

Service Provision and the Study of Local Legislatures: A Response to Professor Zale

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Local legislatures are fascinating sites of institutional experimentation, which legal scholars are only just beginning to describe, much less fully understand. Kellen Zale’s recent Article, *Part-Time Government*, provides an investigation into one particular question of institutional design—whether legislatures operate part-time or full-time—and offers lawmakers valuable insights into how to make that decision.¹ In particular, Zale develops an incisive distinction between those functions that may go altogether unexercised as a result of the part-time legislature’s diminished capacity, such as constituent services and other political acts of representation, and those powers that are redistributed to other actors, especially the executive branch.² More broadly, the Article continues to build a growing body of scholarship detailing the constitutional design of local government, an important shift in a field that has historically emphasized the intergovernmental relationships of local government over those governments’ internal structures.³

But as this scholarship develops, it is important not to lose sight of one of local government law’s most traditional claims: that local government’s special (though hardly only) role in our federalist system is as a direct service provider. The federal government, the states, and cities, counties, and school districts all set education policy, but only the last, local set actually employs the teachers. This specialization in function bears with it structural consequences. At the local

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¹ Kellen Zale, *Part-Time Government*, 80 OHIO ST. L.J. 987, 987–95 (2019).

² *Id.* at 1030–41.

³ Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 575 (2017).

level, the balance between regulation and service provision as modes of governance and policymaking tilts sharply towards the latter, with accompanying effects on the role of the legislative branch.

Zale titles her Article “Part-Time Government.” But the Article focuses entirely on part-time *legislatures*—and just because the city council works part-time, that doesn’t mean that teachers, police officers, or sanitation workers do. Zale’s easy identification of the government with the legislature is common, but, I argue, mistaken. Not only is service provision local government’s most traditional role, it is a highly *governmental* role. By defining government as legislation, Zale overlooks much of what makes local government distinctive and powerful. This Response insists on re-centering service provision, even when studying the structure of local government.

Pairing *Part-Time Government* with an understanding of cities-as-service-providers offers another benefit: a window into two methodological models used when studying local institutional design. The choice to employ legislators as full-time workers, part-time workers, or volunteers presents a classic bureaucratic question: how to hire staff. For traditional city services, many scholars believe that local governments have the incentives to make this kind of bang-for-your-buck choice relatively efficiently. Zale proceeds—implicitly, and for big cities, probably correctly—on the assumption that these incentives for efficiency do not extend to this particular issue of institutional design. In the absence of such incentives, municipalities need a helping hand in thinking through how to structure their legislatures. This is one model of studying local institutional design. But if the political dynamics that discipline city service provision extend to certain questions of local government structure, then scholars need not instruct cities on the answers to those questions. Under this second model, scholars should be learning from local governments’ choices. Identifying this methodological dichotomy, I hope, will allow for more careful identification of when and where each model best applies.

I. LOCAL LEGISLATIVE DESIGN AND PART-TIME LEGISLATURES

Local legislatures are strange creatures. They take a wide variety of forms and generally defy intuitions about legislatures developed by reference to the federal Congress. Studying their structure not only expands one’s sense of what a legislature could or should be, but also reveals much about how local governments choose to function.

By comparison, state legislatures—which scholars hold up as diverse and distinctive⁴—hew closely to the federal model. Like Congress, forty-nine states

⁴Grace E. Hart, *State Legislative Drafting Manuals and Statutory Interpretation*, 126 YALE L.J. 438, 444 (2016) (“[I]t is difficult to speak of ‘state legislatures’ as a whole because they are marked by tremendous diversity.”); see Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1329 n.33 (2016) (referencing scholarship analyzing diversity in state legislatures).

use a bicameral model, Nebraska being the sole exception.⁵ All states other than Nebraska use partisan elections to choose their legislatures.⁶ All fifty states, like the federal government, elect their representatives from districts—and the use of multi-member districts in state legislatures is increasingly rare.⁷ All states have some system of separation of powers, with the legislature independent and distinct from the governor’s office.⁸ State constitutional law sometimes diverges in stark, fascinating ways from the federal model,⁹ but when it comes to legislative design, the Madisonian framework is alive and well in statehouses.

Not so for local governments. While the range of institutional choices before a local government is not infinite, it is vast. Local legislators are elected at-large and from districts—sometimes both in the same chamber.¹⁰ Elections can be partisan or nonpartisan.¹¹ Local legislatures range in size from New York City’s fifty-one-person Council—large enough to have familiar institutions like a Speaker and committee chairs—to as few as three members, where there is little scope for internal hierarchy or specialization.¹²

Some features of local legislative structure would be, from a state or federal perspective, rather outré. In my own research, I have explored the long transition of local governments away from bicameralism; the last bicameral local legislature only became unicameral in 2014.¹³ Proportional representation—that boogeyman of federal election law¹⁴—has been used by local governments big

⁵ Kim Robak, *The Nebraska Unicameral and Its Lasting Benefits*, 76 NEB. L. REV. 791, 792 (1997).

