

# The Virtues of Optional Legislation

Jacob Bronsther\* & Guha Krishnamurthi\*\*

*In this Article, we continue our work on a new solution to legislative dysfunction in Washington: optional legislation. Imagine that states could opt in to a new federal program—say, Universal Basic Income (“UBI”) or Medicare for All—on the condition that they alone foot a higher tax bill to pay for the plan. States that opt out are completely unaffected since they do not have to contribute funds. Given that each party controls its own set of states, this “optional” type of legislation enables each party to govern at the federal level with a degree of independence from the other. Optional legislation thus promises to break the legislative gridlock. However, its advantages are not merely strategic. By comparison to nationwide bills, we contend that optional legislation would better realize an array of democratic “virtues,” leading to policies and debates that were more responsive, innovative, honest, and participatory. To be sure, optional legislation is not always appropriate. For instance, we should never agree to a checkerboard statute on the enforcement of civil rights. But when there is a “reasonable” policy disagreement—say, with respect to the provision of UBI—then optional legislation would score more highly than a nationwide bill on all four of these virtues.*

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\* Associate Professor of Law, Michigan State University College of Law.

\*\* Associate Professor of Law, Maryland Carey School of Law.

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## INTRODUCTION

In recent years our political system has combined intense ideological polarization<sup>1</sup> with almost unbelievably close elections.<sup>2</sup> For instance, Presidents Biden and Trump offered radically different governing visions during the 2020 campaign; yet in a contest with more than 156 million ballots cast, only 44,000 votes in Georgia, Arizona, and Wisconsin separated the candidates from an Electoral College tie.<sup>3</sup> In the 2024 election, Trump swept the “swing” states, but the popular margin was in fact the second closest since 1968,<sup>4</sup> as Trump gained just under half of the nationwide vote.<sup>5</sup> Meanwhile, control of the House has hinged on fewer than 10 seats out of 435 during the last two Congresses, with only one seat separating the parties from a tie in the Senate.<sup>6</sup> And while Republicans will lead both chambers in the upcoming

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1. See generally SAMUEL MERRILL III ET AL., *HOW POLARIZATION BEGETS POLARIZATION: IDEOLOGICAL EXTREMISM IN THE U.S. CONGRESS* (2024); NOLAN MCCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 15–70 (2006); MATTHEW LEVENDUSKY, *THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS* 38–77 (2009); BARBARA SINCLAIR, *PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING* 3–35 (2006); DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* 13–16 (1991).

2. See, e.g., Harry Enten, *The Most Underdiscussed Fact of the 2022 Election: How Historically Close It Was*, CNN (Dec. 26, 2022, 6:13 AM), <https://www.cnn.com/2022/12/26/politics/midterm-election-2022-historically-close/index.html> [<https://perma.cc/8BXJ-ECY8>] (reporting that the 2022 cycle was the first time since the popular election of senators in 1914 where neither party won more than 52% of governorships, House seats, or Senate seats).

3. Benjamin Swasey & Connie Hanzhang Jin, *Narrow Wins in These Key States Powered Biden to the Presidency*, NPR (Dec. 2, 2020, 5:00 AM), <https://www.npr.org/2020/12/02/940689086/narrow-wins-in-these-key-states-powered-biden-to-the-presidency> [<https://perma.cc/44L7-TW49>].

4. Domenico Montanaro, *Trump Falls Below 50% in Popular Vote, but Gets More than in Past Elections*, NPR (Dec. 3, 2024), <https://www.npr.org/2024/12/03/nx-s1-5213810/2024-presidential-election-popular-vote-trump-kamala-harris> [<https://perma.cc/4SSR-FE86>].

5. See *2024 National Popular Vote Tracker*, COOK POL. REP., <https://www.cookpolitical.com/vote-tracker/2024/electoral-college> [<https://perma.cc/5AB7-X544>].

6. See *Balance of Power: Republican Majority in the House*, BLOOMBERG GOV'T (Dec. 14, 2023), <https://about.bgov.com/brief/balance-of-power-republican-majority-in-the-house> [<https://perma.cc/89MG-CESR>]; Drew DeSilver, *Narrow Majorities in U.S. House Have Become More Common but Haven't Always Led to Gridlock*, PEW RSCH. CTR. (May 5, 2023), <https://www.pewresearch.org/short-reads/2023/05/05/narrow-majorities-in-u-s-house-have-become-more-common-but-havent-always-led-to-gridlock> [<https://perma.cc/T5FW-GWTY>]; Thomas F. Schaller, *A Republican Senate in a Divided Government*, CTR. FOR POL. (Dec. 21, 2023), <https://centerforpolitics.org/crystalball/a-republican-senate-in-a-divided-government> [<https://perma.cc/D3VL-JYF4>].

119th Congress, their majority will rest on five seats in the House and three in the Senate.<sup>7</sup>

This equipoise of power has impacted both parties' legislative strategies. With control always one election away—and with acceptable compromises so hard to reach—both sides seek total victory and eschew bipartisan policy solutions.<sup>8</sup> The problem with this logic is that, to everyone's surprise, support for the *other* party endures, and both retain the power to bring the process to a standstill.<sup>9</sup> The result has been legislative calamity over a period of decades: a “broken” Washington,<sup>10</sup> as the parties bash against each other like enemy rams, refusing to govern on a genuinely cooperative basis even when they

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7. Katherine Schaeffer, *Slim Majorities Have Become More Common in the U.S. House and Senate*, PEW RSCH. CTR. (Dec. 17, 2024), <https://www.pewresearch.org/short-reads/2024/12/17/slim-majorities-have-become-more-common-in-the-us-house-and-senate> [<https://perma.cc/9GFW-CCGB>].

8. See FRANCES E. LEE, *INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN* 4–5 (2016) (“[P]arty competition strengthens partisan incentives and motivates partisan strategic action.”); Sarah Binder, *Marching (Senate Style) Towards Majority Rule*, 19 FORUM 663, 668 (2021) (“The same forces that encourage majority party leaders to more tightly manage party strategy also embolden minority party leaders to coordinate obstruction that often derails the majority’s plans.”). By comparison, given the sheer dominance of the postwar Democratic Party, Republicans in that era had no rational hope of making legislation unless they added their voice to compromises within the Democratic Party or, as with the Civil Rights Act, joined a faction within the Democratic Party. See Brian Balogh et al., *Political Partisanship in the U.S.*, C-SPAN (Jan. 29, 2016), <https://www.c-span.org/video/?403876-1/political-partisanship-us>.

9. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 288 (2011) (“[T]he hyperpolarization of the last generation should be understood as the steady state of American democracy, or the manifestation of a more mature American democracy, and hence likely to be enduring.”).

10. See, e.g., Press Release, Rick Scott, Sen. Rick Scott: Washington Is Broken (Dec. 21, 2020), <https://www.rickscott.senate.gov/sen-rick-scott-washington-broken> [<https://perma.cc/5E7W-WTZ9>]; *Plan to Fix a Broken Washington*, CONGRESSMAN JARED GOLDEN, <https://golden.house.gov/plan-fix-broken-washington> [<https://perma.cc/SVA7-GC5G>]; Sean Alfano, *Biden: Washington Is “Broken,”* CBS NEWS (Feb. 17, 2010, 7:17 AM), <https://www.cbsnews.com/news/biden-washington-is-broken> [<https://perma.cc/B8KE-AKX7>]; Burgess Everett et al., *‘Get Off Our Damn Asses’: Stimulus Debacle Exposes Broken Washington*, POLITICO (Dec. 10, 2020 5:33 PM), <https://www.politico.com/news/2020/12/10/coronavirus-stimulus-relief-impasse-444320> [<https://perma.cc/SC64-3WGQ>]; Mark Kelly, *Why I’m Running*, MEDIUM (Jan. 4, 2020), <https://medium.com/fullspeedahead/why-im-running-797473adb10f> [<https://perma.cc/V5CM-ZF9J>] (“Washington is broken and Arizona needs independent leaders focused on solutions”); Jesse McKinley, *In Upstate New York House Race, Republican Makes Her Youth a Selling Point*, N.Y. TIMES (Oct. 28, 2014), <https://www.nytimes.com/2014/10/29/nyregion/in-upstate-new-york-house-race-republican-makes-her-youth-a-selling-point.html> (“‘I understand firsthand that Washington is broken,’ said Ms. Stefanik . . .”); Steve Holland, *Jeb Bush Endorses Ted Cruz for Republican Nomination*, REUTERS (Mar. 23, 2016, 3:18 AM), <https://www.reuters.com/article/us-usa-election-bush-cruz-idUSKCN0WP11V> [<https://perma.cc/523E-3ESN>] (quoting Jeb Bush as saying “Washington is broken”).

agree on the merits.<sup>11</sup> In spite of broad consensus on the need for federal solutions over an array of issues, the overall number of bills passed has declined precipitously, as has the number of “important” bills.<sup>12</sup> Perhaps most tellingly, the percentage of “salient” issues on which Congress is gridlocked has increased to over 70% recently.<sup>13</sup> Entire policy areas have been left essentially untouched for years, including poverty, education, immigration, and so forth, with Presidents often struggling to fill in the regulatory gaps with executive orders<sup>14</sup> and Congresses occasionally attempting patchwork solutions with filibuster-proof spending bills.<sup>15</sup> Almost nobody is pleased with the results.<sup>16</sup> Only 4% of Americans believe that the political system is working very well.<sup>17</sup> And while 77% of respondents in 1964 said that they trusted the government most of the time, that number dropped to 16% in 2023.<sup>18</sup>

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11. See Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 86 (2015) (“[E]ven when Congress and the president manage to reach agreement on the big issues of the day, the intense partisanship and electoral competition of recent years appears to be undermining Congress’s broader problem-solving capacity.”); THOMAS E. MANN & NORMAN J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE POLITICS OF EXTREMISM 101 (2012) (“The single-minded focus on scoring political points over solving problems, escalating over the last several decades, has reached a level of such intensity and bitterness that the government seems incapable of taking and sustaining public decisions responsive to the existential challenges facing the country”); STEVEN S. SMITH, THE SENATE SYNDROME: THE EVOLUTION OF PROCEDURAL WARFARE IN THE MODERN U.S. SENATE 45 (2014) (“[T]he pattern of obstruct and restrict behavior that we have witnessed in recent years goes beyond the behavior that is predicted by models from behavior of previous eras.”).

12. Richard H. Pildes, *The Neglected Value of Effective Government*, 1 U. CHI. LEGAL F. 185, 188 (2023) (“[I]n the 1970s, Congress enacted 800 laws in every two-year term; today, that number is 300–350. In the late 1990s, the Senate cast around 350 votes on legislation; in 2019, that number fell to 108.”).

13. Sarah A. Binder, *Polarized We Govern?*, BROOKINGS (May 27, 2014), <https://www.brookings.edu/articles/polarized-we-govern> [<https://perma.cc/96NB-AZ5K>] (finding that over 75% of the “salient” issues on Washington’s agenda were subject to gridlock); Sarah Binder (@bindersab), X (Dec. 29, 2022, 9:57 AM), <https://x.com/bindersab/status/1608477394658070530> [<https://perma.cc/JG3H-5P2Q>].

14. See generally *Executive Orders*, FED. REG., <https://www.federalregister.gov/presidential-documents/executive-orders> [<https://perma.cc/9XWD-HKGV>] (collecting every presidential executive order since 1937).

15. See Jonathan S. Gould, *A Republic of Spending*, 123 MICH. L. REV. (forthcoming 2025).

16. See PEW RSCH. CTR., AMERICANS’ DISMAL VIEWS OF THE NATION’S POLITICS 34 (Sept. 19, 2023), [https://www.pewresearch.org/wp-content/uploads/sites/20/2023/09/PP\\_2023.09.19\\_views-of-politics\\_REPORT.pdf](https://www.pewresearch.org/wp-content/uploads/sites/20/2023/09/PP_2023.09.19_views-of-politics_REPORT.pdf) [<https://perma.cc/T39G-XLA2>].

17. *Id.*

18. *Public Trust in Government: 1958–2024*, PEW RSCH. CTR. (June 24, 2024), <https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2024> [<https://perma.cc/H7R3-64GZ>].

What is to be done with Washington? The parties' preferred solution—vanquishing the other side—has proven to be a fantasy. So has the promise of meaningful bipartisanship.<sup>19</sup> Meanwhile, scholars have proposed technocratic fixes, such as open primaries and instant runoff voting; though creative and sensible as ways to elect less rabidly partisan officials, these are doubtfully up to the task on their own.<sup>20</sup> In this Article, we continue our work on a novel solution to America's legislative malaise: *optional legislation*.<sup>21</sup> Imagine that states could opt in to a new federal program on the condition that they alone foot a higher tax bill to pay for the plan. States that opt out are completely unaffected since they do not have to contribute funds. Given that each party controls its own set of states, this "optional" type of legislation enables each party to govern at the federal level with a degree of independence from the other.

For instance, if Republicans are opposed to robust schemes of Universal Basic Income ("UBI"), Democrats might propose such legislation on an optional basis, given that few states have the financial or programmatic confidence to enact such a policy on their own. States that want to participate will contribute to a collective fund administered by a new federal agency. Residents of participating states will receive monthly payments from the fund as well as a supplemental tax to pay for the program. Residents from nonparticipating states will receive neither. This point about the source of funding is critical, for it ensures that the legislation is genuinely optional. If the federal government were to fund the benefit payments in the traditional manner,<sup>22</sup> then residents of nonparticipant states would also be paying for the program through their federal tax contributions. Nonparticipant states might

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19. See Colin R. Case & Emily Cottle Ommundsen, *Partisan Appeals to Bipartisanship*, 46 POL. BEHAV. 451, 470 (2024) ("The minority's incentive to discredit the majority's claims of bipartisanship, along with the media's amplification of this negative rhetoric, is yet another reason why the public perceives Congress as a partisan institution, incapable of compromise.").

20. See, e.g., Michael Wines, *The Ballot Measures Aim to Reduce Partisanship. Can They Fix American Politics?*, N.Y. TIMES (June 25, 2024), <https://www.nytimes.com/2024/06/25/us/ohio-redistricting-ballot-measures.html>; Judy Woodruff et al., *How Open Primaries and Ranked-Choice Voting Can Help Break Partisan Gridlock*, PBS (May 29, 2024, 6:30 PM), <https://www.pbs.org/newshour/show/how-open-primaries-and-ranked-choice-voting-can-help-break-partisan-gridlock> [<https://perma.cc/DT2U-P4AJ>].

21. See Jacob Bronsther & Guha Krishnamurthi, *Optional Legislation*, 107 MINN. L. REV. 297 (2022) [hereinafter Bronsther & Krishnamurthi, *Optional Legislation*]; see also Jacob Bronsther & Guha Krishnamurthi, *Congress Is Dysfunctional: History Shows It Won't Change Anytime Soon*, WASH. POST (Feb. 9, 2023, 7:00 AM), <https://www.washingtonpost.com/made-by-history/2023/02/09/congress-dysfunction-polarization-gridlock>.

22. *How Much Revenue Has the U.S. Government Collected This Year?*, FISCALDATA, <https://fiscaldata.treasury.gov/americas-finance-guide/government-revenue> [<https://perma.cc/GT9H-V4B9>].

thus feel pressured to opt in. But, more importantly, the parties' independence would then break down, and representatives of such states would then have a rational basis for opposing the legislation in the first place.

Consider also Democratic proposals for an expanded public healthcare system, such as the various forms of Medicare for All<sup>23</sup> and “the public option.”<sup>24</sup> In truth, these are academic proposals for a future America rather than live political projects, at least on a national scale. Neither Medicare for All nor the public option retains clear majority support even amongst Democrats.<sup>25</sup> Enter optional legislation. As of the 119th Congress, twenty-five states are represented by Senators who caucus with the Democrats.<sup>26</sup> While finding a majority—let alone supermajority—in Congress for healthcare reform is unlikely, the chances improve dramatically at the state level. All twenty-five states would doubtfully opt in to Medicare for All or the public option, but it is not hard to imagine that some number of them—say, five to fifteen states at first—would choose to join some version of an expanded insurance program.<sup>27</sup>

But why, if the alternative is no bill at all, would Republican Congresspeople support an optional version (or perhaps abstain from voting

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23. See, e.g., Medicare for All Act of 2019, S. 1129, 116th Cong. (2019) (sponsored by Sen. Bernie Sanders); Medicare for All Act of 2019, H.R. 1384, 116th Cong. (2019) (sponsored by Rep. Pramila Jaypal).

24. See, e.g., Keeping Health Insurance Affordable Act of 2019, S. 3, 116th Congress (2019) (sponsored by Sen. Benjamin L. Cardin); Choose Medicare Act, S. 1261, 116th Congress (2019) (sponsored by Sen. Jeff Merkley); Choose Medicare Act, H.R. 2463, 116th Congress (2019) (sponsored by Rep. Cedric L. Richmond); Medicare-X Choice Act of 2019, S. 981, 116th Congress (2019) (sponsored by Sen. Michael Bennet); Medicare-X Choice Act of 2019, H.R. 2000, 116th Congress (2019) (sponsored by Rep. Antonio Delgado); CHOICE Act, S. 1033, 116th Congress (2019) (sponsored by Sen. Sheldon Whitehouse); CHOICE Act, H.R. 2085, 116th Congress (2019) (sponsored by Rep. Janice Schakowsky).

