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Fast-Food Government and Physician-Assisted Death: The Role of Direct Democracy in Federalism

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* Associate Professor, University of Denver Sturm College of Law. I would like to dedicate this Article to my parents, Dr. Edward Keyes DuVivier and Mrs. Marjorie Attebery DuVivier. They have supported and encouraged me in this work and throughout my life. To me, they are the ultimate models of lives lived with wisdom and dignity. I also would like to thank the following for their valuable input and assistance in completing this piece: J. Robert Brown, Diane Burkhardt, Robert Chang, David McDaniel, Kalin Ivany, Nora Pincus, and the members of the Legal Writing Institute's 2007 Writer's Workshop.

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Thomas Jefferson argued that the key to lasting government was flexibility and a process for change.¹ When establishing the representative form of government in the United States, the

¹ Thomas Jefferson stated:

[I]t may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. . . . Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right.

Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 5 THE WRITINGS OF THOMAS JEFFERSON 115, 121 (Paul Leicester Ford ed., 1895); see also Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787, 788 (1997) (addressing changes in the constitutional context, Jefferson wrote, “[L]et us provide in our constitution for its revision at stated periods . . . so that it may be handed on, with periodical repairs, from generation to generation, to the end of time, if anything human can so long endure” (quoting Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THOMAS JEFFERSON: WRITINGS 1395, 1402 (Merrill D. Peterson ed., 1984))). Alexander U.S.C Hamilton also conceded that “‘the right of the people to alter or abolish the established Constitution’ must be seen as a ‘fundamental principle of republican government.’” Scheiber, *supra*, at 788 n.3 (quoting THE FEDERALIST No. 78, at 489, 494 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1996)).

Founders ensured that change would come gradually by setting up an inefficient system of checks and balances.² This deliberative process sought to produce compromises reflecting both minority and majority views.³ Maintaining some continuity and consensus on issues helped avoid abrupt pendulum swings in policy. The Founders' efforts resulted in one of the most enduring governments in the world.

As is often the case, however, a strength can become a weakness if carried to extremes. At times throughout our nation's history, special interests have learned to employ the deliberative process to deadlock legislatures and paralyze the decision-making process. In the late 1800s, members of the Progressive movement introduced an alternative to legislatures controlled by special interests: direct democracy through state-wide citizen initiatives. Although none of the original state constitutions allowed citizens to impact legislation directly through citizen initiatives,⁴ the Progressives successfully introduced the process in several Western states from 1897 to 1918.⁵ Currently, almost half of the states allow citizens to

² See Steven A. Siegel, *Historicism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1479 n.265 (“[T]he whole scheme was so contrived with checks and balances, that the governmental action should be steady, the changes gradual, and progress uniform.” (quoting JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 86 (1868))).

³ See, e.g., Derek W. Black, *The Contradiction Between Equal Protection's Meaning and Its Legal Substances: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533, 559 (2006).

⁴ Direct democracy comes in many forms and varies widely from state to state. Some distinguish an “initiative” as a measure that citizens originate by petition from a “referendum” that is legislation originating from a legislature and referred to the people for a vote. K.K. DuVivier, *By Going Wrong All Things Come Right: Using Alternative Initiatives to Improve Citizen Lawmaking*, 63 U. CIN. L. REV. 1185, 1185 n.2, 1191 n.42 (1995). A number of terms are also used to describe the process such as “plebiscite,” “proposition,” or “amendment.” *Id.* at 1185 n.2. For purposes of this Article, the term “initiative” will generically encompass any direct democracy mechanism that forces a legislature to consider a matter outside the standard representative process.

⁵ The states to first adopt the initiative process between 1898 and 1918 include Arizona, Arkansas, California, Colorado, Delaware, Idaho, Illinois, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. DAVID D. SCHMIDT, *CITIZEN LAWMAKERS* 16–17 (1989); see also K.K. DuVivier, *The United States as a Democratic Ideal? International Lessons in Referendum Democracy*, 79 TEMP. L. REV. 821, 830–33 (2006).

initiate laws either to their representatives or to a direct vote of the people.⁶

The initiative process is controversial; some see it as “fast-food government”—unhealthy fare because it creates laws quickly, bypassing the slower, more deliberative legislative process.⁷ Other commentators have argued that initiatives are especially well suited to bring about progress in the area of political reform, sidestepping self-interested representatives to impose term limits or campaign spending limitations when they have no incentive to make such changes legislatively.⁸ Similarly, initiatives can be a mechanism to advance social reform. Particularly at nascent stages, these types of controversial reforms may be difficult to navigate through the legislative process. Citizen initiatives will often be the only available method for altering the legal regime to advance these reforms.

This Article will focus on the benefits of initiatives in contributing to one of the goals of federalism: fostering innovation by allowing the states to serve as Brandeis laboratories.⁹ Addressing controversial issues through “fast-

⁶ The initiative right was lost in some of the original states, and a handful of states and the District of Columbia added initiatives between 1956 and 1977. The following states currently allow some form of initiative: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. See DAVID B. MAGLEBY, *DIRECT LEGISLATION* 36 (1984); Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 15 (1997).

⁷ “We live in a society of instant gratification, but our government was designed by the Founders to be slow and deliberative. The initiative process is just fast-food government for people who don’t want to follow the standard political process.” Brandon C. Shaffer, Colo. State Senator, *What Is the Political and Legal Future of Colorado’s Initiative?*, Remarks at the University of Colorado School of Law’s 14th Ira C. Rothgerber, Jr. Conference, *The Voice of the Crowd—Colorado’s Initiative Process* (Jan. 26, 2007).

⁸ See, e.g., Lynn A. Baker, *Preferences, Priorities, and Plebiscites*, 13 J. CONTEMP. LEGAL ISSUES 317, 334–36 (2004); Sherman J. Clark, *The Character of Direct Democracy*, 13 J. CONTEMP. LEGAL ISSUES 341, 347–48 (2004); Richard L. Hasen, *Comments on Baker, Clark, and Direct Democracy*, 13 J. CONTEMP. LEGAL ISSUES 563, 564 (2004).

⁹ The concept of “states as laboratories” comes from Justice Brandeis’s dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932). Justice Brandeis stated:

There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . .

food government” can promote the evolution of innovation. Because initiatives have been the first, or sometimes the only, successful mechanisms for addressing some progressive issues, they illustrate the benefits of this dispersed form of federalism.

The debate over physician-assisted death, or PAD,¹⁰ provides a concrete illustration. Even though a majority of Americans support the right of patients to make their own decisions about end-of-life care, including the right to choose death, some religious and other interest groups have influenced the traditional legislative process to prevent PAD legislation from becoming law. Only one state, Oregon, has successfully passed a PAD law, and this success was through the fast-food initiative process. Oregon may now serve as a Brandeis laboratory to help the entire country address the controversial issue of PAD. While Part I of this Article provides a framework for the debate, Part II illustrates the significant role the initiative process can play in promoting this valuable benefit of federalism.

. . . It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Id. at 311 (Brandeis, J., dissenting).

¹⁰ This Article focuses on the process of enacting legislation rather than on the particular form of physician-assisted death (“PAD”). Consequently, throughout the Article, the generic term PAD refers to the most widely accepted form: (1) voluntary use (2) by mentally competent patients (3) who are terminally ill (4) of legal drugs prescribed to them by licensed physicians (5) to hasten death. In contrast to “euthanasia,” “physician-assisted suicide,” or “death with dignity,” PAD is a value-neutral term now encouraged by the American Psychological Association. See Valerie J. Vollmar, Recent Developments in Physician-Assisted Death (May 2007), <http://www.willamette.edu/wucl/pdf/pas/2007-05.pdf> [hereinafter Vollmar, May 2007 Developments] (“[T]he reasoning on which a terminally ill person (whose judgments are not impaired by mental disorders) bases a decision to end his or her life is fundamentally different from the reasoning a clinically depressed person uses to justify suicide.”).

It is also encouraged by the American Public Health Association (urging “accurate, value-neutral terms such as ‘aid in dying’ or ‘patient directed dying’”), and the American Academy of Hospice and Palliative Medicine (noting PAD “captures the essence of the process in a more accurately descriptive fashion than the more emotionally charged designation’ of physician-assisted suicide”). *Id.*; see also Stephen W. Smith, Book Review, 13 MED. L. REV. 286, 287 (2005) (arguing that the media routinely confused the issue of PAD with the practice of euthanasia, creating negative images); Don Colburn, *Oregon Officials Seek Neutral Term for “Assisted Suicide,”* NEWHOUSE NEWS SERVICE, Nov. 15, 2006. Furthermore, in this Article, I will not specifically address the issue of “palliative care,” which allows a physician to administer pain relief instead of curative treatment to terminally ill patients. See *infra* notes 155–63 and accompanying text.

I

FEDERALISM AND DIRECT DEMOCRACY

“Federalism,” a mantra frequently voiced by U.S. politicians and judges, is the “constitutional balance between the States and the Federal Government”¹¹ that makes the U.S. political system exemplary.¹² Federalism contemplates a key role for local as well as national authority, but because of the modern centralization of power at the federal level, some commentators debate whether the construct has any true value.¹³

As originally configured, the Constitution “split the atom of sovereignty”¹⁴ in the new nation by granting the federal government limited, “enumerated” powers and reserving to the states the remaining authority to regulate the affairs of their citizens.¹⁵ However, that balance has been disrupted: the federal government’s commerce power has metastasized to consume nearly every semblance of state authority.¹⁶ Before 1937, the Supreme Court resisted expansion of Commerce Clause authority, fearing it would leave “nothing left to the realm of state police regulation.”¹⁷ However, the Court threw in

¹¹ *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006).

¹² *See New York v. United States*, 505 U.S. 144, 187 (1992) (“[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.”); *see also Gregory v. Ashcroft*, 501 U.S. 452, 457–60 (1991) (cataloguing the benefits of the federal structure).

¹³ *See, e.g., Barry Friedman, Valuing Federalism*, 82 MINN. L. REV. 317, 317 (1997).

¹⁴ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (Kennedy, J., concurring).

¹⁵ *See U.S. CONST.* art. I, § 8; *U.S. CONST.* amend. X (“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.”); *see also Larry Kramer, Understanding Federalism*, 47 VAND. L. REV. 1485, 1490–91, 1495 n.18 (1994) (arguing that there was consensus among the Framers that the powers of the national government would be limited).

¹⁶ For a wonderful synopsis of the progression, *see Friedman, supra* note 13, at 328–38.

¹⁷ *Id.* at 333; *see, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935) (“If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government.”); *Hammer v. Dagenhart*, 247 U.S. 251, 272–

the towel in *NLRB v. Jones and Laughlin Steel Corp.*,¹⁸ expanding the federal commerce power “beyond judicially enforceable limits.”¹⁹

In the last few decades, the Court’s decisions have contained rhetoric about the value of federalism as a guiding principle while “accord[ing] barely any weight to the state side of the federalism balance.”²⁰ Yet, the Constitution provides that the powers not explicitly delegated to the federal government have been “reserved to the states respectively, or to the people,”²¹ and

73 (1918), *overruled in part by* *United States v. Darby*, 312 U.S. 100 (1941) (“If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States.”); *United States v. E.C. Knight Co.*, 156 U.S. 1, 19 (1895) (“Undoubtedly, the preservation of the just authority of the States is an object of deep concern to every lover of his country. No greater calamity could befall our free institutions than the destruction of that authority, by whatever means such a result might be accomplished.”).

¹⁸ 301 U.S. 1 (1937).

¹⁹ Friedman, *supra* note 13, at 334; *see also id.* at 334–35 n.69 (citing Vincent A. Cirillo & Jay W. Eisenhofer, *Reflections on the Congressional Commerce Power*, 68 TEMP. L.Q. 901, 912 (1987) (stating that during the New Deal, “the congressional commerce power emerged as a virtually unlimited power and, in effect, became the national police power rejected by the Framers at the Constitutional Convention”); Jonathan L. Entin, *The New Federalism After United States v. Lopez*, 46 CASE W. RES. L. REV. 635, 636 (1996) (“The Court struggled . . . for more than a century before the New Deal transformation ushered in a doctrinal structure suggesting that there were no judicially enforceable limits on the commerce power.”); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1451 (1987) (arguing that the New Deal Supreme Court “rejected the idea of limited federal government and decentralized power” in favor of a centralized government acting for the public welfare); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1259 (1995) (“In addition, since the New Deal ‘switch,’ the Commerce Clause power in particular has been understood to be remarkably inclusive. Consequently, the universe of legitimate ends has expanded to such a degree that it now seems almost brazen to suggest that there is anything Congress may not do.”)).

²⁰ *Id.* at 321–22.

²¹ U.S. CONST. amend. X; *see also* *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 847–48 (1995) (Thomas, J., dissenting). Justice Thomas stated:

In each State, the remainder of the people’s powers—“[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States,”—are either delegated to the state government or retained by the people. . . .

These basic principles are enshrined in the Tenth Amendment, which declares that all powers neither delegated to the Federal Government nor prohibited to the States “are reserved to the States respectively, or to the

federalism contemplates dispersal of power and some role for the states within the federal system.

In a few instances, the Supreme Court has begun to articulate the benefit of shifting some weight back to state-side deference.²² While the Court has declared it “unwise to attempt to identify a list of ‘traditional’ state functions,”²³ the federalization of issues traditionally identified as local matters, such as crime, has brought criticism.²⁴ Likewise, the balance has also shifted in the areas of economics, the environment, and civil rights. In the last century, many problems were “best solved at the national

people.” With this careful last phrase, the Amendment avoids taking any position on the division of power between the state governments and the people of the States: It is up to the people of each State to determine which “reserved” powers their state government may exercise. But the Amendment does make clear that powers reside at the state level except where the Constitution removes them from that level. All powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State.

Id. (first alteration in original) (citation omitted).

²² See Freidman, *supra* note 13, at 363; see also *id.* at 363 n.203 (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 575–76 (1985) (Powell, J., dissenting) (discussing how state and local governments are better able than the national government to perform activities that affect the everyday lives of citizens)). Justice Powell noted:

State and local officials of course must be intimately familiar with [traditionally local] services and sensitive to their quality as well as cost. Such officials also know that their constituents and the press respond to the adequacy, fair distribution, and cost of these services. It is this kind of state and local control and accountability that the Framers understood would insure the vitality and preservation of the federal system that the Constitution explicitly requires.

Garcia, 469 U.S. at 578–79.

²³ Friedman, *supra* note 13, at 361; see *id.* at 361 n.189 (“We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional.’ Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.” (quoting *Garcia*, 469 U.S. at 546–47)).

²⁴ See *id.* at 375; see also *id.* at 375 n.250 (citing Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1166–72 (1995) (arguing that Congress must exercise restraint in federalizing criminal law); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 506 (1995) (expressing the belief that “many matters of ‘local concern’ are presently being federalized by Congress”)).

level,”²⁵ but more recently, local action has led the way on economic and environmental issues.²⁶ In addition, many state constitutions now afford greater civil rights protections for citizens than they enjoy under the Federal Constitution.²⁷

Placing more weight on the state side of the federalism equation has a number of advantages. For one, it helps avoid dissatisfaction with a remote federal government. Proponents of “anti-nationalizing movements . . . reflect[] unease among the people about the extent to which governmental authority is slipping from their grasp.”²⁸ Respect for state authority under the concept of federalism can assuage those who bristle because of the “disadvantages [of] overweening national authority.”²⁹ Initiatives force local representatives to be in touch directly with their constituents’ desires. Thus, the initiative process can be

²⁵ *Id.* at 367 (referencing the civil rights advantages); *see also id.* at 374 (listing the areas of environmentalism and consumerism in addition to civil rights). Initiative advocates also called for a Constitutional Amendment to create a National Initiative in the late 1970s. *See, e.g.,* LAURA TALLIAN, DIRECT DEMOCRACY 120–21 (1977). However, that movement appears to have almost completely died. DuVivier, *supra* note 5, at 867.

²⁶ For example, New Hampshire residents are voting on a state referendum addressing global climate change. Katie Zezima, *In New Hampshire, Towns Put Climate on the Agenda*, N.Y. TIMES, Mar. 19, 2007, at A8. Kurt Ehrenberg, from the Sierra Club’s New Hampshire office, noted that “the lack of federal leadership on this issue [has] forced people to find a solution on the local level.” *Id.* In the United States, concern about the democracy deficit has been expressed frequently in the context of environmental law. *See* Freidman, *supra* note 13, at 392 (citing Michael P. Vandenberg, *An Alternative to Ready, Fire, Aim: A New Framework to Link Environmental Targets in Environmental Law*, 85 KY. L.J. 803, 849–54 (1996–97)); *id.* at 392 n.317 (“By regulating vital decisions about environmental risk management through a remote, arcane, and piecemeal bureaucratic process, the command and control system necessarily runs a serious democracy deficit.” (quoting Richard B. Stewart, *United States Environmental Regulation: A Failing Paradigm*, 15 J.L. & COM. 585, 590 (1996))). *But see id.* at 318 n.4 (citing Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 648–52 (1996) (arguing that the participation of uninformed citizens in environmental regulatory judgments is of dubious value)).

²⁷ James M. Hoefler, *Diffusion and Diversity: Federalism and the Right to Die in the Fifty States*, 24 PUBLIUS 153, 160 (1994) (noting the “trend in state courts to hold minimum levels of constitutional protections set by the U.S. Supreme Court to be insufficient to satisfy state standards of constitutional rights”); *see also* S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 890 (1992) (“Even in the area of civil rights, it is no longer apparent that federal law will afford individuals more protection than the laws of their states.”).

²⁸ Friedman, *supra* note 13, at 379.

²⁹ *Id.* at 384.

one of the most effective mechanisms for promoting federalism, resulting in a more responsive and robust form of democracy.³⁰

Furthermore, surrendering total authority to distant representatives not only weakens accountability but also can promote dishonesty.³¹ Allocating more power back to the state side of the federalism equation may address “the clear loss of faith in democracy many in this country feel” due to “the corrupting influence of interest groups and money in the national Congress.”³² Initiatives can be a salutary response to the voters’ “disenchantment”³³ with corruption in government and satisfy federalism’s focus on more local participation.

Finally, federalism allows states to act as laboratories. Centralization at the federal level can stifle innovation, with congressional “stasis” preventing any positive action from that national legislative body.³⁴ Instead, dispersing power to the states encourages the evolution of ideas that can help advance an issue nationally. The “evolutionary process” of “innovation” works best when experimentation is diffused.³⁵ More progress is likely when “fifty different parallel state governments and countless substate governments” are working on possible solutions to problems that face the nation.³⁶ Some of these ideas will be rejected, but the odds improve with the existence of multiple, creative options.

A. State Legislative Processes

The traditional deliberative process for legislation from representatives was designed to allow gradual, rather than abrupt, change. An executive, small groups of legislators, or sometimes a single legislator can halt the progress of laws at any

³⁰ See Scheiber, *supra* note 1, at 787 (praising “the tradition that finds in the people themselves the source of legitimacy for both constitutional foundations and the ongoing governance of the state polity”).

³¹ See TALLIAN, *supra* note 25, at 25.

³² Friedman, *supra* note 13, at 384.

³³ *Id.* at 390 (“Indeed, intuition suggests that disenchantment with government and anemic levels of citizen participation in democracy positively correlate with nationalizing trends. . . . Intuition suggests that more people would and could participate in smaller levels of government . . .”).

³⁴ *Id.* at 384.

³⁵ *Id.* at 399–400.

³⁶ See *id.* at 398–400.

one of several pressure points throughout the process to encourage compromise between minority and majority views. Although these pressure points have advantages in many situations, influential minority interests sometimes can manipulate the process to create gridlock on controversial issues they oppose on moral grounds. In contrast, laws created by citizen initiatives bypass these pressure points in the traditional legislative process. In some cases, this lack of minority protection is problematic. However, for innovative experiments opposed by religious minorities, the fast-food initiative process may be the only mechanism for allowing legislation to move forward.

1. Pressure Points in the Traditional Legislative Process

The U.S. legislative process is notoriously inefficient.³⁷ Based on James Madison's vision to pit "factions" against one another to force compromise,³⁸ the process attempts to filter out

³⁷ See *id.* at 388; see also *id.* at 388 n.301 ("[I]t is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency." (quoting *INS v. Chadha*, 462 U.S. 919, 958–59 (1983))); Richard D. Marks, *High Technology Legislation as an Eighteenth Century Process*, 6 STAN. L. & POL'Y REV. 17, 18 (1994). Marks notes that:

Generalizations are risky, but it still is fair to say that the legislative process of the United States is designed to be inefficient in the short run. Checks and balances, and the concomitant need to build political coalitions, result in a slower decision-making process, at least in comparison to less democratic forms.

Id.

³⁸ See THE FEDERALIST NO. 10, at 132–33 (James Madison) (Benjamin Fletcher Wright ed., 1996). Madison wrote:

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.

Id.

extremes and bring parties toward a middle ground.³⁹ Although the goal is to achieve gradual, rather than abrupt, change,⁴⁰ sometimes minority interests can exploit the process so that the result is gridlock instead of any progress at all on an issue.

Pressure points throughout the legislative process permit minority factions to strategically assert influence to stop the flow of legislation.⁴¹ Individual legislators can assert pressure to defeat a bill by assigning it to an unreceptive committee or by scheduling so it never comes to a vote before the full chamber. In addition, the national Congress and all of the state legislatures but one⁴² are bicameral; thus a few representatives in one of the two separate legislative chambers can assert pressure in their own chamber to defeat legislation passed by the other legislative chamber. Similarly, bills that successfully pass through committee hearings and the multiple votes of both chambers of a legislature still may be halted at the executive level by a presidential or gubernatorial veto.⁴³

³⁹ See Christopher M. Pietruszkiewicz, *Discarded Deference: Judicial Independence in Informal Agency Guidance*, 74 TENN. L. REV. 1, 36 n.252 (2006) (“By its very nature, the legislative process is one of mediation, compromise, and reconciliation of differing views and opinions.” (quoting Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, B.U. L. REV. 841, 879 (1992))).

⁴⁰ Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 722 n.213 (2000) (“The traditional liberal justification of bicameralism is that it slows down the legislative process, renders abrupt change difficult, forces myopic legislators to have second thoughts, and thereby minimizes arbitrariness and injustice in governmental action.” (quoting William H. Riker, *The Justification of Bicameralism*, 13 INT’L POL. SCI. REV. 101, 101 (1992))); see also Elizabeth R. Leong, *Ballot Initiatives & Identifiable Minorities: A Textual Call to Congress*, 28 RUTGERS L.J. 677, 685–91 (1997); Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 401–04 (2003).

⁴¹ Some scholars have identified these mechanisms for filtering out undesirable outcomes in the legislative process as “vetogates.” See LARRY I. PALMER, *ENDINGS AND BEGINNINGS: LAW, MEDICINE, AND SOCIETY IN ASSISTED LIFE AND DEATH* 108 (2000).

⁴² Nebraska voters converted their state legislature from a bicameral to a unicameral system through an initiative in 1934. History of the Nebraska Unicameral, www.unicam.state.ne.us/web/public/history (last visited June 4, 2007). Although twenty-one other states also attempted to switch to unicameral systems in the 1930s, these efforts failed. Interest in unicameral legislatures revived in the 1960s, but no state government other than Nebraska currently uses this form. *Id.*

⁴³ See Leong, *supra* note 40, at 685–86. Leong writes:

We are familiar with the Constitution’s fine-tuned system of deliberative democracy. An initiative process would have been wholly

Thus, pressure-point inefficiency may contribute to more moderate laws in some instances, but in others, it does not work so tidily and can become a recipe for gridlock.⁴⁴ The existence of these pressure points also makes legislators especially susceptible to party pressures and special interests. Interest groups need only influence the process at one of the critical junctures, and progress grinds to a halt.

2. *The Citizen Initiative Process*

Dissatisfaction with an entirely representative form of government reached a turning point during the Progressive era in the late 1800s.⁴⁵ In response to intransigent and corrupt legislatures,⁴⁶ the Progressives proposed citizen initiatives as an

foreign to the framers, who structured the legislative process in a thoroughly inefficient, though ingeniously deliberative, manner: (1) a bicameral legislature expected to deliberate and pass on each proposed bill; (2) a Chief Executive permitted to veto all legislative enactments complete with his articulated reasons; and (3) the ability of both houses to override that veto by a supermajority vote. The Constitution's divided processes of federal legislation supply a probative model of what republican government is: structural opportunities for a minority faction to alter the outcome or impact of a majority's bare desire or tendency to harm.

