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HOW MANY CRITIQUES MUST HISTORIANS WRITE?

Stephen A. Siegel*

Edward A. Purcell, Jr., *Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry* (Yale U. Press 2007). Pp. 320. \$45.00.

Historians coined the epithet “law-office history” over a half-century ago to describe the way Supreme Court Justices distort the historical record to provide support for positions they take on constitutional controversies.¹ The epithet encompasses many abuses of the historian’s craft, such as cherry-picking evidence, ignoring the context in which evidence was embedded, and drawing clear conclusions from evidence that was conflicting or indeterminate.²

It is not that historians believe history never gives clear answers to constitutional issues. Sometimes the answer is clear because the Constitution’s text is clear.³ When questions involve one of the Constitution’s abstract or ambiguous clauses, historians agree that clear answers sometimes may be found through historical study of the clauses’ context.⁴ Yet frequently enough, historians and the Justices differ on what the answer

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1. Howard Jay Graham, *The Fourteenth Amendment and School Segregation*, 3 *Buff. L. Rev.* 1, 7 (1953); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *S. Ct. Rev.* 119, *passim*. See also Charles A. Miller, *The Supreme Court and the Uses of History* 68-69, 195-196 (Belknap Press 1969) (explicating examples of the Court’s “misuse” of history); Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 *Wake Forest L. Rev.* 239, 418-419 (2002) (suggesting the proper epithet should be “judicial-chambers history”).

2. See e.g. Edward M. Gaffney, Jr., *History and Legal Interpretation: The Early Distortion of the Fourteenth Amendment by the Gilded Age Court*, 25 *Cath. U. L. Rev.* 207, 229-230 (1976) (cherry-picking evidence and improper certainty); Graham, *supra* n. 1, at 7 (taking evidence out of context); Kelly, *supra* n. 1, at 144 (speaking of lawyers’ briefs as offering “manipulated . . . doctored, distorted, twisted, and suppressed historical evidence . . .”); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 *UCLA L. Rev.* 217, 282-286 (2004) (empirical study of the Justices’ citations in federalism cases showing preferences between federalist and anti-federalist writings track the Justices’ preferred case outcomes). See also John Yoo, *War and the Constitutional Text*, 69 *U. Chi. L. Rev.* 1639, 1644 (2002) (discussing the symptoms of law-office history).

3. Jack M. Balkin, *Abortion and Original Meaning*, 24 *Const. Commentary* 291, 305 (2007). This does not mean that the Constitution’s clear and specific text is always followed. Compare e.g. U.S. Const. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury”) with e.g. *Patton v. U.S.*, 281 U.S. 276, 298-299 (1930) (upholding bench trial after defendant waives right to jury); *Schick v. U.S.*, 195 U.S. 65, 67-69 (1904) (upholding bench trials for “petty” offenses).

4. Jack N. Rakove, *Confessions of an Ambivalent Originalist*, 78 *N.Y.U. L. Rev.* 1346, 1351-1354 (2003); Jack N. Rakove, *Statement on the Background and History of Impeachment*, 67 *Geo. Wash. L. Rev.* 682, 686-

provided by history is,⁵ or whether history provides any answer at all.⁶

The Supreme Court's reliance on law-office history is not confined to Justices of any particular jurisprudential persuasion or political preference.⁷ Nor is it confined to majority or minority opinions.⁸ Perhaps the use of law-office history is so widespread because the norms of judicial-opinion writing require judges to assert certainty about their decisions⁹ and because cases must be decided within a time frame that is too short for scholarly investigation. Undoubtedly, briefs written by lawyers who appear before the Court promote its consideration of history written more to advance advocacy goals than to faithfully recount the past.¹⁰

In response to the extensive literature on the Court's reliance on law-office history, the Justices, in a striking demonstration of the irrelevance of academic writing to legal practice even when that writing is clearly relevant to professional concerns,¹¹ not only have continued to premise decisions on law-office history,¹² but effectively have made law-office history even more central to constitutional law by making "tradition" the preferred technique for discovering nontextual liberties protected by the Fourteenth Amendment¹³ and by adopting originalism as an influential mode for interpreting all

687, 690-691 (1999) (founding generation did not intend that misleading a civil jury was an impeachable offense); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 Stan. L. Rev. 1031, 1041, 1047 (1997) (founding generation intended judicial review).

