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Locke, Church and State: Stanley Fish’s Impossible Mission

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Stanley Fish’s critique of liberalism is a challenging one. This paper seeks to show how Fish’s most comprehensive attempt to deconstruct the liberal tradition is subject to fundamental flaws due to Fish’s failure to come to grips with the very foundations of liberalism itself. In particular, Fish places great emphasis on the seventeenth century English philosopher, John Locke, as the inaugurator of the basic “contradiction” to which, he believes, liberalism is beset. This paper shows that Fish has fundamentally misunderstood Locke and therefore has misunderstood the “contradiction” which he believes Locke’s political philosophy inaugurates for liberalism. Ultimately therefore, Fish’s broad challenge to liberalism, which he has also pursued in other writings, is weakened by the fact that what he perceives to be the root of the liberal problem was not present within the roots of liberalism at all.

Stanley Fish is one of the most challenging of liberalism’s contemporary critics. Indeed, one commentator in the American Political Science Review referred to Fish’s critique of liberalism as “among the most radical to emerge in recent political theory.”¹ It is just over a decade since Fish engaged in his most systematic and comprehensive critique of the liberal tradition – in a seminal article published in the Columbia Law Review.² While some might think Fish’s discussion of liberalism in this decade-old article is somewhat dated, the reverse is in fact the case. Fish remains one of the most challenging and vociferous critics of liberalism, and while he adopts a similar critique in There’s No Such Thing as Free Speech and The Trouble With Principle, the Columbia Law Review article is his most sustained, detailed and comprehensive engagement with the liberal tradition.³ Indeed Judith Shulevitz, on the basis of the corrosive critique of liberalism that Fish offers in that article, says that it is in the Columbia Law Review that “Fish’s scariest side emerges in clear view.”⁴

³ See Fish, “Why We Can’t All Just Get Along”, in Fish, The Trouble with Principle, pp.252-55. See also Fish, “Liberalism Doesn’t Exist” in Fish, There’s No Such Thing as Free Speech and it’s a Good Thing Too (Oxford: Oxford University Press, 1994).
In his Columbia Law Review article, Fish pursues his critique of the liberal tradition by revisiting its foundations, in the work of the late seventeenth century English philosopher, John Locke, and Locke’s search for a just separation of church and state. This is indeed another reason why Fish’s discussion is not dated, because Locke himself is not. As Fish points out: “…..[t]he modern contours of the debate concerning the relationship between church and state were established in 1689 by Locke in A Letter Concerning Toleration, and discussion of the issue has not advanced one millimeter beyond Locke’s treatment even though over three hundred years have passed.”\textsuperscript{5} Nevertheless, despite what he perceives as Locke’s inaugural status for the liberal tradition, we shall see that Fish’s assessment of Locke is vitiated by fundamental misunderstandings. The result is that the aporia that Fish traces to the roots of the liberal tradition, in the work of Locke, were not present when Locke was planting the roots of liberalism at all. On the contrary, we shall see that Locke grounded the liberal tradition in precisely those “pragmatic” and “political” foundations that Fish claims are absent within liberalism, and which Fish advocates as an alternative to the liberal project as a whole.

\textbf{Fish and Liberalism}

In his Columbia Law Review article, Fish advances a critique of liberalism which claims that liberalism, as a political philosophy, is inherently flawed because it is doomed always to fall short of its own ambitions. The reason, he says, is because liberalism

\textsuperscript{5} Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2255. See also \textit{ibid}, p. 2258.
invariably seeks what it will never be able to find. Fish argues that liberalism, in all its variants, invariably seeks indubitable foundations upon which to prioritise a particular set of values, where these values would then claim a privileged status over all other values and the practices associated with them, and therefore an authority to order and regulate these other values and practices in turn.\(^6\) To this privileged set of values, Fish says, liberalism will ascribe the status of “justice” or “equality” or “neutrality”, and the outcomes produced by these values (in terms of the regulation and ordering of all other competing values and practices) will be presented by liberalism as legitimate outcomes.\(^7\)

It is this search for legitimacy - via a privileged set of values, grounded in indubitable foundations, capable of ordering all other competing values and practices in turn - that Fish sees as distinctive of and central to the liberal tradition, and it is precisely this project that he also believes is inherently flawed. This is because, Fish tells us, there is no indubitable, objective and universally acceptable criterion upon which liberalism can establish such a foundation, and therefore upon which liberalism can prioritise a particular set of values, bestowing on them this “privileged” status whereby they are capable of ordering everything else in a fair and universally acceptable manner.\(^8\) Rather, for Fish, the absence of any such criterion renders all values “equal” in the sense of equally “unprivileged”, which in turn renders any choice between them an arbitrary political affair rather than an objective, neutral or just one, even if such objectivity, neutrality or justice is nevertheless appealed to in order to mask the political character of that choice. As Fish states:

\(^6\) See *ibid*, pp. 2257, 2271, 2272, 2275, 2275-76.
\(^7\) See *ibid*.
\(^8\) See *ibid*, pp. 2278, 2279, 2284, 2296-97, 2297, 2312, 2324, 2332.
Whatever ‘principle’ one might offer as a device for managing the political process will itself be politically informed, and any agreement it secures will be the result of efforts by one party first to fill the vocabulary of principle with meanings reflecting its agenda and then to present that vocabulary, fashioned as an adjunct to political program, as the principled, apolitical, source of that same program.9

The result, according to Fish, is that liberalism’s claims to justice or neutrality are in fact an attempt to advance as objective what are, in the absence of any objective foundations, necessarily partial and arbitrary claims which inevitably and unfairly exclude the equally legitimate (or equally illegitimate) claims of others. As Fish puts it:

Every discourse, even one filled with words like ‘fair’ and ‘impartial’, is an engine of exclusion and therefore a means of coercion. It follows that it is beside the point (unless it is a narrowly theoretical one) to prove that a particular discourse is coercive. Of course it is. The real question is, is this the coercion we want, or is it the coercion favored by our opponents?10

And again:

No matter how apparently capacious the vision or generous the impulse, unfairness will always be a feature of any so-called rational scheme, and more often than not, it will be a feature that the architects of the scheme will not and cannot acknowledge. What this means is that it cannot be a criticism of a political theory or of the regime it entails that it is unfair. Of course it is. The only real question is whether the unfairness is the one we want. The only real question, in short, is a political one.11

10 Ibid, p. 2315.
11 Ibid, p. 2256.
This paper takes issue with Fish’s critique of liberalism. It does so by drawing on the political philosopher that Fish presents as inaugurating the liberal agenda of privileging certain values over others and bestowing on these values the authority to regulate goods and values overall. That philosopher is John Locke.12 Fish claims that Locke’s attempt to impose a distinction between matters of church and matters of state, and his attempt to draw a just boundary between them, separating each into their rightful sphere, is “basic” to the “entire liberal project”.13 This is because it gives rise, in seminal form, to that perennial liberal concern of what laws and duties belong to the public sphere, and what rights and liberties belong to the private sphere, and in what instance one can legitimately impinge upon the other.14 Fish therefore presents Locke’s seventeenth century attempt to find some privileged criterion upon which to settle the legitimate boundary between “church” and “state” as inaugural for liberalism as a whole.

For Fish however, the search for such a criterion, and its priority over competing values, does not give rise to a “just”, “neutral” or “fair” adjudication between public and private matters, as liberals from Locke onward have claimed. Indeed Fish believes that all attempts to arrive at such a criterion are a chimera, none being able to yield the impartial outcomes desired. This is because, Fish insists, there is no moral or epistemic point capable of being reached which is neutral or impartial, relative to all others, and so capable of producing such outcomes.15 The result, Fish says, is that far from such criteria

12 See ibid, pp. 2260, 2262, 2265, 2269.
13 See ibid, p. 2271. C.f. ibid, p. 2272.
14 See ibid, pp. 2271-72.
15 See ibid, pp. 2264-65, 2274, 2277, 2278, 2306-07, 2307, 2319, 2319-20, 2321, 2324, 2326.
giving rise to a process of impartial adjudication, they give rise to an arbitrary political process whereby one party manages (under the auspices of “neutrality”) to assert its own cherished values as having a privileged status over those of all competing parties, and is thereby able to exclude as “unfair” or “unjust” those values in conflict with theirs.16 Once again, Fish believes that Locke’s search for a criterion to establish the “just bounds” between church and state exhibits precisely these surreptitious and disingenuous qualities, and in this respect too is both endemic to and symptomatic of all liberal attempts to come, revealing both the ambitions and the flaws which will characterize all his successors.17

By showing how Fish’s presentation of Locke as the origin or root of liberalism’s flawed agenda is vitiated by an equally flawed and inadequate understanding of Locke, this paper seeks to displace Stanley Fish’s critique of liberalism by revealing the faults at its foundations – in particular, by showing that what Fish perceived to be the root of the liberal problem was not present when Locke was planting the roots of liberalism at all. It also seeks to do this in a way that overcomes and transcends the limits of the primary scholarly debate Fish’s Columbia Law Review article has generated in the journal literature – that between Fish and J. Judd Owen in the pages of the American Political Science Review.

16 See ibid, pp. 2256, 2256-57, 2262, 2263, 2264, 2264-65, 2277-78, 2278, 2279, 2284, 2291, 2292, 2292-93, 2294-95, 2297, 2298, 2300, 2308, 2312, 2326, 2332.
17 See ibid, pp. 2260, 2262, 2265, 2266, 2267, 2269.
Fish and Locke

Stanley Fish begins his critique of liberalism by focusing on John Locke’s attempt in his *Letter Concerning Toleration* to “distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other.” Locke wrote the *Letter* while in exile in Holland to escape persecution for the Rye House Plot. However from the very start of his intellectual career, Locke saw the rival claims of competing religions as the primary source of political conflict within his own society, and so it was this religious pluralism that he believed politics had to accommodate and control in some way if peace within civil society was to be secured. It is the principles (or “privileged values”) capable of producing such an accommodation that the *Letter* tries to articulate – and it is this accommodation to which Locke gives the name of “toleration”.

The basic focus of Locke’s *Letter* is therefore the rival claims of competing religions, and the principles that we can arrive at to ensure their toleration, or in the case of unassimilable religions, their proscription, within civil society in order to guarantee civil peace overall.

