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## Alien Thoughts: A Comment on Constitutional Scholarship

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# ALIEN THOUGHTS: A COMMENT ON CONSTITUTIONAL SCHOLARSHIP

ALLAN C. HUTCHINSON\*

As the only non-American at the Symposium, I have been placed in an ambivalent position. While my lack of any intimate dealings with the American system of constitutional governance might be thought to weaken some of my comments, it also gives them a certain freshness and detachment that some of the other commentators' observations might lack. Although I am familiar with American jurisprudential materials, I had not previously had any first-hand experience of American scholarly debate. Its intellectual passion and energy cannot be questioned, but its focus and relevance leave room for comment. To be blunt, there is a distressing tendency to treat peculiarly late twentieth-century American jurisprudential difficulties as fundamental issues of universal human significance. Taking advantage of my alien status, I intend to stand outside the ethnocentric American tradition and offer some critical observations on the contemporary jurisprudential enterprise.

## I. AMERICAN CONSTITUTIONAL SCHOLARSHIP

The hallmark of American constitutional scholarship is its obsessive quality and character. Although the scholarly debate appears sophisticated and assured, it is energized by a growing sense of desperation. American scholars struggle to offer some theoretically valid account of the jurisprudential enterprise. As part of the larger political project of modern liberalism, lawyers seek to establish the distinctiveness of legal discourse, the centrality of the adjudicative enterprise and, more generally, the pivotal importance of the Constitution in

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American politics and history.<sup>1</sup> The history of American jurisprudence can be characterized by its ambition to explain the legitimate role and responsibilities of the judiciary within a constitutional democracy. The contemporary concern has been to provide an adjudicative paradigm that discloses how judges can and should have a structured and constrained resort to political morality.<sup>2</sup> In the 1970's, the discipline of economics seemed to offer a solution, but scholars became disenchanted with its pseudo-scientific claims. Eager for fresh insight, legal scholars turned to other extra-legal pursuits. The 1980's promises to be the decade of legal hermeneutics.<sup>3</sup> This present excursion into the world of interpretative practices is fascinating. However, the zeal with which many prominent constitutional scholars have thrown themselves into this hermeneutical debate is troubling.

Whatever other differences they may have, many of the symposiasts are united in their belief that something important is at stake when they argue about which theory of interpretation is to be adopted and followed. In general terms, I tend to agree with Stanley Fish and Walter Benn Michaels that legal interpretation is not an activity in need of restraint;<sup>4</sup> interpretation is only possible because there is already, and always in place, some interpretative strategy which "renders unavailable the independent or uninterpreted text and renders unimaginable the independent and freely interpreting reader."<sup>5</sup> My present concern operates at a much less abstract and more concrete level.<sup>6</sup> It is a central, but largely unexplored, assumption in the debate that the institution of judicial review has made a significant and substantive difference

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1. See Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199 (1984).

2. See, e.g., B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984).

3. This dabbling in hermeneutics is nothing new. See, e.g., F. LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* (1839). This monograph is very powerful and remains a relatively sophisticated analysis of legal interpretation. Its study would repay many of the present "legal hermeneutics" enthusiasts. For instance, Lieber argues that:

[T]he very nature and essence of human language, being . . . not a direct communion of minds, but a communion by intermediate signs only, renders a total exclusion of every imaginable misapprehension, in most cases, absolutely impossible.

. . . .  
 Literal interpretation ought to mean of course, that which takes the words in their literal sense, which is hardly ever possible, since all human language is made up of tropes, allusions, images, expressions relating to erroneous conceptions, etc. for instance, the sun rises.

*Id.* at 27, 66.

4. For further comments on this subject, see *infra* text accompanying notes 50-52.

5. Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551, 562 (1982).

6. For a more abstract discussion, see Hutchinson & Monahan, *The "Rights" Stuff: Roberto Unger and Beyond*, 62 TEX. L. REV. 1477 (1984).

to American society. In more practical terms, it is assumed that the United States Supreme Court, as the official constitutional interpreter, has played a major role in shaping the content and quality of life for Americans. If the struggle over constitutional interpretative theory is to have any bite, it must be demonstrated that the United States would be a *substantively* different country without the institution of judicial review. As heretical as it might seem, it is my contention that judicial review has not played the central role many legal scholars claim or wish that it has. The interpretive activities of the courts with regard to the Constitution and the resulting scholarship have been marginal to social life.

