SPLITTING THE ATOM OF FALSE SCIENTISM IN CONSTITUTIONAL LAW

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Metaphor can enlighten, but it can also mislead. This Article critiques two metaphors that have become powerful emblems of United States federalism: the "split[ting] the atom of sovereignty" metaphor introduced by Justice Kennedy and the "states as laboratories of democracy" metaphor attributed to Justice Brandeis. These metaphors shape legal and policy debates to this day. And therein lies the rub. We contend that, by wrapping aspects of United States federalism in a false scientism, the metaphors provide misleadingly authoritative cover for the contingent messiness of our constitutional order. The United States' system of "dual sovereignty" is a path-dependent product of history, not a universal, immanent truth. Moreover, the "splitting the atom" metaphor makes a hash of the concept of sovereignty itself. Likewise, although states provide distinctive domains for policy trials that can approximate "field experiments," states are generally not "laboratories" in any meaningful sense. They are commonly not well isolated from one another. Further, state governments are often neither the prime movers for relevant experiments nor the best equipped to conduct informative trials. State-based innovation can also stray from the "of democracy" assumptions of Justice Brandeis's vision, possibly threatening liberal democracy itself. Consequently, uncritical repetition of the "splitting the atom" and "laboratories of democracy" metaphors frequently does more harm than good. We should curtail their use and to the extent we use them, follow Justice Holmes's injunction (prior to becoming a Justice) to wash such concepts in "cynical acid."

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INTRODUCTION

U.S. Supreme Court opinions are not generally known for their poetry—or even their prose. Indeed, there might be a problem if there were too much "poetry" in judicial opinions. The Supreme Court's Justices need not campaign for election or reelection after having secured their lifetime appointments, and as Mario Cuomo famously observed, politicians may campaign in poetry but must, for better or worse, govern in prose.[1] The latter part of this observation might be considered especially true for the governance task of judging. The solemn nature of adjudicating bitterly contested public or private disputes can make extended versification in judicial opinions seem flippant, diversionary, or obscurantist.[2] Still, Justices' opinions need not be a desert of plain language. Occasionally, a turn of judicial phrase takes flight and is embraced as embodying a key aspect of our legal system or its heritage. But the success of the Court in generating a meme is not always for the best. Widely propagated and sticky metaphors can turn out to be problematic because of metaphor's natural capacity to mislead or distract as well as to enlighten. In a world where difficulties with maintaining and revitalizing democratic dialogue are front and center[3] and invocations of scientific authority have featured prominently in efforts to obscure political and subjective value choices during the COVID-19 pandemic,[4] reconsideration of the use of references to science in legal and democratic dialogue cannot be more timely.

This Article focuses on two metaphors that have become emblematic of modern understandings of United States federalism: the "split[ting] the atom of

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1. *See* Maurice Carroll, *Cuomo, at Yale, Urges Democrats to Remain with Tested Principles*, N.Y. TIMES, Feb. 16, 1985, at 26 ("The truth is we campaign in poetry, but when we're elected we're forced to govern in prose.").

2. *See* Mary Kate Kearney, *The Propriety of Poetry in Judicial Opinions*, 12 WIDENER L.J. 597, 606–09 (2003) (discussing criticisms of "rhymed verse" in judicial opinions).

3. *See, e.g.*, J. Cherie Strachan & Michael R. Wolf, *Can Civility and Deliberation Disrupt the Deep Roots of Polarization? Attitudes Toward Muslim Americans as Evidence of Hyperpolarized Partisan Worldviews*, *in* A CRISIS OF CIVILITY? POLITICAL DISCOURSE AND ITS DISCONTENTS 113, 113 (Robert G. Boatright et al. eds., 2019) ("A resurgence of civil discourse is key to American democracy's viability.").

4. *See, e.g.*, Alex Stevens, *Governments Cannot Just 'Follow the Science' on COVID-19*, 4 NATURE HUM. BEHAV. 560, 560 (2020) ("[T]o rely on science as the determining influence in policy is to misunderstand what science is.").

sovereignty" metaphor introduced by Justice Anthony Kennedy in 1995[5] and the "states as laboratories of democracy" metaphor attributed to a dissenting opinion by Justice Louis Brandeis in 1932.[6] Beyond continued use by various Justices, these metaphors regularly feature in legal briefs, law review articles,[7] and the popular press. The laboratories metaphor is a particular favorite of news and editorial pages—whether in relation to abortion[8] or gun[9] rights, term limits for elected officials,[10] the decriminalization of marijuana use,[11] social media regulation,[12] or tax policy.[13]

The Brandeis and Kennedy metaphors both frame discussions of United States federalism. But they also share another trait that we highlight. These metaphors wrap a vision of United States federalism in an aura of science. They thereby generate a false sense of scientific legitimacy or even infallibility for aspects of U.S. governance that are better viewed as contestable and contingent. We contend that the false scientism of these metaphors and their potential to warp and dampen debate make them more pernicious than helpful. On balance, we would often do better to avoid them than to attempt to rehabilitate them with qualifications and caveats. There might be a more generally applicable lesson here for best practices

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5. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

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

7. *See, e.g.*, Jack Goldsmith & Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, 101 TEX. L. REV. 1083, 1087 (2023) (noting that federalism "lets states serve as 'laboratories' that can experiment with various options and show the way for other states (and perhaps for an eventual national rule)").

8. *See, e.g.*, Howard Fischer, *Ducey Files Brief Supporting Abortion Ban After 15 Weeks*, HERALD/REVIEW MEDIA, https://www.myheraldreview.com/news/state/ducey-files-brief-supporting-abortion-ban-after-15-weeks/article_d1f1007a-f188-11eb-8ab5-8b3b494c3445.html [https://perma.cc/8KGG-V673] (Sept. 5, 2022) (quoting a governors' amicus brief that used the laboratories metaphor in arguments relating to abortion rights).

9. *See, e.g.*, Steven Lemongello, *State Revives Campus Gun Legislation*, ORLANDO SENTINEL, Jan. 13, 2019, at A1 (quoting a state representative who used the laboratories metaphor in relation to a bill to broaden gun rights).

10. *See, e.g.*, Byron Williams, *The Unintended Consequences of Term Limits for Politicians*, WINSTON-SALEM J., Apr. 24, 2022, at C12 (citing Justice Brandeis in using the laboratories metaphor).

11. *See, e.g.*, Editorial, *Will Efforts to Legalize Weed Go Up in Smoke?*, HOUS. CHRON., Apr. 5, 2022, at A9 ("If states are still considered laboratories for democracy, then these successful experiments [in legalization or decriminalization] should make clear federal prohibition should end.").

12. *See, e.g.*, Avi Asher-Schapiro, *U.S. States Take Center Stage in Battles for Control over Social Media*, REUTERS (June 16, 2022, 1:19 PM), https://www.reuters.com/legal/litigation/us-states-take-center-stage-battles-control-over-social-media-2022-06-16/ [https://perma.cc/7B7J-PKHG] (quoting an advocate of "more regulation of tech platforms" as saying, "States are the laboratories of democracy").

13. *See, e.g.*, Gene Barr, *Unleash Pa. Growth: Cut Corporate Taxes, Red Tape*, LEBANON DAILY NEWS, June 5, 2022, at A10 (using the laboratories metaphor in advocating "pro-growth tax and regulatory reform").

in using, as opposed to abusing, scientific ideas and expertise in a democratic society.[14]

This Article proceeds as follows. In Part I, we discuss general issues with the use and abuse of metaphors and broach the problem of false scientism in the "splitting the atom" and "laboratories of democracy" metaphors. In Parts II and III, we further analyze the origins, prevalence, and faults of these metaphors. We show how, even as the substance of U.S. Supreme Court rulings justifiably draws the lion's share of attention, two of the Court's favored rhetorical flourishes warrant misgivings and indeed, rejection. In this case, at least, prose in the form of more pedestrian attention to legal, historical, and practical realities would be preferable to the established poetry even if—and in fact partly because—such prose might be more likely to invite critical thought, as well as a law clerk's (or law review editor's) demand for supporting citations.

I. ON THE USES AND ABUSES OF METAPHORS

One might respond that we are far too grumpy about what are, after all, the inevitable limitations of figures of speech. Metaphors are ubiquitous in human communication and thought,[15] including legal communication and thought.[16] Metaphors are also all but intrinsically vulnerable to criticism because they by definition involve an assertion of equivalence where there is, in fact, difference.[17] As a standard dictionary states, metaphor is "the application of a name or descriptive term or phrase to an object or action to which it is imaginatively but not literally applicable."[18] For the metaphor to avoid being misleading—or for that matter, to avoid being simply nonsensical—the audience for a metaphor needs to be able to make the correct imaginative leap, picking out the relevant quality or qualities shared by the metaphor's object and the associated descriptive language. The audience member's participation in this imaginative leap can, in turn, give a metaphor special persuasive force by providing "a fresh perspective" on previously known facts that "strikes . . . with a shock of recognition."[19] In the book *The*

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14. *See, e.g.*, David Leonhardt, *Follow the Science?*, N.Y. TIMES, Feb. 12, 2022, at A12 (noting a tendency for participants in "the angry, polarized Covid debates on social media and cable television" to "pretend that science offers an unambiguous answer," rather than evidence of "trade-offs" that science cannot resolve).

15. *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 3 (1980) ("[M]etaphor is pervasive in everyday life, not just in language but in thought and action.").

16. *See* STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 43 (2001) ("Metaphor is a central modality of human thought without which we cannot even begin to understand the complex regularities of the products of the human mind."); Raymond W. Gibbs, Jr., *Embodied Metaphor in Persuasive Legal Narrative*, *in* NARRATIVE AND METAPHOR IN THE LAW 90, 90 (Michael Hanne & Robert Weisberg eds., 2018) ("It is almost impossible to talk about many abstract legal concepts without metaphor rushing in . . . .").

17. *E.g.*, MONROE C. BEARDSLEY, THINKING STRAIGHT: PRINCIPLES OF REASONING FOR READERS AND WRITERS 241 (2d ed. 1956) (describing a "metaphorical statement" as having the property that "[i]t cannot literally be true"); Harold Anthony Lloyd, *Law as Trope: Framing and Evaluating Conceptual Metaphors*, 37 PACE L. REV. 89, 91 (2016) ("Metaphors literally equate different things (as in 'law is a gnarly tree') . . . .").

18. *Metaphor*, THE OXFORD AMERICAN DICTIONARY OF CURRENT ENGLISH (1999).

19. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 150 (1990).

Problems of Jurisprudence, Judge Richard Posner offered as an example of this potential effect "the efforts to defend the [*Roe v. Wade*[20]] abortion decision by comparing the pregnant woman forbidden to abort her fetus to a bystander forced . . . to render nine months of life support to a stranger."[21] That such a metaphor can provide insight but can also gloss over important distinctions has been recognized since at least the time of Aristotle.[22]

But the fact that metaphors are both common and almost necessarily imperfect should not insulate them from critique. A newly invoked metaphor might be especially likely to facilitate new outlooks on even old problems.[23] The flip side, however, is that routine invocation of an established metaphor can entrench modes of thinking that are exclusionary, misleading, or otherwise wrongheaded.[24] George Lakoff and Mark Johnson have contended, for example, that characterizing labor as a "resource" disentangles the concept of labor from the person "who performs it, how [they] experience[] it, and what it means in [their] life, hid[ing] the issues of whether the work is personally meaningful, satisfying, and humane."[25] Haig Bosmajian criticized Supreme Court Justices' "constant invocation" of Justice Oliver Wendell Holmes, Jr.'s "marketplace of ideas" metaphor because of its tendency to "misle[ad] us into a passive acceptance" of a warped vision of reality.[26] To be sure, one may continue to refer reasonably to a "marketplace of ideas," but one should recognize that today's "marketplace" is very different from the world of town squares "for small farmers and tradespeople to bargain, trade, buy, and sell" that Justice Holmes presumably had in mind.[27] Perhaps even more critically, one

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20. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

21. POSNER, *supra* note 19, at 150; *id.* at 349–50 (citing as the source of the metaphor Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFS. 47 (1971)).

22. *See, e.g.*, Donna Greschner, *The Supreme Court, Federalism and Metaphors of Moderation*, 79 CAN. BAR REV. 47, 51 (2000) ("As Aristotle first said, good metaphors offer fresh insight."); J. Christopher Rideout, *Penumbral Thinking Revisited: Metaphor in Legal Argumentation*, 7 J. ASS'N LEGAL WRITING DIRS. 155, 156 (2010) ("Aristotle, like so many to follow, found a dual nature to metaphors: they are something to be mastered and used well . . . but with caution and with an understanding of their peculiar nature.").

23. Linda L. Berger, *Metaphor and Analogy: The Sun and Moon of Legal Persuasion*, 22 J.L. & POL'Y 147, 149 (2013) ("[N]ovel metaphors tend to be more capable of generating knowledge while conventional metaphors tend to provide categories into which new information is unthinkingly slotted.").

24. *See* BEARDSLEY, *supra* note 17, at 245 ("But the trouble with all metaphors is that they have a strong pull on our fancy. They tend to run away with us. Then we find that our thinking is directed, not by the force of the argument at hand, but by the interest of the image in our mind."); *see also* MILNER S. BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY 27 (1985) (contending that the metaphor of "[l]aw as bulwark of freedom" denigrates justice relative to law and facilitates law becoming merely "the systemic, degenerative brute force of the powerful"); Greschner, *supra* note 22, at 52 (stating that metaphors' "partiality . . . may justify degrading and exclusionary actions").

25. LAKOFF & JOHNSON, *supra* note 15, at 67.

26. HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS 70–71 (1992).

27. *Id.* at 59–60.

should recognize that this marketplace, like many markets, suffers from severe imperfections.

