

A COMPARISON OF THE POSITIVE EFFECTS OF THE  
SUPREME COURT’S REFUSAL TO CREATE A  
CONSTITUTIONAL RIGHT TO ASSISTED SUICIDE  
WITH THE NEGATIVE EFFECTS OF THE COURT’S  
MANUFACTURE OF A RIGHT TO ABORTION  
PROVIDES EVIDENCE OF FIVE OF ORIGINALISM’S  
BENEFITS

*Lee J. Strang*<sup>†</sup>

INTRODUCTION

Assisted suicide has been an issue of robust debate in the United States since at least the late-1980s.<sup>1</sup> Americans in their individual states, and throughout the country as a whole, vigorously argued for and against the legalization of assisted suicide.

The United States Supreme Court waded into this contentious thicket in *Washington v. Glucksberg* in 1997.<sup>2</sup> The Court ruled that the Constitution did not protect a substantive due process right to assisted suicide.<sup>3</sup> Instead, the Court concluded, “[t]hroughout 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.”<sup>4</sup> This debate *has* continued in the United States to the present.

Though assisted suicide is as contentious an issue as abortion, its path from that otherwise-similar issue has diverged—in a positive direction—because of the Supreme Court’s refusal to create a constitutional right to assisted suicide. I argue in this Essay that this divergence provides evidence of five of

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<sup>†</sup> John W. Stoepler Professor of Law & Values, University of Toledo College of Law. My special thanks to Professor Richard S. Myers for inviting me to participate in this symposium and Professor Lynn D. Wardle for organizing and hosting the symposium.

1. *Washington v. Glucksberg*, 521 U.S. 702, 716–19 (1997).
2. *Id.* at 705–06.
3. *Id.*
4. *Id.* at 735.

originalism's benefits: (1) originalism protects and incentivizes democratic processes; (2) originalism increases Americans' capacity for compromise on important issues about which they robustly disagree; (3) originalism guards the Rule of Law; (4) originalism maintains the judicial nomination process' integrity; and (5) originalism safeguards and secures federalism's benefits.

Below, I first provide a brief summary of the current state of originalist theory. Part II then describes the positive impact of the Supreme Court's refusal to create a constitutional right to assisted suicide compared to the negative impact of the Court's fabrication of a constitutional right to abortion, a comparison that exemplifies five of originalism's benefits.

My claim in this Essay is not that these five positive consequences provide, individually or *in toto*, a sufficient reason to choose originalism over an alternative theory of interpretation. Instead, my limited goal is to provide evidence of those five benefits through comparison of the Supreme Court's different treatment of purported constitutional rights to abortion and assisted suicide. Though I believe these benefits are valuable, I do not think they provide sufficient reason, by themselves, to prefer originalism over another theory. They do, however, parry some nonoriginalist criticisms of originalism, and they also provide additional reasons to favor originalism over competitor theories, all things considered.

#### I. BRIEF SUMMARY OF ORIGINALISM: FIXED CONSTITUTIONAL MEANING, WITH QUALIFICATIONS

Originalism is one of the main theories of constitutional interpretation today. Its core claim is that the public meaning of the Constitution's text when it was ratified is its authoritative meaning.<sup>5</sup> This core claim cashes-out into two components: (1) the Constitution's meaning was fixed at the time the text was ratified; and (2) the Constitution's fixed original meaning contributes to constitutional doctrine.<sup>6</sup> There is divergence among originalists on both axes.

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5. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 92 (2005) (hereinafter *RESTORING*); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 53 (1999); Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017).

6. Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 7 (Mar. 24, 2017), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2940215](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215) (describing the constraint principle); see Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) (describing the fixation thesis); see also BARNETT, *RESTORING*, *supra* note 6, at 96; Solum, *Methodology*, *supra* note 5, at 269.

For instance, on the first axis, originalists focus on different forms of the fixed meaning: original public meaning, original intended meaning, and original methods meaning.<sup>7</sup> Similarly, originalists vary regarding how much the original meaning must contribute to current constitutional doctrine.<sup>8</sup>

Most originalists have also adopted the doctrine of constitutional construction.<sup>9</sup> Constitutional construction is the activity in which interpreters engage once they have exhausted the Constitution's original meaning. Construction occurs when the Constitution's original meaning is underdetermined.<sup>10</sup> Interpreters in the "construction zone" must construct—create—constitutional doctrine that is consistent with the known original meaning but not determined by it. In the construction zone, interpreters have discretion on how to craft constitutional meaning.<sup>11</sup> Originalists disagree over which branch of the government has authority to construct constitutional doctrine. Some originalists, including myself, argue that Congress and the President have authority to construct constitutional doctrine,<sup>12</sup> while others argue that the Supreme Court should do so.<sup>13</sup>

Lastly, most originalists have also argued for originalism's incorporation of some nonoriginalist precedent.<sup>14</sup> Nonoriginalist precedent is precedent that incorrectly articulated or applied the Constitution's original meaning.<sup>15</sup> Through using different rationales and tests, most originalists have proposed

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7. Lee J. Strang, *Originalism as Popular Constitutionalism?: Theoretical Possibilities and Practical Differences*, 87 NOTRE DAME L. REV. 253, 263 (2011).

8. That being said, most originalists argue that the text's public meaning, at the time it was ratified, should determine the answer to legal questions. ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 10 (2011).

9. E.g., BARNETT, *RESTORING*, *supra* note 5, at 121; WHITTINGTON, *supra* note 5, at 7. The notable exceptions are Professors McGinnis and Rappaport. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 140 (2013).

10. BARNETT, *RESTORING*, *supra* note 5, at 121.

11. WHITTINGTON, *supra* note 5, at 5.

12. Lee J. Strang, *The Role of the Common Good in Legal and Constitutional Interpretation*, 3 U. ST. THOMAS L.J. 48, 70–72 (2005).

13. See BARNETT, *RESTORING*, *supra* note 5, at 267 (discussing the "Presumption of Liberty" and the need for judicial review to protect individual rights).

14. See MCGINNIS & RAPPAPORT, *supra* note 9, at 175; Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1442 (2007). But see Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24 (1994); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1570–82 (2000); Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1333 (2006).

