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THE "STATES-AS-LABORATORIES" METAPHOR IN STATE CONSTITUTIONAL LAW

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I. INTRODUCTION

No contemporary discussion of state constitutional law, it seems, is considered complete without some invocation of the metaphor of "states-as-laboratories." We are constantly invited by judges and scholars alike to imagine state appellate judges as white-coated lab technicians, solemnly and disinterestedly conducting grave experiments involving constitutional liberties. At their best, metaphors help sharpen thinking by conjuring up vivid images to clarify difficult concepts. But the misuse of metaphors can just as easily impede sound analysis by serving up images that are attractive, but misleading. A metaphor that gets tossed around by as many different people in as many different circumstances as the states-as-laboratories metaphor surely deserves a skeptical reexamination. Accordingly, I want to use this opportunity to examine the metaphor of states as laboratories. In what sense is the metaphor apt? Is it merely descriptive? Or does it furnish some kind of justification for judicial action, and if so, of what sort?

The metaphor first appeared in a 1932 dissenting opinion of Justice Brandeis: "It is one of the happy incidents of the federal system," he wrote, "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."[1] I begin in Part II by examining the context in which Justice Brandeis used the laboratory metaphor, and some of its limitations. Part III turns to some ways in which the image of scientific experimentation can be misleading when applied to constitutional and political analysis. Part IV then examines some recent invocations of the metaphor. I conclude that the metaphor is most often used, not entirely aptly but certainly harmlessly, to describe the federal system of government. Problems arise, however, when the metaphor is invoked not to describe, but to justify. I argue in Part IV that the metaphor has some limited justificatory power when invoked to support certain interpretations of the federal Constitution, but that its use to justify constructions of state constitutions by state courts is misleading and improper.

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1. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

II. ORIGINS OF THE METAPHOR

The states-as-laboratories metaphor first appeared in the final two paragraphs of Justice Brandeis' dissent in *New State Ice Company v. Liebmann.*[2] Apart from these two paragraphs, the decision is in every other respect an undistinguished and typical ruling of the *Lochner* era. The case concerned the constitutionality of an Oklahoma statute forbidding the manufacture and distribution of ice without a license. Under the challenged statute, the state was authorized to issue such a license only upon a showing "of the necessity for a supply of ice at the place where it is sought to establish the business."[3] The existence of an adequate supply of ice at the pertinent location furnished grounds to deny a license to new applicants. The statute thus created a network of local ice monopolies protected by the state from price competition.

A six-Justice majority invalidated the statute under the Due Process Clause of the Fourteenth Amendment as an unwarranted interference with the right to engage in private business in a lawful occupation.[4] In a lengthy and candid dissent, Justice Brandeis laid out some of his growing frustrations with the Court's substantive due process jurisprudence. As we shall see, Brandeis' opinion is often treated as a ringing endorsement of state experimentation. In fact, the key language, taken in context, means something rather different.

In the part of the dissent that concerns us here, Justice Brandeis argued that the appropriate due process standard was reasonableness, and that Oklahoma's statute was nothing if not reasonable.[5] His reasons for thinking the statute reasonable are worth quoting at some length:

> The people of the United States are now confronted with an emergency more serious than war. Misery is widespread, in a time, not of scarcity, but of over-abundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices and a volume of economic losses which threatens our financial institutions. . . . [R]ightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition. Increasingly, doubt is expressed whether it is economically wise, or morally right, that men should be permitted to add to the producing facilities of an industry which is already suffering from overcapacity. . . . All agree that irregularity in employment—the greatest of our evils—cannot be overcome unless production and

2. *Id.*
3. *Id.* at 272.
4. *Id.* at 278 (citing Burns Baking Co. v. Bryan, 264 U.S. 504, 513 (1924)).
5. New State Ice Co. v. Liebmann, 285 U.S. 262, 302-03 (1932).

