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HOW TO DO THINGS WITH THE FIRST AMENDMENT

PIERRE SCHLAG*

The fading away of [X] is signaled not by silence but by more and more talk, more journals, more symposia, and more entries in the contest for the right to sum up [X's] story. There will come a time when it is a contest no one will want to win, when the announcement of still another survey of [X] is received not as a promise but as a threat, and when the calling of still another conference on the function of [X] in our time will elicit only a groan. that time may have come: [X's] day is dying; the hour is late; and the only thing left for a [student of X] is to say so, which is what I have been saying here, and, I think not a moment too soon.

Stanley Fish¹

I am not here to criticize Stanley Fish's presentation. I am here to interpret it. I am not here to defend or to criticize the First Amendment. In an important sense, I won't have much to say about the First Amendment at all.

Now, you're probably thinking: He can't do that. This is a conference on the First Amendment. He's got to talk about the First Amendment. Well, yes. And in a way, I will. But as I see it, all this talk about "The First Amendment" is no more about the First Amendment than fear of stepping on a crack in the sidewalk is about sidewalks. The First Amendment here is, in all sorts of ways, the sidewalk. And I'm not interested in sidewalks. And so, I will have absolutely nothing to say about where the cracks should be located on the First Amendment sidewalk, or whether they should be moved or why or anything of the sort. What I want to talk about is what Stanley Fish is doing and how he does it.

So is Stanley Fish right about the First Amendment? Of course, he is right. He is right from a certain perspective. And his rightness, of course, must itself be an interested partisan perspective—namely his own. Now to call Stanley Fish's perspective an

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1. Stanley Fish, *Consequences*, in *AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM* 106, 128 (W.J.T. Mitchell ed., 1985).

interested partisan one is not an objection, much less a refutation of his argument. It is rather, as he might say, its restatement.

So what has Stanley Fish been doing here? He has been doing what all legal thinkers strive to do when they talk and write about the First Amendment. What they do—within the limits of their capacities and their agendas—is try to make “The First Amendment” their own. They are all, in other words, busily composing their own version of that famous, apocryphal, but utterly emblematic, piece of scholarship: “What the First Amendment Means to me.” They are all, as they “edify,” “clarify,” “expand” or “contract” the First Amendment trying to inscribe their own politics, their own agendas into the First Amendment.

Now, to this claim, there is, of course, an immediate objection. The objection is that while some legal thinkers are clearly projecting their fondest, indeed sometimes florid, hopes into the First Amendment, there are many others who seem to show an utterly subservient and reverential attitude for the First Amendment and its demands. Think here of a certain kind of a First Amendment purist or a doctrinally-chastened legal thinker. These thinkers and their subservience are readily identifiable because you will see them routinely offer up their own cherished political commitments as sacrifices on the altar of the First Amendment.

This desire for self-abnegation, for self-denial before a higher power, is familiar. It is what we call in ethics, self-mastery, in theology, worship, in psychoanalysis, masochism and in jurisprudence, legal process. Those who strive so hard to submit their writings and their talks to the exigent and intransigent commands of the First Amendment are seeking to be *bound*, and this desire for bondage—and we must use that word, for it is the word *they* use—this too is an interested perspective. And its interested character becomes quite obvious, when one realizes that this desire for bondage is meant for export. It is then what we call in ethics, mastery over others, in theology, proselytizing, in psychoanalysis, sadism and in jurisprudence, legal process.

This desire for bondage to a higher law is, of course, eminently understandable. I'll skip the ethical, theological, psychoanalytic accounts and go straight for the jurisprudence. This desire for bondage to a higher law is what gives legal thinkers perhaps what they desire most: the sense that they actually “know” something and that what they know actually has some power. What they know they call “reason” and what they want is for reason to be in charge of power. This, of course, is the standard issue liberal

enlightenment dream. (I won't deal here with its Marxian twin). What many legal thinkers want is for the dream to come true.

The premium juridical test site for the dream—the laboratory as it were—is the First Amendment. It is the key site, because it presents the challenge in its purest form and, at least at first glance, its easiest form. Thus, it might be said of the liberal enlightenment thinker and the First Amendment exactly the inverse of what is said about New York: If you cannot make it here, you cannot make it anywhere.

