The Role of the Federal Judge in the Constitutional Structure: An Originalist Perspective†

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Good evening. It is an honor to be with you tonight at the Center for the Study of Constitutional Originalism here at the University of San Diego School of Law. Institutions such as the center play an essential role in exploring matters that are fundamental to our system of law. Originalists here and elsewhere have done much to shed light on the meaning of the United States Constitution. Such work has resulted in legal thinking and decisionmaking that is sounder and more faithful to our constitutional heritage. The law is much the better for the efforts of the center and its originalist forebears.

It is also a special privilege to deliver a lecture sponsored by the Hugh and Hazel Darling Foundation. Since 1988, the Darling Foundation has done enormous good in furthering the study of the law here in the State of California. Through scholarships, endowments for facilities, and lecture

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sponsorships at law schools across the state, the foundation has produced a legacy most worthy of its namesakes.

I hope to honor that legacy tonight by exploring a feature of originalism that is treated less often than some others. When jurists and scholars discuss the subject, they often have in mind the original meaning of the Constitution's words and clauses. But originalism speaks not just of the meaning of the Constitution's textual provisions. It speaks also of the structure established by the Constitution, of the role that each branch plays in that structure, and of the respect that the federal branches owe to the states and to the people. Originalism does not just tell us that certain words or phrases mean certain things. It also tells us that the Constitution establishes an order to our government and that the Constitution leaves many questions open—not to be decided by appointed judges with life tenure but, rather, to be decided by the political branches and by the people.

Just as judges must take care to apply laws and precedents faithfully, they must also respect the limits on their authority and their place in the structure established by the Constitution. Our system of government is, after all, a democratic one and thus is not a system in which the judiciary is supreme. The point was made well by Judge Robert Bork more than forty years ago. As he put it, "If the judiciary [were] supreme, able to rule when and as it sees fit"—rather than ruling in keeping with the limits imposed by the Constitution—then our "society is not democratic."[1] Judges, after all, "are citizens upon whom we delegate the responsibility of *interpreting* our laws."[2] That limited task does not include the authority to say that the law is "whatever judges want it to mean."[3] When judges move beyond their limited role, they undermine the core of our democratic system, which is, after all, designed to allow the people to resolve disputes on matters left open by the Constitution.

So join me now in examining some of the structural features of our Constitution. And let's do so by focusing upon cases that have come before my court—the United States Court of Appeals for the Ninth Circuit, the second highest federal court in the land, inferior only to the Supreme Court of the United States. My goal is to present, in modest outline, an originalist perspective on the federal judge's role, particularly my role as a circuit judge, in the constitutional order.

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1. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2 (1971).
2. Diarmuid F. O'Scannlain, *Judging and Democracy*, 89 KY. L.J. 563, 566 (2001) (emphasis added).
3. *Id.*

As we will soon see, my court's august status does not mean that we always get it right. We usually do, but sometimes we fall short. I will discuss some cases that, in my view, fall into each category. My aim in doing so is not to applaud some or to denigrate others but to emphasize that it is important for federal judges to remember their limited role in the constitutional structure.

I.

First, let's explore the relationship between the federal courts and Congress.

A.

As we all know, federal legislation often addresses politically charged or policy-laden judgments. The first article of the Constitution entrusts these judgments largely to Congress. Article I enumerates some of the powers to make these judgments. Congress may, for example, "lay and collect Taxes,"[4] "borrow Money on the credit of the United States,"[5] and "regulate Commerce with foreign Nations, and among the several States."[6] Other powers are implied because they are "necessary and proper for carrying into Execution" enumerated powers.[7]

Congress's authority is, to be sure, circumscribed. Article I grants the powers that the people have entrusted to Congress; indeed, all powers not thus enumerated have been retained by the people or the states.[8] As Chief Justice Rehnquist once explained, under our system "[t]he people are the ultimate source of authority; they have parceled out the authority

4. U.S. CONST. art. I, § 8, cl. 1.
5. *Id.* art. I, § 8, cl. 2.
6. *Id.* art. I, § 8, cl. 3.
7. *Id.* art. I, § 8, cl. 18.
8. The Tenth Amendment makes this point explicitly: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.* amend. X. As so very recently explained by our current Chief Justice,

> The[] affirmative prohibitions [contained in the Bill of Rights] come into play . . . only where the Government possesses authority to act in the first place. If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) (Roberts, C.J.).

that originally resided entirely with them by adopting the original Constitution and by later amending it."[9] Other limitations on Congress are set forth in the Bill of Rights, starting with the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press."[10] These restrictions are familiar to us all.

