

Book Review

***Erie* and the History of the One True Federalism**

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Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America. By Edward A. Purcell, Jr.* *New Haven: Yale University Press, 2000. Pp. 417. \$37.50.*

I. INTRODUCTION

In his ambitious and beautifully realized new book, Edward Purcell reminds his readers that only recently have federal courts scholars begun to consider the extent to which their subject is the product of distinctive historical developments.¹ One of the many gifts of this important work is its vivid demonstration of how much scholars gain by studying jurisdictional issues in historical context, at least when history is treated with the richness and breadth of purpose that characterize *Brandeis and the Progressive Constitution*.

Purcell describes his book as a work of history, not of legal analysis. But it is history, and historical method, that should be of tremendous interest to legal scholars. This rich, nuanced, and meticulously researched

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1. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 5 (2000).

work uses *Erie*,² a decision that has transformed, Zelig-like, to personify each jurisprudential age, as a prism through which to view the evolving concept of federalism, and, more generally, the cyclical erosion and creation of doctrinal meaning. It weaves together intellectual, political, social, and legal history to tell the compelling story of the changing social dynamics that engendered and then constantly reinvented the *Erie* doctrine. In modeling this use of history, Purcell shows, implicitly and explicitly, the limits of the current doctrinal method for understanding the evolution and proper role of the federal courts. For, as Purcell says, “[w]ithout constant reference to changing social dynamics and consequences, students of procedure can scarcely know what they are talking about. Whatever social purposes abstract analyses might be designed to serve, historical changes continually refit them to new and unexpected ends.”³ Placing jurisdictional doctrine in historical context illuminates the social and political influences that shape and reshape the contours of the federal judicial power and our evolving notions of federalism.

Conventional legal doctrinal method strips away acknowledgment of these forces and recasts principles like federalism in more abstract and formalized terms. It portrays the development of law as linear, logical, and transcending political and social variables. As I argue, the impulse to cast doctrinal development in these formal terms has numerous sources, including the perceived need to satisfy the requisites of the rule of law. When federalism is portrayed as an abstract notion, unaffected by changing political conditions or the changing nature of the institutions themselves, that portrayal gives the seductive appearance of advancing the goals of consistency, predictability, and reason. The legal process school, with its focus on discerning neutral jurisdictional principles, identified the field of federal courts with this effort to articulate a federalism transcending the vagaries of history and politics. In attempting to impart a systemic coherence to the field, and to federalism as its central organizing principle, the legal process approach advocated an insularity that sought to exclude a whole host of influences and contingencies—political, cultural, historical, and practical.⁴

2. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), *rev'g* *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). *Swift* “had expanded the power of the national courts to create a ‘general’ federal common law independent of the common law of the states.” PURCELL, *supra* note 1, at 1. *Erie* held that federal courts exercising diversity jurisdiction may not use their independent judgment on the common law of the state, but must, except in matters governed by the Federal Constitution or acts of Congress, apply the law of the state. In doing so, “it sought to limit [the federal] judicial power and rebalance the lawmaking structure of American government.” *Id.*

3. PURCELL, *supra* note 1, at 257.

4. See, e.g., Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993 (1994); Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 EMORY L.J. 89 (1998).

In a variety of legal subject areas, exposure to interdisciplinarity has both forced and helped legal scholars to identify the hidden assumptions, nonlegal influences, and value choices underlying legal concepts.⁵ The field of federal jurisdiction, however, wards off this challenge to its hermeticism to the extent it defines itself as a closed, autonomous system in which jurisdictional issues can and should be decided based on their fidelity to internally defined principles⁶ like federalism and separation of powers.⁷ There is a troubling persistence to the assumption that these terms possess their own normative content,⁸ or describe stable essences⁹ that exist in the real world, yet somehow outside time.¹⁰ There persists an equally strong conviction that jurisdictional principles should operate independent of the results to which they lead, the substantive issues to which they are applied,¹¹ or the ideological or emotional commitments of the jurists who apply them. In short, the exclusion of substantive justice as a proper inquiry is an essential part of the field's self-definition.

5. See, e.g., PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* 4 (2000); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 60-93, 99 (1996).

6. That is, principles that derive their meaning and legitimacy solely from the assumptions of the system itself, rather than from external sources. For a discussion of these neutral principles, see *infra* text accompanying notes 148-173.

7. This statement may be unduly ahistorical in itself. Purcell asserts that the field, as originally inspired by Brandeis and molded by Frankfurter, was "born of political commitment and ideological conviction," and should not be equated with what it became after the Second World War. PURCELL, *supra* note 1, at 4-5.

8. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) (finding that principles of federalism created a strong presumption against applying the Age Discrimination in Employment Act to state employees, justified by the fact that "[i]n the tension between federal and state power lies the promise of liberty"); see also Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. REV.* 903, 904-05 (1994) (discussing *Gregory*). Increasingly, there also has developed a rich body of scholarship debating the possible normative underpinnings of these concepts and their formal versus functional qualities. See, e.g., DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995) (bibliography); sources cited in Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 *HARV. L. REV.* 2180, 2213-23 (1998).

9. Such assumptions are limited neither to the field of federal courts nor to law in general, of course. See, e.g., JEROME KAGAN, *THREE SEDUCTIVE IDEAS* 67 (1998) (stating that one of the hardest preferences is for ideas that "imply stable essences, possess symmetry, and are simple").

10. See, e.g., *United States v. Morrison*, 120 S. Ct. 1740, 1744 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local."); see also THOMAS C. GREY, *THE NEW FORMALISM* 5-7 (Stanford Law Sch., Pub. Law & Legal Series, Working Paper No. 4, 1999), available at http://papers.ssrn.com/paper.taf?abstract_id=200732 (discussing Christopher Langdell's essentialism, which Grey defines as the belief that a concept delineates the essence of a species); Robert A. Ferguson, *The Judicial Opinion as a Literary Genre*, 2 *YALE J.L. & HUMAN.* 201, 211 (1990) (describing a declarative judicial tone that conflates the actual world with the world represented in the text); Robert W. Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017, 1029 (1981) (discussing the belief that "the function of law is to learn to recognize . . . regimes of spontaneous order already present in social life").

11. Wells, *supra* note 4, at 89.

Granted, the concept of neutral jurisdictional principles¹² has been taking increasing heat. It is becoming ever clearer, as legal scholars gain historical perspective and the benefit of insightful scholarship,¹³ that the legal process school's¹⁴ belief in an abstract and timeless logic of federalism is itself a product of its time, and is itself based on a choice of values—albeit a choice that went unacknowledged and undefended. Yet it is not at all clear that the notion has lost its hold on the field.¹⁵ Certainly, for reasons complicated by the perceived requisites of the judicial role, the concept of neutral principles remains an article of faith in judicial opinions. The more basic question is whether the belief in the existence and efficacy of neutral principles is separable from the field with which it was created. That is, if scholars accept the inevitability of value choices, will procedure be subsumed by substance, or will principles remain to help bound, guide, and assess the allocation of state and federal power? Or, to state the question more optimistically, can a broadening awareness and exploration of the contingencies shaping jurisdictional policy help enrich the field?

This is an opportune and even necessary time to ask these questions. Our nation is witnessing a radical restructuring of federal-state relations. The restructuring, often dubbed “The New Federalism,” is being accomplished largely through revitalizing the Tenth Amendment and establishing a categorical anticommandeering principle,¹⁶ sharply restricting

12. The articulation of the concept of neutral principles is generally credited to Herbert Wechsler, who argued that the judicial process must be “genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.” Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

13. See KALMAN, *supra* note 5, at ch. 1 and *passim*; ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 113-216 (1998); Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601 (1993); Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994); Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561, 571 (1988); Michael Wells, *Busting the Hart & Wechsler Paradigm*, 11 CONST. COMMENT. 557 (1995); Michael Wells, *Who's Afraid of Henry Hart?*, 14 CONST. COMMENT. 175 (1997); Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688 (1989) (book review).

14. The legal process school takes its name from the seminal work of Henry Hart and Albert Sacks. *Infra* note 98. Hart later joined forces with Herbert Wechsler to shape the field of federal courts, which, as I discuss below, is closely associated with both the legal process methodology and the concept of neutral principles. For a discussion of the creation of the legal process school, see *infra* text accompanying notes 98-112, and for a discussion of the school's philosophy, see *infra* text accompanying notes 147-173.

15. *E.g.*, Fallon, *supra* note 13, at 969 (referring to legal process theory as the reigning paradigm); Peller, *supra* note 13, at 571 (claiming that the process approach continues to form background assumptions for most centrist legal scholars). *Contra* SEBOK, *supra* note 13, at 177 (arguing that the reputation of the legal process theory has declined); Duxbury, *supra* note 13, at 704 (noting that some now dismiss this strain of legal philosophy as “little more than a vision of a legal utopia”).

16. *Printz v. United States*, 521 U.S. 898 (1997) (invalidating provisions of the Brady Act).

the power of Congress to legislate under the Commerce Clause,¹⁷ restricting the power of Congress to legislate under Section 5 of the Fourteenth Amendment,¹⁸ and greatly expanding state sovereign immunity.¹⁹ Since 1995, the Court has invalidated all or part of twenty-five federal laws, many on federalism grounds.²⁰ How should the desirability of this emerging vision of federalism be assessed?

Perhaps, as some have argued, the Supreme Court is illegitimately imposing its personal vision of federalism on an unwilling nation, *Lochner*-like,²¹ or perhaps we are entering a fourth transformative era of lawmaking on par with the framing of the Constitution, Reconstruction, and the New Deal.²² The high-stakes rhetoric employed by both sides reflects a deep ideological division on the question of what constitutes a proper federalism.

17. *E.g.*, *United States v. Morrison*, 120 S. Ct. 1740 (2000) (striking down the civil-remedy portion of the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (voiding the Gun-Free School Zones Act of 1990).

18. *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down portions of the Religious Freedom Restoration Act of 1993); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (extending *Boerne's* restrictions on Section 5 power).

19. *E.g.*, *Alden v. Maine*, 527 U.S. 706 (1999) (holding that the principle of sovereign immunity prevents states from being nonconsensually sued in their own courts on federal claims); *Fla. Prepaid*, 527 U.S. 627 (rejecting the constructive waiver theory).

20. Linda Greenhouse, *A Turf Battle's Unlikely Victim*, N.Y. TIMES, June 28, 2000, at A1.

21. Invocation of *Lochner v. New York*, 198 U.S. 45 (1905), is generally shorthand for the accusation that judges have enacted their personal prejudices into law, although the precise contours of the epithet are subject to debate. *Compare* *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 701 (1999) (Breyer, J., dissenting) (stating that *Lochner* “threatened the Nation’s ability to enact social legislation”), *with id.* at 691 (majority opinion) (arguing instead that *Lochner's* distinctive feature “was that it sought to impose a particular economic philosophy upon the Constitution”). *See also Alden*, 527 U.S. at 814 (Souter, J., dissenting) (finding a resemblance between the majority’s jurisprudence and *Lochner*); John E. Nowak, *The Gang of Five and the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091, 1094 (2000) (arguing that the new sovereign immunity cases represent “to some extent anti-Federalist . . . ‘philosophy’ . . . imposed on our country”); Peter M. Shane, *Federalism’s “Old Deal”: What’s Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000) (arguing that the new federalism shares many of the worst characteristics of *Lochner*-era jurisprudence); David L. Shapiro, *The 1999 Trilogy: What Is Good Federalism?*, 31 RUTGERS L.J. 753, 760 (2000) (stating that he “can only hope that this arrogation of authority will sooner, rather than later, meet the fate of some of its notorious predecessors”). This view may or may not eventually prove to parallel the conventional story of the battles between the old Court and the New Deal, which Bruce Ackerman critiques as treating “the constitutional struggles of the 1930’s as if they were the product of an intellectual mistake made by a handful of judicial conservatives on the Supreme Court.” 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 9 (1998); *see* HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 18, 199, and *passim* (1993) (addressing misconceptions about *Lochner*-era constitutional lawmaking); Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115, 2117 (1999) (critiquing the argument that the New Deal was simply a restoration of the previous wisdom of the Marshall Court).

22. *See* ACKERMAN, *supra* note 21 (discussing transformative moments of constitutional government); *see also* Shane, *supra* note 21, at 201 (citing *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 892 (4th Cir. 1999) (en banc) (Wilkinson, C.J., concurring) (stating that federal courts are currently undergoing “[t]his century’s third and final era of judicial activism”), *aff’d sub nom.* *United States v. Morrison*, 120 S. Ct. 1740 (2000)).

Such an extreme fissure sorely tests the belief in an immanent principle of federal-state ordering that is based on a national consensus and transcends political ideology. Long-term branch affinities²³ have undergone a noticeable shift, as conservatives look to the Court for protection and liberals argue for legislative primacy, calling into question the ideal of an ahistorical commitment to particular institutional roles.²⁴ Scholars and dissenting judges accuse the Court of using federalism as a cover for advancing hidden agendas like antipathy to individual rights in the same way the Court once used federalism as a cover for the defense of slavery or laissez-faire capitalism.²⁵ A concept of federalism that may have appeared coherent and timeless during more harmonious times is now revealed to be contested, temporary, and contingent. At such junctures, it is easier to locate ourselves in the realm of values, politics, and a particular historical moment,²⁶ and, from that vantage point, to reassess the requisites for a coherent and principled notion of federalism.

As Purcell notes, judicial opinions “blur, obscure, and then replace broad and complex historical understandings with formalized doctrines.”²⁷ History expands our understanding of the variables that influence the evolution of law, and it therefore poses a challenge to our notions of law’s stability and coherence.²⁸ The challenge needs to be taken seriously, as a signal to reexamine those notions and their continuing viability. How stable or flexible, how impervious or porous should a principled system be? Is a principled federalism possible that fails to defend its value choices and acknowledge its social and political goals? Alternatively, is a principled

23. See PURCELL, *supra* note 1, at 5 (discussing the “critical role ‘branch affinities’ played in the ideological commitments of diverse political partisans to the different branches of government”). The book argues that “such foundational ideas as federalism, separation of powers, and the respective constitutional roles of the various branches of government are rooted largely in expectations concerning the practical consequences that varying allocations of institutional authority would likely cause” and thus will “shift, fragment, and realign over time.” *Id.*

24. See, e.g., Michael C. Dorf, *No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court*, 31 RUTGERS L.J. 741, 747 (2000) (discussing “Nationalist” dissenters’ accusations of hypocrisy toward the conservative majority and calling them a “double-edged sword”); Shane, *supra* note 21; David Cole, *Paper Federalists*, NATION, June 12, 2000, at 6 (charging conservatives with using the same activist strategies they once decried when liberals used them).

25. Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1340 (1999) (critiquing the Court’s use of federalism to avoid responsibility for systemic police brutality); Nowak, *supra* note 21, at 1113-17; Cole, *supra* note 24; see also Morrison, 120 S. Ct. at 1768 (Souter, J., dissenting) (stating that the Court revives a formalist conception of federalism in order to assert its own conception of a sphere of state autonomy).

26. See, e.g., Lawrence Lessig, *Translating Federalism: United States v Lopez*, 1995 S. CT. REV. 125, 126-27 (discussing the process by which accepted fictions and conventions cease to be widely understood and become contested).

27. PURCELL, *supra* note 1, at 4.

28. See Gordon, *supra* note 10, at 1021-22; Morton J. Horowitz, *The Historical Contingency of the Role of History*, 90 YALE L.J. 1057, 1057 (1981).

federalism possible that more fully takes the influence of these complex variables into account?

In *Brandeis and the Progressive Constitution*, Edward Purcell provides an admirable model for considering these questions. The book is organized into three major sections. Part I focuses on the Progressive era and the expansion of federal judicial power. Part II shifts focus to a consideration of Justice Brandeis and the genesis of the *Erie* opinion. Part III follows the evolution of the *Erie* doctrine and considers it in the larger context of the nature of historical and legal change. Purcell's concerns are ultimately about the very nature of a principled jurisprudence. The book's historical approach affords insight into the choices and tradeoffs implicated in defining a coherent field and populating it with coherent concepts.

This Review first turns, in Part II, to a discussion of Purcell's historical account of the age leading up to *Erie*, the creation of the *Erie* opinion itself, and its subsequent doctrinal evolution under rapidly evolving historical conditions. This Part focuses, in particular, on Purcell's account of the myriad ways in which political, social, and cultural influences affect the scope of the federal judicial power over time. It considers the broad political and social trends, the influence of interest groups—including the bar—and the ways in which certain highly influential jurists, particularly Justices David Brewer,²⁹ Felix Frankfurter, and Louis Brandeis, and Professor Henry Hart, helped shape the evolution of legal doctrine. Specifically, Section II.A examines the expansion of the federal judicial power during the late-nineteenth-century era of federalizing commercial and industrial interests. This Section also focuses on Justice David Brewer's contribution to the expansion of *Swift v. Tyson*. Section II.B focuses on Justice Brandeis, his role in crafting the *Erie* decision, and the influences and constraints affecting that role. Section II.C focuses on the path of the *Erie* doctrine in the aftermath of the Progressive era, and particularly on the role of Frankfurter, Hart, and the other expositors of the doctrine of neutral principles in recasting the significance of *Erie* and its conception of federalism. This Part examines these influences in order to pose the question of whether a greater recognition of these influences, and the interactions among them, would enrich and improve upon the conventional ahistorical legal account of the development of doctrine.

Part III considers this question. In Section III.A, I posit that although law and history are not entirely congruent in their purposes, history nevertheless can offer valuable insights into the ingredients of a principled

29. Brewer was a Fuller Court jurist prominently associated with the expansion of the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which held that while state statutes were rules of decision binding on federal courts, state judicial decisions were not laws governed by the Rules of Decision Act and were thus not binding on the federal courts. See *infra* text accompanying notes 40-60.

legal jurisprudence. As Purcell shows, historical context can shed light on the ways in which, for example, the one true federalism of one era becomes the discredited formalism of the next. In documenting the changing nature of American institutions and of scholars' attitudes toward them, history reminds observers to approach current claims for timeless verities and immutable federal-state ordering with caution. Thus, in Section III.B, I examine the still influential defense of value-neutral federalism that undergirds the doctrine of neutral principles of jurisdictional law. To the extent the doctrine of neutral principles is premised on the desirability of excluding nonlegal considerations from judging, it poses a direct challenge to the argument that historical context can enrich jurisdictional doctrine. Thus, it is important to understand the historical context in which the doctrine itself arose. Here I argue that the doctrine was premised on an undefended and historically contingent belief in the possibility of value-neutral judging that should have little continuing validity. In Section III.C, I argue that this misguided belief in the possibility of a value-neutral, internally coherent body of jurisdictional doctrine has much in common with the brand of formalism that characterizes the New Federalism of the Rehnquist Court. This Section offers a critique of this aspect of the New Federalism, which, I argue, sacrifices concern for substantive justice for a questionable notion of predictability and coherence. Section III.D argues that jurisdictional doctrine, and the doctrine of federalism in particular, would benefit from more explicit recognition of the political and social values that have always shaped them, and that will inevitably continue to do so. It argues that a notion of federalism that acknowledges its social, political, and historical influences holds out the possibility of being more principled—more flexible, more responsive to changing conditions, more concerned with substantive justice, less likely to calcify around an illusion of coherence that has lost its normative hold. It concludes that Purcell is correct in suggesting that Justice Brandeis offers a model for this type of jurisprudence.