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20 Thus in his earliest known political writing, written around the time of Charles II’s restoration in 1660, Locke stated: “Indeed [I have] observed that almost all those tragical revolutions which have exercised Christendom these many years have turned upon this hinge, that there hath been no design so wicked which hath not worn the vizor of religion, nor rebellion which hath not been so kind to itself as to assume the specious name of reformation, proclaiming a design either to supply the defects or correct the errors of religion, that none ever went about to ruin the state but with pretence to build the temple….” (John Locke, “First Tract on Government”, in John Locke, *Two Tracts on Government*. Edited by Philip Abrams. Cambridge: Cambridge University Press, 1967, p. 160).
Fish argues that Locke’s attempt within the *Letter* to arrive at a privileged set of principles capable of settling the “just bounds” of church and state encounters a basic contradiction. And it is this contradiction which Fish perceives as perennial for liberalism. As Fish puts it, the same intellectual move that produces this Lockean contradiction “….is made over and over again by every liberal theorist including those who write today”. 22 This contradiction, Fish says, involves, on the one hand, Locke’s recognition of the inherent relativism in all competing values (in Locke’s case, the competing beliefs and values of rival churches with no authoritative judge to decide between them, evident in Locke’s statement that “very church is orthodox to itself”) and on the other, Locke’s search for a more general principle which might regulate and constrain the competing claims of these rival values and produce just outcomes overall. 23 Fish insists that Locke cannot plausibly arrive at the second more general principle (with its implicit claim to objectivity capable of producing “just” outcomes overall) while acknowledging the inherent relativism of all values from which this search for such a general principle begins. 24 As Fish puts it:

….if every church is orthodox to itself, there is no space between orthodoxies that might serve as the location of some supposedly impersonal constraints. In fact, if every church is orthodox to itself, there can be no such constraints, and when one of them is supposedly invoked, what is really being invoked is some very personal agenda passing itself off as the impersonal judgment of all….. 25

22 See Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2255.
23 See *ibid*, p. 2255.
24 See *ibid*, pp. 2262, 2265.
Locke’s Contradiction

Locke acknowledges that “every church is orthodox to itself”, in the absence of any authoritative earthly judge to decide between them, in the following passage from the *Letter*:

For every church is orthodox to itself; to others, erroneous or heretical. Whatesoever any church believes, it believes to be true; and the contrary thereupon it pronounces to be error. So that the controversy between these churches about the truth of their doctrines, and the purity of their worship, is on both sides equal; nor is there any judge, either at Constantinople, or elsewhere upon earth, by whose sentence it can be determined. The decision of that question belongs only to the Supreme Judge of all men….  

Fish points out, correctly, that the primary means by which Locke seeks to accommodate these rival churches within civil society is through a state policy of toleration for competing faiths. Yet as mentioned above, Locke still needs some criterion or principle, administered by the state, by which to determine which faiths to tolerate and which to proscribe on the grounds that the latter are at odds with peaceful coexistence and so are unassimilable within civil society. It is with the search for such a principle that Fish claims Locke’s contradiction occurs, since the very objectivity and impartiality presumed by such a principle, in its capacity to decide between toleration and proscription, is vitiated, Fish claims, by the relativism inherent in Locke’s acknowledgment that “every church is orthodox to itself”. As Fish puts it:

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27 Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, pp. 2255, 2259.
The problem is that were tolerance always the rule, government would be barred from restricting behaviour that it found wrong and disruptive so long as those who engaged in that behaviour could plausibly claim that they were moved to it by religious faith. Locke responds to this difficulty by refusing to extend tolerance to doctrines which ‘manifestly undermine the foundations of society, and are therefore condemned by the judgment of all mankind’. The contradiction is obvious: If every church is orthodox to itself, the category ‘the judgment of all mankind’ is empty because it presupposes the common ground or shared point of view denied by the announcement that every church is orthodox to itself. Indeed, if there were something called the judgment of all mankind, there would be no need of a liberal framework within which competing orthodoxies vied for political supremacy; any clash would simply be referred to the judgment of all mankind, and the resolution it directed would be accepted by all mankind which, after all, would only be agreeing with itself. Despite its obvious illegitimacy, however, this originary Lockean move is made over and over again by every liberal theorist including those who write today.²⁸

What this statement reveals is not a “contradiction” inherent in Locke but rather Fish’s fundamentally flawed understanding of the argument Locke advances in the Letter Concerning Toleration. It is true that Locke puts forward in that text a principle or criterion to determine which beliefs and practices ought to be tolerated and which proscribed, but the criterion that he resorts to for this purpose is not the “judgment of all mankind”. Such a phrase is an instance of rhetorical hyperbole which Locke resorted to at times when he wished to present a particular viewpoint as uncontested and so not worth serious consideration. As we shall see later in the paper, the criterion that Locke actually resorts to in order to include or exclude certain religious beliefs and practices from civil society is much less universal, and much more pragmatic. It is, indeed, the public ends

for which those in civil society (or their predecessors) initially entered civil society and consented to its political authority in the first place.\(^{29}\) These are the only ends, Locke tells us, to which political authority within that society may be legitimately directed.\(^{30}\)

Yet this is not the end of the story. As we shall see, not only is Fish mistaken about the criterion he believes Locke resorts to in order to include or exclude (tolerate or proscribe) beliefs and practices in civil society. He is also mistaken about the claims he argues Locke makes in regard to this criterion.

Contrary to Fish, who insists that Locke perceives the “judgment of all mankind” as authoritative and binding on all issues of toleration and prescription within civil society, we shall see that in regard to the criterion Locke actually does resort to, he sees no such judgment as, in and of itself, authoritative.\(^{31}\) Indeed, and this is of the first importance, Locke considered no judgment upon any criterion ultimately authoritative short of the divine judgment of the “Supreme Judge of all men”, referred to in the passage above.\(^{32}\)

This fact is crucial to any understanding of Locke’s concept of toleration, and indeed is also fundamental to understanding the pitfalls of Fish’s critique of Locke. This is because once we understand that Locke considered no judgment as ultimately authoritative short of God’s, we shall see that Locke was just as aware of the inherently political and

\(^{29}\) See the section “Locke’s Criterion” below.


\(^{31}\) See the section “Locke’s Criterion” below.

\(^{32}\) For Locke’s reference to the “Supreme Judge of all men”, see note 26 above. For the status Locke elsewhere accords to the will of God, see Locke, Two Treatises of Government. Edited by Peter Laslett (New York: New American Library, 1963), II, § 6, 25, 31, 32, 34-36, 58, 63, 66, 67, 135, 172.
arbitrary nature of all political judgment (including the rhetorical “judgment of all mankind”) as Fish is. Indeed even more so, since as the conclusion of this paper will reveal, Fish ultimately succumbs to the same unjustified universalist pretensions that he so assiduously unearths in others.

The same cannot be said for Locke who, in this manner, “out-Fishes” Fish in his sensitivity to the irreducible element of realpolitik in all rival normative claims – i.e. how such claims arbitrarily assert a priority over others, inevitably seeking to exclude these others in the process. In other words we will find through a closer and more thorough understanding of Locke’s political philosophy that not only does Fish misunderstand the “contradiction” for liberalism to which he believes Locke’s philosophy gives rise, but he also fails to see how Locke was fully aware of, and sought to avoid, many of the problems of political justification that Fish ascribes to liberalism and upon which he relies in his attempt to undermine not only the coherence of the liberal project but the liberal project itself.

**Fish’s Letter**

As we have seen, Locke’s concern in the *Letter Concerning Toleration* is the settlement of the “just bounds” between church and state. Fish appears to believe that Locke

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33 See the section “Locke’s Realpolitik” below.
34 See the section “Fish Out-Fished” below.
35 On Locke’s recognition of this realpolitik process, see the section “Locke’s Realpolitik” below. On Fish’s recognition of the same process, see notes 9, 10 and 11 above.
36 This last point is not too strong a claim. Fish’s attempt to undermine the liberal project can be seen in his encouragement of liberalism’s opponents not to play by liberalism’s rules. See, for example, Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2331.
conceived of these “just bounds” as in some sense a permanent, stable marker which
separates what intrinsically belongs to the church on one side and what intrinsically
belongs to the state on the other. He quotes Locke in this manner as follows:

I esteem it above all things necessary to distinguish exactly the business of civil government from that of
religion, and to settle the just bounds that lie between the one and the other. If this be not done, there can be
no end put to the controversies that will be always arising….

We have seen that Fish erroneously attributes to Locke a criterion for determining what is
excluded from civil society (“the judgment of all mankind”) which Locke never resorted
to in practice. Fish then offers what he believes is Locke’s criterion for determining what
is included in civil society, and so intrinsically belongs to the realm of “church” as
distinct from the “state”. According to Fish, this criterion is what (from Locke’s
perspective) is necessary for salvation. First and foremost, what Locke believes is
necessary for salvation is the need of each individual to come to their religious belief on
the basis of their own volition and without coercion. This is because only such unforced
belief is likely to be sincere and genuine, since as Locke tells us, “such is the nature of
the understanding, that it cannot be compelled to the belief of any thing by outward
force.” For Locke, “sincere” and “genuine” belief is a necessary condition for

37 See ibid, pp. 2269-70.
Concerning Toleration in Focus, p. 12, cited in Fish, “Mission Impossible: Settling the Just Bounds
Between Church and State”, p. 2258.
39 See Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, pp. 2259-2260. See
Concerning Toleration in Focus, p. 18, cited in Fish, “Mission Impossible: Settling the Just Bounds
Between Church and State”, p. 2259.
However it is not a sufficient condition because Locke tells us that such belief must also be “true” belief – i.e. reflecting the “one truth, one way to heaven.”

Regarding all such conditions however, toleration is necessary for salvation because it requires the state to leave believers, in the matters of their belief, alone, allowing them to come to such beliefs (be they “true” or not) in an unforced, uncoerced (and therefore “sincere” and “genuine”) manner.

While such an argument might explain why “toleration [is] the chief characteristical mark of the true church” – it being necessary for salvation and churches having a genuine interest in promoting salvation - nevertheless contrary to Fish, it does not “follow inescapably” upon the same premises that “‘[t]he care of the salvation of men’s souls cannot belong to the magistrate’”.

Admittedly Locke himself presented such an argument as one reason why “the care of souls” cannot belong to the magistrate, insisting that because the magistrate can only coerce belief, and because belief must be uncoerced if it is to be “sincere” and “genuine” and therefore worthy of salvation, the jurisdiction of the magistrate “is confined to the care of the things of this world, and has nothing to do with the world to come”.

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41 See Locke, “A Letter Concerning Toleration”, in Locke, Political Writings, pp. 394-95.
42 Ibid, p. 396.
43 Thus Locke defines toleration precisely in terms of this “leaving alone”, where toleration is understood as restraint on the part of some in not interfering with the beliefs and practices of others. The opening pages of Locke’s Letter Concerning Toleration contrasts such a stance with those who “persecute, torment, destroy, and kill other men upon pretence of religion” (ibid, p. 391).
45 Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2260.
such a conclusion only “follows inescapably” from such premises if the magistrate is concerned with persecuting religious belief for the sake of people’s salvation. If the magistrate persecutes belief for some other reason (for instance, state security) the extent to which such coercion undermines the “sincerity” and “genuineness” of belief, and therefore the conditions of salvation, would be irrelevant to the success or failure of the magistrate’s policy. This would mean that, in such an instance, the use of force by the state in religious matters would no longer be inherently at odds with state purposes, thereby undermining this particular argument that Locke advances as to why the jurisdiction of the magistrate “has nothing to do with the world to come”, and therefore why he should tolerate religious belief.

