The Limits of Liberal Rights: Stanley Fish on Freedom of Religion

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1. Introduction

In *The Trouble With Principle*,[1] Stanley Fish's latest book on law and politics, he continues his project of questioning a wide range of liberal values, goals, and rights. He critiques the liberal search for principles and procedures which are neutral as regards different conceptions of the good life. He debunks the liberal goals of tolerance, openness, and multiculturalism. He probes behind the fine-sounding proclamations of fundamental liberal rights such as freedom of speech and freedom of religion.

In essence, his criticism is not that these things are undesirable, but that they are impossible—at least if they are understood in the way liberals understand them. If they are understood in the different way Fish argues for, of course they are possible, but they stand revealed as expressions of a local partisan project that necessarily has limited comprehension of, and tolerance for, opposed local partisan projects.

Predictably, Fish's position has produced incomprehension and outrage in many of his readers.[2] However my primary goal in this paper is to explicate and support Fish's arguments with respect to freedom of religion, a right which is enshrined in many liberal bills and charters of rights. Pursuing this goal will also require me to delve into the unorthodox epistemology and account of the self which sit in the background of Fish's work.

2. The Liberal Account of Freedom of Religion

On the liberal account, freedom of religious belief was a hard-won achievement stemming from the 16th and 17th century religious wars in Europe. People finally accepted that disagreement in the area of religious belief was intractable, and could not be overcome by a state-imposed orthodoxy. The liberal solution, which

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This paper is part of an ongoing project to evaluate the challenges Fish poses to mainstream understandings of law and politics. Part of this project has already been published. See Michael Robertson, "Picking Positivism Apart: Stanley Fish on Epistemology and Law", (1999) 8 *Southern California Interdisciplinary Law Journal* 401-465. Papers on Fish's approach to theory ("What Am I Doing? Stanley Fish on the Possibility of Legal Theory") and freedom of speech ("Principle, Pragmatism, and Paralysis: Stanley Fish on Freedom of Speech") will appear later.

1 Stanley Fish, *The Trouble With Principle* (Harvard University Press, 1999).

2 See, for example, the following reviews of Stanley Fish, *The Trouble With Principle*, *supra* note 1: Terry Eagleton, "The Estate Agent" in *The London Review of Books*, 2nd March, 2000, vol. 22, no. 5, 11; Peter Berkowitz, "The Principle Problem", in *The Weekly Standard*, 20th March, 2000, 29; Edward Rothstein, "A Provocateur for Whom Principles are a Sham", in the *New York Times*, 22nd January, 2000.

was given an early powerful statement by John Locke[3], was to reconceive social space as having a public zone of legitimate state activity, and a private zone where the state must withhold its coercive power and leave citizens free to make their own choices. Religion was to be relegated to the private, rather than the public zone, and consequently people were to be left free to make their own choices regarding beliefs about God and modes of worship.

> Liberalism and the Enlightenment were born of the desire to escape the conflicts generated by religious disputes. Toleration is the preferred implementation of that desire; it is a device for placing religious issues off the public agenda so that civil business might proceed undisturbed by what had turned out to be intractable oppositions. If everyone would agree to confine his or her religious life to the heart and the chapel, religion would flourish without interference from the state, and the state would flourish without interference from religion. Hence the public/private distinction, which is a theoretical distinction because it is drawn—or so it is claimed—from a vantage point that is neutral between competing religious views, all of which are equally cabined and equally protected.[4]

Thus the liberal principle of freedom of religion is a particular instance of the general liberal search for neutral principles or procedures which can, without prejudice to any, be applied to all of those disputing about substantive conceptions of the good life.

3. Fish's Critique of the Liberal Account — Overview

Fish's general position is that liberalism can never deliver on its promise to find neutral principles or procedures which rise above the fray of partisan dispute, and which can therefore regulate that dispute from a position outside it.[5] He holds that such principles or procedures are impossible for humans because being locally embedded is a precondition of being a self or individual, and so this state can never be transcended. Consequently, any such purported neutral principle will turn out to be a concealed device for advancing a particular local substantive agenda. The liberal principle of freedom of religion is claimed by Fish to exemplify this inescapable, but often concealed, local bias and partiality.

These claims will seem outrageously wrongheaded to a liberal. How can it reflect bias for the state to refrain from acting? How can it advance a partisan viewpoint to let different religious viewpoints contend in the free marketplace of ideas? How can it be non-neutral to leave it entirely up to the individual to decide which system of religious beliefs is most convincing? Those with strong religious beliefs are tolerated in liberal societies; they are allowed to worship in the ways they choose; they can preach and proselytise; they are not persecuted or prohibited from holding particular offices or jobs. How can Fish possibly hold that liberalism is not delivering, and can never deliver, on its promise to respect religious freedom and tolerate differences in religious viewpoints?

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3 See the discussion of Locke's *A Letter Concerning Toleration* (1689) in Stanley Fish, "Mission Impossible" in *The Trouble With Principle*, *supra* note 1, 163-175.

4 Stanley Fish, "Mission Impossible" in *The Trouble With Principle*, *supra* note 1, 177.

Fish's project is to show us how, notwithstanding these facts about liberal societies, the liberal conception of freedom of religion rests upon and advances a deep layer of contentious partisan beliefs about society, authority, rationality and the nature of the self. He seeks to achieve this by focusing upon a group of conservative Christians who do not share many of these underlying liberal beliefs, and are consequently disadvantaged and constrained by the liberal freedom of religion principle.[6] I shall refer to this group as "strong religious believers", because although Fish's examples focus on conservative Christians, I take it that his argument could be made equally well by referring to non-Christian conservative religious believers. In all of what follows, Fish is not endorsing the substantive position of any strong religious believers. He finds such people valuable not because of the truth of their beliefs, but because their beliefs throw into high relief the contentious and substantive nature of much that liberalism presents to us as neutral procedure or principle. They allow us to see liberalism as the expression and promotion of a substantive partisan viewpoint, not the articulation of abstract universal principles.

