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TEXT:
[*585]

Most of what we know about "liberty" comes to us from outside the Constitution. The word appears three times in the instrument: in the preamble--"secure the blessings of liberty"--and in the Due Process Clauses of the Fifth and Fourteenth Amendments. There is no clue in the records of the Federal Convention, n1 nor in those of the First Congress respecting the Bill of Rights as to the meaning the Founders attached to the word. So we must look to the common law for its meaning. n2 Whatever the historical content of "liberty," it cannot draw enlarged substantive content from the procedural confines of due process. Let me therefore begin with the meaning due process had for the Founders.

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n1 Charles Pinckney referred to the "blessings of civil and religious liberty" in his version of his own speech in the Convention. 4 Max Farrand, Records of the Federal Convention of 1787 28 (1937).

n2 See *Ex parte Grossman, 267 U.S. 87, 108-09 (1925)* ("The language of the constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted.").

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I. Due Process

The Fifth Amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law." n3 On the eve of the Convention, Hamilton declared, "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 legislature." n4 That is to say, due process is ever procedural, never "substantive" (i.e., affecting contents of legislation). Hamilton correctly summarized the common law. n5 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 procedural due process." n6 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." n7

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n3 U.S. Const. amend V.

n4 4 The Papers of Alexander Hamilton 35 (H. Syrett et al. eds., 1962).

n5 Raoul Berger, "Law of the Land" Reconsidered, *74 Nw. U. L. Rev. 1 (1979).*

n6 Charles P. Curtis, Review and Majority Rule, in Supreme Court and Supreme Law 153, 160 (Edmund Cahn ed., 1954).

n7 *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 . . . the 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 same Sense it was understood at the Common Law." 4 Matthew Bacon, A New Abridgment of the Law I(4) (1768).

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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. n8 When John Bingham, draftsman of the Fourteenth Amendment, was asked what he meant by due process, he curtly replied, "The courts have settled that long ago," n9 indicating that there was no intention to depart from the common-law meaning. His coframer, Judge William Lawrence, quoted the Hamilton definition to the House in 1871; n10 in the same year,

[*587] another framer, James Garfield, destined to be the martyred President, stated that due process of law "meant an impartial trial according to the law of the land." n11 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," n12 as I likewise found upon delving into the records.

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n8 *Hurtado v. California, 110 U.S. 516, 535 (1884).*
n9 Cong. Globe, 39th Cong., 1st Sess. 1089 (1866).

n10 Alfred Avins, The Reconstruction Amendments' Debates 479 (1967).

n11 *Id. at 529.*

n12 John Hart Ely, Constitutional Interpretivism: Its Allure and Impossibility, *53 Ind. L.J. 399, 416 (1978).*

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In sum, as said by 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. n13

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n13 Edward S. Corwin, The Twilight of the Supreme Court 118-19 (1934).

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It was the Justices who made the change. Charles Curtis asked, "But who made it a large generality? Not they [the Framers]. We [the Court] did." n14 In sum, there was no substantive content on which liberty could draw.

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n14 Curtis, supra note 6. In 1925, Felix Frankfurter wrote that the contents of the Due Process Clauses "are derived from the disposition of the Justices." Alexander M. Bickel, The Supreme Court and the Idea of Progress 25 (1978).

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II. Liberty

Libertarians associate their claims to modern "rights" with "liberty"; but they can find no warrant in the common law. The origin of liberty may be discerned in the thirty-ninth chapter of the Magna Carta: "No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed . . . ." n15 Imprisonment and exile are deprivations of liberty. Charles McIlwain considered that the chief grievance of the barons at Runnymede was the king's [*588] seizure of their persons without trial. n16 In origin, therefore, liberty was not a vacuous concept that drew all imaginable rights within its compass, but freedom from restraint of the person. Some 550 years later, Blackstone, citing the "great charter," restated it: "This personal liberty

consists in the power of locomotion . . . of moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint . . . ." n17 Surveying earlier history in 1926, Charles Warren concluded, "There seems to be little question that, under the common law, 'liberty' meant simply 'liberty of the person,' or in other words, 'the right to have one's person free from physical restraint.' " n18 This was the settled connotation of liberty when early state constitutions adopted the "life, liberty, and property" phrase. Indeed, as Edward Corwin stated, "prior to the Civil War American constitutional law and theory evince a quite surprising unconcern regarding 'liberty' . . . . So far as the power of the states was involved, in brief, liberty was the liberty which the ordinary law allowed and nothing more. . . ." n19

