Washington University Journal of Law & Policy

Volume 3 *Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker*

January 2000

Imagining the World Anew: The Course in State and Local Government Law and the Future of Legal Education

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Chapter 10: Education

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INTRODUCTION

Daniel Mandelker is known as a leading scholar and teacher to generations of faculty and students in law, city planning, public administration, and other fields. His scholarship is marked by remarkable breadth, attention to breaking issues, integration of insights from theory and practice, and accessibility to audiences of many sorts. As a teacher, he has imagined and shaped curricula in state and local government law, land use planning, and housing and community development law. He has recruited and galvanized a diverse range of colleagues to contribute to these efforts, and with them has developed new strategies for more effective teaching including use of problems, videos, and websites.

The essays in this volume reflect the high regard with which Dan is held by his colleagues in these fields. Our goal is not just to praise Dan, but to embody the ways in which he has contributed to the scholarship, teaching, and service in the fields of state and local government, land use, and housing law.

With that goal in mind, this essay urges that faculty and students engaged in the study of state and local government seize the day as leaders who can, and should, envision the future of our field and the possible future of legal education writ large. The system of state and

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local government, including governing legal principles, reflect our society's conception of how we can best function collectively to foster the public good. Those of us who teach and write in this field shape the understandings, expectations, and skills of future generations of leaders who will serve in public office, advise, or participate in this critical arena. We therefore bear a special responsibility to do so with as much vision and effectiveness as possible. We should also be sensitive to principles of constructive change and good governance, a potential source of leaders within legal education who could contribute to needed change within our academic communities.

With these possibilities and obligations in mind, this essay endeavors to answer two important questions. How might we envision a future course in state and local government (both in coverage and methodology) that realizes the subject's full potential? What might the process of designing such a course teach us about improvements that might be made in legal education as a whole?

The essay proceeds in three sections. Part I considers trends that may shape our conception of future courses in state and local government law. Part II examines the implications of new ideas on teaching and learning. Part III argues that lessons learned from our work as teachers and scholars of state and local government law can help us better map the future of legal education writ large.

I. THE COURSE OF THE FUTURE: IMPORTANT SUBSTANTIVE TRENDS

Current courses in state and local government law may envision or depict the world in somewhat different terms. For some courses the organizing concept is the local community (the theoretical basis for its existence, its relationship with the state, its residents, and non-residents).[1] For other courses attention centers on the issue of decentralization of political power (both as a theoretical and legal matter)[2] or on local governments' structures, functions, organization,

1. CLAYTON GILLETTE & LYNN BAKER, LOCAL GOVERNMENT LAW: CASES AND MATERIALS (2d ed., 1999).

2. GERALD FRUG, CASES AND MATERIALS ON LOCAL GOVERNMENT LAW (2d ed., 1995). *See also* Joan Williams, *The City, The Hope of Democracy: The Casebook as Moral Act*, 103 HARV. L. REV. 1174 (1990).

and relationships.[3] One of Dan Mandelker's significant contributions to state and local government law has been to depict this world as one in which the dynamic operation of the governmental system (state and federal government, as well as localities) and the intragovernmental distribution of power (between the state legislatures, the judiciary, the executive branch, and citizens) take center stage.[4]

Whatever the organizing principles, today's courses tend to address certain common topics: municipal incorporation and annexation, local powers and their sources, municipal liability, and, in many instances, basic funding sources and constraints. Whatever our overall frame of reference, faculty teaching the core course in state and local government law probably include some exploration of structural issues, relationships between levels of government, government powers, long-standing issues relating to finance and liability, and breaking issues of special current interest to them. This traditional baseline is likely to continue to guide us in the future. It is worth reflecting further on the impact of a number of significant trends that will need to be addressed in the years ahead.

A. Neo-Federalism and Its Implications

Those who follow state and local government law are aware of one of the most significant developments of the last decades—the Congress' and United States Supreme Court's active efforts to limit the powers of the federal government and devolve more power and responsibility to the states and local governments. A rich array of scholarship is burgeoning on this subject,[5] with the potential for it to

3. WILLIAM VALENTE & DAVID MCCARTHY, LOCAL GOVERNMENT LAW: CASES AND MATERIALS (4th ed., 1992).

4. DANIEL MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM: CASES AND MATERIALS (4th ed., 1996). As one of his co-authors, I share his view. *See also* R. Martineau, *Review Essay: The Status of State Government Law in Legal Education*, 53 U. CINN. L. REV. 511 (1984).

5. *See, e.g.*, Symposium, *National Power and State Autonomy: Calibrating the New "New" Federalism*, 32 IND. L. REV. 1 (1998); Symposium, *Revising the Structural Constitution*, 22 HARV. J. L. & PUB. POL'Y 1 (1999); F. Cross, *Realism about Federalism*, 74 N.Y. U. L. REV. 1304 (1999); R. Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998); V. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L.

become as enticing as the "takings" jurisprudence that emerged in prior years. Many of us will be drawn toward further inquiry in this area and will most likely include more coverage of this subject in future courses. We need, however, to stretch ourselves to imagine the consequences that loom beyond the immediate horizon.

The Supreme Court's recent federalism decisions limit Congress' power to dictate policies and practices of the states and to open courtroom doors to their citizens.[6] Limits on the Commerce Clause power also curtail federal action in some fields of great social importance.[7] Limits on federal power under the Fourteenth Amendment, to assure voting rights and to continue to address racial disparities in educational services, also exist.[8] The effect of such decisions has been to create a broader zone of action in which state policy is immunized from intervention by Congress,[9] while simultaneously removing systems that have in the past contributed to greater accountability from diverse citizens.

This, however, is not the end of the story. "Our Federalism" is premised, in part, upon the notion that states are "laboratories" in

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REV. 2180 (1998); G. Moulton, *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849 (1999); M. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819 (1999).

6. *See* Alden v. Maine, 119 S. Ct. 2240 (1999) (state probation officers could not sue in state court for monetary damages under the Fair Labor Standards Act); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 119 S. Ct. 2199 (1999) (Florida could not be sued for alleged patent infringement resulting from the actions of its state agency in using a patented methodology for calculating amounts to be paid under annuity contracts to finance future college expenses).

7. *See* United States v. Lopez, 514 U.S. 549 (1995) (Gun Free School Zones Act held to have exceeded Congress' power under the commerce clause); Brzonkala v. Virginia, 169 F.3d 820 (4th Cir. 1999) (striking down key provisions of the federal Violence Against Women Act, Pub. L. 103-322, based on the court's assessment that conduct federally criminalized by that statute was of the sort traditionally left to state domestic relations law and did not sufficiently implicate interstate commerce), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999).

8. *See, e.g.*, Shaw v. Hunt, 517 U.S. 899 (1996) (limiting state decisions regarding configuration of voting districts to take into account historic racial discrimination); Missouri v. Jenkins, 515 U.S. 70 (1995) (limiting federal courts' authority to remedy historic racial discrimination in schools).

9. In the last twenty years, Congress has also moved away from strategies of categorical aid to more common use of block grants. *See* Casino, *Federal Grants-in-Aid: Evolution, Crisis, and Future*, 20 URB. LAW. 25 (1988). The Welfare Reform Act of 1996 (Pub. L. No. 104-188) is a more recent example of this trend.

which a variety of experiments in policy and governance can be performed. Recently, there has been significant, and increasingly sophisticated, scholarship on the roles and powers of local governments.[10] Strikingly, however, in our scholarship, as well as in our courses, we have often attended so thoroughly to the system of local government that we have failed to give the states their due. Because of the Supreme Court's recent decisions, however, a more intensive focus is needed on the states themselves.