4. Fish's Critique of the Liberal Account—Detail

a) The public/private distinction

One of the things strong religious believers do not share with liberals is a belief in the centrality of the public/private distinction. It can be hard for liberals to understand this, because as a result of the historical success of liberalism in Western Europe and North America, this public/private division is now regarded by most of us as uncontentious and commonplace. Typically, commerce as well as religion is conceived as properly belonging in the private zone, for early liberals like Locke also stressed the right of individual private property, and that the state has no general authority to interfere with that right.[7] But it is important to remember that this was a great departure from what had existed before. Previous

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5 Of course, this general criticism of liberalism's claims to neutrality and universality is not original to Fish. *See* Charles Taylor, *Philosophical Arguments* (Harvard University Press, 1995) at 249: "Liberalism is not a possible meeting ground for all cultures; it is the political expression of one range of cultures, and quite incompatible with other ranges...Liberalism is also a fighting creed."; Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame University Press, 1988) at 345: "The principles [of liberalism]....are not neutral with respect to rival and conflicting theories of the human good. Where they are in force they impose a particular conception of the good life, or of practical reasoning, and of justice upon those who willingly or unwillingly accept the liberal procedures and the liberal terms of debate. The overriding good of liberalism is no more and no less than the continued sustenance of the liberal social and political order." See too Bikhu Parekh, "The Cultural Particularity of Liberal Democracy" in David Held (ed.), *Prospects for Democracy* (Stanford University Press, 1993) at 156-175.

6 For an excellent summary of the positions taken by conservative Christians, and their differences with liberal Christians, see Rex Ahdar, *Worlds Colliding: Conservative Christians and the Law* (Ashgate Publishing, 2001), ch. 2. Liberal Christians have absorbed many of the liberal ideas that conservative Christians reject, but as Ahdar points out, many people fall within the spectrum between these two poles.

7 John Locke, *The Second Treatise of Government* (1690), ch. 5.

Western societies certainly had an understanding of public and private which distinguished between what was open for all to see and what was hidden away (in the King's privy chamber, or the home). But the separation of economic and religious life into a private zone separate from the public political realm was a significant innovation.[8] In pre-liberal societies the legitimate authority of the monarch clearly extended to the economic and religious lives of his subjects:

> [The Monarchy of Louis XIV] was not simply a government in the sense of nineteenth-century liberalism, i.e. a social agency existing for the performance of a few limited functions to be financed by a minimum of revenue. On principle, the monarchy managed everything, from consciences to the patterns of the silk fabrics at Lyons, and financially it aimed at a maximum of revenue. Though the king was never really absolute, public authority was all-comprehensive.[9]

As well as pre-liberal societies, some contemporary societies which developed outside the liberal tradition have not completely absorbed the liberal version of the public/private distinction. Karel van Wolferen, in his book *The Enigma of Japanese Power* says that the characteristic liberal division of social space into public and private realms is not well developed in Japan, for example.[10]

Even within contemporary liberal societies, there are some, like strong religious believers, who do not accept the sanctity of the distinction, nor the premise that it is the very foundation of religious freedom. Liberals hold that it is only when social space is divided up in this way that a private zone free from state interference and coercion is created, and it is only by being placed deep within that private zone that religious belief and practice are safeguarded. But for the strong religious believer, religious commitments demand application in all areas of life. His is a "form of strong conviction that refuses to respect, or even recognize, the line between the private and the public, between the cerebral and the political, and moves instead to institutionalize itself in the rule of law".[11]

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8 For an expansion of this claim, see John B. Thompson, *Ideology and Modern Culture* (Polity Press, 1990), 238-241.

9 Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (1943), excerpted in Brenda Sutton (ed.), *The Legitimate Corporation* (Blackwell, 1993), 27. Robert Heilbroner makes a similar observation in his *Twenty-First Century Capitalism* (Anansi Press, 1992) at 50-51: "[Capitalism brings] the separation of overall governance in any social order into two independent and legally divorced realms, which are at the same time mutually dependent and married for life. .... What we do not ordinarily bear in mind is that this duality of realms, with its somewhat smudgy boundaries, has no counterpart in non-capitalist societies. .... There was only one realm even in such seemingly capitalist like societies as ancient Greece, with its flourishing international trade, or Rome, which sported a kind of stock market in the forum, or 16th century Florence with its monied life. The reason was that the governing authority of the state was legally unbounded. The idea that the material provisioning of society, gladly left to the self-motivated activities of farmers, artisans, and merchants, was not in some ultimate sense under the aegis of the state would never have occurred to Aristotle, Cicero, or Machiavelli." See too his *Behind the Veil of Economics* (Norton, 1988) 43-44, 70-72, 73-74.

10 Karel van Wolferen, *The Enigma of Japanese Power* (Macmillan, 1989) 164-5, 186-7.

11 Stanley Fish, "Sauce for the Goose" in *The Trouble With Principle, supra* note 1, 39.

Here is a religious commitment that is not confined to private belief and worship, but which seeks to order society and law in its image.[12]

So, for a strong religious believer, confining and restricting the scope of religious belief to the private zone is a concealed way of hobbling it. The effect of the liberal freedom of religion principle is that religious belief has been barred from seeking expression through law and public policy, unlike other beliefs such as utilitarianism, or Kantianism. Not only has liberalism worked to constrain and restrict religious viewpoints which are fundamentally opposed to liberal values and beliefs, but it has achieved this in a way which makes it difficult for strong religious believers to object. Since liberals see placing religion within the private zone as the very foundation of religious freedom, any complaints about this state of affairs as constituting a restriction on religious freedom will sound silly. The constraint has been achieved and concealed in plain sight.[13]

> Once the distinction [between the civil and the religious] has been assumed and presides over the inquiry, the claim of a religion to have precedence in every aspect of one's life will seem prima facie absurd. With that claim out of play, all that remains is the task of drawing a line around religion, supposedly to protect it from state interference, but actually to constrain its exercise in ways the state finds comfortable. ... Since the impulse to divide comes from the side of the civil, its values will be normative and religious values will either be accorded a ceremonial but empty honor or regarded as a trivial expression of individual taste, or condemned as 'an irrational and regressive antisocial force.'[14]

Of course, this liberal effort to constrain religion to the private zone and keep it out of the public zone is often resisted, as Fish is aware. He notes that religious beliefs have established a greater public role in liberal democracies such as Northern Ireland and Israel, for example.[15] Even in America, the exclusion from

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See too Stanley Fish, "Mission Impossible" in *The Trouble With Principle, supra* note 1, 178.

12 "The strong claims of religion ... can be realized only if the adherents of religion succeed in institutionalizing their views and thus marginalizing or even suppressing the views of their adversaries." Stanley Fish, "Playing Not To Win" in *The Trouble With Principle, supra* note 1, 240.

