

FEDERAL CONSTITUTIONAL LAW  
AND AMERICAN LOCAL GOVERNMENT

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M. DAVID GELFAND

**FEDERAL CONSTITUTIONAL LAW  
AND AMERICAN LOCAL GOVERNMENT**

**A Treatise for City Attorneys,  
Public Interest Litigators, and Students**

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To the women who have taught me so  
much and from whom I still have  
so much to learn.

## PREFACE

This treatise was researched and written over a two-year period. Since this was an unusually peripatetic period for me, I did my work at three institutions on two continents. As a result, I have more than the usual number of assistants, secretaries, colleagues, and administrators to thank for their help. I would like to share the blame for errors of omission and commission with the persons listed below, but, unfortunately, I must accept full responsibility myself.

My very special thanks go to Dr. Robert Vexler, who conducted extensive research relating to several of the chapters, and to Donna Petrucelli, who provided extremely perceptive editorial criticism of nearly every chapter. I very much appreciate the valuable research assistance of Dan Zimmerman, Elizabeth Cronin, James Kennedy, Robert Webber, Stacy White, Jeanine Mioton, Joan Wachna, Tom Constantine, Dale Wyatt, Anne Segrest, Blair Batson, Noel Johnson, and Carole Levy. I also want to express my thanks to Lisa Shelton, who provided essential research assistance for an earlier article of mine which formed the kernel for this work.

I am very grateful for the support and encouragement provided by Dean Paul Verkuil of Tulane Law School, in New Orleans, Louisiana; Dean Robert Fleming of Pace University Law School, in White Plains, New York; and Warden Michael Brock of Nuffield College, Oxford, England. The support staffs at these three institutions deserve special praise. Anita Walker, Administrative Assistant of the Center for Legal Studies on Intergovernmental Relations, consistently fought off chaos in a cheerful, efficient manner. Judy Caporale, Sherry Bachus, Stephanie Jones, Helen Carbonneau, and Trude Hickey patiently typed and retyped draft after draft of the manuscript. I also appreciate the very useful editorial comments from colleagues at Columbia, Miami, N.Y.U., Pace, and Tulane Law Schools; city attorneys and public interest litigators in several cities; and The Michie Company editorial staff.

## PREFACE

Last, but certainly not least, I want to thank my wife, Mary, for her calmness and self-sacrifice.

M. DAVID GELFAND

## INTRODUCTION

During the last five years, many municipal attorneys, public interest litigators, and law students have repeatedly approached both the author and the publisher of this treatise to ask questions regarding federal constitutional law as it applies to local government. This book attempts to answer these and similar questions in a manner that will be intelligible, interesting, and useful to all three audiences. The necessary balance between practical and academic approaches has not always been easy to achieve.<sup>1</sup> I do not expect this to be the last book my readers consult when researching this subject, but I hope it will usually be the first.

Attorneys who represent village, town, city, or county governments are regularly called upon by public officials to provide immediate, yet definitive opinions on the constitutional propriety of particular governmental actions. After *Monell v. Department of Social Services*<sup>2</sup> and its progeny,<sup>3</sup> ill-considered

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1. I have endeavored to present the cases in this book as objectively as possible. For my more critical approach to many of them, see Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980's*, 21 B.C.L. REV. 763 (1980) (discussing my theories of the community self-determination, public participation, and service provider aspects of local government).

2. 436 U.S. 658 (1978). In *Monell*, the Supreme Court ruled that local governments were "persons" under 42 U.S.C. § 1983 (Supp. IV 1980) (quoted in note 5 *infra*) and therefore could be sued for their federal constitutional violations. The *Monell* Court thereby overruled the portion of *Monroe v. Pape*, 436 U.S. 658 (1978), which had held that municipalities were totally immune from suit under § 1983.

3. See, e.g., *Maher v. Gagne*, 448 U.S. 122 (1980) (§ 1983 liability for violations of federal statutory rights); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (§ 1983 suits for constitutional or statutory violations can be pursued in state courts); *Owen v. City of Independence*, 445 U.S. 622 (1980) (municipal liability under § 1983 for constitutional violations even if officials act in "good faith"). *But see* *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981) (municipal immunity from punitive damages in § 1983 actions); *Middlesex County*

## FEDERAL CONSTITUTIONAL LAW

responses to such inquiries can expose the local government involved, and its officials,<sup>4</sup> to liability for substantial damages in actions under 42 U.S.C. § 1983.<sup>5</sup> Furthermore, city and state agencies can be held liable for substantial attorney's fee awards<sup>6</sup>

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*Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (no § 1983 liability for violation of a federal statute which contains a "sufficiently comprehensive" remedial scheme); *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981) (no § 1983 liability unless the federal statute creates an enforceable right and does not provide an exclusive remedy for that right). *See generally* § 6-2 *infra*.