15. See Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729, 1740 (2010).

that originalism not reject all nonoriginalist precedent. I have argued that the original meaning of Article III “judicial Power” requires federal judges to utilize three factors to evaluate the continued viability of nonoriginalist precedent.<sup>16</sup>

Scholars have robustly criticized originalism. One such criticism, relevant to this Essay, is that originalism prevents constitutional doctrine from achieving just results. For example, scholars have argued that originalism would prevent the Supreme Court from identifying constitutional rights to abortion<sup>17</sup> or same-sex marriage<sup>18</sup> and, conversely, that originalism is bad to the extent it required the Supreme Court to protect an individual right to keep and bear arms.<sup>19</sup> In the assisted suicide context, originalism is similarly subject to criticism for its inability to deliver a constitutional right to assisted suicide<sup>20</sup> in the same way that the *Glucksberg* Court was criticized for its refusal to find such a constitutionally protected right.<sup>21</sup>

Below, I argue that originalism’s inability to protect a constitutional right to assisted suicide, which coincided with *Glucksberg*’s result, shows that originalism produces a number of salutary benefits for our society and legal system. I support this claim through a comparison with the—I argue—negative consequences of the Supreme Court’s nonoriginalist decision in *Roe v. Wade*.<sup>22</sup>

16. Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 420 (2006).

17. See, e.g., Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 291–92 (2007) (describing this); see also Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 552–53 (2017) (“This is not to say that the old originalists had it right. Quite to the contrary, the old originalism suffered from very serious problems, including the fact that it could not justify some of our most deeply valued norms of constitutional law. . . , for example, *Roe* . . .”).

18. See Ian P. Farrell, *Enlightened Originalism*, 54 HOUS. L. REV. 569, 572–73 (2017) (arguing that “enlightened originalism” is substantively as good as nonoriginalism because it “takes into account evolving social standards in our understanding [through] application[] of the Constitution’s moral terms, [and] resolves constitutional controversies in a manner more in line with living or justice-seeking constitutionalism than with the various, already familiar flavors of originalism”); William N. Eskridge, Jr., *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1114–18 (2015) (arguing, according to the author, contrary to popular assumption, that the Equal Protection Clause’s original meaning required states to authorize same-sex marriage, and challenging self-professed originalists to agree or disagree).

19. See, e.g., Jeffery M. Shaman, *The Wages of Originalist Sin: District of Columbia v. Heller* 6 (July 17, 2008), <http://ssrn.com/abstract=1162338>.

20. See generally Joan Biskupic, *Unanimous Decision Points to Tradition of Valuing Life*, WASH. POST (June 27, 1997), <http://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/die.htm>.

21. See Erwin Chemerinsky, *Washington v. Glucksberg Was Tragically Wrong*, 106 MICH. L. REV. 1501, 1503 (2008) (criticizing the Court and originalism for failing to recognize a “right to privacy” in the Constitution that would protect assisted-suicide).

22. *Roe v. Wade*, 410 U.S. 113, 166 (1973).

II. A COMPARISON OF THE SUPREME COURT'S NOT FINDING A CONSTITUTIONAL RIGHT TO ASSISTED SUICIDE WITH ITS FINDING OF A CONSTITUTIONAL RIGHT TO ABORTION SHOWS FIVE OF ORIGINALISM'S BENEFITS

A. *Introduction*

A common criticism of originalism is that it fails to achieve just results, and this includes the lack of a constitutional right to assisted suicide. In this Part, I argue that, on the contrary, a comparison of the Supreme Court's *Glucksberg* and *Roe* decisions, and their different impacts on our nation, provides evidence of five benefits that originalism produces and the harm that nonoriginalism creates.

B. *Originalism Protects and Incentivizes Democratic Processes*

The Supreme Court's refusal to employ a nonoriginalist methodology and create a constitutional right to assisted suicide protected and incentivized America's democratic processes. By contrast, the Supreme Court's creation of a constitutional right to abortion harmed and disincentivized American popular sovereignty.

The American People adopted the various provisions in the Constitution at different times and typically after robust debate and discussion. For instance, Americans engaged in a decades-long debate over gender equality in voting prior to coming to a consensus and embodying that consensus in the Nineteenth Amendment in 1920.<sup>23</sup> Originalism protects and incentivizes Americans' engaging in such democratic debate and ultimately embodying the results of that debate (or not) in the Constitution's text.<sup>24</sup>

First, originalism *protects* American democratic processes. It does so in many ways. First, originalism respects the constitutional judgments of the American People embodied in the Constitution. Once the American People place a constitutional judgment in the Constitution, originalism requires judges to ascertain that fixed constitutional meaning of the American People, and to be faithful to that meaning in the creation of constitutional doctrine.

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23. U.S. CONST. amend. XIX (1920); JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN'S L.J. 103 (1994).

24. WHITTINGTON, *supra* note 5, at 154–55.

For instance, once the American People embodied their commitment to gender equality in voting in the Constitution's text, we have not looked back.

Second, originalism respects the constitutionally protected space for federal and state democratic processes. The United States Constitution, expressly and via constitutional principles, provides wide space for Americans to resolve social problems through law on federal, state, and local levels. For example, the Constitution's text specifically authorizes the federal legislature to resolve national problems, such as interstate trade disputes.<sup>25</sup> And it explicitly protects state legislative autonomy, such as state control over the education of its citizens.<sup>26</sup> Furthermore, the constitutional principles of separation of powers<sup>27</sup> and federalism,<sup>28</sup> protect and supplement these textual acknowledgements of democratic processes. Originalism requires federal judges to identify and respect the constitutionally authorized and recognized authority of these legislative actions.

Third, and relatedly, originalism respects the democratic processes of state constitutionalism. Every American state has a constitution, and, unlike the federal Constitution, most are subject to frequent debate and change because of their relative ease of amendability.<sup>29</sup> For this reason, state constitutions tend to be close(r) approximations of states' citizens' current policy views. Originalism requires federal judges to respect state constitutional processes when the processes themselves and their products are consistent with the Constitution's original meaning.<sup>30</sup>

Second, originalism *incentivizes* Americans to be engaged in democratic processes. It does so by creating a space for democracy to operate—for democracy to answer important questions. Originalism prevents judges from answering at least some important constitutional questions (in the

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25. U.S. CONST. art. I, § 1, cl. 1, § 8.

26. *Id.* amend. X; see *United States v. Lopez*, 514 U.S. 549, 580–81 (1995) (Kennedy, J., concurring).

27. See U.S. CONST. art. I, § 1, cl. 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1, cl. 1.

28. *Texas v. White*, 74 U.S. 700, 726 (1869).

29. Compare Jeffrey S. Sutton, *What Does - and Does Not - Ail State Constitutional Law*, 59 KAN. L. REV. 687, 689 (2011) (discussing some of the pitfalls of such amendability).

30. Let me pause before proceeding to suggest a distinction between the first manner by which originalism respects democracy from the second and third. The second and third are subject to the counter-weight that, on occasion, originalism will *not* respect those democratic processes because the Constitution's original meaning protects an activity from federal or state democratic oversight. For instance, states may not ban handguns via state statute or constitutional amendment. *E.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010). The first manner of originalist respect for democratic processes is not, however, subject to this counter-weight because, by hypothesis, it protects the democratically-enacted constitutional judgment.