Id. (footnotes omitted).

⁴⁴ As Germany's first chancellor, Otto Von Bismarck, famously quipped: "Laws are like sausages, it is better not to see them being made." Tracey E. George & Robert J. Pushaw, Jr., *How Is Constitutional Law Made?*, 100 MICH. L. REV. 1265, 1265 (2002) (quoting 1,911 BEST THINGS ANYBODY EVER SAID 232 (Robert Byrne ed., 1988)).

⁴⁵ THOMAS M. DURBIN, CONG. RESEARCH SERV., REF. NO. 81-63A, INITIATIVE, REFERENDUM AND RECALL: A RESUME OF STATE PROVISIONS 3 (1981). In addition to the initiative and referendum process, the Progressive movement sought a number of political reforms, including secret ballots, direct election of U.S. senators, primary elections, and women's suffrage. THOMAS GOEBEL, A GOVERNMENT BY THE PEOPLE: DIRECT DEMOCRACY IN AMERICA 1890-1940, at 3-4 (2002). Some also recognize the movement as that of the Populist party as well as the Progressives. The Populist platform of 1892 affirmed support for direct legislation and the National Direct Legislation League. TALLIAN, *supra* note 25, at 35-36.

⁴⁶ M. DANE WATERS, A BRIEF HISTORY OF THE INITIATIVE AND REFERENDUM PROCESS IN THE UNITED STATES 3 (2003), <http://www.ianrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Quick%20Facts/History%20of%20I&R.pdf>; see also GOEBEL, *supra* note 45, at 4 (noting that the direct democracy movement typically has been interpreted as response to perceived influence of special interest groups on legislatures). In California, the initiative was introduced to wrest control of the state government from the Southern Pacific Company. See James E. Castello, Comment, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*,

alternative mechanism for creating laws.⁴⁷ The Progressives argued that initiatives could correct the control of government by moneyed interests⁴⁸ and could force action when elected officials became “paralyzed by inaction.”⁴⁹ Woodrow Wilson studied initiatives as an academic before he ran for president, and after initial skepticism, became an initiative convert, praising the process as the “gun behind the door”⁵⁰ and “a sobering means of obtaining genuine representative action on the part of legislative bodies.”⁵¹

Currently, twenty-three states allow citizen initiatives to create law outside of the traditional legislative process.⁵² The citizen initiative process is controversial.⁵³ Critics have argued

74 CAL. L. REV. 491, 503–04 (1986) (describing amendment of the California Constitution to authorize referendum and initiative immediately following election of reform movement’s “standard bearer” Hiram Johnson as governor).

⁴⁷ See, e.g., *Beall v. State ex rel. Jenkins*, 103 A. 99, 102–03 (Md. 1917) (opining that Maryland and other states amended their constitutions to provide for referendum veto of legislation in order to eliminate alleged control and corruption by “great corporations” and political parties); *State ex rel. Mullen v. Howell*, 181 P. 920, 922 (Wash. 1919) (opining that citizens asserted referendum power due to perception that legislature had become unresponsive to popular will). One New Jersey reformer concluded that “representative government is a failure.” GOEBEL, *supra* note 45, at 36. On another occasion, supporters of direct legislation by the electorate characterized representative government as an “utter failure,” stating that “[i]t fails in the leaders it develops; it fails in its mechanism[;] [i]t is cumbrous, uncertain, confused, irresponsible, undemocratic, often farcical and dishonest, and commonly partisan.” *Id.* at 207 n.35.

⁴⁸ The Progressives also argued the initiative could “take back government from the special interests.” Scheiber, *supra* note 1, at 790; see *id.* (“As Senator Jonathan Bourne, Jr., of Oregon declared in 1912, [the initiative was needed] ‘to restore the sovereignty of the people[,] [t]o educate and develop the people[,] [t]o secure legislation for the general welfare[,] [t]o prevent legislation against the general welfare[,] [t]o eliminate the legislative blackmailer[, and] [t]o make our legislative bodies truly representative.’” (quoting Jonathan Bourne, Jr., *Functions of the Initiative, Referendum and Recall*, 43 ANNALS AM. ACAD. POL. & SOC. SCI. 3, 3 (1912) (alterations in original))); see also GOEBEL, *supra* note 45, at 4 (noting that the direct democracy movement is typically interpreted as response to perceived influence of special interest groups on legislatures); WATERS, *supra* note 46, at 3.

⁴⁹ WATERS, *supra* note 46, at 2.

⁵⁰ GOEBEL, *supra* note 45, at 55.

⁵¹ Scheiber, *supra* note 1, at 793 (quoting Woodrow Wilson, *The Issues of Reform, in THE INITIATIVE, REFERENDUM AND RECALL* 69, 88 (William Bennett Munro ed., 1912)).

⁵² See *supra* note 6.

⁵³ For example, many authors suggest different standards for judicial review of initiatives than for legislative enactments. Although it is beyond the scope of this Article to address judicial review of any PAD laws enacted by initiative, some

that initiatives produce inferior law because they do not allow the fine tuning produced by a trip through the traditional legislative process.⁵⁴ This criticism is especially appropriate when initiatives attempt to address complex fiscal questions with a yes or no vote.⁵⁵

Also, initiatives are frequently maligned for allowing oppression of unpopular minorities.⁵⁶ In the early 1900s,

authors have suggested deference to initiative-made laws. See, e.g., K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 223–27 (2005) (discussing a heightened presumption against preemption). Others have argued for greater scrutiny. See, e.g., Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1548–51 (1990) (urging heightened scrutiny of laws enacted by initiatives and referendums); see also Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 494–504 (creating “quasi-constitutional canons of statutory interpretation” to interpret direct democracy enactments); Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 123–29 (1995) (criticizing judicial efforts to divine legislative intent when interpreting ballot measures); Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748, 2755–57 (2005). Yet a third group argues for no difference. See, e.g., Eule, *supra*, at 1505 n.5 (Although Eule argues for heightened scrutiny, his work collects citations to Supreme Court cases recognizing popular enactment of a law at issue yet refusing to interpret it any differently because of the method of enactment); see also *Judicial Approaches to Direct Democracy, supra*, at 2760–62.

⁵⁴ See, e.g., Eule, *supra* note 53, at 1520, 1527, 1555; Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 20 (1997); Hans A. Linde, *On Reconstituting “Republican Government,”* 19 OKLA. CITY U. L. REV. 193, 204–06 (1994) (“When groups or individuals can bypass deliberative bodies and enact these passions by plebiscite, the state departs from republican lawmaking.”).

⁵⁵ See, e.g., DuVivier, *supra* note 53, at 246 (describing the budget crisis in Colorado when voters passed conflicting funding initiatives); Mildred Wigfall Robinson, *Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case in Point*, 35 U. MICH. J.L. REFORM 511, 543 (2002); *Judicial Approaches to Direct Democracy, supra* note 53, at 2759 (“[I]ts myopic focus creates difficulty for a legislature that is responsible for taking a more holistic view of the state’s fiscal responsibilities.”); *id.* (also noting that California’s Proposition 13 “wreak[ed] havoc [on] state finances” and the “three strikes” criminal law had fiscal implications because of the larger prison population).

⁵⁶ Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 245–46 (1997) (finding empirically that initiatives that restrict civil rights have been approved seventy-five percent of the time in contrast to the approximate thirty-three percent approval success of all initiatives historically); see also Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 712–15 (1992); Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1, 2–9 (1978); Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 473–75 (1998); Hans A. Linde, *When Initiative Lawmaking Is Not “Republican*

initiatives were used to disenfranchise African American citizens in the South and to restrict the ability of Asian Americans to hold land in California.⁵⁷ Recent initiatives attempting to restrict gay rights and denying services to illegal immigrants perpetuate the initiative's ugly legacy in this area.⁵⁸ Fortunately, many initiatives that attempted to infringe civil rights have been defeated,⁵⁹ and among those that have been enacted, many have

Government": *The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 34–37 (1993); Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 150–57 (1983); Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 421–25 (1999); Priscilla F. Gunn, Note, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 URB. L. ANN. 135, 158 (1981). *But cf.* Ronald J. Allen, *The National Initiative Proposal: A Preliminary Analysis*, 58 NEB. L. REV. 965, 1021 (1979) (noting that "[t]he history of the initiative is remarkably free of the enactment of abusive legislation").

⁵⁷ See Scheiber, *supra* note 1, at 795 (discussing California's Alien Land Law, Proposition 1, in 1920); see also Janice C. May, *The Constitutional Initiative: A Threat to Rights?*, in HUMAN RIGHTS IN THE STATES 163, 171–72 (Stanley H. Friedelbaum ed., 1988).

⁵⁸ For example, California's Proposition 187 attempted to cut services for illegal aliens, but was declared unconstitutional or preempted by federal law in *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 786–87 (C.D. Cal. 1995). A similar measure was passed in Arizona in 2004. Proposition 200 passed by a margin of fifty-six percent. Richard Marosi, *Anti-Immigrant Initiatives Growing*, SEATTLE TIMES, Nov. 6, 2004, at A13. Another was proposed for Colorado in 2006. Proposed Initiative No. 55 failed to make it on the ballot when the Colorado Supreme Court determined that it did not meet the requirements of the single subject rule. Sarah Burnett, "We're Not Giving Up" Initiative Activist Says, ROCKY MOUNTAIN NEWS, June 13, 2006, at 13A. In 2000, California Proposition 22 sought to keep gay and lesbian couples from marrying in other states and seeking recognition of the union in California. Evelyn Nieves, *Ballot Initiative That Would Thwart Gay Marriage Is Embroiling California*, N.Y. TIMES, Feb. 25, 2000, at A12.

⁵⁹ AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 38 (1998). One of the authors has stated:

Indeed, a tiny percentage of proposed initiatives are aimed at restricting civil rights, and most of these are defeated. Citizens have used direct democracy less to oppress vulnerable minorities than to (i) reform government processes through campaign finance laws, restrictions on lobbying, and conflict of interest statutes, (ii) restrict their tax burden, and (iii) protect the environment.

DuVivier, *supra* note 53, at 243 n.110 (quoting Alan Hirsch, *Direct Democracy and Civic Maturation*, 29 HASTINGS CONST. L.Q. 185, 206–07 n.110 (2002) (citations omitted)).

been invalidated by the courts.⁶⁰ Furthermore, the traditional legislative process can result in similar oppression, and there is evidence that legislation enacted through “the deliberative process does not systematically create fewer discriminatory laws.”⁶¹

The initiative process has many detractors, and even those who appreciate its advantages acknowledge that its use has been problematic in some situations.⁶² Despite the criticism, the initiative process is wildly popular with voters. During the 1981 to 1990 decade, U.S. voters placed a record 274 initiatives and referendums on state ballots nationwide. The following decade, the number rose to another record of 391 statewide measures.⁶³ The upward trend appears to be continuing with more initiatives on state ballots every year.⁶⁴ Furthermore, the relatively few initiatives that may have tainted the process for some should not

⁶⁰ See, e.g., COLO. CONST. art. II, § 30b (1992); *Romer v. Evans*, 517 U.S. 620, 623 (1996) (finding that an initiative passed by Colorado voters in 1992, known as Amendment 2, which invalidated antidiscrimination protections on the basis of sexual orientation enacted by local governments, violated Equal Protection).

⁶¹ DuVivier, *supra* note 53, at 243.

⁶² It fosters reactions of “serious concern to outright disillusionment, and oftentimes sheer despair.” Scheiber, *supra* note 1, at 789. However, it also “play[s] a positive role in increasing electoral participation” and “has become a preferred mechanism of governing . . . the state’s most important policies.” Caroline J. Tolbert et al., *The Effects of Ballot Initiatives on Voter Turnout in the American States*, 29 AM. POL. RES. 625, 625 (2001); see also DuVivier, *supra* note 53, at 221–23, 235–48.

⁶³ *Overview of Initiative Use, 1904–2006*, INITIATIVE USE (Initiative & Referendum Inst., L.A., Cal.), Nov. 2002, at 1, 2, [http://www.iandrinstute.org/IRI%20Initiative%20Use%20\(2006-11\).pdf](http://www.iandrinstute.org/IRI%20Initiative%20Use%20(2006-11).pdf). The resurgence of the initiative process, after a decline in the 1940s through 1960s, is often credited to California’s Proposition 13. Jim Wasserman, *Tax-Cutting Proposition 13 Sparked Revolt*, DENVER POST, June 2, 2003, at 6A. In a February 2003 poll by the Public Policy Institute of California, sixty-five percent of homeowners say the proposition was “mostly a good thing for California.” MARK BALDASSARE, PUB. POL. INST. OF CAL., PPIC STATEWIDE SURVEY: CALIFORNIANS AND THEIR GOVERNMENT 10 (2003), available at http://www.ppic.org/content/pubs/survey/S_203MBS.pdf.

⁶⁴ A total of 204 measures appeared on the ballots of thirty-seven states during the 2006 midterm elections, an increase from the 162 measures on ballots during the 2004 election. *Election Results 2006*, BALLOT WATCH (Initiative & Referendum Inst., L.A., Cal.), Nov. 2006, at 1, 1, [http://www.iandrinstute.org/BW%202006-5%20\(Election%20results-update\).pdf](http://www.iandrinstute.org/BW%202006-5%20(Election%20results-update).pdf). “A total of 2,231 state-level initiatives have been on the ballot since the first one went before the voters in Oregon in 1904, and 909 (41 percent) have been approved.” *Overview of Initiative Use*, *supra* note 63, at 1. See generally, K.K. DuVivier, *Out of the Bottle: The Genie of Direct Democracy*, 70 ALB. L. REV. 1045 (2007) (describing the popularity of initiatives and the spread of their use to influence candidate elections).

serve to render initiatives “categorically suspect.”⁶⁵ Instead, it is valuable to consider the positive role initiatives have played in the past and still can play in the context of federalism.

B. The Benefit of Fast-Food Initiatives for Innovation

One of the biggest advantages of citizen initiatives is that they avoid many of the deficiencies of the legislative process. Few would want to eat at McDonalds all the time, but in some situations, fast food may be the best option. Similarly, fast-food government is a mechanism for the people to get action when legislatures are unwilling to respond for social or political reasons. As Theodore Roosevelt noted: “I believe in the initiative and referendum, which should be used not to destroy representative government, but to correct it whenever it becomes misrepresentative.”⁶⁶

Legislators personally benefit from infusions of additional money to their campaigns, so they have an incentive to appease large campaign contributors.⁶⁷ Furthermore, legislators cannot always vote their personal convictions on legislation without fear of repercussions for voting against party lines.⁶⁸ Consequently, sophisticated donors need only make contributions to party leaders and strategic legislators to manipulate the pressure points in the traditional process and improve their odds for favorable legislative outcomes.

In contrast, the initiative process was designed specifically to address the problems with representative governments that have stalled. While initiatives may suffer from some of the same shortcomings as the legislative process,⁶⁹ they are less susceptible

⁶⁵ *Judicial Approaches to Direct Democracy*, *supra* note 53, at 2765–66.

⁶⁶ Theodore Roosevelt, A Charter of Democracy, Address Before the Ohio Constitutional Convention (Feb. 12, 1912), in *POLITICS AND PEOPLE: THE ORDEAL OF SELF-GOVERNMENT IN AMERICA* 180 (Leon Sein et al. eds., 1974).

⁶⁷ DuVivier, *supra* note 53, at 245–46.

⁶⁸ *Id.* at 247; see also AMAR & HIRSCH, *supra* note 59, at 39.

⁶⁹ DuVivier, *supra* note 53, at 240–48; see also BETTY H. ZISK, MONEY, MEDIA, AND THE GRASS ROOTS 108–09 (1987); DuVivier, *supra* note 64, at 1048 n.15; Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845, 1849 (1999); Clayton P. Gillette, *Is Direct Democracy Anti-Democratic?*, 34 WILLAMETTE L. REV. 609, 622–24 (1998); Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 517–19 (1982); Randy M. Mastro et al., *Taking the Initiative: Corporate Control of the Referendum Process Through Media*

to special interest manipulation of the pressure points. Individual voters do not need to respond to pressure from party leaders because they may vote by secret ballot and will not suffer any personal consequences for voting contrary to the party line.⁷⁰

Similarly, initiatives are no more corrupted by the influence of money than the traditional legislative process. Minority interest contributors are more likely to see a direct return for their donations to legislators whose tenure in office may ride on a campaign contribution. In contrast, voters receive no direct financial benefit by choosing for one side or another, so they are more likely to vote their consciences on an initiative.⁷¹ Because most citizens are motivated by good intentions rather than greed, “big money can kill a ballot measure[;] [b]ut the corresponding good news is that big money can’t always buy a ‘yes’ vote.”⁷²

Trust in the “power of the people”⁷³ as an alternative to representative government sparked the resurgence of direct democracy in the late 1960s. For example, the People’s Lobby, a grassroots group, “resurrected and energized California’s previously moribund direct-democracy laws” initially in an attempt to recall Ronald Reagan, then governor of California.⁷⁴

Spending and What to Do About It, 32 FED. COMM. L.J. 315, 319–23 (1980); John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377, 391–400 (1985).

⁷⁰ TALLIAN, *supra* note 25, at 29 (quoting John R. Haynes, *The Actual Workings of the Initiative, Referendum, and Recall*, 1 NAT’L MUN. REV. 586, 589 (1912)). The father of the recall in California worked to get direct democracy in Los Angeles and then the state twenty-four years before the election of Governor Hiram Johnson and other representatives sympathetic to the cause who enacted statewide direct democracy in California in 1910. *Id.* at 36–38 (“[T]he ordinary legislator often votes upon scores of questions at a single sitting, amid tumult and uproar, the appeal to party passion, and to his private pocketbook.” (quoting Haynes, *supra*, at 586)).

⁷¹ The desire to vote their consciences also may have a downside on repressive moral issues; despite contributions by gay-rights activists, voters in eight of nine states approved same-sex marriage bans in 2006. Karen E. Crummy, *A Big Role in a Fight to Help Gays Wed*, DENVER POST, Aug. 7, 2007, at 1B. In contrast, these activists noted that their contributions helped elect “a number of state lawmakers who support gay rights . . . and some are changing laws.” *Id.*

⁷² Al Knight, *Do Initiatives Still Work? Yes, but They Need Some Repair*, DENVER POST, Dec. 1, 2002, at 1E; *see also* DuVivier, *supra* note 64, at 1048–49.

⁷³ TALLIAN, *supra* note 25, at 118.

⁷⁴ Matt Smith, *Recalling Reagan*, SFWEEKLY.COM, Aug. 27, 2003, <http://www.sfweekly.com/2003-08-27/news/recalling-reagan>.

The initiative process inspired these individuals to eschew more futile, and potentially destructive, methods of impacting government policies and instead provided a constructive mechanism for those who felt disempowered to seek political change.⁷⁵ Without initiatives, the influential “triumphed without even the need publicly to justify their views.”⁷⁶ Now both the right and the left recognize the power of the initiative to motivate and achieve results, as both the state and local initiative processes have enjoyed record popularity during the last thirty years.⁷⁷

Fast food is not healthy as daily fare, but it can work well as part of a complete diet. Similarly, direct democracy is best not for circumventing legislatures, but instead as a supplemental means of addressing a “fail[ure] in [the] mechanism.”⁷⁸ Citizens may be allowed to “recogniz[e] legislators as specialists in government,” and yet “join in partnership with them to supplement their work” by registering their preferences not only during representative elections, but between them.⁷⁹

Federalism encourages the diffusion of power, and the initiative process illustrates the advantage of this diffusion. The Supreme Court continues to endorse Justice Brandeis’s assertion that “one of the happy incidents of the federal system” is allowing a state to “serve as a laboratory[] and try novel . . . experiments without risk to the rest of the country.”⁸⁰ History

⁷⁵ See TALLIAN, *supra* note 25, at 117 (noting that more than boycotts and protest, the “initiative surpasses all other political methods to bring an issue into sharp focus”).

⁷⁶ *Id.* at 118.

⁷⁷ DuVivier, *supra* note 53, at 235. Although initiatives were initially promoted by Progressives in the late 1800s and by liberal groups in the late 1960s, they are now embraced by liberals and conservatives and do not “promote any particular agenda over another.” *Id.*

⁷⁸ Representative government “fails in the leaders it develops; it fails in its mechanism. It is cumbrous, uncertain, confused, irresponsible, undemocratic, often farcical and dishonest, and commonly partisan.” GOEBEL, *supra* note 45, at 206 n.35 (quoting NAT’L DIRECT LEGISLATION LEAGUE, DIRECT LEGISLATION RECORD I, at 84 (1894)).

⁷⁹ TALLIAN, *supra* note 25, at 8.

⁸⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), *cited in* *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting), *Atkins v. Virginia*, 536 U.S. 304, 326 (2002), *United States v. Oakland Cannabis Buyers Coop.*, 532 U.S. 483, 502 (2001) (Stevens, J. dissenting), *Smith v. Robbins*, 528 U.S. 259, 261 (2000); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 292 (1990).

has shown that citizen initiatives are some of the best vehicles for this dispersed experimentation by states.

1. Local Legislative Experimentation

The division of power between national and local authority in the U.S. Constitution was designed to secure the “people’s rights.”⁸¹ This division of power favors local authority to address experimental issues for at least three reasons.

First, communities themselves, not the federal government, should have the power to resolve important local issues that do not impact other states. As the Supreme Court stated in recognizing one of the benefits of citizen initiatives, “a decentralized government . . . will be more sensitive to the diverse needs of a heterogeneous society.”⁸²

Second, allowing state social experimentation sometimes can result in a national consensus where none previously existed. The state efforts can signal to Congress that there is widespread support for a particular measure or, just as importantly, widespread opposition.

Third, federal control in experimental areas can eliminate any potential for progress or the resolution of differing views. Because federal law preempts, “the state is powerless to remove the ill effects of [a federal] decision.”⁸³ When the U.S. Constitution or a federal statute speaks on a topic, alternative state approaches may be curtailed, preventing them from contributing to a compromise resolution on a controversial topic that might better reflect a consensus of opinions.⁸⁴

⁸¹ *Conant v. Walters*, 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring) (quoting *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000)) (arguing that federal regulation in the area of medical marijuana use is inappropriate under basic principles of federalism and is best left to the states).

⁸² *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (stating that a decentralized government “increases [the] opportunity for citizen involvement in democratic processes”).

⁸³ *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 643 (1973) (Rehnquist, J., dissenting) (quoting *Pa. Dairies, Inc. v. Milk Control Comm’n*, 318 U.S. 261, 275 (1943)). In contrast, if Congress is unhappy with a court’s finding that state law may stand, it can enact new legislation because “the national government, which has the ultimate power, remains free to remove the burden.” *Id.* at 643 (quoting *Pa. Dairies, Inc.*, 318 U.S. at 275).

⁸⁴ See generally DuVivier, *supra* note 53 (describing Attorney General Ashcroft’s efforts to use the federal Controlled Substances Act, 21 U.S.C. §§ 801–971 (2000),

Many innovations arise at the state level in a manner “akin to natural selection.”⁸⁵ State legislators are forced into experimentation by necessity because they are faced with difficult issues, and “the spirit of state experimentation is one of creative response to immediate necessity, often addressed to solving a real problem staring the official in the face.”⁸⁶

Some scholars credit state governments with innovations in welfare reform, social security, unemployment compensation, minimum-wage laws, public financing of political campaigns, no-fault insurance, hospital cost containment, and prohibitions against discrimination in housing and employment.⁸⁷ Others also say state experiments at the local level led the way in public education, health care, taxation, penology, and environmental protection.⁸⁸ One scholar surmised that “[c]ommon intuition suggests that the vast majority of techniques used today to govern were developed at the state and local level.”⁸⁹

Yet, critics have argued that states are not effective laboratories for experimentation because state legislators are risk averse. Legislators do not want to commit resources to an experiment that may prove unpopular or costly.⁹⁰ State legislators, instead, have an incentive to support the status quo and “free ride on the activities of other governments.”⁹¹

to preempt Oregon’s Death with Dignity Act, described in this Article at notes 319–23 and accompanying text).

⁸⁵ Deborah J. Merritt, *Federalism as Empowerment*, 47 FLA. L. REV. 541, 551 (1995); see also Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 31 (2006) (“Well, if the fifty states are laboratories for public policy formation, then surely the 3,000 counties and 15,000 municipalities provide logarithmically more opportunities for innovation . . .”).

⁸⁶ Friedman, *supra* note 13, at 398.

