Mississippi College Law Review

Volume 5
Issue 1 *Vol. 5 Iss. 1*

Article 3

1985

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VOLUME 5 FALL 1984 NUMBER 1

MISSISSIPPI COLLEGE LAW REVIEW

FISH v. FISS†

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I. THE RULES OF THE GAME

On the first page of his essay *Objectivity and Interpretation* Owen Fiss characterizes interpretation as "neither a wholly discretionary nor a wholly mechanical activity," but a "dynamic interaction between reader and text" of which meaning is the "product."[1] This middle way, he asserts, "affords a proper recognition of both the subjective and objective dimensions of human experience."[2] The alternatives Fiss rejects will be familiar to all students of both literary and legal interpretation. The "wholly mechanical" alternative is the view, often termed positivist, that meaning is a property of—is embedded in—texts and can therefore be read without interpretive effort or intervention by a judge or a literary critic. The "wholly discretionary" alternative is the opposite view, often termed subjectivist, that texts have either many meanings or no meanings, and the reader or judge is free to impose—create, legislate, make up, invent—whatever meanings he or she pleases, according to his or her own whims, desires, partisan purposes, etc. On the one view, the text places constraints on its own interpretation; on the other, the reader interprets independently of constraints. Fiss proposes to recognize the contributions of both text and reader to the determination of meaning by placing between the two a set of "disciplining rules" derived from the specific institutional setting of the interpretive activity. These rules "specify the relevance and weight to be assigned to the material" and define the "basic concepts and . . . procedural circumstances under which the interpretation must occur."[3] They thus act as constraints on the interpreter's freedom and direct him to those meanings in the text that are appropriate to a particular institutional context.

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1. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 739 (1982).
2. *Id.*
3. *Id.* at 744.

On its face, this proposal seems reasonable enough, but ultimately it will not do, and it will not do because the hinge on which Fiss' account turns is not sufficiently fixed to provide the stability he needs. That hinge is the notion of "disciplining rules" that will constrain readers or interpreters and mitigate (if not neutralize) the inherent ambiguity of texts.[4] The claim is that, given a particular situation, the rules tell you what to do and prevent you from simply doing whatever you like.

The trouble is that they don't. If the rules are to function as Fiss would have them function—to "constrain the interpreter"—they themselves must be available or "readable" independently of interpretation; that is, they must directly declare their own significance to any observer, no matter what his perspective. Otherwise they would "constrain" individual interpreters differently, and you would be right back in the original dilemma of a variously interpretable text and an interpretively free reader. To put the matter another way, if the rules tell you what to do with texts, they cannot themselves be texts, but must be—in the strong sense assumed by an older historiography—documents.[5] Unfortunately, rules *are* texts. They are in need of interpretation and cannot themselves serve as constraints on interpretation.

That at least is my argument, and we can test it by trying to think of some rules. Fiss does not spend much time telling us what the disciplining rules are like, but the general form they would take is clear from what he does say. They would be of at least two kinds, particular and general. A particular rule would be one that "specif[ied] the relevance and weight to be assigned to the material,"[6] and would presumably take a form like: "If someone takes the property of another without his consent, count that as larceny." A general rule would be one that defined the "basic concepts and . . . procedural circumstances under which the interpretation must occur,"[7] and its form would be something like: "Always consult history" (one of Fiss' examples,

4. Not that I am accepting this characterization of reader and text; it is just that I am proceeding within the assumptions of Fiss' model so that I can more effectively challenge it in all its aspects.

5. I refer to the distinction, assumed by many historians, between a *text* as something that requires interpretation and a *document* as something that wears its meaning on its face and therefore can be used to stabilize the meaning of a text. My argument, of course, is that there is no such thing as a document in that sense.

6. Fiss, *supra* note 1, at 744.

7. *Id.*

in fact).[8] The problem with the particular rule is that there will always be disputes about whether the act is indeed a "taking" or even about what a "taking" is. And even where the fact of taking has been established to everyone's satisfaction, one can still argue that the result should be embezzlement or fraud rather than larceny. The same analysis holds for the more general rules. To say that one must always consult history does not prevent—but provokes— disagreements about exactly what history is, or about whether or not this piece of information counts as history, or (if it does count) about what its factual configurations are.

Fiss himself acknowledges the possibility of such disputes, but says that they "pose only issues of application";[9] that is to say, they do not affect the "legitimacy of the disciplining rules," which are still doing their disciplining. "The authority of a particular rule can be maintained even when it is disputed . . . ."[10] But how can "it" be maintained *as a constraint* when the dispute is about what "it" is or about what "it" means? Fiss assumes that one first "has" a rule and then interprets it. But if the shape of the rule could be had without interpretation, then the interpretation would be superfluous.[11] And if interpretation is not superfluous to the "reading" of rules (Fiss would agree that it is not) then one only has rules in an interpreted shape. Thus we are back once again to my assertion that a so-called "disciplining rule" cannot be said to act as a constraint on interpretation because it is (in whatever form has been specified for it) the product of an interpretation.

This is true even in those cases where there are no disputes, where there is perfect agreement about what the rule is and what it means. There is a temptation (often irresistible to those on Fiss' side of the street) to assume that such cases of perfect agreement are normative and that interpretation and its troubles enter in only in special circumstances. But agreement is not a function of particularly clear and perspicuous rules; it is a function of the fact that interpretive assumptions and procedures are so widely shared in a community that the rule appears to all in the same (interpreted) shape. And if Fiss were to reply that I am not deny-

8. *Id.* at 747.