⁶ *Id.*

⁷ Thomas F. Schaller, *Multi-Member Districts: Just a Thing of the Past?*, RASMUSSEN REPS. (Mar. 21, 2013), http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_thomas_f_schaller/multi_member_districts_just_a_thing_of_the_past [https://perma.cc/BHN5-WYF7].

⁸ Ethan Wilson, *Separation of Powers and Legislative Immunity*, NAT’L CONF. OF ST. LEGISLATORS (May 2015), <http://www.ncsl.org/research/ethics/separation-of-powers-and-legislative-immunity.aspx> [https://perma.cc/XPU3-7BQV].

⁹ See, e.g., Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135 (1999) (discussing positive rights in state constitutional law).

¹⁰ See, e.g., *City Council*, CITY OF BOS., <https://www.boston.gov/departments/city-council> [https://perma.cc/5DDD-BVHK] (“The council is made up of four at-large councilors that represent the entire City, and nine district councilors that represent specific areas of the City.”).

¹¹ See Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 385.

¹² *Compare Council Members and Districts*, N.Y.C. COUNCIL, <https://council.nyc.gov/districts/> [https://perma.cc/B2Q7-NBSB], and *What We Do*, N.Y.C. COUNCIL, <https://council.nyc.gov/about/> [https://perma.cc/G4H2-DQP8], with *City Council*, CITY OF WATERVLIET, N.Y., <https://www.watervliet.com/city/council.htm> [https://perma.cc/B2CD-RX4A]. A related variable is the ratio of representatives to population.

¹³ Noah M. Kazis, *American Unicameralism: The Structure of Local Legislatures*, 69 HASTINGS L.J. 1147, 1149 (2018) [hereinafter Kazis, *American Unicameralism*].

¹⁴ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019); see also Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 820 (2005) (describing the

and small, although now only Cambridge, Massachusetts retains the system.¹⁵ Many jurisdictions even guarantee seats for minority parties or independents, regardless of their success at the polls.¹⁶ Separation of powers is relatively rare: most local governments use a council-manager form that intermingles legislative and executive functions, and local governments commonly play a role in quasi-judicial land use decision-making.¹⁷ In New England, direct participatory democracy abounds, in the form of town meetings.¹⁸

The design of the local legislature offers local governments a plethora of options, each rooted in its own take on democratic values and its own permutation of accountability, expertise, participation, and efficiency. Yet legal scholarship has barely catalogued the distinctive features of local legislatures, much less comprehended their dynamic interplay with each other.

In this context, Kellen Zale has made a valuable contribution to the study of local legislatures, with an investigation of one specific question of institutional design: whether legislatures operate part-time or full-time. (States, like local governments, are split on this question.)

Admittedly, this may not be much of a choice at all for the majority of municipalities. About half of municipalities have fewer than 1000 residents.¹⁹ At that scale, it would be fiscally onerous to pay three, five, or seven full-time salaries just to the local city council. Take the small New Jersey borough of Hinnella, population 860 (chosen for no particular reason other than its small-but-

“[s]pecter of [p]roportional [r]epresentation” in gerrymandering literature and jurisprudence).

¹⁵ Douglas J. Amy, *A Brief History of Proportional Representation in the United States*, FAIRVOTE, https://www.fairvote.org/a_brief_history_of_proportional_representation_in_the_united_states [https://perma.cc/XQ6Q-QYAT].

¹⁶ See, e.g., Sean Collins Walsh, *Philadelphia City Council Could See a Seismic Shift in the 2019 Election. Here's What You Need to Know*, PHIL. INQUIRER (Nov. 1, 2019), <https://www.inquirer.com/news/philadelphia-city-council-2019-election-candidates-2019-11-01.html> [https://perma.cc/864E-NPRC] (noting that the Philadelphia charter guarantees seats for independents or minority-party candidates).

¹⁷ *Moreau v. Flanders*, 15 A.3d 565, 579 (R.I. 2011) (“[T]he separation of powers doctrine is a concept foreign to municipal governance.”).

¹⁸ *Cities 101—Forms of Local Government*, NAT'L LEAGUE CITIES, <https://www.nlc.org/resource/cities-101-forms-of-local-government> [https://perma.cc/J4YW-UCVS]. Many local governments, like some states, also use the electoral forms of direct democracy: the initiative and the referendum. See Gerald Benjamin, *New York IS a Referendum State—In Local Government*, ROCKEFELLER INST. GOV'T (Apr. 25, 2017), <https://rockinst.org/blog/new-york-referendum-state-local-government/> [https://perma.cc/5M3Y-6BYZ] (noting that while referenda are a minor part of New York state governance, they are a major part of New York local governance).

