

LABORATORIES OF DEMOCRACY?

G. Alan Tarr

In any pantheon of champions of American federalism, Louis Dembitz Brandeis deserves an honored place. Throughout his public career, Brandeis opposed centralization and campaigned for a devolution of power.¹ He rejected large institutions, whether public or private, because he believed that they "inevitably lost their ability to think in terms of individuals and to respond to their needs. Worse, they tended to be beyond the intellectual understanding and control of any individual."² Brandeis focused his attacks on the leading corporations of his day, contending that their large size was dictated not by economic efficiency but by a desire to wield political power. However, his concern about what he labeled "the curse of bigness" extended to the political sphere as well. He rejected Theodore Roosevelt's "New Nationalism" because it sought to use big government to control concentrated economic power. As a policy adviser to Woodrow Wilson, he championed the prerogatives of state and local governments and succeeded in moving Wilson's "New Freedom" in a decidedly more federalist direction.³ Once on the Supreme Court, he regularly defended state efforts to deal with social and economic problems, albeit often in dissent.⁴ Even during the Great Depression, he remained skeptical of a powerful Federal Government, and he opposed in

¹ Stephen W. Baskerville, *Of Laws and Limitations: An Intellectual Portrait of Louis Dembitz Brandeis* (Rutherford, N.J.: Fairleigh Dickinson University Press, 1994), 171.

² Philippa Strum, *Brandeis: Beyond Progressivism* (Lawrence: University Press of Kansas, 1993), 4.

³ As Arthur S. Link has noted, "Because Brandeis understood the problem thoroughly, because he was ready with a definite plan for the bridling of monopoly, he became the chief architect of the New Freedom." Link, *Wilson: The Road to the White House* (Princeton, N.J.: Princeton University Press, 1947), 489.

⁴ See, for example, *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 289 (1922); *Liggett v. Lee*, 288 U.S. 517 (1933); and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

correspondence, in action, and—occasionally—in judicial opinions the New Deal's centralization of political power.⁵ Indeed, scholars who criticize Brandeis typically claim that his thought reflected a romantic attachment to a Jeffersonian diffusion of power to states and communities.⁶

Yet today Brandeis's decades-long battle against the centralization of power is largely forgotten. His reputation as a federalist instead rests largely on a single sentence drawn from his famous dissenting opinion in *New State Ice Co. v. Liebmann*: "It is one of the happy accidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."⁷ Brandeis's depiction of the states as laboratories of democracy has spawned a rich literature within political science documenting the diffusion of innovations among the American states.⁸ His metaphor has also, it is fair to say, achieved the status of "received wisdom" among federalism's proponents, at least in the United States. It is ritually invoked in judicial opinions, in textbooks, and in social science and legal research.⁹

⁵ On Brandeis's correspondence during this era, see Baskerville, 317-323. Brandeis voted with the Court majority to strike down provisions of the National Industrial Recovery Act of 1935 in *Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935) and in *Panama Refining Company v. Ryan*, 298 U.S. 388 (1935).

⁶ See, for example, Thomas K. McGraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge: Belknap Press, 1984), ch. 3.

⁷ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

⁸ The seminal work in this field is Jack L. Walker, "The Diffusion of Innovations Among the American States," *American Political Science Review* 63 (September 1969): 880-899. For a recent survey of research in the field, see Virginia Gray, "Competition, Emulation, and Policy Innovation," in Lawrence C. Dodd and Calvin Jillson, eds., *Perspectives on American Politics* (Washington, D.C.: CQ Press, 1994).

⁹ A typical example of a judicial opinion approvingly quoting Brandeis's statement is Justice O'Connor's dissent in *FERC v. Mississippi*, 456 U.S. 742, 788-789 (1982). For a listing of some recent judicial invocations of Brandeis's "laboratories," see James A. Gardner, "The 'States-as-Laboratories' Metaphor in State Constitutional Law," *Valparaiso University Law Review* 30 (Summer 1996): 483-490. The leading textbook on state politics—Virginia Gray and Herbert Jacob, *Politics in the States: A Comparative Analysis*, 6th ed. (Washington, D.C.: CQ Press, 1996)—highlights Brandeis's quote almost immediately (page 5) in beginning its discussion of state politics. Virtually every monograph on federalism quotes Brandeis—see, for example, A. E. Dick Howard, "Does Federalism Secure or Undermine Rights?" in Ellis Katz and G. Alan Tarr, *Federalism and Rights* (Lanham, Md.: Rowman & Littlefield, 1996), p. 17. Articles in social science journals and law reviews quoting Brandeis are far too

numerous to list. Illustrative examples include: Charles Fried, "Federalism—Why Should We Care?" *Harvard Journal of Law and Public Policy* 1 (1982): 2, and Deborah Jones Merritt, "The Guarantee Clause and State Autonomy: Federalism for a Third Century," *Columbia Law Review* 88 (1988): 9.