25. See Sarah Kliff & Margot Sanger-Katz, *With New Majority, Here's What Democrats Can (and Can't) Do on Health Care*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/upshot/biden-democrats-health-plans.html> (“[U]nanimity among 50 Democratic senators may be a big political challenge in any case. When Congress last debated the public option in 2010, it split the Democratic caucus and couldn't garner enough support to pass.”); Paige Winfield Cunningham, *The Health 202: Senate Democrats Announce Budget Deal to Expand Medicare Benefits*, WASH. POST (July 14, 2021, 8:32 AM), <https://www.washingtonpost.com/politics/2021/07/14/health-202-senate-democrats-announce-budget-deal-expand-medicare-benefits>.

26. See Hannah Dormido et al., *Meet the Republican and Democratic Senators of the 119th Congress*, WASH. POST (Nov. 21, 2024), <https://www.washingtonpost.com/politics/interactive/2024/republicans-senate-control-119th-congress>.

27. Yet another possibility is a *hybrid* optional bill, by which a baseline of federal programming is guaranteed to all, and states would be allowed to opt in to additional forms of support. Thanks to Michael Sant'Ambrogio for this suggestion.

on the bill)? There are at least four reasons.<sup>28</sup> First, they may want to hedge against or undercut a nationwide regulation or spending bill.<sup>29</sup> Second, the optional law may help them win an election in a swing district or state.<sup>30</sup> Third, they may be principled federalists.<sup>31</sup> Finally, and crucially, optional legislation goes both ways, and Republicans may want to employ it reciprocally to promote their own platform.<sup>32</sup> For instance, Republicans may be able to use optional legislation to advance their policies on, say, school choice or religious freedom, or perhaps even to opt out of certain existing programs.<sup>33</sup>

All that said, the advantages of optional legislation extend beyond mere strategies to enact federal laws, and the optional form should not be limited to situations of intractable division. Indeed, in this Article, we make the bolder claim that, by comparison to nationwide bills, optional legislation would be more *democratic*. In this way, we continue our prior work by taking an idea that sounded primarily in political science and rational choice theory and bringing it into the realms of democratic theory and political philosophy.

While there are several contending theories of democracy,<sup>34</sup> we maintain that there are at least four democratic “virtues” that all such theories prize. That is, all else equal, democrats favor systems of government that are more *responsive*, *innovative*, *honest*, and *participatory*.<sup>35</sup> To be sure, optional legislation is not always appropriate. For instance, we should never agree to a checkerboard statute on the enforcement of civil rights. But when there is a “reasonable” policy disagreement—say, with respect to the provision of UBI—then optional legislation would score more highly than a nationwide bill on all four of these virtues.

First, optional legislation would be more *responsive* to people’s policy preferences.<sup>36</sup> It would enable more people—in both red and blue states—to live under the set of regulations that they affirmatively want, as opposed to merely acceding to legislation because it survived the gauntlet of bicameralism and presentment, or merely acceding to the fact that no bill at all passed. The difference is between *choosing* a bill because of its perceived substantive merits and *acquiescing* to a bill (or the lack thereof) because of

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28. See Bronsther & Krishnamurthi, *Optional Legislation*, *supra* note 21, at 344–47.

29. *Id.* at 303.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 303–04.

34. See generally ROBERT A. DAHL, ON DEMOCRACY (1998).

35. See *infra* Part II.

36. See *infra* Section II.A.



the putatively fair procedure by which Congress considered the proposal.<sup>37</sup> Now, if there were only one justifiable policy option, then that choice should win on political summary judgment, as it were, without consideration of people's actual views. But the political sphere so rarely presents us with demonstratively and cleanly true propositions. Typically, we have a "reasonable" disagreement, where rivals hold genuine and good faith reasons for their positions, but none can prove that they are right beyond a reasonable doubt.<sup>38</sup> It is in these situations that the power to choose realizes its value. As William Galston writes: "Freedom operates in a zone of partial but not complete regularity, a discursive arena in which some reasons are better than others but none is clearly dominant over all the rest in every situation."<sup>39</sup> Within this zone of reasonable disagreement, optional legislation thus respects our individuality and freedom by allowing more of us to determine the substance of the laws under which we live.

Second, optional legislation would lead to more *innovative* policymaking by promoting diversified decision-making, providing the government with better access to information about the citizenry, and enabling the benefits of group voting associated with Condorcet's Jury Theorem.<sup>40</sup> More particularly, optional legislation would hypercharge the "laboratories of democracy" afforded by our federal system.<sup>41</sup> It would enable states to run trials on policies that they would be unable or unwilling to administer on their own for myriad reasons, such as a lack of resources or policy expertise at the state level, state constitutional provisions that require balanced budgets, collective action problems amongst the states, and a political culture which often looks to Washington for policy leadership.

Third, optional legislation would force politicians to be more *honest* about their policy views.<sup>42</sup> In the current gridlocked environment, representatives are incentivized to grandstand and to pander to primary voters, given that the

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37. See generally Richard Wollheim, *A Paradox in the Theory of Democracy*, in 2 PHILOSOPHY, POLITICS AND SOCIETY 71, 85 (Peter Laslett & W.G. Runciman eds., 1962) (comparing substantive and procedural democratic principles).

38. See *infra* notes 79–93 and accompanying text.

39. WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 70 (2002).

40. See *infra* Section II.B.

41. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 386–87 (1932) ("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.").

42. See *infra* Section II.C.

chances of passing a major bill are so low.<sup>43</sup> By augmenting the realm of the possible in Washington, optional legislation would incentivize politicians to tell the truth about their real agenda, enabling a more reality- and reason-based discourse both between the parties and between representatives and their constituents.

Fourth, optional legislation would create a more *participatory* system by placing certain political questions and debates at a more local level.<sup>44</sup> While federal representatives would pass the legislation, ultimately a state would signal participation in an optional regime via the same process that it would pass equivalent state legislation. Thus, with optional bills, the stakes of the state legislative processes would be higher than normal. People would be able to more meaningfully participate in the federal process, lobbying their state representatives on federal issues without exclusively relying on their distant Congresspeople or President.

This Article proceeds in four parts. First, we define the appropriate scope of optional legislation, explaining which policy areas are legitimate candidates for the optional form, and which are not.<sup>45</sup> Second, we detail the four “virtues” of democratic governance and assess optional legislation along these dimensions.<sup>46</sup> Third, we evaluate several putative “vices” of optional legislation.<sup>47</sup> We then briefly conclude.<sup>48</sup>

## I. THE SCOPE OF OPTIONAL LEGISLATION

The question of scope concerns which types of legislation would be appropriate candidates for optionality. Like any proposal to use federal as opposed to state legislation, optional legislation would be especially relevant in regulatory areas where states could benefit from pooling resources and policy expertise, as in the context of welfare services like UBI and public healthcare.<sup>49</sup> However, optional legislation would not be relevant for policy areas that inherently impact the nation as a whole, such as immigration and

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43. See SARAH ISGUR ET AL., NAT’L CONST. CTR., RESTORING THE GUARDRAILS OF DEMOCRACY: TEAM CONSERVATIVE 5 (2022), [https://constitutioncenter.org/media/files/Team\\_conservative\\_final.pdf](https://constitutioncenter.org/media/files/Team_conservative_final.pdf) [<https://perma.cc/YJF7-2YPW>] (describing our modern Congress as a “parliament of pundits”).

44. See *infra* Section II.D.

45. See *infra* Part I.

46. See *infra* Part II.

47. See *infra* Part III.

48. See *infra* Part IV.

49. See generally Inke Mathauer et al., *Pooling Financial Resources for Universal Health Coverage: Options for Reform*, 98 BULL. WORLD HEALTH ORG. 132 (2020) (considering various methods of financing universal health coverage).

foreign affairs. The Supremacy Clause of the U.S. Constitution provides another straightforward limit: any legislative regime by which states could purport to opt out of constitutional provisions would be illegal.<sup>50</sup> Beyond these intrinsic and constitutional constraints on the scope of optional legislation, we believe there are *moral* limitations which foreclose optional bills in the context of basic or fundamental rights. This is a crucial point. States cannot opt out of the principle that each person has equal moral worth, for instance, and so optional legislation should never be available for issues such as civil rights. To seek any sort of compromise in this realm would be odious. As Susan Estrich and Kathleen Sullivan write, “[F]undamental liberties are not occasions for the experimentation that federalism invites.”<sup>51</sup>

Nonetheless, it is difficult to determine precisely which policies belong in this nonnegotiable category, and it would undoubtedly be an evolving point of contention. However, we think that John Rawls’s work on political pluralism provides some helpful structure for representatives deliberating on this question. Rawls considered the challenges of imposing a legitimate and stable system of law on a diverse group of citizens that hold “conflicting and even incommensurable religious, philosophical, and moral doctrines.”<sup>52</sup> Rawls developed a theory of “reasonable” pluralism in his attempt to determine which sorts of policy questions and justifications are appropriate for the public realm of such a heterogeneous society.<sup>53</sup> Rawls writes:

Citizens are reasonable when, viewing one another as free and equal in a system of social cooperation over generations, they are prepared to offer one another fair terms of cooperation according to what they consider the most reasonable conception of political justice; and when they agree to act on those terms, even at the cost of their own interests in particular situations, provided that other citizens also accept those terms.<sup>54</sup>

Thus, following Rawls, if people could in good faith disagree about whether the “fair terms of social cooperation” amongst “free and equal”

50. See U.S. CONST. art. VI, cl. 2.

51. Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 151 (1989); see also Allen Buchanan, *Political Legitimacy and Democracy*, 112 ETHICS 689, 703 (2002) (“[A] wielder of political power (the monopolistic making, application, and enforcement of laws in a territory) is legitimate (i.e., is morally justified in wielding political power) if and only if it . . . does a credible job of protecting at least the most basic human rights of all those over whom it wields power . . .”).

52. JOHN RAWLS, *POLITICAL LIBERALISM* 133 (1993).

53. *Id.* at 35–38.

54. John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 770 (1997); see also JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 6–7 (Erin Kelly ed., 2001).

citizens entail a particular policy, then both sides of the dispute are “reasonable”—and that policy is likely an acceptable candidate for optional legislation.<sup>55</sup> “Reasonableness,” on this view, is defined by certain *substantive* commitments to human equality and agency as well as a *formal* commitment to the rule of law, particularly the “generality” of the law’s application.<sup>56</sup>

These are demanding principles, the application of which has been a rare achievement as a historical matter worldwide. But they are not especially determinative of contemporary policy, allowing for a wide degree of “reasonable” disagreement. Indeed, as support for the idea that political liberals ought to respect those who disagree on “reasonable” grounds, Rawls discusses what he calls “the burdens of judgment”—that is, “the many obstacles to the correct (and conscientious) exercise of our powers of reason and judgment in the ordinary course of political life.”<sup>57</sup> Examples of such obstacles include conflicting and complex empirical evidence, the unavoidability of judgment and interpretation, the divergence of views on “cases of significant complexity,” and the presence of competing and sometimes contradictory normative considerations.<sup>58</sup> William Galston explains further how “reasonable” disagreement in the Rawlsian vein often turns on different methods of balancing “incommensurate” or “incomparable” values, without any master principle or metric that would reduce the dispute and deliver a precise answer.<sup>59</sup> Galston writes: “Different

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55. See RAWLS, *supra* note 54, at 41 (“[P]olitical power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason.”); FRANK I. MICHELMAN, *CONSTITUTIONAL ESSENTIALS: ON THE CONSTITUTIONAL THEORY OF POLITICAL LIBERALISM* 51–52 (2022) (interpreting the “essential” features of a “reasonable” constitution).

56. On the distinction between “formal” and “substantive” conceptions of the Rule of Law, see generally Paul P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 PUB. L. 467, reprinted in *THE RULE OF LAW AND THE SEPARATION OF POWERS* 95 (Richard Bellamy ed., 2016) (2005); and JEREMY WALDRON, *THE RULE OF LAW AND THE MEASURE OF PROPERTY* (2012).

57. RAWLS, *supra* note 54, at 35.

58. *Id.* at 35–36; see also Shaun P. Young, *Rawlsian Reasonableness: A Problematic Presumption?*, 39 CAN. J. POL. SCI. 159, 161–63 (2006) (discussing Rawlsian “reasonableness” and enumerating the “burdens of judgment”); GERALD F. GAUS, *JUSTIFICATORY LIBERALISM: AN ESSAY ON EPISTEMOLOGY AND POLITICAL THEORY* 131–36 (1996).

59. GALSTON, *supra* note 39, at 57–58 (“Because there is no single uniquely rational ordering or combination of such values, no one can provide a generally valid reason, binding on all individuals, for a particular ranking or combination.”); see also JEREMY WALDRON, *LAW AND DISAGREEMENT* 112 (1999) (“On any plausible account, human life engages multiple values and it is natural that people will disagree about how to balance or prioritize them. Also, on any

kinds of normative considerations may be involved on both sides of a question; when we are forced to select among cherished values, we find it hard to set priorities; even when the choice involves balancing rather than choosing among important values, we may well disagree about their weight.”<sup>60</sup>

An appreciation of the “burdens of judgment” and the subsequent breadth of acceptably liberal policy buttresses the notion that optional legislation can be consistent with core liberal values. Consider the debate currently raging in the states over “school choice,” which involves parents receiving subsidies in the form of tax credits, vouchers, or tuition savings accounts to send their children to nonpublic schools, such as charter, magnet, religious, or “home” schools.<sup>61</sup> Arguments in favor focus on parental autonomy and free market principles.<sup>62</sup> Proponents argue that parents should be granted at least broad control over the nature of their children’s schooling.<sup>63</sup> And when

plausible account, people’s respective positions, perspectives, and experiences in life will give them different bases from which to make these delicate judgments. These differences of experience and position, combined with the evident complexity of the issues being addressed, mean that reasonable people may disagree not only about what the world is like but also about the relevance and weight to be accorded the various insights that they have at their disposal.”). On the philosophical basis of “incomparable” values, see generally Ronald B. De Sousa, *The Good and the True*, 83 MIND 534, 544–45 (1974); Thomas Nagel, *The Fragmentation of Value*, in MORTAL QUESTIONS 128, 128 (1979); CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 131–44 (1987); JOSEPH RAZ, THE MORALITY OF FREEDOM 333–34 (1988); BRIAN BARRY, POLITICAL ARGUMENT: A REISSUE WITH A NEW INTRODUCTION 3–8 (1990); Kurt Sylvan & Ruth Chang, *An Introduction to the Philosophy of Practical Reason*, in THE ROUTLEDGE HANDBOOK OF PRACTICAL REASON 1, 4–5 (Ruth Chang & Kurt Sylvan eds., 2020); Ruth Chang, *The Possibility of Parity*, 112 ETHICS 659 (2002); Jacob Bronsther, *Vague Comparisons and Proportional Sentencing*, 25 LEGAL THEORY 26, 27–36 (2019); and Cian Dorr et al., *The Case for Comparability*, 57 NOÛS 414 (2023).

60. GALSTON, *supra* note 39, at 46.

61. See Andrew Prokop, *The Conservative Push for “School Choice” Has Had Its Most Successful Year Ever*, VOX (Sept. 11, 2023, 5:35 AM), <https://www.vox.com/politics/23689496/school-choice-education-savings-accounts-american-federation-children> [https://perma.cc/8QDZ-5Y38].

62. See Milton Friedman, *The Role of Government in Education*, in ECONOMICS AND THE PUBLIC INTEREST 123, 129 (Robert A. Solo ed., 1955) (“Here, as in other fields, competitive private enterprise is likely to be far more efficient in meeting consumer demands than either nationalized enterprises or enterprises run to serve other purposes.”).

63. See Libby Stanford, *What the Push for Parents’ Rights Means for Schools*, EDUCATIONWEEK (Feb. 22, 2023), <https://www.edweek.org/leadership/what-the-push-for-parents-rights-means-for-schools/2023/02> [https://perma.cc/X7TM-LYQ9]; see also CHARLES FRIED, RIGHT AND WRONG 152 (1978) (arguing that the right to “form one’s child’s values, one’s child’s life plan, and . . . to lavish attention on that child” is grounded in the “basic right not to be interfered with in doing these things for oneself”). Sometimes the autonomy argument is extended to cover minority and religious communities, with the idea being that such communities should

institutions—public and private alike—are forced to compete for students, they will provide a better service.<sup>64</sup> A further concern is that, without school choice, only wealthy children can receive the benefits of private education.<sup>65</sup> Meanwhile, opposition to school choice centers on ideals of equality and “prioritarianism,” meaning that, in the distribution of goods, we ought to be prioritize the least well off.<sup>66</sup> The worry is that traditional public schools will be gutted with too much school choice, and the least advantaged students will suffer as a result.<sup>67</sup> Good public schools have created so much opportunity for generations of diverse Americans, and it is unwise to risk all that success when there are other means of improving underperforming schools. Also at stake are the solidarity benefits of a genuinely public education,<sup>68</sup> and the separation of church and state.<sup>69</sup>

With these latter considerations in mind, we (the authors) are school choice skeptics, if not outright opponents. Nonetheless, we can appreciate that school choice proposals remain firmly within the bounds of liberal democracy. Put differently, if we assume that all children in fact receive equal access to a state’s educational resources, school choice schemes are consistent with human equality and the rule of law. Employing Rawls’s concept/conception distinction, we might say that the “concept” of liberal democracy does not determine the precise form and content of public

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be able to educate their children in their own schools. See Alan Wolfe, *Introduction to SCHOOL CHOICE: THE MORAL DEBATE* 1, 5 (Alan Wolfe ed., 2003) (“Should we encourage school choice because we want to encourage diversity?”).