II. THE STORY OF *ERIE*: FROM THE PROGRESSIVE ERA TO THE REHNQUIST COURT

The story Edward Purcell sets out to tell, as the title of his book announces, is about the Progressive Constitution—the rise, fall, or evolution (depending on one's view) of a regime in which Progressive values animated constitutional interpretation. This focus explains many of the choices Purcell makes, and perhaps some of the tensions in the book's conception as well. It explains, for example, why the book contains very little discussion of Justice Story, the author of *Swift v. Tyson*, or his initial conceptions of *Swift's* federal common law, and a wealth (indeed, at times a

surfeit) of detail about Justice Brandeis and his conceptions of the *Erie* doctrine. This is not meant to be a story about the origins of *Swift v. Tyson* and *Swift's* demise at the hands of *Erie*. The story instead begins in the Progressive era, and focuses on Justice Brandeis as, in most respects, an exemplar and major architect of Progressive values.³⁰ Similarly, Purcell's book treats the *Erie* case as the achievement of one of Brandeis's most dearly held goals as a judge: overruling a case that, in its operation and perhaps also its conception, was antithetical to his Progressive conception of constitutional governance, and replacing that case with a regime that would better accord with that conception. The book examines the choices Brandeis made in crafting *Erie* and the constraints within which he made these choices. Purcell's book then traces the consequences of those choices and constraints for a precedent conceived in one era but thrust, almost immediately, into vastly different political, social, and constitutional contexts.

Given the central role Purcell accords Justice Brandeis, Purcell's account of the Progressive Constitution is best understood as an account of the particular Progressivism of Justice Brandeis. Purcell describes Brandeis's Progressivism as consisting of intertwined commitments to the ideals of social justice and efficiency, an antagonism toward corporate concentration and "bigness" in general, and a belief that the legitimacy of all institutions derived from their ability to enhance the freedom of individuals.³¹ In Purcell's complex portrait, Brandeis's commitment to judicial restraint was an outgrowth of these commitments, a concern for the justice of each individual case.³² In this portrait, Brandeis's respect for the constraints of judging coexisted with his conception of substantive justice, a conception that was infused with his deeply held Progressive values.³³

As Purcell tells his readers at the outset, his is a historical and not a legal analysis, a distinction to which I will return later.³⁴ This historical analysis explains the creation and evolution of the *Erie* doctrine not as the linear result of doctrinal logic, but as part of a dynamic pattern of change and continuity, formation and reformation.³⁵ Purcell's historical approach

30. *But see* PHILIPPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* 2-3 (1993) (discussing the ways in which Brandeis's Progressivism was unique).

31. PURCELL, *supra* note 1, at 141-42; *see also* STRUM, *supra* note 30, at 2-3. Strum notes that Brandeis's philosophy went "beyond Progressivism." She argues that unlike most Progressives, Brandeis did not advocate a level economic playing field, if the leveling of the playing field required government regulation. He preferred that economic liberty be guarded by individuals rather than by the state. STRUM, *supra* note 30, at 8.

32. PURCELL, *supra* note 1, at 304.

33. *Id.* at 159.

34. *Infra* text accompanying notes 121-148.

35. David Hackett Fischer draws on the terminology of THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962), to describe the series of structural reformations that best captures the dynamics of historical evolution. DAVID HACKETT FISCHER, *HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* 161-62 (1970).

places *Erie* within a broad range of historical, political, and social forces that provide a richer context for understanding the evolving notions of the role of law and the nature of constitutional government according to which the doctrine was shaped and reshaped.

This historical account centers on several themes with important implications for the development of jurisdictional doctrine, and for the question of whether jurisdictional doctrine can remain coherent or principled over time in the face of such influences. The account focuses first on the social and political forces that drive, at different historical junctures, the expansion and limitation of the federal judicial power. For example, Purcell draws on historical developments such as the labor movement, the New Deal, the Depression, the Second World War, and the McCarthy era, and on intellectual currents such as Progressivism,³⁶ legal realism,³⁷ and the legal process school.³⁸ The book illustrates the role of powerful interest groups, including commercial and labor interests, on changing conceptions of law. For example, one important contribution of the book is its treatment of the legal profession as a powerful special-interest group that consistently sought to shape the law for the enhancement of its own prestige and well-being, while wearing the mantle of detached concern for the rule of law and the greater good.

Purcell's book examines the question of how particular political or ideological groups choose their branch affinities, and, more important for this historical analysis, the question of how these choices are transformed into neutral, ahistorical-sounding jurisdictional principles. This historical treatment provides a valuable perspective on the political and social forces that, in certain eras, create a powerful incentive toward the federalization of law. Most valuable for legal scholars, Purcell considers the extent to which this perspective can inform our understanding of the evolution of the judicially created concept of federalism.

Finally, Purcell considers the role of powerful individuals, particularly those jurists in a position to shape the path of the law, and the influences shaping those individuals. The book focuses not only on Justice Brandeis, the eponymous hero of the narrative of Progressive constitutionalism, but

36. See PURCELL, *supra* note 1, at 2 n.*, in which he states his intent to use the term "Progressive" to refer to:

the ideas, values, and assumptions that characterized many of the reform movements of the early twentieth century, particularly their widely shared if somewhat varied commitments to science, expertise, efficiency, popular education, democratic government, the rights of labor, the limitation of corporate power, and the use of government to ameliorate the harsh consequences of industrialization.

37. See *id.* at 218-21. Purcell discusses the prewar legal realists, who, he describes, "had rejected the idea that courts 'found' law and had insisted that social results constituted the proper test of a rule's desirability." *Id.* at 218; see also GREY, *supra* note 10, at 9 (discussing the legal realists of 1925 to 1940, including Jerome Frank, Karl Llewellyn, and Max Radin).

38. See *infra* text accompanying notes 101-110, 157-186.

on three other powerful and influential thinkers as well. Specifically, it highlights Justice David Brewer, a major architect of the expansion of *Swift v. Tyson*; Justice Felix Frankfurter, in his role as one of the most influential interpreters of the legacy of *Erie* and that of Justice Brandeis himself; and Professor Henry Hart, the prime architect of the field of federal courts.

This focus on individuals in historical context permits Purcell to raise crucial questions about the proper role of personal values and commitments in shaping and interpreting the law, and on the evolving historical, social, and constitutional constraints within which judges work. Focusing on individuals also allows him to present *Erie* not as doctrine spawned in a historical vacuum from previous doctrine, but in light of its “complex social origins . . . [and] purposeful human crafting.”³⁹ By focusing on the human agency behind *Erie*, the book fittingly illustrates the fallacy of the notion of “found law,” and provides an extended consideration of all the ways in which law is made by people with values, political and religious beliefs, intellectual passions, and emotional commitments. Purcell’s approach allows the reader to ruminate on the nature of those values and beliefs, the extent to which they are shaped by historical time, and the circumstances in which they are taken for granted or contested.

Throughout, the book explores crucial questions about the development of doctrine. It questions the extent to which one jurist’s conception can shape the path of law. It asks whether law can stand apart from the political and ideological commitments of the jurists who shape that law. And finally, it inquires: What is the obligation of jurists to ensure the coherence or stability of doctrine over time, and how should they carry out this obligation? In this Part, I describe Purcell’s approach to these issues.

A. *Laying the Foundation for Erie: The Expansion of Federal Power*

Purcell’s story begins in the final third of the nineteenth century, during which the increasing nationalization of industrial and commercial interests, as well as a perceived loss of moral and cultural order in the face of these radical economic shifts, seemed to point to the need for a more centralized locus of order and authority. The shift of power from state to nation, and particularly to the federal judiciary, were important means of advancing those goals, in the service of which the Supreme Court restructured jurisdictional law to expand the lower federal courts’ ability to deal with economically important disputes.⁴⁰ Here, as throughout, Purcell portrays the

39. PURCELL, *supra* note 1, at 1.

40. For example, expanding pendent federal jurisdiction over state law claims and limiting the Eleventh Amendment by permitting federal injunctive relief against state actors. *Id.* at 42-43 (discussing *Ex parte Young*, 209 U.S. 123 (1908)); *id.* at 321 nn.15-16 (discussing, inter alia, *Siler v. Louisville & Nashville R.R.*, 213 U.S. 174 (1909)).

shaping of branch affinities as proceeding according to a complex mixture of idealism and self-interest, and the accompanying tendency, by both courts and commentators, to express their defense of those branch affinities in formal, categorical terms.⁴¹ Conservatives, viewing the federal courts as an effective and powerful guardian for corporate interests and their expansion, cast them as the embodiment of the ideals of law, reason, and justice. The organized bar preached the need to preserve the federal courts' prestige and influence, an outcome that would enhance its own prestige and influence as well.⁴²

Many Progressives, favoring localism and abhorring "bigness," naturally looked askance at the nationalizing tendencies and their advancement of corporate interests. As the Progressives saw, the increasing centralization and uniformity of federal law served political ends, ends with which it was distinctly out of sympathy.⁴³ They fought growing industrialization and the resultant concentration of power with efforts toward unionization and labor reform.⁴⁴ The federal courts thwarted these Progressive reform campaigns through neutral-appearing doctrinal means, at the same time consolidating their own power and prestige. They used the Contract Clause, substantive due process, the Commerce Clause, and the search for the "true, enduring, and universal" principles of the common law⁴⁵ (as enunciated by federal judges) as the judicial tools through which the judiciary's protectiveness toward national commercial interests and organized wealth was translated into formal doctrine. Progressives, unsurprisingly, developed their own set of branch affinities, finding the legislatures both better equipped, structurally, to ameliorate social problems, and more open to doing so.⁴⁶

At this point the book focuses on the first of its pivotal figures, Justice David J. Brewer, one of the more conservative Justices on the conservative Fuller Court of the late nineteenth century, and an architect of the expansion of federal power. The portrait of Justice Brewer raises two important questions, which I later consider in more detail. The first is the question of how a judge's ideological framework, and particularly the most basic unexamined assumptions underlying it, shape the judge's perceptions of which choices are legitimate, which are nonpolitical, and which are

41. *Id.* at 16.

42. The sections on the role of the bar are some of the most interesting in the book because they offer concrete illustrations of the means by which legal elites shape law, at least in part, to enhance and preserve their own prestige. At this juncture Purcell provides an insightful description of the ABA reform proposals of the early twentieth century. *Id.* at 28-29. Later, he gives a brilliant exegesis of the ALI proposals of the 1950s. *Id.* at 273-84.

43. *Id.* at 37.

44. See STRUM, *supra* note 30, at 89.

45. PURCELL, *supra* note 1, at 19.

46. *Id.* at 12-19.

foreordained. The second is the question of how particular legal regimes (and perhaps especially jurisdictional regimes) constrain or enable the judge's ability to make such choices—and how much they ought to do so.

Justice Brewer, in Purcell's vivid portrait, was a Justice with strong convictions on a wide range of subjects, including the dangers of labor unions, legislatures, and the non-Anglo-Saxon races; and the saving power of Christianity, the Constitution, and the federal courts. Purcell describes Brewer as a jurist who found a remarkable degree of congruity between his personal beliefs, his vision of the Constitution, and his view of the power of the federal judiciary to enforce his own constitutional vision, particularly his stunningly expansive view of the reach of Article III. Purcell states that Brewer equated "God's justice with the law, the law with the courts, and the federal courts with the salvation of the nation."⁴⁷ Thus Brewer's fundamental goal was to ensure that the judiciary could maintain the rule of the Founders' law and God's justice. He found a powerful ally in the federal common law, whose reach—with his assistance—had been greatly expanded since the decision in *Swift v. Tyson*.⁴⁸ Under Brewer's influence, according to Purcell, the Fuller Court's brand of federal common law⁴⁹ allowed Brewer to serve his ideas of right and justice for several reasons: That brand of federal common law allowed the Court to make rules without identifying their source or legitimating their creation, to strike down legislative enactments and replace them with judge-made law, and to establish federal primacy over the states in areas in which Congress, if not impeded by the Court, would have preserved state autonomy.⁵⁰

47. *Id.* at 63.

48. 41 U.S. (16 Pet.) 1 (1842).

49. Purcell, like Tony Freyer, Morton Horwitz, and Lawrence Lessig, distinguishes the *Swift* opinion itself from the vast expansions in its reach and method that came later. See TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM 93 (1981); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 245-66 (1977); Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1788 (1997). *Swift* was premised on the notion that federal courts could, like state courts, interpret state law, at least in the absence of state statutory interpretations and in a confined set of substantive areas. Later, the notion of interpreting state law seemed to be subsumed by a less positivist notion of a federal lawmaking power more in line with the conception of federal law as a brooding omnipresence. At the same time, the types of state common-law cases in which federal power applied grew substantially. See Lessig, *supra*, at 1792-95; see also Charles A. Heckman, *Uniform Commercial Law in the Nineteenth Century Federal Courts: The Decline and Abuse of the Swift Doctrine*, 27 EMORY L.J. 45 (1978) (analyzing the evolution of the *Swift* doctrine from 1842 until *Erie* in 1938).

50. Since federal primacy was key in Brewer's hierarchy of values, he was able to harmonize results that were apparently quite inconsistent but that served to expand federal power. For example, Brewer held insurance law to be local and thus not part of interstate commerce for purposes of the Commerce Clause, thereby placing it off-limits to Congress. At the same time, however, he held insurance law to be general and thus within *Swift*'s definition of the reach of the federal common law, thereby placing it within the federal judicial power. PURCELL, *supra* note 1, at 56.

Purcell's discussion seems intended, especially in light of the book's later treatment of Justice Brandeis, to illustrate how thoroughly the personal values of an ideologically committed but not particularly reflective jurist can shape and indeed permeate his jurisprudence. If, as it appears, Purcell evinces more than a hint of authorial disapproval here, it raises the question: Is it because Purcell believes Brewer's personal values unduly influenced his jurisprudence, that they were objectionable values, or that there were inherent faults in the substance of the jurisprudence itself? Interestingly, Purcell implies that the questions may not be separable in this case. For him, the heart of the problem appears to be that the essence of Brewer's jurisprudence *was* that it created so many opportunities for the unbridled imposition of the values of individual judges, impervious to correction by the democratically elected legislature.⁵¹

The treatment of Justice Brewer highlights the tension, inherent in Purcell's approach, between the focus on the role of influential individuals in shaping law and the portrayal of law's evolution as the product of a complex mixture of broad social and political forces. This approach demands of the author a difficult balancing act between attributing events to human agency and placing them in a more complex sociopolitical context. In focusing on Justice Brewer's effect on the general common law, to the exclusion of, for example, Justice Story's own conception of *Swift* and its reach, does Purcell attribute *Swift*, and particularly the expansive *Swift* that he finds most objectionable, too strongly to the acts and desires of one man? It becomes, as one reads on, a sometimes odd juxtaposition: the individual story in which Justice Brandeis's "correct" *Erie* vanquishes Justice Brewer's wrongheaded *Swift*, alongside the complex tale of the historical and cultural context within which the drama was played out. The focus on Brewer also leads to what I consider a far more detailed account of the doctrinal intricacies of his jurisprudence than is necessary for an understanding of Brewer's place in the narrative of *Erie* and Progressive constitutionalism.

The book turns from Justice Brewer to document the growing counter-reaction to the growth of federal judicial power in the period after the First World War. Here again Purcell demonstrates concretely the ways in which changes in political and cultural context affect the assumptions that shape both doctrinal law and branch affinities. The reaction against federalization was based on changes both intellectual⁵² and practical.⁵³ The Supreme Court

51. *Id.* at 52. Compare this to Purcell's discussion of Brandeis's objection to *Swift*. *Id.* at 165-66.

52. This is the often-told story of the growth of legal realist and positivist philosophical thought, the rise of Darwinism with its implication for law that institutions and principles evolve in response to social change, *id.* at 67, and the growing influence of Justice Holmes, *id.* at 68-69. The intellectual impetus also came from changes in the application of *Swift* itself, such as its application in the widely reviled *Black & White Taxicab & Transfer Co. v. Brown & Yellow*

construed an array of substantive, procedural, and jurisprudential tools to fend off these attacks, strengthen the courts' ability to protect employers and other corporate interests, and generally accord with its own deeply held view of its mission. The description of these tools underlines a theme that will recur: The judicial choice of when to look to practical consequences and when to look to abstract theory has an important strategic component. For example, the Court narrowly construed certain pro-union provisions of the Clayton Act⁵⁴ but broadly construed other provisions of antitrust law and the Commerce Clause to uphold labor injunctions.⁵⁵ The Court used diversity jurisdiction, liberty of contract, and the federal common law to gain jurisdiction over and then uphold yellow dog contracts,⁵⁶ and employed pragmatic, equitable considerations to strike down union contracts while becoming highly formalistic in the service of employers' contracts.⁵⁷

There were many reasons why the campaign to restrict or abolish diversity jurisdiction was, in large part, unsuccessful⁵⁸—reasons involving matters of timing, politics, and personality.⁵⁹ The role of the ABA, which Purcell describes as nakedly partisan on behalf of corporate interests and the ABA's own prestige, while claiming to represent the public at large,⁶⁰ is especially noteworthy. The ABA role suggests that centralization and uniformity of federal law privileges legal elites, especially, it may be argued, when the law at stake is arcane procedural law inaccessible to the layperson. The Progressives' much greater success in restricting the federal labor injunction was due to a confluence of factors, including the fact that the cause of labor unions garnered—at least with the Red Scare over and

Taxicab & Transfer Co., 276 U.S. 518 (1928), which was viewed as a flagrant example of the manipulation of diversity jurisdiction by corporate litigants. PURCELL, *supra* note 1, at 78; see also HORWITZ, *supra* note 49, at 253-66 (tracing the rise of legal formalism); William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907 (1998) (discussing changes in the intellectual climate that contributed to the overruling of *Swift*). But see Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998) (arguing that the natural law/positivism story explains little).

