry, drawing on Munzer and Nickel,[13] dismisses Dworkin's argument by saying that there is no empirical evidence that the framers had an abstract rather than a concrete intention (or that they wanted their abstract intention to govern).[14] But Dworkin in fact provided the best evidence imaginable—the language of the clause itself.[15] The framers had a choice between specific and abstract language, and their choice of the latter is, for Dworkin, a fairly good indication of what level of intent they thought should govern. Dworkin also claimed that the empirical evidence Perry sought was irrelevant because the choice of what kind of intent should govern (abstract rather than specific) should not itself

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Professor Perry's openmindedness but continue to address his earlier views because they have achieved a certain currency and represent one important strain in the professional debates. Perry's book presents a theory of interpretation not unlike that advanced by Raoul Berger. *See* R. BERGER, GOVERNMENT BY JUDICIARY (1977).

8. The term "originalism" was first coined by Paul Brest. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

9. 347 U.S. 483 (1954).

10. M. PERRY, *supra* note 7, at 66-75.

11. Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 499-500 (1981).

12. *Id.* at 476-82, 488-98.

13. Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1037-41 (1977).

14. M. PERRY, *supra* note 7, at 70 & n.71.

15. *See* Dworkin, *supra* note 11, at 494-95.

turn on what the framers intended on that issue (for that would involve a circularity) but rather on a political theory (unfortunately not yet worked out by Dworkin).[16] To this, Perry made no rejoinder: He seemed determined, in his effort to explicate the concept of interpretation, to reduce authorial intent to a more specific level.[17]

In this determination, Perry reflects the same impulse as Ely and, earlier, Thomas Grey[18]—seeing interpretation as a largely mechanical process which denies a creative role for the reader. Ely reduces interpretation to textual determinism, while Perry, addressing the more general clauses, sees it as a form of originalism. For Ely, the judge interpreting the Constitution is carrying out the specific directives of the Constitution. To use the familiar metaphor, the judge is the phonograph, the words on the parchment are the record. For Perry, authorial intent is the record. A judge engaged in interpreting a clause such as equal protection is implementing original intent; to minimize the creative role of the judge, Perry formulates that intent to make it a wholly sufficient basis for resolving the case before the court—very specific and concrete. Perry in fact speaks of the framers' intent in terms of "value judgments," and of the Constitution as an embodiment of those judgments.[19] He appears to conceive of the framers as judges (rather than political actors), distinguished from the Justices of the Supreme Court only by their multitude (hundreds of thousands, rather than nine) and their age (they formulated their judgments in 1868 rather than 1954).

I take issue with the Ely-Perry conception of interpretation because it is excessively mechanistic. As I argued in my earlier article, such a conception confuses interpretation with execution. For me an interpretation is determined neither by the specific words on the parchment nor by an assessment of the specific concrete intentions of the framers, although each plays a role. Interpretation is not reducible to either textual determinism or originalism but, instead, contemplates a dynamic interaction between text and reader in which an analysis of the text's specific words and of the concrete intent of the framers is only part of the process by which that meaning is understood. I do not take issue with the substantive views of either Ely or Perry, inasmuch as

16. *Id.* at 493-98.

17. M. PERRY, *supra* note 7, at 70-71.

18. *See* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). Like Perry, Grey has begun to retreat from his early deterministic account of interpretation. *See* Grey, *The Constitution as Scripture*, 37 STAN. L. REV. (forthcoming 1985).

19. M. PERRY, *supra* note 7, at 10-11, 74-75.

each envisions a role for the Supreme Court that extends beyond what he calls "interpretation." For Ely, *Brown* is an instance of "ultimate interpretivism"[20] (which he distinguishes from ordinary interpretation or "clause-bound interpretivism" and which is in truth not a form of interpretation but a program for using the judicial power to perfect majoritarian processes). For Perry, *Brown* is an instance of "constitutional policy-making" under which the judge "reaches decision without really interpreting any provision of the constitutional text"[21] and instead writes into law his or her "own values (albeit, values ideally arrived at through, and tested in the crucible of, a very deliberate search for right answers)."[22] Given Ely's and Perry's positions on a case like *Brown*, so central to the modern understanding of the judicial power, it might seem that my disagreement with them over interpretation is only nominal; we all accept *Brown* as a legitimate exercise of the judicial power but use different words to describe the same intellectual activity.