13 "The mechanism by which liberal orthodoxy installs itself as the neutral arbiter between competing systems of belief will also be the mechanism that rules out beliefs liberal theorists find uncomfortable. And these will almost always include the beliefs held by fundamentalists and others who feel compelled to imprint their views on public institutions. This is a convenient outcome for secularists who are not really interested in doing justice to strong religious conviction but rather seek a formula that will enable them to dismiss strong religious convictions while appearing to have taken them into serious account." Stanley Fish, "A Wolf in Reason's Clothing" in *The Trouble With Principle, supra* note 1, 187. See too Stanley Fish, "Why We Can't All Just Get Along" in *The Trouble With Principle, supra* note 1, 257.

14 Stanley Fish, "Mission Impossible" in *The Trouble With Principle, supra* note 1, 171, 173. See too Stanley Fish, "Taking Sides" in *The Trouble With Principle, supra* note 1, 12.

15 See Stanley Fish, "Playing Not To Win" in *The Trouble With Principle, supra* note 1, 213.

the public zone is resisted by strong religious believers, who sometimes manage to inject their theological premises into the public policy discussion. Fish points to the abortion debate and gay marriage as two areas where religious convictions enter the public arena in a substantive way.[16] But on Fish's analysis, these are instances of religious beliefs forcing their way through the barriers put in place by the structure of liberal thought, and do not sit easily with liberal beliefs about the importance of separating the public and private zones of life.

As well as religious views sometimes forcing their way across the public/private barrier, liberals themselves will sometimes raise the barrier slightly in particular circumstances. Fish notes that liberals will allow religion to enter the public zone if it accepts a role that is ceremonial, rather than substantive. As an example Fish gives "a prayer that opens a session of Congress in which the proposals of religion will not be given a serious hearing".[17] Those proposals will not be given a serious hearing because "liberalism cannot allow ['Christ is Risen'] to have a public life in the sense that it might be put forward as a *reason* for taking this action (going to war, passing a budget, ending affirmative action) rather than another".[18] Liberals will also allow strong religious believers to participate in the public arena if they can give secular reasons rather than religious reasons for their substantive positions.[19] But these examples only serve to confirm the general point that while liberals present the public/private distinction as a neutral procedural device that guarantees equal protection to all religious viewpoints, it really only protects religious viewpoints which have accommodated themselves to the strictures of liberal values and beliefs.[20]

b) The association/community distinction[21]

Strong religious believers can also object to the liberal claim that religious commitment must be an individual choice freely made (and unmade) on the basis of the open contest of religious viewpoints in the marketplace of ideas. This seems an obvious meaning of freedom of religion for liberals, and also seems to them to be neutral as between competing partisan religious viewpoints. But some strong religious believers object that such a procedure is not neutral, but is rather biased in favor of liberal *associations* and against religious *communities*.

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16 See *ibid.*, 217.

17 Stanley Fish, "Why We Can't All Just Get Along" in *The Trouble With Principle*, *supra* note 1, 253.

18 Stanley Fish, "Faith Before Reason" in *The Trouble With Principle*, *supra* note 1, 271 (italics in the original).

19 See Stanley Fish, "Playing Not To Win" in *The Trouble With Principle*, *supra* note 1, 213.

20 For an interesting parallel account of how democracy has been forced to accommodate itself to the strictures of liberalism, see Bikhu Parekh, "The Cultural Particularity of Liberal Democracy", *supra* note 5, 156-166.

21 The arguments made by strong religious believers in this section are not dealt with by Fish, but can be found in Rex Ahdar, *Worlds Colliding*, *supra* note 6. I include them here because they flesh out and support the arguments Fish does deal with.

As well as the public/private distinction, another of liberalism's historical innovations was to reverse the priority of the community over the individual that was characteristic of earlier societies:

> Unlike the Greeks, and indeed all the premodern societies which took the community as their starting point and defined the individual in terms of it, liberalism takes the individual as the ultimate and irreducible unit of society and explains the latter in terms of it. Society 'consists' or is 'made up' of individuals and is at bottom nothing but the totality of its members and their relationships.[22]

Because the individual is primary, rather than the group, deciding what to value is a matter of individual free choice, on the liberal account. Once individuals have made their free choices about what to value, they may choose to join in a group with like-minded others. Thus groups are formed, on the liberal account, by individuals freely choosing to associate together to advance some goal or value they all individually share. Of course, if an individual member of this association decides that he no longer shares the values or goals of the group, he must be free to leave. Both the freedom to join and the freedom to leave are aspects of the liberal "freedom of association" right.

But a strong religious believer can object that a religious community is not reducible to such a liberal association. One argument might be that a religious community is formed not by the choices of the individuals within it, but by the force of the religious truth which stands above and commands them all. Or the strong religious believer might challenge the liberal premise that deciding upon what to value is something that is ultimately an individual matter. He may claim that one can only come to understand the good in community with others.[23] Arguments such as these seek to restore the priority of the religious community over the individual, and to insist that the rules for liberal associations are not appropriate for religious communities. Under the rules for an association of individual, rational, choosing agents:

> [the religious community] must inform its members that they can quit at any time and thus it must inform its members that believing along with the rest of the community is not the most fundamental thing of all. Communities thus become half-minded and thus half-hearted.....They become communities founded on prior respect for individual choice and thus become mirror images of the larger liberal society. In this liberal society, communities are not left free: rather they are constrained to become liberal associations.[24]

Again, what seems like the neutral enhancement of individual religious freedom to a liberal seems like bias and constraint to a strong religious believer.

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22 Bikhu Parekh, "The Cultural Particularity of Liberal Democracy", *supra* note 5, 157. See too Steven Lukes, *Individualism* (Blackwell, 1973).

23 This argument is developed in Patrick Neal, "A Liberal Theory of the Good?" (1987) 17 *Canadian J. of Phil* 57, and is cited in Rex Ahdar, *Worlds Colliding, supra* note 6, 113.

24 Paul Marshall, "Liberalism, Pluralism and Christianity: A Reconceptualization" (1989) 21 *Fides et Historia*, 9, cited in Rex Ahdar, *Worlds Colliding, supra* note 6, 79.

c) Competing attitudes to authority

Fish describes another challenge to the neutrality of the liberal freedom of religion principle which was provided by Vicki Frost. She was a strong religious believer who objected to her children being taught in school from a book which exposed "readers to a variety of religious beliefs, without attempting to suggest that one is better than another".[25] The school argued, and the Courts agreed, that her children were not being taught to accept these other religions, they were just being exposed to a range of ideas so that they would better understand them. The process the children were going through was enhancing their ultimate ability to make a free choice as to what religious beliefs they wanted to hold, and was not indoctrinating them in any substantive creed.