Among the many things that the First Amendment offers to the liberal enlightenment thinker is the opportunity to work out some key liberal enlightenment distinctions. Now, some of these key distinctions appear in Stanley Fish's presentation; others do not. But it doesn't matter much because, in the jurisprudential lore of the First Amendment, these distinctions are all, for most purposes, variations on each other. They are all homologies of the liberal enlightenment attempt to distinguish reason and power. The key homologous distinctions mentioned in Stanley Fish's paper are:

speech	action
free speech	consequential speech
constative utterance	performative utterance ²

We could add others to the list such as:

expression	action
communication	conduct
persuasion	coercion
additive	determinative ³

Anyone wanting to press the point, will immediately see that all these distinctions are all also variations on the mind/body distinction—a distinction that Fish does not mention explicitly in his presentation, but nonetheless exploits ruthlessly through the strategic use of adjectives—"bloodless" being I think the most memorable.

Now, what makes the First Amendment challenging for the liberal enlightenment thinker is that some such distinction must be made to define the scope of the First Amendment and it must be made from a perspective or a place that is itself free and not

2. Stanley Fish, *Fraught With Death: Skepticism, Progressivism, and the First Amendment*, 64 U. COLO. L. REV. 1061 (1993).

3. (Citations omitted).

consequential, a place that is itself persuasion and not coercion, a place that is [. . .] and not [. . .]. Stanley Fish describes the strategies used to describe that place. The distinctions are familiar: The place must be:

neutral	not interested
universal	not particular
public	not private
law	not politics
truth	not experience

In Stanley Fish's argument, all these distinctions—both the first and the second set—bite the dust. And they bite the dust in all the usual ways—ways which I have somewhat uncharitably identified in terms that are also *fraught with death*.

The first of Stanley Fish's moves is the least interesting, because most common. It is the least used in Fish's argument. It is:

1. *Radical Perspectivalism*. This move is used by Fish to show that any attempt to draw the critical enlightenment First Amendment distinctions, must recognize that these distinctions are always drawn from some point of view. The next step is to point out that there are indeed many points of view and that the identity of the critical distinctions depends upon the point of view whence they are drawn. But this cannot be (or so the argument goes) because the very identity of the critical distinctions also requires that they cannot be drawn from a particular point of view.

2. *Suicidal Conceptual Purification*. This move serves to render the enlightenment distinctions impossible. Stanley Fish argues that in order to be able to discharge their functions, the categories of reason (free speech or truth or whatever) must be demarcated as completely separate from their opposing terms. But thus purified of interest, desire, agenda, program or any of the other terms that could supply *motivation*, these categories of reason turn out to be utterly empty. In Fish's own words, they are "formal," "thin," "substanceless," "bodiless," "empty," "bloodless" and "abstract." They have, in Ronald Dworkin's telling invocation of the well-worn phrase, worked themselves pure—so pure, in fact that nothing remains.⁴ Total purification means total emptiness. And being utterly empty, such disembodied free speech and free speech values cannot produce anything nor contain anything of value. They have become like Gertrude Stein's Oakland: there is no there there.

4. Ronald Dworkin, *Law's Ambitions for Itself*, 71 VA. L. REV. 173 (1985).

3. *Transitive Conceptual Contamination*. Not surprisingly, Fish insists that these totally purified categories are impossible. They are impossible because, they could only be created from an interested, partisan, political perspective. In other words, these purified categories either do not exist or they are fatally contaminated by desire, politics, interest and so on. And, of course, true to the metaphor of contamination they are not just a little bit contaminated. Contamination is not a matter of degree—at least not from the perspective of the party contaminated. To give an example: When Stanley Fish following Robert Post following Frank Easterbrook following Catharine McKinnon recognizes that *pornographic speech* has a performative (non-reasoning) dimension, he like all the others is led to acknowledge that *all speech* has a performative dimension.⁵ The point is that once the contamination starts, it is contamination all the way through. That is because, as Fish would have it, there is no uncontaminated place from which to draw an uncontaminated line. Once contaminated with the guilty knowledge, paradise is lost, and there's just no way of getting back.

In First Amendment jurisprudence, the guilty knowledge is precisely this knowledge that all speech has a performative dimension. It is the knowledge that merely in speaking, something is already being done. This is dangerous knowledge. It is expressed periodically in the academic literature (and then forgotten over and over again). Indeed, before Frank Easterbrook and Robert Post and Stanley Fish and now I and indeed now *you*, were led to recognize that all speech has a performative dimension, the point had been articulated by John Hart Ely.