It seems important, however, to recover the concept of interpretation and to avoid the mechanistic view of that activity. It seems important to understand that interpretation permits the judge or reader a creative role and that a decision such as *Brown* could be seen as an interpretation of the Constitution. Such an understanding would forge links between law and literature and bring into our vision the work of literary theorists like Stanley Fish. It would remove some of the controversy and puzzlement surrounding the Supreme Court's role in our political system, for it allows us to conceive of the Court's function in the most elemental and widely accepted terms. Such an understanding would also emphasize the unity of constitutional adjudication, whether the Court is applying the first amendment, the equal protection clause, or the clause specifying the minimum age of the President. There may be more disagreement over the meaning of one clause than another, but the function of the Court and the methods by which it discharges that function are the same and do not vary from clause to clause.

Ely and, to a large extent, Perry identify the countermajoritarian dilemma as their preeminent concern,[23] and I will concede that recovering the idea of interpretation and characterizing a decision such as

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20. J. ELY, *supra* note 5, at 88.

21. M. PERRY, *supra* note 7, at 11.

22. *Id.* at 123. Perry seizes upon Raoul Berger's research into the framers' intent on school segregation with a relish that makes one suspect that he is not trying to find a proper basis for *Brown* but is instead trying to use *Brown* as a way of legitimating this more controversial theory of judicial review. *Id.* at 66-75. *See also* Perry, Book Review, 78 COLUM. L. REV. 686 (1978).

23. J. ELY, *supra* note 5, at 1-9; M. PERRY, *supra* note 7, at 1-8.

Brown as an instance of interpretation will not solve that dilemma. Interpretation is countermajoritarian, even if properly understood. On the other hand, a proper conception of interpretation will help us understand the pervasiveness of the countermajoritarian dilemma and thus, in my judgment, reduce its significance. The highly mechanical kind of activity that Ely and Perry characterize as interpretation is widely accepted, and yet it puts the majority at risk. True, the role of the judge is trivialized under that conception of interpretation (the judge is the phonograph), but power is not transferred from the judge to the contemporary majority. It is instead given to the framers, as manifest in either the words scribbled in 1787 or 1868 or their concrete intentions. And the countermajoritarian dilemma, as formulated and propounded by Bickel[24] and addressed by Perry and Ely, focuses on the tensions between the Supreme Court and the *current* majority (as reflected in the practices of the elected representatives).

B. Total Freedom

Standing at the other end of the spectrum is a theorist such as Sanford Levinson.[25] He repudiates the Ely-Perry conception of interpretation as excessively mechanical and, in an effort to bridge the gap between law and literature, emphasizes the creative role of the judge. But Levinson errs in the other direction: His conception of interpretation is too dynamic. While the Ely-Perry conception denies any freedom to the interpreter or reader, Levinson's exalts that freedom—too much for my taste.

Levinson is prepared to treat *Brown* as an interpretation of the equal protection clause (without regard to the framers' intent) only because he believes all interpretation is a constructive process. Levinson begins his account with the observation that the Constitution is capable of any number of readings and then characterizes the judicial task as one of choosing among these different readings. He also asserts that the judge is (relatively) free to choose among these readings and that there are no standards—distinctively legal standards—by which to evaluate that choice. Levinson, like Ely, Perry, and myself and presumably Fish (and maybe the entire generation of which we are part), believes *Brown* is a correct decision. But for Levinson the "correctness" of *Brown* derives simply from the fact that he shares the political

24. A. Bickel, The Least Dangerous Branch 16-23 (1962).

25. *See* Levinson, *Law as Literature*, 60 Tex. L. Rev. 373 (1982).

or moral (but not legal) vision that guided the Justices' choice among the many possible readings of the equal protection clause.

Just as I reject the Ely-Perry account of interpretation as too deterministic, I reject Levinson's account as too free. I start with the view that the Constitution embodies a public morality, including a commitment to racial equality. But I recognize that this commitment, when applied to a particular situation, such as segregated schools, is capable of several readings, some of which may conflict with other constitutional promises, such as liberty. The judicial task is to choose among these readings (and to harmonize the whole), and this choice is for me, as it was for Levinson, the core of the intellectual process known as interpretation (legal or literary). Unlike Levinson, however, I do not believe that the choice is unconstrained.

The judge's choice is constrained by a set of rules (or norms, standards, principles, guides, etc.)[26] that are authorized by the professional community of which the judge is part (and that define and constitute the community). A judge might be directed, for example, to pay particular attention to the wording of a text and to the intent of the framers, while a political actor might consider the impact of segregation on the conduct of foreign affairs. Adherence to the rules authorized by the professional community imparts a measure of impersonality to a legal judgment (its objective quality) and at the same time provides the standards for evaluating the correctness of the judgment as a legal judgment. I can say *Brown* is a correct interpretation of the fourteenth amendment because it conforms to the properly authorized disciplining rules, not because I subscribe to some political or moral tenet that condemns racial segregation.

