FAST-FOOD GOVERNMENT AND PHYSICIAN-ASSISTED DEATH: THE ROLE OF DIRECT DEMOCRACY IN FEDERALISM

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THE ROLE OF DIRECT DEMOCRACY IN FEDERALISM 

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I. INTRODUCTION

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 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 1800’s, members of the Progressive movement introduced an alternative to legislatures controlled by special interests: direct democracy through statewide citizen initiatives. Although none of the original state constitutions allowed citizens to impact legislation directly through citizen initiatives,4 the Progressives successfully

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1 “[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 1788-1792, at 115, 121 (Paul Leicester Ford ed., 1895). See also Harry N. Scheiber, Foreword: The Direct Ballot and State Constitutionalism, 28 RUTGERS L.J. 787, 787-88 (1997) quoting Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) in THOMAS JEFFERSON, WRITINGS 1395, 1402 (Library of America ed., 1984) (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 periodic repairs, from generation to generation, to the end of time, if anything human can so long endure”). 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." Schneiber, supra note 1, at 408 (quoting THE FEDERALIST, No. 78, at 489, 494 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961)).

2 J. POMEROY, AN INTRODUCTION TO MUNICIPAL LAW, at 97-98 (William S. Hein Publishing, 1997) (1864) cited in Steven A. Segel, Historicism in Late Nineteenth Century Thought, 190 WIS. L. REV. 1431,1479, n. 265 (1990) (“[T]he whole scheme was so contrived with checks and balances, that the governmental action should be steady, the changes gradual, and progress uniform.”).


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. A number of terms are also used to describe the process such as “plebiscite,” “proposition,” or “amendment.” See generally Initiative & Referendum Institute at University of Southern California, Brief History available at:
introduced the process in several Western states from 1897 to 1918. Currently, almost half of the states allow citizens to initiate laws either to their representatives or to a direct vote of the people.

The initiative process is controversial; some see it as “fast-food government”—unhealthy fare because it creates laws quickly, by-passing the slower, more deliberative legislative process. 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. Similarly, initiatives can be a mechanism to advance social reform. Particularly at nascent stages, these types of controversial reforms may be particularly 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
Addressing controversial issues through “fast-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 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. Thus, the initiative process played a significant role in promoting this valuable benefit of federalism.

II. FEDERALISM AND DIRECT DEMOCRACY

“Federalism,” a mantra frequently voiced by United States politicians and judges, is the “constitutional balance between the States and the Federal Government” that makes the U.S. political system exemplary. Federalism contemplates a key role for local as

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9 The concept of “states as laboratories” comes from Justice Brandeis’s dissent in New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“There must be power in the states and the nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs. 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.”).

10 This article focuses on the process of enacting legislation rather than on the particular form of physician-assisted death (or “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 (“the 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”), 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 (PAD “captures the essence of the process in a more accurately descriptive fashion than the more emotionally charged designation” of “physician-assisted suicide”). See Professor Valerie J. Vollmer’s website on physician-assisted death (hereinafter Valerie J. Vollmer website), May 2007 report, available at http://www.willamette.edu/wucl/pas/ (last visited July 26, 2007). See also Don Colburn, Oregon Officials Seek Neutral Term for “Assisted Suicide,” NEWHOUSE NEWS SERVICE, Nov. 15, 2006; Stephen W. Smith, Book Review: A Write to Death: News Framing of the Right to Die: From Quinlan’s Coma to Kevorkian’s Conviction, 13 MED. L. REV. 286 (2005) (arguing the media routinely confused the issue of PAD with the practice of euthanasia, creating negative images). 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. Cf. infra notes 158-64 and accompanying text.


12 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
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.\textsuperscript{13}

As originally configured, the Constitution “split the atom of sovereignty”\textsuperscript{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.\textsuperscript{15} However, that balance has been disrupted: the federal government’s Commerce power has metastasized to consume nearly every semblance of state authority.\textsuperscript{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.”\textsuperscript{17} However, the Court threw in the towel in \textit{NLRB v. Jones & Laughlin Steel Corp.},\textsuperscript{18} expanding the federal Commerce power “beyond judicially enforceable limits.”\textsuperscript{19}

\textsuperscript{13} See, e.g., Barry Friedman, \textit{Valuing Federalism}, 82 \textit{Minn. L. Rev.} 317 (1997).

\textsuperscript{14} U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (Kennedy, J., concurring).

\textsuperscript{15} See U.S. CONST. art. I, § 8; 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.”). Larry Kramer, \textit{Understanding Federalism}, 47 \textit{Vand. L. Rev.} 1485, 1490, 1495 n.18 (1994) (arguing that there was consensus among the Framers that the powers of the national government would be limited).

\textsuperscript{16} For a wonderful synopsis of the progression, see Friedman, \textit{supra} note 14, at 328-38.

\textsuperscript{17} See, e.g., Schechter Poultry Corp. v. United States, 295 U.S. 495 (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, 272-73 (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.”).

\textsuperscript{18} 301 U.S. 1 (1937).

\textsuperscript{19} Friedman, \textit{supra} note 14, at 334 (citing Jonathan L. Entin, \textit{Introduction to Symposium, The New Federalism After United States v. Lopez}, 46 \textit{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.”). See also Vincent A. Cirillo & Jay W. Eisenhofer, \textit{Reflections on the Congressional Commerce Power}, 60 \textit{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.”); Richard A. Epstein, \textit{The Proper Scope of the Commerce Power}, 73 \textit{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, \textit{Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation}, 108 \textit{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.”).
In the last few decades, the Court’s decisions have contained rhetoric about the value of federalism as a guiding principle while “according barely any weight to the state side of the federal 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 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 level....”25 but more

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20 Friedman, supra note 14, 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, joined by Rehnquist, C.J., O'Connor, J., Scalia, J.) (“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 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.”).
22 See e.g., Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. at 575-76 (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); Garcia, 469 U.S. at 578-79 (“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.”).
23 Friedman, supra note 14, at 361 (citing Garcia, 469 U.S. at 546-47) (“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.”).
25 Friedman, supra note 14, at 367 (referencing the civil rights advantages). See also id. at 374 (listing all three areas); id. at 371-75 (discussing more specifics). Initiative advocates also called for a Constitutional Amendment to create a National Initiative in the late 1970’s. See e.g., LAURA TALLIAN, DIRECT DEMOCRACY: AN HISTORICAL ANALYSIS OF THE INITIATIVE, REFERENDUM, AND RECALL PROCESS, 120-21 (People’s Lobby Press 1977). However, that movement appears to have almost completely died. DuVivier, supra note 8, 40 WAKE FOREST L. REV. at 867.
recently, local action has led the way on economic and environmental issues. In
addition, many state constitutions now afford greater civil rights protections for citizens
than they enjoy under the federal constitution.

Placing more weight on the state side of the federalism equation has a number of
advantages. 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.” Respect for state authority
under the concept of federalism can assuage those who bristle because of the
“disadvantages [of] overweening national authority.” Initiatives force local
representatives to be in touch directly with their constituents’ desires. Thus, initiatives
can be some of the most effective mechanisms for promoting federalism, resulting in a
more responsive and robust form of democracy.

Furthermore, surrendering total authority to distant representatives not only weakens
accountability but also can “promote dishonesty.” 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.” Initiatives can be a salutary response to the voters’

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26 E.g., New Hampshire residents are voting on a state referendum addressing global climate change. Kurt
Ehrenberg, from the Sierra Club’s New Hampshire office, noted, “the lack of federal leadership on this
issue [has] forced people to find a solution on the local level.” Katie Zezima, In New Hampshire, Towns
Put Climate on the Agenda, N.Y. TIMES, March 19, 2007, available at
energy. See infra note 23. In the United States, concern about the democracy deficit has been expressed
frequently in the context of environmental law. See, e.g., Richard B. Stewart, United States Environmental
Regulation: A Failing Paradigm, 15 J. L. & COM. 585, 590 (1996) (“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.”); Michael P. Vandenbergh, 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) (noting that the public is largely excluded from environmental decision-
making and that decision-making is vulnerable to control by special interests); but see 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) cited in
Freidman, supra note 14 at 318 n.4.

27 James M. Hoefler, Diffusion and Diversity: Federalism and the Right to Die in the Fifty States, 24
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
(“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 14, at 379.

29 Id. at 384.

30 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 TALLIAN, supra note 26,at 25 (quoting John R. Haynes, The Actual Workings of the Initiative,
Referendum, and Recall, NAT'L MUNICIPAL REV. 38 (Vol. 4, No. 4, Oct. 1912)).

32 Freidman, supra note 14, at 384.
“disenchantment”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{36} Some of these ideas will be rejected, but the odds improve with the existence of multiple, creative options.

\textit{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 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.

\textit{1. Pressure-Points in the Traditional Legislative Process}

The United States legislative process is notoriously inefficient.\textsuperscript{37} Based on Madison’s vision to pit “factions” against one another to force compromise,\textsuperscript{38} the process attempts to

\textsuperscript{33} Id. at 390 (“Indeed, intuition suggests that disenchantment with government and anemic levels of citizen participation in democracy positively correlate with nationalizing trends. . . . Also, intuition suggests that more people would and could participate in smaller levels of government. . . . ”).
\textsuperscript{34} Id. at 384.
\textsuperscript{35} Id. at 399.
\textsuperscript{36} Id. at 397-400.
\textsuperscript{37} See INS v. Chadha, 462 U.S. 919, 958-59 (1983) (“[I]t is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency.”); Richard D. Marks, \textit{High Technology as an Eighteenth Century Process}, 78 STAN. L. \\ & POL’Y REV. 17 (1994) (“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.”).
\textsuperscript{38} \textit{THE FEDERALIST} (James Madison) No. 10 at 45 (Benjamin Fletcher Wright ed., 1961)).
(“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
filter out extremes and bring parties toward a middle ground. Although the goal is to achieve gradual, rather than abrupt, change, sometimes minority interests can exploit the process so 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. 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 one 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.

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.”).

39 E.g., Joseph M. Pietruszkiewicz, Discarded Deference: Judicial Independence in Formal 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.”).


41 Some scholars have identified these mechanisms for filtering out undesirable outcomes in the legislative process as “vetogates.” KAY SCHLOzman AND JOHN Tierney, ORGANIZED INTERESTS and AMERICAN 178 (Harper and Roe 1986) cited in Larry I. PALMER, ENDINGS AND BEGINNINGS: LAW, MEDICINE AND SOCIETY IN ASSISTED LIFE AND DEATH 108 (Prager 2000).

42 Nebraska voters converted their state legislature from a bicameral to a unicameral system through an initiative in 1936. Although 21 other states also attempted to switch to unicameral systems in the 1930’s, these efforts failed. Interest in unicameral legislatures revived in the 1960’s, but no state government other than Nebraska currently uses this form. www.unicam.state.ne.us/web/public/history (last visited June 4, 2007).

43 Leong, supra note 42, at 685-86 (“We are familiar with the Constitution's fine-tuned system of deliberative democracy. An initiative process would have been wholly 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.”).
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 intransient and corrupt legislatures,\(^{46}\) the Progressives proposed citizen initiatives as an alternative mechanism for creating laws.\(^{47}\) The Progressives argued that initiatives could correct the control of government by moneyed interests\(^{48}\) and could force action when elected officials became "paralyzed by inaction."\(^{49}\) Woodrow Wilson studied initiatives as an academic before he

\(^{44}\) As Germany's first chancellor, Otto Von Bismarck famously quipped: “Laws are like sausages, it is better not to see them being made.” Bismarck, available at http://www.worldofquotes.com/author/Otto-Von-Bismark/ (last visited Jan. 20, 2005).