Regardless, Justice Holmes himself would have agreed that almost any decades-old metaphor is likely to require caution in use and might even more generally add relatively little value. As later Columbia Law School professor Robert Ferguson[28] noted in 1988, Holmes, "heavily influenced by Ralph Waldo Emerson, kn[ew] that 'any idea that has been in the world for twenty years and has not perished has become a platitude although it was a revelation twenty years ago.'"[29] Per Ferguson, Holmes also believed that "routinization destroys the essence of meaningful thought."[30] As Holmes put it, "[t]o rest upon a formula is a slumber that, prolonged, means death."[31]

Consistent with Holmes's ruminations, a sad fact is that the very success of a metaphor can lead to longevity that substantially erodes the metaphor's net utility. In this vein, then-Judge Cardozo long ago warned that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[32] Justice Kennedy's "splitting the atom" metaphor and Justice Brandeis's "laboratories of democracy" metaphor are, we believe, grounded in unjustified assumptions that made the metaphors problematic even at the outset. But the metaphors' pervasiveness and longevity have turned these initial blemishes into significant impediments to thoughtful analysis.

The danger from these metaphors is sharpened by their wrapping of operative ideas in a mantle of (pseudo)scientific authority or inevitability. This is obtrusively the case with the "splitting the atom" metaphor. Through this metaphor, U.S.-style federalism manifests not as a mere product of late eighteenth-century political improvisation but instead as a Newtonian-level scientific breakthrough through which the Framers discovered a mechanism for unleashing enormous stores of political energy. Given the inherency of U.S.-style federalism's genius according to the metaphor, there is apparently no need for reference to the U.S. Constitution's

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28. Robert A. Ferguson, *Tribute to Judge Richard A. Posner*, 61 N.Y.U. ANN. SURV. AM. L. 1, 4 (2005) (indicating the author's position and affiliation).

29. Robert A. Ferguson, *Holmes and the Judicial Figure*, 55 U. CHI. L. REV. 506, 522 (1988) (quoting Oliver Wendall Holmes, *Law and Social Reform*, *in* THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS 399, 399–400 (Max Lerner ed., 1943)).

30. *Id.*

31. *Id.* (quoting OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 306 (1920)).

32. Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926); *see also* BOSMAJIAN, *supra* note 26, at 205 ("[I]t is especially incumbent that judicial tropes be identified and examined, for the acceptance or rejection of specific metaphors, metonymies, and personifications of the law will determine the legal principles and doctrines by which we will be guided and ruled."); Andreas Philippopoulos-Mihalopoulos, *Flesh of the Law: Material Legal Metaphors*, 43 J.L. & SOC'Y 45, 50 (2016) ("We are so conditioned by the ruling metaphors of law that a) we do not question them and b) we allow them to carry on determining the way we stand in relation to the law, since we cannot even imagine a different way.").

literal starting point—"We the People"[33]—never mind historically contingent norms regarding how such a bilevel system of government is to operate. The metaphor subtly espouses a vision resonant with a common poster saying: "Gravity isn't just a good idea, it's the law."[34] Per Justice Kennedy's "splitting the atom" metaphor, U.S.-style federalism does not simply reflect a legitimately debatable set of ideas. It is, instead, an always immanent optimum that the Framers had the lucky brilliance to discover.

The "laboratories of democracy" metaphor is less obviously grandiose, but it likewise abstracts away from the common messiness of polycentric democracy. As repeated, Justice Brandeis's metaphor fails to acknowledge either the role of state citizens as "lab rats" in its posited experiments or the extent to which the interconnectedness of states often frustrates any hypothesized capacity for them to operate effectively as independent laboratories—i.e., as places that are isolated enough to run probative experiments that do not inflict excessive negative externalities on other polities that lack representation in the experimenting state's governance.[35] Hence, Charles Tyler and Dean Heather Gerken refer to "the myth of the laboratories of democracy" in part because there is almost no plausible connection between the conditions for expert and controlled experimentation that we usually associate with scientific laboratories and the very peculiar fields for experimentation that our actual state governments afford.[36]

The above is a motivational start for the detailed critiques of the "splitting the atom" and "laboratories of democracy" metaphors that follow. Part II focuses on Justice Kennedy's "splitting the atom" metaphor. Part III focuses on Justice Brandeis's "laboratories of democracy."

II. "SPLITTING THE ATOM OF SOVEREIGNTY"

A. Origin and Continued Use of the "Splitting the Atom" Metaphor

Justice Anthony Kennedy's 1995 description of the Constitution's Framers as having "split the atom of sovereignty"[37] ranks as perhaps the most well-known and oft repeated turn of phrase he made in his official capacity.[38] Repetition at the

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33. U.S. CONST. pmbl.

34. J. Gilmour Sherman, *Reflections on PSI: Good News and Bad*, 25 J. APPLIED BEHAV. ANALYSIS 59, 63 (1992) (internal quotation marks omitted).

35. *See infra* notes 155–73 and accompanying text.

36. Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2199–202 (2022) (describing obstacles to effective innovation in state governance).

37. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

38. *See, e.g.*, Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792, 1794 (2019) (describing the "splitting the atom" metaphor as "one of the most influential metaphors in modern American law"); Michael C. Dorf, *Justice Kennedy's Genius*, 13 CHARLESTON L. REV. 97, 102 (2018) ("'The Framers split the atom of sovereignty,' Justice Kennedy famously wrote in a 1995 concurrence . . . ." (quoting *U.S. Term Limits, Inc.*, 514 U.S. at 838 (Kennedy, J., concurring)); Cheryl Ann Krause et al., *In Tribute: Justice Anthony M. Kennedy*, 132 HARV. L. REV. 1, 6 (2018) (noting as an illustration of "the long-term vision" that Justice Kennedy brought to the law how "[t]he concept of

Supreme Court has been not so much by Justice Kennedy himself, whose opinions appear to feature the phrase only one additional time.[39] Instead, other Justices have run with the metaphor[40]—even in writing opinions opposed to Justice Kennedy's own.[41] If anything, the Justices' use of the metaphor appears to have quickened after Justice Kennedy's retirement in 2018: the metaphor has appeared in at least five opinions penned by Justices—three of them opinions of the Court—since the start of June 2019.[42] The three cases in which these opinions appear merit attention.

In *Gamble v. United States*,[43] both the majority and dissenting opinions used the metaphor to set the basic terms of constitutional debate.[44] *Gamble* was a

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federalism was brought to life as '[t]he Framers split[ting] the atom of sovereignty'" (quoting *U.S. Term Limits, Inc.*, 514 U.S. at 838 (Kennedy, J., concurring)); Kathleen Parker, *The Economy Shall Reopen, by Order of King Trump*, VALLEJO TIMES-HERALD, Apr. 15, 2020, at 3 (quoting Justice Kennedy in response to President Trump's "insist[ence] that he has 'ultimate authority' to order states to get back to work").

39. *See* Alden v. Maine, 527 U.S. 706, 750–53 (1999) (Kennedy, J.) (using the metaphor in support of a holding that the federal government lacks power to abrogate state sovereign immunity for purposes of a private suit for damages in a state's own courts).

40. *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 504 n.17 (1999) (Stevens, J.) (quoting *U.S. Term Limits, Inc.*, 514 U.S. at 838); District of Columbia v. Heller, 554 U.S. 570, 652 (2008) (Stevens, J., dissenting) (describing constitutional compromises on "allocation of military power" as "quintessential examples of the Framers' 'split[ting] the atom of sovereignty'" (quoting *Saenz*, 526 U.S. at 504 n.17)); Bush v. Gore, 531 U.S. 98, 142 (2000) (Ginsburg, J., dissenting) (describing the notion that "'[t]he Framers split the atom of sovereignty'" as representative of "the core of federalism, on which all agree" (quoting *Saenz*, 526 U.S. at 504 n.17)); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 150 (1996) (Souter, J., dissenting) (including the "splitting the atom" metaphor in a parenthetical supporting the statement that "this federal arrangement of dual delegated sovereign powers truly was a more revolutionary turn than the late war had been").

41. *See, e.g.*, *Alden*, 527 U.S. at 799–800 (Souter, J., dissenting) (arguing that, "[o]nce 'the atom of sovereignty' had been split, . . . the general scheme of delegated sovereignty as between the two component governments of the federal system was clear" and established that "[t]he State of Maine is not sovereign with respect to the national objectives of the [Fair Labor Standards Act]").

42. *See* Gamble v. United States, 139 S. Ct. 1960, 1968 (2019) (Alito, J.) ("[T]he people, by adopting the Constitution, 'split the atom of sovereignty.'" (quoting *Alden*, 527 U.S. at 751)); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2202 (2020) (Roberts, C.J.) ("At the highest level, [the Framers] 'split the atom of sovereignty' itself into one Federal Government and the States."); Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S. Ct. 1002, 1011 (2022) (Alito, J.) ("[O]ur Constitution 'spli[t] the atom of sovereignty.'" (quoting *Alden*, 527 U.S. at 751)); *Gamble*, 139 S. Ct. at 1999 n.26 (Gorsuch, J., dissenting) ("The American people 'split the atom of sovereignty' . . . to set two levels of government against each other, not to set both against the people." (internal quotation marks omitted)); *Seila*, 140 S. Ct. at 2226 (Kagan, J., dissenting) ("The Constitution's first three articles, the majority recounts, 'split the atom of sovereignty' among Congress, the President, and the courts.").

43. 139 S. Ct. 1960 (2019).

44. *See id.* at 1968 (Alito, J.) (invoking the notion that "the people, by adopting the Constitution, "'split the atom of sovereignty'" (quoting *Alden*, 527 U.S. at 751)); *id.* at 1999 n.26 (Gorsuch, J., dissenting) (repeating the "splitting the atom" metaphor but contending that the splitting was done "to set two levels of government against each other, not to set both against the people").

many-pages, many-separate opinions case in which the metaphysics of "dual sovereignty" took pride of place. Indeed, the central principle at issue in *Gamble* was the so-called "'dual-sovereignty' doctrine," under which "a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign."[45] The majority held that, despite the U.S. Constitution's Double Jeopardy Clause, Mr. Gamble could be tried for the same acts by both the United States and Alabama because, after all, he violated the laws of each separate sovereign—thereby committing constitutionally distinct offenses.[46] Justice Alito's opinion for the Court explained:

> Under this "dual-sovereignty" doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute.
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> Or the reverse may happen, as it did here.[47]

Dissenting opinions by both Justice Ginsburg and Justice Gorsuch responded to the majority opinion by highlighting their views of "We the People" as the true locus of a sovereignty that is not cleanly divided between separate federal and state fragments.[48] Instead, in their accounts, sovereignty resides fundamentally in a united people for whom state and federal governments are chosen governmental instruments.[49] Justice Ginsburg asserted, "The notion that the Federal Government and the States are separate sovereigns overlooks a basic tenet of our federal system" by "treat[ing] governments as sovereign," rather than "the people"—"the governed."[50] Justice Gorsuch similarly contended:

> [The majority's] argument errs from the outset. The Court seems to assume that sovereignty in this country belongs to the state and federal governments, much as it once belonged to the King of England. But as Chief Justice Marshall explained, "[t]he government

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45. *Id.* at 1964.

46. *Id.*

47. *Id.*

48. *See id.* at 1990 (Ginsburg, J., dissenting) (contending that "the Federal and State Governments should be disabled from accomplishing together 'what neither government [could] do alone—prosecute an ordinary citizen twice for the same offence'" (quoting Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 2 (1995)); *id.* at 1999 (Gorsuch, J., dissenting) ("Without meaningful support in the text of the Double Jeopardy Clause, the government insists that the separate sovereigns exception is at least compelled by the structure of our Constitution.").

49. *See supra* note 48.

50. *Gamble*, 139 S. Ct. at 1990 (Ginsburg, J., dissenting). Confusing use of "sovereign" in referring to states arguably traces back at least to Chief Justice Marshall's opening line in *McCulloch v. Maryland*, in which he explicitly describes Maryland as "a sovereign state" even though the point of the opinion is to demonstrate that Maryland is thoroughly subordinate to the national government with regard to its taxing power. 17 U.S. (4 Wheat.) 316, 400–03 (1819); *see also* Sanford Levinson, *The Confusing Language of* McCulloch v. Maryland*: Did Marshall Really Know What He Was Doing (or Meant)?*, 72 ARK. L. REV. 7, 21 (2019) ("I have for many years been perplexed why Marshall, an unusually skilled rhetorician, chose to begin the opinion this way."); Sanford Levinson, McCulloch II*: The Oft-Ignored Twin and Inherent Limits on "Sovereign" Power*, 19 GEO. J.L. & PUB. POL'Y 1, 7 (2021) ("Maryland's 'sovereignty' is in tatters by the end of the opinion . . . .").

> of the Union . . . is emphatically, and truly, a government of the people," and all sovereignty "emanates from them." . . . Under our Constitution, the federal and state governments are but two expressions of a single and sovereign people.[51]

Thus, Justices Ginsburg and Gorsuch both contested the "splitting the atom" metaphor's sly excision of "We the People" from the picture.

Nonetheless, Justice Gorsuch's dissent also demonstrated how an entrenched metaphor can exert power even as its limitations are highlighted. In a footnote, Justice Gorsuch sought to square his vision "of a single sovereign people" with the "splitting" metaphor by saying, "The American people 'split the atom of sovereignty' . . . to set two levels of government against each other, not to set both against the people."[52] Gorsuch's line of argument presumably would have been cleaner if, like Justice Ginsburg, he rejected or simply ignored the metaphor. By accepting the metaphor, he effectively had to rhetorically concede (as Justice Ginsburg did not) that the federal and state governments possessed sovereignty, albeit sovereignty that they "ultimately derive . . . from one and the same source," the people.[53] Justice Gorsuch's rhetorical struggles are a poignant example of how an accepted metaphor can frame the terms of debate as well as (and not coincidentally) bias that debate's outcome—here by driving Gorsuch to persuasiveness-reducing incoherence in asserting the people's sovereignty while also describing state and federal governments as possessing that quality.