5. Compare e.g. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270-271 (1964) (agreeing with Justice Brandeis that the founding generation believed in unfettered public debate without fear of punishment) with e.g. Leonard W. Levy, *Emergence of a Free Press* 199-220, 338-340 (Oxford U. Press 1985) (libel of public officials may be criminally sanctioned when not true or not spoken with good motives).

6. Compare e.g. *Brown v. Bd. of Educ.*, 347 U.S. 483, 489-490 (1954) (history is "inconclusive" on whether Fourteenth Amendment was meant to prohibit segregated schools) with e.g. Earl M. Maltz, *A Dissenting Opinion to Brown*, 20 S. Ill. U. L.J. 93 (1995) (Fourteenth Amendment was meant to permit segregated schools).

7. See e.g. Kelly, *supra* n. 1, at 136-137 (both Chief Justice Warren and Justice Harlan wrote law-office history in *Reynolds v. Sims*, 377 U.S. 533 (1964)); Sanford Levinson, *For Whom Is the Heller Decision Important and Why?* 13 Lewis & Clark L. Rev. 315, 327 (2009) (saying both sides in *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008), use law-office history).

8. *Supra* n. 7.

9. See Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* 60 (Times Bks. 2005) (describing Justice Black advising Justice Blackmun, "Never agonize in an opinion," and make them "sound as though it's clear as crystal.").

10. The norms of the legal profession, which promote advocacy rather than reflection, may well require the assertion of certainty when none exists. It has also been suggested that the adversary process is supposed to sort out the historical truth. I doubt it can, but even if it could it would justify law-office history written by lawyers, not by judges.

11. As a startling rebuke to relevant historical writing, consider Justice Scalia's response to Alan Gura when Gura recently urged the Court to use the Fourteenth Amendment's Privileges or Immunities Clause rather than its Due Process Clause to incorporate the Second Amendment. Scalia dismissed the notion, humorously suggesting that Gura was "bucking for a —a place on some law school faculty" rather than acting like a lawyer. Transcr. of Oral Argument at 7, *McDonald v. City of Chi.*, 130 S. Ct. 3020 (2010) (available at 2010 WL 710088). A lawyer who attended the argument told me that when Mr. Gura persisted with his Privileges or Immunities Clause argument, Justice Scalia covered his eyes and shook his head in disbelief.

12. Saul Cornell, *Heller, New Originalism, and Law Office History: "Meet the New Boss, Same As the Old Boss"*, 56 UCLA L. Rev. 1095 (2009); Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of Giles's Forfeiture Exception to Confrontation Were or Were Not "Established at the Time of the Founding"* 13 Lewis & Clark L. Rev. 605 (2009) (discussing recent criminal procedure cases); Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 Nw. U. L. Rev. 727 (2009).

13. See e.g. *Wash. v. Glucksburg*, 521 U.S. 702, 710 (1997); Cass R. Sunstein, *Due Process Traditionalism*, 106 Mich. L. Rev. 1543, 1544 (2008).

constitutional text.¹⁴

Federalism is one area that illustrates the unfortunate phenomenon I have just described. Over the past twenty-five years such luminaries as Forrest McDonald, Gordon Wood, and Jack Rakove have written award-winning histories of the Constitution's drafting and ratification asserting that in the 1780s and 1790s American federalism was a novel advance in Western political thought that the founding generation understood and articulated only in vague outline.¹⁵ What the federal principle portended for the new nation was something over which the Constitution makers had substantial disagreements and about which leading framers and ratifiers changed their views as the drafting, ratification, and implementation process unfolded.¹⁶ Although there may well have been agreement at the highest level of abstraction – that in the new republic there would be two layers of government, each exercising somewhat distinct and somewhat overlapping powers – the workings of the unprecedented system were far from clear.