⁸⁷ See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988) (identifying four advantages of federalism: checks on the central government, greater accessibility, diversity, and enhanced opportunities for experimentation); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1491–1511 (1987) (book review) (arguing that federalism secures the public good, protects private rights, and preserves the spirit and form of popular governments).

⁸⁸ See DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 87–88 (1995).

⁸⁹ Friedman, *supra* note 13, at 399.

⁹⁰ See Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980) (“[L]ow-level governments remain flawed mechanisms to rely on in the search for new ideas.”).

⁹¹ *Id.* (“[S]ecure incumbents are likely to behave as if they were ‘risk averse’ even if their underlying preferences are risk neutral. In a multiple government system

Most local legislators especially prefer to avoid confronting matters of social experimentation. The pressure-point structure of traditional legislation permits a few vested representatives to kill controversial bills, allowing other legislators to avoid taking a stand.⁹²

2. *The History of Initiatives for Innovation*

While federal and state legislators have an incentive to be fiscally and issue conservative to guarantee reelection, citizen voters do not have these concerns. Citizen voters, who are not motivated by a desire to be reelected, are more likely to “vote their conscience.”⁹³ Furthermore, citizen votes on many experimental measures are more likely to be well considered and less likely to be influenced by outside sources when these measures have the potential to impact voters or their immediate acquaintances locally.⁹⁴ Because these local voters are less

the overall incentive to take risks is reduced if the politician hopes to free ride on the activities of other governments.”).

⁹² SCHMIDT, *supra* note 5, at 33–34. Schmidt notes:

There are several ways to kill a bill that allow legislators to avoid answering to the electorate—politicians are very creative in this regard. The New Jersey state senate in 1981 and 1983 passed bills nearly unanimously to amend the state constitution to provide for a statewide Initiative process. Many of the legislators actually opposed Initiative, but voted for it because they knew that it would be blocked in an assembly committee. This arrangement allowed the senators to report to constituents that they had voted for Initiative, and allowed the assembly members—with the exception of the handful who voted to block I&R in committee—to report to constituents that they too favored I&R, but did not get a chance to vote on it.

Id.; see, e.g., Erik Bailey, *Action on “Right to Die” Languishes in California*, L.A. TIMES, June 27, 1997, at A12 (“But from a political standpoint, as we saw with Proposition 161, [PAD is] a difficult issue to address.” (quoting Assemblyman Bob Hertzberg)).

⁹³ See INITIATIVE & REFERENDUM INST., GENERAL ELECTION POST ELECTION REPORT 1 (2002), <http://www.iandrinstute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Election%20Reports/2002%20General%20Election/2002%20POST-election%20Report%20-%2012-11-02%20-%20State%20by%20State.pdf>.

⁹⁴ DuVivier, *supra* note 53, at 248 (arguing that initiatives having the following qualities are the best candidates for initiative resolution: “Such initiatives represent an alignment of factors: (a) topic areas that have traditionally been regulated by the states, such as health and safety; (b) good candidates for experimentation at the state level when there is no need for national uniformity; and (c) matters that expand the rights of individuals without infringing on the rights of others.”).

influenced by the pressure points that snag controversial issues in the traditional legislative process, fast-food government by initiative has often been the first, if not the only, way that innovative concepts find their way into law.

Historically, many significant innovations have been achieved through, or with the help of, the initiative. In contrast to elected legislators who fear repercussions, citizens have traditionally embraced the initiative mechanism for experimentation on important social issues, especially social issues that are particularly controversial and can have a difficult time surmounting the legislative process.⁹⁵ The Progressives sought to address the “intransigence” and “lack of integrity of elected legislators” through “public participation in the lawmaking process,” and their expectations were largely vindicated.⁹⁶ A few of the areas in which initiatives have been most beneficial are reform of government itself, social reforms, civil rights, and protection of the environment.

Reform of Government: More initiatives have addressed government reform than any other single category.⁹⁷ This is an especially appropriate area for citizen participation because legislators who benefit from the status quo⁹⁸ are reluctant to legislate change.⁹⁹ Many of the early reforms proposed by the Progressives related to government reform, and early initiatives succeeded in establishing (1) nominations of candidates through

⁹⁵ Judith F. Daar, *Direct Democracy and Bioethical Choices: Voting Life and Death at the Ballot Box*, 28 U. MICH. J.L. REFORM 799, 830 (arguing voter-made lawmaking is inherently more beneficial to reform than representative lawmaking).

⁹⁶ *Judicial Approaches to Direct Democracy*, *supra* note 53, at 2763.

⁹⁷ See, e.g., SCHMIDT, *supra* note 5, at 21; see also *Judicial Approaches to Direct Democracy*, *supra* note 53, at 2764 (“Of all the initiatives placed on statewide ballots in the last half of the twentieth century, nearly one in four addressed the administration of government, whether in the legislative branch, in state agencies and administrations, in the electoral or apportionment processes, or in the very processes of direct democracy.”).

⁹⁸ “Just as scholars have advocated an enhanced judicial role when ‘the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out,’ so too can direct democracy promote more responsive and representative government” *Judicial Approaches to Direct Democracy*, *supra* note 53, at 2765 (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST* 103 (1980)). So too can direct democracy promote more responsive and representative government in such situations. *Id.*

⁹⁹ See Baker, *supra* note 8, at 320–21; Clark, *supra* note 8, at 347.

primary elections,¹⁰⁰ (2) presidential primaries,¹⁰¹ (3) direct election of U.S. senators,¹⁰² and (4) home rule of cities.¹⁰³ Fair reapportionment has often been a topic for initiatives, and Arizona citizens blazed the way by passing a measure in 1912 requiring a population-based formula more than “half a century before the U.S. Supreme Court ruled this method of reapportionment mandatory.”¹⁰⁴ Well-meaning, if sometimes problematic, initiative efforts to clean up government more recently have included (1) term limits,¹⁰⁵ (2) campaign finance reform,¹⁰⁶ and (3) limits on lobbying contributions.¹⁰⁷

Social reforms: Early initiatives promoted several social reforms long before the New Deal, including (1) the eight-hour work day,¹⁰⁸ (2) a ban on child labor,¹⁰⁹ and (3) government aid programs for farmers, the poor, the disabled, and the elderly.¹¹⁰ The 2006 elections continued to illustrate the initiative’s advantage in this category as six states passed initiative measures increasing the minimum wage for hourly workers.¹¹¹

Civil Rights: Women’s suffrage was a key cause for the Progressives. Successful initiatives in Arizona and Oregon “helped prepare the way for passage of the national suffrage amendment nine years later.”¹¹² Early initiatives also (1) banned poll taxes¹¹³ and (2) established a juvenile court system.¹¹⁴ At least one author has speculated that the issue of slavery could

¹⁰⁰ SCHMIDT, *supra* note 5, at 15 (Arkansas, Maine, Montana, Oregon, and South Dakota).

¹⁰¹ *Id.* (Montana and Oregon).

¹⁰² *Id.* (Oregon, Montana, and Oklahoma).

¹⁰³ *Id.* (Colorado and Oregon).

¹⁰⁴ *Id.*

¹⁰⁵ *See* WATERS, *supra* note 64, at 6.

¹⁰⁶ *See id.*

¹⁰⁷ *See* DuVivier, *supra* note 64, at 1050 (discussing Colorado Amendment 41 attempting to achieve high ethical standards and transparency in government).

¹⁰⁸ SCHMIDT, *supra* note 5, at 18 (Colorado).

¹⁰⁹ *Id.* (Arkansas).

¹¹⁰ *Id.* at 19.

¹¹¹ *Election Results 2006*, *supra* note 64, at 1; *see also* DuVivier, *supra* note 64, at 1050 n.27.

¹¹² SCHMIDT, *supra* note 5, at 19.

¹¹³ *Id.* (California, Oregon, and Washington).

¹¹⁴ *Id.* (Colorado).

have been resolved, and the Civil War averted, if the Senate had passed a proposal to put the matter to a vote of the people.¹¹⁵

Environment: Initiatives also have played a vital role in helping citizens take stands against business interests to protect the environment. Oregon sponsored the first successful conservation initiative in 1910, banning the use of destructive fish-harvesting techniques.¹¹⁶ Since that time, initiatives have addressed topics such as: (1) establishing fish and game commissions,¹¹⁷ (2) coastal protection,¹¹⁸ (3) animal rights,¹¹⁹ and (4) the use of renewable energy by utility companies.¹²⁰

¹¹⁵ See TALLIAN, *supra* note 25, at 7. On January 3, 1861, Senator Crittenden proposed “taking the sense of the people and submitting to their vote . . . [the] Constitutional amendments to solve the slavery question by compromise.” *Id.* (quoting CHARLES SUMNER LOBRINGIER, *THE PEOPLE’S LAW* 299 (1909)). Senator Crittenden’s proposal was defeated in the Senate by one vote, and the Civil War began one month later. *Id.* Another author has suggested that:

Had the United States had a national Initiative process in the late 1960s and early 1970s, the course of the Vietnam War and protests against it might have been different. The Initiative process is effective not only in *venting* popular discontent, but in *channeling it constructively* to make the necessary changes.

SCHMIDT, *supra* note 5, at 29.

¹¹⁶ SCHMIDT, *supra* note 5, at 20.

¹¹⁷ *Id.* (during the 1930s and 1940s in Arkansas, Idaho, Montana, and Washington).

¹¹⁸ See, e.g., Proposition O: Citizens Oversight Advisory Committee (COAC), <http://www.lapropo.org/sitefiles/coac.htm> (last visited July 30, 2007). California Proposition O passed in 2006 and provides:

\$500 million in bond measure funds to clean up the City’s rivers, lakes, beaches, and ocean. The language of Proposition O includes provisions for the establishment of a Citizens Oversight Advisory Committee (COAC) that is [to] be responsible for monitoring the bond program, projects, budgets and schedules and to advise and report to the Mayor and the Los Angeles City Council on its status.

Id.

¹¹⁹ For example, in 2006 Arizona Proposition 204 provided for a minimum living space for pregnant pigs and calves. JAN BREWER, ARIZ. SEC’Y OF STATE, 2006 BALLOT PROPOSITION GUIDE 134 (2006), *available at* <http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop204.pdf#page=21>.

¹²⁰ See, e.g., BALLOT INITIATIVE STRATEGY CTR., 2004 ELECTION RESULTS: BALLOT INITIATIVE & REFERENDUM 18–19, 23 (2004), *available at* <http://www.ballot.org/vertical/Sites/{26C6ABED-7A22-4B17-A84A-CB72F7D15E3F}/uploads/{82C8AB19-CA41-4A88-A59E-41DCC6C29D4B}.pdf> (noting the passage of Colorado Amendment No. 37 that would require public utilities to derive ten percent of their electricity from alternative resources).

One of the primary goals of Ed Koupal’s groups, the People’s Lobby and the Western Bloc, which resurrected the initiative process in the late 1960s, was a

This list illustrates that the citizen initiative has been a particularly effective tool in the arsenal for effecting change. In fact, the reputation for innovative lawmaking at the state level is perhaps more attributable to initiative-made law than to any actions by state legislators.¹²¹ Because they do not have to pass through the pressure points of the traditional legislative process, the fast-food quality of citizen initiatives makes them distinct from legislative enactments and especially effective for reform.

3. Initiatives for Moral Issues

Morality has long been a driving force in the initiative movement. Prohibitionists joined forces with those who lobbied for the initiative power hoping the direct vote would help them legislate against the use of alcohol.¹²² Yet every early proposition in California that attempted to prohibit alcohol or regulate liquor failed,¹²³ and the Eighteenth Amendment was ratified by state legislatures, not by the people.¹²⁴ Other moral issues have been the focus of initiatives, often showing back-and-forth swings between competing majorities such as prohibiting or legalizing fights¹²⁵ and gambling.¹²⁶ Some of the most recent

nationwide attempt to use initiatives to freeze the advance of nuclear power. See TALLIAN, *supra* note 25, at 113–14. Most of the nuclear freeze initiatives failed to pass, but the initiative attention to the issue was effective: 1979 was the last year a new nuclear plant was approved in the United States. See, e.g., Michael V. Copeland, *Digging the Nuclear Future*, BUSINESS 2.0, Aug. 2007, at 84, 85.

¹²¹ Cf. *supra* notes 90–92 and accompanying text.

¹²² GOEBEL, *supra* note 45, at 77–79 (noting that “the prohibition movement” joined organized labor and “the single taxers” as “another key ally of direct democracy advocates”).

¹²³ See, e.g., TALLIAN, *supra* note 25, at 173, 176–78 (noting the failures of California Propositions 2 (1914), 1 (1916), and 1 & 22 (1918)).

¹²⁴ U.S. CONST. amend. XVIII (repealed 1933). In contrast, Amendment XXI repealing Prohibition is the only Constitutional amendment ratified by constitutional conventions of the people instead of by state legislatures. See DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 162 (1979).

¹²⁵ Compare California Prop. 20 (1914), SEC’Y OF STATE, AMENDMENTS TO THE CONSTITUTION AND PROPOSED STATUTES 95 (1914), available at http://library.uchastings.edu/ballot_pdf/1914g.pdf (prohibiting prize fighting and boxing), with California Prop. 7 (1924), FRANK C. JORDAN, SEC’Y OF STATE, AMENDMENTS TO THE CONSTITUTION AND PROPOSED STATUTES 9 (1924), available at http://library.uchastings.edu/ballot_pdf/1924g.pdf (legalizing boxing and wrestling contests for prizes).

¹²⁶ See, e.g., BILL JONES, SEC’Y OF STATE, CALIFORNIA VOTER INFORMATION GUIDE 20 (1998), available at http://library.uchastings.edu/ballot_pdf/1998g.pdf (discussing California Prop. 5 allowing federally recognized Indian tribes to operate

moral battles being fought by initiative are the legalization of medical marijuana,¹²⁷ gay rights,¹²⁸ abortion rights,¹²⁹ and stem cell research.¹³⁰

Failure to resolve these moral issues is especially troubling when efforts to expand the rights of individuals to make their own moral decisions are thwarted by an influential minority simply on the basis that the exercise of this right offends the beliefs or sensibilities of the minority group. Although some of the other moral dilemmas currently subject to initiative battles arguably infringe the rights of one group or another,¹³¹ the right to request medical assistance in hastening one's death is the quintessential example of a right to self-determination.

This Article focuses on the advantages of the initiative process in federalism rather than on the substance of initiative issues that are the best candidates for allowing citizens to determine "what

high stakes casinos and establish additional casinos without state legislature approval); Press Release, Sam Reed, Wash. Sec'y of State, Initiative 892 Qualifies for 2004 General Ballot (Aug. 3, 2004), http://www.secstate.wa.gov/office/osos_news.aspx?i=jeDvwiNAVQX7HqlwWP1%2FRg%3D%3D (discussing Washington Initiative 824, an effort to legalize slot machines).

¹²⁷ DuVivier, *supra* note 53, at 222–24.

¹²⁸ For example, Colorado Amendment 2 (1992), Arkansas Amendment 3 (2004), Georgia Amendment 1 (2004), Kentucky Amendment 1 (2004), Michigan Proposal 04-2 (2004), Mississippi Amendment 1 (2004), Montana Initiative 96 (2004), North Dakota Measure 1 (2004), Ohio Issue 1 (2004), Oklahoma Question 711 (2004), Oregon Measure 36 (2004), and Utah Amendment 3 (2004) all prohibited same-sex marriages. See *Election 2004—Ballot Measures*, CNN.COM, Nov. 3, 2004, <http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures/>.

¹²⁹ CHRIS NELSON, S.D. SEC'Y OF STATE, SOUTH DAKOTA 2006 BALLOT QUESTIONS 12 (2006), available at <http://www.sdsos.gov/elections/voteregistration/electvoterpdfs/2006southdakotaballotquestionpamphlet.pdf> (describing Referred Law 6).

¹³⁰ See, e.g., CAL. ATTORNEY GEN., PROPOSITION 71: OFFICIAL TITLE AND SUMMARY 68 (2004), available at http://www.sos.ca.gov/elections/bp_nov04/prop_71_entire.pdf; ROBYN CARNAHAN, MO. SEC'Y OF STATE, 2006 BALLOT MEASURE: CONSTITUTIONAL AMENDMENT 2 (2006), <http://www.sos.mo.gov/elections/2006petitions/ppStemCell.asp>; see also Michael S. Mireles, Jr., *States as Innovation System Laboratories: California, Patents, and Stem Cell Technology*, 28 CARDOZO L. REV 1133, 1193–1207 (2006) (discussing California as a laboratory for stem cell technology).

¹³¹ For example, a woman's right to choose to control her own body by having an abortion under some religious theories interferes with the unborn child's right to be brought to full term. Also, the right to use medical marijuana to relieve pain may impact the right of others to live in a society free from the negative impacts of the criminal use of the drug.

serves the public interest.”¹³² However, the physician-assisted death issue represents an alignment of the three factors for controversial issues that might best be resolved by initiative.¹³³ The first factor is *a straightforward and logical topic*. PAD concerns health and safety, topic areas that have traditionally been regulated by the states. In addition, every individual must face death, so the matter is not only a local one; it is deeply personal. Finally, the topic is not overly complex, and most voters understand it and will consider its consequences carefully as it could potentially affect each one of them. The second factor is *no infringement on minority rights*. PAD expands the rights of individuals who choose to exercise the right and does not impact the rights of others to hold whatever religious beliefs they wish.¹³⁴ The third factor is *no need for national uniformity*. The Supreme Court itself has stated that there is no need for uniformity and that PAD is a good candidate for experimentation at the state level.¹³⁵

Arguably, legislatures should be the better forums for resolving the PAD moral battle. The legislative process is tailored to sculpt compromises respecting both majority and minority views. Unfortunately, however, legislatures have been

¹³² *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 678 (1976) (noting that it is appropriate for voters to use “their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest” (quoting *S. Alameda Spanish Speaking Org. v. City of Union City*, 424 F.2d 291, 294 (9th Cir. 1970))). Yet in the PAD debate, the people are not overriding their representatives’ views; instead they are trying to get action when the representatives have failed to express a view. The *Eastlake* Court noted that when the people exercised their direct vote, they were exercising “a power reserved by the people to themselves.” *Id.* at 675.

¹³³ DuVivier, *supra* note 53, at 248. Some of the justifications for eliminating “criminal penalties for consensual sexual relations” of homosexuals might be comparable in the PAD context: assisted suicide statutes (1) penalize conduct many doctors engage in; (2) regulate conduct not harmful to others; and (3) are arbitrarily enforced. *Cf. Lawrence v. Texas*, 539 U.S. 558, 572 (2003); *see also* Diana Hassel, *Sex and Death: Lawrence’s Liberty and Physician-Assisted Suicide*, 9 U. PA. J. CONST. L. 1003, 1046–48 (2007).

¹³⁴ Some opponents argue that legalizing PAD may hurt society by giving doctors the power to make life and death decisions. Yet, doctors already have this power because the Supreme Court has declared that individuals have a constitutional right to refuse medical treatment. *See Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 265–69 (1990). This right to make a life or death decision for an incompetent patient gives doctors more power than they would exercise by simply writing a prescription for a mentally competent patient who is contemplating death.

¹³⁵ *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 287–91 (2006).

especially inept at addressing this controversial issue. Legislators' own deeply held personal beliefs that may conflict with the majority of their constituents or fear of igniting the ire of minority interests who hold such fervent beliefs has mired this topic in the pressure points and stalled all legislation on the issue.

II

FEDERALISM IN THE PHYSICIAN-ASSISTED DEATH DEBATE

Freshly minted doctors cannot leave medical school without first taking the Hippocratic Oath, which binds them to prescribe regimens for the good of their patients according to their ability and judgment and to never do harm to anyone.¹³⁶ While the

¹³⁶ See ROBERT M. VEATCH, *MEDICAL ETHICS* 7 (2d ed. 1997). "The Hippocratic Oath is often acknowledged by both physicians and lay people to be the foundation of medical ethics for physicians . . ." *Id.* at 6. The oath emerged in the fifth century B.C. and is "traced to a group of physicians in ancient Greece . . . [headed by] Hippocrates, but surely not all the writings were . . . authored by him." *Id.* Although there are many translations and modified modern version, here is one translation of the original Greek:

I swear by Apollo the physician, and Asclepius, and Hygieia and Panacea and all the gods and goddesses as my witnesses, that, according to my ability and judgement, I will keep this Oath and this contract:

To hold him who taught me this art equally dear to me as my parents, to be a partner in life with him, and to fulfill his needs when required; to look upon his offspring as equals to my own siblings, and to teach them this art, if they shall wish to learn it, without fee or contract; and that by the set rules, lectures, and every other mode of instruction, I will impart a knowledge of the art to my own sons, and those of my teachers, and to students bound by this contract and having sworn this Oath to the law of medicine, but to no others.

I will use those dietary regimens which will benefit my patients according to my greatest ability and judgement, and I will do no harm or injustice to them.

I will not give a lethal drug to anyone if I am asked, nor will I advise such a plan; and similarly I will not give a woman a pessary to cause an abortion.

In purity and according to divine law will I carry out my life and my art.

I will not use the knife, even upon those suffering from stones, but I will leave this to those who are trained in this craft.

Into whatever homes I go, I will enter them for the benefit of the sick, avoiding any voluntary act of impropriety or corruption, including the seduction of women or men, whether they are free men or slaves.

Whatever I see or hear in the lives of my patients, whether in connection with my professional practice or not, which ought not to be spoken of outside, I will keep secret, as considering all such things to be private.

obligation to do both good and no harm to patients may have seemed consistent in the past, modern medicine has created a tension about when and how to stop in the case of seriously ill people who want to die.¹³⁷

In 2003, over 35.9 million Americans were age sixty-five or older.¹³⁸ Experts project that this number will almost double by 2030.¹³⁹ A major reason for this rapid growth is the miracle of modern medicine. Life expectancy in 1900 was 47.3 years.¹⁴⁰ In contrast, the average American in 2000 could expect to live until the ripe age of 76.9.¹⁴¹

Unfortunately, the same medical advances that have helped extend life sometimes also extend death, creating a “twilight zone of suspended animation”¹⁴² that draws out the hardship for

So long as I maintain this Oath faithfully and without corruption, may it be granted to me to partake of life fully and the practice of my art, gaining the respect of all men for all time. However, should I transgress this Oath and violate it, may the opposite be my fate.

U.S. NAT'L LIBRARY OF MED., NAT'L INSTS. OF HEALTH, GREEK MEDICINE: THE HIPPOCRATIC OATH, http://www.nlm.nih.gov/hmd/greek/greek_oath.html (last visited Apr. 8, 2008).

¹³⁷ “There is a tragic mismatch between the health care many seriously ill people want and what they get We don’t know when or how to stop.” Leon Jaroff, *Knowing When to Stop*, TIME, Dec. 4, 1995, at 76, 76 (quoting Dr. Knaus, author of a study on hospital death). The definition of “harm” may include mental as well as physical damage. See, e.g., MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2005). Consequently, a doctor should not ignore the mental damage created by attending only to a patient’s physical needs. A family practice doctor in Ohio noted that he attended a public education seminar on pain management and was “shocked that more than 30 percent of the patients in the audience raised their hands when asked if they had Kevorkian’s telephone number [to help them die]. . . . Dying patients want dignity, they want to be in control and they don’t want a tube in every orifice.” Joyce Peterson & Karen Klinka, *Suicide Requests Rare, State Doctors Say Focus on Care, Experts Urge*, DAILY OKLAHOMAN, June 21, 1997, at 8.

¹³⁸ WAN HE ET AL., U.S. DEP’T HEALTH & HUMAN SERVS., 65+ IN THE UNITED STATES: 2005, at 1 (2005), available at <http://www.census.gov/prod/2006pubs/p23-209.pdf>.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*; see also CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: UNITED STATES, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Apr. 11, 2008) (stating life expectancy overall in 2008 is 78, with an expectancy of 75.15 for males and 80.97 for females).

¹⁴² *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 270 (1990) (Brennan, J., dissenting) (“Medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form, continues.”).

families and the pain for the soon-to-be deceased. These twilight-zone patients “simply didn’t exist a generation ago because the technology and drugs that help keep them alive didn’t exist.”¹⁴³ Doctors now recognize that some efforts to keep a person alive may be doing that patient more harm than good.¹⁴⁴

An overwhelming majority of Americans believe that an individual patient should have the right to refuse life support.¹⁴⁵ In addition, the U.S. Supreme Court has declared that this right to refuse medical treatment was a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment.¹⁴⁶ Despite this, many state legislatures have had difficulty passing “living will” legislation recognizing this right because of opposition by groups that morally oppose the right on religious grounds.