64. See Friedman, *supra* note 62, at 129; CHESTER E. FINN, JR. ET AL., *CHARTER SCHOOLS IN ACTION: RENEWING PUBLIC EDUCATION* 74–99 (2001) (arguing that charter schools improve public education writ large); Mark Schneider et al., *Networks to Nowhere: Segregation and Stratification in Networks of Information About Schools*, 41 AM. J. POL. SCI. 1201, 1202 (1997); cf. JAMES G. DWYER, *VOUCHERS WITHIN REASON: A CHILD-CENTERED APPROACH TO EDUCATION REFORM* 4 (2002) (arguing that, given that private schools exist, a voucher program reflects the state’s interest in the quality of education in such schools).

65. See JOSEPH P. VITERITTI, *CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY* 74 (1999) (“[P]oor parents have precise educational goals in mind for their children that they are capable of acting on when given the opportunity to select a school.”).

66. See Derek Parfit, *Another Defence of the Priority View*, 24 UTILITAS 399, 401 (2012) (“[W]e have stronger reasons to benefit people the worse off these people are.”).

67. See Wolfe, *supra* note 63, at 3 (“Those who believed that the introduction of marketlike mechanisms into schooling was a bad idea often emphasized that vouchers would result in lower levels of public support for already underfunded inner-city schools and in that sense would harm the opportunities of the poor pupils who attended them.”); Harry Brighouse, *What’s Wrong with Privatizing Schools?*, 38 J. PHIL. EDUC. 617, 617 (2004).

68. ADAM SWIFT, *HOW NOT TO BE A HYPOCRITE: SCHOOL CHOICE FOR A MORALLY PERPLEXED PARENT* 44 (2003) (“[P]rivate schools undermine community; they foster social division rather solidarity, fragmentation rather than cohesion.”).

69. See Prokop, *supra* note 61.

education, and that both sides of the school choice debate champion rival “conceptions” of liberal democratic education, explicating and interpreting the core liberal ideals in different ways.<sup>70</sup> For instance, since 1993 Sweden has employed a radically open (by American standards) school choice program.<sup>71</sup> To discover that fact about Sweden, however, is not to uncover some surprising contradiction or exception to Sweden’s broader system of liberal—or even socialist—values. Indeed, while the school choice debate ranges over several distinct and incommensurable normative considerations (parental autonomy, distributive justice, solidarity, etc.), much of the disagreement is pragmatic and empirical in nature.<sup>72</sup> And if it turned out that school choice led to superior educational outcomes up and down the socioeconomic ladder, then we (the authors) would support it. The upshot is not that liberal values are *indeterminate* regarding the method of public support for education, generating no “liberal” solution at all, but rather that they are *inconclusive* on this issue, generating multiple acceptable and nonarbitrary solutions—one of which has a central place for school choice.<sup>73</sup>

70. On the concept/conception distinction, see JOHN RAWLS, *A THEORY OF JUSTICE* 5 (1971) (“[I]t seems natural to think of the concept of justice as distinct from the various conceptions of justice and as being specified by the role which these different sets of principles, these different conceptions, have in common.”); James Higginbotham, *Conceptual Competence*, 9 PHIL. ISSUES 149, 149 (1998) (distinguishing between having a *concept*, a *conception* of the concept, and a *view* of the concept); and William Lad Sessions, *Rawls’s Concept and Conception of Primary Good*, 7 SOC. THEORY & PRAC. 303, 304 (1981).

71. *The Swedish School System*, SWEDEN.SE (Oct. 18, 2023), <https://sweden.se/life/society/the-swedish-school-system> [<https://perma.cc/N4C4-99LF>] (“The Swedish school system includes a growing number of independent schools with public funding, *friskola* in Swedish. Following a law change in the 1990s, parents and their children can choose among tuition-free schools that are either municipal or private.”). Flanders, the Dutch-speaking northern region of Belgium, offers another example. See Deborah Nusche et al., Org. for Econ. Coop. & Dev. [OECD], *OECD Reviews of School Resources: Flemish Community of Belgium*, at 106 (2015), [https://www.oecd.org/en/publications/oecd-reviews-of-school-resources-flemish-community-of-belgium\\_9789264247598-en.html](https://www.oecd.org/en/publications/oecd-reviews-of-school-resources-flemish-community-of-belgium_9789264247598-en.html) [<https://perma.cc/CBH9-CXQH>] (“One of the most prominent features of the Flemish education system is school choice. The tradition of school choice dates back to the early 1800s when an effort was made to develop public municipal schools to supplement the existing system of Catholic schools. The parochial and private school providers in the Flemish Community have long been receiving public resources, a recognition of their important role as providers for compulsory level education.”).

72. See Nancy L. Rosenblum, *Separating the Siamese Twins, “Pluralism” and “School Choice,”* in *SCHOOL CHOICE: THE MORAL DEBATE* 79, 85 (Alan Wolfe ed., 2003) (“[F]or the dominant group of supporters of choice the justification and goal is ‘neutral’ academic performance. Arguments do not focus on pluralism—on schools geared to the interests and needs of particularist groups and communities. Quality is key, and choice is instrumental.”).

73. See GAUS, *supra* note 58, at 154 (“Justifications are often inconclusive—they are open to doubt, not fully convincing, or not decisive because of the complexity of our belief systems

As Gerald Gaus writes, “Victorious public justifications are fairly rare in a pluralistic society such as ours; in contrast, undefeated, unvictorious justifications—those that are reasonable but also contentious—abound.”<sup>74</sup>

In sum, there is a “reasonable” disagreement within the liberal democratic family over school choice, and optional legislation would thus be a legitimate vehicle for states to run a largescale experiment on the program. Participating states could combine their school choice resources into a centralized, federal bureaucracy that monitors schools, collects data, and enforces “best practices,” likely through some cooperative scheme with participating state governments.<sup>75</sup> States could opt in or out of the program as it proves successful or otherwise over a period of years.

Ultimately, if we follow Rawls, the realm of legitimate democratic consent ought to determine the moral scope of optional legislation.<sup>76</sup> If some policy is outside the bounds of liberal decency, then no state should be afforded the opportunity to opt into it, even if—through some horse-trading scheme—

and our limited ability to process all the information at our disposal. We have good grounds for forming (or rejecting) beliefs, but because so much information is available that cannot be adequately canvassed, we can seldom be confident that defeaters for our beliefs are not lurking, ready to overturn our conclusion . . . . The relevant information is so great that we are rational to form beliefs on the basis of what we have access to, but other people pick up on other information, coming to different conclusions. Because matters are so complex, neither side can typically claim victory. This is important, for it is inconsistent with the popular view that public debate is indeterminate, that neither acceptance nor rejection of the competing public justifications (qua public justifications) is rational.”); JONATHAN QUONG, *LIBERALISM WITHOUT PERFECTION* 204–12 (2010); SAMUEL FREEMAN, *JUSTICE AND THE SOCIAL CONTRACT: ESSAYS ON RAWLSIAN POLITICAL PHILOSOPHY* 242–43 (2006).

74. GAUS, *supra* note 58, at 13.

75. On such “cooperative” federalism, see generally Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1557 (2012) (“States do not rule separate and apart from the [federal] system, and the power they wield is not their own. Instead, they serve as part of a complex amalgam of national, state, and local actors implementing federal policy.”); and Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 663 (2001) (highlighting how Congress favors cooperative federalism programs and has rejected the dual federalism model of regulation).

76. See Thomas Christiano, *The Authority of Democracy*, 12 J. POL. PHIL. 266, 268 (2004) (“[T]here are limits to the authority of the procedural over the substantive and these limits are founded on the same principle as that which grounds the authority of democracy.”); DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 117–35 (2008) (discussing the normative limitations of both consent and non-consent); Jonathan Quong, *Public Reason*, STAN. ENCYC. PHIL. (Apr. 20, 2022), <https://plato.stanford.edu/entries/public-reason> [<https://perma.cc/ALK6-P7D5>] (“An account of public reason must find some way of giving the perspective of individual persons a significant role, without allowing this to collapse into consent: public reason is not simply a way of identifying those principles to which people already consent. But equally, public reason must not define those principles that could be justified to, or be acceptable to, each person as simply those principles that are true. In either case, the idea of public reason would do no independent work.”).



providing that choice served to enable a broader legislative agenda that sought to do much good; under those circumstances, certain people in opt-in states would be impermissibly sacrificed to that greater good.<sup>77</sup> However, if liberals can “reasonably” disagree in good faith over some policy, then it matters what people in fact want, and optional legislation can therefore be a legitimate solution since it fosters a greater degree of choice on the issue. In the following Part, we will consider the nature and value of such choice in greater detail.

## II. THE VIRTUES

We contend that, so long as a bill is a legitimate candidate for optionality, there are several normative reasons for preferring the optional form over the nationwide form. As detailed above, we identify four “virtues” of democratic governance. All else equal, democrats favor systems of government that are more *responsive*, *innovative*, *honest*, and *participatory*. We consider each virtue in turn, explaining their contours and detailing how optional legislation furthers their realization.

### A. *Responsive*

First, optional legislation is more responsive than nationwide bills. Here, we do not mean anything technical by “responsive.” Rather, we follow the basic idea that democratic governance is favored principally because it gives voice to people’s problems and objectives, and because it enables the government to attend to their preferences. Below we explain how optional legislation honors this virtue, first and most importantly in relation to the substantive policy wishes of individual citizens, and second in relation to the wishes of distinct political communities. In so doing, we rely closely on the work of several theorists who have examined both the importance and the

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77. On the impermissibility of such a “sacrifice,” see generally RAWLS, *supra* note 70, at 3–4 (“Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others.”); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 32–33 (1974) (“Why not . . . hold that some persons have to bear some costs that benefit other persons more, for the sake of the overall social good? But there is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up.”); and RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xi (1977).

limits of democracy's responsiveness in the context of deep political disagreement.

### 1. Individual Choices

Optional bills mean that more people will be able to live under a set of regulations that they affirmatively want, as opposed to merely acceding to legislation because it survived the gauntlet of bicameralism and presentment, or merely acceding to the fact that no bill passed whatsoever. The difference is between *choosing* a bill because of its perceived substantive merits and *acquiescing* to a bill (or the lack thereof) because of the putatively fair procedure by which Congress considered the proposal.<sup>78</sup> To see when and why this is a legislative virtue, it is helpful to contrast it to situations where the government must act and (a) the people's preferences do not matter, or (b) their preferences matter, but not necessarily their choices.

Imagine that, after a decade of work, NASA must solve a devilishly hard math problem to send a special satellite into orbit. This satellite would enable profound insights into the origins of the cosmos, dramatically increase the speed of internet in America while decreasing its cost, and, through unique sound waves, dissolve ten percent of the world's historic carbon emissions and thus help the United States realize its obligations under global emissions treaties. In-house NASA mathematicians have narrowed the realm of plausible answers to the math problem down to two: 1.4 and 7.1. But they have only one chance at getting it right, and if they input the wrong number, the satellite will explode, wasting many billions of dollars and shuttering the project forever. The government must act, and much is at stake for Americans of all persuasions. Yet, in choosing between 1.4 and 7.1, it would be absurd for NASA to consider the preferences of the people by, say, setting up a referendum on the matter. NASA might poll an elite class of experts, perhaps, but certainly not the populace at large, even if—when presented with a choice between the numbers—many people would likely come to form strongly held preferences, with some perhaps based on superstition or group allegiance (“Philadelphians for 1.4!”). In this way, the details of important, real-world regulations often depend on theoretical or scientific knowledge, and what

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78. See Richard Wollheim, *A Paradox in the Theory of Democracy*, in PHILOSOPHY, POLITICS AND SOCIETY 71, 85 (Peter Laslett & W.G. Runciman eds., 1962) (comparing substantive and procedural democratic principles). See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962) (understanding unanimous consent on the substance of regulations to be the democratic ideal).

ordinary citizens might want is normatively irrelevant. It is an Aristotelian idea. He explained that we do not deliberate about things like the laws of nature or particular facts, but rather about complex matters of human agency that do not admit of precise answers (such as whether to spend tax dollars on a public space agency in the first place, and to what degree).<sup>79</sup> As Chaim Perelman writes: “I do not decide that two plus two make four or that Paris is the capital of France.”<sup>80</sup> The axiological liberal principles that define the scope of optional legislation seem to belong in this category, too, such that their limits apply—at least as a moral matter—regardless of the contingent desires of the citizenry.

Now, imagine that the federal government, intending to celebrate the ultimately successful satellite launch, decides to fund several hundred ornate public gardens on federal land throughout the country. There still remains the question of which types and arrangements of floras to plant. In this case, the people’s preferences would determine the “right” answer—in terms of which flowers, shrubs, and so forth they would find most pleasing or interesting to gaze upon.<sup>81</sup> And yet the issue need not be put to a vote for the selection to be legitimate. The people probably do not know what they like precisely, or what plants work together visually; and even if they did, there are more efficient and accurate means of aggregating their preferences through statistical sampling. Better to leave it to professional landscape architects (or maybe algorithms). In such a case, the people’s *preferences*, but not necessarily their *choices*, ought to determine the government’s course of action. Put differently, no matter one’s view on nondelegation principles, there would be nothing worrisomely undemocratic about delegating the ultimate decision to landscapers. It is not simply that they may be authoritative in the sense articulated by Joseph Raz: that we have good reason to follow their lead because they can better satisfy our preferences than we

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79. See generally ARISTOTLE, NICOMACHEAN ETHICS bk. III, ch. 3, § 112(b), at 35 (Terence Irwin trans., Hackett Publishing Co. 2d ed. 1999) (c. 384 B.C.E.) (“There is no deliberation about the sciences that are exact and self-sufficient, as, for instance, about letters, since we are in no doubt about how to write them [in spelling a word]. Rather, we deliberate about what results through our agency, but in different ways on different occasions . . . .”); Heda Segvic, *Deliberation and Choice in Aristotle*, in MORAL PSYCHOLOGY AND HUMAN ACTION IN ARISTOTLE 159 (Michael Pakaluk & Giles Pearson eds., 2011) (discussing different types of Aristotelean deliberation); David Wiggins, *Deliberation and Practical Reason*, in PRACTICAL REASONING 144 (Joseph Raz ed., 1978).

80. Ch. Perelman, *What the Philosopher May Learn from the Study of Law*, 11 NAT. L.F. 1, 11 (1966).

81. For those tempted by the prospect of mind-independent aesthetic values, imagine that the statutory purpose of the gardens is explicitly to “please, delight, and awe” the citizenry.

could by ourselves.<sup>82</sup> Rather, the right to choose loses its potency when we seek to realize a single value (or family of values) like aesthetic beauty, and there is thus no possibility of genuine deliberation or “judgment” with regard to the realization of competing principles or concerns.<sup>83</sup> In these cases, there is simply not much at stake in terms of who gets to decide.

The biggest issues in politics are nothing like this. These are the issues that lead to “reasonable” disagreements, as suggested above, where the disputants weigh the underlying value considerations in different ways, resulting in what Jeremy Waldron calls “rival syntheses.”<sup>84</sup> Both positions represent legitimate interpretations of liberal egalitarian principles, but neither can fully defeat the other in the realm of reason. In these situations, people’s preferences certainly matter when asked to decide, but so do their *choices* regarding the option they decide upon. Consider Isaiah Berlin’s teaching:

The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some of which must inevitably involve the sacrifice of others. Indeed, it is because this is their situation that men place such immense value upon the freedom to choose . . . .<sup>85</sup>

The fact that the policy option that one disfavors—say, robust school choice or \$10,000-a-year universal basic income—is broadly “reasonable” does not mean that one is happy to flip a coin to resolve the debate. Edna Ullman-Margalit and Sidney Morgenbesser explain that one “picks” an alternative when they are strictly indifferent between the options, whereas one “chooses” an alternative when the selection is determined by their preferences.<sup>86</sup> When it comes to complex policy debates, we want to “choose.” The notion of indifferent “picking”—as between two shades of white paint—is inapposite. Our rivals have their reasons, and we have ours.

However, if both policy options are “reasonable,” we might wonder how one can substantively choose an option based on reasons rather than arbitrary

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82. See RAZ, *supra* note 59, at 53–54 (describing the “normal” justification for authority).

83. This is true even if there may be competing aspects to aesthetic beauty, such as between the aesthetics of simplicity and complexity.

84. WALDRON, *supra* note 59, at 98.

85. ISIAH BERLIN, TWO CONCEPTS OF LIBERTY (1958), *reprinted in* LIBERTY 166, 213–14 (Henry Hardy ed., 2d ed. 2002) (1969).

