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# FEDERALISM AND THE POLICE: An Applied Theory of “Fiscal Attention”

Peter J. Boettke, Liya Palagashvili & Ennio E. Piano\*

## ABSTRACT

*Policing in America has made a drastic transformation over the mid-twentieth century. Local police agencies today are more federally funded, they “dress” like the military, they police more federal initiatives, and the constitutional and fiscal boundaries between local police and the federal government have been blurred. At the same time, conflicts between communities and the police have intensified and the trust between the two has diminished. Our paper investigates the transformation of local policing in a federal system. We analyze how the decisions of policymakers and agencies at the federal level can alter the choice set and associated payoffs faced by local police departments, and how that changes the nature of local policing services. We then discuss how this framework can be used to understand the transformation of U.S. local policing in the twentieth century by illustrating this intervention and providing preliminary analysis of the breakdown of community-orientated policing. Specifically, we outline the expansions of the civil asset forfeiture program, program 1033 and related procedures, and direct federal grants and discuss the incentives of local police to pursue federal initiatives, independent of the desires of the local population that they serve. These programs soften the budget constraints of state and local police and thereby shift police attention to their new funders—the federal government. Through the changes in the financing process, the federal government can create, on the margin, more federally-focused local law enforcement agencies rather than community-focused law enforcement agencies.*

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## I. INTRODUCTION

What has happened to American policing? The current crisis in policing is characterized by conflicts between communities and the police, a severe breakdown of trust between the two, instances of racial tensions, and several cases of abuse of police power. In structure, organization, and outcomes, local policing has fundamentally changed since the mid-twentieth century. Local law enforcement agencies today have a greater share of their budgets coming from outside sources; they “dress” like the military; they police more federal initiatives, and the constitutional and fiscal boundaries between local police and the federal government have been blurred.

Historically the federal government’s role in state and local law enforcement has been minimal. The first main step that began the trend of federal involvement in local police was in 1968 with President Lyndon Johnson’s Omnibus Safe Streets and Crime Control Act.<sup>1</sup> The aim of the Act was to provide aid to state and local police departments in combatting crime.<sup>2</sup> Since then, federal involvement has expanded under Richard Nixon and later Ronald Reagan, particularly to address the “war on drugs.”<sup>3</sup> This expansion has continued onto the twenty-first century with the new main aim of counterterrorism measures.

Our paper explores the transformation of local policing in a federal system. We analyze how the decisions of policymakers and agencies at the federal level can alter the choice set and associated payoffs faced by local police departments. In a federal system like that of the United States, the policing services are mainly provided and funded by local communities.<sup>4</sup> Following Tiebout’s model, this in theory should create strong incentives for local police to be more “community-orientated,” or more responsive to the citizens in that locality.

In practice, many factors can lead to a breakdown of the specific mechanisms that generate these incentives that can lead to more community-orientated police.<sup>5</sup> In our paper, we focus exclusively on how the hard budget constraint assumption is relaxed by federal government programs and policies toward local policing. Specifically, federal government transfers and aid soften the budget constraint of local police, and thereby alter the payoffs

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1. WILLIAM J. CHAMBLISS, *POWER, POLITICS, AND CRIME* 18 (2001).

2. *Id.*

3. CLARENCE LUSANE, *PIPE DREAM BLUES: RACISM AND THE WAR ON DRUGS* 77 (1991).

4. In addition to local police, there are also state and federal police: State police oversee statewide issues and also assist local police, and federal police generally enforce laws at the federal government level.

5. For example, the freedom of movement (i.e. voting with your feet) assumption is often questioned, but in this paper, we focus mostly on the hard budget constraint assumption.

of local police departments to direct their resources and attention to their new funding sources—mainly, the U.S. federal government. In their decisions between directing resources to enforce local or federal initiatives, police departments weigh the respective costs and benefits of each. Federal programs that fund local police departments to pursue various federal initiatives will, at the margin, distort the provision of local police services *away* from the ones desired by the local public.

We provide evidence of this federal government intervention into local policing by documenting the expansions of the civil asset forfeiture program, program 1033 and related procedures, and direct federal grants. We then discuss preliminary analysis of how these federal government programs beginning in the late 1960s have lowered the cost and increased the benefits for local police to enforce federal government initiatives, regardless of actual community needs. In terms of the Tiebout model, these programs can soften the budget constraints of state and local police and thereby shift police attention to their new funders—the federal government. These funding opportunities were tied to the federal initiatives of the war on drugs and war on terror, and as a result, incentivize police to pursue those federal initiatives, independent of the desires of the population that they serve. These programs were expanded through the twenty-first century and still exist today, and have created the modern federally funded police departments.

Our paper will proceed as follows: Section II will survey the theory of local public goods and Section III will develop our analysis of the theory of fiscal attention. Section IV will describe the specific federal intervention programs into local policing. Section V will conclude.

## II. SOME ECONOMICS OF LOCAL PUBLIC GOODS AND FEDERALISM

### *A. Tiebout Sorting and the Provision of Public Goods*

From a strictly economic perspective,<sup>6</sup> the specific form of the provision of a public good—that is, a good that is at one time non-excludable and non-rivalrous—cannot be ascertained a priori, but only after careful comparative institutional analysis.<sup>7</sup> This is especially true with respect to such questions as whether the public good should be provided by the market or by the public

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6. That is, a perspective that does not take into account questions about desert, fairness, equality, and other ethical considerations.

