

Progressives, the COVID Pandemic, and the Laboratories of Democracy:  
Is the Left Saying “Goodbye” to Cooperative Federalism?

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## Introduction

The COVID pandemic yielded some interesting political outcomes, one of them being that some progressives have looked to the states for the advancing of progressive policies and away from Washington. This can be seen in recent articles where progressives speak woefully of the “the tenth amendment,” “states’ rights,” and the “laboratories of democracy” which seems to suggest a warming to a more traditional view of federalism and a retreat from progressive-styled cooperative federalism. During the pandemic, progressives are calling some state governors “national heroes”<sup>1</sup> and praising the virtues of decentralization.<sup>2</sup>

Not long ago, a different and even hostile stance toward the state’s involvement in policymaking was the norm among progressives. Progressives advanced the view of “cooperative federalism” which posited a strong central national government with states serving as mostly administrators of national policy. States were considered by progressives as too parochial to be the impetus for national policy making.

What should we think of this shift in attitude among some progressives? The pandemic presents an unprecedented crisis that has come to bear on American politics. And because the COVID pandemic is so unprecedented, norms and benchmarks based on experience are difficult to establish. In the area of cooperative federalism, it is difficult to determine “who does what,” especially in an era when Washington can step in and preempt almost any area of policy. Cooperative federalism is now considered “national federalism,” and even the federalism intended by the framers.<sup>3</sup>

In this paper, I will focus on whether recent progressive praise for state policy leadership and cooperative federalism represent a fundamental shift in progressive ideology or is merely a tactical move by progressives brought on by other factors. The limited focus of this paper will be on Louis Brandeis’s concept of the “laboratories of democracy,” which is often associated with state policy innovation. Both conservatives and liberals have used the metaphor for many years. Here, the focus will be on progressive ideologues and their recent use of the metaphor. Finally, I will consider some of the implications for federalism and a Christian worldview.

## The Laboratories of Democracy

This investigation focuses on the concept of the “laboratories of democracy” as it has been used when addressing state policy innovation. In 2020, several articles, popular and academic, were written that used the “laboratories of democracy” as a metaphor for the role of state policy leadership during the crisis.

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<sup>1</sup> Clay Jenkinson, “Who’s in Charge? Coronavirus and the Tenth Amendment.” *Governing*, April 17, 2020. <https://www.governing.com/context/Whos-in-Charge-Coronavirus-and-the-Tenth-Amendment.html> (accessed February 13, 2021).

<sup>2</sup> Archon Fung, “Covid-19 Requires More Democracy, Not Less.” *Boston Review*, April 23, 2020. <http://bostonreview.net/politics/archon-fung-covid-19-requires-more-democracy-not-less> (accessed January 13, 2021).

<sup>3</sup> Like that advocated by Samuel Beer in *To Make a Nation: The Rediscovery of American Federalism* (Cambridge, MA: Harvard University Press, 1993).

The phrase “laboratories of democracy” comes from Justice Louis Brandeis in the court case *New State Ice Co. v. Liebmann* in (1932) in which he said that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>4</sup> According to Brandeis's quote, individual states can pursue distinct policy solutions that were created by other states to improve their state's policies. With respect to the recent pandemic, some progressives are characterizing the acts of some states as trying “novel” policies in hopes of confronting the spread of the virus and regarding these policies as “courageous.”

If progressives are praising states for acting without Washington’s direction during the pandemic, and perhaps even contrary to it, and if they are extolling the benefits of “state innovation” and the constitutional tenth amendment, it signals a different attitude among progressives that historically champions bold central government action, especially during a crisis, and views states as inadequate to provide leadership during a national crisis. The progressive federalist theory of choice has been one that opposed the framer’s form of decentralized federalism, what scholars call “cooperative federalism.”

