Fish’s writings on philosophy, politics, and law comprise numerous books and articles produced over many decades. This book connects those dots in order to reveal the overall structure of his argument and to demonstrate how his work in politics and law flows logically from his philosophical stands on the nature of the self, epistemology, and the role of theory. Michael Robertson considers Fish’s political critiques of liberalism, critical theory, postmodernism, and pragmatism before turning to his observations on political substance and political practice. The detailed analysis of Fish’s jurisprudence explores his relationships to legal positivism, legal formalism, legal realism, and critical legal studies, as well as his debate with Ronald Dworkin. Gaps and inconsistencies in Fish’s arguments are fully explored, and the author provides a description of Fish’s own positive account of law and deals with the charge that Fish is an indeterminacy theorist who undermines the rule of law.

Michael Robertson is an associate professor of law in the Faculty of Law at the University of Otago, New Zealand, where he teaches courses in jurisprudence, legal theory and law & society.
STANLEY FISH ON PHILOSOPHY, POLITICS, AND LAW

How Fish Works

MICHAEL ROBERTSON
For Vicki Evans and Rick Norris
CONTENTS

Short titles of books by Stanley Fish x

Introduction 1

PART I: Philosophy 5

1 The nature of the self 7
   Kant’s conception of the self 7
   Fish’s critique of Kant’s conception of the self 9
   Fish’s conception of the self 11

2 Epistemology 16
   Foundationalism 16
   Fish’s critique of foundationalism 18
   Fish’s anti-foundationalism 21
   Facts, reasons, and beliefs 40

3 The role of theory 48
   Three orthodox claims about the role of theory 48
   Fish’s rejection of the claim that theory can transcend
   the limitations of local contexts 50
   Fish’s rejection of the claim that all local practices
   presuppose some theory 53
   Fish’s rejection of the claim that theory has a special role in
   guiding or reforming other practices 55
   Fish’s account of the contingent consequences of theory 70

PART II: Politics 79

4 Political theory 81
   Fish’s critique of liberal political theory 81
   Fish’s critique of anti-foundationalist political theories:
   critical theory, postmodernism, and pragmatism 108
5 Political substance 139
Fish’s claim that there is no necessary connection between his philosophical analysis and any substantive political positions 139
Fish’s own substantive political positions 139
The objection that some substantive political positions do follow from Fish’s philosophical analysis 144

6 Political practice 154
Fish’s different senses of “politics” 154
Fish on political practice 156

PART III: Law 177

7 Legal positivism 179
The impossibility of the unconstrained legal actor 179
Fish’s rejection of the separation of law and morality/politics 183
Legal positivist responses to Fish 186

8 Legal formalism 206
The textualist version of legal formalism 206
Fish’s critiques of textualism 213
More on Fish’s intentionalism 228

9 The Fish/Dworkin debate 251
Fish’s critique of Dworkin’s fear of an unconstrained legal actor 253
Fish’s critique of Dworkin’s hope for an independent constraint upon interpretation 259
Fish’s critique of Dworkin’s hope that philosophy can provide coherence and guidance for law 264
How does Fish’s analysis of Dworkin fit with Fish’s intentionalism? 269
Dworkin’s critique of Fish’s rejection of unconstrained legal actors 273
Dworkin’s critique of Fish’s analogizing judging to the instinctive performances of athletes 281

10 Fish’s positive account of law 287
Law’s disorder 287
Law’s jobs 290
Law’s two stories 295
Law’s amazing trick 299
Rewriting in law 301

11 Change and indeterminacy in law 305
Arguments for the claim that Fish is an indeterminacy theorist 305
<table>
<thead>
<tr>
<th>CONTENTS</th>
<th>ix</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does the ability to recontextualize entail indeterminacy?</td>
<td>308</td>
</tr>
<tr>
<td>Consequences of the constraints on achieving recontextualization in law</td>
<td>311</td>
</tr>
<tr>
<td>Three implications of Fish’s analysis</td>
<td>315</td>
</tr>
<tr>
<td>12 Legal realism and critical legal studies</td>
<td>320</td>
</tr>
<tr>
<td>Legal realism</td>
<td>320</td>
</tr>
<tr>
<td>Critical legal studies</td>
<td>327</td>
</tr>
<tr>
<td>Conclusion</td>
<td>335</td>
</tr>
<tr>
<td>Index</td>
<td>339</td>
</tr>
</tbody>
</table>
SHORT TITLES OF BOOKS BY STANLEY FISH

Stanley Fish, *Is there a text in this class? The authority of interpretive communities* (Cambridge, MA: Harvard University Press, 1980) will be referred to as *Text*.


Stanley Fish, *There’s no such thing as free speech and it’s a good thing, too* (New York, NY: Oxford University Press, 1994) will be referred to as *No free speech*.

Stanley Fish, *Professional correctness. Literary studies and political change* (Oxford: Clarendon Press, 1995) will be referred to as *Professional*.

Stanley Fish, *The trouble with principle* (Cambridge, MA: Harvard University Press, 1999) will be referred to as *Trouble*.


Stanley Fish, *Save the world on your own time* (New York, NY: Oxford University Press, 2008) will be referred to as *Save*. 