9. *Id.*

10. *Id.*

11. *Cf.* Michaels, *Is There a Politics of Interpretation?*, in THE POLITICS OF INTERPRETATION 337–39 (W.J.T. Mitchell ed. 1983) (directing a similar argument at a thesis offered by Ronald Dworkin).

ing the existence—and authority—of disciplining rules, but merely suggesting a new candidate for them in the "persons" of interpretive assumptions and procedures, I would simply rehearse the argument of the previous paragraphs all over again, pointing out this time that interpretive assumptions and procedures can no more be grasped independently of interpretation than disciplining rules can; thus they cannot be thought of as constraints upon interpretation either.[12]

The difficulty, in short, cannot be merely patched over; it pervades the entire situation in which someone (a judge, a literary critic) faced with the necessity of acting (rendering a judgment, turning out a reading) looks to some rule or set of rules that will tell him what to do. The difficulty becomes clear when the sequence—here I am, I must act, I shall consult the rule—becomes problematic in a way that cannot be remedied. Let us imagine that the President of the United States or some other appropriate official appoints to the bench someone with no previous judicial or legal experience. This person is, however, intelligent, mature, and well-informed. As she arrives to take up her new position she is handed a booklet and told "Here are the rules—go to it!" What would happen? The new judge would soon find that she was unable to read the rules without already having a working knowledge of the practices they were supposed to order, or, to put it somewhat more paradoxically, she would find that she could read the rules that are supposed to tell her what to do only when she already knew what to do. This is so because rules, in law or anywhere else, do not stand in an independent relationship to a field of action on which they can simply be imposed; rather, rules have a circular or mutually interdependent relationship to the field of action in that they make sense only in reference to the very regularities they are thought to bring about. The very ability to read the rules in an informed way presupposes an understanding of the questions that are likely to arise (should liability be shared or strictly assigned?), the kinds of decisions that will have to be made, the possible alternative courses of action (to dismiss, to render a summary judgment), the conse-

12. It is sometimes the strategy of those who have been forced to acknowledge that all facts are contextual to posit context itself as a new fact or set of facts that can serve as a constraint, but the perception of context is no less contextually determined than the facts that context determines in turn. *See, e.g.*, Fish, *With the Compliments of the Author: Reflections on Austin and Derrida*, 8 CRITICAL INQUIRY 693, 708 (1982).

quences (for future cases) of deciding one way or another, and the "deep" issues that underlie the issue of record (are we interested in retribution or prevention?). Someone who was without this understanding would immediately begin to ask questions about what a rule *meant*, and in answer would be told about this or that piece of practice in a way that would alert her to what was "going on" in some corner of the institutional field. She would then be able to read the rule because she would be seeing it as already embedded in the context of assumptions and practices that make it intelligible, a context that at once gives rise to it (in the sense that it is a response to needs that can be felt) and is governed by it.

Even that would not be the end of the matter. Practices are not fixed and finite—one could no more get out a list of them than one could get out a list of *the* rules. Sooner or later the new judge would find herself "misapplying" the rules she thought she had learned. In response to further questions she would discover that a situation previously mastered also intersected with a piece of the field of practice of which she had been ignorant; and in the light of this new knowledge she would see that the rule must be differently applied because in a sense it would be a different, though not wholly different, rule.

Let me clarify this somewhat abstract discussion by juxtaposing to it another example. Suppose you were a basketball coach and had taught someone how to shoot baskets and how to dribble the ball, but had imparted these skills without reference to the playing of an actual basketball game. Now you decide to insert your student into a game, and you equip him with some rules. You say to him, for instance, "Take only good shots." "What," he asks reasonably enough, "is a good shot?" "Well," you reply, "a good shot is an 'open shot,' a shot taken when you are close to the basket (so that the chances of success are good) and when your view is not obstructed by the harassing efforts of opposing players." Everything goes well until the last few seconds of the game; your team is behind by a single point; the novice player gets the ball in heavy traffic and holds it as the final buzzer rings. You run up to him and say, "Why didn't you shoot?" and he answers, "It wasn't a good shot." Clearly, the rule must be amended, and accordingly you tell him that if time is running out, and your team is behind, and you have the ball, you should take the shot even if it isn't a good one, because it will

then *be* a good one in the sense of being the best shot in the circumstances. (Notice how both the meaning of the rule and the entities it covers are changing shape as this "education" proceeds.) Now suppose there is another game, and the same situation develops. This time the player takes the shot, which under the circumstances is a very difficult one; he misses, and once again the final buzzer rings. You run up to him and say "Didn't you see that John (a teammate) had gone 'back door' and was perfectly positioned under the basket for an easy shot?" and he answers "But you said . . . ." Now obviously it would be possible once again to amend the rule, and just as obviously there would be no real end to the sequence and number of emendations that would be necessary. Of course, there will eventually come a time when the novice player (like the novice judge) will no longer have to ask questions; but it will not be because the rules have finally been made sufficiently explicit to cover all cases, but because explicitness will have been rendered unnecessary by a kind of knowledge that informs rules rather than follows from them.