A somewhat different lesson about the power and perils of metaphor appears in the opinion for the Court written by Chief Justice Roberts in *Seila Law LLC v. Consumer Financial Protection Bureau*[54] and the dissenting opinion in that case from Justice Kagan.[55] *Seila* concerned a question of separation of powers: the Court in *Seila* held that Congress had enacted a statute that unconstitutionally restricted the President's power to remove the director of the Consumer Financial Protection Bureau ("CFPB"), a new federal agency "wield[ing] significant executive power."[56] Hence, *Seila* turned on questions of "horizontal separation of powers"[57] within the federal government that had little directly to do with the "vertical separation of powers"[58] questions of constitutional federalism for which the

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51. *Gamble*, 139 S. Ct. at 1999 (Gorsuch, J., dissenting).

52. *Id.* at 1999 n.26 (Gorsuch, J., dissenting) (internal quotation marks omitted).

53. *Id.*

54. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2202 (2020).

55. *Id.* at 2226 (Kagan, J., dissenting) (discussing the majority's "Schoolhouse Rock definition" of "separation of powers").

56. *Id.* at 2192.

57. *See, e.g.*, Jonathan Remy Nash, *Secondary Prosecutors and the Separation-of-Powers Hurdle*, 77 N.Y.U. ANN. SURV. AM. L. 33, 34 (2022) ("[S]eparation of powers among the three branches of the federal government; this is often referred to as 'horizontal separation of powers.'").

58. *See id.* (describing the "separation of powers between the federal (national) government and the states" as "so-called 'vertical separation of powers'"); *see also* Peter Cane, *Executive Primacy, Populism, and Public Law*, 28 WASH. INT'L L.J. 527, 558–59 (2019) (noting that, whereas "Montesquieu was concerned with what we might call 'horizontal' separation of powers between the main governmental organs in a polity[,]" "[a]

"splitting the atom" metaphor was developed. Roberts connected the two forms of separation of powers, however, by indicating that they both reflected the Framers' basic "solution to governmental power and its perils": namely, to "divide it."[59] "At the highest level, they 'split the atom of sovereignty' itself into one Federal Government and the States. They then divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.'"[60] The "splitting the atom" metaphor thus featured in an effort to show the depth of a general constitutional commitment to preventing concentrations of power (outside the constitutional commitment to a unitary presidency[61]) and thereby to help justify a decision that effectively limited the CFPB director's power by placing the director more firmly under the thumb of the President.

Even in dissent, Justice Kagan unfortunately reinforced the Chief Justice's recruitment of the metaphor to support a particular understanding of horizontal separation of powers. To some extent, she did this by misstating what she characterized as the majority's "Schoolhouse Rock" account of separation of powers.[62] Whereas Chief Justice Roberts's opinion had only used the "splitting the atom" metaphor to describe the Framers' vertical division of power between the federal and state governments, Kagan's opinion stated, "The Constitution's first three articles, the majority recounts, 'split the atom of sovereignty' among Congress, the President, and the courts."[63] The errant description of the majority's account seems substantially to have been a mistake against interest: Kagan's opinion proceeded to contend that, "by design," the federal legislative, executive, and judicial powers are interconnected and interdependent.[64] This argument was basically at odds with the "splitting the atom" metaphor's imagery of a fission reaction that generates discrete and rapidly (indeed explosively) separating fragments of a previous conceptual whole. But the metaphorical damage was done: as in Justice Gorsuch's dissent in *Gamble*, unwillingness to eschew the "splitting the atom" metaphor hobbled an effort to push against a conclusion for which the metaphor was a more straightforward fit.

Happily, there is reason to hope that Justice Kagan's description of horizontal separation of powers as a feat of sovereignty fission will not catch on. Although it has become conventional to describe sovereign power as residing separately in the states and in the federal government, it is not conventional to describe separate branches of the federal government as separate sovereigns, even if they are understood as separately wielding aspects of the federal government's sovereign power. Regardless of whether Kagan's arguable malapropism catches on,

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further complexity [Montesquieu] did not have in mind is 'vertical' separation of powers between large, central government institutions and smaller, more localised institutions").

59. *Seila,* 140 S. Ct. at 2202.

60. *Id.* (internal citation omitted).

61. *Id.* ("Aside from the sole exception of the Presidency, [our constitutional] structure scrupulously avoids concentrating power in the hands of any single individual.").

62. *Id.* at 2226 (Kagan, J., dissenting).

63. *Id.*

64. *Id.* ("The problem lies . . . in failing to recognize that the separation of powers is, by design, neither rigid nor complete.").

however, its appearance illustrates how reflexive and rhetoric-distorting the reach of the "splitting the atom" metaphor has become.

By comparison, the most recent appearance of the "splitting the atom" metaphor in a Supreme Court opinion is somewhat mundane. In writing the opinion for the Court in *Cameron v. EMW Women's Surgical Center*, Justice Alito returned to the "splitting the atom" well.[65] On the way to holding that a state attorney general was entitled to intervene in defense of a state law regulating abortion,[66] Alito's opinion for the Court emphasized "constitutional considerations" in favor of upholding the attorney general's right to intervene.[67] Alito launched his discussion of such considerations by stating, "As we have observed, our Constitution 'spli[t] the atom of sovereignty.'"[68] The opinion thereby used the metaphor to help make a relatively conventional point that the states "retained a residuary and inviolable sovereignty" after the U.S. Constitution's adoption, as well as the further, more specific point that a state possesses a "legitimate" and "significant" interest in upholding and enforcing its laws.[69] The reference to state sovereignty and constitutional federalism was arguably gratuitous, however, in that Justice Kagan's opinion concurring in the judgment made a strong case that "no invocation of, or lofty observations about, the Constitution," were necessary to "show why the Sixth Circuit went wrong" by denying the attorney general's motion to intervene.[70] If anything, the primary concern highlighted by *Cameron* might be the "splitting the atom" metaphor's capacity to insinuate its way into the explanation of a decision that was justifiable on purely non-constitutional grounds.

Of course, the "splitting the atom" metaphor has also appeared outside Supreme Court Justices' opinions. Predictably, the Supreme Court's metaphorical practices trickle down to the rest of the legal community. Even after Justice Kennedy's retirement, federal district and court of appeals judges have continued to treat the metaphor as legally instructive.[71] Further, legal commentators continue to

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65. Cameron v. EMW Women's Surgical Ctr., P.S.C., 595 U.S. 267, 277 (2022) (using the metaphor).

66. *Id.* at 282 (holding that "the Court of Appeals erred in denying the attorney general's motion to intervene").

67. *Id.* at 276–77.

68. *Id.* at 277–78.

69. *Id.* 277–78 n.4 (internal quotation marks omitted).

70. *Id.* at 291 (Kagan, J., concurring in the judgment).

71. *See, e.g.*, United States v. Kelley, 40 F.4th 276, 284 (5th Cir. 2022) (using the splitting metaphor in support of the notion that a state county had a capacity to prosecute a defendant separate from that of the federal government); Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev., 5 F.4th 666, 673 (6th Cir. 2021) (Thapar, J., concurring) (noting that "our Founders did not just 'split the atom of sovereignty'" but also "separated powers *within* the Federal Government"); Leaders of a Beautiful Struggle v. Balt. Police Dep't, 2 F.4th 330, 362–64 (4th Cir. 2021) (en banc) (Wilkinson, J., dissenting) (supporting dissent from the majority's "precipitous strike" against a municipal program for aerial surveillance by invoking "[t]he unique genius of our Founding Fathers [in] 'split[ting] the atom of sovereignty'"); MillerCoors LLC v. Anheuser-Busch Cos., LLC, 940 F.3d 922, 932 (7th Cir. 2019) (Hamilton, J., dissenting) (invoking the splitting metaphor in support of the notion that trial and appellate courts can sometimes have concurrent "jurisdiction over a case or portion of a case"); Ohio v. Yellen, 539 F. Supp. 3d 802, 808 (S.D. Ohio 2021) ("Under our

quote it as embodying a principal understanding, if not the dominant understanding, of the basic nature of United States federalism.[72] For the foreseeable future, the "splitting the atom" metaphor seems likely to be a major reference point for constitutional explanation and argument. Section II.B explains why this is cause for regret.

B. Problematic Scientism in the "Splitting the Atom" Metaphor

The problems with the "splitting the atom" metaphor are manifold and deep. The metaphor has drawn repeated critiques for wrongly suggesting that the sovereign states and sovereign federal government were birthed through a single founding "bang"[73] and relatedly, for suggesting that the work of the Philadelphia Convention was primarily one of fission, rather than fusion.[74] But the Supreme Court's penchant for contributing to distorted or even incorrect views of history, ones that become effectively ensconced as precedential legal "fact" even if they are historical fiction, is nothing new.[75] It is often unfortunate but not our focus. Our

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constitutional design, the Framers 'split the atom of sovereignty.'"); Al Shimari v. CACI Premier Tech., Inc., 368 F. Supp. 3d 935, 967 n.14 (E.D. Va. 2019) (using the splitting metaphor in support of the principle that "the federal government may only exercise power that has been legitimately delegated to it by the People").

72. *See, e.g.*, Eric W. Orts, *Senate Democracy: Our Lockean Paradox*, 68 AM. U. L. REV. 1981, 2068 (2019) (stating that "Americans are citizens of both the United States and their individual states" (emphasis omitted) (citing U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (Kennedy, J., concurring))); Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1917 (2019) ("[A]s Justice Kennedy famously said, the American Founders 'split the atom of sovereignty.'" (quoting *U.S. Term Limits, Inc.*, 514 U.S. at 838 (Kennedy, J., concurring))); *cf.* Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 882 (2020) ("If federalism 'split the atom of sovereignty,' the modern administrative state is the nuclear fusion of Diceyan constitutional elements." (footnote omitted) (quoting *U.S. Term Limits, Inc.*, 514 U.S. at 838 (Kennedy, J., concurring))).

73. *See, e.g.*, Sonu Bedi & Elvin Lim, *The Two-Foundings Thesis: The Puzzle of Constitutional Interpretation*, 66 UCLA L. REV. DISCOURSE 110, 125 (2018) ("The view that there was a single, monolithic founding treats the Constitution as 'split[ting] the atom of sovereignty.'" (quoting *U.S. Term Limits, Inc.*, 514 U.S. at 838 (Kennedy, J., concurring))).

74. *See, e.g.*, Ablavsky, *supra* note 38, at 1796 (viewing "the coming of dual federalism . . . as a move from a world in which sovereignty was diffuse toward one where authority was increasingly understood as concentrated in the hands of only two legitimate sovereigns"); Mark R. Killenbeck, *The Physics of Federalism*, 51 U. KAN. L. REV. 1, 4–5 (2002) (describing the Framers as having created (rather than divided) "an atom, with a federal nucleus surrounded by state electrons"); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 908 (1994) ("We have a federal system because we began with a federal system; the new nation consisted of a group of self-governing units that had to relinquish some of their existing powers to a central government.").

75. *See* Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 90 (2013) (describing the phenomena of "historical factual precedents," where "courts invoke what the Supreme Court has said about history without re-examining the relevant historical account"); *cf.* Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 335–36 (2010) (noting that "legal historians . . . have long lamented lawyers' and jurists' efforts to simplify the past for expedient purposes").

primary concern is with the nature of the "splitting the atom" metaphor as an exercise in self-promotional "scientism": one packaging a stylized vision of U.S. federalism as the equivalent of a literally earth-shaking scientific breakthrough, an advance in human capacity that entailed unleashing a new and explosive source of energy through the splitting of actual atoms—historically viewed as indivisible units of matter.[76]

Significantly, the "splitting the atom" metaphor presents the Framers not as forging a practical and historically contingent response to concerns of their time but instead as theorists who discovered an immutable truth or principle akin to a natural phenomenon or natural law: specifically, the viability of dual sovereignty as a peculiarly and perhaps even universally useful principle for advancing interests in both liberty and effective governance. Such legal scientism obscures a long-posited distinction between human and natural laws: the presumed contingency and mutability of the former versus the presumed universality and immutability of the latter.[77] The result is scientism in the service of legal mythology. Provisionally desirable and almost necessarily imperfect human laws—or their dubious interpretations—are airbrushed with a false gloss of unchanging and eternal truth.

Justice Kennedy's fuller passage introducing the "splitting the atom" metaphor highlights its misleading scientism even more than the bare metaphor itself. The full paragraph in which Justice Kennedy introduced the metaphor reads as follows:

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution.[78]

This paragraph adds garlands to the metaphor's dressing up of the creation of the United States' federal system—a creation born of political compromise—as the "genius" "discovery" of a somehow long-hidden but nonetheless immanent possibility,[79] a discovery akin to the great advances in quantum theory brought forth

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76. *See* Duane H. D. Roller, *Greek Atomic Theory*, 49 AM. J. PHYSICS 206, 208 (1981) (describing the original concept of the "atom" as "a tiny, nondivisible, discrete particle, invented by [the Ancient Greek] Leukippos").

77. *See* Bruce P. Frohnen, *Multicultural Rights? Natural Law and the Reconciliation of Universal Norms with Particular Cultures*, 52 CATH. U. L. REV. 39, 51 (2002) (discussing "the classic distinction between natural law, as universal standards of right conduct, and civil law, as the particular laws of nations that put those standards into practice under historically and culturally contingent circumstances").

78. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838–39 (1995) (Kennedy, J., concurring).

