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UNPACKING AMERICA'S CONSTITUTIONAL LAYERS

Jonathan L. Marshfield*

LUCAS A. POWE, JR., *AMERICA'S LONE STAR CONSTITUTION: HOW SUPREME COURT CASES FROM TEXAS SHAPE THE NATION* (UNIVERSITY OF CALIFORNIA PRESS 2018). PP. 320. HARDCOVER \$85.00. PAPERBACK \$34.95.

JEFFREY S. SUTTON, *51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* (OXFORD UNIVERSITY PRESS 2018). PP. 296. HARDCOVER \$29.95.

INTRODUCTION

Constitutional law in the United States is most often taught, studied, and understood by focusing on the progression of key Supreme Court opinions.¹ The dominance of this perspective is understandable. Many significant cultural and social issues come to a head before the Supreme Court.² Moreover, the Court's privileged position as the final arbiter of most federal constitutional disputes means that its opinions carry great weight and can change or re-direct constitutional norms.³ The Supreme Court is no doubt influential, and its opinions tell us a great deal about constitutional development in the United States. It is no surprise, therefore, that law students learn about American constitutional law primarily by reading opinions from the Supreme Court, that lawyers most often frame constitutional issues by reference only to the United States Constitution,⁴ and that scholars construct theories of constitutionalism by drawing mostly from Supreme Court opinions and federal

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1. A quick review of notable constitutional casebooks shows this. *See, e.g.*, ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* (5th ed. 2017); PAUL BREST, ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* (7th ed. 2018).

2. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (marriage equality); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (school desegregation).

3. *See generally* Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1172–73 (1988) (describing broader institutional context that has elevated the Supreme Court to a prominent role in directing constitutional change).

4. *See generally* Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41 (2006) (tracing dominance of federal law in constitutional jurisprudence).

sources.⁵

Judge Jeffrey S. Sutton's *51 Imperfect Solutions*⁶ and Lucas A. Powe, Jr.'s *America's Lone Star Constitution* offer compelling critiques of this perspective on American constitutionalism.⁷ Both Sutton and Powe draw our attention away from the Supreme Court and towards the states as key components of American constitutionalism; although they do this from different vantage points.

Sutton, on the one hand, adds a fresh voice to the longstanding call for lawyers, judges, and professors to take state constitutions seriously when engaging with constitutional rights.⁸ Sutton's central claim is that "an underappreciation of state constitutional law has hurt state and federal law and undermined the appropriate balance between state and federal courts in protecting individual liberty."⁹ He supports this claim by providing detailed accounts of how four individual rights issues developed through complex processes and moved through dynamic institutional machinery.¹⁰ In the course of these narratives, Sutton successfully shows that the Supreme Court is only one component of how American constitutionalism operates to protect individual liberty. He also observes that premature nationalization of individual rights by the Court can sometimes be detrimental to liberty, and that allowing state courts to wrestle with rights issues can be beneficial.¹¹ His account is a compelling critique of the dominant view that the Supreme Court should be the primary institution resolving rights disputes.

Powe, on the other hand, provides an equally compelling critique but from a very different vantage point. Powe focuses exclusively on Texas.¹² His book starts with the bold but intriguing claim that "[m]ore important United States Supreme Court cases have originated in Texas than in any other state, so many, in fact, that the entire basic courses in constitutional law in both law schools and political science departments could be taught using nothing but Texas cases."¹³ This claim is both a teaser and a nuanced commentary

5. See, e.g., David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012) (focusing on Federal Constitution as basis for comparing American constitutionalism to constitutions around the world). *But see* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641 (2014) (comparing state constitutions to constitutions around the world).

6. JEFFREY S. SUTTON, *51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* (2018).

7. LUCAS A. POWE, JR., *AMERICA'S LONE STAR CONSTITUTION: HOW SUPREME COURT CASES FROM TEXAS SHAPE THE NATION* (2018).

8. Key sources exploring state constitutionalism in depth include, G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 26 (1998); ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* (2009); JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS* (2005). Other sources analyzing in depth why independent state constitutionalism has not developed further include, Long, *supra* note 4; Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN ST. L. REV. 83 (2011).