Indeed, explicitness is a good notion to focus on in order to see why Fiss' disciplining rules won't do what he wants them to do (namely, provide directions for behavior). On the one hand, no set of rules could be made explicit enough to cover all the possible situations that might emerge within a field of practice; no matter how much was added to the instruction "Take only good shots," it could never be descriptive of all the actions it was supposed to direct, since every time the situation changes, what is or is not a "good" shot will change too. On the other hand, for someone already embedded in a field of practice, the briefest of instructions will be sufficient and perhaps even superfluous, since it will be taken as referring to courses of action that are already apparent to the agent; upon hearing or remembering the rule, "Take only good shots," a player will glance around a field already organized in terms of relevant pieces of possible behavior. A rule can never be made explicit in the sense of demarcating the field of reference independently of interpretation, but a rule can always be received as explicit by someone who hears it within an interpretive pre-understanding of what the field of reference could possibly be.[13]

13. The requirement of explicitness can, in the strong sense, never be met, since it is the requirement that a piece of language declare its own meaning and thus be impervi-

The moral of the story, then, is not that you could never learn enough to know what to do in every circumstance, but that what you learn cannot finally be reduced to a set of rules. Or, to put the case another way (it amounts to the same thing), insofar as the requisite knowledge *can* be reduced to a set of rules ("Take only good shots," "Consult history"), it will be to rules whose very intelligibility depends on the practices they supposedly govern. Fiss believes that the rules must exist prior to practice, or else practice will be unprincipled; but as the examples of the judge and the basketball player have shown, practice is already principled, since at every moment it is ordered by an understanding of what it is practice *of* (the law, basketball), an understanding that can always be put into the form of rules—rules that will be opaque to the outsider—but is not produced by them.

The point has been well made by Thomas Kuhn when he wrote that "scientists . . . never learn concepts, laws, and theories in the abstract and by themselves." "Instead," he adds, "these intellectual tools are from the start encountered in a historically and pedagogically prior unit that displays them with and through their applications."[14] As an illustration Kuhn offers an example that is on all fours with the ones we have already considered. His text is an eighteenth century law of rational mechanics: "Actual descent equals potential ascent."

> Taken by itself, the verbal statement of the law . . . is virtually impotent. Present it to a contemporary student of physics, who knows the words and can do all these problems but now employs different means. Then imagine what the words, though all well known, can have said to a man who did not know even the problems. For him the generalization could begin to function only when he learned to recognize "actual descents" and "potential ascents" as ingredients of nature, and that is to learn something, prior to the law, about the situations that nature does and does not present. That sort of learning is not acquired by exclusively verbal means. Rather it comes as one is given words together with concrete examples of how they function in use . . . . To borrow . . . Michael Polanyi's useful phrase, what results from this process is "tacit knowledge" which is learned by doing science rather than by acquiring rules

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ous to the distorting work performed by interpreters. It is my contention that language is always apprehended within a set of interpretive assumptions, and that the form in which a sentence appears is always an interpreted or "read" form, which means that it can always be read again. For the full argument, see S. FISH, IS THERE A TEXT IN THIS CLASS? 281–84 (1980); Fish, *supra* note 12, at 703–04 .

14. T.S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 46 (2d ed. 1970).

for doing it.[15]

In another place Kuhn characterizes this process as one "of learning by finger exercise" and identifies it with "the process of professional initiation."[16] The generality of this assertion can be seen immediately when one considers what happens in the first year of law school (or, for that matter, in the first year of graduate study in English). The student studies not rules but cases, pieces of practice, and what he or she acquires are not abstractions but something like "know how" or "the ropes," the ability to identify (not upon reflection, but immediately) a crucial issue, to ask a relevant question, to propose an appropriate answer from a range of appropriate answers, etc. Somewhere along the way the student will also begin to formulate rules or, more properly, general principles, but will be able to produce and understand them only because he or she is deeply inside—indeed, is a part of—the context in which they become intelligible.

II. INDEPENDENCE AND CONSTRAINT

To have said as much is already to have taken the next step in my argument. In the course of explaining why rules cannot serve as constraints on interpretation, I have explained why rules (in that strong sense) are not necessary; and in the course of explaining why rules are unnecessary, I also have explained why the fear of unbridled interpretation—of interpreters whose determinations of meaning are unconstrained—is baseless.[17] It is this fear that animates Fiss' entire enterprise, but it is a fear that assumes an interpreter who is at least theoretically free to determine meaning in any way he or she likes, and who therefore must be constrained by something *external,* by rules or laws. But on the analysis offered in the preceding paragraphs there can be no such interpreter. To be, as I have put it, "deeply inside" a context is to be already and always thinking (and perceiving) with and within the norms, standards, definitions, routines, and understood goals that both define and are defined by that context.

The point is an important one because it clarifies the relationship between my argument and Fiss' (which is not simply one of

15. *Id.* at 191.

16. *Id.* at 47.

17. I make this point in a more extended way in Fish, *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism,* in THE POLITICS OF INTERPRETATION, *supra* note 11, at 271–86.

opposition, as it is, for example, in the dispute between Fiss and Sanford Levinson[18]). The notion of disciplining rules is crucial to Fiss' account because it represents for him the chief constraint on the process of adjudication; and by taking away the firmness and independence of those rules I may seem to have undermined the process altogether by leaving an undisciplined interpreter confronting a polysemous text, with nothing between them to assure that the assignment of meaning will proceed in one direction rather than another. But these consequences follow only if readers and texts are in need of the constraints that disciplining rules would provide, and the implication of what I have already said is that they are not.