### **Progressivism and Cooperative Federalism**

Varying theories of federalism have surfaced since the beginning of the republic. According to Professor Corwin (1950) the traditional idea of dual federalism gave rise to a “cooperative federalism” that favored a national-state relationship characterized by national dominance and state compliance, where the states and Washington might cooperate, but where the states are the “inferior governments” in the federal relationship.<sup>5</sup> George W. Carey noted that one of the two great issues of federalism in modern times is the extent of the national powers v. those of the states.<sup>6</sup> Cooperative federalism provides a vision for the extent of national powers over the powers of the states.

For much of American history, the United States operated under a theory of dual federalism which consigned most policies to the states based on the tenth amendment’s reserved powers, and some important delegated powers to the national government. This traditional idea of dual federalism gave way to a modern version called cooperative federalism that Professor Corwin called “a short expression for a constantly increasing concentration of power at Washington in the instigation and supervision of local policies.”<sup>7</sup>

Cooperative federalism is progressive federalism. Early progressives like Woodrow Wilson, Frank Goodnow, and Herbert Croly held the framer’s constitutional limits in contempt.<sup>8</sup>

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<sup>4</sup> Louis Brandeis, Opinion, *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

<sup>5</sup> Martha Derthick, “The Enduring Features of American Federalism.” *The Brookings Review* 7, no. 3 (Summer, 1989): 35.

<sup>6</sup> The other issue is whether the constitutional union is a compact of the states or a union of its people. George W. Carey, *A Student’s Guide to American Political Thought* (Wilmington, DE: ISI Books, 2004), 64.

<sup>7</sup> Edwin Corwin, “The Passing of Dual Federalism,” *Virginia Law Review* 36, no. 1 (1950): 21.

<sup>8</sup> “The Progressive Era was the first major period in American political development to feature, as a primary characteristic, the open and direct criticism of the political and constitutional theory of

Their quasi-Hegelian vision was one of a powerful national government that would subordinate the state and local governments. That vision was realized in the meta welfare schemes like the New Deal, the Great Society, and more recently, Obamacare. With cooperative federalism came practices such as the grants-in-aid, along with conditions, and practices such as direct orders (like those contained in the Equal Employment Opportunity Act [1972]), crosscutting requirements, crossover sanctions, and partial preemptions.<sup>9</sup> These tools of “intergovernmental relations” allowed Washington to maintain control over much of state policy, leaving the states as Derthick’s “inferior governments” in the federal mix. State and local governments have been conditioned to expect that Washington would be at the head of any crisis like that of 9-11 and Hurricane Katrina.

### References to the “Laboratories of Democracy,” Past and Present

In this initial investigation, I was interested in looking at whether there was a prima facie case for a shift in attitudes among progressives away from cooperative federalism, based on an apparent warming to traditional favorable appeals to the tenth amendment and states' rights. Toward that end, I surveyed peer-reviewed articles over the past twenty years that used the expression “laboratory of democracy” in its title.<sup>10</sup> A conclusion to draw from these articles and the use of the metaphor in the last twenty years is that, while there are several references to the

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the American founding” (Ronald Pestritto, *Progressivism and America’s Tradition of Natural Law and Natural Rights*. Natural Law, Natural Rights and the Constitution, <http://www.nlnrac.org/critics/american-progressivism> [accessed February 16, 2016]).

<sup>9</sup> United States Advisory Commission on Intergovernmental Relations, “The Techniques of Intergovernmental Relations,” in *American Intergovernmental Relations: Foundations, Perspectives, and Issues*, Fifth edition, ed. Laurence O’Toole, Jr. and Robert Christensen (Thousand Oaks, CA: Congressional Quarterly, 2013), 252-257.

