

# THE MYTH OF THE LABORATORIES OF DEMOCRACY

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*A classic constitutional parable teaches that our federal system of government allows states to function as “laboratories of democracy.” This tale has been passed down from generation to generation, often to justify constitutional protections for state autonomy from the federal government. But scholars have failed to explain how state governments manage to overcome numerous impediments to experimentation, including resource scarcity, free rider problems, and misaligned incentives.*

*This Article maintains that the laboratories account is missing a proper appreciation for the coordinated networks of third-party organizations (such as interest groups, activists, and funders) that often fuel policy innovation. These groups are the real laboratories of democracy today. They perform the lion’s share of tasks necessary to enact new policies; they create incentives that motivate elected officials to support their preferred policies; and they mobilize the power of the federal government to change the landscape against which state experimentation occurs. If our federal system of government seeks to encourage policy experimentation, then courts should endeavor to create ground rules for regulating competition between political networks, rather than continuing futile efforts to protect state autonomy. This Article concludes by sketching some implications for several areas of legal doctrine, including federal preemption of state law, conditional spending, and the anticommandeering principle.*

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## INTRODUCTION

We all know the story. Received wisdom says that our federal system of government encourages high levels of policy experimentation. “It is one of the happy incidents of the federal system,” Justice Louis D. Brandeis wrote, “that a single, courageous State may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>1</sup> The basic idea is simple: The Constitution divides power and responsibility between the federal and state governments, giving states reign over their own affairs. That arrangement encourages state officials to compete for a mobile tax base by inventing better policies, and it allows them to tailor state law to local conditions. “Our Federalism” thus creates fifty state “laboratories,” whose officials toil to “devise[] solutions to difficult legal problems.”<sup>2</sup> And the nation benefits from knowing whether, and under what conditions, those solutions work.<sup>3</sup>

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1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). While usually attributed to Justice Brandeis, the notion that federalism encourages policy innovation appeared in nascent form as early as the Founding. See *The Federalist* No. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting the states’ competition with the federal government for the people’s “affection”); Todd E. Pettys, *Competing for the People’s Affection: Federalism’s Forgotten Marketplace*, 56 *Vand. L. Rev.* 329, 332 (2003); see also *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting); 1 James Viscount Bryce, *American Commonwealth* 468 (3d ed. 1908).

2. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2673 (2015) (internal quotation marks omitted) (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)).

3. See Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 *Va. L. Rev.* 959, 1007, 1013–14 (2007).

In the decades since Justice Brandeis penned his memorable opinion, countless scholars and judges have spun the same yarn about federalism's role in promoting policy experimentation. The laboratories account has been deployed in thousands (yes, *thousands*) of academic works.<sup>4</sup> And the Supreme Court has invoked it in scores of decisions on topics far and wide.<sup>5</sup> In those decisions, the laboratories account often fits into a larger theory about how best to promote federalism values, such as choice, participation, competition, the diffusion of power, and experimentation.<sup>6</sup> In particular, the Court has sought to achieve those ends by carving out a policy space where states are autonomous—where federal law and federal

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4. We'll spare the reader the full string citation. Suffice it to say that as of November 2022, Westlaw contained over 3,000 law review articles citing *New State Ice* for Brandeis's "laboratories" idea. See Westlaw, [https://1.next.westlaw.com/RelatedInformation/I2e2163979ca411d9bdd1cfdd544ca3a4/kcCitingReferences.html?originationContext=documentTab&transitionType=CitingReferences&contextData=\(sc.Default\)&docSource=fbd4f9ff86b4498ea4766f523d7cc657&rulebookMode=false&ppcid=db92fe9d11404d339fbb2489a0046317](https://1.next.westlaw.com/RelatedInformation/I2e2163979ca411d9bdd1cfdd544ca3a4/kcCitingReferences.html?originationContext=documentTab&transitionType=CitingReferences&contextData=(sc.Default)&docSource=fbd4f9ff86b4498ea4766f523d7cc657&rulebookMode=false&ppcid=db92fe9d11404d339fbb2489a0046317) (on file with the *Columbia Law Review*) (last visited Nov. 1, 2022) (searching for "New State Ice Co. v. Liebmann" and filtering by "Secondary Sources," then by "Law Reviews"). That search doesn't even include the vast number of political science and economics papers invoking the idea.

5. See *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2260–61 (2020); *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2214 (2016); *Ariz. State Legislature*, 135 S. Ct. at 2673; *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003); *Smith v. Robbins*, 528 U.S. 259, 272–73 (2000); *Lewis v. Casey*, 518 U.S. 343, 351–52 (1996); *Arizona v. Evans*, 514 U.S. 1, 8 (1995); *County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1990); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985); *Schall v. Martin*, 467 U.S. 253, 275 (1984); *Chandler v. Florida*, 449 U.S. 560, 579 (1981); *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); *Whalen v. Roe*, 429 U.S. 589, 597 (1977); *Gerstein v. Pugh*, 420 U.S. 103, 123 (1975); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973); *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971); *Powell v. Texas*, 392 U.S. 514, 536–37 (1968); *Fay v. New York*, 332 U.S. 261, 296 (1947); *New State Ice*, 555 U.S. at 171. We cite only majority opinions here. Counting separate concurrences and dissents, we found sixty-five opinions in total where a Justice has invoked the laboratories idea since Justice Brandeis's dissent in *New State Ice*. Westlaw, [https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20%22new%20state%20ice%22&isPremiumAdvanceSearch=false&jurisdiction=ALLFEDS&contentType=CASE&querySubmissionGuid=i0ad73aa7000001843aa6523ceee82fe7&searchId=i0ad7401100000184357e55aeac5c0ce7&transitionType=ListViewType&contextData=\(sc.History\\*oc.Search\)](https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20%22new%20state%20ice%22&isPremiumAdvanceSearch=false&jurisdiction=ALLFEDS&contentType=CASE&querySubmissionGuid=i0ad73aa7000001843aa6523ceee82fe7&searchId=i0ad7401100000184357e55aeac5c0ce7&transitionType=ListViewType&contextData=(sc.History*oc.Search)) (on file with the *Columbia Law Review*) (last visited Nov. 1, 2022) (searching for "New State Ice" and filtering by "Cases," then by "Jurisdiction" and "Supreme Ct.," then by "Date after '03/21/1932'").

6. For sources reeling off these purported benefits of federalism, see *Gregory*, 50 U.S. at 458–59; David L. Shapiro, *Federalism: A Dialogue* 75–106 (1995); Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 *Vand. L. Rev.* 1229, 1230–46 (1994); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 *Duke L.J.* 75, 136–39 (2001); Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 *Mich. L. Rev.* 752, 774–79 (1995); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 *U. Chi. L. Rev.* 1484, 1493–511 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 *Colum. L. Rev.* 1, 3–10 (1988); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 *Tex. L. Rev.* 1, 53–63 (2004) [hereinafter Young, *Rehnquist Court*].

officials may not intrude. The laboratories account aligns with this vision of federalism, as it seeks to prevent a federal behemoth from displacing states from domains where they can experiment.

The laboratories account has had a remarkable run, but it is little more than a campfire story. Even a cursory glance at states and their officials suggests that they are poorly equipped innovators. For starters, there's the problem of resources. State officials tend to be overwhelmed by the many demands on their time and hamstrung by tiny budgets, short legislative sessions, and low levels of expertise. There are also problems of incentives. As Professor Susan Rose-Ackerman and others have argued, a state often has little reason to pioneer new policies when it can simply copy successful ones from other jurisdictions at a fraction of the cost.<sup>7</sup> Further, the potential electoral costs of endorsing unsuccessful policies will often outweigh the potential gains from endorsing successful ones.<sup>8</sup> Taken together, these obstacles to innovation suggest that major parts of the laboratories account are mistaken.

These obstacles, however, can't be the end of the story. States are, in fact, flourishing sites for policy innovation. Just in recent years, they've pioneered a huge range of policies—from fracking to climate-change laws; from voter ID laws to sanctuary cities; from LGBTQ civil rights to protections for the “right to work”; from enhanced firearm restrictions to stand-your-ground defenses.<sup>9</sup> On the right and the left, ideas for new policies are

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7. See Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. Legal Stud. 593, 610–11 (1980); see also Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 Emory L.J. 1333, 1361 (2009); Doni Gewirtzman, *Complex Experimental Federalism*, 63 Buff. L. Rev. 241, 265–66 (2015).

8. See Galle & Leahy, *supra* note 7, at 1371–72.

9. See Krsna Avila, Kemi Bello, Lena Graber & Nikki Marquez, *Immigr. Legal Res. Ctr., The Rise of Sanctuary: Getting Local Officers Out of the Business of Deportations in the Trump Era I* (2018), [https://www.ilrc.org/sites/default/files/resources/rise\\_of\\_sanctuary-lg-20180201.pdf](https://www.ilrc.org/sites/default/files/resources/rise_of_sanctuary-lg-20180201.pdf) [<https://perma.cc/LM5M-RMAX>]; Alexander Hertel-Fernandez, *State Capture* 2–3 (2019) [hereinafter Hertel-Fernandez, *State Capture*]; Sarah Warbelow, Courtney Avant & Colin Kutney, *Hum. Rts. Campaign Found., State Equality Index 2019*, at 4 (2020), <https://www.thehrcfoundation.org/professional-resources/state-equality-index-2019> [<https://perma.cc/PNX6-FPHM>]; Jasmine C. Lee, Rudy Omri & Julia Preston, *What Are Sanctuary Cities?*, N.Y. Times (Feb. 6, 2017), <https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html> (on file with the *Columbia Law Review*) (describing sanctuary-city policies that cities, counties, and states have adopted to limit cooperation between local law enforcement and federal immigration authorities); *Following the Parkland Shooting, 20 States and Washington, D.C.—Including Nine Led by Republican Governors—Passed Meaningful Gun Violence Prevention Bills Into Law*, Everytown Rsch. & Pol'y, <https://everytownresearch.org/map/following-the-parkland-shooting-20-states-and-washington-d-c-including-nine-led-by-republican-governors-passed-meaningful-gun-violence-prevention-bills-into-law/> [<https://perma.cc/5YSE-DVTM>] (last visited Aug. 8, 2022); Weihua Li & Humera Lodhi, *Which States Are Taking on Police Reform After George Floyd?*, The Marshall Project (June 18, 2020), <https://www.themarshallproject.org/2020/06/18/which-states-are-taking-on-police-reform-after-george-floyd> [<https://perma.cc/>

often first enacted in the states. While some legal scholars have criticized the laboratories account, no one has offered a satisfactory affirmative account of how states and their officials manage to enact major innovative policies despite the obstacles to innovation mentioned above. The primary task of this Article, then, is to figure out where the laboratories account goes wrong and to propose a better account in its place.

This Article maintains that the laboratories account focuses on the wrong actors. It focuses inward, viewing state policies as the output of officials working within state governments to promote local interests and concerns. But it should focus outward—on interest groups, activists, constituency-mobilization organizations, advocacy coalitions, donor consortia, and other third-party organizations that aggressively advocate for their preferred policies.

To illustrate the influence of these groups, consider the state of Iowa in the aftermath of the 2016 elections. Republicans had just gained total control of Iowa's state government for the first time in nearly two decades. One of the first items on the agenda was changing the legal rules governing public sector labor unions.<sup>10</sup> The bill that was ultimately signed into law drew heavily from a proposal by the conservative-leaning American Legislative Exchange Council (ALEC) and was championed by several ALEC members.<sup>11</sup> Policy briefs published by an affiliate of the State Policy Network (SPN)—a national association of right-leaning think tanks—advocated for the bill.<sup>12</sup> And lawmakers were pressured to publicly pledge support for the bill by the Iowa chapter of Americans for Prosperity (AFP)—a national libertarian advocacy organization established by industrial magnates Charles and David Koch—which launched a “grassroots” campaign that included mailers, advertisements, and constituent outreach.<sup>13</sup> Together, these groups both made the lawmaking process easier for Republicans who antecedently supported the union-busting legislation and exerted considerable electoral and social pressure on any lawmaker who would have preferred to move more slowly.

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MH44-TPU8]; Daniel Nichanian, *Criminal Justice Reform in the States: Spotlight on Legislatures*, Appeal, <https://theappeal.org/political-report/legislative-round-up/> [https://perma.cc/2U89-Z4DU] (last updated June 30, 2021); Sam Ricketts, Rita Clifton, Lola Oduyeru & Bill Holland, *States Are Laying a Road Map for Climate Leadership*, Ctr. for Am. Progress (Apr. 30, 2020), <https://www.americanprogress.org/article/states-laying-road-map-climate-leadership/> [https://perma.cc/4DJ5-F82F]; State Climate Policy Maps, Ctr. for Climate & Energy Sols., <https://www.c2es.org/content/state-climate-policy/> [https://perma.cc/CHG4-22YL] (last visited Aug. 8, 2022); States With Extreme Risk Laws, Everytown Rsch. & Pol'y, <https://everytownresearch.org/map/states-with-extreme-risk-laws/> [https://perma.cc/J9LU-3NMA] (last visited Aug. 8, 2022) (displaying on a map the states that have enacted extreme risk restrictions on firearm possession).

10. Hertel-Fernandez, *State Capture*, *supra* note 9, at 174.

11. *Id.* at 176.

12. *Id.* at 177.

13. *Id.* at 176.

As this example illustrates, policy innovations are often devised and then propagated by third-party organizations connected to state officials through political networks. For many of the most important state policies, these organized interests are the true “laboratories of democracy,” as they catalyze policy experimentation in several crucial ways. They inform public officials about important social issues; propose solutions supported by bespoke research; provide model legislative text and talking points tailored to local conditions; create electoral incentives and social connections that conduce to policy experimentation; and use the federal government’s power to spark state innovation.<sup>14</sup> State officials aren’t so much the scientists responsible for many of the most important policy innovations as they are the test subjects on which the real laboratories of democracy can experiment.<sup>15</sup>

The prominent role of intense policy demanders in creating and diffusing state policy is familiar to close observers of American politics. But it has failed to elicit a change in federalism doctrine, and a fair amount of federalism scholarship remains oblivious to it. If one takes that role seriously, it becomes clear that the Court’s federalism doctrine needs to be revised. For starters, state autonomy shouldn’t be the desideratum. There is no reason to think that leaving states to their own devices will result in higher levels of experimentation since the third-party organizations behind many of the most important policy innovations aren’t typically motivated by the possibility of giving one state a competitive advantage over others or tailoring its policies to local conditions. Instead, these intense policy demanders seek to push their agendas in any jurisdiction

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14. See *infra* section II.B.

15. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 *Harv. L. Rev.* 1077, 1081 (2014) [hereinafter *Bulman-Pozen, Partisan Federalism*]. Professor Jessica Bulman-Pozen’s important article reexamines the relationship between political parties and federalism. She argues that federalism provides “durable and robust scaffolding” for partisan competition, thus explaining why states challenge the federal government and why Americans identify with particular states (sometimes different from where they reside). *Id.* She also argues that partisan federalism recasts states as “laboratories of partisan politics” and explores how partisanship, rather than local preferences or needs, shapes state policy. *Id.* at 1124–30. This Article adopts Bulman-Pozen’s insight but moves it in a different direction. It shifts the focus from political parties writ large and bores down on the crucial role that networked interest groups play in moving ossified state policymaking apparatuses forward, something that Bulman-Pozen touches upon only briefly. See *id.* at 1085 & n.20, 1101, 1126. In doing so, this Article explains how these interest group dynamics help solve a long-standing puzzle about how state experimentation gets off the ground, highlighting the dynamics of intraparty as well as interparty policymaking. It also focuses on a key problem for any form of partisan or interest group competition—that one side will use its power to shut down the efforts of the other—and identifies the doctrinal solutions one would seek if this threat to state policy experimentation is taken seriously.

where they have political leverage.<sup>16</sup> Moreover, many influential state policy experiments take place within federal regulatory regimes. Creating separation from these regimes would thus sometimes inhibit state experiments that wouldn't otherwise occur. In short, there is little gained and much lost from attempts to maintain separation between the state and federal governments.

At the same time, it's important to acknowledge that the federal government's wide-ranging power can be used to interfere with state experiments. The federal government can impose draconian funding conditions designed to put an end to state policies; it can try to co-opt state officials into regulatory regimes with which they disagree; and it can broadly preempt state law. But the axis along which federal-state rivalry occurs is less *intergovernmental* than it is *interpartisan*.<sup>17</sup> The threat to experimentation with which we should be most concerned isn't federal encroachment on state domains—rather, it is a federal government controlled by officials with one set of partisan interests using its power to thwart the experiments of states controlled by another set of partisans. The problem with the autonomy model is that it proposes a separation-of-powers solution to what is fundamentally a separation-of-parties problem.<sup>18</sup>

This Article proposes an alternative to the autonomy model that doesn't require the futile task of keeping the federal government out of the states' domains. Instead, the proposal aims to obtain the right conditions for federal-state bargaining within areas of overlapping jurisdiction. Put differently, the goal isn't to prevent federal-state fights by keeping the two sides separated—it is to establish ground rules to push the fights toward beneficial forms of contestation. While the Article does not aim to identify the complete set of doctrinal rules that courts following this model should adopt, it concludes by sketching some potential implications for several areas of doctrine, including federal preemption of state law, conditional spending, and the anticommandeering principle.

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16. See, e.g., Hertel-Fernandez, *State Capture*, *supra* note 9, at 2 (discussing the rapid wave of stand-your-ground, right-to-work, and voter ID legislation promoted by networked interest groups); Rena M. Conti & David K. Jones, *Policy Diffusion Across Disparate Disciplines: Private- and Public-Sector Dynamics Affecting State-Level Adoption of the ACA*, 42 *J. Health Pol. Pol'y & L.* 377, 379–81 (2017) (discussing the rapid diffusion of policy packages implementing the Affordable Care Act (ACA)).

17. See generally Bulman-Pozen, *Partisan Federalism*, *supra* note 15 (identifying the partisan forces that shape federal-state conflict).

18. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 *Harv. L. Rev.* 915, 940–50 (2005) (positing that federal and state government actors seek to maximize voter and interest group support, rather than jurisdictional power or wealth); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *Harv. L. Rev.* 2311, 2316–30 (2006). For a more sympathetic take on institutional loyalties in the separation-of-powers context, see David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 *U. Chi. L. Rev.* 1, 27–37 (2018).

The argument proceeds in three parts. Part I describes the laboratories account in more detail and outlines several obstacles inhibiting state officials' propensity to experiment with new policies. Part II explains the role of networks of organized interests in the creation and diffusion of state policy innovations and how they help state officials overcome obstacles to innovation. Part III identifies the implications for legal theory and doctrine.

Before proceeding, two preliminary points are in order. First, this Article follows the convention of political scientists in using the term "innovation" to refer to "a program or policy which is new to the state[] adopting it."<sup>19</sup> That sense of the term differs from another common sense according to which something is an "innovation" only if it's *better* than the thing preceding it.<sup>20</sup> This Article uses the more value-neutral definition because it's more tractable—not everyone will agree about which policies are genuine improvements over their predecessors. Indeed, one of the most powerful justifications for our federal system of government is that Americans have different conceptions of the "good" and thus different ideas about which policies to adopt. Attempting to study "innovation" in its value-laden sense would lead to disagreement as to which phenomena count as part of the study. Further, there is value in determining whether particular doctrines, frameworks, and systems conduce to producing "democratic churn,"<sup>21</sup> quite apart from whether the changes they tend to produce align with any particular conception of the good. When jurisdictions implement new policies, they show us how those policies fare relative to their predecessors, and that information may allow us to improve our decisions in the future.<sup>22</sup>

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19. Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 *Am. Pol. Sci. Rev.* 880, 881 (1969). This definition includes mimicked policies (i.e., policy diffusion) as well as policies instantiated for the very first time. One reason for this choice is methodological: It is easier to determine when a policy is new to a particular jurisdiction than it is to determine whether it is the first such policy anywhere. Another reason is normative: Policies that are new to a jurisdiction provide information about how the policy works in particular circumstances, and that is a good above and beyond the information obtained when the policy is first instantiated.

