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LECTURE

POLITICIANS IN ROBES: THE SEPARATION OF POWERS AND THE PROBLEM OF JUDICIAL LEGISLATION

*The Honorable Diarmuid F. O'Scannlain**

THANK you for inviting me to speak here today, and for the warm welcome. As an alumnus and recipient of an LLM in Legal Process, it is always a pleasure to come back to the Grounds here in Charlottesville, and an honor to be at the University of Virginia School of Law. Those of us in the legal profession know Virginia's reputation for producing exceptional lawyers, including former law clerks of mine, who have served our country in a great many ways.

Today, I want to discuss how our constitutional structure affects the work of a federal judge.¹ Specifically, I hope to explore a troubling trend in our country by which litigants, the American public, and, I dare say, members of the bench themselves have come to regard the judicial branch as an alternative forum for achieving political goals. Think affirmative action, abolition of the death penalty, abortion, gun control, physician-assisted suicide, or same-sex marriage. The list goes on. This trend, I fear, raises vital questions about the civic health of our country and challenges the constitutional structure our Founders created.

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¹ The views expressed herein are my own and do not necessarily reflect the views of my colleagues, the United States Court of Appeals for the Ninth Circuit, or the Judicial Conference of the United States.

Before I say any more, let me make clear that I speak only for myself, and not on behalf of the United States Court of Appeals for the Ninth Circuit, the court on which I sit. I must also emphasize that my remarks today should not be construed as considerations or decisions about cases that could come before me. Because the problem I address is quite pervasive, the themes are relevant to many contemporary and salient legal issues that are regularly covered in popular media. But my aim is not to comment on such issues or specific cases. Instead, I hope to undertake a broader analysis of how our constitutional structure speaks directly to the general *role* of the judiciary in deciding (or deciding *not* to decide) these questions.

Of course, to say that the judicial power is limited is not to say that it does not exist, and in numerous cases, federal courts must exercise such power. In the specific context of constitutional adjudication—my focus today²—courts are often asked to assess the legitimacy of popularly enacted democratic laws. Since *Marbury v. Madison*, such judicial review has been recognized as part and parcel of what Chief Justice Marshall called the judicial “duty.”³ Acting pursuant to this duty, courts are regularly injected into contentious social debates as varied and diverse as those just mentioned.

Most troubling is that litigants often bring these cases to the courts only because they do not want to engage the democratic process, or because they have already lost out in the legislative arena. As one scholar has put it, “Recourse to the courts . . . [is] seen as a natural move for interests disadvantaged in majoritarian legislative politics.”⁴ “Courts are no longer . . . outside of the policy process but more typically now constitute just another . . . stage in the . . . process of policy formation.”⁵ And when judges willingly open their courthouse doors to political litigants seeking to achieve their goals outside the democratic process, litigants take note.

²The problem of judicial legislation can arise in other contexts as well, such as when courts interpret statutes or assess the validity of regulations. In the interest of time, however, my focus here is on constitutional adjudication.

³*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

⁴Julianna S. Gonen, *Litigation as Lobbying: Reproductive Hazards and Interest Aggregation* 4 (2003).

⁵*Id.* at 3; see also Anthony Champagne, *Interest Groups and Judicial Elections*, 34 *Loy. L.A. L. Rev.* 1391, 1393 (2001) (“Interest groups today often draw no distinction between achieving their goals through the courts or through the political process.”).

But this was never the view of the judiciary as envisioned by our Founding Fathers. Unelected members of the federal judiciary, as Justice Rehnquist once said, were never thought to be a “council of revision” “with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country.”⁶

Unless a given legislative enactment violates the original understanding of the Constitution, a judge’s striking it down is nothing more than “an end run around popular government.”⁷ But how, exactly, is one to distinguish such impermissible “judicial legislation”⁸ from the constitutionally legitimate exercise of “the judicial power”?

I suggest that the most effective way to ensure the judicial power is exercised legitimately is to employ a methodology that relies on the Constitution’s text, structure, and history as constraining forces. Without such constraints, judges are nothing more than politicians in robes, free to tackle the social problems of the day based on *avant-garde* constitutional theory or, worse yet, their own personal preferences. While such jurists may often be well meaning, their approach is inconsistent with our government’s history, structure, and framework, and it threatens the ideal of self-rule that we should so dearly cherish.