<sup>10</sup> Because the “articles in social science journals and law reviews quoting Brandeis are too numerous to list” (Tarr, 2001, 39, n. 11), I narrowed my focus to look at public policy peer-reviewed articles where the phrase “laboratory of democracy” or “laboratories of democracy” was in the title. I found only three articles since 2000 (Tarr, “Laboratories of Democracy?”, Barrilleaux, and Brace, “Notes from the Laboratories of Democracy,” and Lowery, et al., “Policy Attention in State and Nation”). When I removed the phrase “public policy,” I got 22 articles which I narrowed to 10. The narrowing was due to the use of the “laboratories of democracy” phrase not in keeping with the Brandeis quote. The subject matter of the articles using the “laboratories of democracy” metaphor varied. Among the topics were clarification of Brandeis’s metaphor (Tarr, “Laboratories of Democracy?”), state campaign finance reform (Schultz, “Laboratories of Democracy”), state and market strategies to reduce uninsurance in the states (Barrilleaux and Brace, “Notes from the Laboratories of Democracy”), federal health care reform via state health care experimentation (Kucskar, “Laboratories of Democracy”), policy innovation in decentralized governments (Galle and Leahy, “Laboratories of Democracy?”), state tort law (Klass, “Tort Experiments in the Laboratories of Democracy”), whether state-level policy diffusion affects national policy agenda setting (Lowery, et al., “Policy Attention in State and Nation”), lethal injection protocols (Blythe, “‘Laboratories of Democracy’ or ‘Machinery of Death’?”), state constitutions (McGinley, “Results from the Laboratories of Democracy”), and the status of healthcare reform in gubernatorial elections (Johnson and Kishore, “Laboratories of Democracy”).

laboratory of democracy relating to health care policy, the usage of the metaphor is diverse. Few of the articles analyze the concept; most are content to use it as a catchphrase or as a synonym for “state policy innovation.” The conclusion that I draw from this is that while the usage of the metaphor is pervasive according to Tarr, it has not been a sufficiently powerful metaphor to provide direction, either theoretically or practically for state policy innovation. Furthermore, there is no indication in the academic literature that the idea of states as laboratories of democracy supplanted the progressive ideological and pragmatic commitment to cooperative federalism.

After looking at the peer-reviewed literature, I did a Google search of articles that used the expression “laboratories of democracy” and “COVID” in their articles during 2020. I obtained six articles.<sup>11</sup> It is these articles that I analyze below, considering whether progressives are abandoning cooperative federalism in favor of greater regional orientation toward policymaking.

### **Analysis of Recent Articles Pertaining to the Laboratories of Democracy and the COVID Pandemic**

Recent articles on the pandemic and federalism suggest that progressives might be in retreat from cooperative federalism and embracing state policy experimentation and implementation as a proxy for national policy leadership. In this section, the idea that cooperative federalism might be in retreat will be discussed. This will be followed by a discussion of the perceived merits of state policy innovation, along with some of its limits.

**Is cooperative federalism in retreat among progressives?** The idea that cooperative federalism might be shoved to the side is especially intriguing because “cooperative federalism” is “progressive federalism.” However, there is some evidence that there are cracks in the progressive commitment to cooperative federalism. Jenkinson excitedly remarks that “suddenly the nearly forgotten Tenth Amendment is relevant again!”<sup>12</sup> Baker quotes the tenth amendment as authoritative and praises it as having “empowered state and local governments across America to make a difference in their communities without the help of Washington.”<sup>13</sup> He also treats as factual the concept of state sovereignty noting that the historical foundations of state sovereignty are 1) federalism and 2) the laboratories of democracy.”<sup>14</sup>

Fung attacks the hubris of centralized authority thinking that they know what is “best,” stating that “It is tempting for those in big central government to think that they know better and so try to develop the best policies, the best plans, the best forecasts, the best tests and impose

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<sup>11</sup> Keeling Baker, “A Progressive Call to Arms: Laboratories of Democracy,” Michael Cornfield, “The States We’re In: Can ‘Laboratories of Democracy’ Conquer Covid-19?,” Phillip Elliot, “Why State-Run Vaccine Delivery Could be Bumpy,” Archon Fung, “Covid-19 Requires More Democracy, Not Less,” Clay Jenkinson, “Who’s in Charge? Coronavirus and the Tenth Amendment,” Donald Kettl “States Divided: The Implications of American Federalism for COVID-19.” Opinion articles and blogs were excluded.