53. Much of the practical impetus for Progressive reform came from anger at corporate abuses of diversity jurisdiction in general, and at the use of the diversity jurisdiction to facilitate the wide use of the federal labor injunction to thwart unionism, in particular. In 1934, the American Law Institute published a study that documented empirically the pro-corporate uses and effects of diversity jurisdiction. PURCELL, *supra* note 1, at 79.

54. 15 U.S.C. § 15a (1994) (allowing the United States to sue for actual damages arising out of injuries sustained from antitrust violations).

55. PURCELL, *supra* note 1, at 70-77.

56. That is, contracts conditioning continued employment on a promise not to join a labor union. *Id.* at 71.

57. *Id.* at 70-77.

58. Purcell notes that while broad attacks consistently failed, several statutes were passed that reduced the inequitable impact of diversity. *Id.* at 77-79.

59. *Id.* at 77-85.

60. *Id.* at 83-84.

the Depression underway—greater mass rallying power than an obscure issue like diversity jurisdiction ever could.

B. *Justice Brandeis and His Erie Decision*

The second part of the book focuses on Justice Brandeis and the decision in *Erie*. It is no small feat to make a fresh and important contribution to the literature about *Erie*, a body of work that has reached “staggering proportions.”⁶¹ Purcell’s approach moves beyond abstract analysis of judicial process to provide a concrete demonstration of the variety of interrelated forces that lead to the making and evolution of precedent. In particular, it sheds light on the dynamics of making precedent of the magnitude of *Erie*, and overruling precedent as venerable as the ninety-year-old decision in *Swift v. Tyson*. In this part, Purcell shifts focus. His question becomes: What were the social, political, and historical forces that gave rise to Justice Brandeis’s philosophy and that provided the context for his decision in *Erie*?

This strategy is largely successful. A central goal of the work, which it achieves beautifully, is to present *Erie* in the context of Justice Brandeis’s jurisprudence, and to enrich the reader’s understanding of both by placing them in a larger historical context. Purcell asserts that “to an unusual degree, [*Erie*] embodied the . . . constitutional theory of only a single justice.”⁶² Purcell’s overriding concern with identifying Justice Brandeis’s role in crafting *Erie* and Justice Brandeis’s individual conception of *Erie* has its costs, however. One such cost, evident also in Purcell’s discussion of Brewer, is that Purcell goes overboard in his effort to amass a wealth of detail to support his argument for the importance of Brandeis’s role.⁶³ The other cost is in the tension created between Purcell’s strong allegiance to Brandeis’s individual role and Purcell’s sophisticated approach to the dynamics of judicial decisionmaking and the evolution of legal meaning. This allegiance also manifests itself in an occasional tendency to portray *Erie* as belonging to Brandeis, and thus to portray those who deviated from Brandeis’s vision—whether on the Court that issued the opinion or on future Courts interpreting it—as betraying the true *Erie*.⁶⁴

Though some of the book’s detail may appeal mainly to historians, Purcell’s meticulous presentation contains many nuggets that will be of

61. *Id.* at 2.

62. *Id.* at 114.

63. See, for example, the extended discussion of who should be credited with insisting on *Erie*’s constitutional grounding, critiquing the claim that Justices Stone and Black made major contributions to the *Erie* decision and to the decision to ground it in the Constitution. *Id.* at 109-12.

64. See, e.g., *infra* note 80 (discussing Purcell’s rejection of a possible Tenth Amendment component of *Erie* based on his interpretation of Brandeis’s intent).

broader interest. One particularly tantalizing bit is Purcell's theory as to why *Erie* was decided without benefit of briefing by the parties on the issue of whether *Swift v. Tyson* should be overruled. *Erie* was the unusual case in which the federal common law (particularly in the Second Circuit) was more favorable to the injured plaintiff than to the corporate defendant, the railroad. An overruling of *Swift*, relegating *Tompkins* to Pennsylvania state law, would have meant victory for the railroad in the case at hand, but would have cost it far more in the long run of cases. Purcell argues that the Court gave the railroad's attorney ample opportunity to argue the overruling of *Swift*, and in light of his refusal to do so, saw no point in ordering reargument on the issue.⁶⁵

Likewise, whether or not Purcell is correct in his assessment of the extent of Justice Brandeis's influence on *Erie*, readers will appreciate the light he sheds on the forces affecting the Justice, and how these forces led to the theory he espoused. Purcell portrays Brandeis as a morally committed, theoretically principled pragmatist.⁶⁶ For Brandeis, process values like legislative primacy and judicial restraint were not themselves fundamental, but rather were tools for achieving the core values of political accountability, constitutional balance, and preclusion of the exercise of arbitrary power.⁶⁷ As Purcell claims, "his advocacy of restraint was seldom far removed from his Progressive social goals."⁶⁸ He was concerned about the social and practical consequences of legal rules, including jurisdictional rules.⁶⁹ Thus, for example, he viewed federalism "not as a rigid norm or a cynical excuse but as an evolving ideal to be tested by its social results."⁷⁰

65. He argues that though it is true *Tompkins*'s attorneys did not have the opportunity fully to defend *Swift*, this disability was counterbalanced by the railroad's failure to raise any argument its adversaries had been precluded from answering. PURCELL, *supra* note 1, at 101. A similar issue arose recently regarding the Supreme Court's decision to hear argument in *Dickerson v. United States*, 120 S. Ct. 2326 (2000), the case determining that 18 U.S.C. § 3501 (1994), enacted in 1968, had to be struck down in light of *Miranda v. Arizona*, 384 U.S. 436 (1966). When the government refused to defend § 3501, the Court appointed amicus Paul Cassell to argue that the statute should be upheld. See Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering Miranda*, 149 U. PA. L. REV. 251 (2000) (noting the parallel between the *Erie* and *Dickerson* arguments and arguing that the Court was justified in hearing the issues in both cases). *But see* Erwin Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding United States v. Dickerson*, 149 U. PA. L. REV. 287 (2000) (disputing commonalities between the *Erie* and *Dickerson* situations).

66. PURCELL, *supra* note 1, at 117-20. Thus Purcell rejects the claim that Brandeis was a positivist or a skeptical realist. Purcell argues that although Brandeis liked the idea that law was derived from the authority of a sovereign, he did not adopt a broader realist philosophy that law meant only what courts would enforce or that any rule courts enforced was immune to moral or philosophical critique. Instead, he emphasized the authority of constitutional principle, fairness, and justice. He believed that "moral 'principles' existed . . . [that] could be . . . developed by human reason, and . . . should guide judicial reasoning." *Id.* at 182.

67. *Id.* at 123, 190.

68. *Id.* at 123.

69. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); PURCELL, *supra* note 1, at 123 (arguing that, in *Ashwander*, Brandeis was concerned

Brandeis believed in localism and small units of organization as a moral as well as a practical good.⁷¹ He believed in rule by the people, and by the legislature, as the people's representative.⁷² He shared the Progressive conviction that legislatures were not only more sympathetic to Progressive reform, but structurally better suited to achieving it.⁷³

Justice Brandeis's affinity for legislative lawmaking was thus in line with his most fundamental personal beliefs, and also fell squarely within the context of the Progressive tradition of the time. It led to his conviction that *Swift* had to be overruled because, as a constitutional matter, *Swift* allowed the judiciary, an unresponsive and undemocratic institution, to make law that was impervious to correction by Congress, and to ordain its own institutional primacy.⁷⁴ By the same token, *Erie*'s theory of legislative primacy was both "a constitutional statement of the political ideals of early twentieth-century Progressivism"⁷⁵ and a reflection of Brandeis's own "deeply cherished and fundamental convictions about public policy and constitutional structure," an implementation of the Progressive values he "had absorbed . . . for a lifetime."⁷⁶

It is in this context, Purcell asserts, that the *Erie* holding must be understood. He believes that Brandeis decided *Erie* on constitutional grounds.⁷⁷ Specifically, Purcell asserts that *Erie* was grounded on two related principles. The constitutional principle was that legislative and judicial powers are coextensive. Thus the Court has no power to act in areas in which Congress cannot.⁷⁸ The essential constitutional error of *Swift* was that it denied the existence of legislative power as a prerequisite to judicial lawmaking. The prudential corollary (albeit one that was quickly drained of much of its significance by events like the expansion of the commerce power⁷⁹) was that the federal courts should not, absent compelling reasons,

not only with judicial restraint, but with the social effects of permitting broad corporate challenges to legislative action).

70. PURCELL, *supra* note 1, at 308.

71. *Id.* at 141-42.

72. *Id.* at 165-66.

73. *Id.* Brandeis believed that legislatures possessed the decentralization, the fact-finding ability, the flexibility, and the responsiveness to experiment, to incorporate new knowledge, and to inaugurate change when social conditions called for it. *Id.*

74. *Id.* at 190. Brandeis also argued that as a prudential matter, *Swift* allowed the judiciary to usurp Congress's political role in determining when uniformity was called for, and thus when state power may be federally limited. *Id.* at 174-75.

75. *Id.* at 172.

76. *Id.* at 140.

77. Purcell believes that a majority supported Brandeis's constitutional language, at least when the opinion was written, but that Justice Hughes and perhaps others apparently harbored doubts shortly thereafter. *Id.* at 113.

78. *Id.* at 175-77.

79. For examples of cases that vastly expanded the reach of Congress's commerce power, see *Wickard v. Fillburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); see also FREYER, *supra* note 49, at 142, for a discussion of the shrinking jurisdiction governed by the *Erie* doctrine.

make nonconstitutional law even in areas within the national legislative power unless Congress has first acted in these areas. In short, he argues that *Erie* was based on a theory of legislative primacy.⁸⁰

C. *Erie's Legacy: The Path of Doctrinal Principle*

The question of whether Brandeis succeeded in *Erie* is complex. If he brought the Constitution closer to his Progressive ideals, did he do so in a principled manner? Did he do so in a way that would endure? Could he have done more to achieve his goals? These questions are addressed in the book's third part, which traces the erosion and creation of meaning in the *Erie* decision. This part simultaneously raises some of the book's most interesting issues—the uses and abuses of neutral jurisdictional principles, their definition, their strategic advantages and pitfalls, their ethical boundaries—and highlights some of its more problematic assumptions.

Purcell, while illuminating the insight that historical change and the processes of interpretation make new versions of doctrine inevitable,⁸¹ nevertheless appears to display both a particular attachment to the “Brandeis” version of *Erie* and an ambivalence toward the idea that this version could not be maintained as times changed. Though Purcell places the *Erie* decision squarely within the Progressive tradition, he notes, apparently with some chagrin, that Brandeis purposely used neutral language that masks many of his social concerns. Purcell concedes that Brandeis had several good reasons to “drain[] his opinion of identifiable, partisan, and concrete social consequences,”⁸² but links the opinion's studied neutrality of language to what Purcell considers its later misinterpretation. He wonders whether Justice Brandeis could have protected against the sloughing off of historical and social context, the later recasting of *Erie's* holding and significance for different generations, by writing a more candid opinion. Purcell makes it clear that he believes the costs of Brandeis's lack of candor were high. Purcell argues, for example, that the opinion's level of abstraction allowed Justice Frankfurter to misinterpret and in fact to misrepresent *Erie*, notably in *Guaranty Trust Co.*

80. For this reason, Purcell also asserts, Brandeis did not mean to rest the decision on the Tenth Amendment, since such a basis would have the potential to impose an independent limit on the federal legislative power. Purcell argues that Brandeis deliberately refrained from quoting the Tenth Amendment. However, Purcell allows that the opinion does contain some language from a dissent citing the Amendment, as well as some reference to reserved rights. He believes that this language was needed to maintain the vote of Justice Hughes, and that both Justices Hughes and Roberts may have considered the Tenth Amendment the basis of *Erie*. PURCELL, *supra* note 1, at 178-80. This is an example of the tension between the notion of “Brandeis's *Erie*” and the notion of the “true *Erie*,” which I discuss below. *Infra* text accompanying notes 81-85.

81. PURCELL, *supra* note 1, at 4, 303.

82. *Id.* at 160.

v. *York*,⁸³ portraying it as a case about forum shopping, and ignoring both its constitutional basis and its concerns about imbedded inequities in litigation access.⁸⁴ Likewise, Purcell argues that the process school mischaracterized *Erie* as an exemplar of that school's implicitly nationalistic vision of neutral principles, again ignoring *Erie*'s concern for litigant inequality, and paving the way for the Warren Court, in *Hanna v. Plumer*,⁸⁵ to misinterpret *Erie* as a decision expanding the role of the federal courts. On a purely practical level, Purcell's description of a lost "Progressive" *Erie* is frustrating, because he never makes clear whether the loss is purely heuristic, or whether, for example, *York* or *Hanna* might have (or even should have, in Purcell's view) been decided differently, or whether the path of federalism might have been altered, had *Erie*'s political concerns been more clearly stated.

To some extent, Purcell portrays Brandeis's use of formal, neutral language as a necessary or at least effective strategy for commanding a majority and for establishing a general public consensus in favor of this major doctrinal shift.⁸⁶ Purcell sees the use of generalized principles like federalism in place of less socially neutral principles like equality of access as an admirable effort to reconcile social commitments with broader commitments to the ideal of principled and evenhanded law. At the same time, he sees it as a useful strategic tool for portraying a radical shift in doctrine as inexorable, timeless, and without political or social valence.⁸⁷ One strategic possibility Purcell does not explore is that Brandeis's Progressive ideals themselves constrained Brandeis's willingness better to articulate⁸⁸ a constitutional basis.⁸⁹ If so, perhaps *Erie*, though its

83. 326 U.S. 99, 111 (1945) (holding that federal courts were bound under *Erie* to apply state laws if failure to do so would result in different outcomes in federal and state court). Purcell argues that in this case Justice Frankfurter undercuts *Erie*'s constitutional grounding. PURCELL, *supra* note 1, at 213-16.

84. PURCELL, *supra* note 1, at 213-16.

85. 380 U.S. 460, 469-70 (1965) (holding that the Federal Rules of Civil and Appellate Procedure are to be applied by federal courts even if a conflicting state rule would produce a different outcome). Purcell argues that in this case Chief Justice Warren uses *Erie* to "affirm the breadth and independence of federal judicial power." PURCELL, *supra* note 1, at 289.

86. PURCELL, *supra* note 1, at 163.

87. *Id.* at 156-64.

88. In 1958, Professor Alfred Hill observed that "the constitutional basis of *Erie* has been widely regarded as dictum, and rather dubious dictum at best." Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 427 & n.3 (1958) (citing numerous articles). As recently as 1996, Wright, Miller, and Cooper stated that "[h]owever tempting it might be to dismiss the constitutional discussion in *Erie* as so much dicta, as many have done," it is necessary to accept its constitutional basis because the Court explicitly stated it was relying on the Constitution. 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4505 (2d ed. 1996). The precise nature of the constitutional basis continues to generate debate. See, e.g., LOUISE WEINBERG, FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER 10-15 (1994) (canvassing various scholarly arguments for *Erie*'s constitutional basis, which include equal protection, the Tenth Amendment, separation of powers, and due process).

constitutional grounding may have been stronger, was not so unlike Brandeis's decision in *Willing v. Chicago Auditorium Ass'n*⁹⁰ (a decision of which Purcell is highly critical), in the sense that its constitutional basis served primarily as a means of achieving social and political goals.

Although Purcell suggests that the social goals of *Erie* could have been better protected against erosion or misunderstanding, for the most part he tempers this judgment with awareness of the practical and institutional constraints within which judges operate: first, that the meaning of *Erie* must come from the opinion that was written, as opposed to the opinion Brandeis would have liked to write; and, second, that the *Erie* doctrine was bound to evolve, and it is probably not productive to view such evolution as a betrayal of one man's vision.⁹¹ Purcell observes that as social context, political assumptions, and individual perspectives change, a decision based on the assumptions of a dramatically different age cannot "maintain its intended social and political significance unchanged."⁹²

The age that gave rise to the *Erie* decision was ending as the decision was issued, dramatically altering many of the social concerns and political assumptions on which the decision had been based. The new Roosevelt Court⁹³ expanded federal power to validate the newly established administrative state. The character of both Congress and the judiciary changed markedly. Congress in the postwar period began to draw away from New Deal activism and legislative experimentation, which had by then taken on more negative connotations, and it became involved in anti-subversion investigations that posed severe threats to civil liberties. The Court, conversely, was becoming more liberal—less identified with corporate wealth and property and more protective of civil liberties. These changes "scrambled and largely reversed" the branch affinities of the half-century preceding *Erie*.⁹⁴

89. For example, if Brandeis believed that the bases for declaring *Swift* unconstitutional would interfere with the expansion of the commerce power, or with the power of Congress to delegate its lawmaking power to the courts, or would expand the reach of the Tenth Amendment, he may have been reluctant to articulate any of these bases, all of which were at odds with his broader Progressive goals. Conversation with Erwin Chemerinsky, Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science, University of Southern California Law School, in Los Angeles, Cal. (Sept. 16, 2000).

90. 277 U.S. 274 (1928). For further discussion of this case, see *infra* text accompanying notes 286-291.

91. PURCELL, *supra* note 1, at 163-64. Purcell concludes that "[p]ractical considerations and the demands of a majoritarian institution committed to publishing reasoned opinions make such obfuscating strategies inevitable. They should not, however, allow such judicial craft to pass unnoticed and unexamined." *Id.* at 306.

92. *Id.* at 195.

93. The confrontations over President Roosevelt's Court-packing plan came to a head in 1937. *Id.* at 33-38. Within two years of the *Erie* decision, or four years of the Court fight, only Justices Stone and Roberts remained from the old Court. *Id.* at 201.

94. *Id.* at 199.