Vicki Frost disagreed strongly. First, she did not accept the liberal premise that mere exposure to an idea is harmless. Her premise was the Christian doctrine of original sin, and as a consequence of that original sin, the mind, "rather than standing apart from the range of views that contend for its approval, ...is, in its congenital weakness and disposition to be overwhelmed, at the mercy of those views. Accordingly, it behooves the parent or educator to take care lest their charges be influenced in the wrong directions, as they might well be if they were introduced to notions they were ill-equipped to resist."[26] Nor did she accept the liberal premise that decisions about religious belief should be made by the individual free of the constraints of external authority. For her, believing in accordance with the highest external authority, *i.e.* God, was the most desirable thing, and she did not want her children harmed by being deflected from such obedience.[27]

The point Fish wants to draw out of this dispute is that while it is true that Vicki Frost's children were not indoctrinated into any particular religious creed by the school, there was a more concealed indoctrination into liberal beliefs about external authority. This is where the bias, the non-neutrality, the concealed advancement of a substantive partisan agenda comes in. For a liberal, the value Vicki Frost places on obedience to authority is beyond the pale: "For the Mill of *On Liberty*, what 'no reasonable person would believe' is that the highest value is the value of obedience. Mill is incredulous before a philosophy according to which 'all the good of which humanity is capable is comprised by obedience,' and he is aghast at an ethics that requires nothing of man but 'the surrendering of himself to the will of God'."[28] It is such liberal beliefs, which undercut strong

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25 Stanley Fish, "Vicki Frost Objects" in *The Trouble With Principle, supra* note 1, 156.

26 Stanley Fish, "A Wolf in Reason's Clothing" in *The Trouble With Principle, supra* note 1, 197. See too Rex Ahdar, "Children's Religious Freedom, Devout Parents, and the State" in Peter Edge and Graham Harvey (eds.), *Law and Religion in Contemporary Society: Religious Communities, Individualism and the State* (Ashgate Publishing, 2001), 93-114.

27 "Vicki Frost and her colleagues pledge allegiance to an authority (God, the church, the Bible) and wish their children to follow it (not critically examine it)..." Stanley Fish, "A Wolf in Reason's Clothing" in *The Trouble With Principle, supra* note 1, 198. See too Stanley Fish, "Vicki Frost Objects" in *The Trouble With Principle, supra* note 1, 157.

28 Stanley Fish, "Why We Can't All Just Get Along" in *The Trouble With Principle, supra* note 1, 248.

religious beliefs, that Vicki Frost's children are being taught in school:

> This is where the indoctrination comes in, not at the level of urging this or that belief but at the more subliminal level at which what is urged is that encountering as many ideas as possible and giving each of them a run for its money is an absolutely good thing. What the children are being indoctrinated in is distrust for any belief that has not been arrived at by the exercise of their unaided reason as it surveys all the alternatives before choosing one freely with no guidance from any external authority. Unaided reason, however—reason freed from the tethering constraints of biblical commands or parental precepts—is what Vicki Frost and her co-religionists distrust.[29]

d) Competing conceptions of the self

It is not just a particular liberal position on authority and obedience that is being inculcated in the children here, according to Fish. There is also a contentious liberal position on the nature of the self that Fish thinks is ultimately incoherent. The liberal account of how freedom of religion is being enhanced here relies upon a Kantian conception of the self in which an autonomous, choosing agent stands apart from competing substantive beliefs, and only accepts those that pass the test of rationality. On this account:

> ...you assume, first, that the mind is a cognitive machine that can always draw back from the ideas presented to it and assess them by independent criteria; second, that this is what the mind, if it is working properly, is supposed to do; and third, that a conviction held in any other way, held in conformity with authority rather than as the conclusion of a process of critical reasoning, is not a conviction worth having.[30]

On Fish's alternative account, rather than the self being able to draw back from any of its current beliefs and hold them at arm's length, being gripped by some local beliefs is what constitutes me as a particular self. The self only exists because of the beliefs, norms, values, categories *etc* put in place through education and socialization into particular human communities. Consequently the liberal picture, found in both Kant and Rawls, of an autonomous, choosing self, existing separate from its particular beliefs and evaluating those beliefs while holding them at arms length, is an impossibility.[31]

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29 Stanley Fish, "A Wolf in Reason's Clothing" in *The Trouble With Principle, supra* note 1, 198.

30 Stanley Fish, "Vicki Frost Objects" in *The Trouble With Principle, supra* note 1, 157. In "A Wolf in Reason's Clothing" in *The Trouble With Principle, supra* note 1, 197 Fish describes this as "a psychology that is part and parcel of the liberalism Vicki Frost and her friends don't want imposed on their children. In that psychology, the mind remains unaffected by the ideas and doctrines that pass before it, and its job is to weigh and assess those doctrines from a position distanced from and independent of any one of them."

31 This is a very compressed account of a fundamental element of Fish's work, his conception of the "embedded self". I have tried to expand on this conception elsewhere. See works by Michael Robertson cited in note * above. This conception of the self can also be found in the philosophical writings of others such as

It is this conception of the self which leads Fish to hold that the liberal commitment to free religious choice without constraint by some external authority is incoherent. In exercising choice, one is always in the grip of authoritative beliefs provided by one's community, because without such beliefs being already in place, the notion of making a choice could not arise. It is only because of the goals, values, beliefs, practices *etc.* that come with some local, biased, partisan, and therefore *constraining* viewpoint, that we have the ability to exercise our freedom. It is only because of these that we see a particular range of choices, and have reasons to choose one action over another.

> Indeed, if you think about it, the requirement that people be allowed 'to form their own opinions, beliefs, concepts, hypotheses' makes no sense. You cannot form a belief in a vacuum, in the absence of an already-in-place framework of norms, distinctions, and hierarchies. And it cannot be you who puts that framework in place, or who chooses it, for prior to its institution the notion of choice could not possibly have had a content. Indeed, you couldn't even have a thought if the range of possible thoughts had not already been established and imprinted on your brain before you took your first mental step. Just as you can't have education without authoritative selection, so you can't have consciousness without authoritative selection, and one you didn't make.[32]

Fish is not denying that we can be self-critical about our religious beliefs and even change our minds about what we believe and what church to belong to. But this thinking and changing is always enabled by a constellation of other presently-in-place beliefs which are not being questioned. Self-criticism is enabled by background beliefs, including beliefs about what sorts of evidence or reasons justify changing our beliefs. The necessary presence of these background, enabling beliefs means that the act of choosing or self-criticism is never free or unconstrained by external authority in the strong sense that the liberal wants.

e) The reason/faith distinction

Fish's final critique of the liberal claims of freedom of religion as neutral principle or procedure is centred on the idea of reason. Liberals tell the devout that all beliefs are treated equally when they are evaluated in the marketplace of ideas according to the same critical standard of reason. However, religious ways of life often appear deficient when subjected to this test. Strong religion with its beliefs about scriptural authority, miracles and revelation can seem like a wilful turning away from facts in favour of irrationality and dogmatism. Consequently strong religious believers are often viewed with suspicion by liberals because they are perceived as rejecting reason in favour of faith.