7. See James M. Buchanan, *An Economic Theory of Clubs*, 32 *ECONOMICA* 1, 1–14 (1965); Harold Demsetz, *The Private Production of Public Goods*, 13 *J.L. & ECON.* 293, 293–306 (1970).

sector or whether it should be provided by local, regional, or national governments. Issues about the incentives faced by the provider as well as about its capacity to acquire and effectively utilize the necessary information need to be considered in order to adjudicate about the superiority of public against private provision.<sup>8</sup>

A very similar reasoning can be used to ascertain the optimal configuration of publicly provided public goods. Keeping the degree of indivisibility or non-rivalry constant, different goods will have different optimal sizes of production and distribution. The basic principle of economic efficiency will therefore suggest that different public goods be provided at different levels of governance<sup>9</sup> and that the widespread presumption that public goods should always be produced and provided at the national or federal level is misplaced.<sup>10</sup>

Welfare economists ignored this fundamental point until the pioneering work of Charles Tiebout, Vincent Ostrom, and others.<sup>11</sup> Tiebout develops a model of decentralized provision of public goods against Samuelson's argument that "*no decentralized pricing system can serve to determine optimally [the] levels of collective consumption.*"<sup>12</sup> The flaw in this reasoning lies in the failure to recognize the possibility of a decentralized system of competing communities all of which are responsible for the provision of local public goods.<sup>13</sup> Given a set of assumptions, among which are full mobility of consumer-voters, perfect information, and a large number of communities, in

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8. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 33 (Liberty Fund 1999) (1962).

9. See JAMES M. BUCHANAN, *THE DEMAND AND SUPPLY OF PUBLIC GOODS* 175 (1968).

10. See George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3, 17-18 (1971).

11. Vincent Ostrom, Charles M. Tiebout & Robert Warren, *The Organization of Government in Metropolitan Areas: A Theoretical Inquiry*, 55 *AM. POL. SCI. REV.* 831, 832 (1961); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416, 418 (1956) [hereinafter Tiebout, *Local Expenditures*]; CHARLES M. TIEBOUT, *An Economic Theory of Fiscal Decentralization*, in *PUBLIC FINANCES: NEEDS, SOURCES, AND UTILIZATION* 79, 95-96 (1961) [hereinafter TIEBOUT, *Fiscal Decentralization*].

12. Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 *REV. ECON. & STAT.* 387, 388 (1954).

13. See Vincent Ostrom & Elinor Ostrom, *A Behavioral Approach to the Study of Intergovernmental Relations*, 359 *ANNALS AM. ACAD. POL. & SOC. SCI.* 137, 137-46 (1965) (pioneered the theoretical and empirical analysis of the provision of public goods within the context of a decentralized ("polycentric") and democratic system of governance); see also Elinor Ostrom & Roger B. Parks, *Neither Gargantua nor the Land of Lilliputs: Conjectures on Mixed Systems of Metropolitan Organization*, in *POLYCENTRICITY AND LOCAL PUBLIC ECONOMIES* 284, 284-305 (Michael D. McGinnis ed., 1987); Elinor Ostrom, *Size and Performance in a Federal System*, 6 *PUBLIUS* 33, 33-73 (1976).

the model the process approximates the results of a market for private goods.<sup>14</sup>

The logic of this argument is straightforward. In the market, the combined forces of residual claimancy and competition ensure that resources will gravitate towards their highest valued uses.<sup>15</sup> Entrepreneurs are incentivized by the presence of competitors and by the profit and loss mechanism to price resources just above their marginal opportunity cost, in a process that leads toward the minimization of waste and the maximization of consumer surplus. The theory of public goods rightly identified the possibility that this process might “fail” to meet consumer demand in the presence of non-excludability.<sup>16</sup> But market failure need not lead to the conclusion that government will necessarily succeed.<sup>17</sup>

Governments face the same exact obstacles as private individuals in attempting to achieve the optimal provision of public goods. Thus, any effective mechanism for the provision of public goods must satisfy three requirements: a) The system must be able to generate a mechanism of consumer-voter preference revelation; b) it must tend towards the satisfaction of consumer-voter preferences; c) the system must lead to the efficient allocation of resources.<sup>18</sup> This latter “no-waste” condition also implies the principle of efficient taxation: no more taxes should go to the provision of local public goods than their value to the consumer-voters. These three requirements are met when providers are both incentivized and have the knowledge needed to adjust optimally to the changing circumstances of demand and supply.

First of all, to do so, the incentives of the public officials must be aligned to those of the consumer-voters. To assume this problem away, as many early public good theorists have,<sup>19</sup> is a violation of one of the fundamental principles of economic analysis: The assumption of behavioral symmetry. Behavioral symmetry requires that all agents—regardless of whether they act in the market as sellers or buyers, or in the political sphere as voters, bureaucrats, and politicians—must be treated as having the same motivations. If you assume self-interest as the *primum mobile* of human action in the market, the same assumption must be made in public arena.

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14. TIEBOUT, *Fiscal Decentralization*, *supra* note 11, at 419.

15. See Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 14 (1969).

16. *Id.* at 11–12.

17. See *id.* at 20.

18. Tiebout, *Local Expenditures*, *supra* note 11, at 417–18.

19. Albert Breton, *A Theory of the Demand for Public Goods*, 32 CANADIAN J. ECON. & POL. SCI. 455, 455 (1966).

A second problem faced by providers is the one of acquiring the necessary information about the demand for public goods. Through a process of competitive trial and error in which wasteful production practices and institutional arrangements are filtered out, the market economizes on the necessary information needed by any single buyer and seller to adjust their plans and expectations to those of all other buyers and sellers.<sup>20</sup> No such mechanism takes place in the public sector, as taxation is employed instead of the price mechanism and competition by other agencies (such as families, clubs, and firms) is either suppressed or undermined by the soft budget constraint of public providers.<sup>21</sup>

The Tiebout model aims at providing a theoretical solution to both problems. The incentive-alignment problem is solved through the introduction of a hard-budget constraint among providers.<sup>22</sup> If public expenditure must be funded exclusively through the tax revenues of the relevant public of consumer-voters, in a competitive context of many local providers, perfect information, and freedom of movement, then we would observe each local provider adjusting its services to accommodate the preferences of consumer-voters. Second, the competitive process will lead to the optimal use of resources, including knowledge of the circumstances of demand and supply. On the demand side, this mechanism allows for experimentation regarding quality and quantity of the goods provided, with consumer-voters orbiting towards their preferred bundles. On the supply side, competition will lead to the accommodation of consumer-voters as consumer-voters will abandon communities that have grown beyond their optimal sizes, resulting in services of lower quality and/or increasing costs.<sup>23</sup> In other words, the system would match the bundle of goods provided by the local communities with the preferences of taxpayers.