In making this claim, it is important to emphasize what I am *not* saying. I am not suggesting that judicial review has had no impact. To make such a mistake would be to fall into the same trap of making exaggerated claims as the traditional scholars do. There is a distinctly American culture of constitutional argument and rhetoric. American political dialogue has its own tone and style; the Supreme Court has been an important participant in this constitutional conversation.<sup>7</sup> Also, it would be foolish to deny the powerful symbolic function of constitutional adjudication in the United States. Clearly, the Supreme Court is a major institution in the ritual and ceremony of American governance.<sup>8</sup> Furthermore, it has had an important impact on the structure of governance.<sup>9</sup> Notwithstanding all these roles, judicial review, as opposed to adjudication generally, has played a minor part in the substantive development and organization of American life. Without the help or hindrance of a constitutional mandate, American judges would have found a way to reach much the same decisions as arrived at under the guise of constitutional adjudication.

These "off-the-wall" claims might be considered to derive from willful ignorance or plain stupidity. Such allegations demand strong support and substantiation. The limiting confines of a Comment make a thorough accomplishment of that task impossible. The best I can hope for is to make a strong *prima facie* case and cast some real doubt on the validity and solidity of constitutional scholarship's foundational premises. After some general comments, I will look to the Anglo-Ca-

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7. See J.B. WHITE, WHEN WORDS LOSE THEIR MEANING (1984).

8. See *infra* text accompanying notes 53-54. A powerful argument for the crucial cultural significance of "social symbolism" is made by Clifford Geertz in C. GEERTZ, LOCAL KNOWLEDGE (1983).

9. The Supreme Court's decisions on legislative reapportionment schemes offer a good illustration of this. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

nadian legal tradition and its doctrinal history and, also, to revealing data on contemporary American society.

## II. ANGLO-CANADIAN DOCTRINE

Neither Canada nor England possesses a constitution in the sense of one with an entrenched Bill of Rights,<sup>10</sup> but the substance and trends of contemporary governmental practice in both countries is markedly similar. Aside from the argumentative style and attitude, topical legal concerns and conclusions of all three countries are surprisingly close. In the broadest terms, the United States, Canada, and the United Kingdom share a common and basic economic structure. Each remains organized around the institutions of private property and private enterprise. While there no longer thrives a crude form of *laissez-faire* capitalism, all three countries remain committed to industrial profitability. To varying degrees, the trappings of the welfare state have been added and a large public sector, subject to increasing government regulation, has developed. Nonetheless, the vast majority of wealth and power is still wielded by private interests. These basic economic arrangements dictate the general shape of social and political life.

Of course, there are significant differences between the United Kingdom and the United States, but it is difficult to attribute these to the existence of judicial review alone. Indeed, the Supreme Court has been very reluctant to intervene in governmental action on economic grounds. For instance, the "equal protection" doctrine has recently been applied so that a wealth classification need only meet a "minimal rationality" standard rather than a "compelling state interest" test.<sup>11</sup> Such crude generalizations may be dismissed, quite rightly, as lacking any lawyerly precision or detail. Accordingly, I will concentrate on a particular and topical aspect of legal doctrine, namely due process, and explore the comparative responses of American and Anglo-Canadian judges to the relations between bureaucracy and citizens. The intention is not to present American and Anglo-Canadian doctrine as being clone-like, but to emphasize that the Anglo-Canadian courts' lack of

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10. Canada has recently taken this "fateful" step. It has possessed a federally legislated Bill of Rights for the past twenty years. However, the effect of the new constitutional change remains unclear. Moreover, the Canadian Charter allows particular legislation to be put beyond the reach of its provisions. Needless to say, I believe that the Charter's effect will be more rhetorical than substantive. See Hutchinson, *Of Kings and Deity Rascals: The Struggle for Democracy*, 9 QUEENS L.J. 273, 282 (1984).

11. See *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

any formal constitutional power of judicial review has not prevented them from developing similar doctrines.