<sup>12</sup> Jenkinson, “Who’s in Charge?”

<sup>13</sup> Keeling Baker, “A Progressive Call to Arms.”

<sup>14</sup> Jenkinson, “Who’s in Charge?”

them on the states and localities. If they had done that in Washington State, more of its residents would have gotten sick and died.”<sup>15</sup> Instead of playing the role that they know what is “best,” central governments should instead refocus during the pandemic from knowing what is best to effectively disseminating successful practices to the state and local levels, according to Fung.<sup>16</sup>

Fung is also not encouraged by other centralized states and their handling of the pandemic. France, Italy, and Spain have not inspired confidence in their response to the virus and they are highly centralized states. Kettl points out how the United States is out of step with how other nations are handling the pandemic and cites Germany as a model to which the United States should aspire.<sup>17</sup> Fung also praises Germany, but for the decentralized features of its state. He also notes that private and non-profit organizations moved more quickly to implement social-distancing policies than did Washington.<sup>18</sup>

A part of the value of decentralized systems is that they provide a check on state powers to ensure that democratic principles prevail. Fung advances an uncharacteristic progressive position that democratic principles might conflict with the values of centralized authority and they might be more in alignment with decentralized authority. Centralized government must conform to democratic principles. According to Fung, we cannot sacrifice our “democratic impulse”<sup>19</sup> which has manifested itself in practices such as “questioning authority, raising alternative perspectives, vigorous debate, disagreement, and experimentation” in order to achieve centralized government. Fung calls this “dangerously misguided.”<sup>20</sup>

While the assumption among progressives has normally been that “national problems require national solutions,” some progressives, like Jenkinson, have questioned the assumption. It is possible that, given our existing federal arrangement, a strong local role might be essential. He notes that “a patient enters a local hospital to be treated by local medical professionals.”<sup>21</sup> He also remarks that a decentralized approach is needed because a centralized system is missing, noting that “absent a national health-care system, medical treatment in the United States is delivered by a dizzying range of systems, with widely different results depending on the availability of insurance, affordability and coverage options, but also social class and regional political philosophies.”<sup>22</sup>

A foundational principle of cooperative federalism is the preference for expert knowledge, favoring it over the constitutional principle of government by consent.<sup>23</sup> But Fung

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<sup>15</sup> Fung, “COVID-19 Requires More Democracy, Not Less.”

<sup>16</sup> Ibid.

<sup>17</sup> Kettl, “States Divided.”

<sup>18</sup> Fung, “COVID-19 Requires More Democracy, Not Less.”

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Jenkinson, “Who’s in Charge?”

<sup>22</sup> Ibid.

<sup>23</sup> “The idea of separating politics and administration—of grounding a significant portion of government not on the basis of popular consent but on expertise—was a fundamental aim of American Progressivism and explains the Progressives’ fierce assault on the Founders’ separation-of-powers constitutionalism” (Ronald Pestritto, “The Birth of the Administrative State: Where it

undermines the commitment to uniform expert knowledge during the pandemic, noting that “scientists and experts rarely speak with one voice, and this pandemic is no exception...Experts make mistakes just like the rest of us; they are fallible.”<sup>24</sup>

**Two cheers for the laboratories of democracy.** When comparing the states to the national government, progressives often portray states as too parochial and sectarian to be leaders of national policy, thinking of them as the “the neglected middle children of federalism...”<sup>25</sup> However, during the pandemic, a different attitude was reflected among some progressives. Some of the praise for state government was for progressive governors. In history, Robert LaFollette, and more recently, Governors Newsom, Cuomo, and Inslee have been praised as “national leaders,” and even “almost shadow presidents.”<sup>26</sup> Cornfield noted that “Cuomo is the biggest star in a constellation of governors made famous by the pandemic.”<sup>27</sup> Publicly, the most visible demonstrations of their policies are the wearing of masks, the testing for the virus, and the practice of “social distancing.”