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n15 William McKechnie, Magna Carta: A Commentary on the Great Charter of King John 375 (2d ed. 1914).

n16 Charles McIlwain, Due Process of Law in Magna Carta, *14 Colum. L. Rev. 27, 46-47 (1914)*.

n17 1 William Blackstone, Commentaries on the Laws of England 134 (1765).

n18 Charles Warren, The New Liberty Under the Fourteenth Amendment, *39 Harv. L. Rev. 431, 440 (1926)*. "In the beginnings of constitutional government," wrote Cardozo, "the freedom that was uppermost in the minds of men was freedom of the body." Benjamin N. Cardozo, Paradoxes of Legal Science 97 (1928).

n19 Corwin, supra note 13, at 78. Sir William Holdsworth stated that when people in the seventeenth century talked about rights, "they meant the rights which the existing law gave them." John W. Gough, Fundamental Law in English Constitutional History 39 n.3 (1955).

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In forging the Fourteenth Amendment, no discussion of the Due Process Clause purported to enlarge the common-law scope of liberty. Instead James Wilson, chairman of the House Committee on the Judiciary, read the Blackstonian definitions to the House in discussing the cognate Civil Rights Bill, and said, "Thus, sir, we have the English and American doctrine harmonizing." n20 Alfred Kelly, a Reconstruction historian and member of the team that prepared the desegregation brief for the NAACP, wrote: "The 'rights of Englishmen' were not vacuous; instead they were quite well defined and specific [the Blackstonian triad]. The notion of
[*589] pulling new natural rights from the air to allow for an indefinite expansion can hardly be considered to be within the original spirit of the fourteenth amendment. . . ." n21

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n20 Avins, supra note 10, at 164.

n21 Alfred H. Kelly, Clio and the Court: An Illicit Love Affair, *1965 Sup. Ct. Rev. 119, 15455*.

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The current preoccupation with individual rights obscures the Founders' concern with the rights of the community rather than the individual. 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." n22 "In the Convention and later," wrote Alpheus Thomas Mason, "states rights--not individual rights--was the real worry." n23 The Founders were concerned with erecting a structure of government that would diffuse and limit delegated power, not with fortifying individual rights. n24 "It was conceivable," wrote Gordon Wood, "to protect the common liberties of the people against their rulers, but not against the people themselves." n25 The Constitution, Louis Henkin observed, "said remarkably little about rights" because the federal government "was not to be the primary government . . . governance was left principally to the states." n26 Not that the Founders were indifferent to individual rights, but those rights were peculiarly the concern of the States, as Judge Edmund Pendleton underscored in the Virginia Ratification Convention: "Our dearest rights--life, liberty and property, as Virginians are
[*590] still in the hands of our state legislatures." n27 That the Fourteenth Amendment did not accomplish a shift may be gathered from the view of a noted contemporary, Chief Justice Thomas Cooley: "Obstacles stood in the way of an unconditional commitment to human freedom. Innovation, he believed, required historical basis, and American history was singularly lacking in precedents for national power used in behalf of individual freedom." n28

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n22 Gordon S. Wood, The Creation of the American Republic 1776-1787 63 (1969).

n23 Alpheus T. Mason, The States Rights Debate: Antifederalism and the Constitution 75 (1964).

n24 Justice William Brennan, a leading exponent of individual rights, acknowledged that "the original document, before the addition of any of the amendments, does not speak primarily of the rights of men, but of the abilities and disabilities of government." Justice William Brennan, Address, Georgetown University (Oct. 12, 1985), in The Great Debate: Interpreting Our Written Constitution 11, 18 (Federalist Soc'y 1986).

n25 Wood, supra note 22, at 63. For the Founders, Gordon Wood considered, "Liberty was realized when the citizens were . . . willing to sacrifice their private interests for the sake of the community." Gordon S. Wood, The Radicalism of the American Revolution 104 (1992). Wood's observation is a far cry from the current rampant individualism. See Raoul Berger, The Ninth Amendment, As Perceived by Randy Barnett, *88 Nw. U. L. Rev. 1508, 1509 (1994).*

n26 Louis Henkin, Human Dignity and Constitutional Rights, in The Constitution of Rights: Human Dignity and American Values 210, 213-14 (Michael J. Myers & William A. Parent eds., 1992).

n27 3 Jonathan Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 289, 354 (1836). "The framers of the

Constitution and Bill of Rights believed that state governments were, in some vital respects, safer repositories of power over individual liberties than the federal government." Michael W. McConnell, Federalism: Evaluating the Founders' Design, *54 U. Chi. L. Rev. 1484, 1506 (1987)*.

n28 Phillip S. Paludan, A Covenant With Death: The Constitution, Law and Equality in the Civil War Era 263 (1975).