Troubling though it may be, one can see why turning to the judiciary to achieve one’s political objectives might be appealing. For one, rather than having to persuade a majority of a bicameral legislature, the President, and the public constituencies these elected officials represent, political litigants can limit their focus to a single trial judge, or two judges out of three on a panel of the court of appeals, or five Justices out of nine on the High Court, none of whom were elected.⁹ We know that the constitutionally prescribed process of enacting legislation, involving 536 political players, is difficult and cumbersome—but that is how the Framers designed our system to operate. As my colleague Judge

⁶ William H. Rehnquist, *The Notion of A Living Constitution*, 54 *Tex. L. Rev.* 693, 695–98 (1976).

⁷ *Id.* at 706.

⁸ When I use the term “judicial legislation,” I do not do so literally. Rather, judicial legislation is the phenomenon of judges displacing democratic policy choices in the name of their own policy preferences couched in amorphous constitutional clauses interpreted without the aid of text, structure, and history.

⁹ One can tell a similar story at the state level. See Robert P. Young, Jr., *A Judicial Traditionalist Confronts Justice Brennan’s School of Judicial Philosophy*, 33 *Okla. City U. L. Rev.* 263, 283 (2008).

Kavanaugh has put it, our constitutional structure “tilts toward liberty.”¹⁰ Our preference for liberty and self-rule is undermined when the courtroom is opened as an alternative venue for *lawmaking*. Rather than clearing the carefully constructed “veto gates” that restrain and guide the legislative process, litigants need only win a lawsuit to make their political preferences the law.¹¹

But there are serious consequences to this trend, and while some are almost imperceptible, they are potentially explosive. Using the courts to enact public policy, while perhaps effective for political operatives in the short-term, actually threatens, I suggest, the foundational premises of our nation and imposes serious long-term costs.

First, as I will explain in a moment, it violates our Constitution’s structure and our commitment to democratic self-rule. Second, whereas the democratic process allows for the law to change as the will of the people changes, “judicial legislation,” particularly in the constitutional context, tends to freeze the law in place. Once the judiciary strikes down a law as unconstitutional, it can be nearly impossible to reverse this “judicial veto.” Third, unlike legislatures, which represent broad and varying interests, enjoy superior fact-finding and information-gathering abilities, and are, as Madison put it, “sufficiently numerous to feel all the passions which actuate a multitude,”¹² courts must consider the issues and facts as framed only by the specific parties before them. In short, courts do not have institutional competence to decide broad questions of public policy.

Finally, when courts act in the place of the legislature, they create perverse incentives for political actors. As courts demonstrate a willingness to legislate, political litigants and interest groups—finding litigation cheaper and easier than engaging the democratic process—will direct their attention (and resources) to the courts. This weakens democratic responsiveness and undermines the electoral process by which we normally hold political actors responsible for their actions. In contrast, when courts limit themselves to their proper constitutional role,

¹⁰ Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 *Notre Dame L. Rev.* 1907, 1908 (2014).

¹¹ See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 *Tex. L. Rev.* 1321, 1339, 1341–42, 1345 (2001).

¹² *The Federalist* No. 48, at 332 (James Madison) (Carl Van Doren ed., 1945).

those pushing for policy changes are forced to engage our country's democratic mechanisms for change.¹³

My lecture today has three main parts. First, I will explore the writings and philosophy of James Madison and his Founding-era contemporaries. Their work product, our great Constitution, speaks to many of the themes I wish to explore today. In particular, I want to demonstrate how the Framers envisioned a limited role for the federal courts that left room for the people to exercise their own self-rule through the democratic branches of government. By making clear that lawmaking is reserved for the people and their representatives—and not the judiciary—the Constitution mandates separation of these powers. Next, I hope to demonstrate that, when considering constitutional cases, an interpretative method that focuses on the text, history, and structure of the Constitution is more effective at protecting the democracy the Framers envisioned. Other interpretative methods, I submit, not only undermine our constitutional structure, but also injure the civic health of our country by enabling and promoting judicial legislation. Finally, I will conclude by offering a few remarks on how the theoretical can be implemented in practice.

I

A

To begin, I will return to the basics—the structure of our federal government as outlined in our Constitution. It is axiomatic that ours is a government designed to separate and to divide power. As James Madison wrote in *The Federalist No. 47*, “[T]he preservation of liberty requires that the three great departments of power should be separate and distinct.”¹⁴ Although the Constitution does not include a specific “Separation of Powers” article, section, or clause, the doctrine is imbedded in the general structure of limited government that the Constitution creates. As the Supreme Court has put it: “The principle of separation of powers was not simply an abstract generalization in the

¹³ See Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* 119–20 (2006) (using the term “democracy-forcing” to describe how certain judicial behavior may have incentive effects on the democratic branches of government).