But unless Congress exceeds its authority or trespasses on a protected area, judges are bound to respect its decisions—no matter what policy disagreements they may have with Congress's choices. Article III, after all, vests federal courts only with the "judicial Power."[11] That is a limited and specific charge. The judicial power, as Professor Philip Hamburger has explained, "was originally understood to mean essentially what it had meant in England: the power of courts to decide cases 'in accord with the law of the land.'"[12] It was quite clearly not the power to decide cases "according to [a judge's] personal values or individual notions of justice."[13]

Thus, "if the popular branches of government . . . are operating within the authority granted to them by the Constitution, their judgment and not that of [judges] must . . . prevail."[14] Judges are, after all, unelected and serve indefinitely. These features are not conducive to a policymaking role. As Chief Judge Frank Easterbrook has put it, "[O]ur Constitution's design is to keep policymakers on short temporal leashes. Judges don't stand for election, and it follows that they can't adopt their own legislative proposals."[15] Those who make policy, moreover, "ought to have at least some connection with popular feeling."[16] That is, at least, the basic underpinning of our constitutional system, under which the people—not the judges—control their own fate.

B.

This notion requires judges at times to uphold congressional decisions that seem unwise or strange. Take, as an example, a dispute my court

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9. William H. Rehnquist, In Memoriam, *The Notion of a Living Constitution*, 29 HARV. J.L. & PUB. POL'Y 401, 404 (2006) (summarizing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

10. U.S. CONST. amend. I.

11. *Id.* art. III, § 1.

12. Diarmuid F. O'Scannlain, *The Role of the Federal Judge Under the Constitution: Some Perspectives from the Ninth Circuit*, 33 HARV. J.L. & PUB. POL'Y 963, 964 (2010) (quoting PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 17 (2008)).

13. *Id.*

14. Rehnquist, *supra* note 9, at 404.

15. Frank H. Easterbrook, *Judges as Honest Agents*, 33 HARV. J.L. & PUB. POL'Y 915, 919 (2010).

16. Rehnquist, *supra* note 9, at 406.

once considered over the proper labeling of chickens for sale. At issue was whether a food retailer could label chickens "fresh" when those chickens had been frozen—and thus were, quite literally, not fresh. California law prohibited the practice of labeling chickens stored below twenty-six degrees Fahrenheit as "fresh."[17] Federal law, however, allowed chickens to be labeled "fresh" when they had been stored at temperatures just above zero degrees Fahrenheit.[18] Applying principles under the Constitution's Supremacy Clause—which commands that valid federal laws prevail over conflicting state laws[19]—we ruled that the federal law prevailed over California's rule.[20]

I wrote separately in the case to underscore the oddity of the result we had just reached and also to reaffirm that Congress is permitted to pass odd laws or to promote unwise policies. Our decision—allowing deep-frozen chickens to be labeled "fresh" and allowing that view to prevail over a far more accurate view—was clearly "absurd" from a typical shopper's perspective.[21] But I explained that, in this case, as in many others, Congress had the authority to allow the absurd: doing so did not trespass on protected rights, did not draw invidious distinctions, and did not otherwise exceed Congress's authority. And although California had imposed a more sensible rule, the Constitution's Supremacy Clause makes clear that when federal and state laws conflict, federal law trumps. That clause makes the legitimately passed "Laws of the United States . . . the supreme Law of the Land"—"any Thing in the . . . Laws of any State to the Contrary notwithstanding."[22] That being so, my court's duty was to "affirm th[e] absurd[ ]."[23]

C.

Now, when faced with disputes such as the frozen chicken case, judges are of course tempted to take it upon themselves to reach a decision that promotes what is, by their lights, the best policy. But that is not the

17. Nat'l Broiler Council v. Voss, 44 F.3d 740, 742–43 (9th Cir. 1994) (per curiam) (discussing CAL. FOOD & AGRIC. CODE § 26661 (West 2001)).
18. *See id.* at 745.
19. *See* U.S. CONST. art. VI, cl. 2. *See generally* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000) (discussing preemption and the overlap of state and federal law).
20. *Voss*, 44 F.3d at 749.
21. *Id.* (O'Scannlain, J., specially concurring).
22. U.S. CONST. art. VI, cl. 2.
23. *Voss*, 44 F.3d at 749 (O'Scannlain, J., specially concurring).

judge's place. As Professor—and former federal judge—Michael McConnell has explained,

> [A]n essential element of responsible judging is a respect for the opinions and judgments of others, and a willingness to suspend belief, at least provisionally, in the correctness of one's own opinions, especially when they conflict with the decisions of others who have, no less than judges, sworn an oath to uphold and defend the Constitution.[24]

When judges make it their task to promote their favored policies, they forget the role that has been entrusted to them.