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III. Expansion and Recession

a. expansion

The expansion of liberty commonly is traced to Allgeyer v. Louisiana, n29 where the Court read into the "liberty" of the Due Process Clause the concept of "liberty of contract." That concept was notoriously exemplified in Lochner v. New York; n30 there the Court struck down a New York statute that limited bakers' working hours to sixty per week, because it interfered with "the right of an individual to labor for such time as he may choose." n31 Casuistry seldom rose to greater heights; the statute responded to the unequal bargaining power of employer and employee. Justice Stone wrote in a comparable case, "There is a grim irony in speaking of the freedom of contract of those who, because of their economic necessities, give their services for less than is needful to keep body and soul together." n32 The callousness of bench and bar was nakedly revealed in a remark by Joseph Choate, then the most eminent corporate lawyer: He saw no reason why "a big, husky
[*591] Irish washer-woman should not work more than ten hours a day in a laundry if she and her employer so desired." n33 Nor was interference with contracts as heterodox as the Lochner majority pretended. Justice Holmes's dissent pointed to statutes cutting down the liberty to contract by way of combinations, to the prohibition of sales of stock on margin, and to Holden v. Hardy, which had sustained an eight-hour day for miners. n34

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n29 *165 U.S. 578 (1897)*.

n30 *198 U.S. 45 (1905)*. Justice Holmes later commented that the dogma of liberty of contract "is merely an example of doing what you want to do, embodied in the word liberty." *Adkins v. Children's Hosp., 261 U.S. 525, 568 (1923)* (Holmes, J., dissenting).

n31 *Lochner, 198 U.S. at 54*.

n32 *Morehead v. Tipaldo, 298 U.S. 587, 632 (1936)* (Stone, J., dissenting).

n33 Ernest Samuels, Henry Adams: The Major Phase 412 (1964).

n34 *Lochner, 198 U.S. at 75* (Holmes, J., dissenting).

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Before "liberty of contract" fell into disuse, the Justices extended the

concept of liberty to freedom of speech. In Gitlow v. New York, the Court "assumed that freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." n35 Although Justice Holmes dissented on the merits, he joined in the free speech aspect, saying it must be taken to be included in the Fourteenth Amendment "in view of the scope that has been given to the word 'liberty,' " n36 tacit recognition that the extension was without historical footing.

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n35 *268 U.S. 652, 666 (1925)* (emphasis added).

n36 *Id. at 672.*

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When a petitioner charged in Palko v. Connecticut n37 that a state conviction violated the Double Jeopardy Clause of the Fifth Amendment (the Bill of Rights originally applied only to the federal government), Justice Cardozo remarked in passing that freedom of speech was "implicit in the concept of ordered liberty," the test being that the principle is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." n38 But Madison's proposal to make the First Amendment applicable to the States had been rejected, so its extension can hardly be rooted in our "tradition." No departure from inapplicability of the Bill of Rights to the states can be found in the Fourteenth Amendment; n39
[*592] instead, but for the narrow enclave of the Civil Rights Act of 1866, n40 its framers plainly withheld from the Court power to intrude into state regulation of internal affairs.

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n37 *302 U.S. 319 (1937).*

n38 *Id. at 325.*

n39 For detailed documentation see Raoul Berger, The Fourteenth Amendment and the Bill of Rights (1989).

n40 "The legislative history of the 1866 [Civil Rights] Act clearly indicates that Congress intended to protect a limited category of rights." *Georgia v. Rachel, 384 U.S. 780, 791 (1966).* The Fourteenth Amendment was conceived to prevent repeal of the Act or alternatively to "constitutionalize" the Act because of doubts concerning Congress's power to enact it. George Latham stated that the Act "covers exactly the same ground as this amendment." Cong. Globe, 39th Cong., 1st Sess. 2883 (1866). Justice Bradley, a contemporary of the Amendment, declared that the "bill covers the same ground as the Fourteenth Amendment." *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & SlaughterHouse Co., 15 F. Cas. 649, 655 (C.C.D. La. 1870)* (No. 8, 408). For documentation see Raoul Berger, Incorporation of the Bill of Rights: A Response to Michael Zuckert, *26 Ga. L. Rev. 1, 9-11 (1991).*

