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COMMENT

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Let me begin where Professor Cox began. Professor Cox recounted: "It was on September 17, 1787, that stout, old Ben Franklin's sedan chair was carried up the steps of Independence Hall for the signing of a proposed new Constitution. Franklin wept as he signed."[1]

But, instead of joining Ben Franklin and the other delegates in the Pennsylvania State House, let's follow the "four husky prisoners from the Walnut Street Jail"[2] who carried the ailing Dr. Franklin. The Jail was located directly across from the State House where the Constitutional Convention met.

Our Jail tour is conducted by Charles Dickens (albeit fifty-five years later), who in 1842 visited Philadelphia's Eastern Penitentiary, the successor to the Walnut Street Jail. He described the character of this Quaker experiment, which was intended to provoke self-improvement through introspection:

> Over the head and face of every prisoner who comes into this melancholy house, a black hood is drawn; and in this dark shroud, an emblem of the curtain dropped between him and the living world, he is led to the cell from which he never again comes forth, until his whole term of imprisonment has expired. He never hears of wife or children; home or friends; and life or death of any single creature. He sees the prison-officers, but with that exception, he never looks upon a human countenance, or hears a human voice. He is a man buried alive; to be dug out in the slow round of years; and in the meantime dead to everything but torturing anxieties and horrible despair.[3]

If, as he walked to the State House each morning, James Madison had looked behind the "long begging poles of reed, with . . . cloth cap[s] at the end"[4] thrust out the Jail windows by the more

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1. Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 118, 118 (1987).

2. C. BOWEN, MIRACLE AT PHILADELPHIA 34 (1966).

3. C. DICKENS, AMERICAN NOTES (P. Smith ed. 1961).

4. C. BOWEN, *supra* note 2, at 50.

fortunate inmates, the ones on the open, debtors' side of the Jail, he would have seen what Dickens later saw.

What if Madison had taken Dickens' Jail tour in 1791, the year the eighth amendment, with its proscription of "cruel and unusual punishments,"[5] was ratified as part of the Bill of Rights? Leaving the "incorporation" question[6] aside, would he have thought the Jail conditions, themselves a recent reform, violated that new amendment he had helped draft? If it were not the intention of the draftsmen of the eighth amendment, or those who ratified it, to lift the black hoods from the inmates' heads, or to allow them to visit with family, should that intention bind the judicial conscience of today's Supreme Court?

In my view, those who would freeze the meaning of the Constitution in the specific understandings of 1787 and 1788 miniaturize the founders; the text, history, and spirit of the Constitution; and the judicial function itself.

Because, in this respect, I share Professor Cox's expanded vision of original intent, and because that vision supports much of the Warren Court's work, I would like to look more closely at the historical justifications for this expanded vision. Yet it is the founders' original intent about the Court's role—whether it ought to be active or passive—that I specifically wish to discuss.[7]

Discovering this intent is a task that requires more than historical reconstruction. While the founders did speak about whether they expected judges to review and invalidate laws that conflicted with the Constitution, they said much less about whether judicial review should be exercised "actively" or "passively." Thus, my search is for clues—in history, the text and structure of the Constitution, and the Convention and ratifying debates—about what they might have said if asked.

My inquiry can be organized around some of the traditional justifications for judicial self-restraint. What did the founders think about them? In analyzing these justifications, one inevitably relives the great debates at the Constitutional Convention.

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5. U.S. CONST. amend. VIII.

6. The "incorporation question" involves whether the fourteenth amendment incorporated the Bill of Rights, making it applicable against the states. For a general discussion, see Duncan v. Louisiana, 391 U.S. 145, 147, 158 (1968).

7. I agree with Professor Tushnet that the asserted "judicial activism" and "judicial restraint" dichotomy may mean many different things. I accept the two phrases as descriptive of often differing judicial views about the weight to be accorded the judgments of legislative bodies, popular will, precedent, and governmental interests in interpreting the Bill of Rights.

Judicial activism, it is asserted, is antidemocratic; it erodes representative self-government and majority rule. This may be the case on some occasions. Judicial activism certainly did not have that effect in the apportionment cases. It has in the abortion cases.