20. Similarly, the use of the term "experimentation" does not imply that a state has followed the scientific method. See, e.g., Malcolm M. Feeley & Edward Rubin, *Federalism: Political Identity and Tragic Compromise* 26–28 (2008); Michael Abramowicz, Ian Ayres & Yair Listokin, *Randomizing Law*, 159 *U. Pa. L. Rev.* 929, 947 (2011); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. Rev.* 903, 923–26 (1994) [hereinafter Rubin & Feeley, *National Neurosis*]. Thanks to Professor Deborah Hensler for clarification on this and some related points.

21. Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 *Harv. L. Rev.* 4, 10 (2010) [hereinafter Gerken, *Foreword*].

22. This is one of the "discursive benefits of structure"—that is, the ways that federalism "help[s] tee up national debates, accommodate political competition, and work through normative conflict." Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 *Yale L.J.* 1889, 1894 (2014) [hereinafter Gerken, *New Nationalism*]; see also



Second, this Article is primarily interested in the influence of the laboratories myth on our constitutional discourse and the development of constitutional law. Accordingly, its inquiry is limited to policy domains where clashes between the federal and state governments are likely to occur—where the threat to state experimentation is at its peak.<sup>23</sup> The Article thus sets to one side policies that are idiosyncratic to a particular jurisdiction or that otherwise lack national salience. The potential for our federal structure of government to encourage the latter sort of experimentation is a point in its favor and would be relevant to someone trying to design a political system from scratch. But our interest is in whether and how courts can encourage policy experimentation by policing disputes between the federal and state governments.<sup>24</sup>

## I. THE LABORATORIES ACCOUNT

According to the laboratories account, federalism encourages policy experimentation by vertically subdividing governmental power. While that general notion is ubiquitous in case law and legal scholarship, it tends to be invoked in exasperatingly vague fashion.<sup>25</sup> We're typically not told how, precisely, federalism encourages experimentation. Section I.A therefore begins by offering what we think is the best account of this claim. It explicates the fundamental elements of the laboratories account and briefly explains the ends for which it has been deployed. Section I.B then outlines three obstacles to achieving high levels of state policy experimentation that the laboratories account fails to address.

### A. *Explicating the Laboratories Account*

Our federal system of government is commonly thought to encourage experimentation in two ways.

First, federalism allows states with different circumstances and preferences to adopt different approaches to the myriad problems they

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Heather K. Gerken, *Federalism 3.0*, 105 *Calif. L. Rev.* 1695, 1720 (2017) [hereinafter Gerken, *Federalism 3.0*].

23. As with the use of the word “innovation,” this Article uses “threat” to refer to any intervention that would diminish the frequency of state policy experiments, regardless of whether one believes that the intervention improves the overall policy ecosystem.

24. This Article also sets to one side a related debate concerning whether state courts do and should serve as laboratories in defining the scope of constitutional rights. See, e.g., Jeffrey S. Sutton, 51 *Imperfect Solutions: States and the Making of American Constitutional Law* 174–78 (2018); Goodwin Liu, *State Courts and Constitutional Structure*, 128 *Yale L.J.* 1304, 1338–39 (2019) (reviewing Jeffrey S. Sutton, 51 *Imperfect Solutions: States and the Making of American Constitutional Law* (2018)).

25. In this respect, the laboratories idea is similar to other normative arguments for our federal system of government. See Erwin Chemerinsky, *The Values of Federalism*, 47 *Fla. L. Rev.* 499, 501 (1995); Barry Friedman, *Valuing Federalism*, 82 *Minn. L. Rev.* 317, 319 (1997).

confront.<sup>26</sup> As a consequence, policy experimentation “just happens” when states “try to solve problems” from their different perspectives.<sup>27</sup> Innovation is thus the byproduct of the political equivalent of the process of natural selection. Just as random physiological mutations sometimes give members of a species a survival advantage over their peers, variation resulting from regulatory diversity sometimes generates better policies.<sup>28</sup>

Second, federalism encourages experimentation by “putting the States in competition for a mobile citizenry.”<sup>29</sup> Taxpayers can be expected over time to relocate to states that offer the most attractive ratio of public goods to taxes paid.<sup>30</sup> Our federal system thus gives states a powerful incentive “to make things better,” as luring taxpayers to one’s state lowers “each citizen’s share of the overhead costs of government.”<sup>31</sup> This incentive, Professor Steven Calabresi argues, “will lead inexorably to experimentation and product differentiation” because “state governments, as competing sellers of bundles of public goods, must strive constantly to improve the desirability of their bundle.”<sup>32</sup> Federalism thus

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26. See Shapiro, *supra* note 6, at 85–88; Amar, *supra* note 6, at 1233–34; Baher Azmy, Squaring the Predatory Lending Circle, 57 Fla. L. Rev. 295, 395 (2005); Vicki Jackson, Federalism and the Uses and Limits of Law: *Printz* and Principle?, 111 Harv. L. Rev. 2180, 2217 n.176 (1998); McConnell, *supra* note 6, at 1498; Deborah J. Merritt, Federalism as Empowerment, 47 Fla. L. Rev. 541, 551–52 (1995) [hereinafter Merritt, Empowerment]; Wallace E. Oates, An Essay on Fiscal Federalism, 37 J. Econ. Literature 1120, 1132 (1999); Erin O’Hara O’Connor & Larry E. Ribstein, Preemption and Choice-of-Law Coordination, 111 Mich. L. Rev. 647, 659 (2013); see also Equal Emp. Opportunity Comm’n v. Wyoming, 460 U.S. 226, 264 (1983), abrogated by *New York v. United States*, 505 U.S. 144 (1992) (Burger, C.J., dissenting) (noting the benefits of allowing local decisionmakers to tailor policies to local conditions).

27. Friedman, *supra* note 25, at 398.

28. See *id.* at 399; Gewirtzman, *supra* note 7, at 258; Merritt, Empowerment, *supra* note 26, at 551.

29. *Bond v. United States*, 564 U.S. 211, 221 (2011) (internal quotation marks omitted) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

30. See Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416, 423–24 (1956) (providing a theoretical model predicting that competition between jurisdictions will lead to optimal outcomes). For an in-depth exploration of these ideas, see generally Ilya Somin, *Free to Move: Foot Voting, Migration, and Political Freedom* (2020).

31. McConnell, *supra* note 6, at 1498–99; see also *Garber v. Menendez*, 888 F.3d 839, 844 (6th Cir. 2018) (“[T]he States’ ability to attract and retain residents through policy choices has long been considered a healthy byproduct of the laboratories of democracy.”).

32. Calabresi, *supra* note 6, at 777; see also Wallace E. Oates, Fiscal Federalism 12 (1972); Shapiro, *supra* note 6, at 78; Jonathan H. Adler, Interstate Competition and the Race to the Top, 35 Harv. J.L. & Pub. Pol’y 89, 89 (2012); Richard B. Collins, Economic Union as a Constitutional Value, 63 N.Y.U. L. Rev. 43, 68 (1988); Clayton P. Gillette, The Exercise of Trumps by Decentralized Governments, 83 Va. L. Rev. 1347, 1360 (1997); Margaret H. Lemos, State Enforcement of Federal Law, 86 N.Y.U. L. Rev. 698, 745 (2011); Barry R. Weingast, The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development, 11 J.L. Econ. & Org. 1, 5–6 (1995); Young, Rehnquist Court, *supra* note 6, at 55.

encourages states to behave like the governmental equivalent of corporations competing for the loyalty of “consumers” (constituents) by inventing new “products” (policies).<sup>33</sup>

Besides promoting the creation of new ideas, another putative benefit of our federal system is that it modulates the diffusion of policies across jurisdictions. Because policy innovations can be expected to take root only in a small number of states, failed policies are less costly than they would be if adopted on a national scale.<sup>34</sup> “Much can be said for the piecemeal diffusion of new policies,” writes Professor Michael Greve, “[as] when we do not know what we are doing, it is best not to do it everywhere, all at once.”<sup>35</sup> States can observe how a new policy in one state has fared before deciding whether to implement a similar policy at home. Good ideas will therefore spread, while bad ideas will “die on the vine.”<sup>36</sup>

This picture of what drives state policy experimentation lends support to an autonomy model of federalism, according to which certain values are best achieved when state policy and state officials enjoy separation from the federal government.<sup>37</sup> The Court tends to conceive of the requisite separation as *de jure* autonomy (or “sovereignty”),<sup>38</sup> whereas many federalism scholars have gravitated toward *de facto* autonomy—the ability to serve as a source of law and policy, even if that ability isn’t legally insulated from potential federal encroachment.<sup>39</sup> Both accounts conceive of state

33. See Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 *San Diego L. Rev.* 555, 561–62 (1994) (comparing “competitive jurisdictions” and “competitive firms”).

34. See Adler, *supra* note 32, at 95; Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 *Harv. L. Rev.* 4, 60–61 (1998); Ernest A. Young, *The Conservative Case for Federalism*, 74 *Geo. Wash. L. Rev.* 874, 882 (2006) [hereinafter Young, *Conservative Case*].

35. Michael S. Greve, *The Upside-Down Constitution* 195 (2012).

36. Friedman, *supra* note 25, at 400; see also Jenna Bednar, *The Robust Federation: Principles of Design* 31 (2009); Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 *Sup. Ct. Rev.* 71, 78–79.

37. See Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 *N.C. L. Rev.* 663, 665 (2001) (describing the autonomy model).

38. See *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (upholding the dual sovereignty doctrine); *Bond v. United States*, 564 U.S. 211, 214 (2011) (reversing the lower court’s finding that the petitioner lacked standing to challenge a statute as an infringement on powers reserved to the states); *Alden v. Maine*, 527 U.S. 706, 713 (1999) (asserting that the structure, history, and interpretation of the Constitution all indicate that the states enjoy sovereignty); *Printz v. United States*, 521 U.S. 898, 918–19 (1997) (holding that the Constitution established dual sovereignty and that the states “retained ‘a residuary and inviolable sovereignty’” (quoting *The Federalist* No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961))); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (stating that a fundamental assumption of the Eleventh Amendment is the sovereignty of each state in a federal system).

39. See Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 *Notre Dame L. Rev.* 1681, 1681 (2008) [hereinafter Clark, *Procedural Safeguards*]; Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 *Colum. L. Rev.* 215,

“power as the ability to preside over one’s own empire rather than to administer someone else’s.”<sup>40</sup> The federal government displaces state policy wherever it steps. And if it regulates with an overly heavy hand, the states won’t have enough freedom to experiment with new policies. The laboratories account thus sees the “relentless federal juggernaut”<sup>41</sup> as state experimentation’s biggest threat, and it sees state autonomy as the solution. Autonomy permits state policies “to be tailored to local circumstances”<sup>42</sup> and affords states “the opportunity to act as ‘laboratories of democracy.’”<sup>43</sup> The laboratories account therefore recommends a general blueprint for crafting legal doctrine: The Court should adopt doctrines that will preserve spaces where the states can operate free from federal incursions.

### B. *Obstacles to Innovation*

While the Court continues to blithely invoke the laboratories account, it blinks a key fact about the political process: Policy experimentation involves uncertainty and requires information that’s difficult to obtain. Ideas for successful and politically viable policies don’t just grow on trees, nor

222 (2000) [hereinafter Kramer, Putting the Politics Back]; D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 Wash. U. L.Q. 779, 786 (1982); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 Sup. Ct. Rev. 341, 416; Ernest A. Young, *Two Cheers for Process Federalism*, 46 Vill. L. Rev. 1349, 1349, 1358 n.42, 1385 (2001) [hereinafter Young, Two Cheers].

40. Gerken, Foreword, *supra* note 21, at 7, 15; see also Gerken, *Federalism 3.0*, *supra* note 22, at 1698.

41. Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1494 (1994) [hereinafter Kramer, *Understanding Federalism*].

42. Young, *Conservative Case*, *supra* note 34, at 882; see also Shapiro, *supra* note 6, at 85–88 (recognizing that differences in conditions and preferences across the United States may result in varying policy solutions among the states); Collins, *supra* note 32, at 68 (“Efficiency of local lawmaking is a basic justification for state autonomy in the federal system. Local lawmaking can be more exactly tailored to particular problems and can more readily experiment with different solutions. Competition among legal systems generates efficiencies as jurisdictions compete to attract and retain people and capital.”); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847, 854–55 (1979) (arguing that state and local governmental units serve an important role as avenues of expression for differences in culture and ways of life in relation to policies).

43. *Daunt v. Benson*, 956 F.3d 396, 428–29 (6th Cir. 2020) (Readler, J., concurring in the judgment) (quoting *Garber v. Menendez*, 888 F.3d 839, 844 (6th Cir. 2018)); see also *Gonzales v. Raich*, 545 U.S. 1, 42–43 (2005) (O’Connor, J., dissenting) (arguing that the Court must “protect the historic spheres of state sovereignty” to “promot[e] innovation”); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (observing that the “federalist structure of joint sovereigns preserves to the people numerous advantages,” including that “it allows for more innovation and experimentation in government”); *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 955 (9th Cir. 2019) (“State autonomy in the regulation of economic and social affairs is central to our system because of the recognized role states have as laboratories, trying novel social and economic experiments without risk to the rest of the country.” (internal quotation marks omitted) (quoting *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013))).

are they ever certain to succeed. Someone has to come up with them, compile evidence that they will be viable (both practically and politically), and ultimately put them into action.<sup>44</sup> And this stubborn fact engenders several obstacles to innovation.

First, state officials are generally ill-equipped to formulate ideas for new policies. Before the advent of modern communication technologies, the most difficult challenge was the expense of collecting actionable, policy-relevant information. But in today's information ecosystem, the bigger challenge is *sorting* through the information at a lawmaker's disposal. As numerous political scientists have observed, lawmakers today experience information overload, as their staffs are inundated with huge amounts of policy-relevant data.<sup>45</sup> Policy innovation thus requires the expenditure of considerable time and money to determine which problems government should prioritize; the potential solutions to those problems; and how those solutions should be implemented in the form of specific legal rules, programs, and policies.<sup>46</sup>

State lawmakers, however, often cannot devote sufficient time and resources to those questions.<sup>47</sup> In the case of governors and other executive branch officials, the problem is primarily one of attention scarcity. Governance in the modern era is more than a full-time job, leaving hardly any time to formulate innovative ideas.<sup>48</sup> And in the case of legislators, those problems are compounded by generally low levels of what political scientists term "professionalism."<sup>49</sup> In most states, lawmakers are paid a pittance for their service;<sup>50</sup> they are expected to work fewer hours than a full-time

44. Hertel-Fernandez, *State Capture*, supra note 9, at 78–80 (noting ALEC's influence on state legislators).

45. See, e.g., Andrew Karch, *Democratic Laboratories: Policy Diffusion Among the American States* 7 (2007) [hereinafter Karch, *Democratic Laboratories*] (noting that "time constraints" impede the ability of state lawmakers to "sift[] through [the] potentially overwhelming amount of information" at their disposal).

46. Hertel-Fernandez, *State Capture*, supra note 9, at 78–79, 89–91; Karch, *Democratic Laboratories*, supra note 45, at 80–84.

47. See Pamela J. Clouser McCann, Charles R. Shipan & Craig Volden, *Top-Down Federalism: State Policy Responses to National Government Discussion*, 45 *Publius* 495, 500 (2015).

48. See Karch, *Democratic Laboratories*, supra note 45, at 8; Joshua M. Jansa, Eric R. Hansen & Virginia H. Gray, *Copy and Paste Lawmaking: Legislative Professionalism and Policy Reinvention in the States*, 47 *Am. Pol'y Res.* 739, 744 (2019).

49. Political scientists often conceptualize legislative professionalism as a function of three components: salaries paid to lawmakers, session length, and staff expenditures. See Jansa et al., supra note 48, at 743; Peverill Squire, *Legislative Professionalization and Membership Diversity in State Legislatures*, 17 *Legis. Stud. Q.* 69, 71 (1992).

50. By our count, lawmakers in twenty-six states are paid less than the 2020 federal poverty threshold for a family of four—\$26,200—for their legislative service. We rely on data from the National Conference of State Legislatures on the annual income of both salaried and unsalaried lawmakers. See *2020 Legislator Compensation*, Nat'l Conf. of State Legislatures (June 17, 2020), <https://www.ncsl.org/research/about-state-legislatures/2020->

job;<sup>51</sup> and individual members often lack substantial experience in government.<sup>52</sup> In theory, of course, staffers could compensate for these shortcomings. But in practice, most state governments are woefully understaffed.<sup>53</sup> The confluence of these factors—attention-demanding work and information overload—renders most state lawmakers unlikely sources of ideas for new policies. They simply lack the tools.

Second, even when state lawmakers have ideas for new policies, our federal system diminishes their incentives to follow through on those ideas. As Professor Rose-Ackerman first noted, new policies are costly to implement and are never certain to succeed.<sup>54</sup> These costs, moreover, will typically be greatest for early-adopting states because copycats can use a first mover's policy as a template and learn from its successes and failures.<sup>55</sup> Each state's lawmakers will therefore be tempted to free ride on the innovations of others, diminishing their willingness to sponsor policy experiments.<sup>56</sup> Relatedly, states will sometimes worry that they will lose valuable taxpayers if they regulate more heavily than others. In such

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legislator-compensation.aspx [https://perma.cc/A4EC-RK56]; Full- and Part-Time Legislatures, Nat'l Conf. of State Legislatures (July 28, 2021), <https://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx> [https://perma.cc/VE2H-W3RA]. For states that do not pay annual salaries, we calculated the maximum income legislators could receive if their legislatures were to meet for the maximum length of time allowed per year. The data underlying our calculations are on file with the *Columbia Law Review*.

51. By design, most state legislative posts aren't full-time jobs. Constitutional or statutory rules in many states bar legislatures from meeting for longer than a short period. Legislative Session Length, Nat'l Conf. of State Legislatures (July 1, 2021), <https://www.ncsl.org/research/about-state-legislatures/legislative-session-length> [https://perma.cc/WLU6-79NH]. Seventeen states limit their legislatures from meeting for more than sixty calendar or session days in one year. *Id.*

52. Forty-four percent of state legislators surveyed in 2002 reported not having previously held elected office. See John M. Carey, Richard G. Niemi, Lynda W. Powell & Gary Moncrief, 2002 State Legislative Survey (ICPSR 20960), Inter-Univ. Consortium for Pol. & Soc. Rsch. (Mar. 25, 2008), <https://www.icpsr.umich.edu/web/ICPSR/studies/20960> [https://perma.cc/R46V-P5TV].

53. For example, the typical state legislator has funding to hire just four staffers. See Size of Legislative Staff, Nat'l Conf. of State Legislatures (May 18, 2021), <https://www.ncsl.org/research/about-state-legislatures/staff-change-chart-1979-1988-1996-2003-2009> [https://perma.cc/ZC5K-56AL]. For comparison, the average Congressperson had 15.6 full-time staffers in 2016. R. Eric Petersen, Amber Hope Wilhelm & Lara Chausow, Cong. Rsch. Serv., R43947, House of Representatives Staff Levels in Member, Committee, Leadership, and Other Offices, 1977–2016, at 12 (2016), <https://crsreports.congress.gov/product/pdf/R/R43947/6> [https://perma.cc/E2GF-SRLR].

54. See Rose-Ackerman, *supra* note 7, at 604–05 (describing how politicians must make decisions against an uncertain backdrop of project costs, election timelines, and political risk-taking techniques).