Whatever the merits of these decisions, or the legitimacy of their bases in text, history, or judicial philosophy, their future significance will lie in their impact on governance. It may well be that they reflect, or create, a fundamental shift in understanding of governmental structures, moving away from centralization to increasing decentralization.[11] What remains to be seen, however, is whether this shift in legal discourse will spur states to act in more autonomous ways, band together to address shared problems, disseminate new policy strategies, or otherwise alter their traditional course. In the years ahead it will therefore be critical to attend more fully to diverse developments at the state level to see the degree to which state institutions, both legislatures and courts, take up the opportunities the Supreme Court has thrust upon them.[12] It will also be important to take note of whether devolution continues with additional autonomy flowing to local governments.[13]

If we take up the challenge of focusing more carefully on the states, we will face a number of challenges. Except in certain areas, such as school finance reform and land use, we often tend to treat state law in relatively generic terms, in large part because of our

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10. *See, e.g.*, Richard Briffault, *Our Localism, Parts I and II*, 90 COLUM. L. REV. 1, 346 (1990); Gerald Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993).

11. *See* K. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483 (1998).

12. *See, e.g.*, H. Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) (arguing that state courts should reject rational basis review in favor of other strategies in interpreting state constitutional provisions).

13. *See* R. Hills, *Dissecting the States: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201 (1999); M. Albuquerque, *California and Dillon: The Times They are A-Changing*, 25 HASTINGS CONST. L.Q. 187 (1998); D. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999); W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57 (1999).

tendency to dwell on case law rather than emerging trends in legislation or policy reform. This tendency may stem from our desire to see ourselves as scholars swimming in the ocean of national or international jurisprudence rather than in smaller state or local ponds. As we look beyond the immediate impact of the Supreme Court's recent federalism jurisprudence, we may be well-advised to focus respectfully on state-level questions, attend to distinctive developments in diverse jurisdictions, and follow more closely legislative and policy developments. Taking such challenges to heart in our teaching, and in our scholarship, we might contribute to our students' and our own understanding by following more closely the developing legislation and jurisprudence in one or more specific states. A simple way of facing this challenge and seizing this opportunity would be to develop supplemental teaching materials tracking statutory and case law developments in particular jurisdictions and posting such information on websites for others to explore.

B. Emerging Social Forces

Thoughtful scholars have offered observations about a number of the issues that may assume growing importance in the field of state and local government law in the years ahead.[14] It is useful, as we seek to envision the future, to take stock frequently and systematically about the future that is likely to enfold us, so that we can begin critical research and prepare our students with such developments in mind. Law is a notoriously backward-regarding discipline in which students, and too often teachers, dwell very heavily on critiquing decisions or policies crafted in the past. We would do ourselves and our world a service if we turned our attention to thinking about and preparing our students to think about matters that loom ahead.

Several powerful social forces will affect our communities, the legal profession, and the system of higher education in coming years. These forces include demographic changes, globalization, technological developments, and economic trends. In varying ways,

14. *See, e.g.*, John Martinez, *Local Government Law for the Next Millenium*, 28 STETSON L. REV. 517 (1999).

these forces will affect what we research and teach.

1. Demographic Change

Particular demographic trends are sometimes noted in isolation, but overall implications for our purposes are in many ways as yet unexplored. The baby boom generation will continue to age. A smaller, youthful population will face significant burdens such as maintaining a vital economy with a smaller work force in a context of rapid change, managing costs of health care and educational debt, and juggling the responsibilities of a "sandwiched" generation. Minority populations will become majority populations in an increasing number of areas, where de facto segregation and unequal opportunity have remained all too common. The disparity between rich and poor will remain enormous while the middle class will continue to feel significantly squeezed. Population distribution will shift, particularly in light of the changing economy, with possible gentrification of cities, suburban stagnation, rural sprawl, and "fringe" development patterns that fail to fit traditional political boundaries.[15] Gated communities that service rich or elderly populations will become increasingly important.

Taken together such changes are likely to create considerable uncertainty and perhaps notable change in political realities, distribution of power, and social priorities. It is not clear whether the impact of such changes will occur at some indeterminate "tipping point," or more gradually. At the very least, however, such trends suggest that it will be important to attend to developments in states demographically poised at the leading edge of demographic change and to recruit diverse students and faculty members who are interested, engaged, and able observers. As noted below, it will also be important to reflect upon and study the nature of governance, and not only state and local governance, since the process of governing is likely to become more dynamic in years to come.

15. *See* E. Zelinsky, Book Review, *Metropolitanism, Progressivism, and Race*, 98 COLUMBIA L. REV. 665 (1998); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996); Gerald Frug, *The Geography of Community*, 48 STAN. L. REV. 1047 (1996).

2. Globalization

Globalization will gradually overtake a traditionally isolationist consciousness,[16] but American efforts to grapple with related implications may well continue to lag behind the experience of those in Europe, Latin America, and Asia. Recent, isolated instances in which states or localities have sought to limit purchases of goods from foreign countries they view as oppressive will most probably be rebuffed.[17] New realities will nonetheless make themselves felt in a variety of ways.

At the state level, the implications of treaty obligations on such issues as professional licensure or environmental regulation will gradually come to the forefront.[18] States and localities may forge alliances by necessity that seek to lure global business in order to bolster employment opportunities.[19] As these forces play themselves out, it will become increasingly important for lawyers and political leaders to understand the historical and philosophical differences that have shaped the assumptions of global partners.[20] Policymakers,

16. American law schools have as yet to embrace the global consciousness that has permeated other fields of professional education. For reflections on how curriculum may change, see Blackett, *Globalization and Its Ambiguities: Implications for Law School Curricular Reform*, 37 COL. J. TRANS. L. 57 (1998).

17. *See* National Foreign Trade Council v. Natsios, 199 U.S. App. Lexis 13755 (1st Cir. 1999) (striking down Massachusetts statute which restricts the ability of the state and its agencies to purchase goods or services from companies that do business in Burma in light of federal powers relating to foreign relations and foreign commerce), *cert. granted*, 120 S. Ct. 525 (1999); M. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999).

18. N. Gal-Or, *Labor Mobility Under NAFTA: Regulatory Policy Spearheading the Social Supplement to the International Trade Regime*, 15 ARIZ. J. INT'L & COMP. L. 365 (1998); M. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117 (1999); L. Del Duca & V. Sciarra, *Developing Cross-Border Practice Rules: Challenges and Opportunities for Legal Education*, 21 FORDHAM INT'L L.J. 1109 (1998); D. Brown, *Thinking Globally and Acting Locally: The Emergence of Global Environmental Problems and the Critical Need to Develop Sustainable Development Programs at State and Local Levels in the United States*, 5 DICK. J. ENVTL. L. & POL'Y 175 (1996); G. Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards*, 25 YALE J. INT'L L. 1 (2000).

19. *See* J. Chen, *Globalization and its Losers*, 9 MINN. J. GLOBAL TRADE 157 (2000) (expressing apocalyptic view regarding impact of changes resulting from globalization).

20. *See, e.g.*, M. Light, *Different Ideas of the City: Origins of Metropolitan Land-Use Regimes in the United States, Germany, and Switzerland*, 24 YALE J. INT'L L. 577 (1999).

lawyers, and judges will have opportunities to identify and perhaps adopt other nations' models for such important questions as government ethics and financial federalism,[21] taking care, however, to explore the wisdom and applicability of such alternative approaches.[22]

3. Advances in Technology

Advanced technology is significantly affecting the fabric of society, creating new realities and issues relating to telecommunications, e-commerce, and privacy policies that will preoccupy Congress for years to come.[23] These debates will also raise novel questions regarding state sovereignty that are only beginning to be understood. For example, should states retain the right to ban Internet-based gambling within their jurisdictions?[24] States and localities will also very likely engage in the front-line struggle to address difficult questions posed by the digital divide, grappling with hard issues about the ownership of the information superhighway and the potential for municipalities to return to an earlier role as utility provider in order to assure that their citizens have high-speed internet access.[25]

These issues are only the tip of the iceberg. States are beginning to

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21. *See* J. Mills, *The Future of Governmental Ethics: Law and Morality*, 17 DICK. J. INT'L L. 405 (1999); C. Larsen, *States Federal, Financial, Sovereign and Social: A Critical Inquiry into an Alternative to American Financial Federalism*, 47 AM. J. COMP. L. 429 (1999).