> consumption are more nearly balanced. Many insist there must be some form of economic control. There are plans for proration. There are many proposals for stabilization. And some thoughtful men of wide business experience insist that all projects for stabilization and proration must prove futile unless, in some way, the equivalent of the certificate of public convenience and necessity [employed by the state in this case] is made a prerequisite to embarking new capital in an industry in which the capacity already exceeds the production schedules.[6]

Having established to his own satisfaction that Oklahoma's policy was a rational response to a dire problem, Brandeis went on to address the more difficult question of the standard of rationality to which the state should be held, arguing for a deferential form of judicial review. It is here that Brandeis, in the context of establishing the uncertainty of human knowledge, began to analogize to scientific experimentation:

> Whether that view is sound nobody knows. The objections to the proposal are obvious and grave. The remedy might bring evils worse than the present disease . . . .
>
> Yet the advances in the exact sciences and the achievements in invention remind us that the seemingly impossible sometimes happens. . . . The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation . . . . Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science . . . .[7]

With the analogy to the physical sciences in place, Brandeis then introduced the famous metaphor:

> There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity . . . .

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6. *Id.* at 306-09 (footnotes omitted).
7. *Id.* at 309-11.

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. 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.[8]

Brandeis thus invoked the metaphor of states as laboratories to support an interpretation of the Due Process Clause that would permit a state to create some kinds of monopolies for the purpose of increasing employment and reducing excess industrial capacity. But how exactly does the metaphor support his conclusion?

Brandeis is often understood to be saying that state experimentation produces beneficial knowledge, and that states should therefore be permitted and encouraged to experiment to the greatest possible extent. But this is an argument against any federal displacement of state power, and Brandeis could hardly have been urging the Court to hold that the Due Process Clause imposes no constraints at all on the states. The majority's response to Brandeis makes this point clearly:

> [I]t is plain that unreasonable or arbitrary interference or restrictions cannot be saved from condemnation merely by calling them experimental. It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the Federal Constitution. The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments.[9]

The majority went on to cite the Court's recent decision in *Near v. Minnesota*,[10] in which it struck down a prior restraint under the First Amendment, as a case in which "the theory of experimentation in censorship was not permitted to interfere with the fundamental doctrine of the freedom of the press."[11]

This is a cogent response, and surely Brandeis would have had to agree that one of the purposes of the federal Constitution is to place certain policies off

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8. *Id.* at 311 (footnotes omitted).
9. New State Ice Co. v. Liebmann, 285 U.S. 262, 279-80 (1932).
10. 283 U.S. 697 (1931).
11. *New State Ice*, 285 U.S. at 280.

limits to state (and often federal) "experimentation." If so, Brandeis could not have been arguing that states must have the power to experiment in general, but rather that they must have the power to experiment only in certain areas. Was he then arguing that states should be entirely free to experiment in the realm of economic regulation? Surely not. Brandeis believed that the dormant commerce clause prohibits state "experimentation" with economic protectionism,[12] and even in *New State Ice* Brandeis argued that state policies must be reasonable to survive review under the Due Process Clause. If Brandeis was arguing for state experimentation, he seems to have done so tautologically: states should have the constitutional power to experiment, but only where they have the constitutional power to do so.

Brandeis, however, was not arguing that states need, or have, the power to experiment; rather, he argued that states must have the power to implement the specific policy at issue in the case. And why, in Brandeis' view, must states have this power? Because the policy is a reasonable response to "an emergency more serious than war."[13] And what makes it reasonable? In the opinion of "thoughtful men of wide business experience,"[14] it just might succeed. Of course, as Brandeis concedes, we can never be sure a policy will work until we try it, but the situation is so dire that we must try something, and the Constitution must be understood to permit this. Brandeis, then, uses the experimentation metaphor not to undergird a conclusion that states must have the power to experiment—a position he never asserts—but to support his conclusion that the challenged policy is rational and therefore constitutional.

Brandeis is often misunderstood in another respect when he notes that an individual state may "try novel social and economic experiments without risk to the rest of the country."[15] This phrase is often interpreted as a claim for the superiority of the states as forums for experimentation in economic policy. In context, however, the language does not support such a conclusion. Brandeis makes his observation in the course of an argument against an interpretation of due process that, in his view, imposed on the nation a set of economic policies that were virtually suicidal under the prevailing economic conditions. What was needed, he claimed, was the constitutional flexibility to allow government to implement the kind of economic policies at issue in this case. Nothing in Brandeis' argument suggests that these policies could not be usefully

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12. For example, Brandeis wrote the Court's opinion in Buck v. Kuykendall, 267 U.S. 307 (1925), in which the Court struck down a state monopoly on common carriers doing interstate business. Indeed, the Washington certificate of public convenience and necessity struck down in *Buck* was exactly the same kind of license that Oklahoma tried to require in *New State Ice*.