86. See Edna Ullman-Margalit & Sidney Morgenbesser, *Picking and Choosing*, 44 SOC. RSCH. 757, 757 (1977).

factors like unthinking precedent or whim.<sup>87</sup> Ultimately, it is a matter of moral interpretation and, perhaps, moral risk-taking. That several multidimensional and incomparable values underlie a policy debate need not mean that there is no correct way to balance those values in a particular context—or, if not fully “correct,” than at least no “better” or even “less arbitrary” method of balancing.<sup>88</sup> Rather, the underlying vagueness means that because we lack an overarching metric capable of reducing the dispute to a single consideration, it is incredibly difficult, if not impossible, to discern the right solution beyond a reasonable doubt. We thus interpret the relevant values in a way that coheres with our settled convictions and, because we must make a choice, we effectively take a chance at getting the best answer. We stand by our interpretation as objectively correct, arguing that, say, our commitment to solidarity and prioritizing those who are worse off trumps our commitment to parental autonomy in the school choice debate. But we lack the ability to definitively prove that somebody who curated and interpreted the relevant values in a “reasonable” but different manner is definitively wrong.<sup>89</sup> Put differently, while we cannot establish that they are wrong, we are entitled to believe that there is in fact a better answer, and that we are more likely—perhaps much more likely—to be right. Jeffrey Reiman writes:

If some moral principle could be proven true beyond a reasonable doubt, then anyone who disagreed with that principle would be mistaken. If the winner has appealed to that principle, then the winner prevails because she is right, not simply because she can. Otherwise, the two still confront each other as two people with

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87. See Chang, *supra* note 59, at 682–87 (contrasting the arbitrariness of resolving indeterminate “borderline case” issues with the necessity of resolving a given perplexity in “superhard case” disagreements, and arguing that the “resolution of superhard cases cannot be a matter of arbitrary stipulation”); cf. Charles Taylor, *Leading a Life*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 170 (Ruth Chang ed., 1997) (arguing that one method of resolving vague practical matters is to consider which option meshes with one’s past commitments and conception of the good life as a whole).

88. See Bronshter, *supra* note 59, at 34 (“By accepting the possibility of multiple weightings, one is not committed to their absolute and context-independent equality at capturing the covering value’s meaning. And when forced to choose, substantive debate concerns the following question. Among the weightings that could resolve this particular comparison in this particular context, which does the best job of capturing the meaning of the covering value, of, say, career goodness? In this way, we might describe the debate as being over which weighting is the *least arbitrary*.”); cf. Chang, *supra* note 59, at 682 (“Of course in one way, there is already a ‘resolution’ in a borderline case: it is borderline.”).

89. See GAUS, *supra* note 58, at 154.

incompatible judgments, and one prevails because he or she is able to.<sup>90</sup>

In this way, if a single policy option emerges as the best choice beyond a reasonable doubt, then opening the matter up to a vote would be superfluous and risky. That choice should win on what we might call political summary judgment, for as Perelman notes: “Before truth there is no place for rational choice, because all choice, in that perspective, implies ignorance of the truth.”<sup>91</sup> But the political sphere so rarely presents us with demonstratively and cleanly true propositions—leaving us to feel our way through the fog of reasonable disagreement. And it is in that fog that we prize the power to choose. Indeed, Perelman explains that the existence of legitimate and meaningful human choice depends on a set of practical questions that we can employ genuine reason to answer, but not in a manner that involves “necessary adherence to a previously given natural order” such that all good reasoners must reach the same solution.<sup>92</sup> Galston interprets Perelman incisively: “Freedom operates in a zone of partial but not complete regularity, a discursive arena in which some reasons are better than others but none is clearly dominant over all the rest in every situation.”<sup>93</sup> Thus, our individuality—our independent perspective on the world and our capacity for independent thought—and our capacity for free choice both realize their worth in this “zone.”

However, to see as Perelman and Galston that reasonable political disagreement opens a realm of interpretation and choice is to immediately wonder: Who gets to decide? Of course, that assumes, consistent with what Jeremy Waldron calls the “circumstances of politics,” that we indeed want or need to reach a collective decision on the matter of disagreement.<sup>94</sup> But assuming that we do, the stakes are high. Indeed, Reiman defines “subjugation” as “any case in which the judgment of one person prevails over the contrary judgment of another simply because it can and thus without

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90. JEFFREY REIMAN, *JUSTICE AND MODERN MORAL PHILOSOPHY* 5 (1990).

91. Perelman, *supra* note 80, at 4.

92. CH. PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 514 (John Wilkinson & Purcell Weaver trans., University of Notre Dame Press 1969) (1958).

93. GALSTON, *supra* note 39, at 70.

94. WALDRON, *supra* note 59, at 101–03 (“There are lots of things that can only be achieved when we play our parts, in large numbers, in a common framework of action. Enterprises like protecting the environment, operating a health care system, securing the conditions for the operation of a market economy, or providing a basis for dispute resolution will founder unless people act in concert, following rules, participating in practices, and establishing institutions.”).

adequate justification for believing that it should.”<sup>95</sup> If one of two reasonable options becomes policy simply because its supporters are richer or stronger or luckier, then those on the losing side have been “subjugated”—even if they cannot prove that their position is substantively better beyond a reasonable doubt.<sup>96</sup> For to accept that your position is reasonable does not mean, without more, that I accept your ability to impose it upon me. The language of “subjugation” is not hyperbolic, given how much of our autonomy is realized in the context of public affairs. If somebody else decides for us in this area, we become their “subjects,” losing much of the ability to define for ourselves our personal and especially communal existences.<sup>97</sup>

One answer to the question of who decides is what we might call *substantive consensus*. Imagine that after some period of deliberation, all citizens come to agree on the substantive merits of the appropriate course of action about school choice, Medicare for All, or whatever it may be. That is, they come to agree on “direct principles,” to use Richard Wollheim’s term, as opposed to “oblique principles” related to the legitimacy of the broader decision procedure in which some have lost out.<sup>98</sup> However, we are skeptical of such a “dewy-eyed”<sup>99</sup> belief in the possibility of substantive consensus, given the pervasive nature of good faith and not merely self-interested policy disagreement.<sup>100</sup> Part of the problem, once more, is the inevitability of interpretation and the subsequent inability to provide knock-down arguments in the realm of public affairs. Here we think Rawls is instructive. He writes that modern societies feature “a diversity of conflicting and irreconcilable—

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95. REIMAN, *supra* note 90, at 2; *see also* WALDRON, *supra* note 59, at 90 (“The issues that legislation addresses are issues where important individual interests are being balanced, and if great care is not taken, there is a danger that some will be oppressed or unjustly treated.”).

96. *See* RAWLS, *supra* note 52, at 61 (“[T]hose who insist, when fundamental political questions are at stake, on what they take as true but others do not, seem to others to simply insist on their own beliefs when they have the political power to do so. Of course, those who do insist on their beliefs also insist that their beliefs alone are true: they impose their beliefs because, they say, their beliefs are true and not because they are their beliefs. But this is a claim that all equally could make; it is also a claim that cannot be made good by anyone to citizens generally. So, when we make such claims others, who are themselves reasonable, must count us unreasonable.”).

97. *See* Adam Lovett & Jake Zuehl, *The Possibility of Democratic Autonomy*, 50 PHIL. & PUB. AFFS. 467, 469 (2022) (“[S]elf-government is a good thing in its own right. It is a positive form of autonomy, understood as the authorship of one’s life. Just as it is valuable for me to be the author of my private life, it is valuable for me to share in the joint authorship of our common political life.”).

98. *See* Wollheim, *supra* note 78, at 85.

99. WALDRON, *supra* note 59, at 91.

100. *Id.* at 112–13 (“The difficulty of the issues—and the multiplicity of intelligences and diversity of perspectives brought to bear on them—are sufficient to explain why reasonable people disagree.”).

and what's more, reasonable—comprehensive doctrines,” and that such a wide variance in perspective “is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy.”<sup>101</sup>

Given that reasonable disagreement is thus doubtful to melt into *substantive consensus*, we are left to discover a form of *procedural consensus* by which citizens can agree upon a fair procedure through which those who lose a policy debate nonetheless avoid being “subjugated.”<sup>102</sup> The contemporary answer to this challenge is, of course, some form of majoritarian voting. Waldron explains that such a procedure is justified because it “attempts to give each individual’s view the greatest weight possible in this process compatible with an equal weight for the views of each of the others.”<sup>103</sup> Waldron continues that, given that we do disagree, the majoritarian mechanism expresses “perhaps the most robust conception of respect for persons that we are entitled to work with in those circumstances.”<sup>104</sup> It does so because of its inherent egalitarianism—one person, one vote, and each vote counts the same—as well as because it does not force anyone’s sincere views “to be played down or hushed up because of the fancied importance of consensus.”<sup>105</sup>

Now, the democratic unfairness of the Senate’s composition and the electoral college aside,<sup>106</sup> nationwide bills must go through a majoritarian procedure to be passed. So we might wonder how any of this represents a point in favor of optional bills, which must be passed in the same manner, at least in the first instance before states choose to opt in or not. However, there is an important difference between optional and nationwide bills with regard to respecting people’s right to choose in the context of reasonable disagreement. When a bill takes an optional form, the percentage of Americans who can employ the federal government in a manner that they *substantively* rather than merely *procedurally* agree with is higher, perhaps

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101. RAWLS, *supra* note 52, at 36.

102. REIMAN, *supra* note 90, at 2.

103. WALDRON, *supra* note 59, at 114.

104. *Id.* at 117.

105. *Id.* at 109; *see also id.* at 111 (“Respect has to do with how we treat each other’s *beliefs* about justice in circumstances where none of them is self-certifying, not how we treat the truth about justice itself (which, after all, never appears in politics *in propria persona*, but only—if at all—in the form of somebody’s controversial belief).”).

106. *See generally* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006) (arguing that the Constitution is undemocratic due to the lack of proportional representation in the Senate); *Representation in the Electoral College: How Do States Compare?*, USAFACTS, <https://usafacts.org/visualizations/electoral-college-states-representation> [https://perma.cc/2TGM-U27A] (noting how more populous states are underrepresented by the electoral vote system).



much higher given the current gridlocked environment in which all parties are frustrated. On any given issue over which there is reasonable disagreement, optional legislation enables more people to live under the set of regulations that they positively want and choose, leading more of their public lives by “direct” rather than merely “oblique” principles.<sup>107</sup>

We need a good reason to force somebody to live under coercive regulations with which they substantively disagree (assuming their favored policy is fundamentally liberal). Again, the majoritarian answer is that, given that we can choose only one policy, letting the majority win is the method of selection that respects each person’s views equally.<sup>108</sup> But optional legislation changes the premise, at least at the federal level, that we must choose only one policy. In so doing, it frees disparate Americans who hold rival but nonetheless reasonable policy views to employ the federal government in realizing their regulatory vision. Or more accurately yet, it empowers them to run policy experiments which others are free to opt into or out of as policies emerge successful or otherwise over a period of years or even decades. Given that such a legislative scheme is conceivable (and constitutional<sup>109</sup>), respecting people as democratic choosers means *prima facie* favoring the optional form in the face of reasonable disagreement. The case is stronger yet when we appreciate that, in recent decades, there are no nationwide compromise bills available. Optional bills are “responsive” to people’s choices, in significant part, because of their strategic ability to break through the legislative gridlock, thus providing people with *some* federal bills they want, as opposed to *no* federal bills at all.<sup>110</sup>

In any event, optional legislation does not foreclose nationwide deliberation on the merits of bills. Rather, it renders the policy debate less abstract by enabling people to see how their desired policies operate in the real world. In that way, it is not entirely antagonistic to deliberative theories

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107. See Wollheim, *supra* note 78, at 85; see also Lovett & Zuehl, *supra* note 97, at 490 (considering the democratic autonomy advantages of delegating political questions to subnational groupings that house less internal disagreement than the wider national polity).

108. See WALDRON, *supra* note 59, at 109.

109. See Bronsther & Krishnamurthi, *Optional Legislation*, *supra* note 21, at 350–57.

110. Further, when gridlock forecloses Congressional action, less representative political actors often fill the void. See Mark E. Warren & Jane Mansbridge, *Deliberative Negotiation*, in *POLITICAL NEGOTIATION: A HANDBOOK* 141, 142 (Jane Mansbridge & Cathie Jo Martin eds., 2016) (“Because Congress is composed of many representatives, elected from every part of the country, it . . . can come far closer than the executive to representing and communicating with the people in all of their plurality. When Congress is unable to act in the face of urgent collective problems, power flows to other parts of the political system, often diminishing the system’s democratic capacity and legitimacy.”); Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 1009 (2016).

of democracy, but it has a much more experimental and long-term understanding of how the deliberation ought to proceed.<sup>111</sup> We might call it *diachronic deliberation*.

But what if some state would never come to opt in to some demonstratively beneficial scheme due to its underlying political makeup? We think there is not much reason to worry about this, at least over a long enough period. This is evidenced by the forty states that have now opted into the Medicaid expansion associated with Obamacare, many of which were vehemently opposed to the policy initially.<sup>112</sup> But assuming a state's opposition is indeed consistent with basic human equality and the rule of law, then respecting its citizens as independent thinkers who can run their own affairs means respecting their political choices. The alternative is condescending paternalism. For instance, why so many poor and working-class Americans vote for conservative leaders is an enduring American query.<sup>113</sup> Yet the existence of that puzzle does not alter the fact that they have expressed their policy views clearly and in good faith. Again, we imagine

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111. Jessica Bulman-Pozen identifies this virtue with “executive federalism,” by which the federal executive negotiates differential federal policies with the states. Bulman-Pozen, *supra* note 110, at 954–56 (“Because executive federalism generates different variants of national policy, it may stimulate deliberation grounded in concrete acts rather than abstract speech.”); *id.* at 1011 (“Because most conceptions of representation are oriented around legislative processes, they assume that deliberation precedes action and ultimately yields a single accord. The disaggregated quality of executive federalism inverts these premises: Deliberation may follow from policymaking and be a matter of exploring ongoing disagreement rather than settling it. It is in these two respects that the plural character of executive federalism is most important—not because it is a satisfying form of multiplicity in and of itself, but because it enables a variety of different policy choices to be instantiated and, at least potentially, to spur richer governmental and public conversations.”); see also Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1890, 1892–93 (2014) (explaining how federalism may further national purposes).

112. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581–85 (2012) (converting the Medicaid expansion into an option for the states); *Status of State Medicaid Expansion Decisions: Interactive Map*, KFF (May 8, 2024), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map> [<https://perma.cc/3QRB-BKVZ>] (listing the states that have opted into the program).

113. See ROBERT REICH, *THE SYSTEM: WHO RIGGED IT, HOW WE FIX IT* 77–90 (2020) (arguing that corporations and conservative policies do not serve the American populace’s economic self-interest); ZEPHYR TEACHOUT, *BREAK ’EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY* ch. 1 (2020) (arguing that monopolists, aided by conservative political interests, have seized an increasingly large share of the working class paycheck); Nigel Barber, *Why Do Many Poor People Vote Republican?*, PSYCH. TODAY (July 31, 2020), <https://www.psychologytoday.com/us/blog/the-human-beast/202007/why-do-many-poor-people-vote-republican> [<https://perma.cc/WJ9W-RR4R>] (“One of the most puzzling features of U.S. political life is why many of those close to the bottom of the income distribution vote Republican, given that Republican policies often favor the interests of wealthy business owners.”).

(and, in truth, hope) that their views will change over time if they come to see progressive bills succeeding in states that opt into them. But perhaps they won't, especially if their opposition to such bills is grounded in a sincere and non-consequentialist libertarianism.

Another method of justifying the “responsiveness” of optional legislation is to consider Waldron’s admonition that majoritarian voting “attempts to give each individual’s view the greatest weight possible in this process compatible with an equal weight for the views of each of the others.”<sup>114</sup> There is a “levelling up” of legislative power built into Waldron’s formula. Formal egalitarianism would be satisfied, for instance, by a procedure that allowed voters to determine the final four candidate bills on any given issue, with the final selection being determined by a random number generator. That’s not what Waldron has in mind.<sup>115</sup> As Thomas Christiano has argued in the context of distributive justice, “[t]here is an internal connection between the rationale for equality and the value of the relevant fundamental good that is equalized,” such that—all else equal—a strict egalitarian should seek to increase the degree to which people realize the good in question, and not merely ensure that they realize it equally.<sup>116</sup> Christiano provides a helpful example: if we are distributing bread, and everyone has more than they could ever use, it does not matter if the rest of the bread is distributed equally (or distributed at all).<sup>117</sup> Thus, equal distribution matters only when the good being distributed is of value to the recipients.<sup>118</sup> But assuming it *is* of value, then as a matter of basic logic, “more is better than less.”<sup>119</sup> As with bread, so with political power. Limiting federal bills to the nationwide form would distribute political power just as equally as would allowing for optional legislation, at least as a formal matter. But the political egalitarian should prefer the optional form because it provides people with more actual power to determine the substance of their own regulatory environments.<sup>120</sup> That is, it gives people more of the good that we are trying to distribute equally.

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114. WALDRON, *supra* note 59, at 114; *see also id.* at 111, 188 (discussing how majoritarian decision-making “respects individuals”).

115. *See id.* at 111, 114; *see also* Gregory Vlastos, *Justice and Equality*, in EQUALITY: SELECTED READINGS 120, 131 (Louis P. Pojman & Robert Westmoreland eds., 1997) (“[I]f *D* and *E* have sole and equal right to benefit from *x*, they have a joint right to the benefit at the highest level at which it may be secured.” (emphasis omitted)).

116. THOMAS CHRISTIANO, *THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS* 33–34 (2008).

117. *Id.*

118. *See id.*

119. *Id.* at 34.

120. *See generally* Bronsther & Krishnamurthi, *Optional Legislation*, *supra* note 21, at 345–47 (discussing the flexibility of optional legislation).