55. See Sarah M. Brooks, When Does Diffusion Matter? Explaining the Spread of Structural Pension Reforms Across Nations, 69 *J. Pol.* 701, 705 (2007); Galle & Leahy, *supra* note 7, at 1343.

56. Hongbin Cai & Daniel Treisman, Political Decentralization and Policy Experimentation, 4 *Q.J. Pol. Sci.* 35, 37–38 (2009); see also Rubin & Feeley, National

situations, our federal system may be susceptible to costly races to the bottom.<sup>57</sup>

Third, even when a particular policy experiment seems worthwhile for a particular state, that state's interests will often not align with the incentives of its officials. For officials, the potential costs associated with policy experimentation will often outweigh the potential rewards. Since a policy's effects can never be predicted with complete accuracy, championing a proposed innovation always carries the risk of displeasing a lawmaker's constituents.<sup>58</sup> Meanwhile, incumbent officials typically have significant electoral advantages over challengers.<sup>59</sup> Thus, an incumbent legislator may often conclude that a new policy will, at best, marginally improve her electoral prospects but will, at worst, put her otherwise secure job at risk. As a result, a conservative approach to proposals for new policies is often the dominant strategy for seeking reelection. Most officials can therefore be expected to support a proposed policy experiment only if it promises an especially high personal return on their investment.<sup>60</sup>

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Neurosis, *supra* note 20, at 925; Matthew C. Stephenson, Information Acquisition and Institutional Design, 124 *Harv. L. Rev.* 1422, 1464–67 (2011) (noting that the collective-action problem may impair information acquisition). But cf. Stephen Clowney, Property in Law: Government Rights in Legal Innovations, 72 *Ohio St. L.J.* 1, 49–56 (2011) (arguing that there are benefits to granting state and local governments intellectual property rights in their statutory texts).

57. Frank B. Cross, The Folly of Federalism, 24 *Cardozo L. Rev.* 1, 12–18 (2002); see also William W. Bratton & Joseph A. McCahery, The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World, 86 *Geo. L.J.* 201, 217–19, 262–64 (1997); Alvin K. Klevorick, The Race to the Bottom in a Federal System: Lessons From the World of Trade Policy, 14 *Yale L. & Pol'y Rev.* 177, 178, 185–86 (1996); Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation, 67 *N.Y.U. L. Rev.* 1210, 1218 (1992); Peter H. Schuck, Introduction: Some Reflections on the Federalism Debate, 14 *Yale L. & Pol'y Rev.* 1, 16–20 (1996).

58. See Karch, *Democratic Laboratories*, *supra* note 45, at 10–11; Michael Abramowicz, Speeding Up the Crawl to the Top, 20 *Yale J. on Regul.* 139, 158–59 (2003) (noting that politicians may be less inclined to support policy innovations with long-term gains because they value short-term results that affect reelection); Michael A. Livermore, The Perils of Experimentation, 126 *Yale L.J.* 636, 656 (2017) (positing that policymakers are largely motivated by “electoral or appointment success” and “career prospects” and constrained “only [by] the reality that . . . voters may cry foul”); Stephenson, *supra* note 56, at 1427–28.

59. See Stephen Ansolabehere & James M. Snyder, Jr., The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Officers, 1942–2000, 1 *Election L.J.* 315, 319–21 (2002); Gary W. Cox & Scott Morgenstern, The Increasing Advantage of Incumbency in the U.S. States, 18 *Legis. Stud. Q.* 495, 499–503 (1993).

60. See Gary Biglaiser & Claudio Mezzetti, Politicians' Decision Making With Re-Election Concerns, 66 *J. Pub. Econ.* 425, 427 (1997); Gary W. Cox & Mathew D. McCubbins, Electoral Politics as a Redistributive Game, 48 *J. Pol.* 370, 379 (1986) (concluding that the “more risk-averse a candidate is, the more emphasis he will give to avoiding a high variance investment” in a policy or constituency); Rapaczynski, *supra* note 39, at 411–12. What matters is not the citizens' expected return on investment, but the politicians' expected return.

Finally, a brief word about direct democracy. With the exception of misaligned incentives for elected officials (who are often overly conservative about preserving their own positions in government), the obstacles to innovation discussed in this section also impede policy innovations enacted through ballot initiatives and referenda. Just like ordinary statutes, ballot initiatives are costly to enact.<sup>61</sup> One still has to identify a problem and formulate a workable solution to it. Successful ballot initiatives also typically require tens of thousands of signatures (and thus thousands of hours of labor collecting signatures) to be placed on the ballot. They also usually require messaging campaigns to raise the popular salience of an initiative (and to defeat any competing initiatives).<sup>62</sup> Further, collective-action problems abound. Each potential ballot initiative sponsor has the same incentive to free ride as state officials. Since no new policy is certain to deliver on its promise, it's better to see how a policy fares in other jurisdictions before making the huge investment necessary to get it passed. Ballot initiatives also require the coordination of far more actors than ordinary legislation.<sup>63</sup>

To be clear, the point isn't that the foregoing obstacles are so burdensome as to prevent all forms of state policy experimentation. Sometimes the conditions for experimentation are sufficiently favorable that lawmakers can overcome these obstacles. A particularly influential state lawmaker may have ambition for higher office, which may lead her to support innovative policies as a means of building a reputation as an effective leader among a broader constituency.<sup>64</sup> This is particularly true for governors,

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Those two things often come apart, as is evident when relatively moderate states adopt ideologically extreme policies over the objection of the minority party. For more on the personal incentives of politicians, see *infra* section II.C.1.

61. See, e.g., John Ingold, Colorado Marijuana-Legalization Amendment Spending Tops \$3 Million, *Denver Post* (Oct. 20, 2012), [http://www.denverpost.com/ci\\_21820068/colorado-marijuana-legalization-amendment-spending-tops-3-million](http://www.denverpost.com/ci_21820068/colorado-marijuana-legalization-amendment-spending-tops-3-million) [<https://perma.cc/R32Z-NNWQ>]; Open Secrets, Proposition 064, FollowTheMoney.org, <https://www.followthemoney.org/entity-details?eid=40814643&default=ballot> [<https://perma.cc/K5DM-7R8J>] (last visited Aug. 8, 2022) (showing that more than thirty-six million dollars was raised by donors in support of the proposed 2016 marijuana legislation in California).

62. See Kathleen Ferraiolo, From Killer Weed to Popular Medicine: The Evolution of American Drug Control Policy, 1937–2000, 19 *J. Pol'y Hist.* 147, 162–68 (2007).

63. See Jessica Bulman-Pozen, From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism, 123 *Yale L.J.* 1920, 1952–53 (2014) [hereinafter Bulman-Pozen, *Afterlife*] (noting that ballot initiatives in a single state often rely on assembling and mobilizing a network of individuals and groups across the nation).

64. See Gary W. Copeland, Choosing to Run: Why House Members Seek Election to the Senate, 14 *Legis. Stud. Q.* 549, 553 (1989) (providing empirical evidence that bids to win higher elected office are preceded by increased risk-taking); Roderick M. Hills, Jr., Against Preemption: How Federalism Can Improve the National Legislative Process, 82 *N.Y.U. L. Rev.* 1, 22–24 (2007) [hereinafter Hills, *Against Preemption*]; Christos Kotsogiannis & Robert Schwager, On the Incentives to Experiment in Federations, 60 *J. Urb. Econ.* 484, 485 (2006); Koleman S. Strumpf, Does Government Decentralization Increase Policy Innovation?, 4 *J. Pub. Econ. Theory* 207, 227–28 (2002). But see Rose-Ackerman,



who are “ubiquitous potential presidential nominees in both parties.”<sup>65</sup> In other cases, lawmakers may believe that other states are unlikely to enact policies suitable for their state, especially if their state is an outlier with respect to its preferences,<sup>66</sup> available resources,<sup>67</sup> or population.<sup>68</sup> Further, lawmakers may invest in formulating new policies if they believe that reliable information about another state’s policies can’t be obtained at a reasonable cost<sup>69</sup> or that a policy promises a substantial “first-mover advantage”—that is, a benefit that can’t easily be captured by copycats.<sup>70</sup> Finally, one can of course think of genuine grassroots movements that have produced the kind of groundswell necessary for direct democracy to succeed.

But even as the obstacles discussed above shouldn’t be expected to impede policy experimentation altogether, they cast substantial doubt on the explanatory power of the laboratories account. That account portrays state autonomy as a boon for policy experimentation. Yet the mere existence of states with legislative responsibilities distinct from the federal government doesn’t explain how state officials or ballot initiative sponsors manage to overcome those obstacles. In fact, several prominent features of our federal system appear to turn the laboratories account on its head. Far from encouraging policy experimentation, our federal system of government may actually impede it. We’re therefore confronted with a puzzle: to identify where ideas for state policy experiments come from and explain

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supra note 7, at 614–16 (predicting this incentive will have only a weak effect on a state official’s inclination to innovate). This ambition, however, will often encounter a different version of the free rider problem. To encourage a politician to be a first mover, she would have to receive an appreciable electoral advantage from being perceived as a proactive lawmaker, rather than merely a productive lawmaker (who may copy successful innovations from others). See Galle & Leahy, supra note 7, at 1383.

65. Margaret Ferguson, *Governors and the Executive Branch*, in *Politics in the American States: A Comparative Analysis* 208, 241 (Virginia Gray, Russell L. Hanson & Thad Kousser eds., 10th ed. 2013).

66. See Ken Kollman, John H. Miller & Scott E. Page, *Decentralization and the Search for Policy Solutions*, 16 *J.L. Econ. & Org.* 102, 122 (2000); David Lazer, *Regulatory Capitalism as a Networked Order: The International System as an Informational Network*, 598 *Annals Am. Acad. Pol. & Soc. Sci.* 52, 62 (2005).

67. See Brooks, supra note 55, at 705–06 (noting the impact of both human and financial resource constraints on policymaking); Craig Volden, *States as Policy Laboratories: Emulating Success in the Children’s Health Insurance Program*, 50 *Am. J. Pol. Sci.* 294, 304 (2006).

68. See Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 *Am. J. Pol. Sci.* 840, 851 (2008) (finding that large cities are primary innovators among municipalities).

69. See Galle & Leahy, supra note 7, at 1352–55.

70. See *id.* at 1361. Many experiments in corporate law may have this quality, with Delaware serving as a prime example. See Lucian Ayre Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 *Harv. L. Rev.* 1435, 1448 n.56 (1992); William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 *Yale L.J.* 663, 664–65 (1974); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 *J. Legal Stud.* 251, 254–56 (1977).

why they are enacted despite state lawmakers' apparent lack of resources and incentives. The next Part takes up that puzzle in earnest.

## II. THE OVERLOOKED ROLE OF INTENSE POLICY DEMANDERS

The laboratories account fails to explain how state officials overcome several obstacles to innovation. That shortcoming results in large part from a failure to appreciate the influence of political networks, which connect state and federal lawmakers to third-party groups that intensely advocate for their preferred policies. Many of the most important state policy innovations originate with “intense policy demanders”—organizations that fiercely advocate for policies on issues they care about, such as interest groups, activists, policy entrepreneurs, advocacy coalitions, constituency-mobilization organizations, and donor consortia.<sup>71</sup> The *raison d'être* of many of these organizations is to formulate proposals for new policies consistent with their legislative agendas. They then shop those proposals around to receptive jurisdictions, often with draft legislative text in hand.<sup>72</sup> They exert professional and social pressure to encourage lawmakers to transform those proposals into law. And they often ensure that political primaries can be won only by candidates who support their preferred policies.<sup>73</sup>

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71. See Marty Cohen, David Karol, Hans Noel & John Zaller, *The Party Decides: Presidential Nominations Before and After Reform* 35–37 (2008); David Karol, *Party Position Change in American Politics* 7 (2009); Seth E. Masket, *The Inevitable Party: Why Attempts to Kill the Party System Fail and How They Weaken Democracy* 21 (2016) [hereinafter Masket, *The Inevitable Party*]; Seth E. Masket, *No Middle Ground: How Informal Party Organizations Control Nominations and Polarize Legislatures* 16–17 (2009) [hereinafter Masket, *No Middle Ground*]; Kathleen Bawn, Martin Cohen, David Karol, Seth Masket, Hans Noel & John Zaller, *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 *Persps. on Pol.* 571, 571–73 (2012); Jacob S. Hacker & Paul Pierson, *After the “Master Theory”: Downs, Schattschneider, and the Rebirth of Policy-Focused Analysis*, 12 *Persps. on Pol.* 643, 650 (2014).

72. See Frank Baumgartner & Bryan Jones, *Agendas and Instability in American Politics* 233 (2009); Graeme Boushey, *Punctuated Equilibrium Theory and the Diffusion of Innovations*, 40 *Pol’y Stud. J.* 127, 131–32 (2012); Kristin N. Garrett & Joshua M. Jansa, *Interest Group Influence in Policy Diffusion Networks*, 15 *State Pol. & Pol’y Q.* 387, 391–92 (2015); Donald P. Haider-Markel, *Policy Diffusion as a Geographical Expansion of the Scope of Political Conflict: Same-Sex Marriage Bans in the 1990s*, 1 *State Pol. & Pol’y Q.* 5, 7 (2001); Thomas T. Holyoke, *Choosing Battlegrounds: Interest Group Lobbying Across Multiple Venues*, 56 *Pol. Rsch. Q.* 325, 325–26 (2003); Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 *Yale L.J.* 2094, 2124 (2014) [hereinafter Rodríguez, *Negotiating Conflict*].

73. See Masket, *The Inevitable Party*, *supra* note 71, at 20. For this reason, many party scholars define the two major American political parties as networks connecting their respective groups. See Cohen et al., *supra* note 71, at 35–37; Karol, *supra* note 71, at 7; Masket, *The Inevitable Party*, *supra* note 71, at 21; Masket, *No Middle Ground*, *supra* note 71, at 17; Bawn et al., *supra* note 71, at 571; Hacker & Pierson, *supra* note 71, at 650.

The activities of many of these groups are highly coordinated. Although they are not all partisan,<sup>74</sup> many cooperate within the broader ecosystem of the two “competing party coalitions.”<sup>75</sup> In the current configuration, one network includes conservative and libertarian groups such as ALEC, SPN, AFP, Focus on the Family, the National Rifle Association (NRA), the Heritage Foundation, and many others. Meanwhile, the other network includes progressive groups, such as the State Innovation Exchange (SiX), the Open Society Network, the Sierra Club, Planned Parenthood, and various labor unions, to name just a few.<sup>76</sup>

These networks connect state lawmakers to intense policy demanders as well as like-minded federal officials. They thus facilitate cooperation across different levels of government. That is critically important because many of the most significant state policy experiments arise within *federal* programs. As Professor Abbe Gluck explains, states today “pass new state laws and regulations, create new state institutions, appoint state officials, disburse state funds, and hear cases in state courts” as part of their effort “to implement federal law.”<sup>77</sup> Intense policy demanders can therefore use their influence within political networks to affect federal policy and thus alter the baseline against which states must regulate. Ideologically aligned officials working at different levels of government will often work together to promote state policy experimentation to the extent they believe it is an

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74. One major exception is the influential set of nonpartisan organizations of governmental actors, such as the National Governors Association and the U.S. Conference of Mayors. See generally Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 *Ariz. L. Rev.* 709 (2008) (explaining the influence of translocal organizations of government actors on the proliferation of various policies).

75. Matt Grossmann & Casey B.K. Dominguez, *Party Coalitions and Interest Group Networks*, 37 *Am. Pol. Rsch.* 767, 793–94 (2009); see also Loren Collingwood, Stephen Omar El-Khatib & Benjamin Gonzalez O’Brien, *Sustained Organizational Influence: American Legislative Exchange Council and the Diffusion of Anti-Sanctuary Policy*, 47 *Pol’y Stud. J.* 735, 738–40 (2019); Michael T. Heaney, Seth E. Masket, Joanne M. Miller & Dara Z. Strolovitch, *Polarized Networks: The Organizational Affiliations of National Party Convention Delegates*, 56 *Am. Behav. Scientist* 1654, 1657 (2012) (arguing that segregation of organizational ties on the basis of party makes finding common ground between parties more difficult); Gregory Koger, Seth Masket & Hans Noel, *Cooperative Party Factions in American Politics*, 38 *Am. Pol. Rsch.* 33, 44–48 (2010); Gregory Koger, Seth Masket & Hans Noel, *Partisan Webs: Information Exchange and Party Networks*, 39 *Brit. J. Pol. Sci.* 633, 634 (2009) (noting the funneling of information from interest groups to the formal Democratic and Republican parties); Seth Masket, *The Networked Party: How Social Network Analysis Is Revolutionizing the Study of Political Parties*, in *New Directions in American Politics* 107, 113–14 (Raymond J. La Raja ed., 2013) (observing that parties resemble clustered groups of “activists, interest groups, and officeholders” more than they do hierarchical organizations); Richard M. Skinner, Seth E. Masket & David A. Dulio, *527 Committees and the Political Party Network*, 40 *Am. Pol. Rsch.* 60, 63–65 (2012).

76. For a more comprehensive description of the organizational ecology of these networks, see Hertel-Fernandez, *State Capture*, *supra* note 9, at 291–94.

77. Abbe R. Gluck, *Our [National] Federalism*, 123 *Yale L.J.* 1996, 2014 (2014) [hereinafter Gluck, *National Federalism*].

effective means of pursuing shared political objectives, all with an eye to teeing up a push for a change in national policy.<sup>78</sup>

Networks of intense policy demanders help state lawmakers overcome obstacles to innovation in at least three ways. First, they help lawmakers overcome resource constraints by conducting research, drafting legislative text, and providing technical support. Second, they help solve collective-action problems by activating the federal government's power to stimulate experimentation. Third, they create electoral and social incentives for lawmakers to endorse their preferred policy innovations.

#### A. *Resource Constraints*

As noted, state officials are often limited by extreme resource constraints. For that reason, numerous studies have found that state officials “typically do not engage in rational, comprehensive decision making.”<sup>79</sup> They rely instead on cognitive shortcuts, heuristics, signals, and cues from interest groups, other states, and the federal government. Intense policy demanders help lawmakers overcome these constraints by performing much of the work necessary to enact new policies. In so doing, they provide a form of “subsidy,” which lowers the costs associated with enacting new legislation.<sup>80</sup> As one of us has observed elsewhere, “McLegislation and McResearch and McTalking Points are immense time-savers, especially when they come from a trusted source.”<sup>81</sup>

These subsidies come in various forms and at various stages of the legislative process. During the beginning stages, intense policy demanders enlist experts to formulate ideas for new policies and communicate those ideas in policy briefs, legislative toolkits, periodicals, online databases, and

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78. *Id.* at 2005 (discussing state environmental experiments made possible by the Clean Air Act and health reform experiments made possible by federal waivers); Rodríguez, *Negotiating Conflict*, *supra* note 72, at 2108–11 (discussing the symbiotic relationship between states and the Obama Administration on various fronts).

79. Steven J. Balla, *Interstate Professional Associations and the Diffusion of Policy Innovations*, 29 *Am. Pol. Rsch.* 221, 221–22 (2001); see also Hertel-Fernandez, *State Capture*, *supra* note 9, at 79, 91 (finding that less experienced politicians and legislatures with lower levels of professionalization are more likely to rely on ALEC-generated model bills); Karch, *Democratic Laboratories*, *supra* note 45, at 7–9; Jansa et al., *supra* note 48, at 744 (“The more time-constrained a legislator is, the more likely he or she is to look for . . . shortcuts to solv[e] social problems.”); Edward Alan Miller, *Advancing Comparative State Policy Research: Toward Conceptual Integration and Methodological Expansion*, 36 *St. & Loc. Gov't Rev.* 35, 39–40 (2004).