Ely had been confronting a rather popular theory of the time which divided the realm of human behavior into two purportedly distinct categories: action and expression. This was the theory advanced by Thomas Emerson, who argued that while "action" was not protected by the First Amendment, "expression" was.⁶ I remember this theory well, because at the time, I was a law student taking the First Amendment course. I thought Emerson had developed a truly great theory—one with obvious economizing virtues. I was hoping the theory would hold up. But it was not to

5. As a scholar of speech-act theory and the work of Austin, Stanley Fish, of course, was prepared to recognize this all along. J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 145-47 (1989). In turn, all of this was previously known—one way or another—to Wittgenstein and Nietzsche, and . . . in short, the contamination reaches very far back.

6. THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 17 (1966) (action/expression).

be. Indeed, Emerson's theory had already been dealt a death blow in 1975, when John Hart Ely succinctly pointed out in reference to the *O'Brien*⁷ case, that draft card burning, "is an undifferentiated whole, 100% action and 100% expression. It involves no conduct that is not at the same time communication, and no communication that does not result from conduct."⁸

And of course, in accordance with the logic of transitive conceptual contamination, it turned out that this truth about draft card burning became a truth about symbolic speech in general—and then about speech in general. Indeed, in the very movement from John Hart Ely's textual comments respecting *O'Brien* to his supporting footnote, we already have an amplification of the point.⁹ So the transitive conceptual contamination proceeds apace: what is true of burning of draft cards, becomes true of symbolic speech becomes true of all speech.

Now while this point has epidemic implications difficult to cabin, it is also the sort of point that is forgotten *over and over again* in the academic First Amendment literature. It is a point which, in order for standard liberal First Amendment literature to sustain itself, *must be* forgotten over and over again. Indeed, forgetting this point is a pre-condition to doing standard liberal First Amendment thought. To put it another way, if you are the sort of person who cannot tell the difference between action and expression or their substitute homologies, you simply cannot do standard liberal First Amendment thought. This, as Stanley Fish might say, is a condition devoutly to be wished for; and if you can hold on to it, it's yours.

Now, this I think this sets forth the broad outlines of Stanley Fish's argumentative strategy. Notice what Fish has done here. He has represented (and in a sense, quite accurately, I think) the liberal enlightenment First Amendment in its prototypical object-forms: sharp lines, boundaries, stable identities, etc. As the two

7. *United States v. O'Brien*, 391 U.S. 367 (1968).

8. John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975).

9. In Professor Ely's footnote, it is the entire expression/action dichotomy (without limitation) that is found wanting:

The expression-action distinction is by no means all there is to Professor Emerson's theory of the first amendment. His sensitive explication of the values underlying that amendment cannot be ignored by anyone who would try to understand it. The impulse to define clear categories, and thus better to safeguard freedom of expression in times of national panic, is also one I share. *I simply do not think this distinction can be made to work.*

Ely, *supra* note 8, at 1495 n.53 (emphasis added) (citation omitted).

lists above reveal, this liberal enlightenment First Amendment is very clear, very neat, very stable, very static. Meanwhile, the world which Stanley Fish fashions for this highly objectified First Amendment is very much an animated one. It is a world animated according to some rather peculiar poststructuralist logics: including as I have called them, radical perspectivalism, suicidal conceptual purification and transitive conceptual contamination.

Now in a world that is characterized by these somewhat unfriendly logics, the attempt to construct a box around whatever it is one values—say, free speech, for instance—is as eminently understandable as it is ill advised. There is a deathly—indeed a suicidal—asymmetry here. And this asymmetry manifests itself in three problems.

The first problem might be called the problem of *recognition*. Basically, the problem is that standard-issue enlightenment liberalism is just not equipped to understand the sort of world it is dealing with here. It won't even know where it is, much less how it got here or how the hell to get out. Very likely it won't even recognize that it is in serious intellectual trouble.¹⁰ It won't even realize when it has made a faux pas. In short, in this world, it doesn't have a chance. Now, if this seems too alarmist, or if you have absolutely no idea what I am talking about, that just proves my point exactly. Indeed, given the sort of poststructuralist animation in Stanley Fish's text, it is a stone-cold cinch that the clumsy objectifications of the liberal enlightenment First Amendment will have a life that is nasty, brutish and short. Indeed, its life is over before it even begins.