22. *See* K. Perales, *It Works Fine in Europe, so Why Not Here? Comparative Law and Constitutional Federalism*, 23 VT. L. REV. 885 (1999).

23. *See, e.g.*, M. Froomkin, *Of Governments and Governance*, 14 BERKELEY TECH. L.J. 617 (1999); C. Topping, *The Surf is Up, But Who Owns the Beach?—Who Should Regulate Commerce on the Internet?*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 179 (1999); D. Johnson & D. Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); L. Lessig, *The Law of the Horse: What Cyberspace Might Teach*, 113 HARV. L. REV. 501 (1999).

24. *See, e.g.*, *Developments in the Law–The Law of Cyberspace, Cyberspace Regulation and the Discourse of State Sovereignty*, 112 HARV. L. REV. 1680 (1999).

25. *See* S. Carlson, *A Historical, Economic, and Legal Analysis of Municipal Ownership of the Information Highway*, 25 RUTGERS COMPUTER & TECH. L.J. 1 (1999); A. Willscher, *The Justiciability of Municipal Preemption Challenges to State Law*, 67 U. CHI. L. REV. 243 (2000); M. Maier, *Affordable Internet Access for All Americans*, 6 RICH. J.L. & TECH. 8 (1999); M. Maher, *Cable Internet Unbundling: Local Leadership in the Deployment of High Speed Access*, 52 FED. COMM. L. UJ. 211 (1999); P. McCauley, *Municipal Regulation of Increased Telecommunication Competition*, 78 MICH. B.J. 1278 (1999).

grapple comprehensively with the range of changes in state law that are necessitated by technological advances.[26] For example, questions are raised regarding the maintenance and retention of government records and provision of internet access by public libraries.[27] As work on the human genome progresses, states willing to grapple with health care reform or insurance regulation will confront questions about how best to address competing demands for potentially high-cost interventions that can save or improve an individual's health or welfare, how new forms of evidence (such as DNA testing) can be integrated into criminal justice systems, and how environmental risks can be assessed and minimized within the constraints of economic and political realities.[28] Localities will struggle with implementing appropriate land use regulation strategies for cellular towers and other technological innovations.[29] States and localities will also face special wrinkles on questions facing private sector employers and businesses. For example, First Amendment considerations may affect oversight of government employee computer use and the liability government employers may face as the result of failures to respond to requests for emergency services.[30]

4. The Economy

The economic prosperity characterizing the last decade has raised high expectations for the foreseeable future while unfortunately fueling tendencies to focus on short-term possibilities to get rich quick. History cautions that boom times are inevitably succeeded by busts, with painful dislocation and social costs. State and local

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26. See D. Horvath & J. Jung, *1999 Technology Legislation in Virginia*, 33 U. RICH. L. REV. 1037 (1999).

27. *See* M. Kline, Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 14 BERKELEY TECH. L.J. 347 (1999).

28. *See, e.g.*, M. Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 WAKE FOREST L. REV. 767 (1999); P. Longo, *The Human Genome Project's Threat to the Human Constitution: Protections from Nebraska Constitutionalism*, 33 CREIGHTON L. REV. 3 (1999).

29. *See, e.g.*, S. Lopata, *Monumental Changes: Stalling Tactics and Moratoria on Cellular Tower Siting*, 77 WASH. U. L.Q. 193 (1999).

30. *See Postscript: Why* Urofsky v. Gilmore *Still Fails to Satisfy*, 6 RICH. J. L. & TECH. 14 (1999); J. Winn, *The Hedgehog and the Fox: Distinguishing Public and Private Sector Approaches to Managing Risk for Internet Transactions*, 51 ADMIN. L. REV. 955 (1999).

governments have become more committed to efforts to foster economic development within their jurisdictions but may have been lulled by the recent past. Future challenges are likely to arise, even if good times continue, as globalization results in continuing shifts in the scale of industrial sectors and consolidations as businesses merge to remain competitive. Jobs will be less constrained to current locations and international workforces will be more readily tapped. When economic times grow troubled again investment capital may shrink significantly and debt loads undertaken in good times become a deeper drag.[31]

State and local governments can also expect to face their own direct fiscal issues. On-line sales in the e-economy have a number of significant implications. They will sap traditional governmental revenue streams generated by existing sales tax, perhaps, creating issues of legitimacy for continuation of that form of taxation even if a sales tax on e-commerce has not already been appropriated as a source of federal revenue.[32] An aging population will likely have reduced disposable and taxable incomes. This population will then very probably become increasingly resistant to paying property taxes, even at a time when significant funding for education will be needed to produce an educated, younger workforce capable of sustaining long-term economic health. Consensus may also be harder to muster for support of city services[33] if understandings of community deteriorate in the face of an increasingly transient population and more pronounced demographic rifts. Alternative sources of revenue that prove appealing during good economic times, such as business improvement districts[34] and "regulatory contracts,"[35] may become

31. For example, strategies such as the creation of empowerment zones may prove feasible in good economic times, but less so in recessions. For a discussion of empowerment zones, see A. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295 (1999).

32. *See* S. Cole, *Taxing Texas Into the Future*, 62 TEX. B.J. 1104 (1999); A. Sawyer, *Electronic Commerce: International Policy Implications for Revenue Authorities and Governments*, 19 VA. TAX REV. 73 (1999); K. Way, *State and Local Sales Tax on Internet Commerce: Developing a Neutral and Efficient Framework*, 19 VA. TAX REV. 115 (1999).

33. *See* Gerald Frug, *City Services*, 73 N.Y.U. L. REV. 23 (1998) (arguing for a justification for city services based on community building rather than a theory of public goods).

34. *See* Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365 (1999).

unavailable in less optimistic or prosperous times. Problems such as these may be exacerbated if preliminary evidence that fiscal constraints adopted in prosperous times has undermined governance capacity proves valid.[36]

The trends just outlined will undoubtedly bear upon other areas of the law school curriculum, where they may be explored with thought and care. Those of us who focus quite directly upon the realities of state and local government should, however, be among the first to recognize their importance in our scholarship and teaching by illuminating and exploring these challenging problems in the future.

C. Governance, as Well as Governments.

Historically, teachers of state and local government law have been able to assume that their students enter law school with a basic understanding of the operation of American government. It will no longer be safe to do so in the years ahead for a number of reasons. Law students, like those in college, have generally had less significant instruction, grounding, or experience in the nature and role of governments. Much of the world is being reshaped by economic and market metaphors, and traditional models of government regulation and provision of services are no longer assumed to be justified or advisable.[37] The shape of government and the distribution of powers and responsibilities are also in flux, with evolving functions and administrative structures at the state level, an increase in regional alliances and special-purpose government entities, hybrid public-private partnerships, and increasingly significant roles for neighborhood associations.[38] In the face of such a shifting landscape, it becomes ever more critical to understand the core values that underlie governance in order to grapple with its

35. See D. Dana & S. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473 (1999).

36. *See* J. Kirlin, *The Impact of Fiscal Limits on Governance*, 25 HASTINGS CONST. L.Q. 197 (1998).

37. *See* JANE JACOBS, SYSTEMS OF SURVIVAL (1994) (discussion of competing ethical systems including the guardian system associated with traditional governments and the trader system associated with the marketplace).

38. *See, e.g.*, G. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607 (1997).

continuing legitimacy and evolving norms.

Changing demographics and challenging social issues will as previously noted create potential tensions and increased volatility in the future, and well-established legal requirements regarding initiatives and referenda, charter reform, open meetings, public records, and public contracting are likely to become more important and potentially more subject to reform.[39] In the face of wrong-doing, or as a preventive measure, states and localities have adopted statutory or regulatory requirements regarding conflicts of interest, nepotism, and other measures designed to preserve government integrity. Increasingly, public entities are engaged in forms of dispute resolution that may in time lead to new legal structures and procedures as informal practices move toward formal norms.[40] As more and more functions are handled by business and government in the virtual reality of cyberspace, the traditional sense of citizenship and engagement may become increasingly attenuated.[41]

The law students of today and tomorrow will be called upon to advise citizens, businesses, and governments in this increasingly uncertain universe. As they do so, they will need to rely on their understanding of underlying principles and be prepared to negotiate the rapids of governmental operations and approaches in resolving problems of many different sorts. Understanding governance, as well

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39. *See* S. Buchanan, *Upping the Procedural Ante: A Study in Conflicting Democratic Values*, 37 BRANDEIS L.J. 175 (1998); H. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. REV. 1735 (1998).