II. THE STRUGGLE OVER THE MIDDLE GROUND: THE SOURCES OF CONSTRAINT

Stanley Fish and I are united in our effort to secure the middle ground. I believe he would reject the Ely-Perry conception of interpretation as excessively mechanical, and I know (from another article[27]) that he rejects Levinson's proclamation of freedom. Fish believes, as I do, that the interpretive process—whether it be of a specific clause or a highly general one, like equal protection—is neither wholly determined

26. The term "rules" is used by me interchangeably with "norms," "standards," and "principles," and is meant to suggest, as Fish understands, a generalized assertion about what should be done.

27. Fish, *Pluralist Vision*, *supra* note 2.

nor wholly free, but is constrained. What we are divided over is the nature of the constraints and the account we give of them: Fish emphasizes practice and I emphasize norms. Compared to my disagreement with those at the ends of the spectrum—Ely and Perry at one, Levinson at the other—this difference might seem trivial (and probably accounts for the play on the similarity of our names in Fish's title and the difficulty some may have in remembering who's who). But I believe the difference between us is worth noting: Fish's account of these constraints trivializes the reflective moments of the law and, like Levinson's account (but for different reasons), blurs the distinction between law and politics.

In countering Levinson, I thought it necessary to introduce two concepts: one is the idea of disciplining rules, which constrain the judge, and the other is that of an interpretive community, which is defined and constituted by, and confers authority upon, the disciplining rules. Fish has claimed a proprietary interest in the idea of an interpretive community and thus, not surprisingly, his criticism is addressed only to my notion of disciplining rules (although we use the concept of an interpretive community differently—I see it as a source of authority for the disciplining rules, and Fish sees it as the source of shared understandings). Fish makes two claims about the disciplining rules: first, they will not work, and second, they are unnecessary.

A. The Usefulness of Disciplining Rules

Disciplining rules are, as I have said, to provide constraints. "Unfortunately," Fish comments, "rules are texts; they therefore are in need of interpretation and cannot serve as a constraint on interpretation."[28] I agree that disciplining rules must be interpreted and like Fish conceive of the interpretive process as a dynamic interaction between the text and the reader; but none of this renders these rules incapable of constraining the interpretive process.

To see this, let us return to *Brown*. The Justices' task was to determine whether segregated schools were consistent with the promise of equality in the fourteenth amendment. This seems like a rather open-ended judgment, one in which the Justices could have said a large number of things or, as Levinson (invoking a notable image of Richard Rorty) might put it, they could have beaten the text into any shape that

28. Fish, *supra* note 3.

served their purposes.[29] I maintain, however, that their freedom was in fact bounded by certain disciplining rules, some that required them to pay attention to precedents, others that directed their attention to the purposes of the Civil War and the fourteenth amendment, and still others that precluded them from favoring one side over the other simply because of the race of the parties. Under my view of interpretation, judges faced with an open-ended question (such as whether Jim Crow laws are consistent with equal protection) are increasingly circumscribed in their discretion by more particularized constraints (which direct their attention to the framers' intent, precedent, etc.). The image I have in mind is that of a judge moving toward judgment along a spiral of norms that increasingly constrain.

At any point in the spiral there might be a disagreement over the meaning of a rule (just as there might be disagreement over whether the conditions that make the rule applicable are present). There may, for example, be a dispute as to the level of authorial intent one must look to—whether it be the particularized desires of the framers with regard to segregated schools or, as Dworkin would maintain, their general concept of equality. To resolve this dispute, the disciplining rules must be interpreted, and the process of interpreting those rules must itself be constrained by other norms further along or higher up the spiral. Of course, if the dispute about any norm is so pervasive as to return one to the previous level of constraint, then we have made no progress. The judge is as unconstrained as before we made any mention of disciplining rules.

In my original article I acknowledged the possibility of disputes over a disciplining rule, but then confidently asserted, "The authority of a particular rule can be maintained even when it is disputed. . . ."[30] To this Fish replies, "But how can 'it' be maintained as a constraint when the dispute is about what 'it' is or about what 'it' means?"[31] I would answer: the same way that the Constitution, or a statute, or a common law rule can be "maintained" as a constraint even though there are disputes as to its meaning. Disputes over the meaning of a text deny neither the existence of the text nor that it has a meaning which can inform, guide or constrain intellectual processes.

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29. Levinson, *supra* note 25, at 385 (quoting R. RORTY, *Nineteenth-Century Idealism and Twentieth-Century Textualism*, in CONSEQUENCES OF PRAGMATISM 151 (1982)).