Under the fifth and fourteenth amendments, federal and state governments must not deprive persons "of life, liberty or property, without due process of law." Prior to 1970, courts utilized a simple one-step process in which a "fair" procedure had to be observed by the government if its actions conflicted with substantive constitutional rights or "those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, which were shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."<sup>12</sup> This procedure basically required notice and an opportunity to be heard prior to any government deprivation.<sup>13</sup> Although "property" was liberally interpreted, it did not encompass public office or employment.<sup>14</sup> In 1970, in response to the rapid growth of the public sector, the range of interests protected was expanded. In *Goldberg v. Kelly*,<sup>15</sup> the Supreme Court held that New York could not terminate "public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination."<sup>16</sup> Also, the variable standard of due process requirements was re-emphasized. In the last few years, however, courts have taken a much less generous approach to the interests protected and the amount of due process afforded.<sup>17</sup>

In the 1982 term, for instance, the Supreme Court handed down two decisions on the procedural rights of prisoners, a particularly powerless social group. On a restrictive interpretation of earlier cases, it decided that there existed only narrow and minimal procedural restrictions on changes to prisoners' conditions of confinement. In *Hewitt v. Helms*,<sup>18</sup> a review of a prisoner's "misconduct report" was made by a prison committee outside his presence. He was placed in solitary confinement and no further review occurred for seven weeks. The court decided that in balancing the prisoner's interests against those of prison administration, "informal, nonadversary evidentiary review [was] suffi-

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12. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

13. *See, e.g., Twining v. New Jersey*, 211 U.S. 78 (1908).

14. *See, e.g., Bailey v. Richardson*, 341 U.S. 918 (1951).

15. 397 U.S. 254 (1970).

16. *Id.* at 255.

17. *See Rabin, Some Thoughts on the Relationship Between Fundamental Values and Procedural Safeguards in Constitutional Right to Hearing Cases*, 16 SAN DIEGO L. REV. 301 (1979).

18. 459 U.S. 460 (1983).

cient."<sup>19</sup> Also, in *Olim v. Wakinekona*,<sup>20</sup> the Court determined that, although "prisoners retain a residuum of liberty,"<sup>21</sup> an alleged breach of Hawaii's prison regulations concerning the composition of independent review committees did not offend the due process requirements.

In Anglo-Canadian law, the signal achievement for many, over the past two decades, has been the rise of administrative law, especially the vibrant doctrine of judicial review. Indeed, the judicial review of bureaucratic activity has developed at much the same pace and in much the same direction as American "due process" law.<sup>22</sup> Prior to the 1960's, the courts enforced a very light regime of procedural requirements for governmental invasion of a limited range of interests, mainly focusing upon property rights.<sup>23</sup> Indeed, in 1939, John Willis stated that:

[T]he lack of any constitutional limitation on administrative procedure has been supplied by "judicial legislation. . . ." We can only conclude that, despite the absence of a Bill of Rights, English and Canadian judges have succeeded [by means of a spurious technique of statutory interpretation] in evolving a control over administrative action that bears comparison with the due process clause. Let us, in default of a better name, call it the Pseudo Bill of Rights.<sup>24</sup>

However, the real explosion in the doctrine of "natural justice" occurred in the 1960's. Prompted by the legislative introduction of minimal procedural standards in 1957, the courts launched a full scale assault on bureaucratic maladministration. In the seminal case of *Ridge v. Baldwin*,<sup>25</sup> the House of Lords decided that instead of searching for some "super-added" duty to act judicially in exercising a legislatively conferred power,<sup>26</sup> a duty to act judicially was to be inferred from the nature of the power being exercised. There now exists a relatively low

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19. *Id.* at 476 (Rehnquist, J.).

20. 460 U.S. 238 (1983).

21. *Id.* at 245.

22. The leading texts are J. EVANS, DE SMITH'S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION (4th ed. 1980) and H. WADE, ADMINISTRATIVE LAW (5th ed. 1982). For a more critical account of these developments, see J. GRIFFITH, THE POLITICS OF THE JUDICIARY (2d ed. 1983) and Hutchinson, *The Rise and Ruse of Administrative Law and Scholarship*, 48 MOD. L. REV. (forthcoming 1985).