To see why they are not, one must remember that Fiss' account takes the form it does because he begins by assuming two kinds of independence, one good and one bad. The bad kind of independence attaches to readers and texts: Readers are free to choose any meanings they like, and texts contain too many meanings to guarantee a principled choice. The good kind of independence attaches to rules: Because they stand outside of or are prior to a field of interpretive practice, they can guide and control it in appropriate ways. The good kind of independence controls and disciplines the bad. My contention is that by showing why the good kind of independence can never be achieved, I have shown at the same time why the bad kind is never a possibility. Just as rules can be read only in the context of the practice they supposedly order, so are those who have learned to read them constrained by the assumptions and categories of understanding embodied in that same practice. It is these assumptions and categories that have been internalized in the course of training, a process at the end of which the trainee is not only possessed *of* but possessed *by* a knowledge of the ropes, by a tacit knowledge that tells him not so much what to do, but already has him doing it as a condition of perception and even of thought. The person who looks about and sees, without reflection, a field already organized by problems, impending decisions, possible courses of action, goals, consequences, desiderata, etc. is not free to choose or originate his own meanings, because a set of meanings has, in a sense, already chosen him and is working itself out in the actions of perception, interpretation, judgment, etc. he is even now performing. He is, in short, already filled with and

18. Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 392–402 (1982).

constituted by the very meanings that on Fiss' account he is dangerously free to ignore. This amounts finally to no more, or less, than saying that the agent is always and already situated, and that to be situated is not to be looking about for constraints, or happily evading them (in the mode, supposedly, of nihilism), but to be constrained already. To be a judge or a basketball player is not to be able to consult the rules (or, alternatively, to be able to disregard them) but to have become an extension of the "know-how" that gives the rules (if there happen to be any) the meaning they will immediately and obviously have.[19]

Of course, what holds for the rules holds too for every other "text" encountered in a field of practice, including the text with which Fiss is most concerned, the Constitution. Fiss believes that texts present the same liabilities (the liabilities of independence) as interpreters. Interpreters have too many choices; texts have too many meanings. "[F]or any text," he says, "there are any number of possible meanings and the interpreter creates a meaning by choosing one."[20] I have tried to show why this is the wrong account of the position occupied by interpreters, and I shall now show why it is also (and for the same reasons) the wrong account of texts. Although Fiss says that any text has any number of possible meanings, we have already seen that for his system to work there must be at least some texts—i.e., disciplining rules—that have only one meaning, and we have seen too that (1) there are no such texts, and (2) the fact that there are no such texts is not fatal to the goal of principled interpretive behavior. The reason that this fact is not fatal is that there are also no texts that have a plurality of meanings, so that there is never a necessity of having to choose between them.

Now I know that this will seem immediately paradoxical. How can there be at once no texts that have a single meaning and no texts that have many meanings, and how can this impossible state of affairs (even if it could exist) be seen as a *solution* to the problem of interpretation? The answer to this question will emerge once we are no longer in the grip of the assumption that gives rise to the paradox, the assumption that texts "have" properties

19. When I use phrases like "without reflection" and "immediately and obviously" I do not mean to preclude self-conscious deliberation on the part of situated agents; it is just that such deliberations always occur within ways of thinking that are themselves the ground of consciousness, not its object.

20. Fiss, *supra* note 1, at 762.

before they are encountered in situations, which is also the assumption that it is possible to encounter texts in anything but an already situated—that is, interpreted—condition. It is this assumption that impels the project of formal linguistics, the project of specifying the properties of sentences as they exist in an acontextual state, so that one could finally distinguish in a principled way between sentences that were straightforward, ambiguous, multiply ambiguous, etc. But as I have argued elsewhere,[21] sentences never appear in any but an already contextualized form, and a sentence one hears as ambiguous (for example, "I like her cooking"[22]) is simply a sentence for which one is imagining, at the moment of hearing, more than one set of contextual circumstances. Any sentence can be heard in that way, but there are conditions under which such imaginings are not being encouraged (although they are still possible), and under these conditions any sentence can be heard as having only a single obvious meaning. The point is that these conditions (of ambiguity and straightforwardness) are not linguistic, but contextual or institutional. That is to say, a sentence does not ask to be read in a particular way because it is a particular kind of sentence; rather, it is only in particular sets of circumstances that sentences are encountered at all, and the properties that sentences display are always a function of those circumstances. Since those circumstances (the conditions within which hearing and reading occur) can change, the properties that sentences display can also change; and it follows that when there is a disagreement about the shape or meaning of a sentence, it is a disagreement between persons who are reading or hearing (and therefore constituting) it according to the assumptions of different circumstances.

Everything that I have said about sentences applies equally, *mutatis mutandis,* to texts. If there are debates about what the Constitution means, it is not because the Constitution "provokes" debate, not because it is a certain *kind* of text, but because for persons reading (constituting) it within the assumption of different circumstances, different meanings will seem obvious and inescapable. By "circumstances" I mean, among other things, the very sense one has of what the Constitution is *for.* Is it an

21. S. FISH, *supra* note 13, at 281–84.

22. *Cf.* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Men feared witches and burnt women.").

instrument for enforcing the intentions of the Framers?[23] Is it a device for assuring the openness of the political process?[24] Is it a blueprint for the exfoliation of a continually evolving set of fundamental values?[25] Depending on the interpreter's view of what the Constitution is for, he will be inclined to ask different questions, to consider different bodies of information as sources of evidence, to regard different lines of inquiry as relevant or irrelevant, and, finally, to reach different determinations of what the Constitution "plainly" means. Notice, however, that these differences are not infinite; at any one time there are only so many views as to what the Constitution is for;[26] and therefore even those who are proceeding within different views and arguing for different meanings are constrained in their proceedings by the shared (if tacit) knowledge that (1) the number of such views is limited, and (2) they are all views of the *Constitution,* a document whose centrality is assumed by all parties to the debate. (Here is a way in which it does make a kind of sense to say that the Constitution "provokes" debate—not because of any properties it "has," but because the position it occupies in the enterprise is such that specification of its meaning is the business everyone is necessarily in.) Even when the central text of the enterprise is in dispute, all parties to the dispute are already situated within the enterprise, and the ways of disputing and the versions of the Constitution produced by those ways are "enterprise specific." What this means is that the Constitution is never in the condition that occasions the urgency of Fiss' essay—it is never an object waiting around for interpretation; rather, it is always an already-interpreted object, even though the interpretations it has received and the forms it has taken are in conflict with one another.