In contrast to these historians, over the same twenty-five-year period individual Supreme Court Justices,¹⁷ and since the 1990s a majority of the Court,¹⁸ have written opinions and made decisions based on the belief that “the Framers[] carefully crafted [the] balance of power between the States and the National Government”¹⁹ and that balance provides clear and determinate answers to modern questions concerning federal-state relations. Relying on its knowledge of what “the Framers explicitly chose”²⁰ and what “the Framers did *not* intend”²¹ with regard to federalism, the Court has limited Congress's legislative powers,²² narrowly construed important federal statutes,²³ curtailed federal preemption,²⁴ restricted habeas review of state criminal convictions,²⁵ and expanded state immunity from citizen suits.²⁶ The “federalism revolution”²⁷ is one

14. See e.g. *Heller*, 128 S. Ct. 2783 (interpreting Second Amendment); Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 Seton Hall L. Rev. 479, 501-503 (2008) (among areas in which originalism is influential are governmental structure, religion, criminal procedure, and property rights).

15. Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 276-284 (U. Press Kan. 1985) (discussing federalism's novelty); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 167-202 (Vintage Bks. 1996) (discussing the novelties, uncertainties, and ambiguities of federalism); Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 525, 545, 615 (U.N.C. Press 1998) (originally published 1969) (describing federalism as not fully conceived, “emergent,” and a piece-meal development). See also Alison L. LaCroix, *The Ideological Origins of American Federalism* (Harv. U. Press 2010) (tracing the conception of federalism to colonial times, but not contesting that by the 1790s it was still understood only in broad outline).

16. *Supra* n. 15.

17. See e.g. *Nev. v. Hall*, 440 U.S. 410, 432 (1979) (Rehnquist, J. & Burger, C.J., dissenting); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (Powell, J., Burger, C.J., Rehnquist, J. & O'Connor, J., dissenting).

18. See e.g. *U.S. v. Morrison*, 529 U.S. 598, 620 (2000); *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996).

19. *Morrison*, 529 U.S. at 620. See also *N.Y. v. U.S.*, 505 U.S. 104, 166 (1992).

20. *N.Y.*, 505 U.S. at 166.

21. *Id.* at 180.

22. See e.g. *Morrison*, 529 U.S. 598; *U.S. v. Lopez*, 514 U.S. 549 (1995); *N.Y. v. U.S.*, 505 U.S. 104.

23. See e.g. *Solid Waste Agency of N. Cook Co. v. U.S. Army Corps of Engrs.*, 531 U.S. 159 (2001) (construing reach of Clean Water Act narrowly to avoid constitutional doubts based on federalism).

24. See e.g. *BFP v. Res. Trust Corp.*, 511 U.S. 531 (1994) (without clear statement of intent federal statutes will not displace traditional state powers); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (same).

25. See e.g. *Coleman v. Thompson*, 501 U.S. 722 (1991) (not applying “plain statement” rule to determine whether state judgment is based on federal or state law).

26. See e.g. *Fed. Mar. Commn. v. S.C. St. Ports Auth.*, 535 U.S. 743 (2002) (state sovereign immunity bars federal administrative agencies from adjudicating citizen complaints against states); *Alden v. Me.*, 527 U.S. 706

of the signature achievements of the Rehnquist Court.²⁸

With the Supreme Court's turn to history and its "federalist revival"²⁹ in full bloom, Edward Purcell's *Originalism, Federalism, and the American Constitutional Enterprise*³⁰ ("OFACE") is a timely reconsideration of federalism's origins and development. Purcell's study differs from McDonald's, Wood's, and Rakove's work in that it focuses solely on federalism and covers the topic from the founding to the present day. Moreover, as Purcell makes suggestions for a jurisprudential approach to federalism issues that differ from originalism, OFACE is normative as well as descriptive and analytic.

As in his previous prize-winning books,³¹ Purcell seamlessly draws from his expertise in history, law, political science, and jurisprudence. OFACE is well-worth reading if only for its layers of learning. It is a compendium spanning over two hundred years of American constitutional, institutional, political, and jurisprudential development.³² Purcell discusses, *inter alia*, founding era debates about the extent of the federal government's implied powers;³³ the South's massive resistance to school desegregation;³⁴ changing views on whether the vice president is part of the executive or legislative branch;³⁵ the development of local chambers of commerce and boards of trade;³⁶ urban competition for canal and railroad projects;³⁷ Henry Clay's American System;³⁸ histories of theories of federalism;³⁹ John C. Calhoun's and George Sutherland's shifting claims about state's rights and federal power;⁴⁰ and the growth of the federal government's executive, legislative, and judicial branches.⁴¹ In mentioning this seemingly random collection of topics, I have merely scratched the surface of the subjects Purcell discusses in his remarkably compact, accessible, and insightful history

(1999) (state sovereign immunity allows states to refuse to allow federal question suits against them in their own courts).

27. Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. Chi. L. Rev. 429, 429 (2002).

28. Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 Geo. Wash. L. Rev. 888 (2006); Rosalie Berger Levinson, *Will the New Federalism Be the Legacy of the Rehnquist Court?* 40 Val. U. L. Rev. 589 (2006).

29. Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?* 111 Harv. L. Rev. 2180, 2213 (1998).

30. Edward A. Purcell, Jr., *Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry* (Yale U. Press 2007).

31. Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America* (Yale U. Press 2000); Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958* (Oxford U. Press 1992); Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (U. Press. Ky. 1973).

32. Without meaning to take away from the luster of Purcell's text, I would recommend OFACE for its footnotes alone. Scholars with no interest in federalism may well find the book an enjoyable, informative, and useful read for its wealth of detail concerning the development of American government.

33. Purcell, *supra* n. 30, at 32, 41-42, 59-60.

34. *Id.* at 64.

35. *Id.* at 43-44.

36. *Id.* at 94.

37. *Id.* at 94-97.

38. Purcell, *supra* n. 30, at 65-66.

39. *Id.* at 85-110.

40. *Id.* at 66-68.

41. *Id.* at 111-136.

of federalism.

OFACE's wealth of factual detail is superbly marshaled to support three theses. The first is that at the founding the new Constitution's federalism principle was so "unsettled,"⁴² "vague . . . and conflict[ed]"⁴³ that "any claim that the 'original' nature of American federalism can serve as a specifically directive norm . . . is simply mistaken."⁴⁴ Purcell's view is that although "[t]he Constitution's federal structure . . . was both evident and uncontested"⁴⁵ the "way that structure was to function in practice,"⁴⁶ how the two constitutionally mandated levels of government would "interact with one another"⁴⁷ and "how far their powers would reach,"⁴⁸ was so "underdetermined"⁴⁹ that "the Constitution neither gave the federal structure any single proper shape as an operating system of government nor mandated any particular and timeless balance among its components."⁵⁰ In other words, Purcell fully reaffirms McDonald's, Wood's, and Rakove's claim that the Constitution "furnished inadequate direction in deciding most specific issues about the structure's proper limits and operations."⁵¹

As a confirmation of previous studies, the value of Purcell's first thesis lies in its sustained treatment, which allows Purcell to present new proofs and extensive supporting detail. In addition, it serves as a stepping stone to Purcell's novel second thesis, which is that "even had there been some true 'original' balance, the constitutional structure the founders established was inherently incapable of maintaining it."⁵²

Whether Purcell's counterfactual claim is permissible hyperbole or a positive claim need not detain us. The fact is that from the founding to the present day, federalism has been a volatile kaleidoscope of events, shifting claims, and clashing theories. Certainly one reason for federalism's mutability is that there never was a "true 'original' balance"⁵³ to cling or return to. But in a tour de force, Purcell supplies a seminal study of "four inherent characteristics" of the federal structure that made federalism's protean development "inevitable" and "unresolvable."⁵⁴ The largest part of OFACE is a historically informed analysis of why the Nation's federal structure has been so dynamic.

In Purcell's words, the Nation's federal structure was "doubly blurred, fractionated, instrumental, and contingent."⁵⁵ Purcell explicates what he means by these terms in four chapters followed by another four discussing the ever-changing

42. *Id.* at 193.

43. Purcell, *supra* n. 30, at 37.

44. *Id.* at 6.

45. *Id.*

46. *Id.*

47. *Id.*

48. Purcell, *supra* n. 30, at 6.

49. *Id.* at 189.

50. *Id.* at 7.

51. *Id.* at 153.

52. *Id.* at 6. *See also* Purcell, *supra* n. 30, at 7 ("[E]ven had such a 'true' system existed in some 'original' intent or understanding, the governmental structure the founders established could not have preserved it unchanged over time.").