13. New State Ice Co. v. Liebmann, 285 U.S. 262, 302 (Brandeis, J., dissenting).

14. *Id.* at 311.

15. *Id.*

implemented at the federal level. But because the Court was dealing in *New State Ice* with due process, and because due process limitations bind the federal government through the Fifth Amendment as well as the states through the Fourteenth Amendment, the functional outcome of the Court's decision would be to disable all levels of government from implementing a type of badly needed economic regulation. It seems to me that the most natural reading of this aspect of Brandeis' states-as-laboratories metaphor is that it is a kind of last-ditch plea to the Court to limit the impact of its decision. Brandeis seems to say: If you're going to bar these kinds of economic policies, at least do not bar them for the states because, unlike the federal government, the states can harm only themselves. The majority, of course, is unresponsive to this plea because its conclusion does not rest on its perception of the danger to the nation posed by the challenged policy, but on its interpretation of fixed due process limits on government power.

III. THE MISLEADING IMAGE OF SCIENTIFIC EXPERIMENTATION

The inventor of a metaphor does not own it, and uses of the laboratory metaphor are not to be condemned merely because they differ from the use to which Brandeis originally put it. Consequently, in this Section I want to consider the metaphor of states as laboratories on its own merits. In my view, the image of scientific experimentation conjured up by the laboratories metaphor is misleading in several ways.

In the first place, states do not conduct experiments in any genuinely scientific sense. A scientific experiment involves a testable hypothesis, a systematic program of trials to test the hypothesis, control groups, randomization and a host of methods that clearly have no equivalent in the actual political practices of the state or national governments,[16] and would not likely be tolerated by the citizenry if implemented literally.[17]

To the extent that any government engages in "experimentation," it engages not in scientific experimentation, but in a kind of policy experimentation. Particular social, economic or constitutional policies are "experimental" only in the sense that their efficacy is uncertain at the time of implementation. But unlike scientific experiments, policy experiments are not undertaken for the purpose of obtaining *knowledge* about the efficacy of the implemented policy. Rather, policymakers implement one policy over another because they wish to accomplish a particular social good, and they hope, in the face of uncertainty,

16. *See* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 926 (1994).

17. It is interesting to speculate whether the Equal Protection Clause would permit the kind of deliberately unequal treatment involved in true scientific experimentation.

that the chosen policy will achieve their end. Thus, the purpose of policy experimentation is to find and implement policies most conducive to the public good—not, as with scientific experimentation, to produce a body of knowledge that others may draw upon. Of course, the creation of such a body of knowledge may well be a *byproduct* of this kind of experimentation, but in the real political world, policies will rarely or never be implemented solely or even primarily for the purpose of producing knowledge.

This points to a second misleading aspect of the image of states as laboratories. Unlike scientific information, which is produced systematically by a well-defined community using standards designed to enhance the generalizability and usefulness of the information obtained,[18] the kind of information produced by state policy experimentation is produced individually, haphazardly, and under circumstances that are unlikely to yield information suitable for use by other states. Policy experimentation is inherently subjective. Because a policymaker implements a particular policy to achieve a subjectively conceived good, it is difficult—perhaps impossible—for outsiders to evaluate the success or failure of those policies.

Suppose a state adopts a constitutional policy that protects personal privacy at the expense of apprehending criminals by strengthening its exclusionary rule. How ought judges in another state evaluate the success of such a policy? Even if it were possible to calculate the increase in crime directly attributable to an expanded exclusionary rule, how should judges weigh the marginally increased risk of crime against the marginal increase in personal freedom? Whether such a tradeoff has improved the quality of life in the state—that is, whether the "experiment" has succeeded—is the kind of judgment that only the people of that state are competent to make.

The subjectivity of state policy experimentation, and thus the irrelevance to other states of the information obtained through policy experiments, is only increased to the extent that, as is so often claimed, each state is unique. If the people of the different states have unique characters or values, for example, or if they live their lives under conditions different enough to affect the content of constitutional doctrine,[19] then the usefulness of policy experimentation is to the same extent confined to the state's borders.[20] If life in Texas is really fundamentally different from life in California, it is hard to see how either state

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18. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

19. I have expressed my skepticism of this view in James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992). *See also* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993).

