ESSAY

A LAWYER LECTURES A JUDGE

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Not often is a lawyer afforded an opportunity to lecture a judge. Judge Stephen Reinhardt's remarks on "The Supreme Court as a Partially Political Institution"[1] offer just such an occasion. Before one defines the judicial role, he writes, one must choose which of two basic views of the Constitution governs.[2] Let me begin with the view he espouses.

I

The "Constitution is a living, growing document that has as its fundamental purpose the securing of a certain type of liberty for all Americans. . . . This view conceives of the Constitution as a set of principles set down in writing and designed to insure that [the] people . . . have a certain quality of life."[3] There is not the remotest hint in the Records of the Federal Convention and the several State Ratification conventions that the participants were engaged in ensuring "a certain quality of life." Reinhardt reads into the minds of the Founders his own 20th Century predilections. For them, "individual rights, even the basic civil liberties that we consider so crucial, possessed little of their modern theoretical relevance when set against the will of the people."[4] In the Convention and later, wrote Alpheus Thomas Mason, "states rights—not individual rights—was the real worry."[5] The Founders were engaged in erecting a structure of government that would diffuse and limit delegated power; not in fortifying individual rights. "It was conceivable," wrote Gordon Wood, "to protect the common law liberties of the people against their rulers, but

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1. Stephen Reinhardt, *The Supreme Court as a Partially Political Institution*, 17 HARV. J.L. & PUB. POL'Y 149 (1994).

2. *Id.* at 149.

3. *Id.* at 150.

4. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1789, at 63 (1969).

5. ALPHEUS T. MASON, THE STATES RIGHTS DEBATE: ANTIFEDERALISM AND THE CONSTITUTION 75 (1964).

hardly against the people themselves."[6] As Louis Henkin observed, "the Constitution said remarkably little about rights" because the federal government "was not to be the primary government . . . governance was left principally to the States."[7] To this may be added Chief Justice Marshall's explanation of the significance of the *written* Constitution:

> The powers of the legislature [and of the other branches] are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if those limits may, at any time, be passed by those intended to be restrained?[8]

Reinhardt would escape such restraints by resort to double-talk—a Constitution must "grow." Documents are inert; they do not "grow." The appeal to growth is a cloak for judicial alteration.[9] Reinhardt himself conceives of the Constitution as a "set of principles;" a principle is defined as a "fundamental truth"[10] which, like a cornerstone, does not change. It may be abandoned or overturned, but without judicial midwifery it remains unchanged. Indeed, Reinhardt would not "sacrifice certain constitutional principles for momentary advantage."[11] Reinhardt also overlooks the fact, noted in the Declaration of Independence, that governments derive their "just Powers from the Consent of the Governed."[12] The terms of that consent are spelled out in the Constitution. One of the ablest Founders, James Iredell, later to be a Supreme Court Justice, averred that "The people have chosen to be governed under such and such principles. They have not chosen to be governed or promised to submit upon any other."[13] Now comes Reinhardt, claiming that he and his brethren are authorized to revise the Constitution, though he is not so

6. WOOD, *supra* note 4, at 63.

7. Louis Henkin, *Human Dignity and Constitutional Rights, in* THE CONSTITUTION OF RIGHTS 210, 213 (Michael Meyer & William A. Parent eds., 1992).

8. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

9. "Our characteristic contemporary metaphor is 'the living Constitution' . . . sufficiently unspecific to permit the judiciary to elucidate [that is, to make] the . . . change in the content of those rights over time." Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 709 (1975). Justice Black dismissed "rhapsodical strains, about the duty of the Court to keep the Constitution in tune with the times . . . [t]he Constitution makers knew the need for change and provided for it" by the amendment process of Article V. Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting).