I recently had occasion to speak to this in a case called *Log Cabin Republicans v. United States*.[25] The case involved a constitutional challenge to the congressionally enacted "Don't Ask, Don't Tell" policy. That policy, as many will recall, barred from military service those who had declared themselves to be homosexual or were known to have engaged in homosexual acts.[26]

Some background to this case is important. The Constitution entrusts matters of military policy to Congress and the President. Article I grants Congress the power "[t]o declare War," "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces."[27] Article II specifies that the President has the power to command these forces as "Commander in Chief of the Army and Navy of the United States."[28] The Constitution grants no similar powers to the federal courts; it vests the courts, as we have observed, with only "[t]he judicial Power of the United States."[29]

In keeping with that parceling of authority, the Supreme Court has made clear that lower federal courts should take great care when evaluating the constitutionality of congressional enactments regarding the organization of the military. The Court has explained that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and [to] support armies and [to] make rules and regulations for their governance is challenged."[30] The

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24. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1292 (1997).

25. 658 F.3d 1162 (9th Cir. 2011) (per curiam). For an opinion dealing with a similar issue, see Witt v. Dep't of the Air Force, 548 F.3d 1264, 1265 (9th Cir. 2008) (O'Scannlain, J., dissenting from the denial of rehearing en banc).

26. *See Log Cabin*, 658 F.3d at 1165.

27. U.S. CONST. art. I, § 8.

28. *Id.* art. II, § 2, cl. 1.

29. *Id.* art. III, § 1.

30. Rostker v. Goldberg, 453 U.S. 57, 70 (1981).

Constitution, through its channeling of authority, reflects that judges are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[31]

In adopting "Don't Ask, Don't Tell," Congress and the President carefully exercised the authority that the Constitution entrusted to them. President Clinton signed "Don't Ask, Don't Tell" into law after seven months of review, after nine days of hearings before the Senate Armed Services Committee that involved testimony from nearly fifty witnesses, after five days of hearings before the House Armed Services Committee, after an exhaustive review by the Defense Department and the White House, and after a full debate in both houses of Congress.[32] This was not a policy adopted in haste or in passion.

Despite all this, in the *Log Cabin* case, a federal district court in Riverside, California, held that "Don't Ask, Don't Tell" violated principles of substantive due process. In the district court's view, the policy violated a fundamental right to an "autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[33] In reaching that conclusion, the district court afforded no deference to Congress or to the executive branch.

The United States appealed. By the time the case reached our Ninth Circuit three-judge panel, Congress had legislatively repealed the "Don't Ask, Don't Tell" policy. The panel unanimously concluded that the case before us had thus become moot.[34]

In a special concurrence, I emphasized that the district court had not abided its duty to apply established Supreme Court law. That law informs us that "[j]udging the constitutionality of an Act of Congress is 'the gravest and most delicate duty' that federal courts are called upon to perform."[35] That duty is all the greater on matters of military policy, where courts owe Congress special deference. Further, I noted, the

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31. Chappell v. Wallace, 462 U.S. 296, 305 (1983) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962)).

32. *See* Thomasson v. Perry, 80 F.3d 915, 921–23 (4th Cir. 1996) (en banc).

33. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 964–66 (C.D. Cal. 2010) (quoting Lawrence v. Texas, 539 U.S. 558, 562 (2003)) (internal quotation marks omitted), *vacated as moot per curiam*, 658 F.3d 1162 (9th Cir. 2011).

34. Log Cabin Republicans v. United States, 658 F.3d 1162, 1167–68 (9th Cir. 2011) (per curiam).

35. *Id.* at 1170 (O'Scannlain, J., specially concurring) (quoting *Rostker*, 453 U.S. at 64).

Supreme Court demands great care on matters of substantive due process.[36] Courts may credit substantive due process claims only after making sure that an asserted right is "deeply rooted" in this nation's history and tradition.[37]

Yet rather than apply these established principles, in *Log Cabin* the district court reached a decision based upon a policy preference. In doing so, it disregarded the considered policy choices made by Congress and the President acting in keeping with their constitutional authority. The district court's approach failed to heed Supreme Court case law and ignored the deference that courts owe Congress and the President on matters of military policy.[38] Originalists deeply believe that judges must respect such policy choices—particularly when the Constitution has specifically entrusted such choices to the other branches.

D.

When judges neglect the limitations on the role that has been entrusted to them, the results can be breathtaking—and quite at odds with the aims of the Framers.