Polls also suggest that, even though efforts to identify a federal constitutional right to die failed,¹⁴⁷ a majority of Americans favor physician-assisted death.¹⁴⁸ This support has been a growing trend since 1947 when only thirty-seven percent

¹⁴³ See David Noonan, *Special Care at the End of Life*, NEWSWEEK, Oct. 16, 2006, at 67, 67.

¹⁴⁴ See, e.g., HARRIS INTERACTIVE, HARRIS POLL #32, MAJORITIES OF U.S. ADULTS FAVOR EUTHANASIA AND PHYSICIAN-ASSISTED SUICIDE BY MORE THAN TWO-TO-ONE (2005), http://www.harrisinteractive.com/harris_poll/index.asp?PID=561 (reporting the results 2005 phone survey finding that more than two-thirds of adults would like euthanasia for dying patients when requested by that patient, and two-thirds would like their state to adopt an Oregon-style Death with Dignity Act). *But see Polls Show Once Public Understands the Issue: Doctor-Assisted Suicide Fails*, U.S. NEWSWIRE, Mar. 14, 2006 [hereinafter *Polls Show*] (discussing polls to the contrary). An August 2005 Pew Research poll found only forty-four percent of people “[f]avor making it legal for doctors to Assist in suicide.” *Id.* (“Nationwide sample of 1,502 adults, 18 years of age or older.”). A May 2005 Gallup poll found forty-nine percent found doctor-assisted suicide “acceptable” and forty-two percent found it “wrong.” *Id.* (“Telephone interviews with 1,005 national adults, aged 18 and older.”).

¹⁴⁵ For example, a 2005 poll by the Pew Research Center showed that eighty-four percent of those polled agreed that “patients [should have] the right to decide whether they want to be kept alive through medical treatment,” while ten percent disagreed. PEW RESEARCH CTR., STRONG PUBLIC SUPPORT FOR RIGHT TO DIE 2 (2006), available at <http://people-press.org/reports/pdf/266.pdf>.

¹⁴⁶ See *infra* notes 174–79 and accompanying text (discussing the *Cruzan* case).

¹⁴⁷ See *infra* notes 192–225 and accompanying text (discussing the *Quill* and *Glucksberg* cases).

¹⁴⁸ Bill Theobald, *Poll Finds Support for Assisted Dying*, STATESMAN J., Oct. 17, 2005, at B1.

polled supported PAD.¹⁴⁹ In comparison, a Gallup poll in 1996 showed that seventy-five percent of Americans favored PAD.¹⁵⁰ In addition, eight separate polls by Field Research since 1979 show a majority of Californians, ranging from sixty-four to seventy-five percent, consistently support PAD.¹⁵¹

Physicians, however, disagree about PAD. But, it does have significant support within the medical community. For example, physicians have given high approval ratings to its use under Oregon's PAD statute,¹⁵² and several polls showed a majority of doctors favored PAD in certain circumstances.¹⁵³ Moreover, the California Association of Physician Groups, the nation's largest professional organization representing physicians practicing in the managed care model, recently voted to support PAD legislation in California.¹⁵⁴ And although the American Medical Association and some state medical associations have opposed

¹⁴⁹ Franklin G. Miller & John C. Fletcher, *Physician-Assisted Suicide and Active Euthanasia*, in *PHYSICIAN-ASSISTED DEATH* 75, 78 (James M. Humber et al. eds., 1994).

¹⁵⁰ Katherine C. Glynn, Note, *Turning to State Legislatures to Legalize Physician-Assisted Suicide for Seriously Ill, Non-Terminal Patients After Vacco v. Quill and Washington v. Glucksberg*, 6 J.L. & POL'Y 329, 351 n.129 (1997) (citing Jeff Hooten, *A Slippery Slope to the Real Dr. Death*, L.A. TIMES, Sept. 17, 1996, at B7).

¹⁵¹ See Valerie J. Vollmar, Recent Developments in Physician-Assisted Suicide (Feb. 2006), <http://www.willamette.edu/wucl/pdf/pas/2006-02.pdf>. In a Field poll in March of 2006, seventy percent supported a right for terminally ill patients to receive prescriptions for life-ending medication. *Id.* The percentage in favor dropped to sixty-two percent when the question asked if a doctor could administer the drugs. *Id.*

¹⁵² *E.g.*, Theobald, *supra* note 148.

¹⁵³ *Washington v. Glucksberg*, 521 U.S. 702, 748 n.12 (1997) (Stevens, J., concurring) (citing sources saying sixty percent of doctors in Oregon support PAD and fifty-six percent of doctors preferred legalizing assisted suicide to an explicit ban); Jonathan S. Cohen et al., *Attitudes Toward Assisted Suicide and Euthanasia Among Physicians in Washington State*, 331 NEW ENG. J. MED. 89, 89 (1994) (noting fifty-three percent of physicians surveyed said it should be legal for doctors to perform PAD, but only forty percent said they were willing to do so); see also JOAN M. KRAUSKOPF ET AL., 1 ELDERLAW: ADVOCACY FOR THE AGING §§ 13.11–13.27, at 488–502 (2d ed. 1993).

¹⁵⁴ Vollmar, May 2007 Developments, *supra* note 10; see also About CAPG, <http://www.capg.org/home/index.asp?page=7> (last visited July 19, 2007) (noting more than fifty percent of California healthcare is provided by members of the California Association of Physician Groups or CAPG). The legislation, AB 374, did not pass. See Nancy Vogel, *Assisted Death Bill Fails Again in Capitol*, L.A. TIMES, June 8, 2007, at B1 (noting the bill's authors, knowing that they did not have the support to pass the legislation, failed to bring it for a vote).

legalizing PAD,¹⁵⁵ these same organizations “unequivocally endorse[] the practice of terminal sedation—the administration of sufficient dosages of pain-killing medication to terminally ill patients to protect them from excruciating pain even when it is clear that the time of death will be advanced.”¹⁵⁶ The AMA also supports legislation permitting “palliative care,”¹⁵⁷ or care allowing a physician to prescribe pain relief instead of curative treatment.¹⁵⁸

Physician support for terminal sedation and palliative care illustrates a troubling gray area in the entire PAD debate. The distinction between “permitting death to ensue from an underlying fatal disease and causing it to occur by the

¹⁵⁵ Bryan Hilliard, *The Politics of Palliative Care and the Ethical Boundaries of Medicine: Gonzales v. Oregon as a Cautionary Tale*, 35 J.L. MED. & ETHICS 158, 170 (2007) (“[S]ome professional medical organizations, most notably the American Medical Association, do indeed oppose making physician-assisted suicide legal.”); see also Ralph Jimenez, *Legislators Debate Assisted-Suicide Bill: New Hampshire*, BOSTON GLOBE, Feb. 7, 1993, at 37 (noting the New Hampshire Medical Society opposed a bill repealing New Hampshire’s ban on assisted suicide). The California Medical Association opposed California Proposition 161 in 1992 and subsequent legislative efforts to legalize PAD. Bailey, *supra* note 92; Mark Gladstone, *Assisted-Suicide Debate Shifts to State*, L.A. TIMES, Apr. 20, 1999, at A3.

¹⁵⁶ *Glucksberg*, 521 U.S. at 751 (Stevens, J., concurring).

¹⁵⁷ See, e.g., Am. Med. Ass’n, H-85.958 Palliative Care and End of Life Care, http://www.ama-assn.org/apps/pf_new/pf_online?f_n=resultLink&doc=policyfiles/HnE/H-85.958.HTM&s_t=palliative+care&catg=AMA/HnE&catg=AMA/BnGnC&catg=AMA/DIR&&nth=1&&st_p=0&nth=2& (last visited Aug. 4, 2007). The AMA states:

Our AMA: 1. Recognizes the importance of providing interdisciplinary palliative care for patients with disabling chronic or life-limiting illness to prevent and relieve suffering and to support the best possible quality of life for these patients and their families. 2. Encourages research in the field of palliative medicine to improve treatment of unpleasant symptoms that affect quality of life for patients with advanced, chronic illness. 3. Encourages physicians to be knowledgeable of patient eligibility criteria for hospice benefits and, realizing that prognostication is inexact, to make referrals based on their best clinical judgment.

Id.

¹⁵⁸ See, e.g., COLO. REV. STAT. ANN. § 18-3-104(4) (West 2006). The statute provides:

“Palliative care” means medical care and treatment provided by a licensed medical caregiver to a patient with an advanced chronic or terminal illness whose condition may not be responsive to curative treatment and who is, therefore, receiving treatment that relieves pain and suffering and supports the best possible quality of his or her life.

Id. §§ 18-3-104(4)(b)(III), (4)(c) (“Paragraph (a) of this subsection (4) shall not be interpreted to permit a medical caregiver to assist in the suicide of the patient.”).

administration of medication or other means”¹⁵⁹ is not always clear. Sometimes it can rest solely on the prescribing doctor’s intent. Yet, if the doctor is simply striving to “ease the patient’s suffering and to comply with [the patient’s] wishes . . . [then the] same intent and causation may exist.”¹⁶⁰ In fact, thirty-one percent of doctors in one survey¹⁶¹ and twenty-three percent in another admitted they already had performed some form of PAD.¹⁶² Furthermore, no medical associations have supported criminalization of PAD, and some have stated they were “concerned about legislating what should go on between doctors and patients.”¹⁶³

¹⁵⁹ *Glucksberg*, 521 U.S. at 750 (Stevens, J., concurring).

¹⁶⁰ *Id.* at 751; see also Peterson & Klinka, *supra* note 137 (quoting one doctor as saying, “But there are times when I feel like the morphine fairy because the only thing I can do for a terminally ill patient is maybe increase the dosage to make them comfortable,” and reporting another saying he “never believed the pain-relieving medications he gives [his patients] cause death, even though he has had patients die within minutes of receiving painkillers. Admittedly, it’s a fine line. . . . But, ‘I’ve never had the feeling I’ve pushed someone over the line.’”).

¹⁶¹ Glynn, *supra* note 150, at 334 n.28 (“In 1988, the Center for Health Ethics and Policy at the University of Colorado conducted a similar survey of all licensed doctors in Colorado. Thirty-one percent of the 7,095 doctors surveyed responded, 37% of whom admitted to giving life-shortening medication to patients.” (citing Diane E. Meir, *Doctor’s Attitudes and Experiences with Physician-Assisted Death: A Review of the Literature*, in *PHYSICIAN-ASSISTED DEATH*, *supra* note 149, at 1, 14)); see also *Glucksberg*, 521 U.S. at 749 n.12 (Stevens, J., concurring) (noting eighteen percent of Michigan oncologists reported “active participation in assisted suicide,” twenty-four percent of physicians who treat AIDS patients responded they would “likely grant a patient’s request for assistance in hastening death,” and several doctors in Washington State said they had complied with their patients’ requests to hasten death).

¹⁶² Glynn, *supra* note 150, at 334 n.28 (“The survey was conducted in 1987 by the National Hemlock Society. 5,000 California physicians that were members of the American Medical Association were surveyed anonymously by mail. Only 12% of the physicians surveyed responded.” (citations omitted)). Eighty-one percent of those physicians who did perform PAD in the second survey confessed to doing it more than once. *Id.* at 334; see also Diane Martindale, *A Culture of Death*, *SCI. AM.*, May 23, 2005, <http://www.sciam.com/article.cfm?id=a-culture-of-death>.

¹⁶³ Christopher Rowland, *Should Death Be Hastened? Senate Bill Would Make Doctor-Assisted Suicide a Felony*, *PROVIDENCE J.-BULL. (R.I.)*, May 24, 1996, at 1A (quoting Arthur Frazzano, president of the Rhode Island Medical Society, testifying about why the group took a neutral position on a bill criminalizing PAD in Rhode Island). Legislation that criminalizes PAD also could have a chilling effect on the use of palliative care because “physicians must worry that law enforcement officers will see a criminal intent where none existed.” David Orentlicher & Arthur Caplan, *The Pain Relief Promotion Act of 1999: A Serious Threat to Palliative Care*, 283 *J. AM. MED. ASS’N* 255, 256 (2000); see also *infra* notes 277–82 and accompanying text.

Despite this significant support for PAD, only one state in the Union allows it, and that state legalized the practice through a citizen initiative.¹⁶⁴ Similarly, Congress and some state legislatures have made efforts to legalize PAD, but all of these efforts also have failed. Instead, interest groups have been able to take advantage of the traditional legislative process to promote minority views on the topic. Consequently, only Oregon's direct vote by initiative successfully reflected the will of most citizens.

A. On the Federal Side of the Federalism Balance: A Federal Constitutional Right to Choose Death

The first wave of the modern PAD debate began in the courts. The U.S. Supreme Court recognized a fundamental right to choose death by refusing medical treatment that prolonged dying.¹⁶⁵ By grounding the right in the Constitution, the Court effectively ended further state debate on the issue.

Arguably, choosing death by refusing medical treatment that prolongs dying is simply the reciprocal of a right to die by requesting medical treatment to hasten dying. The Supreme Court had the opportunity to recognize constitutional protection for such a right to die. If the Court had done so, the debate over PAD would have ended at the federal level; preemption would prevent states from restricting a right that was constitutionally protected. However, the Court tossed the debate from the federal to the state realm when it refused to recognize a right to die or to receive assistance in choosing death.

1. The Right to Refuse Medical Treatment

The courts first recognized a constitutional right to choose death by refusing medical treatment in response to cases involving medical treatment that extended patients' lives. Although over a hundred cases addressed this right under various common law and constitutional theories,¹⁶⁶ the

¹⁶⁴ See *infra* notes 301–20 and accompanying text.

¹⁶⁵ See *infra* notes 166–79 and accompanying text.

¹⁶⁶ See Hoefler, *supra* note 27, at 156–58 (listing theories including informed consent under the common law, a federal Constitutional privacy right, and a Fourteenth Amendment liberty interest).

predominant framework for the debate arose in two cases: *In re Quinlan*¹⁶⁷ and *Cruzan v. Harmon*.¹⁶⁸

Ironically, in the late 1970s, a comatose patient awoke the American public to the problems created by extending life through modern medical technology.¹⁶⁹ At the age of twenty-one, Karen Ann Quinlan lapsed into a persistent vegetative state¹⁷⁰ after ingesting alcohol and drugs.¹⁷¹ The hospital placed Quinlan on a respirator and, despite the wishes of her family, refused to take her off. Although the district court denied her guardian's request for authority to remove the respirator,¹⁷² the Supreme Court of New Jersey held that removal of the respirator to allow Quinlan to die naturally was a valuable incident to Ms. Quinlan's right to privacy under the U.S. and New Jersey constitutions and could be asserted by her guardian.¹⁷³

¹⁶⁷ *In re Quinlan*, 355 A.2d 647 (N.J. 1976).

¹⁶⁸ *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988), *aff'd sub nom.*, *Cruzan v. Dir.*, Mo. Dep't of Health, 497 U.S. 261 (1990).

¹⁶⁹ The Court stated:

The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment. Until about 15 years ago and the seminal decision in [*Quinlan*], the number of right-to-refuse-treatment decisions was relatively few. Most of the earlier cases involved patients who refused medical treatment forbidden by their religious beliefs, thus implicating First Amendment rights as well as common-law rights of self-determination. More recently, however, with the advance of medical technology capable of sustaining life well past the point where natural forces would have brought certain death in earlier times, cases involving the right to refuse life-sustaining treatment have burgeoned.

Cruzan, 497 U.S. at 270 (footnotes omitted); *see also* FAY A. ROZOVSKY, CONSENT TO TREATMENT § 7.1, at 415–23 (1984); Norman L. Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228, 229 n.5 (1973) (noting paucity of cases); Margeurite Ann Chapman, *The Uniform Rights of the Terminally Ill Act: Too Little, Too Late?*, 42 ARK. L. REV. 319, 324 n.15 (1989). *See generally* Kristine Cordier Karnezis, Annotation, *Patient's Right to Refuse Treatment Allegedly Necessary to Sustain Life*, 93 A.L.R.3D 67 (1979) (collecting cases).

¹⁷⁰ Defined as “generally, a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function.” *Cruzan*, 497 U.S. at 266.

¹⁷¹ Norman L. Cantor, *Twenty-Five Years After Quinlan: A Review of the Jurisprudence of Death and Dying*, 29 J.L. MED. & ETHICS 182, 183 (2001).

¹⁷² *Quinlan*, 355 A.2d at 653.

¹⁷³ The Court stated:

Not until the early 1990s, thirteen years after *Quinlan*, did the U.S. Supreme Court speak to the same issue of a patient's right to refuse life-sustaining treatment. A single car accident in rural southwest Missouri landed Nancy Cruzan in the hospital in a persistent vegetative state.¹⁷⁴ Cruzan's family sought to have the feeding tube providing her with artificial nutrition removed when it became apparent that Cruzan had no chance of regaining her mental faculties.¹⁷⁵ Although the district court issued a declaratory judgment instructing the hospital to remove the feeding tube, the Missouri Supreme Court reversed, finding that Ms. Cruzan's right to refuse medical treatment did not outweigh the state's policy favoring preservation of life embodied in Missouri's living will statute.¹⁷⁶

On certiorari, the U.S. Supreme Court, in a five-to-four decision, affirmed.¹⁷⁷ Primarily, the Court affirmed a state's

Although the Constitution does not explicitly mention a right of privacy, Supreme Court decisions have recognized that a right of personal privacy exists and that certain areas of privacy are guaranteed under the Constitution. The Court has interdicted judicial intrusion into many aspects of personal decision, sometimes basing this restraint upon the conception of a limitation of judicial interest and responsibility, such as with regard to contraception and its relationship to family life and decision.

The Court in *Griswold* found the unwritten constitutional right of privacy to exist in the penumbra of specific guarantees of the Bill of Rights 'formed by emanations from those guarantees that help give them life and substance.' Presumably this right is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions.

Nor is such right of privacy forgotten in the New Jersey Constitution.

Id. at 663 (citations omitted). Ironically, when Quinlan was weaned from the respirator, she was able to breathe on her own and passed away ten years later in a nursing home. See Lawrence K. Altman, *Quinlan Case Is Revisited and Yields New Finding*, N.Y. TIMES, May 26, 1994, at A16.

¹⁷⁴ *Cruzan v. Harmon*, 760 S.W.2d 408, 411 (Mo. 1998), *aff'd sub nom.*, *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990). Note that many patients with brain injuries transition from a coma to a vegetative state. Steven Laureys, *Eyes Open, Brain Shut*, SCI. AM., May 2007, at 84, 84. If they remain in a vegetative state for over a year, the "chances of [regaining consciousness] are close to zero." See *id.* at 86.

¹⁷⁵ *Cruzan*, 760 S.W.2d at 411.

¹⁷⁶ *Id.*

¹⁷⁷ *Cruzan*, 497 U.S. at 265. After *Quinlan*, however, most courts have based a right to refuse treatment either solely on the common law right to informed consent or on both the common law right and a constitutional privacy right. See LAURENCE H. TRIBE ET AL., *AMERICAN CONSTITUTIONAL LAW* 1365 (2d ed. 1988).

power to safeguard against potential abuses by requiring clear and convincing evidence of an incompetent person's desire to have life-sustaining treatment withdrawn.¹⁷⁸ Significantly, however, the Court in *Cruzan* for the first time considered alternative theories set forth in state cases addressing the right to refuse medical treatment. *Cruzan* stands out because the Court held that competent individuals have, under the Due Process Clause of the Fourteenth Amendment, "a constitutionally protected liberty interest in refusing unwanted medical treatment."¹⁷⁹

2. *But No Right to Die*

A conjunction of societal forces resulted in fevered activity on the PAD issue in the five years immediately following the *Cruzan* decision.¹⁸⁰ In 1993, the Hemlock Society established the

¹⁷⁸ See *Cruzan*, 497 U.S. at 278–82. The Court stated:

Petitioners insist that under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person's liberty interest. Although we think the logic of the cases discussed above would embrace such a liberty interest, the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible. But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.

Id. at 279. "But determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'" *Id.* (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)).

¹⁷⁹ *Id.* at 278. The Court noted: "Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest." *Id.*

After *Cruzan*, Congress passed the Patient Self-Determination Act, 42 U.S.C. § 1395cc(f) (2006). This Act merely requires medical providers to make information available to patients so they are aware of their right to refuse medical treatment. § 1395cc(f)(1)(A). Because the Supreme Court recognized this as a right protected by the Constitution, Congress could not pass legislation determining whether the right was appropriate or not. Similarly, states addressed the issue only by passing legislation addressing procedures for exercising the federal constitutional right. *E.g.*, N.J. REV. STAT. ANN. § 26:2H-54 (2008).

¹⁸⁰ Glynn, *supra* note 150, at 350–51. Arguably, the debate started beforehand because the Euthanasia Society of America, the first American organization to crusade for the legalization of euthanasia, was founded in 1938. *Id.*

Patients' Rights Organization, a political action group to advocate the cause of PAD.¹⁸¹ Compassion in Dying, an alternate PAD group, was founded in 1993, and in 1997, created its national advocacy group, the Compassion in Dying Federation, which participated in many of the pivotal cases on the issue.¹⁸² Scholars weighed in,¹⁸³ and opposing groups, such as

¹⁸¹ Compassion & Choices, Milestones in the Modern Choice in Dying Movement, <http://www.compassionandchoices.org/aboutus/themovement.php> (last visited Aug. 4, 2007). Note also in 1991, Derek Humphrey, founder of the Hemlock Society, first published *Final Exit: The Practicalities of Self-Deliverance for the Terminally Ill*. *Id.* In 2003, the Hemlock Society merged with Compassion in Dying and changed its name to End of Life Choices. *Id.*

¹⁸² See *id.*; see also KRAUSKOPF ET AL., *supra* note 153, §§ 13.11–13.27, at 488–502 (stating Compassion in Dying brought the *Quill* and *Glucksberg* cases).

¹⁸³ See, e.g., JAMES M. HOEFLER WITH BRIAN E. KAMOIE, DEATHRIGHT (1994); Michael P. Allen, *The Constitution at the Threshold of Life and Death: A Suggested Approach to Accommodate an Interest in Life and a Right to Die*, 53 AM. U. L. REV. 971 (2004); Brian H. Bix, *Physician-Assisted Suicide and Federalism*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 53 (2003); Cantor, *supra* note 169; Bette-Jane Crigger, *Dying Well? A Colloquy on Euthanasia and Assisted Suicide*, HASTINGS CENTER REP., Mar.–Apr. 1992, at 6; Scott Gast, *Who Defines "Legitimate Medical Practice?" Lessons Learned from the Controlled Substances Act, Physician-Assisted Suicide*, & Oregon v. Ashcroft, 10 VA. J. SOC. POL'Y & L. 261 (2002); Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J.L. & PUB. POL'Y 599 (2000); Thane Josef Messinger, *A Gentle and Easy Death: From Ancient Greece to Beyond Cruzan Toward A Reasoned Legal Response to the Societal Dilemma of Euthanasia*, 71 DENV. U. L. REV. 175 (1993); Colin Miller, *A Death by Any Other Name: The Federal Government's Inconsistent Treatment of Drugs Used in Lethal Injections and Physician-Assisted Suicide*, 17 J.L. & HEALTH 217 (2002–03) [hereinafter Miller, *A Death by Any Other Name*]; Colin Miller, *Escape from New York: Analyzing the State's Relative Interests in Proscribing the Withdrawal of Life Support and Physician-Assisted Suicide*, 11 WM. & MARY BILL RTS. J. 779 (2003) [hereinafter Miller, *Escape from New York*]; Jim Persels, *Forcing the Issue of Physician-Assisted Suicide: Impact of the Kevorkian Case on the Euthanasia Debate*, 14 J. LEGAL MED. 93 (1993); Carol A. Pratt, *Efforts to Legalize Physician-Assisted Suicide in New York, Washington and Oregon: A Contrast Between Judicial and Initiative Approaches—Who Should Decide?*, 77 OR. L. REV. 1027 (1998); Christin A. Batt, Comment, *The Pain Relief Promotion Act of 1999 and Physician-Assisted Suicide: A Call for Congressional Self-Restraint*, 38 SAN DIEGO L. REV. 297 (2001); Janet M. Branigan, Note, *Michigan's Struggle with Assisted Suicide and Related Issues as Illuminated by Current Case Law: An Overview of People v. Kevorkian*, 72 U. DET. MERCY L. REV. 959 (1995); Richard J. Brumbaugh, Comment, *The Oregon Death with Dignity Act: Reversal of the Department of Justice's Position on Physician Assisted Suicide and the Ensuing Court Battle*, 21 ST. LOUIS U. PUB. L. REV. 377 (2002); Stephanie A. Damiani, Comment, *Up with Life and Down with Pain: The Pain Relief Promotion Act: Congressional Attempt to Address the Issue of Physician-Assisted Suicide*, 5 QUINNIPIAC HEALTH L.J. 191 (2001–02); Kelly Green, Note, *Physician-Assisted Suicide and Euthanasia: Safeguarding Against the "Slippery Slope"—The Netherlands Versus the United States*, 13 IND. INT'L & COMP. L. REV. 639 (2003); Stephanie Hendricks, Note, *Pain Relief, Death with Dignity, and*

the Catholic Church, issued sanctity of life statements¹⁸⁴ and “vowed to wage an intensive legal, legislative and media campaign against [PAD].”¹⁸⁵

The AIDS epidemic played a significant role in the PAD debate in the 1980s and early 1990s.¹⁸⁶ Because many of those

Commerce: The Constitutionality of Congressional Attempts to Regulate Physician-Assisted Suicide in Oregon via the Commerce Clause After Lopez and Morrison, 37 WILLAMETTE L. REV. 691 (2001); Philip King, Note, *Washington v. Glucksberg: Influence of the Court in Care of the Terminally Ill and Physician Assisted Suicide*, 15 J.L. & HEALTH 271 (2000–01); Kathryn E. Mazzeo, Comment, *The Right to Die Versus the Right to Live—Who Decides? The Long and Wandering Road to a Legislative Solution*, 66 ALB. L. REV. 263 (2002); Recent Case, 118 HARV. L. REV. 1371 (2005).