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communitarians, social constructionists, and even some conservative thinkers. See the works by Charles Taylor and Alasdair MacIntyre cited in note 5, *supra*, as well as Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press, 1982).

32 Stanley Fish, "Vicki Frost Objects" in *The Trouble With Principle*, *supra* note 1, 158.

This produces the tension within liberal thought regarding religion which Fish describes in "Sauce for the Goose".[33] Freedom of religious belief is placed on the highest pedestal, but the actual content of some religions is despised as superstitious, irrational nonsense, and sometimes even dangerous fanaticism, zealotry, or cultism. Fish claims that this conflict is mediated within liberalism by the Kantian conception of the self, which we saw him criticize earlier. On this Kantian viewpoint, the essence of the self is to be found in its nature as a rational, autonomous agent. Religious belief is valued in the abstract because it is something freely chosen by the autonomous self, but the actual content of the particular choices made by an individual are not essential to the self. Rather they represent something that is contingent and reviseable, and since they do not reflect the essential nature of the self, they need not be accorded the same level of respect as the enduring capacity to act as an autonomous agent.

> One sees in this example what freedom of religion means in a liberal regime, and why the announcement of it can go hand in hand with the demonization of religion: you are free to express your religious views not because of their content but because of their status as expressions. Religious views on this understanding are just like other views—political views, aesthetic views, sexual views, baseball views—and what is valued about them is that they have been freely produced (no one forced you to utter them) and that they are freely broadcast (no one has censored them). What is *not* valued about them is the content of what they urge. As instances of a favored category —expression— religious utterances are cherished; as something you are asked to take seriously, they are feared and condemned.[34]

There are a number of negative consequences for strong religious believers of having to face a harsh judgment at the bar of reason as it is understood by liberals. As we have already seen, one consequence is that strong religious beliefs are confined to the private zone and excluded from the public zone. Liberals are quite happy to leave alone a belief they see as irrational, as long as it remains in the heart or the church where it can do no harm to the body politic.

If the strong religious believer seeks to carry his beliefs forward into actions beyond private devotions, then liberal societies have devices to impose further constraints if liberal values or institutions are not respected—even when the actions of the strong believers remain within what is traditionally conceived of as the private zone. For example, Fish describes how the speech/action distinction developed in the First Amendment context can be used "as the Supreme Court did when it rejected the claim by some Mormons that polygamy was essential to their religion and thus protected by the free exercise clause. ... That is, Mormons are free to believe and say anything they like so long as they do not put their beliefs and words into actions of which the authorities disapprove."[35] In "Mission Impossible" he refers to the same device: "If religion is basically a matter of belief rather than conduct, a restriction on conduct will not be an infringement of religious liberty."[36]

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33 Stanley Fish, "Sauce for the Goose" in *The Trouble With Principle, supra* note 1, 34ff.

34 *Ibid.*, 39 (italics in the original).

35 *Ibid.*, 38.

36 Stanley Fish, "Mission Impossible", in *The Trouble With Principle, supra* note 1, 172. The Mormons are discussed again on page 173.

The most extreme negative consequences are seen when strong religious beliefs are judged to be not only irrational, but also very dangerous to liberal values and institutions. Then the believers tend to be categorized as mindless fanatics who have forfeited their standing in the marketplace of ideas and their claim to enjoy the protection of the freedom of religion umbrella because of their determined refusal to abide by the rules of dialogue and reason as liberals understand them.[37] What we see in all such devices, Fish says, is "an act of power, of peremptory exclusion and dismissal, that cannot be acknowledged as such lest the liberal program of renouncing power and exclusion be exposed for the fiction it surely is".[38]

Underlying all such acts of "peremptory exclusion and dismissal" is the premise that there is only one reason, one logic, which is a neutral tool that can be applied to all substantive positions to see how they stand up, and strong religion fails this test. But whatever the merits of constraint by liberals of strong religious believers on partisan pragmatic grounds, Fish is adamant that it cannot be justified on the higher "principled" ground that some religious beliefs fail the test of neutral, universal reason. Fish rejects "reason" as a candidate for the neutral procedures or principles liberalism constantly seeks, because he sees reason too as a local, contingent, historical product.[39] Hence, according to Fish, we do not have a contest between reason and blind, unthinking faith, as liberals like to portray it. Instead, it is a contest between two different rationalities.

"Persons grasped by opposing beliefs will be equally equipped ... with what are, for them, knock-down, unimpeachable authorities, primary—even sacred—texts, and conclusive bodies of evidence."[40] Those gripped by deep religious beliefs see different facts and are swayed by different compelling reasons than is a secular liberal. For a liberal, reason involves submitting your beliefs to criticism and correction by other people in an open-minded, dialogic process. For a liberal, the strong religious believer's mind is closed in advance to any evidence that would contradict his already-in-place beliefs. But for some strong religious believers, the human reason relied upon by the liberals is rendered

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37 Stanley Fish, "A Wolf in Reason's Clothing" in *The Trouble With Principle, supra* note 1, 190, 199-200.

38 *Ibid.*, 201.

39 *Ibid.*, 187ff. For instances of Fish making the same analysis of reason in his earlier writings, see "Anti-Professionalism" in *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press, 1989) 222-5; "Force" in *ibid.*, 518-9; "Introduction: 'That's Not Fair'" in *There's No Such Thing as Free Speech and it's a Good Thing, Too* (Oxford University Press, 1994) 17-18; "Liberalism Doesn't Exist" in *ibid.*, 135-7. For a challenge to modern liberal notions of rationality from another source, see Phillip E Johnston, *Reason in the Balance: The Case against Naturalism in Science, Law and Education* (InterVarsity Press, 1995).