¹⁴ *The Federalist No. 47*, at 322 (James Madison) (Carl Van Doren ed., 1945).

minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.”¹⁵

Each vesting clause, for instance, denotes a specific and distinct grant of government power.¹⁶ Noted constitutional scholar Professor Gary Lawson has explained:

[T]he Constitution’s three “vesting” clauses . . . effect[] a complete division of otherwise unallocated federal governmental authority among the constitutionally specified legislative, executive, and judicial institutions. Any exercise of governmental power, and any governmental institution exercising that power, must either fit within one of the three formal categories thus established or find explicit constitutional authorization for such deviation. The separation of powers principle is violated whenever the categorizations of the exercised power and the exercising institution do not match and the Constitution does not specifically permit such blending.¹⁷

For instance—and of particular relevance here—Article I, Section 1 states that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”¹⁸ Likewise, Article III, Section 2 extends “[t]he judicial Power” to certain “Cases” and “Controversies.”¹⁹ In other words, the Constitution places the power to legislate, the power “to create law,” in the people’s elected representatives and reserves for the judiciary the power to interpret those laws. When courts open their doors to political litigants seeking to achieve their policy objectives via adjudication, it violates the principle of separation that Madison deemed essential to liberty.

The Constitution contains several other provisions (in addition to the Article III Vesting Clause) that separate the judiciary from the legislative and executive branches. For instance, Article III, Section 1 secures for federal judges life tenure and salary protection.²⁰ This constitutionally mandated job security is not merely a fringe benefit of

¹⁵ *Buckley v. Valeo*, 424 U.S. 1, 124 (1976).

¹⁶ See U.S. Const. art. I, § 1; U.S. Const. art. II, § 1, cl. 1; U.S. Const. art. III, § 1 (vesting each branch with its exclusive constitutional authority).

¹⁷ Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 *Calif. L. Rev.* 853, 857–58 (1990) (internal citations omitted).

¹⁸ U.S. Const. art. I, § 1.

¹⁹ U.S. Const. art. III, § 2, cl. 1.

²⁰ U.S. Const. art. III, § 1.

my job, but is designed to shelter us judges. Because our job is merely to interpret the law in a disinterested and unaffected manner, federal judges are protected from external influences. The judiciary, in other words, is specifically designed to be nonresponsive to political pressures; thus, it should not be charged with effectuating broad-based policy change.

Moreover, when the Constitution *does* authorize the political branches—that is, the legislature and the executive—to make law, it includes a detailed set of procedures these branches must follow. When federal judges choose to engage in lawmaking in their own right, they render these constitutionally mandated procedures meaningless. As Professor John Manning has argued, “[T]he sharp demarcation of the legislative and judicial powers coincide[s] with the adoption of a carefully designed legislative process—bicameralism and presentment.”²¹ Indeed, “on their face, the procedures established by the Constitution for adopting the ‘Constitution,’ ‘Laws,’ and ‘Treaties’ of the United States strongly suggest that they are the exclusive means of adopting such law.”²²

While we do not have time to discuss all the finer points of Madison’s design, it is sufficient to say that the Framers both knew of and feared excessive legislative power, and therefore implemented precautions against domination by transient majorities. Bicameralism ensures that two houses, with members accountable to distinct interests, must each approve legislation before it is sent on to the President. And presentment serves as an additional check on majoritarian legislative dominance. These processes slow down the enactment of legislation, ensure that laws have sufficient popular support, protect the interests of legislative minorities, and help safeguard the rights of states. In short, the procedural requirements that must be followed before laws are enacted have real purpose and are motivated by substantial concerns. Respecting the principles of separation of powers—here, for instance, by insisting that judges refrain from lawmaking—ensures that these constitutional procedures continue to work their salutary effects.

In its design and operation, the structure of our federal government effectuates a sharp separation of powers. For present purposes, we are focused on the distinction between the legislative branch and the

²¹ John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 *Colum. L. Rev.* 1648, 1650 (2001).