40. *See* C. Rose, *New Models for Local Land Use Decisions*, 79 Nw. U. L. REV. 1155 (1985); C. Stukenborg, *The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts*, 19 U. DAYTON L. REV. 1305 (1994); D. Woolston, *Simply a Matter of Growing Pains? Evaluating the Controversy Surrounding the Growth Management Hearings Boards*, 71 WASH. L. REV. 1219 (1996); A. Mehta, *Resolving Environmental Disputes in the Hush-Hush World of Mediation: A Guideline for Confidentiality*, 10 GEO. J. LEGAL ETHICS 521 (1997); N. Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENVTL. AFF. L. REV. 263 (1999); D. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495 (1999); E. Gauna, *The Environmental Justice Misfitt: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3 (1998).

41. S. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277 (1998); N. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149 (1998); C. Luchetta-Stendel, *The E-Vote: A Proposal for an Interactive Federal Government*, 17 J. MARSHALL J. COMPUTER & INFO. L. 1101 (1999).

as governments, can also provide students with insights important to their work in other contexts, for core notions of organizational behavior, sound deliberation, policy development and articulation, and dispute resolution have a bearing in virtually every type of setting in which a lawyer might find herself. Perhaps of even more importance, students drawn to law study are often already committed and skilled leaders who will one day shape the law and its agencies (such as governments) to meet society's future needs. They will serve on local boards and commissions, seek election to state or national office, represent those with limited means in pro bono cases, and engage in law reform through bar associations or other groups. Understanding state and local government law will be important in these settings, but understanding the goals and nature of governance and the operation and norms of the numerous shapes and forms of governments will be of equal or greater significance.

D. Methods and Mores, Roles and Responsibilities

Most teaching and learning in legal education explicitly emphasizes the transmission and acquisition of substantive knowledge. In addition, law schools universally seek to develop in their students a particular way of knowing called "thinking like a lawyer."[42] Consistent with requirements of the American Bar Association, all law schools also provide a modicum of instruction in professional responsibility (or legal ethics),[43] and increasingly

42. *See, e.g.*, John Mudd, *Thinking Critically About "Thinking Like a Lawyer*," 33 J. LEGAL ED. 704 (1984); K. Saunders & L. Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121 (1994); D. Wangerin, *Training in "Legal Analysis": A Systematic Approach*, 40 U. MIAMI L. REV. 409 (1986); D. Hunter, *No Wilderness of Single Instances: Inductive Inference in Law*, 48 J. LEGAL ED. 365 (1998).

43. DEBORAH RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (1994); I. Johnstone & M. Treauhart, *Doing the Right Thing: An Overview of Teaching Professional Responsibility*, 41 J. LEGAL ED. 75 (1991); Deborah Rhode, *Annotated Bibliography of Educational Materials on Legal Ethics*, 58 LAW & CONTEMP. PROB. 361 (Summer/Autumn 1995) (describing teaching materials and initiatives) (in SYMPOSIUM ON TEACHING LEGAL ETHICS); James Moliterno, *Practice Settings as an Organizing Theme for a Law and Ethics of Law Lawyering Curriculum*, 39 WM. & MARY L. REV. 393 (1998) (part of symposium issue); James Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71 (1996) (part of symposium issue); Thomas Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. & MARY L. REV. 409 (1998) (part of symposium issue).

provide students with opportunities to acquire basic levels of "lawyering skills."[44]

Courses in state and local government law are situated as part of the advanced elective curriculum, and thus most commonly focus only on the first of these objectives, that is, conveying to students expert knowledge of certain substantive subject matter of the sort discussed earlier in this essay. For those who would envision more sophisticated and visionary courses for the future, it is important to reexamine this assumption.[45]

"Thinking like a lawyer" is not a simple proposition, or one that comes easily to all.[46] For that reason, faculty sometimes find it necessary to work with thinking skills in their upper division classes, despite the collective hope that students master techniques of critical analysis in the first year. Often, however, faculty teaching advanced courses like state and local government can introduce complementary reading from the social sciences and political theory, or engage concurrently enrolled graduate students from other disciplines in class discussion about the different ways of thinking and knowing that may characterize their work.

Even more attention should be given to development of sophisticated, "expert" ways of thinking and knowing, however. There is a growing literature on expert knowledge and its implications for teaching and learning. For example, recent work by the National Research Council on "the science of learning"

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44. REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992). The MacCrate Commission report recognized increasing diversity in law practice, emphasized the continuum of legal education (from prior to law school, through law school, transition to the profession and law practice), articulated a comprehensive set of skills and values, and called for additional "skills" offerings in law school. The report's recommendations were subsequently incorporated in various respects into ABA accreditation standards. For additional insight on how the MacCrate recommendations have been implemented, see A. Torres, *MacCrate Goes to Law School: An Annotated Bibliography of Methods for Teaching Lawyering Skills in the Classroom*, 77 NEB. L. REV. 132 (1998).

45. A discussion of the role of teaching and learning about lawyering skills follows in Part II of this Article.

46. *See, e.g.*, Kristine Knapland & Richard Sander, *The Art and Science of Academic Support*, 45 J. LEGAL ED. 157 (1995); Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 WILLAMETTE L. REV. 314 (1997). D. Wangerin, *Training in "Legal Analysis": A Systematic Approach*, 40 U. MIAMI L. REV. 409 (1986); G. Strong, *The Lawyer's Left Hand: Non-Analytical Thought in the Practice of Law*, 69 U. COLO. REV. 759 (1998).

concluded that "experts have acquired extensive knowledge that affects what they notice and how they organize, represent, and interpret information in their environment. This, in turn, affects their abilities to remember, reason, and solve problems."[47] Inevitably, then, subject matter, contextual field, and thinking are linked. Insights about decision-making strategies by expert fire-fighters also demonstrates the remarkable power of mental models, the power of stories and analogues, and the benefits and risks of rational analysis and hyper-rationality.[48] Among many lessons, this work should alert us to the fact that emphasis on only one way of thinking may cripple rather than enhance our (and our students') powers to function wisely and effectively in a complex world.

Some legal educators have begun to name and grapple with these possibilities, particularly in the context of advanced clinical and seminar courses. Gary Blasi, among others, has sought to integrate ideas regarding lawyering expertise, cognitive science, and functional theory,[49] while Paul Brest and Linda Krieger have urged that considered attention be given to the development of professional judgment, drawing on models from other fields.[50] Important work in other forms of professional education may provide ideas for empirical research to undergird such efforts in our own world.[51]

The issue of expert thinking may also be addressed in conjunction with parallel efforts to grapple with the complex roles and responsibilities of lawyers. There is currently a strong and growing interest among thoughtful academics, lawyers, and policy makers in reconceptualizing the work of lawyers as "problem solvers," rather

47. JOHN BRANSFORD, ANNE BROWN, R. COCKING, EDS., HOW PEOPLE LEARNING: BRAIN, MIND, EXPERIENCE, AND SCHOOL 19 (National Academy Press, 1999).

48. *See* G. KLEIN, SOURCES OF POWER: HOW PEOPLE MAKE DECISIONS (MIT Press 1999).

49. *See* Gary Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL ED. 314 (1995). *See also* G. Marchant & J. Robinson, *Is Knowing the Tax Code All It Takes to Be a Tax Expert? On the Development of Legal Expertise*, *in* R. STERNBERG & J. HORVATH, TACIT KNOWLEDGE IN PROFESSIONAL PRACTICE: RESEARCHER AND PRACTITIONER PERSPECTIVES 3-29 (1999).