Nonrepresentational compromises forged by Democrats and aristocrats, however, animate virtually every essential provision of the Constitution. Skepticism about unrestricted majoritarian rule had many well-known sources: a desire to protect vested interests, property, and commerce; fear, intensified by Shay's rebellion in Massachusetts, that popular rule would threaten post-war stability; respect for the English experience; and the general fear that the majority would oppress minorities. These concerns often were summarized at the Convention as a general distrust of the "levelling spirit" of the majority, but this distrust accompanied an expressed commitment to at least partially representative democracy.

This modest schizophrenia was one of several factors that contributed to the major constitutional compromises. The Senate was created "to controul the more democratic branch of the Nat'l Legislature."[8] Senators were given six-year terms and elected by state legislatures to partially immunize them from transient, majoritarian feelings. The electoral college was adopted as an intermediary between the people and their representatives. The President was given a qualified veto power to control the excesses of the legislative majority. More than a simple majority vote was required to amend the Constitution. Most importantly, the potentially most antidemocratic institution of all was created—the judiciary, with lifetime appointments.

The debates at the ratifying conventions highlighted the tensions inherent in these great compromises. Brutus, a fierce New York Anti-Federalist, predicted that the vagaries of constitutional text would leave judicial interpretation of the Constitution without limits, converting the judiciary into an autocracy.[9]

Alexander Hamilton's famous defense of the judiciary as the "least dangerous" branch of government—without the power of purse or sword[10]—was bolstered by a pragmatic observation: Con-

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8. Comments of Edmund Randolph, delegate from Virginia, at the Constitutional Convention (June 12, 1787), *reprinted in* J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 110 (Ohio Univ. Press 1966).

9. *See* Brutus, *Essay No. XI*, in 2 THE COMPLETE ANTI-FEDERALIST 417-22 (H. Storing ed. 1981).

10. THE FEDERALIST No. 78, at 227 (A. Hamilton) (R. Fairfield ed. 1981).

gress could trim the Court's jurisdiction if it misbehaved.[11] He might have added many other restrictions to this list of institutional disabilities.

Thus, judicial activism was an articulated issue of the times. While the Constitution promises representative self-government and majority rule, nonrepresentational judicial review—sometimes in the form of judicial activism—was intended to diffuse governmental power and to prevent majoritarian oppression.

Let us turn to a second criticism. Judicial activism, it is asserted, denies state and local governments autonomy. Again, this is true to some extent. But, put simply, the Articles of Confederation, which promised a "league of friendship"[12] in which "each state retain[ed] its sovereignty, freedom and independence,"[13] yielded to a nation. The patent need for a national government was grounded in self-preservation. It was fueled by the failures of the Continental Congress to support the troops at Valley Forge. And it generated and controlled the Constitutional Convention.

This need to be a nation overcame profound regional differences, the intense small state-big state rivalry, and the volatile slavery issue. The founders intended that the Supreme Court would play a significant role in the assertion of national sovereignty, and John Marshall soon made it clear how significant this role would be.

The loss of representative government at the local level—the erosion of the states' role in federalism—*is* a real loss. But when the conflicts are between local communities, on the one hand, and black children who seek an integrated education, black adults who want equal weight attached to their votes, and criminal defendants who assert their right to counsel or their privilege against self-incrimination, on the other, the case for national rules of decision is very strong.

Third, judicial activism, it is asserted, conflicts with the role of precedent. Perhaps sometimes it does, as in the school integration cases. But sometimes, it can be expressed as a refinement of the common-law method, as in the evolution of the "clear and present danger" test.[14]

I admit that the founders' experience with the common-law tra-

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11. *Id.*

12. Articles of Confederation, art. 3 (U.S. 1777).

13. *Id.* at art. 2.

14. This was a test established by the Supreme Court to determine when speech constituted a punishable advocacy of an illegal act. *See* Brandenburg v. Ohio, 395 U.S. 444, 450-54 (Douglas, J., concurring) (1969).

dition created the expectation, discussed at the ratifying conventions, that the development of constitutional precedent would properly constrain judicial review.[15] But it was reasonable to expect that the role of precedent would be more limited than it had been in the common-law experience.