10. OXFORD UNIVERSAL DICTIONARY 1565 (3d ed. 1955).

11. Reinhardt, *supra* note 1, at 153.

12. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

13. 2 GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 146 (1857-58).

bold as to make that claim flat out,[14] but hides behind such weasel-words as a "growing," "evolving" Constitution. Chief Justice Marshall, however, stated unequivocally that the judicial power "cannot [warrant] the assertion of a right to change that instrument,"[15] reiterating his decision in *Marbury v. Madison* that Congress is not empowered to confer additional jurisdiction on the Court, that is, to "alter" the Constitution.[16]

The notion of a changing Constitution runs counter to a basic presupposition cogently stated by Philip Kurland:

> The concept of the written constitution is that it defines the authority of government and its limits, that government is the creature of the constitution and cannot do what it does not authorize . . . . *A priori*, such a constitution could have only a fixed and unchanging meaning, if it were to fulfill its function. For changed conditions, the instrument itself made provision for amendment which, in accordance with the concept of a written constitution, was expected to be the only form of change.[17]

Kurland might have invoked the authority of Justice Story:

> the policy of one age may ill suit the wishes or the policy of another. The Constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be . . . not dependent upon the passions of parties of particular times, but the same yesterday, to-day and forever.[18]

For sponsors of his view, Reinhardt cites Justice Holmes, that "great Justice William Brennan," and "many other great justices," for which only Thurgood Marshall is cited.[19] Let me defer comment on Justice Holmes for the moment and begin with Justice Brennan. Reinhardt chides Lino Graglia for taking a dim view of Justice Brennan,[20] but Leonard Levy, who believes that the Court "could do no other" than to "read the Constitution to mean

14. Paul Brest challenged the assumption that judges "are bound by the text or original understanding of the Constitution." Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 224 (1980).

15. JOHN MARSHALL, A FRIEND OF THE CONSTITUTION (1819), *reprinted in* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 209 (Gerald Gunther ed., 1969).

16. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

17. PHILIP KURLAND, WATERGATE AND THE CONSTITUTION 7 (1978).

18. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 426, at 326 (5th ed. 1905). Justice William Patterson, a leading Framer, declared, "The Constitution is certain and fixed . . . and can be revoked or altered only by the authority that made it." Van Horne v. Dorrance, 28 F. Cas. 1012, 1014 (C.C.D. Pa. 1795) (No. 16,857).

19. Reinhardt, *supra* note 1, at 149, 150 & n.7.

20. *Id.* at 149.

whatever it wanted,"[21] expressed himself more forcibly. Speaking of Brennan's appeal to the "cruel and unusual punishment" clause of the Eighth Amendment in his crusade against capital punishment, Levy said "Brennan's humanistic activism runs amok and he evinces arrogance beyond belief," because "Brennan knows that the Fifth Amendment three times assumes the legitimacy of the death penalty as does the Fourteenth (no denial of life without due process)."[22] Death, Brennan nevertheless insists, is the ultimate affront to "human dignity."[23] Vainly will the reader search for any reference to "human dignity" in the records of the several conventions. Indeed, as Gordon Wood observed, punishment was meant "to expose the offender to public scorn;" branding or slicing an ear would "forever condemn [him] to "contempt." Such punishments, wrote Blackstone, "fix a lasting stigma on the offender," they inflicted "*disgrace*," said Lord Camden.[24] What price "human dignity?"

Brennan handsomely acknowledges that a majority of the Justices and of his fellow countrymen do not subscribe to his "interpretation." Nevertheless, contrary to custom, he dissented in case after case, because he "hope[s] to embody a community striving for human dignity for all, although perhaps not arrived."[25] The hard-nosed philosopher Sidney Hook decried those "who know better what basic human needs *should* be, who know not only what those needs are but what they require *better* than those who have them."[26] The theory that government "can identify what people would really want were they enlightened," was rejected by Lord Noel Annan, then Vice Chancellor of the University of London, for that would justify the state "in ignoring what ordinary people say they desire or detest."[27] In the hands of a zealot such convictions can lead to a Robespierre who maintained that "if Frenchmen would not be free and virtuous voluntarily he would force them to be free and cram virtue down their throats."[28] Brennan himself declared that "Justices are not pla-

21. LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 372-73.

22. *Id.* at 372.

23. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification, in* INTERPRETING THE CONSTITUTION 23, 32-33 (Jack N. Rakove ed., 1990).

24. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 73 (1992); *see also* RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 117-18 (1982).