The second problem is one of *identity*. In Fish's text, the First Amendment is constantly searching for a place to be—a place beyond rhetoric, beyond politics. It is looking for a place where neutrality is just neutrality, truth is just truth and so on. But in Stanley Fish's world (and perhaps more vexingly, in yours too, it turns out) there is no such place—not in the past, not in the present and not in the future. And if there were (which there isn't), you couldn't get to it from here anyway.¹¹ The ontology won't allow for it. The construction of the field in terms of radical perspectivalism, suicidal conceptual purification and transitive con-

10. But it is. See Pierre Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929 (1988).

11. Hence, consider, that in Fish's construction of the search-for-truth rationale, the liberal enlightenment first amendment is going to have to search for truth beyond an ever receding poststructuralist barrier constructed out of an endless semiotic deferral.

ceptual contamination ensure that there is never a coincidence between the description of identity and identity itself. Dislocation is the ontological rule. Violation of the rule means coming to rest. And coming to rest means death.

The third problem is one of *motivation*. The liberal enlightenment First Amendment couldn't move itself even if it wanted to. But, of course, it doesn't want to. And it doesn't want to because it has real motivation problems. The problem is that the liberal enlightenment First Amendment is just like an object. And being just like an object, this First Amendment has no ability to move itself. Instead, it is utterly dependent upon, and captive to, external forces for movement and direction; hence it is subject to the implosion produced through suicidal conceptual purification, the perpetual displacement effected through transitive conceptual contamination and the erratic dislocations prompted by radical perspectivalism.¹²

INTERLUDE

Now, for those who are interested in criticizing Fish's argument, there is no doubt some mileage to be gained by focusing attention on the way that his constitutive object-form metaphors have boxed the liberal enlightenment vision of First Amendment into a highly stable object-form, while his animated description of the world in which the First Amendment must operate is fraught with motion, movement, change and so on. Now, of course, before you pursue this line of criticism, you might want to consider whether these liberal enlightenment First Amendment boxes that Stanley Fish has evoked are yours as well. And if these are also your boxes, now would be a really good time to wonder why and how it is that you are so fond of boxes. Not to put too fine a point on it, but why remain so attached to boxes even in the midst of an article whose very title reads, "*Fraught with Death: [. . .], [. . .], and [. . .]?*". I have some answers to this question, but it would be unseemly to present them here.¹³

END OF INTERLUDE

12. Some of these points have been previously elaborated at greater length in Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37 (1987).

13. That's why they are presented elsewhere. See elsewhere Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. (forthcoming 1993) (discussing the answers).

Now, to get back to the main action: Is Stanley Fish here merely ganging up on enlightenment liberalism or the First Amendment? I don't think so. He's doing much more than that. What he is doing here is exploiting—and I don't mean this in a pejorative sense—a kind political equivalent to Zeno's paradox.¹⁴ Stanley Fish is playing with the political juxtaposition of static and dynamic frames. This is perhaps most evident in his construction of the search-for-truth rationale as an *inexorable semiotic deferral*: No matter how much progress is made in the search for truth, the target—the truth—can never be reached. The truth is always already receding from the advances that are made to reach it. That, of course, is because “the truth” has been constructed as a static object located in a future that is always already dynamically out-distancing our attempts to reach it. This sort of juxtaposition of static and dynamic frames may well be logically forbidden when dealing with motion in space, but politics is not logic. On the contrary, a good working definition of politics is: the art of the impossible.

Presented in this light, Stanley Fish's arguments above are all instantiations of a cardinal rule of politics: All politics worthy of the name presume, and indeed must presume, that the conditions they seek to realize are *already extant* to some significant degree. To what significant degree? The answer to that question depends, among other things, upon the content and configuration of the particular politics in question. This, of course, is something of a hedge.

So to restate the point in an overly strong, but more interesting, clearer fashion: any politics worthy of the name can only get started, by presuming that its epistemics are in some significant way *already* in control, *already* in power. Now to make that sort of presumption once one recognizes the historicity of one's own situation takes a lot of chutzpah. Historicity is what secures the contingency of epistemics. Historicity is what implies—no, it is what guarantees—the death of each and every politics and each and every epistemic (including each and every politics and every epistemic that seeks to become law). And so when chutzpah fails, what we have is dissonance—between what a politics holds to be necessary for its own realization and its perception of the field

14. For a description of Zeno's paradox, see 2 W.K.C. GUTHRIE, A HISTORY OF GREEK PHILOSOPHY 91-93 (1965).

within which it is operating. This condition is hardly unique to contemporary liberalism. We can find utterly analogous instances in Marxism and in the other discursive offspring of the enlightenment.¹⁵ The thing to recognize is that once this point is reached—once there is dissonance—the faith is shaken. It is at this point that a politics—any politics—becomes, in Stanley's Fish's words, "fraught with death." Fraught with intimations of its own death.