40 Stanley Fish, "Mission Impossible" in *The Trouble With Principle, supra* note 1, 163-4. See too Stanley Fish, "Playing Not To Win" in *The Trouble With Principle, supra* note 1, 216, where Fish approves of Larry Alexander's "denial of any epistemological distinction between secular and religious ways of knowing ... Both are faiths, that is, ways of reasoning whose cogency and intelligibility depend on assumptions not open to question. Or, if you prefer, both are rationalities, that is, directions for producing evidence and conclusions undergirded by a full and co-

fallible by original sin and is therefore distrusted and "rejected as a way of knowing in favor of scripture and revelation".[41] In the words of John Webster, writing in 1654, "But if man gave his assent unto, or believed the things of Christ ... because they appear probable ... to his reason, then would his faith be ... upon the rotten basis of human authority."[42] For such a strong religious believer, the reasoning of his secular opponent either counts for little,[43] or does not register at all.

> If the challenges come from within the structure of your belief (since you have already acknowledged that all men are created equal, how can you support a policy of racial discrimination?), then the standard to which you are being held is one you have already acknowledged, and what is being asked of you is, simply, that you be consistent with yourself. If, however, the challenge comes in terms not recognized by the structure of your beliefs, why should you be in the least concerned with it since it rests on notions of evidence and argument to which you are in no way committed? [A] reason persuasive to the devout would have to be a reason compatible with the content of their devotion, and ...a reason which instead trumps, or claims to trump, that content will be seen as no reason at all but as a wolf in reason's clothing.[44]

The key to Fish's critique of the liberal conception of reason as a neutral instrument is his unorthodox account of belief. We have already seen that, for Fish, beliefs are not simply things that the autonomous Kantian self inspects at arm's length and rejects or accepts on the basis of reason. Rather the deep beliefs that come with being embedded inside particular human communities constitute and enable the self.[45] Here we see him rejecting another of the standard accounts of the role beliefs play in our lives. On that standard understanding, belief occupies an inferior epistemological position to facts and reason. Facts and reason are objective, while beliefs are subjective. Beliefs can be proved defective or deficient by appeal to reason or facts. For Fish, on the other hand, the deep

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herent account of what the world is really like." Fish approves of similar remarks by Stephen Carter in Stanley Fish, "Why We Can't All Just Get Along", in *The Trouble With Principle, supra* note 1, 255.

41 Stanley Fish, "A Wolf in Reason's Clothing" in *The Trouble With Principle, supra* note 1, 189.

42 Cited by Stanley Fish in "Why We Can't Just All Get Along" in *The Trouble With Principle, supra* note 1, 258.

43 This is "not because believers avert their eyes from new sources of evidence but because, as they see it, all the evidence is already in and proceeds from a source so high that no piling up of arguments on some 'other side' could possibly matter." Stanley Fish, "A Wolf in Reason's Clothing" in *The Trouble With Principle, supra* note 1, 196-7.

44 *Ibid.*, 199, 208. See too Stanley Fish, "Faith Before Reason" in *The Trouble With Principle, supra* note 1, 263ff, and especially 268.

45 "There is no relationship between us and our beliefs; rather, there is an identity. The operations of my consciousness and the shape of my beliefs are not two entities somehow 'relating' to one another but one entity called by different names....It is because belief is at some level inaccessible to consciousness that it is so crucial to—indeed constitutive of—consciousness." Stanley Fish, "Beliefs About Belief" in *The Trouble With Principle, supra* note 1, 280, 284.

beliefs that come with being embedded turn out to be epistemologically primary, not secondary.

This does not mean that facts are whatever you want them to be, or that the world is the way you believe it is. What it means is that your interpretive community's deep beliefs form "a lattice or web whose component parts are mutually constitutive",[46] and which determine what will be compelling facts for members of that community,[47] and what they will see as compelling reasons.[48] So for the members of any interpretive community, facts and reasons come in compelling forms; forms which may dash some of their established beliefs and expectations, and force them to change their minds about some things. Members of any interpretive community will always have at hand the tools to do the work of distinguishing fact from error and false beliefs from true beliefs, but the (historically contingent) shape of these tools will be a function of the background beliefs of the community.[49]

Fish's general epistemological claim is exemplified by the nature of the disputes between strong religious believers and secular liberals. These disputes cannot be settled by reason, or by an appeal to the facts, because the background beliefs of the two groups mean that they see different facts as objective, and different reasons as cogent. Fact and reason cannot adjudicate between the deep beliefs of the two groups, because what is experienced as compelling facts and reasons is a function of those same deep beliefs.

> A 'creationist parent whose child is being taught ... evolution' protests not in the name of religion and against the witness of fact; he protests in the name of fact as it seems indisputable to him given the 'central' truth that 'God is real'. Given such a 'starting point and the methodology' that follows from it, 'creationism is as rational an explanation as any other' and from the other direction, you might say that given the assumption of a material world that caused itself ... evolution is as faith-dependent an explanation as any other. This is not to debunk rationality in favor of faith but to say that rationality and faith go together in an indissoluble package; you can't have one without the other.[50]

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46 *Ibid.*, 280.

47 "There is no specification of the facts of a matter independent of some or other comprehensive background already in place. Indeed, independently of any comprehensive doctrine there is neither perception nor judgment..." Stanley Fish, "Putting Theory in its Place" in *The Trouble With Principle, supra* note 1, 286.

48 "There is no such thing as reason apart from its appearance in historical circumstances, an appearance that will always take the form of *reasons*, that is, of arguments already inflected and infected by some prechosen partisan vision or angle." *Ibid.*, 287 (italics in the original).

49 "This is not to say that in an anti-foundationalist world one lacks mechanisms for confirming or disconfirming beliefs, or hunches; it is just that such mechanisms (authoritative documents, the pronouncements of revered authorities, standards of measurement, and so on) do not stand apart from the structure of one's beliefs *but are items within it*." Stanley Fish, "Truth and Toilets" in *The Trouble With Principle, supra* note 1, 306 (italics in the original).