30. Fiss, *supra* note 3, at 747.

31. Fish, *supra* note 3.

Some may insist that my account of constraint collapses because the disputes about the meaning or the application of the disciplining rules (such as the one about framers' intent) are more pervasive than I was originally willing to allow, so that there is no way to reduce the vast freedom Levinson claims for the judge. Maybe the judge has no guidance besides the spacious words of the equal protection clause. I don't think so, but this is not the place to explore this problem because it is not Fish's point. He insists that disciplining rules cannot constrain even "where there is perfect agreement about what the rule is and what it means."[32]

In insisting that the disciplining rules will not work, Fish is not making a claim about the pervasiveness of disagreement or of disputes about the meaning of disciplining rules. He is not making a claim about indeterminacy but about contextualization. He notes that disciplining rules, like any text, are always situated within a practice and thus are always interpreted, even where there is perfect agreement as to what they mean. And from this rather straightforward observation Fish concludes that these rules cannot constrain: "[A] so-called 'disciplining rule' cannot be said to act as a constraint on interpretation because it is (in whatever form has been specified for it) the product of one."[33]

I am a conventionalist insofar as I see all texts and agents as situated.[34] I agree with Fish that all disciplining rules, even where there is no dispute as to their meaning, are in need of interpretation and have in fact received that interpretation. Like all texts, disciplining rules are always contextualized and arrive in an "interpreted shape."[35] But that does not reduce (in either a logical or practical sense) the content or meaning of a rule to its various interpretations,[36] nor does it mean that one text (disciplining rules) cannot constrain the interpretation of another text (the Constitution).

B. The Need for Disciplining Rules

Fish's intent, recall, is not simply to deny that disciplining rules will provide constraint, but also to show that they are unnecessary: The freedom of which Levinson spoke, and that I offered my disciplin-

32. *Id.*

33. *Id.*

34. *See* K. Christman, Law as a Rational Enterprise 12 (1984) (unpublished manuscript on file with author).

35. Fish, *supra* note 3.

36. Wittgenstein himself wrote, "any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning." L. Wittgenstein, *supra* note 1, § 198, at 80e.

ing rules to combat, does not exist. In denying this freedom, Fish does not revert to the mechanistic conception of interpretation offered by Ely or Perry, nor does he confine himself to the so-called specific clauses. Rather he tries, once again, to use the conventionalist emphasis on practice and context to give a new and different account of the middle ground.

1. *The Contextualization of the Reader*

One part of Fish's account relates to the position of the interpreter or judge. I picture the judge trying to choose, in a self-conscious and reflective manner, between the arguments of the contending lawyers, and in that process thinking about and perhaps discussing (with colleagues and clerks) the rules or norms of the profession—What do they imply for the case at hand? Are they in conflict? Fish pictures the judge as an actor who is thoroughly socialized into the profession (or practice) and who, by virtue of that socialization (and perhaps the life processes that make the judge the person that he or she is), knows "not upon reflection, but immediately"[37] what to do. For Fish, the judge is like a basketball player who plays the game beautifully and instinctively, without, so Fish says, reflecting on the rules of the game in any way.[38]

Fish introduces this peculiar picture of the judge in the course of his attack on the disciplining rules, for they are the professional norms and symbolize a kind of reflective or abstract knowledge or "knowledge that" (as opposed to "knowledge how").[39] Fish first makes a point about the method by which students are initiated into the legal profession:

> The student studies not rules but cases, pieces of practice, and what he or she acquires are not abstractions, but something like "know how" or "the ropes," the ability to identify (not upon reflection, but

37. Fish, *supra* note 3.

38. Lest you think I am unfair in attributing to Fish this picture of the judge as basketball player, let me quote the critical passage:

> [The judge] is already filled with and constituted by the very meanings that on Fiss's account he is dangerously free to ignore. This amounts finally to no more, or less, than saying that the agent is always and already situated, and that to be situated is not to be looking about for constraints or happily evading them (in the mode, supposedly, of nihilism) but to be constrained already. To be a judge or a basketball player is not to be able to consult the rules (or, alternatively, to disregard them) but to have become an extension of the "know how" that gives the rules (if there happen to be any) the meaning they will immediately and obviously have.

Id.

39. The distinction between "knowing how" and "knowing that" is presented in greater detail in G. RYLE, THE CONCEPT OF MIND (1949).

> immediately) a crucial issue, to ask a relevant question, to propose an appropriate answer from a range of appropriate answers, etc.[40]

In truth, the student learns both cases ("pieces of practice") and rules, and for the remainder of his or her professional life will use both. Fish acknowledges this (as he puts it, "Somewhere along the way 'the young initiate' will also begin to formulate rules."[41]), but then he takes a wrong turn. Rather than acknowledging the interactive nature of rules and practice—the rules will shape the practice just as the practice will shape the rules—he tries to establish a theoretical (as opposed to just a temporal) priority for practice.