¹⁹ Zale, *supra* note 1, at 1016 (citing U.S. CENSUS BUREAU, 2012 CENSUS OF GOVERNMENTS—ORGANIZATION (Sept. 2013), <https://www.census.gov/data/tables/2012/econ/gus/2012-governments.html> (click on Table 7. Subcounty General-Purpose Governments by Population-Size Group and State: 2012) [on file with *Ohio State Law Journal*]).

reasonable size).²⁰ In 2014, its total general appropriations were \$922,714, and its mayor and five-person council appear to have been unpaid.²¹ Had they been paid the same (low!) salary as the municipal clerk—\$33,500—and assuming no cuts in services, paying the legislature would immediately constitute over fifteen percent of the city budget.²² Taxpayers, rightly, aren't going to stand for that.

But for larger cities, the choice between a full-time and part-time legislature is a significant one. As Zale demonstrates, the part-time legislature may be far less diverse: few jobs provide the pay and flexibility to spend half a week working for a nominal stipend. If paired with a full-time executive branch, a city's choice to use a part-time legislature may also reallocate power from the legislature to the mayor, city manager, or bureaucracy. In asking, "Where does that power go?" Zale poses precisely the right question.²³

Laudably, she also declines to offer a uniform answer—even at the rough level of 'large cities should do this, small cities should do that.' Institutions and history matter here, and what's good for the goose is not always good for the gander. A criterion that Zale does not discuss—corruption—is illustrative. On the one hand, part-time legislatures are constantly at risk of mixing public and private interests: a recipe for self-dealing and conflicts of interest.²⁴ But by paying legislators a salary—especially if there isn't all that much legislative work to be done—a municipality might create a new pool of plum jobs, far outside the civil service system, for political machines to allocate. Alternatively, limiting outside employment might force underpaid council members to supplement their income through illicit means. Guessing which effect will predominate requires deep local knowledge about the culture and practices of local officials and political parties and the issues before the local legislature.

Rather than offer a blanket endorsement of full-time or part-time legislators, Zale provides a framework for thinking through these issues. She identifies city councils (particularly those elected from districts) as more likely to focus on local concerns and to represent a diversity of interests as compared to the executive branch, and as more democratically accountable but less expert and efficient than city managers and other staff (who are often the beneficiaries of a weakened council).²⁵ Readers might not necessarily agree on each step of the analysis. Zale claims, for example, that part-time legislatures spare us from

²⁰ *ACS Demographic and Housing Estimates, Hi-Nella Borough, New Jersey*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?g=1600000US3432220&tid=ACSDP5Y2014.DP05&hidePreview=false&vintage=2018&layer=place&cid=DP05_0001E [<https://perma.cc/SFF9-DKPD>].

²¹ BOROUGH OF HI-NELLA, BOROUGH OF HI-NELLA 2015 BUDGET EXPLANATORY STATEMENT 3a, [http://hinellaboro.org/download/i/mark_dl/u/1779306/10516573/Hi-Nella%20Borough%20Budget%20\(2015\).pdf](http://hinellaboro.org/download/i/mark_dl/u/1779306/10516573/Hi-Nella%20Borough%20Budget%20(2015).pdf) [on file with *Ohio State Law Journal*].

²² *See id.*

²³ *See Zale, supra* note 1, at 987.

²⁴ *See Roderick M. Hills, Jr., Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 THEORETICAL INQUIRIES L. 113, 115 (2005).

²⁵ Zale, *supra* note 1, at 1042–43.

more politically effective NIMBYism,²⁶ but I'd wager that in most municipalities, there is little room for growth on that score. Still, Zale offers a useful articulation of how to think through the question, with plenty of room to add one's own variables as needed.

Thus, in this response, I'd like to move away from the particular merits or demerits of part-time legislatures, to a larger point about how to study local legislatures. Analyzing local institutional design, including local legislative design, must account for local governments' traditional role as service providers. Analyzing local legislative structure without that context risks misunderstanding the ways local governments make policy—the ways they govern. It also risks overlooking important theories about local political incentives that, though crafted with an eye to executive-branch service provision, might in some cases illuminate legislative design. Zale's Article shows, in two ways, the necessity and payoffs of considering service provision, even when investigating local legislatures.