25. Brennan, *supra* note 23, at 24.

26. SIDNEY HOOK, PHILOSOPHY AND PUBLIC POLICY 28 (1980) (original emphasis).

27. Noel Annan, *Introduction* to ISAIAH BERLIN, PERSONAL IMPRESSIONS xvii (1981).

28. 2 CRANE BRINTON & R.L. WOLFF, A HISTORY OF CIVILIZATION 115 (1955).

tonic guardians appointed to wield authority according to their personal moral predilections."[29] Yet the irresistible pull of "evolution" led him to become a veritable paragon of Platonic Guardians.

These days it is not "politically correct" to dissent from the deification of Thurgood Marshall. Nevertheless, it needs to be said that first and last *he was an advocate,* who understandably saw everything through black lenses. Advocacy in argument *before* the bench is altogether fitting, but *on* the bench it is a betrayal of the judicial function. Impartiality is the first duty of a judge.[30] One who is the advocate of a cause however noble is not disinterested nor is he capable of judicial impartiality.[31] Levy concluded that "Brennan and Thurgood Marshall corrupt the process and discredit it,"[32] a judgment in which I concur.

Strangely Reinhardt omits Earl Warren from his pantheon, Warren, who reduced the fruits of 800 years of common law adjudication to three little words—"Is it fair?" In his adulatory biography of Warren, his former law clerk G. Edward White concluded that "when one divorces Warren's opinions from their ethical premises they evaporate;" Warren's "justifications for a result were often conclusory statements of what he perceived to be ethical imperatives."[33]

What is it that so excites Reinhardt's sympathies? It is crucial, he asserts, "to protect minorities against oppression by the majority;" that is the "obligation" of the courts.[34] Of course, if specific provision is made in the Constitution for such protection, it must be given effect. Blanket protection of minorities, however, is not mentioned in the Constitution. Reinhardt would jettison a central tenet of our democratic system—majority rule. In Federalist No. 22, Hamilton stated, "To give a minority a negative upon the majority . . . [is] to subject the sense of the greater number to

29. Brennan, *supra* note 23, at 25.

30. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 141 (1756-59). By the Judiciary Act of 1789 a Justice is sworn to "administer justice without respect to persons" and to "impartially discharge and perform the duties incumbent upon [him]." Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 76 (1789) (codified at 28 U.S.C. § 453 (1994)).

31. Learned Hand stated, "You cannot raise the standard against oppression, or leap into the breach to relieve injustice, and still keep an open mind to every disconcerting fact, or an open ear to the cold voice of doubt." LEARNED HAND, THE SPIRIT OF LIBERTY 138 (Irving Dilliard ed., 3d ed. 1960).

32. LEVY, *supra* note 21, at 373.

33. G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 367 (1982).

34. Reinhardt, *supra* note 1, at 151.

those of the lesser."[35] Madison was of the same mind; criticizing a proposal that more than a majority should be required for a quorum, he said that it would reverse a "fundamental principle of free government," because "It would be no longer the majority that would rule; the power would be transferred to the minority."[36] And Jefferson concurred that the "will of the Majority should always prevail."[37] Reinhardt would substitute the "tyranny" of the minority[38] for the "bugaboo" of majority "tyranny."[39]

In stressing the courts' "protective" role, Reinhardt overlooks that Justice James Wilson, a leading Framer, reminded his compatriots that the courts were regarded with "aversion and distrust,"[40] which helps to explain Hamilton's assurance in Federalist No. 78 that the judiciary was "next to nothing,"[41] hardly the vehicle for an open-ended grant of power to up-end majority rule. In the convention, Elbridge Gerry refused to set up the judges "as the guardians of the rights of the people," preferring to rely "on the Representatives of the people as the guardians of their rights and interests."[42] Later that belief was echoed by Justice Brandeis, who referred to the deep-seated conviction of the American people that they "must look to representative assemblies for the protection of their liberties."[43]

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35. THE FEDERALIST No. 22, at 135-36 (Alexander Hamilton) (Mod. Lib. ed., 1937). In the Convention James Wilson said, "The majority of the people wherever found ought in all questions to govern the minority." 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 605 (1911).

36. THE FEDERALIST No. 58, at 382-83 (James Madison) (Mod. Lib. ed., 1937).

37. MASON, *supra* note 5, at 169.

38. According to Mason, Justice Stone concluded that the "experience of the past one hundred and fifty years has revealed the changes that, through judicial interpretation, the constitutional device for the protection of minorities from oppressive majority actions, may be made the means by which the majority is subject to the tyranny of the minority." ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 331 (1956).