20. *See* Rubin & Feeley, *supra* note 16, at 924.

can learn much from the experiences of the other.[21]

On some level, courts obviously understand these difficulties. Even when they self-consciously invoke the laboratories metaphor and review the practices of other states, most courts seem to use the opportunity merely to canvass the range of policy options—to "see what other states have done" —rather than to attempt seriously to evaluate the success or failure of those options in other jurisdictions.[22] These considerations also help explain why referring to state constitutional decisions involving individual rights as "experiments" can seem so jarring. The constitutional protection of freedom of speech, equal protection, or due process results not so much from some kind of provisional policy decision as from a judgment about the content of human rights. Certainly, people may disagree about the content of such rights, but, at least in our tradition, they are unlikely to do so based on disagreements about the instrumental value of those rights for the achievement of other, more important goals; to a significant extent, protection of the rights *is* the goal.

Another misleading aspect of the states-as-laboratories metaphor is the image of the laboratory itself. As we have seen, a state is not a laboratory in the sense that scientific experiments take place there. Rather, a state is an autonomous actor, exercising its powers to implement policies for the purpose of achieving public goods.[23] Nor does putting fifty states together in a single federal system convert them into laboratories. The federal system is made up not of fifty laboratories but of fifty autonomous actors acting autonomously. To be sure, there is a sense in which such an arrangement might be considered a "laboratory": if you put fifty people in a room and watch what they do, you might learn something. However, by this definition, the world itself is a laboratory; you never know what you might learn if you keep your eyes open.

IV. RECENT INVOCATIONS OF THE METAPHOR

With these considerations in mind, let us turn to a few recent judicial invocations of the states-as-laboratories metaphor. Uses of the metaphor tend

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21. It is hard to avoid the impression upon reading the state constitutional decisions and literature that those who most enthusiastically tout the states-as-laboratories metaphor tend to be the very same people who make the strongest claims about the uniqueness of the individual states.

22. A rare but notable exception is Mapp v. Ohio, 367 U.S. 643 (1961). There, the Supreme Court not only examined state approaches to protecting against unreasonable searches, *id.* at 651-53, but apparently relied directly on the experience of California showing that approaches other than some form of exclusionary rule were "worthless and futile." *Id.* at 652. As a result, the Court held that the exclusion of unconstitutionally obtained evidence was mandated under the federal Constitution. *Id.* at 656-58.

23. *See* James A. Gardner, *What Is a State Constitution?*, 24 RUTGERS L.J. 1025, 1046-48 (1993).

to fall into two categories: description and justification. The justification category can be divided into justifications for federal judicial action and for state judicial action.

A. *The Metaphor as Description*

In *Cruzan v. Director, Missouri Department of Health*[24] the Supreme Court rejected a constitutional challenge to a Missouri law that prohibited the termination of life support to a person in a persistent vegetative state without clear and convincing evidence that the person, if competent, would have so wished.[25] In a concurring opinion, Justice O'Connor wrote: "Today we decide only that one State's practice does not violate the Constitution; the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interest is entrusted to the 'laboratories' of the States."[26] This is a typical example of what is probably the most common type of invocation of the metaphor of states as laboratories: an essentially tautological restatement of the state-federal relationship under federalism.

Cruzan raised a substantive due process issue under the Fourteenth Amendment: the Court was asked to hold that Missouri's law unduly impaired a right to die protected by the federal Constitution.[27] In declining so to rule, the Court set the federal constitutional "floor" low enough to leave the states room to develop independently the kinds of policies to which Justice O'Connor referred. Thus, her invocation of the metaphor amounts to the tautological observation that the states are free to act in those areas in which they are free to act. That this is her meaning is made abundantly clear by her warning, immediately preceding her invocation of the metaphor, that the Court's ruling "does not preclude a future determination that the Constitution requires the States to implement the decisions of a patient's duly appointed surrogate."[28] Again, the states cannot do what the Constitution forbids, but are free to do whatever it permits. To call the states "laboratories" adds nothing to this basic fact of federalism.

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24. 497 U.S. 261 (1990).

25. *Id.* at 280-85.

26. *Id.* at 292 (O'Connor, J., concurring) (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

27. *Id.* at 280-82.

28. Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring). This aspect of Justice O'Connor's opinion is sometimes overlooked by those who cite it approvingly as a good use of the laboratories metaphor. *See, e.g.*, Thomas A. Eaton & Edward J. Larson, *Experimenting With the "Right to Die" in the Laboratory of the States*, 25 GA. L. REV. 1253 (1991); Dorothy Toth Beasley, *Federalism and the Protection of Individual Rights: The American State Constitutional Perspective*, 11 GA. ST. U. L. REV. 681, 692-93 (1995).