¹⁸⁴ See, e.g., Jimenez, *supra* note 155 (“[A]ll human life [is] a gift from God over which we have stewardship but not absolute dominion.” (quoting Bishop Leo O’Neal of Roman Catholic Diocese of Manchester, N.H.)); U.S. Conference of Catholic Bishops, *Life at Risk* (Nov. 1998), <http://www.usccb.org/prolife/publicat/liferisk/nov98.shtml> (excerpts from the Bishops’ Statement on the Sanctity of Human Life); U.S. Conference of Catholic Bishops, *Statement on Euthanasia* (Sept. 12, 1991), <http://www.usccb.org/prolife/issues/euthanas/euthnccb.shtml>; Vatican, Sacred Congregation for the Doctrine of the Faith: *Declaration on Euthanasia* (1980), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19800505_euthanasia_en.html; see also Kevin D. O’Rourke, *Physician Assisted Suicide, A Religious Perspective*, 15 ST. LOUIS U. PUB. L. REV. 433, 441–44 (1996).

¹⁸⁵ Diego Ribadeneira, *Bishops Hit Assisted Suicide*, BOSTON GLOBE, Nov. 14, 1996, at A34. At their fall meeting in Boston, the U.S. Catholic bishops of the Roman Catholic Church, “along with evangelical Christian denominations and Muslim groups, recently filed briefs with the Supreme Court opposing doctor-assisted suicide.” *Id.* But cf. JAMES M. HOEFLER, *MANAGING DEATH* 63 (1997) (“Now, most mainstream Catholic organizations have abandoned their obstructionism of years past and joined forces with more progressive elements of the debate . . .”).

¹⁸⁶ Pratt, *supra* note 183, at 1029–32. But note that some of the impetus may have died:

The effectiveness of the newly developed protease inhibitors in combating AIDS and forestalling death may, for some members of the gay community, lessen the sense of urgency to legalize PAS. However, protease inhibitors are a limited, and as yet incomplete, solution to the AIDS epidemic and are therefore unlikely to supplant entirely the interest of the gay community in PAS. The tremendous expense of the drugs precludes access to the medication for many persons who are HIV positive or who have AIDS. Moreover, the efficacy of the drugs is highly dependent upon a strict daily regimen that requires extreme punctuality and coordination of eating and sleeping. Maintenance of this rigorous regimen challenges even the most disciplined individuals. In addition, the drugs are not effective for some individuals who take them faithfully, and forty percent of all AIDS patients who take the drugs develop a resistance to them. Thus, at least for the near future, AIDS still looms as a fatal

infected with HIV/AIDS were young or middle-aged, the demographic of those seeking PAD expanded beyond the traditionally more vulnerable “old” and “infirm.”¹⁸⁷ Furthermore, the “persistent questioning of authority by AIDS activists and their skepticism toward ‘standard medical authority’ . . . resulted in a throwing off of that medical snobbery which insists on life at any cost.”¹⁸⁸ AIDS activists added “well organized and well financed legal and political clout to the legal battles.”¹⁸⁹

The proponents of PAD argued that the right to refuse medical treatment should logically be extended to a constitutional right to use medical treatment to hasten death or alternatively, a constitutional right to die.¹⁹⁰ In an effort to have the courts recognize the right to die, these activists filed several cases in the mid-1990s, challenging the constitutionality of laws outlawing assisted suicide. Some states were using assisted-suicide bans to sanction physicians who wished to assist patients in exercising the alleged right to die.¹⁹¹ The U.S. Supreme Court resolved the debate in two of these cases by refusing to recognize that choosing death was a right protected by the Federal Constitution.¹⁹²

disease of epidemic proportions, and it will continue to fuel the controversy over legalizing PAS.

Id. at 1030–31 (footnotes omitted).

¹⁸⁷ *Id.* at 1030; see Jeremy A. Sitcoff, Note, *Death with Dignity: AIDS and a Call for Legislation Securing the Right to Assisted Suicide*, 29 J. MARSHALL L. REV. 677, 687–88 (1996).

¹⁸⁸ Pratt, *supra* note 183, at 1029 (quoting Andrew Solomon, *A Death of One's Own*, NEW YORKER, May 22, 1995, at 57, 57).

¹⁸⁹ *Id.* at 1030. “Both the Lambda Legal Defense and Education Fund, Inc. and the National Association of People with AIDS filed amicus curiae briefs on behalf of the plaintiffs in the New York and Washington PAS cases.” *Id.* (citing *Quill v. Koppell*, 870 F. Supp. 78 (S.D.N.Y. 1994); *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994)).

¹⁹⁰ For proponents arguments, see generally Allen, *supra* note 183; Bix, *supra* note 183; Cantor, *supra* note 171; Miller, *A Death by Any Other Name*, *supra* note 183; Miller, *Escape from New York*, *supra* note 183; Pratt, *supra* note 183; Batt, *supra* note 183; Brumbaugh, *supra* note 183; Mazzeo, *supra* note 183.

¹⁹¹ See *infra* notes 268–80 and accompanying text for further discussion of state assisted-suicide statutes.

¹⁹² See *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997). Kevorkian's efforts to have the Michigan Supreme Court recognize a right to die failed when the court found that the question was not void for vagueness and that there was no Fourteenth Amendment liberty interest or equal protection violation. See *infra*

In *Quill v. Koppel*,¹⁹³ a group of New York physicians filed suit against the State of New York challenging New York's ban on assisted suicide¹⁹⁴ as violating the Equal Protection Clause of the Fourteenth Amendment. The physicians asserted that it would be consistent with the standards of their medical practices to prescribe lethal medication for mentally competent, terminally ill patients who were suffering great pain and desired a doctor's help in taking their own lives.¹⁹⁵ However, these same physicians asserted that if they did prescribe lethal doses of medication, they could be subject to prosecution under the assisted-suicide laws.¹⁹⁶ The crux of the physicians' argument was that it was inconsistent for the State to allow a mentally competent adult to decline life sustaining treatment while at the same time barring such individuals from seeking assistance in taking their lives.¹⁹⁷ The district court granted summary judgment in favor of the State, finding that the physicians' arguments failed as a matter of law and that the state statute was unambiguous and did not violate the Constitution.¹⁹⁸

On appeal in *Quill v. Vacco*,¹⁹⁹ the Second Circuit reversed. The Second Circuit rejected a due process analysis similar to that of the *Cruzan* Court and refused to hold that terminal patients who chose to end their lives by self-administering prescribed drugs enjoyed the same *Cruzan* due process right to hasten death by removing life-support systems.²⁰⁰

However, the Second Circuit did adopt an equal protection analysis, agreeing with the doctors that the two groups were similarly situated:

note 295. A case brought by a terminally ill patient and his doctor in Florida failed. The Florida Supreme Court found that Florida's assisted-suicide ban did not violate the Fourteenth Amendment nor the Florida Constitution's privacy clause. *Krischer v. McIver*, 697 So. 2d 97, 99 (Fla. 1997); *see also* KRAUSKOPF ET AL., *supra* note 153, §§ 13.11–13.27, at 488–502.

¹⁹³ 870 F. Supp. 78, 79 (S.D.N.Y. 1994), *rev'd in part sub nom.*, *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996), *rev'd in part*, 521 U.S. 793 (1997).

¹⁹⁴ *See* N.Y. PENAL L. § 125.15 (McKinney 1999).

¹⁹⁵ *Quill*, 870 F. Supp. at 80.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 79.

¹⁹⁸ *Id.*

¹⁹⁹ 80 F.3d 716 (2d Cir. 1996), *rev'd in part*, 521 U.S. 793 (1997).

²⁰⁰ *Id.* at 728–29.

[T]hose in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs.²⁰¹

Consequently, the Second Circuit concluded that, to the extent the New York criminal statutes prohibited a physician from prescribing medications to be self-administered by a mentally competent person in the final stages of a terminal illness, such statutes were not rationally related to any legitimate state interest and violated the Equal Protection Clause.²⁰²

On certiorari in *Vacco v. Quill*, the U.S. Supreme Court reversed, finding that the New York law did not violate the Equal Protection Clause.²⁰³ The Court maintained that the distinction between life-sustaining treatment and death-hastening treatment that warranted one to be recognized as a fundamental right and the other not, also was a rational distinction for equal protection purposes.²⁰⁴ Consequently, New York's assisted-suicide statute, which could include PAD within its prohibitions, did not infringe upon the basic right to refuse life sustaining treatment, and New York's distinction between the right to refuse treatment and assisted suicide was rational and served an important public interest.²⁰⁵

On the very same day it decided *Vacco*, the Supreme Court also issued its opinion on another challenge to an assisted-suicide ban in *Washington v. Glucksberg*.²⁰⁶ A group of Washington residents filed the suit asserting that a state law banning assisted suicide²⁰⁷ was unconstitutional on its face.²⁰⁸ The Ninth Circuit held, in an en banc decision, that patients have a "due process liberty interest in controlling the time and

²⁰¹ *Id.* at 729.

²⁰² *Id.* at 727–31.

²⁰³ 521 U.S. 793, 797 (1997).

²⁰⁴ *See id.* at 803–08.

²⁰⁵ *Id.* at 808–09.

²⁰⁶ 521 U.S. 702 (1997).

²⁰⁷ WASH. REV. CODE ANN. § 9A.36.060(1) (West 1994).

²⁰⁸ *Glucksberg*, 521 U.S. at 735. The Ninth Circuit had held that the statute's categorical prohibition was unconstitutional as applied to a class rather than individual plaintiffs. *Compassion in Dying v. Washington*, 79 F.3d 790, 838 (9th Cir. 1996), *rev'd sub nom.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997).

manner of [their] death[s]—that there is, in short, a constitutionally recognized ‘right to die.’”²⁰⁹

The Supreme Court reversed, using the law’s historical rejection of suicide as a basis for refusing to recognize a liberty interest under the Due Process Clause of the Fourteenth Amendment.²¹⁰ According to Justice Rehnquist’s majority opinion, if the right to assist with suicide did not rise to the level of a fundamental liberty interest protected by the Due Process Clause, then Washington’s statute prohibiting it needed only to be “rationally related to legitimate government interests.”²¹¹ Washington State’s goals of preserving human life and upholding the integrity and ethics of the medical profession were sufficient to meet this simple relationship test to overcome the Fourteenth Amendment challenge.²¹²

Remarkably, five justices filed concurring opinions, including four concurrences that addressed both *Glucksberg* and *Vacco*.²¹³ While some of the justices expressed support for “personal control over the manner of death,”²¹⁴ overall the justices

²⁰⁹ *Compassion in Dying*, 79 F.3d at 816. The original lawsuit was brought by four physicians and three terminally ill patients. *Glucksberg*, 521 U.S. at 707. The patients died before the case reached the Ninth Circuit. *See id.* at 707–08.

²¹⁰ *See Glucksberg*, 521 U.S. at 710–28. Arguably, the Supreme Court’s opinion rested on confused semantics. For example, the Court distinguished sexual acts by consenting homosexuals from acts of “sodomy” in *Lawrence v. Texas*, 539 U.S. 558 (2003). By noting that “the concept of the homosexual as a distinct category of person did not emerge until the late 19th century,” the Court could ignore traditional laws outlawing sodomy and conclude that “[t]he policy of punishing consenting adults for private acts was not much discussed in the early legal literature.” *Id.* at 568–70. Similarly, if the Court had concluded that physician-assisted death was distinct from “suicide” as current medical organizations conclude, *cf. supra* note 10, then the examination of traditional laws outlawing suicide or assisted suicide would be irrelevant. *See also* Yale Kamisar, *Can Glucksberg Survive Lawrence? Another Look at the End of Life and Personal Autonomy*, 106 MICH. L. REV. (forthcoming 2008) (noting “nobody was claiming a right to a physician’s assistance in committing suicide generally—only a right to a physician’s help in very special circumstances”).

²¹¹ *Glucksberg*, 521 U.S. at 728.

²¹² *Id.* at 735.

²¹³ *See generally id.* at 736–92 (concurring opinions of Justices O’Connor, Stevens, Ginsburg, and Breyer).

²¹⁴ *Id.* at 789 (Ginsburg, J., concurring); *see also id.* at 744 (Stevens, J., concurring) (noting *Cruzan*’s right rested also implicitly “on the even more fundamental right to make this ‘deeply personal decision’”).

concluded that the states' interests²¹⁵ and the availability of alternatives²¹⁶ outweighed recognizing a new unenumerated "right to commit suicide which itself includes a right to assistance in doing so."²¹⁷

Most notably for the federalism issue, the justices deferred resolution of the PAD debate to the states by failing to recognize a federal constitutional right in *Glucksberg* or *Vacco*. Each of the separate opinions references in some way the importance of allowing the states to address PAD.

For example, Chief Justice Rehnquist noted:

[T]he States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues. . . .

Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.²¹⁸

Similarly, Justice O'Connor stated:

²¹⁵ Washington's statute sought to protect vulnerable groups, such as the poor, elderly, and disabled from abuse, neglect, and mistakes. *Id.* at 732 (majority opinion). *But see* Miller, *Escape from New York*, *supra* note 183, at 779 (noting the distinction that the Court drew in *Vacco v. Quill* was contrary to the reasons cited by the Court in stating that the distinction protects vulnerable members of society). All of the state interests identified by the Supreme Court in rejecting a right to assisted suicide are "implicated to a higher degree by withdrawal of life support." *Id.* "The primary reason for this difference is that withdrawal of life support often involves incompetent patients and surrogate decision making while assisted suicide by definition requires a competent patient choosing to hasten her death." *Id.* The withdrawal of life support is much more akin to the "involuntary euthanasia performed in the Netherlands" because that practice is often performed on incompetent individuals. *Id.* at 806; *see also* Green, *supra* note 183, at 640-43 (attributing different views of when it is proper to end life to cultural differences between the United States and the Netherlands and stating that the objective requirements in the United States adequately protect against the "slippery slope" that is the subjective practice in the Netherlands).

²¹⁶ Several of the justices seemed persuaded by the availability of palliative care to "alleviate suffering, even to the point of causing unconsciousness and hastening death." *Glucksberg*, 521 U.S. at 737 (O'Connor, J. joined by Breyer, J., concurring).

²¹⁷ *Id.* at 723 (majority opinion).

²¹⁸ *Id.* at 719, 735. If the *Glucksberg* Court had decided that assisted suicide was a protected right, then the debate would have been resolved. In a subsequent case on assisted suicide, the Ninth Circuit was explicit in "tak[ing] no position on the merits or morality" of the issue. *Oregon v. Ashcroft*, 368 F.3d 1118, 1123 (9th Cir. 2004), *aff'd sub nom.*, *Gonzales v. Oregon*, 546 U.S. 243 (2006).

There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure. As the Court recognizes, States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues. . . . In such circumstances, "the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States . . . in the first instance."²¹⁹

In addition, Justice Souter noted: "Legislatures, however, are not so constrained [as the Court is in recognizing new unenumerated rights]. The experimentation that should be out of the question in constitutional adjudication displacing legislative judgments is entirely proper, as well as highly desirable, when the legislative power addresses an emerging issue like assisted suicide."²²⁰

Finally, Justice Stevens, in his concurrence, drew a parallel with the changing approach society has taken with capital punishment: "The Court ends its opinion with the important observation that our holding today is fully consistent with a continuation of the vigorous debate about the 'morality, legality, and practicality of physician-assisted suicide' in a democratic society."²²¹

If the Court had determined that assisted suicide was a constitutional liberty interest protected by the Fourteenth Amendment, the debate over PAD would have been over. Federal constitutional law then would have preempted any state attempt to control PAD. The Court, however, declined to do so. Instead, the Court recognized the tension created when public "[a]ttitudes toward suicide itself have changed . . . but our laws have consistently condemned, and continue to prohibit, assisting suicide."²²² The Court's refusal to federalize the issue permitted

²¹⁹ *Glucksberg*, 521 U.S. at 737 (O'Connor, J., concurring) (citations omitted).

²²⁰ *Id.* at 789 (Souter, J., concurring) ("The Court should accordingly stay its hand to allow reasonable legislative consideration. While I do not decide for all time that respondents' [due process] claim should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time.").

²²¹ *Id.* at 738 (Stevens, J., concurring).

²²² *Id.* at 719 (majority opinion).

the states to play their key role in resolving the debate by experimenting with solutions.

But outside forces served to prevent the federalism model of experimentation from working smoothly within the state legislative process. Opponents of PAD applauded the Court's decisions in *Quill* and *Glucksberg*, suggesting those decisions were "a devastating blow to the movement."²²³ These groups also had filed amicus briefs in the key U.S. Supreme Court cases²²⁴ and stood ready to thwart any expansion of PAD by asserting their influence at the state level through the pressure-point process.²²⁵

3. Federal Legislation

Although some members of Congress have attempted to use federal legislation to shift control of PAD back to the federal forum, their efforts have failed. Most of these federal attempts to address PAD focused primarily on revisions to the existing Controlled Substances Act,²²⁶ which regulates drug use, specifically some of the drugs used by physicians to assist patients with dying.²²⁷

In response to voter affirmation of Oregon's PAD initiative, members of Congress introduced the Lethal Drug Abuse

²²³ Bailey, *supra* note 92.

²²⁴ *E.g.*, Brief for the U.S. Catholic Conference et al. as Amici Curiae Supporting Petitioners, *Glucksberg*, 521 U.S. 702 (No. 95-1858), 1996 WL 656248; Brief for the U.S. Catholic Conference et al. as Amici Curiae Supporting Petitioners, *Vacco v. Quill*, 521 U.S. 793 (1996) (No. 96-110), 1996 WL 650919.

²²⁵ *E.g.*, Bailey, *supra* note 92 ("And [the Catholic Church and the California Medical Society] hold sway here in the Capitol as well. This is going to be something that's very difficult to accomplish legislatively.").

²²⁶ Controlled Substances Act, 21 U.S.C. §§ 801-904 (2006).

²²⁷ The Controlled Substances Act states that any schedule II drug, that is, drugs that are only available through prescription, must be used for a "legitimate medical purpose by an individual practitioner . . . acting in the usual course of [his] professional practice." § 830. To prevent diversion of controlled substances, the Controlled Substances Act regulates the activity of physicians, who must register in accordance with rules and regulations promulgated by the Attorney General. § 822. The Attorney General may deny, suspend, or revoke a registration that, as relevant here, would be "inconsistent with the public interest." § 824(a)(4). In determining consistency with the public interest, the Attorney General must consider several factors, including a state's recommendation; compliance with state, federal, and local law regarding controlled substances; and "public health and safety." § 823(f). The Controlled Substances Act explicitly contemplates a role for the states as well as the Attorney General in regulating controlled substances. *See* § 903.

Prevention Act (“LDAPA”) in 1998 as an amendment to the Controlled Substances Act.²²⁸ The purpose of this bill was to “clarify Federal law to prohibit the dispensing or distribution of a controlled substance for the purpose of causing, or assisting in causing, the suicide or euthanasia of any individual.”²²⁹ The proposed change would have allowed the Attorney General to determine that registration of a medical practitioner is inconsistent with the public interest if “the Attorney General determines, based on clear and convincing evidence, that the applicant is applying for the registration with the intention of using the registration” to “intentionally . . . distribute[] a controlled substance with a purpose of causing . . . the suicide or euthanasia” of a person.²³⁰ The bill further would have allowed the Attorney General to revoke the registration of any such offending medical practitioners.²³¹ The LDAPA passed the House of Representatives, but failed to make it out of the Health and Human Services Committee when it reached the Senate.²³²

The year after the LDAPA failed, Congress considered the Pain Relief Promotion Act (“PRPA”) to support the use of PAD.²³³ This legislation proposed to amend the Controlled Substances Act to allow palliative care by providing that “alleviating pain or discomfort in the usual course of professional practice is a legitimate medical purpose for the dispensing, distributing, or administering of a controlled substance that is consistent with public health and safety, even if the use of such a substance may increase the risk of death.”²³⁴

²²⁸ Lethal Drug Abuse Prevention Act (LDAPA) of 1998, H.R. 4006, 105th Cong.

²²⁹ *Id.*

²³⁰ *Id.* § 2(a)(i)(2).

²³¹ *Id.* § 2(b)(1).

²³² See Valerie J. Vollmer, Recent Developments in Physician-Assisted Suicide (Mar. 1999), available at <http://www.willamette.edu/wucl/pdf/pas/1999-03.pdf> [hereinafter Vollmer, Mar. 1999, Developments].

²³³ Pain Relief Promotion Act (PRPA) of 1999, S. 1272, 106th Cong. Whereas the LDAPA was opposed by the AMA because it feared “doctors would be reluctant to prescribe adequate pain relief for suffering patients,” the AMA and National Hospice Association supported the PRPA. Stacy A. Tromble, Note, *A Dialogue on Death & Deference: Gonzales v. Oregon*, 54 BUFF. L. REV. 1639, 1667–68 (2007).

²³⁴ S. 1272 § 101(i)(1); see also *supra* notes 10, 157–64 and accompanying text for more discussion of palliative care.

The PRPA bill had the twin aims of (1) promoting the use of controlled substances in palliative care while expressly refusing to create a federal right to use controlled substances in the intentional taking of life,²³⁵ and (2) still recognizing state laws that allowed such a right.²³⁶ This bill passed the House of Representatives, and survived a divided vote in the Senate Judiciary Committee, but failed to make it to the Senate floor.

In May 2006, Senator Sam Brownback, a Republican from Kansas, chaired a hearing before the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Property Rights. This hearing was titled "The Consequences of Legalized Assisted Suicide and Euthanasia."²³⁷ In August 2006, Senator Brownback introduced the Assisted Suicide Prevention Act of 2006, but Oregon Senator Ron Wyden threatened to filibuster if the bill came to a vote.²³⁸ The bill was never called, but Senator Brownback included federal opposition to PAD as one of the platform issues in his bid for the Republican presidential nomination in 2008.²³⁹

Although the 1998 and 1999 efforts to amend the Controlled Substances Act made significant progress in Congress, neither of these bills passed the congressional pressure points. Furthermore, subsequent efforts at the national level also have

²³⁵ The bill noted that "nothing in this Act authorizes intentionally dispensing or administering a controlled substance for purposes of causing death or assisting another person in causing death." S. 1272 § 101(i)(2).

²³⁶ The PRPA required the Attorney General to give "no force and effect to State law authorizing or permitting assisted suicide or euthanasia." *Id.* § 101(i)(2).

²³⁷ See Jeff Kosseff, *GOP Puts Suicide Law in Spotlight*, OREGONIAN, June 12, 2006, at A1.