Fish's argument for this priority rests on but a single assertion. The student, lawyer, or judge, Fish insists, "will be able to produce and understand [the rules] *only* because he is deeply inside, indeed, is a part of, the context in which they become intelligible."[42] I may agree with Fish that only lawyers can "understand" and "produce" the professional norms (though he may be a glaring exception) and thus, with a nod toward conventionalism, I once again acknowledge the importance of practice. But Fish's point establishes neither the priority of practice nor the secondary nature of the rules (or "knowledge that"), for a reciprocal claim can be made on behalf of rules: A person could not continue to operate successfully within the practice and be considered a good lawyer or judge without understanding and being able to articulate and critically evaluate the rules or norms that govern the practice. While it is true that one cannot fully understand the rules of grammar (or, to revert to Fish's favorite example, basketball) unless one also speaks and uses the language (or plays the game), one cannot fully participate in a practice, much less occupy an exalted place within a practice (especially the practice of law) without knowing the rules and being able to talk about them in an abstract or reflective manner. Practice informs the rules and the rules inform the practice.

Admittedly, the judge does not consult a Judge's Rule Book on a day-to-day basis in order to determine what factors to consider in

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40. Fish, *supra* note 3.

41. *Id.*

42. *Id.* (emphasis added). Elsewhere he puts the point a little more provocatively. He describes the President appointing to the bench someone who has no previous judicial and legal experience, and who, on his appointment, is handed a rule book:

> What would happen? The new judge would soon find that she was unable to read the rules without already having a working knowledge of the practices they were supposed to order; or, to put it somewhat more paradoxically, she would find that she could read the rules that are supposed to tell her what to do only when she already knew what to do.

Id.

reaching judgment, or otherwise to guide him to judgment, any more than the native speaker consults a grammar book before each utterance. Rules, norms, principles, standards, or other general normative propositions can be internalized; a large part of the educational process of any profession is aimed at the internalization of its norms. And sometimes the norms are so thoroughly internalized that a judge can decide without reflecting upon them or considering them in any conscious manner. Judges now and then decide almost by instinct; the press of their work may sometimes force them to. But this is not always the case and, in any event, in introducing the concept of disciplining rules my intent was not to provide an empirical report on the thoughtfulness of the judiciary, but, rather, to construct a conceptual framework that would render coherent the central ideal of the profession—decision according to law. I was trying to explain how law is possible.

At the highest levels of the judicial process—as we get closest to the ideal—debate, discussion, and deliberation about the professional norms (the disciplining rules) are in fact commonplace and are understood to be central to the decisional process. Moreover, even when judges operate short of the ideal and move to judgment almost by instinct, the norms that I speak of have a role similar to that of rules of grammar. They are objects of self-conscious reflection. Judges who in fact decided by instinct can wonder whether they did the right thing and can measure their performance against the norms of their profession. Even before decision, judges can check their initial inclinations and wonder whether they are in accord with those norms.

Fish often speaks of "tacit knowledge,"[43] and it may seem to some that the issue that divides us is one of human psychology: The theory would be that I see the norms "outside" the judge, while Fish believes they are "inside." But that's not it. I concede that norms might be internalized, and in any event, Fish is not trying to locate norms within the human psyche. He is trying to get away from norms altogether. In order to make his point—that judges do not enjoy the freedom that Levinson postulated and that I try to curb through my disciplining rules—Fish must argue for a form of knowledge of a very special kind. Not only must it be internal, as the term "tacit knowledge" suggests, but even more importantly, it must propel action or govern decision almost instinctively. It cannot be in need of interpretation, for Fish has argued that anything that needs interpretation cannot constrain. The

43. *Id.*

kind of knowledge Fish seeks cannot be the object of analysis, discussion, or reflection.

Fish appears to broaden his account of "tacit knowledge" when he speaks of certain "understandings" of the judge, for example, the judge's "sense" or "view" of "what the Constitution is for."[44] Fish suggests that these "understandings" are an important, even decisive, source of decision. This addendum appears to render his account of judging more plausible, but it does so only on the assumption that these "understandings" are viewed as "internalized disciplining rules" or other forms of knowledge that he earlier denounced. This is strongly suggested by Fish's examples of these "understandings," for they sound like our old disciplining rules, though even more abstract and general than I ever imagined. One "understanding" depicts the Constitution as "an instrument for enforcing the intentions of the framers"; another claims the Constitution is "a device for assuring the openness of the political process"; and a third says that the Constitution is "a blueprint for the exfoliation of a continually evolving set of fundamental values."[45] Clearly any of these "understandings" must be interpreted; they are texts, just as much as my disciplining rules or any norms are. Thus under Fish's own argument (texts cannot constrain because they are in need of interpretation), these understandings cannot do the work he assigns them—to provide a basis of decision which denies the possibility of freedom and thus make unnecessary the constraint to be supplied by disciplining rules. In order to do that, these "understandings" must be reduced by Fish to an instinctive form of knowledge, another form of "know how," a non-text.

