

# The University of Chicago Law Review

---

Volume 77

Winter 2010

Number 1

---

© 2010 by The University of Chicago

## **Reassessing the State and Local Government Toolkit**

This Issue of the *Law Review* brings together the articles presented at a two-day conference on state and local government held at The University of Chicago Law School in June 2009. As the “toolkit” metaphor invoked in the conference title suggests, participants were invited to explore the full range of mechanisms that states and localities can use to spur economic development, provide services to their constituents, and otherwise pursue their ends as economic, social, and political actors. While one high-profile tool, eminent domain, has been the subject of intense scholarly scrutiny, we hoped that the conference would broaden the academic conversation to encompass some lower-profile, but equally potent, entries in the state and local policy menu. Consistent with those aspirations, the articles cover a wide array of topics and represent a variety of methodological and theoretical perspectives. Examining the policy space open to states and localities is an especially timely undertaking, as the recent financial meltdown has placed severe budgetary constraints on subnational governments while fueling popular resistance to increased taxation. State and local jurisdictions now offer venues for creatively confronting some of the most longstanding and enduring dilemmas of governance in the context of these tightening constraints.

There is no free lunch; public goods and services are always costly. The various techniques discussed at the conference for providing and funding such goods and services impose both financial and nonfinancial costs. Selecting among them necessarily raises questions of both distribution and efficiency. One recurrent question is whether it is “fair” to use regulation to impose costs—or confer benefits—on some designated group smaller than the entire taxpaying class. If so, which group, and for what reasons? Another perennial quandary is whether state and local governments are better able to achieve their

chosen ends by privatizing costs or whether they should concentrate on improving public delivery of desired services. Slippages occur in both public and private arrangements, so it is difficult to know which method works best and in what context. Nonetheless, the underlying mode of analysis remains largely the same: How do households and businesses respond to the rules governments put in place? And can the rules be changed to make their responses accord better with the avowed aims of the government agency propounding the rules?

Although many of the articles take certain governmental goals as a given, several articles raise the prior issue of how, and by whom, those goals are chosen. These articles also confront another dilemma endemic to discussions of state and local government: what is the appropriate decisionmaking scale and who decides that question? Tiebout's defense of local power assumes that this choice is ordinarily made in an environment free of externalities. But with local governments in close physical and pecuniary proximity, externalities—both positive and negative—are omnipresent. One group or another must come out on top, but we may be unsure whether a particular outcome advances or retards social welfare. There are no shortcuts to the analysis. It will not do, for example, to justify an allocation of decisionmaking power to the larger jurisdiction on the ground that the smaller group is represented in the whole. This argument will surely ring hollow to those beleaguered groups who know they always will be outvoted in the larger arena. James Madison's ever-present fear that majority rule will oppress minority interests extends to actions undertaken by state and local governments. But oppression is a game that anyone can play (or try to play); minorities can also pursue self-interested goals at the expense of everyone else. Evaluating the relative potential for misbehavior in all states of the political world is a tricky if not impossible endeavor. But, difficult or not, that inquiry becomes ever more salient as devolution of authority continues apace with the rise of tax increment financing districts, community benefit agreements, business enterprise zones, and other sublocal entities.

Finding the proper level of government to decide a particular question is just one of many hard questions faced by public planners and private citizens alike. Any complex method of decisionmaking also has a profound temporal element. Devices for entrenching, and overcoming entrenchment, are as important at the local level as the filibuster is to the United States Senate. There is a further question of whether sound decisionmaking requires government transparency or government confidentiality. Most likely it needs both at different stages of the process. And when the entire system is looked at as a whole, just who are the real beneficiaries of governmental actions? And who really pays the costs of the actions? Open discussion could lead to

excessive delay if it allows blocking coalitions to form. Conversely, lack of public transparency may serve short-term political ends by defusing opposition. At the same time it can give knowledgeable insiders extraordinary powers which they may not use wisely or fairly.

There is much more that might be said about the rich and diverse set of articles collected here, but we will step aside and let the reader make his or her own judgment. Given the multifaceted nature of our subject, we deem it a mark of the conference's success, and a testament to the enduring complexities found within the state and local toolkit, that the results defy easy summarization.

This Introduction would not be complete without noting that neither the conference nor this Issue of the *Law Review* would have been possible without the hard work of the editors of *The University of Chicago Law Review*, the financial support of The John M. Olin Foundation, the Sarah Scaife Foundation, Microsoft Corporation, and Visa U.S.A., and, above all, the tireless efforts of our Law and Economics program administrator, Marjorie Holme. We are truly grateful for their support.

Julie A. Roin  
Lee Anne Fennell  
Richard A. Epstein