²³⁸ *Kansas Senator's Legislation Aims to Negate Assisted Suicide Law*, REG. GUARD (Eugene, Or.), Aug. 9, 2006, at F1 (noting the "public hold" on the bill would prevent the legislation from being voted on unless sixty senators move to lift it). The bill would have prohibited doctors from prescribing federally controlled substances for the purpose of aid in dying. *Id.* Legislation would eviscerate the Oregon law and impact patients nationwide by placing a punitive restriction on a physician's ability to adequately treat pain at end of life. *Id.* The prepared testimony and witness list from the hearing can be found on the U.S. Senate Judiciary Committee's website at <http://judiciary.senate.gov/hearing.cfm?id=1916> (last visited Aug. 4, 2007).

²³⁹ See Jeff Kosseff, *Assisted Suicide May Become Newest GOP Campaign Issue*, RELIGION NEWS, <http://pewforum.org/news/display.php?NewsID=10741> (last visited Apr. 14, 2008).

been unsuccessful,²⁴⁰ thus ensuring for now, the significance of federalism and state efforts in resolving the PAD debate.

B. On the State Side of the Federalism Balance: State Legislation and Initiatives

Federalism traditionally relegated the resolution of issues grounded in deep moral beliefs to the states.²⁴¹ To some, it has been a stinging loss of self-government when unelected Supreme Court justices determine the outcome of a moral debate by declaring protections under the U.S. Constitution.²⁴² As Justice Scalia observed in the context of abortion rights, when the Court preempts these moral issues, it usurps “sovereignty over a field where it has little proper business.”²⁴³ Consequently, the PAD

²⁴⁰ The Supreme Court’s holding in *Gonzales v. Oregon*, discussed *infra* notes 336–45, and the Terry Schiavo situation in Florida revived the PAD debate nationally. See, e.g., William H. Colby, *From Quinlan to Cruzan to Schiavo: What Have We Learned*, 37 LOY. U. CHI. L.J. 279 (2006) (article adapted from speech given by the attorney who represented Nancy Cruzan); Annie Danino, *Dodging the Issue of Physician Assisted Suicide: The Supreme Court’s Likely Response in Gonzales v. Oregon*, 10 J. MED. & L. 299 (2006); David Sclar, *U.S. Supreme Court Ruling in Gonzales v. Oregon Upholds the Oregon Death with Dignity Act*, 34 J.L. MED. & ETHICS 639 (2006); Colburn, *supra* note 10.

There has also been PAD debate on the state level. See, e.g., *Bill to Legalize Assisted Suicide in California Rejected by Senate Judiciary Committee*, U.S. NEWSWIRE, June 27, 2006; Editorial, *Capitol Watch: Death and Dignity*, SEATTLE POST-INTELLIGENCER, Feb. 9, 2006, at B6 (“Sen. Pat Thibaudeau, D-Seattle, has introduced a sensitive, reasoned Washington death with dignity bill (SB 6843). It has yet to get a hearing in the Senate Health Care Committee, chaired by fellow Democrat Karen Keiser of Kent.”); Edwin Garcia, *Assisted Suicide Campaign Back On*, SAN JOSE MERCURY NEWS, Jan. 25, 2006; James J. Kilpatrick, Editorial, *10th Amendment Was Cure for This Ill*, AUGUSTA CHRON., Jan. 29, 2006, at A4 (noting a Tenth Amendment argument could have prevented the *Gonzales* Court from finding the way it did in Oregon, but that Congress surely has the federal commerce power to regulate interstate commerce in deadly drugs); Clifford M. Kulwin, *Commentary: People Die Differently These Days*, NEWHOUSE NEWS SERV., Feb. 2, 2006; Colin Nickerson, *Suicide Groups Make Switzerland a Final Destination*, BOSTON GLOBE, Feb. 26, 2006, at A12; *Other States See Path in Ruling on Oregon’s Assisted Suicide Law*, RELIGION NEWS SERV., Jan. 25, 2006; Robert Solomon, *Scalia’s Flip-Flop on Assisted Suicide Is a Killer*, CONN. L. TRIB., Jan. 30, 2006, at 23, 23; Sam Howe Verhovek, *For Ex-Governor Who Advocates Right to Die, Political Is Personal*, L.A. TIMES, Mar. 24, 2006, at A18.

²⁴¹ See Terry Eastland, *Shameless in Seattle*, AM. SPECTATOR, July 1994, at 57, 57.

²⁴² *Id.* at 58.

²⁴³ *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring). Ninth Circuit Judge Tallman has also noted that “[t]he principle that state governments bear the primary responsibility for evaluating physician assisted suicide follows from our concept of federalism, which requires that state lawmakers,

debate appears to be an excellent paradigm for restrained federal power and an appropriate shift of weight back to the state side of the federalism balance.

The PAD debate also illustrates the significant role that citizen initiatives play in this federalism balance. Survey after survey has shown that a majority of Americans nationwide support patient self-determination for removing life support and for some form of physician assistance in dying.²⁴⁴ Despite this popularity, not a single state has passed legislation explicitly legalizing PAD in the thirty-plus years since *Quinlan* sensitized the American public to the issue.

The influence of minority interest groups on key elected officials best explains why the traditional legislative process has failed. The first section below illustrates how religious groups, such as the Catholic Church,²⁴⁵ have used pressure points not

not the federal government, are the ‘primary regulators of professional [medical] conduct.’” *Oregon v. Ashcroft*, 368 F.3d 1118, 1125 (9th Cir. 2004) (quoting *Conant v. Walters*, 309 F.3d 629, 629 (9th Cir. 2002)) (alteration in original), *aff’d sub nom.*, *Gonzales v. Oregon* 546 U.S. 243 (2006).

²⁴⁴ For example, the following polls all have shown a majority of adults support physician-assisted death: (1) Gallup Poll of 1002 adults from May 8–11, 2006 (showing majorities of 64–69% approval to 27–31% disapproval); (2) CBS News / New York Times polls of 1229 adults from June 1990 to January 2006 (showing majorities of 46–58% approval to 36–45% disapproval); (3) Fox News survey of 900 registered voters in October 2005 (showing majorities of 48–52% approval to 37–39% disapproval); and (4) Harris Poll of 1010 adults from 1983 to April 2005 (showing majorities of 53–73% approval to 24–34% disapproval). See National Polls on Euthanasia, <http://www.euthanasiaprocon.org/poll.html> (last visited July 17, 2007). In addition, a Pew Research Center poll from November 9–27, 2005, showed the impact of how questions are asked. *Id.* In 2005, 51% approved and 40% opposed “[m]aking it legal for doctors to give terminally ill patients the means to end their lives,” while 44% approved and 48% opposed in response to “[m]aking it legal for doctors to assist terminally ill patients in committing suicide.” *Id.* Similarly, an ABC News poll of 1021 adults in March 2002 found closer margins for and against PAD depending on the question wording. *Id.*

²⁴⁵ Sources cited throughout this Article identify the “Catholic Church,” the “Roman Catholic Church,” the “U.S. Conference of Bishops” (the Catholic Church’s lobbying arm), and other organizations predominated by Catholics as the key opponents of PAD. Consequently, this Article will sometimes use the term “Catholic Church” or “Church” generically to reference these organizations. This Article also uses broader generic terms, such as “religious groups,” when others have joined the Catholic Church; however, it should be noted that not all religious groups oppose PAD. For example, in June of 2006, the “United Church of Christ (UCC) moved to begin an in-depth study and discussion of supporting a terminally ill patient’s right to request medication to hasten death,” with a report due in 2009. *UCC Calls for Groundbreaking Study of Aid in Dying*, THOUGHT & ACTION (Compassion & Choices, Denver, Colo.), July 2007, <http://www>

only to block PAD legislation, but also to successfully push through legislation in two states that criminalize PAD.

The second section below addresses how PAD has fared in the context of citizen initiatives. Despite some failures, the citizen initiative process has been the only mechanism to successfully enact legislation reflecting what polls suggest is the preference of the majority of Americans with respect to PAD. In 1994, a majority of citizen voters adopted an initiative creating Oregon's PAD statute. Three years later, an even larger majority of citizen voters reaffirmed their support for PAD by refusing to repeal Oregon's act even though religious group contributions to the repeal campaign exceeded those of PAD supporters more than six-to-one.

Finally, the last section will show how the U.S. Supreme Court's treatment of challenges to Oregon's Act leaves open the opportunity for federalism to work: states may resolve the controversial PAD issue by allowing Oregon to serve as a Brandeis laboratory for experimentation.

1. Action by State Legislators

The traditional legislative process is often an ineffective forum for resolving some issues, particularly controversial social issues. In experimental areas, legislative inertia may be driven by controversy over a topic. Because their voting records are public information, legislators often are unwilling to put controversial matters up for a vote, fearing repercussions from their political party or, when seeking reelection, from influential contributors.

Because the issue is controversial, state legislatures have been unsuccessful in enacting any legislation legalizing PAD. Instead, interest groups have been able to use the legislative pressure points not only to block efforts to legalize PAD but also to assert their influence through the legislative process to enact laws that penalize those who might act according to the majority view. Religious groups are leading this legislative campaign, and one commentator noted that "the Roman Catholic Church and its primary lobbying arm, the U.S. Conference of Bishops, has

[.compassionandchoices.org/newsletter/newsletter0707.html](http://compassionandchoices.org/newsletter/newsletter0707.html); *see also* HOEFLER, *supra* note 185, at 63–70 (describing the evolution of the Catholic Church's position on PAD and the positions of other religions in the PAD debate). For purposes of this Article, it is irrelevant which specific group is using the pressure point process, only that the group represents the view of a powerful minority interest.

proved to be an interest group without rival on the right-to-die issue.”²⁴⁶

Before *Quinlan* and *Cruzan*, states had no statutes on the books to address the new situation of a physician assisting a patient with death. The issue only gained prominence when modern medicine made the artificial prolonging of life a more common occurrence.²⁴⁷ Although the Catholic Church fought to oppose living wills that allow patients to refuse medical treatment, it compromised on some legislation due to pressure that courts would invalidate any statute that overly restricted this fundamental right recognized in *Cruzan*.²⁴⁸

California passed the first living will statute in 1976.²⁴⁹ The *Quinlan* case “created a window of opportunity” for the California legislature to pass its Natural Death Act even though proponents had introduced the bill before *Quinlan* was decided.²⁵⁰ Following California’s Natural Death Act of 1976, sixty-one other living will bills were introduced in forty-two states.²⁵¹ Although the 1976 version of California’s Act did not address many of the issues doctors faced with end of life care, subsequent efforts to amend it have been caught in the legislative pressure-point web. For example, a proposed

²⁴⁶ Hoefler, *supra* note 27, at 163; *see also Catholic Church Alters Tactics on Suicide Law*, L.A. TIMES, Nov. 1, 1997, at B4 (explaining that although other religious organizations, such as the Mormon Church, were involved in the 1997 effort to repeal Oregon’s Pro-PAD law, the Catholic Church remained “the dominant financial player” in that election); Gail Kinsey Hill & Ashbel S. Green, *Groups Reveal Details of Financing to Fight Initiative Measures*, OREGONIAN, Oct. 11, 1994, at B5 (noting in the 1994 campaign for Oregon’s pro-PAD Measure 16, just three Catholic organizations contributed more than all of the proponent contributions combined, and overall opponents outspent proponents almost four to one).

²⁴⁷ But note, however, some state efforts to legalize various forms of PAD date back to the early 1900s. In 1906, for example, the Ohio legislature considered and rejected a bill that would have allowed doctors to end patients’ lives as comfortably as possible. Glynn, *supra* note 150, at 349–50.

²⁴⁸ *See* HENRY R. GLICK, THE RIGHT TO DIE 96 (1992).

²⁴⁹ *Id.* at 99.

²⁵⁰ *Id.* at 98.

²⁵¹ *Id.* at 99. Glick argues that the Natural Death Act did not solve many of the issues faced by doctors in dying situations such as how to deal with patients who have not signed a directive, the determination of terminal cases, or patients in permanent vegetative states. *Id.* Doctors were still concerned about liability and seventy-five percent said they would continue to treat patients despite a request not to be treated. *Id.*

amendment passed through the California legislature in 1988, but pro-life supporters were able to use the gubernatorial veto pressure point to stop that legislation.²⁵²

The Florida Catholic Conference (“FCC”) took credit for lobbying to kill a living will bill that passed through a Senate committee in Florida in 1973 by “persuading conservative Senate leadership to block the bill” and to allow it to “die[] on the calendar a week before the end of the legislative session.”²⁵³ In subsequent years, the FCC was bolstered with information from the National Conference of Catholic Bishops and was able to ensure that similar bills died in committee or on the floor.²⁵⁴ More than ten years later, only after pressure from court decisions that “promoted the right to die at a level well beyond that which state legislatures probably would approve if state Catholic conferences lobbied for restrictive provisions and participated actively in bill drafting,” did the FCC reconsider its position.²⁵⁵ Even when the Florida legislature passed a living will bill more closely tracking the rights outlined in Florida court holdings, the opponents were able to use the gubernatorial veto pressure point to prevent that bill from becoming law.²⁵⁶ Only a later compromise bill survived because it provided more limitations than the court holdings recognized and the FCC did not oppose it.²⁵⁷

The California and Florida examples represent a pattern of effort by religious groups to restrict the right to refuse medical treatment. Even though the U.S. Supreme Court has recognized this right as constitutionally protected, these minority view groups have employed the traditional legislative process to enact

²⁵² *Id.* at 104. The California Catholic Conference did not use its pressure point influence to stop the bill in the legislature because it was “better than more extreme alternatives, specifically the assisted suicide proposal endorsed by the Hemlock Society.” *Id.* However, the Committee on Moral Concerns and the California Pro-Life Council convinced Republican Governor George Deukmejian to veto the law. *Id.*

²⁵³ *Id.* at 107.

²⁵⁴ *Id.* at 108.

²⁵⁵ *Id.* at 113.

²⁵⁶ *Id.* at 116 (noting Governor Bob Martinez, a conservative Republican, vetoed the legislation).

²⁵⁷ *Id.* at 117.

laws to minimize exercise of that right.²⁵⁸ Furthermore, because the Supreme Court failed to recognize a constitutional right to die in *Quill* and *Glucksberg*, these religious groups have been even more effective at blocking statutes attempting to legalize PAD.

Several bills to enact statutes that specifically would authorize PAD have been proposed in state legislatures, but none has been successful.²⁵⁹ Many of these efforts started in the early 1990s and continue today. State legislators in Connecticut, Iowa, Maine, New Hampshire, Virginia, and Washington have all submitted bills supportive of PAD, but opponents prevented this legislation from becoming law.²⁶⁰ Two Wisconsin legislators have sponsored pro-PAD bills for more than ten years, but they have never gotten one to a vote.²⁶¹ Similarly in 2007, Arizona, Hawaii, and Vermont all considered bills to legalize PAD, but none of these were able to advance to a full vote.²⁶²

Although in some instances specific religious groups have been prominent in their opposition, in other situations, their impact on the pressure points of the legislative process may be less obvious as they have “lowered their public profiles and played down the moral arguments that dominated their [earlier] effort[s].”²⁶³ Still, recent attempts to pass a pro-PAD law in the California legislature illustrate that the Catholic Church remains actively involved in blocking such measures.

²⁵⁸ *Id.* at 119 (“The struggle for the last word on the right to die shifts back and forth between the courts and the legislature [in Florida] The strategy of the FCC, which has been the most prominent force in Florida’s right to die politics, is to resist enlarging the right to die until expansive judicial policy is expected. Then, the FCC compromises on legislative measures that do not go as far as the appellate courts.”). Furthermore, when the legislature goes beyond its comfort level, the FCC further “seeks to limit [the legislation’s] impact by lobbying administrative agencies for restrictive rules.” *Id.* For additional examples of Catholic Church interference with living-will legislation in Massachusetts, see *id.* at 120, and in Pennsylvania, see Hoefler, *supra* note 27, at 164.

²⁵⁹ Colburn, *supra* note 10 (“In all, 18 states have seen ballot measures proposed or bills introduced on assisted suicide.”); see also Tromble, *supra* note 233, at 1672–73.

²⁶⁰ See Jimenez, *supra* note 155.

²⁶¹ Vollmar, May 2007 Developments, *supra* note 10.

²⁶² See *id.*

²⁶³ *Catholic Church Alters Tactics on Suicide Law*, *supra* note 246.

California legislators introduced AB 374, a bill that would legalize PAD, in January of 2007.²⁶⁴ When AB 374 moved forward by a 7-3 vote in the California Assembly Judiciary Committee in April of 2007, Catholic Cardinal Roger Mahoney “charg[ed] supporters of the bill with participating in a ‘culture of death’ and the legislation with being against ‘God’s law and God’s plan.’”²⁶⁵ The Assembly Speaker, Fabian Núñez, is a Catholic, and the Church asserted pressure directly at him and other Catholics in the California Assembly, encouraging parish priests to distribute “flyers calling Núñez a ‘killer,’ and threatening to withhold the sacrament of communion from any lawmaker voting for the Compassionate Choices Act.”²⁶⁶ Support for AB 374 waned, and the bill was never brought to a vote.²⁶⁷

Aside from blocking legislation that would support PAD, opponents have been able to influence the legislative process to further discourage its use by doctors. Without majority support to pass legislation specifically prohibiting PAD, individuals and

²⁶⁴ Vollmar, May 2007 Developments, *supra* note 10. The California legislature has attempted to pass PAD legislation in several sessions, but each time it was blocked. For example, in 1999, the California legislature tried two times to pass PAD measures. Even with over seventy percent of the public supporting the measures, bills did not get put up for a vote. Valerie J. Vollmar, Recent Developments in Physician-Assisted Suicide (June 1999), <http://www.willamette.edu/wucl/pdf/pas/1999-06.pdf>. There was a renewed effort to change California’s assisted-suicide statute in January 2006 following the Supreme Court decision in *Gonzales v. Oregon*. The California state legislature introduced AB 651 in January, and revised the bill in June 2006, but this legislation also failed to get through. See Valerie J. Vollmar, Recent Developments in Physician-Assisted Suicide (July 2007), <http://www.willamette.edu/wucl/pdf/pas/2006-07.pdf>. Therefore, the current law in California, as written in the California Penal Code, states that “[e]very person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony.” CAL. PENAL CODE § 401 (West 2006).

²⁶⁵ *California AB 374 Supporters Stand Up for Religious Freedom*, THOUGHT & ACTION (Compassion & Choices, Denver, Colo.), Apr. 2007, <http://www.compassionandchoices.org/newsletter/newsletter0407.html>.

²⁶⁶ Barbara Coombs Lee, *On My Mind*, THOUGHT & ACTION (Compassion & Choices, Denver, Colo.), Apr. 2007, <http://www.compassionandchoices.org/newsletter/newsletter0407.html>.

²⁶⁷ Vogel, *supra* note 154 (noting the bill’s authors, knowing that they did not have the support to pass the legislation, failed to bring it for a vote). The Catholic Church also blocked prior bills to legalize PAD, such as AB 1592, which was attacked by the Roman Catholic Church in hearings before the Assembly Judiciary Committee in 1999. Gladstone, *supra* note 155.

interest groups who opposed the practice turned to age-old assisted-suicide statutes.

Every state except Hawaii, Nevada, Utah, and Wyoming has addressed assisted suicide in some way, either through the common law or through statute.²⁶⁸ Historically, these statutes

²⁶⁸ Before 1996, thirty-three states criminalized assisted suicide by statute. Kevin M. Stansbury, Note, *Physician Assisted Suicide-Due Process, The Right to Die, Equal Protection and Slippery Slopes*, 31 LAND & WATER L. REV. 623, 637 n.132 (1996). This list, compiled by Stansbury, includes: ALASKA STAT. § 11.41.100(a)(1)(B) (1994) (first degree murder); ARIZ. REV. STAT. ANN. § 13-1103(3) (1989) (manslaughter); ARK. CODE ANN. § 5-10-104(a)(2) (1987) (manslaughter); CAL. PENAL CODE § 401 (West 1999) (separate crime, felony); COLO. REV. STAT. § 18-3-104(1)(b) (1986) (manslaughter); CONN. GEN. STAT. ANN. § 53a-56(a)(2) (West 1994) (manslaughter in the second degree); DEL. CODE ANN. tit. 11, § 645 (1994) (separate crime, felony); FLA. STAT. ANN. § 782.08 (West 1982) (separate crime, felony); GA. CODE ANN. § 16-5-5 (1995) (separate crime, felony); HAW. REV. STAT. § 707-702(1)(b) (1993) (manslaughter); 720 ILL. COMP. STAT. ANN. § 5/12-31 (West 1995) (separate crime, felony if suicide is successful, misdemeanor if suicide unsuccessful); IND. CODE ANN. § 35-42-1-2.5 (West 1994) (separate crime, felony); KAN. STAT. ANN. § 21-3406 (1992) (separate crime, felony); LA. REV. STAT. ANN. § 14:32.12 (1996) (manslaughter); ME. REV. STAT. ANN. tit. 17-A, § 204 (1993) (separate crime, felony); MD. CODE ANN., CRIM. LAW § 3-102 (LexisNexis 1995) (reckless endangerment); MINN. STAT. ANN. § 609.215 (West 1994) (separate crime, felony); MISS. CODE ANN. § 97-3-49 (West 1994) (separate crime, felony); MO. REV. STAT. § 565.023(2) (1992) (voluntary manslaughter); MONT. CODE ANN. § 45-5-105 (1993) (separate crime, felony); NEB. REV. STAT. § 28-307 (1989) (separate crime, felony); N.H. REV. STAT. ANN. § 630:4 (1994) (separate crime, felony); N.J. STAT. ANN. § 2c:11-6 (West 1994) (separate crime, felony); N.M. STAT. ANN. § 30-2-4 (West 1994) (separate crime, felony); N.Y. PENAL LAW § 120.30 (McKinney 1987) (separate crime, felony); N.D. CENT. CODE § 12.1-16-04 (1993) (separate crime, felony); OKLA. STAT. ANN. tit. 21, § 813 (West 1993) (separate crime, felony); 18 PA. CONS. STAT. § 2505 (1993) (separate crime, felony if suicide is successful, misdemeanor if suicide attempt is unsuccessful); S.C. CODE ANN. § 16-3-1090 (1999) (misdemeanor); S.D. CODIFIED LAWS § 22-16-37 (1993) (separate crime, felony); TENN. CODE ANN. § 39-13-216 (1995) (separate crime, felony); TEX. PENAL CODE ANN. § 22.08 (Vernon 1994) (separate crime, felony if suicide is successful, misdemeanor if suicide attempt is unsuccessful); WASH. REV. CODE ANN. § 9A.36.060 (West 1988) (separate crime, felony); WIS. STAT. ANN. § 940.12 (West 1982) (separate crime, felony).

Since 1996, four additional states have criminalized physician-assisted suicide. Glynn, *supra* note 150, at 333 n.27. These state laws include: IOWA CODE ANN. §§ 707A.2, 707A.3 (West 1997) (separate crime, felony); KY. REV. STAT. ANN. § 216.302 (West 1994) (separate crime, felony); MICH. COMP. LAWS ANN. § 752.1027 (West 1992) (separate crime, felony); and R.I. GEN. LAWS §§ 11-60-1, 11-60-3 (1997) (separate crime, felony).

The District of Columbia has not addressed the issue, while Alabama, Idaho, Massachusetts, North Carolina, Ohio, and Vermont only provide a common law remedy. See State Laws on Assisted-Suicide, <http://www.euthanasiaprocon.org/statelaws.htm> (last visited July 19, 2007).

arose to address “suicide” situations, not PAD.²⁶⁹ Some jurisdictions held that because suicide was not a crime, aiding in it also was not criminal.²⁷⁰ Other jurisdictions considered motive and found liability only if the one assisting intended to selfishly benefit from the death of another.²⁷¹ The Model Penal Code suggests that aiding in suicide will be criminal homicide only if the party assisting caused the suicide “by force, duress or deception.”²⁷² Commentaries on this section of the Code explained that liability is limited to purposeful conduct because merely creating the risk that another will commit suicide would cast the net of liability too wide.²⁷³ None of the Code sections specifically addressed involvement by a physician.

Despite the fact that these statutes were not enacted to address the distinct situations doctors faced with patients whose deaths were now being prolonged by modern medicine, prosecutors in some states began to use the assisted-suicide statutes on the books to deter PAD. Although states have brought unsuccessful actions,²⁷⁴ Michigan, California, and Kansas indicted physicians for assisting in suicide in violation of state laws.²⁷⁵ Furthermore, physicians and patients who feared potential sanctions under the assisted-suicide statutes were the primary instigators of litigation challenging these statutes in Alaska, Colorado, Florida, Michigan, New York, and Washington.²⁷⁶

²⁶⁹ See *supra* note 10 and accompanying text for discussion of confusion created by using the term “suicide” to address PAD; see also Cohen et al., *supra* note 153, at 89 (“To avoid ambiguity in our survey, instead of ‘physician-assisted suicide,’ we used the phrase ‘prescription of medication . . . or the counseling of an ill patient so he or she may use an overdose to end his or her own life.’”).