Fish does not perceive this shortcoming in Locke’s defense of toleration. Instead he simply presents the two factors Locke considered necessary for salvation - the sincerity and genuineness of religious belief and the truth of religious belief – as the basis upon which Locke establishes his criterion to “settle the just bounds of church and state”, thereby enabling Locke to determine what intrinsically belongs to the realm of the “church” as distinct from the “state”. As Fish states:

It would seem that with these arguments in place, Locke can fairly claim to have achieved his goal of settling the just bounds between the business of civil government and that of religion. The key is the identification of the ‘religious interest’ with the salvational aspirations of the individual soul. With these aspirations the civil magistrate has nothing to do – first, because he lacks the authority and wisdom to distinguish the
false from the true, and second, because even if he were to declare an official doctrine and compel its profession, that profession would neither produce nor alter the *inward* persuasion that is the mark of true faith. What remains to the magistrate and is appropriate to his office are the care and protection of ‘outward things, such as money, land, houses, furniture, and the like’, and it is his duty ‘by the impartial execution of equal laws, to secure unto all people in general, and to every one of his subjects in particular, the just possession of these things belonging to this life’.  

Fish then claims that this strategy of Locke’s, establishing a firm criterion upon which to distinguish matters of church from matters of state, became definitive of liberalism in its separation of a public from a private sphere. Referring to the passage quoted above, Fish states:

If this sounds familiar, it is because what we have here, already fully articulated in 1689, is the basic structure of liberal political theory: a firm distinction between the public and private realms (underwritten by a distinction between body and soul/mind), and a determination to patrol the boundaries between them so that secular authorities will not penalize citizens for the thoughts they have (no thought control) or the opinions they express (no censorship), and religious authorities will not meddle in the worldly affairs of their parishioners (no theocracy).  

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47 Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2260.  
As we saw in a passage above, Fish refers to an “originary Lockean move” which he sees as definitive of Locke’s attempt to settle the “just bounds” between church and state and which he believes is characteristic of all liberal attempts to establish similar distinctions to come, insisting that this move is “made over and over again by every liberal theorist including those who write today”.49 This “move”, as we saw, was to juxtapose a recognition of the inherent relativity of all values due to the absence of an authoritative judge to decide between them (“every church is orthodox to itself”) with the affirmation of one universal value (“the judgment of all mankind”) capable of regulating and ordering them all. The need for such regulation and order arises because of the need for the state to secure public limits to acceptable private discourse and practice, be it in the religious realm or any other, in order to secure civil peace overall (i.e. the very political goal from which, we saw, Locke’s political reflections began).50 And yet the relative foundations from which, Fish insists, all such attempts arise inevitably undermine them.

Fish makes this point as follows:

There are (at least) two moves here and together they forecast the next three hundred years. First Locke dismisses views so subversive that no society could allow them to flourish; but then he immediately declares that, since no sane person would urge such views, they are condemned in advance of their unlikely appearance by the judgment of all mankind. Everything happens so quickly here that the reader may not pause to raise the question that emerges as soon as one stops to reflect. How can there be something called

49 See note 28 above.
50 See Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, pp. 2260-2261. On civil peace being the political goal from which Locke’s political reflections began, see the discussion at the beginning of the section “Fish and Locke” above.
‘the judgment of all mankind’ if the entire project of toleration is a response to the bottom line fact of plural judgments issuing from plural orthodoxies? How can you get to the judgment of all mankind, to what we now call ‘common ground’, if you begin by declaring that differences are intractable because every church is orthodox to itself? These are questions no one has been able to answer to this day, although answers are forthcoming all the time.\footnote{Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2262.}

The “moves” that Fish refers to in this passage – where Locke shifts from a recognition of the inherent relativity of all values (“every church is orthodox to itself”) to a universal criterion seeking to place limits upon these values (“the judgment of all mankind”) - is presented by Fish as Locke’s way of responding to an inherent contradiction within his thought (and Fish says, within the thought of liberals ever afterward) which arises from the conflict between two imperatives. On the one hand, there is the need for the liberal state to maintain public order by proscribing certain values and practices, excluding them from civil society, because they are a threat to peace and social order overall.\footnote{See \textit{ibid}, pp. 2260-2261.} On the other hand, there is an absence, from a liberal perspective, of any obvious normative criterion by which the state might decide which values and practices ought to be subject to such exclusion given that liberalism recognizes the inherent relativity of all such values and practices, each one being a product of private choice and therefore “orthodox to itself”.\footnote{See note 25 above.}

It is precisely this relativity that, we saw, was one condition informing Locke’s ethic of toleration, disqualifying the state from interfering with religious belief precisely because
it is unqualified to judge either the truth of those beliefs or ensure they are held in a sincere and genuine manner. But the need for the liberal state to maintain peace and social order means that at times it might have to interfere with such private matters, thereby imposing limits on toleration in the private sphere. But on what basis might it do this, given that it already acknowledges the inherent relativity of all values, and its incapacity to decide between them?

It is this inherent conflict, between the relativity that justifies toleration, and the same relativity that precludes any obvious criterion upon which to determine the limits of toleration, which Fish argues is the inherent contradiction in Locke’s project. He makes this point as follows:

The chief problem is that the strongest point of the argument is also the point of its greatest vulnerability. If toleration is the mark of the true church and the obligation of the civil magistrate, will we not have a religion without content (any doctrine is O.K. so long as someone believes it) and a civil authority prevented from dealing with behaviour it thinks wrong if those who engage in it say they are moved to it by faith? There are two questions here: (1) can religion supposedly a matter of belief, possibly require none and still remain religion? and (2) how far should the freedom of religion from state scrutiny extend given that it is the function of the state to secure good order and stability? How can tolerance be practiced as a general policy without undermining the basis for, and justification of, the judgments both church and state must make in order to be what they are?55

54 See the section “Fish’s Letter” above. However as we also saw, Fish failed to perceive the pitfalls in this particular argument for toleration that Locke advances – see the same section above.
55 Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, pp. 2260-2261.
As Fish states, Locke’s answer to this dilemma is to seek to “….identify a base-line level of obligation that leaves believers free to live out their faiths within limits and provides the magistrate with a measure for determining when those limits are breached and a justification for enforcing them.” But given the relative outlook towards competing values which Fish believes informs and justifies liberal toleration, Fish claims that any “base-line level” or “measure” seeking to place limits on toleration will never achieve the level of objectivity or universality necessary to sustain its claims to priority, in terms of “justice” or “neutrality”, but rather will inevitably appear to those excluded by it as arbitrary and based on the exigencies of power. As Fish states:

Although the problem posed by the strong form of toleration…..is thus solved by establishing limits to its scope, that solution creates its own problem – how to justify the stigmatizing of those doctrines and actions that violate the limits as drawn. It is my thesis that there can be no justification apart from the act of power performed by those who determine the boundaries and that therefore any regime of tolerance will be founded by an intolerant gesture of exclusion. (This is a criticism only from the perspective of the impossible goal a regime of tolerance sets for itself.) Those who institute such a regime will do everything they can to avoid confronting the violence that inaugurates it and will devise ways of disguising it, even from themselves.

Fish says that Locke’s reference to the “judgment of all mankind”, far from being a universally valid criterion for determining the limits to toleration, is one such act of

56 *Ibid*, p. 2261. We saw that Fish assumed such “base-line level of obligation” to be determined by the criterion he believes Locke provides for separating matters of “church” and “state” (or the private from the public sphere) – see note 47 above.

57 Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2261.
arbitrary exclusion, allowing Locke to exclude from the pale of civil society certain beliefs, values or practices he finds intolerable.58

Indeed Fish sees this process as characteristic of liberalism as a whole, but one which liberalism tries to conceal from itself and others by denying the processes of political power involved and instead claiming it is appealing to neutral criteria grounded in justice or fairness.59 Fish insists that all such criteria claiming to be outside arbitrary processes of political power suffer the same fate as the “originary Lockean move” and its elevation of the “judgment of all mankind” - they fail to sustain their objective or universal claims and instead are revealed as ultimately concealing naked acts of realpolitik, arbitrarily excluding competing values and practices. As Fish states:

My point is that if the absence of common ground (because every church is orthodox to itself) initiates a search for a form of government that will accommodate diversity, and you begin (and end) the search by identifying a common ground, what you will have done is elevated some or other orthodoxy to the status of ‘common sense’ and stigmatized as dangerous to the very ‘foundations of society’ those orthodoxies whose common sense is contrary to the preferred one. This is not simply a description of Locke, but a description of anyone who would invoke some common ground as the solution to the problem of what Hobbes called ‘multiplying glasses’, the lens of ‘Passions and Self-love’ through which all men see truth and their duty. Common ground is what emerges when you assume the normative status of your own judgment and fix the label ‘unreasonable’ or ‘inhuman’ or ‘monstrous’ to the judgment of your opponents. (John Rawls’s out-basket category of ‘unreasonable comprehensive doctrines’ is only the latest and most elaborate version of the strategy.) The irony – not a paradox or even a matter of blame because it is inevitable – is that while

58 See *ibid*, p. 2262.
59 See *ibid*, pp. 2256, 2256-57, 2262, 2263, 2264, 2264-65, 2277-78, 2278, 2279, 2284, 2291, 2292, 2292-93, 2294-95, 2297, 2298, 2300, 2308, 2312, 2326, 2332.
adhering to ‘common ground’ is proclaimed as the way to sidestep politics and avoid its endless conflicts, the specifying of common ground is itself a supremely political move.60

As if to emphasize the partial, contingent and irreducibly “political” character of all such normative claims to “common ground”, and the justificatory labels of neutrality, impartiality or justice which invariably accompany these, Fish states:

[C]ommon ground will be what emerges (temporarily) when one party wins the right (through war, elections, dynastic succession, etc.) to determine the decorums of appropriate behavior. Political theorists will always want that determination to be made by some independent calculus or measure, some formula that sorts out the relevant factors, assigns priorities, and provides judges and magistrates with a test that pretty much applies itself. But no test or formula applies itself, and the embarrassment a formula is intended to remove – the embarrassment of decisions inflected by partial and partisan interests – returns when someone (just who it will be is always the real issue) is empowered to apply it.61

Locke Misunderstood

We have seen that Fish perceives the root of Locke’s shortcomings (and through Locke, that of all subsequent liberalism) in what he calls an “originary Lockean move”. This move produces a contradiction between, on the one hand, what Fish believes is the origin of toleration in the relativist claim that “every church is orthodox to itself”, and the universalist limits imposed upon toleration via the “judgment of all mankind”. We have seen, however, that Fish’s critique is vitiated by the fact that Locke never appealed to one

60 Ibid, p. 2264.
side of this contradiction – the “judgment of all mankind” – as the criterion by which he imposed limits on toleration. Rather, as we shall see, the criterion he appealed to lay elsewhere, on a much more contingent, much less universal, and much more political foundation.