A well-known case illustrates the point. In *Newdow v. U.S. Congress*, my court famously held that Congress's decision to add the words "under God" to the Pledge of Allegiance violated the First Amendment's Establishment Clause.[39]

Notwithstanding some confusing Supreme Court case law, such a conclusion clearly departed from the original meaning of the clause, which was meant to prevent government coercion on religious matters—not to remove mentions of God from public life. As Professor McConnell has observed, at the time of the Framing, "legal compulsion to support or participate in religious activities" was regarded as "the essence of an establishment."[40] The *Newdow* decision failed to recognize this and misinterpreted Supreme Court precedents.

As I explained in a dissent from our court's denial of the rehearing en banc, the Supreme Court has blessed, so to speak, classroom readings

36. *Id.*

37. *Id.* at 1169 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) (internal quotation marks omitted).

38. *See id.* at 1173–74.

39. 292 F.3d 597, 612 (9th Cir. 2002), *amended by* 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

40. Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 938 (1986).

that refer to God.[41] The Court had upheld, for example, classroom recitations of the Declaration of Independence, which repeatedly refers to "the Deity."[42] Members of the Court have also cited the pledge specifically as an example of an acceptable public reference to God.[43] In striking down the pledge, our *Newdow* opinion charted territory well outside the settled constitutional landscape.

To my court's credit, we eventually got it right. After the Supreme Court vacated the *Newdow* decision because the plaintiff lacked standing to sue,[44] my court held the pledge to be constitutional after all.[45] Yet my court's initial handling of the *Newdow* case still highlights the danger posed when judges take up the policymaking cudgel, assuming for themselves the powers that the Constitution entrusts to Congress. Originalists believe that judges must leave such matters where the Constitution leaves them and must not allow their policy views to guide judicial decisions.

II.

So far, we have explored some of the constitutional limits of the judge's role in relation to Congress. Let's now focus on another structural feature of our Constitution: the Constitution leaves most power to the states and the people.

A.

The Tenth Amendment reflects this commitment. It declares, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[46] This text is clear that the federal government possesses only the powers that the people have delegated to it. All other powers—that is to say, most powers—remain with the states and the people. State

41. Newdow v. U.S. Cong., 328 F.3d 466, 471–72 (9th Cir. 2002) (O'Scannlain, J., dissenting from the denial of rehearing en banc).
42. Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962).
43. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 602–03 (1989); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 304 (1963) (Brennan, J., concurring); *Engel*, 370 U.S. at 440 n.5 (Douglas, J., concurring).
44. *Elk Grove*, 542 U.S. 1, 5 (2004).
45. Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1012 (9th Cir. 2010).
46. U.S. CONST. amend. X.

legislation and popular initiatives therefore deserve significant deference and leeway from courts.

In a similar vein, the Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[47] The Constitution thus recognizes that the people themselves are the ultimate guardians of their own rights. To ensure that the people can protect their rights, the Constitution leaves great power in their hands.

Judges, to be sure, have a role in safeguarding constitutionally protected rights, but we are bound to respect the will of the people in otherwise ordering and restricting people's lives through legislation. We therefore must remember that the Constitution leaves most such matters to the people. Of course, the decisions the people make in exercising this authority will always displease some. Yet, under the Constitution, unless these decisions infringe fundamental rights, draw invidious distinctions, or transcend some other constitutional limitation, federal courts must respect them.

B.

It is tempting for judges to exceed these limitations on their authority, especially when states enact policies that judges find unwise. Consider as an example a case called *Coalition for Economic Equity v. Wilson.*[48]

In 1996, the people of California passed Proposition 209, a state constitutional amendment outlawing state discrimination and preferential treatment in government employment, education, and contracting "on the basis of race, sex, color, ethnicity, or national origin."[49] This measure faced a legal challenge on the grounds that it violated—of all things—the Equal Protection Clause of the Fourteenth Amendment. Before the law had even been implemented, a district court preliminarily enjoined it as a likely violation of that clause.[50] In barring these groups from securing *preferential* treatment, the district court concluded, the amendment imposed an unconstitutional political burden on them relative to other citizens.[51]

As I explained for a Ninth Circuit panel on appeal, this was a misguided analysis. Here, the people of California had sought to honor the goal of

47. *Id.* amend. IX.
48. 122 F.3d 692 (9th Cir. 1997) (O'Scannlain, J.).
49. *Id.* at 696 (quoting CAL. CONST. art. I, § 31(a)).
50. *Id.* at 697–98 (discussing Coal. for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996)).
51. *Id.* at 698.

the Equal Protection Clause: to stamp out government-sponsored discrimination. To thwart their will was to thwart the Constitution.