²⁷⁰ See, e.g., MODEL PENAL CODE § 210.5 cmt. 5, at 100 n.22 (1980).

²⁷¹ See, e.g., *id.* § 210.5 cmt. 5, at 101 n.24.

²⁷² *Id.* § 210.5(1); see also *id.* § 210.5 cmt. 5, at 100 (“[T]he interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim.”); DAVID C. BRODY ET AL., CRIMINAL LAW 93 (2001).

²⁷³ MODEL PENAL CODE § 210.5 cmt. 5, at 102.

²⁷⁴ See, e.g., *State v. Naramore*, 965 P.2d 211, 224 (Kan. Ct. App. 1998); *People v. Kevorkian*, 519 N.W.2d 890, 890 (Mich. 1994).

²⁷⁵ See, e.g., *infra* notes 291–96.

²⁷⁶ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 707–08 (1997); *Vacco v. Quill*, 521 U.S. 793, 796–97 (1996); *Sampson v. Alaska*, 31 P.3d 88, 90 (Alaska 2001); *Sanderson v. People*, 12 P.3d 851, 852 (Colo. Ct. App. 2000); *Krischer v. McIver*,

In an effort to restrict PAD, a few states have modified their assisted-suicide laws to specifically mention health care providers. Virginia has enacted a law that subjects licensed health care providers who have engaged in assisting suicide or attempted suicide to the possibility of license revocation or civil liability.²⁷⁷ Ohio amended its assisted-suicide statute in 2006 to permit injunctions against health care providers who may be attempting to assist with a suicide.²⁷⁸

In the opposite direction, several states responded after the *Cruzan* decision by modifying their assisted-suicide statutes to include specific provisions to protect health care providers. After *Cruzan*, Georgia, Illinois, Indiana, and Louisiana all amended their laws. Originally, these laws did not specifically address health care providers. After 1990, legislators in these states amended their assisted-suicide statutes to exclude from prosecution health care providers acting under a living will.²⁷⁹

Colorado, Maryland, Minnesota, Oklahoma, South Carolina, and Tennessee all went a step further by attempting to address the gray area between PAD and palliative care that may hasten death. These states now provide exemptions from the assisted-suicide statutes for physicians or other health care workers who may cause death while alleviating pain so long as their intent was not to cause death knowingly.²⁸⁰

697 So. 2d 97, 99 (Fla. 1997); *People v. Kevorkian*, 519 N.W.2d 890, 890 (Mich. 1994).

²⁷⁷ VA. CODE ANN. § 8.01-662.1(D) (1999) (“A licensed health care provider who assists or attempts to assist a suicide shall be considered to have engaged in unprofessional conduct for which his certificate or license to provide health care services in the Commonwealth shall be suspended or revoked by the licensing authority.”).

²⁷⁸ OHIO REV. CODE ANN. § 3795.02 (West 2006).

²⁷⁹ GEORGIA CODE ANN. § 16-5-5 (West 1995); 720 ILL. COMP. STAT. ANN. 5/12-31 (West 1995); IND. CODE ANN. § 35-42-1-2.5(a) (West 1994); LA. REV. STAT. ANN. § 14:32.12 (1995). Note that “living wills” are also sometimes referred to as advanced directives or advanced health care directives.

²⁸⁰ See COLO. REV. STAT. § 18-3-104 (2006); MD. CODE ANN., CRIM LAW § 3-103 (West 2006); MINN. STAT. ANN. § 605.215(3)(2005); S.C. CODE ANN. § 16-3-1090(C) (2006); TENN. CODE ANN. § 39-13-216(b) (2006). Oklahoma’s statute is somewhat ambiguous; it is titled “Assisted Suicide Prevention Act of 1998,” and on its face prohibits PAD, yet it also has a very broad exception for palliative care, placing it on the protective side for doctors. OKLA. STAT. tit. 63, § 3141.4 (2006). Similarly, in Maryland in 1998, the Maryland Catholic Conference began working with hospice organizations and other groups to introduce a bill that would outlaw physician-assisted suicide. Valerie J. Vollmar, *Recent Developments in Physician-*

Finally, not only have opponents been successful in blocking legislation legalizing PAD, they also have pushed their cause to the other extreme, attempting to pass legislation specifically targeting doctors who respond to patients' requests for PAD. Since 1996, Alabama, Arkansas, North Carolina, North Dakota, and Vermont have had bills introduced that would specifically criminalize PAD. None have passed.²⁸¹ However, in Rhode

Assisted Suicide (Feb. 1998), <http://www.willamette.edu/wucl/pdf/pas/1998-02.pdf> [hereinafter Vollmar, Feb. 1998 Developments]. A bill banning physician-assisted suicide and imposing harsh criminal penalties of prison time and fines passed both legislative houses and was signed into law by Governor Glendening on May 27, 1999. Valerie J. Vollmar, Recent Developments in Physician-Assisted Suicide (June 1998), <http://www.willamette.edu/wucl/pdf/pas/1998-06.pdf>. However, the palliative care provision provides some protection for Maryland physicians.

²⁸¹ Alabama: "In February 2000, the Alabama Senate passed Senate Bill 8, which would make assisted suicide a Class C felony punishable by up to 10 years in prison. However, the bill died in the House." Valerie J. Vollmar, Recent Developments in Physician-Assisted Suicide (Nov. 2000), <http://www.willamette.edu/wucl/pdf/pas/2000-11.pdf> [hereinafter Vollmar, Nov. 2007 Developments].

Arkansas: "On February 10, 1999, Arkansas state representatives passed a bill that would make it a felony for a physician to carry out a medical procedure or prescribe drugs for the purpose of ending a patient's life. The bill was sent to the Senate on a vote of 89 to 3 . . ." But, the bill was never enacted. See Vollmar, Mar. 1999 Developments, *supra* note 232.

North Carolina: On February 20, 2003, North Carolina State "Senators Jim Forrester and Bill Purcell, both physicians, filed S.B. 145, which would make assisted suicide by a licensed health care professional a Class D felony. The bill was referred to committee . . ." but did not pass. Valerie J. Vollmar, Recent Developments in Physician-Assisted Suicide (June 2003), <http://www.willamette.edu/wucl/pdf/pas/2003-06.pdf>.

Subsequently, the Executive Council of the Elder Law Section of the North Carolina Bar Association adopted a resolution "oppos[ing] enactment of S. 145 or any other felony law that purports to bar 'assisted suicide,'" primarily due to concern that the bill might affect the quality of end-of-life care. The bill was referred to the Judiciary Committee and was not considered further in the 2003–04 session. The Health Law Section and the Estate Planning Section also voted to oppose the bill, and the North Carolina Bar Association's Board of Governors voted in April 2004 to oppose it when reintroduced in the 2004–05 legislative session.

Valerie J. Vollmar, Recent Developments in Physician-Assisted Suicide (Oct. 2004), <http://www.willamette.edu/wucl/pdf/pas/2004-10.pdf> (alteration in original) (noting the bill did not make it out of committee).

North Dakota: "Senator Ralph Kilzer . . . introduced a bill in the North Dakota legislature that would revoke a health care provider's license for assisting in a suicide and would make the provider liable to pay damages in any potential lawsuits." Vollmar, Mar. 1999 Developments, *supra* note 232 (the bill did not pass).

Vermont: In February 2003 H. 318 was introduced in the Vermont legislature to criminalize PAD. The Senate and House Health and Welfare Committees failed to bring the bill for a vote in both 2003 and when reintroduced in 2004. See Valerie J.

Island and Michigan, legislators specifically made it a crime for a health care provider to “assist” in suicide.²⁸²

In 1996, the Rhode Island legislature considered one bill making PAD a felony and another bill that would legalize PAD. Although Rhode Island has the largest Catholic constituency in

Vollmar, Recent Developments in Physician-Assisted Suicide (June 2005), <http://www.willamette.edu/wucl/pdf/pas/2005-06.pdf>.

²⁸² MICH. COMP. LAWS ANN. § 752.1027 (West 2006); R.I. GEN. LAWS § 11-60-3 (2006). The Rhode Island statute states:

An individual or licensed health care practitioner who with the purpose of assisting another person to commit suicide knowingly:

(1) Provides the physical means by which another person commits or attempts to commit suicide; or

(2) Participates in a physical act by which another person commits or attempts to commit suicide is guilty of a felony and upon conviction may be punished by imprisonment for up to ten (10) years, by a fine of up to ten thousand dollars (\$10,000) or both.

R.I. GEN. LAWS § 11-60-3.

The Michigan statute provides:

A person who has knowledge that another person intends to commit or attempt to commit suicide and who intentionally does either of the following is guilty of criminal assistance to suicide, a felony punishable by imprisonment for not more than 4 years or by a fine of not more than \$2,000.00, or both:

(a) Provides the physical means by which the other person attempts or commits suicide.

(b) Participates in a physical act by which the other person attempts or commits suicide.

MICH. COMP. LAWS ANN. § 752.1027. The current version of this statute has both an advance directive and palliative care exception. *See id.* §§ 752.1027(2), (3). However, the court held that a similar exception in the pre-1993 version of the statute did not apply to Dr. Kevorkian because he administered medication designed to cause death. *See People v. Kevorkian*, 639 N.W.2d 291, 302 (Mich. Ct. App. 2001). The pre-1993 version of the statute read as follows:

A licensed health care professional who administers, prescribes, or dispenses medications or procedures to relieve a person's pain or discomfort, even if the medication or procedure may hasten or increase the risk of death, is not guilty of assistance to suicide under this section unless the medications or procedures are knowingly and intentionally administered, prescribed, or dispensed to cause death.

MICH. COMP. LAWS ANN. § 752.1027(3) (West 1992). *Cf.* GA. CODE ANN. § 6-5-15 (West 1998) (does not explicitly mention health care providers, but makes it illegal for any individual to hold himself or herself out as offering that he or she will intentionally and actively assist another person in the commission of suicide and committing any overt act to further that purpose); KY. REV. STAT. ANN. § 216.302 (1994) (does not specifically address healthcare providers, but makes providing the means of suicide a felony).

the United States,²⁸³ Senator Roney, a PAD advocate noted, “We are here today as legislators. We are not here as Catholics, Jews or Protestants We do not have the luxury of attempting to impose our religious views on others.”²⁸⁴ Despite Senator Roney’s pleas, the Rhode Island legislators passed the anti-PAD legislation, “signal[ing their] full sympathy with Catholic Church representatives and other opponents of assisted suicide who packed a third-floor State House room for the hearing [on a bill making PAD a felony].”²⁸⁵

Michigan is a special case. Although many would argue that Michigan doctor Jack Kevorkian’s actions did more harm than good in the PAD debate, no discussion of the topic would be complete without mentioning his involvement.²⁸⁶ From 1990 to 1998, Dr. Kevorkian claimed to have assisted in over 130 suicides,²⁸⁷ three using his “suicide machine.”²⁸⁸ After early attempts to charge Kevorkian with murder under the existing assisted-suicide law failed,²⁸⁹ the Michigan General Assembly made its statute more restrictive in 1992.²⁹⁰ The statute states that any person is guilty of a felony if that person, with knowledge of another person’s intent or attempt to commit suicide, provides “physical means” or “physical acts” to aid the suicide.²⁹¹

²⁸³ GLICK, *supra* note 248, at 124 (“[T]he Catholic church has direct access and enormous influence in the legislature, and all observers and participants agree that it is able to block or postpone legislation that it opposes. . . . [T]he Catholic constituency of Massachusetts is the second largest in the United States—the population is over 50 percent Catholic, second only to Rhode Island.”). “As in other states, the Massachusetts Catholic Conference has been the main and the most powerful opponent to the right to die” *Id.* at 120.

²⁸⁴ Rowland, *supra* note 163.

²⁸⁵ *Id.*

²⁸⁶ For more detailed discussion on the impact of Kevorkian actions see generally ELIZABETH ATWOOD GAILEY, *WRITE TO DEATH* (2003); George J. Annas, *The “Right to Die” in America: Sloganeering from Quinlan and Cruzan to Quill and Kevorkian*, 34 DUQ. L. REV. 875, 891–92 (1996); Persels, *supra* note 183; Branigan, *supra* note 183;.

²⁸⁷ See Ron Dzwonkowski, *Kevorkian Timeline*, DET. FREE PRESS, Dec. 13, 2006, at B6.

²⁸⁸ Persels, *supra* note 183, at 95.

²⁸⁹ See *id.*

²⁹⁰ See Catherine L. Annas, *Irreversible Error: The Power and Prejudice of Female Genital Mutilation*, 12 J. CONTEMP. HEALTH L. & POL’Y 325, 340 (1996).

²⁹¹ MICH. COMP. LAWS ANN. § 752.1027 (West 2006). Michigan’s assisted-suicide statute was enacted in February of 1993. It was not repealed after six months as

After the statute was amended, Dr. Kevorkian assisted in three more suicides and was indicted under the new law.²⁹² On appeal, the Supreme Court of Michigan held that the statute was properly enacted and that the imposition of criminal penalties on an individual who assists in the suicide of another does not violate the U.S. Constitution.²⁹³ In addition, Kevorkian went a step further when he administered a lethal injection to a patient with terminal cancer, an event that was videotaped and later aired on CBS's *60 Minutes*.²⁹⁴ Kevorkian's attempt to enjoin prosecution failed after the Michigan Supreme Court upheld the state's assisted-suicide statute.²⁹⁵ As a result, Dr. Kevorkian was convicted of second degree murder and served over eight years of his ten to twenty-five year prison sentence.²⁹⁶ He was paroled in June of 2007 for health reasons.²⁹⁷

Assisted-suicide statutes that threaten sanctions for physicians and criminalize decisions about patient care have a chilling effect on doctors.²⁹⁸ Thus, the inability of state legislatures to resolve

provided for in subsection 5 because the Michigan Supreme Court found it was validly enacted and did not violate the U.S. Constitution. *People v. Kevorkian*, 527 N.W.2d 714, 719 (Mich. 1994).

²⁹² Branigan, *supra* note 183, at 962–63.

²⁹³ *Kevorkian*, 527 N.W.2d at 716.

²⁹⁴ *Jail Time for Dr. Kevorkian*, N.Y. TIMES, Apr. 15, 1999, at A30 (noting Dr. Kevorkian was acquitted in the 1994 killing of Thomas Hyde; however, after CBS aired portions of a video depicting Dr. Kevorkian assisting in the suicide of Thomas Youk, Dr. Kevorkian was again indicted and this time convicted of second degree murder and distribution of controlled substances).

²⁹⁵ *Kevorkian v. Thompson*, 947 F. Supp. 1152, 1171–72 (E.D. Mich. 1997) (following the Michigan Supreme Court precedent that there was no Fourteenth Amendment liberty interest in assisted suicide, that Michigan's statute did not violate Equal Protection, and that Michigan common law was not unconstitutionally vague on the topic).

²⁹⁶ See *Kevorkian Leaving Prison in June*, DENVER POST, Dec. 14, 2006, at 2A.

²⁹⁷ Prison officials in Lansing, Michigan, decided to grant him parole after more than eight years behind bars. *Id.* They considered seventy-eight-year-old Kevorkian's health and the unlikelihood that he would pose a danger to society if freed. *Id.*

²⁹⁸ See Press Release, Edward L. Langston, Am. Med. Ass'n, AMA: Justice Served for Dr. Pou (July 24, 2007), <http://www.ama-assn.org/ama/pub/category/17849.html>. In a press release after a grand jury refused to indict Dr. Anna Pou, the AMA stated, "The AMA continues to be very concerned about criminalizing decisions about patient care . . ." *Id.* Dr. Pou was charged with injecting four elderly patients with "lethal cocktails" during the August 2005 Katrina storm. Mary Foster, *No Indictment for Doctoring Katrina Deaths*, DENVER POST, July 25, 2007, at 9A. Some charged that Dr. Pou administered the injections as mercy killings, but the doctor said the patients wished to die naturally and she did all she could to

the PAD issue has made it “difficult for clinicians to deliver care”²⁹⁹ or to prescribe what they believe is the most humane and appropriate treatment for their patients.³⁰⁰

2. Action by Citizen Initiatives

While pro-PAD supporters pushed the debate in legislatures and the courts, they were most successful by using the citizen initiative process. The citizen initiative process has been the only mechanism for enacting legislation reflecting what polls suggest is the preference of the majority of American citizens: the legalization of PAD. Oregon’s Act was such a citizen initiative and currently represents the only U.S. law legalizing PAD.³⁰¹ Aside from Oregon’s success, four other states attempted similar initiatives.

California was the first to try the initiative route with a 1988 attempt. This ballot measure, intended to aid those in persistent vegetative comas and those with AIDS and terminal cancer, did not garner enough signatures to make it on the ballot.³⁰² In 1992, California tried again.³⁰³ This time, proponents were able to get their end-of-life measure on the California ballot as Proposition 161.³⁰⁴ Proposition 161 was leading in the polls just days before

“make them comfortable.” *UCC Calls for Groundbreaking Study of Aid in Dying*, *supra* note 245.

²⁹⁹ Adam Nossiter, *Grand Jury Won’t Indict Doctor in Hurricane Deaths*, N.Y. TIMES, July 25, 2007, at A10 (quoting Dr. Anna Pou). On July 24, 2007, an Orleans Parish grand jury refused to indict Dr. Pou on any charges. *Id.* The American Medical Association has released its statement praising the grand jury’s decision. *Id.*

³⁰⁰ For example, the California State Medical Board revoked Dr. Harold Luke’s medical license when the doctor increased a seventy-six-year-old man’s morphine drip tenfold. *Id.* The Board first concluded this action hastened the patient’s death. Valerie J. Vollmar, *Recent Developments in Physician-Assisted Suicide* (July 2006), <http://www.willamette.edu/wucl/pdf/pas/2006-07.pdf>. On reconsideration, however, Dr. Luke argued he “intended only to make his patient’s last days as painless and comfortable as possible,” and the Board reinstated the doctor’s license and reduced the penalty to a public reprimand for inadequate record keeping. *Id.*

³⁰¹ *See supra* note 240.

³⁰² *See* Joan Beck, *Californians May Be Invited to Vote on a Right to Die*, CHI. TRIB., Apr. 21, 1988, at 23C.

³⁰³ *See* Tom Paulson, *No to Aid in Dying—But Fight Goes On*, SEATTLE POST-INTELLIGENCER, Nov. 7, 1991, at A9.

³⁰⁴ Proponents of Proposition 161 added safeguards to the initiative including family notification without the ability to veto, reporting requirements, psychological evaluation, and a waiting period before the request would be granted. *Id.*

the election,³⁰⁵ but the Catholic Church and other foes “spent more than \$2.8 million on a hard-hitting campaign The measure’s backers spent one-tenth that amount and saw public opinion swing from 75% favoring the initiative in some preelection polls to an election-day defeat of 54% to 46%.”³⁰⁶ John Brooke, president of Americans for Death with Dignity, noted, “We can’t match them financially.”³⁰⁷

In 1991, the citizens of Washington State also voted on a PAD initiative. The initiative, I-119, sought to give the terminally ill the right to physician assistance in speeding their deaths.³⁰⁸ Initially, I-119 showed great promise of successfully passing; even a conference of clergy, the Pacific Northwest Conference of the United Methodist Church, endorsed it.³⁰⁹ However, opponents again weighed in with an aggressive campaign, and the initiative failed in a fifty-four to forty-six percent margin on November 5, 1991.³¹⁰

³⁰⁵ As of November 2, 1992, a telephone poll showed support of the initiative was forty-seven percent for, forty percent against, and thirteen percent undecided. *California: Voters Favor “Death with Dignity” Prop.*, AM. HEALTH LINE, Nov. 2, 1992.

³⁰⁶ Bailey, *supra* note 92 (“People felt that the [California Medical Association] and the Catholic Church were the reason Proposition 161 was defeated”); see also *California: Voters Reject Health Care Propositions*, AM. HEALTH LINE, Nov. 4, 1992. (noting fifty-four percent against, forty-six percent for the California Death with Dignity Act); *Polls Show*, *supra* note 144.

³⁰⁷ Bailey, *supra* note 92.

³⁰⁸ Rob Carson, *Washington’s I-119*, HASTINGS CENTER REP., Mar.–Apr. 1992, at 7, 8. It also would expand the definition of terminally ill to include coma and persistent vegetative state. *Id.* at 8; see also Paulson, *supra* note 303. The bill was in response to *Cruzan* and sought to clearly define a patient’s ability to refuse medical treatment even to the point of ending life. See William Bole, *Right-to-Die Debate Zips Past Cruzan Case*, SEATTLE POST-INTELLIGENCER, June 22, 1991, at D6.

³⁰⁹ Diego Ribadeneira, *Euthanasia Support Is Spreading*, SEATTLE POST-INTELLIGENCER, June 22, 1991, at D6.

³¹⁰ Carson, *supra* note 308, at 7; Paulson, *supra* note 303. I-119 contained many safeguards to prevent acts such as euthanasia from occurring, including requiring that the request be voluntary and in writing from a “conscious, competent” patient and that the request be certified by “two physicians, one of them the attending physician, . . . that the patient had six months or less to live.” Carson, *supra* note 308, at 9. Yet reasons for the failure, voiced by the Catholic Archbishop of Seattle, concerned the lack of safeguards including: (1) it did not define competency, (2) it did not require patients seeking to end their lives to be Washington residents, (3) it required no special training required of physicians to assist patients in dying, and (4) it contained no safeguards for the families or loved ones of the person seeking to die. Thomas J. Murphy, *Initiative 119—A Real Nightmare*, SEATTLE TIMES, Oct.

In the fall of 1998, Michigan voters addressed the PAD issue in Proposal B.³¹¹ Proposal B would have legalized the “prescription of a lethal dose of medication to terminally ill, competent, informed adults in order to commit suicide.”³¹² The measure failed by a significant margin.³¹³ “Proposal B supporters blamed the downturn [of support] on an intense multimillion-dollar ad campaign by a coalition of health care, religious and civil rights organizations” that raised more than five million dollars in contributions.³¹⁴ In contrast, advocates of Proposal B had raised only \$300,000 and produced one television ad.³¹⁵

In 2000, Maine made the most recent attempt to pass a ballot initiative to give people the right to seek physician assistance in death.³¹⁶ Following the Maine legislature’s rejection in February 1998 of a bill that would have legalized physician-assisted suicide, supporters launched the PRO 916 campaign collecting petition signatures to put the proposal on the ballot in 2000.³¹⁷ Although the margin of votes was very close, PRO 916 failed to pass.³¹⁸

Oregon alone successfully passed a measure legalizing PAD. In 1994, Oregon voters approved Oregon’s Death with Dignity

26, 1991, at C9. Some sectors also feared the initiative was euthanasia in disguise. *Death with Dignity—An Attempt to Confuse and Deceive by Hemlock Society*, SEATTLE TIMES, Sept. 24, 1990, at A9.

³¹¹ Proposal B was in response to a statute enacted by the Michigan legislature that banned assisted suicide. The Proposal would instead have made assisted suicide legal. *Michigan: Poll Shows Suicide Measure Heading to Defeat*, AM. HEALTH LINE, Oct. 26, 1998 (noting as early as October 1998, fifty-four percent of voters opposed the measure, forty percent supported it, and six percent were unsure).

³¹² *Michigan Voters Soundly Reject Physician Assisted Suicide*, CNN.COM, Nov. 3, 1998, <http://www.cnn.com/ALLPOLITICS/stories/1998/11/03/election/ballots/assisted.suicide/index.html>.

³¹³ *See id.*

³¹⁴ *Id.*

³¹⁵ *Id.* Some also believe that Dr. Kevorkian’s more aggressive euthanasia activities also contributed to sway public opinion against the measure. *See, e.g.*, Joyce Howard Price, *Maine Voters Say No to Assisted Suicide Among Ballot Issues*, WASH. TIMES, Nov. 8, 2000, at A15.

³¹⁶ *Maine: Voters Narrowly Defeat Assisted Suicide Measure*, AM. HEALTH LINE, Nov. 8, 2000; *see also* Price, *supra* note 315.

³¹⁷ Vollmar, Nov. 2007 Developments, *supra* note 281.