Constitution's name) in the manner that nonoriginalism otherwise would: through the creation of a constitutional "trump card" against legislatures. Originalism's answer pushes such questions (and ultimate answers) to democratic fora (federal and state legislatures, and constitutional change procedures). Doing so incentivizes Americans, who seek legal change, to direct their energies to those fora and not to judicial selection.

The lynchpin of this argument is that originalism identifies the Constitution's meaning as the text's public meaning, when it was ratified—the fixation thesis.<sup>31</sup> This meaning is, by hypothesis, the meaning that the American People would understand an amendment under consideration to be. The public meaning is the text's conventional meaning, augmented by contextual enrichment.<sup>32</sup> Originalism promises later to follow this meaning—the constraint principle.<sup>33</sup> Nonoriginalism, by contrast and by definition, may supplant the original meaning with some meaning other than the original public meaning.

For example, compare the Nineteenth Amendment to the proposed Equal Rights Amendment. The Nineteenth Amendment was bitterly divisive, but slowly, over the decades—at first state-by-state and then, later, with a nationwide constitutional amendment—proponents of gender equality in voting persuaded their fellow citizens.<sup>34</sup> The American People had an appropriately high incentive to expend so much energy debating the issue. They knew that their constitutional judgment in the Constitution's text would be respected by later judicial interpreters, and the only way to maintain that incentive for future constitutional amendments is for our constitutional practice to utilize originalism.<sup>35</sup>

By contrast, the proposed Equal Rights Amendment's failure shows how nonoriginalism *disincentivizes* such healthy constitutional debate.<sup>36</sup> The Amendment, introduced in 1972, was likely to pass despite spirited opposition.<sup>37</sup> However, the Supreme Court, through an innovative

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31. Solum, *The Fixation Thesis*, *supra* note 6.

32. See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 484–507 (2013) (describing communicative content); see also BENNETT & SOLUM, *supra* note 8, at 10.

33. Solum, *The Constraint Principle*, *supra* note 6.

34. See generally Lind, *supra* note 23, at 198–99.

35. MCGINNIS & RAPPAPORT, *supra* note 9, at 82.

36. *Id.* at 149 (arguing that potential broad interpretation or construction of the ERA by courts left the people uncertain as to what the amendment would do).

37. *Id.* at 93.

interpretation of the Equal Protection Clause, created “heightened scrutiny” for gender classification in 1976.<sup>38</sup> Opponents of the ERA argued that the American People no longer needed to expend their energy debating and adopting it because the Supreme Court had already done the “heavy lifting” for them.<sup>39</sup> The Court’s nonoriginalist interpretation disincentivized the American People’s vigorous constitutional debate. Nonoriginalism reduces the incentive for the American People to expend time, energy, and resources because it removes the likelihood that the Supreme Court will later respect their constitutional judgment.

It is not a coincidence that the American People have ceased to debate and adopt substantive constitutional amendments.<sup>40</sup> The last substantive constitutional amendment was ratified in 1920 (the Nineteenth Amendment<sup>41</sup>) or, at the latest, 1933 (the Twenty-First Amendment, which repealed prohibition).<sup>42</sup> The American People no longer do so because nonoriginalist Supreme Court opinions usurped the amendment process. Fatefully, instead of proposing constitutional amendments to authorize his New Deal legislation, President Roosevelt constructed a Supreme Court that re-interpreted the Constitution to authorize it.<sup>43</sup> Since then, Americans focus on judicial nominations and not on persuading their fellow citizens about constitutional amendments to achieve constitutional change. This claim is so widely accepted, that Professor Bruce Ackerman crafted an entire theory of “higher lawmaking” to celebrate it.<sup>44</sup>

Assisted-suicide exemplifies how originalism protects and incentivizes democratic processes. Leading up to *Washington v. Glucksberg* in 1995, assisted-suicide advocates (and their opponents) focused much of their energy on persuading the Supreme Court to create (and reject) a constitutional right to assisted suicide.<sup>45</sup> Some advocacy was directed to federal and state

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38. *Craig v. Boren*, 429 U.S. 190, 204 (1976).

39. MCGINNIS & RAPPAPORT, *supra* note 9, at 93 (discussing the fear that broad interpretations of the ERA would, among other things, require same-sex bathrooms, or require women to serve in combat).

40. *Id.*

41. U.S. CONST. amend. XIX.

42. U.S. CONST. amend. XXI.

43. MCGINNIS & RAPPAPORT, *supra* note 9, at 47.

44. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 3–31 (1998).

45. *See* Chemerinsky, *supra* note 21, at 1505 (laying out the “right to privacy” argument which had developed before *Glucksberg*).



legislative and constitutional fora as well, but the percentage directed to those sources dramatically increased after *Glucksberg*.<sup>46</sup>

The first state to legalize assisted suicide was Oregon, in 1994, via state constitutional amendment.<sup>47</sup> After *Glucksberg*, the debate continued to percolate so that, subsequently, California, Montana, Vermont, and Washington have approved assisted suicide.<sup>48</sup> At the same time, in the other states, advocates repeatedly introduced proposals to allow assisted suicide, and those proposals have failed to secure their states' agreement.<sup>49</sup>

This robust state and national debate shows no signs of abating, and Americans of good will have and will continue to (try to) persuade their fellow citizens that their perspective is best. At some point, Americans may reach a consensus and embody that consensus in the national Constitution's text. Or—and I think this is more likely—American states will settle into an equilibrium where some relatively stable number of states authorize assisted suicide (with varying restrictions) and another relatively stable number prohibit it.

*Glucksberg* protected and incentivized Americans to engage in this robust democratic debate and action. It protected the American People's current and historical constitutional judgment *not* to constitutionally decide the issue of assisted suicide. It also incentivized the American People to continue their robust debate on assisted suicide by protecting the product of that debate from Supreme Court nonoriginalist invalidation.

Contrast that desirable outcome with abortion. Abortion shows how nonoriginalism harms and undermines American democratic processes. Like assisted suicide, after a period during which abortion was generally restricted, beginning in the 1960s, Americans of good faith increasingly debated whether,

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46. See *Physician-Assisted Suicide Fast Facts*, CNN LIBRARY (June 7, 2016, 12:45 PM), <http://www.cnn.com/2014/11/26/us/physician-assisted-suicide-fast-facts/>. Three states—California, Washington, and Vermont—have legislation legalizing assisted suicide since *Glucksberg*, with assisted suicide becoming legal in Montana through state court order.