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Such, in sum, were the roots of the modern "individual rights," inflated by resort to liberty. Two of the leading activist theoreticians concede that these roots do not sustain activist claims. Michael Perry recognizes that the "rights" activists champion are judicial constructs of the "modern" Court. n41 And Paul Brest acknowledges that "fundamental rights adjudication is open to the criticisms that it is not authorized and not guided by the text and original history of the Constitution." n42

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n41 Michael Perry, The Constitution, The Courts and Human Rights 91-92 (1982).

n42 Paul Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Scholarship, *90 Yale L.J. 1063, 1087 (1981).*

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b. recession

The ebbing of the tide found expression in Ferguson v. Skrupa, where the Court referred to "our abandonment of the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise . . . we refuse to sit as a 'superlegislature to weigh the wisdom of legislation.' " n43 But this was only a partial renunciation--confined to the economic sphere. An enthusiastic activist, Stanley Kutler noted that after 1937 critics of the Court's laissez faire decisions "suddenly found a new faith," a "new libertarianism promoting 'pre- [*593] ferred freedoms' . . . [protected by] an activist judiciary." n44

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n43 *372 U.S. 726, 731 (1963).* In 1970 the Court recalled 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 has long ago passed into history." *Dandridge v. Williams, 397 U.S. 471, 484-85 (1970).*

n44 Stanley Kutler, Raoul Berger's Fourteenth Amendment: A History or Ahistorical, *6 Hastings Const. L.Q. 511, 513 (1979).*

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But liberty and property are on a par in the Due Process Clauses; the Clauses make no distinction whatsoever between them. Hence the logic that excludes judicial interference with property no less bars intervention on behalf of liberty. Indeed, property was more highly prized by the Founders than liberty--the Blackstonian freedom from physical restraint. For them, property "was the basic liberty, because until a man was secure in his property, until it was protected from arbitrary seizure, life and liberty could mean little." n45 Consequently, they "warmly endorsed John Adams' deepseated conviction that "property is as sacred as the laws of God." n46 The fact remains, as Learned

Hand observed, that "there is no constitutional basis for asserting a larger measure of judicial supervision over" liberty than property. n47

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n45 1 Page Smith, John Adams 272 (1962). Anatole France made the point ironically: The poor are as free as the rich to sleep under a bridge.

n46 Alpheus T. Mason, The Burger Court in Historical Perspective, *47 N.Y. St. B. J. 87, 91 (1975).*

n47 Learned Hand, The Bill of Rights 51 (1962).

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There are signs on the horizon that a new day is dawning; liberty is being viewed in more Blackstonian terms. First, the Court recently recalled that the core of liberty is "freedom from bodily restraint." n48 And Justice Scalia emphasized that

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n48 *Foucha v. Louisiana, 112 S. Ct. 1780, 1785 (1992).*

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Without that core textual meaning as a limitation, defining the scope of the Due Process Clause 'has at times been a treacherous field for this Court,' giving 'reason for concern lest the only limits to . . . judicial intervention became the predilections of those who happen at the time to be Members of this Court.' n49

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n49 *Michael H. v. Gerald D., 491 U.S. 110, 121 (1989)* (emphasis added).

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Second, when rights have been claimed as "fundamental" the Court has insisted that they "be an interest traditionally protected by our society." n50 If the claim is novel, its "mere novelty . . . is reason
[*594] enough to doubt that 'substantive due process' sustains it." n51 Third,

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n50 Id. at 122; see Gough, supra note 19 and accompanying text; for view of Sir William Holdsworth see supra note 19.

n51 *Reno v. Flores, 113 S. Ct. 1439, 1447 (1993).*

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the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended . . . . The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field. n52

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n52 *Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).*

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The Court, in short, is putting the brakes on fresh claims of rights unknown to the law.

The need to call a halt had been underlined in Bowers v. Hardwick, n53 the sodomy case. Justice White noted that "sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of 37 States in the Union had criminal sodomy laws." n54 He observed that despite the procedural implications of the due process language, the Court had read substantive restrictions into it and recognized (actually fabricated) "rights that have little or no textual support in the constitutional language." n55 And the Court refused "to discover new fundamental rights embedded in the Due Process Clause," stating that "the Court is most vulnerable and comes closest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language." n56 Consequently, it concluded, the Court should greatly resist the expansion of "the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitu- [*595] tional authority." n57 This was welcome reaffirmation that ours is a government by consent of the governed, and that the task of governing--making and executing the laws--was not confided to the courts. n58 But because Bowers split the Court (although three of the dissenters, Blackmun, Brennan, and Thurgood Marshall, are now gone), I may be allowed to set forth additional considerations that buttress the Court's ruling.