²² Clark, *supra* note 11, at 1332.

judiciary. Because “all power is vested in, and consequently derived from, the People,”²³ the institution that *makes* law should be the one closest to “the people.” For that reason, as Chief Justice Rehnquist once remarked, supposing that “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.”²⁴

B

Obviously, such structure did not come about by chance. Early debates among the Founders shed light on the intentionality behind the limited role for the federal judiciary. In fact, before adopting the current form of Article III, the participants at the Constitutional Convention considered various proposals that would have given the federal judiciary a role in *lawmaking*. On at least three occasions, the Framers considered and rejected a proposed Council of Revision. Essentially, the Council would have served as an independent body of executive and judicial officials with the power to negate legislation after it passed Congress or the legislative bodies of the several states.²⁵ Likewise, the delegates to the Constitutional Convention rejected the suggestion to create a Privy Council, composed of executive department officials and the Chief Justice of the United States, that would have advised the President on legal issues that came before him.²⁶ Finally, the same delegates—and the early Supreme Court²⁷—rejected the idea that the federal courts could give advisory opinions to “[e]ach Branch of the Legislature[] as well as the [S]upreme Executive.”²⁸ In short, in almost every respect, the Framers resoundingly rejected each and every proposal that would have given the federal judiciary a role in the lawmaking process of the federal government or the states.

²³ Va. Declaration of Rights, art. II (1776), *reprinted in* The George Mason Lectures: Honoring the Two Hundredth Anniversary of the Virginia Declaration of Rights 20 (1976).

²⁴ Rehnquist, *supra* note 6, at 696.

²⁵ See 1 The Records of the Federal Convention of 1787, at 20–23 (Max Farrand ed., 1911) [hereinafter *Records of the Federal Convention*] (reviewing the Virginia Plan, including the proposed resolutions of Edmund Randolph).

²⁶ 2 *Records of the Federal Convention*, *supra* note 25, at 328–29, 342–44.

²⁷ Letter from John Jay et al., Supreme Court Justices, to President George Washington (Aug. 8, 1793), *in* 13 The Papers of George Washington, Presidential Series, 1 June–31 August 1793, 392–93 (Christine Sternberg Patrick ed., 2007).

²⁸ 2 *Records of the Federal Convention*, *supra* note 25, at 334.

The Framers' writings help explain the rationale behind keeping the judiciary separate from the political branches. Madison, again writing as Publius in *The Federalist*, explained:

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than [separation of powers]. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.²⁹

And Montesquieu, the great Enlightenment thinker whose political philosophy inspired the Constitution's Framers like Madison, expressed a similar view, writing:

[T]here is no liberty, if the judiciary power be not separated from the legislative and executive

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.³⁰

With respect to the judicial branch in particular, Madison's coauthor, Alexander Hamilton, stated in *The Federalist No. 78* that the "general liberty of the people" depended on the judiciary remaining "truly distinct" from the legislature and the executive.³¹ Quoting Montesquieu, Hamilton explained that while "liberty can have nothing to fear from the judiciary alone," our very freedom and right to self-rule "would have every thing to fear from its union with either of the other departments."³² And Madison drove home the point by writing that if "the power of judging [were] joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*."³³

At this point, one might object to my account of our constitutional structure, citing to the ways in which the Constitution allows for the

²⁹ The Federalist No. 47, *supra* note 14, at 322 *cited in* Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

³⁰ 1 Baron de Montesquieu, *The Spirit of Laws*, bk. XI, ch. 6, at 163 (Thomas Nugent trans., London, George Bell & Sons 1878).

³¹ The Federalist No. 78, at 521 (Alexander Hamilton) (Carl Van Doren ed., 1945).

³² *Id.*

³³ The Federalist No. 47, *supra* note 14, at 324.

blending of some powers.³⁴ Or, one might say, even where the Constitution *separates* powers, the document does “not purport to tell us how strict the resultant separation ha[s] to be.”³⁵ True. But these points were not lost on Madison, who explained in *The Federalist No. 47* that “where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.”³⁶ Thus, he conceded that the idea of separation of powers does not demand that the coordinate “departments ought to have no partial agency in, or no control over, the acts of each other.”³⁷ Moreover, Madison acknowledged the difficulty of defining the specific metes and bounds of governmental relations: “Experience has instructed us,” he wrote, “that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive and judiciary Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.”³⁸

However, this blending of powers, as Madison stressed in *The Federalist No. 51*, is paradoxically a way to ensure the broader and more important goal of separation. According to Madison, the most “expedient” way to maintain the “necessary partition of power among the several departments” is “by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”³⁹ He continued, saying that by “giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others,” blending of powers may actually help maintain the long-term independence of the three branches.⁴⁰

³⁴ In *The Federalist No. 47*, Madison remarked that “[o]ne of the principal objections . . . to the Constitution, is its supposed *violation* of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct.” *Id.* at 321 (emphasis added).