As changes in its political, social, and constitutional⁹⁵ context obscured much of the original impetus behind *Erie* and changed its significance, Purcell argues, the shift in *Erie*'s meaning was also accelerated by ideological developments. Progressive concerns faded⁹⁶ and were replaced, in the postwar period, by concerns with totalitarianism and subversion, and a desire for stability, authority, objectivity, and moral order. Scholars and jurists searched for a means of reaffirming the rule of law and the moral content of law in the face of the legal realist insight that law is unavoidably made by judges.⁹⁷ Justice Frankfurter was one of the first to turn to this task, which eventually became the mission of the emerging legal process school.⁹⁸

Purcell is highly critical of Justice Frankfurter. Purcell portrays Frankfurter as falsely wearing the mantle of the authoritative expositor of Brandeis's philosophy while, for personal and strategic reasons, seriously misconstruing it. Purcell charges Frankfurter with recasting in the 1940s *Erie*'s social concerns about unfairness and inequality into politically neutral concerns about forum shopping and with recasting the overthrow of *Swift* as the overruling of a particular way of looking at law rather than as based on the Constitution.⁹⁹ Ultimately, stripped of reference to any of its original social or political motives, *Erie* became, for Frankfurter and his proponents, a case embodying "an unyielding commitment to the abstract standards" of judicial self-restraint in deference to the other branches of government.¹⁰⁰

As the legal process school took shape during the postwar period, Purcell argues, it helped shape yet another version of the *Erie* doctrine, credited largely to Henry Hart. Hart is the last of the pivotal figures in this narrative and one of the creators of the process school. Though Hart began his career as a New Deal Progressive,¹⁰¹ he came to embrace the ideal of

95. See *id.* at 200-01 (discussing the ways in which the abandonment of limits on the Commerce Clause, the expansion of state and federal statutes displacing common law, and the introduction of the new federal common law based on interpretation of federal constitutional and statutory provisions, changed the operational meaning of the case).

96. For example, the labor movement grew more powerful, unequal access to diversity jurisdiction was alleviated, protective social legislation was passed, and the antipathy toward large national corporations waned. *Id.* at 197-98.

97. *Id.* at 222-28.

98. The beginnings of the legal process school were in the work Hart did with Albert Sacks. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Some have argued that Hart and Wechsler's neutral principles were not a natural outgrowth of the legal process school, which viewed "the nature of law as consisting of values to be served, as well as rules and standards." Vincent A. Wellman, *Positivism, Emergent and Triumphant*, 97 MICH. L. REV. 1722, 1741 (1999).

99. See PURCELL, *supra* note 1, at 202-16. See also *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), the case in which Frankfurter recast *Erie* in this manner, according to Purcell.

100. PURCELL, *supra* note 1, at 227.

101. *Id.* at 229-32.

law as process¹⁰²—a rational and cohesive system for which the most important goal is the proper allocation of institutional competencies. He viewed law as made by judges who share the fundamental and ascertainable goals and values of their society. He believed that so long as judges acted within proper institutional bounds, the results of fair procedures would be presumptively fair. In short, the morality inhered in the process.

As the legal process school became ascendant in the postwar period, its assumptions about institutional competencies began contributing to the next major shift in branch affinities. For example, because Hart believed in the effectiveness of the institutional constraints on judges, he began to identify courts with an intrinsically superior ability to make principled judgments and engage in flexible, long-range thinking. For both him and Herbert Wechsler, federalism was the controlling ideological force, the central normative commitment, providing the coherence for the newly developed field of federal jurisdiction. Purcell argues that Hart's federalism had a decided bias in favor of the federal courts: Hart believed in the need for uniformity, the interstitial nature of federal law, and the essential role of the federal courts. Purcell calls him not an "advocate for a sophisticated legal 'federalism,'" but instead a "prophet of a new, intricate, and exceptionally sophisticated version of judicial nationalism."¹⁰³ As Hart grew wary of judicial restraint, he reconceived Brandeis as well, transforming Brandeis's defense of legislative primacy into a broad opposition to arbitrary government.¹⁰⁴ When Hart reimaged *Erie*, it became not only consistent with these principles but their seminal and ideal exemplar. He cast it as establishing a neutral allocative principle, unrelated to animating social issues or to legislative primacy.¹⁰⁵ Purcell charges that Hart's conception elevated *Erie* to the rank of first principles by "stripping it of political and social content" and reconceiving it as overtly antihistorical, grounded in an abstract and timeless "logic of federalism."¹⁰⁶

Someone weaned on Hart and Wechsler's federal courts jurisprudence might be surprised by Purcell's claim that it betrayed a bias in favor of the federal courts.¹⁰⁷ Both men are often associated with the view that state and

102. Hart's postwar reevaluation of his values in light of the challenges of totalitarianism and the Cold War led him to his later, better-known commitment to neutral principles. *Id.* at 234-39.

103. *Id.* at 249.

104. *Id.* at 242.

105. The version of due process on which it was grounded was concerned with the problem of binding litigants with inconsistent rules, and not with issues of unequal power. Hart "assumed the existence of Brandeis's abstract universe of mobile litigant atoms." *Id.* at 252.

106. *Id.* at 248.

107. See, e.g., Amar, *supra* note 13, at 696-97 (stating that Hart and Wechsler's "writings were curiously infected with a . . . willingness to equate state and federal courts"). Amar argues that Wechsler's writings were even more explicit in defense of state-federal parity. *Id.* (citing Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005-06 (1965)). Professor Fallon of Harvard Law School, one of the authors of Hart and Wechsler's casebook since its third edition, writes that Warren Court decisions like *Brown* threatened Hart and

federal courts are fungible, and Hart famously argued that state courts “are the primary guarantors of constitutional rights.”¹⁰⁸ Purcell’s history provides a partially satisfactory explanation for this reaction: that it might be based on Hart’s ambivalent and skeptical attitude toward the Warren Court rather than his more favorable attitude toward the federal courts in general.¹⁰⁹ However, as the narrative reaches a point in recent history about which most scholars have both a fuller appreciation of the cultural context and their own biases to contend with,¹¹⁰ it becomes more plausible to speculate that Purcell is acting from his own set of assumptions about judicial supremacy. In general, the book would have benefited from more discussion of the purposes of Article III and the attributes, if any, that set an Article III court apart from either a state court or the political branches of the federal government. Thus, for example, when Purcell concludes that the ALI, in its 1969 study of diversity jurisdiction, betrayed its own principles by failing to recommend changes that would increase federal supervision of civil rights cases, he has not really explained why he believes the federal courts would safeguard civil rights better than state courts would.¹¹¹

This criticism notwithstanding, Purcell’s analysis of the ALI study provides the most vivid and concrete exegesis I have read of the historical and political contingency, and the strategic utility, of the notion of neutral jurisdictional principles.¹¹² He does so by deconstructing the “basic

Wechsler’s view of federalism because they undermined traditions of federalism and “reflected the judiciary in a leadership role.” Fallon, *supra* note 13, at 960.

108. Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953). Interestingly, Akhil Amar cites Hart’s *Dialogue* as one example of his willingness to equate federal and state courts, focusing on its view that though the Constitution requires that some court be open to hear federal constitutional claims, Congress has broad authority to decide whether that court will be state or federal. Amar, *supra* note 13, at 698. Purcell cites the same *Dialogue* as an example of his judicial nationalism, focusing on its argument that Congress cannot strip the federal courts of their jurisdiction to the extent it interferes with their essential function of articulating federal constitutional norms. PURCELL, *supra* note 1, at 245 & n.115.

109. PURCELL, *supra* note 1, at 255. Purcell acknowledges Hart’s discomfort with the methods and perspectives of the Warren Court, and suggests that his discomfort was partly grounded in Hart’s inability to reconcile his disapproval of the Warren Court’s activism with the fact that it actually embodied many of his own fundamental values and ideals. Wechsler shared Hart’s disapproval of the Warren Court, evidenced most famously by Wechsler’s criticism of *Brown v. Board of Education*, 349 U.S. 294 (1955), in his classic defense of neutral principles. See Wechsler, *supra* note 12.

110. Here I acknowledge my own longstanding bias in favor of federal judicial supremacy as a means of protecting individual rights and liberties, and my own rather belated understanding that the reversal of branch ideologies called the abstract nature of my loyalty to federal judicial supremacy into serious question.

111. PURCELL, *supra* note 1, at 282.

112. *Id.* at 273-83. He places the ALI study at the intersection of several developments, including the postwar need for stability and consensus, which generated the movement toward codification of legal principles; the Warren Court’s need to articulate justifications for its activism, which countered perceptions that it was ideological and countermajoritarian; and the legal elite’s interest in perpetuating federal courts and federal law, and the concomitant flourishing of the process school.

principles of federalism,”¹¹³ upon which the ALI placed its imprimatur. The most fundamental of these principles was that federal courts are uniquely suited to adjudicating federal law and that federal law is of paramount importance.¹¹⁴ He lays bare the contestable assumptions, the confusions between first principles and end objectives, the selective uses of abstraction, which shaped and defined the ALI study. Nevertheless, he argues, the study served its purpose: It defused attacks on the Warren Court, enshrined the idea of neutral principles, and again helped reshape *Erie*, this time as a decision exalting the role of the federal courts.¹¹⁵

And thus to the present, in which the Warren Court’s version of federalism has been subject to the vagaries of changing historical and social context. In the Rehnquist era, scholars are in the position to observe the reversal of branch affinities, with a federal judiciary shaped by Republican appointments¹¹⁶ embracing an activism based on its own set of assumptions about the dictates of federalism. *Erie* remains an “ideological Rorschach test”¹¹⁷ in this era, where it is used in arguments against expansive private rights of action, and more broadly as representing a limited judicial role in the scheme of separated powers.¹¹⁸ Purcell’s book teaches that historical change and the processes of interpretation “ma[k]e such new versions inevitable.”¹¹⁹ Case law works itself pure—it sheds its historical and political specifics and becomes increasingly abstract, and therefore amenable to transformation in new contexts. It works itself pure, but does not necessarily become “righter,” as Purcell says. Yet his argument for an understanding of the historical, political, and cultural contingencies shaping

113. *Id.* at 272.

114. *Id.* at 273.

115. *Id.* at 270-84. Purcell argues, for example, that the ALI study helped justify the approach exemplified by *Hanna v. Plumer*, 380 U.S. 460 (1965), in which the Warren Court safeguarded federal uniformity and independence from the states. PURCELL, *supra* note 1, at 287.

116. It is implicit in Purcell’s description of the changing political bent of the Court that such evolution is connected to the political nature of the appointment process. The notion of the Court as a countermajoritarian institution, of course, fails to take this connection into account. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics*, 148 U. PA. L. REV. 971 (2000) (examining the influence of politics, electoral and otherwise, on judicial behavior).

117. PURCELL, *supra* note 1, at 287. The battle over the legacy of Justice Brandeis continues as well. See, for example, *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000), in which both majority and dissent claim to be advancing the Justice’s most cherished values. Justice Stevens, in dissent, invokes Brandeis’s famous ode to state social and economic experimentation, arguing that the Court prevented New Jersey’s experiment of according protection to gays under its public accommodations law. *Id.* at 2459 (Stevens, J., dissenting). Chief Justice Rehnquist, for the majority, replies that Justice Brandeis, though he championed state experimentation in the economic realm, did not champion experimentation with the First Amendment. *Id.* at 2457-58.

118. PURCELL, *supra* note 1, at 290; see also *Carlson v. Green*, 446 U.S. 14, 37-38 (1980); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 742 (1979); George D. Brown, *Of Activism and Erie—The Implication Doctrine’s Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617 (1984); Donald L. Doernberg, *Judicial Chameleons in the “New Erie” Canal*, 1990 UTAH L. REV. 759.

119. PURCELL, *supra* note 1, at 295.

legal doctrine is not an argument for cynicism toward principled legal analysis. Purcell's optimistic claim is that historical understanding can help teach how to shape legal institutions and processes "to sustain and enhance a decent, ordered, and relatively democratic life."¹²⁰ In Part III, I consider this claim.

III. LEGAL DISTINCTIONS AND HISTORICAL CORRECTIVES: REEXAMINING THE TRULY NATIONAL AND THE TRULY LOCAL

A. *Narrative Coherence in Law and History*

While historians may disagree about the extent to which history should or can provide lessons for the present, they tend to balk at sacrificing the complexity of the past for a linear story with a tidy and usable moral.¹²¹ They have unflattering names for historical fallacies like "presentism,"¹²² which views history as "prun[ing] away the dead branches of the past, and . . . preserv[ing] the green buds and twigs which have grown into the dark forest of our contemporary world."¹²³ As Laura Kalman observes: "Too much orderliness . . . makes historians suspicious."¹²⁴ While lawyers may argue about the proper uses or interpretation of history, we do not argue about *whether* history provides lessons for the present. We tend to use history as we do every other tool in our arsenal: to argue a position. For lawyers' purposes, a linear progression leading to a tidy moral is far more useful than a complex, ambiguous story.

For example, the received legal wisdom about *Swift* and *Erie* has it that *Swift* was based on a misunderstanding about the nature of law. The *Swift* Court, in the thrall of natural law, mistook law for a "brooding omnipresence,"¹²⁵ failed to account for the source of the federal common law, and thus created an illegitimate body of law. The *Erie* Court, with the

120. *Id.* at 6.

121. Indeed, this attempt to extract specific lessons from history and apply them literally to present problems has been labeled "the didactic fallacy." FISCHER, *supra* note 35, at 157 (emphasis omitted).

122. *Id.* at 135-40. Historian David Hackett Fischer defines presentism as "a complex anachronism, in which the antecedent in a narrative series is falsified by being defined or interpreted in terms of the consequent." *Id.* at 135. *But see* KALMAN, *supra* note 5, at 183-84, 335 n.41 (pointing out that not all historians share Fischer's antipathy toward presentism, and arguing that the difficulty is in navigating between an acontextual presentism and an overly contextual antiquarianism).

123. FISCHER, *supra* note 35, at 135.

124. KALMAN, *supra* note 5, at 186.

125. See *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 220, 222 (1917) (Holmes, J., dissenting), in which Justice Holmes took issue with the notion that general principles of admiralty law existed throughout the United States, stating, "The common law is not a brooding omnipresence in the sky but the articulate law of some sovereign It always is the law of some State" *Id.* at 222.

benefit of the insights of positivism and legal realism, corrected the error. The *Lochner* Court was likewise portrayed, in retrospect, as terribly mistaken—stubbornly insistent on its own narrow and wrongheaded political and social biases, which were wholly out of step with the laudable aims of the New Deal. Only when forced to do so could it see beyond its laissez-faire political ends to the proper evolution of doctrine. In these comforting stories, the law evolves in a linear progression. It works itself pure *and* it works itself right.

Both stories are, of course, far more complicated. The meaning and moral of the *Lochner* era are, even now, hotly contested. Much recent scholarship suggests that the *Lochner*-era judges were guided by values that were widely shared by the populace—government by the people, individual liberty, the right to private property, and Jacksonian notions of equality. They were asked to interpret these values in a radically new context,¹²⁶ did so through the lens of assumptions shaped by their class, religion, life experiences, and institutional role,¹²⁷ and thus tended to favor the interests of industrial progress over those of disfavored groups. These jurists did not view themselves as rogue ideologues, and in fact “[i]n propounding laissez-faire constitutionalism, they believed public opinion was on their side.”¹²⁸ They attempted to act as men of principle, but in some respects, their principles were forged in “a past that was fading beyond retrieval.”¹²⁹ Likewise, neither Justice Story nor subsequent Justices who expanded the reach of *Swift* experienced themselves as communing with a brooding omnipresence.¹³⁰ Rather, they viewed themselves as interpreting Article III to determine the proper role of the federal courts in the constitutional

126. For example, political scientist Howard Gillman argues:

[T]he story of the *Lochner* era is not about how reactionary justices in the late nineteenth century became more daring in their willingness to exploit legal materials in order to protect or promote their personal class or policy biases . . . [but] is the story of how a changing social structure exposed the conservatism and class bias inherent in dominant ideological structures first formulated and institutionalized by the framers of the U.S. Constitution.

GILLMAN, *supra* note 21, at 199. *But see* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner* (2001) (unpublished manuscript, on file with author) (critiquing what he calls the “revisionist” theory of the *Lochner* era).

127. PURCELL, *supra* note 1, at 320 n.3 (presenting a nuanced exploration of the complex interaction of influences on the *Lochner*-era judges).

128. Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 108 (1991); *see also* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996) (arguing that the Court generally does not attempt to force legal regimes on an unwilling populace).

129. Siegel, *supra* note 128, at 109. Siegel argues that certain portions of the *Lochner* legacy, including the judicial development of substantive rights and the view—expressed by commentators of the time—that public opinion should affect the content of constitutional law, were in fact quite forward-looking. *Id.* at 110-11.

130. The “brooding omnipresence” language appeared, not in majority opinions applying the federal common law, but in a dissent critiquing it. *Jensen*, 244 U.S. at 222 (Holmes, J., dissenting).

structure,¹³¹ albeit in a way that grew increasingly contested¹³² and difficult to countenance as its interpretive context changed. It is difficult to perceive the deeply embedded assumptions of one's own age. The understanding of how pervasive these assumptions are, and indeed of the fact that they do not simply reflect a "noncontingent reality,"¹³³ is an insight that comes with historical perspective.

If the legal versions of these stories are "dysfunctional" as history,¹³⁴ the historical versions are likely to appear similarly dysfunctional to legal audiences. Historical and legal analysis, as Purcell notes, are "profoundly different intellectual enterprises."¹³⁵ Every genre has its requisites, and stories defying those requisites risk appearing incoherent. Coherence, as narrative theorists explain, is the quality possessed by a story that appears, to its audience, shapely and well-formed.¹³⁶

Shaping a narrative means determining what events and details are relevant, which requires a standard of relevance. It means determining how these events are connected to each other, and to the whole, which requires both a notion of causality and a standard for defining the whole. This standard is most often supplied by the conventionalized norms of the genre¹³⁷

Judges are expected to create a story that portrays the evolution of doctrine as the linear result of doctrinal logic.¹³⁸ This is the linkage that reassures the observer that law is rendered, not as a series of case-by-case (or—more to the point—judge-by-judge) decisions, but as a coherent, stable, predictable "body" of law, subject to the constraints called the rule of law.

131. See, e.g., Goldsmith & Walt, *supra* note 52, at 683 (arguing that *Swift*'s supporters were themselves legal positivists). Michael Collins argues that natural rights discourse did not posit that laws could be struck down based on abstract notions of natural law but, rather, structured legal arguments by suggesting first principles. Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1307 (2000).

132. Tony Freyer, among others, suggests that *Swift* was quite uncontroversial when first decided. FREYER, *supra* note 49, at 93; see also Lessig, *supra* note 49, at 1788.

133. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 513 (1988).

134. PURCELL, *supra* note 1, at 4.

135. *Id.* at 400 n.27.

136. See, e.g., Martin Price, *The Irrelevant Detail and the Emergence of Form*, in ASPECTS OF NARRATIVE 69, 70-71 (J. Hillis Miller ed., 1971); Hayden White, *The Value of Narrativity in the Representation of Reality*, in ON NARRATIVE 1, 15 (W.J.T. Mitchell ed., 1981) (discussing the attributes of a well-formed and satisfying narrative, and the ways in which such narrative expectations are culturally shaped).