23. See, e.g., *Knapin v. Board of Health*, [1954] 3 D.L.R. 760; *Cooper v. Board of Works*, 143 Eng. Rep. 414 (1863).

24. Willis, *Administrative Law and the British North America Act*, 53 HARV. L. REV. 251, 281 (1939).

25. 1964 A.C. 40.

26. See *Rex v. Church Assembly Legislative Comm.*, [1928] 1 K.B. 411.

threshold for the imposition of a duty to act judicially. However, despite this general expansion of "due process," the courts have begun to retreat from their earlier promises.

For instance, as in the United States, the issue of prisoners' rights has troubled the English courts. In a recent series of cases,<sup>27</sup> Anglo-Canadian courts have arrived at similarly ambivalent conclusions to their American counterparts. Although there is a general duty to act fairly, it does not necessarily carry with it rights to the observance of full "due process." As in *Olim*, prison regulations have been held to be declaratory, rather than mandatory, and their breach does not per se offend the rules of natural justice. Also, in circumstances close to *Hewitt*, it was held that although the disciplinary body must act fairly, there was no right to representation or appearance.<sup>28</sup> These doctrinal developments represent a microcosm of general Anglo-Canadian administrative law. As some leading commentators have concluded, "[t]he constitutional differences between Canada and the United States have not prevented considerable similarities in issues, reasoning, and results, and we doubt that they have required the differences that also exist."<sup>29</sup>

### III. JUDICIAL PRACTICE INDEPENDENT OF THE CONSTITUTION

Nevertheless, American scholars may object that while this conclusion is all well and good, the Anglo-Canadian courts cannot strike down legislation and must comply with parliamentary opinions on "due process." In high constitutional theory, this is correct. But judicial practice is something very different.<sup>30</sup> The best illustration is the courts' response to the enactment of "privative clauses" which seek to oust the supervisory jurisdiction of the courts. In the face of dogged legislative determination, the courts have refused to vacate their administrative turf. The privative clause is to legislative-judicial relations "what the Maginot Line was to military tactics: a virtually impregnable legislative project of defence, designed to protect the [administrative process] from frontal assault. And now it has suffered the same

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27. See *Martineau v. Matsqui Inst. Disciplinary Bd.*, [1980] S.C.R. 602 (Can.); *Raymond v. Honey*, [1982] 2 W.L.R. 465 (H.L.); *Regina v. Board of Visitors*, [1979] 1 W.L.R. 1401; *Williams v. Home Office*, [1981] 1 All E.R. 1211 (Q.B.D.); *Guilfoyle v. Home Office*, [1981] 1 Q.B. 309.

28. See *Williams*, [1981] 1 All E.R. at 1247.

29. J. EVANS, H. JANISCH, D. MULLAN & R. RISK, *ADMINISTRATIVE LAW: CASES, TEXT AND MATERIALS* 28 (1980).

30. See J. EVANS, *supra* note 22, at 357-80.

fate. It has been outflanked by a judicial panzer attack, a virtual constitutional blitzkrieg."<sup>31</sup>

The courts have construed preclusive provisions so as to limit, rather than debar, judicial involvement. While feigning deference to legislative intent, the courts' sweeping power to review on jurisdictional grounds remains intact no matter how precise or encyclopaedic the privative clause may be. For instance, in *Anisminic v. Foreign Compensation Commission*,<sup>32</sup> the House of Lords held that a statutory provision directing that "[t]he determination by the [foreign compensation] commission of any application made to them . . . shall not be called in question in any court of law" did not oust the supervisory jurisdiction of the courts.<sup>33</sup> The courts have managed to achieve this result by viewing it as "a straight-forward problem of statutory interpretation."<sup>34</sup> The basic force of this position is that *any* error of law puts the tribunal outside its jurisdiction and places it within the supervisory jurisdiction of the courts. The constitutional rhetoric may be of constitutional partners, but the practice is of constitutional competitors. The ghost of Lord Coke is alive and well in Anglo-Canadian courts.<sup>35</sup>

I need not labor the point of this crude comparative exercise. Similar doctrinal developments and practice have occurred in legal systems that do not possess a constitutionally entrenched Bill of Rights. The major determinants of legal change are complex and varied. But this summary suggests that the existence of judicial review under the Constitution has not had the major or dominant influence that many American scholars claim. Before drawing out the implications of this situation for interpretation theory, it is instructive to comment briefly on the actual social consequences of law, particularly judge-made law.