The passage in the Letter in which the phrase “judgment of all mankind” occurs arises at the beginning of that section of the Letter where Locke goes into detail concerning the limits of toleration – those faiths, beliefs, values and practices which he believes the state should not tolerate and which he therefore deems outside the pale of civil society. Fish quotes this passage from the Letter as follows:

But to come to particulars. I say, first, No opinions contrary to human society, or to those moral rules which are necessary to the preservation of civil society, are to be tolerated by the magistrate. But of those indeed examples in any church are rare. For no sect can easily arrive to such a degree of madness, as that it should think fit to teach, for doctrines of religion, such things as manifestly undermine the foundations of society, and are therefore condemned by the judgment of all mankind.62

As Fish tells us, Locke goes on within this part of the Letter to proscribe certain other faiths, beliefs, values and practices. These include:

any sect that teaches expressly and openly, that men are not obliged to keep their promise; that princes may be dethroned by those that differ from them in religion…..Lastly, Those are not at all to be tolerated who deny the being of God”.63

We shall now move to a closer study of Locke’s *Letter* and related writings to show that Locke did not basis his criterion for excluding such beliefs and teachings on the “judgment of all mankind” at all. This is just an isolated (and as we have seen, rhetorical) phrase within a single passage in the *Letter*. A broader reading of Locke will reveal a much more contingent, much more “political” criterion that evades the bulk of Fish’s critique.

**Locke’s Criterion**

(i) Locke and Civil Society

Fish is correct to point to Locke’s attempts in the *Letter* to separate the spheres of church and state as the origin of the basic liberal distinction between the public sphere of legitimate political authority and the private sphere of individual liberty where individuals live lives and make choices free from interference by public authority.64 Yet the origin of this distinction emerges not only in the *Letter*, with its focus on church and

63 Locke, “A Letter Concerning Toleration”, reprinted in Horton and Mendus (eds) *John Locke: A Letter Concerning Toleration in Focus*, pp. 45-47, cited in Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2263. Fish claims that this list of exemptions from toleration are simply the beliefs and principles of the “losers in a recent struggle” - the supporters of Cromwell’s Commonwealth which was displaced by the restoration of Charles II (see Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2264). In other words, Fish seeks to show that Locke’s criterion of toleration produces no impartial or legitimate exclusions but, as Fish believes is the case with all criteria, simply affirms one side in a partisan political dispute.

64 See note 48 above.
Locke begins his discussion of the origins of civil society in the *Two Treatises* by pointing to a state of nature within which individuals possess natural rights.65 Locke insists that these natural rights ultimately arise from God, given each individual’s equal status as one of God’s creatures, and as this status is equal, so are the natural rights which each individual possesses as a result of this status.66 However despite this equality of each individual *apropos* their natural rights, the absence of a common umpire in the state of nature means that, in regard to the exercise of these rights, and their entitlements, everybody becomes “Judge in his own Case”, with the result that conflict is endemic and the state of nature very insecure.67 It is this which motivates individuals to seek a common political authority to protect these natural rights and leads them to consent to the creation of civil society, within which they transfer some of the powers that they exercised in the state of nature to a political authority (although keeping others in turn,

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66 See *ibid*, II, § 4. See also *ibid*, II, § 5.
67 As Locke states: “For the Law of nature being unwritten, and so no where to be found but in the minds of Men, they who through Passion or Interest shall mis-cite, or misapply it, cannot so easily be convinced of their mistake where there is no establish’d Judge: And so it serves not, as it ought, to determine the Rights and fence the Properties of those that live under it…..” (*ibid*, II, § 136. C.f. *ibid*, II, § 21, 87, 90, 94, 123, 124-26, 127; 131, 134, 136, 171, 222).
not least the natural rights for whose protection they entered civil society in the first place).\textsuperscript{68}

However it is at this point, with the creation of civil society, that we perceive Locke in the \textit{Two Treatises} articulating a distinction between a public and a private sphere, and this articulation is defined entirely by the purposes for which he believes individuals left the state of nature and established civil society in the first place.\textsuperscript{69} Locke makes clear that the purpose of civil society (and more specifically, the public political authority which is created to govern it) is to protect the fundamental individual rights that, in the state of nature, had a “natural” status but were otherwise very insecure.\textsuperscript{70} It is for this reason, he says, that civil society was consciously consented to by those within a state of nature and why they agreed to obey a “common umpire” artificially created to ensure that each was not “Judge in his own Case”.\textsuperscript{71} Yet being created for very specific purposes, Locke insists that the exercise of public political authority by this “common umpire” (be it a legislature or executive) is limited and circumscribed to very specific ends – these ends being those for which it was created in the first place. Locke refers to this link between the origins of public political authority, and the limited purposes towards which it may be legitimately directed, as follows:

\textsuperscript{68} On the transfer to civil society of some of the rights which individuals exercised in the state of nature – not least the right to act as executer of the law of nature – see \textit{ibid}, II, § 88, 129-30, 171. On the rights which individuals retain upon their entry into civil society, see \textit{ibid}, II, § 23, 24, 135, 149, 164, 168, 171, 172, 179.

\textsuperscript{69} Locke insists that his hypothesis concerning the creation of civil society, and the purposes for which it was created, is more than simply a heuristic device, but rather has a historical grounding in the actual origins of civil societies – see \textit{ibid}, II, § 14, 99, 104, 106, 112. However Locke admits that any material proof of these origins would be lost in the midst of time – see \textit{ibid}, II, § 101.

\textsuperscript{70} See \textit{ibid}, II, § 123, 136.

\textsuperscript{71} See \textit{ibid}. See also note 67 above. On the “common umpire” see also Locke, \textit{Two Treatises of Government}, II, § 87, 89, 90, 124-25, 127, 136, 212, 220, 227.
But though Men when they enter into Society give up the Equality, Liberty, and Executive Power they had in the State of Nature, into the hands of the Society, to be so far disposed of by the Legislative, as the good of the Society shall require; yet it being only with an intention in every one the better to preserve himself his Liberty and Property; (For no rational Creature can be supposed to change his condition with an intention to be worse) the power of the Society, or Legislative constituted by them, can never be suppos’d to extend farther than the common good; but is obliged to secure every ones Property by providing against those three defects above-mentioned, that made the State of Nature so unsafe and uneasie. And so whoever has the Legislative or Supream Power of any Common-wealth, is bound to govern by establish’d standing Laws, promulgated and known to the People, and not by Extemporary Decrees; by indifferent and upright Judges, who are to decide Controversies by those Laws; And to imploy the force of the Community at home, only in the Execution of such Laws, or abroad to prevent or redress Foreign Injuries, and secure the Community from Inroads and Invasion. And all this to be directed to no other end, but the Peace, Safety, and publck good of the People.72

Consequently for Locke, the exercise of public political authority is only legitimate if it is exercised by the bodies that have been specifically authorized to do so and if it is directed to ends consistent with the purposes for which that authority was created and consented to in the first place – in this case, the “Peace, Safety and publck good of the People.” Indeed we see Locke establishing precisely the same connection between the purposes for which civil society was established, and its lawful limits, in the Letter:

This is the original, this is the use, and these are the bounds of the legislative, which is the supreme power in every commonwealth. I mean, that provision may be made for the security of each man’s private possessions; for the peace, riches, and public commodities of the whole people; and, as much as possible,

72 Ibid, II, § 131. See also ibid, II, 135-37, 149, 171, 222.
for the increase of their inward strength, against foreign invasions. These things thus being explained, it is easy to understand to what end the legislative power ought to be directed, and by what measures regulated; and that is the temporal good and outward prosperity of the society; which is the sole reason of men’s entering into society, and the only thing they seek and aim at in it.\textsuperscript{73}

Thus we see a close connection between the \textit{Two Treatises} and the \textit{Letter} when it comes to the legitimation of public political authority. Indeed although scholarly opinion is in disagreement concerning the exact date of composition of the bulk of the \textit{Two Treatises}, nevertheless it is in agreement in situating both the \textit{Two Treatises} and the \textit{Letter} in the same period of Locke’s intellectual development – that being during the 1680s in the wake of the Exclusion Crisis.\textsuperscript{74} Consequently the intellectual proximity of the \textit{Two Treatises} and the \textit{Letter} – in terms of their similar understanding of the relation between the origins of political authority and the limits imposed upon it – is underwritten by a chronological proximity concerning their respective dates of composition.

\textsuperscript{73} Locke, “A Letter Concerning Tolerance”, pp. 422-23.

\textsuperscript{74} On the circumstances of the composition of the \textit{Letter}, see note 19 above. Concerning the date of the composition of the bulk of the \textit{Two Treatises}, J.W. Gough points out that the traditional view has always been that it was a text written in response to, and as justification of, the Revolution of 1688 (see J.W. Gough, \textit{John Locke’s Political Philosophy}. Second Edition. Oxford: Clarendon Press, 1973, p. 134. See also Maurice Cranston, “The Politics of John Locke”, \textit{History Today}, September 1952, pp. 619-20) However Peter Laslett, on the strength of his critical edition of the \textit{Two Treatises} published in 1960, famously claimed in his introduction to that text that although Locke made additions to the text in the wake of the 1688 Revolution, he wrote the bulk of it in 1679-80, making it a response to the issues raised by the Exclusion Crisis, not the overthrow of the Stuart dynasty (see Laslett, “Introduction”, in Locke, \textit{Two Treatises of Government}, pp. 60, 74-75, 78). However more recently, Richard Ashcraft has argued that the bulk of the text was written in 1681-82, insisting that it reflected the much more radical political strategies adopted by Locke’s faction, Shaftesbury’s Whigs, in the wake of Charles II’s dissolution of the Oxford Parliament (see Richard Ashcraft, “Revolutionary Politics and Locke’s \textit{Two Treatises of Government}: Radicalism and Lockean Political Theory”, \textit{Political Theory}, Vol. 8, 4, 1980, pp. 431, 436, 438-47, 449, 451, 466, 468, 474-75).
(ii) Public and Private Sphere I

Thus it is clear from the passages above that, for Locke, the *public sphere* is the sphere in which the political authority which individuals consciously create and consent to upon their entry into civil society is exercised.\(^{75}\) The private sphere is therefore everything within civil society that falls outside of this public sphere, and is therefore not subject to the intrusion or interdiction of public political authority. For Locke, this private sphere is coextensive with the sphere of toleration – Locke defining toleration as the absence of such intrusion on the part of public political authority.\(^{76}\) The private sphere (or sphere of toleration) necessarily includes the exercise of those natural rights for whose protection individuals entered civil society in the first place. As Locke famously put it, individuals entered civil society for the protection of their “lives, liberties and estates”, and so the private sphere includes the exercise of those rights associated with these.\(^{77}\)

The idea that the private sphere (or sphere of toleration) is also the sphere in which rights are exercised is even more clear in the *Letter*, where Locke insists on rights to the free exercise of religious belief and worship and perceives the scope for such free exercise as enabled by the limits placed on the authority of the magistrate. As Locke states:

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\(^{75}\) Of course the only individuals who both consciously create and consent to public political authority are those which emerge from a state of nature and specifically create a civil society by agreeing to abide by the rules and decisions of a “common umpire” – see notes 68, 71, and 72 above. However Locke says that subsequent generations of individuals who are born into civil society nevertheless are still considered to *tacitly* consent to it if they are beneficiaries of the law, order and security that civil society ensures – see Locke, *Two Treatises of Government*, II, § 119.