How are these conflicts to be settled? The answer to this question is that they are always in the process of being settled, and that no transcendent or algorithmic method of interpretation is required to settle them. The means of settling them are political, social, and institutional, in a mix that is itself subject to modification and change. This means, of course, that the *arena* of settling is never purely internal; and indeed the distinction be-

23. *See, e.g.,* R. BERGER, GOVERNMENT BY JUDICIARY (1977).

24. *See, e.g.,* J.H. ELY, DEMOCRACY AND DISTRUST (1980).

25. *See, e.g.,* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 452 (1978).

26. On this point see S. FISH, *supra* note 13, at 342–49, where a similar argument is made in relation to the practices of literary criticism.

tween the internal and the external is in general less firm and stable than Fiss assumes. He makes the point that judgments concerning the law are sometimes made from an "external perspective" by someone who is operating "on the basis of some religious or ethical principle (such as denying the relevance of any racial distinction) or on the grounds of some theory of politics (such as condemning the decision because it will cause social unrest)."[27] In such instances, he concludes, "the evaluation is not in terms of the law."[28] Well, yes and no. If Fiss means by this that the evaluation originates from a source that is not part of the "judicial system," narrowly conceived, then his statement is both true and trivial; but if he means that an evaluation emanating from some social, political, religious, or moral concern is not a legal one, then he is propounding a notion of the law that is as positivistic as it is impossible. Instead, one might say (to take up just one of Fiss' examples) that the desire to avoid social unrest is one of the enabling conditions of law; it is one of the tacitly assumed "goods" that dictates the shape of the law even when particular laws nowhere refer to it. For the most part the stated purpose of a statute is the regulation of some precisely defined set of activities in industry or public life (for instance, traffic laws); but it is some unstated general purpose on the order of "avoiding social unrest" that impels the very attempt at regulation and determines the details of the statute as it is finally written. The content of the law, even when its manifestation is a statute that seems to be concerned with only the most technical and mechanical of matters (taxes, for example), is always some social, moral, political, or religious vision; and when someone objects to a decision "on the basis of some ethical or religious principle," his objection is not "external" to the law (except in the narrow procedural sense acknowledged above), but represents an effort to alter the law, so that one's understanding of what was internal to it would be different. If that alteration were effected, it would not be because the structure of the law had been made to bend to the pressure of some moral or political perspective, but because a structure *already* moral and political had been given another moral and political shape.

How might that happen? Just as Fiss says it would, when he enumerates the courses of action available to the "external

27. Fiss, *supra* note 1, at 749.
28. *Id.*

critic": "He may move to amend the Constitution or engage in any number of lesser and more problematic strategies designed to alter the legal standards, such as packing the court or enacting statutes that curtail jurisdiction."[29] However, in calling these latter strategies "lesser" and "more problematic," Fiss once again assumes a distinction that cannot be maintained. Presumably they are "lesser" and "more problematic" because they are more obviously political; but in fact the entire system is political, and the question at any moment is: From which point in the system is pressure being applied, and to what other points? It is no more illegitimate to enact statutes or to make appointments than it is to engage in the slower and less theatrical activity of amending the Constitution. The processes for executing any of these courses of action are already in place, and they have been put in place by political acts. The fact that one rather than another course is taken reflects the conditions obtaining in the entire system, not a bypassing of the system or an unwarranted intrusion on proper legal procedure.

Consider, for example, the course of "packing the Court." That phrase, now laden with pejorative connotations, refers to an attempt by Franklin Delano Roosevelt to assure that the ethical and social philosophy informing the Court's decisions was similar to his own. Roosevelt made that attempt not as an anarchist or an outlaw but as a political agent whose actions were subject to the approval or disapproval of other political agents, all of whom were operating within a system of constraints that made it possible for him to do something but not everything. In other words, "packing the Court" is a possible legal strategy, but it can be successful only if other parts of the legal system assist it or fail to block it. The fact that Roosevelt was in fact blocked is not to be explained by saying that a "lesser" strategy was foiled by a legitimate one, but by saying that the political forces always at work in the system exist in ever changing relationships of strength and influence. (It is not the case that because Roosevelt was unable to do it it can never be done; but it is true that doing it has been made harder by the fact that he tried and failed.)

At times the disposition of the entire system will be such that the judiciary can settle constitutional questions by routine procedures and in accordance with principles that have been long ar-

29. *Id.*

ticulated and accepted; at other times the legislature or the executive will feel called upon to intervene strongly in an attempt to alter those principles and institute new procedures. The mistake is to think that one state of affairs is normative and "legal" while the other is extraordinary and "external." Both are perfectly legal and normative; they simply represent different proportions of the mix of agencies that participate in the ongoing project of determining what the Constitution is. The same analysis holds for the oft-opposed policies of judicial restraint and judicial activism. It is often assumed that the one indicates a respect for the Constitution while the other is an unwarranted exercise of interpretive power, as influenced by social and political views; but in fact, so-called judicial restraint is exercised by those judges who, for a variety of reasons, decide to leave in place the socially and politically based interpretations of the activists of an earlier generation.