47. See Or. Rev. Stat. Ann. § 127.805 (West 2017).

48. See CNN, *supra* note 46.

49. *Id.*

and to what extent, abortion should be legal.<sup>50</sup> The debate was both national and local, and many states were modifying their abortion restrictions.<sup>51</sup>

However, the Supreme Court, in its 1973 *Roe v. Wade* decision, created a constitutional right to abortion.<sup>52</sup> The Supreme Court's nonoriginalist decision harmed and disincentivized democratic processes. *Roe* harmed democratic processes by rejecting the American People's constitutional judgment that the Due Process Clause did not protect (or prohibit<sup>53</sup>) abortion. It further harmed democratic processes by rejecting nearly all federal and state, legislative and constitutional, abortion restrictions.<sup>54</sup>

*Roe* also removed the American People's incentive to engage in democratic processes. *Roe*'s one-size-fits-all constitutional rule precluded federal and state legislative processes and state constitutional processes.<sup>55</sup> Instead, *Roe* channeled debate and discussion into judicial nomination battles, presidential elections, and debates over constitutional interpretation.<sup>56</sup> Furthermore, *Roe*'s aggressive use of nonoriginalism admonished Americans to not trust the Article V amendment process and to instead focus their constitutional energies on changing the Supreme Court's interpretation of the Constitution via change in the Court's composition.

To help evaluate how harmful *Roe* was to America's democracy, think about an alternative originalist *Roe*, and how it would improve our country.<sup>57</sup> The Supreme Court would have upheld Texas' and most other states' protections for unborn humans. That would have stimulated the already-robust debate among Americans in their individual states and among Americans nationally. On a state-by-state level, each state's citizens would

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50. See Linda Greenhouse & Reva B. Siegal, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2077 (2011) (discussing the debate and the opposition of, especially, Catholics to legislative proposals by the American Law Institute and others to liberalize abortion laws); see also JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (2006) (providing a detailed history of abortion).

51. See Greenhouse & Siegal, *supra* note 50, at 2047–49.

52. *Roe v. Wade*, 410 U.S. 113, 165–66 (1973).

53. But see Nathan Schlueter, *Drawing Pro-Life Lines*, FIRST THINGS (Oct. 2001), <https://www.first-things.com/article/2001/10/drawing-pro-life-lines> (arguing that abortion is constitutionally proscribed).

54. *Doe v. Bolton*, 410 U.S. 179, 201 (1973).

55. See *Planned Parenthood v. Casey*, 505 U.S. 833, 979–80 (1992) (Scalia, J., dissenting in part).

56. See Jeffery Rosen, *So, Do You Believe in 'Superprecedent?'*, N.Y. TIMES (Oct. 30, 2005), <http://www.nytimes.com/2005/10/30/weekinreview/so-do-you-believe-in-superprecedent.html>.

57. See *Casey*, 505 U.S. at 980 (Scalia, J., dissenting in part) (lamenting the loss of persuasion and voting).

persuade one another and, in that state, the citizens would decide whether abortion was the right path for its citizens.

Federalism is the default rule in our constitutional system, and it is a good rule because Americans are different, and federalism allows people of like-mind to live with each other. It allows for greater overall preference satisfaction. California is different from Utah, and, if you lived in a state with whose policies on this or other issues you disagreed, you could move to a more hospitable state. It is likely that Americans would have reached a relatively stable consensus (though, I could see how that consensus may have developed in two distinct ways<sup>58</sup>).

On the federal level, an originalist abortion decision would ignite a national debate. Americans would “exercise their civic muscles” by debating federal legislation and constitutional amendments. This would be great for our country, not a cause for regret.

### C. *Originalism Increases Americans’ Capacity for Compromise*

Originalism increases Americans’ capacity to compromise on important substantive issues. Compromise is important to preserve peace, stability, and the Rule of Law, essential background conditions for human flourishing that are especially difficult to achieve in a deeply pluralistic culture like that in the United States.

Originalism makes two key moves to increase Americans’ capacity for compromise. First, it puts resolution of issues in fora within which compromise is structurally more likely to occur. Second, originalism lowers the stakes of disputes from close to winner-take-all to less consequential contests.

First, simply by making issues susceptible to compromise through the normal political process, originalism limits political polarization and thereby increases the possibility of compromise. Compromise on important issues may occur only if the potential compromisers have the capacity to effectuate a compromise. In our legal system, compromise occurs regularly within federal and state legislatures, and on a host of important—and divisive—issues. For instance, Americans compromise on education policy for children.

The normal political process is structurally open to compromise both in the language it uses and its processes. The legislative process does not operate solely with the language of constitutional rights, which tend toward

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58. Schuyler Miller, *The Coast vs. the Heartland*, THE DEMOCRACY NETWORK (Oct. 29, 2016), <https://medium.com/the-democracy-network/the-coast-vs-the-heartland-5c58a40e8ca>.

absoluteness. By contrast, legislative proposals tend toward pragmatism and softness. Moreover, the adversarial litigation process, coupled with the doctrinal framework into which constitutional rights are nested, makes compromise difficult in constitutional litigation. The legislative process, by contrast, invites compromise because it involves deal-making between legislators writing on a slate free of *stare decisis*.

Furthermore, through its default of state regulation of issues, originalism also reduces the stakes of constitutional interpretation, thereby increasing the capacity for intra-United States compromise. Originalism identifies and preserves substantial space for federalism; federalism is the default rule in our constitutional system.<sup>59</sup> Federalism enables Americans of different views on important issues to live in polities that hew relatively more closely to their views. This capacity for intra-American diversity on important issues reduces the stakes of federal decision making. Americans know that, even if they “lose” in a presidential election, or their preferred political party loses control of Congress, or justices with different views are appointed, they can continue their lives much as before. Therefore, to the extent originalism better protects federalism than nonoriginalism, which, in practice, is substantial,<sup>60</sup> originalism reduces the stakes of federal elections and makes compromise more likely.

Second, originalism increases Americans’ capacity to compromise because issues in legislatures are not identified as all-or-nothing: either a judicially enforced constitutional right or no constitutional right at all. One of the effects of an activity being a judicially enforced “constitutional right” is to shield it from popular pressure. For example, the fight over the Free Exercise Clause’s interpretation is motivated by the potential for exemption from democratically enacted restrictions on religious exercise.

The pressure toward all-or-nothingness comes from the character of judicial enforcement of constitutional rights more than the character of rights themselves. Judges have difficulty drawing pragmatic as opposed to principled lines.<sup>61</sup> This pushes judges toward clear lines and away from balancing. Even the purported balancing tests in constitutional law typically operate in a rule-like fashion. For example, much of the heavy lifting performed by the three-tiered levels of scrutiny in substantive due process and equal protection doctrine is the placement in a particular tier. Another piece

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59. See, e.g., U.S. CONST. amends. IX, X (reserving powers to the individual states and the American People).

