Looking for Mr. (or Ms.) Rights

Jack M. Beermann
Boston University School of Law, beermann@bu.edu

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Looking for Mr. (or Ms.) Rights

Author: Jack Beermann

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I am on the prowl. It’s 1 a.m. and I’ve been looking for Mr. (or Ms.) Rights all night. I’ve been hanging out in every Article of the Constitution of the United States and I have been deep into the pages of the United States Reports and the Federal Reporter. Oh, I have found plenty of negative rights, like the right to be free from cruel and unusual punishment and the right not to be twice placed in jeopardy for the same criminal act. But I need something more positive in my life. I want those things that make a person happy, like medical care, clean air and water, good working conditions, and a good education for my kids. I want positive rights.

Even though I turn on my hundred-watt charm, the federal courts keep turning me down. Then the person next to me slaps a book on the bar and says, “Take a look at this. I think it’ll get you what you want—or at least what you need.” The book is Emily Zackin’s excellent volume Looking for Rights in All the Wrong Places: Why State Constitutions Contain America’s Positive Rights, published last year by Princeton University Press. The book is based on Zackin’s doctoral dissertation; she is currently on the political science faculty at Johns Hopkins University. The book’s thesis is that state constitutions are the place to look for positive rights, and after reading this wonderfully written and carefully researched volume, I realize she’s right. I’ve been looking in all the wrong places. No more DeShaney and San Antonio Independent School District v. Rodriguez in my future. I am going to look closer to home, at the provisions of state constitutions and the cases decided under them, rather than at the musings of that distant, unresponsive government in Washington, D.C.

Zackin begins by exploring what she calls American Constitutional Exceptionalism, the idea that, in contrast to most other developed democracies, the United States does not recognize positive rights. By focusing on state constitutions, Zackin explodes this myth. For example, the Missouri Constitution of 1865 contained an education clause (“The general assembly shall establish and maintain free schools for the gratuitous instruction of all persons . . . between the ages of five and twenty-one years”) similar to Belgium’s; the Wyoming Constitution of 1889 contained an article protecting labor (“the rights of labor shall have just protection through laws calculated to secure to the laborer proper rewards for his service”) similar to Peru’s.

The centerpiece of Zackin’s book comprises the chapters on particular positive rights commonly found in state constitutions, in the areas of education, workers’ rights and environmental protection. Of the three, positive education rights are the most familiar. Many states have constitutional provisions requiring the state to provide free primary and secondary education. Across the country, inequality and low-quality, underfunded schools (due to local financing) have provoked litigation over school funding, with state supreme courts wrangling with state legislatures, governors, and local school boards over reforms; Kansas is in the middle of such a controversy today. Less familiar are positive rights in state constitutions protecting labor (including compensation and working conditions) and rights involving environmental protection.

Zackin also does an admirable job defining positive rights and distinguishing them from negative rights. She confronts head on the claim that there is no such distinction because, paraphrasing one proponent of that view, “all rights require both restraint and active intervention if they are to be fully realized.” She also has to deal with the view, associated most recently with the Critical Legal Studies Movement, that the distinction is meaningless because government action
is always lurking in the background. Unemployment, for example, is the product of government fiscal and monetary policy. Her answer is short and sweet: “the activists who shaped state constitutions perceived an important difference between governmental action and restraint. They also distinguished between threats posed directly by government itself and dangers that stemmed from other sources.” This is an effective practical response to a theoretical challenge.

Zackin’s reply to the “no such distinction” critique is related to one of the great joys I experienced reading this book. As a political scientist, Zackin is not myopically focused on decisions by the Supreme Court of the United States or even state supreme courts. Rather, her field of vision includes the social and political movements that led to the positive rights-bearing clauses contained in many state constitutions. We lawyers need more help bringing the insights of political science into the core of our work of interpreting the law. Zackin has done us a great service in this regard.

Finally, I want to draw attention to Zackin’s wonderful analysis of the nature of state constitutions and the political processes underlying them. Many state constitutions are quite different from the federal Constitution. They contain provisions that may seem at first glance unworthy of inclusion in a constitution, such as New York’s provision on the width of ski trails. Zackin’s rich discussion of how such clauses come to be included in state constitutions and what we can learn about the politics underlying them is invaluable to the constitutional law enterprise. Even when the politics are not pretty, such as the racist motives behind some labor and education clauses, Zackin puts it all on the table in a way that enriches our understanding of state constitutions and state constitutional politics. Zackin’s book convinced me that we lawyers are seriously mistaken when we equate “constitutional law” with “federal constitutional law.”

So I have found Mr. and Ms. Rights, and now my problem is that there are too many choices. Which of the 50 available choices is best for me, or can I develop a long-term relationship with multiple state constitutions? Only time will tell, but Emily Zackin’s excellent book has sent me well on my way.

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