A similar invocation of the metaphor can be found in Justice Utter's concurring opinion in *Southcenter Joint Venture v. National Democratic Policy Committee*.[29] There, the Washington Supreme Court held that the Washington Constitution's protection of free speech does not extend to privately owned shopping malls.[30] Justice Utter, criticizing the majority for borrowing heavily from federal precedents, derived a different analysis from the state constitution, although he reached the same result.[31] In conducting his analysis, Justice Utter invoked the metaphor to support his contention that the Washington courts need not follow the Supreme Court's lead. "Federalism," he said, "allows the states to operate as laboratories for more workable solutions to legal and constitutional problems. . . . [W]e have the opportunity to develop a jurisprudence more appropriate to our own constitutional language."[32] It is hard to disagree with this observation. If the United States Constitution does not impose a solution to some constitutional problem, then the states are free to attempt their own solutions. Thus, a state court has the opportunity to develop an independent state constitutional jurisprudence when the federal Constitution leaves it free to do so.

A more genuinely descriptive use of the laboratories metaphor appears in Judge Kaye's concurrence in *People v. Scott*,[33] in which the New York Court of Appeals construed the New York Constitution to invalidate a pair of searches that the federal Fourth Amendment would have permitted.[34] In joining the court's opinion, Judge Kaye wrote: "States . . . by recognizing greater safeguards as a matter of State law can serve as laboratories for national law."[35] This process, she added, is simply the way in which state courts "discharg[e] their responsibility both to State law and to Federal law."[36] Judge Kaye's comment is a fair and substantively descriptive use of the laboratories metaphor because it conveys some sense of the way in which information about policy experiments might actually be gleaned in a federal system: where the states are free to act, the federal government is free to observe; and where the federal government is free to observe, it may learn something. Judge Kaye's comment also recognizes that such information would not arise from deliberate, scientific experimentation, but as a byproduct of autonomous state courts exercising their autonomy simply by doing their jobs.

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29. Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282 (Wash. 1989).

30. *Id.* at 1291.

31. *Id.* at 1293 (Utter, J., concurring).

32. *Id.* at 1306.

33. 593 N.E.2d 1328 (N.Y. 1992).

34. *Id.* at 1337, 1344-46.

35. *Id.* at 1348 (Kaye, J., concurring) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

36. *Id.*

These kinds of descriptive invocations of the laboratories metaphor are certainly unobjectionable so long as they are invoked descriptively. Things get sticky, however, when the metaphor is invoked not to describe the process of policy experimentation in the federal system, but to justify some kind of judicial action to ease transition.

B. *The Metaphor as Justification for Federal Court Actions*

Although my subject is the use of the states-as-laboratories metaphor in state constitutional law, it will be useful for purposes of comparison to defer that discussion briefly to examine the ways in which the metaphor is invoked by federal courts to justify particular constructions of the United States Constitution. Here, the metaphor is most commonly invoked to support arguments for construing the Constitution to allocate substantive power to the states.[37]

An example close in spirit to Justice Brandeis' original use of the metaphor in *New State Ice* appears in Chief Justice Rehnquist's dissent in *West Lynn Creamery Inc. v. Healy.*[38] In his opinion, the Chief Justice invoked the metaphor to support his conclusion that the dormant Commerce Clause should not be construed to bar the state law at issue in the case, a program providing subsidies to local milk producers.[39] After quoting Justice Brandeis and stating that "[h]is observation bears heeding,"[40] the Chief Justice went on, much as Brandeis did, to criticize the Court's ruling for constitutionalizing a harmful economic policy—for pursuing, in his words, "a messianic insistence on a grim sink-or-swim policy of laissez-faire economics."[41] The Court's inflexibility, he concluded, "bodes ill for the values of federalism."[42]

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37. Occasionally, the metaphor is also invoked to justify the more moderate position that federal courts should exercise restraint in displacing state law even when such displacement is concededly constitutionally permitted. An example is Justice Ginsburg's dissent in Arizona v. Evans, 115 S. Ct. 1185, 1198, 1200-01 (1995), where she argues for overruling the presumption of Michigan v. Long, 463 U.S. 1032 (1983), under which state court decisions construing both federal and state law will be treated as resting on federal grounds unless the state court specifically indicates otherwise. Another example is the Supreme Court's decision to deny certiorari for the time being in the hope that lower courts, including state courts, will sharpen the issues for eventual consideration by the Court. *See, e.g.*, McCray v. New York, 461 U.S. 961, 962-63 (1983) (Stevens, J., concurring). The following discussion is equally applicable to these kinds of calls for federal restraint.