II. PART-TIME GOVERNMENT OR PART-TIME LEGISLATURES? THE SIGNIFICANCE OF LOCAL SERVICE PROVISION

Service provision goes missing from Zale's understanding of local government from the very start of the Article: its title. Zale titles her Article "Part-Time Government," but it is really only about part-time legislatures. This is not an oversight by Zale, but rather a choice about how to view the import of her findings. Certainly, the title's conflation of part-time legislatures with part-time governments is not an aberration. The Article opens with the statement, "Part-time government is the rule, not the exception, for cities in the United States."²⁷

But as Zale herself recognizes throughout the piece, just because the legislature meets part-time, doesn't mean that the executive branch is so limited. Mayors might be part-time (especially in weak mayor systems where they are essentially one council member among many), and even city managers can be part-time, though I would guess that is less common.²⁸ But a city with a part-time legislature, like Dallas, doesn't stop collecting trash three months of the year. Government, in the service-provision-sense that the average citizen experiences it, continues on year-round.

What Zale seems to mean is that *policymaking*—as apart from service provision, constituent services, or even what she describes as "nuts and bolts" legislation setting fee schedules and keeping the city running—happens part-

²⁶ *Id.* at 1048.

²⁷ *Id.* at 987.

²⁸ See, e.g., Erik Yabor, *Meigs Council to Interview City Manager Candidate*, THOMASVILLE TIMES-ENTERPRISE (Mar. 20, 2019), https://www.timesenterprise.com/news/local_news/meigs-council-to-interview-city-manager-candidate/article_b0c1ac2d-94e0-58c0-b482-d0a6563e4e3c.html [<https://perma.cc/XE6H-D5VL>] (describing hiring for a part-time city manager).

time. There is a sense that big-picture, innovative lawmaking is the essential legislative act and even the essential governmental act. This isn't unique to Zale; in fact, it is common among leading local government scholars. Richard Schragger, for example, in describing the increasingly aggressive state preemption of local laws (particularly worker and civil rights protections), has characterized such preemption as a "hostility to city government."²⁹ This is precisely the same identification of local lawmaking with local government: for the most part, conservative states have denied local governments regulatory power, not withdrawn their authority to provide services. Similarly, Gerald Frug, in decrying the weaknesses of local governments, has repeatedly called for the creation of new legislatures as the proper response.³⁰

At the federal level, it's probably correct to treat legislation—or more broadly, regulation—as the fundamental governmental act. Congress determines how much you pay in taxes and how much you get back in social welfare programs; it defines what civil rights are protected and what are not; it chooses who may become an American and who is excluded. Without slighting the federal bureaucracy in the least, management of the Postal Service or the Forest Service simply has a less sweeping effect than the federal legislature's power to define the fundamental legal framework under which the nation operates.

But the same may not be true for local governments. Compared to Congress, local legislatures are at a decided disadvantage in the lawmaking process. There's the Supremacy Clause, first and foremost. But local governments also suffer from problems of fragmentation and fiscal competition that impose practical constraints on local policymaking. As a result, local legislation is often better at sparking change than entrenching it: what Heather Gerken has called "dissenting by deciding."³¹ In contrast, local governments hold the driver's wheel for service provision. That's reflected in basic employment numbers: while the federal government employs 2.7 million civilian workers, local governments employ over 10.5 million people.³²

Zale's Article, by highlighting the co-existence of part-time legislatures with full-time administration, offers a chance to explore that disjuncture, and a new lens through which to look at cities' outsized role in service provision and constrained lawmaking capabilities. Without weighing in on the very big question of when local governments should be empowered to legislate,³³ I'd like

²⁹ Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1166 (2018) (emphasis added).

³⁰ See Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1790–91 (2002); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 294–95 (1993).

³¹ Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005).

³² ROBERT JESSE WILLHIDE, U.S. CENSUS BUREAU, ANNUAL SURVEY OF PUBLIC EMPLOYMENT & PAYROLL SUMMARY REPORT: 2013, at 2 (2014).

³³ Volumes could be filled on the twin questions of home rule and preemption. For one recent discussion, see generally Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954 (2019).

to make the narrower claim that we shouldn't give short shrift to the importance, and the *governmentality*, of ordinary service provision.³⁴

Those millions of local employees include police officers, who quite literally wield the power of life and death in daily interactions with the citizenry. For most Americans, police are government at its most sovereign, exercising the state's monopoly on legitimate violence.³⁵ Those local employees also include teachers, entrusted to guide and care for the most vulnerable and impressionable among us: children. On a weekday, many young children whose parents work full-time will spend more waking hours being cared for by their local government than by their parents. This is government at its most intimate.

