Course Materials

STATE & LOCAL GOVERNMENT LAW, A TRANSACTIONAL APPROACH (Anderson Publishing Company, 2000), by John Martinez and Michael E. Libonati
SUPPLEMENT - FALL 2012, by John Martinez. (Available at Bookstore)

We also will have guest speakers. You are responsible for the information and issues they discuss in the same manner as with respect to the materials and class discussions.

First Week's Assignment

Read the Preface, pp. xxv--xxvi, and pages 1-23.
In the Supplement, read UTFC Sequel, Rick Perry's Crony Capitalism Problem, Getting Back the Public's Money excerpt; UofU v. Shurtleff (incl. Heller & Ramsey)
(I will make assignments for subsequent weeks at the end of the last class for the week.)

Grading

Each student's grade for the course will be determined as follows:

85% Final Examination (180 min. ÷ 50 questions = 3.6 minutes per question)
This will be a three-hour, in-class, multiple-choice examination. It will be "closed everything": You may not bring anything into the exam except black or blue pens, (no pencils) and correction tape, (no liquid paper).

15% Class Participation
I will call on students at random and will expect students to volunteer in class as well. The grade will be determined by the degree of preparation as reflected by the quantity and quality of student responses.

ABSOLUTELY, POSITIVELY sign up on my seating chart. If you do not sign up by the end of the second week of classes, you will not receive class participation credit. It is your responsibility to make sure your name gets on my seating chart. (I will email the final seating chart to the class so you can check.)

Office Hours
I will hold office hours as needed. You may also email me at mjohncentury@msn.com and I will schedule individual meetings in my office as appropriate.

The University of Utah seeks to provide equal access to its programs, services and activities for people with disabilities. If you will need accommodations in this class, reasonable prior notice needs to be given to Barbara Dickey, Associate Dean of Student Affairs, and to the Center for Disability Services (CDS) to make arrangements for accommodations. CDS is located at 200 S Central Campus Drive, (Union Building), Rm 162 or you can call 801-581-5020.

All written information in this course can be made available in alternative format with prior notification.
CONCEPTUAL OUTLINE OF THE BOOK AND COURSE

State and local government law has several dimensions that make the subject a considerable challenge. First, there is a bewildering diversity of institutional forms and structures: 50 states, as well as thousands of counties, cities, and special districts, make up the institutional components of state and local government law.

Second, there is a corresponding variety in sources of law. In addition to the overriding dictates of federal constitutional and statute law, there is the challenge of mastering the unique features of state constitutional law. Local government charters and ordinances represent still a third level of laws that are often crucial to resolution of state and local government issues. And, since so much of state and local government law is in the form of statutes or ordinances, the student is exposed to difficult and often controversial questions of statutory interpretation.

Third, the substantive scope of state and local government law is equally staggering. Although state and local governments have uniquely "governmental" functions, they also engage in activities that are similar to those carried out by purely private actors. Thus, one must deal with such traditional public law topics as taxation, borrowing, and government regulation. But in addition, one must also explore the distinctive ways in which the public law of contracts, torts, property, and employment are different from the private law in those areas.

This textbook meets the challenge of these various dimensions by offering a coherent, practical vision of state and local government law that emphasizes skills. Rather than choosing between concentrating on either breadth or depth of coverage, we focus instead on interactive exercises in which students bring to bear the various dimensions of the law of state and local government and engage in strategic thinking to find solutions. For example, Federalism issues are addressed in the context of the Supreme Court's working out of the implications of the "one-person one-vote" principle against the spectrum of state and local decision making structures. This sequence also illustrates how difficult it is to construct bright-line rules which differentiate between public and private sector entities.

Similarly, we present the Dillon Rule of narrow construction of local government authority as a problem in appellate advocacy, in order to underline the significance of principles of statutory interpretation in addressing a state and local government problem. In the same vein, Home Rule is covered as an exercise in drafting a state constitutional provision. These exercises allow teacher and student to focus on a close reading of existing constitutional and statutory texts, with an eye to comparison and synthesis.

We also emphasize the lawyer's role in the creation of structures for governance. The recurring problem of providing public services, such as garbage collection, drinking water and police protection, is therefore addressed by framing the issue as one involving choices among potential community organizational forms, such as formation of a residential community association, creation of a special district, annexation of an unincorporated area to an existing municipality or special district, or the creation of a brand new municipality.

A similar transactional approach is emphasized in our coverage of interlocal contracts and of debt finance. The student is invited to identify and allocate the risks arising out of contractual arrangements with both the public and private sectors. Our coverage of the
government liability area also illustrates our emphasis on a proactive rather than a reactive approach to learning. Thus, for example, we place significant emphasis on the lawyer's role in identifying the risks that arise out of the operation of the law enforcement function as part of an ongoing process of risk management.

We would do our students no favors if we only exposed them to yesterday's issues. We therefore include currently hot topics, such as internet voting. We anticipate that such areas will be changed in future editions to reflect the dynamic, ever-changing policy landscape in state and local government law.
COURSE METHODOLOGY: A TRANSACTIONAL APPROACH

A. The Alchemy of Legal Analysis

Legal questions begin as unorganized collections of facts. A client will almost never go into an attorney's office and say, "I have state and federal constitutional Just Compensation Clause claims against the state that I would like you to bring on my behalf." Instead, clients tell stories, usually by starting at the end, working their way to the beginning, and leaving out substantial parts of the middle. They will say something like, "Those SOB's on the City Council are trying to make me give the city half my land in order to get a permit to build on the other half! What can I do about it?"