60. Through the principle of limited and enumerated powers, among other means.

61. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 369 (1978).

of evidence of how purported balancing tests operate in rule-like fashion is that judges who attempt to be “pragmatic” with their articulation of constitutional rights frequently end with opaque analysis. This occurred, for instance, in Justice Kennedy’s series of opinions beginning with *Romer v. Evans*<sup>62</sup> and ending with *Obergefell v. Hodges*.<sup>63</sup> Though these opinions attempted to be judicious through use of rational basis review, both their results and their thin reasoning suggest impermeability to compromise.

As a result, if a party presents a claim for a constitutional right, judges are pushed by their institutional setting to accept the claim *in toto* or reject it. This hinders the possibility of compromise.

By contrast, in the legislative sphere, legislators can draw lines that respect constitutional rights while also acknowledging other values. For instance, legislatures that have produced legislation to protect the constitutional right to keep and bear arms through concealed-carry laws, have also provided limits on that activity, such as registration.<sup>64</sup>

A second way that originalism lowers the stakes is that it decreases the stakes of presidential elections by reducing the role of presidential Supreme Court nominations in place of fixed, stable, constitutional “rules of the game.” Currently, and since the New Deal, American presidential elections are incredibly high stakes; they may have regime-change level consequences. In large measure, presidential elections are so consequential because presidents largely determine the Supreme Court’s composition and, in turn, the Supreme Court largely determines the Constitution’s meaning. This occurs because the Supreme Court does not utilize originalism and, under a nonoriginalist methodology—in principle—all of the currently politically-viable policy views are possible constitutional interpretations.

That means that, every four years, the “rules of the game” themselves are up for grabs. For instance, in the 2016 election, with up to four Supreme Court justice positions in play,<sup>65</sup> a panoply of substantive issues were also in play. To give just a brief list of the most politically valent: the breadth of the federal government’s authority under its limited and enumerated powers, the capacity of Congress to delegate lawmaking power to administrative agencies, independent executive power, immigration, the President’s control of

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62. *Romer v. Evans*, 517 U.S. 618, 623–35 (1996).

63. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593–2608 (2015).

64. The state of Michigan, for example, has both concealed carry and handgun registration requirements. MICH. COMP. LAWS § 28.422(5)–(6) (2016).

65. Nina Totenberg, *The Supreme Court: A Winning Issue in the Presidential Campaign?*, NPR (Sept. 29, 2016, 4:53 PM), <http://www.npr.org/2016/09/29/495960902/the-supreme-court-a-winning-issue-in-the-presidential-campaign>.

executive officials through removal, free speech, free exercise, religious establishment, gun rights, abortion, marriage, and many other important issues.

This high-stakes process reduces the ability and incentive to compromise. To gather a political coalition to secure election, political parties are limited in their capacity to compromise on key issues. And, once victory is secured, compromise is unnecessary because the winning side can dominate the presidency and the Court, and the Constitution for decades.

Originalism would significantly reduce the stakes of presidential elections and foster compromise. Originalism “lock[s]-in”<sup>66</sup> the rules of our constitutional republic. Every four years, most major issues are not in play. This is because the Supreme Court has less discretion to (re)interpret the Constitution, and so judicial nominations are less important, as is the President who nominates them. Political parties can coalesce around substantive party platforms that will be worked out in the give-and-take of the legislative process, and they have an incentive to do so.

The Supreme Court’s ruling in *Glucksberg* provided the continuing opportunity for Americans to decide how to address assisted suicide in fora more susceptible to compromise and reduced the pressure in contests over the issue. Following *Glucksberg*, the primary places Americans debated assisted suicide was in state legislatures and state constitutional referenda.<sup>67</sup> These institutions were designed to and ultimately encouraged compromises on the issue. For example, California’s recent law approving of physician-assisted suicide contains a significant number of checks on the practice.<sup>68</sup> Furthermore, by placing the issue in the context of state-by-state and legislative resolution, it reduced the electoral stakes in national elections and put the issue in state legislative elections where it became one issue among many; an issue capable of compromise like other issues. Presidential candidates and their supporters debated abortion; assisted suicide was not a major issue.<sup>69</sup>

By contrast, the *Roe* Court’s (ostensibly) constitutionally-required, national, one-size-fits-all dictate eliminated the possibility of compromise and raised electoral stakes. Following *Roe*, Americans of good faith who wished

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66. See BARNETT, RESTORING, *supra* note 5, at 353.

67. See, e.g., CNN, *supra* note 46.

68. See Soumya Karlamangla, *How California’s Aid-In-Dying Law Will Work*, L.A. TIMES (May 12, 2016, 3:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-end-of-life-option-act-qa-20160511-story.html>.

69. See, e.g., RNC Communications, *The 2016 Republican Platform*, GOP (July 18, 2016), <http://www.gop.com/the-2016-republican-party-platform/>. The platform mentions euthanasia and assisted suicide in passing, rather than being a major issue. *Id.*

to chart a different course for their state or the United States did not have the institutional capacity to compromise. Instead, their only viable course of action was to advocate for a differently composed Supreme Court that would overrule *Roe*. Furthermore, pro-life Americans' political incapacity caused them to focus on presidential elections as the sole source of potential change, making that quadrennial election of the utmost importance.

#### D. *Originalism Protects and Facilitates the Rule of Law*

The Rule of Law is a universal ideal of Americans and our legal system.<sup>70</sup> It is one of the few commitments that holds us together, and the Constitution is the center of Americans' commitment to the Rule of Law.<sup>71</sup> Therefore, faithfulness to the Constitution is necessary to our legal system's Rule of Law. Fealty to the Constitution requires understanding and following it.

In particular, for courts, the Rule of Law means at least applying pre-existing constitutional meaning. If a judge does not understand the Constitution's meaning and applies some other meaning to a case, that judge is not faithful to the Constitution. Similarly, if a court knows the Constitution's meaning and applies some other meaning, that court is not faithful to the Constitution.

Delegating to the Supreme Court the awesome power of constitutional judicial review makes sense *if* the Supreme Court's exercise of that power comports with and fosters the Rule of Law. The rationale provided by Alexander Hamilton in *Federalist* 78<sup>72</sup> and Chief Justice Marshall in *Marbury v. Madison*,<sup>73</sup> comported with the Rule of Law. Both argued that judicial review advanced the Rule of Law by providing an institution that would privilege the Constitution over other potential sources of conflicting law.<sup>74</sup>

Originalism supports our legal system's aspiration to the Rule of Law and nonoriginalism does not, at least not as well.<sup>75</sup> Originalism's fixation thesis and constraint principle commit it to following the Constitution's pre-existing meaning. The fixation thesis commits originalism to constitutional meaning

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70. See RONALD DWORKIN, *LAW'S EMPIRE* 8 (1986) (discussing the predilection of Americans (and the British) to believe strongly that the law should be followed by, rather than improved upon by, judges).