## 2. Group Choices

In addition to being more responsive to the views of individual citizens, optional legislation may be more responsive to *group* preferences and thus enable group self-determination. That is, if we consider the relevant groups as the parties, then optional legislation offers more opportunities for Democratic and Republican groups to live under legal regimes of their own choosing. Political communities, it is often argued, ought to be able to organize themselves in accordance with their values, principles, and prior commitments.<sup>121</sup> One benefit of democratic systems is that, in theory, they enable this collective right to self-determination.<sup>122</sup> Our federal system was developed with an understanding that America was composed of overlapping political communities—in particular, the individual states and the nation as a whole—each entitled to determine their own existences within certain jurisdictional bounds set by mutual respect for the others.<sup>123</sup> But since the Founding, two additional political communities arguably have joined our system, each with their own political ideology, culture, and history, and each deserving of respect as a community: the red states and the blue states.<sup>124</sup> Along these lines, Iris Marion Young writes that “it is possible to conceive a unit jurisdictionally constituting a self-determining people as itself not a contiguous territory,”<sup>125</sup> and she argues in favor of “horizontal” forms of federalism that enable such geographically fragmented peoples to govern themselves without the assent of the entire polity.<sup>126</sup>

If all that holds true, then optional legislation is communally responsive and democratic in the sense that it allows for the community of progressives and the community of conservatives to determine their own existences to a greater degree. As Heather Gerken writes: “For all intents and purposes . . .

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121. See Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 *YALE L.J.* 954, 975–79 (2019) (presenting arguments for localism and its democratic virtues). See generally ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* (1995) (providing a comprehensive history of the law of self-determination).

122. See Anna Stilz, *The Value of Self-Determination*, in 2 *OXFORD STUDIES IN POLITICAL PHILOSOPHY* 99, 109–11 (David Sobel ed., 2016) (arguing that collective self-determination enables community members to see themselves as coauthors of the institutions that govern their lives).

123. See *THE FEDERALIST NO. 39*, at 246 (James Madison) (Clinton Rossiter ed., 1961) (noting that the Constitution is “neither wholly *national* nor wholly *federal*”).

124. *But see* Matthew S. Levendusky & Jeremy C. Pope, *Red States vs. Blue States: Going Beyond the Mean*, 75 *PUB. OP. Q.* 227, 228 (2011) (questioning the conventional view that red- and blue-state Americans are from “separate planets”).

125. Iris Marion Young, *Self-Determination as Non-Domination: Ideals Applied to Palestine/Israel*, 5 *ETHNICITIES* 139, 150 (2005).

126. *Id.* at 147–51.

there aren't fifty independent laboratories these days; there are two. One is red, one is blue, and they are composed of highly networked national interest groups running their battles through any state (or local) system where they have political leverage."<sup>127</sup> For instance, imagine that a number of blue states banded together under a state compact to implement a favored progressive policy—a policy that they would never be able to pass at the federal level.<sup>128</sup> On this communal conception of democracy, the compact would surely be deserving of respect in the sense that the community of progressives is coming together to realize its vision of justice, free from conservative obstruction on Capitol Hill. It is by cultivating and enabling such political unions that optional legislation is responsive to a divided nation and champions democratic ideals of communal self-control. That holds even if, at the same time, we can imagine and hope that the parties become more ideologically intertwined and complex through the “diachronic” and experimental deliberation that optional legislation affords.

In sum, optional legislation embodies the twin virtues of what Gerken envisions as the federalism of the future: (1) it conceives of states (and now *collections* of states) and the federal government as “cooperative”<sup>129</sup> or “braided”<sup>130</sup> governance regimes; and (2) it maintains that decentralization

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127. See Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1720 (2017).

128. Optional legislation is, in effect, a state compact accelerator. See Bronsther & Krishnamurthi, *Optional Legislation*, *supra* note 21, at 335–37.

129. See generally DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 162 (2d ed. 1972) (finding that the national government has not expanded at the expense of states); MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* (Daniel J. Elazar ed., 1966) (arguing that the national political process, particularly in Congress, provides strong safeguards for state and local interests); Susan Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 YALE L.J. 1344, 1344 (1983) (analyzing the merits of federal grants to states); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1692 (2001) (developing a vision of how federal courts should enforce cooperative federalism and applying this conception to the implementation of the Telecommunications Act of 1996); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 663 (2001) (highlighting how Congress favors cooperative federalism programs and has rejected the dual federalism model of regulation); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1557 (2012) (“States do not rule separate and apart from the [federal] system, and the power they wield is not their own. Instead, they serve as part of a complex amalgam of national, state, and local actors implementing federal policy.”); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1259 (2009) (theorizing the special case of “uncooperative” federalism, when states refuse to enact federal policy).

130. Robert Cooter, *Gerken's Federalism 3.0: Better or Worse than It Sounds?*, 105 CALIF. L. REV. 1725, 1728 (2017) (“My term for vertical interdependence of governments is ‘braided federalism’—different levels of government twisted together like a rope.”).

can favor progressive and conservative interests alike.<sup>131</sup> By embracing both intergovernmental cooperation *and* decentralization, it rejects the federalism of the New Deal, with its conception of the states and the federal government as competitive, zero-sum sovereigns,<sup>132</sup> as well as the federalism of the civil rights movement, with its assumption that decentralization impedes progressive politics.<sup>133</sup> In so doing, optional legislation provides a novel conceptual framework for American federalism and governance.

### B. Innovative

Another set of justifications for democracy are “epistemic,” with the idea being that democracy produces objectively better results. Principal reasons for this have sounded in diversified decision-making,<sup>134</sup> democratic procedures that inherently provide the government with access to information about the citizenry,<sup>135</sup> and the benefits of group voting associated with Condorcet’s Jury Theorem.<sup>136</sup> Below, we assess these three putative epistemic advantages of democracy and consider how optional legislation fares on each. We find that all three are contentious or highly contingent, but nonetheless plausible. And to the extent they in fact lead to better decision-

131. See Gerken, *supra* note 127, at 1718–21.

132. See *id.* at 1699.

133. See *id.* at 1718; see also Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 367 (1997) (“Repeated reactionary state conduct has had its effect on the American psyche, leaving some Americans—particularly elites—with the idea that problems are best solved at the national level and states are not to be trusted.”).

134. See generally HÉLÈNE LANDEMORE, *DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY* (2013) (discussing how democratic decision-making produces more effective results than individual decision-making); Jeremy Waldron, *The Wisdom of the Multitude: Some Reflections on Book 3, Chapter 11 of Aristotle’s Politics*, 23 POL. THEORY 563 (1995) (same).

135. See generally Elizabeth Anderson, *The Epistemology of Democracy*, 3 EPISTEME 8 (2006) (discussing how democratic institutions gather and make effective use of information to address problems of public interest); JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY* 223 (Melvin L. Rogers ed., Swallow Press 2016) (1927) (“The strongest point to be made in behalf of even such rudimentary political forms as democracy has already attained, popular voting, majority rule and so on, is that to some extent they involve a consultation and discussion which uncover social needs and troubles. This fact is the great asset on the side of the political ledger.”); JACK KNIGHT & JAMES JOHNSON, *THE PRIORITY OF DEMOCRACY: POLITICAL CONSEQUENCES OF PRAGMATISM* 6 (2011) (arguing that democracy is the best means of coordinating, monitoring, and assessing institutional experimentation and effectiveness).

136. See, e.g., Joshua Cohen, *An Epistemic Conception of Democracy*, 97 ETHICS 26, 34–35 (1986); Bernard Grofman & Scott L. Feld, *Rousseau’s General Will: A Condorcetian Perspective*, 82 AM. POL. SCI. REV. 567, 567 (1988). See generally BRIAN BARRY, *POLITICAL ARGUMENT* (1965) (detailing the foundations and methods of political discourse).

making within democracies, we conclude that federalism and, to a yet greater degree, optional legislation furthers the resulting epistemic benefits. Optional legislation introduces pathways for more democratic decision-making, which in turn facilitates greater diversity in decision-making, more information about the public's objectives, and more group voting.

### 1. Diversified Decision-Making

The diversification theory is that democracy is best able to take advantage of “the cognitive diversity of large groups of citizens to solve collective problems.”<sup>137</sup> Consider the following example: suppose two labs are pursuing different, conflicting projects in cancer research. That is, if Lab 1's approach is successful, then Lab 2's will not be, and vice versa. Consider a government entity thinking about how to fund these projects. Even if one of the approaches is probabilistically more fruitful, it could still make sense to fund both projects. Diversifying the approaches to problem solving can, under certain circumstances, increase our chances of discovering solutions—even revolutionary ones.<sup>138</sup> One way of understanding this benefit in the context of democracy is in comparison to other forms of governance, such as authoritarianism and oligarchy. There, the set of decisionmakers is very limited.<sup>139</sup> In contrast, democracy is aimed at gathering the views of the citizenry as a whole.<sup>140</sup> Consequently, the argument goes, democracy brings in more information, perspectives, and approaches to solve problems.

Scott Page and Lu Hong observe that under certain assumptions, a random collection of problem solvers may outperform a collection of the best-performing problem solvers.<sup>141</sup> This has since been referred to as the

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137. Tom Christiano & Sameer Bajaj, *Democracy*, STAN. ENCYC. PHIL. (June 18, 2024), <https://plato.stanford.edu/entries/democracy> [<https://perma.cc/LRJ2-M736>].

138. See Joseph H. Carens, *Compromises in Politics*, in NOMOS XXI: COMPROMISE IN ETHICS, LAW, AND POLITICS 123, 126–29 (J. Roland Pennock & John W. Chapman eds., 1979) (discussing the possibility of novel “integrative compromises” between competing problem-solving approaches).

139. See generally Jean L. Cohen, *Cycles of Oligarchy, Democracy, and Authoritarianism: Lessons from the United States*, CONSTELLATIONS (Dec. 7, 2024), <https://onlinelibrary.wiley.com/doi/full/10.1111/1467-8675.12769> (discussing the differences in decision-making processes between democratic, oligarchic, and authoritarian regimes).

140. See *id.* at 4.

141. Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 PROC. NAT'L ACAD. SCIS. U.S. 16385, 16385 (2004).

Diversity-Trumps-Ability Theorem.<sup>142</sup> Specifically, Page and Hong are motivated by the following scenario and inquiry:

An organization wants to hire people to solve a hard problem. To make a more informed decision, the organization administers a test to 1,000 applicants that is designed to reflect their individual abilities in solving such a problem. Suppose the applicants receive scores ranging from 60% to 90%, so that they are all individually capable. Should the organization hire (i) the person with the highest score, (ii) 20 people with the next 20 highest scores, or (iii) 20 people randomly selected from the applicant pool?<sup>143</sup>

Page and Hong observe that the existing literature suggested (ii) was better than (i), and intuition suggests (ii) is better than (iii).<sup>144</sup> They challenge that latter intuition. They note that it is well accepted that, assuming roughly equal ability, functionally diverse groups are better than the individual best agent and also better than homogeneous groups.<sup>145</sup> Using a mathematical model of problem solvers, and running a computational experiment of problem solvers, Page and Hong show that under certain conditions, “a random group of intelligent problem solvers will outperform a group of the best problem solvers.”<sup>146</sup> The basic idea underlying the finding is that the best performers will often use similar approaches. But, for a particular problem, their method may not be successful. Thus, employing a diversity of approaches—even by less skilled agents—may minimize the risk of a complete misfire.<sup>147</sup> Put simply, it sometimes pays not to put all of your eggs in one basket.<sup>148</sup>

142. See, e.g., Ryota Sakai, *Mathematical Models and Robustness Analysis in Epistemic Democracy: A Systematic Review of Diversity Trumps Ability Theorem Models*, 50 PHIL. SOC. SCIS. 195 (2020).

143. Hong & Page, *supra* note 141, at 16385.

144. *Id.*

145. *Id.*

146. *Id.* at 16389.

147. Sameer Bajaj offers this description of Page’s work:

With respect to problem solving, Page’s result rests on the idea that the best problem solvers think alike and thus tend to get stuck quickly at solutions not much better than the solution any one of them arrives at after careful reflection . . . . When an individual in a cognitively diverse group gets stuck . . . , by contrast, the others can use their diverse ways of seeing alternatives and solving problems to guide the deliberative process toward the best solution . . . .

Sameer Bajaj, Book Note, 124 ETHICS 426, 428 (2014) (reviewing LANDEMORE, *supra* note 134).

148. For a critique of Page and Hong’s article from a mathematical perspective, see Abigail Thompson, *Does Diversity Trump Ability? An Example of the Misuse of Mathematics in the Social Sciences*, 61 NOTICES AM. MATH. SOC’Y 1024 (2014).



Some scholars, in particular H el ene Landemore, have argued that Page and Hong’s findings can be marshaled in favor of democracy, as rule by many can outperform rule by experts (and *a fortiori* oligarchy<sup>149</sup>).<sup>150</sup> But there are some serious concerns about how Page and Hong’s findings extrapolate to political decision-making in the real world.<sup>151</sup> Elizabeth Anderson explains that “the [Diversity-Trumps-Ability] Theorem does not model the epistemic functions of periodic elections and other feedback mechanisms designed to change the course of collective decisions in light of information about their consequences.”<sup>152</sup> That is, “able” agents can adjust their strategies to real-world feedback by adopting entirely new problem-solving approaches. In this way, ability may again win out against diversity. Further, Sameer Bajaj argues that Landemore’s instantiation of Page and Hong’s work rests on a critical but controversial assumption, what Landemore calls “political cognitivism.”<sup>153</sup> “Political cognitivism holds that policies can be better or worse according to a ‘standard of correctness’ . . . [that] does not take into account the procedure that produces the policy.”<sup>154</sup> However, Bajaj notes that on this assumption, groups of experts might achieve better results than diverse groups.<sup>155</sup> Suppose, per political cognitivism, that there are some “standards of correctness” for adjudging the best decisions.<sup>156</sup> Diverse groups may not be able to agree on the standards, precisely because of their diversity of beliefs in basic, foundational principles.<sup>157</sup> Thus, diverse groups may find greater obstacles in solving those problems compared to groups of experts who are more likely to agree on the basic governing standards of correctness.<sup>158</sup>

Another important observation: though democracies are likely more open to cognitive diversity than autocracy or oligarchy, the benefits here are not always substantial. Put differently, that democracies may have built-in

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149. The argument here is that oligarchs will likely be insulated as a matter of diversity in decision-making, but may or may not be expert, high-performing problem solvers. Consequently, they will perform worse than experts, and by transitivity, based on Page and Hong’s findings, they will perform worse than the diversified decision-makers.

150. LANDEMORE, *supra* note 134.

151. See Anderson, *supra* note 135, at 13; Bajaj, *supra* note 147, at 428.

152. Anderson, *supra* note 135.

153. Bajaj, *supra* note 147, at 429.

154. *Id.* (quoting LANDEMORE, *supra* note 134, at 208).

155. *Id.* at 430.

156. *Id.*

157. *Id.*

158. See *id.* For other trenchant criticisms of Landemore’s application of Diversity-Trumps-Ability principles to democratic decision-making, see Paul J. Quirk, *Making It Up on Volume: Are Larger Groups Really Smarter?*, 26 CRITICAL REV. 129 (2014); and Jason Brennan, *How Smart Is Democracy? You Can’t Answer that Question a Priori*, 26 CRITICAL REV. 33, 40 (2014).

epistemic advantages does not mean that they always utilize them. Instead, elections decide winners and losers—usually in terms of winning and losing parties. And parties are often not diverse. They represent particular perspectives and approaches to solving problems, which are informed by selected sources. Party elites—working within constrained cognitive “paradigms”—are thus the experts and the decision-makers, with the result being very similar, epistemically speaking, to oligarchy.<sup>159</sup> Of course, the full story is more complicated. Democracies do offer pathways for dynamism and epistemic change that autocracies and true oligarchies lack. New ideas, and the parties that tout them, can and do challenge in elections, and thus they can obtain purchase in decision-making, even when disfavored by elites.<sup>160</sup> And it doesn’t always require winning elections outright. In particular, in bipartite democratic systems—comprised of two main parties—the two parties can absorb aspiring third parties and their new ideas.<sup>161</sup> But to make this impact, third parties have to be substantially robust—which in turn can be a significant hurdle for their inclusion.<sup>162</sup> That’s simply to observe that successfully confronting the partisan duopoly is no ordinary task; it is difficult to achieve. Thus, while we agree that democracy has advantages in marshalling cognitive diversity, such inclusion is not guaranteed, and it is often discontinuous, occurring through transformative moments.

With that in mind, optional legislation, we contend, can further the benefits of democracy on the dimension of diversified decision-making. Consider that the principal structural innovation of federalism is described in

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159. See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 577 (2014) (finding that “majorities of the American public actually have little influence over” policymaking, which is instead “dominated by powerful business organizations and a small number of affluent Americans”). On “paradigms” of thought and the role they play in enabling and limiting scientific progress, see generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1996).

160. That said, some have questioned whether autocracy or oligarchy is at any disadvantage here. Arnold Kling, in a blog post, argued that the ideal epistocracy—rule by experts—would be open to popular vote on certain kinds of decisions and would consult only experts on others. Brennan, *supra* note 158, at 54 (discussing the “Kling Indifference Theorem”). Thus, autocracy and oligarchy could have the best of both worlds when acting optimally and rationally.