50. Paul Brest & Linda Krieger, *Symposium on the 21st Century Lawyer: On Teaching Professional Judgment*, 69 WASH. L. REV. 527 (1994);

51. A. ELSTEIN ET AL., MEDICAL PROBLEM SOLVING: AN ANALYSIS OF CLINICAL REASONING (Harv. Univ. Press, 1978).

than "hired guns" fixated on litigation.[52] A number of imperatives are contributing to this trend. For some, "problem solving," provides a powerful intellectual framework for approaching negotiation and other forms of dispute resolution.[53] For others, this reconceptualization is necessary to conform more closely with the civic sense of justice and the justice system as it should in fact work.[54] An alternative conceptual model is required as more and more professional practice takes place in transactional or organizational settings. An alternative formulation may also contribute to lawyers' abilities to regain a sense of professionalism and to convince the public at large of their contributions to society. Yet others would simply claim that "problem solving" is an accurate empirical portrayal of lawyers' work.[55]

Teachers and scholars of state and local government law should take to heart these developments. Even brief reflection on the ways of thinking that characterize outstanding public leaders and the lawyers who assist them confirms that more is required than simply the ability to read and analyze a case. Thinking in these contexts requires an ability to engage in "preventive lawyering,"[56] and to imagine constructive possibilities that take into account an unknown future and the complex nuances of a multi-faceted community's past. The possible conceptualization of the role of lawyers as "problem solvers" may also prove helpful in other ways. As previously discussed, students often lack a good appreciation for the nature and operation of government. Seeing themselves as "problem solvers"

52. P. Marion, *Problem Solving: An Annotated Bibliography*, 34 CAL. WESTERN L. REV. 537 (1998) (collecting sources), and other articles included in that symposium issue on "Conceiving the Lawyer as Creative Problem Solver."

53. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. Rev. 754 (1984); Carrie Menkel-Meadow, *Taking Problem-Solving Pedagogy Seriously: A Response to the Attorney-General*, 49 J. LEGAL EDUC. 14 (1999).

54. Janet Reno, *Lawyers as Problem-Solvers* (Keynote Address to the AALS), 49 J. LEGAL EDUC. 5 (1999).

55. REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 15-24 (1992) (citing problem solving as a fundamental skill that includes problem identification, development of alternative solutions and strategies, development and implementation of an action plan, and openness to new ideas and information).

56. L. BROWN, LAWYERING THROUGH LIFE: THE ORIGIN OF PREVENTIVE LAW (Rothman, 1986).

may serve as a useful point of departure in endeavoring to illuminate their prospective professional roles.

Introducing students to such a basic conceptualization of their future professional roles is not enough, however, in the complex context of state and local government law. It is critical to probe and clarify the distinctive roles of elected legislators, professional administrative personnel, and citizens in the dance of governance and to highlight distinctions between judgments regarding policy and law. Only against that backdrop can students begin to grapple with their own professional challenges and obligations. Few of our students have encountered in-depth exploration of ethical issues facing public sector lawyers as part of standard courses in professional responsibility, although there is a substantial body of rules, interpretations, and commentary on this important topic.[57] Public sector lawyers should be well-grounded in their understanding of their roles and responsibilities for another reason. As discussed above, they may be the keepers of core values and norms about good governance, as embodied by the rule of law, in times of uncertainty and volatile change. A firm understanding of their own roles and responsibilities may help them navigate turbulent waters in the future, and help them guide the public officials and foster the public good that is in important ways within their charge.

Teachers of state and local government law face challenges but also significant opportunities if they rise to the challenge of helping students develop more expert thinking and problem-solving strategies, and explore hard questions regarding lawyers' roles and responsibilities in the public sector. For example, extremely engaging case studies are available through noted schools of government or public administration and may be incorporated into law school courses at relevant points in the substantive development. Law faculty might also consider engaging in their own empirical research or participating in volunteer government service yielding

57. *See, e.g.*, Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473 (1998); Dawson, *Dangers of the "Revolving Door:" Disqualification of Attorneys Because of Prior Government Public Service*, 22 J. LEGAL PROF. 317 (1998). The Draft Restatement of the Law Governing Lawyers also addresses a number of important issues relating to ethical obligations of government counsel.

sophisticated case studies susceptible to incorporation into their classes. Expert practitioners from the field may be tapped for conversations or panels with students, or may be connected electronically to class discussions in cyberspace. Students may also be given writing assignments, as discussed below, that incorporate issues of professional ethics as well as substantive law.

E. Summary

In just discussed, there are a number of ways in which the course in state and local government law may well evolve substantively in the future, taking into account recent and emerging trends. Major attention to questions of federalism by the United States Supreme Court is likely to enhance the importance of state governments in the future and will perhaps result in a reexamination of current course emphases on local governments. Emerging social trends relating to demographics, globalization, advanced technology, and the economy likewise bear watching and will in diverse ways affect our teaching and scholarship in this field. We will also need to consider how best to emphasize governance (not only governments) in our courses and how best to help students develop more expert thinking and problem-solving abilities, and an appreciation for their prospective professional responsibilities and roles.

II. MODES OF TEACHING, MODES OF LEARNING

Some thoughtful faculty may conclude that while course coverage bears reflection and reconsideration, instructional pedagogy does not. Shaped as we are by those who taught us, we may at first emulate their example, changing our ways only in the face of unhappy experience or when growing confidence, a desire for novelty, or pure inspiration takes us farther afield.

There are, however, a number of imperatives that should drive us to give more careful and considered attention to how, as well as what, we teach. Like it or not, we should realize that our work in the classroom provides a powerful model of the profession and its operation to the students within our charge. The enactment of the field, through the pedagogical process (focusing on cases or problems, argumentation or cooperation) powerfully shapes our

students' imaginations and perceptions for good or ill. We might reexamine our pedagogy or educational philosophy because we believe we can be better, more effective and more engaging than we once have been. We may realize that our current generation of students have different levels of preparation or different approaches to learning. We may wish to do more with our courses, expanding our goals or coverage, but knowing that doing so will require compromises or changes of other sorts. We may simply find that we care deeply about the art and craft of teaching, and wish to enhance our practice as its own reward.

For those who would imagine their world as teachers of state and local government law anew, the following sections offer observations on pedagogy, performance assessment, and balance in our courses and in our own lives.

A. Effective Pedagogy, in Law and Beyond

Over the years the subject of pedagogy in American legal education has spurred a good deal of philosophical debate. Faculty members have commented on classic methods of instruction, including the "Socratic" method,[58] and the "case method."[59] Others have expounded the benefits of more recent innovations including the "problem method,"[60] and simulations.[61] Significant recent scholarship

58. *See, e.g.*, Philip Areeda, *The Socratic Method*, 109 HARV. L. REV. 911, 911 (1996); Peggy Davis & E. Steinglass, *A Dialogue About Teaching Socratic Method*, 23 N.Y.U. REV. L. & SOC. CHANGE 249 (1998); O. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113 (1999); R. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOYOLA U. CHI. L.J. 449 (1996).

59. J. Dente, *A Century of the Case Method: An Aplogia*, 50 WASH. L. REV. 93 (1974); A. Taslitz, *Exorcising Langdell's Ghost: Structuring a Criminal Procedure Casebook for How Lawyers Really Think*, 43 HASTINGS L.J. 143 (1991); S. Williams, Putting Case-Based Instruction in Context: Examples from Legal and Medical Education, Journal of the Learning Sciences, 2(4), 367-427 (1992).

60. Charles Calleros, *Variations on the Problem Method in First-Year and Upper-Division Classes*, 20 U.S. F. L. REV. 455 (1986); Cynthia Hawkins-Leon, *The Socratic Method-Problem Method Dichotomy: The Debate Over Teaching Method Continues*, 1998 B.Y.U. EDUC. & L.J. 1 (1998); S. Nathanson, *The Role of Problem Solving in Legal Education*, 39 J. LEGAL ED. 167 (1989); C. Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL ED. 654 (1984).