\(^{45}\) THOMAS M. DURBIN, CONG. RESEARCH SERV., INITIATIVE, REFERENDUM AND RECALL: A RESUME OF STATE PROVISIONS, Rep. No. 81–63A at 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 United States senators, primary elections, and women’s suffrage. THOMAS GOEBEL, A GOVERNMENT BY THE PEOPLE: DIRECT DEMOCRACY IN AMERICA 1890-1940, 4 (University of North Carolina Press 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 36; DuVivier, supra note 9, 40 WAKE FOREST L. REV. at 239 n.94; DuVivier, supra note 4, 63 U. CIN. L. REV. at 275 n.312.

\(^{46}\) Waters, supra note 5, at 3; see GOEBEL, supra note 47, at 4 (noting that direct democracy movement typically 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, 74 CAL. L. REV. 491, 503 (1986) (describing amendment of 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, 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 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 47, at 36. On another occasion, supporters of direct legislation by the electorate characterized representative governmental power as an “utter failure,” stating that “[i]t fails in the leaders it develops; it fails in its mechanism[,] [i]t is cumbersome, uncertain, confused, irresponsible, undemocratic, often farcical and dishonest, and commonly partisan.” Id. at 36 (quoting DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 5 (Johns Hopkins University Press 1984).

\(^{48}\) The Progressives also argued the initiative could “take back government from the special interests.” Scheiber, supra note 1, at 790 n.6 (1997) (citing Jonathan Bourne, Jr., Functions of the Initiative, Referendum and Recall, 43 ANNALS AM. ACAD. POL. & SOC. SCI. 3, 3 (1912) (“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."”). See also Waters, supra note 5, at 3; GOEBEL, supra note 47, at 4 (noting that direct democracy movement is typically 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 Castello, supra note 48 at 503 (describing amendment of California constitution to authorize referendum and initiative).

\(^{49}\) Waters, supra note 5.
ran for president, and after initial skepticism, became an initiative convert, praising the process as “the gun behind the door” and “a sobering means of obtaining genuine representative action on the part of legislative bodies.”

Currently, twenty-three states allow citizen initiatives to create law outside of the traditional legislative process. The citizen initiative process is controversial. Critics have argued that initiatives produce inferior law because they do not allow the fine tuning produced by a trip through the traditional legislative process. This criticism is especially appropriate when initiatives attempt to address complex fiscal questions with a yes-no vote.

Also, initiatives are frequently maligned for allowing oppression of unpopular minorities. In the early 1900’s, initiatives were used to disenfranchise African-

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50 GOEBEL, supra note 47, at 55.
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 authors have suggested deference to initiative-made laws (see e.g., a heightened presumption against preemption), DuVivier, supra note 8, 40 WAKE FOREST L. REV. at 223-27. Others have argued for greater scrutiny. See Julian N. Eule, Judicial Review of Direct Democracy, 99 YALE L. J. 1503 (1990) (urging heightened scrutiny of law enacted by initiatives and referendums). See also, Jane S. Schacter, The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy, 105 YALE L. J. 107 (1995) (criticizing judicial efforts to divine legislative intent when interpreting ballot measures); Philip F. 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); Note, Judicial Approaches to Direct Democracy, 118 HARV. L. REV. 2748, 2755-57 (2005). Yet a third group argues for no difference. Eule, supra, at 1505 n.5 (Eule argues for heightened scrutiny, but his work collects citations to cases decided prior to 1989 in which the Supreme Court recognized popular enactment of a law at issue but refused to interpret it any differently because of the method of enactment); Note, supra, at 2760-62.
55 See, e.g., DuVivier, supra note 8, 40 WAKE FOREST L. REV. 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); Note, supra note 55, 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.”); Robinson, supra, at 2759 (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. POLITICAL SCIENCE 245 (Jan. 1997) (finding empirically that initiatives that restrict civil rights have been approved 75% of the time in contrast to the approximate 33% approval success of all initiatives historically); Gamble, supra note 57, at 246. See also Lynn A. Baker, Direct Democracy and Discrimination: A Public Choice Perspective, 67 CHI.-KENT L. REV. 707 (1992); Derrick A. Bell, Jr., The Referendum: Democracy’s Barrier to Racial Equality, 54 WASH. L. REV. 1 (1978); Sherman J. Clark, A Populist Critique of Direct Democracy, 112 HARV. L. REV. 434 (1998); Priscilla F. Gunn, Initiatives and Referendum: Direct Democracy and Minority Interests, 22 URB. L. ANN. 135 (1981); Hans A. Linde, When Initiative Lawmaking Is Not “Republican Government”: The Campaign Against Homosexuality, 72 OR. L. REV. 19 (1993); Cass R. Sunstein, Public
American citizens in the South and to restrict the ability of Asian-Americans to hold land in California.\textsuperscript{57} Recent initiatives attempting to restrict gay rights and denying services to illegal immigrants perpetuate the initiative’s ugly legacy in this area.\textsuperscript{58} Fortunately, many initiatives that attempted to infringe civil rights have been defeated,\textsuperscript{59} and among those that have been enacted, many have been invalidated by the courts.\textsuperscript{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.”\textsuperscript{61}

The initiative process has many detractors, and even those who appreciate its advantages acknowledge that its use has been problematic in some situations.\textsuperscript{62} Despite the criticism, the initiative process is wildly popular with voters. During the 1981 to 1990 decade, U.S. voters placed a record 271 initiatives and referendums on statewide ballots nationwide. The following decade, the number rose to another record of 389


\textsuperscript{58} E.g., California’s Proposition 187 (1994) attempted to cut services for illegal aliens, but was declared unconstitutional or preempted by federal law in League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 763-65 or 786-87 (D. Cal. 1995). Similar measures passed in Arizona in 2004 (Proposition 200 passed by a margin of 56% (Richard Marosi, Anti-Immigrant Initiatives Growing, SEATTLE TIMES, Nov. 6, 2004, at A 13)) and were proposed for Colorado in 2006 (Proposed Initiative # 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 13 A). California Proposition 22 (2000) sought to keep gay and lesbian couples from marrying in other states and seeking recognition of the union in California. Evelyn Neves, Ballot Initiative that would Thwart Gay Marriage is Embroiling California, N.Y. TIMES, Feb. 25, 2000, at A12. See also Colorado's Constitutional Amendment 2 (1994), infra note 65.

\textsuperscript{59} AKHIL REED AMAR AND ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 206-07 n.110 (The Free Press 1998) (citations omitted) (“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.” ).

\textsuperscript{60} E.g., COLO. CONST. amend, II (1992); Evans v. Romer, 517 U.S. 620, 623 (1996) (finding that an initiative passed by Colorado voters in 1992 invalidated antidiscrimination protections on the basis of sexual orientation enacted by local governments violated Equal Protection).

\textsuperscript{61} DuVivier, supra note 8, 40 WAKE FOREST L. REV., at 243 (citing Baker, supra note 8, at 737-52).

\textsuperscript{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 8, 40 WAKE FOREST L. REV at 221-23, 235-48.
statewide measures.\footnote{INITIATIVE AND REFERENDUM INST., OVERVIEW OF INITIATIVE USE, 1904-2006, at 8, available at http://www.iandrinstitute.org/IR%20Initiative%20Use%20(2006-11).pdf (last visited July 27, 2006). The resurgence of the initiative process, after a decline in the 1940’s through 1960’s, 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, 65% of homeowners say the proposition was “mostly a good thing for California.” PUB. POL. INST. OF CAL., PPIC STATEWIDE SURVEY: CALIFORNIANS AND THEIR GOVERNMENT, at 10 (2003) available at http://www.ppic.org/content/pubs/S_203MBS.pdf. (last visited July 27, 2007).} The upward trend appears to be continuing with more initiatives on state ballots every year.\footnote{A total of 204 measures appeared on the ballots of 37 states during the 2006 mid-term elections, an increase from the 162 measures on ballots during the 2004 election. INITIATIVE AND REFERENDUM INST., ELECTION RESULTS 2006, http://iandinstitute.org/ballotwatch.htm (last visited July 27, 2007). See also INITIATIVE AND REFERENDUM INST., OVERVIEW OF INITIATIVE USE, 1904-2006, supra note 65. 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. See generally, K.K. DuVivier, Out of the Bottle: The Genie of Direct Democracy, 70 ALBANY L. REV. 1045 (2007) (describing the popularity of initiatives and the spread of their use to influence candidate elections).} Furthermore, the relatively few initiatives that may have tainted the process for some should not serve to render initiatives “categorically suspect.”\footnote{Note, supra note 55, at 2765-66.} Instead, it is valuable to consider the positive role initiatives have played in the past and still can play in the context of federalism.

\section*{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.”\footnote{President Theodore Roosevelt, A Charter of Democracy, Address Before the Ohio Constitutional Convention (Feb. 12, 1912).}

Legislators personally benefit from infusions of additional money to their campaigns, so they have an incentive to appease large campaign contributors.\footnote{DuVivier, supra note 8, 40 WAKE FOREST L. REV at 245-46.} Furthermore, legislators cannot always vote their personal convictions on legislation without fear of repercussions for voting against party lines.\footnote{Id. at 247. See also AMAR & HIRSCH, supra note 61, at 39.} 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 government that has stalled. While initiatives may suffer from some
of the same shortcomings as the legislative process, they are less susceptible 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.

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. Because most citizens are motivated by good intentions rather than greed, “big money may kill a ballot measure; [b]ut the corresponding good news is that big money can’t always buy a ‘yes’ vote.”

Trust in the “power of the people” as an alternative to representative government sparked the resurgence of direct democracy in the late 1960’s. The grassroots group, the People’s Lobby, “resurrected and energized California’s previously moribund direct-democracy laws” initially in an attempt to recall Ronald Reagan, then governor of California. The initiative process inspired these individuals to eschew more futile, and

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70 TALLIAN, supra note 26, at 29 (quoting John R. Haynes, “The Actual Workings of the Initiative, Referendum, and Recall”, NAT’L MUNICIPAL REV. 38 (Vol. 4, No. 4, Oct. 1912)) (The father of the recall in California, worked to get direct democracy in L.A. and then the state 24 years before the election of Governor Hiram Johnson and other representatives sympathetic to the cause who enacted statewide direct democracy in California in 1910) TALLIAN, supra note 25, at 36 (quoting Haynes, supra note 71, at 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.”)).

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. In contrast, these activists noted that their contributions helped elect ‘a number of state lawmakers who support gay rights…and some are changing laws.’ Karen E. Crummy, A big role in a fight to help gays wed, DENVER POST, Aug. 7, 2007, at 1B, 4B.

72 Al Knight, Do Initiatives Still Work? Yes, but They Need Some Repair, DENVER POST, Dec. 1, 2002, at 1E, cited in DuVivier, supra note 8, 40 WAKE FOREST L. REV at 246 n. 136. See also DuVivier, supra note 66, 70 ALBANY L. REV. at 109.