38. 114 S. Ct. 2205 (1994).

39. *Id.* at 2222-23.

40. *Id.* at 2223.

41. *Id.*

42. West Lynn Creamery, Inc. v. Healy, 145 S. Ct. 2205, 2223 (1994) (Rehnquist, C.J., dissenting). Chief Justice Rehnquist is somewhat less persuasive on this point than was Justice Brandeis because, unlike the ruling in *New State Ice*, the ruling in *West Lynn* does not entirely disable government from implementing the challenged policy. A ruling that a state policy violates

A similar usage appears in Justice Kennedy's concurrence in *United States v. Lopez*.[43] In *Lopez*, the Court struck down a federal law that criminalized the possession of a gun within 1000 feet of a school.[44] Justice Kennedy concurred, arguing that the Commerce Clause should be read to allocate to the states exclusively the power to regulate gun use in school zones.[45] This result, he wrote, is dictated by federalism, under which "the States may perform their role as laboratories for experimentation."[46] While there is a tautological aspect to Justice Kennedy's assertion—if the states have the power to do what they wish then they may do what they wish—he invokes the metaphor in a way that clearly indicates his belief that the metaphor does real work in supporting his conclusion.

In the pre-incorporation era, the metaphor was often invoked by Justices arguing against incorporation and in favor of readings of the Constitution that allocated a variety of powers to the states. Justice Harlan's opinion in *Williams v. Florida*[47] exemplifies this type of argument. In *Williams*, Justice Harlan objected to the Court's holding that the Due Process Clause of the Fourteenth Amendment incorporates certain aspects of the Sixth Amendment and thus applies it to the states.[48] In support of his contention that the Constitution should be understood to allocate the power to the states to administer criminal justice, Justice Harlan observed that one of the "basic virtues" of the federal system "is to leave ample room for governmental and social experimentation."[49]

In each of these cases, a judge invokes the laboratories metaphor as support for a reading of the federal Constitution that would allocate power to the states. But how exactly does the metaphor support their conclusions? Why, precisely, should the states have these particular substantive powers? The laboratories metaphor suggests the following answer: the states should have these powers in order to conduct experiments, thereby producing information and advancing knowledge. But can the production of information really be a sufficiently substantial goal to justify a decision as important as the allocation of governmental power? Faced with two competing interpretations of some constitutional provision, should a judge really choose one interpretation over the

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the dormant Commerce Clause does not preclude Congress either from implementing the same policy itself or from legislatively authorizing the states to discriminate against interstate commerce. In re Rahrer, 140 U.S. 545 (1891).

43. 115 S. Ct. 1624 (1995).
44. *Id.* at 1633-34.
45. *Id.* at 1640-42 (Kennedy, J. concurrring).
46. *Id.* at 1641.
47. 399 U.S. 117 (1970) (plurality opinion).
48. *Id* at 130-33 (opinion of Harlan, J.).
49. *Id.* at 133.

other on the ground that more *information* will result?

This proposition seems doubtful for the simple reason that the federal system does not allocate power to the states for the purpose of advancing knowledge; it does so for the purpose of protecting liberty, and possibly for the purpose of achieving the good. Federalism protects liberty, as Madison wrote, by creating a system of dual sovereignty that provides a "double security" to the people by impeding the concentration of government power.[50] Also, federalism is sometimes said to allocate certain power to the states rather than the federal government to maximize social utility—that is, to achieve a version of the common good. It does so because, to the extent that policy preferences vary somewhat from state to state, a single national policy is likely to produce lower overall levels of satisfaction than a set of state policies more closely tailored to the particular preferences of citizens from various states.[51]