\(^{76}\) See note 43 above.

\(^{77}\) See Locke, *Two Treatises of Government*, II, § 123.
Concerning outward worship, I say (in the first place) that the magistrate has no power to enforce by law, either in his own Church, or much less in another, the use of any rites or ceremonies whatsoever in the worship of God.\footnote{Locke, “A Letter Concerning Toleration”, p. 411.}

Yet the fact that the private sphere (or sphere of toleration) is defined by all that falls outside the public sphere does not make this private sphere “residual” – i.e. existing only in those spaces where the public sphere (i.e. the sphere of public political authority) has not intruded.\footnote{Such a “residual” conception of the private sphere is the view of some Locke scholars such as John Dunn, Jeremy Waldron, Susan Mendus and Richard Vernon – see John Dunn, “The Claim to Freedom of Conscience: Freedom of Speech, Freedom of Thought, Freedom of Worship?”, in Ole Peter Grell, Jonathon I. Israel and Nicholas Tyacke, From Persecution to Toleration. The Glorious Revolution and Religion in England (Oxford: Clarendon Press, 1991), p. 178; Jeremy Waldron, “Locke: Toleration and the Rationality of Persecution”, in John Dunn and Ian Harris (eds) Locke. Volume II (Cheltenham: Edward Elgar Publishing, 1997), pp. 364-65; Susan Mendus, “Locke: Toleration, Morality and Rationality”, in John Horton and Susan Mendus (eds) John Locke. A Letter Concerning Toleration in Focus (London: Routledge, 1991), pp. 150, 159; Richard Vernon, The Career of Toleration. John Locke, Jonas Proast, and After (Montreal: McGill-Queens University Press, 1997), p. 50, 51.} Such a view would be inconsistent with the idea that the rights which individuals (or their predecessors) entered civil society to protect have a “fundamental” status with no individual having the authority to give them up to another.\footnote{See Locke, Two Treatises of Government, II, § 23, 24, 135, 149, 164, 168, 171, 172, 179. Locke does, however, insist that individuals may be required to give up their natural rights if they are guilty of the unjust use of force, thereby placing themselves in a state of war with another – see Locke, Two Treatises of Government, II, § 16-17, 19, 23, 172, 178, 180, 181, 207, 232, 242. Needless to say, short of the judgment of God, there is no apodictic criterion capable of determining whose use of force is “unjust” in any instance, the antagonistic parties likely to have differing views on the matter. See the discussion of this point in the section “Locke’s Realpolitik” below.} Consequently, Locke insists that any intrusion by public political authority on these fundamental rights is illegitimate, arbitrary and coercive, and individuals have a natural right of resistance in all such instances, including an entitlement to decide themselves when such resistance is justified.\footnote{On this right of resistance, see Locke, Two Treatises of Government, II, § 149. On Locke’s other references to a right of resistance in the Two Treatises, see ibid, II, § 149, 155, 164, 168, 202, 204, 205,} In this respect we can see that Locke’s private sphere is not “residual” but defended by a fundamental right of resistance.
(iii) Public and Private Sphere II

Yet to insist that the public sphere is the sphere in which political power is *legitimately* exercised, and the private sphere is the sphere in which persons exercise their individual rights with which political power, if *legitimate*, does not interfere, is to tell us very little at all. Such a statement is purely formal. It tells us nothing about what particular powers fall within the public sphere, *when* that political power has illegitimately trespassed on an individual right in the private sphere, and therefore *when* an individual is justified in engaging in an act of resistance.

Such omissions might not be important if, as Fish suggests, Locke divides the public and private sphere in terms of the intrinsic qualities of the objects belonging to each of them, as if there were some things that were irreducibly “private” and so inherently belonging to the private sphere, and others that are inherently “public” and so do not. In such an instance, what belongs to the public and what belongs to the private sphere, and therefore what is legitimately entitled to toleration and what is not, becomes self-evident, understood in terms of these intrinsic qualities alone. Fish claims that Locke refers to such intrinsic qualities in terms of a series of “binaries” which provide the criteria for precisely this demarcation between the public and the private sphere. These are the distinction between, firstly, what is “necessary” for salvation and what is “indifferent”,

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82 See Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2261.
and so not necessary for salvation at all; between the “truly fundamental part of religion” and that which is mere “circumstance”; and between the “inward performance” of faith and those external matters which are mere “outward show”. According to Fish, Locke believes it is the first item in these “binaries” which is essential to matters of individual salvation, and being essential, should be left to the uncoerced choice of individuals made possible by the magistrate’s toleration. Such matters therefore belong irreducibly to the private sphere. It is the second items which, Fish argues, Locke believes are not matters essential to individual salvation and which may therefore be subject to the magistrate’s interdiction because “…his regulation will not harm the integrity of a faith whose field of exercise is internal.

Of course Fish denies the purported neutrality of any such criteria, but he believes these are the criteria that Locke provides to separate the public from the private sphere and so determine the legitimate scope of toleration:

In each of these binaries, the first pole sets the limits of tolerance – anything goes so long as it respects the fundamentals – and the second pole identifies the areas of indifference – the particular forms one’s faith might take – areas in which the believer is free to choose and the magistrate free to regulate (but his regulation will not harm the integrity of a faith whose field of exercise is internal).

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83 See ibid.
84 See ibid.
85 See ibid.
86 See ibid.
87 See ibid. Although what Fish does not seem to recognize is that as early as Locke’s Essay Concerning Toleration, Locke declared that when it comes to religious worship, “nothing is indifferent”, which appears to erase these binary distinctions concerning the “inner” and “outer” aspects of worship that Fish refers to above – see Locke, “An Essay Concerning Toleration”, in Locke, Political Writings, p. 190.
88 Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2261. On Fish’s denial of the purported neutrality of such criteria – see ibid, pp. 2266-67.
Such a demarcation of the public and private spheres in terms of the intrinsic features of the matters that fall within each would imply that the boundary that divides these spheres is rigid and settled, to be determined only by the invariable characteristics of each. Indeed, Locke himself at one point in the *Letter* seems to suggest precisely such a rigid distinction, stating:

I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other.89

As with Fish’s “binaries” above, such a statement seems to imply that the boundary or division between the public and private sphere, or the sphere where public political authority may be legitimately exercised and the sphere in which its primary object is to leave individuals alone in the exercise of their rights, is determined by the intrinsic qualities of the objects or matters that fall within one sphere or the other – as if the “business of civil government” and that of “religion” were so inherently different that we are able (given the right criteria) to indubitably and uncontestably separate one from the other, thereby enabling us to “draw a line around religion” and settle the “just bounds” between church and state.90

Yet elsewhere in the *Letter*, Locke makes clear that this is not the case and that the boundary between the public and private sphere is malleable and subject to contestation

89 See note 38 above.
90 The phrase “draw a line around religion” is Fish’s – see Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2266.
and negotiation. The instance in the Letter where Locke makes this clear concerns his discussion of animal sacrifice as a religious practice. In this discussion, the use of animal sacrifice in religious worship, which had previously been a purely religious matter and so situated in the private sphere and subject to toleration, becomes a matter of public concern, and so falls within the scope of the magistrate’s legitimate authority, once it is rearticulated as a matter of “animal slaughter”, which in times of food scarcity places it firmly within the scope of the magistrate’s command. As we shall see, what the animal sacrifice example demonstrates is that once we define the legitimate scope of the magistrate’s authority (and by implication, the scope of toleration) in terms of the original purposes for which civil society and public political authority were established in the first place, what were previously “private” matters can be rearticulated as “public” ones by the magistrate, if he can plausibly present them as falling within the scope of these original purposes, thereby extending the jurisdiction of public authority and diminishing the private sphere of toleration. Locke refers to the animal sacrifice example as follows:

Indeed if any people congregated upon account of religion should be desirous to sacrifice a calf, I deny that that ought to be prohibited by a law……for no injury is thereby done to anyone, no prejudice to another man’s goods……The part of the magistrate is only to take care that the commonwealth receive no prejudice, and that there be no injury done to any man, either in life or estate…..But if peradventure such were the state of things, that the interest of the commonwealth required all slaughter of beasts should be forborne for some while, in order to the increasing of the stock of cattle, that had been destroyed by some extraordinary murrain, who sees not that the magistrate, in such a case, may forbid all his subjects to kill
any calves for any use whatsoever? Only ‘tis to be observed that in this case the law is not made about a religious but a political matter; nor is the sacrifice but the slaughter of calves thereby prohibited.  

What the animal sacrifice example clearly shows is that Locke did not intend to define the distinction between the public and private sphere in terms of the “binary” features which divide the objects falling within each – or as Fish says, “….between things expressly commanded and things indifferent, between what is fundamental and what is a mere circumstance, and between inward profession and outward expression”. The animal sacrifice example clearly shows this because it is not such intrinsic features that determine whether animal sacrifice is tolerated or proscribed in the instance Locke describes. Rather, as indicated above, what determines this is whether a particular matter (“animal sacrifice”) falls within the scope or jurisdiction for which the magistrate’s authority was established and consented to in the first place (in this case, the preservation of the public food supply). In other words, we see once again that link between the origins of the magistrate’s command (the purposes for which it was originally consented to) and the ends to which it can be legitimately directed, where these ends must be seen to fall within the compass of these original purposes. The division between the public and private sphere, or the sphere defining the legitimate scope of the magistrate’s authority and all that falls outside it subject to the magistrate’s toleration, is determined by the negotiation of different matters as falling within one or the other. And as the animal sacrifice example shows, this divide is subject to renegotiation and alteration.

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92 See Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2265.
On the basis of his interpretation of the animal sacrifice example (as distinct from the one above) Fish claimed that he was able to see through Locke’s attempt to “draw a line around religion, supposedly to protect it from state interference”, exposing this as in reality a strategy by the state to exclude undesirable forms of religion (in this case, “animal sacrifice”) and so constrain the exercise of religion “in ways the state finds comfortable”\(^93\). However if (as we have seen above) Locke perceives the boundary between the public and private sphere as malleable, because this boundary is determined not by the binary distinction between intrinsic characteristics but by the public ends toward which the magistrate’s authority may be legitimately directed (“ends” which in turn are determined by the purposes for which that authority was established in the first place), this means that, contrary to Fish, Locke recognizes that there is no definite line capable of being drawn around religion, and all is ultimately subject to political contestation and negotiation.

(iv) Locke’s *Realpolitik*

It is at this point that we recognize just how far Fish’s analysis falls short of an accurate account of Locke’s argument for toleration in the *Letter*, and just how much Locke himself approximates that full recognition (shared by Fish) of the inherently arbitrary and inherently political nature of all rival value claims and their associated assertions of precedence and authority.