73 TALLIAN, supra note 26, at 118.

potentially destructive, methods of impacting government policies and instead provided a constructive mechanism for those who felt disempowered to seek political change. Without initiatives, the influential “triumphed without even the need publicly to justify their views.” 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.

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.” Citizens may be allowed to “recognize[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.

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.” History 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.” The 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

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75 TALLIAN, supra note 26, at 117 (No more boycotts and protest, instead the “initiative surpasse[d] all other political methods to bring an issue into sharp focus.”).
76 Id. at 118.
77 DuVivier, supra note 8, 40 WAKE FOREST L. REV. at 235 (Although initiatives were initially promoted by Progressives in the late 1800’s and by liberal groups in the late 1960’s, they are now embraced by liberals and conservatives and do not “promote any particular agenda over another.”).
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 47, at n.35 (quoting DIRECT LEGISLATION RECORD I (Nat’l Direct Legislation League), Oct. 1894, at 84).
79 TALLIAN, supra note 26, at 8.
81 Conant v. Walters, 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring) (quoting United States v. Morrison, 529 U.S. 598, 615 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).
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.”

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.” When the federal 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.

Many innovations arise at the state level because state legislators are forced into experimentation by necessity. States 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.”

“[E]xperimentation in a federal system is akin to natural selection.” 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. Others also say state experiments at the local level led the way in public education, health care, taxation, penology, and environmental protection. 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.”

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83. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 643 (1973) (5-4 decision) (Rehnquist, J., dissenting) (quoting Penn. 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.” City of Burbank, 411 U.S. at 643. (quoting Penn. Dairies, 318 U.S. at 275).
84. See generally DuVivier, supra note 8, 40 WAKE FOREST L. REV.
85. Friedman, supra note 14, at 398.
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

Matters of controversial social experimentation are especially ones that most local legislators prefer to avoid. 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.”94 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.95 Because these local voters are less influenced by the pressure-points that snag controversial issues in the traditional legislative process, fast-food government by


91 Rose-Ackerman, supra note 93, at 594 (“[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 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 6, at 33-34 (“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.”).

93 See, e.g., Erick Bailey, Action on “Right to Die” Languishes in California, L.A. TIMES, June 21, 1997, at A12 (quoting Assemblyman Bob Hertzberg) (“But from a political standpoint, as we saw with Proposition 161, [PAD] is a difficult issue to address.”).


95 DuVivier, supra note 8, 40 WAKE FOREST L. REV. at 248 (arguing that initiatives having the following qualities are best candidates for initiative resolution: “These 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.”).
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. 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.

Reform of Government: More initiatives have addressed government reform than any other single category. This is an especially appropriate area for citizen participation because legislators who benefit from the status quo are reluctant to legislate change. Many of the early reforms proposed by the Progressives related to government reform, and early initiatives succeeded in establishing (1) nominations of candidates through primary elections, (2) presidential primaries, (3) direct election of U.S. senators, and (4) home rule of cities. 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 “half a century before the U.S. Supreme Court ruled this method of reapportionment mandatory.” Well-meaning, if sometimes problematic, initiative efforts to clean up government more recently have included (1) term limits, (2) campaign finance reform, and (3) limits on lobbying contributions.

Social reforms: Early initiatives promoted several social reforms long before the New Deal, including (1) the eight-hour work day, (2) a ban of child labor, and (3)
government aid programs for farmers, the poor, the disabled, and the elderly. 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.

**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.” Early initiatives also (1) repealed the poll tax and (2) established a juvenile court system. At least one author has speculated that the issue of slavery could 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.

**Environment & Conservation:** 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. Since that time, initiatives have addressed topics such as (1) establishing fish and game commissions, (2) coastal protection, (3) animal rights, and (4) the use of renewable energy by utility companies.

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110 Id. (Ark).
111 Id. at 19.
113 SCHMIDT, supra note 5, at 19.
114 Id. (Calif., Oreg., Wash).
115 Id. (Colo).
116 TALLIAN, supra note 26, at 7 (citing Charles Sumner Lobringier, THE PEOPLE’S LAW (N.Y. MacMillan Co. 1909 ). 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]...” Senator Crittenden’s proposal was defeated in the Senate by one vote, and the Civil War began in one month. Another author has suggested that “[h]ad 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.
117 SCHMIDT, supra note 5, at 20.
118 Id. (during the 1930s and 1940s--Ark., Idaho, Mo., Wash).
119 Calif, Proposition O (2006). 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 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. See Proposition O Oversight Committee website, available at: http://www.lapropo.org/sitefiles/coac.htm (last visited July 30, 2007).
120 Ariz. Proposition 204 (2006) provides for a minimum living space for pregnant pigs and calves.
121 Colo. See Ballot Initiative Strategy Ctr., 2004 ELECTION RESULTS: BALLOT INITIATIVE & REFERENDUM REPORT 18-19, 23 (2004) [hereinafter BISC Report], available at: http://www.ballot.org/spotlight/IR_2004_Election_Results.pdf. (last visited July 27, 2007). One of the primary goals of Ed Koupal’s group, the People’s Lobby and the Western Bloc, which resurrected the initiative process in the late 1960’s, was a nationwide attempt to use initiatives to freeze the advance of nuclear power. TALLIAN, supra note 26, at 114. 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 U.S. See, e.g., Michael V. Copeland, Digging the Nuclear Future, BUSINESS 84, 86 (Aug. 2007).
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 any actions by state legislators. 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.

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. Yet every early proposition in California that attempted to prohibit alcohol or regulate liquor failed, and the 18th Amendment was ratified by state legislatures, not by the people. Other moral issues have been the focus of initiatives, often showing back and forth swings between competing majorities such as prohibiting or legalizing fights and gambling. Some of the most recent moral battles being fought by initiative are the legalization of medical marijuana, gay rights, abortion rights, and stem cell research.

Failure to resolve these moral issues is especially troubling when efforts to expand the rights of individuals to make their own moral decisions is 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, the right to request medical assistance in hastening one’s death is the quintessential example of a right to self-determination.

122 Cf. supra notes 88-91 and accompanying text.
123 See e.g., Calif. Prop. 2 (1914); Calif. Prop. 1 (1916); Calif. Props. 1 & 22 (1918). TALLIAN, supra note 26, at 173-78.
124 U.S. CONST. amend. XVIII (1919). In contrast, amend. XXI repealing Prohibition is the only Constitutional amendment ratified by constitutional conventions of the people instead of by the state legislatures. See DAVID KYVIG, REPEALING NATIONAL PROHIBITION, 162 (Kent State University Press, 2000).
125) See e.g., Calif. Prop. 20 (1914) (prohibiting prize fighting and boxing); cf. Calif. Prop. 7 (1922) (legalizing of boxing and wrestling contests for prizes).
126 See e.g., Washington Initiative 824 (2004) (an effort to legalize slot machines); California Proposition 5 (1998) (allowing federally recognized Indian tribes to operate high stakes casinos and establish additional casinos without state legislature approval).
127 DuVivier, supra note 8, 40 WAKE FOREST L. REV.
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.
This article focuses on the advantages of the initiative process in federalism rather than on the substance of initiative issues that are best candidates for allowing citizens to determine “what serves the public interest.” However, the physician-assisted death issue represents an alignment of the three factors for controversial issues that might best be resolved by initiative: (1) 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. (2) 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. (3) No need for national uniformity. Finally, 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.

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 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.

132 City of Eastlake v. Forest City Enters., 426 U.S. 668, 678 (9th Cir. 1976) (quoting S. Alameda Spanish Speaking Org. v. Union City, California, 424 F.2d 291, 294 (9th Cir. 1970)) (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”). 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.” Eastlake, 426 U.S. at 675.

133 DuVivier, supra note 8, 40 WAKE FOREST L. REV. 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 (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 individuals have a constitutional right to refuse medical treatment. Cf. Cruzan v. Harmon, 760 S.W. 2d 408 (Mo. 1988), affm’d 497 U.S. 261 (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.

III. 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 never do harm to anyone.” While the 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.

In 2003, over 35.9 million Americans were age 65 or older. Experts project that this number of elderly in the U.S. will almost double by 2030. A major reason why these numbers are growing so rapidly is the miracle of modern medicine. Life

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136 “The Hippocratic Oath is an oath traditionally taken by physicians pertaining to the ethical practice of medicine. It is widely believed that the oath was written by Hippocrates, the father of medicine, in the 4th Century B.C., or by one of his students” ROBERT M. VEATCH, MEDICAL ETHICS 7 (Jones and Bartlett 1997). Although there are many translations and modified modern version, here is a one translation of the original Greek:

I swear by Æsculapius, Hygeia, and Panacea, and I take to witness all the gods, all the goddesses, to keep according to my ability and my judgment, the following Oath. “To consider dear to me as my parents him who taught me this art; to live in common with him and if necessary to share my goods with him; To look upon his children as my own brothers, to teach them this art if they so desire without fee or written promise; to impart to my sons and the sons of the master who taught me and the disciples who have enrolled themselves and have agreed to the rules of the profession, but to these alone the precepts and the instruction. *I will prescribe regimens for the good of my patients according to my ability and my judgment and never do harm to anyone. *To please no one will I prescribe a deadly drug nor give advice which may cause his death. *Nor will I give a woman a pessary to procure abortion. *But I will preserve the purity of my life and my art. *I will not cut for stone, even for patients in whom the disease is manifest; I will leave this operation to be performed by practitioners, specialists in this art. *In every house where I come I will enter only for the good of my patients, keeping myself far from all intentional ill-doing and all seduction and especially from the pleasures of love with women or with men, be they free or slaves. * All that may come to my knowledge in the exercise of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal. * If I keep this oath faithfully, may I enjoy my life and practice my art, respected by all men and in all times; but if I swerve from it or violate it, may the reverse be my lot. VEATCH, supra note 138, at 9.

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.” Alice Park, Knowing When To Stop: Doctors Go to Heroic Lengths to Keep Terminally Ill Patients Alive – Often Against Their Wishes, TIME, Dec. 4, 1995, at 76 (quoting Dr. Knaus, author of study on hospital death). The definition of “harm” may include mental as well as physical damage. Consequently, a doctor should not ignore the mental damage created by attending only to a patient’s physical needs. See, e.g., www.m-w.com/dictionary/harm. 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 NEWS 8.


139 Id.
expectancy in 1900 was 47.3 years. In contrast, the average American in 2000 could expect to live until the ripe age of 76.9.\textsuperscript{140}

Unfortunately, the medical advances that have led to extending life sometimes also extend death—creating a “twilight zone of suspended animation”\textsuperscript{141} that draws out the hardship for families and the pain for the soon-to-be deceased. These extended-dying patients “simply did not exist a generation ago because the technology and drugs that help keep them alive didn’t exist.”\textsuperscript{142} Doctors now recognize that some efforts to keep a person alive may be doing that patient more harm than good.\textsuperscript{143}

An overwhelming majority of Americans believe that an individual patient should have the right to refuse life support.\textsuperscript{144} 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. 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,\textsuperscript{145} a majority of Americans favor physician-assisted death or PAD.\textsuperscript{146} This support has been a growing trend since 1947 when only thirty-seven percent polled supported PAD.\textsuperscript{147} In comparison, a Gallup poll in 1996 showed that seventy-five percent of Americans favored PAD.\textsuperscript{148} In addition, eight separate polls by Field Research since 1979 show a majority of Californians, ranging from sixty-four to seventy-five

\textsuperscript{140} Id. See also www.cia.gov/cia/publications/factbook/geos/us.html (life expectancy overall in 2006 is 77.85, with an expectancy of 75.02 for males and 80.82 for females).