80. See Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 *Am. Pol. Sci. Rev.* 69, 69 (2006); see also Garrett & Jansa, *supra* note 72, at 391–92; Richard L. Hall & Kristina C. Miller, *What Happens After the Alarm? Interest Group Subsidies to Legislative Overseers*, 70 *J. Pol.* 990, 1000 (2008).

81. Heather K. Gerken & Alex Tausanovitch, *A Public Finance Model for Lobbying: Lobbying, Campaign Finance, and the Privatization of Democracy*, 13 *Election L.J.* 75, 82 (2014).

the like.<sup>82</sup> Policy demanders also provide information about a policy's predicted consequences and its anticipated reception among constituents and fellow copartisans.<sup>83</sup> Many interest groups consider the dissemination of this kind of information to be "a key component of their organizational missions."<sup>84</sup>

Consider the work of SPN. As the Introduction noted, SPN is a national association of more than 160 state-level, right-leaning think tanks and affiliated organizations, such as the Goldwater and Heartland Institutes.<sup>85</sup> According to the association's president, Tracie Sharp, SPN follows an "IKEA model" of policy advocacy: It provides "raw materials" and "services" to affiliated organizations, which then formulate policy proposals tailored to local political and economic conditions.<sup>86</sup> In 2012, for instance, SPN and its Michigan affiliate, the Mackinac Center for Public Policy, were instrumental in disseminating information to state lawmakers about the purported benefits of "right to work" legislation, which was ultimately enacted in 2012.<sup>87</sup>

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82. See Graeme Boushey, *Policy Diffusion in America* 29–30 (2010); Karch, *Democratic Laboratories*, supra note 45, at 7–9; Timothy Callaghan, Andrew Karch & Mary Kroeger, *Model State Legislation and Intergovernmental Tensions Over the Affordable Care Act, Common Core, and the Second Amendment*, 50 *Publius* 518, 520–21 (2020); McCann et al., supra note 47, at 497; Michael Mintrom, *Policy Entrepreneurs and the Diffusion of Innovation*, 41 *Am. J. Pol. Sci.* 738, 739–41 (1997); see also Steven Callander, *Searching for Good Policies*, 105 *Am. Pol. Sci. Rev.* 643, 643 (2011).

83. See Hertel-Fernandez, *State Capture*, supra note 9, at 81; Balla, supra note 79, at 223; Callaghan et al., supra note 82, at 520–21; Alexander Hertel-Fernandez, *Who Passes Business's "Model Bills"? Policy Capacity and Corporate Influence in U.S. State Politics*, 12 *Persps. on Pol.* 582, 586 (2014) [hereinafter Hertel-Fernandez, *Policy Capacity and Corporate Influence*]. Individual legislators value information about how policies will be perceived by copartisans at least as much as they value information about the effectiveness of proposed policies. See Daniel J. Mallinson, *Who Are Your Neighbors? The Role of Ideology and Decline of Geographic Proximity in the Diffusion of Policy Innovations*, 49 *Pol'y Stud. J.* 67, 71–73 (2019); see also Bruce A. Desmarais, Jeffrey J. Harden & Frederick J. Boehmke, *Persistent Policy Pathways: Inferring Diffusion Networks in the American States*, 109 *Am. Pol. Sci. Rev.* 392, 402 (2015) (finding strong ideological homophily in policy diffusion patterns); Lawrence J. Grossback, Sean Nicholson-Crotty & David A. M. Peterson, *Ideology and Learning in Policy Diffusion*, 32 *Am. Pol. Rsch.* 521, 530–39 (2004) (similar); Volden, supra note 67, at 304 (similar).

84. Callaghan et al., supra note 82, at 520.

85. See Hertel-Fernandez, *State Capture*, supra note 9, at 177; About State Policy Network, State Pol'y Network, <https://spn.org/state-policy-network-about/> [https://perma.cc/6E5L-LDHF] (last visited Aug. 8, 2022); The Network, State Pol'y Network, <https://spn.org/directory/> [https://perma.cc/YJ4D-7XKH] (last visited Aug. 29, 2022).

86. See Jane Mayer, *Is IKEA the New Model for the Conservative Movement?*, *New Yorker* (Nov. 15, 2013), <https://www.newyorker.com/news/news-desk/is-ikea-the-new-model-for-the-conservative-movement> (on file with the *Columbia Law Review*).

87. See Lee Fang, *Pro-'Right to Work' Groups in Michigan Outspend Union Counterparts*, *Nation* (Dec. 8, 2012), <https://www.thenation.com/article/archive/pro-right-work-groups-michigan-outspend-union-counterparts/> (on file with the *Columbia Law Review*); Michael D. Lafaive, *Right-to-Work and the Mackinac Center*, Mackinac Ctr. for Pub.

Groups such as the State Priorities Partnership (SPP) and the Economic Analysis and Research Network (EARN) perform a similar function on the left. SPP provides support to more than forty independent, nonprofit research and policy organizations “doing research on budgets and public programs for low-income Americans.”<sup>88</sup> EARN, meanwhile, is a nationwide research network that provides “data-based assessments of local conditions for working families and offer[s] policy roadmaps to shared economic opportunity and security.”<sup>89</sup> Both groups help state organizations with policy analysis and outreach—by supplying important datasets, drafting reports, interacting with the media, and crafting grant proposals to foundations.<sup>90</sup>

After ideas for new policies have been formulated, intense policy demanders provide everything legislators need to transform those ideas into policy. Most significantly, they draft model legislative text that can be introduced in state legislatures with minimal additional effort.<sup>91</sup> By providing “ready-to-go text,” they dramatically reduce the work required of state officials interested in passing a particular policy.<sup>92</sup> In recent years, this technique has been deployed by a wide range of groups—from the NRA to the Giffords Law Center, from corporate lobbies to labor unions, from Lambda Legal to Focus on the Family.<sup>93</sup> As a recent report concludes,

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Pol’y (Nov. 29, 2012), <https://www.mackinac.org/17991> [<https://perma.cc/ZC9G-DTNL>]; Mackinac Center Admits to Lobbying Lawmakers, *Progress Mich.* (Jan. 29, 2013), <https://progressmichigan.org/2013/01/mackinac-center-admits-to-lobbying-lawmakers/> [<https://perma.cc/VFB7-KBLY>]; see also Hertel-Fernandez, *State Capture*, *supra* note 9, at 144–45.

88. Hertel-Fernandez, *State Capture*, *supra* note 9, at 230; see also About, State Priorities P’ship, <https://statepriorities.org/about/> [<https://perma.cc/7N7J-7CN6>] (last visited Aug. 21, 2022).

89. Economic Analysis and Research Network, Econ. Opportunity Inst., <https://www.opportunityinstitute.org/research/ending-corporate-tax-breaks/> [<https://perma.cc/QF2P-EVQY>] (last visited Sept. 4, 2022).

90. See Hertel-Fernandez, *State Capture*, *supra* note 9, at 231.

91. See Callaghan et al., *supra* note 82, at 521; Jansa et al., *supra* note 48, at 741; Matthew Burgess, Eugenia Giraudy, Julian Katz-Samuels, Joe Walsh, Derek Willis, Lauren Haynes & Rayid Ghani, *The Legislative Influence Detector: Finding Text Reuse in State Legislation*, in *KDD ’16: Proceedings of the 22nd ACM SIGKDD International Conference on Knowledge Discovery and Data Mining* 57, 64 (2016), [https://dl.acm.org/doi/pdf/10.1145/2939672.2939697?casa\\_token=n4oNTizMHTQAAAAA:7yMMqZ68buzBXC2mhnKMRJ8mMdzaS5-b9i1ScP4LrhnfQg3URwkMRkEmZ-ncN3yUThR47iDxqIk](https://dl.acm.org/doi/pdf/10.1145/2939672.2939697?casa_token=n4oNTizMHTQAAAAA:7yMMqZ68buzBXC2mhnKMRJ8mMdzaS5-b9i1ScP4LrhnfQg3URwkMRkEmZ-ncN3yUThR47iDxqIk) [<https://perma.cc/6A5L-EWQA>].

92. Garrett & Jansa, *supra* note 72, at 402.

93. See Lambda Legal, Hum. Rts. Campaign Found., Hogan Lovells & N.Y.C. Bar, *Creating Equal Access to Quality Health Care for Transgender Patients: Transgender-Affirming Hospital Policies 4–13* (2016), [https://www.lambdalegal.org/sites/default/files/publications/downloads/hospital-policies-2016\\_5-26-16.pdf](https://www.lambdalegal.org/sites/default/files/publications/downloads/hospital-policies-2016_5-26-16.pdf) [<https://perma.cc/K9ZL-LEBA>]; Collingwood et al., *supra* note 75, at 736 (noting the NRA’s use of model legislative text); Mary Emily O’Hara, *This Law Firm Is Linked to Anti-Transgender Bathroom Bills Across the Country*, *NBC News* (Apr. 8, 2017), <https://www.nbcnews.com/feature/nbc-out/law->

model legislation has “driv[en] agendas in every statehouse and touching nearly every area of public policy.”<sup>94</sup>

One witnesses the full panoply of these services in ALEC—an association of right-leaning state legislators, private companies, conservative think tanks, and philanthropies.<sup>95</sup> ALEC has roughly 2,000 legislator members—just under one-third of all state legislators nationwide.<sup>96</sup> It’s a veritable one-stop shop for conservative policy formation.<sup>97</sup> Its various committees draft model state legislation, which it then promotes through publications and lavish events.<sup>98</sup> It also offers bill tracking, research, and expert witness services to state lawmakers willing to champion its proposals.<sup>99</sup> Put simply, ALEC’s work makes lawmaking easier, particularly for lawmakers who are relatively inexperienced or who work in less professionalized legislatures.<sup>100</sup> From 2003 to 2013, roughly three percent of all legislation sponsored by Republican state lawmakers nationwide relied on ALEC model bills.<sup>101</sup> The importance of ALEC-sponsored bills, moreover, far exceeds their number, as many such laws have effected dramatic changes to state policy. In recent years, legislatures have enacted ALEC-formulated proposals to retrench social programs such as Medicaid and

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firm-linked-anti-transgender-bathroom-bills-across-country-n741106 [https://perma.cc/KY6J-3TJY]; Request Policy Assistance, Giffords L. Ctr., https://giffords.org/lawcenter/action/request-policy-assistance/ [https://perma.cc/99E9-FG2L] (last visited Aug. 8, 2022); Testimony of Michael J. Norton, Senior Counsel, All. Defending Freedom (Feb. 4, 2015), https://www.facingsouth.org/sites/default/files/ADF-model-legislation.pdf [https://perma.cc/GH6P-DYV7].

94. Rob O’Dell & Nick Penzenstadler, You Elected Them to Write New Laws. They’re Letting Corporations Do It Instead., USA Today (Apr. 3, 2019), https://www.usatoday.com/in-depth/news/investigations/2019/04/03/abortion-gun-laws-stand-your-ground-model-bills-conservatives-liberal-corporate-influence-lobbyists/3162173002/ [https://perma.cc/RZ7M-LKXX] (last updated Dec. 16, 2019).

95. See Hertel-Fernandez, Policy Capacity and Corporate Influence, *supra* note 83, at 584.

96. See Membership, ALEC, https://alec.org/membership/ [https://perma.cc/ZLC9-HXYF] (last visited Aug. 30, 2022).

97. See Collingwood et al., *supra* note 75, at 736–40 (discussing characteristics making ALEC uniquely effective in pushing model bills through state legislatures).

98. See Hertel-Fernandez, State Capture, *supra* note 9, at 32; Hertel-Fernandez, Policy Capacity and Corporate Influence, *supra* note 83, at 584–85.

99. See Hertel-Fernandez, State Capture, *supra* note 9, at 81; Hertel-Fernandez, Policy Capacity and Corporate Influence, *supra* note 83, at 585.

100. See Hertel-Fernandez, State Capture, *supra* note 9, at 79, 91–92 (finding that less experienced politicians and legislatures with lower levels of professionalization are more likely to rely on ALEC-generated model bills); Michael B. Berkman, Legislative Professionalism and the Demand for Groups: The Institutional Context of Interest Population Density, 26 *Legis. Stud. Q.* 661, 666 (2001) (arguing that as legislatures professionalize, their demand for information from lobbyists decreases because they “develop the capacity to generate quality information independently”); Jansa et al., *supra* note 48, at 744 (“The more time-constrained a legislator is, the more likely he or she is to look for . . . shortcuts to solv[e] social problems.”).

101. See Hertel-Fernandez, State Capture, *supra* note 9, at 99; see also Collingwood et al., *supra* note 75, at 754 (finding that “about 20% of all anti-sanctuary [city] bills have text directly lifted from the ALEC-backed bill”).

unemployment insurance; lower taxes on the wealthy and businesses; limit the ability of unions to collectively bargain; pare back access to abortion; and expand the rights of gun owners.<sup>102</sup>

For a similar organization on the left, consider SiX, which was formed out of the 2014 merger of the Center for State Innovation, the Progressive States Network, and the American Legislative and Issue Campaign Exchange.<sup>103</sup> SiX is “a national resource and strategy center” that “works in close coordination with legislators, advocacy groups, think tanks and activists to provide the tools and information legislators need,” such as “policy support, communication products, research, trainings, convenings, technical assistance, and strategic advice.”<sup>104</sup> Though younger and less influential than ALEC,<sup>105</sup> SiX has rapidly become its progressive counterpart.<sup>106</sup> In 2018, for example, SiX provided Massachusetts representatives with policy materials, press strategy, and social media support to help promote a bill (later enacted) to codify protections for women seeking abortions.<sup>107</sup> SiX also connected those representatives with “legislators in other states who had crafted similar bills, so [they] could learn from their successes and failures.”<sup>108</sup>

Finally, intense policy demanders play a similar role in promoting ballot initiatives and referenda. While those measures typically call to mind

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102. Hertel-Fernandez, *State Capture*, *supra* note 9, at 1–2; see also Herman Schwartz, *One Party System: What Total Republican Control of a State Really Means*, Reuters (Aug. 19, 2015), <https://www.reuters.com/article/idIN176029136320150819> [<https://perma.cc/Q3ST-LKPK>].

103. See FAQs, State Innovation Exch., <https://stateinnovation.org/frequently-asked-questions/> [<https://perma.cc/76PE-T4S4>] (last visited Aug. 8, 2022).

104. About SiX, State Innovation Exch., <https://stateinnovation.org/about/> [<https://perma.cc/4UKS-P9X5>] (last visited Aug. 8, 2022).

105. This disparity in influence is not limited to SiX and ALEC. Numerous scholars have found that conservative-leaning interest groups exhibit greater levels of organizational consolidation and ideological coherence than their liberal-leaning counterparts—providing empirical confirmation for Will Rogers’s famous quip: “I am not a member of any organized political party—I am a Democrat.” See Hertel-Fernandez, *State Capture*, *supra* note 9, at 211–42; Matt Grossmann & David A. Hopkins, *Ideological Republicans and Group Interest Democrats: The Asymmetry of American Party Politics*, 13 *Persps. on Pol.* 119, 129 (2015); Alexander Hertel-Fernandez, *Explaining Liberal Policy Woes in the States: The Role of Donors*, 49 *PS: Pol. Sci. & Pol.* 461, 461 (2016) [hereinafter Hertel-Fernandez, *Explaining Liberal Policy Woes*]; Alexander Hertel-Fernandez, Theda Skocpol & Daniel Lynch, *Report on Health Reform Implementation: Business Associations, Conservative Networks, and the Ongoing Republican War Over Medicaid Expansion*, 41 *J. Health Pol. Pol’y & L.* 239, 244 (2016); Fridolin Linder, Bruce Desmarais, Matthew Burgess & Eugenia Giraudy, *Text as Policy: Measuring Policy Similarity Through Bill Text Reuse*, 48 *Pol’y Stud. J.* 546, 547 (2020).

106. See Mallinson, *supra* note 83, at 73 (noting that “SIX was founded . . . to provide a progressive policy counterweight to ALEC”); Alan Greenblatt, *Have Democrats Found Their ALEC?*, *New Republic* (Jan. 3, 2020), <https://newrepublic.com/article/156110/democrats-found-alec> [<https://perma.cc/457G-VREZ>].

107. See Greenblatt, *supra* note 106.

108. *Id.*



grassroots movements orchestrated by political amateurs, organized interests drive the proliferation of policy through direct democracy just as much as they do through ordinary legislation.<sup>109</sup> The movement to decriminalize the use and cultivation of marijuana, for example, has been led by interest groups such as Americans for Medical Rights, NORML, the Marijuana Policy, and the ACLU, which have directed their efforts toward state ballot initiatives.<sup>110</sup> For present purposes, the important point is that these organizations provide the infrastructure and infusions of cash necessary to draft initiatives, gather petition signatures, staff campaigns, and buy advertising.<sup>111</sup> They thus catalyze efforts to enact policy innovations through direct-democracy channels, much as they do through ordinary legislative channels.<sup>112</sup> In both contexts, they diminish one substantial obstacle to innovation.

### B. *Collective-Action Problems*

Networks of intense policy demanders also establish bonds between like-minded officials working across multiple levels of government. Those bonds help overcome collective-action problems that impede state lawmakers from achieving high levels of policy experimentation. In particular, allied federal officials can offer incentives to states willing to conduct certain kinds of policy experiments, making innovation less costly. And they can threaten states that refuse to innovate with onerous federal regulations, making failure to experiment more costly. In each circumstance, political networks use the power of the federal government to jostle states into action. Thus, federal law is often the “driving force behind state experimentation.”<sup>113</sup>

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109. See Sasha Issenberg, *Ballot Measures Don't Tell Us Anything About What Voters Really Want*, Wash. Post (Nov. 25, 2020), [https://www.washingtonpost.com/outlook/referenda-ballot-measures-democrats/2020/11/25/d5984964-2e69-11eb-bae0-50bb17126614\\_story.html](https://www.washingtonpost.com/outlook/referenda-ballot-measures-democrats/2020/11/25/d5984964-2e69-11eb-bae0-50bb17126614_story.html) (on file with the *Columbia Law Review*) (noting the importance of forming coalitions of interest groups in winning ballot initiatives); John Meyers, *Powerful, Wealthy Interest Groups Keep Tight Grip on California Proposition System*, L.A. Times (Nov. 5, 2020), <https://www.latimes.com/california/story/2020-11-05/analysis-ballot-initiatives-system-california-spending> [<https://perma.cc/ZMU2-URGE>]; Reid Wilson, *Corporations, Interest Groups Spend Fortunes on Ballot Measures*, Hill (Sept. 1, 2018), <https://thehill.com/business-a-lobbying/404555-corporations-interest-groups-spend-fortunes-on-ballot-measures/> [<https://perma.cc/W583-N93D>].

110. See Ferraiolo, *supra* note 62, at 162–68.

111. See Bulman-Pozen, *Afterlife*, *supra* note 63, at 1952; Elizabeth Garrett, *Agenda Setting and Direct Democracy*, 77 *Tex. L. Rev.* 1845, 1847 (1999).

112. See Bulman-Pozen, *Afterlife*, *supra* note 63, at 1954–55 (highlighting the ways that “networked interests” have propped up national direct-democracy movements related to marijuana policy, labeling for genetically modified foods, recognition for same-sex marriage, fracking, and animal mistreatment).

113. Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *Yale L.J.* 534, 567 (2011) [hereinafter Gluck, *Intrastatutory Federalism*]; see also Michael C. Dorf & Charles F. Sabel,

The federal government's most common technique for encouraging state policy innovation is to offer states funding on the condition that they implement certain kinds of policies. Perhaps the best-known example is the Aid to Families With Dependent Children (AFDC) program, under which forty-six states eventually developed their own distinct regimes.<sup>114</sup> More recently, the Obama Administration granted waivers under the No Child Left Behind Act to state and local governments that sought to reform their school systems.<sup>115</sup> These are just two of many possible examples. Besides Medicare and Social Security, nearly every big-ticket item on the federal government's domestic budget supports such programs, including unemployment insurance, aid to the poor, education standards and incentives, health care for the indigent and the disabled, and legal protections against discrimination.<sup>116</sup> Indeed, as of 2018, there were 1,274 federal programs distributing funds to the states.<sup>117</sup> These conditional spending programs encourage states to experiment for the simple reason that they give states a financial incentive to do so.