79. *Id.* at 838.

by scientific giants such as Niels Bohr and Erwin Schrödinger.[80] Justice Kennedy's use of the word "discovery" is revealing. Beyond implicitly equating the Constitution's Framers to members of a twentieth-century scientific pantheon, the discovery language suggests adherence to what philosophers call the "correspondence theory of truth."[81] Under a standard version of such a theory, progress in science results from getting closer and closer to modeling reality as it truly is.[82] The viability of such a theory has, however, long been contested and is not generally assumed.[83] Similarly, the field of law (and jurisprudence) features differences between those who view law as a process of discovery and those who

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80. *See* RICHARD RHODES, THE MAKING OF THE ATOMIC BOMB 113–15 (1986) (discussing Bohr); *id.* at 128–29 (discussing Schrödinger).

81. *See* Marian David, *The Correspondence Theory of Truth*, *in* THE OXFORD HANDBOOK OF TRUTH 238, 238 (Michael Glanzberg ed., 2018) (describing "the classical formulation of the correspondence theory of truth").

82. *See* Jouni-Matti Kuukkanen, *Kuhn, the Correspondence Theory of Truth and Coherentist Epistemology*, 38 STUD. HIST. & PHIL. SCI. 555, 556 (2007) (characterizing the correspondence theory as involving "the idea that truth consists in a relationship of correspondence between an independent world and our beliefs, theories, and so on"). The scientific historian and philosopher Thomas Kuhn challenged the correspondence theory in his landmark book. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 170 (enlarged 2d ed. 1970) ("We may, to be more precise, have to relinquish the notion, explicit or implicit, that changes of paradigm carry scientists and those who learn from them closer and closer to the truth."). Errol Morris, the distinguished film documentarian (and a former student of Kuhn's at Princeton when Morris was a graduate student in its Program in the History and Philosophy of Science), has published a full-scale attack on what he regards as the pernicious consequences of assertions made by Kuhn, relying on the work of such philosophers as Saul Kripke and others to reject what Morris regards as Kuhn's relativism and essential disregard for the notion of "truth." *See* ERROL MORRIS, THE ASHTRAY (OR THE MAN WHO DENIED REALITY) 31 (2018) ("Relativism, social construction . . . . To some this is Kuhn's most important contribution. To me it is anathema."); *cf.* PETER GODFREY-SMITH, THEORY AND REALITY: AN INTRODUCTION TO THE PHILOSOPHY OF SCIENCE 97 (2003) (criticizing certain "dramatic discussions" by Kuhn for suggesting "that Kuhn seems to think that the belief that we all inhabit a single world, existing independently of paradigms, also commits us to a naïve set of ideas about perception and belief"). *But cf.* Philip Kitcher, *The Ashtray Has Landed: The Case of* Morris vs. Kuhn, L.A. REV. BOOKS (May 18, 2018), https://lareviewofbooks.org/article/the-ashtray-has-landed-the-case-of-morris-v-kuhn/ [https://perma.cc/BL9Q-J545] (characterizing "Kuhnian relativism" as substantially a "caricature" of Kuhn's thought that predated Morris's encounter with it). We do not address those controversies here. The point is that there is no reason to believe that Justices of the Supreme Court of the United States (or, for that matter, any other judges) are sufficiently trained in the complexities of philosophy of science to present genuinely informed views about the deep issues of metaphysics and epistemology presented in that field.

83. *See* Kuukkanen, *supra* note 82, at 556 (discussing Kuhn's challenge to correspondence theory); *cf.* M.J.S. Hodge & G.N. Cantor, *The Development of Philosophy of Science Since 1900*, *in* COMPANION TO THE HISTORY OF MODERN SCIENCE 838, 848 (G.N. Cantor et al. eds., 1996) (observing that, since at least about 1960, a "line of argument explicitly repudiat[ing] any distinction between facts and theories . . . raised a host of problems besetting philosophy of science ever since"). *See generally* GODFREY-SMITH, *supra* note 82, at 186–89 (questioning "the emphasis on truth and reference in philosophy of science" and advocating instead "a broad concept of 'accurate representation' to describe a goal that science has for its theories").

view it as one of conscious and contingent creation and adaptation in response to Holmesian "felt necessities,"[84] or what Chief Justice John Marshall labeled "the various crises of human affairs."[85] Presenting a particular vision of the United States' version of federalism as a discovery simply assumes one of these two viewpoints—specifically, the one that tends to foreclose debate about the value of an associated legal innovation.

The paragraph's unabashedly celebratory tone tends toward the same end. Despite the destructive potential facially implicit in the "splitting the atom" metaphor,[86] Justice Kennedy's paragraph embraces the triumph of "splitting the atom" without acknowledging any dark possibilities thereby enabled. Scientists such as Robert Oppenheimer, the wartime director of the Los Alamos Laboratory, showed more sobriety.[87] Oppenheimer reacted to the first successful test of an atomic bomb in 1945 with an evocation of the Bhagavad Gita: "Now I am become Death, the destroyer of worlds."[88] Nonetheless, despite the historical reality of a Civil War that Garrett Epps has described as an after-effect of "the Framer's 'genius' idea,"[89] those who quote Justice Kennedy thoughtlessly commonly do not convey any ambivalence or recognition of the potentially tragic possibilities inherent in the United States' version of federalism.

Moreover, the scientific sparkle of the "splitting the atom" metaphor can obscure other problems with the vision that it espouses. Ironically or not, the concept of "splitting the atom" ends up making a hash of the concept of sovereignty itself, serving primarily to confuse law students (and their professors) about what is regarded, perhaps falsely, as a key to understanding the American constitutional order.[90] One might be (marginally) more sympathetic to Justice Kennedy's metaphor if the *only* difference between classical notions of sovereignty and standard United States notions of governance turned on the admittedly important issue of divisibility.

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84. *Infra* note 102 and accompanying text.

85. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted).

86. *Cf.* Diane P. Wood, *Indian Sovereignty in Context*, 2022 WIS. L. REV. 211, 213 (2022) (describing the splitting-the-atom metaphor as "[e]vocative language indeed, especially if we contemplate the violence that typically attends atom-splitting").

87. *See* Young-Gun Ko & Jin-Young Kim, *The Los Alamos Dilemma and Psychological Assimilation*, 34 J. PSYCHOHISTORY 60, 61 (2006) (describing scientists at Los Alamos, including "J. Robert Oppenheimer, the research director," as "facing a dilemma: they wanted to end the cruel war that demanded endless killing but at the same time wanted to avoid the use of the atomic bomb that would be recorded as the most atrocious weapon in human history").

88. RHODES, *supra* note 80, at 676 (internal quotation marks omitted).

89. Garrett Epps, *When Republicans Attack States' Rights*, THE ATLANTIC (Mar. 13, 2018), https://www.theatlantic.com/politics/archive/2018/03/when-republicans-become-anti-states-rights/555362/ [https://perma.cc/83QL-JWEQ] ("Splitting atoms is often a mistake; the Framers' 'genius' idea eventually shattered their antebellum Republic over the matter of slavery.").

90. *Cf.* DON HERZOG, SOVEREIGNTY, RIP 49 (2020) ("It might sound logically confounding to say that sovereignty is unlimited, undivided, and unaccountable authority, and then talk about campaigns to limit it, divide it, and hold it accountable.").

But the metaphor problematically obscures the fact that the differences are both more diverse and more substantial.

As University of Michigan political theorist and law faculty member Don Herzog demonstrates in his 2020 book *Sovereignty, RIP*,[91] classical concepts of sovereignty grew out of the thinking of a group of political theorists in the sixteenth and seventeenth centuries who sought solutions to the practical problems posed by seemingly endless, and remarkably vicious and bloody, religious wars.[92] These theorists valorized three seemingly essential characteristics of "sovereignty": omnipotence, indivisibility, and non-accountability.[93]

Monarchs and, for that matter, the British Parliament, had a habit of claiming power within their realms that was subject to no limit except "divine law."[94] Such assertions of omnipotence often linked up with claims of non-accountability. As Hans Morgenthau wrote, "within [a monarch's] territory," the monarch was "the sole source of man-made law . . . but was not himself subject to it."[95] Of course, the Founders of the experiment that became the United States revolted against the British Parliament's claims to sovereign omnipotence in 1776,[96] thereby highlighting American resistance to this classical aspect of sovereignty. But Justice Kennedy's "splitting the atom" metaphor fails to acknowledge this.

The second attribute is the one challenged by Justice Kennedy's talk of "splitting the atom": indivisibility.[97] It had been taken as axiomatic that there could be only *one* sovereign, whether a one-person monarch or later, the British Parliament (or "more technically, the [King or] Queen in Parliament"[98]), acting as a collective body. Nonetheless, as Herzog happily concedes, that ostensible requirement was indeed overridden by Americans stumbling into the creation of our *federal* system.[99] Perhaps it's telling that few of the Founders bothered to explain exactly what their theory of sovereignty was and why American federalism accorded with it.[100] Instead,

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91. *Id.*

92. *See id.* at 14 ("It's no accident that the classic theory of sovereignty is articulated in the sixteenth and seventeenth centuries."); *id.* at 48 (describing the notion of sovereignty as "an intelligible, intelligent response to the savage strife of the wars of religion").

93. *See id.* at 17 (discussing Jean Bodin's view of sovereignty as characterized by unlimited power, indivisibility, and "accountab[ility] only to God").

94. Hans J. Morgenthau, *The Problem of Sovereignty Reconsidered*, 48 COLUM. L. REV. 341, 341 (1948).

95. *Id.*

96. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1430 (1987) ("Colonial leaders took up arms in 1776 [partly] because—as a matter of principle—they could not accept the British idea that Parliament had legitimate authority to do anything it wanted to the colonies.").

97. *See* HERZOG, *supra* note 90, at 94–96.

98. Frederick Pollock, *Sovereignty in English Law*, 8 HARV. L. REV. 243, 243 (1894).

99. *See* HERZOG, *supra* note 90, at 81–84, 115–25.

100. Whatever might have been the intellectual creativity of some of the Founders, it is illuminating, as Amnon Lev has observed, that "the notion of sovereignty is used only sparingly in the federalist papers." Amnon Lev, *Sovereignty and Federalism: Inventing and Reinventing Public Law*, 17 JUS POLITICUM 191, 201 (2017). Indeed, in *Federalist No. 37*,

they acted to respond to what they believed were the political imperatives of the moment, often labeled as "exigencies."[101] As Holmes suggested in another context, in determining rules of human governance, the "felt necessities of the time" and "experience" have commonly taken precedence over the arid "logic" found even in the finest political theories of Hobbes, Bodin, or Grotius—let alone other lesser lights who believed that indivisibility of sovereign power was an analytic rather than a contingent truth.[102]

The final purportedly indispensable essence of "sovereignty" is non-accountability. One might view this property as implicit in the notion of omnipotence. But Herzog, a wonderful miner of quotations, has no trouble finding eminent worthies who proclaim specifically that the sovereign is "above the law" or perhaps, any other human form of accountability. Charles I continued to assert non-accountability to fellow humans even as Cromwellites engaged in what they believed was justified regicide.[103] Blackstone, taken by some to be a great influence on the development of American legal thought, was more than willing to defend the "maxim . . . that the king himself can do no wrong."[104] Per Blackstone, this maxim meant, concretely, "that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him."[105] Blackstone was no softy: he explained that this principle obtained "even though the measures pursued in [the king's] reign be completely tyrannical and arbitrary."[106] Blackstone

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Madison uses the proper nature of federalism as a paradigm example of the inevitable indeterminacies in any effort to design optimal human institutions: Madison dwells on the "arduous" nature of the task of "marking the proper line of partition, between the authority of the general, and that of the State governments," a task complicated by the "indistinctness" of human institutions themselves, "imperfection" in human cognition, and "inadequateness of the vehicle of ideas." THE FEDERALIST NO. 37, at 195, 197 (James Madison) (Clinton Rossiter ed., 1999). Alison LaCroix's study of the intellectual origins of American federalism attempts to mediate between conflicting accounts by contending "that the emergence of American federalism in the second half of the eighteenth century should be understood as primarily an ideological development" culminating in "a belief that multiple independent levels of government could legitimately exist within a single polity, and that such an arrangement was not a defect to be lamented but a virtue to be celebrated." ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 6 (2010).

101. *E.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (contending that, in drafting the Constitution, "[t]o have prescribed the means by which government should, in all future time, execute its powers . . . would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly").

102. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

103. *See* HERZOG, *supra* note 90, at 168–73 (noting that the court that tried Charles I "disdained Charles's conviction that he was accountable only to God").

104. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 237 (1765).

105. *Id.* at 235; *see also id.* at 239 (explaining that the maxim means in part "that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people").

106. *Id.* at 235. Blackstone stressed, however, that subjects might still have remedies. For "private injuries," the subject could seek redress from the king's court of chancery "as a matter of grace, though not upon compulsion." *Id.* at 236. For "ordinary public

further indicated that the king's nonaccountability was a corollary of his "*sovereignty*, or pre-eminence":

> His realm is declared to be an *empire*, and his crown imperial, by many acts of parliament, particularly the statutes 24 Hen.VIII. c.12 and 25 Hen.VIII. c.28; which at the same time declare the king to be the supreme head of the realm, in matters both civil and ecclesiastical, and of consequence inferior to no man upon earth, dependent on no man, accountable to no man.[107]

It was usually conceded that kings were accountable to God,[108] but it was apparently left up to God to figure out how to exercise such accountability.[109]

By focusing attention solely on the Framers' deviation from classical notions of sovereign indivisibility, the "splitting the atom" metaphor can harmfully divert attention from their heterodoxy regarding notions of omnipotence and non-accountability. Here, however, one might be more generous to Justice Kennedy himself (even if not his metaphor), for he was often quite assiduous in rejecting exaggerated claims of authority that affected certain individual rights that he took with consummate seriousness.[110] Despite Justice Kennedy's otherwise expressed concern about the lèse-majesté involved when a state has its "dignity" challenged by the very idea that it might be dragged into court by a common citizen,[111] Justice Kennedy apparently agreed that Congress *can* force states to answer to suits filed by

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oppression," the subject could seek redress against the inevitable "evil counsellors" or "wicked ministers" who could "be examined and punished." *Id.* at 237. Finally, albeit more hazily, in cases of "such public oppressions as tend to dissolve the constitution, and subvert the fundamentals of government, there was precedent for "declar[ing] an abdication, whereby the throne [would be] rendered vacant" through "the exertion of those inherent (though latent) powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish." *Id.* at 238.