III. Interpretive Authority and Power

It is time, I think, to take stock and look back at the argument as it has unfolded so far. The first thing to recall is that Fiss' account of adjudication is inspired by the fear that interpretation will be unprincipled, either because (1) the "interaction" between the reader and the text is not sufficiently constrained by rules that put limits on the freedom of the one and the polysemy of the other, or because (2) interpretive authority is simply a function of the power wielded by those who happen to occupy dominant positions in certain political or bureaucratic structures. I have argued against the first version of this fear by pointing out that readers and texts are never in a state of independence such that they would need to be "disciplined" by some external rule. Since readers are already and always thinking within the norms, standards, criteria of evidence, purposes, and goals of a shared enterprise, the meanings available to them have been preselected by their professional training; they are thus never in the position of confronting a text that has not already been "given" a meaning by the *interested* perceptions they have developed. More generally, whereas Fiss thinks that readers and texts are in need of constraints, I would say that they *are* structures of constraint, at once components of and agents in the larger structure of a field of practices, practices that are the content of whatever "rules" one might identify as belonging to the enterprise. At every point,

then, I am denying the independence (of both the "good" and "bad" kinds) that leads Fiss first to see a problem and then to propose its solution.

The second version of Fiss' fear—that the law may be nothing but "masked power"[30]—is merely a "bogeyman" reformulation of the first, and it can be disposed of in the same way. By "masked power," Fiss means authority that is not related to any true principle, but that instead represents a "mere" exercise of some official will. The opposition surfaces most revealingly when Fiss contrasts two claims that a judge might make in his efforts to secure obedience to a decision. In the best of circumstances the judge may base his claim "on a theory of virtue," but in some situations he "may have to assert the authoritativeness that proceeds from institutional power alone."[31] Once again the mistake is to imagine two pure entities— "institutional virtue" and "institutional power"[32]— which can then be further conceived of as alternative and mutually exclusive bases for action in a community. And, once again, the way to see past the mistake is to challenge the independence of *either* entity.

To begin with "institutional virtue": What exactly would that be? The answer is that it would be precisely *institutional,* virtue defined not in some abstract or asituational way, but in terms of the priorities, agreed-upon needs, long- and short-term goals, etc. of an ongoing social and political project. It would, in short, be virtue in relation to the perspective of an enterprise, and an appeal to it would be compelling only to someone with a commitment to that enterprise. To that same someone the threat of a contempt proceeding or some other punitive action would be no less compelling, *and for the same reason.* That is to say, the person who on one occasion complies with a decision because he agrees with it and on another occasion because of a judicial threat, is in each instance signifying his commitment to the legal institution and its principles. Adherence to the rule of law does not mean agreement with its decisions but a respect for its procedures and its power, including the power to fine, to cite, and to imprison. Such power is not, as Fiss believes, a matter of "brute force," even when its instruments are "rifles, clubs, and tear gas,"[33] but

30. *Id.* at 741.
31. *Id.* at 757.
32. *Id.* at 756.
33. *Id.*

is instead an extension of the standards and norms—indeed, of the "theory of virtue"—that inform the decision in the first place. "Institutional power" is just another (and unflattering) name for an obligation, inherent in an office, to decide this or enforce that, and therefore it is not something extrinsic to a principled enterprise but is itself principled.

This is not to say that there are no differences between immediate compliance and compliance under threat, or compliance in the form of undergoing incarceration. The differences are real, but they cannot simply be characterized as the difference between obedience to a principle and obedience to brute force. Neither the principle, which is authoritative (i.e., *forceful*) only because of the political enactment (sometimes following upon revolution) of some vision or agenda, nor the force, which is an etiolated version of the authority vested in the principle, can be sufficiently distinguished in a way that would make the one a threat to the integrity of the other. Of course, force can be abused—I am not proposing anything as crude as "might makes right"—but the decision that it has been abused is itself an institutional one, and such a decision implicitly entails the recognition that under certain well-defined institutional circumstances force is legitimate and—in terms of the institution's assumed goals and purposes—even virtuous.

The opposition between legitimate (virtue-based) and illegitimate (power-based) authority is for Fiss part of a broader opposition between authority of any kind and interpretation:

> It is important to note that the claim of authoritativeness, whether it be predicated on virtue or power, is extrinsic to the process of interpretation. It does not arise from the act of interpretation itself and is sufficient to distinguish the judge from the literary critic or moral philosopher who must rely on intellectual authority alone.[34]

Obviously there is a harmless (and trivial) sense in which what Fiss says is true: Arriving at a judicial decision and subsequently enforcing it are distinct processes, in the sense that the one precedes the other; but to say that one is *extrinsic* to the other is to attribute to both of them an independence and purity that neither could have. That is to say, neither "arises" from the other, since they both "arise" from the same set of institutional imperatives. Interpretation is not an abstract or contextless pro-

34. *Id.* at 757.

cess, but one that elaborates itself in the service of a specific enterprise, in this case the enterprise of the law; the interpretive "moves" that occur to a judge, for example, occur to him in a shape already informed by a general sense of what the law is *for,* of what its operations are intended to promote and protect. Even when the particulars are the subject of debate, it is that general sense that legitimizes interpretation, because it is the content of interpretation. As we have seen, it is that same general sense that legitimizes (because it is the content of) authority, whether of the virtue-based or power-based variety. To put the matter starkly, interpretation is a form of authority, since it is an extension of the prestige and power of an institution; and authority is a form of interpretation, since it is in its operations an application or "reading" of the principles embodied in that same institution. So while it is possible to distinguish between these two activities on a narrow procedural level (on the level, for example, of temporal precedence), it is not possible to distinguish between them as activities essentially different in kind.