137. Banded, *supra* note 25, at 1310 (citing SEYMOUR CHATMAN, *STORY AND DISCOURSE* 21 (1978)).

138. See RONALD DWORKIN, *LAW'S EMPIRE* 228-32 (1986) (comparing judicial interpretation to writing a chain novel); Ferguson, *supra* note 10, at 214 (describing judgment as a process in which "[w]hat was and what is come together in the ruling expectation of what *must be*").

Legal analysis, and particularly judicial opinion writing, strips away much of the context that historians value. Law achieves its appearance of continuity and coherence, in part, by assuming the existence of stable essences like *legislature* or *right reason* or *democratic consensus* or *federalism*. It treats abstract and general categories “as coherent structures of concepts and principles”¹³⁹ whose underlying meaning does not change in context or over time. Although the creation of doctrine is an essential part of the legal process, it is not obvious that it must, at the same time, be a process of erasing social and cultural context, and of masking contingency, ideology, and choice. Nor is it obvious that the creation of doctrine needs to rely on fixed categories impervious to change. In a sense this is old legal realist ground, but the historical understanding of doctrinal development illustrates, vividly and concretely, what gets lost in the process of creating doctrine.¹⁴⁰ As Purcell’s rich account of the evolution of the *Erie* doctrine shows, the evolution of doctrine rarely proceeds in a linear progression. It is, instead, a pattern of change and continuity, shaped by (and itself a force in shaping) historical, political, and cultural, as well as legal, forces.

The question Purcell raises is whether legal analysis might benefit from a greater acknowledgment of such forces. Can legal scholars learn of and admit to a richer context for decisionmaking without compromising the coherence and stability of doctrinal legal development? The answer depends on what values the rule of law needs to safeguard, and at what cost. A conception of the rule of law that most highly values continuity with past doctrine may appear stable and predictable. However, its costs are great. It may too often sacrifice substantive justice.¹⁴¹ It may sacrifice the ability to evolve with changing conditions, and may even interfere with the willingness to recognize the point at which the stability itself becomes illusory.

History can help here. It can help show how and why certain principles achieved immanent status, and in what form, and for how long. History teaches that in each era there are animating assumptions that go without saying. These assumptions, as long as they are left unexamined and uncontested, lend the law an appearance of stability, coherence, and political neutrality. This is a familiar insight in the context of *Swift* and

139. GREY, *supra* note 10, at 2. This tendency is often referred to as conceptualism, which Thomas Grey identifies as a type of jurisprudential formalism. *Id.*

140. See also Gordon, *supra* note 10, at 1020-21 (arguing that a historical understanding of the evolution of doctrine is threatening to the aim of mainstream legal scholarship, which is to demonstrate that lawmaking is rationally related to some coherent conceptual ordering scheme).

141. See Richard H. Fallon, Jr., “*The Rule of Law*” as a *Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 10-24 (1997) (comparing historicist and formalist notions of the rule of law with notions keyed to fair process and substantive justice); Jackson, *supra* note 8, at 2255-56 (comparing, in the federalism context, adjudication by rule with adjudication by judgment); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 784-92 (1989) (considering various conceptions of the rule of law).

Lochner. Justice Story could, for a time, point with some assurance to a body of customary law governing commercial transactions,¹⁴² until a confluence of cultural and historical forces called the transcendent nature of commercial law into question.¹⁴³ The approach taken by *Lochner*-era judges only gradually began to look like a particular political philosophy. It was based on beliefs about liberty of contract that these judges reasonably assumed were based on traditional and enduring principles of American constitutionalism. These beliefs shaped the judges' most deeply held assumptions and first principles,¹⁴⁴ and gave their system coherence and unity.¹⁴⁵ Only when these assumptions became contested were they transformed, in the public eye, from effective constraints into ideological value choices.¹⁴⁶ Only then did the system's coherence appear suspect.

It is important to note that the coherence and unity of the common law were never truly uncontested. An endemic problem with assuming enduring principles based on consensus is, of course, in defining who counts as part of the consensus. A related problem is the tendency to believe the universality of one's own viewpoint, or at least one's own realm of experience,¹⁴⁷ especially "when [one's] strongest and least conscious class biases [are] engaged."¹⁴⁸ This problem is easy to identify in Purcell's description of Justice Brewer's equation of his own religious and political values with those of the enduring common law, and thus of the Constitution. It becomes harder to see when the values are less obviously anachronistic and, in general, when they are more difficult to sort out from the observer's own values.

B. *Neutral Principles: Coherence Arising from Consensus*

A case in point is the field of federal courts, which came of age in the 1950s, and whose organizing assumptions were widely accepted when many of today's scholars and jurists were in law school.¹⁴⁹ The legal process school and its conception of neutral jurisdictional principles were

142. See Lessig, *supra* note 49, at 1788. *But see* HORWITZ, *supra* note 49, at 245-49 (arguing that Story's view in *Swift* is sharply opposed by his approach in his treatise, and that the declaratory theory of law was eroding by the 1780s).

143. FREYER, *supra* note 49, at 94-97.

144. Collins, *supra* note 131, at 1307-08.

145. GREY, *supra* note 10, at 7-8.

146. Lessig, *supra* note 49, at 1792-95; Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

147. Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 377 (1996); Bandes, *supra* note 25, at 1275-1319.

148. GREY, *supra* note 10, at 10.

149. Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 133-34, 133 n.236 (1998); *see also id.* at 133 n.237 (noting that a majority of sitting Supreme Court Justices not only attended Harvard Law School during the height of the legal process period but also took Hart and Sacks's legal process class).

never without critics,¹⁵⁰ but for many years the critique did little to dim the luster of the Hart and Wechsler paradigm. Many of the process school's assumptions continue to influence the legal community's understanding of what count as proper reasons for decision, what matters are irrelevant, and what grounds should be deemed unprincipled, political, and unduly value-laden.¹⁵¹ Yet some of its most basic assumptions went unarticulated and undefended, and are only gradually revealed to be time-bound and contestable. Therefore, placing doctrine in its historical context is of particular importance to the field of federal courts.

Purcell describes a field that began to take shape in the 1930s and 1940s, inspired by Brandeis and molded by Frankfurter, and “[b]orn of political commitment and ideological conviction.”¹⁵² Yet most legal scholars know the field of federal courts in its substantially different postwar incarnation. The field today's scholars know—the one shaped primarily by Henry Hart and Herbert Wechsler—is linked “almost inextricably” to the legal process methodology that they likewise pioneered.¹⁵³ It is a field that was premised on the perception of a particular problem: the countermajoritarian difficulty.¹⁵⁴ That is, the perceived problem was that the judiciary, which is unaccountable to the electorate, inevitably makes law, rather than simply interpreting the law made by the democratically elected political branches. This is a problem because it permits the undemocratic judiciary to make political, value-laden decisions that ought to be the province of the political branches.¹⁵⁵ The definition of

150. *E.g.*, Duxbury, *supra* note 13, at 677 (discussing the contemporary critics of Wechsler's notion of neutral principles); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 288 (1973) (referring to critics of Hart, such as Thurman Arnold, as “bucking the scholarly tide”).

151. *See* Duxbury, *supra* note 13, at 676 (arguing that many scholars continue to be swayed by the neutral principles thesis); Peller, *supra* note 13, at 571 (arguing that the process approach continues to form background assumptions for most centrist legal scholars); Wells, *supra* note 4, at 94-95 (arguing that federal courts scholars, with few exceptions, claim to subscribe to the Hart and Wechsler model). *But see* Wells, *supra* note 4, at 138 (arguing that the Court claims to implement legal process values when in fact the doctrine is often at odds with those values).

152. PURCELL, *supra* note 1, at 4.

153. Fallon, *supra* note 13, at 956; *see also* Amar, *supra* note 13, at 691-92 (arguing that legal process methodology dovetails with the scope of federal jurisdiction and indeed seems to have helped set the boundaries of the field as defined by Hart and Wechsler).

154. The difficulty with giving too much power to unelected judges was most famously elaborated by Alexander M. Bickel in, among other works, *THE LEAST DANGEROUS BRANCH* (1962). Of course, the starting assumption of the countermajoritarian difficulty is that the judicial branch is countermajoritarian, whereas the executive and legislative branch are representative and democratic. This assumption, like much of Bickel's thesis, is open to argument. *See, e.g.*, Erwin Chemerinsky, *The Supreme Court 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 65 (1989) (arguing that each branch has both majoritarian and non-majoritarian aspects); Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 74 (1986) (raising the possibility of the judiciary as representative of the people).

155. Scholars have often observed that the preoccupation with this difficulty, real or perceived, has become one of the “starting points of constitutional theory.” KALMAN, *supra* note

the problem, then, was premised on a particular view of democracy and of where it resides in America's tripartite system (that is, in the political branches and not the judiciary). This view of democracy was billed as the product of a societal consensus, though the claim of consensus went undefended.¹⁵⁶

The notion of consensus that was so crucial to the coherence of the process methodology was a curious blend of the purportedly descriptive and the aspirational.¹⁵⁷ It was, as Judge Posner described it, an "unacknowledged dependence on homogeneity of outlook and of values."¹⁵⁸ The belief in the existence of homogeneity was in part wishful thinking,¹⁵⁹ but perhaps more accurately explained as a mistaken belief in the universality of a particular viewpoint, not much different from the sort of which the *Lochner*-era judges were accused. Or perhaps, it is more accurately explained as a sort of *willed* consensus, reinforced by the assumption that it was morally desirable and indeed crucial to democracy.¹⁶⁰

The undefended notion of democracy, and the premises flowing from it, not only defined the problem, but, unsurprisingly, were an essential part of its solution. The problem as defined assumes the need for a theory

5, at 231. For liberals in particular, the challenge was to find a theory that would explain why the judicial imposition of values in *Lochner* was illegitimate without invalidating the foundations of *Brown*. See, e.g., Morton J. Horowitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 602 (1979); see also OWEN M. FISS, 8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 9-12 (Stanley N. Katz ed., 1993) (describing the liberal dilemma); KALMAN, *supra* note 5, at 42 ("They never found it."); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Five: The Birth of an Academic Obsession* (Aug. 30, 2000) (unpublished manuscript, on file with author) (discussing the origins of the academic focus on reconciling judicial review with democracy).

156. RICHARD A. POSNER, *OVERCOMING LAW* 75-76 (1995); Duxbury, *supra* note 13, at 643; Peller, *supra* note 13, at 601.

157. Duxbury, *supra* note 13, at 673.

158. POSNER, *supra* note 156, at 75-76.

159. Certainly it was not descriptively accurate. See Duxbury, *supra* note 13, at 643 ("[I]t . . . reinforced an image of the United States which, in truth, belonged to the previous century."); *id.* (citing MICHAEL P. ROGIN, *THE INTELLECTUALS AND MCCARTHY: THE RADICAL SPECTER* 278 (1967)). Although the civil rights era is often portrayed as the moment in which moral consensus began to crumble, descriptions of the immediate postwar period as a time of shared consensus have a hollow ring. It was, after all, the sociological age of David Riesman and William Hollingsworth Whyte, Jr.; the height of the McCarthy era; the period prior to *Brown v. Board of Education* and *Cooper v. Aaron*, just on the heels of *Korematsu v. United States*; well before women were entitled, even on paper, to equal protection; and, like every other period in history, a time in which the federal courts ignored or betrayed the sovereignty of the Indian tribes. DAVID RIESMAN, *THE LONELY CROWD: A STUDY OF THE CHANGING AMERICAN CHARACTER* (1969); WILLIAM H. WHYTE, JR., *THE ORGANIZATION MAN* (1956); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Korematsu v. United States*, 323 U.S. 214 (1944); see Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

160. EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 256 (1973).

identifying the constraints that will prevent judges from allowing improper factors to unduly influence decisionmaking. When Hart and Wechsler joined forces to produce the legendary textbook that shaped the field of federal courts, they sought to impose a sense of coherence on the “vague and unruly elements of jurisprudential debate.”¹⁶¹ The guiding principles of the field were designed to impose coherence by addressing the countermajoritarian difficulty in two complementary ways: through the allocation of decisionmaking power among the branches of government and through constraints on judicial decisionmaking.

The emphasis on the importance of allocational choices followed from the definition of democracy as the product of consensus. When consensus is itself defined as morally desirable, the premium is placed on creating and safeguarding a fair process for achieving agreement, rather than on ensuring that the results of the process are themselves normatively desirable. The idea was that the morality and justice of outcomes arrived at through regular, “democratic,” procedures could generally be assumed. The view of democracy as built on consensus also privileged the legislative branch as more democratic than the judicial branch, and thus as the preferred conduit for achieving consensus. It seemed to follow that judicial opportunities to make ideological choices should be minimized by assigning a severely constrained role to judges. This solution assumed that the jurisdiction to make value choices is capable of such allocation—that it is possible to make broadly applicable rules that channel ideological decisionmaking to the political branches. Thus the very coherence of the field of federal courts, at least as originally conceived, depended on the possibility of identifying a consistent set of procedural rules constraining undemocratic decisionmaking,¹⁶² which can stand apart from the substantive value questions that are largely allocated to the political branches.¹⁶³

Legal process theorists believed that such rules could not in themselves be ideological or value-laden. These theorists considered fair procedures to be those that adhered to transsubstantive, outcome-neutral allocative principles like federalism. The process school’s particular notion of how judicial decisionmaking ought to be constrained also relies on the undefended notion of consensus. It addresses the problem by assuming that judges will be guided in their decisionmaking by this very societal consensus. Because the consensus is discoverable, judges can discern it through reasoned elaboration, which assumes that “for every judicial

161. PURCELL, *supra* note 1, at 243.

162. This is not to say that the result of judicial decisionmaking, even when properly constrained, would be correct in each case. *See* Fallon, *supra* note 13, at 962 (asserting that Hart and Wechsler’s controlling insight was that, assuming proper allocation of authority, the authority to decide must at least sometimes include the authority to decide wrongly).

163. *See* Peller, *supra* note 13, at 567.

problem there [i]s ultimately a ‘reasonable’ solution,” with “reasonable” defined in terms of the value preferences of American society.¹⁶⁴

The definition of a neutral principle was itself, in an often noted irony, not well-elaborated.¹⁶⁵ In legal philosopher Neil Duxbury’s view, Wechsler, at least, left the term largely undefined because he assumed that it, too, flowed from the notion of consensus. As Duxbury says, “[n]eutrality’ and ‘generality’ are assumed by Wechsler to have meanings shared by all reasonable people.”¹⁶⁶ Thus the nature or prevalence of the assumptions underlying the principle went unexamined. As Cass Sunstein, Gary Peller, and others have neatly demonstrated, the Hart and Wechsler version of neutrality, much like that of the Court that struck down *Lochner*, was based on deeply embedded, and generally status-quo-enforcing, assumptions about the distribution of power and resources.¹⁶⁷ Any attempt to unsettle power would look political and nonneutral.

The field of federal courts thus maintains and justifies its internal coherence in a number of mutually reinforcing ways.¹⁶⁸ Jeremy Waldron, in a recent article, notes that it is not necessarily problematic, and may even at times be helpful, for a field to make use of internally defined concepts.¹⁶⁹ It becomes problematic when the concepts are tautological,¹⁷⁰ when they are defined “in a very tight circle, a circle of vanishingly small diameter, by reference to exactly the phenomenon [they are] supposed to explain.”¹⁷¹

164. White, *supra* note 150, at 287 (citing Henry Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100 (1959) (discussing the “maturing of collective thought”)).

165. See, e.g., Duxbury, *supra* note 13, at 681; Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 519 n.98 (1997); Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 *passim* (1960).

166. E.g., Duxbury, *supra* note 13, at 681; see also POSNER, *supra* note 156, at 73-74.

167. See Duxbury, *supra* note 13, at 679; Sunstein, *supra* note 146, at 878-79 (linking the *Lochner* Court’s notion of maximum-hour legislation as nonneutral and partisan with Wechsler’s notion of neutral principles as those which enforce the status quo); Peller, *supra* note 13, at 607-08 (drawing a similar parallel to *Lochner* and noting that Wechsler’s inquiry into the *Brown* opinion assumed that existing patterns of racial subordination were a given and thus beyond the province of the judiciary). Morton Horowitz argues that this is the effect of the effort to separate law from politics—the equation of politics with change, and legality with the status-quo-enforcing. HORWITZ, *supra* note 49, at 266. *But see* Fallon, *supra* note 13, at 975 (suggesting that legal process methodology need not necessarily be a conservative force).

168. See GREY, *supra* note 10, at 17 (discussing the epistemic claim that coherence is derived from the mutually reinforcing nature of coherent elements). It would not be entirely accurate to call the field, even in its “ideal” process school conception, a closed system. As Wechsler himself asserted, neutral principles will not guarantee a just result. If a decision meets the criteria for neutrality, “the other and the harder questions of its rightness and its wisdom must be faced.” Herbert Wechsler, *The Nature of Judicial Reasoning*, in LAW AND PHILOSOPHY: A SYMPOSIUM 290, 299 (Sidney Hook ed., 1964). He did not specify how such decisions would be identified.

169. Jeremy Waldron, “*Transcendental Nonsense*” and *System in the Law*, 100 COLUM. L. REV. 16, 21, 50 (2000).

170. *Id.* at 45 (discussing a complacency about the “tautologies of ‘policy’ and nostrums of the liberal consensus” that continued to be accepted throughout the ascendancy of the legal process school).

171. *Id.* at 21.

This well describes the problem with the premises of the legal process conception of the field of federal courts. To begin with, the undefended assumptions that define the concerns of the field are then used to address those concerns. Next, the system further reinforces its own internal coherence and wards off criticism by placing off-limits the very data that might challenge the essentialist and unexamined assumptions undergirding the field. According to the rules of the field, such data is itself insufficiently neutral and principled. The most obvious such assumption is that of the existence and nature of the consensus about democracy. But in particular, the field's crucial minor premises—that legislatures are representative and democratic institutions that protect societal values, for example—are highly formalized. Inquiries into the actual institutional competence of the branches of government, and the actual results of the prescribed allocation of decisionmaking power, were avoided, perhaps viewed as insufficiently immanent, or too keyed to particular outcomes.¹⁷² Inquiries about whether justice is actually being served in particular cases under the current regime may look too time-sensitive, too ad hoc, too result-oriented. The broader and more timeless the abstraction, the more neutral it appears.¹⁷³

In retrospect it may seem ironic—given the formalism implicit in the notion of neutral principles¹⁷⁴—that the underlying legal process assumptions of the field were based on a sophisticated understanding of the realist critique of classical formalism. Legal process theory attempted to maintain the rule of law despite the unavoidable fact of judicial discretion. It sought to give judges the latitude to check democratic excesses but not the freedom to impose their own values. The constraint on imposition of values, the duty to engage in reasoned elaboration that would generate neutral principles—like the earlier duty to understand the Constitution in accordance with common-law principles judicially filtered through “right reason”—has the appearance of constraint only to the extent its implicit governing assumptions are shared.¹⁷⁵ In this way, the concept of neutral principles replicates the problem of classical formalism that it sought to address.