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n53 *478 U.S. 186 (1986).*

n54 *Id. at 192-93.*

n55 *Id. at 191.*

n56 *Id. at 194.*

n57 *Id. at 195.*

n58 From Francis Bacon forward it has been said, as the Supreme Court itself has reiterated, that it is not for the courts to make law. See Raoul Berger, The Activist Legacy of the New Deal, 59 *Wash. L. Rev. 751, 785 (1984).*

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It borders on the unbelievable to urge that a practice embedded in centuries of common law in England, the colonies, and the states was repudiated by a parallel common-law term, "liberty," amorphous on its face and that historical practice limited to restrictions on bodily restraint without trial. Were this history more equivocal then, as Madison wrote, "no novel construction, however ingeniously devised . . . can withstand . . . the unbroken current of so prolonged and universal a 'practice.' " n59 In similar circumstances, Justice Story wrote, "such long acquiescence in it . . . entitled the question to be considered at rest." n60 So too, in the SlaughterHouse Cases Justice Miller rejected a construction of the Fourteenth Amendment that would subject states "to the control of Congress in the exercise of powers heretofore universally conceded to them . . . in the absence of language which expresses such a purpose too clearly to admit of doubt." n61 And Justice Holmes stated, "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." n62

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n59 Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), in 4 Elliot, supra note 27, at 634.

n60 *Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 621 (1842).*

n61 *83 U.S. (16 Wall.) 36, 78 (1872).* To the same effect, see Chief Justice Marshall's opinion in *Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).*

n62 *Jackson v. Rosenbaum Co., 260 U.S. 22, 31 (1922).*

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To this may be added that the Founders eschewed "vague" words; "vague and uncertain words, more especially Constitutions," Samuel Adams wrote, "are the very instruments of slavery." n63 And Rufus King, one of the leading Framers, told the Massachu- [*596] setts Ratification convention that the Federal convention sought "to use those expressions that were most easy to be understood and least equivocal in their meaning." n64 In light of Blackstone's explanation of liberty, the term may not be regarded as vague and therefore subject to unlimited application. n65 Even less may the states' retained rights to govern themselves in internal matters be curtailed by resort to a vague, indeterminate term.

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n63 3 Samuel Adams, Writings 262 (H. Cushing ed., 1904).

n64 3 Farrand, supra note 1, at 268.

n65 See supra text accompanying note 7.

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Bowers needs to be considered against the demands of federalism, the states' right to control their own internal affairs. Hamilton put it succinctly: The Constitution "is merely intended to regulate the general political interests of the nation," not to regulate "every species of personal and private concerns." n66 Madison and James Wilson were of the same mind. n67 So it was understood by Chancellor Kent, n68 and such was likewise the opinion of John Bingham, draftsman of the Fourteenth Amendment: "The care of the property, the liberty, and the life of the citizen . . . is in the States, and not in the Federal Government . . . . I have sought to effect no change in that respect." n69 Every federal expansion of individual "rights" inversely curtails a state's right to regulate its own citizens. n70 We need to remember what Justice Brandeis stated on behalf of the Court: The Constitution "preserves the autonomy . . . of the States"; federal supervision of their action "is in no case [*597] permissible except as to matters . . . specifically . . . delegated to the United States. Any interference . . . except as thus permitted, is an invasion of the authority of the States." n71

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n66 The Federalist No. 84, at 559 (Mod. Lib. ed. 1937).

n67 Wilson wrote: "Whatever object of government is confined in its operation and effect, within the bounds of a particular state, should be considered as belonging to the government of that state." Federal jurisdiction was to be confined to "operation or effects . . . beyond the bounds of a particular state." 2 Elliot, supra note 27, at 399.

