
REACTIONS TO KEVIN DAVIS

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In a very thoughtful reaction to our book, Kevin Davis points to the ambiguity in the use of the term experimentation, and carefully distinguishes randomized controlled trials (RCTs) from other forms of experimentation, which are associated with the concept of “experimentalist governance”. The central point of his piece is to call attention to the fact that institutional bypasses are primarily associated with “experimentalist governance” and to warn the reader of the limited inferences one can make based on the type of experimentation proposed in our book. More specifically, Davis argues that institutional bypasses do not allow us to truly compare the performance of two institutions, in a way that RCTs would. What is being observed is the performance of the bypass along with the dominant institution; we do not know how the bypasses would operate if it were the only institution. Therefore, one has to refrain (or at least be extremely careful) in extrapolating from this experiment to the conclusion that the bypass is a superior institutional arrangement. Only randomized controlled trials would allow us to assert if one arrangement is superior to the other.

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We agree with Davis. Indeed, in our conclusion of the first chapter of the book, we call attention to the fact that an institutional bypass may not perform as robustly, once it becomes the dominant institution, as the conditions under which it is operating will be different from the ones that existed when it was just a bypass. Therefore, a policymaker resorting to an institutional bypass needs to be extremely vigilant of the bypass’s performance over time (rather than assuming that a successful trial will guarantee success moving forward). Indeed, we go beyond that to say that the institutional bypass can start to decay over time; this can be the result of lack of competition, or changing political, economic or social circumstances. Therefore, similarly to any other institution, constant and uninterrupted vigilance and regular adaptations are likely to be required during the lifetime of the bypass. And if the bypass fails again, and there is strong resistance to reform, a bypass of the bypass may be required.

What Davis does not emphasize is the fact that RCTs are not always a feasible option for legal and institutional reforms -- an important point that he has made elsewhere (Davis 2010). The example of policing that Davis mentions, for instance, would probably not be amenable to an RCT. An arrangement in which two different portions of the population had access to different forms of policing



would likely be considered illegal. Indeed, as we mention in the book, the creation of an anti-corruption court in Indonesia has been considered unconstitutional for this very same reason. Duflo and Banerjee have conducted RCTs with police in India, but they were limited to exploring transfers of police officers as an incentive for improvements in performance (Banerjee et al. 2012). In other words, the experiment does not come even close to the scale of experimentation conducted under the UPPs. Therefore, there are situations in which RCTs are not an option.

When RCTs are out of the picture, other forms of experimentalism become relevant. As Davis argues, there is much similarity between the form of experimentalism proposed by institutional bypasses and the one proposed by the literature on “experimentalist governance”: both rely on incrementalism and assessment of outcomes. There are, however, three important differences between them.

One is that “experimentalist governance” not only includes service delivery, but it also includes rule-making functions. Indeed, “experimentalist governance” has been used in a wide array of regulatory sectors in the European Union, such as energy, financial services and food and drug safety (Sabel and Zeitlin 2012). In contrast, the institutional bypasses explored in our book are exclusively related to service delivery within a single jurisdiction. A rule-making bypass within a single jurisdiction would require giving citizens options as to which rules they would like to follow, which can lead to a number of dysfunctionalities. Examples of “experimentalist governance” seem to abound in transnational law often involving supranational institutions, such as the European Union. In these contexts, as one of us has argued (Prado and Hoffman 2019), it is also possible to conceive of rule-making institutional bypasses. Nevertheless, it is not clear whether “experimentalist governance” or rule-making bypasses could be fruitfully used for the kind of domestic institutional reforms that are the focus of our book.

Another distinction between institutional bypasses and “experimentalist governance” is the measurement and assessment of outcomes. There is, indeed, a dimension of institutional bypasses that involves the assessment of an institution’s performance. In the book, we emphasize that a bypass may fail to perform and could, therefore, be closed without disrupting the dominant institution. This requires someone to measure and evaluate the bypass’s performance. However, assessing bypasses seems fundamentally distinct from the assessment conducted under “experimentalist governance”. In the latter, there are technical criteria to define success. For example, the European Union directives for river basins management prioritize quality and sustainability in the use of water resources (Sabel and Zeitlin 2012). To be sure, there is no top down

regulation here: the specific metrics of “good water quality” will be established on a case-by-case basis and be constantly revised, based on experience, according to a deliberative process (Sabel and Zeitlin 2008). In contrast to this, in institutional bypasses, there are no pre-defined goals (not even the open-ended ones that characterize “experimentalist governance”), let alone deliberation. Instead, the outcome is measure by the revealed preferences of the users, who are given a choice between the two options. In this sense, one could argue that institutional bypasses are less elitist and less technocratic than “experimentalist governance”.

A third difference is that “experimentalist governance” often compares institutions operating in different jurisdictions. The existence of two parallel institutions operating side by side places the institutional bypass closer to RCTs than to “experimentalist governance”, in the sense that there is an opportunity to directly compare the performance of both institutions operating under the same conditions. This argument, of course, does not dismiss Davis’ points about the limitations in this form of experimentation. It does challenge, however, the idea that institutional bypasses are similar to “experimentalist governance”.

While both forms of experimentalism do share some common principles, such as an incrementalist approach to reforms, they also have these three significant differences. If we imagined a spectrum of experimentation, with RCTs and “experimentalist governance” at two opposing ends, institutional bypasses could perhaps be placed in between. Maybe bypasses would not be sitting exactly in the middle of the spectrum, being slightly closer to “experimentalist governance” than to RCTs.

In summary, we agree with Davis’ warning about the limitations of the kind of experimentation associated with institutional bypasses. This short commentary just added that randomized controlled trials (RCTs) and “experimentalist governance” are not always an option for institutional and legal reforms, as Davis himself has discussed in his own work. Moreover, while we agree that bypasses share some similarities with “experimentalist governance”, we also argue that there are important differences between them. One important difference is that, in the case of bypasses, the proof of efficacy is what users/citizens prefer, not what experts think is the most effective regime. This, in turn, suggests at least two interesting topics for future research. First, not all individual choices are likely to be optimal either from an individual point of view (as the literature on behavioral economics suggests, by pointing to heuristic biases that afflict individual choices) or from a collective point of view (as the literature on economic externalities shows). It is, therefore, important to investigate conditions under which the costs of these choices may be higher than the benefits. Second, there are different ways of embedding democratic principles in experiment-based decision-making

processes. While “experimentalist governance” does so by using deliberations, bypasses empower users/citizens to vote with their feet. For scholars interested in the legitimacy of experimentation processes, the relative advantages and disadvantages of each of these two forms of democratic decision-making certainly deserve careful scrutiny.

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