50 Stanley Fish, "Why We Can't All Just Get Along", in *The Trouble with Principle, supra* note 1, 255. See too Stanley Fish, "A Wolf in Reason's Clothing" in *ibid.*, 199. In "Beliefs About Beliefs" in *ibid.*, 284 Fish says: "Belief is prior to rationality; ra-

Fish also uses John Milton's *Paradise Lost* to make his point that reason acquires its historically contingent shape from a background of in-place partisan beliefs. In both "Why We Can't All Just Get Along"[51] and "Faith Before Reason"[52] his extended examination of the role of background beliefs in the different reasoning of Adam, Eve, Satan, and Abdiel leads him to conclude:

> For the modern liberal, beliefs are what the mind scrutinizes and judges by rational criteria that are themselves hostage to no belief in particular. For Milton, beliefs—in God or in oneself or in the absolute contingency of material circumstances—are the content of a rationality that cannot scrutinize them because it rests on them. Milton's motto is not 'Seeing is believing', but 'Believing is seeing'; and since what you see also marks the boundaries of your knowledge, believing is also knowing; and since it is on the basis of what you know...that you act, believing is acting. What you believe is what you see is what you know is what you do is what you are.[53]

So, reason and facts do not stand outside the partisan fray, and are therefore not capable of regulating that fray in the strongly neutral way that liberals desire. Instead, reason and facts have the shape they do for some group because they are the extension of that group's formative partisan beliefs, values, *etc.* Rather than belief being separate from, and in an inferior position to, facts and reason, beliefs are a precondition for facts and reason.

The natural liberal response to Fish's demonstration that power and exclusion has been exercised in a concealed manner with respect to the freedom of religion principle is to cry *mea culpa*, and renounce power and exclusion in the name of restoring real neutrality and toleration. But this is not Fish's goal, nor does he believe it is a possible goal. Instead it is just a repetition of the fundamental liberal error of believing in a position outside the partisan fray, *i.e.* a position of principle rather than pragmatic politics. "I don't criticize liberals for employing power in an effort to further the truths they believe in—that's what everyone does, necessarily—but for pretending to be doing something else and for thinking there is something else to do."[54] Viewed abstractly and philosophically, the epistemologies of the strong believer and the secular liberal may be "on a par, each one an orthodoxy to itself, fully equipped with dogma, criteria for evidence, founding texts, exemplary achievements, heroes, villains, goals, agendas, and all the rest".[55] But politically they will never be on a par; there is a constant contest for the position of dominant epistemology. When one contestant wins, its notions of reason and evidence will seem obvious, natural, and common sense

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tionality can only unfold in the context of convictions and commitments it neither chooses nor approves."

51 Stanley Fish, "Why We Can't All Just Get Along" in *The Trouble With Principle, supra* note 1, 243ff.

52 Stanley Fish, "Faith Before Reason" in *The Trouble With Principle, supra* note 1, 263ff.

53 Stanley Fish, "Why We Can't Just All Get Along" in *The Trouble With Principle, supra* note 1, 247.

54 Stanley Fish, "A Wolf in Reason's Clothing" in *The Trouble With Principle, supra* note 1, 201.

55 Stanley Fish, "Playing Not to Win" in *The Trouble With Principle, supra* note 1, 218.

for most people, while those of its opponent will seem to be irrational fanaticism or blind adherence to dogma. But this victory is political, not philosophical, and so it is not timeless and stable. It might last a long time, but it is always capable of being displaced by the same forces that put it in place.[56]

So Fish concludes that if the strong religious believer wants to be true to his position, he should neither accept the liberal conception of reason as the measure of the adequacy of his religious beliefs, nor should he engage in an impossible search for some other conception that is more truly "neutral". Instead he should struggle to get his partisan conception of reason accepted as the dominant one, as it was in the past. This struggle might sometimes be conducted in the language of neutral principle, and it might even be useful on occasion to employ the principles of the liberal opponent against him.[57] But on Fish's account, this principle talk is only a rhetorical device, because the exercise is really always a pragmatic one, in which people seek different ways to advance the partisan beliefs they are deeply committed to and which indeed constitute them. Failure to absorb the lesson of the impossibility of neutral and universal principles in the liberal sense, and the inescapability of pragmatic partisan politics, can render you less effective in advancing your deeply held beliefs, according to Fish. If you believe in principles, you are at risk of being taken in by the principle talk of your opponents, or of having them take your principle talk and fill it with a content which favours them.[58] Indeed, Fish thinks that this is the condition in which strong religious believers often find themselves. Even as they struggle against secular liberalism, the shape of that struggle reveals that they have been hobbled by accepting the validity of some of the "principles" of their opponents.

It is precisely this state of affairs that Fish sees exemplified in religious thinkers like Daniel Conkle, Franklin Gamwell and Ronald Thiemann in "A Wolf in Reason's Clothing".[59] Even though these men seek to free religion from confinement in the private zone, and to bring it into the arena of public life, they accept that religion's ticket of admission is participation in reasoned debate on the liberal model. They are still committed to the liberal picture of a process of public dialogue, where viewpoints are exchanged, critiqued and corrected in an atmosphere of mutual respect and toleration. But the strong believer should not accept this limitation, which will still keep him out, says Fish. For the strong religious believer, the dialogic process is not the highest good, nor the best model of reasoning. For him, "the moral optimum is not everyone talking to one another in a decorous deliberative forum, but is, rather, everyone allied to and acting in conformity with the Truth and the will of God".[60]

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56 *Ibid.*, 216-218.

57 *See* for example the strategy of Michael McConnell, lawyer for the petitioner in *Rosenberger v Rector*, which Fish describes in *ibid.*, 224-228.

58 *See* for example, Stanley Fish, "Epilogue: How the Right Hijacked the Magic Words" in *The Trouble With Principle*, *supra* note 1, 309ff.

59 Stanley Fish, "A Wolf in Reason's Clothing" in *The Trouble With Principle*, *supra* note 1, 187-91.

60 *Ibid.*, 203. See too Stanley Fish, "Playing Not To Win" in *The Trouble With Principle*, *supra* note 1, 221.

Similarly, Fish thinks that Kent Greenawalt shifts uneasily between a commitment to principle, and a recognition of the inescapablity of pragmatism.[61] Greenawalt imagines a strong religious believer, whom he names "Faith", in a society in which only one sixth of the people share her views. He thinks it would be pragmatically sensible for Faith to accept temporarily the liberal public/private distinction so as to keep her religion free of government interference while it is in a weak position. But he also thinks that there is a principled reason why Faith should not seek to advance her religious views through the state, even if she could. Since her views are those of a small minority, imposing them on others would "inadequately respect freedom and consent as grounds of human community".[62] But Fish responds, "why should she suppose *that*, unless she had abandoned her religion for a new one whose cardinal doctrines are not original sin and the divinity of Christ but freedom and consent?".[63] That is, why should she feel that arguments based on appeals to freedom and consent have more force than arguments based on appeals to God's commands unless she had come to place partisan liberal beliefs above her partisan religious beliefs? Liberals disguise this clash of partisan beliefs by painting their position as embodying a principle (freedom, consent) which stands above the fray of partisan beliefs. But on Fish's analysis, this is a rhetorical ploy, and Greenawalt has fallen for it.

