

STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM

Eighth Edition

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MATTHEW  BENDER

Dedication

To my children, John, Amy, and Daniel
-D.R.M.

To Warren (my husband) and Albert Ilg (my inspiration), and in memory of John
Welch (my father)
-J.W.W.

To Lynne, Tony, Nancy, and Weston Sr.
-J.C.G.

To Gerry Giordano (in memory), Jim Lebenthal, Patty Salkin and Peter Chiappini, and
to William, Elizabeth and Olivia and their future siblings
-K.W.B.

To Gia, Camille, Jordan, and Landry
-C.J.T.

AND WITH MANY THANKS AND DEEP REGARD FOR THE CONTRIBUTIONS
OF OUR CO-AUTHORS FROM PRIOR EDITIONS

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Preface

Viewpoints, Objectives, and Emphasis

The Preface to the first edition of this casebook by its two original co-authors stated our purpose in ways that continue to ring true:

It is reasonable to assume that every casebook has a point of view; it is an equally safe assumption that no casebook could satisfy the point of view, needs, or objectives of every teacher of state and local government law. Within these boundary conditions we have constructed a casebook which has a modest and frequently unobtrusive point of view and which at the same time attempts to provide materials adequate to satisfy the needs and objectives of other teachers.

This point of view is relatively simple and essentially structural. The study of state and local government for law students should be built on a framework of the tri-partite distribution of powers, both vertically and horizontally: the federal-state-local levels of government and their interrelationship, the legislative-executive-judicial branches of government and their interaction.

The book has two principal objectives. First, it focuses on government powers: where they come from, how they operate, and how disputes about such powers are resolved. Second, it addresses the participants in the governance process: who they are, and how they play their roles as entities and individuals. Inevitably, reflection on the governance process results in reflection on the political process, and the interaction of legislators, judges, and members of the executive branch (mayors, governors, and administrative officers). Attention to this intra-governmental distribution of powers stems, of course, from American separation of powers.

Students will also find a good deal more state government law and somewhat less municipal law than is traditional in courses in this area. That also reflects our structural preoccupation. Now, perhaps more than in the latter half of the twentieth century, states occupy a pivotal role in our multi-level structural system. The rhetorical depiction of states as “laboratories” of democracy has never rung more true.

The book is designed for the generalist in state and local government law rather than for the municipal law practitioner. The reasons are twofold. First, and we concede that this is a complaint heard from every law teacher, the time allotted is inadequate: rarely more than three hours, sometimes only two hours. The pressure has been somewhat relieved by the practice in some law schools in recent years of creating a separate course for land use issues and sometimes also for state and local taxation. On the other hand, while some of the content may have moved on to other offerings, new problems have more than replaced them — metropolitan government, reapportionment, school finance, etc. Even by our standard of selectivity, there are more materials than a three-hour course will comfortably contain — which allows room for free choice. We feared that if we expanded coverage the doctrines would pass by so fast that what remained for the student would be a blur.

In addition, more than is true for most public law courses, the students who

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elect state and local government law often do not intend to practice in this area, or to confront state or local government problems other than those that arise in the context of land disputes. Teachers of state and local government courses are nevertheless accustomed to hearing from former students that there was more “practical use” for clients from the course than they would have guessed. A substantial number are also likely to find that their extracurricular professional activities — as school board members, combatants in a neighborhood zoning or highway or environmental dispute — require a legal understanding of local, state, and federal governments. It is important for the course to meet their needs also.

The decision to write for the generalist meant that we do not purport to include all of the subjects and issues which might be covered, or to cover the topics which we have included exhaustively (with perhaps a few exceptions). We have omitted such areas as the duties and rights of office holders, government contract powers, and state legislative reapportionment. Nonetheless, we believe that our materials offer an opportunity to explore a variety of engaging questions in areas of emerging importance.