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20. Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 525–26 (1945).

21. See Albert Breton, *The Growth of Competitive Governments*, 22 CANADIAN J. ECON. 717, 726, 729 (1989).

22. János Kornai, *The Soft Budget Constraint*, 39 KYKLOS 3, 9–10 (1986).

23. As we discuss below, Tiebout's conclusions have been the object of severe criticism. This criticism has mostly focused on the assumptions of perfect competition among local communities and that of perfect mobility of the consumer-voters. See MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 6–7, 91 (2012); RICHARD E. WAGNER, *AMERICAN FEDERALISM: HOW WELL DOES IT SUPPORT LIBERTY* 41, 44–45 (2014); Bryan Caplan, *Standing Tiebout on His Head: Tax Capitalization and the Monopoly Power of Local Governments*, 108 PUB. CHOICE 101, 101–02 (2001).

*B. Polycentric Governance and the Scale of Public Good Provision*

Tiebout's contribution forced social scientists to consider the issue of decentralized governance seriously. His model plays a central role in two important developments in the scientific study of governance structures. The first one was the debate on metropolitan governance in the 1950s and 1960s.<sup>24</sup> Vincent Ostrom, Charles Tiebout, and Robert Warren challenge the consensus (at the time) which sees decentralization, the coexistence of multiple agencies providing similar public services within the same metropolitan area, as a "pathological phenomenon" and an unnecessary waste of resources.<sup>25</sup> An alternative to this view of metropolitan governance as a "Gargantua" of rational centralized planning, the authors proposed the idea of a polycentric system of formally independent but interacting agencies.<sup>26</sup> This argument relies on two simple arguments. First, following the logic of the Tiebout model, there is no reason to assume that the metropolitan government and not smaller agencies, competing within the metropolitan area, should provide public goods and services.<sup>27</sup> Only an assessment of the relevant economies of scale can answer this question. Second, any such analysis must distinguish between economies in the production of the public good and economies in its provision.<sup>28</sup> This reasoning leads to the conclusion that economies of scale might justify centralized production but, because bureaucratic incentives and an informational problem that are the plights of centralized governance, much of the distribution should be left to smaller communities organized in a polycentric fashion.<sup>29</sup>

The very nature of polycentricity appears to open the door to another task for centralized metropolitan governance. Each unit of this polycentric system must deal with the issue of the possibility of conflict resulting from negative externalities imposed onto all or some other units. The metropolitan government will then serve as a supervisor, adjudicator, and enforcer. But smaller communities don't have to submit themselves to the supervision of a higher level of governance to prevent the escalation of conflict. Conflict is a costly practice, and local communities have historically been able to develop their systems of adjudication, for example, through the use of the court

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24. For a review of the debate, see PAUL DRAGOS ALIGICA & PETER J. BOETTKE, *CHALLENGING INSTITUTIONAL ANALYSIS AND DEVELOPMENT: THE BLOOMINGTON SCHOOL* 7–11 (2009).

25. Ostrom, Tiebout & Warren, *supra* note 11, at 831.

26. *Id.*

27. *Id.* at 835–36.

28. *Id.* at 834.

29. *Id.* at 838.



system as well as other formal and informal institutional arrangements. In Ostrom et al.'s assessment, these decentralized systems of conflict resolution are likely to achieve a Pareto superior result, as they require unanimity among the interested parties.<sup>30</sup>

The second development provoked by the Tiebout model was the study of the economic role of a federal system of governance.<sup>31</sup> The economics of federalism occupies an essential role in the development of the new political economy in the last few decades. Economists and political scientists identify federalism as a potential source of solution to the "paradox of government": While government can be a force of good by providing society with a variety of public goods (among which are the protection of property rights and the administration of justice), a government that is strong enough to do so will also be strong enough to spoil society of its wealth, thus preventing it from attaining economic and political development.<sup>32</sup>

A federalist system is able to solve this problem because it is the only form of governance structure in which the ownership of control powers is divided both horizontally and vertically. In a unitary system of governance, such powers are under the exclusive control of one authority (usually the national government), which can then delegate some powers to regional and local authorities but retain the rights to take them away or rearrange them as it pleases.<sup>33</sup> On the other hand, in a confederal system, there is no such concentration of powers: The regional authorities retain the rights to operate autonomously and independently of each other over their own territory, although they might voluntarily cooperate on the basis of unanimity in order to address issues of widespread spillover effects and externalities (as is for example the case in international organizations such as the United Nations or the Arab League).<sup>34</sup> In a federalist system, regional and local authorities retain some powers while the central authority retains some others, and neither level can unilaterally interfere with the power of the other ones.<sup>35</sup>

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30. *Id.* at 842.

31. See Alessandra Casella & Bruno Frey, *Federalism and Clubs: Towards an Economic Theory of Overlapping Political Jurisdictions*, 36 EUR. ECON. REV. 639, 643 (1992).

32. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 8–9, 47 (1990); Casella & Frey, *supra* note 31, at 641. For an overview of the economic theory of federalism and its main contributions see DENNIS C. MUELLER, PUBLIC CHOICE III, at 209–29 (2003).

33. Albert Breton, *Federalism and Decentralization: Ownership Rights and the Superiority of Federalism*, 30 PUBLIS 1, 8–9 (2000).