39. Sidney Hook, who united philosophy with practical wisdom, wrote, "the dictatorship of the majority [is a] bugaboo which haunts the books of political theorists but has never been found in the flesh in modern history." Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1191 (1977). Dean Jesse Choper found it "virtually impossible to justify the Court's action [in providing vigorous protection for the rights of minorities] on the ground that it is doing no more than 'finding' the law of the Constitution and fulfilling the intention of its framers." JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 137 (1980).

Justice Holmes advised Justice Stone, "Young man about 75 years ago I learned that I was no God. And so, when the people . . . want to do something I can't find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not, 'God-damn it, let 'em do it.' " CHARLES CURTIS, LIONS UNDER THE THRONE 281 (1947).

40. 1 JAMES WILSON, THE WORKS OF JAMES WILSON 292 (Robert McClosky ed., 1967).

41. THE FEDERALIST No. 78, at 504 (Alexander Hamilton) (Mod. Lib. ed., 1937).

42. 2 FARRAND, *supra* note 35, at 74-75.

43. Meyers v. United States, 272 U.S. 52, 294-95 (1926) (Brandeis, J., dissenting).

In seeking to divine the "true meaning" of the Constitution, what a judge, like Reinhardt, is really discovering on his interpretive voyage, observes John Hart Ely, "are his own values."[44] Against the small list of "great Justices"—Brennan and Thurgood Marshall—summoned by Reinhardt, it needs emphasis that judging in terms of personal preferences has long been condemned. Henry de Bracton wrote his treatise in 1250 because there were "[judges] who decide cases according to their own will rather than by authority of the laws."[45] Blackstone disapproved of judges whose decisions would be regulated "only by their own opinions."[46] Chief Justice Marshall declared that "the judicial power is never exercised for the purpose of giving effect to the will of the Judge."[47] "Under the guise of interpreting the Constitution," said Justice William Moody, "we must take care that we do not import into the discussion our personal views of what would be wise, just and fitting rules . . . and confound them with constitutional limitations."[48] Recently Judge Richard Posner commented that "a judge ought not to substitute personal values for those that are part of the text, structure and history of the Constitution."[49] The list could go on and on. Even Reinhardt's fellow activists acknowledge the rule,[50] perhaps perceiving that the substitution of "the individual sense of justice . . . would put an end to the rule of law."[51] Indeed, Justice Brennan himself declared that "Justices are not platonic guardians appointed to wield authority according to their personal moral predilections."[52] Notwithstanding, he maintained with respect to death penalties, for instance, that he knew better than the people what was for their own good.

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44. John Hart Ely, *"Foreword": On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 16 (1978).

45. 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 19 (Samuel Thorne ed., 1968).

46. 1 BLACKSTONE, *supra* note 30, at 269.

47. Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738, 866 (1824).

48. Twining v. New Jersey, 211 U.S. 78, 106-07 (1908). Justice William O. Douglas declared, "Our personal preferences, however, are not the constitutional standard." Zorach v. Clausen, 343 U.S. 306, 314 (1952).

49. *Address by Judge Richard R. Posner*, 35 HARV. L. BULL. 34 (1987).

50. Owen Fiss remarks that the judge may not "express his . . . personal beliefs . . . as to what is right or just." Owen M. Fiss, *The Supreme Court, 1978 Term - Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 12-13 (1979); *see also* Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 690 (1985).

51. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 136 (1921).

52. *See* Brennan, *supra* note 23, at 25.

It is time to consider Justice Holmes, whom Reinhardt erroneously couples with his "other great Justices" in support of his views. Let me supply the reference that he omitted, *Missouri v. Holland*, where Holmes said, "The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."[53] This was gratuitous eloquence. At issue was jurisdiction over migratory geese; since they were here today and gone tomorrow no State could claim jurisdiction. Where no State is competent to act, the federal government may.[54] Holmes's perorations ran counter to the whole course of his thinking. Let us begin with the gross disparity between Reinhardt's thinking and that of Holmes. Reinhardt begins with "Justice"—it "has nearly become almost a dirty word in judicial circles."[55] Holmes on the other hand wrote, "I have said to my brethren many times that I hate justice, which means that if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms."[56] He said that "nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law."[57] The "criterion of constitutionality," he observed, "is not whether we believe the law to be for the public good."[58] He stated that the "word 'incomes' in the Sixteenth Amendment should be read in 'a sense most obvious to the common understanding at the time of its adoption,'"[59] which hardly comports with Reinhardt's attribution to Holmes of the view that the Constitution is a "growing document that has as its fundamental purpose the securing of a certain type of liberty for all Americans."[60] In fact, Holmes did "not expect or think it desira-

53. 252 U.S. 416, 430 (1920).