71. *Planned Parenthood v. Casey*, 505 U.S. 883, 934 (1992).

72. THE FEDERALIST NO. 78 (Alexander Hamilton).

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

74. *Id.*; THE FEDERALIST NO. 78, *supra* note 72.

75. See Solum, *The Constraint Principle*, *supra* note 6, at 58–83, 87–141 (arguing that originalism is relatively better at protecting and facilitating the Rule of Law than nonoriginalism).

that does not change; once constitutional meaning is created, it is fixed.<sup>76</sup> The constraint principle commits originalism to following that pre-existing constitutional meaning.<sup>77</sup> Therefore, originalism commits the Supreme Court to applying the Constitution's pre-existing meaning to parties and their lives, liberty, and property. Our legal system, following originalism, would follow the Rule of Law.

Indeed, it is originalism's impermeability to contemporary (elite) conceptions of good policy and their corresponding constitutional interpretations that is a major source of criticism! Originalism's constitutional meaning is fixed at particular periods in the past, prior to contemporary (elite) acceptance of, for example, abortion and assisted suicide.<sup>78</sup> Furthermore, originalism's constitutional meaning is inflexible because that historically fixed meaning constrains constitutional doctrine so that Supreme Court justices who wish to interpret the Constitution to protect abortion and assisted suicide cannot do so. As Professor Randy Barnett pithily put it, originalism "lock[s]-in" the original meaning.<sup>79</sup>

To the extent that nonoriginalist methodologies result in constitutional interpretations that did not pre-exist their application, it undermines the Rule of Law. The variety of nonoriginalist theories makes it impossible to make a claim with universal application; however, with some prominent exceptions,<sup>80</sup> a general characteristic of nonoriginalist theories is their rejection of either or both the fixation thesis and constraint principle. For at least some nonoriginalist theories, the Constitution's meaning is not fixed; it changes. Professor David Strauss' living constitutionalism identifies the constitution's meaning as evolving common law style.<sup>81</sup> For other nonoriginalists, the text's fixed meaning does not constrain constitutional doctrine, which is built from other sources. For instance, Professor Bruce Ackerman's theory of nontextual "higher lawmaking" authorizes the American People to supplant the text's fixed meaning via transformative judicial precedents or federal statutes.<sup>82</sup> These nonoriginalist theories cash out in courts determining citizens' life,

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76. Solum, *The Fixation Thesis*, *supra* note 6.

77. Solum, *The Constraint Principle*, *supra* note 6.

78. The Fourteenth Amendment was adopted in 1868 when both practices were largely illegal.

79. *See*, BARNETT, *RESTORING*, *supra* note 5, at 353.

80. DWORKIN, *supra* note 70, at 131–34.

81. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

82. *See* ACKERMAN, *supra* note 44, at 23–26 (describing the New Deal Supreme Court's nonoriginalist decisions as "transformative judicial opinions") (emphases deleted); BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 5–15 (2014) (describing "landmark statutes").



liberty, and property using constitutional meaning that did not pre-exist the determinations.

Like the other benefits I have identified, originalism's advancement of the Rule of Law is not a "knock-down" argument in originalism's favor. In part, this is because—like any plausible theory of constitutional interpretation—originalism sometimes privileges other values over the Rule of Law. For instance, originalism's acceptance of the continued viability of some nonoriginalist precedent, in part for the sake of protection of reliance interests,<sup>83</sup> introduces indeterminacy into originalism and means that, on occasion, citizens will not be able to clearly ascertain what the Constitution requires.

Furthermore, originalism's support for the Rule of Law is not an overwhelming argument because some nonoriginalist theories, at least on their own terms, advance the Rule of Law as well or perhaps better than originalism. Professor Ronald Dworkin's law-as-integrity conception of law provides one-hundred percent protection for the Rule of Law because there is always a right legal answer, one that, in principle, is epistemically available.<sup>84</sup>

*Glucksberg* shows how originalism respects the Rule of Law. The Supreme Court declined to make a new constitutional interpretation in *Glucksberg*. It was faithful to the Constitution because it followed and preserved existing constitutional meaning. The parties to the case received the treatment due them under the law, under the Constitution.

*Roe* shows how nonoriginalism undermines the Rule of Law. The Supreme Court created a new meaning for the Due Process Clause and applied it in *Roe* itself. Neither Texas (and the forty-nine other states), nor even the Supreme Court itself, had access to that new meaning prior to the case.<sup>85</sup>

#### E. *Originalism Protects the Judicial Nomination Process' Integrity*

If the Supreme Court was a group of distinguished lawyers deciding *legal* questions, then most important issues in the United States would be decided by the Constitution's original meaning and in state legislatures, and, to a lesser degree, in Congress.

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83. Strang, *Precedent: Originalism, Nonoriginalist Precedent, And The Common Good*, *supra* note 4, at 42.

84. DWORKIN, *supra* note 70, at 215–16.

85. See *Roe v. Wade 1971 Oral Argument*, CSPAN, at 59:20 (1971) (last visited 01/27/2017) <https://www.c-span.org/video/?59719-1/roe-v-wade-1971-oral-argument> (recording when a justice asks Roe's attorney, Sarah Weddington, under what part of the Constitution did she raise her client's claim, and Weddington responds with a hodgepodge of clauses).

Supreme Court justices have nearly always been lawyers, and very skilled lawyers. Lawyers are good at the bread-and-butter of law: legal argument. Legal argument is constituted by arguments based on legal texts, history, structure, and precedent. Law school trains lawyers to master these legal arguments, and a lifetime of legal practice can make one excellent at them.

The judicial confirmation process would function well in this (alternate) originalist world. The President would nominate, and the Senate would confirm based on a nominee's legal education and legal practice. Did this nominee do well in law school learning legal arguments? Did this nominee distinguish himself in practice through his effective use of legal arguments?

Lawyers have no special expertise in other intellectual enterprises, such as philosophy or sociology. We have no special insight into questions like: "What is the best conception of "liberty?" "Is an unborn human ethically like other humans?" "Does our country of 315 million people support assisted suicide?" If one wished to answer these questions, you *might* go to a philosopher or sociologist,<sup>86</sup> but you would *not* ask your local lawyer or even a prominent judge. Lawyers are perfectly nice people, and they tend to be more highly educated and informed than the average American, but their experience and expertise is in legal argumentation, not questions that are properly philosophical or sociological. Looking at the typical law school curriculum shows that rarely are these sorts of questions evaluated, much less answered.<sup>87</sup> Furthermore, despite the wide variety of areas of legal practice, rarely will a lawyer directly confront these sorts of questions.