107. *Id.* at 234–35. In a footnote to this section in a later, 1803 edition of Blackstone's *Commentaries*, St. George Tucker added, "In the United States of America, all notions of personal pre-eminence are consigned to oblivion, and it is hoped will forever remain buried under the immovable mass of equal rights." 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA *241 n.3 (1803). Tucker might therefore have anticipated our suggestion that, generally speaking, the Framers/Founders did not intend so much to create a regime of dual sovereignty as to bury the classic concept of sovereignty, replacing it with a concept of limited and divided government.

108. *See supra* note 103 and accompanying text.

109. The Catholic Church was quite willing on occasion to stand in for the Divine, which, equally of course, helped provoke the carnage with which Herzog begins his book. *See* HERZOG, *supra* note 90, at 12 ("[I]t's the collision between the success of Protestantism and that older commitment to the unity of Christendom that set Europe ablaze.").

110. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 764, 770 (2008) (Kennedy, J.) (rejecting "[t]he Government's formal sovereignty-based test" for answering the question whether the U.S. Constitution's Suspension Clause applied to "noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty").

111. Alden v. Maine, 527 U.S. 706, 715 (1999) (Kennedy, J.) (declaring that states "retain the dignity, though not the full authority, of sovereignty").

citizens in response to state behavior that contravenes the Fourteenth Amendment.[112] Even if it would violate a state's "dignity" to force it to defend its manifestly unjust (and illegal) treatment of its employees before a court,[113] that interest (and sovereignty) did not extend, say, to defining the family however the state wished.[114] We applaud Justice Kennedy's vote (and aspects of his decision) on this point, but it should be clear that it did not rest on any great respect for state sovereignty.

In sum, our aim in this Part is neither to bury nor to offer exaggerated praise for Justice Kennedy. Rather, it is to suggest that his metaphor of "splitting the atom of sovereignty" offers nothing that aids in understanding the complexities of the American constitutional order, including federalism. The "splitting the atom" metaphor has an excessive tendency to foreclose debate, obscure historical messiness and contingency, and downplay the United States' deviations from classical notions of sovereignty. The metaphor should, as Herzog suggests of the notion of sovereignty itself, be allowed to rest in peace.[115]

III. STATES AS "LABORATORIES OF DEMOCRACY"

Compared to Justice Kennedy's "splitting the atom" metaphor, Justice Louis Brandeis's "laboratories of democracy" metaphor has a longer history and greater pervasiveness in political and journalistic discourse. The metaphor is generally traced back to Justice Brandeis's 1932 dissent in *New State Ice Co. v. Liebmann*,[116] but after several decades, it is more than going strong. In 2001, political scientist G. Alan Tarr asserted that the metaphor had "achieved the status of 'received wisdom' among most proponents of federalism, ritually invoked in judicial opinions, in textbooks, and in social science and legal research."[117] More

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112. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 376 (2001) (Kennedy, J., concurring) ("The predicate for money damages against an unconsenting State in suits brought by private persons must be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the State in its official capacity."); *see also* United States v. Georgia, 546 U.S. 151, 158 (2006) (Scalia, J.) (stating for a unanimous Court that "no one doubts that § 5 [of the Fourteenth Amendment] grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for actual violations of those provisions").

113. *See Garrett*, 531 U.S. at 360 (holding that the Eleventh Amendment barred state employees from "recover[ing] money damages by reason of the State's failure to comply with the provisions of Title I of the Americans with Disabilities Act of 1990"). One of the authors believes *Garrett* to be perhaps the most truly repulsive case in the contemporary canon of constitutional law.

114. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (Kennedy, J.) ("The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.").

115. *Cf.* Roger Michalski, *Fractional Sovereignty*, 13 U.C. IRVINE L. REV. 683, 686 (2023) ("Building conflict of laws rules on [an] outdated view of sovereignty contributes to endless doctrinal riddles, inefficiencies, and is ill-suited for modern conditions and sensibilities.").

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

117. G. Alan Tarr, *Laboratories of Democracy? Brandeis, Federalism, and Scientific Management*, 31 PUBLIUS 37, 38–39 (2001); *cf.* Michael S. Greve, *Laboratories of*

recently, Charles Tyler and Dean Heather Gerken noted that, "as of November 2022, Westlaw contained over 3,000 law review articles citing *New State Ice* for Justice Brandeis's 'laboratories' idea."[118] As indicated earlier, in public discussion of a great variety of forms of actual or potential state regulation or deregulation—relating to abortion, guns, drugs, social media, elections, taxes, etc.[119]—references to the states as laboratories are rife. Moreover, the metaphor remains a mainstay in the courts.[120] Judges nominated to their positions by both Democratic and Republican presidents have invoked the metaphor favorably in the past half decade, whether in referencing the work of state court judges,[121] state and local policies responding to the COVID-19 pandemic,[122] state-based "experiments" with electoral process,[123] state common law on negligence,[124] state environmental regulation,[125] or state gun laws.[126] Justice Kennedy himself was a fan.[127] Nonetheless, despite the metaphor's

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Democracy: Anatomy of a Metaphor, at 1 (Am. Enter. Inst., 2001) (emphasis omitted), https://www.aei.org/wp-content/uploads/2011/10/Laboratories%20of%20Democracy%20Anatomy%20of%20a%20Metaphor.pdf [https://perma.cc/95VX-L45S] (describing the metaphor as "perhaps the most familiar and clichéd image of federalism").

118. Tyler & Gerken, *supra* note 36, at 2189 n.4.

119. *See supra* notes 8–13 and accompanying text.

120. *See, e.g.*, Tyler & Gerken, *supra* note 36, at 2189 n.5 ("[T]he Supreme Court has invoked [the 'laboratories' metaphor] in scores of decisions on topics far and wide.").

121. Thompson v. Dall. City Att'y's Off., 913 F.3d 464, 471 (5th Cir. 2019) (Willet, J.) (asserting that, though originally directed at "policymaking," Justice Brandeis's "laboratories of democracy" metaphor is "an apt metaphor for judging too").

122. Lawrence v. Colorado, 455 F. Supp. 3d 1063, 1078 (D. Colo. 2020) (Domenico, J.) ("States and localities around the country are grappling with this pandemic, and the genius of our system of government is that it allows them to take different approaches, serving as the 'laboratories of democracy' where various approaches will be tested.").

123. *See, e.g.*, Daunt v. Benson, 956 F.3d 396, 428 (6th Cir. 2020) (Readler, J., concurring in the judgment) (contending that the states' "inviolable sovereignty affords states the opportunity to act as 'laboratories of democracy,' crafting rules and practices tailored to their unique political and cultural settings"); Trump for President, Inc. v. Boockvar, 481 F. Supp. 3d 476, 498 (W.D. Pa. 2020) (Ranjan, J.) (stating that states' freedom to act as "laboratories of democracy" dictates substantial deference to state regulation of elections).

124. Tabares v. City of Huntington Beach, 988 F.3d 1119, 1122 (9th Cir. 2021) (Nelson, J.) (observing that "California's negligence law . . . is the product of common law developed through decisions by California courts" and that "Justice Brandeis famously noted that under our federalist system, 'a . . . state may, if its citizens choose, serve as a laboratory'" (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)) (second omission in *Tabares* opinion)).

125. Rocky Mountain Farmers Union v. Corey, 913 F.3d 940, 955 (9th Cir. 2019) (Gould, J.) (warning, in considering California's Low Carbon Fuel Standard, against "restricting the ability of the states to 'perform their role as laboratories for experimentation'" (quoting United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring))).

126. Pena v. Lindley, 898 F.3d 969, 984 (9th Cir. 2018) (describing a particular California gun regulation as "the first of its kind" before quoting Justice Brandeis's dissent in *New State Ice*).

127. *See, e.g.*, Fisher v. Univ. of Tex., 579 U.S. 365, 388 (2016) (Kennedy, J.) ("[I]t remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity. In striking this sensitive balance, public universities, like the States themselves, can serve as 'laboratories for experimentation.'" (quoting *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring))); Hall v.

long-lasting and broad-based popularity, we contend that it too has serious problems and should be used with circumspection, if at all. Justice Brandeis, who was both a critic of "arid abstractions"[128] and a student of human frailty,[129] would presumably ask no less.

A. Continued Supreme Court Use of the "States as Laboratories" Metaphor

We set the table for this Part's critique of the "laboratories of democracy" metaphor by highlighting Supreme Court Justices' use of the metaphor since 2019. If anything, the already pervasive metaphor has seemed to tighten its hold on legal imaginations under the Roberts Court. Since 2019, Justice Kennedy's former law clerk, Justice Neil Gorsuch, has been the most frequent user, and we discuss in detail his use of the metaphor in three cases. These examples illustrate not only how the Justices employ the metaphor affirmatively and liberally but also how, as with Chief Justice Roberts's and Justice Kagan's use of the "splitting the atom" metaphor in *Seila*,[130] such usage can exhibit mission creep, turning a metaphor for federalism and vertical separation of powers into support for a vision of horizontal separation of powers, as well.

In the Court's 2019 decision in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*,[131] a seven-Justice majority held that Tennessee's two-year residency requirement for obtaining an initial "license to operate a liquor store" violated the (dormant) Commerce Clause because it "blatantly favor[ed] the State's residents and ha[d] little relationship to public health and safety."[132] In a dissent joined by Justice Thomas, Justice Gorsuch stated that, despite "two separate constitutional Amendments to adjust and then readjust alcohol's role in our society," there is "one thing [that] has always held true: States may impose residency requirements on those who seek to sell alcohol within their borders to ensure that retailers comply with local laws and norms."[133] Gorsuch contended that the Twenty-First Amendment,[134]

Florida, 572 U.S. 701, 724 (2014) ("The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects."); Blakely v. Washington, 542 U.S. 296, 327 (2004) (Kennedy, J., dissenting) (arguing that by implicating "the work of a state legislature," the case made relevant "the interest of the States to serve as laboratories for innovation and experiment"); *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) (contending that, in relation to concerns about the potential presence of guns in schools, "the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear").

128. *See* JEFFREY ROSEN, LOUIS D. BRANDEIS: AMERICAN PROPHET 197 (2016) (contending that "Brandeis would never have tolerated these arid abstractions [regarding rights to privacy], which have the effect of giving citizens less privacy in the age of cloud computing than they had during the founding era").

129. New State Ice Co. v. Liebmann, 285 U.S. 262, 310 (1932) (Brandeis, J., dissenting) ("Man is weak and his judgment is at best fallible.").

130. *See supra* notes 54–58 and accompanying text.

131. 139 S. Ct. 2449 (2019).

132. *Id.* at 2456–57.

133. *Id.* at 2477 (Gorsuch, J., dissenting).

134. U.S. CONST. amend. XXI, § 1 ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed.").

which repealed Prohibition under the Eighteenth Amendment,[135] "embodied a classically federal compromise: Nationwide prohibition ended, but States gained broad discretion to calibrate alcohol regulations to local preferences."[136] In Gorsuch's view:

> Under the terms of the compromise [the adopters of the Twenty-First Amendment] hammered out, the regulation of alcohol wasn't left to the imagination of a committee of nine sitting in Washington, D.C., but to the judgment of the people themselves and their local elected representatives. State governments were supposed to serve as "laborator[ies]" of democracy, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), with "broad power to regulate liquor under § 2," *Granholm* [*v. Heald*], 544 U.S. [460], 493 [(2005)].[137]

Three years later, in *Berger v. North Carolina State Conference of the NAACP*,[138] Justice Gorsuch had an opportunity to employ the laboratories metaphor in an opinion written for an eight-Justice majority.[139] *Berger* recalls Section II.A's *Cameron* case in that both involved questions about state officials' right to intervene in federal court proceedings.[140] In *Berger*, the specific question was whether "two leaders of North Carolina's state legislature [were] entitled to participate in [a] case" involving "a challenge to the constitutionality of a North Carolina election law."[141] Justice Gorsuch's opinion for the Court observed that "North Carolina has expressly authorized the legislative leaders to defend the State's practical interests in litigation of this sort."[142] The opinion explained the basis for a "suggest[ion] that federal courts should rarely question that a State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law."[143] Moreover, Gorsuch's opinion asserted that respect for state interests in arranging the manner of their governance "serves national interests" in three ways that reflect the value of distributed power:

> It better enables the States to serve as a "balance" to federal authority. It permits States to accommodate government to local conditions and circumstances. And it allows States to serve as laboratories of "innovation and experimentation" from which the federal government itself may learn and from which a "mobile citizenry" benefits.[144]

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135. *Id.* amend. XVIII, § 1 (repealed 1933) (establishing federal prohibition of the import, export, "manufacture, sale, or transportation of intoxicating liquors").

136. *Thomas*, 139 S. Ct. at 2477 (Gorsuch, J., dissenting).

137. *Id.* at 2484.

138. 597 U.S. 179 (2022).