54. In the Pennsylvania Ratification convention James Wilson explained, "Whatsoever object of government is confined in its operation and effects within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends in its operation and effects beyond the bounds of a particular state, should be considered as belonging to the government of the United States." 2 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 399 (2d ed. 1836).

55. Reinhardt, *supra* note 1, at 149.

56. MAX LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 435 (1943).

57. Oliver W. Holmes, *The Path of the Law*, COLLECTED LEGAL PAPERS 167, 171-72 (1920).

58. Adkins v. Children's Hosp. of the Dist. of Columbia, 261 U.S. 525, 570 (1923) (Holmes, J., dissenting).

59. Eisner v. Macomber, 252 U.S. 189, 219-20 (1920) (Holmes, J., dissenting).

60. Reinhardt, *supra* note 1, at 150.

ble that judges should undertake to renovate the law. That is not their province."[61] And in *Baldwin v. Missouri* he stated,

> I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment . . . . I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions.[62]

Holmes, in short, was poles removed from the views of Brennan and Thurgood Marshall.

Reinhardt also invokes a "series of key phrases that must be interpreted and clarified. . . . principles that need to be given life and further meaning as our society develops and learning increases."[63] He instances "phrases such as 'equal protection' and 'due process,' " as posing the need "to discover what [they] mean by re-examining them from time to time in light of what we have learned."[64] The beginning of "learning" is that at common law due process had a purely procedural meaning. On the eve of the Convention Hamilton stated,

> The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of the legislature.[65]

This was the English and colonial usage.[66] It has long been a canon of construction that when draftsmen employ common law terms, their definitions, as Justice Story stated, "are necessarily included as much as if they stood in the text of the Constitution."[67]

Charles Curtis, an ardent proponent of judicial "adaptation" of the Constitution, wrote that when the Framers put due process "into the Fifth Amendment, its meaning was as fixed and definite as the common law could make a phrase. . . . It meant a proce-

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61. Holmes, *supra* note 57, at 239.
62. 281 U.S. 586, 595 (1930).
63. Reinhardt, *supra* note 1, at 151.
64. *Id.*
65. 4 THE PAPERS OF ALEXANDER HAMILTON 35 (Harold C. Syrett ed., 1962).
66. Raoul Berger, *"Law of the Land" Reconsidered*, 74 NW. U. L. REV. 1 (1979).
67. United States v. Smith, 18 U.S. (5 Wheat.) 153, 160 (1820). Chief Justice Marshall stated that if a word was understood in a certain sense "when the Constitution was framed . . . . [t]he Convention must have used the word in that sense." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824). This was the common law rule: "If a statute make use of a Word the Meaning of which is well known at the Common Law, such Word shall be taken in the Sense it was understood at the Common Law." 1 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW I(4) (1768).

dural process."[68] The words "due process," the Court stated, were used in the Fourteenth Amendment "in the same sense and with no greater extent" than in the Fifth.[69] Judge William Lawrence, one of the framers of the Fourteenth Amendment, quoted the Hamilton definition to the House in 1871;[70] and in the same year another framer, James Garfield, said that due process of law "meant an impartial trial according to the law of the land."[71] John Hart Ely found no reference in the legislative history that gave the due process clause of the Fourteenth Amendment "more than a procedural connotation,"[72] as my own extended delving in the records likewise found. In sum, to borrow from Edward Corwin, "no one at the time of the framing and adoption of the Constitution had any idea that this clause did more than consecrate a method of procedure against accused persons, and the modern doctrine of due process of law . . . could never have been laid down except in defiance of history."[73] The change was fashioned by the Justices. Charles Curtis asked, "But who made it a large generality? Not they [the Founders]. We [the Court] did."[74] Reinhardt does not point to a constitutional grant of judicial power to revise the Constitution. The Court confessed error in 1970, recalling the "era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' That era long ago passed into history."[75] Alas, that is true only with respect to economic affairs. Under the banner of the "liberty" that is conjoined with "property" in the Amendment, the Court continues on its revisory course.