There has also been praise for states as the innovators of policy like the state of Massachusetts with its Health Care Act which was the precursor to Obamacare.<sup>28</sup> Baker praises California as “the state leading the charge for progressive policy experimentation”<sup>29</sup> while Jenkinson praises Colorado as a laboratory of democracy in the area of medicinal and recreational marijuana: “Colorado was thus a ‘laboratory’ in which to work out the kinks of legalization in one jurisdiction, from which other states could learn important lessons of what to do and not to do if they chose to follow suit.”<sup>30</sup>

However, not all progressives commenting on the pandemic are sanguine about relying on the laboratories of democracy during a crisis like the pandemic. Elliot, for example, is critical of a state-run distribution of the vaccine as opposed to a national policy. He suggests that “laboratories for democracy sounds honorable when it comes to tax policy but may prove to be folly when it comes to serving a lifeline to a country hobbled by a pandemic” and compares dealing with the pandemic like fighting a domestic war.<sup>31</sup> However, Jenkinson disagrees saying that the Trump Administration is right when it says that “one size fits all” will not work in every case. It is “an imprecise tool with which to combat the pandemic.”<sup>32</sup>

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Came from and What it Means for Limited Government,” Heritage Foundation First Principles Series, no. 16, November 20, 2007, <https://www.heritage.org/political-process/report/the-birth-the-administrative-state-where-it-came-and-what-it-means-limited> [accessed January 31, 2018]).

<sup>24</sup> Fung, “COVID-19 Requires More Democracy, Not Less.”

<sup>25</sup> Cornfield, “The States We're In.”

<sup>26</sup> Jenkinson, “Who’s in Charge?”

<sup>27</sup> Cornfield, “The States We're In.”

<sup>28</sup> Keeling Baker, “A Progressive Call to Arms”; Elliot, “Why State-Run Vaccine Delivery Could be Bumpy.”

<sup>29</sup> Keeling Baker, “A Progressive Call to Arms.”

<sup>30</sup> Jenkinson, “Who’s in Charge?”

<sup>31</sup> Elliot, “Why State-Run Vaccine Delivery Could be Bumpy.”

<sup>32</sup> Jenkinson, “Who’s in Charge?”



Kettl's critique of the laboratories of democracy focuses on the condition that any promise of states fulfilling such a role is constrained by other factors outside of the state's control. The state's response to COVID is not just a reaction to a crisis; their response is made in a broader policy context, a "policy stream," from which policy decisions are made. Kettl sees this as a problem for the states acting as laboratories of democracy, because needed practices like testing and experimentation were not at the forefront of these state "laboratories" during the pandemic. As Kettl puts it, "COVID-19 created a laboratory, but one without experimentation."<sup>33</sup>

### **Discussion and Conclusion**

In this final section, I will draw some conclusion about progressives and their commitments to cooperative federalism and progressive principles. Also, the role that the framer's federalism continues to play and the Christian's commitment to the Christian worldview in light of the discoveries highlighted will be evaluated in this paper.

**Progressives, cooperative federalism, and the laboratories of democracy.** Since only some progressives appear friendlier with the tenth amendment and "states' rights" since the pandemic and the academic literature with respect to the "laboratories of democracy" is diverse, and there is little analysis of the "laboratories of democracy" concept as an adequate descriptive framework for federalism, there is faint evidence that the changes in the rhetoric on the part of progressives in this pandemic are attributable to substantive philosophical or world view changes. Of course, we can't say definitively that there is not a latent change among progressives in place or that we will not see further motion toward progressive federalism that favors decentralization. A reasonable explanation both from past academic literature and current popular articles is that this shift away from cooperative federalism does not represent a fundamental change in progressive ideology. Rather, the idea that the shift represents a change in strategy should be further explored by future researchers.