In a final turn of the argument, introduced as a parenthetical aside, Fish says, "When I use phrases like 'without reflection' and 'immediately and obviously' I do not mean to preclude self-conscious deliberation on the part of situated agents."[46] This sounds odd to my ear, a distortion of ordinary language and, indeed, of the entire thrust of Fish's argument. Most anyone would assume that "without reflection" means "without self-conscious deliberation," and I am thus left to wonder what Fish in fact means. Alas, Fish continues: "[I]t is just that such deliberations always occur within ways of thinking that are themselves not the object of consciousness because they are its ground."[47]

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44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*

Thus far, Fish has situated the judge within a practice; soon he will situate texts within a practice; but now he is trying to situate "deliberations" within a practice of its own, and that turns out to be "ways of thinking." "Deliberation" is for me a "way of thinking," and consequently, I do not understand what it would be for "deliberations" to be "situated" within "ways of thinking" (and even less what it would be for "ways of thinking" to be a "ground" of "consciousness"). But these puzzlements need not be resolved, for this nesting of cognitive processes won't advance Fish's case. Even if "deliberations" were somehow "situated" within "ways of thinking," it would not follow that the deliberations are not real or important, or that the judge knows immediately and without reflection what to do, or that the judge's deliberations are so constrained as to render the disciplining rules superfluous.

In the end, I find that this parenthetical aside, like the talk about "understandings," leads nowhere. The exaltation of "tacit knowledge" reduces to judgment by instinct. Fish's purpose has been to explain why disciplining rules are unnecessary, and he has searched for a way to deny the freedom that Levinson proclaimed and that I offered my disciplining rules to combat. But he has achieved his purpose by trivalizing the self-conscious and reflective moments of decision (when the judge thinks about the norms of the profession and their implications for the case at hand). These moments may not be as deep and as full as we would like, especially in this age of mass justice, but they are at the core of our professional ideals and probably explain the special appeal of adjudication as a distinctive form of institutionalized power.

2. *The Contextualization of the Text*

In his account of the judge, Fish reflects the conventionalist emphasis on practice (but takes it to false extremes): The judge is "always and already" situated in a practice (the profession). Fish also gives an account of the text which might be seen as another facet of conventionalism: The Constitution is also situated. Fish argues that all texts are part of a context and "never appear in any but an already contextualized form."[48]

In situating a judge within a practice, Fish hoped to show that the freedom I worried about does not exist and that there is therefore no need for disciplining rules because the judge is already constrained. By

48. *Id.*

situating the text within a context, Fish once again tries to allay my fears, but now he wants to show that the problem of the Constitution that I worried over—namely that it is a text with many meanings—is without basis. I have assumed that the Constitution embodies a public morality, that this morality is capable of many meanings (when applied to a specific situation like segregated schools, and when account is taken of the whole Constitution), and that the task of judging is one of choice. (The disciplining rules are supposed to be the standards to govern that choice.) To this Fish responds: "[T]here are . . . no texts that have a plurality of meanings, so that there is never the necessity of having to choose between them."[49]

Fish's assertion seems to contradict the most elemental understanding of the Constitution (or for that matter any other legal or literary text that I can think of). If it were merely a proposition that might be tested by our ordinary experience or our ordinary understanding of language, it could be rejected out of hand. But Fish is not proceeding in such an ordinary manner, as becomes quite evident a moment later, when he couples his assertion that there are no texts that have "many meanings" with an assertion that there are "no texts that have a single meaning."[50] How can it be that there are no texts with a single meaning and no texts with many meanings? Fish answers this question by explaining that meaning is not a "property" or quality or attribute of a text, but, rather, of the context in which the text is located.[51] The Constitution for Fish is not the "repository" of a public morality or of any meaning whatsoever.[52] When we speak of a text such as the Constitution and say that it has many meanings, we are, according to Fish, really talking about a situation in which people disagree about the meaning of the text (because they are reading it with different interpretive assumptions, etc.). When we speak of a text with a single meaning, we are talking about a situation of agreement.