Invoked, yes, but rarely analyzed. This is unfortunate because, although Brandeis was a committed federalist, his metaphor in fact has little to do with federalism. The metaphor misconstrues the process of interstate borrowing and emulation and is implicitly at odds with federal diversity. This paper seeks to document these claims through a contextual analysis of Brandeis's famous statement and a consideration of the implications of his misleading metaphor. The paper concludes with a plea for a more adequate account of the operation of horizontal federalism in the United States and in other federal systems.

I

To understand Brandeis's "laboratories" statement and its purpose, one must first place the statement in appropriate perspective. This requires consideration of the political and legal context of *New State Ice Co. v. Liebmann*, the case in which Brandeis's statement appeared, and of the role that it played in his dissenting opinion in that case. When it came before the Supreme Court, *Liebmann* represented only the most recent of a series of "substantive due process" cases, in which state regulations of business were challenged as in violation of due process rights guaranteed by the Fourteenth Amendment. The statute at issue in *Liebmann* required those seeking to manufacture, sell, or commercially distribute ice in Oklahoma to obtain a license from the state's Corporation Commission before doing so. By regulating entry into this field, Oklahoma sought to reduce competition, stabilize prices, and prevent over-production. (Brandeis himself had on several occasions indicated his sympathy with these aims, although not necessarily with the means Oklahoma chose to achieve them.) However, Oklahoma's regulation accomplished these aims by limiting the economic liberty of those who sought to enter the ice business. Thus, as in earlier substantive due process cases, the Supreme Court was called upon to determine whether the challenged state regulation served valid "police power" purposes and could therefore be upheld, or whether it represented an "arbitrary" interference with economic liberty and so should be struck down as unconstitutional. Put differently, the outcome of the case depended on the answer not only to a question of law—for what ends can a state exercise its police powers?—but also to a question of fact—how effectively did Oklahoma's law advance its professed aims?

In *Liebmann*, the Court majority concluded that Oklahoma's law was an arbitrary interference with economic liberty in violation of the due process clause. In response,

Brandeis sought to demonstrate that the law in fact served valid purposes. Most of Brandeis's 31-page dissenting opinion therefore is devoted to a description of the problem that the Oklahoma Legislature was attempting to address and of the way in which the law it had enacted might have served to address that problem. Toward the end of his dissent, the famous "laboratories" statement appears. The passage in which it appears deserves extended quotation:

Whether [the State's] view is sound nobody knows. . . . The economic and social sciences are largely uncharted seas. . . . Yet the advances in the exact sciences and the achievements in invention remind us that the seemingly impossible sometimes happens. . . . The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries been not only free but encouraged. Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science. . . . To stave experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.¹⁰

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Liebman, at 309-311.

Although Brandeis's statement emphasizes the importance of states having the right to experiment, he does not insist that that power exist without limit. Toward the conclusion of the opinion of the Court, Justice George Sutherland responds to Brandeis's plea for experimentation. Although acknowledging the authority of the states to enact "experimental legislation," Sutherland insists that the Constitution sets limits on such experiments, particularly when they infringe on fundamental liberties. "The principle is imbedded in our constitutional system," he writes, "that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experimentation."¹¹ Brandeis's dissent implicitly accepts Sutherland's limitation--he champions "social and economic experiments," not experiments in the realm of individual rights. His disagreement with the Court thus relates not to the governing principle but to its application. For Brandeis, the Oklahoma statute is an experiment "in things social and economic."