Local governments (and individual public employees) have immense discretion over how to exercise these powers, and that discretion goes well beyond questions of efficiency.³⁶ A local police force that shakes down its citizens for fees and fines, or that targets communities of color for enforcement and the use of force, has made a choice about whom the state serves and whom it does not.³⁷ Even for routine, day-to-day issues of administration—like a school's choice to emphasize standardized test prep or add a music class, or an individual teacher's choice of discipline for a misbehaving student—there are clear policy implications in how services are provided.

Even outside the fundamentally governmental, and fundamentally local, functions of policing and education, other local services have similar dynamics. For over two million Americans living in public housing, a local government is their landlord (notably, that local government, a public housing authority, often lacks a "legislature" altogether, being governed instead by a "board"). In most senses, this is merely managerial service provision: housing authorities need to keep the heat running and the roof from leaking, to take out the garbage, and to do so cost-effectively. But a housing authority also makes difficult choices about when to evict a family and when to let them stay in their house—evicting a grandmother for her grandchild's drug activity is an aspect of service provision, but it's high-stakes policy, too.³⁸

³⁴In this sense, I agree with Gerald Frug's statement that city services should not merely be seen as "objects of consumption." I disagree, however, with his depiction of current local practice as primarily embodying that understanding of city services. Even where residents "buy in" to an exclusionary town and its high-quality services, they buy in to an exclusionary *government*, not, as Frug sometimes puts it, a "country club." Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 28–29 (1998).

³⁵See Noah M. Kazis, *Special Districts, Sovereignty, and the Structure of Local Police Services*, 48 URB. LAW. 417, 449–50 (2017). Incarcerated individuals, those at the border, and those engaged in military operations also deal with the hard core of state sovereignty.

³⁶See generally MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY* (30th ann. ed. 2010).

³⁷*Cf.* Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016) (describing racial subordination from legal police conduct).

³⁸See DEP'T OF HOUS. & URBAN DEV., NOTICE PIH 2015-19, GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAS) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS 2 (Nov. 2015),

Moreover, these decisions are governmental not only in the sense that they involve important questions of public policy, but also because they have public forms of participation and accountability. Voice, not exit, is often the primary tool for change.³⁹ And the extent of that participation can be vast. As I've noted elsewhere, each of Chicago's 279 police beats holds a monthly meeting, with an average of twenty-six residents attending each of those meetings.⁴⁰ This is substantially more (and deeper) participation than takes place before the Chicago City Council.⁴¹

True, there are also local functions, like picking up the trash, that are essentially substitutes for private market provision—here, there can be important distributional questions (tax-funded services may be more progressive than a pure fee-for-service model), but generally efficiency is the goal, and the ideological stakes are limited. Overall, though, local governments embed ideological and political questions of the highest stakes into the day-to-day provision of public services.

Local governments might be well-served by keeping their legislatures at work full-time. They might be better off spending more time legislating, and more of that time enacting what Zale calls “innovative, positive externality-producing policies.”⁴² Zale is right to ask those questions. But asking about the proper extent of local legislative activity shouldn't take anything away from the importance—and the “government-iness”—of the service provision that goes on 24/7 in most cities. Even a city that engaged in no legislation whatsoever would very much be a government, engaging the public and setting broad policies on matters of common concern.

Many local governments have part-time legislatures. They don't—not even as a rhetorical shorthand—have part-time governments. Suggesting otherwise

<https://www.hud.gov/sites/documents/PIH2015-19.PDF> [<https://perma.cc/WWH6-2TAK>] (“[I]n most cases, PHAs . . . have discretion to decide whether or not to . . . evict a household if a tenant, household member, or guest engages in certain drug-related or certain other criminal activity on or off the premises.”).

³⁹ The threat of exit is always present in the background, of course; local governments' small size and large number makes that threat far more credible and constraining than it is for higher levels of government. See Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 476 n.20 (1991). Even so, voice is often the more prominent and direct tool shaping the countless individual decisions that are required for service provision; at the micro level, the decision-making is more political and less analogous to the market.

⁴⁰ Kazis, *American Unicameralism*, *supra* note 13, at 1207–08.

⁴¹ In 2017, the Chicago City Council began allowing one half-hour of public testimony per month. It did so only in response to a lawsuit. Reporting suggests that the city's aldermen were not listening closely, if at all. John Byrne & Hal Dardick, *Chicagoans Speak at City Council Hearing, But Did Aldermen Listen?*, CHI. TRIB. (July 26, 2017), <https://www.chicagotribune.com/politics/ct-chicago-city-council-public-comment-met-2017-0726-story.html> [<https://perma.cc/4GYT-EUCE>].

⁴² Zale, *supra* note 1, at 1051.

imports a federal vision of government, with the legislature at its center, to a local context where it does not belong.