And it is precisely this loss of faith, this dissonance, that Fish describes and exploits so elegantly throughout his entire presentation. Indeed, if the partisans of the enlightenment liberal First Amendment seem so morose and so anguished, it is precisely because they cling to the necessity of drawing a certain set of iron-clad distinctions (the distinctions listed above) and yet recognize that not only does the world fail to conform to those distinctions, but that indeed, the world, as it is now, will never conform to those distinctions.

In short, what seems so disappointing to the First Amendment advocates in Fish's presentation is that free speech is impossible. Now, this notion that "free speech" is impossible seems like a startling conclusion until, of course, we remember that this was exactly the point with which Fish started his presentation. If you remember, he said right up front that free speech is impossible. He said and I quote "There's no such thing as free speech."¹⁶ And then he elaborated: speech is not free 1) because speech is constrained and constraining; 2) because (when it takes) it produces costs; and 3) because speech is not weightless. And then he said, "Free speech does not exist."¹⁷ Now if free speech is defined as a thing that does not exist, then it a cinch that any view of the First Amendment which claims that its *raison d'être* is to protect free speech is at the very least somewhat confused. Indeed, in Fish's words, the First Amendment, and I quote, "will be protecting something that doesn't exist."¹⁸ Yes, exactly so. Now, if

15. I don't want to suggest that liberalism is *particularly* deficient in having such a problem. All offspring of the enlightenment have this problem. Indeed, Marxists have had sustained difficulties dealing with an entirely homologous paradox. For Marxists, the same problem makes its appearance in the question having to do with the coming to consciousness of the proletariat. The proletariat, of course, is the universal class, the agent of history. What happens when it doesn't realize its historical mission or worse, it becomes politically regressive? It is this sort of anxious question that triggers the entire dialectic of Marxian argument (including the disagreements of Ivan Illyich Lenin and Rosa Luxemburg) about the nature of class consciousness, the proper role of the vanguard party, voluntarism, and so on.

16. Fish, *supra* note 2, at 1062.

17. *Id.*

18. *Id.*

the First Amendment has to go through Fish's text trying to protect something that doesn't exist, then it probably is not going to meet with a great deal of success.

Exactly so. And similarly, if the liberal enlightenment First Amendment with its strong objectivist cast has to defend itself in a world whose motions and movements are scripted by an animist like Fish (an animist who is keen on radical perspectivalism, suicidal conceptual purification, transitive conceptual contamination, and inexorable semiotic deferrals), then it's also a cinch that it won't last long. The game has been rigged at yet another level.

Indeed, Fish's argument has been totally and elegantly rigged—rigged through and through. Now, none of this is an objection to Stanley Fish's argument. Not at all. I realize, this may seem counterintuitive, so let me explain: If one were to say to someone like Ronald Dworkin, that he has rigged the game, Dworkin would take that as an insult. But if one says this to Stanley Fish, he will take it as the highest form of compliment, because it is a confirmation of what he has been saying for some time now. Indeed, what he has been saying might be summarized in Lyotard's slogan, "Nothing can be said about reality that does not presuppose it." That is all there is. And for Stanley Fish there is nothing to bemoan about this state of affairs.

Now one of the ironic twists here—one that may console the First Amendment advocates—is that most of what Stanley Fish is saying here actually has nothing to do in particular or in general with the First Amendment. *It has everything to do with the practices of fetishism and idolatry.* "The First Amendment," in Stanley Fish's essay, is the fetish—the main one of three—destined to take the fall. And if you remain fixated on "The First Amendment" you'll end up on the sidewalk too, taking the fall as well. Now, you may think this is rather rude. But it's not. It's poetic justice: Don't spend so much time looking at the cracks. Watch where you are going. And another thing: learn to let go of your boxes . . . even when they are marked with your favorite signifiers—signifiers like "The First Amendment."