Every attorney must master the art of transforming a client's problem into an enforceable solution in the form of an agreement or court order. Transforming problems into solutions requires a knowledge of applicable law in order to identify relevant facts. And sometimes, as facts are ascertained, it becomes clear that more legal research is needed, which in turn leads to the need to find out still more facts.

This textbook approaches the study of State and Local Government Law from a transactional perspective. "Transactions" are contexts in which state and local government problems arise. There is no clear dividing line in practice between legal analysis in nonlitigation settings and legal analysis in litigation settings. Legal issues must be examined in light of the possibility of litigation, no matter how remote, and a prediction must be made about what a court might decide on any given issue presented for judicial resolution. Transactional settings, therefore, may include advice and consultation settings as well as litigation settings.

The text will present Problems which will consist of statements fact as well as exhibits, such as letters, insurance policies, notices and the like, similar to those that would be confronted by a practicing attorney. The Problems will be followed by extensive libraries of relevant Resource Materials, such as cases, statutes, constitutional provisions and other materials that can be used to identify and address the legal issues raised by the Problems. The Notes & Questions after each case, statute or the like, will contain additional facts and resource materials that will explore related legal issues and more deeply examine the ramifications of the Problems initially posed. Suggested Analytical Approaches are also included as guides to problem-solving. Students will be invited to use, criticize, and refine the Analytical Approaches themselves.

When clear answers are available, we will provide them. When they are not, we will suggest ways in which arguments can be used to advocate for one outcome or another. We will move from the core clear areas to the uncertain zones at the periphery. As appropriate, we will offer our views about what we believe the proper resolutions should be in those disputed areas.

B. The "Players and the Play"

Before trying to play the part of a state and local government lawyer, an attorney should know the players and the play.

The "players" in state and local government law are public and private actors. The public actors are federal, state and local governments, and at times the populace directly, acting through initiatives or referenda. Each of the public actors might seek to undertake legislative, executive, or judicial action. Thus, legislative action may be undertaken by Congress, state legislatures, local city councils or by the people directly through initiatives or referenda; executive action may be undertaken by the federal executive branch, state governor's offices or local mayors; and
judicial action may be undertaken by federal, state or local courts.

Private actors may be individuals or artificial legal entities, such as corporations. Such private actors usually become involved with state and local governments in two distinct ways: (1) They might seek to utilize governmental actors in order to advance their own private interests, and also perhaps benefit the public as well. (2) Alternatively, private actors might seek to protect themselves from governmental conduct which has an untoward effect on their private economic or liberty concerns.

The "play" may begin either in the nonlitigation context or in the litigation setting. The nonlitigation context is the "idea" stage of law practice, in which an attorney is asked to give an opinion about a proposed course of action before a public or private actor undertakes it. The litigation mode is the "dispute" stage of law practice, in which an attorney is asked to help resolve a conflict once a course of action is already under way or has been concluded.

Whether advising clients before they take action--or representing them once they have done so--attorneys must grapple with the "problems" in state and local government law which arise. The task of state and local government attorneys is to identify and analyze the pivotal factual and legal issues, and to resolve such problems through negotiation or litigation. The task of this book is to prepare law students for carrying out those responsibilities.

C. The Role of Standards of Judicial Review

Whether in the nonlitigation context, in which attorneys provide advice about a proposed course of action, or in the litigation setting, in which attorneys seek to resolve a dispute which has already arisen, problems in state and local government law inevitably require a determination of whether state or local government conduct is in accordance with law. Since legal questions in our system of justice are ultimately decided by courts, legal analysis therefore is the art of making predictions about what a court will do if a legal question were to be brought before it for decision.1

In making predictions about what a court will decide in a matter involving state or local governments, attorneys must take into account two types of legal rules: (1) the procedural and substantive legal rules defining the authority of the governmental actor in question and (2) "standards of judicial review," which define the judicial attitude that a court will take in examining the governmental conduct in question.

Standards of judicial review embody the analytical frameworks that courts use to determine whether governmental action is proper. Such standards of judicial review may range from judicial attitudes that examine government conduct closely and skeptically, to standards of judicial review which take an acquiescent, hands-off approach.2 Close scrutiny is known as activist judicial review; more accepting examination is deferential judicial review. The type of


2. See generally 3 C. Dallas Sands & Michael E. Libonati, (now Michael E. Libonati & John Martinez) LOCAL GOVERNMENT LAW,§ 16.29.50 [hereinafter Libonati & Martinez, LOCAL GOVERNMENT LAW].
judicial attitude that will apply in any given situation will depend on several factors, including the nature of the governmental conduct, as well as the effect of such conduct on private and public actors. Of utmost importance, however, is that the type of judicial review will have a dramatic impact on whether governmental conduct will be found lawful or not. Therefore, whether acting as an advisor to governmental actors, as an advocate for those challenging governmental conduct, or as a judge making a decision in a case involving state and local government behavior, a state and local government lawyer must always take standards of judicial review into account.
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