A second technique is to condition the preemption of state law on a state's failure to implement certain kinds of policies. In the typical posture, a federal statute or administrative regulation creates a default regulatory

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A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267, 419–38 (1998) (describing the role of federalism in experimentalist legislation); Abbe R. Gluck, Federalism From Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble, 81 Fordham L. Rev. 1749, 1764–65 (2013) [hereinafter Gluck, Federalism From Federal Statutes]; Dale B. Thompson, Optimal Federalism Across Institutions: Theory and Applications From Environmental and Health Care Policies, 40 Loy. U. Chi. L.J. 437, 473–75 (2009) (discussing how the concurrent enactment of Medicaid at a state and federal level allows for the realization of both economies of scale and the ability of states to tailor the programs to their specific needs).

114. See U.S. Gov't Accountability Off., GAO/HEHS-97-74, Welfare Reform: States' Early Experiences With Benefit Termination 3 (1997). Congress later replaced AFDC with the Temporary Assistance for Needy Families program in part because of earlier experimentation. See Andrew Hammond, Welfare and Federalism's Peril, 92 Wash. L. Rev. 1721, 1729–47 (2017).

115. Megan Slack, Everything You Need to Know: Waivers, Flexibility, and Reforming No Child Left Behind, The White House, President Barack Obama (Feb. 9, 2012), <https://obamawhitehouse.archives.gov/blog/2012/02/09/everything-you-need-know-waivers-flexibility-and-reforming-no-child-left-behind> [<https://perma.cc/GBZ4-33UW>]; see also David J. Barron & Todd D. Rakoff, In Defense of Big Waiver, 113 Colum. L. Rev. 265, 279–81 (2013); Rodríguez, Negotiating Conflict, *supra* note 72, at 2109.

116. Brian Galle, Does Federal Spending “Coerce” States? Evidence From State Budgets, 108 Nw. U. L. Rev. 989, 994 (2014); see also Andrew B. Coan, Commandeering, Coercion, and the Deep Structure of American Federalism, 95 B.U. L. Rev. 1, 12 (2015).

117. Robert Jay Dilger & Michael H. Cecire, Cong. Rsch. Serv., R40638, Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues 9–10 (2019), <https://fas.org/sgp/crs/misc/R40638.pdf> [<https://perma.cc/CBG7-JQN2>].

regime, from which a state may opt out by implementing a suitable substitute and obtaining a waiver from the relevant agency.<sup>118</sup> Certain federal environmental laws are paradigmatic examples.<sup>119</sup> Several federal statutes, including provisions of the Clean Air Act and Clean Water Act, set out default requirements for achieving baseline standards of stringency but allow states and local governments to opt out of those requirements by devising their own plans for achieving the federal standards.<sup>120</sup> States typically exercise this option, allowing them to tailor their environmental regulations to local conditions.<sup>121</sup> But if a state fails to devise a suitable alternative, the EPA retains authority to implement the federal default.<sup>122</sup> If conditional spending programs are the federal government's version of a carrot, then its conditional preemption power is the stick. The threat of more onerous federal regulation and oversight is often enough to jostle states to experiment in a particular domain.

These techniques give states a jolt, helping them to overcome collective-action obstacles impeding experimentation. And it is hard to overstate their significance. The last century has witnessed a dramatic increase in the number and importance of federal statutes.<sup>123</sup> The presence

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118. See Bulman-Pozen, *Afterlife*, *supra* note 63, at 1934; William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 *N.Y.U. L. Rev.* 1547, 1566 (2007) [hereinafter Buzbee, *Asymmetrical Regulation*].

119. See John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 *Md. L. Rev.* 1183, 1223 (1995). Other well-known examples include the ACA's provisions relating to the establishment of high-risk insurance pools and the role of states in the development of Medicaid legislation. See Gluck, *Intrastatutory Federalism*, *supra* note 113, at 586; Thompson, *supra* note 113, at 473–75.

120. See *Clean Air Act Stationary Source Compliance Monitoring Strategy*, EPA, <https://www.epa.gov/compliance/clean-air-act-stationary-source-compliance-monitoring-strategy> [<https://perma.cc/4RZH-XTM3>] (last visited Aug. 30, 2022); *Clean Water Act (CWA) Compliance Monitoring*, EPA, <https://www.epa.gov/compliance/clean-water-act-cwa-compliance-monitoring> [<https://perma.cc/D2KX-7AK8>] (last visited Aug. 30, 2022).

121. See Buzbee, *Asymmetrical Regulation*, *supra* note 118, at 1565–66; Hannah J. Wiseman, *Regulatory Islands*, 89 *N.Y.U. L. Rev.* 1661, 1676 (2014).

122. See, e.g., 42 U.S.C. §§ 7409–7410 (2018).

123. See Barron & Rakoff, *supra* note 115, at 301–02; Gluck, *Federalism From Federal Statutes*, *supra* note 113, at 1749–51.

of federal regulation is now the rule, not the exception, in domains as varied as environmental law,<sup>124</sup> health care,<sup>125</sup> telecommunications,<sup>126</sup> and financial regulation.<sup>127</sup> Federal regulation has even crept into areas traditionally thought to be largely under state control, such as education,<sup>128</sup> crime,<sup>129</sup> family law,<sup>130</sup> and land use law.<sup>131</sup> Moreover, just as the federal government has been active in domains traditionally thought to belong to the states, the states consistently encroach on federal turf.<sup>132</sup> Put simply, many of the most important state policies today arise in the interstices of

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124. See David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 *Minn. L. Rev.* 1796, 1796 (2008); William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 *Emory L.J.* 145, 154, 157 (2007); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 *Nw. U. L. Rev.* 1097, 1099 (2009); Dwyer, *supra* note 119, at 1183; Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 *Emory L.J.* 159, 162 (2006); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 *Mich. L. Rev.* 570, 599–603 (1996); Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 *Va. Env't L.J.* 189, 217–18 (2002).

125. See, e.g., Gluck, *Federalism From Federal Statutes*, *supra* note 113, at 1749; Theodore W. Ruger, *Health Policy Devolution and the Institutional Hydraulics of the Affordable Care Act*, *in* *The Health Care Case: The Supreme Court's Decision and its Implications* 359, 364–66 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013).

126. See Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 *NYU. L. Rev.* 1692, 1740–43 (2001).

127. See Robert B. Ahdieh, *Dialectical Regulation*, 38 *Conn. L. Rev.* 863, 863 (2006); Katherine Mason Jones, *Federalism and Concurrent Jurisdiction in Global Markets: Why a Combination of National and State Antitrust Enforcement Is a Model for Effective Economic Regulation*, 30 *Nw. J. Int'l L. & Bus.* 285, 307–08 (2010).

128. See Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 *St. Louis. U. L.J.* 997, 1014–18 (2015).

129. *Id.* at 1012–14.

130. *Id.* at 1018–21.

131. See Ashira Pelman Ostrow, *Land Law Federalism*, 61 *Emory L.J.* 1397, 1400–01 (2012); Patricia E. Salkin & Ashira Pelman Ostrow, *Cooperative Federalism and Wind: A New Framework for Achieving Sustainability*, 37 *Hofstra L. Rev.* 1049, 1052 (2009).

132. See Ahdieh, *supra* note 127, at 900–03; Paul R. Gugliuzza, *Patent Law Federalism*, 2014 *Wis. L. Rev.* 11, 12–13; Paul R. Gugliuzza, *Patent Trolls and Preemption*, 101 *Va. L. Rev.* 1579, 1583 (2015); Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, 88 *Tex. L. Rev.* 1715, 1715–16, 1719–20 (2010) (observing that “local officials and agencies have historically participated in urgent matters of national security . . . and in doing so have frequently rankled their federal counterparts”); Resnik et al., *supra* note 74, at 766–67; Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 *Mich. L. Rev.* 567, 569–71 (2008); Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 *Harv. L. Rev.* 1153, 1155 (2011); Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 *Stan. L. Rev.* 289, 290–92 (2012).

federal law and administration.<sup>133</sup> Accordingly, influence over federal officials is one of the most effective ways for intense policy demanders to stimulate policy experimentation.

Now, one might question whether we have quietly watered down the value of state policy experimentation or whether this counts as “experimentation” at all. Federal law cannot partake of the full range of experimental possibilities that are (technically) possible if a state were to enact a new policy all on its own. State policies enacted in the interstices of federal law can vary within a certain range, but states may not experiment in ways that deviate from federal policy entirely.<sup>134</sup> And, in fact, federal law has the potential to stifle many state policies that might be beneficial.<sup>135</sup> There is, of course, some truth to this concern, but we think it’s overstated in two respects.

First, best shouldn’t be the enemy of the good. Focusing exclusively on federal law’s ability to stifle state experimentation leads one to overlook its experimentalist benefits. In the absence of federal programs, many state policies simply wouldn’t exist (or, at least, not in the same form). State policies to limit air pollution, for example, were uncommon before Congress enacted major environmental statutes in the 1970s.<sup>136</sup> Much the same can be said about the federal Medicaid program,<sup>137</sup> the State Children’s Health Insurance Program,<sup>138</sup> and many others.<sup>139</sup> In many contexts, the states simply won’t experiment when left to their own devices.

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133. See Gluck, National Federalism, *supra* note 77, at 2005–06 (“[F]ederal statutory law has gone so far into the terrain of regulating the everyday affairs of the citizenry . . . that the only way to ‘ensur[e] that states retain something meaningful to *do*’ . . . is to empower them from within national law.” (quoting Young, Two Cheers, *supra* note 39, at 1385)).

134. See Lemos, *supra* note 32, at 750 (calling this a “one-way-ratchet”).

135. We acknowledge—as we must—that federal law has the potential to hamper state policy experimentation. We address how legal doctrine should respond to that possibility in Part III.

136. See Dwyer, Practice of Federalism, *supra* note 119, at 1223–24; Gluck, Federalism From Federal Statutes, *supra* note 113, at 1765. Of course, not all environmental regulation works this way; the federal government is largely absent in some areas where states are nonetheless active. The point, however, is that federal activity functions as a catalyst in some important areas of policy. For a theoretical model of how federal incentives may affect state policy in environmental law, see Jonathan H. Adler, When Is Two a Crowd?: The Impact of Federal Action on State Environmental Regulation, 31 *Harv. Env’t L. Rev.* 67, 86–88 (2007).

137. See Gluck, Intrastatutory Federalism, *supra* note 113, at 568 (making a similar observation about the federal Medicaid program).

138. See Robert F. Rich, Cynthia L. Deye & Elizabeth Mazur, The State Children’s Health Insurance Program: An Administrative Experiment in Federalism, 2004 *U. Ill. L. Rev.* 107, 107–08.

139. See David A. Super, Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law, 157 *U. Pa. L. Rev.* 541, 585 (2008) (highlighting the Supplemental Security Income program for elderly and disabled people, the Food Stamp Program, and the Section 8 voucher program).

From this perspective, federal law “help[s] ‘federalism’ realize its potential,”<sup>140</sup> even as it may foreclose certain possibilities.

Second, we should be careful not to overstate the federal government’s power to force state officials to do things they don’t want to do. The federal government depends just as heavily on the states as the states do on the federal government. That dependence limits how sternly the federal executive branch can deal with states that defy its agenda.<sup>141</sup> As Professor Jessica Bulman-Pozen explains: “Once the federal executive has come to depend on states to play a particular role[,] . . . and has therefore not established the ability to do so itself . . . states will have a greater ability to force the federal executive to make concessions or, in extreme cases, to undermine federal executive policy.”<sup>142</sup> We therefore think it is fair to characterize the federal government’s power as a catalyst for state policy experimentation even as it can also be an impediment.

### C. *Principal–Agent Misalignment*

Finally, intense policy demanders create various professional and social incentives that align a state’s interest in policy experimentation with that of its officials.

1. *Professional Incentives.* — One of the hallmarks of intense policy demanders is the electoral pressure they apply to lawmakers by turning out swarms of voters, bundling large campaign contributions and expenditures, and supplying high-profile endorsements. Consider, for example, Americans for Prosperity (AFP). As of 2015, AFP had a \$150 million budget, roughly 500 paid staffers, a presence in thirty-four states, and 2.5 million enrolled volunteer activists.<sup>143</sup> AFP uses these resources to monitor state and local politics, stage “grassroots” demonstrations at key moments, and make strategic infusions of cash to influence key electoral contests.<sup>144</sup>

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140. Gluck, *Federalism From Federal Statutes*, supra note 113, at 1764.

141. Gerken, *Federalism 3.0*, supra note 22, at 1696; Gerken, *Foreword*, supra note 21, at 33–43 (arguing that the relationship between the federal government and the states is akin to “an ongoing, iterated game which may continue even after a trump card is played” by one institution).

142. Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 *Colum. L. Rev.* 459, 481 (2012); see also Dwyer, *Practice of Federalism*, supra note 119, at 1216 (“Because, as a practical matter, the federal government must rely on state governments to carry out federal environmental policy, state concerns and preferences will continue to receive careful consideration . . .”).

143. See Hertel-Fernandez, *State Capture*, supra note 9, at 166; Theda Skocpol & Alexander Hertel-Fernandez, *The Koch Network and Republican Party Extremism*, 14 *Persps. on Pol.* 681, 688–89 (2016).

144. See Hertel-Fernandez, *State Capture*, supra note 9, at 166 (noting that AFP “directors organize grassroots supporters to stage rallies, write, call, and visit elected officials, and contact the media”); id. at 167 (noting that “sometimes AFP simply pays individuals to sign up as volunteers” for grassroots events); Skocpol & Hertel-Fernandez, supra note 143, at 688–89; Fredreka Schouten, *Koch Group Flexes Conservative Muscle in State Fights*, USA

For examples on the left, consider labor unions. Although their power has waned in recent years,<sup>145</sup> unions continue to “invest massively in efforts to elect Democratic politicians, routinely organizing get-out-the-vote campaigns, voter registration drives and the like.”<sup>146</sup> Teachers unions, in particular, have been described as “among the most powerful interest groups of *any* type in *any* area of public policy.”<sup>147</sup> In the 2009 presidential election the Service Employees International Union alone reported that members and staff knocked on 3.5 million doors, made 16.5 million phone calls, and registered 227,000 new voters.<sup>148</sup> Efforts like these allow intense policy demanders, such as AFP and unions, to ensure that affiliated lawmakers are willing to support their core policy positions.

Intense policy demanders also promise carrots. As noted in Part I, state lawmakers often have their sights set on higher office.<sup>149</sup> Networks of intense policy demanders allow those lawmakers to develop a favorable reputation among powerful network elites and thus improve their prospects for reelection and elevation.<sup>150</sup> While *voters* are unlikely to distinguish between innovative lawmakers and lawmakers who simply copy successful policies pioneered by others,<sup>151</sup> intense policy demanders pay careful attention to which lawmakers zealously and quickly endorse their

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Today (Feb. 25, 2015), <https://www.usatoday.com/story/news/politics/2015/02/25/americans-for-prosperity-clout/23902555/> [<https://perma.cc/GHD6-B9TC>]; Kenneth P. Vogel, Koch Brothers Plan \$125M Spree, Politico (May 9, 2014), <https://www.politico.com/story/2014/05/koch-brothers-americans-for-prosperity-2014-elections-106520> [<https://perma.cc/522Y-8A76>] (last updated May 11, 2014).

145. See Alexander Hertel-Fernandez, Policy Feedback as Political Weapon: Conservative Advocacy and the Demobilization of the Public Sector Labor Movement, 16 *Persps. on Pol.* 364, 364 (2018) [hereinafter Hertel-Fernandez, Policy Feedback as Political Weapon].

146. Jasmine Kerrissey & Evan Schofer, Union Membership and Political Participation in the United States, 91 *Soc. Forces* 895, 899 (2013); see also Daniel Schlozman, When Movements Anchor Parties: Electoral Alignments in American History 73 (2015); Hertel-Fernandez, Policy Feedback as Political Weapon, *supra* note 145, at 364. Labor unions are effective at mobilizing constituents in part because they can leverage strong relationships with employees to encourage them to participate in politics. See Jake Rosenfeld, What Unions No Longer Do 7 (2014); John S. Ahlquist, Amanda B. Clayton & Margaret Levi, Provoking Preferences: Unionization, Trade Policy, and the ILWU Puzzle, 68 *Int'l Org.* 33, 35 (2014); Sung Eun Kim & Yotam Margalit, Informed Preferences? The Impact of Unions on Workers' Policy Views, 61 *Am. J. Pol. Sci.* 728, 730 (2017) (noting that unions regularly communicate with their members on political issues); Jan E. Leighley & Jonathan Nagler, Unions, Voter Turnout, and Class Bias in the U.S. Electorate, 1964–2004, 69 *J. Pol.* 430, 431–32 (2007).

147. Terry M. Moe, Special Interest: Teachers Unions and America's Public Schools 8 (2011); see also Daniel DiSalvo, Government Against Itself: Public Union Power and its Consequences 21 (2015).

148. Kerrissey & Schofer, *supra* note 146, at 899.

149. See *supra* notes 64–65 and accompanying text.

150. See Hertel-Fernandez, State Capture, *supra* note 9, at 109; Hertel-Fernandez, Policy Capacity and Corporate Influence, *supra* note 83, at 585; Rodríguez, Negotiating Conflict, *supra* note 72, at 2120.

151. See *supra* note 64 and accompanying text.

causes.<sup>152</sup> And the support of those groups is often essential for a prosperous and upwardly mobile political career.

2. *Social Pressure.* — Lawmakers also care about things besides “votes and dollars.”<sup>153</sup> They care about the perception that their actions are “desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions”—what social scientists often call “legitimacy.”<sup>154</sup> For that reason, a state’s lawmakers are influenced by other organizations with which their state interacts—what sociologists call their state’s “organizational field.”<sup>155</sup> For each state, the field includes other states, various federal agencies and legislative committees, professional associations, major suppliers, competitors, consulting firms, and—most relevant here—intense policy demanders.<sup>156</sup> The latter groups use their influence within a state’s organizational field to exert at least three forms of social pressure which conduce to policy experimentation.<sup>157</sup>

First, they apply normative pressure by creating expectations that officials will comply with articulated standards of behavior.<sup>158</sup> Many interest groups, for instance, publish legislative tool kits, policy briefs, and model bills, which pressure officials to conform their positions with those of ideologically aligned experts in a particular domain. This dynamic is similar to the sense of obligation that managers of large corporations experience

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152. See Bernard Caillaud & Jean Tirole, *Parties as Political Intermediaries*, 117 *Q.J. Econ.* 1453, 1453–54, 1484 & n.42 (2002) (arguing that average voters are largely ignorant of political outcomes and rely on experts and parties to monitor their representatives in government).

153. Kramer, *Understanding Federalism*, supra note 41, at 1522.

154. Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 *Acad. Mgmt. Rev.* 571, 574 (1995); see also Edward Alan Miller & Jane Banaszak-Holl, *Cognitive and Normative Determinants of State Policymaking Behavior: Lessons From the Sociological Institutionalism*, 20 *Publius* 191, 197 (2005).

155. See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 *Am. Socio. Rev.* 147, 147 (1983); Miller & Banaszak-Holl, supra note 154, at 195.