As I wrote, that is not what judges do:

> Judges apply the law; they do not sua sponte thwart wills. If Proposition 209 affronts the federal Constitution—the Constitution which the people of the United States themselves ordained and established—the court merely reminds the people that they must govern themselves in accordance with principles of their own choosing. If, however, the court relies on an erroneous legal premise, the decision operates to thwart the will of the people in the most literal sense: What the people of California willed to do is frustrated on the basis of principles that the people of the United States neither ordained nor established.[52]

A contrary view was expressed well by an attorney for those challenging Proposition 209. As he argued to us, "The people of the State of California are not entitled to make a judgment as to whether compelling state interests [related to affirmative action programs] have been vindicated. That is for the courts."[53]

What an astonishing statement! Yet, it expresses well a view taken by many judges. If the Constitution does not trust such vital judgments largely to the people, then it failed remarkably at its goal: namely, to create a stable system of self-government. As we put it at the time, "If the federal courts were to decide what the interests of the people are in the first place, judicial power would trump self-government as the general rule of our constitutional democracy."[54]

Not all members of the Ninth Circuit agreed.[55] After the full court declined to hear the case en banc, one dissenting judge accused the panel of "neglect[ing its] duty in favor of a path of conservative judicial activism" and invited the Supreme Court to "correct" what he viewed as "the panel's error."[56] The Supreme Court declined that invitation by denying certiorari,[57] and our decision still stands today.

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52. *Id.* at 699.
53. *Id.* at 709 (internal quotation marks omitted).
54. *Id.*
55. *See id.* at 711 (Schroeder, J., dissenting from the denial of rehearing en banc); *id.* at 712 (Norris, J., respecting the denial of rehearing en banc); *id.* at 717 (Hawkins, J., commenting on the denial of rehearing en banc).
56. *Id.* (Norris, J., respecting the denial of rehearing en banc).
57. Coal. for Econ. Equity v. Wilson, 522 U.S. 963 (1997).

C.

The judicial tendency to second-guess the considered judgments of the people and the states seems especially acute in cases dealing with hot-button social issues. Yet these are the issues on which constitutional federalism leaves the people the broadest authority to reach their own judgments. The Constitution, after all, does not take a view on many contentious policy matters. By its silence, the Constitution has left those matters to the people.

States, moreover, may widely diverge in their judgments. Our enormous demographic, religious, and cultural diversity, after all, begets a diversity of values. The differences in law between states such as New York and Texas do not come about randomly; given the apparently different values and views of the citizens of those states, it is reasonable and expected for them to address social issues in different ways. When judges impose their own values and views on the states and the people, they do violence to our constitutional structure.

Take, as an example, the case of *Compassion in Dying v. Washington*.[58] In 1991, the State of Washington voted to reject Initiative 119, a measure that would have legalized physician-assisted suicide. The Constitution says nothing about physician-assisted suicide, and it is not a practice that our country has generally viewed favorably. But rather than respect Washington's decision, a majority of an eleven-member Ninth Circuit panel determined that the people had no say in the matter. The Due Process Clause, our court held, protects a "right to die," an ability to choose "the time and manner of one's death,"[59] and an ability to "hasten[] one's death."[60] My colleagues arrived at this conclusion in light of, as they put it, "changing values based on shared experience."[61]

With respect, this line of reasoning is starkly at odds with the structure of our constitutional system. To begin with, "changing values based on shared experience" tell judges little about the fixed original meaning of the Federal Constitution. As Justice Scalia once put it, "The purpose of constitutional guarantees—and in particular those constitutional guarantees of individual rights that are at the center of [much] controversy—is . . . to prevent the law from reflecting certain changes in original values that the society adopting the Constitution th[ought] . . . undesirable."[62] Second, to

58. 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd on other grounds*, Washington v. Glucksberg, 521 U.S. 702 (1997).

59. *Id.* at 816 (internal quotation marks omitted).

60. *Id.* at 830.

61. *Id.* at 803.

62. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (emphasis omitted).

the extent the Constitution allows the law to recognize changing values, it entrusts these decisions to the people and to the states—not to judges.[63] Third, whatever it may have claimed, my court's decision showed *no* respect for changing values. It instead imposed one rigid set of values—the values of an ad hoc court majority that a state electorate could not overcome. My colleagues had, quite simply, "usurp[ed] the state legislative function, and in so doing silence[d] the voice of the people of Washington."[64]

In *Washington v. Glucksberg*, the Supreme Court unanimously reversed that Ninth Circuit decision.[65] In doing so, the Court reminded us that when "Americans are engaged in an earnest and profound debate about the morality, legality, and practicality" of contentious matters such as physician-assisted suicide, courts should "permit[ ] [such] debate to continue."[66]

There is, I would add, no reason for judges to short-circuit state efforts to grapple with these issues. When people desire physician-assisted suicide, they are quite capable of authorizing the practice themselves. Before the *Compassion in Dying* decision, my own State of Oregon passed legislation similar to the initiative rejected years prior in Washington. "Oregonians did not need the 'good offices' of the Ninth Circuit to make their legislative decision."[67] The same goes for the many other matters on which the Constitution, through its silence, leaves the people and the states the right to choose among a wide range of choices.