³¹⁸ The vote was 330,671 (51.3%) against and 313,303 (48.7%) for the measure. *Id.*

Act by a margin of two percent.³¹⁹ Oregon's Act exempts from civil or criminal liability state-licensed physicians who, in compliance with the Act's specific safeguards, dispense or prescribe a lethal dose of drugs upon the request of a terminally ill patient.³²⁰

A number of physicians, patients, and residential treatment facilities challenged Oregon's Act and were able to obtain an injunction staying its implementation based on potential violations of their freedom of association, freedom of religion, due process, and equal protection rights.³²¹ However, the Ninth Circuit vacated for lack of standing and ultimately lifted the injunction in February of 1997.³²² Just about a week after the Ninth Circuit lifted the injunction, Oregon's Act survived an initiative effort to repeal it.³²³

The Catholic Church was heavily involved in both the 1994 and 1997 initiative campaigns. In 1994, opponents outspent proponents of the initiative almost four to one.³²⁴ "[T]he Catholic church remain[ed] the dominant financial player. In 1994, almost half of the \$1.5 million spent in opposition to legalization of doctor-assisted suicide came from Catholic dioceses and Catholic hospitals in Oregon and elsewhere."³²⁵

In 1997, Church leaders tried to lower their public profiles: "We didn't want this to backfire on us as it did in 1994, when they said this is the Catholic Church, or the religious right, or

³¹⁹ See Michael C. Dorf, *FindLaw Forum: Telling States What to Do in Cases of Physician-Assisted Suicide*, CNN.COM, Nov. 19, 2001, <http://archives.cnn.com/2001/LAW/11/columns/fl.dorf.assisted.suicide.11.19/>.

³²⁰ Death with Dignity Act, OR. REV. STAT. § 127.885 (2007).

³²¹ See *Lee v. State*, 869 F. Supp. 1491, 1491 (D. Or. 1994). The District Court imposed a preliminary injunction in this case. The next year, the court issued a permanent injunction in *Lee v. State*, 891 F. Supp. 1439, 1439 (D. Or. 1995). The plaintiffs alleged violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, their First Amendment rights of freedom to exercise religion and to associate, and their statutory rights under the Americans with Disabilities Act of 1990. *Lee*, 869 F. Supp. at 1493.

³²² *Lee v. Oregon*, 107 F.3d 1382, 1386 (9th Cir. 1997).

³²³ Vollmar, Feb. 1998 Developments, *supra* note 280.

³²⁴ Hill & Green, *supra* note 246.

³²⁵ *Catholic Church Alters Tactics on Suicide Law*, *supra* note 246; see also Hill & Green, *supra* note 246 (noting approximately one month from the end of the campaign, supporters of Measure 16 had raised only \$260,056 in contrast to opponent's war chest of \$1,034,000).

religious extremists, or conservatives.”³²⁶ Despite its lower profile, the Catholic Church ramped up its opposition. In the 1997 campaign, the opponents to PAD outspent the supporters almost six to one. Catholic organizations contributed about half of the over \$2.3 million raised by the opposition.³²⁷ Despite the significant imbalance of funding, Oregon voters rejected the repeal efforts and renewed their support for PAD by a margin of twenty percent.³²⁸

3. Federal Affronts to Oregon’s Death with Dignity Act

In 2001, Attorney General Ashcroft issued an interpretive rule (“Directive”) declaring physicians in violation of the Controlled Substances Act for prescribing lethal doses of controlled substances in PAD situations.³²⁹ Ashcroft’s Directive pitted the Controlled Substances Act, a federal law not specifically addressing PAD, against Oregon’s Act, which did specifically address the issue. The physicians were licensed, and the drugs were ones they were allowed to prescribe under the Controlled Substances Act. Although lethal doses of these prescriptions were legal under Oregon’s Act, Ashcroft declared that prescribing them in PAD circumstances was “not a legitimate medical practice” under the Controlled Substances Act.³³⁰ Thus, under the Directive, specific conduct authorized by Oregon’s Act could render a practitioner’s federal registration

³²⁶ *Catholic Church Alters Tactics on Suicide Law*, *supra* note 246.

³²⁷ *Id.* In both campaigns, the PAD opponents significantly outspent the proponents. For support of the repeal, “[c]ampaign funds raised as of 9/24/97 amounted to \$2.25 million, including \$800,000 from Catholic archdioceses around the country, \$250,000 from the U.S. Catholic Conference, and \$100,000 from Oregon Right to Life.” Valerie J. Vollmar, *Recent Developments in Physician-Assisted Deaths* (Oct. 1997), <http://www.willamette.edu/wucl/pdf/pas/1997-10.pdf>. “Opponents of Measure 51 include[d] Governor Kitzhaber (an emergency room physician) and a group of physicians known as Physicians for Death with Dignity. [Opponents’] [c]ampaign funds raised as of 9/24/97 amounted to \$370,000, including \$150,000 each from a local millionaire and international philanthropist George Soros.” *Id.*

³²⁸ OR. DEP’T OF HUMAN SERVS., EIGHTH ANNUAL REPORT ON OREGON’S DEATH WITH DIGNITY ACT 6 (2006), *available at* <http://www.oregon.gov/DHS/ph/pas/docs/year8.pdf>. The total votes against repeal were 666,275, while the total for repeal were 445,830. Official Results State Measure No. 51 (Nov. 4, 1997), <http://www.sos.state.or.us/elections/nov497/other.info/m51abst.htm>.

³²⁹ *Dispensing of Controlled Substances to Assist Suicide*, 66 Fed. Reg. 56,607, 56,608 (Nov. 9, 2001), *invalidated by* *Gonzales v. Oregon*, 546 U.S. 243 (2006).

³³⁰ *Id.*

inconsistent with the public interest, and therefore subject to possible suspension or revocation.³³¹ The Directive specifically targeted health care practitioners in Oregon and instructed the U.S. Drug Enforcement Administration to enforce this determination regardless of whether state law authorized or permitted such conduct by practitioners.³³²

A physician, a pharmacist, several terminally ill patients, and the State of Oregon filed suit seeking an injunction against the Directive the day it was published.³³³ On appeal, in *Oregon v. Ashcroft*, the Ninth Circuit Court of Appeals held that the Ashcroft Directive was unlawful and unenforceable because it violated the plain language of the Controlled Substances Act, contravened Congress's express legislative intent, and overstepped the bounds of the U.S. Attorney General's statutory authority.³³⁴ The court found that the Controlled Substances Act was enacted to combat drug abuse, and that "to the extent that it authorize[d] the federal government to make decisions about the practice of medicine, those decisions [were] delegated to the Secretary of Health and Human Services, not to the Attorney General."³³⁵ Ashcroft's successor, Attorney General Alberto Gonzales, appealed to the U.S. Supreme Court.

In January 2006, the Supreme Court affirmed the Ninth Circuit's decision in *Gonzales v. Oregon*.³³⁶ In a six-to-three opinion, the *Gonzales* majority held that the U.S. Attorney General could not prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide under Oregon's Death

³³¹ *See id.*

³³² *Id.* Just three years before, then Attorney General Janet Reno had refused to challenge physicians practicing under Oregon's Act, deciding not to "displace the states as the primary regulators of the medical profession, or to override a state's determination as to what constitutes legitimate medical practice in the absence of a federal law prohibiting that practice." Letter from Janet Reno, Attorney Gen., to Orrin G. Hatch, Chairman of the Senate Judiciary Comm. (June 5, 1998), in S. REP. NO. 105-372, at 9 n.10 (1998).

³³³ *State v. Ashcroft*, 192 F. Supp. 2d 1077, 1079–80, 1087 (D. Or. 2002), *aff'd*, 368 F.3d 1118 (9th Cir. 2004), *aff'd sub nom.*, *Gonzales v. Oregon*, 546 U.S. 243 (2006) (finding that Attorney General Ashcroft exceeded the authority delegated to the Attorney General by the Controlled Substances Act, and finding that Congress did not intend, through the Controlled Substances Act or otherwise, to override state decisions concerning what constitutes the legitimate practice of medicine).

³³⁴ *Ashcroft*, 368 F.3d at 1120.

³³⁵ *Id.* at 1131.

³³⁶ 546 U.S. 243 (2006).

with Dignity Act.³³⁷ Furthermore, the Court held that the Attorney General may not issue a directive if the federal statute is not ambiguous and if Congress has not specifically delegated that role to the Attorney General.³³⁸ The Court found that the Controlled Substances Act was not ambiguous: Congress had delegated to the Attorney General only the authority to promulgate rules relating to “registration” and “control” of the dispensing of controlled substances.³³⁹ The Court further stated that “control” means “to add a drug or substance . . . to a schedule”³⁴⁰ following specified procedures, and that because the Directive did not concern scheduling of substances and was not issued under the required procedures, it could not fall under the Attorney General’s control authority.³⁴¹

The Court also found that the Attorney General’s Directive could not be justified under the Controlled Substances Act’s registration provisions because it deals with much more than registration³⁴² and it does not undertake the Act’s five-factor analysis for determining when registration is “inconsistent with the public interest.”³⁴³ The *Gonzales* majority based its decision on a close reading of the Controlled Substances Act and focused its result on the administrative power of the Attorney General, stating that the Attorney General’s Directive purported to declare that using controlled substances for PAD is a crime,³⁴⁴ which requires authority “well beyond the Attorney General’s statutory power to register or deregister [physicians].”³⁴⁵

By focusing on the administrative power of the Attorney General, the *Gonzales* majority avoided the preemption and federalism issues raised in the Ninth Circuit’s opinion. The Ninth Circuit suggested that any effort to limit an Oregon statute

³³⁷ *Id.* at 274–75. Justice Kennedy authored the opinion. He was joined in the majority opinion by Justices Stevens, O’Connor, Souter, Ginsburg, and Breyer. Justices Roberts, Scalia, and Thomas dissented.

³³⁸ *Id.* at 255–56.

³³⁹ *Id.* at 259 (interpreting 21 U.S.C. § 821 (2006)).

³⁴⁰ *Id.* at 260 (quoting 21 U.S.C. § 802(5) (2006)).

³⁴¹ *Id.*

³⁴² *Id.* at 249.

³⁴³ *Id.* at 250–51 (quoting 21 U.S.C. § 823(f) (2006)).

³⁴⁴ *Id.* at 261.

³⁴⁵ *Id.* Thus, the Ashcroft directive was not entitled to either *Auer* or *Chevron* deference. *Id.* at 269.

defining legitimate medical practice in that state would require a clear statement of preemption in the federal statute.³⁴⁶ In some respects, the *Gonzales* court appeared to accept the Ninth Circuit's reasoning. Although the Court concluded that it was "unnecessary even to consider the application of clear statement requirements . . . or presumptions against pre-emption . . . to reach [its] commonsense conclusion."³⁴⁷ It also noted:

Just as the conventions of expression indicate that Congress is unlikely to alter a statute's obvious scope and division of authority through muffled hints, the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power.³⁴⁸

Similarly, the Court indicated that Ashcroft's effort to make actions that were authorized by Oregon's Death with Dignity Act illegal would have given him:

[T]he power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality. The text and structure of the [Controlled Substances Act] show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it.³⁴⁹

Justices Roberts, Scalia, and Thomas dissented. Justice Scalia authored the primary dissent, and Justice Thomas wrote his own separate dissenting opinion in addition to joining the primary dissent.

The dissenters not only voiced support for the authority of the Attorney General to issue the Ashcroft Directive, but they also disputed the majority's deference for state sovereignty over the PAD issue. First, Justice Scalia acknowledged federalism concerns by stating:

The Court's decision today is perhaps driven by a feeling that the subject of assisted suicide is none of the Federal Government's business. It is easy to sympathize with that position. The prohibition or deterrence of assisted suicide is certainly not among the enumerated powers conferred on the United States by the Constitution, and it is within the realm of

³⁴⁶ *Oregon v. Ashcroft*, 368 F.3d 1118, 1125 (9th Cir. 2004).

³⁴⁷ *Gonzales*, 546 U.S. at 275 (citations omitted).

³⁴⁸ *Id.*

³⁴⁹ *Id.*

public morality (*bonos mores*) traditionally addressed by the so-called police power of the States.³⁵⁰

However, the dissenters went on to waive aside the federalism objection, justifying use of the expanded Commerce Clause for their conclusion that the Attorney General's interpretation of the Controlled Substances Act was an appropriate way to emasculate Oregon's Act:

From an early time in our national history, the Federal Government has used its enumerated powers, such as its power to regulate interstate commerce, for the purpose of protecting public morality Unless we are to repudiate a long and well-established principle of our jurisprudence, using the federal commerce power to prevent assisted suicide is unquestionably permissible. The question before us is not whether Congress *can* do this, or even whether Congress *should* do this; but simply whether Congress *has* done this in the CSA. I think there is no doubt that it has.³⁵¹

Justice Scalia's stance in the primary dissent is puzzling. In other Supreme Court opinions, Justice Scalia had espoused the importance of initiatives and states' rights.³⁵² With respect to morality in the context of abortion, he specifically chided the Court for intruding on state sovereignty.³⁵³ Consistent with this leaning, Justice Scalia, in 2002, complained to an audience at Lewis and Clark Law School in Oregon that judges should not usurp the role of legislatures.³⁵⁴ In Justice Scalia's opinion, if people wanted to extend rights like assisted suicide, they should

³⁵⁰ *Id.* at 298 (Scalia, J., dissenting).

³⁵¹ *Id.* at 298–99.

³⁵² *See, e.g.,* *Romer v. Evans*, 517 U.S. 620, 647 (1996) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (“[Amendment 2, a citizen initiative,] put directly, to all the citizens of the State, the question: Should homosexuality be given special protection? They answered no. The Court today asserts that this most democratic of procedures is unconstitutional.”); *see also* *Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring); *Hibbs v. Winn*, 542 U.S. 88, 114 (2004) (Kennedy, J., joined by Scalia, J., dissenting); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 741 (1972) (Scalia, J., dissenting).

³⁵³ *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring) (arguing the Court should not assert its sovereignty in a field in which it has little business).

³⁵⁴ Solomon, *supra* note 240, at 23.

do it like the people of Oregon did, through the initiative-legislative process, not through the courts.³⁵⁵

In the *Gonzales* dissent, however, Justice Scalia suggests that the Supreme Court should defer to the Attorney General's interpretation of the Controlled Substances Act. Thus, he would give "a single Executive officer,"³⁵⁶ who is not elected, power to usurp the effort of Oregon citizens to extend their PAD rights through the initiative process. Further, this dissent urged nonelected members of the Court to interpret the Controlled Substances Act to usurp Oregon's Death with Dignity Act by concluding that "[v]irtually every relevant source of authoritative meaning confirms that the phrase 'legitimate medical purpose' does not include intentionally assisted suicide."³⁵⁷

Justice Thomas's separate dissent in *Gonzales* is also disturbing. Justice Thomas has been one of the most vocal supporters of the citizen initiative process.³⁵⁸ In *Gonzales v.*

³⁵⁵ See *id.*; see also Robin K. Chand, Note, *Deconstructing Gonzales v. Oregon: When Political Agendas Yield to Rudimentary Notions of Federalism and Statutory Interpretation*, 50 HOW. L.J. 229, 255-57 (2006).

³⁵⁶ *Gonzales*, 546 U.S. at 275; see also Friedman, *supra* note 13, at 392 ("Congress often shirks important decisions by foisting them off on bureaucratic officials."); *id.* at 392 n.317 (citing DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 966-67 (1993) (arguing that legislators delegate powers of standard creation to agencies in order to avoid conflict issues)). "Commentators especially point to actors in administrative agencies." *Id.* at 394 n.325 (citing John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1268 (1993) (arguing that the ability of legislators to appoint administrative officials "raises obvious problems of lack of electoral accountability"); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 447 (1987) (noting that agency actors are "not responsive to the public as a whole").

³⁵⁷ Solomon, *supra* note 240, at 23 (noting that although the court took a pretty good whack at John Ashcroft for assuming more power than Congress granted, the court was unanimous in its view that Congress could ban assisted suicides under the Commerce Clause).

³⁵⁸ See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 883-84 (1995) (Thomas, J., joined by Rehnquist, C.J., O'Connor, J., Scalia, J., dissenting) ("[A constitutional amendment, enacted by initiative,] is not the act of a state legislature; it is the act of the people of [the state], adopted at a direct election and inserted into the State Constitution. The majority never explains why giving effect to the people's decision would violate the 'democratic principles' that undergird the Constitution."). Justice O'Connor hails from Arizona, which is a strong initiative state, and her departure from the Court may impact recognition of the initiative power in future Supreme Court decisions. Four other justices are also from

Raich, Justice Thomas dissented when the majority found the Controlled Substances Act preempted California's medical marijuana initiative.³⁵⁹ He especially railed against the majority's intrusion into state rights: "One searches the Court's opinion in vain for any hint of what aspect of American life is reserved to the States."³⁶⁰ Furthermore, he touted the federalism benefit that the majority decision stifled by saying:

The majority prevents States like California from devising drug policies that they have concluded provide much-needed respite to the seriously ill. It does so without any serious inquiry into the necessity for federal regulation or the propriety of "displac[ing] state regulation in areas of traditional state concern." The majority's rush to embrace federal power "is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union." Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens.³⁶¹

Remarkably, Justice Thomas reversed his federalism position in the *Gonzales* dissent. In *Raich*, he urged the federal government to avoid interfering with state issues determined by

initiative states: Justices Kennedy and Breyer are both from California; Justice Stevens is from Illinois; and Justice Souter is from Massachusetts, which has a modified initiative process.

³⁵⁹ *Gonzales v. Raich*, 545 U.S. 1, 57 (2005) (Thomas, J., dissenting).

³⁶⁰ *Id.* at 70. Justice Thomas wrote:

The majority holds that Congress may regulate intrastate cultivation and possession of medical marijuana under the Commerce Clause, because such conduct arguably has a substantial effect on interstate commerce. The majority's decision is further proof that the "substantial effects" test is a "rootless and malleable standard" at odds with the constitutional design.

....

One searches the Court's opinion in vain for any hint of what aspect of American life is reserved to the States. Yet this Court knows that "[t]he Constitution created a Federal Government of limited powers." That is why today's decision will add no measure of stability to our Commerce Clause jurisprudence: This Court is willing neither to enforce limits on federal power, nor to declare the Tenth Amendment a dead letter. If stability is possible, it is only by discarding the stand-alone substantial effects test and revisiting our definition of "Commerce among the several States." Congress may regulate interstate commerce—not things that affect it, even when summed together, unless truly "necessary and proper" to regulating interstate commerce.

Id. at 67–71.

³⁶¹ *Id.* at 74 (citations omitted).

citizen initiative; in *Gonzales* he dissented even though the Court upheld Oregon's initiative law by determining that the Attorney General had no authority to interfere with it. Justice Thomas's sole explanation for his conclusion in *Gonzales* was his unhappiness about how the Court dealt with similar issues in *Raich*.³⁶²

As justification for the result in *Gonzales*, it would be overly simplistic to observe that all of the dissenting justices are Catholics.³⁶³ Whatever the cause, the realignment of former federalism advocates over to the federal, instead of the state, side of the PAD issue is somewhat startling.³⁶⁴

Although PAD rights advocates may have little chance of making much progress through the Supreme Court for years to come, the *Gonzales* decision appears to reaffirm the role of federalism and the initiative process in providing some resolutions on this controversial issue.

³⁶² See *Gonzales v. Oregon*, 546 U.S. 243, 302 (2006) (Thomas, J., dissenting). Justice Thomas stated:

The Court's reliance upon the constitutional principles that it rejected in *Raich* ["limitations of federalism, which allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons,'" *Id.* at 270 (majority opinion)]—albeit under the guise of statutory interpretation—is perplexing to say the least.

Id. at 302 (Thomas, J., dissenting).

³⁶³ Justices Scalia, Thomas, and Roberts are all Catholic. Joan Biskupic, Opinion, *Changing Faith*, WASH. POST, Aug. 4, 1996, at C1; Dennis Coyle, *Studying John Roberts*, NAT'L REV. ONLINE, Sept. 1, 2005, <http://www.nationalreview.com/comment/coyle200509010733.asp>.

³⁶⁴ Considering the vehemence with which the Catholic Church has opposed the expansion of PAD rights, it is interesting to consider that the most recently sworn justice, Samuel A. Alito, Jr., is a Catholic. Warren Richey, *Role of Alito's Catholic Faith Could Be Tricky Question*, CHI. SUN TIMES, Nov. 6, 2005, at A30. Justice Anthony Kennedy is also a Catholic. Biskupic, *supra* note 363, at C1. Although Kennedy authored the majority opinion in *Gonzales*, he has joined the other Catholic justices on several five-to-four majority opinions in 2007. Kennedy sided with Roberts, Scalia, Thomas, and Alito in thirteen of the nineteen five-to-four split decisions issued by the Supreme Court in the 2006-07 term. See Stuart Taylor, Jr. & Evan Thomas, *The Power Broker*, NEWSWEEK, July 16, 2007, at 36, 36-37 (quoting one of Kennedy's former clerks saying, "He thinks he is the living embodiment or transmitter of the nation's bedrock values."). Also, the fact that Kennedy authored the majority opinion in *Gonzales* might explain why it is so restrained, focusing primarily on the scope of the Attorney General's administrative powers.

CONCLUSION

In establishing one of the first large-scale democracies in the modern world, the Founders appeased states' rights advocates through the construct of federalism. Federalism blended national and local power by granting the federal government limited enumerated authority and reserving to the states and the people some measure of decentralized authority over their affairs. This diffusion of power helped legitimize the government and allowed for a robust democracy that is more responsive and accountable to those governed.

One of the advantages of federalism is that states may act as laboratories for social experimentation allowing the entire country to benefit from the influx of diverse ideas from a variety of sources. Innovation is an evolutionary process that works best when experimentation is diffused. The odds of finding creative solutions improve when multiple governments are working on alternative options. Legislation that centralizes and limits experimentation can stifle progress in areas in which there is no need for national uniformity.

The debate over physician-assisted death illustrates the key role citizen initiatives can play in federalism by helping create state laboratories of experimentation to address controversial issues. Although polls show that a majority of Americans support PAD, neither Congress nor a single state legislature has enacted a statute legalizing it. All bills introduced on the topic have been snared in the pressure points of the traditional legislative process.

These pressure points were incorporated into the traditional legislative process to filter out extremes and achieve compromise legislation that reflected both majority and minority interests. However, minority interest groups can sometimes avoid compromise and instead impose their sensibilities on the majority by strategically employing the pressure points to block all legislation in a controversial area. Minority view religious groups have been using this pressure point mechanism in legislatures throughout the country by enlisting a few influential legislators or requesting executive vetoes to block every single bill proposing to legalize PAD from successfully navigating through the traditional legislative process.

These same minority interest groups have not had the same degree of effectiveness in the context of citizen initiatives. Outspending PAD proponents has improved the odds of a minority interest prevailing in state legislatures and some initiative campaigns. However, despite outspending the PAD proponents by as much as six to one, the minority interest religious groups were not able to prevent the majority of Oregon citizens from voicing their preference by enacting the only law in the country that legalizes PAD.

Oregon alone was successful in passing a pro-PAD statute because the law was enacted by citizen initiative. Some criticize citizen initiatives as “fast-food government” because they can circumvent the more time consuming traditional legislative process. Yet, precisely because initiatives can avoid some of the shortcomings of the traditional process, they are sometimes the best, or the only, choice for addressing controversial issues that cannot make it through the legislative pressure points.

The Supreme Court has failed to recognize a constitutional “right to die,” and Congress has failed to pass specific legislation on the issue, so the debate over physician-assisted death has become an exemplar for the role of citizen initiatives in allowing states to serve as laboratories in a federalism model. Oregon’s Act is initiative lawmaking at its best. A clear majority of Oregonians supported the law: they voted twice on the topic and on the second vote, affirmed the law by a majority of approximately sixty percent. Furthermore, PAD is the type of issue that most appropriately should be resolved at the local, as opposed to the federal, level. It involves health, a traditional state concern. It is a highly personal, moral issue that does not directly impact or infringe the rights of others. Furthermore, there is no commercial or other reason for national uniformity.

Fast-food chains thrive in the United States because they serve a need of the people. Sometimes fast-food fare is not good for us, but other times it can really hit the spot. Although the fast-food initiative process is imperfect in some contexts, Oregon’s Death with Dignity Act illustrates that an initiative really can be the best mechanism for promoting federalism. By allowing power to diffuse to the citizen level, Oregon citizens were able to achieve something that no state legislature has been able to accomplish: the creation of a state laboratory for social experimentation on physician-assisted death.