156. See DiMaggio & Powell, supra note 155, at 148. Conformity with the expectations of an organizational field increases as individuals within an organizational field interact more frequently and more closely (i.e., as an organizational field’s level of “structuration” increases). See id. at 156; see also David Strang & John W. Meyer, *Institutional Conditions for Diffusion*, 22 *Theory & Soc’y* 487, 495–99 (1993) (highlighting theorization processes in which organizations come to regard themselves as similar to others). High levels of interconnectedness among policy demanders increases the structuration of the states’ organizational fields. See Alexander Hertel-Fernandez, Theda Skocpol & Jason Sclar, *When Political Mega-Donors Join Forces: How the Koch Network and the Democracy Alliance Influence Organized U.S. Politics on the Right and Left*, 32 *Stud. Am. Pol. Dev.* 127, 129 (2018) (explaining that “donor consortia build and leverage social solidarity—weaving ties among wealthy donors and between donors and other political players”).

157. See DiMaggio & Powell, supra note 155, at 150–54.

158. Id.



when private consultants produce lists of best practices.<sup>159</sup> To some extent, the mere publication of such lists threatens the legitimacy of anyone who flouts their recommendations.

Second, intense policy demanders apply coercive pressure by praising officials who adopt their suggestions and shaming those who refuse.<sup>160</sup> Groups use conferences and awards to recognize the achievements of vanguard lawmakers who have championed their preferred policies, and they criticize those who haven't done as much to advance their causes. At the extreme, they can even ostracize or blacklist recalcitrant lawmakers.<sup>161</sup>

Third, state officials experience mimetic pressure when their peers endorse certain policy experiments. Such pressure is often the product of uncertainty about an organization's goals, how they are best achieved, or how a particular action will be perceived by others.<sup>162</sup> Copying "legitimated practices" promoted by the wider institutional environment" is a viable and low-cost way for officials to manage this uncertainty.<sup>163</sup> This is particularly true for lawmakers working within state governments with relatively low levels of professionalism because inexperience and small staffs result in high levels of ambiguity about a state's priorities, how to pursue

159. See Miller & Banaszak-Holl, *supra* note 154, at 196 ("[O]rganizations acquiesce to normative standards promoted by professionals (e.g., public administrators, accountants, and consultants).").

160. See DiMaggio & Powell, *supra* note 155, at 150 (describing coercive pressures experienced within organizational fields); see also W. Richard Scott, *Institutions and Organizations* 51–52 (2d ed. 2001).

161. See, e.g., Ally Mutnick, *EMILY's List Goes on Air Against Cuellar in Texas Primary Battle*, Politico (May 13, 2022), <https://www.politico.com/news/2022/05/13/emilys-list-goes-on-air-for-cisneros-00032478> [<https://perma.cc/JV6X-PL56>]; Caroline Vakil, *Club for Growth Goes After Cheney in Ad, Compares Her to Clinton, Hill* (July 21, 2021), <https://thehill.com/homenews/house/564250-club-for-growth-goes-after-cheney-in-ad-compares-her-to-clinton/> [<https://perma.cc/PND2-MQ4W>].

162. See DiMaggio & Powell, *supra* note 155, at 151.

163. Miller & Banaszak-Holl, *supra* note 154, at 196–97 (quoting M. Tina Dacin, *Isomorphism in Context: The Power and Prescription of Institutional Norms*, 40 *Acad. Mgmt. J.* 46, 48 (1997)). Scholars of the international arena have repeatedly demonstrated the power of mimetic pressure. See David H. Bearce & Stacy Bondanella, *Intergovernmental Organizations, Socialization, and Member-State Interest Convergence*, 61 *Int'l Org.* 703, 705 (2007) (noting that nations that "interact on a regular and sustained basis . . . [can] tak[e] on new identities and interests"); Xun Cao, *Global Networks and Domestic Policy Convergence: A Network Explanation of Policy Changes*, 64 *World Pol.* 375, 376 (2012); Xun Cao, *Networks of Intergovernmental Organizations and Convergence in Domestic Economic Policies*, 53 *Int'l Stud. Q.* 1095, 1098–100 (2009); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 *Int'l Org.* 887, 895 (1998); Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology's Institutionalism*, 50 *Int'l Org.* 325, 335–36 (1996) (book reviews); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *Duke L.J.* 621, 626 (2004); Brian Greenhill, *The Company You Keep: International Socialization and the Diffusion of Human Rights Norms*, 54 *Int'l Stud. Q.* 127, 129 (2010); Magnus Thor Torfason & Paul Ingram, *The Global Rise of Democracy: A Network Account*, 75 *Am. Socio. Rev.* 355, 356 (2010).

them, and how particular actions will be perceived by important constituents and stakeholders.<sup>164</sup>

Similarly, a political network's ability to influence lawmakers at the federal level can create mimetic pressure for state officials. Political scientists have found that federal attention to a policy proposal increases the likelihood that states will pursue similar proposals, even if the federal government doesn't ultimately act.<sup>165</sup> Professor Andrew Karch has concluded, for example, that former President George W. Bush's "nationally televised address in August 2001 [on stem cell research] and the debate over the Stem Cell Research Enhancement Act increased the probability that state officials would introduce stem-cell-related legislation."<sup>166</sup> Federal officials who are responsive to a particular set of interests can thus create pressure for state officials to act on a particular policy proposal merely by raising the proposal's national salience.

A similar dynamic can be seen among electorates in efforts to promote particular policies through ballot initiatives. As Professor Bulman-Pozen has argued, certain states have come to be seen as standard bearers for a particular set of ideological commitments. Progressives across the country often identify with California's policies, for instance.<sup>167</sup> Thus, as California or other vanguard states enact new policies, those policies steadily become constitutive of the national progressive identity.<sup>168</sup> This, in turn, makes it more likely that progressive electorates in other states will favor similar policies that are introduced as ballot initiatives in their states.<sup>169</sup>

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The influence of intense policy demanders helps explain how state officials overcome the obstacles to innovation described in Part I. They help state officials overcome legislative resource constraints by performing policy research, proposing solutions, and providing model legislative text and bill analyses. They encourage experimentation within federal programs by offering subsidies, threatening preemption, and allowing waivers. And they create professional and social incentives that conduce to the creation of new policies.

Understanding the role of intense policy demanders also permits a more perspicacious account of the relationship between "Our Federalism" and state policy experimentation. That account is nothing like the quaint

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164. See *supra* notes 48–49 & 100 and accompanying text.

165. See Frank R. Baumgartner, Virginia Gray & David Lowery, *Federal Policy Activity and the Mobilization of State Lobbying Organizations*, 62 *Pol. Rsch. Q.* 552, 553 (2009); McCann et al., *supra* note 47, at 515.

166. Andrew Karch, *Vertical Diffusion and the Policy-Making Process: The Politics of Embryonic Stem Cell Research*, 65 *Pol. Rsch. Q.* 48, 57 (2012).

167. Bulman-Pozen, *Partisan Federalism*, *supra* note 15, at 1101–03.

168. See *id.* at 1102.

169. See *id.* at 1129.

idea of fifty state laboratories on which students of federalism are weaned. The laboratories account views state policies as the output of officials working *within* state governments to promote *local* interests and working *independently* from officials in the federal government and in other states. In reality, ideas for many of the most significant state policy experiments come from *outside* of state governments, serve interests that are *national* in scope, and are advanced by *coordinated* political networks. While the policies that intense policy demanders promote are often enacted in the states, these groups often aim to advance a national policy agenda by propagating their preferred policies across as many jurisdictions as possible.<sup>170</sup> Many issues given the “state” moniker are therefore better understood as “national experiments carried out within state fora.”<sup>171</sup> The states aren’t so much the players in this game as they are the means of keeping score.

None of this is to say that local conditions don’t matter. Each state has its own political history and culture.<sup>172</sup> Each has its own legislative processes, its own way of dividing power within the executive branch,<sup>173</sup> and its own way of thinking about the relationship between the state and its localities.<sup>174</sup> And each has its own circumstances, such as its geographical

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170. Rodríguez, *Negotiating Conflict*, supra note 72, at 2125 & n.79; see also Gerken, *Federalism 3.0*, supra note 22, at 1696; Heather K. Gerken, *The Loyal Opposition*, 123 *Yale L.J.* 1958, 1977 (2014) [hereinafter Gerken, *Loyal Opposition*]. That is one reason why state-level policy debates across the country are often so strikingly similar to high-profile clashes in Congress—they are driven by similar forces—and why policies rapidly diffuse across numerous, ideologically aligned states, seemingly without regard for a state’s individual characteristics. See Hertel-Fernandez, *State Capture*, supra note 9, at 2; Karch, *Democratic Laboratories*, supra note 45, at 7 (discussing the diffusion of “enterprise zones”); id. at 30 (discussing the diffusion of prescription drug programs and “medical savings accounts, time limits, and family caps”); Conti & Jones, supra note 16, at 379–80 (discussing the rapid diffusion of policies implementing the ACA); Mintrom, supra note 82, at 741–42 (analyzing the rapid adoption of school choice programs).

171. Bulman-Pozen, *Partisan Federalism*, supra note 15, at 1128; see also Daniel J. Hopkins, *The Increasingly United States: How and Why American Political Behavior Nationalized* 6, 24 (2018) (noting the potential for national issues and policies to “crowd out more local concerns” and “dominate state and even local political debates”); James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 *J.L. & Pol.* 1, 17 (2013); Gerken, *Foreword*, supra note 21, at 17.

172. Compare Ernest A. Young, *The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System*, at i–ii, 2 (Duke L. Sch., Working Paper No. 2015-11, 2015), [https://scholarship.law.duke.edu/faculty\\_scholarship/3431](https://scholarship.law.duke.edu/faculty_scholarship/3431) [<https://perma.cc/2CLB-3VWA>] (arguing that states have distinct identities), with Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 *Annals Am. Acad. Pol. & Soc. Sci.* 37, 45 (2001) (taking the opposite view), and Rubin & Feeley, supra note 20, at 944 (same).

173. Some states have divided executives—others don’t. See, e.g., Fred Monardi, “Divided Government” in *State Executive Branches*, 31 *Pol. & Pol’y* 232, 232, 236–42 (2003). Some governors enjoy a lot of power—others don’t. See, e.g., Ferguson, supra note 65, at 216–29.

174. Some states, for example, have home rule, while others don’t. See Richard Briffault, Paul Diller, Sarah Fox, Laurie Reynolds, Erin Adele Scharff, Richard Schragger &

location, state debt, tax revenue, major industries, and demographic composition. These characteristics, of course, affect the specific form in which a policy manifests in a particular jurisdiction.<sup>175</sup> But the national and coordinated character of the groups that drive many proposals for new policies casts doubt on the notion that state policy experimentation is a function of disconnected state officials promoting local interests and addressing local concerns. Simply put, the laboratories account is, in significant part, a myth.

### III. DOCTRINAL IMPLICATIONS

While any close observer of U.S. politics will have some sense of the role that interest groups play in pushing forward change at the state level, there remains a yawning gulf between the functional justification the Court offers in shaping federalism doctrine—the traditional account of the laboratories of democracy—and the way those laboratories function in practice. Now, of course, the mere fact that the laboratories account is a myth doesn't necessarily entail a need for reform. Legal fictions have their uses after all.<sup>176</sup> It's therefore worth considering whether exposing the Court's fictitious account of state experimentation warrants retooling the doctrine and, if so, in what ways. To be clear, we do not aim to provide all-things-considered prescriptions about the direction legal doctrine should take. "Our Federalism" serves many values (such as choice, participation, and the diffusion of power), which often point in different directions and should be weighed differently from context to context. And this Article has focused on only one of those values—state policy experimentation. Instead, we report the results of a modest thought experiment: What implications for federalism doctrine would follow if the Court's only goal was to increase state policy experimentation?

Before turning to that question, it's worth noting one caveat. This Part assumes that state policy experimentation is a good that federalism doctrine should seek to maximize. It thus leaves room for the possibility that this assumption is false. Interest group preferences can be at odds with the public interest and tend to be closer to the ideological fringe than those

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Rick Su, Nat'l League of Cities, Principles of Home Rule for the 21st Century 13 (2020), <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf> [<https://perma.cc/52LN-876E>].

175. See Sanya Carley, Sean Nicholson-Crotty & Chris J. Miller, Adoption, Reinvention and Amendment of Renewable Portfolio Standards in the American States, 37 *J. Pub. Pol'y* 431, 454 (2017); Jami K. Taylor, Daniel C. Lewis, Matthew L. Jacobsmeier & Brian DiSarro, Content and Complexity in Policy Reinvention and Diffusion: Gay and Transgender-Inclusive Laws Against Discrimination, 12 *State Pol. & Pol'y Q.* 75, 76 (2012).

176. See Frederick Schauer, Legal Fictions Revisited, *in* *Legal Fictions in Theory and Practice* 113, 127 (Maksymilian Del Mar & William Twining eds., 2015). See generally Lon L. Fuller, *Legal Fictions* 49–56 (1967) (discussing the potential utility of employing legal fictions, namely to "reconcile a specific legal result with some premise or postulate").

of the general public.<sup>177</sup> For those reasons, one may reasonably question whether legal doctrine *should* aim to encourage the kind of policy experimentation driven by intense policy demanders.<sup>178</sup> Further, as Professor Alexander Hertel-Fernandez and his fellow travelers have shown,<sup>179</sup> in recent years, groups associated with Republican lawmakers have been far more successful at diffusing their preferred policies than those associated with Democratic lawmakers.<sup>180</sup> That could be a source of worry for progressives.

While this Article doesn't provide a full-fledged defense of experimentation as one of federalism's normative goals, we remain optimistic about the normative benefits of state policy experimentation. For starters, not all organized interests are captured interests. As Professor Cristina Rodríguez has argued, political networks also expand "the people's capacity for politics," helping "local interests influence national debates by giving their preferences profile and thus the opportunity to influence others."<sup>181</sup> This is precisely the democratic churn we would seek in a well-functioning democracy, and interest groups often provide the push necessary for change. As for the asymmetric influence of the two dominant political networks, there's no reason to think that the current configuration and relative influence of the two dominant political networks will be permanent. Politics in America is a Red Queen's race. So even if conservative groups have found a more effective political technology in recent years (as it appears they have), there's reason to expect that competitive advantage will be fleeting.

The remainder of this Part proceeds as follows. Section III.A explains why the autonomy model of federalism, which has long rested on the laboratories myth, represents the wrong strategy for encouraging state experimentation. It argues that protecting state autonomy isn't just a poor strategy for encouraging experimentation but may in fact discourage important forms of experimentation. Section III.B then considers and rejects a dissent-based model for protecting state experimentation. Finally, section III.C proposes an alternative model—a new process federalism. The goal of federalism doctrine, according to this model, isn't to preserve substantive domains where states can preside free from federal incursions.

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177. Ryan L. Claasen & Stephen P. Nicholson, *Extreme Voices: Interest Groups and the Misrepresentation of Issue Publics*, 77 *Pub. Op. Q.* 861, 862 (2013).

178. See Garrett & Jansa, *supra* note 72, at 388; Anthony Kammer, *Privatizing the Safeguards of Federalism*, 29 *J.L. & Pol.* 69, 115 (2013).

179. See *supra* note 105 and accompanying text.

180. Of course, that's not necessarily a reason to abandon the goal of promoting policy experimentation. But it does mean that someone committed to progressive state policies may have understandably mixed feelings about measures designed to encourage more experimentation fueled by third-party interest groups.

181. Rodríguez, *Negotiating Conflict*, *supra* note 72, at 2128; see also Gerken, *Loyal Opposition*, *supra* note 170, at 1980 (noting that "state and local platforms . . . connect dissenters to the large and powerful networks that fuel policymaking in the United States").

Instead, the goal is to preserve state power to bargain with, and even resist, the federal government from within federal programs and legal regimes. Adopting a new process federalism would ensure that states have both the capacity and incentives to experiment. Section C concludes by applying the model to several areas of legal doctrine—federal preemption of state law, the spending power, and the anticommandeering principle.

A. *The Autonomy Model*

As noted, the laboratories myth is routinely invoked to support an autonomy model, which posits that our federal system best achieves its ends by giving states space to operate free from federal interference.<sup>182</sup> As relevant here, that model suggests that autonomy sparks innovation by giving state officials the opportunity and the incentive to develop better policies.<sup>183</sup>

The previous two Parts cast substantial doubt on this vision of our federal system. The assumption underlying the laboratories myth is that separation between states generates healthy competition and permits local adaptation. Cordoning off certain policy domains from the federal government's reach, however, does little to address the obstacles to innovation that state officials encounter. Indeed, given the federal government's role in facilitating experimentation, severing state and federal policymaking seems more likely to discourage state officials from trying new things than to spawn innovation.<sup>184</sup> Moreover, legal protections for state autonomy do little to stimulate policy experiments driven by the intense policy demands that drive change. The groups discussed in the previous Part generally don't aim to confer a competitive advantage on any particular jurisdiction or tailor policies to local circumstances. Their focus is often national rather than local, and they work as part of a coordinated network rather than in separate hubs. In short, both their motivations and sources of influence depend largely on a high level of integration among states and between the states and the federal government.

While the autonomy model is a poor fit for facts on the ground, one can certainly understand the intuition that animates it: The federal government can be a threat to state policy experiments when its power is used to target state policies that federal officials dislike. A few examples from the previous three presidential administrations illustrate the general flavor of the problem. The Trump Administration tried to condition the receipt of federal funding intended for public safety on states' (and localities') discontinuation of their sanctuary policies.<sup>185</sup> The Obama Administration,

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182. See *supra* notes 37–43 and accompanying text.

183. See *supra* notes 37–43 and accompanying text.

184. See *supra* notes 54–57 and accompanying text.

185. See *City of Chicago v. Barr*, 961 F.3d 882, 886–87 (7th Cir. 2020). As of March 2021, eleven states and nearly 200 localities identified as “sanctuaries.” See Jessica M. Vaughan &

for its part, issued a “Dear Colleague” letter to school districts and colleges receiving federal funds, explaining that the administration interpreted Title IX to forbid enforcement of a North Carolina statute that prohibited transgender students from using bathrooms consistent with their gender identities.<sup>186</sup> And these techniques were nothing new. The Bush Administration used the authority of the Centers for Medicare & Medicaid Services to try to prevent states from extending health insurance coverage to wider portions of their populations under the State Children’s Health Insurance Program,<sup>187</sup> and used the Attorney General’s power under the Controlled Substances Act to prevent states from decriminalizing medical marijuana<sup>188</sup> and allowing physician-assisted suicide.<sup>189</sup>

As these vignettes suggest, just as interest group competition fuels state experimentation, it can also thwart it. When state and federal officials have incompatible policy agendas, federal officials will face a substantial temptation to use the federal government’s power to shut down state laboratories whose experiments they oppose.<sup>190</sup> It’s thus worth asking whether the need to control that power justifies legal protections for state

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Bryan Griffith, Map: Sanctuary Cities, Counties, and States, Ctr. for Immigr. Stud. (Mar. 22, 2021), <https://cis.org/Map-Sanctuary-Cities-Counties-and-States> [<https://perma.cc/E7MB-3R4D>]. In the interest of full disclosure, one of us runs a clinic that helped win a national injunction against the Trump Administration’s policy on behalf of the City of San Francisco.

186. See C.R. Div., DOJ & Off. for C.R., U.S. Dep’t of Educ., Dear Colleague Letter on Transgender Students 2 (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/M2R2-92WP>]. Those who agree with the Obama Administration’s reading of Title IX shouldn’t be distracted from the trans-substantivity of the power claimed by the federal government. When President Trump took office, his Administration took an entirely different view of Title IX, threatening to withhold funding from Connecticut schools that allowed transgender students to compete in athletic competitions consistent with their gender identities. See Letter from Timothy C. J. Blanchard, Dir., New York Off., Off. for C.R., U.S. Dep’t of Educ., to Lori Mizerak, Assistant Corp. Couns., City of Hartford, David S. Monastersky, Att’y, Howd & Ludorf, LLC, Peter J. Murphy, Att’y, Shipman & Goodwin, LLP, Linda L. Yoder, Att’y, Shipman & Goodwin, LLP & Johanna Zelman, Att’y, Ford Harrison 3 (Aug. 31, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf> [<https://perma.cc/JPP2-XBC4>].

