Foreword

One of the dismaying realities of American legal education, particularly at its most elite level, is the abject ignorance displayed about the importance of state constitutions and even of state judiciaries, even though most of the common law cases that students read arise in state courts. Still, too many students may well graduate from three years of legal study with the perception that the only Constitution operating within the United States is the national document and that the only courts one need really focus on are federal courts, particularly, of course, the United States Supreme Court. To a significant extent, the curriculum at most law schools is driven by accreditation requirements of the American Bar Association, and it is simply the case that no law school is ever going to be downgraded because it fails to offer courses about its own state's legal system. Similarly, no ambitious assistant professor within the legal academy would be advised to specialize on state law or institutions; perhaps this helps to explain in turn why students seeking judicial clerkships are far more likely to apply even to what the Constitution calls "inferior" federal judges, in other words, district and appellate judges, than to state judges, even members of the states' highest courts. And, to my knowledge, no state judge serves as a "feeder" to justices of the United States Supreme Court, whatever the professed devotion of its current majority to the importance of federalism. Interestingly enough, the Supreme Court since Justice David Souter's retirement in 2010 is the first in our history to have not a single member who had served as a member of the state judiciary. Think only of Justices Holmes and Cardozo, who would have had distinguished careers as members of the Massachusetts Supreme Judicial Court and the New York Court of Appeals, respectively, had they not been named to the United States Supreme Court.

Academic political science is somewhat less parochial; there are indeed some distinguished political scientists who write – and even receive awards within the discipline for their work – on state courts. However, it is certainly the case that the bulk of the work produced by members of the Section on Law and Courts within the American Political Science Association – among the largest of the APSA's subgroups – concerns federal courts, especially the Supreme Court.

It is against this background that *American Judicial Power: The State Perspective*, by Michael L. Buenger and Paul J. De Muniz is so welcome. It provides an accessible and highly illuminating overview of American state judicial systems. It reminds us that there are literally thousands of such courts, not least because, unlike federal courts, many state courts enjoy “general jurisdiction.” That is, they are open to almost anyone and everyone who believes, rightly or wrongly, that his or her legal rights have been violated in any conceivable respect. Indeed, there is an interesting discussion of the provisions found in a number of state constitutions, including my home state of Texas, requiring that courts be “open” to all for the adjudication of any disputes that might arise. Thus their book begins with the truly stunning statistic that the total caseload in 2012 in all federal courts was 1.8 million, of which 1.37 were bankruptcy cases. Less than half-a-million “ordinary” civil and criminal cases were filed or heard. In decided contrast, “state trial courts alone handled nearly 96 million cases”! This obviously does not include appeals heard before intermediate state appellate courts or state supreme courts. It is stunningly more likely that an ordinary American will at one point or another have occasion to experience whatever degree of justice is dispensed in state courts even as federal courts remain distant entities.

Moreover, and just as importantly, many state courts are specialized courts reflecting a variety of reform movements over the past century. Thus states have many juvenile courts, an innovation going back to the early twentieth century, when youngsters in trouble were viewed as in need of a helping hand from the state rather than the kinds of punitive treatment meted out to full-fledged adults. In the modern era, one finds in many states a myriad of “drug courts,” not to mention specialized “probate courts” to deal with certain legal consequences of death or “small-claims courts” to offer an alternative for ordinary people to seek justice in lieu of having to rev up the machinery of a full-scale law suit. Some states are experimenting with “veterans’ courts” in acknowledgement that the survivors of recent American wars may have some special problems meriting special solicitude. There are, of course, no real analogues to these courts at the federal level, even if there do exist specialized bankruptcy and tax courts or the federal court of claims.

But, as television announcers might say, “wait, there’s more.” The job description of federal judges is, by and large, a quite limited one. Their job is indeed to preside over cases, and, as every first-year student learns, the cases must involve live “cases and controversies.” Federal courts will adamantly refuse to offer advisory opinions about some potential law being considered by Congress, however helpful that might be in avoiding needless conflict and expensive litigation afterward passage. Consider,

though, that at least eight states, like a number of foreign countries, see advisory opinions as a feature of their state judicial systems rather than a bug. Moreover, state supreme courts are often charged with basic tasks of administering the state bar. In Tennessee, the Supreme Court appoints the state's attorney general. Some states have in effect assigned to state judges the task of drawing the boundaries of reapportioned districts if the legislature, because of partisan divisions, proves inadequate to the task. All of these realities of state judiciaries call into question bromides about the "nature" of judiciaries or of judges that one often sees in the opinions of the United States Supreme Court. How judiciaries are organized is the product of highly contingent choices and not of some Platonic ideal of what a "true" judiciary must look like.

No doubt the most striking difference between state and federal courts is the fact that most state judges are accountable, in one way or another, to state electorates. Federal judges, of course, owe their jobs to selection by the President and then confirmation by the United States Senate, secure in the knowledge that if they surmount these hurdles, they are guaranteed what might be termed "true lifetime tenure." That is, unlike the case with almost all state judiciaries in the United States and national judiciaries around the world, there are no age limits for members of the federal judiciary. If one is looking for "American exceptionalism," perhaps one can find two altogether conflicting examples in, first, the extraordinarily long tenure in office of most federal judges, and then, second, in the fact that most state judges are initially elected or otherwise electorally accountable in, say, "retention" elections after a certain length of service. Judicial election, of course, is highly controversial, especially among judges themselves, but one might be equally dubious of placing judicial selection entirely in the hands of a single chief executive, even if confirmation is required by a senate. The New York Barnburners of 1846 led the way for an elected judiciary in the New York State Constitutional Convention of that year in order to provide a valuable check against domination by political coalitions that controlled Albany politics. Judicial elections were thought to be a method of guaranteeing a truly independent judiciary, as against allowing state governors, backed by supporters in the New York Senate, to place political allies on the court who would inevitably rubberstamp the decisions of those who appointed and confirmed them.

One might, of course, be skeptical that elected judiciaries have worked out exactly as intended by the Barnburners, but that does not necessarily suggest that states would be well off adopting the "national model" whereby a highly partisan governor, backed up by compatriots in the state senate, could pack the judiciary with party favorites. Buenger and De Muniz note the use in some states of an appointment process in which

“commissions” play an important role inasmuch as they can recommend to governors a highly restricted list of candidates or qualified nominees from which he or she must choose. Political scientists could demonstrate problems with that system of choice as well; there is, in fact, no perfect way of selecting judges (or deciding how long they should remain in office). All choices involve tradeoffs among conflicting values. But the point is that any truly helpful national discussion, which is in fact long overdue, would benefit from the kinds of evidence brought together by Buenger and De Muniz.

The obvious point is that state courts are vitally important – and intellectually interesting – in almost every way. Anyone concerned about the future of our country, or, for that matter, anyone who is asked to opine on how some country elsewhere should design its judicial system in the course of writing a new constitution, should become aware of the issues so well delineated by Buenger and De Muniz. Nobody would treat their book as the “last word” on the subject, but it should serve as a very welcome “first word” for anyone looking to know more about the theory and practice of “American judicial power” throughout the United States and not only within the relatively small (and in many ways atypical) federal judiciary.

Sanford V. Levinson,
The University of Texas at Austin