34. *Id.* at 4.

35. WAGNER, *supra* note 23, at 43; Breton, *supra* note 33, at 5.

Federalism and decentralization are analytically different notions. The benefits identified by the Tiebout model are benefits of decentralization, not those of federalism.<sup>36</sup> The accountability of the public good providers, the tendency for innovative administrative methods, and the protection of the political rights of the public all flow from the fact that the polity is organized in a decentralized fashion, regardless of whether this decentralization is engineered from the top-down or it has emerged from the bottom-up.<sup>37</sup> What federalism offers is not decentralization per se, but a robust political structure that, under some circumstances, guarantees the smooth functioning of a decentralized system.<sup>38</sup>

### III. A THEORY OF FISCAL ATTENTION WITH SPECIAL REFERENCE TO COMMUNITY POLICING

Policing is in many ways a peculiar good. Its peculiarity starts with the very nature of the service that a police agency provides: the threat and use of violent means for the enforcement of property rights and contracts as well as the punishment of their breach. Most importantly, policing is characterized by a high degree of publicness<sup>39</sup> and by the collaborative nature of its production process, or co-production.<sup>40</sup>

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36. See Breton, *supra* note 33, at 4.

37. *Id.*

38. Yingyi Qian & Barry R. Weingast, *Federalism as a Commitment to Preserving Market Incentives*, 11 J. ECON. PERSP. 83, 85–86 (1997); Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 6 (1995); see FRIEDRICH A. HAYEK, *The American Contribution: Constitutionalism, in THE CONSTITUTION OF LIBERTY: THE DEFINITIVE EDITION* 261, 275 (Ronald Hamowy ed., The Collected Works ed. 2011); WAGNER, *supra* note 23, at 43; Breton, *supra* note 33, at 2. Weingast develops a theory of market-preserving federalism to explain the miracle of sustained economic development in eighteenth-century England, nineteenth-century United States, and contemporary China. Weingast, *supra*, at 10–24. Building on the classical contribution of Riker, Weingast's market-preserving federalism is a system of hierarchically organized but autonomous regional governments with hard budget constraints and exclusive control over economic regulation, and in which the central government is the guarantor of the national common market. WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, AND SIGNIFICANCE* (Sheldon S. Wolin ed., 1964); Weingast, *supra*, at 4. According to this understanding, a federal system will be able to align the incentives of local and national authorities in such a way that the economic forces of society are used for the ever-increasing production of wealth.

39. TIEBOUT, *Fiscal Decentralization*, *supra* note 11, at 95–96.

40. See Peter J. Boettke, Jayme S. Lemke & Liya Palagashvili, *Re-evaluating Community Policing in a Polycentric System*, 12 J. INSTITUTIONAL ECON. 305, 314 (2016).

Economists have often treated policing as the local public good *par excellence*.<sup>41</sup> Policing's publicness comes from its relatively high degree of non-rivalry. Imagine the case of a small village which relies exclusively on the private action of its members for the deterrence of criminal activities. Left to their own devices, the households invest in protection technology until its marginal benefit just exceeds marginal cost: They buy thicker and more robust doors, harder locks to pick, get a dog to surveil their houses, and so forth. Although purely private, this scenario is characterized by some spillover effects. Assuming that thieves do not possess perfect information about the investment of each household in protection technology, A's investment reduces the probability of everyone else in the village being robbed. Although this implies that the overall investment in crime prevention will be suboptimal, it would likely be positive, as each individual household still internalizes most of the benefits that result from its investment.

Now imagine that Household A proposes to its fellow villagers the creation of a police force to deal with the problem of crime. Hiring, say, four police officers will have the effect of reducing crime by more than the private actions of all villagers combined, but at a lower overall cost. Although the services of the police force will not be perfectly non-rivalrous, its presence would have a net positive effect for each and every household. Nevertheless, the iron law of collective action frustrates Household A's attempt as everyone expects to free-ride on the contributions of others. No community police force is voluntarily provided in the village.

The second characteristic of policing consists in the fact that it can only be effectively provided if co-produced, that is, the members of the community are actively involved in its production.<sup>42</sup> The notion of co-production is intuitive. Effective community policing requires that the public provides information to the authorities in order for them to catch criminals in this way reducing the expected profits from theft and, therefore, the general level of crime in the community.<sup>43</sup> The quantity and quality of cooperation between police and citizens is a function of their trust relation, which in turn

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41. See, e.g., MUELLER, *supra* note 32, at 210–11; TIEBOUT, *Fiscal Decentralization*, *supra* note 11, at 82–86; Breton, *supra* note 21, at 735; Ostrom, Tiebout & Warren, *supra* note 11, at 834; Tiebout, *Local Expenditures*, *supra* note 11, at 418. Friedman, Benson, and Stringham provide a theoretical and historical treatment of the possibility of private provision of community policing. BRUCE L. BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* (The Indep. Inst. 2d ed. 2011) (1990); EDWARD PETER STRINGHAM, *PRIVATE GOVERNANCE: CREATING ORDER IN ECONOMIC AND SOCIAL LIFE* 113–33 (2015); David D. Friedman, *Making Sense of English Law Enforcement in the Eighteenth Century*, 2 U. CHI. L. SCH. ROUNDTABLE 475 (1995).