Nor is it possible to distinguish between the law and literary criticism or philosophy by saying that practitioners of the latter "must rely on intellectual authority alone."[35] Again there is a fairly low-level sense in which this is true: The decisions or interpretations of literary critics and philosophers are not backed up by the machinery of a court. But Fiss means more by "intellectual authority"; he means the authority exerted by arguments that make their way simply by virtue of a superior rationality and do not depend for their impact on the lines of power and influence operating in an institution.[36] That kind of authority, I submit, does not exist. In literary studies, for example, one possible reason for hearkening to an interpretation is the institutional position occupied by the man or woman who proposes it, the fact that he or she has a record of successfully made (that is, influential) arguments, or is known as the editor of a standard text, or is identified with an important "approach," or is highly placed in a professional organization (a department, a professional society), or all of the above. These and other institutional facts are not external to the issue of intellectual authority, because the very

35. *Id.*

36. This is a familiar distinction in the literature and is central to the argument of S. TOULMIN, HUMAN UNDERSTANDING (1972). For a critique of that argument, see Fish, *Anti-Professionalism,* in CHANGE (S. Fish ed. 198—) (forthcoming).

shape of intellectual authority—in the form of "powerful" arguments and "decisive" evidence and "compelling" reasons—has been established (not for all time, but for a season) by the same processes that have established these facts—by publications, public appearances, pedagogical influence, etc. When a Northrop Frye or a Jacques Derrida speaks, it is with all the considerable weight of past achievements, battles fought and won, constituencies created, agendas proposed and enacted; and that weight is inseparable from the "intellectual" decision to "comply" with what they have said. (They are the E.F. Huttons of our profession.) Of course, Frye and Derrida cannot call in the judiciary or the Congress or the President of the United States to implement their interpretations, but there are other means of implementation at their disposal and at the disposal of their adherents. They can influence decisions about tenure, promotion, publications, grants, leaves, appointments, prizes, teaching assignments, etc. Although the "compliance" secured by these and other means is more diffuse and less direct than the compliance secured by a judge, it is rooted in authority nevertheless, and this authority, like that wielded in the law, is *at once* intellectual and institutional. This is not to deny that literary and legal practice are importantly different, but their differences cannot be captured by drawing the kind of line Fiss draws.

It may seem that by collapsing so many distinctions—between the intellectual and the institutional, between authority and power, between virtue and authority—I am undermining the possibility of rational adjudication; but in fact, everything I have said points to the conclusion that adjudication does not need these distinctions (any more than it needs "disciplining rules") to be rational. All it needs is an understanding, largely tacit, of the enterprise's general purpose; with that in place (and it could not help but be) everything else follows. Fiss knows this too, but not in a way that figures strongly in his analysis. He knows, for example, that "[a] judge quickly learns to read in a way that avoids crises,"[37] and that "[t]he judge must give a remedy";[38] but he does not recognize such facts for what they are: the very motor of adjudication and a guarantee of its orderliness. The judge who has learned to read in a way that avoids crises is a judge who has learned what it means to be a judge, and has learned that the

37. Fiss, *supra* note 1, at 754.
38. *Id.* at 759.

maintenance of continuity is a prime judicial obligation because without continuity the rule of law cannot claim to be stable and rooted in durable principles. It is not simply that crisis would be disruptive of the process, but that crisis and disruption are precisely what the process is supposed to forestall. That is why the judge must give a remedy: not only because the state, defendant, and plaintiff have a right to one, but also because every time a remedy is given the message is repeated that there is always a remedy to be found, and that the law thereby underwrites and assures the ongoing and orderly operations of society.

The situation is exactly the reverse in literary studies, at least in the context of a modernist aesthetic where the rule is that a critic must learn to read in a way that *multiplies* crises, and must never give a remedy in the sense of a single and unequivocal answer to the question, "What does this poem or novel or play mean?" This rule is nowhere written down, and the ways of following it are nowhere enumerated. But it is a rule inherent in the discipline's deepest beliefs about the objects of its attention, in its deepest understanding of what literary works are for—for contemplation, for the reflective exploration of complexity, for the entertainment of many perspectives, for the *suspension of judgment.* Critics who hold these beliefs (and, for many, to hold them or be held by them is what it means to be a critic) interrogate texts assumed to be literary in such a way as to "reveal" the properties—ambiguity, irony, multivalence—a literary text is supposed to have. That is to say, the procedures of literary criticism—its methods of inquiry, notions of evidence, mechanisms for evaluation—flow naturally from a sense, already in place, of what literature is and should be; and it follows that these same procedures are not in need of any external or independent constraints to assure their orderliness. A literary critic faced with an interpretive task always knows in general what to do (find interpretive crises), although the ways of doing it will vary with the circumstances, with his commitment to this or that methodology, with the currently received wisdom about a text or a period, with the scope of the project (a teaching of a single poem, of an entire oeuvre, of a genre, of a period). And, by the same reasoning, a judge always knows in general what to do (avoid crises, give a remedy), although his ways of doing it will vary with the nature of the case, with the forces (political, social, legislative) pressing for this or that decision, with the (interpreted) history of previous

decisions.[39]

In neither discipline then, does rationality depend on the presence of "disciplining rules"; nor is the shape of rationality a function of different kinds of texts. Legal texts might be written in verse or take the form of narratives or parables (as they have in some cultures); but so long as the underlying rationales of the enterprise were in place, so long as it was understood (at a level too deep to require articulation) that judges give remedies and avoid crises, those texts would be explicated so as to yield the determinate or settled result the law requires. In both law and literature it is ways of reading, inseparable from the fact of the institution itself, and not rules or special kinds of texts that validate and justify the process of rational interpretation, whether it leads to the rendering of a clear-cut legal decision or to the demonstration that what is valuable about a poem is its resolute refusal to decide.