53. *Id.* at 6.

54. *Id.*

55. *Id.*

governmental system to which they gave rise. These “consequential dynamics”⁵⁶ involve federalism’s “kaleidoscopic politics,”⁵⁷ “readjusting components,”⁵⁸ “contested authorities,”⁵⁹ and “evolving understandings.”⁶⁰

Purcell’s elaboration of the claim that the federal structure had “four intrinsic characteristics” that “together . . . rendered it impossible either to identify or to maintain a definitive boundary between state and national authority” occupies most of the book and accounts for the unusual decision for a book about originalism to discuss its subject from the founding to the present.⁶¹ In this short review, I cannot properly recount Purcell’s intricate argument. Suffice it to say that Purcell provides a fascinating and fresh analysis of American federalism. The feature I found most telling was Purcell’s depiction of federalism as a polyvalent, not a binary, system. Federalism, Purcell shows, does not involve the relationship between two monoliths (the national government and the states). The national government itself is fractured into three branches, and one of them, the legislature, is itself broken into two houses. Moreover, over time, each branch of the federal establishment grew and changed into something distinctly different from what it was at the founding. The national establishment has even sprouted another branch, the independent agencies, with its own interests and politics.⁶²

The states also were fractured at the founding into thirteen entities with different perspectives, and over time they multiplied into fifty entities that cooperated, competed, and contended with each other as well as with the evolving branches of the national government. Furthermore, each state itself is fractured into cities and different economic and geographic areas that cooperate, compete, and contend among themselves as well as with their own state for Washington’s attention.⁶³

With a surfeit of examples, Purcell’s study shows that all these institutional divisions created a welter of constantly shifting interests and alliances that cut unpredictably across the supposed binary nation-state divide. The “intrinsic dynamism” of interstate, intrastate, and even intrafederal politics “continuously generated changing matrices of pressures on the . . . blurred constitutional lines between state and federal power and prevented either side of the binary divide, states or nation, from maintaining those lines clearly and consistently.”⁶⁴ The federal structure, Purcell concludes, “simply incorporated far too many mutable and malleable parts divided by far too many murky and manipulable lines either to define or to sustain any single and true balance.”⁶⁵

In light of his first two theses, Purcell concludes OFACE with some suggestions as to how the Justices should approach federalism questions. Purcell’s general suggestion is that the Justices must recognize that they, not the “Constitution or other ‘originalist’

56. *Id.* at 83.

57. Purcell, *supra* n. 30, at 85.

58. *Id.* at 111.

59. *Id.* at 140.

60. *Id.* at 161.

61. *Id.* at 85.

62. See Purcell, *supra* n. 30, at 7-8, 38-47, 111-137.

63. *Id.* at 47-52, 137-139.

64. *Id.* at 192.

65. *Id.* at 193.

sources,”⁶⁶ are responsible for the principles, doctrines, and decisions that govern the nation-state relationship. Because the founding generation specified only the broad outlines of the federal structure, the Justices should stop trying to apply “vacuous”⁶⁷ principles and categories supposedly imposed on them by the founders. Rather, they should work from “specific, pragmatic, and empirically based analyses of the operations of the federal structure and the likely practical consequences involved in accepting any particular interpretation of its nature and limits.”⁶⁸

Federalism decisions should be “practical judgments,” involving “careful, flexible, and pragmatic line-drawing.”⁶⁹ Although ultimately federalism decisions “must necessarily be rooted in the [Justices’] personal values and interests,”⁷⁰ the Constitution provides a foundation for their task. The Constitution ordains a “‘compound’ structure,”⁷¹ from which Purcell derives the “essential structural requirement”⁷² that both levels of government must have an “independent existence, efficacious operation, and ultimate public accountability.”⁷³ Moreover, the Constitution supplies the “ideals and goals”⁷⁴ that federalism - as worked out by the Justices - is a tool to effectuate.⁷⁵

Purcell’s view is that rather than the comfort of “guarantees” or “clear and specific direction,” what the Constitution provides is “‘guidance’ - in the sense of informed and aspirational counsel.”⁷⁶ All else “rests ultimately in the wisdom and judgment of the Court itself.”⁷⁷ This may well be, Purcell acknowledges, an “unsatisfying and unnerving” situation, but it is “a fundamental aspect of the American constitutional enterprise.”⁷⁸

Given how persuasively argued OFACE is, it is possible that some originalists will take comfort in the thought that Purcell’s analysis “applies only to federalism”⁷⁹ because federalism is the sole focus of his historically informed study.⁸⁰ I would not take refuge in that thought. There are many areas and issues where, in the view of leading historians, the Constitution’s text and other originalist sources do not give clear and specific direction.⁸¹ Moreover, in some areas where the sources are clear, the results are highly

66. *Id.* at 194.