4. Only officials performing judicial or legislative functions, or conducting related activities, have absolute immunity from damages in § 1983 actions. *See, e.g.*, *Stump v. Sparkman*, 435 U.S. 349 (1978) (judges); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislators). *See also* Supreme Court of Va. v. Consumers Union, 446 U.S. 719 (1980). Other officials have qualified, or "good faith" immunity. *See, e.g.*, *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (governor and state executive officers); *Wood v. Strickland*, 420 U.S. 308 (1975) (school board members); *Pierson v. Ray*, 386 U.S. 547 (1967) (police officers). *See also* *Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982). *See generally* § 6-3 *infra*.

5. Section 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (Supp. IV 1980). It first became law as part of the Civil Rights Act of 1871, Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871). Its federal court jurisdictional counterpart is 28 U.S.C. § 1343(3) (Supp. IV 1980).

6. Awards are made pursuant to the Civil Rights Attorney's Fees Awards Act, which provides, in relevant part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1976 & Supp. IV 1980).



## INTRODUCTION

in these constitutional cases,<sup>7</sup> even if the damages awarded are minimal.<sup>8</sup> Therefore, lawyers working as advisors or litigators for public agencies<sup>9</sup> simply cannot afford to be uninformed about the federal constitutional issues analyzed in this book.

This treatise should also serve as a basic reference source for lawyers in private practice whose clients periodically seek injunctive, monetary, or other relief from local governments for constitutional violations. The availability of attorney's fees has dramatically increased the amount of this litigation. I hope that law students in introductory and advanced constitutional law and federal litigation courses will find the direct, topical approach of this treatise useful for study and reference purposes. State and local officials with more limited legal training and public administration students may also find portions of this book helpful.

Unlike traditional constitutional treatises, which are organized on the basis of specific constitutional provisions — Equal Pro-

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7. See, e.g., *Hutto v. Finney*, 437 U.S. 678 (1978) (rejecting Eleventh Amendment defense to attorney's fee award against state in case based on constitutional violation). *Maher and Maine*, see note 3 *supra*, also allow attorney's fee awards against a state for a wide range of § 1983 cases involving violations of federal statutes. See also *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1975) (no Eleventh Amendment barrier to attorney's fee award against state agency in federal suit under Title VII of the 1964 Civil Rights Act); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 67 (1980) (no Tenth Amendment barrier to attorney's fee award under Title VII). Local governments cannot assert the Eleventh Amendment as a defense in any type of case. See *Monell v. Department of Social Servs.*, 436 U.S. 658, 690 n.54 (1978); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). Nor does it shield state or local officials sued in their individual capacities. See *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974).

8. See § 6-5(A) *infra*.

9. Though this treatise discusses issues that are also relevant to state government activities, it concentrates primarily upon cases involving local governments.

## FEDERAL CONSTITUTIONAL LAW

tection, Due Process — this treatise is structured around problem areas the reader is likely to encounter in his or her daily practice — land use, elections, employee relations. After all, ordinances are drafted and constitutional litigation is initiated in response to specific problems of public governance. Within each topic, however, I have presented the relevant cases essentially in chronological order, to show how the law in that particular area has developed. For those who prefer the more traditional organizational pattern, the index includes references based on constitutional provisions.

Limitations of time and space have forced me to concentrate primarily upon United States Supreme Court opinions, especially those issued within the last 15 years. However, lower federal court and state supreme court cases are mentioned when there is sparse Supreme Court authority on an important issue. The analysis of major cases generally includes extensive quotations of key passages from the majority opinions, especially the relevant tests. Also, the discussions of cases decided during Chief Justice Burger's tenure include the voting pattern by members of the Court and often include descriptions of important concurring and dissenting opinions. This is necessary because many crucial cases turn on five-four or four-one-four,<sup>10</sup> or even one-four-four,<sup>11</sup> votes. In these volatile situations, a slight change in the facts or in the membership of the Court could allow the rationale of a prior concurring or dissenting

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10. In both *Milliken v. Bradley*, 418 U.S. 717 (1974) (discussed in § 3-2(C) *infra*), and *National League of Cities v. Usery*, 426 U.S. 833 (1976) (discussed in §§ 1-4(B), 2-5(B) *infra*), the concurrences limit the sweep of the majority opinions.

11. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (Powell, J., announcing judgment of the Court). *Bakke* is discussed in § 2-2(A) *infra*.

## INTRODUCTION

opinion to capture majority support.<sup>12</sup> For similar reasons, I have tried to highlight open questions specifically identified by the Court or suggested in dicta.