³⁵ John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 *Harv. L. Rev.* 1939, 2004 (2011).

³⁶ *The Federalist No. 47*, *supra* note 14, at 323.

³⁷ *Id.*

³⁸ *The Federalist No. 37*, at 235–36 (James Madison) (Carl Van Doren ed., 1945).

³⁹ *The Federalist No. 51*, at 346 (James Madison) (Carl Van Doren ed., 1945).

⁴⁰ *Id.* at 347.

Centuries later, in *Youngstown Sheet & Tube Co. v. Sawyer*,⁴¹ the *Steel Seizure Case* that is perhaps the most famous decision discussing these separation of powers principles, the Justices grappled with this separation-blending dichotomy. Justice Jackson wrote that the “Constitution diffuses power the better to secure liberty,” but that “it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”⁴² Such an acknowledgment of the blending of powers, however, Justice Frankfurter responded, should not obscure the broader point that separation of powers is still the default. Justice Frankfurter wrote, “The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.”⁴³ Such a warning reminds those of us in the judicial branch that we must not allow our own personal preferences to motivate us to disregard the “fences” that bound our authority. Not only must we be watchdogs for the other branches of government—as in the *Steel Seizure Case*—but we must also be cognizant of how the structural principles of the Constitution inform our own role.

Indeed, as we have seen, though the separation of powers is a central feature of our constitutional structure, it is not self-enforcing or absolute.⁴⁴ The temptation for judges to move beyond the constitutional bounds placed upon them is ever present, and to maintain those bounds, judges must maintain a self-imposed discipline and commitment to the constitutional structure they are sworn to uphold.

C

The Framers were acutely aware of the danger of falling under the rule of a cabal of unelected judicial oligarchs. Because of this, in the constitutional structure they designed, they went to great lengths to establish judicial separation from the legislative and executive branches. Yet, the federal courts do have constitutional authority—indeed, what

⁴¹ 343 U.S. 579 (1952).

⁴² *Id.* at 635 (Jackson, J., concurring).

⁴³ *Id.* at 594 (Frankfurter, J., concurring).

⁴⁴ See *Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting) (“The great ordinances of the Constitution do not establish and divide fields of black and white.”).

Chief Justice Marshall called a “duty”⁴⁵ —to interpret the legal text applicable in a given case and to apply that law to the facts. If this exercise of the judicial power is constitutionally permissible and required, how—in the high-stakes world of constitutional adjudication—should a judge faithfully fulfill his duty in a way that eschews the temptation to engage in judicial legislation and respects our separation of powers?

II

In my view, originalism, properly understood, allows the judge to discharge his constitutional duties and responsibilities, while simultaneously limiting interpretative ventures that could lead to judicial legislation. Originalism keeps the judge in his proper constitutional sphere, incentivizes the legislative branches to take action, and thereby effectuates democratic rule.

First, a definitional point: As I use the term “originalism,” I refer to an interpretative method that “regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.”⁴⁶ An originalist starts by looking at the textual provision at issue in a given case, and if that does not give a clear answer, turns to the historical understanding of the relevant language to clarify and to guide the interpretative inquiry.

Originalism, though present in the very first debates over constitutional meaning,⁴⁷ has a shorter history as a theoretically developed mode of constitutional interpretation. The modern form of originalist theory actually appeared in the 1980s as the American public, government officials, and academics felt the effects of the Warren Court’s decidedly *non*originalist jurisprudence. But I need not recount the full history of the theoretical development of originalism here. Suffice it to say that, led by proponents like Attorney General Edwin Meese, Judge Robert Bork, Chief Justice William Rehnquist, and Justice Antonin Scalia, originalism quickly came to be regarded as a highly respected mode of constitutional interpretation.

⁴⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁴⁶ Keith Whittington, *The New Originalism*, 2 *Geo. J. L. & Pub. Pol’y* 599, 599 (2004).

⁴⁷ See *Marbury*, 5 U.S. (1 Cranch) at 179–80 (1803) (inquiring into what “the framers of the constitution contemplated”).