9. See SUTTON, *supra* note 6, at 6, 174. For landmark treatments of the relationship between liberty and America's dual constitutional structure, see generally GARDNER, *supra* note 8; ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* (2009).

10. Sutton focuses on public education financing, SUTTON, *supra* note 6, at 22–41; criminal procedure and the exclusionary rule, *id.* at 42–83; compelled sterilization, *id.* at 84–132; and free speech, free exercise, and freedom from mandatory flag salutes, *id.* at 133–72.

11. See *id.* at 5.

12. POWE, *supra* note 7, at 249–62.

13. *Id.* at 1.

on the conditions that underly constitutional adjudication before the Supreme Court.¹⁴ Powe’s book is important because of his unique perspective as both an expert in Texas legal and political history and a master scholar of the Supreme Court. From this unique vantage point, Powe uncovers the ground-level complexities that drive constitutional litigation in Texas while also placing them in the nuanced context of the Supreme Court and national politics. By focusing narrowly on Texas, Powe provides a compelling account of how national constitutional litigation is often influenced by complex state and local factors. His book is both a detailed history of constitutional law from Texas and a powerful account of how politics and law at the local, state, and federal levels influence Supreme Court outcomes.

In this review, I briefly sketch what I believe to be the main contributions of each book. I then provide a few thoughts about where these important works might lead us next.

I. WHY WE NEED MORE STATE CONSTITUTIONAL JURISPRUDENCE

Sutton argues that American constitutionalism needs more state constitutional jurisprudence.¹⁵ He offers three principal reasons for this. First, because state constitutions can sometimes provide a basis for relief independent of the Federal Constitution, lawyers better serve clients when they raise separate state constitutional claims.¹⁶ Second, in many cases, liberty will be better preserved by state courts than the United States Supreme Court because state courts are better situated to craft rules responsive to their state’s circumstances, mistaken state court opinions are more easily corrected, and difficult constitutional issues with no clear answer are better resolved by preserving competing positions across states (as opposed to randomly declaring one position the nationwide winner).¹⁷ Finally, Sutton explains that the Supreme Court and federal constitutional law would benefit from allowing state courts to wrestle with rights issues on their own before declaring a national outcome because robust state constitutional jurisprudence can better inform the Court’s own ruling.¹⁸

These arguments have many longstanding exponents,¹⁹ but Sutton’s book provides

14. *See id.* at 255–62.

15. *See* SUTTON, *supra* note 6, at 6, 174.

16. *Id.* at 19.

17. *Id.* at 16–19.

18. *Id.* at 20.

19. On the idea that state constitutional jurisprudence can inform federal constitutional law, see generally Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323 (2011); Joseph Blocher, *What State Constitutional Law Can Tell Us About the Federal Constitution*, 115 PENN ST. L. REV. 1035 (2011). On the notion that lawyers and judges should invoke state constitutional rights to better serve clients and protect individual rights, see generally Hand Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379 (1980). On the notion that state courts can be more independent and perhaps aggressive in protecting rights because their judgments can be more easily corrected, see Conor O’Mahony, *If a Constitution Is Easy to Amend, Can Judges Be Less Restrained? Rights, Social Change, and Proposition 8*, 27 HARV. HUM. RTS. J. 191, 192 (2014); Blocher, *Reverse Incorporation*, *supra* note 19, at 358 (“It is possible that the political accountability of state judges (and the amendability of state constitutions) might encourage them to read state constitutions more expansively, knowing that their rulings can always be ‘corrected’ by a democratic majority.”); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1453 (1999) (“[T]heir greater accountability might render state judges more willing to read state constitutional guarantees expansively.”); Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 285–86 (1994).

a truly fresh exploration of state constitutionalism. The core of the book’s contribution, in my opinion, are the four individual rights narratives that Sutton provides to substantiate the value of state constitutionalism. His narratives are rich in detail, doctrinal nuance, and pragmatic insight. Sutton masterfully weaves together complicated developments in federal constitutional jurisprudence with related evolutions in state law to present a more accurate, dynamic, and compelling account of American constitutionalism.²⁰