Even so confined, Brandeis's metaphor remains problematic. One recent critic, James Gardner, has charged that Brandeis's analogy to scientific experimentation is seriously misleading.¹² For one thing, Gardner insists, the metaphor ignores the fact that scientific experiments and policy experiments differ fundamentally in their aims. Scientific experiments are designed to produce knowledge, whereas policy experiments are undertaken to achieve a public good. Thus the one is concerned with theory, the other with practice. Brandeis's metaphor also downplays crucial differences between scientific experimentation and policy experimentation. Scientific experiments are systematic,

¹¹ *Liebman*, at 279-280. Ironically, this statement anticipates Justice Robert Jackson's famous statement, much beloved by civil libertarians, in *West Virginia Board of Education v. Gobitis*, 319 U.S. 624, ___ (1943): "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."

¹² Gardner, 480-482.

utilizing procedures and controls "designed to enhance the generalizability and usefulness of the information obtained."¹³ In contrast, policy experiments tend to be, according to Gardner, "haphazard and inherently subjective." He therefore concludes that the results of such policy experiments can offer little guidance to policymakers in other jurisdictions.

¹³ Gardner, 481.

Whatever the validity of Gardner's critique, what is striking is that Brandeis does not merely ignore these differences between scientific experiments and policy experiments. Rather, he makes a point of emphasizing the similarities between scientific and policy experimentation. He begins by praising scientific experimentation: "The discoveries in physical science, the triumphs in invention, attest the value of trial and error. In large measure, these advances have been due to experimentation."¹⁴ What is noteworthy about this statement--particularly in the light of Gardner's critique--is how quickly Brandeis moves from a focus on the discovery of knowledge to the use ("triumphs of invention") to which that knowledge will be put. Brandeis then seeks to connect experimentation in the social and economic spheres to experimentation in the natural sciences by stressing its scientific character: "Some people assert that our present plight is due, in part, to the limitations set by courts upon experiments in the fields of social and economic *science*."¹⁵ As in the natural sciences, Brandeis asserts, the results of experiments in the fields of social and economic science must lead to "triumphs of invention." "There must, "he asserts, "be power in the States and the Nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs."¹⁶ This in turn leads to his oft-quoted conclusion that federal arrangements enable courageous states to engage in such experimentation, at least if the courts do not intervene to deny this right.

Brandeis's insistence on the similarities between scientific and policy experiments is particularly pertinent when one considers the anticipated outcomes of policy experiments in the "laboratories" of the states. Brandeis recognizes that the initiation of experiments within a single jurisdiction reduces the risk of undertaking them: if an experiment fails, the damage is limited, because it is confined to that single jurisdiction. What this prudential argument leaves unspoken is what will--or should--occur if an experiment succeeds. As Gardner notes, when scientists conduct an experiment, they do so in order to obtain

¹⁴ *Liebmann*, at 310.

¹⁵ *Liebmann*, at 310-311 (*italics added*).

¹⁶ *Liebmann*, at 311.

generalizable knowledge. If the experiment succeeds, the conclusions reached in their laboratory become part of the body of scientific knowledge and thus are authoritative for scientists in all other laboratories. Following the logic of the metaphor Brandeis chose, one would expect that, analogously, the outcome of a successful policy experiment in one state laboratory should be generalizable and should lead to adoption of the same policy in all other state laboratories. Thus, although the short-term outcome of policy experimentation in the states would be a diversity of policies, over the longer term the tendency would be toward policy uniformity, as states emulated the successful policies of sister states. Although one might hesitate to draw this conclusion, given Brandeis's stalwart federalist credentials, we shall see that it is consistent with another important facet of his political thought.

Other critics, such as Edward Rubin and Malcolm Feeley, have sought to detach Brandeis's support for policy experimentation from his attachment to federalism.¹⁷ They note that the logic of his argument for policy experimentation does not require federal arrangements because it has application even beyond the political realm. (It should be noted that Brandeis himself recognized this, championing experimentation in industry and agriculture, as well as in public policy.¹⁸) In addition, Rubin and Feeley argue that even within the public sphere, federalism is neither a necessary nor a sufficient condition for policy experimentation. The argument for the states as laboratories rests on the assumption that multiple truth-seekers, acting independently, are more likely to uncover the truth than is a single truth-seeker. From this, proponents of federalism have drawn the conclusion that federalism, because it establishes a multiplicity of decision-makers, encourages policy experimentation. Yet, as Rubin and Feeley point out, the crucial factor is that there be a multiplicity of distinct policy-makers, not that these policy-makers have constitutional autonomy.¹⁹ A unitary government may stimulate policy experimentation by mandating that various sub-units implement different policies. Conversely, the existence of autonomous component units within a federal

¹⁷ Edward L. Rubin and Malcolm Feeley, "Federalism: Some Notes on a National Neurosis," *U.C.L.A. Law Review* 41 (April 1994): 903, 923-926.