"Equal protection" appears for the first time in the Fourteenth Amendment, unladen with historical meaning. In such case

68. Charles P. Curtis, *Review and Majority Rule, in* SUPREME COURT AND SUPREME LAW 170, 177 (Edmund Cahn ed., 1954).

69. Hurtado v. California, 110 U.S. 516, 535 (1884).

70. ALFRED AVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES 479 (1967).

71. *Id.* at 529.

72. John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 416 (1978). The draftsman of the Fourteenth Amendment, John Bingham, gave due process the "customary meaning recognized by the courts." JOSEPH JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 86-87 (1965).

73. EDWARD S. CORWIN, THE TWILIGHT OF THE SUPREME COURT 118-19 (1934).

74. Curtis, *supra* note 68, at 177.

75. Dandridge v. Williams, 397 U.S. 471, 484-85 (1970) (citation omitted). Alas, the Court's renunciation does not extend to "liberty" issues, though historically "property" was the more highly prized.

counseled Senator Charles Sumner, the champion of full rights for the freedmen,

> Every Constitution embodies the principles of its framers. It is a transcript of their minds. If its meaning in any place is open to doubt, or if words are used which seem to have no fixed signification, we cannot err if we turn to the framers.[76]

The exclusion of suffrage—the quintessential right—from the Amendment[77] testifies that "equal protection" did not extend to *all* rights. Time and again the framers rejected proposals to ban *all* discrimination.[78] In fact, the framers associated equal protection with the specific rights enumerated in the Civil Rights Act of 1866. Two examples should suffice: Samuel Shellabarger of Ohio explained, "whatever rights as to each of these enumerated civil (not political) matters the States may confer upon one race . . . shall be held by all races in equality. . . . It [the Bill] secures . . . *equality of protection* in *those enumerated civil rights.*"[79] In commenting on the Amendment, Leonard Meyers of Pennsylvania, observed that a "change" was required so that "each State shall provide for equality before the law, *equal protection* to life, liberty, and property, equal right to sue and be sued, to inherit, to make contracts, and give testimony,"[80] thus wedding equal protection to the "limited category of rights" enumerated in the Civil Rights Act.[81] So it was understood by a leading contemporary commentator on constitutional law, John Norton Pomeroy who stated that the Amendment "secured to all an equal right to enter or leave the State, to acquire and transfer property, to sue and be sued, to make contracts and to hold a lawful occupation."[82] Justice Joseph Bradley, a contemporary, declared that the "first section of the Bill covers the same ground as the fourteenth

76. CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866).

77. Senator Jacob Howard explained, "the theory of this whole amendment is, to leave the power of regulating . . . suffrage with the States." AVINS, *supra* note 70, at 143. The Report of the Joint Committee on Reconstruction recommended section two of the Amendment because it "would leave the whole question with the people of each State." *Id.* at 94.

78. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 163 (1977).

79. AVINS, *supra* note 70, at 188 (emphasis added).

80. *Id.* at 193.

81. Georgia v. Rachel, 384 U.S. 780, 791 (1966).

82. PHILLIP S. PALUDAN, THE COVENANT WITH DEATH 241 (1975). Pomeroy believed that the Fourteenth Amendment "mirrored the congressional view of the rights protected under the Civil Rights Bill." *Id.* at 235.

amendment,"[83] as leading Senators confirmed during the ratification campaign.[84] Manifestly Reinhardt is uninformed as to the historical scope of "due process" and "equal protection."