Madison stated: Federal power "will be exercised principally on external objects" such as war; state powers were to extend to "all objects which . . . concern the lives, liberties and properties of the people; and the internal order . . . of the State." The Federalist No. 45, at 303 (Mod. Lib. ed. 1937).

n68 The "principal rights and duties which flow from our civil and domestic relations, fall within the control, and we might almost say the exclusive cognizance of the state governments." Mark de W. Howe, Justice Oliver Wendell Holmes: The Proving Years 30 (1963).

n69 Avins, supra note 10, at 187.

n70 Judge Richard Posner wrote, "Apply the Bill of Rights to the States through the due process clause and you weaken the states tremendously by handing over control of large areas of public policy to federal judges." Richard Posner, The Federal Courts, Crisis and Reform 195 (1985).

n71 *Erie Ry. Co. v. Tompkins, 304 U.S. 64, 78-79 (1938).*

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We are cautioned against "antiquarian historicism that would freeze the

original meaning" of the Constitution. n72 But such views run counter to the presuppositions of the Founders. As Philip Kurland wrote,

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n72 Leonard Levy, Judgments: Essays in American Constitutional History 17 (1972).

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The concept of the written Constitution is that it defines the authority of the 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 only have a fixed and unchanging meaning. For changed conditions, the instrument itself made provision for amendment. n73

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n73 Philip Kurland, Watergate and the Constitution 7 (1978).

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Against this, activists assert that we cannot be ruled by the dead hand of the past, n74 although they regard the dead hand of Earl Warren as sacrosanct. n75 No less a jurist than Justice Story affirmed that the Constitution "is to have a fixed, uniform, permanent construction . . . the same yesterday, today and forever." n76 Learned Hand, himself a philosophical jurist, stated, "Every society which promulgates a law means that it shall be [*598] obeyed until it is changed, and any society which lays down means by which its laws can be changed makes those means exclusive." n77 This was well understood by Chief Justice Marshall: He disclaimed judicial power "to change the instrument." n78

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n74 Arthur J. Miller asserts that the "Founding Fathers cannot rule us from their graves." Arthur J. Miller, Book Review, Wash. Post, Nov. 17, 1977, at E5. Richard Kay comments that, "the fashion has grown in our generation of scoffing at the 'filio-pietistic' notion that we must be restrained" by the dead hand of the past. Richard Kay, Book Review, *10 Conn. L. Rev. 801, 804 (1978).*

n75 Activist writings, Mark Tushnet notes, are "plainly designed to protect the legacy of the Warren Court." Mark Tushnet, Legal Realism, Structural Review, and Prophecy, *8 U. Dayton L. Rev. 809, 811 (1983).*

n76 1 Joseph Story, Commentaries on the Constitution of the United States section 426 (5th ed. 1905). Justice William Paterson, 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). This was likewise the view of a

contemporary of the Fourteenth Amendment. Thomas Cooley, Constitutional Limitations 67 (1883).

n77 Gerald Gunther, Learned Hand: The Man and the Judge 605 (1994).

n78 John Marshall's Defense of McCulloch v. Maryland 185 (Gerald Gunther ed., 1969).

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Opposition to judicial revision of the Constitution does not entail petrifaction. n79 The people are explicitly authorized by Article V to amend the Constitution. Should they conclude that liberty stands in need of expansion, they can adopt an amendment to embrace such individual and collective rights as they may choose, or delegate such power to Congress. Our paramount duty is to preserve the integrity of the Constitution, n80 always remembering James Iredell's warning: 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." n81 When the Court does for the people "what they have not chosen to do for themselves," Justice Story stated, "it is usurping the function of a legislator." n82 This was not arid legalism but a pragmatic appreciation of the perils of such usurpation, pungently expressed by Washington in his farewell address: "Let there be no change by usurpation, for though this, in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed." n83 We have only to recall the rise of Hitler to grasp afresh the wisdom of this utterance. Our nation, I believe, has survived while empires and totalitarian regimes have crashed because of our attachment to the rule of law, of which the Constitution is a supreme expression. n84

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n79 See Raoul Berger, Original Intent: The Rage of Hans Baade, *71 N.C. L. Rev. 1151, 1153 (1993).*

n80 "Integrity" has been defined as "original, unimpaired condition." New Standard Dictionary (1930).

n81 Griffeth J. McRee, Life and Correspondence of James Iredell 146 (1858).

n82 Story, supra note 76, at 426.

n83 35 George Washington, Writings 228-29 (J. Fitzpatrick ed., 1940).

n84 Even the hard-headed Hamilton believed that "every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence, which ought to be maintained in the breasts of the rulers towards the Constitution." The Federalist No. 25, at 158 (Mod. Lib. ed. 1937).

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