¹⁸ Strum, 85; Baskerville, 315.

¹⁹ Rubin & Feeley, 924. Some commentators have even argued that federalism may retard innovation; see Susan Rose Ackerman, "Risk Taking and Reelection: Does Federalism Promote Innovation?" *Journal of Legal Studies* 9 (1980): 593.

system does not guarantee policy experimentation. Indeed, studies of policy diffusion have documented that several instances in which policy innovation has depended upon policy leadership at the center.²⁰

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See, for example, William R. Lowry, *The Dimensions of Federalism* (Durham, N.C.: Duke University Press, 1992), and Robert Eyestone, "Confusion, Diffusion, and Innovation," *American Political Science Review* 71 (June 1977).

Yet if Brandeis's commitment to federalism cannot explain his enthusiasm for policy experimentation, what can? James Gardner has suggested that Brandeis's metaphor should be read not as a general endorsement of state policy experimentation but as part of a rhetorical effort to justify the sort of economic policies under attack in *Liebmann*. "Brandeis, then, uses the experimentation metaphor not to undergird a conclusion that states must have a power to experiment—a position he never asserts—but to support his conclusion that the challenged policy is rational and therefore constitutional."²¹ Although Gardner is correct to emphasize how Brandeis's statement is linked to the particular outcome he favors in *Liebmann*, I would argue that Brandeis's choice of metaphor is itself revealing. To understand Brandeis's attachment to policy experimentation, one must look not to his attachment to federalism but rather to his championing of Scientific Management.

II

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Gardner, 479.

The Scientific Management movement emerged in the late nineteenth century, the brainchild of Frederick Winslow Taylor.²² Taylor maintained that economic competition did not—and could not—produce efficiency in business enterprises. Inefficiencies would persist, he argued, until the production process was scientifically organized and orchestrated. He therefore called for "the development of a science to replace the rule-of-thumb knowledge of the workmen."²³ An engineer by training, Taylor "fashioned [his new science's] methods after the exact sciences—experiment, measurement, generalization—in the hope of discovering laws of management which, like laws of nature, would be impartial and above class prejudice."²⁴ More specifically, Taylor and other proponents of Scientific Management immersed themselves in the systematic analysis of work, seeking to determine through time-and-motion studies how jobs could best be done. Later proponents of Scientific Management, such as Frank and Lillian Gilbreth, would christen this the search for "the One Best Way."

Although the Scientific Management movement originated in the factory, its emphasis on systemization and efficiency potentially had much broader application. Taylor argued that government in particular would benefit from an infusion of the principles of Scientific Management and proposed the appointment of an expert in the field to the President's Cabinet. Indeed, during his later years, Taylor contemplated extending the principles of Scientific Management to all human endeavors.

It is not difficult to understand why Scientific Management attracted broad support during the Progressive Era. Its rejection of laissez faire in favor of expert planning struck a responsive chord in a populace distrustful of the effects of unbridled economic competition. Its promise that reform could benefit both management and labor comforted those concerned about class conflict.²⁵ Its

²² Taylor comprehensively elaborates the principles of his system in Frederick W. Taylor, *Scientific Management* (New York: Harper, 1947). The best study of Scientific Management and its impact is Samuel Haber, *Efficiency and Uplife: Scientific Management in the Progressive Era, 1890-1920* (Chicago: University of Chicago Press, 1964). I rely on Haber's volume for most of the background of my account.

²³ Frederick W. Taylor, *Testimony Before the U.S. House of Representatives, January 25, 1912*, excerpted in Jay M. Shafritz and Albert C. Hyde, *Classics of Public Administration*, 4th ed. (Fort Worth: Harcourt Brace, 1997), 30.

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Haber, x.

²⁵ Organized labor, however, remained skeptical of Scientific Management.

grounding in empirical analysis dovetailed nicely with the prevailing distrust of *a priori* systems—witness John Dewey's Pragmatism—and its emphasis on specialized knowledge appealed to the Progressive infatuation with non-partisan technical expertise. Finally, its scientific aura fit well with the broader intellectual climate of the era.

See Haber, 66-70.