II

According to Reinhardt, the other "basic view" of the Constitution derives from "the concepts that *may have been in the minds* of the Framers over two hundred years ago. To proponents of this . . . view, the Constitution means what *they* think *was in the minds* of the Framers."[85] That said, this view disappears from the scene as if mere mention exhibits its absurdity, this with reference to a doctrine that goes back to the very roots of the common law. Originalists, however, waste no time psycho-analyzing anyone's minds; they do not inquire what "was in the minds" of the framers. Instead they look to what the framers explained they meant to accomplish, for once a statement is made, the utterance exists independently of the speaker's or writer's "mind." Reinhardt lists no "great Justices" for this "basic view;" yet Chief Justice Marshall declared that he could cite from the common law "the most complete evidence that the intention is the most sacred rule of interpretation."[86] Apparently Reinhardt does not read what may jar his predilections, so I may be allowed, in behalf of continuing legal education, briefly to set forth some historical facts.

We need to remember Hamilton's "The rules of legal interpretation are rules of common sense;"[87] common sense asks, who better knows what he means than the writer?—certainly not the reader. John Selden, a preeminent 17th Century scholar, stated that "a man's Writing has but one true sense, which is what the Author meant when he writ it."[88] His illustrious precursors,

83. Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-stock Landing and Slaughter-House Co., 15 F. Cas. 649, 655 (C.C.D. La. 1870) (No. 8408).

84. Raoul Berger, *Incorporation of the Bill of Rights: A Response to Michael Zuckert*, 26 GA. L. REV. 1, 10-11 (1991).

85. Reinhardt, *supra* note 1, at 149 (emphasis added). Originalists are no less concerned by the expanded role of the Court.

86. JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 167 (Gerald Gunther ed., 1969).

87. THE FEDERALIST No. 83, at 539 (Alexander Hamilton) (Mod. Lib. ed., 1937).

88. JOHN SELDEN, TABLE TALK: BEING THE DISCOURSES OF JOHN SELDEN ESQ. OR HIS SENSE OF MATTERS OF WEIGHT AND HIGH CONSEQUENCE; RELATING ESPECIALLY TO RELIGION AND STATE 10 (2d ed. 1696).

Thomas Hobbes and John Locke were of the same mind.[89] A striking, very early judicial illustration is furnished by *Aumeye's Case* (1305), wherein Chief Justice Bereford cut off counsel's argument on the Statute of Westminster II with "Don't bother interpreting the statute for us: we know it better than you do, for we made it."[90] The common law proceeded along this path as a few examples will show:

(1) Chief Justice Frowycke, a 15th Century sage, recounted that in 1285 the judges asked the "statute makers whether a warrantie with assettz should be a barre in the Statute of Westminster," and "they answered that it shulde. And so in our dayes, have those that were the penners & devisors of statutes bene of the grettest lighte for expocision of statutes."[91]

(2) Lord Chancellor Christopher Hatton, writing circa 1587-1591, said, "when the intent is proved, that must be followed . . . but whensoever there is a departure from the words to the intent, that must be well proved that there is such a meaning."[92]

(3) In the *Magdalen College Case* Coke stated that "in acts of Parliament which are to be construed according to the intent and meaning of the makers of them, the original intent is to be observed."[93] Examples could be multiplied, but let us move on to the American scene.

Jefferson Powell, the activist "discoverer" of what original intention *really* meant,[94] recounts that the English Puritans' suspicion of judges traveled to America.[95] They feared that judges

89. "The judge is to be guided by the finall causes, for which the law was made . . . the knowledge of which finall causes is in the legislature." THOMAS HOBBES, LEVIATHAN *18. Locke stated

> when a man speaks to another, it is to make known his ideas to the hearer. That then which words are the marks of are the ideas of the speaker . . . this is certain, their signification, in his use of them, is limited to his ideas, and they can be signs of nothing else.

JOHN LOCKE, AN ESSAY CONCERNING THE HUMAN UNDERSTANDING 204-06 (Raymond Wilburn ed., 1942).

90. Hans W. Baade, *"Original Intention:" Raoul Berger's Fake Antiques*, 70 N.C. L. REV. 1523, 1530 n.63 (1992).

91. A DISCOURSE UPON THE EXPOSICION & UNDERSTANDING OF STATUTES 151-52 (Samuel Thorne ed., 1942). An English historian, Chrimes concluded that "the rule of reference to the intention of the legislators . . . was certainly established by the second half of the fifteenth century." S.B. CHRIMES, ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY 293 (1936).