III.

Up until now, we have discussed the courts' relationship in our constitutional system to Congress, to the states, and to the people. A less discussed though still important relationship is that between the courts and the executive branch.

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63. *Cf. id.* ("A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect 'current values.' Elections take care of that quite well.").

64. Compassion in Dying v. Washington, 85 F.3d 1440, 1443 (9th Cir. 1996) (O'Scannlain, J., dissenting from order rejecting request for rehearing en banc by the full court).

65. 521 U.S. 702, 735–36 (1997).

66. *Id.* at 735.

67. *Compassion in Dying*, 85 F.3d at 1442 (O'Scannlain, J., dissenting from order rejecting request for rehearing en banc by the full court).

A.

Article II of the Constitution contains several grants of executive authority.[68] Some are reasonably explicit. As mentioned earlier, the President is appointed the "Commander in Chief of the Army and Navy of the United States."[69] Other grants of authority are broader, such as the "vest[ing]" of the "executive Power" "in a President of the United States of America."[70] To the Framers, the term *executive power* was not abstract. Rather, it was rooted in the executive's traditional sovereignty in matters such as foreign affairs and the administration of the national government's functions.

Just as important as the Framers' establishment of an executive authority was their decision to vest that authority in a single President. That decision was made to overcome a defect of the Articles of Confederation: the diffusion of executive powers to the many members of the Continental Congress. The new Constitution's more unitary executive, the Framers hoped, would promote more efficient and effective administration of national affairs.

When judges interfere with the administration of executive affairs, they undermine that efficiency and effectiveness. Sometimes such interference may well be justified. But often not, and the Supreme Court has therefore counseled judges to allow the executive branch wide discretion in discharging its core duties.

B.

For example, the Supreme Court has emphasized that judicial respect for the executive branch must be especially generous on matters of prosecutorial discretion. Article II directs the executive, after all, to "take Care that the Laws be faithfully executed."[71] In keeping with this framework, the Supreme Court has explained that

> the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.[72]

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68. *See generally* Saikrishna Bangalore Prakash, *A Taxonomy of Presidential Powers*, 88 B.U. L. REV. 327 (2008) (discussing the sources, checks, and exclusivity of presidential power).

69. U.S. CONST. art. II, § 2.

70. *Id.* art. II, § 1.

71. *Id.* art. II, § 3.

72. Wayte v. United States, 470 U.S. 598, 607 (1985).

Unfortunately, courts sometimes interfere with the most basic decisions made by prosecutors. My court, for example, recently directed the executive branch to tell the court whether it would continue to prosecute several specific immigration cases.[73] The court set a deadline and demanded that the government inform the court by that date of its decision whether or not to exercise discretion.[74]

It simply is not the place of the federal courts to micromanage such decisions by prosecutors. As I explained in dissent, federal judges "have only the slimmest authority even to review the exercise of prosecutorial discretion," and thus "we certainly lack authority to demand a pre-emptive peek into whether and when . . . the executive branch will exercise such discretion."[75] This invasive activity is a first step toward the judiciary undertaking a full-scale review of core executive functions. By assuming such authority, my court "needlessly catapult[ed] [itself] into a realm of decisionmaking from which it is constitutionally walled off."[76] The broad prosecutorial authority entrusted to the executive branch counsels against this sort of judicial meddling.[77]

C.

The same goes for the exercise of other executive functions, such as prison administration. Prison life is, of course, quite different from the civilian life of the federal judge. The focus is not liberty but order and discipline. Judges are ill-suited to make on-the-ground determinations about such matters. The Supreme Court has therefore cautioned that judges should afford prison officials significant leeway to maintain order and discipline within prisons.[78]

Yet judges often forget this. In one recent case, my court ruled that a private publisher had a First Amendment right to require *the government*

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73. *See* San Agustin v. Holder, 668 F.3d 672 (9th Cir. 2012) (order).
74. *Id.*
75. *Id.* (O'Scannlain, J., dissenting).
76. *Id.* at 673.
77. *Id.* Similarly, in *United States v. Jenkins*, 518 F.3d 722 (9th Cir. 2008), I disagreed with my colleagues' decision limiting prosecutors' ability to charge individuals for crimes they acknowledge having committed during trial testimony for unrelated offenses. Such decisions, I wrote, "disrupt the government's ability to manage its criminal caseload by impermissibly encroaching upon prosecutorial discretion." *Id.* at 728 (O'Scannlain, J., dissenting from the denial of rehearing en banc).
78. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 84–85 (1987).