172. See POSNER, *supra* note 156, at 74 (asserting that Wechsler “forbids courts to inquire into the actual competence of the legislature—he assigns spheres of competence in an empirical void”); see also Fallon, *supra* note 13, at 977 (suggesting that large abstractions can ossify into neutral principles, and that the antidote is empirical research to see if ideas actually work in practice).

173. See HORWITZ, *supra* note 49, at 262 (discussing the means by which the development of abstract and formal legal categories suppresses particularized equitable inquiries in order to promote the rule of law).

174. See Friedman, *supra* note 165, at 519 (noting that “Wechsler’s approach, to those critical of it, bore too much similarity to the now bad old days of arid legal formalism”).

175. See GREY, *supra* note 10, at 7-8 (noting that the traditional conception of common law as “judicially filtered ‘right reason’” assumed a correspondence of common-law principles, natural rights, and dictates of sound political economy).

In raising the specter of formalism, I recognize that the term is a moving target. The characteristics of formalism are a topic of intense debate.¹⁷⁶ Particularly before the recent revival of formalism,¹⁷⁷ the term often seemed to serve mainly as an epithet, a means of critiquing disfavored results or methodologies.¹⁷⁸ I do not desire to enter this fray. My use of the term “formalism” to describe and critique certain attributes common to the neutral principles doctrine and to the New Federalism is meant to denote two general characteristics often attributed to the term. The first characteristic is determinacy, “roughly the view that a unique answer in a particular case can be conclusively derived from application of a general rule.”¹⁷⁹ As Fred Schauer observes, the effort to place consideration of certain variables beyond the judge’s jurisdiction, while a characteristic of formalism, is also a characteristic of the rule of law itself. Rules, as Schauer observes, “achieve their ‘ruleness’ precisely by . . . screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account.”¹⁸⁰ Law achieves a certain amount of predictability and coherence by denying the decisionmaker the power to acknowledge factors not allowed for by the rule.¹⁸¹ Thus in one respect, the debate about whether a decision is too formalistic is a debate about whether certain variables were improperly placed beyond the decisionmaker’s power of decision. The first problem of formalism, as I use the term herein, is that it overstates the amount of predictability and coherence that law can achieve, and the extent to which coherence can be achieved by limiting the universe of allowable considerations. The problem, that is, lies in the assumption that answers can ever be derived from rules automatically, or inexorably, without supplementary value judgments.

The second problem of formalism that I wish to highlight, generally one with more derogatory implications, derives not so much from the choice to place certain variables off-limits, but from “its *denial* of the

176. See, e.g., SEBOK, *supra* note 13, at 49 (observing that the term is used in many different and almost inconsistent ways); Schauer, *supra* note 133, at 509-10 (noting the same).

177. See generally GREY, *supra* note 10 (discussing the New Formalism); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988) (offering a prominent articulation of the New Formalism).

178. See SEBOK, *supra* note 13, at 57 (noting this phenomenon); Schauer, *supra* note 133, at 510 (observing that according to the literature, “whatever formalism is, it is not good”).

179. Radin, *supra* note 141, at 792. Radin describes this as, roughly speaking, the view associated with traditional formalism. Thomas Grey argues that classical formalism held that law has three requirements: It must be determinate (with judgment following uncontestedly from application of norm to facts); it must be systematic (forming a coherent structure); and it must be autonomous (deriving norms from distinctly legal sources). GREY, *supra* note 10, at 5.

180. Schauer, *supra* note 133, at 510.

181. *Id.* at 540.

political, moral, social, and economic choices involved in the decision, and indeed in its denial that there was any choice at all.”¹⁸²

The legal process school’s brand of formalism partook of both these characteristics. Its goal was to remove, as much as possible, moral and political choices from the realm of judicial decisionmaking. It sought to preserve the rule of law and to create a coherent and autonomous system by placing considerations it deemed political, such as the normative acceptability of the consequences of judicial decisions, outside the judicial realm. It overstated the extent to which these purportedly extraneous normative considerations could be removed from the judicial realm. It also denied the normative choices involved in attempting to remove moral and political considerations from judging.

The notion of federalism that operated as the central organizing principle for the field of federal courts was assumed to be principled because it was, in theory, unconcerned with outcome and capable of consistent application over time, despite changes in the character of the institutions themselves or in the prevailing concerns of the age.¹⁸³ It was presented as not just a neutral principle, the substantive results of whose “proper” application were assumed to be just, but as a first principle, albeit an unexamined one. It went unacknowledged that the process school’s conception of federalism was necessarily animated by particular values, based on a particular vision of federal-state relations, and shaped by its political and social context.¹⁸⁴

It was, therefore, completely predictable that the legal process school would lose the battle to reconcile *Brown v. Board of Education*¹⁸⁵ and its progeny with the methodological tenets of neutral principles.¹⁸⁶ The dramatic shifts in jurisdictional doctrine during the civil rights era, leading to a dramatic broadening of federal court availability for civil-rights claimants, could not be explained without reference to an evolution in values.¹⁸⁷ There were no neutral principles that would condemn the *Lochner*

182. *Id.* at 511 (discussing, in particular, the meaning of the charge that the *Lochner* decision was formalistic).

183. PURCELL, *supra* note 1, at 246-54.

184. In Purcell’s view, at least, this conception of federalism was meant to advance a “sophisticated version of judicial nationalism.” *Id.* at 249. Although this is debatable, the principle was certainly assumed to rest on a particular notion of consensus. See *supra* text accompanying notes 152-172.

185. 347 U.S. 483 (1954).

186. See Wechsler, *supra* note 12, at 31 (asserting agreement with the result in *Brown* but raising problems with its methodology); Friedman, *supra* note 165, at 516 (noting that Wechsler’s problems reconciling *Brown*’s result and methodology “went to the very heart of the legal system’s legitimacy”); Wells, *supra* note 4, at 136 & n.259 (citing the negative scholarly reaction of process theorists toward Warren Court opinions).

187. Thus, until quite recently, Hart and Wechsler’s casebook was rightly criticized for failing to incorporate adequately the developments of the civil rights era. *E.g.*, Amar, *supra* note

Court's role in shaping a particular conception of federalism as illegitimate while exonerating the Warren Court's role in *Brown*.¹⁸⁸ It was a comparison between radically different conceptions of federalism, and any judgment would rest, ultimately, on the moral and political acceptability of those conceptions over time.

If I am correct that federalism is a concept that is necessarily animated by particular values, the difficult question about federalism is whether the concept is capable of providing any sort of coherence or at least linkage across time. Jeremy Waldron talks about one value of abstract concepts: They can act as what he calls "flags of systematicity."¹⁸⁹ They alert the audience that a concept is part of a broader linkage, that there is cross-cutting among doctrinal elements that must be taken into account when new law is made.¹⁹⁰ It is possible that the term "federalism" should serve just such a function, alerting the audience to the complex web of doctrine concerning federal-state relations and advising jurists to consider particular decisions in light of that complex web. The problem arises when the term "federalism" is asked to carry a heavier load—when it is assumed to provide a determinate answer to any particular question of federal-state relations.

As I argue below, this denial of choice is precisely the vice of the New Federalism. Any conception of federalism must be animated by particular values, because the concept is pervasively indeterminate.¹⁹¹ As Fred Schauer explains about such concepts:

It is not that such terms have no content whatsoever; it is that *every* application, every concretization, every instantiation requires the addition of supplementary premises to apply the general term to specific cases. Therefore, any application of that term that denies the choice made among various eligible supplementary premises is formalistic in this sense.¹⁹²

This recognition does not require the conclusion that concepts like federalism are merely empty incantations to be deployed cynically.¹⁹³ Political theorist Edward S. Corwin has observed that to "[t]he average

13, at 702-14 (noting that Hart and Wechsler did not properly incorporate the jurisprudence of the civil rights era into their casebook until the third edition in 1988).

188. See *supra* note 155 (discussing the scholarly obsession with finding a theory that would explain both *Brown* and *Lochner*).

189. Waldron, *supra* note 169, at 23.

190. See *id.*

191. Thomas Grey explains that for law to be determinate, "its judgments [must follow] from the application of norms to facts, without the exercise of discretion or contestable judgment." GREY, *supra* note 10, at 5.

192. Schauer, *supra* note 133, at 514 (citations omitted).

193. For an excellent discussion of the importance of both realist insights and the study of legal materials, see GILLMAN, *supra* note 21, at 196-98.

Supreme Court judge . . . such phrases as the separation of powers, check and balance, judicial independence, national supremacy, states' rights, freedom of contract . . . not only express important realities, they *are* realities—they are forms of thought with a vitality and validity of their own.”¹⁹⁴

But to say that the notion of federalism is one a Supreme Court Justice does or should take seriously is not to say that the Justice must accept a particular version of federalism. The indeterminacy of the concept leads to the opposite conclusion. Such a concept cannot have a fixed, timeless, or inexorable meaning. The seductive pull of a broad abstraction like federalism is that it appears “general and evaluative enough to provide a plausible gapless grid”¹⁹⁵ that unifies a complex and unruly field. But any concept that general, as Thomas Grey points out, “tend[s] to be fuzzy and interpretively contestable.”¹⁹⁶ Any articulation of federalism that suggests inexorability is one that papers over both the fact that other choices were available and the fact that the chosen version was deemed preferable according to values other than simply because “‘it’ is in the Constitution.”¹⁹⁷

The reasons why articulations of federalism so often deny choice are complex. One such reason, discussed at some length above,¹⁹⁸ is that judges, operating within their own set of cultural assumptions, may not fully grasp the extent of the choice that they make. They may assume that the abstraction really does correspond to some “underlying and noncontingent reality [and therefore that] certain specific embodiments are necessarily part of that reality.”¹⁹⁹ For example, Justice Brewer’s deeply held beliefs about the correspondence among law, morality, and religion strongly influenced his view of the role of the federal courts in a way that no doubt seemed quite logical and principled to him.²⁰⁰ If one of the vices of formalism is the deception inherent in its masking of choice,²⁰¹ often the

194. *Id.* at 198 (quoting EDWARD S. CORWIN, *Constitution v. Constitutional Theory: The Question of the States v. the Nation*, in AMERICAN CONSTITUTIONAL HISTORY: ESSAYS BY EDWARD S. CORWIN 99, 104-05 (Alpheus T. Mason & Gerald Garvey eds., 1964)).

195. GREY, *supra* note 10, at 9.

196. *Id.*; see also Rubin & Feeley, *supra* note 8, at 910 n.38 (stating that words like federalism are “generally webs of meaning, rather than having a simple, sharply circumscribed definition”); Shane, *supra* note 21, at 227 (“Legal categories like ‘federalism’ are especially amenable to divergences of meaning.”).

197. Jackson, *supra* note 8, at 2215; see also *New York v. United States*, 505 U.S. 144, 154 (1992) (holding that the Low-Level Radioactive Waste Policy Amendments Act of 1985 violated the requisites of federalism); *Gregory v. Ashcroft*, 501 U.S. 452, 463-64 (1991) (holding the Age Discrimination in Employment Act of 1967 inapplicable to state employees, based on a presumption created by principles of federalism).

198. *Supra* text accompanying notes 142-148.

199. Schauer, *supra* note 133, at 513.

200. See *supra* text accompanying notes 47-51.

201. Schauer, *supra* note 133, at 513.

vice seems to be a species of self-deception that is difficult to distinguish from a widely shared human attribute—the tendency to assume that one’s own experience is, if not universal, then at least generalizable.

To complicate matters further, even judges who accept a pragmatic and dynamic vision of federalism may choose to articulate such a vision in more abstract terms. Robert Ferguson explains the use of judicial formalism as “not just a legal philosophy that can be put aside” but an “innate psychological impulse,”²⁰² an integral part of the genre of the legal opinion.²⁰³ He argues that judges adopt the “rhetoric of inevitability”²⁰⁴ as a way to reassure the reader that they are rising above normal human predilections, and that their conclusions are compelled by logic, to “convince a democratic society that independent judges work within the spirit of justice for all.”²⁰⁵ Judges feel the powerful pull of the expectations of the genre. They may employ abstract formulations because it is expected, and because it is strategically useful. Such strategies are not necessarily objectionable,²⁰⁶ but neither are they inevitable.²⁰⁷ Judicial language that admits innovation or choice would sound less incongruous if judges employed it more often.²⁰⁸

Moreover, the strategy of relying on abstract formulations often is objectionable, for example, when it is employed for pernicious ends. Federalism is a term that serves as an indelible reminder²⁰⁹ of the dangers of

202. Ferguson, *supra* note 10, at 208.

203. Laura Little argues that this impulse is particularly strong in the field of federal courts, in which courts are reordering the balance of power and at times expanding their own power. Little, *supra* note 149, at 135.

204. Ferguson, *supra* note 10, at 213.

205. *Id.* at 208.

206. Lessig, for example, argues that the appearance of consistency is critical to the maintenance of judicial authority and that judges ought to adopt a strategy of using formalism as a conscious tool. Lessig, *supra* note 26, at 174-75. *Contra* David Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (arguing for the importance of candid articulation of criteria for judicial discretion); Wells, *supra* note 4, at 138-39 (arguing that lack of judicial candor encourages cynicism).

207. As Robert Cover said about the choice of the antislavery judges to employ abstractions: “Alternative articulations were available—articulations that gave the formal structure more down-to-earth, instrumental justifications, that stressed the inevitable and desirable role of the judge and of policy input in decision making, and that gave the judiciary a more explicit role as conjoint legislator.” ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 237 (1975). *But see* SEBOK, *supra* note 13, at 49-57 (discussing Cover’s treatment of Massachusetts Supreme Court Chief Justice Lemuel Shaw and exploring the possibility that Justice Shaw’s philosophy could be characterized as antiformalist).

208. Ferguson, *supra* note 10, at 218 (suggesting the possibility of a new language that incorporates activism and innovation into the genre of the legal opinion).

209. Some commentators argue that the indelible reminder of the use of federalism norms in defense of slavery has served as a barrier to realizing the more legitimate aims of federalism. *E.g.*, Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1804 (1995) (explaining that the invocation of federalism “came to be seen as a euphemistic pretext for the support of slavery and racially discriminatory practices”); *see also* SHAPIRO, *supra* note 8, at 7 (noting the arguments by some scholars that appeals to federalism “were little more than the last refuge of a scoundrel”); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 384-85 (1997)

jurisdictional principle deployed as a socially acceptable cover for the insulation of unacceptable substantive ends.²¹⁰ Robert Cover, in his study of the antislavery judges who felt themselves bound to enforce the fugitive slave laws, noted that a judge faced with a conflict between moral and formal values would often select as norms “those articulations of the process and its limits that invoked the highest possible justifications for formalism; that described the process in the most mechanistic terms; and that emphasized the place of others in the decisional process.”²¹¹

But the deeper problem is that in masking the assumptions and value judgments that inevitably shape decisionmaking, abstract norms insulate those judgments from public debate. They therefore deprive both the judiciary and the community at large of the opportunity to test them against community norms, or for that matter, actual conditions. Such strategies may also backfire. The coded understandings behind a term like “federalism” in one era are unlikely to survive to the next. As a means of insuring principled and just adjudication, abstract norms like federalism are unreliable, and indeed seductively dangerous. Abstract norms ossify, lose their original moorings, disguise their organizing assumptions, and begin to look timeless. They begin to substitute for individual equitable concerns, empirical inquiries, and other means of determining whether substantive justice continues to be served.²¹²

C. *The New Federalism: Sacrificing Principle for the Illusion of Coherence*

One important insight to be gleaned from Purcell’s history is that no particular version of federalism can credibly claim to be timeless or immanent. The contingency of the concept has lately become easier to see. As the circumstances of the demise of *Lochner* and *Swift* illustrate, allocational principles look neutral only until those who assess them become self-conscious about their sources, effects, and political natures. The current judicial battles over the allocation of federal power, and the meaning of federalism in particular, reveal not only a fundamental absence of shared moral consensus, but fundamentally conflicting ideological

(arguing that for those who came of age during the civil rights era, the memory of the use of federalism as a cover for opposition to desegregation may pose a barrier to thinking clearly about federalism).

210. One of the more notorious recent examples of a retreat to mechanistic formalism was Justice O’Connor’s opinion in *Coleman v. Thompson*, 501 U.S. 722 (1991), in which a capital defense lawyer missed the filing deadline for a state habeas petition by two days, and the Supreme Court rejected the litigant’s claim that his attorney’s error should constitute cause excusing his default. In O’Connor’s opinion, permitting the execution to go forward, she began: “This is a case about federalism.” *Id.* at 726.

211. See COVER, *supra* note 207, at 237.

212. Bandes, *supra* note 25, at 1314-17.

frameworks.²¹³ Not only questions of judicial oversight of the commerce power that appeared to have been settled since 1937, but questions as basic as whether the Constitution's authority derives from the states or the people of the Nation—questions that some argue hark back not only to the *Lochner* era²¹⁴ but to the debate over the Articles of Confederation²¹⁵—are generating heated debate. There is a general sense that we are in the midst of a major shift in federal-state relations, and few are agnostic about whether the shift is well-advised or warranted. Of course, as Purcell's book nicely illustrates, it is unusual for conflicts about jurisdiction to capture the public imagination.²¹⁶ Linda Greenhouse recently observed that the current constitutional developments, despite their potentially enormous significance, have been unfolding largely outside the realm of public discussion, though that could change as high-profile substantive issues like the Violence Against Women Act or the Americans with Disabilities Act²¹⁷ are implicated.²¹⁸ But at least among jurists and academics, this is hardly a time of consensus,²¹⁹ but rather a time in which the content and uses of federalism are highly contested. It is, in short, an opportune time to reconsider the issue of what a principled federalism might look like when comfortable assumptions about consensus are unavailable.