\(^{93}\) See *ibid*, p. 2266.
I mentioned above that “to insist that the public sphere is the sphere in which political power is *legitimately* exercised, and the private sphere is the sphere in which persons exercise their individual rights with which political power, *if legitimate*, does not interfere”, is to tell us very little at all since such a statement “tells us nothing about *what* particular powers fall within the public sphere, *when* that political power has illegitimately trespassed on an individual right in the private sphere, and therefore *when* an individual is justified in engaging in an act of resistance.” However what the animal sacrifice example suggests above is that Locke recognized that *all* such claims, such as whether a particular exercise of public political authority is legitimate or illegitimate, or whether a particular individual right has been legitimately or illegitimately trespassed upon, are *themselves* political claims and so are inherently contestable and open to a political (as distinct from an objective, neutral or just) resolution.

This political resolution can be seen in the animal sacrifice example itself where the magistrate seeks to extend the scope of his legitimate political authority by rearticulating a private as a public matter. Such rearticulation is only plausible if it can be linked to the ends for which it is publicly recognized the magistrate’s authority was established in the first place. The final determination of this plausibility, and therefore of the legitimacy of the magistrate’s attempt, is not determined by some apodictic criterion demarcating the public from the private sphere (as Fish’s reference to “binaries” might suggest) but rather by the subjective perception of this plausibility by the individuals who are subject to the magistrate’s command, and their consideration as to whether their fundamental rights have or have not been violated. If they believe such violation has taken place, Locke says
they are entitled to resist the magistrate’s command – Locke even making a distinction in the *Letter* between disobeying a magistrate’s decision and yet accepting the penalty for such disobedience (thereby not placing the legitimacy of the magistrate’s command in question) and openly resisting the magistrate and therefore denying such legitimacy altogether.94

Yet even the decision to engage in resistance is itself a political decision, since not only must the dissidents decide themselves on the justice of their cause, thereby determining when their own resort to resistance is justified, but they must also engage in a *realpolitik* consideration as to whether their resistance is likely to be successful.95 Foremost in this is a consideration of whether their cause is likely to garner sufficient support among the rest of the populace – otherwise, as Locke states, they are likely to be perceived in their resistance as “busie heads” and “turbulent spirits” and so subject to “just ruine and perdition”.96

Such processes of *realpolitik* will also be evident in how their resistance is viewed in the public sphere. The magistrate, having conventional law on his side, will redefine their resistance not as an act in which equal state and non-state parties contest a claim of legitimacy, but rather as a criminal act violating civil peace. Of course if such resistance is successful then the terms of legitimacy will have shifted and it is likely to be the magistrate who, in terms of law, will be perceived to have acted illegitimately.

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95 On Locke’s claim that individuals decide themselves when their resistance is justified, see note 81 above.
In other words, what we have in this instance is not a contestation played out under the umbrella of normative constraints such as justice or neutrality, but rather a confrontation of realpolitik where all such terms are themselves open to political contestation and each side tries to “fill the vocabulary of principle with meanings reflecting its agenda”. This is because in such an ultimate contest, the terms of legitimacy are themselves open to contestation, the magistrate simply being one warring party among others.

(v) Locke’s Skepticism

It is therefore the pervasiveness of politics, and the fact that all normative claims are politically contestable, that Locke recognizes in his political philosophy. In this context, Locke concedes that the outcome of any ultimate clash of “principle” is arbitrary because these outcomes are shaped by the contingency of politics rather than the indubitable correctness of some apodictic criterion capable of adjudicating on these principles themselves. It is precisely this contingency, and this arbitrariness, that Locke recognizes when he writes that the final appeal in any such matter is ultimately an “appeal to heaven”. Locke says the appeal is to “heaven” because, in earthly terms, the outcomes of such ultimate conflicts are outside of the complete control of any temporal party. It is therefore precisely, from any earthly perspective, the open-endedness and contingency of such outcomes that Locke reflects in his reference to an “appeal to heaven”. Locke makes a similar reference in his Letter, stating:

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97 See note 9 above.
But what if the magistrate believe that he has a right to make such laws, and that they are for the public good; and his subjects believe the contrary? Who shall be judge between them? I answer, God alone. For there is no judge upon earth between the supreme magistrate and the people. God, I say, is the only judge in this case, who will retribute unto everyone at the last day according to his deserts; that is, according to his sincerity and uprightness in endeavouring to promote piety, and the public weal and peace of mankind. But what shall be done in the meanwhile? I answer: The principal and chief care of everyone ought to be of his own soul first, and in the next place of the public peace: though yet there are very few will think ‘tis peace there, where they see all laid waste.99

Yet Locke’s recognition of the irreducible elements of *realpolitik* in any ultimate clash of principle, and his realization that the outcomes of such a clash are likely to be arbitrary, should not be taken to imply that Locke was a sceptic regarding the validity of such principles, or that in Machiavellian fashion he saw their worth as inseparable from their political success. As we saw, Locke believed that in the case of religion there was “one truth, one way to heaven”.100 And similarly, in the case of politics, Locke refers to

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99 Locke, “A Letter Concerning Toleration”, p. 424. Locke’s statement here needs to be understood in its late seventeenth century context where open advocacy of resistance to the constituted political authorities (of the type he admittedly resorted to in the *Two Treatises*) could have dire consequences – Locke even going so far as to publish the *Letter* anonymously (see James Tully, “Introduction”, in John Locke, *A Letter Concerning Toleration*. Edited by James Tully. Indianapolis: Hackett Publishing Co., 1983, p. 1). Hence the fact that in the passage referred to, the maintenance of “public peace” is the second “principal and chief care” that Locke enunciates, is significant. The implication is that it is capable of being sacrificed to the first of these cares – the care of one’s “own soul” – perhaps because the state is perceived as having infringed on one’s religious belief or practice. This interpretation of Locke’s passage as an advocacy of resistance is backed by the lines in the *Letter* which immediately follow it. Locke states: “There are two sorts of contests amongst men: the one managed by law, the other by force; and these are of that nature, that were the one ends, the other always begins.” (Locke, “A Letter Concerning Toleration”, p. 424). All of this provides credence to my claim that Locke’s reference to the judgment of God in the passage above is the same sort of advocacy of resistance that Locke makes in his reference to an “appeal to heaven” in the *Two Treatises*.

100 See note 42 above.
“Right” as a value capable of being on one side rather than another. Indeed it is only because he could refer to “Right” in this non-relative, non-sceptical fashion that Locke could refer to the possibility of “injustice”, since otherwise both “Right” and “injustice” would be determined entirely by the contingency of political (and ultimately military) outcomes. Locke makes such a reference to “Right” and “injustice” as having a meaning and validity separate from their contingent political outcomes as follows:

That the Aggressor, who puts himself into the state of War with another, and unjustly invades another Man’s right, can, by such an unjust War, never come to have a right over the Conquered, will be easily agreed by all Men, who will not think, that Robbers and Pyrates have a Right of Empire over whomsoever they have Force enough to master; or that Men are bound by promises, which unlawful Force extorts from them…..He that troubles his Neighbour without a Cause, is punished for it by the Justice of the Court he appeals to. And he that appeals to Heaven, must be sure he has Right on his side; and a Right too that is worth the Trouble and Cost of the Appeal, as he will answer at a Tribunal, that cannot be deceived, and will be sure to retribute to every one according to the Mischiefs he hath created to his Fellow-Subjects; that is, any part of Mankind.

Consequently we can see that what I have referred to as Locke’s realpolitik does not lead to a claim that Locke was some seventeenth century Machiavellian whose concept of right was thoroughly contingent on the practice of might, and where the worth of principles was determined solely by the contingent outcomes of the force of arms. Having said this, however, the passage above reveals the tension at the heart of this aspect of Locke’s account. The only indubitable principle of right that Locke refers to is natural

102 Locke, Two Treatises of Government, II, § 176.
law, which he identifies with the will of God and which he says “….stands as an Eternal Rule to all Men.” It is precisely God’s will that Locke refers to in his reference to a “Tribunal that cannot be deceived” above, which is of course a reference to a final Day of Judgment. Yet prior to this Day, and this final and indubitable Judge, it seems that matters of Right and justice are open to the contest and contingency of politics referred to above. After all, what constitutes an “unjust War”, as referred to in the passage above, can only finally be determined by the “Eternal Rule” that Locke associates with God, and so is only revealed to all on the Day of Judgment. Prior to that, the contesting parties are likely to have differing views on the matter.

Consequently, just as in the state of nature Locke tells us there is no ultimate judge of natural law, each being “Judge in his own Case”, so in civil society, when the magistrate is one warring party among others, principles of right, and claims to legitimacy, are similarly contingent. Locke may refer to principles of “Right”, and make reference to the “justice” or “injustice” of political outcomes (as in the passage above) but in practice he offers no indubitable criterion by which to judge which particular outcomes accord in practice with these norms other than the judgment of God Himself, which as we saw is ultimately revealed only on that last Day.

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103 See *ibid*, II, § 135. See also *ibid*, II, § 134, 136, 171, 195. On the identification of natural law with the will of God, see *ibid*, II, § 6, 135.  
104 See note 67 above.  
105 See the *Letter* where Locke also refers to the “Rule of Right” but again only in the context of recognizing that its outcomes within the temporal realm are determined by the force of arms (Locke, “A Letter Concerning Toleration”, p. 424)
So Locke is not a skeptic regarding principles of Right or the “justice” or “injustice” that such normative criteria make possible. He is, however, a skeptic regarding any person’s particular claim to have indubitable knowledge of these, or the ultimate authority to decide upon them to the conclusion of all other parties, since such knowledge and authority he reserves to God alone. It is precisely because of the absence of any temporal authority possessing such knowledge and authority that Locke claims that any ultimate clash of principle within the temporal world involves an “appeal to Heaven”. Such a reference to the divine infers both Locke’s assumption that such a clash of principle has a definite right and wrong, just and unjust outcome (reflecting the normative reality of a criterion of Right) and yet the fact that, short of the Day of Judgment, we lack any means to determine what this outcome is other than the contingent clash of arms within the temporal world.

(vi) Locke’s “Originary Lockean Move” Revisited

However short of this clash of arms, Locke’s conception of politics is still infused by the double recognition that politics within civil society involves the appeal to “principle”, and yet that such politics lacks any indubitable criterion to decide right outcomes in practice. Of course, it was the magistrate (or in the terms of the Two Treatises, the legislature and executive) which was created in civil society to be the “establish’d Judge” which was so absent in the state of nature. But as we saw in the case of the animal sacrifice example, the magistrate’s judgment is itself contestable, ultimately by a right of

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106 See note 67 above.
resistance, and so is recognized by all sides as “political” rather than as existing above politics. Indeed, in any resort to resistance against the magistrate’s command, that command itself (and the civil laws it administers) will not be capable of judging the issue, since the magistrate will be one warring party among others, with the result that the appeal is, once again, to “Heaven”, and any claim to legitimacy itself dependent on the clash of arms.