I do not believe that this view (which makes the meaning of a text the property of a context rather than a text) in any way follows from the conventionalist tenet—which I believe to be true—that every text is "always and already" embedded in a context and "is always an already

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* Fish writes, in an effort to allay my fears about a new form of nihilism, "On my analysis, the Constitution cannot be drained of meaning, because it is not a repository of meaning; rather, meaning is always being conferred on it by the very political and institutional forces Fiss sees as threats." *Id.*

interpreted object."[53] Fish simply seems to be taking conventionalism to illogical extremes and confounding a situation (context) with an object located in that situation (the text), or confusing the act of interpretation with the object of interpretation. Moreover, I fail to see what there is to be gained from his strategy of making meaning a property of a context rather than of a text. The theoretical problem we confront, you will recall, is one of constraint: The question is whether there is a need for a concept such as disciplining rules. Fish sought to deny that there is any such need by proclaiming that there are no texts with many meanings, but all he has done is recharacterize the problem of choice and thus the need for constraint. Choices still must be made, though now it is not a choice among several "meanings of a text" (for texts have no meanings), but rather among "different interpretive assumptions" (for example, about the purpose of the text, etc.). The Constitution is, I admit, an "always and already interpreted object," but that does not deny the need to interpret it, to reinterpret it, or to choose among conflicting interpretations.

At one point in his essay, Fish concedes that even though the Constitution is "always an already interpreted object," conflicts will arise and choices will have to be made. He then puts to himself the question of method: "How are these conflicts to be settled?"[54] My answer to this question makes reference to the disciplining rules, the authoritative norms of the interpretive community, but Fish is adamant in his determination not to introduce into his account any such norms or standards and, as a result, blurs whatever distinctions might flow from such norms. "How are these conflicts to be settled?," he asks himself and then continues:

> The answer to this question is that they are always in the process of being settled, and that no transcendent or algorithmic method of interpretation is required to settle them. The means of settling them are political, social, and institutional, in a mix that is itself subject to modification and change.[55]

Is this an adequate answer?

Adjudication may be subject to two different attacks. One is based on a moral vision that condemns the institutionalized relationships that are necessarily entailed in adjudication and that begins to point to new institutional forms. Adjudication is condemned because it is evil. A

53. *Id.*
54. *Id.*
55. *Id.*

prominent intellectual and political movement of the day, Critical Legal Studies, often aspires to a critique so radical, but it fails in its delivery because it does not explain how we could meet the genuine needs presently served by adjudication and yet avoid the excesses of that institution. There is, however, another, somewhat lesser critique of adjudication also mounted by the Critical Legal Studies movement: This critique claims not so much that adjudication is evil, but that it is incoherent. The theory is that the judge lacks any distinctive legal standards to guide or constrain his or her judgment, and that the judge, by choice and of necessity, draws upon values, viewpoints, etc., that are either personal or rooted in the various social groups to which he or she belongs. This theory is similar to that espoused by Levinson and is encapsulated in the movement's slogan, "law is politics."

Stanley Fish is not, by any stretch of the imagination, a member of the Critical Legal Studies movement. He believes in professionalism, as do most conventionalists. He does not seek to undermine adjudication: He does not claim that it is evil nor even that it is incoherent. Indeed, he probably thinks it is more coherent than I do. The problem, however, is that he offers an account of that institution and answers the question of method in a way that blurs the line between law and politics. His point is not so much to dispute the existence of *legal* norms or standards, but to deny a role for *any* norms or standards. All is practice. But once you enter Fish's normless world, you have lost the basis—other than instinct or "know-how"—for separating good judgments from bad ones, or legal judgments from political ones. All you can say is that there are conflicting interpretations and that "[t]he means of settling [them] are political, social, and institutional, in a mix that is itself subject to modification and change"[56]—which, in my judgment, is not saying much at all.

Under my account, professional norms constrain judges in choosing among the conflicting interpretations and are the standards for assessing the correctness of their decisions. My reference to disciplining rules allows me to see an inner coherence to the law, and to speak about the legal correctness of a decision such as *Brown*. I also envision a role for an external critic of a decision, who stands outside of the law and operates on some other standards, such as those rooted in moral or political principles. Fish insists that this distinction between the internal and external critic is "less firm and less stable" than I suggest.[57] He

56. *Id.*
57. *Id.*

also belittles the distinction I draw between the various strategies open to a critic of a judicial decision—amending the Constitution as opposed to "packing" the Court or enacting statutes that curtail jurisdiction: "In calling these latter strategies 'lesser' and 'more problematic,' Fiss once again assumes a distinction that cannot finally be maintained. Presumably," Fish continues, "they are 'lesser' and 'more problematic' because they are obviously political; but in fact the entire system is political and the question at any moment is from which point in the system is pressure being applied to what other points."[58]