Louis Brandeis was an early and vocal advocate of Scientific Management. In the Eastern Rate Case (1910), for example, he successfully opposed a rate increase for railroads by parading before the Interstate Commerce Commission the leading proponents of Scientific Management, all of whom testified that the railroads' financial difficulties stemmed from inefficiencies in management.²⁶ Scientific Management may have appealed to Brandeis because he believed that law and policy should be based on facts—one recalls the use of sociological data in the famous "Brandeis brief" in *Muller v. Oregon* (1908)—and Scientific Management developed its recommendations through painstaking empirical analysis, through an immersion in the facts of situations.²⁷ It may also have appealed to Brandeis because it promised efficiency and offered a scientific—and hence presumably non-partisan—means of achieving that end. Whatever the bases for Brandeis's enthusiastic endorsement of Scientific Management, that enthusiasm continued unabated throughout his life, even after Scientific Management had ceased to be fashionable. That enthusiasm largely explains his dissent in *Liebmann*.

Like Taylor, Brandeis in *Liebmann* denied that economic competition would lead to the best possible outcome. The business of supplying ice, he noted, lends itself to monopoly—"in only six or seven localities in the state . . . was there a semblance of competition"—and the industry had

²⁶ Brandeis's legal brief in the case waxes eloquent regarding the promise of Scientific Management: "Under scientific management nothing is left to chance. All is carefully prepared in advance. Every operation is to be performed according to a predetermined schedule under definite instructions, and the execution under this plan is inspected and supervised at every point. Errors are prevented instead of being corrected. The terrible waste of delays and accidents is avoided. Calculation is substituted for guess; demonstration for opinion. . . . The same preparedness is invoked for industry which secured to Prussia her victory over France and to Japan her victory over Russia." Quoted in McGraw, 92-93.

²⁷ *Muller v. Oregon*, 208 U.S. 412 (1908). Philippa Strum attributes Brandeis's enthusiasm for Scientific Management (wrongly, I believe) to an atypical love of theory in contradiction of facts. See Strum, 43-45.

steadfastly resisted the introduction of competition. This was hardly surprising, for competition tended to be "destructive" and "ruinous" for producers. It also led to a duplication of facilities and delivery services that was "wasteful and ultimately burdensome to consumers" as well. Brandeis concluded that neither unregulated monopoly nor unregulated competition served the public good. The achievement of the common good for Brandeis, as for Taylor, required the infusion of human ingenuity.

Put differently, Brandeis shared Taylor's faith in the ability of science—"the triumphs of invention"—to solve human woes. Equally important, he rested his argument in *Liebmann* on a distinctive understanding of science that echoes Taylor's account. For Brandeis and for Taylor, science is not a quest to discover the laws of nature or to elaborate theories with broad explanatory power. Rather, what distinguishes science are its method, which they describe as trial-and-error experimentation, and its rootedness in facts, in empirical reality. Moreover, the aim of science is intensely practical, to solve specific concrete problems, whether in business or in the broader social and economic spheres by the application of the correct method to the particular situation.²⁸ Insofar as the results of these experiments have implications beyond the particular problems that they are designed to solve, these implications are likewise practical rather than theoretical. If the concrete problems within one jurisdiction resemble those in others, then the same *practical* solutions should be appropriate.

III

Of course, even assuming that the preceding analysis is correct, one encounters the "so what?" question. What does it matter that a former Supreme Court justice once based his plea for policy experimentation in the states on his enthusiasm for Scientific Management rather than on his support for federalism? To this our reply is three-fold. First, Brandeis remains a revered and influential figure in American political thought, and therefore a more accurate understanding of the roots of his thought is intrinsically valuable. Second, our analysis cautions against a continuing invocation of "the states as laboratories," by showing that the slogan is not rooted in a concern for federalism, has no necessary connection to federal arrangements, and has

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For Taylor, this conception of science seems to reflect his training as an engineer.

implications that undermine federal diversity. Of course, it is possible to invoke Brandeis's metaphor without endorsing Scientific Management. However, the metaphors we employ affect the way in which we think about politics, and thus an inaccurate metaphor thus has a distorting effect. Third, the rejection of this convenient metaphor seems a necessary condition for serious reconsideration of the character of "horizontal" relationships in federal systems. Such a consideration would go beyond the "diffusion of innovations" literature, which seems based—implicitly or explicitly—on the laboratories metaphor, and address the political and social factors that influence the interaction among the component units of federal systems. If this paper contributes to such a reconsideration, it has served its purpose.