\textsuperscript{141} Cruzan v. Director, Mo. Dept 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.”)

\textsuperscript{142} David Noonan, Special Care at the End of Life, NEWSWEEK, October 16, 2006, at 67.

\textsuperscript{143} Harris Interactive Poll April 27, 2005 (This was a phone survey done b/t April 5 and April 10, 2005 of 1,010 U.S. adults. More than 2/3 would like euthanasia for dying patients when requested by that patient. 2/3 would like their state to adopt an Oregon-style DWDA.); \textit{but see, Polls Show Once Public Understands the Issue: Doctor-Assisted Suicide Fails}, U.S. Newswire, March 14, 2006 (Pew Research -- August 2005, found only 44 percent of people "Favor making it legal for doctors to Assist in suicide." (Nationwide sample of 1,502 adults, 18 years of age or older); Gallup -- May 2005, found 49 percent found doctor-assisted suicide "acceptable" and 42 percent found it "wrong." (Telephone interviews with 1,005 national adults, aged 18 and older).

\textsuperscript{144} \textit{E.g.}, a 2005 poll by the Pew Research Center showed that 84% or those polled agreed that “Patients [should have the right to] decide about being kept alive through medical treatment.” 10% disagreed. \textit{Strong Public Support for Right to Die}, Pew Research Center for People and the Press website, \textit{available at} http://people-press.org/reports/display.php3?ReportID=266 (last visited 8/3/2007).

\textsuperscript{145} \textit{See Quill and Glucksberg cases, infra.}


\textsuperscript{147} JAMES M. HUMBER, PHYSICIAN-ASSISTED DEATH 78 (Pergamon Press 1993).

percent, consistently support PAD.\textsuperscript{149}

Physicians disagree about PAD. They have given high approval ratings to its use under Oregon’s statute,\textsuperscript{150} and several polls showed a majority of doctors favored PAD in certain circumstances.\textsuperscript{151} 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.\textsuperscript{152} Furthermore, although the American Medical Association and some state medical associations have opposed legalizing PAD,\textsuperscript{153} these same organizations “unequivocally support the practice of terminal sedation—the administration of sufficient doses 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.”\textsuperscript{154} The AMA also supports legislation permitting “palliative care,”\textsuperscript{155} or care allowing a physician to prescribe pain relief instead of curative

\textsuperscript{149} Eight separate polls by Field Research since 1979 show a consistent majority supporting PAD, ranging from 64 to 75%. See Valerie J. Vollmar website report of June 2002, available at: http://www.willamette.edu/wucl/pas/ (last visited July 26, 2007). In the most recent Field poll in March of 2006, seventy percent supported a right for terminally ill patients to receive prescriptions for life-ending medication. Field Research poll conducted on March 15, 2006 on 500 California adults. The percentage in favor dropped to 62% when the question asked if a doctor could administer the drugs. Valerie J. Vollmar Website report of June 2002, available at http://www.willamette.edu/wucl/pas/ (last visited July 26, 2007).

\textsuperscript{150} E.g., Theobald, supra note 149, at B2.

\textsuperscript{151} Washington v. Glucksburg, 521 U.S. at 748 n.12 (Stevens, J., concurring) (citing sources saying 60% of doctors in Oregon support PAD and 56% 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 N.Eng. J. Med. 89 (1994) (noting 53% said it should be legal for doctors to perform PAD but only 40% said they were willing to do so). See also, ROBERT N. BROWN, KAREN L. TOKARZ AND ALLAN D. BOGUTZ, ELDERLAW: ADVOCACY FOR THE AGING, ch. 13. Health Care Decision-Making B. Judicial Developments (ALI-ABA 2005).

\textsuperscript{152} Valerie J. Vollmer website 2007 report available at: http://www.willamette.edu/wucl/pas/ (last visited July 26, 2007). See also http://www.capp.org/home/index.asp (last visited 7/19/2007) (More than 50% of California healthcare is provided by a member of CAPG. One of the priorities of CAPG is providing lobbying services. The areas that CAPG generally focuses on are insurance reform, freedom in health care decision making, and Medicare and Medicaid reform.). AB 374 did not pass by the 6/8/2007 deadline. See Nancy Vogel, Assisted Death Bill Fails Again in Capitol, L.A. TIMES, June 8, 2007 at California Metro (The bill’s authors, knowing that they did not have the support to pass the legislation, failed to bring it for a vote.).


\textsuperscript{154} Glucksberg, 521 U.S. at 751.

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 administration of medication or other means”\(^\text{157}\) 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 suffering of the patient and comply[ing] with [the patient’s] wishes…[then the] same intent and causation may exist….”\(^\text{158}\) In fact, thirty-one percent of doctors in one survey\(^\text{159}\) and twenty-three percent in another admitted they already had performed some form of PAD.\(^\text{160}\) 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.”\(^\text{161}\)

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\(^{156}\) See, e.g., \textsc{Colo. Rev. Stat.} § 18-3-104 (4)(b)(III) (2006) (“‘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.”); \textsc{Id.} § 104(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.”).

\(^{157}\) \textsc{Glucksberg}, 521 U.S. at 750.

\(^{158}\) \textsc{Glucksberg}, 521 U.S. at 751. \textit{See also} Joyce Peterson & Karen Klinka, \textit{Suicide Requests Rare, State Doctors Say Focus on Care, Experts Urge}, \textsc{Daily Oklahoman}, June 21, 1997, at NEWS 8 (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 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, he said. But, ‘I’ve never had the feeling I’ve pushed someone over the line.’”).

\(^{159}\) \textsc{Humber}, supra note 150, at 14 (“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.”) \textit{cited in} Glynn, supra note 150, at 334 n.28. \textit{See also} \textsc{Glucksberg}, 521 U.S. at 749 n.12 (Stevens, J., concurring) (noting 18% of Michigan oncologists reported “active participation in assisted suicide,” 24% 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).

\(^{160}\) Glynn, \textit{supra} note 150, at 355 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.”) (internal citations omitted). Eighty-one percent of those physicians who did perform PAD in the second survey confessed to doing it more than once. \textit{Id.} at 334 n.29.

\(^{161}\) \textit{E.g.}, 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, \textit{The Pain Relief Promotion Act of 1999: A Serious Threat to Palliative Care}, 283 J. AM. MED. ASS’N 255, 255 (2000); Christopher Rowland, \textit{Should death be hastened? Senate bill would make doctor-assisted suicide a felony; After emotional and strongly conflicting testimony, the Senate Judiciary Committee votes 12-to) to outlaw the practice}, \textsc{Providence Journal-
Despite this significant support for PAD, only one state in the Union allows it, and that state legalized the practice through a citizen initiative. Similarly, Congress and some state legislatures have made efforts to legalize PAD directly, 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.


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. By grounding the right in the federal 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 chose 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, the pre-dominate framework for the debate arose in two cases: In re Quinlan and Cruzan v. Harmon.

Ironically, in the late 1970’s, a comatose patient awoke the American public to the problems created by extending life through modern medical technology. At the age of
21, Karen Ann Quinlan lapsed into a persistent vegetative state after ingesting alcohol and drugs. 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, 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.

Not until the early 1990’s, thirteen years after Quinlan, did the United States 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. 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. 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.\footnote{172}

On certiorari, the United States Supreme Court affirmed in a 5-4 decision.\footnote{173} Primarily, the Court affirmed a state’s power to safeguard against potential abuses by requiring clear and convincing evidence of an incompetent person’s desire to have life sustaining treatment withdrawn.\footnote{174} Significantly, however, the Court in \textit{Cruzan} for the first time considered alternative theories set forth in state cases addressing the right to refuse medical treatment. \textit{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.”\textsuperscript{\textsuperscript{175}}

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 \textit{Cruzan} decision.\footnote{176} In 1993, the Hemlock Society established the Patients’ Rights Organization, a political action group to advocate the cause of PAD.\footnote{177} Compassion in Dying, an alternate PAD group, was founded in 1993, and in 1997, created its national advocacy group called Compassion in Dying Federation,

\footnote{172 Id.}
\footnote{173 \textit{Cruzan}, 497 U.S. 261. After \textit{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 L. Tribe, \textit{American Constitutional Law} § 15-11, p. 1365 (The Foundation Press 2d ed. 1988).}
\footnote{174 “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.” \textit{Cruzan}, 497 U.S. 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.’” \textit{Id}}
\footnote{175 “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.” \textit{Id}. After \textit{Cruzan}, Congress passed the Patient Self-Determination Act, 42 U.S.C. § 1395cc(f)(2000). This Act merely requires medical provider to make information available to patients so they are aware of their right to refuse medical treatment. 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. \textit{E.g.}, N.J. REV. STAT. 26:2H-54.}
\footnote{176 Glynn, \textit{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. \textit{Id}.}
\footnote{177 Note also that in 1991, Derek Humphrey first published \textit{Final Exit: The Practicalities of Self-Deliverance for the Terminally Ill}. In 2003, the Hemlock Society merged with Compassion in Dying and changed its name to End of Life Choices. End of Life Choices website, \textit{available at} \textit{http://www.compassionandchoices.org/aboutus/themovement/php} (last visited August 4, 2007).}
which participated in many of the pivotal cases on the issue. Scholars weighed in and opposing groups, such as the Catholic Church, issued sanctity of life statements.
and “vowed to wage an intensive legal, legislative and media campaign against [PAD].”

The AIDS epidemic played a significant role in the PAD debate in the 1980’s and early 1990’s. Because many of those infected with HIV/AIDS were young or middle-aged, the demographic of those seeking PAD expanded beyond the traditionally more vulnerable “old” and “infirm.” 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." AIDS activists added “well organized and well financed legal and political clout to the legal battles.

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. In an effort to have the courts recognize the right to die, these activists filed several cases in the mid-1990’s, 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

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181 Diego Ribadeneira, Bishops hit assisted suicide; At meeting, US prelates vow to fight practice by doctors THE BOSTON GLOBE, November 14, 1996, at A34 (At their fall meeting in Boston, “the US Catholic bishops [of the Roman Catholic Church] vowed to wage an intensive legal, legislative and media campaign against physician-assisted suicide.” “The bishops, along with evangelical Christian denominations and Muslim groups, recently filed briefs with the Supreme Court opposing doctor-assisted suicide.”); but cf. JAMES M. HOEFLER, MANAGING DEATH 63 (Westview Press 1997)(noting “[n]ow most mainstream Catholic organizations have abandoned their obstructionism of years past and joined forces with more progressive elements of the debate…."

182 Pratt, supra note 182, 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 disease of epidemic proportions, and it will continue to fuel the controversy over legalizing PAS.” Id. at 1030.


184 Pratt, supra note 182, at 1030.

185 The gay community has made significant contributions to the PAS movement by adding its well organized and well financed legal and political clout to recent legal battles. 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. Pratt, supra note 182, at 1030 n.13; Compassion In Dying, 850 F. Supp 1454; Quill, 870 F. Supp. 78; Pratt, supra note 182, at 1030. Spencer Heinz, End Game: Will Oregon Become Nation's AIDS Suicide Capital?, OREGONIAN (Portland), Dec. 5, 1994, at A1.