Originalism mandates that the judge treat the Constitution like he would any other legal text—that is, that he interpret how it applies to the facts of the case before him, not speculate how the law *should* apply. In cases involving the broad provisions of the Constitution, relying on history “tends to rein in the subjective elements that are necessarily present.”⁴⁸ Originalism thus moves the judge away from a subjective normative inquiry regarding what the law *should* be toward a principled application of what the law *is* and *has been since the time of its enactment*. In doing so, it limits the opportunity for the judge to act as a legislator and public policy advocate, and reorients him toward “interpret[ing] . . . the law[],” what Alexander Hamilton called “the proper and peculiar province of the courts.”⁴⁹

As an added benefit, originalism helps resolve the “seeming anomaly of judicial supremacy in a democratic society.”⁵⁰ As Judge Bork once noted, “If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic.”⁵¹ But when judges rely on the text, structure, and history of the Constitution, it transforms the Constitution from a sword by which the judge can impose his will to a shield by which he upholds the *original* agreement we the people entered into in 1789.

Thus, originalism is a jurisprudence that is grounded in judicial humility, but that bears its teeth in linguistic and historical determinacy. Originalism’s humility first comes from its admission that “the Constitution is not designed to produce the one ‘best answer’ to all questions, but rather to establish a framework for representative government and to set forth a few important substantive principles, commanding supramajority support, that legislatures are required to respect.”⁵² It also fosters a certain personal humility among judges themselves, by limiting judicial discretion and preventing unelected federal judges from constitutionalizing their own personal views. By limiting such discretion and instructing that the judge only enforce those constitutional rights and principles that were agreed to at the framing,

⁴⁸ *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).

⁴⁹ The Federalist No. 78, *supra* note 31, at 522.

⁵⁰ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 2 (1971).

⁵¹ *Id.*

⁵² 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, 1273 (1997).

originalism ensures that all *other* questions will remain in the hands of legislative majorities. That is the idea of a constitutional democracy.

On the other hand, as I alluded to, originalism is not an exercise in futility. My earlier definition of the method referred to the “discoverable meaning of the Constitution at the time of its initial adoption,” acknowledging that such a discoverable meaning exists. Thus, a commitment to originalism does not entail abdication of the judicial duty and certainly does not leave the judge without a principled basis for decision making. In fact, originalism “require[s] the active exercise of the power of judicial review in order to keep faith with the principled commitments of the founding [O]riginalism does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less.”⁵³

As Justice Powell once wrote, in the high-stakes world of constitutional adjudication, “the language of the applicable provision [often] provides great leeway and . . . the underlying social policies are felt to be of vital importance.”⁵⁴ This means that “the temptation to read personal preference into the Constitution is understandably great.”⁵⁵ Thus, it is most critical that here, in the adjudication of constitutional cases, judges seek out the constraints of text and history to bind their own discretion and to serve as “guideposts for responsible decisionmaking.”⁵⁶

III

To illustrate how these principles of constitutional structure and originalist constitutional interpretation matter in real-world cases, I want to discuss with you a relatively recent case that came before my court and, eventually, the Supreme Court. The case, *Washington v. Glucksberg*, involved whether there was a constitutionally guaranteed right to physician-assisted suicide.⁵⁷

First, a bit of history: the Anglo-American common law tradition has long punished or otherwise disapproved of suicide and assisted suicide.⁵⁸

⁵³ Whittington, *supra* note 46, at 609.

⁵⁴ *Furman v. Georgia*, 408 U.S. 238, 431 (1972) (Powell, J., dissenting).

⁵⁵ *Id.*

⁵⁶ *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992).

⁵⁷ 521 U.S. 702 (1997).

⁵⁸ See *id.* at 712 (“Blackstone emphasized that ‘the law has . . . ranked [suicide] among the highest crimes’”).

By the time the Fourteenth Amendment was ratified, most states had made it a crime to assist suicide.⁵⁹ In more recent decades, however, due to advances in medical technology that have prolonged life, some states have begun to consider various measures designed “to protect dignity and independence at the end of life,” including legislative reforms that would permit certain forms of physician-assisted suicide.⁶⁰

In 1991, the acceptability of physician-assisted suicide was squarely before citizens in the state of Washington. By a vote of fifty-four percent to forty-six percent,⁶¹ “Washington voters rejected a ballot initiative which . . . would have permitted a form of physician-assisted suicide.”⁶² Specifically, Initiative 119 would have permitted “aid-in-dying,” which was defined as “a medical service provided in person by a physician that will end the life of a conscious and mentally competent qualified patient.”⁶³ By rejecting the initiative, Washington voters reaffirmed the long-standing prohibition on physician-assisted suicide.