Unfortunately, since the Supreme Court appears to be in the business of answering important *nonlegal* questions in a *nonlegal* manner, Americans, political movements, and political parties have and will continue to pour tremendous resources into the judicial nomination process. Rightly, they will all want to "get confirmed" their nominee who holds their policy views on those important nonlegal issues. Instead of asking about a nominee's facility with legal arguments, the process will seek to answer these important nonlegal issues such as "What is your conception of liberty?" So long as the Supreme Court continues to answer *nonlegal* questions, the process will devolve even further into the cat-and-mouse game of results-oriented politics.

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86. Though, at least empirically, that does not appear to be what Americans do. Instead, if (and it is a big if) Americans seek to answer such questions, they answer these questions for themselves through reading.

87. See generally *ABA Standards and Rules of Procedures for Approval of Law Schools 2016-2017*, Program of Legal Education 15-25 (discussing the legal curriculum law schools must have for accreditation, which focuses on legal knowledge and skills, not philosophy).

Originalism will maintain the judicial nomination process' integrity. The process will seek to discern and have the capacity to discern two key things about nominees: (1) is a nominee committed to following the Constitution's original meaning; and (2) is the nominee adept at uncovering and following that meaning using the tools of text, structure, precedent, and history?

Nonoriginalism will continue to corrupt the nomination process. By definition, nonoriginalist theories include within their interpretative calculus an indeterminate category of factors. Some look at "the People themselves,"<sup>88</sup> others at what is "morally best,"<sup>89</sup> and still others at what a particular philosophical system would say is ideal.<sup>90</sup> The nomination process, to be effective, would have to ascertain what that factor is and how it weighed in the nominee's interpretative calculus.

*Glucksberg* shows how originalism would maintain the nomination process' integrity. The President or senators evaluating Supreme Court nominees would not have to worry about or inquire into a nominee's substantive views on assisted suicide. Either the Constitution's original meaning protects it, or it does not. And, so long as the nominee professes fealty to that meaning, the process has served its purpose.

Has *Roe* helped or hurt our nomination process? It has caused Americans to devote inordinate time and resources to nominate or reject justices based on the nominee's substantive views on one issue: abortion. Many Americans, on both sides of the aisle, only care about whether the nominee will vote for or against abortion; they do not care about the nominee's legal acumen or judicial character.

#### F. *Originalism Protects and Facilitates Federalism's Benefits*

Originalism is able to leverage federalism to protect individual liberty, encourage experimentation, and maximize preference satisfaction. It does so through faithfulness to the Constitution's original meaning, which contains federalism as one of its structural principles.

The Constitution contains a number of structural principles. These are principles drawn from the text and structure of the document itself, and from

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88. LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004).

89. DWORKIN, *supra* note 70, at 7.

90. See Randy E. Barnett, *Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 612–13 (1999), for a listing of the various grounds for attacking originalism.

the government that the Constitution created. For example, the principle of limited and enumerated powers is evidenced by the statement in Article I, Section 1, Clause 1 that Congress possesses only the “legislative Power” “herein granted,” coupled with the discrete listing of powers in Article I, Section 8.<sup>91</sup> Similarly, the principle of separation of powers is evidenced by the existence of three separate legislative, executive, and judicial branches, respectively.

Federalism is a crucial structural principle of the U.S. Constitution. The Constitution describes an enduring federal-state relationship,<sup>92</sup> and in many ways. Most fundamentally, because the federal government is one of limited and enumerated powers, by implication, the rest of governmental power, such as property, tort, and contract law—the states’ police power—must be exercised by someone. The states are the only alternative in our constitutional system. The states, who authorized the Constitution in Article VII, are the gatekeepers for constitutional amendments and play continuing roles in the political processes of the federal government. Federalism also continues to play a significant role in American legal and political life.<sup>93</sup>

The Supreme Court and scholars have identified three primary benefits from the federal structure of the United States. First, the most frequently identified value of federalism is that it protects individual liberty, and through two primary mechanisms.

The first mechanism is dividing power among different governments. Vertically dividing power among governments prevents the concentration of power, which is a necessary precondition to suppressing liberty. For example, the federal government does not possess an enumerated power over education, and states are the primary providers and regulators of education. Relatedly, dividing power among different governments also provides mechanisms to check governmental power. One government can check another government by active or passive resistance to its exercises of power and, in doing so, protect individual liberty. For instance, after the federal government passed the controversial Affordable Care Act (ACA), many states pushed back. My own state, Ohio, passed a state constitutional amendment forbidding state

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91. U.S. CONST. art. I, § 1, cl. 1.

92. *Texas v. White*, 74 U.S. 700, 726 (1869).

93. *See, e.g., The Case for a Convention of States*, CONVENTION OF STATES, <http://www.conventionofstates.com> (last visited Jan. 27, 2017).

cooperation with implementation of the ACA.<sup>94</sup> Florida led twenty-five other states to litigate the ACA's constitutionality to the Supreme Court.<sup>95</sup>

The second mechanism by which federalism preserves liberty is creating jurisdictional competition for the affections of the American People. Humans value liberty so, when governments compete for citizens and their affections, one of the axes upon which they compete is liberty. The states and federal governments compete to offer regulatory "packages" that contain the most liberty. For instance, many states are currently liberalizing their restrictions on marijuana usage, and they are doing so self-consciously contrary to the federal government's rigorous restrictions on marijuana.<sup>96</sup>

Second, the Supreme Court and scholars argue that federalism creates space for jurisdictional experimentation. In a unitary state, there is only one jurisdiction and only that government can experiment with different approaches to subject matters. Experimentation presents significant risk because the entire jurisdiction suffers if the experiment fails. And, that assumes that experimentation will occur, which is more difficult in unitary states because of the difficulty garnering a sufficient consensus to experiment.

Federalism both increases the likelihood of experimentation and reduces the risks posed by it. It is more likely that experimentation will occur in a federal system because one state is more likely to have a consensus to experiment than the entire nation because of the uneven distribution of preferences. If an experiment fails to provide net benefits, the experiment's costs are limited to that one state, and the other jurisdictions in fact benefit from that state's failed experiment by not duplicating it. For example, beginning in the 1980s, Wisconsin experimented with significant changes to its provision of welfare.<sup>97</sup> At the time, welfare reform was not possible on the national level because preferences were relatively equal in the nation.<sup>98</sup> The potential costs of welfare reform were internalized to Wisconsin. Other states, and the federal government, learned from and followed Wisconsin's successful experiment.<sup>99</sup>

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94. OHIO CONST. art. I, § 21.

95. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 540 (2012).

96. Kathy Steinmetz, *These States Just Legalized Marijuana*, TIME, <http://time.com/4559278/marijuana-election-results-2016> (last updated Nov. 10, 2016).