61. J. Feinman, *Simulations: An Introduction [to the Symposium on Simulations]*, 45 J. LEGAL ED. 469 (1995) (and following articles).

on the subject of teaching and learning has been contributed by those involved in clinical legal education and other forms of "skills" instruction.[62] Broad surveys have been conducted,[63] and empirical studies employed[64] in order to map the territory as understood by individual teachers and diverse students in various law schools. Recently, through the work of Gonzaga's Institute on Law School Teaching and others, important steps have been taken systematically to compile annotated bibliographies of the growing scholarship of teaching and learning in legal education, and to document ongoing experiments of law teachers at work in the field.[65] New work continues to emerge as law faculty grapple with using advanced technology[66] and explore the potential of collaborative work.[67]

This growing dialogue and resulting publications provide law teachers in state and local government law and other fields with a variety of insights from which to choose. To probe our unrecognized assumptions even more deeply, however, we would benefit from turning to important work on "the science of learning," being pursued

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62. For example, a variety of pedagogical strategies have been suggested for teaching legal research and writing. *See, e.g.*, *Discourse Politics: Legal Research and Writing's Search for Pedagogy of Its Own*, 29 NEW ENG. L. REV. 883 (1995); C. Rideout & J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35 (1994); D. Harris & S. Susman, *Toward a More Perfect Union: Using Lawyering Pedagogy to Enhance Legal Writing Courses*, 49 J. LEGAL ED. 185 (1999).

63. S. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 27-31 (1996); Stephen Sheppard, *The State of the Art: A Survey of Teaching Practices in the American Law School Lecture Hall*, *in* THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES, vol. II, ch. 57, 777-811 (1995).

64. *See* Elizabeth Mertz et al., *What Difference Does Difference Make*, 48 J. LEGAL ED. 1 (1998); Lani Guiner, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994).

65. GERALD HESS & STEVEN FRIEDLANDER, TECHNIQUES FOR TEACHING LAW (1999); J. Eager, *The Rights Tool for the Job: The Effective Use of Pedagogical Methods in Legal Education*, 1996-96 GONZAGA L. REV. 389 (1996). S. Harwell & S. Harwell, *Teaching Law: Some Things Socrates Did Not Try*, 40 J. LEGAL ED. 509 (1990); A. Torres & K. Harwood, *Moving Beyond Langdell: An Annotated Bibliography of Current Methods for Law Teaching*, 1994 GONZAGA L. REV. 1 (1994).

66. *See, e.g.*, A. Johnson, *Teaching Creative Problem Solving and Applied Reasoning Skills: A Modular Approach*, 34 CAL. WESTERN L. REV. 389 (1998); S. Saxer, *One Professor's Approach to Increasing Technology Use in Legal Education*, 6 RICH. J. LAW & TECH. 21 (2000).

67. C. Zimmerman, *"Thinking Beyond My Own Interpretation:" Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 ARIZ. ST. L.J. 957 (1999).

by researchers in education, psychology, and the cognitive sciences under the auspices of the National Research Council.[68] This extensive effort to document what is known about learning and what might be discovered through a structured program of future research bears more lengthy consideration, but a few key highlights are worthy of attention here.

Learning is a complex phenomenon that begins with the (often neglected) realities of prior knowledge, personal and cultural experiences.[69] Learning is more powerful if situated in a context rich in facts, with a framework of conceptual organization[70] that is augmented by the learner's own participation in extracting underlying principles to guide when, where, how and why to use new knowledge to solve new problems.[71] Learning does not correlate simply with time spent on task, but rather with the way time is used and the extent to which deliberative practice is employed.[72] Learning entails not only a stage of comprehending information, but also includes an active stage of integrating and transferring that knowledge to facilitate future learning.[73] Competence and expert performance result when problem representations are built upon well-organized underlying knowledge structures, and problem solvers monitor and modify their strategies as necessary.[74] Learning is facilitated in certain kinds of environments. Such environments are learner-centered (helping students to link previous knowledge to current learning tasks), knowledge-centered (linked to well-organized bodies of knowledge), assessment-centered (providing frequent feedback and a sound basis for evaluation), and community-centered (enhanced by shared norms and interaction).[75]

A number of lessons can be learned from this ongoing research. In many ways, legal education has been doing things right, for example

68. HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL 19 (John Bransford et al. eds., 1999).
69. *Id*. at 229.
70. *Id*. at 227.
71. *Id*. at 224
72. Bransford et al., *supra* note 68.
73. *Id*. at 223.
74. *Id*. at 226.
75. *Id*. at 119-42.

by stressing both analysis and synthesis of information and ideas and endeavoring to engage students actively in recitation during class. In other regards, however, we have much to strive for, including better appreciation for the importance of student background or prior learning in entering a given class, and more attention to the necessity for active learning particularly in later law school years. We also need to develop more meaningful opportunities for frequent feedback and more sophisticated approaches to evaluation of competence. We would likewise benefit from more attention to the development of community-centered learning environments in which class members and practicing professionals help establish and achieve high levels of accomplishment and competence. However daunting these challenges, it may be possible to make incremental progress in ways more fully sketched below.

B. Performance as a Measure of Learning.

Debates have raged for years about whether "performance skills" can and should be taught during law school, or left for development through on-the-job training in future years. The ABA's MacCrate Commission Report stimulated increased attention to this subject in many law schools around the country, intensifying the conversation about strategies that may be used in a variety of settings to aid students in developing "lawyering" skills.[76] Empirical work has also sought to map the skills required in professional practice and the extent to which those skills are developed during law school.[77] Recent action by nearly half of American jurisdictions to incorporate a performance segment on their bar examinations will undoubtedly raise the profile of initiatives in this dimension of law school

76. B. Baker, *Learning to Fish, Fishing to Learn: Guided Participation in the Interpersonal Ecology of Practice*, 6 CLINICAL L. REV. 1 (1999); J. Ogilvy, *Introduction to the Symposium on Developments in Legal Externship Pedagogy*, 5 CLINICAL L. REV. 337 (1999); A. Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y. U. REV. L. & SOC. CHANGE, 109 (1993-94); A. Torres, *MacCrate Goes to Law School: An Annotated Bibliography of Methods for Teaching Lawyering Skills in the Classroom*, 77 NEB. L. REV. 132 (1998).

77. Bryan Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL ED. 469 (1993); John Mudd & J. LaTrielle, *Professional Competence: A Study of New Lawyers*, 49 MONT. L. REV. (1988).

curricula even higher in days to come. For some state and local government teachers, a possible response to these developments will be to propose an additional advanced elective, perhaps involving student internship placements in state or local government or an advanced topics seminar focusing on drafting or policy reform. However intriguing these alternatives may be, others will wish or need to take a different tack.

Performance skills need not be addressed only in earmarked clinical offerings. Perhaps even more important, performance can be seen as a means of fostering or demonstrating learning, rather than only as a distinct set of technical skills. Consider, for example, my course objectives. I want to impart substantive knowledge on topics such as those addressed in part I of this essay. I also want to teach my students about creative thinking, political and organizational behavior, dispute resolution, decision-making, and collaboration. I want to enhance their understanding of how to plan and undertake research, since no course can touch on all the important issues in a rapidly evolving field. I want to bolster their abilities to communicate ideas effectively in oral and written form, to listen to and understand others' viewpoints. Which of these goals are substantive, which "merely" oriented to performance skills? I reject the dichotomy and see instead the need for active learning, using an evaluation strategy that encourages and fairly assesses competence on each of these key points.

My approach has been to try in each substantive unit to develop an assignment that provides an opportunity for active learning, an avenue for me (or student peers) to provide feedback, and, as appropriate, for me to provide some partial assessment of student performance on that aspect of the course. Early in the semester, students are assigned to attend a local council or board meeting and write a short memorandum about the differing roles and organizational dynamics observed. During the unit on annexation, they are assigned to write a "plain English" memorandum explaining annexation law to a lay legislator, assuring that they master the complex statutory text and recognize their obligation as teachers to explicate complex legal concepts in terms that non-lawyers can understand. This memorandum is subject to peer critique, and I evaluate both the revised memorandum and their critique of others'

work.