161. See Perry Bacon Jr., Opinion, *The U.S. Has Four Political Parties Stuffed into a Two Party System. That’s a Big Problem.*, WASH. POST (Mar. 8, 2022, 8:00 AM), <https://www.washingtonpost.com/opinions/2022/03/08/americas-four-party-system/>; J. DAVID GILLESPIE, *CHALLENGERS TO DUOPOLY: WHY THIRD PARTIES MATTER IN AMERICAN TWO-PARTY POLITICS* (1st ed. 2012) (explaining the mechanisms by which third parties have achieved substantive change through American history).

162. See generally GILLESPIE, *supra* note 161, at 16–36 (noting obstacles third parties have had to overcome in having their voices heard).

the phrase the “laboratories of democracy.”<sup>163</sup> The idea here is that the many states will face problems and tailor possible solutions to those problems. Some of those problems will be common across many states—at least to a certain degree of similarity. And each of those states will have the freedom to address those problems as they wish. Given the diversity of decision-makers in those states, there will, naturally, be variations in those solutions. And thus, the states will serve as laboratories—showcasing the successes and failures of different approaches to common problems. This in turn will demonstrate what the successful strategies are in tackling such problems, which can be emulated and further developed.

In this way, federalism straightforwardly advances the epistemic benefits of democracy by expanding the bases of information available for decision-making. It gives us the opportunity to see how different approaches can address problems—some will succeed, some will fail, and most will succeed in some respects and fail in others. Federalism’s laboratories of democracy marshal all of that to advance our collective decision-making, aiding future decision-makers to arrive at better decisions.

Federalism also may plug the gap in applying Page and Hong’s scholarship to real-world democracy. Recall that one of the main concerns was that democracies do not regularly and ordinarily avail themselves of multiple approaches, perspectives, and information bases. If democracies operate—as an epistemic matter—just like oligarchies, then federalism challenges that because different states will naturally have different electoral winners. In our two-party system, some states are blue, and some states are red. And those states will each have *different* party elites at the helm. So at the least, in a federalist system, you will get that kind of variation. Along with data from the laboratories of democratic experimentation, our collective decision-making will have further access to a diversity of perspectives and approaches because elections across the nation are *not* all-or-nothing.

The benefits of optional legislation on this epistemic dimension are pellucid, then. Principally, optional legislation expands the types of laboratories of democracy that can exist. Whereas the basic federalist system treats the states as the laboratory units, optional legislation diversifies the types of laboratories that can operate. Rather than relying only on the ossified

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163. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“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.”); *Fed. Energy Regul. Comm’n v. Mississippi*, 456 U.S. 742, 788 (1982) (O’Connor, J., concurring in part and dissenting in part) (“Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas.”).

individual state structure, optional legislation allows for policy experiments that are run through collections of states.

That difference isn't theoretical. Optional bills enable states to experiment with programming that they would be unable or unwilling to administer on their own for myriad reasons. Consider the fact that many states are small, which in turn presents issues of generation and scalability. Small states may not have the revenue and size to be able to promulgate certain regimes. And even if they can, evidence from small states may not be good evidence of operation on a national scale. There are also other concerns with the operation of laboratories at the state level alone—like a lack of policy expertise, collective action problems amongst the states, and a political culture which often looks to Washington for policy leadership.<sup>164</sup> Further, optional legislation enables states to take advantage of the federal government's deficit spending capacity.<sup>165</sup> Unlike the federal government, most state governments—large and small alike—are required by their constitutions or other state law to balance their budgets.<sup>166</sup> While participating states would presumably have to cover the cost of deficit spending at some point, that year-to-year fiscal flexibility is enormously valuable when managing a large and expensive program.<sup>167</sup> Consequently, collections of states working through the federal bureaucracy, with pooled resources and the benefits of centralization, can tackle problems that singular states may not be able to.

Thus, optional legislation enables experiments on bigger issues, which otherwise would have been appropriate only for national bills. Again, optional legislation allows us to see how different approaches fare in solving problems on a subnational scale, just as federalism envisioned. However, by comparison to exclusively state-level programs, the resulting experiments—on new, bigger issues—will provide us with greater information bases to solve our future problems, which in turn promotes the sharing and transfer of valuable data. In this way, optional legislation builds upon the epistemic

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164. See generally Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 135–44 (2010) (arguing that many government programs require a strong federal policy and financial role due to collective action problems between the states).

165. Thanks to Matt Grossmann for helpful discussion on this point.

166. See NAT'L CONF. OF STATE LEGISLATURES, NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS (2010), <https://docs.house.gov/meetings/JU/JU00/20170727/106327/HHRG-115-JU00-20170727-SD002.pdf> [<https://perma.cc/TG33-WBUT>].

167. To be sure, determining which amount of the federal deficit corresponded to which optional program would be a complex accounting challenge, and the method of doing so would presumably have to be incorporated into the legislation itself to ensure that opt-out states are not later fiscally responsible for some portion of the opt-in states' deficits. Thanks to Adam Candeb for helpful discussion on this point.

benefits afforded by the multiplicity of electoral winners in the federal system. Just as we observed that federalism, by naturally having different parties at the helm in different states, showcases different perspectives and approaches, optional legislation will do the same for *collections of states*—allowing for novel problem-solving methods to flourish when they would otherwise be politically or practically infeasible at either the state or national level.

Recently, scholars have challenged whether the famed laboratories of the states actually foster innovation.<sup>168</sup> Specifically, there are often problems with information sharing between states.<sup>169</sup> This can be due to resource constraints or because innovation in the states may be driven by actors—like corporate interest groups—who do not have an incentive to collect and share such data.<sup>170</sup> As a result, states are often left to regulate with no benefit of other states' experience.<sup>171</sup> They are, in Hannah Wiseman's words, "regulatory islands."<sup>172</sup> Optional legislation can help to solve these information deficits along multiple pathways. First, by pooling resources among the participant states, optional legislation can mitigate the resource constraints that might plague individual states on shoestring budgets. Second, the fact that many states will naturally participate in the legislation, which is in turn centralized in a federal bureaucracy, means fewer bottlenecks of information. Third, competition between national groups invested in demonstrating the success of their respective optional programs should provide further transparency.

## 2. More Information

A related, but distinct, concern is whether the government is in fact addressing people's problems and increasing their wellbeing. The key point here is that because democracy brings more people into the decision-making process, it will bring forth detailed information about people's desires and needs.<sup>173</sup> And, so the argument goes, because a democracy will be so informed, it has better potential to satisfy those desires and meet those

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168. See, e.g., Hannah J. Wiseman, *Regulatory Islands*, 89 N.Y.U. L. REV. 1661, 1661 (2014).

169. *Id.*

170. See *id.* at 1713–14.

171. *Id.* at 1722–23.

172. See *id.* at 1713–19; cf. Charles W. Tyler & Heather Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2190–91 (2022) (arguing that while states themselves lack much capacity to innovate, they are nonetheless sites of policy experiments organized by third-party organizations).

173. Anderson, *supra* note 135, at 13–14.

needs.<sup>174</sup> Even assuming that benevolent experts are at the helm of government, the problems of the citizenry are not always apparent. As John Dewey argued, democracy involves, at its core, a deliberative process, and this process does the work of unearthing the objectives of the citizenry.<sup>175</sup> Elizabeth Anderson explains that Dewey offered an “experimentalist account” of epistemic democracy, with a diversity of citizens in discussion with each other, and democratic institutions—such as “periodic elections, a free press skeptical of state power, petitions to government, public opinion polling, protests, public comment on proposed regulations of administrative agencies”—as catalysts for “dynamism” and change in light of failures and successes to give the people what they want.<sup>176</sup>

Of course, this argument does not arise without objection. Among other things, it is not clear that democracy does a better job of revealing the needs and desires of the citizenry. For one, they may be largely obvious—cheaper food and housing, better schools, etc. And it’s not clear that the reason they go unaddressed by governments is because they are unknown; it could be incompetence, nonegalitarianism, corruption, and so forth.<sup>177</sup> Furthermore, per Dewey’s formulation, it is the deliberative process itself that reveals the people’s preferences. But democracies can operate without much productive deliberation. Elections are held, but election campaigns may not involve genuine deliberation on the citizenry’s objectives.<sup>178</sup> In such a case, it’s not clear that democracy will be better informed about what people want. A humbler formulation, then, is that democracy has greater potential to receive and act upon information about the citizenry’s objectives.

Insofar as the information-gathering benefit of democracy is genuine and realizable, federalism generally proffers advantages. That is because local control fosters many of the dynamistic democratic practices that reveal the citizens’ objectives—with more decisions being put up to vote, and more discourse between citizens and government. Optional legislation would augment and accelerate this epistemic process by creating more pathways for legislation. It broadens the agenda, putting more decisions up for votes both

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174. *Id.*

175. *Id.* (citing JOHN DEWEY, *The Public and Its Problems*, in 2 THE LATER WORKS OF JOHN DEWEY 1925–1953, at 235–372 (J.A. Boydston ed., 1981)).

176. *Id.* at 14.

177. See, e.g., Aris Trantidis & Nick Cowen, *Is Public Ignorance a Problem? An Epistemic Defense of Really Existing Democracies*, 77 POL. RES. Q. 759, 759–61 (2024) (arguing that political responses to public discourse, but not public ignorance, are most critical for successes in the democratic process).

178. See Yasmin Dawood, *Second-Best Deliberative Democracy and Election Law*, 12 ELECTION L.J. 401, 405 (2013).

at the federal level, where representatives will debate optional mechanisms, and at the state level, where representatives will choose to join into any resulting schemes, or not. This will generate more discourse between citizens and their governments, and it will better reveal the aims and desires of the people.

*a. Problems with Perspectival Diversity*

There's an additional concern about perspectival diversity: some have worried that perspectival diversity may in fact undercut the democratic process.<sup>179</sup> That's because perspectival diversity may reveal core disagreements about normative matters, and it may also challenge whether there are even shared methods of describing the world.<sup>180</sup> If so, then public reasoning “faces grave difficulties” as people talk past each other, threatening the possibility of inclusive, democratic decision-making.<sup>181</sup> In the face of such challenges, Ryan Muldoon argues that there can be epistemic advantages to such gridlock.<sup>182</sup> Muldoon contends we should not seek a permanent agreement on justice amidst all this deep diversity and disagreement, but rather proceed with temporary deals that may be incremental and subject to change—what he calls “justice as a trajectory.”<sup>183</sup> Even here, we think federalism and optional legislation have much to offer, principally in helping to produce those temporary deals and moving us along the “trajectory.” Rather than waiting for the day that one party enlists an enduring, filibuster-proof majority of the country, optional legislation promotes a vision of policy experimentation and incremental progress, as collections of states adjust their policy preferences over a period of decades as they come to see their policy visions succeed or fail. Indeed, as discussed above, we think Obamacare's Medicaid expansion has been an exemplar of such possibilities.<sup>184</sup>

### 3. Condorcet Jury Theorem

Another epistemic justification proffered in favor of democracy is the Condorcet Jury Theorem (“CJT”), which purportedly shows that the wisdom

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179. See, e.g., Quong, *supra* note 76.

180. *Id.*

181. *Id.*

182. RYAN MULDOON, SOCIAL CONTRACT THEORY FOR A DIVERSE WORLD: BEYOND TOLERANCE 21–37 (2016).

183. *Id.* at 5.

184. See *supra* note 112 and accompanying text.

of crowds will arrive at better decisions.<sup>185</sup> The CJT states that when (1) each voter decides a question independently, (2) they all have the same probability of achieving a correct decision, and (3) they each are more likely than not to decide the question correctly, then a group decision using majority voting will have a greater chance of deciding correctly than any individual voter.<sup>186</sup> Moreover, as the number of such voters increases, the probability of the group's success approaches 1 (or 100%). Consider the following table:<sup>187</sup>

Probability of Voter Success	Number of Voters	Probability of Group Success
51%	1	51%
	5	51.88%
	11	52.71%
	101	57.99%
	1,001	73.66%
60%	1	60%
	5	68.26%
	11	75.35%
	101	97.91%
	1,001	99.99% (nearly 100%)
70%	1	70%
	5	83.69%
	11	92.18%
	101	99.99%
	1,001	99.99% (nearly 100%)

Thus, with even some bare level of competence for each individual voter, majority voting among groups can result in a high success rate of decision-making. At the same time, the Condorcet Jury Theorem produces a symmetric result among incompetent—even slightly incompetent—decision-makers. That is, if each voter has less than a 50% chance of getting to the

185. See Marquis De Condorcet, *Essay on the Application of Mathematics to the Theory of Decision-Making* (1785), reprinted in CONDORCET: SELECTED WRITINGS 33, 33 (Keith Michael Baker ed. & trans., 1976); Anderson, *supra* note 135, at 10–12.

186. Guha Krishnamurthi, *For Judicial Majoritarianism*, 22 U. PA. J. CONST. L. 1201, 1224–25 (2020) (explaining the CJT).

187. This data was calculated using the Binomial Probability Formula, assuming under each probability of success that at least half of the voters succeed in obtaining the correct decision. See generally GEORGE P. WADSWORTH, INTRODUCTION TO PROBABILITY AND RANDOM VARIABLES 48, 52 (1960).



right decision, the group's chance of success is less than the individual's, and it will also plummet rapidly.

With that in mind, applying the highly idealized CJT to real-world democratic voting is difficult. For one, none of the basic premises actually hold: it is not the case that all voters are competent (that is, more likely than not to achieve correct decisions); it is not the case that they are uniform—different voters have different capacities of achieving correct decisions; it is not the case that they vote independently, as their votes are generally correlated with other votes.<sup>188</sup> But perhaps more fundamentally, there must be some standard of correctness. For normative questions, it's not clear that there is an objective standard of correctness at all, but even if there were, it may not be epistemically accessible to us. Given the failure of these assumptions, the CJT itself cannot tell us anything about the propensity of success by the group.<sup>189</sup>

That said, there are “close cousins” of the CJT that are potentially applicable. One corollary, from Bernard Grofman, Guillermo Owen, and Scott Feld, states that the result holds so long as the average competency of the voters is greater than 50% and the distribution of voters' competence is symmetric; in that case, the majority outperforms the average competency.<sup>190</sup> Another, from Krishna Ladha, states that the result holds so long as the average competency of the voters is greater than 50% and the votes are not highly correlated.<sup>191</sup> And there are several others that temper the strict requirements of the CJT to suggest that there is indeed a wisdom of crowds, so long as the crowd averages competence.<sup>192</sup>

Even equipped with these close-cousin theorems that relax the stringent requirements of the CJT, it is not clear that this epistemically favors democracy over expert oligarchy (“epistocracy”). Recall that the CJT states

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188. *See id.* at 1226–27.

189. Anderson contends another problem with the CJT modeling democracy is that in suggesting the near infallibility of group decision-making, the CJT model of democracy does not recognize the need for feedback mechanisms to correct errors in the group decision-making. Anderson, *supra* note 135, at 12. We don't think that is necessarily true. Even very highly improbable events occur (indeed, even 0% probability events can occur). Thus, even if CJT predicts a group is very likely to achieve a correct outcome, it might nevertheless not. And depending on the stakes, a CJT model of democracy can still build in feedback mechanisms to detect and correct democratic errors.

190. Bernard Grofman et al., *Thirteen Theorems in Search of the Truth*, 15 THEORY & DECISIONS 261, 268–71 (1983).

191. *See* Krishna K. Ladha, *Condorcet's Jury Theorem in Light of De Finetti's Theorem: Majority-Rule Voting with Correlated Votes*, 10 SOC. CHOICE WELFARE 69, 82 (1993).

192. *See* Philip J. Boland, *Majority Systems and the Condorcet Jury Theorem*, 38 J. ROYAL STAT. SOC'Y SERIES D (THE STATISTICIAN) 181, 181–89 (1989) (generalizing the CJT for dependent voters).

that the success rate of the group differs on two variables—the competency of the individual voter (even if averaged) and the size of the group.<sup>193</sup> And one observation is that with slightly higher competency (even just 60%), the rate of success of the group rapidly climbs with even modest increases in size. Suppose you have a group of experts with 70% competency; under the CJT, even a group size of 15 will achieve roughly 95% success, using majority vote. That, of course, is under ideal assumptions, but the close cousins produce a similar result. Adding more voters, who are not experts, does not improve the group chances much—principally because the reduction in competency will lower the curve of group success, but also because *there is not much room for improvement*.<sup>194</sup> So all in all, it's unclear that the CJT offers a strong epistemic justification for democracy.

However, if it is true that subjecting decision-making to populous democratic voting takes advantage of the “wisdom of crowds,” then federalism (and, by extension, optional legislation) advances this epistemic benefit. Federalism, by and large, provides more opportunities for populous decision-making in the states. And because federalism empowers local decision-makers to determine local issues, there might be a greater competence among the voters, which favors the group's success according to the CJT.

Further, one of the principal benefits of optional legislation is that it provides a way to circumvent the filibuster rule, as discussed below.<sup>195</sup> In short, even if one generally believes in the function of the filibuster to protect the rights and interests of minority states, there is simply no reason to impose a supermajority requirement from the filibuster for the passage of optional legislation. States are amply protected by the terms and function of optional bills; they do not have to opt in. This has an epistemic benefit because the anti-majoritarian filibuster rule in the Senate frustrates the CJT by preventing bills being put up to majority vote. Because optional legislation would allow more decisions to be decided pursuant to sufficiently numerous group vote, it marshals the high probability of success of majority-in-group decision-making. Additionally, while local decision-makers may be more informed on local issues, they may suffer an expertise gap on more complex, national

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193. See Krishnamurthi, *supra* note 186.