Another area that should be further explored is the role that the Trump administration might have played in the progressive's more favorable views toward traditional federalist concepts such as the tenth amendment, and states' rights. There were some articles during the Trump presidency, but prior to 2020, that also spoke favorably of the laboratories of democracy. Perhaps the progressive shift was political and that a shift in progressive views on federalism was apparent during the Trump administration and before the pandemic.

**The Constitution, federalism, and the laboratories of democracy.** Whether modern progressivism is departing from cooperative federalism has implications for federalism provided by the framers. For example, if progressives have softened their animus toward the tenth amendment, we might witness an ideological realignment with respect to the theories of the Constitution that progressives espouse.

Some of the authors, like Jenkinson, speak of the tenth amendment and even "state sovereignty" as authoritative.<sup>34</sup> However, Jenkinson also says that "The Constitution does not

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<sup>33</sup> Kettl, "States Divided," 596.

<sup>34</sup> Jenkinson, "Who's in Charge?"

provide clear guidelines for elected officials or government functionaries.”<sup>35</sup> And while it is true that the Constitution does not provide a bright line between the state role and the national role in a pandemic, it does provide a set of principles such as federalism, the separation of powers, and checks and balances that encourage decentralization and the diffusion of power across political actors and across regions.

Fung suggests that progressives should disregard the law if the goal is to advance greater knowledge of the disease, like tracking the spread of the virus. Fung praises Dr. Helen Chu’s decision to defy the law to repurpose her study to track the spread of the COVID-19 virus within the state even though Dr. Chu not only defied the law, but also risked subject confidentiality.

The Constitution which represents our fundamental law cannot be discarded so frivolously during a crisis. Sadly, past American history has demonstrated too often that during times of national crises, like the Civil War or the Depression, the Constitution is one of the early casualties.

The rule of law is not the only constitutional principle likely to be imperiled during a crisis. A lot of historical baggage has been laid at the feet of federalism by progressives, namely, that federalism advanced historical segregation and slavery. However, Justice Clarence Thomas noted that, “federalism, per se, is not an evil or a good, it is just a construct, just as the separation of powers is a construct—they are both means that serve certain ends.”<sup>36</sup>

**Federalism and the commitment to a Christian worldview.** Like the separation of powers or checks and balances, federalism is a construct of process. It is one of James Madison’s “auxiliary precautions” (Federalist #51) designed to check the advance of tyrannical government. So, while federalism may not be a moral principle like honesty or fidelity, the aims of its framers were moral with the purpose of advancing human flourishing along with the security that governments fulfill their role as the ministers of God for the good of the people (Romans 13:4). And that sounds a lot like securing “the blessings of liberty to ourselves and our posterity” as stated in the Constitution’s Preamble.

The implementation of the framer’s constitutional principles has resulted in a diffusion of power and authority, leading to a general benefit for humankind. In contrast, progressives have tended to place their bet on the ideas and policies of a few planners rather than the many citizens. However, even Fung agrees that “in situations of high stakes and high uncertainty, it is better to attempt many strategies and learn from experience rather than placing one big bet.”<sup>37</sup> And while it might be prudent to centralize some elements of policy during a crisis, it is equally prudent that social problems that are greater in number and complexity need a like increase in the number of minds engaged in solving those problems. During a crisis, nations need an increase in intellectual resources. That increase in the number of people and institutions requires a diffusion of power and authority that constitutional federalism affords.

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<sup>35</sup> Ibid.

<sup>36</sup> Clarence Thomas, “Why Federalism Matters,” *Drake Law Review* 48, no. 2 (2000): 234.

<sup>37</sup> Fung, “COVID-19 Requires More Democracy, Not Less.”

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