The new national government, in many ways, was remarkably unique. Although the debates were full of references to the states' constitutions, Parliament, the colonial experience, and even the Greek city-states, the national government was not a replication of any one of these, with accrued experiences that would channel judicial interpretation. Indeed, that was the central fear of the Anti-Federalists.

In addition, the principles embodied in the Bill of Rights were broad, evolving, and rooted in natural law. Responding to the public firestorm about the initial lack of a bill of rights in the Constitution, James Wilson said: "Enumerate all the rights of men? I am sure that no gentleman in the late Convention would have attempted such a thing."[16] Dr. Benjamin Rush added that it would be "absurd to frame a formal declaration that our natural rights are acquired from ourselves."[17] The ninth amendment's recognition of rights not enumerated in the first eight amendments evidences this natural law philosophy.

In short, the founders did not propose a bill of rights limited to the "circumstances of the moment." The rights recognized in the Bill of Rights had evolved from the Magna Carta (and before), through the 1628 English Petition of Rights, the 1641 Massachusetts Body of Liberties, the 1689 English Bill of Rights, colonial charters, state constitutions, and state bills of rights.

When the founders placed these rights in trust for future generations and appointed the Supreme Court trustee, they certainly did not intend to freeze these rights in the forms of 1787. To think so is to infer that they also intended to limit all future travel to carriages and all future commerce to canals.

Let me return to the Walnut Street Jail, or its successor. Its debtors have now been released. Isolation can be used, but only for limited periods and purposes. Prisoners must be allowed to visit with family and friends. They are entitled to adequate food, shelter, and clothing; hygienic necessities; reasonable protection from phys-

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15. *See* Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

16. C. BOWEN, *supra* note 2, at 245-46.

17. *Id.* at 247.

ical assault; essential medical care; rudimentary legal help to assert habeas corpus and civil rights claims; and a minimal amount of living and recreational space.

Much of this inmate-specific "bill of rights" has been the consequence of federal "judicial activism," which, in this context, has been increasingly criticized and limited by the current Supreme Court. These activist decisions have sometimes, perhaps often, reversed majoritarian judgments, limited the exercise of local sovereignty, and broken with precedent.

However, in my view, these decisions are in the tradition of the founders. They have diffused and checked extraordinary concentrations of executive and legislative power. As one court explained:

> [T]he most striking aspect of prison, in terms of Fourteenth Amendment litigation, is that prison is a complex of physical arrangements and of measures, all wholly governmental, all wholly performed by agents of government, which determine the total existence of certain human beings (except perhaps in the realm of the spirit, and inevitably there as well), from sundown to sundown, sleeping, waking, speaking, silent, working, playing, viewing, eating, voiding, reading, alone, with others.[18]

In checking centralized governmental power, these decisions have protected a very unpopular and disenfranchised minority from oppression and neglect sanctioned by the majority's representatives, sometimes purely for individual political gain. These decisions also have opened up prisons and jails to public scrutiny, in many instances for the first time.

Such institutional jurisprudence has tailored to today's circumstances principles that motivated the founders' prohibition of "cruel and unusual punishments." This constellation of factors, in my view, justifies judicial activism, particularly in light of the institutional limitations that bind the judiciary.

If we had met with George Washington, Alexander Hamilton, James Madison, James Wilson, and even Luther Martin, after the adoption of the eighth amendment, and asked them whether Congress and the people specifically intended to close the Walnut Street Jail when they proscribed "cruel and unusual punishments," I am sure they would have said "no." If we asked them, however, whether they generally anticipated that abuses other than the inflic-

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18. Morales v. Schmidt, 340 F. Supp. 544, 550 (W.D. Wis. 1972), *rev'd*, 489 F.2d 1335 (7th Cir. 1973).

tion of bodily pain or mutilation might someday be condemned by a United States court as "cruel and unusual," I think they would have affirmed that to be the legitimate business of future generations of judges.