The Supreme Court's New Federalism is problematic in both of the senses I described in my earlier discussion of formalism.²²⁰ First, it

213. See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 662-64 (1983) (discussing the problem of conflicting ideological templates, or "universes of discourse").

214. See *United States v. Morrison*, 120 S. Ct. 1740, 1759 (2000) (Souter, J., dissenting); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 701 (1999) (Breyer, J., dissenting); *id.* at 690-91; Nowak, *supra* note 21, at 1094; Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121, 1128 (2000).

215. See, e.g., Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133, 1137 (2000); Shane, *supra* note 21, at 210.

216. See, for example, his discussion on the difficulty of mobilizing support for the abolition of diversity jurisdiction at PURCELL, *supra* note 1, at 77-85.

217. The Supreme Court heard arguments on October 11, 2000, on the issue of whether the Eleventh Amendment bars private damage suits against unconsenting states for violating the Americans with Disabilities Act. Charles Lane, *Disabilities Act Challenge Divides Court*, WASH. POST, Oct. 12, 2000, at A15. The case is *University of Alabama Board of Trustees v. Garrett*, No. 99-1240.

218. Linda Greenhouse, *Battle on Federalism: In an Era of States' Rights Debates, High Court's Ruling Limits Congress*, N.Y. TIMES, May 17, 2000, at A18. Thus the Tenth Amendment, Eleventh Amendment, and Commerce Clause debates probably do not qualify as "contested" in the sense Lessig refers to, as at the forefront of public debate. Lessig, *supra* note 49, at 1807. As this Book Review was going to press, the U.S. Supreme Court issued its decision in *Bush v. Gore*, 121 S. Ct. 525 (2000). This decision, needless to say, may do much to place previously obscure procedural issues of federal-state relations into the realm of public discourse.

219. It is also likely that legal scholars have become more sophisticated about the limits of the very notion of consensus—whom it includes and whose exclusion goes unnoticed. It is a hopeful thought that scholars are simply more aware of heterogeneity and therefore more skeptical of the claim that a norm is widely shared. See KALMAN, *supra* note 5, at 245 (citing Jean-François Lyotard's claim that "consensus has become an outmoded and suspect value").

220. See *supra* text accompanying notes 176-182.

overstates the determinacy of the concept of federalism and the possibility of deriving inexorable conclusions from the concept. Second, it denies the need to defend the principles on which it is premised. It is, of course, based on particular—and, in my view, unfortunate—choices about the balance of federal and state power. Its choices, on the whole, have tended to create barriers to federal governmental protection of the rights of individuals.²²¹ Whether the Court has chosen wisely is debatable; whether it has chosen at all is not. I suggest the limits of the Court's approach with a brief consideration of two areas of federalism in which it has been especially prolific: the Commerce Clause and the Eleventh Amendment.

The Court's pre-1937 Commerce Clause jurisprudence struck down federal legislation under the Commerce Clause by relying on distinctions—which are in retrospect inevitably characterized as “formalist distinctions”²²²—between commerce and police power,²²³ direct effects and indirect effects,²²⁴ that which was in the stream of commerce and that which was outside it.²²⁵ When these distinctions ceased to sound credible and were abandoned,²²⁶ the Court entered a period, nearly sixty years long, during which it is only a slight exaggeration to say that the Court simply ceased to impose judicial limits on the commerce power at all.²²⁷ In the view of one group of scholars, this hands-off judicial approach was and remains entirely appropriate,²²⁸ since, in these scholars' view, the breadth of Congress's power to regulate the states under the Commerce Clause ought to be resolved by the political branches.

221. See, e.g., Shane, *supra* note 21, at 239 (making this point).

222. See, e.g., *United States v. Morrison*, 120 S. Ct. 1740, 1759 (2000) (Souter, J., dissenting); Friedman, *supra* note 209, at 333; Lessig, *supra* note 26, at 175.

223. E.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 13 (1895); see also Friedman, *supra* note 209, at 332-33 (discussing the Court's creation of formal distinctions in order to cabin the commerce power).

224. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935); Friedman, *supra* note 209, at 384-85.

225. *Schechter*, 295 U.S. at 543.

226. See Lessig, *supra* note 26, at 175.

227. Friedman, *supra* note 209, at 334-35; Lessig, *supra* note 26, at 154.

228. A recent influential article advancing this argument is Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000), which argues that the states are well represented by Congress and do not need protection from the judiciary. Herbert Wechsler most famously made this argument. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); see also Jackson, *supra* note 8, at 2215-16 (discussing this argument). There are other arguments that lead to the same conclusion that the courts have no role to play in enforcing federalism constraints. E.g., Rubin & Feeley, *supra* note 8, at 909 (arguing that the concept of federalism is a poor substitute for more legitimate values like decentralization and itself fails to articulate any legitimate goals for judicial enforcement).

Other scholars argue that the Court should exercise oversight in the Commerce Clause area.²²⁹ Vicki Jackson, for example, argues that the rule of law demands some form of a judicial check on congressional power. In her view, the absence of any judicial role would deprive the law in the area of any claim to be principled or consistent and would be profoundly destabilizing.²³⁰ As she recognizes, there is an inherent tension in the notion of principled adjudication of the norms of federalism. Jackson characterizes federalism as “quintessentially, a political deal among different governments. Workability is its core. It is a means to many ends, the most basic of which is the stable survival of the union it creates. To be successful, federalism must be pragmatic and it must be dynamic.”²³¹

For those who see federalism as a pragmatic and fluid concept, a belief in the need for judicial oversight necessarily implicates the tension between this fluidity and the doctrinal consistency, or “ruleness,” that is a key component of the rule of law. A pragmatic, judicially enforceable federalism is one that is keyed to the advancement of the values of federalism. Although the precise identity of these values will be debated, any such values will tend to be articulated at a fairly high level of generality, for example, “accountability” or “public participation in democracy” or “diffusion of power to protect liberty.”²³² If oversight of the commerce power is keyed to a pragmatic inquiry into whether national regulation addressing particular problems would advance the values of federalism,²³³ the results of such inquiries are bound to vary over time and according to substance. The attempt to impose doctrinal consistency on such a fluid and pragmatic series of judgments will inevitably require the imposition, rather than the discovery, of a consistent doctrinal framework.

This recognition that doctrinal consistency would need to be imposed rather than found by no means invalidates the enterprise. The creation of a coherent story, including the story of the “rule of law,” is always, to some extent, artificial. It necessarily requires the erasure or simplification of certain contingencies, the use of abstractions that disguise certain distinctions and choices. If courts are to have some role in regulating the commerce power, the challenge in constructing a principled jurisprudence is in determining how much doctrinal consistency is necessary and what ought to be traded off to achieve it. Ideally, courts would engage in such determinations fully aware of the choices before them and would articulate

229. See, e.g., Dorf, *supra* note 24, at 746-47 (arguing that antifederalists are justified in looking for some judicially enforceable principles of state sovereignty, though nationalists are justified in questioning their doctrinal means of achieving this goal).

230. Jackson, *supra* note 8, at 2224-26.

231. *Id.* at 2228-55 (discussing federalism in relation to the Commerce Clause, the anticommandeering principle, and generally).

232. Friedman, *supra* note 209, at 386-405.

233. *Id.* at 336-38.

those choices. This would permit a more democratic dialogue on the desirability of the choices made and would also facilitate reassessment of their desirability as conditions change.

But history teaches that the impulse to formalism is strong, and that a flexible jurisprudence that recognizes and articulates value choices is a threatening specter because it fails to reassure us that judging transcends politics. History also teaches that the formalisms jurists employ to create that reassuring illusion do not always look like formalisms at the time. The problem with the current Court's reversion to a highly formalist approach to federalism is that, although the *Lochner*-era judges may well have believed their Commerce Clause jurisprudence was found, not made, it is now too late in the day to claim ignorance of the choices involved.

United States v. Lopez,²³⁴ the first case since the New Deal to strike down a federal enactment as beyond the commerce power, did so by creating a three-part categorical test to determine when Congress may use its commerce power.²³⁵ The majority opinion in *United States v. Morrison*,²³⁶ striking down portions of the Violence Against Women Act, explicitly rests its decision on its responsibility to police the boundary between the "truly national and the truly local."²³⁷ The opinions in *Lopez* and *Morrison* assume, as the dissent in the *Morrison* case correctly observes, a formal and categorical distinction between commerce and the realm of moral and social wrongs,²³⁸ a "sacred province of state autonomy" divorced from the needs and failings of the political process.²³⁹

The assertion that there is an immutable and obvious boundary between the truly national and the truly local, and that judicial policing of this boundary is "required by the Constitution,"²⁴⁰ essentially treats the period from 1937²⁴¹ to 1995²⁴² as a doctrinal anomaly. It also rather resolutely ignores the lesson of 1937—that appearances of what is required by the Constitution can be deceptive, and that the Court must guard against the

234. 514 U.S. 549 (1995) (voiding the Gun-Free School Zones Act).

235. Congress may use its commerce power only if its action fits into one of three categories: regulating interstate commerce; regulating instrumentalities of interstate commerce; or regulating activities that have a substantial effect on interstate commerce. *Id.* at 558-59.

236. 120 S. Ct. 1740 (2000).

237. *Id.* at 1754.

238. *Id.* at 1764 (Souter, J., dissenting).

239. *Id.* at 1778 (Breyer, J., dissenting).

240. *Id.* at 1749.

241. *E.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (greatly expanding the definition of interstate commerce, thereby calling into serious question the distinction between the truly national and the truly local); see also Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 802 (1996) (discussing this shift in doctrine).

242. *United States v. Lopez*, 514 U.S. 549 (1995) (reviving the judicially enforceable distinction between national and local for purposes of the Commerce Clause).

temptation to assume that its own assessments are widely held.²⁴³ The Court's assertion is thus hard to credit as stemming from a belief that the Court is accurately describing a politically or judicially discernible boundary that is consistent across time. It is hard to accept despite the Court's claim that to police this boundary is necessary to "preserve one of the few principles that has been consistent since the Clause was adopted."²⁴⁴ Instead, such policing appears to be an effort to recapture a long-lost balance.²⁴⁵ But rather than explain why the old balance is worth recapturing, or why a principled and coherent federalism requires the revival of such categorical distinctions, the Court invokes yet more tradition to buttress its claim.

The Court relies on the "sensible and traditional understanding"²⁴⁶ that there must be some judicially enforced limit to congressional power under the Commerce Clause. The Court also defends the need for such a distinction by invoking the fear that the statute will interfere with the "traditional" exclusion of family law from the realm of federal regulation.²⁴⁷ The repeated invocation of tradition, implicit constitutional requisites, and essential distinctions, coupled with the failure to consider either the historical reasons for such distinctions or whether those reasons ought to animate current Commerce Clause jurisprudence, is a message that the Court believes those considerations are off the table. Rules are rules, regardless of whether they accurately describe the current polity, advance currently viable policies, or lead to desirable consequences.

This is an interpretation of the Constitution that privileges tradition and coherence above all else. In order to maintain this hierarchy of values, the interpreter must choose a certain version of history and then declare inquiry into the forces shaping that version of history—or into the existence of other versions—off-limits. In placing such heavy reliance on formalist notions of what is traditional and essential, with so little examination of when or why these traditions took hold, and whether they are worth maintaining, the Court denies that it makes such choices, and deprives those affected by its decisions of any opportunity to evaluate them. The Court never seeks to defend its notion that its version of federalism is *required*, or beyond the realm of choice. And as I have argued, the notion of a

243. Purcell's history illustrates the ease with which the bar may conflate its own interests with those of the nation. See PURCELL, *supra* note 1, at 29, 249, 273-83. Assumptions about the inherently local nature of family law may be difficult for federal judges to separate from their own notions of what sorts of cases are worthy of their time and commensurate with their prestige. See Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1687-88, 1695-98 (1992).

244. *Morrison*, 120 S. Ct. at 1754.

245. Lessig, *supra* note 26, at 129.

246. *Morrison*, 120 S. Ct. at 1765 (Souter, J., dissenting).

247. *Id.* at 1753.

federalism that requires no justification is not defensible. Federalism in itself is a term incapable of such determinative force. It is not a rule from which judgments can follow inexorably, without the imposition of contested value choices.²⁴⁸

In placing an evaluation of the traditions of federalism off-limits, the Court short-circuits any examination of the traditions it so freely invokes. As Reva Siegel,²⁴⁹ Judith Resnik,²⁵⁰ and other scholars²⁵¹ have shown, these traditions have questionable roots that are instead worth repudiating. Although in the debates about the Violence Against Women Act the rhetoric of federalism has replaced earlier rhetorical justifications for insulating domestic violence from judicial intervention, the federalism arguments themselves “acquire persuasive power as they draw on the traditional modes of reasoning about intimate assault.”²⁵² The Court in *Morrison* embraces a notion of federalism that views domestic violence, including rape and battery, as a species of “family law,” and family law as a category that is both “truly local” and an area “of traditional state regulation.”²⁵³ Judith Resnik observes that “the equation of women with the family . . . derive[s] from nineteenth-century images”; there is nothing “intrinsic” or “natural” about it.²⁵⁴ As she notes, these jurisdictional rules were constructed to exclude domestic violence from federal court and characterize it as local through reasoning echoing that which once excluded it from the protection of law entirely.²⁵⁵

The Court’s approach also short-circuits consideration of the central practical inquiry: whether domestic violence is a problem that ought to be addressed on the federal level. There has been substantial evidence adduced that the Violence Against Women Act has, since 1994, led to significant improvement in the governmental response to violence against women, and to a noticeable drop in the incidence of such violence.²⁵⁶ If the Court

248. The desire to maintain the rule of law might itself be a value supporting a consistent judicial conception of federalism. See Jackson, *supra* note 8, at 2224. However, this is an instrumental argument to consider coherence, stability, equal treatment and other values advanced by the rule of law. As such, it ought to be considered along with competing values.

249. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2201 (1996).

250. Resnik, *supra* note 243.

251. E.g., Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073 (1994); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998). *Contra* Dailey, *supra* note 209, at 1825 (arguing that state authority over family law is an essential feature of our liberal constitutional order).

252. Siegel, *supra* note 249, at 2201. For example, they exhort deference to the traditional allocation of federal and state responsibilities, despite the fact that many of the assumptions driving that allocation are now unconstitutional or widely considered repugnant.

253. *United States v. Morrison*, 120 S. Ct. 1740, 1753-54 (2000).

254. Resnik, *supra* note 243, at 1698; see also Siegel, *supra* note 249, at 2200-06 (tracing the historical antecedents of the relegation of family issues to the local or private sphere).

255. Resnik, *supra* note 243, at 1739-50.

256. See, e.g., Liberty Aldrich, *Sneak Attack on VAWA*, NATION, Oct. 2, 2000, at 6.

believes that such factual inquiries are beyond its competence, the conclusion may be that these factual inquiries are better left to Congress. If the Court believes that such factual inquiries are unnecessary, because the line between national and local concerns is historically fixed, or because maintaining such a line is more important than asking whether it has been drawn correctly, the Court's refusal to defend these beliefs and take responsibility for the consequences of their application is, quite simply, unprincipled.

The formalism of the Court's sovereign immunity jurisprudence is, if possible, even more categorical. This formalism relies on an expansive version of sovereign immunity whose claimed immanence is such that it supersedes the limitations imposed by the language of the Constitution, and trumps, without any justification beyond its existence, weighty countervailing principles like governmental accountability and the supremacy of federal law.²⁵⁷ The Court has done much to "denationalize"²⁵⁸ systematic federal protection of core federal rights, and has done so without acknowledging that the importance of according federal protection to such rights ought to be part of the equation. Its jurisprudence has justifiably been called frightening for its lack of concern for text,²⁵⁹ its increasing imperviousness to legislative correction,²⁶⁰ and its questionable use of history.²⁶¹ Implicit in the Court's formalism is the message that the Court is choiceless, bound by longstanding and enduring principle regardless of substantive outcome, and despite the costs to

257. As David Shapiro succinctly puts it:

For the Court to take a concept that has little justification in itself, to constitutionalize it, to use it as a vehicle for a possible assault on several fundamental Fourteenth Amendment doctrines, including a direct attack on the recognition of statutory entitlements as property, and to strike down three acts of Congress in one day on three different grounds (when only two acts of Congress were invalidated before the Civil War) is the opposite of either moderation or good federalism.

Shapiro, *supra* note 21, at 759-60 (footnote omitted).

258. Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691 (2000).

259. The Court's sovereign immunity jurisprudence, which forbids damage actions in both federal and state court by citizens against their own states, though the language of the Eleventh Amendment prohibits neither, derives from the Eleventh Amendment "not so much for what it says, but for the presupposition . . . which it confirms." *Alden v. Maine*, 527 U.S. 706, 729 (1999); see James E. Pfander, *Once More unto the Breach: Eleventh Amendment Scholarship and the Court*, 75 NOTRE DAME L. REV. 817, 821 (2000) (arguing that the Court treats the text of the Eleventh Amendment as irrelevant); Sherry, *supra* note 214, at 1128 (same).

260. See, e.g., *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (limiting Congress's power under Section 5 of the Fourteenth Amendment to authorize suits against state governments where state remedies have not been held inadequate); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (restricting the power of Congress to enforce rights more broadly than the Court would); see also Farber, *supra* note 215, at 1055-56 (noting the constriction of the power of Congress under *Boerne*).

261. Farber, *supra* note 215, at 1144 (arguing that the Court reads "text, history, and precedent" through "the lens of [its] constitutional faith"); Nowak, *supra* note 21, at 1099-105 (contending that the Court is incorrect in its treatment of history).

fairness and other subservient values.²⁶² Scholars have increasingly described the Court's commitment to its understanding of the principle of state sovereignty in terms like "reverential,"²⁶³ "resistant to analysis and critique,"²⁶⁴ "shocking,"²⁶⁵ "intuitive,"²⁶⁶ "cavalier,"²⁶⁷ and "surprising."²⁶⁸ As the string of adjectives suggests, the majority exhibits a commitment to its particular notion of sovereign immunity that has a fervent, emotional quality to it (and that has elicited similarly strong emotion in response). It has declared off-limits all considerations but one: original intent. The moral, political, historical, and constitutional choices inherent in the Court's decision to rely solely on original intent,²⁶⁹ and on the particular and highly contested version of that intent to which the Court subscribes,²⁷⁰ are denied.