97. See Melissa Kwaterski Scanlan, *The End of Welfare and Constitutional Protections for the Poor: A Case Study of the Wisconsin Works Program and Due Process Rights*, 13 BERKELEY WOMEN'S L.J. 153, 155 (1998).

98. *Id.*

99. *Id.*

Third, federalism provides a greater variety of environments in which the reasonable diversity of forms of human flourishing can find a home. Human beings flourish through a nearly infinite variety of combinations of the basic human goods.<sup>100</sup> Some humans, for example, value the good of knowledge relatively more than others, while others value friendship more than others, etc.

This same reasonable diversity of approaches to human flourishing occurs on the state level. Federalism enables Americans to pursue their reasonably diverse approaches to human flourishing in jurisdictions that most closely match their conception of human flourishing. States in a robust federal system have the capacity to construct reasonably different “packages” of background services that cater to different forms of human flourishing. For example, Iowa’s state government promotes a different combination of goods than does California. To take just one example, Iowa privileges farming over environmental protection,<sup>101</sup> while California takes the opposite approach.<sup>102</sup>

Think of all the things that Americans deeply disagree about, which the Constitution does not answer, and think how much better it would be if Americans could resolve those issues on the state and local levels. You can find examples from many important areas of life including education, criminal law, and tort law. When the Supreme Court creates a one-size-fits-all rule for our enormous and enormously diverse country, it is inevitable that many reasonable Americans will disagree. These Americans, who would otherwise live in or move to states whose policies reflect their own conception of human flourishing, no longer can. Furthermore, these Americans’ normal recourse to the political process is cut off because of the Supreme Court’s purported constitutional ruling.

The Supreme Court’s *Glucksberg* decision provided space for originalism to secure federalism’s benefits. After *Glucksberg*, the federal government and states remain in competition with each other on the issue of assisted suicide. This competition encourages the jurisdictions to “push” against each other, and to compete with each other for Americans’ affections. This push and competition were dramatically displayed in *Gonzales v. Oregon*, where Attorney General Gonzales sought to prevent Oregon from implementing its

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100. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 90–91 (1980).

101. IOWA CODE § 352.11 (2017).

<sup>102</sup>See Jennifer Medina, *California Cuts Farmer’s Share of Scant Water*, N.Y. TIMES (June 12, 2015), <https://www.nytimes.com/2015/06/13/us/california-announces-restrictions-on-water-use-by-farmers.html>.

permissive assisted suicide regime through the federal Controlled Substances Act.<sup>103</sup>

Additionally, post-*Glucksberg*, states have robust freedom to experiment with how they will approach assisted suicide. And they have utilized it. Some states are reducing their restrictions on assisted suicide, and they are doing it with different restrictions,<sup>104</sup> while others, for the time being, are continuing to prohibit assisted suicide.<sup>105</sup> This experimentation will also test, for instance, whether assisted suicide legalization will lead to involuntary euthanasia or the disproportionate use by the poor, as argued by opponents of assisted suicide.<sup>106</sup>

Third, states treated *Glucksberg* as an invitation to satisfy their citizens' preferences. It is no coincidence that the states that have increased the availability of assisted suicide have political leanings which suggest that broader access to assisted suicide fits their citizens' preferences. For instance, it is not surprising that Washington State has legalized assisted suicide, while Utah has not.<sup>107</sup> The Supreme Court's refusal to create a constitutional right in *Washington v. Glucksberg* sent the issue back to the federal and state legislatures, where some states have legalized it and others have not.<sup>108</sup> This resulted in stability because most Americans are happy with the results in their respective states. Additionally, if unhappy, Americans may advocate for policy change in their states or move to other states that better fit their policy preferences.

The story with abortion is not happy. *Roe v. Wade* foreclosed jurisdictional competition through normal means. It prevented states from experimenting

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103. *Gonzales v. Oregon*, 546 U.S. 243, 249 (2005).

104. See CNN, *supra* note 46.

105. Assisted suicide remains a felony in Michigan, for instance, despite being the home of Jack Kevorkian. MICH COMP. LAW § 750.329a.

106. See Charles Lane, *Where the Prescription for Autism can be Death*, WASH. POST (Feb. 24, 2016), [https://www.washingtonpost.com/opinions/where-the-prescription-for-autism-can-be-death/2016/02/24/8a00ec4c-d980-11e5-81ae-7491b9b9e7df\\_story.html?utm\\_term=.351bfc53d0c5](https://www.washingtonpost.com/opinions/where-the-prescription-for-autism-can-be-death/2016/02/24/8a00ec4c-d980-11e5-81ae-7491b9b9e7df_story.html?utm_term=.351bfc53d0c5).

107. See CNN, *supra* note 46. These states, as is not uncommon, have wildly differing political leanings, with Washington voting 54% Democrat in the 2016 Presidential election and Utah voting Republican by 45%, with an independent conservative gaining 21% of the vote. *Elections & Voting*, SECRETARY OF ST., <http://results.vote.wa.gov/results/20161108/President-Vice-President.html> (last updated Nov. 8, 2016); *Utah Results*, N.Y. TIMES, <http://www.nytimes.com/elections/results/utah> (last updated Feb. 10, 2017).

108. See CNN, *supra* note 46.

with different approaches to abortion.<sup>109</sup> It made it impossible for states to tailor their abortion regulations to their respective citizens' preferences.

G. *These Are Benefits Caused by Originalism, but They Are Not Sufficient to Justify Originalism*

I argued that the different effects of *Glucksberg* and *Roe* provided evidence of five of originalism's benefits. Each of these benefits is valuable and counts in originalism's favor as the best theory of constitutional interpretation. At the same time, they are (together) not sufficiently powerful, without other arguments, to privilege originalism over other theories. For example, though originalism protects and incentivizes democratic processes, it does so in a limited way,<sup>110</sup> and democracy facilitation is, itself, not sufficiently weighty to justify originalism in all situations.<sup>111</sup>

### III. CONCLUSION

I tentatively argued in this Essay that the divergence between the effects of *Glucksberg* and *Roe* provides evidence of five of originalism's benefits: (1) originalism protects and incentivizes democratic processes; (2) originalism increases Americans' capacity for compromise on important issues about which they robustly disagree; (3) originalism guards the Rule of Law; (4) originalism maintains the judicial nomination process' integrity; and (5) originalism safeguards and secures federalism's benefits.

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109. This limit was reduced by *Planned Parenthood v. Casey*, 505 U.S. 883, 935 (1992), but not eliminated. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016).

110. Originalism does not facilitate democracy when the original meaning limits the federal or state governments. For instance, in *NFIB v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court's interpretation of the Commerce Clause, though consistent with originalism, limited Congress' actions.

111. Democracy is not an end in itself and, though it is constitutive of full citizenship, it can be outweighed by other values, such as full human flourishing.