186 See generally Pratt, supra note 182; Allen, supra note 182; Batt, supra note 182; Bix, supra note 182; Brumbaugh, supra note 182; Cantor, supra note 168; Mazzeo, supra note 182; Miller, supra note 182, 17 CLEVELAND S. U. J. L. & HEALTH; Colin Miller, supra note 182, 11 WM. & MARY BILL OF RTS. J.
right to die.\textsuperscript{187} 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.\textsuperscript{188}

In \textit{Quill v. Koppel},\textsuperscript{189} a group of New York physicians filed suit against the State of New York challenging New York’s ban on assisted suicide\textsuperscript{190} 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. 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. 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.\textsuperscript{191} 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.\textsuperscript{192}

On appeal in \textit{Quill v. Vacco},\textsuperscript{193} the Second Circuit reversed. The Second Circuit rejected a Due Process analysis similar to that of the \textit{Cruzan} Court and refused to hold that terminal patients who chose to end their lives by self-administering prescribed drugs enjoyed the same \textit{Cruzan} Due Process right to hasten death by removing life-support systems.

However, the Second Circuit did adopt an Equal Protection analysis, agreeing with the doctors that the two groups were similarly situated: “those 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.”\textsuperscript{194} 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

\begin{footnotes}
\item[187] See infra notes 260-71 and accompanying text for further discussion of state assisted suicide statutes.
\item[188] \textit{Quill v. Vacco}, 80 F.3d 716 (2d Cir. 1996) and \textit{Compassion in Dying v. State of Washington}, 49 F.3d 586 (9th Cir. 1995) were consolidated for Supreme Court argument. Washington v. Glucksberg, 521 U.S. 702 (1997). Kevorkian’s efforts to have the Michigan Supreme Court recognize a right to die failed when the court found no 14th Amendment liberty interest, no equal protection violation, and no voidness for vagueness. See note 260 infra. 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 14th Amendment nor the Florida Constitution’s privacy clause. \textit{Krischer v. McIver}, 697 So. 2d 97 (Fla. 1997), reversing \textit{McIver v. Krischer}, 1997 WL 225878 (Fla. Cir. Ct. 1997). See also, KRAUSKOPF et al., supra note 153, at Chapter 13. Health Care Decision-Making B. Judicial Developments.
\item[190] N.Y. PENAL LAW § 125.15; \textit{Quill}, 870 F. Supp. at 79.
\item[191] \textit{Id.}
\item[192] \textit{Quill}, 80 F.3d at 729.
\end{footnotes}
a terminal illness, such statutes were not rationally related to any legitimate state interest and violated the Equal Protection Clause.\textsuperscript{195}

On certiorari in \textit{Vacco v. Quill},\textsuperscript{196} the United States Supreme Court reversed finding that the New York law did not violate the Equal Protection Clause. 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.\textsuperscript{197} Consequently, New York’s assisted suicide statute, which could include PAD within in 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.\textsuperscript{198}

On the very same day it decided \textit{Vacco}, the Supreme Court also issued its opinion on another challenge to an assisted suicide ban in \textit{Washington v. Glucksberg}.\textsuperscript{199} A group of Washington residents filed the suit asserting that a state law banning assisted suicide\textsuperscript{200} was unconstitutional on its face.\textsuperscript{201} The Ninth Circuit held, in an en banc decision, that patients have a “due process liberty interest in controlling the time and manner of [their] death[s]”—that there is, in short, a constitutionally-recognized ‘right to die.’\textsuperscript{202}

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.\textsuperscript{203} 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.”\textsuperscript{204} Washington State’s goals of preserving human life and upholding the integrity and ethics of the medical profession were

\begin{itemize}
  \item Id. at 727-31.
  \item \textit{Vacco v. Quill}, 80 F.3d 716 (2d Cir.1996) and \textit{Compassion in Dying}, 49 F.3d 586 (9th Cir. 1995), were consolidated for Supreme Court argument.
  \item \textit{Vacco}, 521 U.S. at 803-08.
  \item Id. at 808-09.
  \item WASH. REV. CODE ANN. § 9A.36.060(1)
  \item The 9\textsuperscript{th} Circuit Court of Appeals held that the statute’s categorical prohibition was unconstitutional as applied to a class rather than individual plaintiffs. \textit{Compassion in Dying}, 79 F. 3d at 838. See also \textit{Glucksberg}, 521 U.S. at 735.
  \item \textit{Compassion in Dying}, 79 F.3d at 816. The original lawsuit was brought by four physicians and three terminally ill patients. The patients died before the case reached the case reached the Ninth Circuit. \textit{See Glucksberg}, 521 U.S. at 739 (Stevens, J., concurring).
  \item \textit{Glucksberg}, 521 U.S. at 710-728. Arguably, the Supreme Court’s opinion rested on confused semantics. For example, the Court distinguished sexual acts by consenting homosexuals from acts of “sodomy.” By noting that “the concept of the homosexual as a distinct category of person did not emerge until the late 19\textsuperscript{th} 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.” \textit{Lawrence v. Texas}, 539 U.S.558, 568-70 (2003). Similarly, if the Court had concluded that physician-assisted death was distinct from “suicide” as current medical organizations conclude, \textit{cf. supra} note 10, then the examination of traditional laws outlawing suicide or assisted suicide would be irrelevant.
  \item \textit{Compassion in Dying}, 79 F.3d at 728.
\end{itemize}
sufficient to meet this simple relationship test to overcome the Fourteenth Amendment challenge.\textsuperscript{205}

Remarkably, five justices filed concurring opinions, including four concurrences that addressed both \textit{Glucksberg} and \textit{Vacco}.\textsuperscript{206} While some of the justices expressed support for “personal control over the manner of death…”\textsuperscript{207} overall the justices concluded that the states’ interests\textsuperscript{208} and the availability of alternatives\textsuperscript{209} outweighed recognizing a new “unenumerated right to commit suicide including a right of assistance in doing so.”\textsuperscript{210}

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 \textit{Glucksberg} or \textit{Vacco}. Each of the separate opinions reference in some way the importance of allowing the states to address PAD.

Chief Justice Rehnquist noted:

“[T]he States are currently engaged in serious, thoughtful examinations of physician–assisted suicide and other similar issues.”\textsuperscript{211} “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.”\textsuperscript{212}

Similarly, Justice O’Connor stated:

“There is no reason to think that the democratic process will not strike the proper

\textsuperscript{205} Id. at 735.

\textsuperscript{206} Id. at 736-92 (concurring opinions of Justices O’Connor, Stevens, Ginsburg, and Breyer).

\textsuperscript{207} Id. at 789 (Ginsburg, J., concurring). See also id. at 744 (Stevens, J., concurring) ("Cruzan’s right rested also implicitly on the even more fundamental right to make this ‘deeply personal decision.’").

\textsuperscript{208} Washington’s statute sought to protect vulnerable groups, such as the poor, elderly, and disabled from abuse, neglect, and mistakes. \textit{Glucksberg}, 521 U.S. at 732. \textit{But see}, Miller, \textit{supra} note 182, at 779 (The distinction that the Court drew in \textit{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.” 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.”); \textit{Glucksberg}, 521 U.S. at 781 (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.); \textit{id.} at 788. See also Green, \textit{supra} note 182, at 640-643 (attributing different views of when it is proper to end 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).

\textsuperscript{209} 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.” \textit{Glucksberg}, 521 U.S. at 737 (O’Connor, J. concurring, joined by Ginsburg and Breyer).

\textsuperscript{210} Id. at 722-23.

\textsuperscript{211} Id. at 719.

\textsuperscript{212} Id. at 735 (emphasis added). If the \textit{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. \textit{Oregon v. Ashcroft}, 368 F.3d 1118, 1123 (9th Cir. 2004).
balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State’s [sic] 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.’”  

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.”

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.”

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 declined to do so.

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.” The Court’s refusal to federalize the issue permitted the states to play their key role in resolving the debate. Instead, through balanced federalism, the states could continue to experiment 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….“ These groups also had filed amicus briefs in the

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213 *Glucksberg*, 521 U.S. at 737 (O’Connor, J., concurring, joined by Ginsburg and Breyer, JJ) (internal citations omitted).
214 *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’ [doctors’ 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.”).
215 *Id*. at 738 (Stevens, J., concurring) (internal citations omitted).
216 *Id*. at 719.
217 Bailey, supra note 155.
key U.S. Supreme Court cases and stood ready to thwart any expansion of PAD by asserting their influence at the state level through the pressure-point process.

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, which regulates drug use, specifically some of the drugs used by physicians to assist patients with dying.

In response to voter affirmation of Oregon’s PAD initiative, members of Congress introduced the Lethal Drug Abuse Prevention Act (LDAPA) in 1998 as an amendment to the Controlled Substances Act. 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.” 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 for the purpose of causing the suicide or euthanasia” of a person. The bill further would have allowed the Attorney General to revoke the registration of any such offending medical practitioners. 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.

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219 E.g., Bailey, supra note 155 (“And [the Catholic Church and the California Medical Society] hold say here in the Capitol as well. This is going to be something that’s very difficult to accomplish legislatively.”).
221 The Controlled Substances Act states that any schedule II drug, that is, drugs which 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.” 21 U.S.C. § 816 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. 21 U.S.C. § 820 The Attorney General may deny, suspend, or revoke a registration that, as relevant here, would be "inconsistent with the public interest." 21 U.S.C. §§ 824(a)(4), 822(a)(2). 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." 21 U.S.C. § 823(f). The Controlled Substances Act explicitly contemplates a role for the States as well as the Attorney General in regulating controlled substances. See 21 U.S.C. § 903.
223 Id. § 2(b)(4).
224 Id. § 2(a)(i)(2).
The year after the LDAPA failed, Congress considered the Pain Relief Promotion Act (PRPA) to support the use of PAD. 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 consistent with public health and safety even if the use of such a substance may increase the risk of death.”

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 and (2) still recognizing state laws that allowed such a right. 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 of 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.” In August of 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. The bill was never called, but Senator

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225 Pain Relief Promotion Act of 1999, S. 1272, 106th Cong. (1999). The LDAPA was opposed by the AMA because it feared “doctors would be reluctant to prescribe adequate pain relief for suffering patients.” Stacy A. Tromble, Note, A Dialogue on Death & Deference: Gonzales v. Oregon, 54 BUFF. L. REV. 1639, 1667 (2007). The AMA and National Hospice Association supported the PRPA. Id. at 1668.

226 Id. § 101(i)(1). See also supra notes 10 and 158-64 and accompanying text for more discussion of palliative care.

227 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.” Pain Relief Promotion Act of 1999, S. 1271, 106th Cong. § 101(i)(2).

228 The PRPA prohibited the Attorney General from making determinations as to whether a “controlled substance manufacturer, distributor, or dispenser registration is consistent with the public interest.” Id. § 101(i)(2). It also required the Attorney General to give “force and effect to State law permitting assisted suicide or euthanasia.” Id.

229 Jeff Kosseff, GOP Puts Suicide Law in Spotlight, OREGONIAN, June 12, 2006, at Local 1.


Brownback has included federal opposition to PAD as one of the platform issues in his bid for the Republican presidential nomination in 2008.