If the protection of liberty and the achievement of the good are the dominant reasons for allocating government power to the states, can the fact that an interpretation of the Constitution allows the states to produce information *ever* be a reason to support it? I think the answer is yes, but a very qualified yes. Advancing knowledge is a good thing, but it is at best a weak, tertiary reason for allocating power to the states that pales in comparison to the two reasons just mentioned. Even then, the production of information is a reason to allocate substantive power to the states only under a very limited set of circumstances. First, the information produced must be useful. This means it must be relevant to other jurisdictions and not produced under circumstances so unique or idiosyncratic that others are unable to profit from it. Second, other jurisdictions must be able, and at least potentially willing, to act on the information produced by state policy experimentation. Where the information is intended to help courts make constitutional decisions, at a minimum the courts expected to profit from the information must have enough leeway in the interpretation of their own constitutions to make use of the information, something that may not always be the case with provisions whose meaning is considered clear and certain. Third, there must be some reason to believe that state experimentation is likely to produce better information than federal experimentation, hardly a self-evident proposition. As Professor Rose-Ackerman has demonstrated, the free rider problem may make states reluctant to adopt novel policies that have not been

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50. THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). *See also* Gardner, *supra* note 23, at 1044-46.

51. *See, e.g.*, Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1314-15 (1994); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1492-94 (1987).

tried elsewhere.[52] And, as Professors Rubin and Feeley have pointed out, as a result of the allocation of incentives and resources, "the most significant 'experimental' programs in recent years have in fact been organized and financed by the national government."[53]

C. *The Metaphor as Justification for State Court Actions*

Although the states-as-laboratories metaphor may provide federal courts in certain limited circumstances with a weak reason to construe the federal Constitution in particular ways, state courts are in a far different position. For these courts, the fact that states might be "laboratories" for policy experimentation has no justificatory power whatsoever, either as a reason to construe the state constitution or as a reason to construe it in any particular way.

State judges sometimes seem to suggest that the role of states-as-laboratories provides state courts with a sufficient reason to turn to and develop state constitutional law. For example, Justice Bablitch of the Wisconsin Supreme Court recently wrote:

> [T]he Wisconsin Constitution is not and has never been intended to be a potted plant. It can serve, if this court chooses to give it life, as a bedrock of fundamental protections for all Wisconsin citizens. . . . Even the U.S. Supreme Court has recognized, if not encouraged, the use of state constitutions for just such a purpose. It is consistent with our deeply held notions of federalism, our notions that states should be encouraged to be the laboratories of the nation. . . .We may, in many if not most cases, reject an alternative interpretation [i.e., construe the state constitution differently from the federal]. But we should at least look.[54]

If this statement is meant to suggest that state courts should turn to their state constitutions because those constitutions exist, or because those constitutions could conceivably differ from the federal Constitution, or because the Supreme Court has provided encouragement, or because others might learn something, then the statement is simply wrong. A state court should construe a state constitution when it is jurisprudentially appropriate to do so—when the court has jurisdiction, when a litigant raises a claim under the state constitution, perhaps when the case cannot be resolved on statutory grounds, and so on. The fact that a state may be a laboratory is not any kind of reason for construing the state

52. Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980).

53. Rubin & Feeley, *supra* note 16, at 925.

54. State v. Seibel, 471 N.W.2d 226, 238 n.1 (Wis. 1991) (Bablitch, J., dissenting).

constitution—indeed, a state is under no obligation even to *have* a constitution. And even if having the freedom to experiment were somehow an adequate reason for a state court to do *something*, there are good reasons to think that resorting to the state constitution is by no means the best option. As Chief Judge Kaye of New York recently observed, state courts can do much of the work of constitutional law, such as protecting individual rights, by exercising their option to develop the common law, an alternative that allows not only the court but also the state legislature and the state populace a good deal more flexibility.[55] But the root problem with Justice Bablitch's logic is that it incorrectly identifies the autonomy to act as a reason to act.

A common variant of this misuse of the states-as-laboratories metaphor arises from misunderstandings of the theory of state-federal "dialogue" proposed by Justice Brennan and echoed in some recent state judicial decisions. In a 1986 article, Justice Brennan extolled "the growing dialogue between the Supreme Court and the state courts on the topic of fundamental rights," a dialogue, he said, that "enables all courts to discern more rapidly the 'evolving standards of decency that mark the progress of a maturing society.'"[56]

The significance of any dialogue between the state high courts and the Supreme Court has been widely misunderstood. Justice Brennan's description of the dialogue is just that—a description. State courts do what they do, the Supreme Court does what it does, and from time to time some court somewhere may learn something useful by observing what the others have done. Yet some state courts take this metaphor too seriously, treating it as an independent, fully sufficient reason to construe the state constitution.