67. Purcell, *supra* n. 30, at 205.

68. *Id.* at 9.

69. *Id.* at 204.

70. *Id.* at 9.

71. *Id.* at 197.

72. Purcell, *supra* n. 30, at 194.

73. *Id.* For this reason, Purcell approves of the “anti-commandeering” principle announced in *N.Y.*, 505 U.S. 144. See Purcell, *supra* n. 30, at 194, 286 n.10.

74. Purcell, *supra* n. 30, at 198.

75. See *id.* at 198-200 (discussing the goals).

76. *Id.* at 203.

77. *Id.*

78. *Id.* at 206.

79. Purcell, *supra* n. 30, at 193.

80. See also *id.* at 7 (saying his “conclusions . . . are based not on general theories of language or meaning but on empirical evidence from the nation’s history” based only on a “narrow and specific” study of federalism.).

81. See e.g. Rakove, *supra* n. 15, at 3-22, 244-365 (discussing executive power, rights, and the founder’s approach to interpreting the Constitution).

disturbing.⁸²

Originalists may also take comfort in the thought that Purcell's book investigates only the Supreme Court's practice of originalism. Purcell does not study originalist theory or the practice of originalism by academics. In fact, a fair number of academic originalists recognize that the Constitution and other originalist sources may fail to give clear answers to constitutional issues and they respond thoughtfully to the problem in ways that differ from Purcell's.⁸³ Still, the fact that the Justices have not shown themselves to be good at doing history is a problem for originalism regardless of the bonafides of its academic theory and academic practice.⁸⁴

For that reason alone, Purcell's final thesis may be welcome as a timely turn away from "judge as umpire" jurisprudence toward a jurisprudence that begins to flesh out anew the view that "the Supreme Court is not, and has never been, simply a 'court of law,'"⁸⁵ but also is a " 'lawmaking' "⁸⁶ institution, necessarily so, and rightfully so. Of course, there is much more work to be done to flesh out the jurisprudence attendant upon Purcell's reminder that when it comes to the Constitution's continuing development "judicial 'lawmaking,' in fact, has become a key component of that enterprise."⁸⁷ Whatever one may think of Purcell's normative suggestions, OFACE's analytical parts are a superb piece of history and political science. Its wealth of factual detail analyzes federalism with subtlety and originality. OFACE is a substantial contribution to our understanding of one of the oldest, most fundamental, and controversial facets of American politics and constitutional law.

OFACE is, as well, a timely demonstration of what is (or what because of OFACE will become) the historians' conventional wisdom: that the Constitution makers established federalism as an integral part of American government without establishing what federalism meant in practice. How long will it take before that insight also becomes the conventional wisdom of the Justices?

82. See e.g. Levy, *supra* n. 5, at 199-220 (First Amendment permitted prosecutions for seditious libel); Maltz, *supra* n. 6 (Fourteenth Amendment permitted segregated schools).

83. See Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. Contemp. Leg. Issues 409, 436-445 (2009) (discussing Keith Whittington's, Randy Barnett's, and his own response to the problem of "failure of constitutional communication."). Cf. John Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 Harv. L. Rev. 2003, 2059-2061 (2009) (concluding on textualist grounds that the Constitution's federalism principle has no directive power apart from specific constitutional provisions adopted to implement federalism).

84. See Koppelman, *supra* n. 12, at 749-750 (suggesting that the increased production of originalist scholarship will end up increasing the Justices' ability to find historical analyses that colorably support the conclusion they want to reach on nonoriginalist grounds).

85. Purcell, *supra* n. 30, at 202.

86. *Id.* at 204.

87. *Id.*