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 been unsuccessful,\(^{231}\) 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 “issue[s] grounded in deep moral beliefs” to the states.\(^{232}\) 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.\(^{233}\) 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 business.”\(^{234}\) Consequently, the physician-assisted death, or PAD,

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\(^{231}\) The Supreme Court’s holding in Gonzales v. Oregon, discussed infra, and the Terry Schiavo situation in Florida revived the PAD debate. See William H. Colby, From Quinlan to Cruzan to Schiavo: What Have We Learned, 37 LOY. U. CHI. L. J. 279 (2006) (speech given by the Cruzan attorney; a good overview of Cruzan and Schiavo); Annie Danino, Dodging the Issue of Physician Assisted Suicide: The Supreme Court’s Likely Response to Gonzales v. Oregon, 10 MICH. ST. MED. & LAW 299 (2006); David Sclar, Recent Developments in Health Law: U.S. Supreme Court Ruling in Gonzales v. Oregon Upholds the Oregon Death With Dignity Act, 34 J. L. MED & ETHICS 639 (2006). See also Colby, supra note 10.

Other States See Path in Ruling on Oregon’s Assisted Suicide Law, RELIGIOUS NEWS SOURCE, Jan. 25, 2006; Edwin Garcia, Assisted Suicide Campaign Back On, SAN JOSE MERCURY NEWS, Jan. 25, 2006; James J. Kilpatrick, 10th Amendment Was Cure for This Ill, AUGUSTA CHRONICLE, Jan. 29, 2006, at A04 (10th Amendment argument could have prevented the Court from finding the way it did in Oregon but Congress surely has power to regulate interstate commerce in deadly drugs). Thus, “using the federal commerce power to prevent assisted suicide is unquestionably permissible.” Gonzales, 546 U.S. at 939; Clifford M. Kulwin, Commentary: People Die Differently These Days, NEWHOUSE NEWS SERVICE, Feb. 2, 2006; Colin Nickerson, Suicide Groups Make Switzerland a Final Destination, THE BOSTON GLOBE, Feb. 26, 2006, at A12; Capitol Watch: Death with Dignity, THE SEATTLE POST-INTELLIGENCER, Feb. 9, 2006, at B6 (Sen. Pat Thibaudeau, D-Seattle, has introduced a sensitive, reasoned Washington death with dignity bill (WA SB 6843). It has yet to get a hearing in the Senate Health Care Committee, chaired by fellow Democrat Karen Keiser of Kent. The bill failed.); Bill to Legalize Assisted Suicide in California Rejected by Senate Judiciary Committee, U.S. NEWSWIRE, June 27, 2006; Robert Solomon, Scalia’s Flip-Flop On Assisted Suicide Is A Killer; Closing Arguments, CONNECTICUT LAW TRIBUNE, Jan. 30, 2006, at 23 (Vol. 27 No. 71); Sam Howe Verhovek, For Ex-Governor Who Advocates Right to Die, Political Is Personal, L.A. TIMES, March 24, 2006, at A18.

\(^{232}\) Terry Eastland, Shameless in Seattle, AM SPECTATOR, July, 1994, at 57.

\(^{233}\) Eastland, supra note 235, at 57.

\(^{234}\) Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring). Justice O’Connor has also noted that “the principle that state governments bear the primary responsibility for evaluating physician assisted suicide follows from our concept of federalism, which requires that state lawmakers, not the federal government, are the ‘primary regulators of professional [medical] conduct.”’ Glucksberg, 521 U.S. at 737 (O’Connor, J., concurring) cited in 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 (2006).
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.235 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.

Minority interest influence 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,236 have used pressure-points not only to block PAD legislation but 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 statute even though religious group contributions to the repeal campaign exceeded those of PAD supporters more than six-to-one.

235 E.g., The following polls all have shown a majority of adults support physician-assisted death: (1) a Gallup Poll of 1,002 adults from May 8-11, 2006 (showing majorities of 64-69% approval to 27-31% disapproval); (2) CBS News/ New York Times polls of 1,229 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 of 2005 (showing majorities of 48-52% approval to 37-39% disapproval); (4) Harris Poll of 1,1010 adults from 1983 to April 2005 (showing majorities of 53 to 73% approval to 24-34% disapproval). In addition, a Pew Research Center poll from November 9 through 27, 2005, showed the impact of how questions are asked. The approval to disapproval ratio was 51-54/39-40 in response to “making it legal for doctors to give terminally ill patients the means to end their lives” as opposed to a ratio of 43-44/48 in response to “making it legal for doctors to assist terminally ill patients in committing suicide.” Similarly, an ABC News poll of 1,021 adults in March of 2002 found closer margins for and against PAD depending on the question wording. Source of all poll data: www.euthanasiaaprocon.org/poll.html (last visited July 17, 2007).

236 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 a broader generic term, 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 moved to begin an in-depth study and discussion supporting a terminally ill patient’s right to request medication to hasten death” with a report due in 2009. COMPASSION & CHOICES: IN THOUGHT AND ACTION 07.07, available at compassionandchoices.org (last visited August 8, 2007). See also HOEFLER, supra note 182, 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.
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

Some issues, particularly controversial social issues, can have a difficult time producing results through the traditional legislative process. 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 proved to be an interest group without rival on the right-to-die issue.”

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. 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.

California passed the first living-will statute in 1976. The Quinlan case “created a window of opportunity” for the California legislature to pass its Natural Death Act even

237 James M. Hoefer, supra note 27, at 163. See also Gail Kinsey Hill & Ashbel S. Green, Group Reveal Details of Financing to Fight Initiative Measures, OREGONIAN, October 11, 1994, at B05 (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 4 to 1.); Alters Tactics on Suicide Law; Vote: Leaders Focus on Medical—Not Moral—Issues in Campaign to Repeal Oregon Statute, L.A. TIMES, November 1, 1997, at Metro part B, Page 4 (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 as well.).

238 But note, however, some state efforts to legalize various forms of PAD date back to the early 1900’s. 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 350.


240 Id. at 120.
though proponents had introduced the bill before Quinlan was decided. Following California’s Natural Death Act of 1976, sixty-one other living-will bills were introduced in 42 states. 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 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.

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.” 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. More than ten years later, only after pressure from court decisions that “promoted the right 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. 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. Only a later compromise bill survived because it provided more limitations than the court holdings recognized and the FCC did not oppose it.

The California and Florida examples represent a pattern of effort by religious groups to restrict the right to refuse medical treatment. Even though the Court has recognized this right as constitutionally protected, these minority view groups have employed the traditional legislative process to enact laws to minimize exercise of that right. Furthermore, because the Supreme Court failed to recognize a constitutional

241 Id. at 98.
242 Id. at 99 (“The NDA 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, nor patients in permanent vegetative states. Doctors were still concerned about liability and 75% said they would continue to treat patients despite a request not to be treated.”).
243 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.” GLICK, supra note 242, at 104. However, the Committee on Moral Concerns and the California Pro-Life Council convinced Republican Governor George Deukmejian to veto the law. Id.
244 GLICK, supra note 242 at 107.
245 Id. at 108.
246 Id. at 113.
247 Id. at 116 (Governor Bob Martinez, a conservative Republican, vetoed the bill.).
248 Id. at 117.
249 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 their comfort level, the FCC further “seeks to limit its [a law’s] impact by lobbying administrative agencies for restrictive rules.”). See also examples of Catholic
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.250 Many of these efforts started in the early 1990’s 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.251 Two Wisconsin legislators have sponsored pro-PAD bills for more than ten years, but they have never gotten one to a vote.252 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.253

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] efforts.”254 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.

California legislators introduced AB 374, a bill that would legalize PAD, in January of 2007.255 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.’”256 The Assembly Speaker, Fabian Núñez, is

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250 Colburn, *supra* note 10 (“In all, 18 states have seen ballot measures proposed or bills introduced on assisted suicide.”). See also Tromble, *supra* note 226, at 1672-73.
251 Jimenez, *supra* note 156 (quoting Bishop Leo O’Neil).
253 Id.
255 AB 374. The California legislature has attempted to pass PAD legislation in several sessions, but each time it is blocked. *See e.g.*, In 1999, the California legislature tried to pass a PAD measure. Even with 75 percent of the public supporting the measure, the author of the bill did not put it up for a vote. The California state legislature introduced AB 651 in January but this legislation also failed to get through. *See* Valerie J. Vollmer website, report of March 2000, available at http://www.willamette.edu/wucl/pas/2000_reports/102000.html (last visited August 4, 2007). *E.g.*, In 1999, the California legislature tried to pass a PAS-type measure. Even with 75 percent of the public supporting the measure, the author of the bill did not put it up for a vote. Therefore, the current law in California, as written in California Penal Code section 401, states that “[e]very person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony.” 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. Its current status is pending. Mark Gladstone, *Assisted-Suicide Debate Shifts to State; Ethics: An Assembly Panel will consider a bill modeled on Oregon’s Law that allows physician-aided deaths. The Catholic Church and a Doctors’ Group attack the measure*, L. A. TIMES, April 20, 1999, at part A3.
256 Compassion & Choices: In Thought and Action 04.07, available at compassionandchoices.org (last visited August 4, 2007).
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.”

Support for AB 374 waned, and the bill was never brought to a vote.

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 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. Historically,
these statutes arose to address “suicide” situations, not PAD. Some jurisdictions held that because suicide was not a crime, aiding in it also was not criminal. Other jurisdictions considered motive and found liability only if the one assisting intended to selfishly benefit from the death of another. 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.” 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.” 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 other states brought unsuccessful actions, Michigan, California, and Kansas indicted physicians for assisting in suicide in violation of state laws. 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.

A few states have modified their assisted suicide laws to specifically mention health care providers as an effort to restrict PAD. 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. Ohio amended its assisted

See supra note 10 and accompanying text for discussion of confusion created by using the term “suicide” to address PAD. See also Jonathan S. Cohen et al., supra note 154, at XXX ("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.'").

See, e.g., MODEL PENAL CODE COMMENTARIES (Official Draft and Revised Comments) part II Definition of Specific Crimes §§ 210.0 to 213.6, at 100, n. 22 (1980)

See, e.g. MODEL PENAL CODE COMMENTARIES (Official Draft and Revised Comments) part II Definition of Specific Crimes at 101, n.24.

Model Penal Code § 210.5(1). See also MPC § 210.5(2) (The MPC’s drafters stated that “the interests in the sanctity of life that are represented by 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.” JAMES R. ACKER, WAYNE A. LOGAN AND DAVID C. BROYDY, CONSTITUTIONAL LIMITS ON THE DEFINITION AND PUNISHMENT OF CRIME, 93 (Aspen Publishers 2001).


See supra note 129.


VA. CODE ANN. § 8.01-662-.1(D) (“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
suicide statute in 2006 to permit injunctions against health care providers who may be attempting to assist with a suicide.268

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.269

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. 270

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.271 However,

provide health care services in the Commonwealth shall be suspended or revoked by the licensing authority.”) (enacted 1999).