194. Jason Brennan makes this point as well: that it may be sufficient for democracy to use large deliberative bodies of experts, rather than the whole population. Brennan, *supra* note 158, at 40.

Now, of course it is rare that substantive decisions are put to popular vote as we have a representative democracy. Nevertheless, the decision-making bodies themselves—specifically the legislatures—are numerous, and the CJT can operate on that group's decision-making.

195. See Bronsther & Krishnamurthi, *Optional Legislation*, *supra* note 21, at 349–50.

matters. Here too, optional legislation improves the situation. By bringing together collections of states, with federal coordination, it can pool resources to attract and deploy greater expertise. This in turn improves the competence of individual decision-makers upon which the CJT relies.

### C. Honest

Partisan polarization and gridlock are deleterious and indeed dangerous for many reasons.<sup>196</sup> One negative result is that our policy debates have become atrociously mean and unserious.<sup>197</sup> Any sort of change, even minor, is seen as an endgame scenario. Every slope is slippery, and thus any sort of innovation is life-or-death.<sup>198</sup> As we have observed in prior work, this is because “voters and politicians tend to see political party affiliation as the key feature of their (political) identity.”<sup>199</sup> Not only is legislative compromise seen as a policy failure—it is seen as jeopardizing one’s electoral prospects.<sup>200</sup>

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196. See Jacob Bronsther & Guha Krishnamurthi, *The Iron Rule*, 42 CARDOZO L. REV. 2889 (2021) (explaining the logic of partisan escalation in a realm of reciprocally self-applied norms of cooperation).

197. See, e.g., Stephen Collinson, *Washington Is Broken*, CNN (Jan. 19, 2018, 1:51 AM), <https://edition.cnn.com/2018/01/19/politics/washington-shutdown-broken/index.html> [<https://perma.cc/M93Z-SCJT>] (“It’s not that Washington politicians don’t understand the human consequences of their delay and inability to compromise. They just don’t know how to get it done in an era of deep polarization and when goodwill and bipartisan solutions between the parties have long since disappeared.”); Burgess Everett et al., *‘Get Off Our Damn Asses’: Stimulus Debacle Exposes Broken Washington*, POLITICO (Dec. 10, 2020), <https://www.politico.com/news/2020/12/10/coronavirus-stimulus-relief-impasse-444320> [<https://perma.cc/CMR7-AGFY>]; Mychael Schnell, *Frustrated Lawmakers Run for the Exits: ‘DC Is Broken,’* HILL (Nov. 22, 2023), <https://thehill.com/homenews/house/4322092-house-lawmakers-retire-toxic-congress> [<https://perma.cc/3F75-WT2G>].

198. As David Moss writes, “Policy making in America is approaching all-out war, where victory is paramount, ‘compromise’ is a dirty word, and virtually any issue or development can become a weapon for bludgeoning the other side.” David A. Moss, *Fixing What’s Wrong with U.S. Politics*, HARV. BUS. REV., Mar. 2012, at 134, 138.

199. Bronsther & Krishnamurthi, *Optional Legislation*, *supra* note 21, at 314–15; see also David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 765–67 (2017); Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 363–84; *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public> [<https://perma.cc/VBJ7-JS6J>].

200. Amber Phillips, *Why Is Washington So Dysfunctional?*, WASH. POST (Sept. 30, 2021), <https://www.washingtonpost.com/politics/2021/09/30/why-is-washington-so-dysfunctional> (statement of former Rep. Charlie Dent) (“I think in America today, many politicians view their political safety [as reliant on] tacking hard to their bases. Fewer members of Congress tack to the center, because they don’t see a reward for compromise and consensus.”).

In light of such partisan gridlock, we have an environment where there is no fruitful discourse between the parties—and thus between politicians and the citizenry. Where there should be engagement on our collective problems, we have silence. As Yuval Levin observes of the dysfunction in Congress:

[T]oo many members treat the institution like a platform for expressing dissent rather than a space for legislative negotiation. Anyone who has attended a high-profile congressional hearing in recent years can attest that hearings have become production sessions for YouTube clips and other social media posts rather than opportunities for collective deliberation or debate.<sup>201</sup>

One effect of this political culture is that this allows politicians to prevaricate about their own positions. Because they know that all legislative proposals are effectively doomed, they can appeal to their respective bases about what they would counterfactually do if they had an enduring supermajority—all the while knowing that such a state of affairs will not come to fruition. The result is that our politics are rendered less honest, frustrating many of the virtues of and justifications for democracy.

One fundamental justification for democracy concerns its core ability to provide the public with the reasoning behind their government's actions.<sup>202</sup> In one sense, this is a conceptual claim about democracy. That is, government action is legitimate only insofar as it is publicly justified—to the polity and through reasoned discourse between the citizenry.<sup>203</sup> To this point, Jürgen Habermas's theory of deliberative democracy has been extremely influential.<sup>204</sup> And while they disagree with Habermas on certain fundamental matters, John Rawls and Joshua Cohen both proffer conceptions of

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Consider the recent example of Senate negotiations on dealings with the southern border. The idea behind the bipartisan deal was to “pair assistance to Ukraine and Israel with measures to improve border security.” Lexie Schapitl et al., *Senate Border Negotiations Forge Ahead Despite Pressure from Trump*, NPR (Jan. 25, 2024), <https://www.npr.org/2024/01/25/1226883552/bipartisan-border-deal-at-risk-of-collapse-under-pressure-from-trump> [<https://perma.cc/ZE6M-3XWT>]. But then-candidate Trump exerted pressure on Republican Senators to reject the deal so as to preserve an important campaign issue for Trump in the 2024 presidential election. *See id.* This is just another example of bipartisan progress being seen to jeopardize electoral success, and vice versa.

201. Yuval Levin, Opinion, *This Is Why Americans Are So Cynical About Politics*, N.Y. TIMES (Jan. 21, 2024), <https://www.nytimes.com/2024/01/21/opinion/america-politics-cynical-dysfunctional.html>.

202. Christiano & Bajaj, *supra* note 137.

203. *Id.*

204. *Id.*; *see also* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 110 (William Rehg trans., MIT Press 1996) (1992) (“[O]nly those statutes may claim legitimacy that can meet with the assent . . . of all citizens in a discursive process of legislation that in turn has been legally constituted.”).

democracy in which regulation and governance must be pursuant to principles on which there is (or ought to be) societal consensus—and developing that consensus requires public discourse and deliberation.<sup>205</sup>

Apart from these conceptual accounts of democracy, there is also the instrumental point that for a government to be effective it must have authority. And in democracies, such authority is obtained through public justification.<sup>206</sup> That is, people in democracies approve of and agree with their government's actions when they understand *why* their government is taking such action.<sup>207</sup> Public justification is thus key to the authority—and the proper function—of democratic governance.<sup>208</sup>

The problems of partisan discord and gridlock then become clear. Of course, it impedes legislative action and thus the ability of the legislature to address problems of the citizenry. But it also results in an environment where genuine deliberation between the parties is verboten and good faith communication between the legislators and the citizenry is absent. The government keeps running, but only through the operation of default rules and processes typically carried out in administrative agencies—it is not the result of public deliberation between those who disagree. These are grave problems under any theory of democracy that is even *mildly* deliberative. In a similar way, then, this “default” or perhaps “background” form of governance will fail to be authoritative, as it fails to justify its actions with sufficient publicity. It will provide some rules, and it will enforce them; but it will not explain itself, at least not in full. That is not to say that the government's actions are mysterious or inexplicable. Of course, they can be explained: there is partisan discord, and thus a resulting unwillingness to deliberate and compromise, which in turn leads to governance by existing default structures. But that does not suffice as *justification*. It does not carry the explanatory burden that the citizenry requires to view their government's actions as valid and legitimate. Instead, it is simply a reflection that the government is not functioning properly.

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205. See RAWLS, *supra* note 70, at 5, 221–22 (discussing the rational basis of agreed-upon principles); RAWLS, *supra* note 52, at 134; Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 95 (Seyla Benhabib ed., 1996) (discussing established principles created through citizen interaction).

206. See Christiano & Bajaj, *supra* note 137 (“[L]aws and policies are legitimate to the extent that they are publicly justified to the citizens of the community.”).

207. DAVID ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK 8 (2008).

208. See *generally* ROBERT B. TALISSE, DEMOCRACY AFTER LIBERALISM: PRAGMATISM AND DELIBERATIVE POLITICS (2005); THOMAS CHRISTIANO, THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS (2008) (both discussing the legitimacy and authority of democracy).

Furthermore, because of the partisan gridlock, government action is on hold. Beyond the lack of public justification, we also have opportunistic politicians capitalizing on the logjam to promote ambitious policy plans aimed at their frustrated and incensed voter base. But all of this arises in a context where their proposals will never be tested, precisely because of the gridlock created by partisan group dynamics. If no bill is passable, it creates an incentive for candidates, especially in primary elections, to stake out maximally partisan positions. This problem is exacerbated when, as is increasingly the case, politicians compete for gerrymandered, “safe” seats in which the leading party’s primary effectively determines the winner of the general election.<sup>209</sup> Consider Senator Mitt Romney’s insights on the state of our politics after a recently failed bipartisan bill on border reform: “Politics used to be the art of the possible. Now it’s the art of the impossible . . . . Meaning, let’s put forward proposals that can’t possibly pass so we can say to our respective bases, look how I’m fighting for you.”<sup>210</sup> These positions are thereby dishonest in the sense that they are presented as real policy platforms even though they cannot be accomplished.

To be clear, the problem here is not that we have opportunistic politicians. The democratic virtue of governance can survive the fact that we have opportunistic politicians who give voice to their voters’ policy fantasies. Our politicians needn’t be saints to have a democracy. Rather, the problem is that in such a situation, the resulting political discourse is devoid of meaning. It is, as Harry Frankfurt elucidated, “bullshit”—politicians do not care whether their political discourse is true or not, but simply whether it will garner votes.<sup>211</sup> As a consequence, our discourse is not deliberative. It does not genuinely explore ways that the legislature can address the citizenry’s

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209. See Reid J. Epstein & Nick Corasaniti, *‘Taking the Voters Out of the Equation’: How the Parties Are Killing Competition*, N.Y. TIMES (Feb. 8, 2022), <https://www.nytimes.com/2022/02/06/us/politics/redistricting-competition-midterms.html> (“Both Republicans and Democrats are responsible for adding to the tally of safe seats. Over decades, the parties have deftly used the redistricting process to create districts dominated by voters from one party or to bolster incumbents.”).

210. Gitanjali Poonia, *Sen. Mitt Romney on the Border Bill: Politics Is Now ‘the Art of the Impossible,’* DESERET NEWS (Feb. 6, 2024, 6:02 AM), <https://www.deseret.com/2024/2/6/24064158/sen-mitt-romney-border-bill-trump> [<https://perma.cc/C82J-VV8U>].

211. See Harry Frankfurt, *On Bullshit*, 6 RARITAN Q. 81, 98 (1986) (“Someone who lies and someone who tells the truth are playing on opposite sides, so to speak, in the same game. Each responds to the facts as he understands them, although the response of the one is guided by the authority of the truth, while the response of the other defies that authority and refuses to meet its demands. The bullshitter ignores these demands altogether. He does not reject the authority of the truth, as the liar does, and oppose himself to it. He pays no attention to it at all. By virtue of this, bullshit is a greater enemy of the truth than lies are.”).

objectives. Instead, the legislature is doomed to inaction, and the politicians disingenuously exploit that fact.

Here too, optional legislation offers clear advantages. Currently, the filibuster rule, and the subsequent fact that nationwide federal legislation requires strong consensus, gives politicians an excuse for inaction. It is similar to the Constitution's stringent amendment provisions in Article V; querying why we simply don't amend the Constitution is not a serious political retort when amending the Constitution is so difficult. Similarly, the filibuster has proven to be remarkably resilient, at least with respect to substantive legislation.<sup>212</sup> However, optional legislation offers a way to circumvent the filibuster requirement and the demand for robust consensus. By enabling collections of states to pass federal legislation applicable only to their citizens, and paid for only by their resources, optional legislation obviates the common objections legislators might have: their constituents do not want the legislation, and they do not want to pay for it. But with optional bills, their constituents would not be affected at all. Why, then, should they get to prevent other states from opting in? This democratic logic should obviate the filibuster with respect to optional legislation. Indeed, given that optional bills impact people in opt-in states alone, a collection of states that represents a minority of the country should be able to use the optional form to coordinate their activities (e.g., a UBI program that covers only ten states).

In this manner, optional legislation presents an opportunity to pass more legislation, which in turn removes the excuse for inaction. Unlike the current situation where gerrymandering, partisan polarization, and inaction lead to the expression of extreme and infeasible positions, the possibility of action may lead to compromise (perhaps intraparty compromise if not yet between the parties). Regardless, it would force politicians to explain why they have opted for the uncompromising position of inaction. Consequently, by increasing the real ability of politicians to pass bills, it would pressure them to present their views in good faith. If legislators choose inaction, they must explain why, and the citizenry can respond. Moreover, because there are genuine opportunities for political votes to matter, the citizenry has a way to test politicians' claims about their plans and objectives. And equipped with this mechanism for testing their representatives, the citizenry can then extract

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212. The Senate has amended the filibuster rules for some forms of budgetary legislation and for judicial nominations. See MEGAN S. LYNCH, CONG. RSCH. SERV., RL30458, *THE BUDGET RECONCILIATION PROCESS: TIMING OF LEGISLATIVE ACTION 2* (2016) (discussing limitations to the length of debate on the budget reconciliation process); Susan Davis, *Senate Pulls 'Nuclear' Trigger to Ease Gorsuch Confirmation*, NPR (Apr. 6, 2017, 12:33 PM), <https://www.npr.org/2017/04/06/522847700/senate-pulls-nuclear-trigger-to-ease-gorsuch-confirmation> [https://perma.cc/8T4W-A3TR] (discussing filibuster limitations in judicial nominations).

better justifications. By augmenting the realm of the politically feasible, optional legislation should render our political discourse more transparent and honest, and our system of democratic governance more authoritative.

#### *D. Participatory*

One virtue of federalism is that it increases political participation by placing certain political questions and debates at a more local level.<sup>213</sup> As Barry Friedman observes: “States, and their substate local governments, are closer to the people and provide an opportunity for greater citizen involvement in the functional process of self-government.”<sup>214</sup> This virtue recognizes that democracy is not solely a mechanism for protecting our interests; it also respects our dignity and autonomy by empowering us to make decisions for our collective future.

Optional regimes would broaden that participatory benefit to federal legislation, as states are forced to debate whether or not they choose to opt in. While federal representatives would pass the legislation, ultimately a state would signal participation in an optional regime via the same process that it would pass equivalent state legislation. So, if such legislation required passage by the state legislature and signing by the governor, then a state

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213. See generally CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970) (emphasizing the role of participation in both classic and contemporary democratic theory).

214. Friedman, *supra* note 133, at 389; see also Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (“This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.”); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1509–10 (1987) (“One of the principal arguments for substantial state autonomy was that representatives in a smaller unit of government will be closer to the people . . . . There were two reasons to believe that a centralized government would undermine republican virtue. First, public spiritedness is a product of participation in deliberation over the public good. If the citizens are actively engaged in the public debate they will have more of a stake in the community. The federal government is too distant and its compass too vast to permit extensive participation by ordinary citizens in its policy formulations. By necessity, decision making will be delegated to agents. But as they are cut off from active participation in the commonwealth, the citizens will become less attached to it and more inclined to attend to their private affairs.”); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 91–92 (1995) (“[O]ne of the stronger arguments for a decentralized political structure is that, to the extent the electorate is small, and elected representatives are thus more immediately accountable to individuals and their concerns, government is brought closer to the people, and democratic ideals are more fully realized.”); Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1324–25 (2004) (detailing multiple rationales for federalism).



would agree to participate in optional legislation in the same way. If the state allowed for legislative override of a governor's veto, then that same process could be used to participate in optional legislation as well. Thus, with optional bills, the stakes of the state legislative processes would be higher than normal. People would be able to participate in the federal process in a more meaningful manner—suddenly, they could lobby their state representatives on federal issues, rather than only their distant Congresspeople or President. Further, some states create legislative space for direct democracy, and the participatory benefit of optional legislation would be even greater if citizens attempted to opt in via popular referenda or ballot initiatives.<sup>215</sup>

Part of the story is the sheer size of Congressional districts. With the national population increasing, Congress added seats to the House after every census from 1790 to 1910.<sup>216</sup> But it failed to reach a deal after the 1920 census because of disagreements over whether adding more seats would create a cumbersome large chamber and, more importantly as a matter of politics, whether doing so would favor the growing urban areas at the expense of the rural.<sup>217</sup> However, under pressure from President Herbert Hoover, Congress finally compromised on the Apportionment Act of 1929, which capped the number of House seats at 435 and transferred the responsibility of setting the count to the executive branch.<sup>218</sup> But as the number of seats stayed the same,

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215. The Medicaid expansion presents several examples of such a process. See Amy Goldstein, *Three Deep Red States Vote to Expand Medicaid*, WASH. POST (Nov. 7, 2018), [https://www.washingtonpost.com/national/health-science/three-deep-red-states-vote-to-expand-medicaid/2018/11/07/6586ae58-e1dc-11e8-ab2c-b31dcd53ca6b\\_story.html](https://www.washingtonpost.com/national/health-science/three-deep-red-states-vote-to-expand-medicaid/2018/11/07/6586ae58-e1dc-11e8-ab2c-b31dcd53ca6b_story.html) (“Voters in Idaho, Nebraska and Utah approved ballot initiatives to include in their Medicaid programs adults with incomes of up to 138 percent of the federal poverty line.”). Thanks to Quinn Yeargain for helpful discussion on this point.