Descriptively, Sutton’s narratives reveal that American constitutionalism is much more complicated than a myopic obsession with Supreme Court opinions suggest. Sutton shows that in various contemporary instances, state constitutions have had a positive impact on the trajectory of American constitutionalism.²¹ From a normative perspective, Sutton’s narratives also reveal that engaging with the complexities of American constitutional structure, specifically embracing a dual system of rights protections, can increase the overall quality of the constitutional order. For Sutton, this improvement is gauged by the system’s efficacy in “maximizing liberty,” which does not, as he argues, “invariably follow from a national rule.”²²

From a practical perspective, Sutton’s narratives bring to life many of the concepts and ideas that proponents of state constitutionalism have articulated but failed to meaningfully animate. Sutton’s narratives demonstrate in practical ways that state constitutions truly matter and that lawyers and judges can and should use them in principled ways.

II. WHY WE NEED TEXAS

Powe’s book is a rare treat for anyone interested in understanding how American constitutional law evolves. The book ostensibly focuses on Texas, but its contribution is much broader. Powe’s organizing premise is that Texas has produced more landmark Supreme Court decisions than any other state. In exploring that claim, he provides a detailed, bottom-up perspective on a full gamut of landmark Supreme Court opinions.²³ In my view, the great value of Powe’s book is that it brings together a rare combination of expertise in both Texas law and political history and the Supreme Court and federal constitutional law. His book provides a window into the layers and nuance of constitutional change in the United States that few others can offer.

Powe’s list of landmark cases from Texas is impressive. It includes *United States v. Lopez*, *City of Boerne v. Flores*, *San Antonio Independent School District v. Rodriguez*, *Shelby County v. Holder*, *Roe v. Wade*, *Lawrence v. Texas*, and *Fisher v. University of Texas*. He organizes these cases and others around four general characteristics of Texas.

20. He suggests, for example, that the Supreme Court’s refusal to set a national rule requiring equal funding for public schools may have nevertheless advanced education equality because many states subsequently pushed their state constitutional jurisprudence to impose more rigorous requirements on state legislatures than the Supreme Court would have imposed. See SUTTON, *supra* note 6, at 35–41. In the criminal procedure context, Sutton shows how the Supreme Court benefited from allowing the states to experiment with the exclusionary rule before the Court imposed a national rule on the states. *Id.* at 68–69.

21. See *id.* at 96–114 (noting how early state constitutional challenges to mandatory sterilization laws were successful).

22. *Id.* at 77.

23. For a helpful overview of the cases, see POWE, *supra* note 7, at 249–55.

He first discusses cases related to race in the context of Texas as a former member of the Confederacy and a Jim Crow state.²⁴ He then traces the evolution of the court's jurisprudence regarding federal and state economic regulation in the context of Texas as an emerging western state during the early to mid-twentieth century.²⁵ He discusses Due Process and First Amendment cases in the context of Texas as a state long concerned with morality and culture and, more recently, a state dominated by Republican politics.²⁶ He concludes with a chapter discussing several cases that he attributes to conditions that are "distinctly Texas."²⁷ He places *Lawrence v. Texas*, the capital punishment cases, and mid-century, partisan re-districting cases in that category.

Powe traces all of these landmark cases back to their roots in Texas while also retaining their national context and significance. The result is a series of detailed explorations of how constitutional litigation develops and a nuanced account of the many different factors that influence Supreme Court outcomes. From grass-roots politics and state procedural oddities, to lawyering missteps and the influence of national interest groups, Powe's book traces the full litany of factors that can affect constitutional evolution.

One example is noteworthy because it ties together Powe's book with Sutton's work. In Powe's discussion of *Lawrence v. Texas*, he notes that the case gave Lambda Legal (a national organization) a rare opportunity to challenge the Court's holding in *Bowers v. Hardwick*, which upheld a state's authority to criminalize private homosexual conduct.²⁸ To challenge *Bowers*, Lambda needed a state to charge someone, but it was very unusual for states to prosecute private homosexual conduct. Thus, when the Harris County prosecutor charged John Lawrence and Tyson Garner with criminal "homosexual conduct," Lambda was quick to accept the invitation to represent them.²⁹ Powe notes, however, that if the defendants were acquitted in a Texas state court, Lambda would lose the opportunity to challenge *Bowers* before the Supreme Court.³⁰ Thus, in light of Lambda's ultimate interest in the case, its strategy in the lower courts was to lose.³¹ Indeed, the defendants pleaded no contest, and Lambda appealed, attacking the constitutionality of the Texas law.