to distribute his free criminal justice magazine to prison inmates who had not requested it.[79] As one of my colleagues pointed out in dissent, the ruling forced law enforcement officials "either to allow all unrequested mail to reach inmates or to make a case by case determination of the quality of the publication."[80] This placed an enormous, unnecessary burden on the government, whose interest in managing its prisons and monitoring prisoner communication is quite strong. What is more, "a jail cell is quite clearly not a public forum" meriting full-scale First Amendment protections.[81]

With respect, judges can issue these rulings only by forgetting their role. As the Supreme Court has made clear, "Prison administration is . . . a task that has been committed to the responsibility of [the executive and legislative] branches, and separation of powers concerns counsel a policy of judicial restraint" on such matters.[82] Only by disregarding the need for restraint can courts make decisions so at odds with our constitutional structure.

IV.

Having argued that a federal judge must, for good originalist reasons, respect Congress, the executive branch, the states, and the people, the remaining question is, what respect do we federal judges owe the Supreme Court?

A.

Article III of the Constitution establishes "one supreme Court" and allows for the creation of "inferior Courts,"[83] which now include the thirteen circuit courts of appeals and the ninety-four district courts. The simplest point to follow from this hierarchical structure is that "the decisions of a superior court . . . bind the inferior courts."[84]

This is true even when the Supreme Court's decisions depart from the Constitution's original meaning. This too follows from the structure of the judiciary under the Constitution. Under that structure, the judiciary as a whole has a responsibility to interpret the text of the law faithfully—to exercise, in the words of Article III, the "judicial

79. Hrdlicka v. Reniff, 631 F.3d 1044, 1049 (9th Cir. 2011).
80. *Id.* at 1057 (N.R. Smith, J., dissenting).
81. Hrdlicka v. Reniff, 656 F.3d 942, 946 (9th Cir. 2011) (O'Scannlain, J., dissenting from the denial of rehearing en banc).
82. *Turner*, 482 U.S. at 85.
83. U.S. CONST. art. III, § 1.
84. Colby v. J.C. Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987) (Posner, J.).

Power."[85] But this duty is not shouldered by each federal judge as an individual; rather, each judge operates in a hierarchical system under which superior courts' views prevail. Judges who serve on inferior courts must treat higher court precedent as legitimate, leaving disputes to be resolved at the proper level in the judicial structure. Thus, exercising the judicial power means not only interpreting the words of the Constitution as faithfully as possible but also interpreting those words under the constraints imposed by our hierarchical constitutional system.

B.

Some examples may help to illustrate this point.

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments."[86] Some Supreme Court Justices have argued that the Court's Eighth Amendment cases depart from the original meaning of the words "cruel and unusual punishments." Consider, in this vein, *Graham v. Florida*.[87] In that case, the Supreme Court held that the Eighth Amendment prohibited sentencing a minor to life in prison without the possibility of parole on a nonhomicide offense.[88] In dissent, Justice Thomas stated, "It is by now well established that the Cruel and Unusual Punishments Clause was originally understood as prohibiting torturous '*methods* of punishment.'"[89] But, "[m]ore recently," he continued, the Supreme Court "has held that the Clause authorizes it to proscribe not only methods of punishment . . . but also any punishment that the Court deems 'grossly disproportionate' to the crime committed."[90] "This latter interpretation," Justice Thomas contended, "is entirely the Court's creation."[91]

Justice Thomas may well be right. But any rightness of his dissenting view does not affect my constitutional duty as a circuit judge. Whatever the inferior federal court jurist might think about the original meaning of the Constitution, the Supreme Court's view trumps that view. When the Supreme Court has rejected the original meaning of the Constitution on a particular issue, inferior court judges may no longer decide cases based

85. U.S. CONST. art. III, § 1.
86. *Id.* amend. VIII.
87. 130 S. Ct. 2011 (2010).
88. *Id.* at 2034.
89. *Id.* at 2044 (Thomas, J., dissenting) (internal quotation marks omitted).
90. *Id.*
91. *Id.*

upon the original understanding. Rather, we must interpret the law in light of the principles set forth by the Supreme Court.

I recognize that this approach—which compels a judge to reach decisions that are at odds with original meaning—may be painful to the originalist. But, as I have emphasized, originalism speaks not only of the meaning of the Constitution's words and clauses but also of the structure and limitations that the Constitution establishes. By honoring the judicial hierarchy that the Constitution puts in place, the originalist promotes the Framers' goals—and thereby furthers the goals of originalism.