Frederick Gedicks successfully demonstrates that liberalism fails to conform to its own standard of neutrality with respect to religion. But, Fish says, this by itself only helps the liberals, because the charge only has bite if you accept the liberal premise that real neutrality is possible. Belief in the existence of neutral principles has snared Gedicks as well, causing him to reinforce liberal values and deflecting him from moving more effectively to advance his anti-liberal beliefs:

> Every discourse, even one filled with words like 'fair' and 'impartial', is an engine of exclusion and therefore a means of coercion. It follows that it is beside the point (unless it is a narrowly theoretical one) to prove that a particular discourse is coercive. Of course it is. The real question is: 'Is this coercion we want, or is it coercion favored by our opponents?' Gedicks ... should critique liberalism not because it excludes something, but because it excludes something he believes to be good and true. And he should try to combat that exclusion not by eliminating exclusion altogether—that, after all, is liberalism's goal and an impossible one—but by replacing his opponent's exclusions with his own.[64]

Even David Smolin, " a law professor *and* a fundamentalist Christian" who rejects "the assumptions of fallibilism (all points of view are partial and corrigible) and pluralism (the more points of view in play the better)"[65] falls into the quicksand of liberal principles, according to Fish. He sees that liberal

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61 Stanley Fish, "Playing Not To Win" in *The Trouble With Principle, supra* note 1, 211-220.

62 *Ibid.*, 214.

63 *Ibid.*, 214-5 (italics in the original).

64 *Ibid.*, 223-4.

65 *Ibid.*, 240 (italics in the original).

assumptions like fallibilism and pluralism are built into the rules of the game, and complains that this is "unfair" and prevents "real dialogue" with the devout. But, Fish says, Smolin should not want fairness and dialogue—those are the values ranked highly by liberals. He should want to have his own highest values, the values of strong religion, put in place and liberal concepts cast out or understood anew against a different background of religious values and beliefs.

> To put the matter baldly, a person of religious conviction should not want to enter the marketplace of ideas but to shut it down, at least insofar as it presumes to determine matters that he believes have been determined by God and faith. The religious person should not seek an accommodation with liberalism; he should seek to rout it from the field.[66]

Smolin says he does want this, but he wants to achieve it in a way that all can accept as fair.[67] Fish's claim is that this hope reveals that liberalism still has Smolin in its grip. Liberals are concerned with fair procedures and shy away from mandating substance, but what is adherence to fair procedures worth to a strong believer if adherence to God's truth is not the substantive outcome? And how would one ascertain which procedures were "fair"? That determination would depend upon judgments as to what was reasonable, but as we have seen, perceptions of what reason requires are products of already in-place deep beliefs. Consequently those gripped by competing deep beliefs will not be able to agree on what reason and fairness require. There will be a contest between them as to which partisan viewpoint will get to determine what comes to be seen as fair and reasonable processes.

Since politics/rhetoric is the only game in town, the task is to find the most effective moves to make in the situation confronting you. Fish's view is that engaging in theoretical disputes or accommodations with liberalism which take place largely on liberalism's own ground is not generally going to be the most effective move for the strong believer, or indeed, any non-liberal.[68] Again, Fish is not endorsing any such non-liberal position. He is simply offering some observations on the nature of the task ahead for those who do, based on his own deep critique of the possibility of neutral liberal principles or universal liberal rights.[69]

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66 Stanley Fish, "Why We Can't All Just Get Along" in *The Trouble With Principle*, *supra* note 1, 250. See too page 261.

67 Stanley Fish, "Playing Not To Win" in *The Trouble With Principle*, *supra* note 1, 240-1.

68 *Ibid.*, 221. For similar criticisms of strong religion's defenders for falling into the snares of liberal "principles", see Stanley Fish, "Why We Can't All Just Get Along" in *The Trouble With Principle*, *supra* note 1, 250-262. "Men like McConnell, Carter, and Marsden ... set out to restore the primacy of the good over the right but find the protocols of the right—of liberal proceduralism—written in the fleshly tables of their hearts." (At page 262).

69 "Let me say what should now go without saying: Smolin's victory is what *he* should want, not what I want for him or for myself; once again, you will learn nothing about my own agenda by reading my analyses of the agendas of others." Stanley Fish, "Playing Not To Win" in *The Trouble With Principle*, *supra* note 1, 241 (italics in the original).

5. Conclusion

Stanley Fish has a number of targets in *The Trouble With Principle* which can be thought of as nested inside each other. At the innermost level, there are particular liberal rights, such as freedom of religion and freedom of speech. But for Fish, the deeper purpose in exposing problems with the conventional understandings of these particular rights is to expose more general problems with liberalism. And the basic problem with liberalism, according to Fish, is that it is just a particular instance of a more general impulse in Western thought, the impulse to achieve transcendence. By this I mean the impulse to attain an Olympian position above or to the side of our contingent beliefs and practices by means of critical self-reflection. Fish sometimes calls this general impulse philosophy, sometimes he calls it theory, but he is consistent in insisting that whatever you call it, it is impossible.[70]

For Fish, we will always remain embedded in the concrete particulars of some community-specific form of life, because that is the only way we can exist as the humans we are. We can sometimes consciously alter the nature of our community's form of life, pursuant to rules of change which the community itself accepts. And we can sometimes move laterally out of the grip of one community's form of life into the grip of a different community's form of life. But we can never release ourselves from the non-neutral, partisan grip (constraint, bias, authority, *etc.*) of some form of life or another. Liberalism seeks this transcendence, just as "critical theory" does, but it can never achieve it. The liberal version of the yearning for transcendence takes the form of a search for universal and neutral principles which are not hostage to any particular partisan position, and which can therefore, without injustice, be imposed upon all of those disputing over competing conceptions of the good life. Freedom of religion is asserted to be such a principle by liberals, but Fish, I conclude, has demonstrated that it is not, and could never be.

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70 "With respect to this project (which is the project of theory or philosophy in general; liberalism is just one relatively recent name for it) my position is, first, that it is impossible...." Stanley Fish, "Putting Theory in its Place", in *The Trouble with Principle*, *supra* note 1, 286.