III. CITY STRUCTURES AS CITY SERVICES?: EFFICIENCY AND INTENT IN LOCAL INSTITUTIONAL DESIGN

Thinking about local governments as service providers also offers a new window into Zale's methodological approach to studying local government structure. Zale's project in *Part-Time Government* is to "develop a set of normative criterion [sic] by which to judge the part-time model."⁴³ Such criteria are presumably needed because, at least in some set of cities, the *wrong* choice has been made. Zale suggests that large cities with part-time legislatures are the likeliest candidates for having picked incorrectly, in part because they never bothered to adapt their legislative design to their increased size and complexity (this seems true).

Methodologically, this type of project embeds an assumption: that local governments *need* external guidance on how to design their own internal structures. That assumption, I argue, does not always hold. It doesn't for questions of local service provision, and in certain contexts—perhaps including the choice to have a part-time legislature—questions of institutional design may not be so different from questions of service provision.

Thus, Zale's Article offers an opportune moment to ask: When do local governments have the capacity and incentives to choose the best institutional structures for themselves? And in turn, when should legal scholars help local governments make choices about their own institutional form, and when instead should we learn from the choices they have made?

To develop this dichotomy,⁴⁴ I begin with a comparison of local legislatures to other city services—a comparison that is particularly simple when dealing with part-time and full-time legislatures. The question of part-time status arises for all kinds of local employees. For example, small towns routinely decide whether to hire professional firefighters or instead rely on a volunteer fire squad (volunteer firefighters, like part-time legislators, have outside jobs and receive little-to-no compensation for their civic service). But most local government law scholars would assume that any given town has made a sensible-enough choice about how to provide fire services for itself.

⁴³ *Id.* at 991.

⁴⁴ Like many dichotomies, this is an artificially false choice. Scholarship can, and does, look at these questions from both angles. But the prominence of each perspective varies from piece to piece—or even from argument to argument. Local government law is uniquely confronted with an immense diversity of institutional designs, so it must be thoughtful about responding to that diversity. This dichotomy is meant to highlight the methodological choices and assumptions at play.

For a direct city service like fire protection, we assume a modicum of efficiency. The twin forces of Tiebout competition⁴⁵—in which mobile individuals sort themselves into the local governments of their choice, avoiding inefficient packages of taxes and services—and “homevoter”-dominated local politics⁴⁶—in which anxious homeowners ensure that no local policies run any risk of reducing the value of their home—combine to discipline local decision-making. These models have their critics, to be sure, and there are important ongoing debates about the magnitude of their effects, but there is at least some empirical evidence supporting them.⁴⁷ At a minimum, the model demonstrates that in a fragmented region, local governments have meaningful incentives to provide residents and businesses with the services they want in an efficient manner, and generally do so.

For these basic city services, therefore, there isn’t tremendous need for legal scholars to weigh in on the pros and cons of, say, paid firefighting. If anything, legal scholars can learn from the choices local governments themselves make.⁴⁸ Voters and elected officials may not get every decision right, from either an empirical or normative perspective, but they have reasons for what they do, and those reasons can be revealing.

This raises the interesting question: Does this type of argument apply to local institutional design, and not just to city services? And if so, when?

After all, the City Council is from one perspective just a special kind of city service. It is one more budget line paid for out of property taxes, albeit one which in turn affects all the others. Neither mobile housing consumers nor resident homevoters should want to pay local legislators if those taxes don’t buy anything of value—as the earlier look at the Hi-Nella, New Jersey budget makes clear. Likewise, if a particular institutional structure is guaranteed to lead to bad outcomes—say, corruption, or wasteful spending—small jurisdictions should have ample incentives to avoid them.⁴⁹

⁴⁵ See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

⁴⁶ See generally WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* (2001).

⁴⁷ Darien Shanske, *Above All Else Stop Digging: Local Government Law as a (Partial) Cause of (and Solution to) the Current Housing Crisis*, 43 U. MICH. J.L. REFORM 663, 679 (2010) (“[E]mpirical evidence is widely believed to confirm the existence of the Tiebout dynamic more generally (at least to some extent).”); Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227, 235 (2014) (finding that most empirical studies generate results “that are at least consistent with the homevoter theory” in the suburban context).

⁴⁸ Robert Ellickson, for example, has pointed out that the lack of municipal banks is not due to a complete legal prohibition on their creation, but rather due to voter behavior—the implication being that voters generally have some reason for not seeing their cities as proper banks. Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1572–73 (1982).

⁴⁹ See David Schleicher, *I Would, but I Need the Eggs: Why Neither Exit nor Voice Substantially Limits Big City Corruption*, 42 LOY. U. CHI. L.J. 277, 285 (2011).