92. CHRISTOPHER HATTON, A TREATISE CONCERNING STATUTES, OR ACTS OF PARLIAMENT: AND THE EXPOSITION THEREOF 14-15 (1677).

93. 77 Eng. Rep. 1235, 1245 (1615).

94. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

95. *Id.* at 891-92.

would "undermine the legislative prerogatives of the people's representatives by engaging in the corruptive process of interpreting legislative texts;" they feared that the "advantages of a known and written law would be lost if the laws' meaning could be twisted by judicial construction,"[96] and they opposed the "judges' imposition of their personal views,"[97] a prescient anticipation of Reinhardt and his ilk. Came the Jeffersonian "revolution of 1800" and the Republican victors, Powell notes, viewed it as "the people's endorsement" of original intention.[98] In 1838 the Supreme Court declared that construction

> must necessarily depend on the words of the constitution, the meaning and intention of the conventions which framed and proposed it for adoption and ratification to the conventions . . . in the several States . . . to which the Court has always resorted in construing the Constitution.[99]

"By the outbreak of the Civil War," Powell observed, "intentionalism in the modern sense reigned supreme."[100]

The framers of the Fourteenth Amendment, whereunder the great bulk of modern constitutional litigation arises, were cognizant of this practice, as is exemplified by the earlier quoted remarks of Senator Sumner.[101] One of his confreres in the 39th Congress, John Farnsworth of Illinois, said of the Amendment in 1871, "Let us see what was understood to be its meaning at the time of its adoption by Congress."[102] His colleague, James Garfield, rejected an interpretation that went "far beyond the intent and meaning of those who amended the Constitution."[103] Such sentiments found unmistakable expression in 1872 in a unanimous Senate Judiciary Committee Report, signed by Senators who had voted for the Thirteenth, Fourteenth, and Fifteenth Amendments.

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96. *Id.* at 892.

97. *Id.* at 891.

98. *Id.* at 934. In his Inaugural Address, Jefferson pledged to administer the Constitution "according to the safe and honest meaning contemplated by the plain understanding of the people at the time of its adoption—a meaning to be found in the explanations of those who advocated . . . it." 4 ELLIOT, *supra* note 54, at 446.

99. Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838): *cf.* Carpenter v. Pennsylvania, 58 U.S. (17 How.) 456, 462 (1854).

100. Powell, *supra* note 94, at 947.

101. *See supra* p. 861.

102. AVINS, *supra* note 70, at 506.

103. *Id.* at 528.

> In construing the Constitution we are compelled to give it such interpretation as will secure the result which was intended by those who framed it and the people who adopted it.
>
> . . .
>
> A construction which should give the phrase . . . a meaning differing from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution in any other particular. This is the rule of interpretation adopted by all commentators on the Constitution, and in all judicial expositions of that instrument.[104]

It remains to note that in 1939 Jacobus tenBroek, an early anti-originalist, wrote that the Court "has insisted with almost uninterrupted regularity that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument."[105] No intimation that the foregoing body of learning exists is to be found in Reinhardt's article. For him apparently, original intention may be laughed out of court.

In conclusion, Suzanna Sherry's remarkable charge that Judge Robert "Bork has a knack for political rhetoric, but not much inclination for serious thought"[106] may more appropriately be leveled at Judge Reinhardt. At the very least, one must conclude that he has not done his homework. In an avuncular spirit I commend to him as a future motto Cardozo's admonition: the judge "is not to be innovative at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or goodness."[107]

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104. *Id.* at 571-72.

105. Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: The Intent Theory of Constitutional Construction*, 27 CAL. L. REV. 399 (1939). Doubtless it is inspiriting to regard oneself as a White Knight. But Learned Hand had an "unconcealed scorn 'for that temper . . . which transfigures a judge into a crusader for righteousness as righteousness may appear to an incandescent conscience.' " GERALD GUNTHER, LEARNED HAND 521 (1994). He referred to "the stigmata of the uplifter—a class of saint who more and more I have come to deprecate." *Id.* at 454. Happily he did not live to witness the feats of derring-do by Justices Brennan and Thurgood Marshall.

106. Suzanna Sherry, *Original Sin*, 84 NW. U. L. REV. 1215, 1220 (1990).

107. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 141 (1924).