For example, in a recent case the Texas Court of Criminal Appeals supported its conclusion that the state constitution ought to be consulted on the grounds that state courts "have thus been considered 'laboratories' of constitutional law," and that they "have the opportunity to experiment with constitutional rights and lay potential guidelines for future constitutional decisions of not only state courts but the Supreme Court as well."[57] But, as

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55. Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 15-17 (1995). *See also* Eaton & Larson, *supra* note 28, at 1266-68.

56. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1970)).

57. Heitman v. State, 815 S.W.2d 681, 686 (Tex. Crim. App. 1991). *See also* Immuno AG. v. Moor-Jankowski, 567 N.E.2d 1270, 1279 (N.Y. 1991) ("State constitutional law review —which is a responsibility of State courts and a strength of our Federal system—advances the process of pronouncing Federal law; a State can act as a 'laboratory.'. . . By the same token, Federal cases . . . can act as a source of guidance for State courts in formulating State law.").

one baffled Texas lower court judge subsequently observed, the question of when and how to construe the state constitution "deserves a more credible answer than, 'Well, we just do it because we are "laboratories" of constitutional law and therefore, we can.'"[58] The judge was right. A state constitution is not an authorization for state courts to "engage in dialogue" with one another or with the Supreme Court. A state constitution sets out the state's fundamental law and should be construed when a question arises about the meaning of that law. I know of no jurisprudential principle suggesting that courts should resort to or construe a constitution for the purpose of sending a message to influence another court.

The appeal of this dialogue theory is especially puzzling in that it is, if anything, antithetical to the kind of state autonomy that its proponents seem to desire. As Justice Brennan himself pointed out, "the Constitution and the Fourteenth Amendment allow diversity only *above and beyond* [the] federal constitutional floor. Experimentation which endangers the continued existence of our national rights and liberties cannot be permitted."[59] This fact has two significant implications. First, any state experimentation can take place only above the federal floor,[60] so state courts are free to talk to the Supreme Court only if they wish to talk about the need for enhanced federal constitutional protections. Second, if the purpose of these conversations is to influence the Court's development of federal constitutional law, the effect of success can only be to persuade the Court to raise the federal floor—thereby depriving the states of a measure of their autonomy.

This paradox reveals starkly the different institutional positions of the Supreme Court and state high courts.[61] The Supreme Court has the power in essence to appropriate state autonomy for federal use, and the political ramifications of so doing may lead the Court in some circumstances to seek as much information as possible. Thus, the Court may sometimes wish to observe the states for a time in the hope of obtaining useful information. State high courts, on the other hand, are under no obligation to provide that information. As custodian of the state's fundamental law, the state supreme court is charged with interpreting that law according to rules set by state law, not by the Supreme Court. The Supreme Court may learn something from watching the state court

58. Autran v. State, 830 S.W.2d 807, 817 (Tex. Ct. App. 1992) (Walker, C.J., concurring).

59. Brennan, *supra* note 56, at 550 (emphasis added).

60. This makes for a rather biased "experiment," one in which it is known in advance that the outcome can only be the maintenance or expansion of constitutional rights.

61. *Compare* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

go about its business, but it is no part of that business to assist the Supreme Court to perform its very different function.[62]

V. CONCLUSION

The metaphor of states as laboratories, although not without some limited descriptive power, conjures up a misleading image of states conducting scientific experiments for the purpose of advancing society's knowledge about constitutional rights and liberties. This inaccuracy is benign so long as those who invoke the metaphor use it solely for descriptive purposes. Unfortunately, courts and judges have sometimes taken the metaphor too literally, and relied on it to justify judicial interpretations of the federal and state constitutions. The metaphor has some extremely limited legitimate uses in construing the Federal Constitution. That states may use their autonomy to produce information may be a reason for reading the Constitution to allocate power to the states if that information is likely to be relevant and useful, and if it is likely to be better information than the equivalent federal experimentation is likely to produce. Even then, the production of information takes a distant third place, behind the protection of liberty and the achievement of the public good, as a justification for allocating power to the states. However, the states-as-laboratories metaphor provides state courts with no reason to construe state constitutions. State courts should construe state constitutions when it is jurisprudentially appropriate to do so, not because the Supreme Court or other state courts might find a construction of the state constitution instructive.

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62. Of course, this is not the case when state courts construe *federal* law. When state courts sit as lower courts in the federal system, they have the same obligation to superior courts as any other lower court would have. But state courts are not lower courts when they construe state law; they answer to no one except the people of the state.