The extreme (entirely implausible) case makes clear that theories of local efficiency should at least sometimes apply to institutional design. Few households would choose to live in a town where, say, a single individual, chosen by lot, was given total, permanent, and unchecked power over all aspects of local government—and homevoters would surely mobilize against any such change to preserve their home values. But the logic extends to realistic changes to government structure as well.

If neighbors are willing to rise up against the slightest off-chance of a low-density development causing poor drainage, to use one of William Fischel's famous examples, they should also care about who decides about drainage.⁵⁰ Presumably, maximizing the expected performance of their local government is what local voters *think* they are doing when they periodically debate changes to their form of government.⁵¹ If only as a derivative of their incentives for efficient service provision, local governments have incentives for efficient institutional design.⁵²

Moreover, local governments are, at least sometimes, perfectly capable of understanding and manipulating government structure to achieve their desired substantive outcomes. The history of voting discrimination is replete with conscious and effective efforts to use government structure, such as at-large districts, to achieve downstream effects.⁵³ Shouldn't, in some instances, local governments likewise be able to effectively manipulate government structure to improve city services, or to keep taxes low?

Yet it is equally clear that in most cases, on most questions of institutional design, the political "market" can't and doesn't function efficiently at all. There's too much uncertainty about the likely effects of any particular change in any particular place. Even political scientists can't reach consensus on these issues. To take just one routine example from the legislative context, local

⁵⁰ FISCHEL, *supra* note 46, at 9.

⁵¹ For example, Framingham, Massachusetts, the largest town in the state, replaced its representative town meeting system with a council-mayor system in 2017. According to the Charter Commission, the town had convened charter commissions in 1925, 1971, 1992, and 1996. FRAMINGHAM CHARTER COMM'N, FRAMINGHAM CHARTER 2016/2017 (Jan. 2017), <https://www.framinghamma.gov/DocumentCenter/View/25763/Final-City-Charter-2017---Printed-Version> [<https://perma.cc/F3XZ-7BYL>]. That same year, neighboring Newton, Massachusetts rejected a proposal to shrink the size of its city council in a close and hard-fought vote. *See Charter Commission*, CITY OF NEWTON, MASS., <http://www.newtonma.gov/gov/chartercommission/default.asp> [<https://perma.cc/R2A3-QBL5>]. This is not a comprehensive review of that year's government reforms even in the state of Massachusetts, much less the nation.

⁵² *See, e.g., Oscar Gamble, Group Seeks to Amend Norristown Charter, Bring Back Mayor*, TIMES HERALD (Feb. 13, 2016), https://www.timesherald.com/news/group-seeks-to-amend-norristown-charter-bring-back-mayor/article_5ff4ab67-0cb7-58e9-974e-23760b2bfab6.html [<https://perma.cc/B8QV-G4DE>] (reporting that advocates for re-establishment of position of mayor cited diminished property values, high taxes, and poor service provision as arguments for structural change).

⁵³ *Rogers v. Lodge*, 458 U.S. 613, 627 (1982).

governments must choose how many council members to have. Political scientists for many years believed in the “law of $1/n$,” which suggests that larger legislatures will inefficiently spend more money.⁵⁴ But more recent research indicates that whether this “law” holds may depend on five separate factors and that, in some cases, switching to a larger legislature can promote efficient spending.⁵⁵ Those drafting local charters may have their own beliefs about the effect of legislative size on spending (not to mention on partisanship, land use decision-making, and all the rest), but there is little reason to think that belief is accurate or reliable.

Put differently, voters and homebuyers may not be able to perfectly quantify the impacts of a property tax levy for the local schools, but they are perfectly positioned to get the gist of it and make an informed judgment. It’s not clear they can do the same for structural questions, where the causal chain is much more attenuated and the issues more abstract. Additionally, taxes and spending are adjusted annually, if not more often; institutional designs are changed only infrequently. Even if they were once efficient, they will not necessarily remain so.

Indeed, there are many aspects of local institutional design that self-evidently have nothing to do with efficiency—like the town meeting. Town meetings are fairly widespread among smaller municipalities in New England, but they are essentially nonexistent outside New England. This can’t be explained through stories about efficiency: it doesn’t pass the smell test that New England has town meetings because New Englanders are so good at participatory politics and everyone else so bad. Town meetings remain in New England because of history, political culture, and status quo bias, not institutional optimization. In such cases, the question is not what New England’s use of the town meeting teaches us (it tells us primarily where the town meeting was invented). The main question is what effect the town meeting has on New England.

This discussion sets up two contrasting perspectives from which to study local government structure. In the first, the assumption is that local governments are structured so as to further some functional purpose and that governments’ design choices actually achieve those ends. If so, scholars can study those choices and discern what they reveal about local governments and local communities. In the second, the assumption is that local governments don’t accurately assess the likely outcomes of a given institutional design (or don’t

⁵⁴Barry R. Weingast et al., *The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics*, 89 J. POL. ECON. 642, 650–54 (1981).