C.

As a further illustration, consider again the *Newdow* Pledge of Allegiance case that I discussed earlier.

The Establishment Clause was meant to prevent *Congress* from establishing a religion. Indeed, that is what the text says: "Congress shall make no law respecting an establishment of religion."[92] The clause was not meant to encroach upon local decisions regarding religious establishment. After all, several states—Connecticut, Georgia, Maryland, Massachusetts, New Hampshire, and South Carolina—had established churches when the First Amendment was adopted, and they maintained these churches for years thereafter.[93] Moreover, as noted before, the clause was meant to prevent government-sponsored coercion, not mere mentions of God in public life and, for that matter, not mere government endorsement of religion.

When called upon to decide Establishment Clause cases, however, these originalist understandings do not control my decisions. That is because the Supreme Court has not adopted all of these views and has, in fact, rejected some of them. Only for the last sixty-five years has the Supreme Court maintained an Establishment Clause jurisprudence built on the popular "wall of separation" interpretation offered by Thomas Jefferson—who, it should be noted, had no part in the drafting of the Establishment Clause and was abroad when it was enacted.[94] And the Court has even applied the Establishment Clause to action at the local and state levels notwithstanding its facial application to Congress alone.

The debate relevant to inferior federal court judges hearing Establishment Clause cases is, therefore, *not* over whether church-state separationism is

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92. U.S. CONST. amend. I.

93. *See* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1132 & n.97 (1988).

94. *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (internal quotation marks omitted).

the best understanding of the First Amendment but over how to apply the Supreme Court's separation-based doctrine in the case at hand. Thus, my dissenting view in *Newdow* did not rest on the Establishment Clause's original meaning. It rested instead on what I viewed as my court's grave errors in applying the Supreme Court's own Establishment Clause precedents. That, once again, was my role as a circuit judge.

Any judge on an inferior federal court may, of course, respectfully encourage changes to controlling doctrines. I have done so in addressing several of the Establishment Clause precedents just discussed.[95] But beyond expressing my concerns with the precedents at issue in a case, I have no authority under our Constitution to disregard them.

CONCLUSION

Let me conclude by recognizing that limitations are always frustrating to those subject to them. They can be especially so to federal judges, who often regard themselves as unusually enlightened.

But these limits are imposed by our Constitution, and they serve an important function. Arbitrary or policy-laden decisions by courts erode our constitutional structure. They foster dependence on judges and thus promote the surrender of much of the authority the people retained when the Constitution was ratified. To return to Judge Bork's observation, a society is not really democratic if the judiciary is supreme.[96] To maintain a democratic society, judges thus must "suspend belief" in the correctness of their own policy views and respect the decisions of policymakers who, "no less than judges," have "sworn . . . to uphold and [to] defend the Constitution."[97] Under our system, "if the popular branches of government—state legislatures, the Congress, and the President—are operating within the authority granted to them by the Constitution, their judgment and not that of [judges] must . . . prevail."[98] This is the essence of originalism.

When judges forget their role in our constitutional structure, they reach decisions such as the one in the *Log Cabin* case, where the district court

95. *See, e.g.*, Separation of Church and State Comm. v. City of Eugene, 93 F.3d 617, 622 (9th Cir. 1996) (O'Scannlain, J., concurring in the result).
96. Bork, *supra* note 1, at 2.
97. McConnell, *supra* note 24, at 1292.
98. Rehnquist, *supra* note 9, at 404.

"invalidated a considered congressional policy and imposed a wholly novel view of constitutional liberty on the entire United States."[99]

That is not the system that the Framers established. The Framers created a judiciary that would exercise "care, caution, and humility"[100]—that would exercise only the "judicial Power" and would respect the legislative and executive authority of its coordinate branches. When judges do not fulfill that role, they erode the rule of law and corrode our democratic system. As I put it in *Log Cabin*, "When judges sacrifice the rule of law to find rights they favor . . . the people may one day find that their new rights, once proclaimed so boldly, have disappeared because there is no longer a rule of law to protect them."[101] Our Constitution—through its structural arrangements as well as its specific guarantees—protects our rights by protecting our democratic form of government. We judges must never forget our place in our constitutional structure. This is what constitutional originalism is all about, and so I commend USD's Center for the Study of Constitutional Originalism and the Darling Foundation for reminding us of that.

Thank you.

99. Log Cabin Republicans v. United States, 658 F.3d 1162, 1174 (9th Cir. 2011) (O'Scannlain, J., specially concurring).

100. *See id.*

101. *Id.*