187. See Colleen M. Grogan & Elizabeth Rigby, Federalism, Partisan Politics, and Shifting Support for State Flexibility: The Case of the U.S. State Children’s Health Insurance Program, 39 *Publius* 47, 60–63 (2009) (noting that, under the relevant regulations, states were not allowed to extend coverage beyond 250% of the federal poverty line unless they could prove that they had enrolled at least 95% of eligible children below 200% of the federal poverty line).

188. See *Gonzales v. Raich*, 545 U.S. 1, 2 (2005).

189. See *Gonzales v. Oregon*, 546 U.S. 243, 244 (2006).

190. Often these fights will divide along partisan lines. But not always. In some areas, the political valence of a particular subject matter is more important than the party that controls the federal government. The Obama Administration, for example, experienced resistance to its immigration policies not just from Republican-controlled states that wanted more robust enforcement but also from Democratic-controlled states that wanted federal policy to be more open. See Bulman-Pozen, *Partisan Federalism*, *supra* note 15, at 1126; Rodríguez, *Negotiating Conflict*, *supra* note 72, at 2118–19.

autonomy, even as those protections don't themselves affirmatively encourage innovation.

We think the answer is "no." Our core concern is that legal protections for state autonomy fail to carve at the joints of the problem. They are underinclusive insofar as they offer no protection to state experiments that arise in domains considered appropriate for federal activity. Since the federal government has unquestionable authority to regulate in nearly every quarter, legal protections tied to vanishingly narrow domains where states still regulate alone will leave a great deal of state policy unprotected from a federal administration's efforts to stifle certain forms of experimentation. Legal protections for state autonomy are also overinclusive insofar as they treat *all* exercises of federal power in a state's "domain" as encroachments. As the previous Part explained, not all exercises of federal power stifle experimentation. To the contrary, federal regulation often stimulates it by supplying the motive, technical support, and resource push states need to get new policies off the ground. Moreover, both the motive and the power of interest groups to push forward change depend on the integration of state and federal policymaking. To the extent that protections for state autonomy would impede these efforts, they would also impede state experimentation.

If the goal of the courts is to increase state policy experimentation, they should therefore abandon attempts to police substantive boundaries between state and federal domains. Policing those boundaries does little to encourage experimentation, and it impedes the many forms of policy experimentation that depend on nudges from the federal government. More fundamentally, this strategy disregards the essential fact that the integration of state and federal politics and policymaking is what motivates and fuels a robust system of democratic experimentation in the first place.

#### B. *The Dissent Model*

The autonomy model goes wrong by misdiagnosing the threat that the federal government poses to state power. The threat isn't the federal government's mere presence in domains where states are supposed to be autonomous; it is the ability of one set of interests to use the federal government's power selectively to thwart state policies that promote a conflicting set of interests. Given the nature of this threat, one might think that courts should be explicit about policing federal efforts to shut down the state-level policy experiments of competing interest groups. Rather than hiving off large swaths of state policymaking from federal interference, the Court should focus on the core problem: a federal government influenced by one set of interests using its power to shut down the laboratories of a competing set of interests.

As matter of principle, the idea seems sensible enough. But it encounters a deep tension running through the Supreme Court's federalism



doctrine. Federalism doctrine is largely animated by functional concerns.<sup>191</sup> But despite its functional roots, the Court reverts to formalist rules when it comes to fashioning doctrine.<sup>192</sup> In theory, one could imagine the Court taking political considerations into account when policing federal intrusion upon state laboratories, increasing its scrutiny of federal decisions to shut down competing state laboratories. In practice, however, it seems almost inconceivable that the Court would fold political motives into its analysis.<sup>193</sup> The Court would be required not just to acknowledge the partisan dimensions of its decisions but to pick political winners and losers, something it has eschewed even where such decisions are a necessary precondition for judicial intervention.<sup>194</sup>

One might be tempted to reframe politically motivated targeting as efforts to suppress “dissent” and thereby sidestep the Court’s discomfort with delving into political motives. But that brings us to a more fundamental problem with efforts to referee battles between state and federal policymakers. There are fundamental differences between dissenting speech and dissent that takes the form of a governmental decision.<sup>195</sup> It is one thing to prevent the federal government from silencing a speaker; it is another to prevent it from overriding state law. After all, competition and friction between the states and the federal government are pervasive. Any federal law that conflicts with state law could be characterized as the suppression of state dissent. As a result, a “dissent” model for protecting state experimentation would be wildly overinclusive, even when compared to an autonomy model. Indeed, this model might suggest shutting down federal actions entirely, even in domains where the federal government unquestionably enjoys the power to act. In addition, while democracy can tolerate an enormous amount of dissenting speech, there is a limit to the

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191. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012); *Bond v. United States*, 564 U.S. 211, 222 (2011).

192. Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 *Harv. L. Rev.* 85, 99–111 (2014) [hereinafter Gerken, *Slipping the Bonds*].

193. See Levinson & Pildes, *supra* note 18, at 2355 (“At least in the current constitutional culture . . . it is hard to imagine courts expressly making legal doctrine turn on the partisan configuration of government . . .”).

194. The clearest example is partisan gerrymandering, where the Court’s allergy to refereeing partisan disputes has led it to eschew the very interventions it has been more than willing to make in the domains of race and geography. Compare *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (“We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.”), with *Baker v. Carr*, 369 U.S. 186, 209 (1962) (“We hold that this challenge to an apportionment presents no nonjusticiable ‘political question.’”), and *Shaw v. Reno*, 509 U.S. 630, 642 (1992) (holding that appellants stated a claim under the Equal Protection Clause for a state’s “redistricting legislation that [was] so extremely irregular on its face that it rationally [could] be viewed only as an effort to segregate the races for purposes of voting”).

195. See Heather K. Gerken, *Dissenting by Deciding*, 57 *Stan. L. Rev.* 1745, 1783–84 (2004) [hereinafter Gerken, *Dissenting by Deciding*]; Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 *Duke L.J.* 1349, 1358 (2013); Gerken, *Loyal Opposition*, *supra* note 170, at 1978–80.

amount of state dissent we should desire. While too little dissent can lead to democratic stasis, too much would shut down a functioning national democracy. For this reason, if our aim is to encourage state experimentation, we need to do so in a more finely calibrated fashion than a dissent model would permit.

C. *The New Process Federalism*

If our goal is not to protect all forms of state experimentation but to generate the right level of experimentation, we need courts to develop what Professor Robert Schapiro calls “rules of engagement.”<sup>196</sup> Such rules would allow us to maintain healthy and productive federal–state interactions, particularly across partisan lines, instead of hiving off separate policy domains for the states or categorically curtailing the federal government’s power to override state law. Put differently, courts should play an Elyian role,<sup>197</sup> developing rules of process that will ensure that bargains (and fights) between the federal government and dissenting states are productive.<sup>198</sup>

This vision of federal–state relations would closely resemble the checks-and-balances model that courts use to referee conflicts between the branches of the federal government. In that context, the Court seeks not to hive off one federal branch from another but to maintain “a messy structure of overlapping institutions that depend on one another to get anything done.”<sup>199</sup> Courts aim not to shut down interbranch friction but to maintain a healthy balance of power between the branches as they compete and conflict.

Our proposal is a variant of process federalism. While theories of process federalism come in many stripes, they share the belief that federalism values are best protected by the right kinds of procedures, rather than substantive rules demarcating which domains belong to the states and which to the federal government. We differ from other process theorists, however, in how we think about state power and the way courts should go about protecting it. While other process theorists have denied that courts should maintain fixed domains of exclusive state jurisdiction, they have continued

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196. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 *Iowa L. Rev.* 243, 285 (2005); see also Robert A. Schapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights* 87–89 (2009).

197. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 181 (1980).

198. See Gerken, *Federalism 3.0*, *supra* note 22, at 1722. This way of framing the role of courts in this area is best expressed by Professor Ernest Young. See Ernest A. Young, “The Ordinary Diet of the Law”: The Presumption Against Preemption in the Roberts Court, 2011 *Sup. Ct. Rev.* 253, 264 [hereinafter Young, *Ordinary Diet*]; Young, *Rehnquist Court*, *supra* note 6, at 15–16; Young, *Two Cheers*, *supra* note 39, at 1395. Professor Erin Ryan’s work provides an excellent example of this approach in practice. See Erin Ryan, *Federalism and the Tug of War Within* 145–80 (2011); Erin Ryan, *Negotiating Federalism*, 52 *B.C. L. Rev.* 1, 11–12 (2011).

199. Gerken, *Foreword*, *supra* note 21, at 34.

to think about state power in much the same way as the autonomy model.<sup>200</sup> On this view, the states' ability to preside free from federal interference in particular domains is what ensures that states (and their officials) have the ability and motivation to seek federalism's ends.<sup>201</sup>

By contrast, we propose a "new process federalism,"<sup>202</sup> which embraces the power that states wield in administering federal law alongside federal officials and understands the integration of state and federal systems to be an important component of much state experimentation. If the policy experiments described in the previous Part are to thrive, they must do so alongside, and even within, ubiquitous federal programs, which will often be administered by a federal administration influenced by a competing set of interests. In lieu of process rules designed to preserve state autonomy, this model would therefore aim to develop rules that protect state dissent and resistance within integrated federal-state regimes.

While a full account of the doctrinal rules that would best vindicate this vision of federalism is beyond the scope of this Article, the remainder of this section illustrates the model using examples from three areas of legal doctrine—federal preemption of state law, conditional spending, and the anticommandeering principle.

1. *Preemption of State Law.* — The most practically significant implication of a new process federalism would be in the area of federal preemption. That may be surprising to some since the Court often fails to treat preemption as a "federalism" issue, relegating it instead to the field of statutory interpretation.<sup>203</sup> But in a world like ours, where the state and federal governments exercise concurrent jurisdiction in nearly every domain, preemption cases form the "functional heart" of federalism doctrine.<sup>204</sup>

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200. *Id.* at 11–21.

201. See Clark, *Procedural Safeguards*, *supra* note 39, at 1681; Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 *Tex. L. Rev.* 1321, 1324 (2001); Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 *Geo. Wash. L. Rev.* 91, 91–92 (2003); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 *Tex. L. Rev.* 795, 799 (1996); Gluck, *National Federalism*, *supra* note 77, at 1999–2000; Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 *Mich. L. Rev.* 813, 828–29 (1998) [hereinafter Hills, *Political Economy*]; Kramer, *Putting the Politics Back*, *supra* note 39, at 287; Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 543 (1954); Young, *Rehnquist Court*, *supra* note 6, at 53–63; Young, *Two Cheers*, *supra* note 39, at 1377–84; Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 *Brook. L. Rev.* 1277, 1288–91, 1295–1301 (2004) [hereinafter Young, *Dark Side*].

202. Gerken, *Federalism 3.0*, *supra* note 22, at 1703–05.

203. See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 *UCLA L. Rev.* 1353, 1365–68 (2006).

204. Young, *Ordinary Diet*, *supra* note 198, at 254.

As numerous commentators have observed, the Court's preemption cases exhibit a noticeable pattern in favor of fairly broad displacement of state law, which seems remarkably out of step with the Court's otherwise pro-federalism bent.<sup>205</sup> After all, preemption is inherently "jurispathic";<sup>206</sup> wherever it exists, federal law displaces state law, thereby "stifling state-by-state diversity and experimentation"<sup>207</sup> and "suppress[ing] political entrepreneurship."<sup>208</sup> Upon deeper reflection, however, the Court's preemption cases and its other federalism cases are products of the same stale assumptions about state power.<sup>209</sup> If one defines state power only as the ability to rule free from the possibility of interference, then all federal-state conflicts will seem categorical and binary—either the federal government or the states must prevail. Once it is established that a particular domain falls within the federal government's bailiwick, preemption of state law follows nearly ineluctably.

But the Court's preemption jurisprudence is precisely the opposite of what it should be, if its goal is to promote policy experimentation driven by fiercely competitive interest groups.<sup>210</sup> The Justices should be far more

205. See Buzbee, *Asymmetrical Regulation*, *supra* note 118, at 1575; Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 *Brook. L. Rev.* 1313, 1314 (2004); Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 *S.C. L. Rev.* 967, 968 (2002); Richard H. Fallon, *The "Conservative" Paths of the Rehnquist Court's Federalism Doctrine*, 69 *U. Chi. L. Rev.* 429, 471–72 (2002); Stephen A. Gardbaum, *The Nature of Preemption*, 79 *Cornell L. Rev.* 767, 771 (1994); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 *B.U. L. Rev.* 559, 565, 613–18 (1997); Issacharoff & Sharkey, *supra* note 203, at 1356–57; Daniel J. Metzger, *The Supreme Court's Judicial Passivity*, 2002 *Sup. Ct. Rev.* 343, 362–78; Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 *Duke L.J.* 2023, 2051 (2008) [hereinafter Metzger, *New Federalism*]; Young, *Rehnquist Court*, *supra* note 6, at 30; Young, *Two Cheers*, *supra* note 39, at 1377–84.

206. S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 *B.U. L. Rev.* 687, 694 (1991). The phrase, of course, originates in Robert M. Cover, *Foreword: Nomos and Narrative*, 97 *Harv. L. Rev.* 4, 40 (1983).

207. Young, *Rehnquist Court*, *supra* note 6, at 130; see also *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018) ("[S]weeping federal regulations . . . foreclose[] the States from experimentation with laws and policies of their own . . ."); *Gonzales v. Raich*, 545 U.S. 1, 43 (2005) (O'Connor, J., dissenting) (arguing that broad federal regulation threatens to "extinguish[]" state experiments); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 502 (2001) (Stevens, J., concurring in the judgment) (urging the Court to "minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to 'serve as a laboratory'" (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))); *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (contending that broad federal regulation "forecloses the States from experimenting").

208. Hills, *Against Preemption*, *supra* note 64, at 22.

209. See Gerken, *Slipping the Bonds*, *supra* note 192, at 102 n.100; see also Gerken, *Foreword*, *supra* note 21, at 73–74 (identifying the importance of clear jurisdictional lines in both types of cases and the inapplicability of "Weberian assumptions").

210. For a general critique of the Court's preemption doctrine and its inconsistency with its commitments to federalism, see, e.g., Shapiro, *supra* note 6, at 34–50; Ernest A.

tolerant of tension in areas of regulatory overlap—of situations where state and federal officials occupy the same terrain and at times come into conflict. A jurisprudence committed to encouraging this kind of state policy experimentation could take a variety of forms. By way of example, we mention three potential reforms here.

First, the Court could strengthen its commitment to the presumption against preemption. Like some other normative canons, that presumption is designed to protect federalism values by raising the costs associated with preemptive legislation.<sup>211</sup> If Congress wants to use its preemption power to thwart state policy experiments, the canon requires it to do so with more than the typical level of clarity. The Court has recognized the presumption since its 1947 decision in *Rice v. Santa Fe Elevator Corp.*,<sup>212</sup> but it has applied the presumption only episodically—sometimes calling it a “cornerstone[]”<sup>213</sup> of preemption jurisprudence, other times ignoring it entirely.<sup>214</sup> A Court committed to promoting state policy experimentation, however, would apply the presumption more consistently.

Second, the Court could rein in its conflict preemption jurisprudence. Conflict preemption is a form of implied preemption,<sup>215</sup> where a court finds that state law conflicts with federal law even though Congress

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Young, Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception, 69 *Geo. Wash. L. Rev.* 139, 167–77 (2001).

211. See Ernest A. Young, Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review, 78 *Tex. L. Rev.* 1549, 1585–99 (2000); Ernest A. Young, Federal Preemption and State Autonomy, in *Federal Preemption: States’ Powers, National Interests* 249, 265 (Richard A. Epstein & Michael S. Greve eds., 2007) (arguing that federalism canons like the *Rice* presumption can give effect to underenforced constitutional principles). But see Viet Dinh, Reassessing the Law of Preemption, 88 *Geo. L.J.* 2085, 2087–97 (2000) (maintaining that the presumption against preemption is illegitimate because it generates results contrary to the most likely intent of Congress); Caleb Nelson, Preemption, 86 *Va. L. Rev.* 225, 235–44 (2000) (arguing that the presumption against preemption is inconsistent with the original understanding of the Supremacy Clause).

212. 331 U.S. 218, 230 (1947).

213. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). For other cases where the Court has highlighted the presumption against preemption, see *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 365 (2002); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995); *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991).

214. See Buzbee, *Asymmetrical Regulation*, supra note 118, at 1613; Davis, supra note 205, at 971; Hoke, supra note 206, at 733; Thomas W. Merrill, Preemption and Institutional Choice, 102 *Nw. U. L. Rev.* 727, 741 (2008) (arguing that the presumption has been “honored as much in the breach as in observance”); Mark D. Rosen, Contextualizing Preemption, 102 *Nw. U. L. Rev.* 781, 784–85 (2008); Young, *Ordinary Diet*, supra note 198, at 277–78.

215. In practice, implied preemption jurisprudence is far more significant than express preemption because Congress often fails to specify the extent to which it intends federal legislation to preempt state law. See Catherine M. Sharkey, *Inside Agency Preemption*, 110 *Mich. L. Rev.* 521, 523 (2012).

hasn't expressly preempted it.<sup>216</sup> As others have noted, the Court has taken a fairly "freewheeling" approach to conflict preemption.<sup>217</sup> It has found conflicts not only where simultaneous compliance with state and federal law is impossible<sup>218</sup> but also where state law would merely impede "the accomplishment and execution of the full purposes and objectives of Congress."<sup>219</sup>

A commitment to protecting state experimentation would push preemption doctrine in the opposite direction. To permit greater levels of experimentation, the courts should allow states more leeway to regulate on the same terrain as the federal government and permit a greater degree of tension between state and federal law. Doing this would allow states influenced by one set of interests to "flesh out an alternative vision" of federal programs,<sup>220</sup> even when those programs are administered by an executive branch influenced by a hostile set of interests.

Third, a preemption jurisprudence committed to encouraging state policy experimentation could be especially cautious about the federal executive branch's authority to preempt state law unilaterally. Executive preemption is a particularly effective tool for obstructing state policy experiments because administrative processes are more efficient—and require the assent of fewer federal officials—than federal legislation.<sup>221</sup> Executive preemption can be divided into two varieties: (1) where federal administrative agencies interpret federal statutes to have preemptive effect, and (2) where agencies promulgate regulations that preempt state

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216. Conflict preemption should be distinguished from field preemption, where Congress' regulation of a domain is so extensive that the courts find it has "occupied the field" and therefore displaced all state law regarding the same domain. See *Arizona v. United States*, 567 U.S. 387, 401 (2012); *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990) (describing three categories of preemption: explicit preemption, field preemption, and conflict preemption).

217. Meltzer, *supra* note 205, at 369; Metzger, *New Federalism*, *supra* note 205, at 2051; see also Issacharoff & Sharkey, *supra* note 203, at 1372 (describing the Rehnquist Court's preemption jurisprudence as having "read the claims of congressional authority broadly and . . . correspondingly narrowed the scope for state conduct"); Alan Untereiner, *The Defense of Preemption: A View From the Trenches*, 84 *Tul. L. Rev.* 1257, 1261 (2010); Young, *Ordinary Diet*, *supra* note 198, at 273. For cases demonstrating this approach, see *Buckman Co. v. Plaintiff's Legal Comm.*, 531 U.S. 341, 347 (2001); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–74 (2000).

218. See Nelson, *supra* note 211, at 228 (noting that the set of impossibility preemption cases is "vanishingly narrow").

219. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); see also *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413–27 (2003); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869–74 (2000).

220. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *Yale L.J.* 1256, 1306 (2009).

221. See Merrill, *supra* note 214, at 756; see also *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (noting that "a single executive officer [would have] the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality").

law of their own force. If the Court wants to encourage state policy experimentation, it should be wary of both.

With regard to agency interpretations of federal statutes, the Supreme Court hasn't squarely addressed whether an agency's opinion that a federal statute preempts state law is entitled to *Chevron* deference.<sup>222</sup> When it finally has the occasion to do so, a commitment to fostering state policy experimentation would counsel against extending *Chevron* to this context. That's because, as Professor Nina Mendelson has argued, agencies will frequently fail to appreciate the value of federalism.<sup>223</sup> In particular, agencies can be expected to weigh the perceived benefit of their own policy preferences more heavily than the benefits of allowing state contestation and dissent from the federal administration.<sup>224</sup>

With regard to agency regulations that preempt state law of their own force, the Court has held federal administrative regulations *may* preempt state law,<sup>225</sup> and that agencies enjoy an implied preemption power where a rule's subject matter is within the agency's scope of delegated authority.<sup>226</sup> Here again, the Court should be wary of executive preemption because it too easily allows a federal administration influenced by one political network to shut down policy experiments pushed by the other network. When the Bush Administration's tort reform agenda failed in Congress, for example, it resorted to preempting state common law through "preambles" in federal agency regulations.<sup>227</sup> Similarly, the Obama Administration used this same technique when it resorted to

222. See Kent Barnett & Christopher J. Walker, *Chevron* in the Circuit Courts, 116 Mich. L. Rev. 1, 16 (2017). In different cases the Court has applied both *Chevron* and *Skidmore* to agency preemption decisions. Compare *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 525 (2009) (applying the *Chevron* framework), with *Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009) (applying the *Skidmore* framework). Note also that this question is different from the question of whether an agency's interpretation of what a statute requires is entitled to *Chevron* deference where that interpretation entails preemptive effects. See Ernest A. Young, Executive Preemption, 102 Nw. U. L. Rev. 869, 884 (2008) [hereinafter Young, Executive Preemption]. The Court's decision in *Smiley v. Citibank*, 517 U.S. 735, 743–44 (1996), makes clear that *Chevron* deference does apply in that circumstance.

223. See Nina A. Mendelson, *Chevron* and Preemption, 102 Mich. L. Rev. 737, 779 (2004); see also Merrill, *supra* note 214, at 755–57 (suggesting that agencies may be more "attuned to the interests of the industries they regulate and less responsive to the states" than legislatures would be); Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 331 (2000) (contesting that "administrative agencies will not be allowed to interpret ambiguous provisions so as to preempt state law"); Young, Executive Preemption, *supra* note 222, at 888 (calling into question whether federal agencies or state legislatures are "more competent to formulate efficient product safety rules").

224. See William N. Eskridge Jr., Vetogates, *Chevron*, Preemption, 83 Notre Dame L. Rev. 1441, 1484 (2008) (finding that "agencies pressed pro-preemption positions in two-thirds of the cases" studied).

225. See, e.g., *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982).

226. See, e.g., *City of New York v. Fed. Commc'ns Comm'n*, 486 U.S. 57, 63–64 (1988) (citing *La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 351, 368–69 (1986)).

227. Young, Ordinary Diet, *supra* note 198, at 280.

agency action to preempt state immigration policies, rather than pursuing legislative reform.<sup>228</sup>

Congress and the Court could rein in this practice in numerous ways.<sup>229</sup> The one that seems most promising is the clear statement rule advocated by Justice Anthony Kennedy in his dissent in *Alaska Department of Environmental Conservation v. EPA*, according to which ambiguous statutes should be construed not to allow federal agencies to constrain state implementation discretion.<sup>230</sup> A number of federal statutes expressly delegate authority to preempt state law to agencies.<sup>231</sup> This rule would permit these express delegations of preemption authority, where Congress thinks them appropriate, but it would put a thumb on the scale in favor of state dissent within overlapping regulatory regimes.

Notice what unites these three potential reforms. Their aim isn't to prevent the federal government from overriding state law altogether. It is simply to recalibrate the balance of power, giving states more wiggle room to regulate and making it harder for the federal government to eliminate state experiments it opposes.

2. *The Spending Power.* — As a new process federalism aimed at increasing state experimentation would call preemption doctrine into question, it would give two cheers for the Court's emerging conditional spending doctrine. Numerous federal statutes grant money to the states on the condition that they perform tasks that the federal government

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228. *Id.* at 281.

229. Young, *Executive Preemption*, *supra* note 222, at 896–900 (outlining various options for judicial and legislative restraints on executive preemption).

230. See 540 U.S. 461, 504 (2004) (Kennedy, J., dissenting) (involving state implementation of the Clean Air Act).

231. See Susan Bartlett Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 Va. L. Rev. 1429, 1429 (1984) (noting that many federal health and safety statutes “delegate[] to federal administrative agencies the responsibility for deciding whether to preempt . . . state laws or to exempt them from preemption under the governing federal statute”).



couldn't otherwise command.<sup>232</sup> The Court has analogized these conditional appropriations to contracts for the performance of services.<sup>233</sup> Applying this analogy, the Court has held that funding conditions are enforceable only if (1) they are clearly stated,<sup>234</sup> and (2) they are not coerced.<sup>235</sup>

These requirements were on full display in *NFIB v. Sebelius*'s much-maligned ruling on expansion of the Affordable Car Act (ACA), which conditioned Medicaid funding on a state's willingness to expand Medicaid

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232. Scholars take varying positions on the constitutionality and advisedness of directing federal funds to the states. Compare Hills, *Political Economy*, supra note 201, at 871 (arguing that the combination of anticommandeering and spending doctrine results in efficient cost internalization), and Young, *Rehnquist Court*, supra note 6, at 35 (arguing that the same proposition), with Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 *Colum. L. Rev.* 1911, 1962 (1995) [hereinafter Baker, *Conditional Federal Spending*] (arguing that spending conditions encouraging states to take actions that Congress may not directly mandate should be presumed invalid), Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 *Stan. L. Rev.* 1103, 1103–05 (1987) (advancing a similar proposition), and Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restrictions of Federal Subsidies to State Governments*, 90 *Geo. L.J.* 461, 464 (2002) (arguing that Congress should not provide subsidies to states).

233. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576–77 (2012); *Barnes v. Gorman*, 536 U.S. 181, 186 (2002); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). For commentary critically examining the contract analogy, see Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 *Tex. L. Rev.* 1283, 1298 (2013) (arguing that the Court's implicit assumption that “the meaning of coercion for purposes of contract law is compulsion” is in fact “false” (emphasis omitted)); David E. Engdahl, *The Spending Power*, 44 *Duke L.J.* 1, 63 (1994) (outlining the “supremacy fallacy” behind the contract analogy, whereby “states and localities must yield not merely to Congress's decision whether and on what conditions federal funds should be offered, but also to whatever policy choices . . . Congress might try to promote through funding or funding conditions”); Brian Galle, *Getting Spending: How to Replace Clear Statement Rules With Clear Thinking About Conditional Grants of Federal Funds*, 37 *Conn. L. Rev.* 155, 159 (2004) [hereinafter Galle, *Getting Spending*].

234. See, e.g., *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *Suter v. Artist M.*, 503 U.S. 347, 356 (1992); *Pennhurst*, 451 U.S. at 17; see also Galle, *Getting Spending*, supra note 233, at 157–60; Nicole Huberfeld, *Clear Notice for Conditions on Spending, Unclear Implications for States in Federal Healthcare Programs*, 86 *N.C. L. Rev.* 441, 444 (2008) (observing that, in *Arlington*, the Court shifted “the foundational clear statement rule from requiring ‘unambiguous conditions’ on spending to a ‘clear notice’ standard” (quoting *Arlington*, 548 U.S. at 296)); Terry Jean Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Legislation*, 84 *Tul. L. Rev.* 1067, 1069 (2010).

235. See *NFIB*, 567 U.S. at 577; *Coll. Sav. Bank*, 527 U.S. at 687; *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (reiterating that certain instances of financial inducement qualify as compulsion); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–90 (1937) (noting that “[e]very tax . . . [t]o some extent . . . interposes an economic impediment to the activity taxed” but that the government's imposition of such a burden does not, as a rule, always amount to an “exertion of a power akin to undue influence” (quoting *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937))).

eligibility to citizens and legal residents earning less than 133% of the federal poverty line.<sup>236</sup> Chief Justice John Roberts's opinion rejected the Medicaid expansion primarily on two grounds.<sup>237</sup> First, the states hadn't been given adequate notice that Congress had reserved the right to expand the Medicaid program in this way when they first agreed to accept Medicaid funding. Second, the funding condition was coercive, and therefore unenforceable, because it conditioned a state's receipt of *all* Medicaid funding (whether connected to the new conditions or not) on its acceptance of the new conditions.<sup>238</sup>

The Court's Spending Clause doctrine has been roundly criticized.<sup>239</sup> But, in our view, the Court asked the right *kinds* of questions: Was the bargaining process between the federal government and the states fair, particularly to states influenced by a different vision of how best to care for their most vulnerable populations?<sup>240</sup> Whatever one thinks of the outcome in *NFIB* itself, the decision proceeds from the intuitive idea that a federal government controlled by one set of interests shouldn't be given an excessive amount of power in federal-state negotiations—either by allowing it to fundamentally alter the terms of a longstanding program or by threatening vital portions of a state's budget for failure to comply with its partisan objectives.<sup>241</sup> While we might quibble with the Court's analysis of the ACA itself, we see the decision as an effort to set ground rules for how federal-state relations should evolve over time. Its aim isn't to separate federal and state lawmaking or to declare definitive winners and losers in

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236. *NFIB*, 567 U.S. at 576.

237. The relevant portion of the Chief Justice's opinion was joined by only Justices Stephen Breyer and Elena Kagan, but the four dissenting Justices reached the same conclusion on essentially the same grounds. See *id.* at 681 (Scalia, J., dissenting) (concluding that the ACA violated "the anti-coercion rule"). Scholars have disagreed about how to read this portion of the Chief Justice's opinion. Compare Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 *Geo. L.J.* 861, 864–65 (2013) (concluding that the opinion is best read as finding coercion where "[1] they are attached to large amounts of federal money, [2] change the terms of participation in entrenched cooperative programs, [and] [3] tie together separate programs into a package deal"), and Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 *Yale L.J.* 248, 298 (2014) (outlining a three-part test as the proper interpretation of *NFIB*'s coercion doctrine), with Berman, *supra* note 233, at 1286 (concluding that the opinion is best understood as forbidding conditions motivated by unacceptable purposes).

238. *NFIB*, 567 U.S. at 582.

239. See, e.g., Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 *Duke L.J.* 345, 372–80 (2008); Berman, *supra* note 233, at 1287–89.

240. See Gerken, *Federalism 3.0*, *supra* note 22, at 1707.

241. See *id.* Professors Lynn Baker and Mitchell Berman grasp the central insight that conditional spending often forces dissenters either to forego federal funds or to abandon their own policies, though they frame the issue as interstate, rather than interpartisan, conflict. See Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 *Ind. L.J.* 459, 470 (2003); see also Baker, *Conditional Federal Spending*, *supra* note 232, at 1962; Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 *Chap. L. Rev.* 195, 216 (2001).

federal–state tussles. Instead, the goal is to ensure that federal policymakers don’t have such powerful weapons in their arsenal that they can nullify state experimentation with ease.

3. *Anticommandeering*. — Finally, a new process federalism suggests that the Court’s treatment of federal commandeering should change. The anticommandeering principle provides that the “Federal Government may not compel the States to enact or administer a federal regulatory program.”<sup>242</sup> If one’s aim is to shield state regulation from federal interference, then that principle makes perfect sense because commandeering “denigrates state autonomy,”<sup>243</sup> “wrest[s] control of state governments away from their local constituencies,”<sup>244</sup> and may even constitute compelled speech.<sup>245</sup> But matters are not so simple if one’s goal is to increase state experimentation driven by networks of outside interests.

Some forms of commandeering, to be sure, stifle state experiments that countermand federal policy. The Professional and Amateur Sports Protection Act at issue in *Murphy v. NCAA*, which prohibited state experiments with sports gambling, is a good example.<sup>246</sup> But an outright ban on commandeering not only prevents federal policymakers from nullifying some state experiments—it also eliminates opportunities for generating experimentation. That’s because forcing a state to participate in a federal regulatory scheme has the potential to spark experimentation in much the same way that conditional spending and conditional preemption do.

That may seem counterintuitive, since commandeering essentially gives federal actors the right to boss state actors around. But that way of thinking overlooks the power that state administrators wield within federal

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242. *Printz v. United States*, 521 U.S. 898, 933 (1997) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)). The Court has invoked that principle to hold several federal statutes unconstitutional. See, e.g., *Murphy v. NCAA*, 138 S. Ct. 1461, 1478–79 (2018) (holding unconstitutional a statute prohibiting state legislatures from legalizing sports gambling); *Printz*, 521 U.S. at 925–33 (holding unconstitutional a statute requiring state officers to implement a federal gun control law); *New York*, 505 U.S. at 176–77 (holding unconstitutional a statute requiring state legislators to enact nuclear waste regulations pursuant to federal instructions).

243. See Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 *Loy. L.A. L. Rev.* 1309, 1330 (2000); see also Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 *Brook. L. Rev.* 1231, 1259–61, 1274 (2004). Precisely because of its deep ties with the failed autonomy model, one of us has shown little patience for the doctrine in our past work. See Gerken, *Slipping the Bonds*, *supra* note 192, at 100–01, 113–23. Professor Roderick Hills has argued that the anticommandeering doctrine is best understood not as protecting state autonomy but as evening out the bargaining power between the state and federal governments. See Hills, *Political Economy*, *supra* note 201, at 817–19, 855–58. While Hills’s argument is robust, it overlooks some of the advantages associated with federal commandeering, at least if one cares about state experimentation. See *supra* notes 196–201 and accompanying text.

244. Coan, *supra* note 116, at 18.

245. Hills, *Political Economy*, *supra* note 201, at 906–15; Young, *Dark Side*, *supra* note 201, at 1295–301.

246. See 138 S. Ct. at 1468.

schemes.<sup>247</sup> When states are commandeered into federal programs, they will often engage in “uncooperative federalism,” introducing dissent and disagreement into a federal administrative regime.<sup>248</sup> After all, to be implemented effectively, most federal programs require local resources and knowledge. Because of this dependence, federal officials must pick their battles with state administrators, giving those administrators discretion over how federal law manifests in practice.<sup>249</sup> Commandeering thus introduces “salutary pluralism” into regulatory schemes that are otherwise dominated by the federal executive branch.<sup>250</sup> Commandeering is therefore a power that should be calibrated, not eliminated.

If the Court were to soften its ban on commandeering, it might ask the same kinds of questions it posed in *NFIB* regarding Spending Clause doctrine. It might, for instance, consider whether there was sufficient play in the joints in the administrative scheme that a state has been thrust into. Will state administrators enjoy some degree of freedom in carrying out federal regulations, or will their discretion be eliminated entirely? Are there opportunities for uncooperative federalism within the federal scheme, or is this an instance where the federal government is able to put an end to disagreement entirely?<sup>251</sup> One might even imagine that over time the Court could develop a series of markers for identifying federal regulatory schemes that offer states sufficient degrees of freedom to experiment.

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247. See Heather K. Gerken, *Of Sovereigns and Servants*, 115 *Yale L.J.* 2633, 2635, 2639–41 (2006) [hereinafter Gerken, *Sovereigns and Servants*]; Gerken, *Foreword*, *supra* note 21, at 35–44.

248. See Bulman-Pozen & Gerken, *supra* note 220, at 1295–302.

249. See Gerken, *Dissenting by Deciding*, *supra* note 195, at 1783–85; Heather K. Gerken, *The Federalism Society*, 36 *Harv. J.L. & Pub. Pol’y* 941, 944–45 (2013); Gerken, *Sovereigns and Servants*, *supra* note 247, at 2635; Gerken, *Foreword*, *supra* note 21, at 37–39. A great deal of scholarship on the administrative state assumes that federal administrators wield this same kind of power against their political masters. See, e.g., Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2255–72 (2001) (describing the historical balance of discretion and oversight between Congress, the President, and administrative agencies); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 5–7, 5 n.11, 7 nn.16–18 (1994) (describing presidential efforts to assert authority over administrative agencies).

250. Jessica Bulman-Pozen, *Preemption and Commandeering Without Congress*, 70 *Stan. L. Rev.* 2029, 2041 (2018); see also Bulman-Pozen, *Afterlife*, *supra* note 63, at 1933–34 (“States . . . inject diversity, contestation, and . . . a degree of chaos . . . [because they serve as] co-administrators, frequently challenging the federal executive’s exercise of its statutory authority.” (footnote omitted)); Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 *Colum. L. Rev.* 1739, 1744 (2015) (“[S]tate involvement injects a political edge into program implementation . . . In a polarized world, . . . politically opposed states . . . can check executive branch unilateralism . . .”).

251. See, e.g., Bulman-Pozen & Gerken, *supra* note 220, at 1271–84 (canvassing numerous examples of uncooperative federalism in practice).

## CONCLUSION

For nearly a century, Justice Brandeis's "laboratories of democracy" idea has occupied a prized place in our constitutional discourse. The Court continues to invoke that idea, seemingly oblivious to the substantial scholarly criticisms mounted against it. And scholars haven't done any better at suggesting an alternative to the laboratories myth. We thus lack a full account of how states manage to innovate despite the obstacles standing in their way. The account this Article offers does that. It explains the role that intense policy demanders play in helping states and their officials overcome the obstacles of innovation. And in doing so it provides a more perspicacious account of the relationship between our federal structure of government and policy innovation. If courts want to encourage state policy innovation, they must recognize that power and motivation often derive from integration within, not separation from, national political networks and national policies and programs. And they must work to permit competing visions of those programs to coexist.

These judgments are unquestionably complex, and efforts to calibrate federal power will inevitably lack the superficial attractions associated with outright bans on federal interference. But there are at least two virtues to the approach we suggest here. First, our model is grounded in reality and buttressed by decades of social science, while the Court's doctrine rests on a flatly incorrect account of how state experimentation gets off the ground. Second, the proposed model is appropriately calibrated. The Court's autonomy model is too crude a strategy for promoting state experimentation. It is simultaneously over- and underinclusive, precluding federal regulation where federal involvement would help promote experimentation while leaving the federal government free to shut down experiments in arenas where it holds sway. As a result, the doctrine the Court has developed to facilitate state experimentation is just as likely to dampen it. Our approach, in contrast, gives courts the ability to create rules for federal-state competition writ large while leaving in place the federal-state connections that motivate and fuel state experimentation in the first place.

One might doubt the ability of courts to referee federal-state tussles in the fashion we suggest. If so, one should probably throw in the towel on judicial involvement in federalism disputes generally.<sup>252</sup> After all, this Article asks a relatively simple question: How should we tweak federalism doctrine if our goal were to increase state experimentation? The Court's federalism decisions are far more complex, as they aim not just to preserve the laboratories of democracy but also to promote other values such as choice, competition, participation, and the diffusion of power. While we're sympathetic to those who doubt the ability of the courts to do any of this

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252. So, too, it's hard to imagine why we would entrust the Court with resolving inter-branch conflicts given that the "checks and balances" approach is similarly fraught with complexities.

successfully, we also recognize that there are few ready alternatives. It's easy enough to critique judicial intervention in these arenas, but it's not always clear that judicial withdrawal is any better. Necessity, then, is the mother of muddling through. For now, our own argument is confined to a more straightforward claim: If the courts *are* to muddle through federalism disputes, their decisions shouldn't rest on a myth.

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