Undaunted, advocates in favor of physician-assisted suicide then turned to the courts. The litigants—a coalition of doctors, three terminally ill patients, and a nonprofit organization that counsels people considering physician-assisted suicide—filed suit in federal court in Seattle. They claimed that Washington’s prohibition against “caus[ing]” or “aid[ing]” a suicide violated the United States Constitution.⁶⁴ Specifically, they asserted “the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide.”⁶⁵ In pursuing litigation, the members of this coalition were asking the courts to set aside the views of a majority of Washington voters by, in effect, creating a previously unknown constitutional right.

The procedural history of the case is complicated. Suffice it to say that the district court agreed with the plaintiffs, concluding that Washington’s ban indeed violated the Constitution.⁶⁶ A panel of three

⁵⁹ *Id.* at 715.

⁶⁰ *Id.* at 716–17.

⁶¹ Jane Gross, *Voters Turn Down Mercy Killing Idea: Washington State Campaign Gives New Prominence to a Sensitive Issue*, N.Y. Times, Nov. 7, 1991, at B16.

⁶² *Glucksberg*, 521 U.S. at 717.

⁶³ *Id.* at 717 n.13.

⁶⁴ *Id.* at 707–08.

⁶⁵ *Id.* at 708 (quoting *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459 (W.D. Wash. 1994)).

⁶⁶ *Compassion in Dying*, 850 F. Supp. at 1467.

judges on my court, the Ninth Circuit, reversed, emphasizing that there was no *historical* basis, which is to say no basis at all, for the constitutional right asserted.⁶⁷ That decision, however, was then called before an eleven-judge en banc panel of the Ninth Circuit, which reversed the original panel decision and affirmed the district court. According to eight judges on the en banc panel, the “Constitution encompasses a due process liberty interest in controlling the time and manner of one’s death—that there is, in short, a constitutionally recognized ‘right to die.’”⁶⁸ The full court then voted on whether the entire Ninth Circuit should hear the case, but that vote failed.⁶⁹ Like I said, complicated.

Along with two other colleagues, I dissented from our decision not to rehear the case as a full court. In my view, the en banc panel got it exactly wrong: There was no historically-based constitutional right to physician-assisted suicide. The Constitution’s structure demanded that the citizens of Washington, not “six men and two women[,] endowed with life tenure and cloaked in [judicial] robes,” decide whether physician-assisted suicide should be permitted in the state.⁷⁰ Not only was the en banc panel’s decision wrong as a matter of constitutional interpretation, but the application of its incorrect analysis resulted in the rejection of the considered policy choice of Washington voters.

As I argued in my dissent, the history, and thus the constitutional analysis, was clear. “[T]he weight of authority in the United States, from colonial days through at least the 1970s has demonstrated that the predominant attitude of society and the law has been one of opposition to suicide.”⁷¹ Because the asserted right to physician-assisted suicide was not deeply rooted in our history and traditions, it was not a protected right under the United States Constitution. To conclude that it was such a right would have “reverse[d] centuries of legal doctrine and practice, and str[uck] down the considered policy choice of almost every State.”⁷² That is simply not the role of a federal court!

⁶⁷ *Compassion in Dying v. Washington*, 49 F.3d 586, 588 (9th Cir. 1995).

⁶⁸ *Compassion in Dying v. Washington*, 79 F.3d 790, 816 (9th Cir. 1996).

⁶⁹ See *Compassion in Dying v. Washington*, 85 F.3d 1440 (9th Cir. 1996).

⁷⁰ *Id.* at 1440 (O’Scannlain, J., dissenting from denial of rehearing en banc).

⁷¹ *Id.* at 1445 (quoting Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 *Duq. L. Rev.* 1, 100 (1985)).

⁷² *Glucksberg*, 521 U.S. at 723.

Thus, it was “without adequate justification” that eight unelected judges engaged in a “shockingly broad act of judicial legislation,” nullifying the policy choice of Washington voters and, by constitutionalizing the question, removing the issue from the public square.⁷³ Perhaps the asserted justification was that physician-assisted suicide was a question of immense public import. But “[t]he Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary.”⁷⁴ By so boldly rejecting the considered views of Washington voters, the panel’s decision threatened the “public’s confidence in the legitimacy of judicial nullification of the will of the electorate.”⁷⁵ When judges engage in such “embarrassing judicial excess,” it undermines the foundational principles of our country and erodes the legitimacy of the judiciary as an institution.⁷⁶

Of course, the en banc panel was not wrong simply *because* it “imposed [a policy] on the people contrary to their manifest intent.”⁷⁷ Had the voters of Washington infringed on a right that was deeply rooted in the original meaning of our Constitution, the en banc panel would have been correct to strike down Initiative 119. But that is why the historical inquiry is so critical. It is what ensures that the judiciary merely applies the law to resolve a case rather than acts as an alternative forum for policymaking. When a court is freed from the constraints of history, it too easily mutates into a substitute legislature.