Yet the absence of any criterion within civil society by which to determine the correct application of such principles of Right, and the need to postpone such certainty to the Day of Judgment, does not only extend to political matters. Locke’s claim that “every church is orthodox to itself” is itself a recognition of the same reality. Just as there is no indubitable criterion to determine political Right once the magistrate himself is a partisan advocate in a dispute, so there is no criterion to determine religious truth, and therefore orthodoxy, short of the judgment of God Himself. It is for this reason that Locke is able to claim that “…..the controversy between these churches about the truth of their doctrines, and the purity of their worship, is on both sides equal”, because there is no “judge, either at Constantinople, or elsewhere upon earth, by whose sentence it can be determined”. 107 Rather, as with matters of political Right, the ultimate decision on such matters of church orthodoxy must be left to the “Supreme Judge of all men”. 108 Indeed it is precisely this absence of any indubitable criterion of church orthodoxy within the temporal realm that informs Locke’s claims for religious toleration since, although he admits there is only “one truth, one way to heaven”, he denies that any party (short of

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107 See note 26 above.
108 See note 26 above.
God) has either the knowledge or the authority to determine what this is and so such matters should be left to the “dictates” of each individual conscience. 109

We saw that Fish referred to Locke’s claim that “every Church is orthodox to itself” as constituting one half of Locke’s “originary Lockean move”, the other being the “judgment of all mankind”. We also saw that Fish believed that this “move” is a manifestation of the fundamental contradiction that Locke bequeaths to all his liberal successors. 110 Yet this contradiction itself breaks down once we recognize (contra Fish) that Locke himself was aware of the inherently political, and therefore contestable, nature of all evaluative claims, and (short of God) the absence of any indubitable or universal criteria (such as the “judgment of all mankind”) by which such claims could be determined in practice. Given such a recognition, we can hardly understand Locke’s reference to the “judgment of all mankind” as having anything other than a rhetorical purpose – an instance of his attempt to “fill the vocabulary of principle with meanings reflecting [his] agenda”. 111

109 See Locke, “A Letter Concerning Toleration”, pp. 396. Of course Locke makes some significant exceptions to this realm of religious toleration, such as those who profess atheism, or who owe their religious allegiance to a foreign power, or who profess to themselves “any peculiar privilege or power above other mortals, in civil concerns” (see ibid, p. 424-26). But far from the criterion of such exclusion being the “judgment of all mankind” we have seen it lies in a far more secular (and contestable) criterion concerning the magistrate’s conception of the public good. See the discussion in the section “Public and Private Sphere II” above.

110 See note 28 above.

111 See note 9 above.
Fish’s Locke

Thus Fish is mistaken to view Locke as the source of that liberal practice of privileging a particular set of values, ascribing to them the status of “justice” or “neutrality”, by which they then claim to regulate, order and adjudicate all others. The fact that Locke sees the ultimate (temporal) resolution of such competing claims in realpolitik terms, as an “appeal to heaven”, is meant to indicate his recognition of the radically contingent, open-ended and political character of any such contestation – involving as it may the use of armed force on both sides. Locke does indeed elevate particular norms within civil society, insisting that the magistrate should not act in an arbitrary manner and should respect the natural rights for whose protection individuals (or their predecessors) first entered civil society. But we have seen that this, in and of itself, is a purely formal claim, and does not provide any criterion for determining when the magistrate is acting in an arbitrary manner or when an individual’s natural rights have been illegitimately violated. It is for this reason that Locke reserves for individuals themselves the prerogative to decide when they believe their rights have been violated and when resistance is justified. In such instances, Locke recognizes that all such contestations are inherently political, and that their outcomes are subject to contingent and open-ended circumstance. In other words, Locke recognizes precisely what Fish claims he does not.

The extent to which Fish misunderstands Locke in this context is evident from his failure to perceive the full significance of the animal sacrifice example that Locke provides in

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113 See note 81 above.
the *Letter*. Fish only perceives one half of the animal sacrifice example – that part which recognizes the magistrate’s capacity to rearticulate private as public matters, thereby extending the sphere of his authority and reducing the scope of toleration. Fish believes that this demonstrates that toleration is contingent upon the magistrate’s command, stating “….it is from the perspective of the tolerator that the limits to toleration will be set.”114

However Fish does not see the other side of this process, centered in a right to resistance, where individuals can contest this magisterial claim. For this reason, Fish presents the animal sacrifice example as showing what he believes is the essentially residual nature of the sphere of toleration, where individuals only have those rights which the magistrate accords them – a view which is shared by Jeremy Waldron, John Dunn, Susan Mendus and Richard Vernon and which we have already dismissed as erroneous.115

Perhaps more than any later liberal, Locke, as the founder of the liberal tradition, was fully aware of the irreducible dimension of *realpolitik* inherent in all normative claims to right, and the associated claims of authority to order competing goods within civil society. Locke’s norms, including those centered on determining the “just bounds between church and state”, all have an irreducibly political dimension because for Locke, no norm (except the judgment of God) is ultimately above the arbitrary contest and process of *realpolitik*.

114 Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2266.
115 See note 79 above. On Fish’s claims concerning the animal sacrifice example, see Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2266.
Owen’s Fish

Although Fish’s *Columbia Law Review* article is widely cited within the literature on liberal toleration, particularly regarding issues of church and state, the only systematic attempt to come to terms with its argument within the journal literature is provided by J. Judd Owen in the *American Political Science Review* – to which Fish replied. Owen refers to Fish’s critique of liberalism as “the most radical to emerge in recent political theory” and Owen says the purpose of his paper is to “lay out Fish’s critique and offer a limited defense against it.” Indeed much of Owen’s argument attempts a moral critique of Fish’s “anti-foundationalism”, which Owen defines as the view that “all claims to knowledge are made from a particular and partisan perspective, are ‘socially constructed’, and therefore are never impartial or objective.” In holding such a view, Owen claims, Fish refuses to concede that there is any criteria independent of competing moral perspectives capable of making authoritative judgments between them. Owen states that because of the absence of such criteria, Fish’s “anti-foundationalism” means that “[n]othing, so to speak, can be ruled out – not religious orthodoxy or even theocracy.” The result, according to Owen, is that “[i]n Fish’s account, the possibility of immorality or wickedness, of willfully doing wrong, has been almost entirely eclipsed.”

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117 Owen, “Church and State in Stanley Fish’s Antiliberalism”, p. 911.

118 See *ibid*, p. 911.

119 See *ibid*, pp. 915-17.

120 Ibid, p. 913.

121 Ibid, p. 920.
In criticism of this view, Owen responds with an almost quasi-theistic insistence that “immorality” is an objective possibility in any moral judgment, and is capable of endangering the soul:

The need for clarity is implied in Fish’s claim that our ignorance concerning moral principles involves risk. Does not this risk entail the risk of being wrong and all that goes with it, such as the perverting of the soul and the deserving of punishment? Ignorance of the content of morality must be a defect. Might not the result of that ignorance be immorality? Does not an action taken in faith always risk immorality? The morally serious human being cannot rest satisfied with antifoundationalism.122

Owen then points to those elements of Fish’s critique where, in denying that liberalism has any neutral or impartial criteria by which to exclude religious claims, Fish then exhorts “the religious person” not to “seek accommodation with liberalism” but to “rout it from the field, to extirpate it, root and branch.”123 Such claims are evident in Fish’s Columbia Law Review article where he encourages religious fundamentalists not to play by liberalism’s rules but to replace their “opponent’s exclusions” with their own.124

Regarding such advocacy (involving, as it does, an agonistic clash of “ultimate beliefs” where each side seeks the right to determine the “organizing principles of public life”) Owen says that “great harm to our pluralistic body politic would indeed result if believers

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122 Ibid, p. 920.
124 Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2315. See also ibid, pp. 2314-15, 2319-20, 2323, 2330-31, 2331.
of all stripes were to heed Fish’s call.”  

However, Owen’s response is, instead, to defend liberalism as the best available alternative given these pluralistic (and conflicting) circumstances, warn of the “risks posed by unmoderated ‘difference’”, and ask:

Does Fish really want to see believers competing to establish their religious doctrines into law? In an ever more religiously pluralistic country such as the United States, is any alternative to liberalism feasible or desirable?

On this question, Owen concludes:

Even one who recognizes the radical limitations of liberalism with a view to the ultimate truth remains morally obligated to uphold liberalism in the absence of a better practicable alternative. Such is our situation today. One can concede to critics that liberalism is not the ultimate standard without conceding that it deserves to be condemned and abandoned.

Fish’s Owen

Fish responds to Owen’s defense of liberalism by insisting that this defense is evidence of liberalism’s hubris – its unwillingness to engage with its opponents on anything other than its own terms, terms which include the assumption that we must adopt a neutral or impartial attitude to competing claims, privileging none in relation to the other:

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125 Owen, “Church and State in Stanley Fish’s Antiliberalism”, p. 923.
126 Ibid, p. 923.
127 Ibid, p. 923.
[Owen] states that ‘if believers of all stripes were the heed Fish’s call’, the result could be ‘great harm’ to our pluralistic body politic’. Notice how the assertion that ours is a pluralistic body politic and that this is a good thing is slipped into the sentence as an assumption and then used as a club against those believers who harbor monistic hopes. Like his fellow liberals, Owen can only score points against strong believers by presupposing as normative the very condition (every belief should be respected equally) they oppose. I say that, however, only as an aside, as one more effort to show that liberals are incapable of understanding, never mind coming to terms with, illiberal views. 128

Yet Fish’s response to Owen’s critique is also characterized by a certain disingenuousness. For instance, he responds to Owen’s criticism of his advice to the religious person to “rout [liberalism] from the field, to extirpate it, root and branch”, by insisting that this was not an instance of personal advocacy but simply a logical delineation of the assumptions implicit in any religious position itself:

Owen twice characterizes this as my ‘exhortation’….by which he seems to mean my personal exhortation, my personal desire that religious believers should do this. But my urging is logical not personal, and it has nothing to [do] with (and reveals nothing about) my beliefs; it has everything to do with the beliefs of those for whom truth is to be located in the Bible or in some other sacred text or holy personage. I tell such persons that if they want to be faithful to their deepest convictions, they should not accept liberalism’s invitation to bring those convictions to the table of rational, deliberative, and open inquiry, because to do so would be to make rationality, deliberateness, and openness into their gods, and if they did that, they would be committing idolatry. This is not my lesson, but the lesson I draw from their own beliefs. 129

But the evidence that such a claim is disingenuous is that it runs up against two other of Fish’s key claims – one of which he makes in the paper he published in response to Owen, and the other he makes in his Columbia Law Review article. In his response to Owen, Fish insists (contrary to the passage above) that his “antifoundationalist” arguments involve no implications for religious believers (or anyone else) whatsoever:

Far from being fraught with the dire implications enumerated by Owen and others, the unavailability of independent grounds – of foundations that are general and universal rather than local and contextual – is fraught with no implications at all. It is an unavailability, an absence, without consequences. 130

And again:

Antifoundationalism….has no imperative to follow; it merely tells you where your imperatives and urgencies will not come from (they will not come from neutral principles or independent norms because there are not any). It does not point you (except negatively) in the direction of any other source of guidance. 131

And finally:

But when I make the antifoundationalist assertion that our beliefs and convictions will not find support in any independent grounds, there is no ‘therefore’ – nothing follows…..132