Now, I grant you as jurisprudential signifiers go "The First Amendment" seems pretty powerful. In American jurisprudential cosmology, this "First Amendment" is no ordinary icon. But powerful as this signifier may be, it tends to pale next to the signifier marked "death." Take your time and think about it. If necessary balance them for a while: On this side, "First Amendment"; on that side, "Death." "First Amendment"—"Death,"

“First Amendment”—“Death” O.K.?

Now, of course, Stanley Fish is not Ingmar Bergman and law is not a chess game. But you had better believe that in Fish's argument, “Death” is going to win hands down against “The First Amendment.” Indeed, he tells you so in his title: that “The First Amendment,” is “Fraught with Death.” Believe him. He really means it. Indeed, in all of Stanley Fish's essays (I may be overstating the point slightly) there is always a major signifier that some people usually care a great deal about that will take the hit—signifiers like “theory” or “critical self-consciousness” or “liberalism” and so on.¹⁹

Now here, the main signifier fraught with death just happens to be the First Amendment. But there are two other signifiers also marked for death in Fish's essay: progressivism and skepticism, but these are lesser marks; they pale in the shadow of the signifier, “The First Amendment.” Notice something about this signifier. In Stanley Fish's presentation, this signifier is fairly thin. Indeed, Fish says outright it is “thin.” And Fish also performatively demonstrates that it is thin. After all, what is this thing, “The First Amendment,” in Stanley Fish's presentation? Well, for one thing, it is a self-consuming artifact: it is the kind of thing that is trying to protect something that doesn't exist—namely, free speech. Now, that is a really thin thing to do. But the signifier “The First Amendment” is thin in other ways as well: It is thin in the sense that in Fish's paper, “The First Amendment” is barely represented at all before it gets into serious trouble. In Fish's paper, that signifier, “The First Amendment,” is fleshed out in only the sparsest manner—with a few quotes from distinguished law school professors and a few aphorisms from Law's Nietzsche, Oliver Wendell Holmes (who has already said everything worth saying).

This, then, is the identity of the First Amendment that bites the dust. No other. So if, like all these legal thinkers, you want to write on the body of *this* First Amendment, you have just made a serious category mistake. *This* First Amendment has no body. It is really thin. It is not worth writing on.

So if you actually cared when Fish's First Amendment bit the dust, then he got you. He got you, because there is no reason—a

19. On “theory” and “critical self-consciousness,” see STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 372-98, 436-70 (1989). On “liberalism,” see Stanley Fish, *Liberalism Doesn't Exist*, 1987 DUKE L.J. 997.

word that cannot possibly be used carefully enough here—to be at all upset when this essentially empty icon bites the dust. Fish's First Amendment is really thin. Not only does he tell you so—repeatedly—but performatively he keeps evacuating whatever content you might try to put in there. Why do you hang on? Or more precisely: just what is it that you are hanging on to?

So what is the point you say? What is Fish's message? Stanley Fish doesn't have a message. What he has is a rhetoric. Do you want to walk away with a message anyway? O.K. here's a good one.²⁰ Do not take false Gods. Do not worship graven images. Also, remember, Just do it. The alternative (and it is a bleak one), is that, as Stanley Fish puts it, "the condition of being a machine . . . may be the fate we make love to."²¹

And if you think this is too alarmist or too apocalyptic a vision even to consider, then I invite you to look at that other First Amendment—the one that is worked under by the Supreme Court of the United States of America. Think about that First Amendment. Indeed, consider that of all the excruciatingly overwrought labyrinthine corridors of "The Constitution," it may be the First Amendment that is the most labyrinthine of them all. As rights go, the First Amendment is right up to date—it is bureaucracy made the best it can be. It is bureaucracy working itself pure—making itself into an endless subdivision of compartments each with its own test and its four-part or five part, very contextual factors. The United States Supreme Court and its academic groupies in the law schools have succeeded in doing what many, only a few decades ago, would have thought impossible. They have succeeded in making Kafka look naive.

So there it is.

Is it possible after reading Fish to reconstruct a First Amendment that would be immune from these serious flaws? Sure, of course. Not to worry. But, remember—just as a cautionary suggestion—that it is also possible to reconstruct a unicorn. And note too that no matter how serious and rigorous your efforts at argumentative reconstruction of the unicorn may be, all you will have, at the end, assuming, of course, that things work out for the very best, is, a "unicorn"—a "unicorn" preceded by very serious, very rigorous, supporting arguments.

20. It too is self-consuming, you understand.

21. Fish, *supra* note 3, at 1083.