270 COLO. REV. STAT. § 18-3-104 (2006); MD. CODE ANN., Criminal Law § 3-103 (2006); MINN. STAT. § 605.215(3)(2005); S.C. CODE ANN. § 16-3-1090(C) (2006);TENN. CODE ANN. § 39-13-216(b) (2006). The 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 1998, the Maryland Catholic Conference began working with hospice organizations and other groups to introduce a bill that would outlaw physician-assisted suicide. A bill banning physician-assisted suicide and imposing harsh criminal penalties of prison and fines passed both legislative houses and was signed into law by Governor Glendening on 5/27/99. See Valerie J. Volmer website, reports of February 1998, June 1998, and June 1999 available at: http://www.willamette.edu/wucl/pas/ (last visited 7/20/2007). However, the palliative care provision provides some protection for Maryland physicians.

271 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. See Valerie J. Volmer website, report of November 2000, available at http://www.willamette.edu/wucl/pas/2000_reports/102000.html (last visited 7/20/2007).

Arkansas: On 2/10/00, 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 Valerie J. Volmer website, report of March 1999 available at http://www.willamette.edu/wucl/pas/1999_reports/031999.html (last visited 7/20/2007).
in Rhode Island and Michigan, legislators specifically made it a crime for a health care provider to “assist” in suicide.\(^{272}\)

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 the United States,\(^{273}\) Senator Roney, a PAD advocate noted, “We are here

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272 R.I. GEN. LAWS § 11-60-3 (2006) (“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.”); MICH. COMP. LAWS § 752.1027 (2006) (“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.”). The current version of this statute has both an advance directive and palliative care exception. 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, appeal denied 642 N.W.2d 681, certiorari denied 537 U.S. 881 (2001). The pre-1993 version of the statute read as follows: “(3) 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 statute unless the medications or procedures are knowingly and intentionally administered, prescribed, or dispensed to cause death.” Cf. KY. REV. STAT. 216.302, enacted in 1994, does not specifically address healthcare providers, but makes providing the means of suicide a felony; GA. CODE ANN. § 6-5-15, enacted in 1997, 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. 273 “[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.” GLICK, supra note 242, at 124. “As in other states, the
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.”274 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].”275

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.276 From 1990-1998, Dr.
Kevorkian claimed to have assisted in over 130 suicides,277 three using his “suicide
machine,”278 After early attempts to charge Kevorkian with murder under the existing
assisted suicide law failed,279 the Michigan General Assembly made its statute more
restrictive in 1992.280 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.281

After the statute was amended, Dr. Kevorkian assisted in three more suicides and was
indicted under the new law.282 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 United States
Constitution.283 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.284 Kevorkian’s attempt to enjoin prosecution failed when the

Massachusetts Catholic Conference has been the main and the most powerful opponent to the right to
die….” Id. at 120.
274 Rowland, supra note 164.
275 Id.
276 See generally Persels, supra note 182; Janet M. Branigan, supra note 182; E. ATWOOD GAILEY, A
WRITE TO DEATH: NEWS FRAMING OF THE RIGHT TO DIE CONFLICT, FROM QUINLAN’S COMA TO
KEVORKIAN’S CONVICTION (Praeger Publishers, 2003); George J. Annas, The “Right to Die” in America:
278 Persels, supra note 182, at 95.
279 Id. at 16.
280 Katherine L. Annas, Irreversible Error: The Power and Prejudice of Female Genital Mutilaiton, 12 J.
in February of 1993. It was not repealed after 6 months as provided for in subsection (5)
because the Michigan Supreme Court found it was validly enacted and did not violate the
282 Janet M. Branigan, supra note 182.
283 Kevorkian, 527 N.W.2d at 716.
284 Jail Time for Dr. Kevorkian, N.Y. TIMES, April 15, 1999, at A 30. (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.).

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Michigan Supreme Court upheld the state’s assisted suicide statute.285 As a result, Dr. Kevorkian was convicted of second degree murder and served over eight years of his 10-to-25 year prison sentence. He was paroled in June of 2007 for health reasons.286

Assisted suicide statutes that threaten sanctions for physicians and “criminaliz[e] decisions about patient care”287 have a chilling effect on doctors. Thus, the inability of state legislatures to resolve the PAD issue has made it “difficult for clinicians to deliver care”288 or to prescribe what they believe is the most humane and appropriate treatment for their patients.289

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.290 Aside from Oregon’s success, four other states attempted similar initiatives.

285 *Kevorkian v. Thompson*, 947 F. Supp. 1152 (E.D. Mich. 1997) (finding that there was no 14th 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).
286 Prison officials in Lansing, Michigan, decided to grant him parole after more than 8 years behind bars. They considered 78-year old Kevorkian’s health and the unlikelihood that he would pose a danger to society if freed. *Kevorkian leaving prison in June*, DENVER POST, December 14, 2006, at 2A.
287 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…..” Edward L. Langston, M.D., Chair, AMA Board of Trustees, AMA: Justice served for Dr. Pou http://www.ama-assn.org/ama/pub/category/17849.html (July 24, 2007). 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 “make them comfortable.” Compassion & Choices: In Thought and Action info@compassionandchoices.org (07.07).
288 Quote from Dr. Anna Pou in Adam Nossiter, *Grand Jury Won’t Indict Doctor in Hurricane Deaths*, The N.Y. TIMES, July 25, 2007, at Nation (July 25, 2007) (On July 24,2007, an Orleans Parish grand jury refused to indict Dr. Pou on any charges. The American Medical Association has released its statement praising the grand jury’s decision.).
289 See also, e.g., The California State Medical Board revoked Dr. Harold Luke’s medical license when the doctor increased a 76-year-old man’s morphine drip tenfold. The Board first concluded this action hastened the patient’s death. 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. Valerie J. Vollmar website, available at http://www.willamette.edu/wucl/pas/ (last visited 7/20/2007).
290 Colby, *supra* note 234 (speech given by the Cruzan attorney; a good overview of Cruzan and Schiavo); Danino, *supra* note 234; Sclar *supra* note 233. See also, Don Coburn. *Other States See Path in Ruling on Oregon's Assisted Suicide Law*, RELIGIOUS NEWS SERVICE, Jan. 25, 2006; Edwin Garcia. *Assisted Suicide Campaign Back On*, SAN JOSE MERCURY NEWS, Jan. 25, 2006, at 5B.; James J. Kilpatrick. *10th Amendment Was Cure for This Ill*, AUGUSTA CHRONICLE, Jan. 29, 2006 at A04 (10TH Amendment argument could have prevented the Court from finding the way it did in Oregon but Congress surely has power to regulate interstate commerce in deadly drugs. Thus, “using the federal commerce power to prevent assisted suicide is unquestionably permissible.”); Clifford M. Kulwin. *Commentary: People Die
California was the first to try the initiative route with a 1988 attempt. This ballot measure, 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. In 1992, California tried again. This time, proponents were able to get their end-of-life measure on the California ballot as Proposition 161. Proposition 161 was leading in the polls just days before the election, 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%.” John Brooke, president of Americans for Death with Dignity, noted, "We can't match them financially.”

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. 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. However, opponents again weighed in with an aggressive campaign, and the initiative failed in a 54-to-46 percent margin on November 5, 1991.


291 Joan Beck, Californians May be Invited to Vote on a Right to Die, CHICAGO TRIBUNE, Apr. 21, 1988, at 23C.
293 Proponents of Prop. 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. Paulson, supra note 299.
294 As of November 2, 1992, a telephone poll showed support of the initiative was 47% for, 40% against, and 13% undecided. California: Voters Favor “Death with Dignity” Prop., AM. HEALTH LINE, Nov. 2, 1992.
295 Bailey, supra note 155 (“People felt that the CMA [California Medical Association] and the Catholic Church were the reason Proposition 161 was defeated,” said Representative Kerry Mazzoni (D-Novato)). See also Polls Show Once Public Understands the Issue: Doctor-Assisted Suicide Fails, U.S. NEWS WIRE, March 14, 2006; California: Voters Reject Health Care Propositions, AM. HEALTH LINE, Nov. 4, 1992. (54% against, 46% for).
296 Bailey, supra note 155.
297 Rob Carson & Bette-Jane Criger, supra note 182, at 7. It also would expand the definition of terminally ill to include coma and persistent vegetative state.Id. at 7; Paulson, supra note 299; 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. Right-to-die Debate Zips Past Cruzan Case, SEATTLE TIMES, June 22, 1991, at D6.
299 Carson & Criger, supra note 182 at 7; Paulson, supra note 299, at A9. 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 certify by “two
In the fall of 1998, Michigan voters addressed the PAD issue in Proposal B. Proposal B would have legalized the "prescription of a lethal dose of medication to terminally ill, competent, informed adults in order to commit suicide." The measure failed by a significant margin. 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. In contrast, advocates of Proposal B had raised only $300,000 and produced one television ad.

In 2000, Maine made the most recent attempt to pass a ballot initiative to give people the right to seek physician assistance in death. 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. Although the margin of votes was very close, PRO 916 failed to pass.

Oregon alone successfully passed a measure legalizing PAD. In 1994, Oregon voters approved Oregon’s Death With Dignity Act by a margin of two percent. Oregon’s Act exempts from civil or criminal liability state-licensed physicians who, in compliance with physicians, one of them the attending physician, … that the patient had six months or less to live.” Carson & Crigger, supra note 182, at 7. Yet reasons for the failure, voiced by the Catholic Archbishop of Seattle, concerned the lack of safeguards including that it 1) did not define competency, 2) did not require patients seeking to end their lives to be Washington residents, 3) required no special training required of physicians to assist patients in dying, and 4) contained no safeguards for the families or loved ones of the person seeking to die. Archbishop Thomas J. Murphy, Initiative 119 – A Real Nightmare – Tragically, We Are Being Asked to Violate God’s Basic Gift of Life, SEATTLE TIMES, Oct. 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, Sep. 24, 1990, at A9.

300 Proposal B was in response to a statute enacted by the Michigan legislature that banned assisted suicide. Eugene Volokh, The Mechanisms of the Slippery Slope, 116 HARV. L.REV. 1026, 1136 (2003). The Proposal would instead have made assisted suicide legal. Michigan: Poll Shows Suicide Measure Heading to Defeat, AM. HEALTH LINE, October 26, 1998 (As early as October 1998, 54% of voters opposed the measure, 40% supported it, and 6% were unsure.). Joyce Howard Price, Maine Voters Say No to Assisted Suicide Among Ballot Issues; Gay 'Marriage' Struck Down in Two States, WASHINGTON POST, Nov. 8, 2000, at A15.

301 Volokh, supra note 307, at 1136.


303 Id. Some also believe that Dr. Kevorkian’s more aggressive euthanasia activities also contributed to sway public opinion against the measure. See, e.g., Michigan: Poll Shows Suicide Measure Heading to Defeat, AM. HEALTH LINE, October 26, 1998.

304 Maine: Voters Narrowly Defeat Assisted Suicide Measure, AM. HEALTH LINE, Nov. 8, 2000. See also Price, supra note 304.

305 The vote was 330,671 (51.3%) against and 313,303 (48.7%) for the measure. Valerie J. Volmer website, available at http://www.willamette.edu/wucl/pas/2000_reports/102000.html (last visited 7/20/2007).

the Act's specific safeguards, dispense or prescribe a lethal dose of drugs upon the request of a terminally ill patient.307

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.308 However, the Ninth Circuit vacated for lack of standing and ultimately lifted the injunction in October of 1997.309 Just about a week after the Ninth Circuit lifted the injunction, Oregon’s Act survived an initiative effort to repeal it.