130 Ibid, p. 926.
131 Ibid, p. 929.
132 Ibid, p. 927. See also ibid, pp. 928-29, 929.
Such unconditional claims that “antifoundationalism” entails no implications, no imperatives, no consequences (“nothing follows”), would seem to cover both logical and personal consequences. It would seem, therefore, to be at odds with the logical/personal distinction that Fish articulates in the earlier passage above (admitting to logical but not personal “urging” of religious fundamentalists) in order to escape the personal culpability that Owen attributes to him in the wake of his “root and branch” exhortations.\footnote{133}

Yet both of Fish’s contradictory claims – that he derives only logical consequences from his antifoundationalist argument and that he derives no consequences at all, are at odds with those elements of his Columbia Law Review article where not only does Fish derive such consequences, but these consequences seem to move beyond a purely logical framework to embrace an ethical imperative exhorting competing parties to play to “win”. As Fish states:

> In a world where nothing is fixed or permanent and the relationship between present urgencies and ultimate ends is continually changing one must take one’s constructs not ‘less seriously’….but more seriously; for if we wait for constructs that are in touch with eternity we will fail to act in moments when action is possible for limited creatures. One may know….that ‘the clearing within which’ one does one’s work ‘is already infested with chance, accident, [and] chaos’, but that knowledge, if it is a reason for anything, is a reason for doing the work with all the energy possible and with every intention of doing it successfully, which means, when there is a battle brewing, with every intention of winning. That, finally, is the only lesson to take away from the insight…..that politics is pervasive and inside all our attempts to avoid it: play it (the lesson is superfluous; what else could you do?), and play it to win.\footnote{134}

\footnote{133} On Fish’s logical/personal distinction, see note 129 above.\footnote{134} Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2330. See also \textit{ibid}, p. 2331.
In this passage Fish openly grounds his imperative of “winning” in his “antifoundationalism”, insisting that it arises from the “insight” that “nothing is fixed and permanent” and that “politics is pervasive” (views that we have seen are characteristic of Fish’s position as articulated in his Columbia Law Review article). That his antifoundationalism gives rise to an ethical imperative (oriented to what ought to be) as distinct from a merely logical one, is also evident in Fish’s negative judgment upon one theorist sympathetic to religious fundamentalism, insisting that “[w]hat [he] should want is not a fair and full game, but victory.” Nothing could be more at odds with Fish’s claim in his response to Owen that no implications, consequences or imperatives arise from his antifoundationalist arguments. Indeed, such an imperative of “winning” would seem to prove that, contrary to Fish, his antifoundationalism is not simply an “argument” but a “position”.

Ironically however, given these pitfalls of Fish’s “position”, he then uses this imperative of “winning” as one more stick to beat liberalism for what he perceives as its “disingenuousness”. He says that it is precisely “winning” that is a “dirty word in liberal theory”, but yet that it is liberalism’s maintenance of “modernist assumptions” like “fallibilism (all our views are partial and therefore challengeable) and pluralism (the

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135 On the pervasiveness of politics, and therefore the inevitability of “conflict, strategy, and winning and losing”, see ibid, p. 2324.
137 See Fish, “A Reply to J. Judd Owen”, p. 927. Fish contrasts what he calls his “argument”, from which he says “nothing follows”, from a “position” which he says “.....is something to stand on, something from which you launch action in a direction it mandates or strongly suggests” (ibid). Such characteristics of a “position”, he says, are entirely absent from his “argument” (see ibid). Yet his imperative of “winning” would seem to be precisely such a characteristic.
more points of view in play the better)" which in giving “winning a bad name” thereby ensure that it is liberalism which “wins”. In other words, we arrive at the ironic destination of Fish accusing liberalism of disingenousness and doing so from his own disingenuous position.

Fish Out-Fished

The seventy-eight pages of Stanley Fish’s Columbia Law Review article cumulatively deconstruct a series of liberal thinkers and their critics, showing that all (liberals and critics alike) ultimately appeal to a set of normative standards which claim a privileged status relative to all other competing values, but which lack the indubitable foundations for such claims, and yet which try to conceal this absence in order to mask the arbitrary political process of exclusion that is the real foundation for such a move. We have seen that the one thinker to which this critique does not apply is the one that Fish perceives as the precursor and impetus for all that follow – the seventeenth century English philosopher, John Locke.

Yet what is even more ironic is that Fish too ultimately succumbs to the very process that he so assiduously and remorselessly unearths in others. At the very end of his article, when he has exhaustively exhumed the hidden political biases masquerading as principle within all others, and has continually asserted his own alternative claim that the real point of arbitration is our capacity to successfully assert our own preferred position relative to competing claims, Fish stumbles. The problem begins in the conclusion to his article

138 Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, pp. 2330, 2331.
when, after repeating once again his basic criticism that what liberalism purports to be doing (refuting its opponents by appeal to an impartial realm of principle) is precisely what it is incapable of doing, he again gives his own advice to those engaged in politics:

[C]onflict is the name of our condition, and moreover, naming it does nothing to ameliorate it or make it easier to negotiate. The negotiations have to be done one at a time in the context of the urgencies and choices life continually throws in our way. If I have any recommendation it is, by my own argument, entirely superfluous. Figure out what you think is right and then look around for ways to be true to it…..Not very helpful, I admit, but it has the (perhaps not so small) advantage of promising nothing and sending you on your moral way. 139

As before, therefore, Fish is emphasizing the inherently arbitrary and political character of all conflicts between competing values (and the commitments and practices associated with them). He does not deny the existence of “competing moralities”, but he does deny the existence of any point of “principle”, separable from such competing moralities, able to impartially order the conflicts between them. As Fish states:

…..in the discourse of liberalism, principle is another word for the effort to stand to the side of competing moralities, and it is that kind of principle the existence of which I deny. 140

The absence of such principles means that, in the face of ‘competing moralities’, we have no independent or impartial means to determine whether one position is any less “moral” or any more “immoral” than another. Such a basis of comparison would, after all, assume

139 Ibid, p. 2332.
140 Ibid, p. 2257.
that we could somehow appeal to a criterion of “morality” which, in some general or abstract sense, was distinct from specific competing “moralities” themselves, and sufficiently authoritative as to bestow a normative priority upon one rather than another. For Fish, this would be one more instance of the practices he is so critical of in others. Fish’s advice above to “[f]igure out what you think is right and then look around for ways to be true to it” assumes the very opposite – that there is no impartial criterion of “morality” by which we could determine whether our own specific moral viewpoints are more or less “moral”, and therefore more or less authoritative, than others – and so the only basis for choice or decision is our own arbitrary commitment to advance our own commitments. Such advice is the only advice one can give if one does not think we have any impartial way to determine what is the most “moral” or least “immoral” path.

So it comes as something of a surprise to see Fish, in the final paragraph of his extremely long article, appealing to precisely such an abstract and impartial criterion of “morality” to reject the similar claims to “morality” of those he disagrees with. As he states:

Politics…..is what is usually opposed to morality, especially in the texts of liberal theorists. Politics, interest, partisan conviction, and mere belief – these are the forces that must be kept at bay. What I have attempted here is a reversal of this judgment. Politics, interest, partisan conviction, and belief are the locations of morality. It is in and through them that one’s sense of justice and the good lives and is put into action. Immorality resides in the mantras of liberal theory – fairness, impartiality, and mutual respect – all devices for painting the world various shades of gray.141

141 Ibid, pp. 2332-2333.
This dichotomy between “morality” and “immorality” is a “binary” distinction if ever there was one. While Fish can certainly plausibly claim (and spends seventy-eight pages claiming) that liberalism is mistaken in its belief that its universalist claims have a self-sufficient foundation and are capable of negotiating and ordering the competing claims of a plural society in a just and legitimate manner, there seems no grounds for Fish to claim in the passage above that such a project is “immoral” in any abstract or general sense without him drawing on the same sort of universalist criteria that he so resolutely rejects in others.\(^{142}\) The predicates of “morality” and “immorality” that he resorts to in the passage above to distinguish the practice of politics from the principles of liberal theory are unqualified and absolute in precisely the objectivist, universalist sense he is so critical of. He is not saying that politics is simply one form of “morality” and liberal theory another (in the sense of his “competing moralities” above). Rather he is ascribing to one the unconditional status of “morality” and to the other the status of “immorality” – a distinction that can only assume that there is some criterion for both that is independent of the actual contingencies of liberal theory and politics in practice.

Further, such a distinction would seem to be another instance of a “consequence” arising from Fish’s “anti-foundationalism” – at odds with his claim that either none arise or, if they do, they are merely “logical”, not “personal”.\(^{143}\) David Hume’s fact/value distinction

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\(^{142}\) Equally there seems plausible grounds for Fish claiming that the “mantras” of liberal theory – “fairness, impartiality, and all the rest” – lack “reality” (see *ibid*, pp. 2319-20) since this is a quasi-empirical claim, and he contrasts such claims to what he believes does have “reality” – “the contingent, the rhetorical, and the political” (*ibid*). But to claim that these “mantras” of liberal theory are “immoral” lacks any such empirical basis and seems to be entirely unjustified given his “antifoundationalist” position.

\(^{143}\) See notes 129-132 above.
alone should tell us that a categorical claim concerning “morality” and “immorality” has nothing to do with logic and everything to do with “personal” imperatives.144

Conclusion

It seems therefore that even Fish succumbs to the temptation to seek norms that purport to stand outside of the plural context in which we negotiate and criticize competing claims. It is these norms which, if successfully advanced, render our context less plural by providing criteria against which competing claims can be judged, assessed and, in the case of positions we disagree with, excluded. The ultimate irony of Fish’s Columbia Law Review article is, therefore, that he ascribes to the founder of liberalism a contradiction – centered on a purported appeal to impartial criteria of judgment - which Locke by no means exhibits. He then attempts to attribute this contradiction to later liberal thinkers but ultimately reveals himself complicit in this same search for impartial sources. In contrast, it is Locke, with his recognition of the irreducibility of realpolitik in all political contestation, who demonstrates precisely those pragmatic qualities that Fish so admires and who, in contrast to Fish’s appeal to “morality” and “immorality” above, recognizes

144 On Hume’s fact/value distinction, see David Hume, A Treatise of Human Nature. Edited by L.A. Selby-Bigge. Oxford: Clarendon Press, 1973, Book III, Part 1, Section 1, pp. 469-70. Elsewhere Hume also insists on “personal” imperatives informing rational or moral claims as follows: “Thus all probable reasoning is nothing but a species of sensation. ‘Tis not solely in poetry and music, we must follow our taste and sentiment, but likewise in philosophy. When I am convince’d of any principle, ‘tis only an idea, which strikes more strongly on me. When I give the preference to one set of arguments above another, I do nothing but decide from my feeling concerning the superiority of their influence.” (ibid, Book I, Part iii, Section viii, p. 103).
that (short of the judgment of God on the Final Day) there are no impartial norms, so that for all practical purposes the “only real question….is a political one.”

145 Fish, “Mission Impossible: Settling the Just Bounds Between Church and State”, p. 2256, quoted at note 11 above.