After instructing students on the complexities of research in the field and the rapid transition in certain facets of the law, I assign them to prepare a memorandum for a city manager relating to use of electronic mail by council members as they reach a tentative decision on a novel economic development initiative. This assignment provides an opportunity to explore both constitutional and statutory issues, including those related to public records and public meetings. It strengthens their understanding of the role and ethical obligations of city attorneys, and spurs exploration of evolving public policy and means of law reform.

I also require students to draft a clear and up-to-date model statute on nepotism, as a way of developing clearer understanding of issues relating to public employment, testing their ability to identify and define problems raised by patterns of personal relationships that transcend those of blood and marriage, driving home points regarding clear thinking and clear drafting, and building appreciation for the role of statutes as well as case law. In addition, I invite students to write a reflective essay on the value systems that underlie state and local government law,[78] and give them an opportunity to contribute to class discussion in ways that will be objectively evaluated by me, themselves, and their peers for extra credit. I also incorporate exercises on team problem-solving and a budget negotiation into class sessions at points when I believe such a change of pace will leaven their other work. I do not give a final examination.

This strategy serves to integrate objectives regarding substantive instruction with development of key performance skills, while incorporating more sophisticated approaches to pedagogy and a more comprehensive evaluation scheme. It also raises difficult questions of balance, a matter to which I will now turn.

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78. They are encouraged to think about this issue from a number of perspectives including the present (what value systems appear to underpin the operation of state and local governments as they currently exist? how are these value systems evidenced in governing law?), the future (what legal reforms are needed to bring the law more closely into conformity with or to foster relevant values?), and the role of members of the legal profession (does the legal profession currently foster civic engagement? are there ways in which lawyers can do so more effectively during their lifetime in the law?).

C. A Reasonable Balance: Teaching, Scholarship, and Service

The proposals I've suggested regarding experimentation with new pedagogical strategies raise difficult questions for many of us because they may require an intensive commitment of time. As our lives become increasingly harried, it may seem impossible to devote ourselves to such ventures, while also pursuing our love and commitment to other interests including those in scholarship and public or professional service, and maintaining a reasonable home life. Just as I've urged an integrated approach to providing substantive coverage, instruction in professional roles and responsibilities, and development of students' performance skills, so, too, do I suggest that we reflect on ways to integrate our own professional lives in pursuit of strong teaching, creative scholarship, and meaningful service.

Scholarship and teaching can be understood as closely connected. Through our scholarship, we serve as professional role models for our students in the pursuit of learning.[79] Disciplined inquiry regarding cutting-edge issues informs instruction so that students become educated not only in past developments but also explore those that are likely to emerge in later years. Scholarly work also illustrates active inquiry and continuous learning, providing an important example of the disciplined search for truth. Scholarship and teaching are related in other ways as well. Areas of scholarly inquiry may be identified through teaching, particularly in instances in which a lack of coherence is evident in an area being studied. If, despite strenuous effort, it is simply not possible to explain a topic in ways that are convincing and clear, it is very likely that the law and related social policy are confused or at war, and the field is perhaps fertile for more intensive scholarly work. As discussed earlier in this essay, there are numerous subjects which warrant careful inquiry because of legal developments and social forces now at work in the area of state and local government. Faced with a wealth of important possibilities, we might shape our scholarly agendas in ways that take into account the future of our society, and target our work toward subjects that bear on

79. *See* Judith Wegner, *Lawyers, Learning, and Professionalism: Meditations on a Theme*, 43 CLEV. ST. L. REV. 191 (1995).

our collective future, the challenges that will face our students, and society's greater good.

Traditional scholarship will undoubtedly continue to probe doctrinal developments of various sorts. The increasing prominence of political theory and legal history within the realm of constitutional scholarship will also influence our thinking about state and local government law, particularly insofar as it is shaped by understandings of the federal Constitution. State and local government law scholars would do well to focus with similar intensity on developments regarding state constitutions, their history, and their interpretation, recognizing that this complex arena should not be treated as a generic whole.

State and local government law scholars should also give serious consideration to the varied forms of scholarship available to us. In an acclaimed report published in 1990, Ernest Boyer, President of the Carnegie Foundation for the Advancement of Teaching, urged that faculty should consider the "full range of academic and civic mandates," and explore four forms of scholarship: The scholarship of discovery, the scholarship of integration, the scholarship of application, and the scholarship of teaching.[80] In Boyer's view, the "scholarship of discovery" encompasses "research" as traditionally understood, including the pursuit of knowledge for its own sake, a common paradigm in the field of medicine.[81] Much recent scholarship in the field of state and local government law takes the form of theoretical work deemed by many to be a pre-eminent form of the "scholarship of discovery." The "scholarship of discovery" might, however, take other forms, such as much-needed empirical work to determine what in fact is happening in the world outside the academy.[82] Significant empirical research is needed to determine how governments and governance operates in practice as a basis for proposing and evaluating various types of reforms. Research collaborations between far-flung colleagues in different jurisdictions, using similar protocols to guide empirical work, could provide

80. ERNEST C. BOYER, SCHOLARSHIP RECONSIDERED: PRIORITIES OF THE PROFESSORIATE 16-25 (1990, The Carnegie Foundation for the Advancement of Teaching).

81. *Id*. at 17.

82. We might be inspired by the superlative work of Robert Ellickson in this regard.

important insight into breaking developments, problems and possible solutions.

Boyer's second form of scholarship is the "scholarship of integration." This form of "scholarship" entails "giv[ing] meaning to isolated facts, putting them in perspective, . . . making connections across the disciplines, placing the specialties in larger context, illuminating data in a revealing way, often educating non-specialists, too."[83] In Boyer's view, the "scholarship of integration" addresses "connectedness" such as is necessary in interdisciplinary work, and the search for interpretations that yield larger intellectual patterns.[84] For scholars in the field of state and local government law, the scholarship of integration might involve connection of legal developments and ideas with insights from other disciplines such as the social sciences, political science, organizational behavior, and public administration.

Next is the "scholarship of application," in which, according to Boyer, the scholar asks "How can knowledge be responsibly applied to consequential problems? How can it be helpful to individuals as well as institutions? . . . Can social problems *themselves* define an agenda for scholarly investigation?"[85] In this arena, a scholar uses her special field of knowledge, and her professional work, to undertake "serious, demanding work, requiring the rigors—and the accountability—traditionally associated with research activities."[86] Such work can involve the integration of discovery and application of ideas, perhaps tied to the development of public policy proposals, or evaluation of their implications. Students, too, can be research collaborators in such ventures insofar as they engage in coordinated "service-learning" projects requiring active exploration of real-world issues facing state or local governments.

Boyer's fourth form of scholarship is the "scholarship of teaching." For Boyer, this form of scholarship begins with what the teacher knows, then examines how knowledge is not only transmitted, but transformed and extended through the act of

83. *Id*. at 18.
84. *Id*. at 19-21.
85. BOYER, *supra* note 80, at 21-23 (emphasis in original).
86. *Id*. at 22.

teaching.[87] Since Boyer's death, this concept has been significantly developed and re-conceptualized as "the scholarship of teaching and learning." Scholars affiliated with the American Association for Higher Education and the Carnegie Foundation for the Advancement of Teaching are actively exploring this concept with colleagues around the country.[88] Law faculty who take to heart the possibility that the course in state and local government law provides, in microcosm, a setting in which to explore issues facing legal education as a whole could also engage more actively in this form of scholarship. For example, we may be able to explore and document how students can more effectively come to understand statutes, how problem-based teaching stimulates learning, how collaborative work or instruction using advanced technology can improve students' understanding of professional norms, and how understandings of professional roles and responsibilities can best be achieved.