The Catholic Church was heavily involved in both the 1994 and 1997 initiative campaigns. Opponents outspent proponents of the initiative almost four to one. "[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." 310

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 religious extremists, or conservatives.’”311 Despite its lower profile, the Catholic Church ramped up its opposition. In the 1997 campaign, the opponents to PAD outspent the supporters almost six times. Catholic organizations contributed about half of the over $2.3 million raised by the opposition.312

310 Religion News Service, Catholic Church Alters Tactics on Suicide Law; Vote: Leaders Focus on Medical—Not Moral—Issues in Campaign to Repeal Oregon Statute, L.A. TIMES, Nov. 1, 1997, Metro B4. See also, Gail Kinsey Hill & Ashbel S. Green, Group Reveal Details of Financing to Fight Initiative Measures, OREGONIAN, October 11, 1994, at B05 (Approximately 1 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).
312 In both campaigns, the PAD opponents significantly outspent the proponents. The report for 1997 at Prof. Valerie J. Vollmar’s website has the following information about spending on Measure 51 in the 1997 campaign: (1) Supporters of repeal. . . . Campaign funds raised as of 9/24/97 amounted to $2.2 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; (2) Opponents of repeal. Opponents of Measure 51 include Governor Kitzhaber (an emergency room physician) and a group of physicians known as Physicians for Death with Dignity. Campaign funds raised as of 9/24/97 amounted to $370,000, including $150,000 each from a local millionaire and international philanthropist George Soros http://www.willamette.edu/wucl/pas/1997_reports/101997.htm#legislation
funding, Oregon voters rejected the repeal efforts and renewed their support for PAD by a margin of twenty percent.\textsuperscript{313}

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

In 2001, Attorney General Ashcroft issued a Directive declaring physicians in violation of the Controlled Substances Act for prescribing lethal doses of controlled substances in PAD situations. 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. Thus, under the Directive, specific conduct authorized by Oregon’s Act could render a practitioner's federal registration inconsistent with the public interest, and therefore subject to possible suspension or revocation.\textsuperscript{314} The Directive specifically targeted health care practitioners in Oregon and instructed the United States Drug Enforcement Administration to enforce this determination regardless of whether state law authorized or permitted such conduct by practitioners.\textsuperscript{315}

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.\textsuperscript{316} On appeal, in \textit{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' express legislative intent, and overstepped the bounds of the U.S. Attorney General's statutory authority.\textsuperscript{317} The court found that the Controlled Substances Act was enacted to combat drug abuse, and that to the extent that it authorized the federal government to make decisions about the practice of medicine, those decisions were delegated to the Secretary of Health and Human

\textsuperscript{313} D. Niemeyer et al., \textit{Eighth Annual Report on Oregon's Death with Dignity Act}, Oregon Department of Human Services, Office of Disease Prevention and Epidemiology, March 10, 2005, at 6, \textit{available at <http://www.oregon.gov/DHS/ph/pas/docs/year8.pdf> (last visited Feb. 5, 2007)}. The total votes against repeal were 666,275; while the total for repeal were 445,830.

\textsuperscript{314} \textit{Dispensing of Controlled Substances to Assist Suicide}, 66 Fed. Reg. 56,607, 56,608 (Dep’t of Justice Nov. 9, 2001) (hereafter “Ashcroft Directive”).

\textsuperscript{315} \textit{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, Att’y Gen., to Senator Orrin Hatch, Chairman of the Senate Judiciary Comm. (June 5, 1998), in S. Rep. No. 105-372, at 10 (1998).

\textsuperscript{316} \textit{Oregon v. Ashcroft}, 192 F. Supp. 2d 1077, 1083 (D. Or., 2002) (finding that Attorney General Ashcroft exceeded the authority delegated to the Attorney General by the Controlled Substances Act 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).

\textsuperscript{317} \textit{Oregon v. Ashcroft}, 368 F.3d 1118 (9th Cir. 2004).
Services, not to the Attorney General.\textsuperscript{318} Ashcroft’s successor, Attorney General Alberto Gonzales, appealed to the United States Supreme Court.

In January 2006, the Supreme Court affirmed the Ninth Circuit in \textit{Gonzales v. Oregon}.
\textsuperscript{319} In a six-to-three opinion, the \textit{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 With Dignity Act.\textsuperscript{320} 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.\textsuperscript{321} 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.\textsuperscript{322} The Court further stated that “control” means “to add a substance to a schedule” 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.\textsuperscript{324}

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 registration\textsuperscript{325} and “it does not undertake the Act's five-factor analysis for determining when registration is ‘inconsistent with the public interest.'”\textsuperscript{326} The \textit{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. The \textit{Gonzales} majority stated that the Attorney General’s Directive purported to declare that using controlled substances for PAD is a crime,\textsuperscript{327} which requires authority “well beyond the Attorney General's statutory power to register or deregister physicians.”\textsuperscript{328}

By focusing on the administrative power of the Attorney General, the \textit{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 defining legitimate medical practice in that state would require a clear statement of preemption in the federal statute.\textsuperscript{329} In some respects, the \textit{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…,” it also noted, “The background

\begin{itemize}
\item \textsuperscript{318} \textit{Ashcroft}, 368 F.3d 1118.
\item \textsuperscript{319} \textit{Gonzales v. Oregon}, 546 U.S. 243 (2006).
\item \textsuperscript{320} Justice Kennedy authored the opinion. He was joined in the majority opinion by Stevens, O’Connor, Souter, Ginsburg, and Breyer. Roberts, Scalia, and Thomas dissented.
\item \textsuperscript{321} \textit{Gonzales}, 546 U.S. 243.
\item \textsuperscript{322} 21 U.S.C. § 821.
\item \textsuperscript{323} \textit{Id.} § 802(5).
\item \textsuperscript{324} \textit{Gonzales}, 546 U.S. at 248.
\item \textsuperscript{325} \textit{Id.} at 249.
\item \textsuperscript{326} 21 U.S.C. § 823(f).
\item \textsuperscript{327} \textit{Gonzales}, 546 U.S. at 249
\item \textsuperscript{328} \textit{Id.} (Thus, the Ashcroft directive was not entitled to either \textit{Auer} or \textit{Chevron} deference.
\item \textsuperscript{329} \textit{Ashcroft}, 368 F.3d at 1125.
\end{itemize}
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.”

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 “the 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.”

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

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.

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330 Gonzales, 546 U.S. at 274 (“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.”).
331 Id.
332 Id. at 298 (Scalia, J., dissenting).
333 Id.
Justice Scalia’s stance in the primary dissent is puzzling. In other Supreme Court opinions, Scalia had espoused the importance of initiatives and state’s rights. With respect to morality in the context of abortion, he specifically chided the Court for intruding on state sovereignty. 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. If people wanted to extend rights like assisted suicide, they should do it like the people of Oregon did—through the initiative-legislative process, not through the courts.

In the Gonzales dissent, however, 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,” 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 non-elected 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."

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

334 See, e.g., Romer v. Evans, 517 U.S. 620, 647 (1996) (Scalia, J., dissenting, joined by Rehnquist, C.J., Thomas, J.) (“[Amendment 2, a citizen initiative,] put directly, to all citizens of the State, the question…The Court today asserts that this most democratic of procedures is unconstitutional.”). See also Gonzales v. Raich, 521 U.S. 1 (2005) (Scalia, J., concurring); Nevada Dep’t of Human Resources v. Hibbs, 538 U.S. 721 (1972) (Scalia, J., dissenting ); Hibbs v. Winn, 542 U.S. 88 (2004) (Scalia, J., dissenting).
335 Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (1989)(Scalia, J., concurring) (the court should not assert its “sovereignty in a field in which it has little business”).
336 Robert Solomon, supra note 234, at 23.
337 Id. See also Chand, supra note 235, at 255-57.
338 Gonzales, 546 U.S. at 275. See also Friedman, supra note 14, at 392 (“Congress often shirks important decisions by foisting them off on bureaucratic officials; DANIEL A. FARBER AND PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE, 966-67 (University of Chicago Press 1991) (arguing that legislators delegate powers of standard creation to agencies in order to avoid conflict issues). Commentators especially point to actors in administrative agencies. See 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”).
339 Solomon, supra note 234, at 23 (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).
340 See, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 883-84 (1995) (Thomas, J., dissenting, joined by Rehnquist, C.J., O’Connor, J., Scalia, J.) (“[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 under gird 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 initiative states:
Thomas dissented when the majority found the Controlled Substances Act preempted California’s medical marijuana initiative.341 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.”342 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.343

Remarkably, Thomas reversed his federalism position in the Gonzales dissent. In Raich, he urged the federal government to avoid interfering with state issues determined by 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. Thomas’s sole explanation for his conclusion in Gonzales was his unhappiness about how the Court dealt with similar issues in Raich.344

As justification for the result in Gonzales, it would be overly simplistic to observe all of the dissenting justices are Catholics.345 However, the realignment of former

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341 Gonzales v. Raich, 545 U.S. 1 (2005).
342 Raich, 545 U.S. at 67 (Thomas, J., dissenting) (“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. Morrison, 529 U.S. at 627 (THOMAS, J., concurring). 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.' New York v. United States, 505 U. S. 144, 155 (1992) (quoting Gregory v. Ashcroft, 501 U. S. 452, 457 (1991)). 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.'
343 Raich, 545 U.S. at 67. (Thomas, J., dissenting) (citations omitted).
344 Gonzales, 546 U.S. at 302 (Thomas, J., dissenting) (“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’”]—albeit under the guise of statutory interpretations—is perplexing to say the least. Accordingly, I respectfully dissent.”).
345 Justices Scalia, Thomas and Roberts are all Catholic. Joan Biskupic, Changing Faith: Protestants No Longer Rule the High Court, WASHINGTON POST August 4, 1996, at A1; Dennis Coyle, Studying John
federalism advocates over to the federal, instead of the state, side of the PAD issue is somewhat startling.\textsuperscript{346}

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

IV. 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, or PAD, 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.


\textsuperscript{346} 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, \textit{Role of Alito’s Catholic Faith Could be TrickyQuestion}, \textit{CHICAGO SUN TIMES}, November 6, 2005, at A30. Justice Anthony Kennedy is also a Catholic. Biskupic, supra note 352. Although Kennedy authored the majority opinion in \textit{Gonzales}, he has joined the other Catholic justices on several 5-to-4 majority opinions in 2007. Kennedy sided with Roberts, Scalia, Thomas, and Alito in 13 of the 19 5-4 spit decisions issued by the Supreme Court in the 2006-2007 term. See, e.g., Stuart Taylor, Jr. and Evan Thomas, \textit{The Power Broker}, \textit{NEWSWEEK}, 36-37(July 16, 2007) (One of Kennedy’s former clerks said, “He thinks he is the living embodiment or transmitter of the nation’s bedrock values.”). \textit{Id.} at 37. Note also, the fact that Kennedy authored the majority opinion in \textit{Gonzales} might explain why it is so restrained, focusing primarily on the scope of the Attorney General’s administrative powers.
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 times 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 short-comings of the traditional process, they are sometime 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, or PAD, 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 U.S. 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 Act illustrates that an initiative really 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.