#### IV. THE SOCIAL CONSEQUENCES OF LAW

Modern scholastic orthodoxy assumes the instrumental effect of legal precepts and decisions. The little empirical work carried out indicates that the social impact of law has been vastly overestimated by lawyers.<sup>36</sup> What impact there is can be more accurately attributed to legislative and regulatory intervention than to judicial activity.<sup>37</sup> At

31. H. Arthurs, *Protection Against Judicial Review* 7 (July 1982) (unpublished manuscript).

32. [1969] 2 A.C. 147.

33. *Id.* at 169-70.

34. *See* *Re Racial Communications Ltd.*, [1980] 2 All E.R. 634, 636 (H.L.).

35. *See* *Dr. Bonham's Case*, 77 Eng. Rep. 638, 652 (1610).

36. *See, e.g.*, Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

37. *See* Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717,

best, the direct effect of legal rules on public officials and private citizens is problematic. Furthermore, lawyers often assume that the impact will result in the intended conforming behavior. Initial research suggests that the impact of law is as likely to be indirect and unintended as direct and intended.<sup>38</sup> The indeterminacy of the courts' educational effect is underlined by Marc Galanter:

[T]his model of the courts as engineers of control through deliberately projected images is as illusionary and partial as that of courts as authoritative resolvers of disputes . . . . [T]he messages disseminated by courts do not carry endowments or produce effects except as they are received, interpreted and used by (potential) actors. Therefore the meaning of judicial signals is dependent on the information, experience, skill and resources that disputants bring to them.<sup>39</sup>

One of the most documented areas is that of judicial attempts to curb and control police conduct. Most studies reveal that such judicial activity has failed to improve police practices and, in some instances, has actually encouraged police perjury.<sup>40</sup> Another revealing illustration is institutional reform litigation. Despite positive judicial pronouncements, many judicial decrees have not been implemented<sup>41</sup> and actual prison conditions remain appalling.<sup>42</sup> Similarly, as regards mental institutions, many of the consequences of judicial intervention have been detrimental.<sup>43</sup> For instance, the aftermath of *Wyatt v. Stickney*<sup>44</sup> is far from reassuring for traditional scholars.<sup>45</sup> Although

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1744-51 (1982) (in tort and contract law the greatest effects come from legislative and regulatory intervention rather than judicial decisions); Griffiths, *Is Law Important?*, 54 N.Y.U. L. REV. 339, 351-56 (1979) (although legal rules do have some effects the extent and type are difficult to ascertain).

38. See, e.g., Ross, *The Scandinavian Myth: The Effectiveness of Drinking-and-Driving Legislation in Sweden and Norway*, 4 J. LEGAL STUD. 285 (1975) (concluding that there is little solid support for the belief that Scandinavian drunk driving laws deter drunk driving).

39. Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. OF L. PLURALISM 1, 32 (1981).

40. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

41. See Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1345 n.31 (1975) (citing McDonald, *Enforcing the Prison Desegregation Decree* (unpublished paper delivered at All ACLU Lawyers' Conference, Mar. 24, 1973) (on file with *Yale Law Journal*)).

42. See ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 75-80 (1981).

43. See, e.g., Note, *supra* note 41, at 1355 (premature discharge of patients).

44. 325 F. Supp. 781 (M.D. Ala. 1971).

45. Michael Perry directly addresses institutional reform litigation. See M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1982). His discussion is ambivalent. While he recognizes the *continuing* dreadfulness of conditions in many prisons and hospitals, he still

often hailed as a milestone in American constitutional jurisprudence, its practical implementation leaves much to be desired. While there were some improvements, a large disparity remains between actual practice and the standards laid down by the courts.<sup>46</sup> Indeed, an Alabamian clinician claims that ten years after Judge Johnson's decree, "the state of Alabama has still not rectified the deficiencies that existed when the litigation began."<sup>47</sup> The *Wyatt* experience underscores the fact that while publicized litigation can powerfully enrich and galvanize debate, its impact on actual social conditions is limited and ambiguous. As Leaf and Holt conclude:

The history of the *Wyatt* case also demonstrates that structural changes within psychiatric and retardation facilities are not sufficient to generate a humane and effective system of care. The Alabama experience suggests that while vast improvements can be made in the manner in which society deals with the mentally ill, humane treatment can only exist when there is concern about the needs of an individual, not a concern about procedures.<sup>48</sup>

Many legal commentators more confidently point to the courts' contribution over the past thirty years to the radical improvement of the race and gender discrimination problem in the United States. However, leaving aside the doctrinal development of procedural rights, the substantive impact on society is limited at best. Some hard facts make for distressing reading: the poorest fifth of the population receive a smaller percentage of total after-tax income than almost anywhere else in the industrial world; the poverty rate for black Americans is three times that of the rate for white Americans; earnings for full-time working women are less than sixty percent of men's and this percentage has actually decreased over the last thirty years; nonwhite American men earn about eighty percent of the earnings of equivalent white Americans; the income gap between white and black American families has widened since 1977; and, not only is the unemployment rate among black Americans more than double that for white Americans,

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characterizes this litigation as representing "one of the most important recent developments in constitutional law." *Id.* at 146; *see generally id.* at 146-51. Despite his passionate indictment of such a state of institutional affairs, he ultimately glosses over the problems of effectiveness and falls back on the position that the courts do as good a job as the legislative or executive branch of government. Yet it is the ineffectiveness of those very branches that are said to justify judicial involvement and activism in the first place.

46. *See Note, supra* note 41, at 1378.

47. Leaf & Holt, *How Wyatt Affected Patients*, in *WYATT V. STICKNEY: RETROSPECT AND PROSPECT* 49, 50 (1981).

48. *Id.* at 105-06.

but this unemployment inequality has itself doubled in the last thirty years.<sup>49</sup> The gap between legal change and social change is striking. The rosy picture of social life drawn by the legal materials is far removed from its sombre actuality.

## V. THE HERMENEUTIC CONNECTION

What has all this discussion to do with interpretation? How does any of this comparative analysis or social data relate to the legal hermeneutical enterprise? Not surprisingly, I contend that it is extremely pertinent. This new cult of "jurisgenesis"<sup>50</sup> is simply the most recent indulgence by legal scholars. It is a weak attempt to draw attention away from the marginal importance of constitutional adjudication and to establish constitutional scholarship as an intellectually rigorous endeavour distinct in kind to political prophecy. To separate debates over interpretive strategies from their political ramifications is a convenient, but artificial and illegitimate move. All criticism and interpretation, legal or otherwise, "have a deep and complex relation with politics, the structures of power and social value that organize human life."<sup>51</sup>

In this sense, Fish and Michael's epistemological attack is dangerous, as it encourages the false belief that politics and legal interpretation can remain intellectually separate.<sup>52</sup> Fish is suspiciously and uncharacteristically reticent about the political foundations of his interpretive theory. At the very least, he must offer some explanation for the direction and dynamics of changes in the collusive conventions that comprise the interpretive community. Also, the extant matrix of interpretive strategies cannot be monolithic. At the periphery, these must be vague, half-formed or half-discarded conventions. Unless he wishes to

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49. J. COHEN & J. ROGERS, ON DEMOCRACY 30-32 (1983). They rely on official sources for their statistics. The *Brown* saga still manages to plague the courts thirty years after its "momentous" resolution. See *Brown v. Board of Educ.*, 84 F.R.D. 383 (D. Kan. 1979) (seeking intervention in original Topeka desegregation case on behalf of class represented by Linda Brown's daughter); *Clark v. Board of Educ.*, 705 F.2d 265 (8th Cir. 1983) (continuation of Little Rock desegregation case). Like Dickens' *Jarndyce and Jarndyce*, this affair "drones on" and "still drags its dreary length before the Court." C. DICKENS, *BLEAK HOUSE* 4-5 (1853).

50. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983) ("the creation of legal meaning").

51. Mitchell, *Introduction*, in *THE POLITICS OF INTERPRETATION* 1, 1 (1983).

52. See Bruns, *Law as Hermeneutics: A Response to Ronald Dworkin*, in *THE POLITICS OF INTERPRETATION* 315, 319 (1983); Hutchinson, *From Cultural Construction to Historical Deconstruction*, 94 YALE L.J. 211 (1984); A. Hutchinson, *Power and Interpretation (Or an Essay on How to Make Bouillabaisse)* (Jan. 1985) (unpublished manuscript on file with the *Southern California Law Review*).

embrace some mystical theory of change, Fish must come clean on his assumptions about language, power and society. Law is politics, and legal scholarship must embrace, not eschew, that insight.