Though many organizational patterns are possible, the chapters in this book present topics in an order which reflects the representative and service provider functions of American local government. Thus, the first chapter discusses constitutional issues related to local government elections, and the second considers public employment relations. Chapter 3 analyzes constitutional cases relating to three key local government services. Chapter 4 is devoted to the local government regulatory activity — land use planning — which has generated the most constitutional litigation in recent years, and chapter 5 discusses more general regulatory activities related to public order. Since most of the cases reviewed in this book are premised upon 42 U.S.C. § 1983, the final chapter examines the many procedural issues which arise in § 1983 cases. Other cases, involving challenges by state or local governments to federal regulatory statutes, under the “state sovereignty” principle articulated in *National League of Cities v. Usery*,<sup>13</sup> are discussed at appropriate points.<sup>14</sup>

Of course, every topic related to local government or to constitutional law cannot be included. For example, taxation and debt financing are not covered here because the important issues in these fields relate to state law provisions, which are

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12. Compare *City of Mobile v. Bolden*, 446 U.S. 55 (1980) with *Rogers v. Lodge*, 102 S. Ct. 3272 (1982) (discussed in § 1-4(A) *infra*), and compare *Goss v. Lopez*, 419 U.S. 565 (1975) with *Ingraham v. Wright*, 430 U.S. 651 (1977) (discussed in § 3-2(D) *infra*).

13. 426 U.S. 833 (1976).

14. See §§ 1-4(B), 2-5(B) *infra*.

## FEDERAL CONSTITUTIONAL LAW

adequately examined elsewhere,<sup>15</sup> rather than to federal constitutional law. Furthermore, federal statutory law, constitutional criminal procedure, and state constitutional provisions are generally excluded from this book. Where relevant, however, there are references to other treatises and articles that cover these topics.

I have tried to facilitate research within this book by various devices. When a related case or topic is discussed in another chapter, the cross-reference is given by section and subsection number; when it is described within the same chapter, the cross-reference is by footnote numbers. Constitutional provisions are quoted in full and treatises are cited in full the first time they appear in a particular chapter, so readers are not forced to refer to earlier chapters unnecessarily.

Since this treatise will be supplemented regularly it is extremely important that I maintain a dialogue with its readers. Please let me know which sections prove helpful to you and which need to be expanded or contracted. I promise to do my best to comply with your requests.

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15. See, e.g., J. HELLERSTEIN & W. HELLERSTEIN, *CASES AND MATERIALS ON STATE AND LOCAL TAXATION* (1978); Gelfand, *Comparative Urban Finance: Are the London and Brooklyn Bridges Falling Down?* 55 *TUL. L. REV.* 651 (1981); Gelfand, *Seeking Local Government Financial Integrity Through Municipal Debt Ceilings, Tax Limitations, and Expenditure Limits: The New York City Fiscal Crisis, Proposition 13, and Beyond*, 63 *MINN. L. REV.* 545 (1979).

## TABLE OF CONTENTS

*Preface.*

*Introduction.*

### CHAPTER 1

#### ELECTIONS AND VOTING RIGHTS

- § 1-1. Overview.
- § 1-2. Local Referenda.
- § 1-3. The One-Person-One-Vote Standard: Malapportioned Election Districts and Franchise Restrictions.
  - § 1-3(A). Election Districts of Nearly Equal Population.
  - § 1-3(B). Restrictions on the Local Electoral Franchise.
- § 1-4. Fair and Effective Representation: Attacks on Electoral Arrangements That May Dilute the Voting Strength of Racial Minorities.
  - § 1-4(A). Constitutional Cases.
  - § 1-4(B). Cases Under the Voting Rights Act.

### CHAPTER 2

#### PUBLIC EMPLOYMENT RELATIONS

- § 2-1. Overview.
- § 2-2. Hiring, Firing, and Job Benefits.
  - § 2-2(A). Equal Protection.
  - § 2-2(B). Due Process.
  - § 2-2(C). Contract Clause.
  - § 2-2(D). First Amendment.
- § 2-3. Conditions for Maintaining Public Employment.
  - § 2-3(A). Restrictions Upon Partisan Political Activities.

## FEDERAL CONSTITUTIONAL LAW

- § 2-3(B). Restrictions Upon Other Political Activities.
- § 2-3(C). Continuing Residency Requirements.
- § 2-3(D). Maintaining Professional and Other Qualifications.
- § 2-3(E). Restrictions Upon Dual Employment.
- § 2-3(F). Required Disclosure of Financial and Other Information.
- § 2-3(G). Grooming Requirements.
- § 2-4. Public Sector Unionization.
  - § 2-4(A). Employee Rights and Union Rights.
  - § 2-4(B). Rights of Rival Unions and Nonunion Employees.
- § 2-5. Congressional Regulation of Local Government Employment Relationships.
  - § 2-5(A). Applicable Federal Statutes.
  - § 2-5(B). Constitutional Challenges to Federal Regulation of Local Government Employment.