Despite the burgeoning law in this field, we have endeavored to maintain concise coverage and to continue the book’s long-standing commitment to “teachability.” To that end, we continue to employ framing problems at the outset and at other strategic points in the chapters. In addition, the notes following principal cases are formatted to allow both teachers and students to grasp the application of related questions to timely situations that should spark engaged classroom discussion. We have also continued to shift certain coverage to expanded Notes that instructors may elect to assign for more in-depth consideration of particular topics, while making it easy for others to pick and choose areas they wish to cut in the interests of time. We hope that this approach will allow instructors to engage students more actively, particularly since the state and local government course is an elective taken in the second or third year of school, when a fresh pedagogical approach is likely to be more interesting to all concerned. To that end, we have endeavored to identify opportunities to introduce discussions and instruction relating to various kinds of professional skills and insights (such as professional responsibility and drafting) in various contexts as discussed in the teachers’ manual.

Eighth Edition

The Eighth Edition of this book reflects a number of important changes. First, two of our senior authors are no longer with us. Professor Dawn Netsch retired from Northwestern School of Law and subsequently died before work on this edition began. Professor Peter Salsich has now retired and taken emeritus status at Saint Louis University School of Law. We miss both of these significant contributors and friends very much.

This Eighth Edition of the casebook reflects insights from two new co-authors. Kenneth Bond is a partner with Squires Patton Boggs (US) LLP, who has 40 years of practice experience as bond counsel and underwriters’ counsel. He is also an adjunct professor at Albany Law School, where he has taught public finance law for over 10 years. Professor Chris Tyson of Paul Hebert Law Center, Louisiana State University has

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a background in land use planning and municipal law and has also contributed to this revision particularly in the areas of government power and public employees. The other more senior authors have taken on slightly different assignments and thus have contributed to this significantly revised new edition by bringing their insights to bear in areas they had not necessarily worked on before. We hope that this approach will bring freshness and vigor to the book.

You will notice a number of other important changes in this Edition. We have reorganized the book in a number of important ways to maintain core coverage but eliminated tangential topics in order to enhance teachability. We have consolidated former Chapters 1 and 2 in order to present all preliminary topics in one place (background on local governments and constitutional principles along with more tightly presented material on incorporation and annexation). New Chapter 2 addresses local government powers. Chapter 3 includes updated attention to new forms of governance. Chapter 4 on public finance has been completely reorganized and re-written. Chapter 6's coverage of state tort law has been revised and clarified, and Chapter 9's coverage of voting rights and education has been reorganized and tightened. All other materials have been carefully updated as well. This Edition also incorporates a number of new problems with a contemporary focus to enhance discussion.

Coverage Choices and Continuing Themes

More than ever, the range of fascinating issues potentially encompassed by the course in state and local government provides faculty and students with hard choices about balancing breadth and depth of inquiry. We believe the first two chapters provide necessary and essential background no matter what the length of the course. Reasonable decisions can then be made whether to emphasize the material in Part I, which deals primarily with governmental structure, powers and intergovernmental problems, or Part II, which deals primarily with internal governmental functions, judicial review issues and access to the courts.

Those who have previously taught the course in state and local government undoubtedly emphasize selected themes as a unifying force. We offer several possibilities for consideration, based on our own ongoing work in the field and with this book.

An initial important theme is the way in which discrete pockets of doctrine seem inevitably to come together in operation, since most problems facing state and local governments raise a multitude of issues at once. For example, questions of municipal liability are likely to require an appreciation for the scope of authority under which an employee functioned, the range of discretion involved, the place of the employee in the organizational structure, the relation of the diverse branches of government, and the interplay of state tort law and federal and state constitutions.

Another unifying pattern is the simplicity and one might say the crudeness of doctrine in this field. State and local government legal issues often are solved through the application of "tired" two-way classifications that are conclusory and do not really explain results. The time-worn governmental-proprietary distinction is an example. One of the more vibrant trends in state and local government law is the rejection of these ancient classifications and the substitution of new doctrine. The question is whether some of this new doctrine, such as the "balancing test" now applied to a variety of issues, is really an improvement. The same point applies to the ministerial-discretionary distinction often used in local government tort law.