139. *See id.* at 181–82 (noting joiners of Justice Gorsuch's opinion and Justice Sotomayor's dissent).

140. *See supra* notes 63–64 and accompanying text.

141. *Berger*, 597 U.S. at 183.

142. *Id.* at 193.

143. *Id.* at 191.

144. *Id.* (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (citing Bond v. United States, 564 U.S. 211, 221 (2011))).

Finally, in support of the Court's 2022 decision in *West Virginia v. Environmental Protection Agency*,[145] Justice Gorsuch wrote a concurring opinion, joined by Justice Alito, that resonated with Chief Justice Roberts's and Justice Kagan's opinions in *Seila* by similarly exporting the influence of a federalism-centered metaphor to the support of a stylized version of horizontal separation of powers.[146] In *West Virginia*, the Court held that the Environmental Protection Agency ("EPA") lacked the "clear congressional authorization" required "under the major questions doctrine" in order for the EPA to put in place a policy of "[c]apping carbon dioxide emissions at a level that w[ould] force a nationwide transition away from the use of coal to generate electricity."[147] Justice Gorsuch used the occasion to reiterate conventional wisdom that "the [Constitution's] framers deliberately sought to make lawmaking difficult by insisting that two houses of Congress must agree to any new law and the President must concur or a legislative supermajority must override his veto."[148] According to Gorsuch's account, this difficulty in lawmaking helps to (1) ease concerns about potential legislation's "threat to individual liberty;" (2) improve the quality and stability of federal law; and (3) "preserve room for lawmaking" by more localized government entities, thereby "allow[ing] States to serve as 'laborator[ies]' for 'novel social and economic experiments,' *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)."[149] Per Gorsuch, allowing Congress to short-circuit intended difficulties of lawmaking by "divest[ing] its legislative power to the Executive Branch" risks all these benefits and leaves "little . . . to stop agencies from moving into areas where state authority has traditionally predominated."[150] In Gorsuch's hands, the laboratories metaphor thus became not only a vehicle for championing a stylized vision of United States federalism but also a vehicle for championing a particular view about federal-level separation of powers.

In short, Justice Gorsuch's opinions exemplify not only the laboratories metaphor's continued judicial use but also the extent to which its influence, like that of Justice Kennedy's "splitting the atom" metaphor, can extend far beyond its original focus. The time to reconsider this metaphor's use could not be more urgent. The next Sections discuss reasons why the metaphor's use should be qualified or curtailed.

B. Justice Brandeis's Likely Criticism

If Justice Brandeis were transported to the present, he might be among the first to criticize how the laboratories metaphor is used. Brandeis might start by stressing that the phrases "laboratories of democracy" and "laboratories of experimentation" are simplifications of things that he in fact said. These phrases do not themselves appear in a Brandeis opinion. Instead, they are summary versions of aspects of Brandeis's *New State Ice* dissent, which argued for upholding a state

145. 597 U.S. 697 (2022).
146. *See supra* notes 54–58 and accompanying text.
147. *West Virginia*, 597 U.S. at 735.
148. *Id.* at 738 (Gorsuch, J., concurring).
149. *Id.* (second alteration in Justice Gorsuch's opinion).
150. *Id.* at 739–40.

regime for licensing the commercial manufacture of ice.[151] Brandeis would likely emphasize that the dominant point of this opinion was broader than any concern with states in particular: the laboratories metaphor arose as an incidental part of his more general contention that "legislatures, both *federal and state*, must have broad power to determine the legal relationships among labor, management, capital, and consumers."[152] Brandeis would presumably object to the extent to which his metaphor has become a mechanism for redirecting effort away from the pursuit of sensible national responses to problems of national or international scope.

Much of Justice Brandeis's opinion in *New State Ice* has a national focus. In the opinion, Justice Brandeis characterized the Great Depression as a time in which "the *people of the United States* [were] confronted with an emergency more serious than war."[153] He noted that "[m]any insist there must be some form of economic control," but he also acknowledged that "[w]e have been none too successful in the modest essays in economic control already entered upon."[154] He found cause for hope in "the advances in the exact sciences and the achievements in invention," which "attest the value of the process of trial and error" and of "experimentation."[155] On the strength of this example, Justice Brandeis concluded, "There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs."[156]

Justice Brandeis finished his dissent with the passage that became the font of the laboratories metaphor:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.[157]

There are several remarkable things about this passage. Not least among them is Justice Brandeis's finishing call for judicial restraint as an exercise in

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151. New State Ice Co. v. Liebmann, 285 U.S. 262, 280–81 (Brandeis, J., dissenting).

152. Stephen G. Breyer, *Justice Brandeis as Legal Seer*, 42 BRANDEIS L.J. 711, 717 (2004) (emphasis added).

153. *Liebmann*, 285 U.S. at 306 (Brandeis, J., dissenting) (emphasis added).

154. *Id.* at 308, 310.

155. *Id.* at 310.

156. *Id.* at 311.

157. *Id.*

"bold[ness]"—presumably because such restraint would permit potentially audacious "novel social and economic experiments" that a state or national citizenry chooses to pursue. This emphatic conclusion, plus the prior assertion of a need for "power in the states *and the nation* to remould . . . our economic practices and institutions,"[158] provide strong support for a conclusion that, in *New State Ice*, Justice Brandeis primarily, if not entirely, "saw the danger posed by the Court's decision not in terms of federal intrusion on state prerogatives, but rather in judicial overreaching."[159] Indeed, Alan Tarr has reasonably warned supporters of a robust view of federalism that Justice Brandeis's *New State Ice* opinion is less in line with their beliefs than with a spirit of Taylorist "Scientific Management."[160] Tarr's concern is that such scientism predictably tends to lead to "policy uniformity," rather than a long-term state-by-state patchwork: if policy experimentation is a scientific process, we might naturally expect that the nation, like a standard scientific community, will use the knowledge gleaned from experiments to gravitate toward a consensus result.[161] Justice Brandeis might well have agreed with the prediction—but with a happier view of the outcome.

C. Further Critique of the Laboratories Metaphor

Unfortunately, there is much more that is problematic with the laboratories metaphor than Brandeis's likely point that its use has strayed far from his intended purpose. This Section details problems with the metaphor's misleading scientism. First, we note how the use of the term "laboratories" favors a commonly incorrect premise that what one state does likely has negligible effect on others. Second, we discuss how the laboratories language likewise obscures limitations on the states' capacities (or willingness) to support innovation that can provide useful instruction. Third, we highlight another point that "laboratories of democracy" formulations of the metaphor elide: the fact that state "experiments" can challenge democratic and libertarian norms to a degree that threatens liberal democracy itself.

1. Externalities

Justice Brandeis bears substantial responsibility for externalities concerns in relation to his metaphor. After all, he chose to add as a flourish the notion that states might try social experiments "without risk to the rest of the country."[162] If read as a condition that limits the range of relevant state experiments—i.e., as a requirement for being considered part of the set of experiments about which Justice Brandeis was talking—this assumption of no interstate externalities helps explain

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158. *See id.* at 311 (emphasis added).

159. Thomas W. Beimers, *Searching for the Structural Vision of* City of Boerne v. Flores*: Vertical and Horizontal Tensions in the New Constitutional Architecture*, 26 HASTINGS CONST. L.Q. 789, 851 (1999).

160. Tarr, *supra* note 117, at 43–44.

161. *See id.* at 42 ("Following the logic of the metaphor chosen by Brandeis, 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."); *id.* at 46 ("[T]he slogan is not rooted in a concern for federalism, has no necessary connection to federal arrangements, and has implications that undermine federal diversity.").

162. *See supra* note 157 and accompanying text.

why the allowance for democratically sanctioned state experimentation should be viewed as so presumptively benign. If the people of a particular state wish to try out a new social or economic policy that will have no negative effects on the rest of the country, why should the U.S. Supreme Court have the power to hold that relatively vague and arguably subjective notions of federal substantive due process block the endeavor?[163] If what happens in Vegas truly stays in Vegas, then what's the harm to the outside world in tolerating whatever in fact happens there?

Unfortunately, Justice Brandeis did not make clear that his no-externalities flourish expressed a limiting condition, rather than encoding a dangerous assumption. For alas, absence of interstate spillovers often seems more the exception than the rule.[164] Sure, one can imagine a set of circumstances in which a state *is* acting as a sort of "laboratory" in the sense that it is an area for experimentation effectively walled off from the outside world, including, perhaps, being walled off from communication to others that the state is even conducting the experiment in question. (Otherwise, for example, one might expect spillover effects in other states from the mere knowledge that "Sin City" is showing permissiveness toward yet another form of traditionally perceived vice.[165]) But the policy trials that states run almost necessarily bear a closer analogy to messier "field experiments" than true lab experiments.[166] That isolation of state experiments can be imagined is, of course, no evidence at all for its actual likelihood, especially in a deeply interconnected modern world. For constitutional lawyers, the notion of isolated state policies evokes the distinction offered by John Marshall in *Gibbons v. Ogden*[167] between a state's regulations that affect only its own commerce and those that have wider

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163. Brandeis had emphasized an implicit limitation on the range of "social and economic experiments" that he contemplated in *New State Ice*—i.e., that they not violate constitutional prohibitions more specific than supposed notions of substantive due process. Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) (contending that, like socioeconomic regulation of the sort discussed in *New State Ice*, "[constitutional [c]lauses guaranteeing to the individual protection against specific abuses of power [such as the Fourth Amendment], must have a similar capacity of adaptation to a changing world"), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967); *see* Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 HARV. L. REV. 2348, 2357 (2017) ("Willingness to assume legislative competence with respect to economic conditions challenged under the Due Process Clause did not, for Brandeis, necessarily carry over to more personal liberties protected by the First and Fourth Amendments.").

164. *See, e.g.*, Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1727 (2011) (concluding that, in the immigration context, "the states that Justice Brandeis described as models for enacting '*novel* social and economic experiments *without risk* to the rest of the country' simply do not exist within forced federalism" (emphasis added by Cunningham-Parmeter) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))).

165. *Cf.* Hal K. Rothman, *Las Vegas and the American Psyche, Past and Present*, 70 PAC. HIST. REV. 627, 628 (2001) ("Las Vegas is a canvas on which people paint their neuroses.").

166. *See* Alan S. Gerber & Donald P. Green, *Field Experiments and Natural Experiments*, *in* THE OXFORD HANDBOOK OF POLITICAL SCIENCE 1108, 1109 (Robert Goodin ed., 2013) ("Field experimentation represents a departure from laboratory experimentation.").

167. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

consequences.[168] Maybe that made sense in 1824. Almost no one truly believes it has much bite today, when even the most conservative Supreme Court in modern history has refused to overrule *Wickard v. Filburn*[169] and its finding that farmer Roscoe Filburn's home-grown wheat, at least if one views it as part of a wider aggregate, affects interstate commerce sufficiently to be subject to congressional regulation.[170]

Indeed, the COVID-19 pandemic has highlighted how flimsy the laboratories notion can be when a nation—indeed, a world—is faced with social or economic dislocation at the level with which Justice Brandeis was concerned in *New State Ice*. It soon became a cliché that COVID-19 is not a respecter of political boundary lines, whether national or sub-national.[171] State governors recognized the absurdity of acting as if their states' COVID-19 policies and actions did not affect other states. When the federal government effectively defaulted on providing coordination in 2020, a number of states allied with one another to generate common responses, thereby showing a preference against operating as separate "laboratories" in the face of shared difficulties.[172] On the flip side, states' efforts to better isolate themselves from one another, such as Texas responding to the Louisiana "experiment" by temporarily denying entry to the state, could visibly chafe against the nature of the overall constitutional system of the *United* States in which state "laboratories" supposedly feature.[173]

Nonetheless, it was impossible to keep the laboratories metaphor down. On April 19, 2020, the Sunday morning news show "Face the Nation" invoked the "laboratories of democracy" metaphor in reporting on states' coronavirus responses

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168. *Id.* at 194 (disclaiming any suggestion that Congress's power to regulate interstate commerce was alleged to "comprehend that commerce, which is completely internal [to a State] . . . and which does not extend to or affect other States").

169. Wickard v. Filburn, 317 U.S. 111 (1942).

170. *Id.* at 128 ("It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions [for wheat more generally].").

171. *See, e.g.*, James G. Hodge, Jr., *Nationalizing Public Health Emergency Legal Responses*, 49 J.L. MED. & ETHICS 315, 316 (2021) (noting that the pandemic "reveal[ed] substantial drawbacks of a nation of sovereign states attempting to respond to a disease that ignores boundaries").

172. *See* Jeffrey B. Litwak & John Mayer, *Developments in Interstate Compact Law and Practice 2020*, 51 URB. LAW. 99, 104 (2021) ("In 2020, many state administrations entered into agreements with each other to manage aspects of their responses to the Covid-19 pandemic.").

173. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 416 (2012) (Kennedy, J.) ("Arizona may have understandable frustrations with the problems caused by illegal immigration while that process [of 'civic discourse' on national immigration policy] continues, but the State may not pursue policies that undermine federal law."); Edwards v. California, 314 U.S. 160, 173 (1941) (holding a "prohibition . . . against the 'bringing' or transportation of indigent persons into California" to be "an unconstitutional barrier to interstate commerce"). *See generally* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-3, at 1046 (3d ed. 2000) (noting a historically rooted "suspicion of any state action seriously (especially if *differentially*) burdening individuals or enterprises outside the state and hence unable to influence its policies, as well as any state action threatening to revive interstate economic rivalries of the sort that had undermined the Articles of Confederation").

and even added the further twist of characterizing state governors as the laboratories' "political scientists."[174] Given the disdain with which some politicians seem to regard scientists, who felt most slandered by this characterization is open to question.