## CHAPTER 3

### PROVISION OF SERVICES BY LOCAL GOVERNMENT

- § 3-1. Overview.
- § 3-2. Public Schools.
  - § 3-2(A). Local School Financing on an Unequal Basis.
  - § 3-2(B). Total Denial of the Education Service to a Segment of the Population.
  - § 3-2(C). Public School Districts and Desegregation Remedies.
  - § 3-2(D). Public Schools and Student Discipline.
  - § 3-2(E). Other Constitutional Issues Involving Public School Students or Teachers.

## TABLE OF CONTENTS

- § 3-3. Police.
  - § 3-3(A). Recruitment and Training.
  - § 3-3(B). Pay and Unionization Policies.
  - § 3-3(C). Internal Organization and Relationship With the Public.
- § 3-4. Jails and Prisons.
  - § 3-4(A). General Prison Conditions.
  - § 3-4(B). Prisoner Associational Activities.
  - § 3-4(C). Prisoner Communications With Persons Outside the Prison.
  - § 3-4(D). Access by Prisoners to Legal Assistance and to the Courts.

## CHAPTER 4

### LAND USE REGULATION

- § 4-1. Overview.
- § 4-2. The Federal Courts and Residential Exclusionary Zoning.
  - § 4-2(A). Single-Family Zoning and the Discriminatory Intent Requirement.
  - § 4-2(B). Deference to Local Growth Control Programs.
  - § 4-2(C). Restrictive Standing Rules for Challenging Local Zoning Practices.
  - § 4-2(D). Exclusionary Zoning by Referendum.
  - § 4-2(E). Family Autonomy as a Constitutional Constraint.
  - § 4-2(F). Conclusions.
- § 4-3. The State Courts and Residential Exclusionary Zoning.
- § 4-4. Commercial Zoning, Public Nuisance Actions, and “Adult” Businesses.

## FEDERAL CONSTITUTIONAL LAW

- § 4-4(A). Restrictive Commercial Zoning.
- § 4-4(B). Public Nuisance Actions.
- § 4-5. Restrictions on Signs and Billboards.
- § 4-6. Historic Preservation Programs.
- § 4-7. Inverse Condemnation Through Rezoning.

## CHAPTER 5

### POLICE POWER REGULATIONS TO MAINTAIN PUBLIC ORDER

- § 5-1. Overview.
- § 5-2. Curfew Ordinances.
- § 5-3. Loitering and Vagrancy Laws.
- § 5-4. Registration Systems and Identification Cards.
- § 5-5. Regulation of Commercial and Noncommercial Canvassing and Solicitation.
  - § 5-5(A). House-to-House Solicitation and Canvassing for Commercial Purposes.
  - § 5-5(B). House-to-House Solicitation and Canvassing for Political, Charitable, or Religious Purposes.
  - § 5-5(C). Solicitation in Other Special Public Places.
- § 5-6. Regulation of Demonstrations and Meetings in the Public Forum.
  - § 5-6(A). Overview.
  - § 5-6(B). Licensing and Permit Requirements for Use of the Public Forum.
  - § 5-6(C). Regulation of Marches and Demonstrations.
  - § 5-6(D). Regulation of Noise Levels and Audience Reactions.



TABLE OF CONTENTS

CHAPTER 6

BRINGING AND DEFENDING CONSTITUTIONAL  
LITIGATION UNDER § 1983.

- § 6-1. Overview.
- § 6-2. Municipal Liability Under § 1983.
  - § 6-2(A). Municipalities Are “Persons.”
  - § 6-2(B). Governmental and Quasi-Governmental Actions That Can Lead to Liability Under § 1983: The “Under Color of” State Law Requirement.
  - § 6-2(C). Deprivation of Rights “Secured by The Constitution and Laws.”
  - § 6-2(D). Remedies for § 1983 Violations.
- § 6-3. Immunity of Public Officials From Personal Liability in § 1983 Actions.
  - § 6-3(A). Absolute Immunity.
  - § 6-3(B). Qualified Immunity.
- § 6-4. Procedural Aspects of § 1983 Claims.
  - § 6-4(A). Pleading Burdens.
  - § 6-4(B). Causation Issues.
  - § 6-4(C). Justiciability Issues in Federal Court Actions.
  - § 6-4(D). Applicability of State Procedural Rules.
- § 6-5. Attorney’s Fees Awards.
  - § 6-5(A). When Awards Are Appropriate.
  - § 6-5(B). Calculating Fee Awards.

*Table of Cases.*

*Index.*