42. Boettke, Lemke & Palagashvili, *supra* note 40, at 314.

43. See *id.* at 312.

is a function of social distance between the two parties, the use of violent as opposed to nonviolent means in the solution of conflict situations, the prevalence of discriminatory practices within the police, and many other factors.<sup>44</sup>

Building on the discussion above, we develop what we call a theory of fiscal attention to illustrate the effect of alternative institutional arrangements and policies on the provision of community policing. The logic of the model is straightforward: In a polycentric system, a local administrator's choice over the bundle of goods and services supplied is constrained by the ability of the consumer-voters to "vote with their feet."<sup>45</sup> A budget-maximizing public administration will therefore conform itself to the preferences of consumer-voters. Of course, to the extent that the real-world deviates from the assumptions of the Tiebout model illustrated in Section II, the bundle supplied will also partially deviate from the one preferred by the citizenry. Nevertheless, the forces of competition will still act as a constraint over the arbitrary decision-making power of local administrators.

This logic is illustrated in Figure 1. The small circles, identified by the letter "C," represent the consumer-voters, the medium sized ones, identified by the latter "B," the local providers of public goods, and the large circle, "A," the federal government. We refer to this system as "quasi-market-preserving federalism." Under this system, the federal government merely ensures that local administrations are unable to collude thus guaranteeing some level of interjurisdictional competition in the provision of public goods. Because the consumer-voters are the only source of revenues, local providers' "fiscal attention," identified by the arrows in Figure 1, is directed towards the consumer-voters.<sup>46</sup>

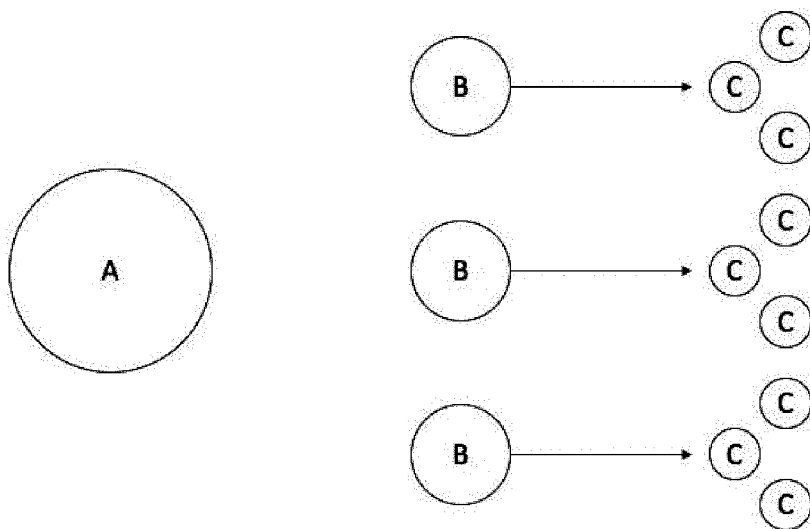
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44. *See id.* at 320.

45. *See* Peter J. Boettke & Liya Palagashvili, *Taming Leviathan*, 23 SUP. CT. ECON. REV. 279, 295 (2015).

46. Of course, real-world local governments are seldom, if ever, fully funded through local taxes. We employ this extreme, hypothetical case for illustrative purposes only.

Figure 1: Fiscal attention under quasi-market-preserving federalism



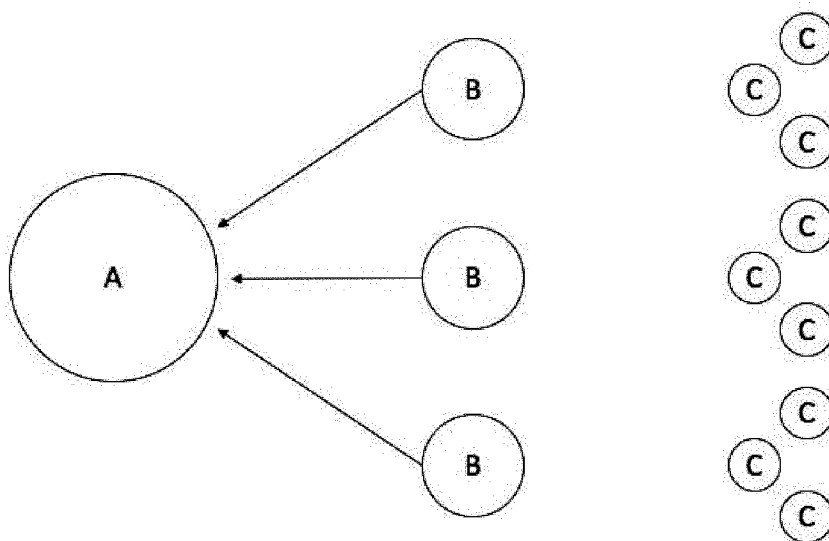
We now modify our discussion by allowing the federal government to have ends of its own other than the pursuit of the maximization of social welfare. For example, it might want to redirect the resources of local authorities for political considerations. In other words, the federal government's preferred bundle of goods and services provided by local administrators differ from the one preferred by the consumer-voters.<sup>47</sup> In exchange, the federal government allocates national funds to the local communities. The budget-maximizing local administrator will choose to supply the bundle that maximizes the sum of tax revenues and federal transfers. Figure 2 illustrates the extreme case where the federal government completely outbids consumer-voters for the services of local authorities. The same logic applies to less extreme cases as well. The larger the federal share of local governments' budgets, the more the latter's "fiscal attention" will be directed towards the goals set by the national government and the further the equilibrium bundle will be from the one desired by the citizen-voters.<sup>48</sup> This

47. The war on terror and the war on drugs are two examples of federally-mandated goals from the recent history of the United States.