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It is also possible to trace the tension between responsiveness on the part of local government and parochialism. There is a constant search for boundaries that delineate community identity. The geographic scope of municipalities must be defined at the time of incorporation and may be expanded through annexation. Broader community links are increasingly forged through intergovernmental cooperation designed to address shared possibilities or concerns. On the other hand, certain populations may be “fenced out” even as others are brought in. Government authority may be used to favor some (be they particular homeowners, businesses, older or younger individuals) at the expense of others (who may carry a differential tax load).

In addition, of course, there is the perennial question of the role of the courts in the state and local government system, and the extent to which they should review state and local government actions. Here, there is a notable contrast between the judicial reserve characteristic of cases raising substantive issues with the more active judicial role in issues, like voting rights, where the structure of the governmental system and the fairness of the governmental process are at issue. These patterns reflect something more subtle than constitutional concern for separation of powers, since there are substantive patterns at work. In addition, one must wonder about the ways in which the closeness of state court judges to local and state-wide politics informs their judgment in ways that may float to the surface now and again.

Then, too, there are the interesting questions of how theory informs practice and how practice informs theory. This theme is increasingly evident in the aftermath of the “devolution” frenzy evident in congressional and presidential policy-making over the last two decades and the resulting growth of discrete state-based and localized solutions to major social problems, crafted more often in the legislatures than in the courts. The range of empirical studies on such topics as welfare and educational reform and the growing sophistication of academic theory on local governments more generally create a beneficial counterpoint.

Emerging Issues

Each time we update this book, we endeavor to think ahead about where the future will likely lead. For example, in the Seventh Edition, we flagged harsh economic realities, shifting judicial and political philosophies, division and debate that went beyond traditional political parties, and demographic changes as likely sources of change as the book went to print in 2010. At this writing, these trends appear likely to continue. More should be noted, however.

Permanent downsizing for state and local governments. A few years ago, there seemed to be hope for a return to “normal” patterns of government personnel and budgeting. At this juncture, although the economy has to some extent “recovered” from the Great Recession of 2008, government jobs and funding have not recovered and seem unlikely to do so anytime soon. Thus, state and local governments will likely continue to lag in their efforts to provide needed or desired services. Of particular concern is the inability of governments to maintain core infrastructure such as roads and bridges. Failures to do so may lead to increasing liability claims.

Deadlocked government. Recent years have seen tragically deadlocked government at the federal level and in many states. Major issues are left unaddressed, and efforts remain underway in many venues to maintain a controlling majority in legislative bodies. It seems likely that the public will become increasingly disenchanted (if, in fact, it is

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possible to become more disenchanted than at the present moment). With a new census six years away, and incumbent protection a guiding force during redistricting, it is unclear whether there's "some way out of here" as Bob Dylan sang years back.

Economic disparities. The last few years have witnessed growing division between the "1%" and everyone else. As the nation has experienced a growing concentration in wealth, the plight of those with limited means has increased. All levels of government will be called upon to maintain a "safety net" for those who lack the financial wherewithal to weather storms, or deal with basic necessities such as food and shelter. How such dilemmas are handled will determine what sort of nation the United States will be.

Technology and community. All levels of government have increasingly embraced advanced technology, as a means of communicating with citizens and gathering their points of view. As technology advances, virtual communities may take the place of traditional meetings and face-to-face interaction. The courts have begun to grapple with such questions as how freedom of information laws should be interpreted, and how search and seizure requirements should be implemented. These new pressures may ultimately result in rebalancing of authority and financial frameworks at federal, state and local government levels. Watch for incoming drones.

Conventions and Thanks.

Only selected footnotes from the cases and other reprinted materials are reproduced. These footnotes retain their original numbering, and the numbers have been enclosed in brackets. Ellipses are used within cases to indicate omitted textual material only and are not used to indicate deleted case citations. Internal citations to Supreme Court cases in reproduced decisions are cited only to the official reporter. Statutes cited and quoted in the text were current as of the date of publication, so dates are not given.

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We also wish to thank our colleagues who teach in this area across the country and our students who each year engage with us in addressing challenging legal and policy questions in hopes of building a better world.

Daniel R. Mandelker
Judith Welch Wegner
Janice C. Griffith
Kenneth W. Bond
Christopher J. Tyson

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