On appeal, Lambda raised several federal constitutional challenges aimed at overruling *Bowers*. However, it also argued that the Texas statute was unconstitutional under the Texas Constitution.³² Powe perceptively notes that this was a tactical error by Lambda because if the Texas court accepted the argument, the case would have been resolved on an adequate and independent state ground, thus insulating it from review by the United States Supreme Court.³³ Because Lambda and the defendants were primarily

24. *See id.* at 15–68.

25. *See id.* at 69–129.

26. *See id.* at 135–93.

27. *See id.* at 195–248.

28. *See* POWE, *supra* note 7, at 200–01.

29. *Id.*

30. Lambda did not pursue this at the expense of their clients. Powe notes that the defendants were aligned with Lambda's ultimate goal and "had little at stake and fac[ed] no prospect of jail time." *Id.* at 201.

31. *Id.*

32. *Id.*

33. POWE, *supra* note 7, at 200–01.

concerned with challenging *Bowers*, their safest strategy would have been to omit any state challenges and force Texas courts to resolve the case on federal law.

This tidbit from Powe's book illustrates the many layers of American constitutionalism. On the one hand, Sutton is surely correct that state constitutions matter and that lawyers should not overlook them in ignorance. On the other hand, if we start with the assumption that constitutional change is often pursued through litigation, then we must account for the reality that litigants (who are the dominant architects of these cases) may have various objectives when asserting constitutional claims. Similarly, we must also account for the realities that judges face when deciding constitutional cases. Some judges may find it advantageous to invoke the state constitution to insulate rulings from Supreme Court review. Other judges—perhaps elected judges or those subject to recall—may find a safe harbor in lockstepping with federal law. In any event, by capturing the detailed histories of core constitutional cases, Powe's book reveals the layers of complexity that characterize litigation as a pathway of constitutional change.

CONCLUSION

Both Sutton and Powe's books are important contributions. They both encourage us to reject narrow, top-down perspectives on American constitutional law and to look more broadly at state and local actors that animate constitutional development. Taking this cue, I note that both Sutton and Powe focus their discussions primarily around constitutional litigation and judicial rulings as representative of American constitutional law. Sutton exhorts us to ensure that state constitutional jurisprudence is included in the corpus, but his ultimate focus is on judicial rulings regarding the meaning of constitutional norms. To be sure, Sutton discusses how state legislatures have played a role in protecting individual rights, but his main concern is about how broader judicial development of state constitutional jurisprudence can improve American constitutionalism. Powe offers a slightly broader perspective, but he is likewise focused mostly on explaining and contextualizing landmark Supreme Court cases as representative of American constitutional law.

My own perspective is that we must broaden our view on constitutional law even further to include more than just constitutional jurisprudence by courts—federal or state. The defining characteristic of state constitutionalism in recent decades has not been court opinions but the frequent use of formal amendment procedures by interest groups and public officials to change and direct constitutional norms.³⁴ To be sure, federal constitutional law does not often change in this way because the Federal Constitution is much more difficult to amend. But the reality of state constitutionalism is that amendment actors make and change constitutional law as much or more than judges.³⁵ A full perspective on American constitutionalism must account for this law-making activity in addition to state and federal court opinions. A full perspective will require an appreciation for how judicial decision-making and methodology might change when the underlying

34. See generally JOHN J. DINAN, *STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES* (2018).

35. See Jonathan L. Marshfield, *The Amendment Effect*, 98 B.U. L. REV. 55 (2018); Jonathan L. Marshfield, *Courts and Informal Constitutional Change in the States*, 51 N.E. L. REV. 453, 455 (2017).

constitution is fluid and frequently modified. This more structurally informed perspective on American constitutionalism, I believe, will be the next important layer to unpack as we seek to understand and live under American constitutionalism.