In short, the use of an abstract notion of federalism shorn of historical context may appear to provide coherence across time, but the appearance is deceptive and dangerous. The abstract notion of federalism merely drives the influence of history underground and deprives all those affected of the opportunity to decide whether any particular version of federalism ought to retain its hold. It would be more sensible to look to history for help identifying the forces that have shaped and reshaped the notion of federalism over time. But legal doctrinal analysis also has conventions and demands of its own, and the question is how these ought to coexist with the notion of historical and social contingency. That is, can the judicial system be "opened up," can it afford to acknowledge more variables, more fluidity, more responsibility for choice, without sacrificing its authority? More specifically, is it possible to construct a principled federalism that acknowledges such contingencies? Is there a role for a functional federalism that presents itself, not as immutable, but as the best way to

262. Here, too, this assertion is not an accurate description of a timeless principle, since it involves treating "the period from 1959-1996 as anomalous" and relying instead on the "inglorious period" from 1887 to 1934. Jackson, *supra* note 258, at 700-01.

263. Farber, *supra* note 215, at 1135.

264. *Id.* at 1144.

265. Nowak, *supra* note 21, at 1096.

266. Pfander, *supra* note 259, at 832.

267. Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1056 (2000).

268. Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 959 (2000).

269. See Schauer, *supra* note 133, at 513 & n.9 (calling the decision to rely on a particular interpretation of original intent, when intent does not provide a definitive answer, formalistic).

270. There is a vast and impressive body of scholarly commentary suggesting that the Court's version is incorrect. *E.g.*, William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983). In any case, the Court's version is certainly contested.

achieve an articulated set of goals at a particular time in history, or under a particular set of circumstances?

D. *Principled Pragmatism: Piercing the Formalisms*

A functional notion of federalism makes particular sense, since notions of what is inherently national or local are themselves time-bound and fluid.²⁷¹ Purcell's account illustrates the ebb and flow of the concept of the proper division of federal and state power, and the complex array of forces that help shape it. As he shows, uniformity was needed at particular junctures, for particular purposes. The federal courts were strengthened and law was centralized intermittently in response to particular pressures, ranging from great historical and political forces to interest group politics. The drive for uniformity was impelled, at times, by the national need for economic and commercial growth, the expansionist interests of the railroads, the need to protect civil rights, the interests of elites like the bar (including the Supreme Court itself)²⁷² and the legal academy: interests both national and particular, and often a mixture of the two. As Purcell's account illustrates, "[t]he adversaries chose their formalisms accordingly,"²⁷³ portraying their positions as timeless, transsubstantive, and on the highest level of principle. Nevertheless, the shifting ground of federal-state power has always been tied to the consequences, not only for the growth of the nation as a whole, but for the particular substantive areas and doctrines whose development was perceived, at least by those influential enough to be heard, as essential to that growth.²⁷⁴

The perceived need for judicially imposed uniformity has also proved to be closely tied, historically, to the perception of which institution—the Court or Congress—is, as a practical matter and at the particular time in history, more likely to achieve the desired end.²⁷⁵ In this regard, it is

271. See Richard Briffault, "What About the 'Ism'?" *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303 (1994) (discussing formal and functional approaches); Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997) (arguing for a functional approach); Friedman, *supra* note 209 (calling for a richer dialogue on the values underlying federalism).

272. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 925, 970-75 (2000) (discussing federal courts' evolving conception of their own cultural identity and their efforts to shape the scope of their jurisdiction accordingly).

273. PURCELL, *supra* note 1, at 16.

274. See, for example, Purcell's discussions of commercial law, *id.* at 12-18, labor law, *id.* at 85-91, and civil rights law, *id.* at 262-65; see also Ann Althouse, *Federalism, Untamed*, 47 VAND. L. REV. 1207, 1209 (1994); and Wells, *supra* note 4, at 114, 118, discussing the Warren Court's expansion of habeas corpus relief and the Rehnquist Court's narrowing of it. Though the decisions were couched in terms of statutory construction, comity, and finality, both sets of decisions were obviously aimed at reshaping the particular substantive area.

275. See PURCELL, *supra* note 1, at 4.

instructive to recall Purcell's nuanced description of Brandeis's attitude toward federalism and of his use of federalism in *Erie*.

Brandeis held a principled belief that the legislative branch was more democratic than the judiciary, and this belief was itself in accord with his Progressive ideals of decentralization, experimentation, and social reform. Perhaps more fundamentally, his belief in legislative primacy was premised on his pragmatic experience that the legislature was more likely to effectuate the social goals, such as social efficiency and equality of access, that he held dear. Brandeis historian Philippa Strum makes a similar point when she notes the futility of asking whether Brandeis would have maintained his belief in judicial restraint in a different age in which, perhaps, he did not approve of the legislature's actions. As she says: "What he would have done had he lived in another era is not germane because his entire political thought, including his jurisprudence, grew out of his experiences at a particular historical moment."²⁷⁶

Strum makes an important point. It is impossible to know what effect a shift in the character of Congress and the Court would have had on the application or evolution of Brandeis's principles, since no such shift occurred during his lifetime. Of course his attitudes toward the institutions were shaped by his perceptions of their character, their capabilities, and how they comported with his conception of government.²⁷⁷ And if the character of the institutions shifted in Brandeis's lifetime, and he therefore shifted branch affinities in service of his commitment to justice and fairness, such a shift in allegiance would hardly make him unprincipled. A shift in affinities could mean that he—quite reasonably—found the actual character of the institutions more relevant to his decisionmaking than the characteristics of an abstract model that existed out of time.²⁷⁸ It could also mean that legislative primacy was, to him, a second-order principle. Neither of these positions is unprincipled.

The current generation of legal scholars, in contrast, has witnessed a marked shift in branch ideologies, upsetting timeless verities about the essential nature of legislative and judicial power. Perhaps what legal scholars are experiencing is another version of the liberal anxiety that the process school faced after *Brown*: the anxiety about reconciling shifting branch affinities with a nontemporal notion of the character of the institutions. Hence the "hoist 'em on their own petard" arguments that

276. STRUM, *supra* note 32, at 89.

277. See Louis L. Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 994 (1967) (concluding that it was proper for Brandeis, at least when no clear national consensus could be ascertained, to "consult his own understanding of 'the ethos of democracy'").

278. See Gordon, *supra* note 10, at 1026 (discussing what he calls "Cartesianism," the construction of "highly simplified models of social reality for the sake of analytic rigor and elegance").

many find so satisfying to make but so ineffective in practice. Warren Court activists have been assailed as hypocrites for failing to support Rehnquist Court activism. Rehnquist Court activists likewise have been assailed for abandoning the conservatism they championed during the Warren era.²⁷⁹ This attack begs the question.

Whether a shift in branch affinities is unprincipled depends on the principles underlying it and whether others judge those principles adequate.²⁸⁰ Suppose, for example, that one's constitutional vision focuses on promoting governmental accountability, and on protecting the rights of disfavored groups against the abuse of governmental power.²⁸¹ Arguably, in many respects, the Warren Court proved itself generally able and willing to advance that vision, whereas during the Rehnquist era Congress has proven more able and willing to do so. A shift in branch affinities in this situation is unprincipled only under the erroneous assumption that a commitment to particular institutional roles must outlast major ideological changes in the nature of those institutions, changes that cause them to cease protecting the values underlying the original commitment. To the contrary, a functional federalism is one that accommodates such shifts when necessary to achieve its underlying goals. For this reason, it is not problematic to assume both the sincerity of Brandeis's belief in federalism and the fact that he regarded it as a value both consistent with and subordinate to his social goals. Indeed, as I suggest above, it is more problematic to entertain a belief in a federalism that requires no such supplementary justifications, and that cannot be balanced against other basic values.

Brandeis grounded *Erie* in federalism for a complex host of reasons,²⁸² which, like most reasoning, partook of emotional and moral commitments, concerns with consequences on levels both abstract and concrete, and the influence of values both pragmatic and lofty.²⁸³ Because his highest principles were themselves deeply concerned with pragmatic consequences and wary of abstract ideology,²⁸⁴ it seems neither necessary nor descriptively accurate to distinguish his principles from his pragmatic ends. Supreme Court Justices confronting novel and difficult issues are and must

279. See, e.g., Dorf, *supra* note 24, at 747 (discussing the double-edged nature of accusations of hypocrisy); Cole, *supra* note 24, at 6-7 (condemning conservatives on the current Court for practicing the very activism they condemned in the *Miranda*, abortion, and exclusionary rule cases).

280. Thomas Grey points out that "it is quite natural that the critique comes mainly from those who lack sympathy with the results it rationalizes." GREY, *supra* note 10, at 16.

281. See Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2346-47 (1990).

282. PURCELL, *supra* note 1, at 95-191 *passim*.

283. See, e.g., Samuel H. Pillsbury, *Harlan, Holmes, and the Passions of Justice*, in *THE PASSIONS OF LAW* 330, 330-62 (Susan Bandes ed., 2000) (discussing the emotional components of the judicial passion for justice).

284. See STRUM, *supra* note 30, at 6.

be influenced by their personal values and assumptions.²⁸⁵ The questions are how they act on those values and how they attempt to reconcile them with the requirements of their judicial role.

When, on occasion, Brandeis faced a conflict between his branch affinities and his political and social goals, the latter tended to trump the former. Did his willingness to treat branch affinities or other process values, at times, as subservient to his Progressive goals make his commitment to those process values cynical, situational, or unprincipled? This is one of the core questions Purcell raises. He explores the question through two comparisons. The first is between two of Justice Brandeis's own jurisdictional rulings and his role in shaping them: *Erie* itself, and *Willing v. Chicago Auditorium Ass'n*.²⁸⁶ The second comparison is between the jurisprudence of Justice Brewer and that of Justice Brandeis. Though Purcell never makes the comparative measure of the two jurists' adherence to principle explicit, the issue is both unavoidable and important, and I return to it below.

In his discussion of *Willing*, Purcell portrays Brandeis's role in the debate about the proposed declaratory judgment act as problematic. The declaratory judgment is a "final and binding adjudication of rights that issue(s) without an accompanying order of execution."²⁸⁷ Initially, concerns were raised about whether, given the absence of an enforcement mechanism, the declaratory judgment was an advisory opinion and thus violated Article III's case and controversy requirement. Brandeis, according to Purcell, regarded the declaratory judgment as a dangerous and disruptive mechanism. It offended his belief that law ought to be made based on concrete and narrow fact situations, not abstract and untested principles. But, as Purcell tells it, Brandeis's most basic objection was to its potential to derail Progressive legislative reforms before their reasonableness could be demonstrated. In *Willing*, Brandeis held that the declaratory judgment violated Article III. The factual context was unfortunate: His holding meant that the legality of tearing down an auditorium would not be considered a ripe issue until after the auditorium was torn down. His decision in the *Willing* case, which ironically became the symbol for the need for the Declaratory Judgment Act,²⁸⁸ was intended both in content and in timing to signal to Congress the Court's opinion that the then-pending bill was unconstitutional. Purcell portrays Brandeis as using the Article III

285. See Bandes, *supra* note 147, at 366-68.

286. 277 U.S. 274 (1928).

287. PURCELL, *supra* note 1, at 125.

288. It was ironic not only because his decision backfired, but because the case became a symbol of rigidity leading to unfairness. In this case, Brandeis did apparently jettison his concern for fairness for the sake of his broader political agenda. *Id.* at 129.

argument,²⁸⁹ as Justice (then Professor) Frankfurter charged, solely because it was “the only intellectual device open to him.”²⁹⁰ Ultimately, Brandeis found himself painted into a doctrinal corner, unable to admit the political agenda driving his unnecessary use of the Article III constitutional argument in his zeal to defeat the Declaratory Judgment Act. In this episode, Purcell adjudges, Brandeis made improper use of jurisdictional doctrine to achieve political goals.²⁹¹

The comparison is with Brandeis’s conduct in *Erie* itself. The *Erie* case is not usually associated with judicial restraint. It overruled the ninety-year-old *Swift* case without the benefit of briefs on the topic. The opinion violated four of Brandeis’s own canons of judicial restraint, which he had set out less than two years earlier in *Ashwander v. Tennessee Valley Authority*.²⁹² Purcell argues that *Erie* was, like *Willing*, animated by political and social considerations, and was, like *Willing*, a product of Brandeis’s personal values and motives, but that, unlike *Willing*, it was neither a strained and unsound opinion, nor an improper or pretextual interpretation of the Constitution. Brandeis was moved by deep social, political, and emotional commitments when he seized the opportunity to overrule *Swift* and replace it with the *Erie* doctrine.²⁹³ But Purcell concludes that in doing so, Brandeis acted both as a reasonable human being and as a broad-visioned constitutional judge. The goals *Erie* allowed him to achieve—improving the social efficiency and practical fairness of the system, and bringing the government into proper constitutional balance—were dear to his heart and his Progressive values. They were also fully consistent with his vision of the Constitution, which was, in turn, deeply intertwined with his emotional and political commitments.

The more difficult question, which Purcell never directly addresses, is what distinguishes Brandeis from Brewer. Purcell’s meticulous description

289. Specifically, Brandeis held that the request for a declaration of property rights prior to the tearing down of the auditorium in issue would violate Article III’s requirement of a live case or controversy. In *Aetna Life Insurance v. Haworth*, 300 U.S. 227, 241 (1937), the Court ultimately held that declaratory judgments could, in the proper circumstances, meet the requirements of Article III.

290. PURCELL, *supra* note 1, at 130.

291. *Id.* at 123-31. Perhaps more troubling was Brandeis’s role in the campaign to abolish diversity jurisdiction when he was a sitting judge. He spoke to congressmen about bills to restrict jurisdiction, sent directives to (then-Professor) Frankfurter urging him to have his students publish work on the topic, guided Frankfurter himself in writing and lobbying, even sending him money to defray expenses, and tried to instigate specific legislation of his own. *Id.* at 144.

292. 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); see PURCELL, *supra* note 1, at 132-33 (explaining the four rules broken). Tony Freyer also suggests that Brandeis subordinated his usual concern for the practical consequences of a newly minted doctrine to “a deeper urge to establish a constitutional underpinning for a new judicial federalism,” and that *Erie* was a “triumph of theory over function.” FREYER, *supra* note 49, at 153.

293. Brandeis wanted to seize the moment for several reasons, including his impending retirement, his desire to pay his last respects to Justice Holmes, and his sense that the time was ripe politically and jurisprudentially. PURCELL, *supra* note 1, at 133-40.

of Brewer's jurisprudence certainly gives the impression that Brewer was not particularly reflective about the differences between his own values and assumptions, the values of his time, and any limitations the judicial role might place on their implementation. Purcell also suggests that Brewer's craftsmanship was adversely affected by this problem, and that a number of Brewer's opinions were manipulative and fundamentally inconsistent. However, Brandeis is also vulnerable to charges that he was manipulative and inconsistent at times. More important, although it is surely preferable that jurists be reflective, it is inescapable that to a great degree judges will be a product of their time and that they will understand the values of that time through the prism of their own values and assumptions.

It is arguable (and seems to be Purcell's argument, in part) that the problem with Brewer's jurisprudence—unlike that of Brandeis—was that it was self-aggrandizing.²⁹⁴ That is, in expanding the Article III power of the judiciary, Brewer's jurisprudence insulated a broad swath of judicial conduct from oversight by the political branches. But this argument works only if one agrees with an abstract concept of legislative primacy apart from its consequences for justice and fairness. Ultimately, any judgment of Brewer's jurisprudence, or Brandeis's, must rest most heavily on those consequences. Perhaps what made Brandeis's jurisprudence more principled and more successful was that his underlying conception of justice was more attractive than Brewer's. Perhaps, also, Brandeis kept his focus on his underlying commitment to justice and on the real-world consequences of decisionmaking for achieving justice, rather than on an unthinking adherence to abstract subsidiary principles.

IV. CONCLUSION

Purcell's history, which approaches the past with meticulous respect for its complexity, is rich with lessons for the present. It suggests, above all, the need for a certain humility when we engage in debates over the nature of timeless principles like the one true federalism. The question of what constitutes a proper federalism cannot be definitively resolved. The historical perspective suggests that judgment on the long-term acceptability of any notion of federalism will be forged in the crucible of public opinion. The true question is whether a particular jurisprudence is advancing the values we have chosen as a society, by way of our "most deeply informed judgments about pursuing individual freedom and the common good through the instruments of popular government."²⁹⁵

294. *See id.* at 52 (discussing Brewer's jurisprudence and its tendency to expand federal judicial power); *id.* at 165-66 (discussing Brandeis's jurisprudence and its tendency to curb federal judicial power).

295. *Id.* at 305.

The book also teaches that jurisdictional policy has long been influenced by forces that are not well captured by the traditional depiction of linear doctrinal development that remains consistent over time. This is a key point for the study of jurisdiction. Scholars and jurists impoverish jurisprudence when they insist that the evaluation of jurisdictional principles transcends emotional and political commitments, historical context, and substantive ends. This insistence impoverishes jurisprudence not because it is possible to succeed at such an endeavor, but because such success is neither possible nor desirable. Moreover, in pretending that jurisdictional principles can float free of all human influences and nonprocedural purposes, scholars drive those influences and purposes underground, where they exist beyond the realm of democratic accountability.²⁹⁶ For, as Robert Cover says, “[t]he more opaque the procedural principles are to discernible ends, the more their manipulation becomes an arcane province of lawyers to be used in a purely strategic manner.”²⁹⁷

Purcell’s *Erie* saga teaches that neutral principles were themselves a purposeful and utilitarian creation of a particular historical time. It asks the reader to consider whether that time has passed and to acknowledge that principled jurisdictional policy was made before that time. If Justice Brandeis “acted admirably and well as a constitutional judge,”²⁹⁸ perhaps, then, jurisdictional rulings can be principled even when jurisdictional policies are not treated as first principles, or immutable principles. Brandeis’s career suggests the possibility of engaging in a more pragmatic and flexible jurisdictional jurisprudence,²⁹⁹ one that keeps a close watch on the goals that the jurisdictional rules are meant to accomplish, determines their shape by the values they are meant to protect, and is open to change when those purposes are no longer being served.

296. See Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 229 (1990) (making this point in the context of the interpretation of Article III’s case and controversy requirement).

297. Cover, *supra* note 213, at 639 n.1.

298. PURCELL, *supra* note 1, at 307.

299. As Purcell writes:

[L]egal analysis should systematically examine the dynamics of litigation practice, consider more thoroughly the role of social inequalities in determining the results of procedural and jurisdictional rules applied in the various de facto litigation processes that mark different fields of practice, and seek continually to recraft those rules in order to maximize the ability of litigants—particularly the weak, unsophisticated, and practically disadvantaged—to secure practical justice.

Id. at 297.