216. See generally Emanuel Celler, *Congressional Apportionment—Past, Present, and Future*, 17 LAW & CONTEMP. PROBS. 268 (1952) (providing a history of Congressional apportionment); Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV. 1921, 1928 (2018) (explaining apportionment's evolution before 1920); SARAH J. ECKMAN, CONG. RSCH. SERV., R45951, APPORTIONMENT AND REDISTRICTING PROCESS FOR THE U.S. HOUSE OF REPRESENTATIVES (2021) (describing the legislation that fixed the number of House seats).

217. See generally CHARLES W. EAGLE, DEMOCRACY DELAYED: CONGRESSIONAL REAPPORTIONMENT AND URBAN-RURAL CONFLICT IN THE 1920S (1990) (discussing the cultural underpinnings, political frictions, and governmental developments surrounding congressional reapportionment in the 1920s); LAURENCE F. SCHMECKEBEIR, CONGRESSIONAL APPORTIONMENT (1941) (discussing the history of and various methods for Congressional apportionment); Karlan, *supra* note 216, at 1937 (discussing rural states' fear of losing seats in Congress); Geoffrey Skelley, *How the House Got Stuck at 435 Seats*, FIVETHIRTYEIGHT (Aug. 12, 2021), <https://fivethirtyeight.com/features/how-the-house-got-stuck-at-435-seats> [https://perma.cc/4U5N-GC7D] (noting the concern that a seat increase would make the House “unwieldy”).

218. Karlan, *supra* note 216, at 1938–39.

the population continued to rise in the intervening century. As of 2023, each House member represents approximately 760,000 people<sup>219</sup>—after representing about 210,000 people in 1910.<sup>220</sup> Consider, by comparison, that the average population per national seat in Japan is about 270,000 people; in Germany about 130,000; in the United Kingdom and Italy about 100,000; and in Greece, Denmark, Sweden, and Finland about 30,000.<sup>221</sup> It’s better at the state level. On average in 2020, state senators represented 167,820 people, while members of the lower statehouses represented 61,169 people.<sup>222</sup> Thus, our voices are far less diluted at the state level, and optional legislation would thereby augment our ability to participate in the federal legislative process. Without losing any access to Washington, D.C., we would gain an additional layer of potential influence, which in turn should incentivize additional participation. Further, all this applies not only to the average citizen, but also to the average state representative, who would be empowered by optional legislation to participate directly in certain federal debates. Perhaps that prospect would excite more people to run for state office.

### III. THE VICES

Optional legislation is a novel governmental “technology,” by which likeminded individuals and groups can employ the federal government to realize their conception of good policy, but without forcing those who reasonably disagree with them to live under the same legislative regime. But as with all technologies, rarely are they so virtuous that there is no corner for viciousness. Many of the prodemocratic features we have identified with optional legislation can be mischievously utilized for wrongful, antidemocratic purposes. To this end, there are at least three putative “vices” of optional legislation that may concern skeptics. First is that it poses a threat to solidarity and, as a result, it enables secessionism. Second is that it abandons people in opposite party states. Third is that it will lead to massive population flows between red and blue states. We contend that each of these can be mitigated, and do not pose a true threat of harm in embracing optional legislation. We consider them in turn.

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219. Danielle Allen, Opinion, *The House Was Supposed to Grow with Population. Let’s Fix That.*, WASH. POST (Feb. 28, 2023), <https://www.washingtonpost.com/opinions/2023/02/28/danielle-allen-democracy-reform-congress-house-expansion>.

220. Skelley, *supra* note 217.

221. *Id.*

222. *Population Represented by State Legislators*, BALLOTPEDIA, [https://ballotpedia.org/Population\\_represented\\_by\\_state\\_legislators](https://ballotpedia.org/Population_represented_by_state_legislators) [<https://perma.cc/M4A3-38B9>].

*A. Eroding Solidarity, Enhancing Secessionism*

Through the laboratories of democracy enabled by optional legislation—and the policy successes or failures that they may reveal—we envision that the communities of progressives and conservatives might eventually come together into a more deeply shared political culture. But perhaps they won't come together, at least not in the near- or medium-term future. Maybe, then, allowing clusters of states to solve big issues separately will create entrenched constituencies, eroding any potential for greater cooperation. Thus, is optional legislation then a vehicle of secessionism, either intentionally or not? The worry is that allowing parties to realize their policies at the state level, without developing bipartisan consensus at the federal level, may lead to wholly separate “peoples” who will ultimately seek independent statehood.<sup>223</sup>

Amy Gutmann and Dennis Thompson advance a similar argument in the context of assessing mutual “toleration” of disparate views, contending that it stifles deliberative democracy.<sup>224</sup> They argue that toleration of this sort “provides no positive basis on which citizens can expect to resolve their moral disagreements in the future. Citizens go their separate ways, keeping their moral reasons to themselves, avoiding moral engagement.”<sup>225</sup> Though acknowledging that this “may sometimes keep the peace[, such] mere toleration also locks into place the moral divisions in society and makes collective moral progress far more difficult.”<sup>226</sup> With respect to optional legislation, the idea is that allowing collections of states to pursue such isolated approaches is akin to toleration that stifles genuine deliberative democracy.

We think this is incorrect. The first critical point is that optional legislation—like federalism itself—is principally a mechanism to reduce partisan rancor. This, in turn, has the main potential of diverting and deterring secessionist sensibilities. In part, we think that partisan discord emanates from a relatively small set of consequential issues.<sup>227</sup> Optional legislation allows us to table those issues when discussing a uniform national policy,

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223. Thanks to Linda Greene for raising this objection.

224. AMY GUTMANN & DENNIS F. THOMPSON, *DEMOCRACY AND DISAGREEMENT* 62 (1996).

225. *Id.*

226. *Id.* at 62–63.

227. See, e.g., Frank Newport, *Update: Partisan Gaps Expand Most on Government Power, Climate*, GALLUP (Aug. 7, 2023), <https://news.gallup.com/poll/509129/update-partisan-gaps-expand-government-power-climate.aspx> [<https://perma.cc/9D4T-3393>] (providing examples of polarized policy areas).

thereby isolating the accompanying enmity from the greater national policy conversation.

But beyond tabling issues to divert partisan rancor, we think allowing opportunities for multiple approaches to problems in fact cultivates a beneficial national conversation. Here, Jessica Bulman-Pozen's work on "executive federalism" is illustrative.<sup>228</sup> She examines how certain national policies (e.g., on healthcare and marijuana regulation) are set through negotiations between federal and state officials, and she presents a "qualified defense" of the practice.<sup>229</sup> Bulman-Pozen notes that such executive federalism is not unitary—there are many different executive actors working, sometimes at cross and inconsistent purposes.<sup>230</sup> But the proliferation of a variety of approaches to problems, she argues, enhances deliberation.<sup>231</sup> She points to how various states' decisions on expanding Medicaid led to fruitful national discourse about healthcare and health insurance, and that differing state choices on marijuana legalization have led to better discourse on drug policy.<sup>232</sup> She writes:

Because executive federalism enables multiple versions of national policy to be instantiated at once, the discussions it stimulates both within government and beyond it may be a matter of exploring ongoing disagreement rather than resolving it. Deliberation may generate new interests, new coalitions, and new judgments of existing policies, but it need not eliminate difference.<sup>233</sup>

This is what we envision for optional legislation: the enhanced freedom for different collections of states to pursue disparate policy solutions will lead to a more sophisticated, respectful, and dynamic policy debate, and a deeper understanding of our good faith (and evolving) points of consensus and dissensus. That said, we cannot positively rule out the possibility of secessionist momentum. But we think that the probable upsides of optional

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228. Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 954 (2016); see also Jessica Bulman-Pozen & Gillian E. Metzger, *The President and the States: Patterns of Contestation and Collaboration Under Obama*, 46 PUBLIUS 308, 309 (2016) ("National policy is increasingly determined by presidentially instigated executive branch action, but it is executive action taken in conjunction with the states."); Adam S. Zimmerman, *Ghostwriting Federalism*, 133 YALE L.J. 1802, 1810 (2024) (demonstrating how "federal agencies shape state legislation" and considering the resultant "implications for administrative law and our divided system of government").

229. Bulman-Pozen, *supra* note 228, at 957, 992–93.

230. *Id.* at 1010–13.

231. *Id.*

232. *Id.* at 1011.

233. *Id.* at 1012.

legislation, like breaking the legislative gridlock and promoting democratic virtues, outweigh these doomsday considerations.

### B. *Abandoning Political Minorities*

Another concern about optional legislation is that it abandons those in the political minority—liberals and progressives in Republican collections of states and conservatives in Democratic collections of states. In that way, perhaps optional legislation engenders large failures in representation.

In our current gridlocked era, where the alternative is no federal bill at all—such that all people are effectively abandoned at the federal level—we contend that this worry is not especially strong. From the perspective of its supporters, an optional bill represents a “Pareto improvement” in a given policy area, in the sense that *some* individuals will be able to live under putatively superior legislation, while none will live under worse legislation.<sup>234</sup> To be sure, the extent to which that is true may depend on the degree to which both parties would employ optional legislation in that area.

Optional legislation is neutral between the parties’ potential objectives. It does not favor liberal or progressive interests over conservative ones. Indeed, while we envision optional legislation principally as a vehicle for advancing new programs, it may be possible to use the optional form to enable states to *opt out* of existing legislation. Further, Bulman-Pozen has elsewhere defended the idea that today’s partisanship creates a “federalist variant of surrogate representation,” by which legislators can represent people with whom they have no electoral relationship.<sup>235</sup> As it relates to optional legislation, the idea is that a member of the political minority in one state—which opts in or out of a bill against their wishes—can be represented in the national discourse by the political majorities in other states that go in the other direction.

Moreover, looking at optional legislation exclusively through the partisan lens is mistaken. Optional legislation promises better solutions to big

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234. See Samson Alva & Vikram Manjunath, *Strategy-Proof Pareto-Improvement*, 181 J. ECON. THEORY 121, 124 (2019) (“One allocation Pareto-improves another if each agent finds the first at least as desirable as the second.”); Gerard Debreu, *Valuation Equilibrium and Pareto Optimum*, 40 PROC. NAT’L ACAD. SCIS. U.S. 588, 588 (1954) (discussing Pareto optimality).

235. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1132–34 (2014); see also Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 522–23 (2003) (discussing surrogate representation); Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387, 406–07 (2008) (considering how political representation can extend beyond government representatives to associations, movements, and opinion leaders).

problems. If an optional legislation program is succeeding in participating states, then additional states can and, we think, *will* join in the plan. As such, optional bills may be the most effective means of convincing the many American citizens and politicians who are skeptical of progressive demands for a more socialized system of government—or, conversely, the people who are skeptical of demands for a more libertarian system. As indicated above, the Medicaid expansion associated with Obamacare, which the Supreme Court converted into an option, has now been adopted by forty states, many of which were initially disparaging of the policy.<sup>236</sup> This is “proof of concept” for the idea that states—even red states—will eventually join a successful, progressive program. From a progressive perspective, then, rather than abandoning the poor and the working class in states that would decline progressive optional legislation, we believe that such legislation represents their best hope. Or, at least, it represents a better hope than watered-down compromise bills engineered with political strategy rather than good policy in mind—bills which, no matter how diluted, are increasingly unlikely to pass through a divided Washington and, if they are somehow enacted, will face such immediate and severe opposition from the losing side that whatever benefits they do provide are uncertain to last.

### C. *Mass Migration, Turbulent States*

Finally, there is a worry that optional regimes will lead to massive internal migration between blue and red states.<sup>237</sup> Perhaps, for instance, if a state opts into a generous welfare system there will be (1) an influx of individuals who want to take advantage of optional social welfare programs and (2) an outflow of individuals who want to avoid paying optional taxes.

We aren’t especially worried about this “vice.” Partially, that’s because state tax and benefit rates have historically had very minimal impact on interstate moves.<sup>238</sup> Furthermore, there are several strategies that opt-in states

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236. See *supra* note 112 and accompanying text.

237. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416–24 (1956) (setting forth a model of governmental competition across local jurisdictions, which theoretically would lead to the optimal provision of social and public goods, as people pick up and move themselves into the local government system that best satisfies their preferences); see also ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 4 (1970) (arguing that members of any organization that fails to satisfy their preferences, whether a club, union, business, nation, or so forth, can either “exit” the organization or attempt to reform it with their “voice”).

238. See Michael Mazerov, *State Taxes Have a Minimal Impact on People’s Interstate Moves*, CTR. ON BUDGET & POL’Y PRIORITIES (Aug. 9, 2023), <https://www.cbpp.org/research/state-budget-and-tax/state-taxes-have-a-minimal-impact-on-peoples-interstate-moves> [https://perma.cc/2SZP-K345] (synthesizing data and studies).

may employ to mitigate an influx. First, states can use geography, making their participation conditional on the involvement of neighboring and nearby states. For example, if California made its participation conditional on, say, Nevada, Arizona, and Oregon opting in, that might prevent a great deal of migration. Second, while it is more complicated legally, states may be able to impose residency requirements on optional benefits, such that people are subject to the benefits and burdens of optional bills only once they've resided in the state for, say, a year.<sup>239</sup> All that said, it's not clear whether migration motivated by welfare programs would be a net fiscal negative for participating states. It may, of course, be that some people moving in will be net takers. But others may consider welfare programs to be simply good insurance; they may move to the state, start a business or be gainfully employed, contribute to the productivity and tax revenue of the state, and thus offset any welfare benefits they might ever draw. They might be net contributors. It will be a genuine empirical question as to whether, or to what degree, migration motivated by optional welfare bills—that is, people voting with their feet, either to receive the optional benefits or avoid the optional taxes—will frustrate such programs.<sup>240</sup>

If the migration worry proves to be more important than we believe, it would not rule out optional legislation writ large; it would simply limit its radicalism. It would create a feasibility limit for optional legislation (at least in the context of expensive welfare programs). Once the dust settles and the insurance pool is set, the program simply might not be viable, given population flows. Maybe such an internal “limit” makes optional legislation less interesting as a policy matter, but also less frightening and more viable as a political matter, in the sense that it can be used to enact real change but not totally radical change that would cause an enormous amount of people to move.

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239. See *Saenz v. Roe*, 526 U.S. 489, 510–11 (1999) (rejecting distinctions between new residents and long-term residents with respect to access to welfare benefits).

240. One further point is that our system does reward states for attracting more residents: relative growth in population is rewarded with further seats in the House, when there is reapportionment after the decennial census. Barry Edmonston, *Using U.S. Census Data to Study Population Composition*, 77 N.D. L. REV. 711, 712–13 (2001). Indeed, if there is enough migration to frustrate the implementation of some optional legislation, that detriment may be offset somewhat by gains of relative population growth that might give the state greater representation in the House (which can be used for decisions broader than the subject of the optional legislation). However, this correction does lag because it only occurs after the decennial census. But even a few seats in the House may have a dramatic impact over the course of ten years. Thus, the calculus is multifactorial and may involve incommensurables, but there are plausible scenarios where net losses due to the optional legislation may be worth it for the gain in representation.

## IV. CONCLUSION

These are tough times for American democracy. Partisan gridlock has created such an impasse that even one party capitulating to the other's desired policy preferences is not enough to get a bill passed.<sup>241</sup> There is no longer such a thing as a bipartisan victory. And that's a problem when the two parties each control about half the country. In this Article, we have proffered a new "optional" type of legislation as a way forward. Optional legislation capitalizes on our federalist structure to bring forth new opportunities for policymaking, and for clearing, or at least circumventing, partisan gridlock. It enables the parties to score victories for their constituencies while isolating their constituencies from any losses. Alongside this practical political benefit, optional legislation, we contend, will result in a richer form of American democracy. But we observe that "democracy" is a slippery term.<sup>242</sup> A natural question, then, is what theory of democracy vindicates the promise and value of optional legislation? Our response is that optional legislation is prodemocratic on the four most central virtues of democracy: responsiveness, innovation, honest discourse, and participation. On all these virtues, we argue that optional legislation enhances our current form of government—by respecting and leveraging the diversity of reasonable policy views and the benefits of federal-state cooperation, and by mitigating the filibuster and obstacles to resource pooling. Furthermore, the purported vices of optional legislation—that it dissolves unity, abandons political minorities, and encourages mass migration—are doubtful to manifest. Insofar as these pathologies do plague us—and they sometimes do—they are endemic to our current system.

That we Americans disagree so strongly does not mean, in every case, that those we disagree with hold their views in bad faith. Policymaking is hard and usually, the contending positions are all consistent with liberalism and legality, even if they may be very different in substance. Optional legislation, by enabling more of us to employ the federal government to experiment with our reasonable legislative visions, thus enables two final democratic virtues—tolerance and humility.

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241. See *supra* note 210 and accompanying text.

242. See DAHL, *supra* note 34.