In due course, the Supreme Court properly reversed the en banc panel and explicitly recognized the dangers inherent in disregarding historically grounded constitutional inquiry and the impermissibility of judicial legislation. Writing for the Court in *Washington v. Glucksberg*, Chief Justice Rehnquist explained that the en banc panel had cut short the “earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide”—and had done so in a way that ignored the historical inquiry that should have been central to the constitutional analysis.⁷⁸

⁷³ *Compassion in Dying*, 85 F.3d at 1441–42 (O’Scannlain, J., dissenting from denial of rehearing en banc).

⁷⁴ *Id.* at 1442–43 (quoting *Compassion in Dying v. Washington*, 79 F.3d 790, 857, 858 (9th Cir. 1996) (Kleinfeld, J., dissenting)).

⁷⁵ *Id.* at 1441.

⁷⁶ *Id.* at 1442.

⁷⁷ *Id.* at 1443.

⁷⁸ *Glucksberg*, 521 U.S. at 722–23, 735.

On the historical side, the Court began by analyzing the English common law roots of suicide bans, surveying the writings of Henry de Bracton and William Blackstone. The Court then turned to early American history, noting that the colonies and early state legislatures continued to prohibit aiding suicide. As the Court summarized, “for over 700 years, the Anglo-American common law tradition has punished or otherwise disapproved of both suicide and assisting suicide.”⁷⁹

With no textual basis or historical justification to set aside the law in question, the Court concluded that the citizens of Washington should have been left free to decide the policy of their state as they saw fit. They had demonstrated themselves willing and able to consider the contentious social issue, and now their choice was to stand.⁸⁰ James Madison and his contemporaries, I dare to say, would have agreed with that conclusion.

Madison’s design was ingenious, and his legacy enduring for all the right reasons. When he wrote about widening the scope of political participation, he said that it would only serve “to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”⁸¹

Those words ring true in the physician-assisted suicide case. But they also remind us that the broader truth applies across different areas of constitutional inquiry. When courts act as legislatures, we lose the benefits of civic participation and surrender our right to self-rule. Our Framers designed a system that would prevent such destructive outcomes. We should do all we can to uphold that design.

IV

I want to conclude by offering a remark that should be obvious: In our tripartite system of government, the people rule. Through our politically elected representatives—at the state and national level—we the people make choices that become law. The Constitution does leave an

⁷⁹ *Id.* at 711.

⁸⁰ Interestingly, in the years after the *Glucksberg* case, Washington voters reversed course and voted to permit physician-assisted suicide in certain circumstances. See Wash. Rev. Code § 70.245 (2008). Regardless of one’s views of the wisdom of such a choice, one can see how when the courts were taken out of play, the political branches were reinvigorated.

⁸¹ The Federalist No. 10, at 60 (James Madison) (Carl Van Doren ed., 1945).

important role for the judge—to interpret those laws—but that role is separate and distinct from displacing legitimate legislative choices. Since *Marbury v. Madison*, that role also includes the duty to strike down laws that conflict with the Constitution’s express words.

When constrained by the text, structure, and history of the Constitution, judicial review is palatable, and indeed necessary, to our constitutional system. But without those limits, we risk, as Thomas Jefferson once wrote, being placed “under the despotism of an oligarchy.”⁸²

I urge all of us to be wary of the long-term effects of using the courts to override democratic choices that do not offend the original understanding of the Constitution. That model of governance has no place in our constitutional structure. As President Lincoln wrote shortly after the infamous *Dred Scott* decision, if “the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions” of unelected federal judges, “the people will have ceased to be their own rulers.”⁸³

Our Constitution bestows on the people the authority to make laws through our politically accountable representatives. We should protect that prerogative by demanding that judges resist the temptation to become politicians in robes.

Thank you.

⁸² Letter from Thomas Jefferson to William C. Jarvis (Sept. 28, 1820), in 12 *The Works of Thomas Jefferson*, 161, 162 (Paul Leicester Ford ed., 1905).

⁸³ Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in *Abraham Lincoln: Selections from His Speeches and Writings*, 255, 262 (J.G. de Roulhac Hamilton ed., 1922).