Too often in the law we transform differences in degree into differences in kind; lawyers tend to see lines where there are only gradations of gray (so my students and friends often remind me). Fish's brand of conventionalism may be a healthy corrective for this tendency, but I cannot help believing that in the end it is a bit too much, and that Fish is destroying distinctions that comport with the way we think and talk about the law and that have served us well. For those in the profession, and maybe even for those outside, it seems terribly important—not just as a psychological matter, but also for purposes of figuring out what you can and cannot do—to know the difference between a "legal" argument, and a "political" one, that is, to know that passing a constitutional amendment is a more "legitimate" response to a detested decision than is "packing" the Court. Of course, all of these distinctions are made in terms of an ongoing "system,"—a certain discourse and set of institutions that we know all too well—and it might be that the "entire system," viewed from some transcendental perspective, is "political." But that seems to be beside the point. We work and live within this world, not at some point of transcendence (as any conventionalist should know). Adjudication is an ongoing institution (or practice) and the purpose of this exercise to identify those features that distinguish it from other institutions and that call forth and justify the special normative discourse that surrounds it.

Let me also note, on perhaps a more technical level, that Fish's assault on the distinction between law and politics does not in any way flow from his views about the contextualized nature of texts or any of the other insights of conventionalism. It simply flows from his unwillingness to allow any place in his system for disciplining rules or any other form of generalized norms. I see them as essential because, for me, adjudication is a process that calls upon judges to choose among conflicting interpretations (or "meanings," or "interpretive assump-

58. *Id.*

tions," or whatever) of some authoritative text and because the law assumes that these choices are made pursuant to standards. The distinction between law and politics arises from the fact that the standards for judges are not necessarily the same as those for political actors or moral prophets. The distinction assumes different standards for different actors.

In my earlier article, I tried to identify the forces that tend to make legal and political standards converge—the desire of the judge to avoid crises, the sharing of similar normative concepts such as "equality," etc.[59] I acknowledged the considerable convergence of law and politics that has in fact occured in American society and indicated that this convergence might be one of the most distinctive features of our legal system. But I did not suggest that the convergence was complete, and more to the point, I do not believe that this convergence is in any way attributable to the fact that texts—whether they be the Constitution itself or disciplining rules—are always contextualized or that judges are situated within a practice. Wittgenstein tried to give an account of meaning that employed the idea of a language game, but always insisted upon the *multiplicity* of language games.[60]

III. THE STAKES

In the final paragraph of his paper, Fish announces "that nothing hangs on Fiss's account, or, for that matter, on my account either."[61] With this assertion Fish (once again) reveals his love for the paradoxical, but also, and more significantly, reflects the conventionalist emphasis on practice and context. As Wittgenstein put it, "[D]on't think, but look."[62] As a conventionalist, Fish believes that everything is in place: The judge is situated; the text is situated; so what possible significance could there be to a theoretical dispute about adjudication?

This may be a real problem for Fish (I doubt it), but not for me. I do not believe that everything is in place. It is important to look, but I also believe that it is important to think, and that there is a crucial place in the profession of law for the theoretical. Professional training does try to instill "know how," but that is not all there is to the law (nor perhaps even to basketball). Ideas do matter. Indeed, the interest the profession has shown in Fish's own theoretical work suggests that not

59. Fiss, *supra* note 3, at 753-54.
60. L. WITTGENSTEIN, *supra* note 1, §§ 23-24, at 11e-12e.
61. Fish, *supra* note 3.
62. L. WITTGENSTEIN, *supra* note 1, § 66, at 31e.

all is practice (although Fish assures me that this interest is a passing fad that will last for only seven years). I mention this now not in order to find another ground for impeaching Fish's account, but only to explain why I believe it is important to figure out whether Fish is right (and I wrong).

Theory informs practice, just as surely as practice informs theory, and in my view Fish's theory threatens two important practices of the profession. One is the value placed on self-conscious reflection—those moments when a judge considers the interpretive choices and identifies and weighs the norms of the profession that are to guide that choice. Fish denies that such moments exist ("a judge always knows in general what to do"[63]), and in that denial both legitimates and invites a certain thoughtlessness. Those who judge by instinct are told not to worry, because that is what they must of necessity do. The others—the great judges—only believe that they are deliberating.

Fish's account also jeopardizes the special pull that the norms of the profession have—and should have—upon the judge. Anything goes. The judge is told by Fish that "the entire system is political" and all that differs is the "point in the system" where the pressure is applied. These words might be taken seriously by some judges (although I have explained why they shouldn't), and if so, they might generate a set of practices that would turn law into politics. Judges who listen to Fish would see no reason for being especially faithful to the norms of the profession and would instead believe they are entitled to do whatever they think best. The discipline that is so prized by the law would be gone, and with it much of the law's special claim for our respect.

63. Fish, *supra* note 3. One can only wonder what he means by "in general."