The COVID-19 pandemic has not been an isolated example of how the effects of state policies can cross state lines. For example, by the time the pandemic struck, there was already a substantial scholarly literature on "experiments" being carried out by states that had decriminalized both the possession and sale of marijuana even as adjoining states apparently agreed with the federal government that such activities should remain illegal.[175] Multiple neighbors of Colorado were less than sanguine about its experiment and quickly sued the State after it had decriminalized marijuana's sale.[176] Their concerns were understandable. Coupled with a decision by the Obama Administration to cease enforcement of undoubtedly constitutional federal criminal law,[177] Colorado's decriminalization meant, as a practical matter, that residents of an adjoining state (plus, of course, visitors from farther away), could easily buy marijuana in Colorado and bring it into the adjoining state to enjoy there. Adjoining states were thereby involuntarily enlisted in Colorado's policy experiment. Although one can argue that Colorado's experiment was a success in multiple senses, including the fact that many states followed its lead, the experiment was—contrary to Justice Brandeis's optimistic account in *New State Ice*—not assayed "without risk to the rest of the country."[178] Nevertheless, in 2021, Justice Thomas added further testimony to the metaphor's remarkable, albeit often unwarranted, ubiquity by using the laboratories metaphor to describe the federal government's newfound allowance for states to "try novel social and economic experiments" in the regulation or deregulation of marijuana.[179]

In short, the laboratories metaphor persists in part through glib invocations that ignore potential external effects of state experiments in a way that flouts reality. One might seek to correct for the metaphor's misdirection with respect to the

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174. *Full Transcript of "Face the Nation" on April 19, 2020*, CBS NEWS (Apr. 19, 2020, 12:12 PM), https://www.cbsnews.com/news/full-transcript-of-face-the-nation-on-april-19-2020/ [https://perma.cc/W455-U243] ("While the medical laboratories search for a coronavirus cure, the laboratories of democracy are also hard at work. . . . The political scientists in these laboratories are the governors, facing the toughest issues of the virus.").

175. *See, e.g.*, MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE (Jonathan H. Adler ed., 2020) (featuring multiple chapters discussing state innovations in marijuana policy).

176. Nebraska and Oklahoma attempted to invoke the original jurisdiction of the Supreme Court, but the Court, albeit in a split, 7–2 decision, with Justices Thomas and Alito dissenting, dismissed the states' motion to file a bill of complaint. *See* Nebraska v. Colorado, 577 U.S. 1211, 1211–12 (2016) (Thomas, J., dissenting).

177. *See* Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235, 238–39 (2016) ("[T]he Justice Department announced increasingly expansive nonenforcement policies with respect to federal marijuana crimes committed in states where marijuana possession and distribution is legal as a matter of state law.").

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

179. Standing Akimbo, LLC v. United States, 141 S. Ct. 2236, 2238 (2021) (Thomas, J., respecting denial of certiorari).

likelihood of externalities by assiduously emphasizing the possibility or actuality of externalities as an adjunct to the metaphor's use. But by central reference to "laboratories," the metaphor intrinsically stacks the linguistic deck against focus on—or even acknowledgment of—externalities. The resulting naturally distortive tendency frequently provides good reason to seek to avoid the metaphor's use.

2. Doubts About States' Innovative Capacities

Beyond concern about the metaphor's facial obscuring of externalities, the laboratories metaphor is also problematic to the extent it suggests that states are reliable and substantially independent sources of more generally useful experimentation.[180] Here again, the metaphor tends to run aground on reality. As discussed below, state governments are often relatively indifferent innovators, frequently responding to national initiatives, rather than developing new approaches on their own.[181] Moreover, there is commonly cause to doubt how instructive one state's "experiment" should be for others.

As Tyler and Gerken have emphasized, the contemporary reality is that much state "experimentation" is the result of exogenous pressure groups, often representing one or another wing of national ideologies. In Tyler and Gerken's words:

> 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. . . . Many issues given the "state" moniker are therefore better understood as "national experiments carried out within state fora."[182]

These observations are especially important with regard to what might be described as "ordinary" areas of public policy such as education, delivery of medical services, or environmental protection.[183]

Tyler and Gerken's account builds on a pre-existing literature emphasizing the states' limitations as innovators. Susan Rose-Ackerman long ago contended that, in a federal system bearing at least some resemblance to that of the United States, factors such as "[t]he reelection motive, the lack of sorting by risk preferences,

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180. *See* Tyler & Gerken, *supra* note 36, at 2203 (describing "the laboratories account" as "portray[ing] state autonomy as a boon for policy experimentation").

181. *Cf.* Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689, 1699, 1782 (2018) (questioning whether "the famous Brandeisian federalism values of experimentation and variation" depend "on states being involved at all" based on experiences with implementing aspects of the federal Affordable Care Act that provide "examples of locally driven experimentation that comes through a *national* program with a flexible, state-centered component").

182. Tyler & Gerken, *supra* note 36, at 2221 (quoting Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1081, 1128 (2014)).

183. *See id.* at 2211–12 (discussing the federal government's use of funding incentives and regulatory defaults to "encourag[e] state policy innovation").

external effects [and associated free riding], and the impact of migration" can predictably lead to state and local governments conducting "few useful experiments."[184] The national government can encourage state and local innovation by awarding prizes or grants to state and local governments,[185] but reliance on associated state and local government actors might be best avoided. Rose-Ackerman concluded that, "[i]nstead of inducing state and local politicians to sponsor innovative projects, it may often be cheaper and easier for the central government to contract with private firms or use federal agencies."[186] Others have followed Rose-Ackerman in highlighting the limitations of state and local governments as innovators[187] and the arguably superior capacities of the central federal government in promoting policy experiments.[188]

Additional commentary has focused on how state government can actively block innovation. In 2020, Joshua Sellers and Erin Scharff wrote about how state preemption of local initiatives not only quashes possibilities for innovation in relation to such matters as "minimum wage laws, antidiscrimination laws, firearms regulation, and plastic bag laws," but also interferes with localities' abilities to experiment with what they regard as good-governance measures, such as bans on "dark money" in local politics.[189] Sellers and Scharff thereby highlight a question that has long dogged the laboratories metaphor. Among the multiple levels of U.S. governance, are the states the best to be running "laboratories"? Might a city have interests at least as legitimate in developing its own "laboratory" as the state of which it is a part? Moreover, what of states that lack the resources for experiments that might alternatively be run as federal initiatives? Robert Schapiro has pointed out that a substantial number of divergences in state policies—such as in the provision of "education, health care, and a whole range of government services"—

184. Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovations?*, 9 J. LEGAL STUD. 593, 594 (1980).

185. *See id.* at 615–16 (discussing the possibility of grant or prize schemes).

186. *Id.* at 616.

187. *See, e.g.*, Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1339 (2009) (concluding that state and local governments "are unlikely to innovate in all instances at the optimal social level, or in a way that captures the true benefits of experimentation").

188. *See id.* at 1399–1400 ("Policies that will be easy for other jurisdictions to notice, difficult to conceal, cheap to copy relative to their benefits, and that would be of similar value in most of the country are likely to see significant free-riding, and so are good candidates for nationalization."); Rubin & Feeley, *supra* note 74, at 926 ("[C]entralization is not only necessary to initiate the experimental process, but also to implement that process in any reasonably effective fashion."); Hannah J. Wiseman & Dave Owen, *Federal Laboratories of Democracy*, 52 U.C. DAVIS L. REV. 1119, 1123 (2018) ("In a federalist system of hierarchical and decentralized governance, a key driver of experimentation often will, and should, be the federal government."); *cf.* Kristin Madison, *Building a Better Laboratory: The Federal Role in Promoting Health System Experimentation*, 41 PEPP. L. REV. 765, 814 (2014) (discussing how federal law "facilitates [healthcare policy] experimentation among both states and providers").

189. Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1363–64 (2020).

might reflect more "the unequal resources of states" than the unconstrained preferences of their citizens.[190]

But wait, there's more! Even if states do experiment in distinctively state-based ways, the very bases for federalism can generate questions about the extent to which such state experiments have instructional value for other states and the Nation as a whole.[191] Federalism is often—and often plausibly—justified as a means of accommodating differences between sub-groups within an extant or would-be union.[192] If all people in the United States were, as John Jay dubiously argued in *Federalist No. 2*, substantially alike,[193] one might well wonder why we chose a federal system at all, instead of a more unitary system where policymakers use decentralization merely, even if heavily, as an administrative tool. But if the states are significantly different from one another—either in external circumstances or the internal preferences of their populations or both—one might well wonder what their separate experiments should teach one another. As Tarr noted, Justice Brandeis's laboratories metaphor seems to assume universal or, at least universalizable, aspects of governance and perceptions of the good, and such assumed commonality is in tension with common justifications for federalism.[194]

Of course, governments frequently—and often for good reason—make drawing useful lessons from their "experiments" additionally difficult by failing to pursue policy trials that employ randomized "treatment and control groups," an approach that some view as definitional for scientific experimentation.[195] This is not to deny that the provision of separate state governments allows for "experimentation" of a sort that can be useful and pragmatically instructive. But to suggest that such processes of trial and error are much like the scientific method of experimentation that has enjoyed sustained success over the past four centuries is

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190. Robert A. Schapiro, *States of Inequality: Fiscal Federalism, Unequal States, and Unequal People*, 108 CAL. L. REV. 1531, 1536 (2020).

191. Víctor Ferreres Comella has made points along the lines of those in this paragraph, with specific reference to Spain. *Cf.* Víctor Ferreres Comella, *The Spanish Constitutional Court Confronts Catalonia's 'Right to Decide' (Comment on the Judgment 42/2014)*, 10 EUR. CONST. L. REV. 571, 571 (2014) (discussing Spain's "divi[sion] into 17 self-governing units," with the Basque and Catalonian regions having "traditionally had the strongest nationalist sentiment[s]").

192. *See, e.g.*, Peter H. Schuck, Introduction, *Some Reflections on the Federalism Debate*, 14 YALE L. & POL'Y REV. 1, 4 (1996) (describing federalism as acting "as a rather flexible institutional accommodation to the extraordinary diversity of American society"); *see also* Anthony Johnstone, *Hearing the States*, 45 PEPP. L. REV. 575, 589–90 (2018) (chronicling the endorsement by various scholars of a diversity-oriented rationale for federalism).

193. THE FEDERALIST NO. 2, at 32 (John Jay) (Clinton Rossiter ed., 1999) (describing "independent America" as inhabited by "one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs").

194. *See supra* notes 160–61 and accompanying text.

195. *See* Gerber & Green, *supra* note 166, at 1109 ("Experimentation represents a deliberate departure from observational investigation, in which researchers attempt to draw causal inferences from naturally occurring variation, as opposed to variation generated through random assignments.").

ludicrous.[196] Members of modern society are, by and large, entitled to think well of a scientific community that has made monumental advances by engaging in systematic and rigorous experiments. But many "experiments" to which state actors subject us could be devised only by a mad scientist and would never be approved by any human subjects committee or ethics board that routinely reviews proposals for scientific experiments. One might not expect much more of decisions made by policymakers who are often highly ideological actors lacking rigorous scientific training and substantially unconcerned with the knowledge-generating capacity of their policies. But we can, at least, stop suggesting that their policy trials are a form of laboratory science.

3. Democratic and Libertarian Qualms

Both academic writers and journalists have highlighted another problem with the reassuringly scientistic "laboratories of democracy" formulations of Justice Brandeis's metaphor. These days, states are often taking deliberate steps to act in ways that appear suboptimally democratic at best and blatantly anti-democratic at worst. As political scientist Jacob Grumbach highlights in the 2022 book *Laboratories Against Democracy*, "some state governments have become laboratories *against* democracy—innovating new ways to restrict the franchise, gerrymander districts, exploit campaign finance loopholes, and circumvent civil rights in the criminal justice system."[197] In Grumbach's view, this situation results in substantial part from the rise of "nationally coordinated" partisanship, which has generated a situation in which state governments no longer "serve as a safety valve for national politics" but instead "exacerbate national challenges."[198] In this environment, states do not learn from one another's successes or failures in quite the manner that the laboratories metaphor tends to suggest: unlike a boundaryless community of scientists united in devotion to a process of discovering and proving generally accepted truths, states under opposing-party control tend to "exist in separate partisan 'scientific' communities" that can have little interest in gravitating toward an effective national (never mind international) settlement.[199] The process of state-by-state policymaking is not proceeding, as Justice Brandeis envisioned, in a way that "has little to do with ideology and everything to do with trial-and-error, seat-of-the-pants pragmatism."[200] Instead, it is serving and reifying distinct sets of tribal interests.

Grumbach's is far from the only voice sounding an alarm. Multiple writers have highlighted the worrisomely questionable nature of the "laboratories of

196. *See, e.g.*, MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 27 (2008) ("[E]ven decentralization creates problems for the kind of experimentation that is needed to select policies in a modern administrative state.").

197. JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL POLITICS TRANSFORMED STATE POLITICS 5 (2022).

198. *Id.* at 4.

199. *See id.* at 5 ("Instead of emulating successful policy experiments from other states and rejecting failed ones, laboratories of democracy exist in separate partisan 'scientific' communities.").