48. An argument can be made to claim that such a federal interference is in fact desirable. The danger of terrorism or some other "national emergency" might be better addressed via central command and control than through the spontaneous cooperation of decentralized decision-making units. Moreover, federal mandates can increase the effectiveness of the system by forcing each

outcome is reinforced by the fact that the federal government can directly regulate local authorities,<sup>49</sup> which in turn might have the effect of resulting in classic rent-seeking dynamics on the part of the latter.<sup>50</sup>

Figure 2: Fiscal attention with federal interference



The decision of the local government between the two alternatives will depend on the respective costs and benefits. The choice will be for the option that maximizes the budget controlled by the local authorities. Imagine that, by selecting bundle two the authority expects to lose a certain amount of dollars in tax revenues as the marginal consumer-voters move to other

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community to internalize benefits and costs of their policies. This reasoning models the federal authority as benevolent and better informed than its local counterparts, and therefore better able to maximize the welfare of society. More realistic assumptions about the ability of centralized systems to collect knowledge as well as about their motivations radically undermines this reasoning. See Peter J. Boettke & Peter T. Leeson, *Liberalism, Socialism, and Robust Political Economy*, 7 J. MARKETS & MORALITY 99, 103 (2004).

49. Boettke and Palagashvili apply a similar framework to explain the growth of the size and scope of the federal government in the United States in the twentieth century. Boettke & Palagashvili, *supra* note 45. Richard Epstein identifies the intellectual origins of this process in the progressive movement at the beginning of the twentieth century. RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* 7–8 (2014).

50. See Boettke & Palagashvili, *supra* note 45, at 284. This argument is akin to the theory of economic regulation developed by Stigler and Peltzman. Stigler, *supra* note 10; Sam Peltzman, *Toward a More General Theory of Regulation* (Nat'l Bureau of Econ. Research, Working Paper No. 133, 1976), <http://www.nber.org/papers/w0133.pdf>.

localities, but also knows that it would receive some funds from the federal government. The choice would depend on the relative magnitude of the foregone tax revenues and the federal funds received. Of course, the choice is seldom a binary one. The implication for the behavior of the local authority is—at the margin, federal aid will distort the provision of local police services *away* from the ones desired by the public.<sup>51</sup>

In the section to follow, we provide evidence of the federal government intervention into local policing and discussion of how this can lead to less community-orientated police.

#### IV. LOCAL POLICE AND FEDERAL INITIATIVES

Although the movement toward federal government involvement in local law enforcement began in the late 1960s, it only took off in the 1980s. Since then, various federal policies and programs have provided state and local police with alternative sources of funding, conditional on them pursuing certain federal initiatives. Figures 3 and 4 provide an illustration of federal funding to state and local police services from 1980–2012.<sup>52</sup>

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51. Boettke and Palagashvili identify another mechanism through which federal aid distorts the incentives of local authorities. These transfers are likely to transform localities into interest groups actively engaged in rent-seeking activities. Boettke & Palagashvili, *supra* note 45, at 294.