D. Summary

As just discussed, an effort to re-imagine the course in state and local government should not stop with consideration of possible substantive course coverage. Pedagogy plays a critical role in depicting the subjects we teach, assisting students in achieving mastery, and shaping how time is spent. Important new insights about teaching and learning are being developed by our colleagues in law, as well as colleagues who study the new "science of learning." If we stop and reflect about our course objectives, we may well see that coupling substantive goals with approaches to assessing performance would lead to more effective and more interesting courses in our field. Finally, fresh thinking about our courses and pedagogy may stimulate us to reexamine our own efforts to balance scholarship,

87. *Id*. at 24.

88. *See* Lee Shulman, *Taking Learning Seriously*, CHANGE 11-17 (July/August 1999); Pat Hutchings & Lee Shulman, *The Scholarship of Teaching: New Elaborations, New Developments*, CHANGE 11-15 (September/October 1999); Lee Shulman, *Course Anatomy: The Dissection and Analysis of Knowledge Through Teaching*, *in* P. HUTCHINGS, ED., THE COURSE PORTFOLIO (AAHE, 1998). Examples of the scholarship of teaching in legal education are cited earlier in this section. Educators in other fields are actively exploring this form of scholarship as well. *See, e.g*., S. Williams, *Putting Case-Based Instruction in Context: Examples from Legal and Medical Education*, J. LEARNING SCIENCES 2(4), 367-427 (1992).

teaching, and professional service. In doing so, we might move more decisively to embrace varied forms of scholarship, including not only the scholarship of discovery but also the scholarships of integration, application, and teaching.

III. SEEING THE BIG PICTURE: LESSONS FOR LEGAL EDUCATION

Often, both as teachers and as scholars, we discipline ourselves to focus quite narrowly on designing a particular course or crafting a particular article or book. Such close focus may, however, limit our capacity to perceive looming challenges or embrace potential opportunities that have yet to come directly into our field of view. We, of anyone, should be alert to the importance of "thinking globally," while "acting locally," particularly given our field of study. Thus, as a byproduct of our efforts to envision the state and local government law course of the future, we might consider and map a richer and more interesting landscape for teaching and learning in legal education as a whole.

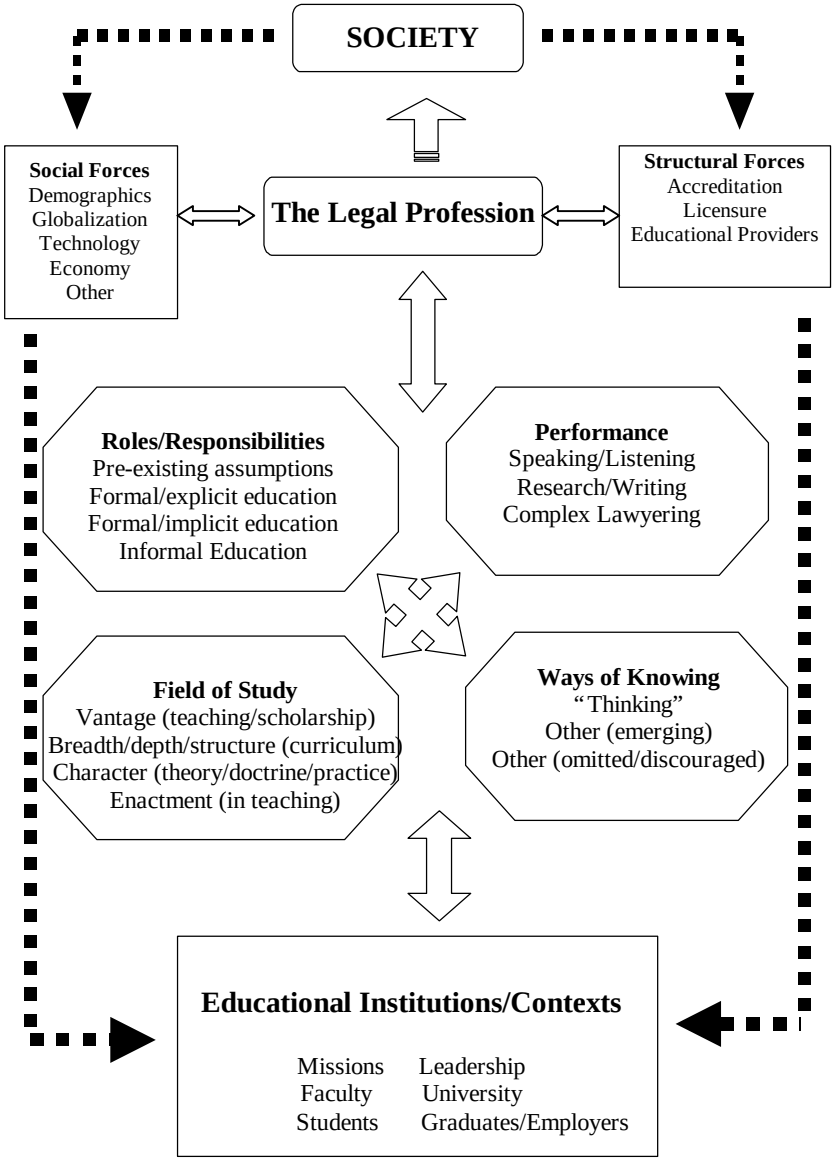
The schematic appended to this essay depicts many of the concepts developed earlier, with a few emendations appropriate to the change in operative scale. At the core are four fundamental dimensions that characterize law study as well as other forms of professional education: the field of study, the core epistemology (way of knowing), the skills in performance expected of graduates, and the roles and responsibilities they will be expected to fulfill. At the base are the educational institutions and contexts in which communities of teachers and learners gather, the varied laboratories in which preparation for the professions take place. Across time, social and structural forces impede or bring about change and evolution in legal education. In the world outside, the legal profession and society more generally experience needs and articulate expectations that may influence or be influenced by professional education and the future professionals who emerge either well or ill-prepared for the challenges to come.

This depiction may serve to clarify the relationships among some of the varied ideas included in this essay, a point of reference and a conceptual map. Issues discussed in Parts I.A-C relate most significantly to the "field of study" set forth in the southwest

quadrant, and to the social forces bringing winds of change from the west. Those raised in Part I.D concern ideas depicted in the northwest and southeast. The discussion in Part II.B relates in large part to the northeastern quadrant, while Parts II.A and C refer back to pedagogical aspects of the field and the complex issues associated with our underlying institutions and our overarching social and professional responsibilities. A discussion of the forces to the east relating to the structural forces at work in our universe would require extensive elaboration, and so is not attempted here. Suffice it to say that the powerful forces of change that have resulted in calls for privatization of traditional public services and fundamental reform of our health care system are fast upon us, and may prove the impetus for massive restructuring of higher education. The suggestions for re-imagining the course in state and local government presented here are modest in comparison to those that will be thrust upon us if we lack the will to attend more seriously to the quality of legal education and the necessity for change.

CONCLUSION

Let me close this essay with a challenge. We, like our colleague Dan Mandelker, can be adept and visionary leaders who imagine a better world and devote our lives as educators to making it come to pass. We are privileged to teach and learn about state and local government law, a critically important subject in a world where devolution of governmental responsibilities continues and forces for change press upon us from many sides. We are responsible for educating the leaders of the future, who continue to look to legal education as a means of preparing for their future roles in government service or in sectors in which they can wield influence for the public good. We are the trustees of our own time and talent, and have at our disposal the opportunity to undertake scholarship and public service that can address the critical issues of our time. May we hold ourselves accountable for meeting these challenges and for helping our students prepare to do the same.


SOCIETY
Social Forces
Demographics
Globalization
Technology
Economy
Other
The Legal Profession
Structural Forces
Accreditation
Licensure
Educational Providers
Roles/Responsibilities
Pre-existing assumptions
Formal/explicit education
Formal/implicit education
Informal Education
Performance
Speaking/Listening
Research/Writing
Complex Lawyering
Field of Study
Vantage (teaching/scholarship)
Breadth/depth/structure (curriculum)
Character (theory/doctrine/practice)
Enactment (in teaching)
Ways of Knowing
"Thinking"
Other (emerging)
Other (omitted/discouraged)
Educational Institutions/Contexts
Missions
Faculty
Students
Leadership
University
Graduates/Employers