⁵⁵David M. Primo & James M. Snyder, Jr., *Distributive Politics and the Law of $1/n$* , 70 J. POL. 477, 478 (2008). The five factors are: “the degree of ‘publicness’ and congestion in the goods being distributed, the curvature of the benefit function, the degree of subsidy from the central government, deadweight costs of taxation, and the size of the legislature before the change.” *Id.*; see also Per Pettersson-Lidbom, *Does the Size of the Legislature Affect the Size of Government? Evidence from Two Natural Experiments*, 96 J. PUB. ECON. 269, 269 (2012) (finding opposite effect from “law of $1/n$ ” in some empirical contexts).

update their assessments in response to changed conditions). Under this model, scholars should help them make better choices.

Part-Time Government leans strongly toward the second perspective. Zale's Article offers a guide to local governments about how to choose whether to operate part-time or full-time (or to states on how to structure the choice). Although it identifies the many forces that push many cities towards part-time legislatures (including budget constraints and limited home rule authority leaving legislators with little to do), this is not the Article's ultimate focus.⁵⁶ In my own scholarship, in contrast, I've often prioritized the first perspective. In writing about local unicameralism, for example, rather than ask how cities should have structured their legislatures, I asked what about local government drove voters to choose a different legislative model for their cities and towns than for their states and the federal government.⁵⁷ Likewise, in writing about policing, I have drawn conclusions about the perceived role of municipalities from the structure of police services, not suggested how policing ought to be assigned to municipalities or special districts.⁵⁸

Both of these angles on local government are valuable. Moreover, the use of each often reflects the underlying facts being studied. Unlike part-time or full-time status, *every* local government has adopted a unicameral legislature. Bicameralism was quite common in the 19th century, so this represents a steady shift, uniformly in one direction, over a period of many decades. It's easier to imagine that local governments have chosen an institutional design intentionally, and gotten the results they sought, where so many governments, one after another, considered the same question and reached the same answer. Likewise, the lack of special police districts is a case of remarkable institutional convergence.⁵⁹ Zale, in contrast, suggests that at least some big-city legislatures have simply failed to update their internal design and are ready to switch to full-time status; this is a story of inertia rather than convergence, and a place where a normative scholarly intervention is well-placed.

Thus, I offer this dichotomy not to suggest that one or the other approach is preferable, or even that one can be pursued entirely independently from the other. Rather, my goal is to make explicit assumptions that have been implicit. We can't always learn from local institutional choices. Sometimes, what would be data are just noise: a mess of haphazard variation and the best guesses of (perhaps part-time!) local officials. But viewing local legislatures as a special case of city services offers a reminder that local governments have powerful incentives towards efficiency. Now and again, those incentives—paired with local knowledge—might determine the shape of local structures. When studying

⁵⁶ Zale, *supra* note 1, at Part II.B.2.

⁵⁷ Kazis, *American Unicameralism*, *supra* note 13, at 1180–1202.

⁵⁸ *Id.* at 1185–86.

⁵⁹ Convergence does not always imply efficacy, though it often might. Policies can cascade through their own momentum, and at moments of broad dissatisfaction with the status quo, there may be widespread shifts to the most available alternative, regardless of the merits of that alternative. I am grateful to Clayton Gillette for this point.

local institutional design, scholars must be careful to ask who—the outside observers and the people on the ground—should be learning from whom.

IV. CONCLUSION

Understanding the internal structures of local governments is not likely to be a quick or easy project. Scholars and courts have had more than two centuries to figure out the federal constitution—a single, shared document that barely changes—yet there’s still plenty of debate about what it means and how it works (some of it even novel). There are more than 90,000 local governments, of all shapes and sizes, and they are always evolving. We need all the help we can get to identify and analyze each feature of their own constitutional designs.

In *Part-Time Government*, Kellen Zale adds one brick to that wall, identifying and analyzing an important feature of local legislatures. (Zale’s earlier Article on the compensation of city councils is another.⁶⁰) That is, by itself, immensely productive. But as the study of local institutional design continues—as we develop a firmer and more precise descriptive understanding of local government—we can begin to ask some larger questions about the form of local government. This Response suggests that in doing so, we should not lose sight of local governments’ traditional role as service providers—nor of the political theories generated by those studying local public service provision. Even as local legislatures must be understood as important in their own right, they must also be understood in their proper—in many ways, junior—relationship to local governments’ powerful executive branches.

⁶⁰ See generally Kellen Zale, *Compensating City Councils*, 70 STAN. L. REV. 839 (2018).