All of which is to say that, while I stand with Fiss in his desire to defend adjudication in the face of "nihilist" and "subjectivist" arguments, I do not believe that this defense need take the form of asserting a set of external constraints, because the necessary constraints are always already in place. Indeed, I would put the case even more strongly: It is not just that the dangers Fiss would guard against—the dangers of excessive interpretive freedom, of "masked power," of random or irresponsible activity—have been neutralized, but that they are *unrealizable,* because the conditions that would make them the basis of a reasonable fear—the condition of free subjectivity, of "naturally" indeterminate texts, of unprincipled authority—could never obtain; the "worst case" scenario that Fiss calls up in his penultimate paragraph could never unfold:

> The great public text of modern America, the Constitution, would be drained of meaning. It would be debased. It would no longer be seen as embodying a public morality to be understood and expressed through rational processes like adjudication; it would be reduced to a mere instrument of political organization—distributing political power and establishing the modes by which that power will be exercised. Public values would be defined only as those held by the current winners in the processes prescribed by the Constitution; beyond that,

39. This may seem to be reinstating the distinction between inside and outside considerations, but any consideration that finds its way into the process of legal inquiry has been recharacterized as a legal consideration and has therefore become "inside."

> there would be only individual morality, or even worse, only individual interests.[40]

Were I to attempt a full-fledged analysis of this paragraph, I would find myself repeating everything I have said thus far, for it has been the business of this essay to redefine and recharacterize every one of the concepts and entities Fiss here invokes. On my analysis, the Constitution cannot be drained of meaning, because it is not a repository of meaning; rather, meaning is always being conferred on it by the very political and institutional forces Fiss sees as threats. Nor can these forces be described as "mere," because their shape and exercise are constrained by the very principles they supposedly endanger. And, since the operation of these forces is indeed principled, the fact that they determine (for a time) what will be thought of as "public values" is not something to be lamented, but simply a reflection of the even more basic fact that values derive from the political and social visions that are always competing with one another for control of the state's machinery. Moreover, such values are never "individual," since they always have their source in some conventional system of purposes, goals, and standards; therefore, the very notion of "merely individual" interests is empty.[41] In short, if *these* are the fears that animate Fiss' efforts, then there is nothing for him to worry about.

Paradoxically, he need not even be worried by the possibility that his account of adjudication might be wrong. Fiss believes that it is important to get things right because, if we don't, nihilism might triumph. Nihilism must therefore be "combated" in "word and in deed" because it "calls into question the very point of constitutional adjudication."[42] But if I am right, nihilism is impossible; one simply cannot "exalt the . . . subjective dimension of interpretation"[43] or drain texts of meanings, and it is unnecessary to combat something that is not possible. Of course, there may be people who regard themselves as nihilists or subjectivists (whether these are the people who promote "deconstruction" is the subject of another essay), and who try to instruct others in nihilist ways, but the fact that they intend the impossible does not make them capable of doing it; they would simply be

40. Fiss, *supra* note 1, at 763.

41. On this point see S. FISH, *supra* note 12, at 331–37; Fish, *supra* note 17, at 276–79.

42. Fiss, *supra* note 1, at 763.

43. *Id.* at 746.

conferring meanings and urging courses of action on the basis of principles they had not fully comprehended. One could of course combat those principles and dispute those meanings; but in doing so one would simply be urging alternative courses of action, not combating nihilism.

Another way of putting this is to say that nothing turns on Fiss' account or, for that matter, on my account either. To be sure, one would rather be right than wrong, but in this case being right or wrong has no consequences for the process we are both trying to describe.[44] Fiss thinks otherwise; he thinks that there are consequences and that they are grave ones: "Viewing adjudication as interpretation helps to stop the slide toward nihilism. It makes law possible."[45] But if the slide toward nihilism is not a realizable danger, the urging of nihilist views cannot accelerate it, and, conversely, the refutation of nihilist views cannot retard it. From either direction, the account one has of adjudication is logically independent of one's ability to engage in it. Your account may be nihilist or (as it is for Fiss) objectivist or (as it is for me) conventionalist, and when all is said and done, adjudication is still either possible or it is not. The empirical evidence is very strong that it is; and it has been my argument that its possibility is a consequence of being situated in a field of practice, of having passed through a professional initiation or course of training and become what the sociologists term a "competent member." Owen Fiss has undergone that training, but I have not; and, therefore, even though I believe that his account of adjudication is wrong and mine is right, anyone who is entering the legal process would be well-advised to consult Fiss rather than Fish.

44. There is a large issue to be considered here, the issue of the consequences of theory in general. It is my position that theory has no consequences, at least on the level claimed for it by its practitioners. Rather than standing in a relationship of precedence and governance to practice, theory is (when it happens to be a feature of an enterprise) a form of practice whose consequences (if there are any) are unpredictable and no different in kind from the consequences of any form of practice. Both those who fear theory and those who identify it with salvation make the mistake of conceiving of it as a special kind of activity, one that stands apart from the practices it would ground and direct. If there were a theory so special, it would have nothing to say to practice at all; and, on the other hand, a theory that does speak meaningfully to practice is simply an item in the landscape of practices. *See* Fish, *Consequences*, in CHANGE, *supra* note 36.

45. Fiss, *supra* note 1, at 750.