52. These figures were also published in Boettke, Lemke & Palagashvili, *supra* note 40, at 316 fig.1, 318 fig.2.

Figure 3: Federal aid to state and local police enforcement

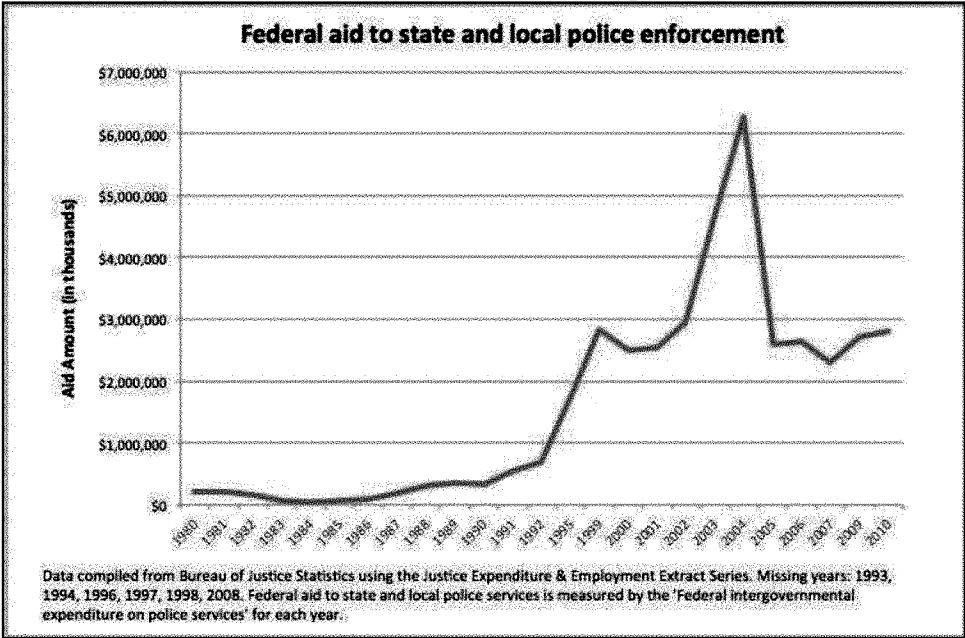


Figure 4: Federal aid as a percent of state and local police expenditures

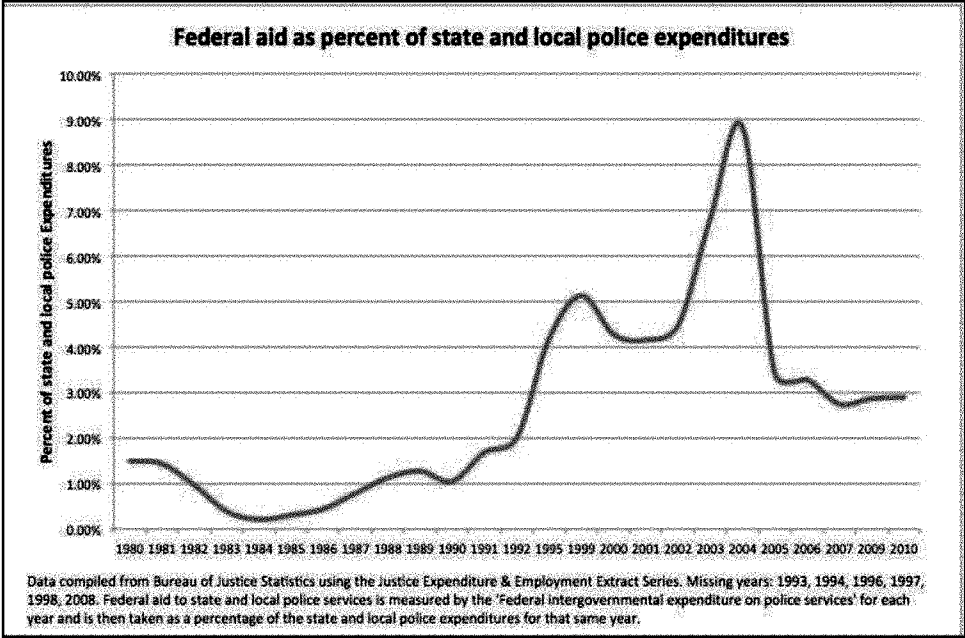
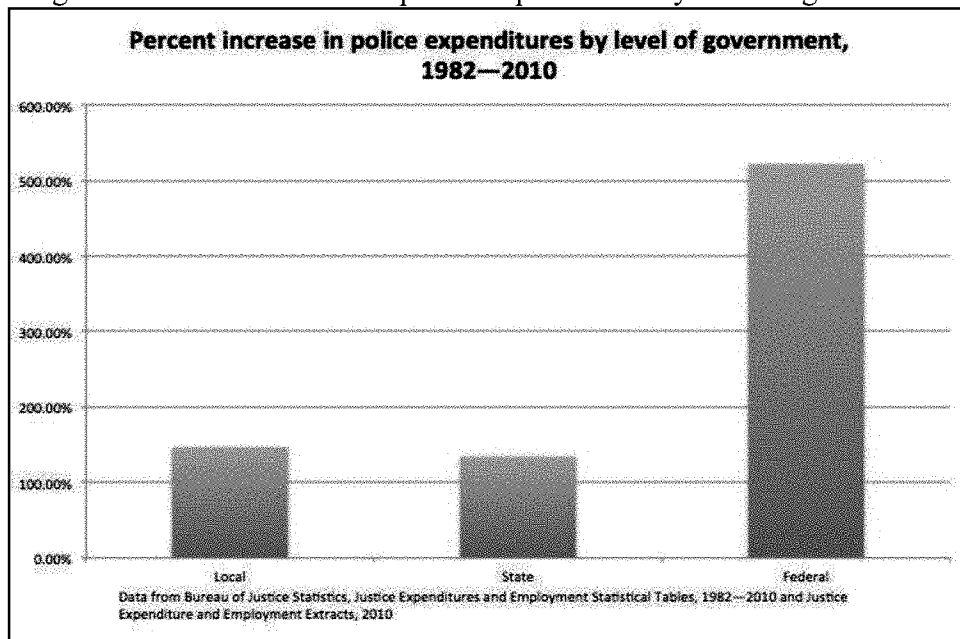




Figure 5 shows the breakdown between local, state, and federal government expenditures on police services. From 1982–2007, state and local police expenditures increased by a little over 100%. During this same time period, federal police expenditures increased by more than 500%, which includes significant increases in grants to state and local police departments.

Figure 5: Percent increase in police expenditures by level of government



Based on our above discussion, the new sources of funding can soften the budget constraints of local police. This means that police agencies are less constrained by the budgets coming from their local communities. In both the Tiebout model and Weingast’s discussion of market-preserving federalism, the hard-budget constraint condition has now been violated.<sup>53</sup> But, more specifically for our discussion, the new sources of funding also direct local police departments to pursue these federal initiatives that are tied to sources of funding. Specifically, the expansions of the civil asset forfeiture program, the 1033 program and related procedures, and direct federal grants shift police attention to enforcing federal initiatives such as the war on drugs and the war on terror.

53. Tiebout, *Local Expenditures*, *supra* note 11, at 423; Weingast, *supra* note 38, at 4.

*A. Civil Asset Forfeiture*

One of the most important ways in which the federal government has been able to alter the incentives of local police to pursue federal initiatives over local initiatives is by expanding the civil asset forfeiture component through the Comprehensive Crime Act of 1984.<sup>54</sup> Civil asset forfeiture is an age-old legal process that allows law enforcement officers to seize assets from individuals if they suspect those individuals to be involved in a criminal or illegal activity.<sup>55</sup> The gist of this program is that police officers are able to seize the assets *without* charging the owners with wrongdoing.<sup>56</sup> This is in contrast to criminal asset forfeiture, which requires a criminal conviction in order to seize assets and funds.<sup>57</sup> Except for a brief period during the Prohibition Era in the 1920s, the use of asset forfeiture has been dormant until it was unleashed in 1984 in the Comprehensive Crime Act when its use was broadened to the supply of illicit drugs.<sup>58</sup>

The Act also created the Department of Justice's Assets Forfeiture Fund and it required the Department of Justice (DOJ) to share the proceeds from drug-related asset forfeiture confiscation with any state and local agencies participating in the investigations.<sup>59</sup> This particular program is called "equitable sharing."<sup>60</sup> This means that if local and state police cooperate with federal drug investigations, they will receive a share of any associated asset forfeitures.<sup>61</sup> Equitable sharing also allows state and local police to bypass any state restrictions on the use of these acquired funds.<sup>62</sup> As a result, state and local police have been found using civil asset forfeiture funds to purchase such things as margarita and popcorn machines, flat-screen TVs, a five million dollar helicopter, and many other items that state law would typically consider as an "inappropriate" use of funds.<sup>63</sup> Seized funds can of course be

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54. DICK M. CARPENTER ET AL., INST. FOR JUSTICE, *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 10 (2d ed. 2015).

55. *Id.* at 8.