200. DAVID OSBORNE, LABORATORIES OF DEMOCRACY 3 (1990) ("Brandeis's phrase captured the peculiar, pragmatic genius of the federal system.").

democracy" language's presumption that state governments are good agents of democracy. In Pamela Karlan's view, the U.S. Supreme Court's 2008 decision upholding an Indiana voter-identification law[201] "gave a green light to jurisdictions to shape the electorate for partisan advantage."[202] In combination with modern advances in the art of gerrymandering,[203] the results are perhaps too predictable. According to Miriam Seifter, "[a]cross the nation, the vast majority of states in recent memory have had legislatures controlled by either a clear or probable minority party."[204] In the 2021 book *Laboratories of Autocracy*, former chairman of the Ohio Democratic Party David Pepper contended that, over the course of U.S. history, states have repeatedly used their capacities as "laboratories" to test and then spread approaches to governance that undermine democratic ideals.[205]

An indulgent witness might respond that state "experimentation" with restrictive election laws is simply another example of states' exercising their "free[dom] to serve as 'laboratories' of democracy," here "experimenting about the nature of democracy itself."[206] But with authoritarianism on the march worldwide—and sometimes under the cover of democratic populism[207]—talk about experiments with the nature of democracy might seem less benign today than when Justice Thomas remarked on this experimental possibility in a 2016 opinion engaging with the question of whether a state may "creat[e] legislative districts that contain approximately equal total population but vary widely in the number of eligible voters in each district."[208] Even then, one might have guessed that Madisonian "factions"—self-interested groups that now include U.S. political parties[209]—would seek to use such "experiments" to rig electoral processes in their favor. In the meantime, other countries have made clearer the extent to which such manipulative "experimentation" can threaten liberal democracy. Rosalind Dixon and David

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201. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189 (2008) (affirming a "conclu[sion] that the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute").

202. Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CAL. L. REV. 2323, 2348 (2021).

203. *See* Jed Handelsman Shugerman, *Countering Gerrymandered Courts*, 122 COLUM. L. REV. F. 18, 18 (2022) ("Gerrymandering is especially antidemocratic in many state legislatures because state parties seize control of both houses of the legislature and use a mix of advanced computer programs and asymmetric hardball to draw favorable districts.").

204. Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1735 (2021).

205. DAVID PEPPER, LABORATORIES OF AUTOCRACY: A WAKE-UP CALL FROM BEHIND THE LINES 7–8 (2021) ("Before the Civil War, again in the late 1800s, and on and off again in the 1900s, states and state legislatures played a pernicious role.").

206. Evenwel v. Abbott, 578 U.S. 54, 89 (2016) (Thomas, J., concurring in the judgment) (internal quotation marks omitted).

207. *Cf.* Bojan Bugaric, *Could Populism Be Good for Constitutional Democracy?*, 15 ANN. REV. L. & SOC. SCI., 41, 43 (2019) ("Authoritarian populism is in vogue today.").

208. *Evenwel*, 578 U.S. at 75.

209. THE FEDERALIST NO. 10, at 72 (James Madison) (Clinton Rossiter ed., 1999) ("By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.").

Landau have chronicled an insidious process by which a variety of illiberal rulers, such as Viktor Orbán in Hungary, "borrow" political practices or perspectives from elsewhere—e.g., gerrymandering or "political constitutionalism"—to help implement or justify efforts to stifle genuine democracy at home.[210] "Experiments" compatible with robust democracy under certain circumstances might be fatal to it (and deliberately so) under others.

In *New State Ice*, however, Justice Brandeis's laboratory passage appears to have assumed that state policy would follow what its "citizens choose" after observing the results of experimentation.[211] Sophisticated manipulation of electoral processes can call into question this assumption by facilitating the adoption and retention of policies that are not in accordance with the preferences of a majority. For Brandeis, who long fought against what he deemed government partiality in favor of "big business" that, in his view, undermined democracy,[212] such manipulation of state and local electoral processes to favor a national party's grip on state and local power would presumably be anathema.[213]

Some state policy innovations would also likely cause Brandeis concern by threatening cherished individual rights beyond voting rights.[214] This concern is appreciated across the political spectrum. Many people dismayed by the U.S. Supreme Court's rejection of its prior recognition of federal abortion rights have called for national legislation to abrogate the effects of that ruling.[215] Others, including members of the federal judiciary, have expressed dismay at the extent to which states might seek to curtail individuals' rights to carry firearms. In a California gun regulation case, two judges nominated to the bench by then-President Trump signaled their senses of limits that should be placed on the laboratories metaphor. In dissenting from a decision rejecting constitutional challenges to a California law banning "possession of large-capacity [gun] magazines,"[216] Judge Patrick J. Bumatay of the U.S. Court of Appeals for the Ninth Circuit stated, "When Justice Brandeis observed that states are the laboratories of democracy, he didn't mean that states can experiment with the People's rights."[217] Fellow dissenter Judge Lawrence VanDyke took on the laboratories metaphor's reach even more directly by writing that "[r]equiring governments to satisfy real heightened scrutiny before

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210. *See* ROSALIND DIXON & DAVID LANDAU, ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY 15 (2021) ("[W]ould-be authoritarians are turning to similar practices found in true liberal democracies, or the liberal international order, in order to justify their erosion of the substance of liberal democracy.").

211. *See supra* note 157 and accompanying text.

212. PHILIPPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM 154 (1993).

213. *See, e.g.*, Beimers, *supra* note 159, at 846–47 ("Brandeis feared bigness in all manifestations, predicated on the belief that centralization of power bred corruption and inefficiency, and limited the opportunity for participation.").

214. *See supra* note 163.

215. *See, e.g.*, David Morgan & David Lawder, *Democratic Women Call on Biden, Congress to Protect Abortion Rights*, REUTERS (June 26, 2022, 8:41 PM), https://www.reuters.com/world/us/democratic-women-call-biden-congress-protect-federal-abortion-rights-2022-06-26/ [https://perma.cc/5KLC-BFDL].

216. Duncan v. Bonta, 19 F.4th 1087, 1095–96 (9th Cir. 2021) (en banc).

217. *Id.* at 1140 (Bumatay, J., dissenting).

they step too far out of line with what is working in most other jurisdictions would help deter states like California from using their 'laboratory of democracy' to conduct ongoing experiments on how to subject a fundamental right to death by a thousand cuts."[218] By effectively calling for a presumption in favor of substantial national uniformity lest a state be all too diverse, Judge VanDyke appears to have deviated greatly from literal adherence to Brandeis's paean to boldness in tolerating single-state experimentation.

Of course, queasiness about state experimentation with individual rights extends far more broadly. Stanley Fish has written strikingly of what he calls "boutique multiculturalism," i.e., the willingness to tolerate different practices by which one, in fact, is not truly offended, whether or not one is sufficiently attracted to adopt them.[219] But even the most tolerant tend to draw the line at some level of "offensive" diversity. Such tendencies may be viewed as reflected in, for example, the Constitution's explicit prohibition of slavery.[220] The same can be said of the post-World War II application of much of the Bill of Rights to the states.[221] There are predictable limits to a nation's collective willingness to tolerate "viewpoint diversity" among regional subdivisions about things that people believe to really matter, and surely the United States is not exceptional in this regard. If Jacob Levy (following Montesquieu) is right that there is pragmatic advantage in "bounded variation" "on constitutional fundamentals" within "a federal system,"[222] one might be surprised by an alternative result.

D. "Laboratories of Democracy" in Review

Although we recognize the continuing appeal of the laboratories metaphor, our ultimate counsel is that acknowledging the metaphor's limitations is unlikely to suffice to draw its negative sting. The laboratories metaphor might not be as facially and fully problematic as Justice Kennedy's "splitting the atom" metaphor. On balance, however, talk of states as "laboratories" is more trouble than it is worth. The basic problem is the overly glib analogizing of a very important and, indeed, essential aspect of science—the careful testing of ideas in controlled settings—with a comparatively uncontrolled political reality of often errant and commonly all too human processes of political trial and error. As Barry Friedman has observed, "'[i]nnovation' might have been a better word choice for Justice Brandeis than 'experimentation,' saving us all a lot of bother."[223]

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218. *Id.* at 1172 (VanDyke, J., dissenting).

219. *See* Stanley Fish, *Boutique Multiculturalism, or Why Liberals Are Incapable of Thinking About Hate Speech*, 23 CRITICAL INQUIRY 378, 378 (1997) (describing "boutique multiculturalism").

220. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States.").

221. *Cf.* Jerold H. Israel, *Selective Incorporation: Revisited*, 71 Geo. L.J. 253, 253–54 (1982) (describing the "selective incorporation doctrine" as "hold[ing] that the fourteenth amendment's due process clause fully incorporates all those guarantees of the Bill of Rights deemed to be fundamental").

222. Jacob T. Levy, *"States of the Same Nature": Bounded Variation in Subfederal Constitutionalism*, *in* NEW FRONTIERS OF STATE CONSTITUTIONAL LAW 25, 27 (James A. Gardner & Jim Rossi eds., 2011).

223. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 399 (1997).

Admittedly, in contrast to Justice Kennedy's metaphor, Brandeis's metaphor has the virtue of not treating the existence or establishment of state "laboratories" as reflective of particular genius or as a revelation of truth in itself. Instead, Brandeis presented the states' potential "experimental" utility merely as a "happy incident[] of the federal system."[224] Nonetheless, Brandeis's metaphor still dresses up the messy process of multilayered U.S. democracy as a sort of scientific enterprise that can be expected—given current expectations of continual scientific and technological process—to lead upward and onward, rather than downward, backward, or perhaps nowhere much at all.

As Brian Galle and Joseph Leahy have noted, the metaphor suggests a process of experimentation that "implies efforts to pool information, diversify risks, and learn from both successes and failures."[225] Yet Galle and Leahy "found no plausible account to suggest that states on their own would engage in that behavior."[226] Indeed, judges have had to internalize such realism to avoid striking state initiatives for failure to meet scientific standards. In *Pena v. Lindley*,[227] for example, Judge M. Margaret McKeown, a President Clinton nominee, invoked Brandeis's metaphor to cast California in the role of Justice Brandeis's "single courageous State"[228] in adopting a requirement that "new handguns . . . stamp microscopically the handgun's make, model, and serial number onto each fired shell casing."[229] But McKeown hastened to deflect any demands that California's experimentation satisfy typical standards for scientific rigor by adding, "But we have never forced an experimenting state to prove its policymaking judgment with scientific precision, especially when expert opinion supports the decision."[230]

In formulating the laboratories metaphor, Brandeis might have reflected a Progressive hope that professional technocrats, using the most advanced techniques of public policy analysis, would increasingly have responsibility for the actual making of laws.[231] But the realities of U.S. governance remain far from this vision. Moreover, even in a technocrat's paradise in which states test-drive policy experiments through randomized trials or in which careful empirical scholars readily tease out instruction from the "natural experiments" generated by different state

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224. *See supra* note 157 and accompanying text.

225. Galle & Leahy, *supra* note 187, at 1399; *cf.* James A. Gardner, *The "States-as-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 481 (1996) (asserting that, "[u]nlike scientific information, which is produced systematically by a well-defined community using standards designed to enhance the generalizability and usefulness of the information obtained, the kind of information produced by state policy experimentation is produced individually, haphazardly, and under circumstances that are unlikely to yield information suitable for use by other states").

226. Galle & Leahy, *supra* note 187, at 1399.

227. Pena v. Lindley, 898 F.3d 969, 984 (9th Cir. 2018).

228. *See supra* note 157 and accompanying text.

229. *Pena*, 898 F.3d at 973; *id.* at 984 (invoking Justice Brandeis's "laboratory" passage in *New State Ice*).

230. *Id.* at 984.

231. *Cf.* David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 717, 726 (1988) (describing a 1905 talk by Brandeis to the Harvard Ethical Society as "promot[ing] . . . the 'technocratic vision' of progressive professionalism").

policies,[232] the laboratories metaphor would be a stretch. A metaphor that has such a tendency to mislead, as opposed to elucidate, is commonly best avoided.

CONCLUSION

It is frequently asserted that law school teaches students to "think like lawyers," a process that is often self-servingly defined as meaning to think more precisely and logically.[233] We suspect that most members of the legal academy and profession would say that lawyers must think, at least in substantial part, in terms of hard-headed realities, rather than untethered abstractions.[234] This is one possible meaning of Holmes's injunction to wash our conventional concepts in what he called "cynical acid" in order to expose the implicit biases that distract from actually understanding the world in which we live.[235] Consistent with this understanding, we should recognize that the way contemporary lawyers reflect on the complexities posed by American federalism is ill-served by meaningless or misleading metaphors that are currently part of the legal canon.[236] They should certainly be washed in cynical acid. Herzog's recent book suggests that recourse to the concept of "sovereignty made people stupid."[237] So it is, unfortunately, with mindless recitation of the "splitting the atom" and "laboratories of democracy" aphorisms of Justices Kennedy and Brandeis. Little is gained, and much is lost, by repeating them uncritically.

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232. *Cf.* Scott T. Leatherdale, *Natural Experiment Methodology for Research: A Review of How Different Methods Can Support Real-World Research*, 22 INT'L J. SOC. RSCH. METHODOLOGY 19, 19 (2019) (emphasis omitted) (describing "natural experiments" as ones for which "the circumstances surrounding the implementation are not under the control of researchers" and "random allocation of the intervention is not feasible for ethical or political reasons").

233. *Cf.* MICHAEL EVAN GOLD, A PRIMER ON LEGAL REASONING 1 (2018) ("Lawyers, particularly law professors speaking to prospective or beginning law students, are fond of stating that thinking like a lawyer is something special, something that is powerful, esoteric, and unique.").

234. *Cf.* WILLIAM POWERS JR., SHARPENING THE LEGAL MIND: HOW TO THINK LIKE A LAWYER 3 (John Deigh ed., 2023) ("My point is that learning to think like a lawyer can be a double-edged sword that raises serious issues about how we should think about and interact with the world and with other people.").

235. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461–62 (1897).

236. *Cf.* Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949, 990 (2007) ("Rather than unthinking acceptance of unstated assumptions and associations, thinking imaginatively about rhetorical choices is a fundamental method of increasing understanding.").

237. HERZOG, *supra* note 90, at 110.