Needless to say, it would be absurd for me to conclude that since I met Owen Fiss, Sanford Levinson, Mark Tushnet, and Michael Perry at the University of Southern California, they all live in Los Angeles. Similarly, it is a mistake to assume that since we met at an "Interpretation Symposium," we all treated interpretation as an autonomous intellectual and apolitical concern. Just as Fiss, Levinson, Tushnet, and Perry came from, and will go back to, different parts of the United States, so they came to the discussion of interpretation from very different political perspectives and will return to their political agendas after the interpretation debate is over. I have tried to show how the debate over whether an originalist or nonoriginalist, interpretavist or noninterpretavist, literalist or functionalist approach ought to be taken, while fascinating, is of secondary importance. With no Bill of Rights and with no institution of judicial review, other countries have reached broadly similar results. Furthermore, the substantive impact of much constitutional adjudication has been highly exaggerated.

Of course, this does not make law or legal scholarship irrelevant. They remain important as symbolic institutions and serve a powerful function as such. For some, the discrepancy between legal doctrine and social practice is unfortunate, but does not fatally impair the operation of the courts as the nation's conscience; they can still meet "the challenge of making the standards that govern our collective life articulate, coherent and effective."<sup>53</sup> Others, including myself, take a less benign view. The symbolism is offensive and amounts to nothing more than a ritualistic reaffirmation of some vague commitment to justice and fairness.<sup>54</sup> Indeed, such symbolism may have a marked negative effect; it tends to persuade people to believe that things are being done. This may serve to frustrate reformative energy and relieve other governmental institutions from the pressures and responsibility of initiating and facilitating social change.

Contemporary society is characterized by inequality and domination. The enterprises of adjudication and legal scholarship merely serve to clothe this political organization with the essential garments of

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53. Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165, 187 (1982).

54. See Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30 (arguing that the practices of the Ideology of Advocacy are inconsistent with those practices' justifying values of autonomy, responsibility, and dignity).

political legitimacy. They help transform the jungle of social order into a civilized world of legal right. Legal thought helps to suppress these distressing facts of social life. At bottom, legal discourse is a stylized version of ideological obfuscation.

### CONCLUSION

Still, I remain excited and attracted to American scholarship. Moreover, it does not hold a monopoly over the "adjudication obsession"; British and Canadian academics are equally preoccupied with the doctrinal product of the courts. Fortunately, in America there is a growing debate over many of these issues.<sup>55</sup> As Alexander Pope observed, "what mighty contests rise from trivial things."<sup>56</sup> So much valuable energy and juristic ability is presently employed in the interpretative debate. The cause of social justice would be so much better served if even a small part of those resources were shifted to more concrete or constructive concerns. This statement is not an indictment of theory generally, but only of its present performance. Insofar as contemporary theorizing drifts free of social practice or historical circumstance, it loses all claim to theoretical respectability or validity.<sup>57</sup>

I am generally optimistic that American legal scholarship will better utilize its immense talents. As interesting as this symposium has been, I hope that it marks the end of the present phase of the interpretation debate and helps to usher in fresh exchanges over the politics of interpretation. Yet, in my more pessimistic moments, I am haunted by the "alien" words of Robert Pirsig:

To tear down a factory or to revolt against a government because it is a system is to attack effects rather than causes; and as long as the attack is upon effects only, no change is possible. The true system, the real system, is our present construction of systematic thought itself, and if a factory is torn down but the rationality that produced it is left standing, then the rationality will simply produce another factory. If a revolution destroys a systematic government, but the systematic patterns of thought that produced the government are left intact, then those patterns will repeat themselves in the succeeding government. There's so much talk about the system and so little understanding.<sup>58</sup>

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55. See Hutchinson & Monahan, *supra* note 1.

56. Rape of the Lock (1712) Canto 1, line 1.

57. See Hutchinson, *supra* note 52.

58. R. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE: AN INQUIRY INTO VALUES* (1974).