56. *Id.*

57. *Id.*

58. *Id.* at 10.

59. *Id.* at 25.

60. *Id.*

61. *Id.* at 6 ("Participating agencies [can] receive up to 80 percent of the proceeds . . .").

62. *Id.* at 28.

63. *Id.* at 16; MILWAUKEE CTY. OFFICE OF THE COMPTROLLER AUDIT SERVS. DIV., MILWAUKEE COUNTY OFFICE OF THE SHERIFF'S FEDERAL ASSET FORFEITURE FUND EXPENDITURES COMPLY WITH PROGRAM CRITERIA BUT IMPROVEMENT NEEDED IN REPORTING ACCURACY, COMPLIANCE WITH COUNTY PROCUREMENT PROCEDURES 34 (2012); Renée C. Lee, *Montgomery DA Says Funds Used for Liquor at Cook-Off*, HOUS. CHRON. (Mar. 18, 2008), <http://www.chron.com/neighborhood/humble-news/article/Montgomery-DA-says-funds-used->

used for official purposes as well, and they are sometimes used to pay for vehicles or for officers' overtime hours.<sup>64</sup> The use of the DOJ's equitable sharing program has exploded over the last two decades. In 2000, the DOJ paid state and local enforcement agencies \$199 million.<sup>65</sup> That number has tripled to \$643 million in 2013.<sup>66</sup> In total, between 2000–2013, the DOJ has paid state and local agencies \$4.7 billion in forfeiture funds.<sup>67</sup>

The equitable sharing program has in effect increased the returns to police departments for pursuing drug-related offenses. In a study using data on Florida police jurisdictions and asset forfeiture, Benson et al. found that police in fact did shift to greater drug enforcement with the introduction of the Comprehensive Crime Act, and that this stronger drug enforcement was not demanded locally during that time.<sup>68</sup> Between 1985–1990, the police department's relative effort against drug crimes increased by roughly forty-five percent.<sup>69</sup> Prior to this from 1970–1984, drug arrests relative to all other arrests remained constant.<sup>70</sup> Even after Ronald Reagan famously declared the “war on drugs” in October of 1982, police did not significantly increase their relative efforts against drugs until they were incentivized to do so, which occurred in 1984.<sup>71</sup> And furthermore, despite Reagan's war on drugs rhetoric, survey data shows that the public opinion even in 1985 did not consider drug use a significant problem.<sup>72</sup> The public opinion turn on the war on drugs only began to take a dramatic change in the early 1990s.<sup>73</sup>

The study also found a positive impact of confiscations on the police departments' discretionary budgets—that is, local police departments were able to generate increases in their discretionary budgets by taking advantage

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for-liquor-at-1757341.php; Robert O'Harrow Jr. et al., *Asset Seizures Fuel Police Spending*, WASH. POST (Oct. 11, 2014), <http://www.washingtonpost.com/sf/investigative/2014/10/11/asset-seizures-fuel-police-spending/>.

64. CARPENTER ET AL., *supra* note 54, at 10.

65. *Id.* at 25.

66. *Id.*

67. *Id.*

68. Bruce L. Benson et al., *Police Bureaucracies, Their Incentives, and the War on Drugs*, 83 PUB. CHOICE 21, 22 (1995).

69. *Id.* at 21.

70. *Id.*

71. *Id.*

72. *Id.* at 22.

73. *Id.*

of this new procedure and confiscating assets during the process of investigating drug-related crime.<sup>74</sup> Benson et al. conclude:

The asset forfeiture provisions of the federal statute created an exogenous change in state and local law enforcement agencies' bureaucratic incentives, inducing them to join in the federally declared war on drugs. Police agencies were tempted to use an increasing portion of their resources against drug offenders, and to devote fewer resources to other crimes.<sup>75</sup>

In another study of California police departments and asset forfeiture funds, researchers found that when police departments experienced cuts in their budgets, the federal equitable sharing payments going to those departments had increased dramatically and significantly in response to those cuts.<sup>76</sup> That is, police departments shifted to this external source of funding when their main source of funding, which came from their communities, had decreased.<sup>77</sup> In a 2014 investigation by the *Washington Post*, researchers found “298 state and local agencies and 210 task forces nationwide have used the Department of Justice’s equitable sharing program to seize funds equal to 20 percent or more of their annual budgets since 2008.”<sup>78</sup> In other words, the civil asset forfeiture program has become an external mechanism for police departments to fund themselves through the federal government.

Without having to directly subsidize police departments or to make any constitutional or legislative amendments requiring them to fight the war on drugs, the civil asset forfeiture program incentivizes state and local police departments to direct a greater portion of their resources toward cracking down on drug-related crime. Any department choosing not to place a greater emphasis on drug-related crime would be foregoing income, regardless of the community’s actual public safety needs.

### *B. Program 1033 and Related Procedures*

While not through direct monetary aid, the federal government beginning in the 1980s has also altered the budget constraints of local police

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74. *Id.* at 33–38.

75. *Id.* at 38.

76. DRUG POLICY ALL., ABOVE THE LAW: AN INVESTIGATION OF CIVIL ASSET FORFEITURE IN CALIFORNIA 20 (2015).

77. *Id.*

78. CARPENTER ET AL., *supra* note 54, at 28 (citing Michael Sallah et al., *Stop and Seize*, WASH. POST (Sept. 6, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>).

departments by providing state and local law enforcement with operational advice, physical facilities, military support, and equipment. This began with Congress passing the Military Cooperation with Law Enforcement Act (MCLEA) in 1981 in the context of the war on drugs.<sup>79</sup> The Act allowed the military to cooperate and provide assistance to state and local agencies in not only drug cases, but also with civil disturbances, security operations, and counterterrorism measures.<sup>80</sup> For example, with this program, the Department of Defense could supply police with such things as aircraft, military personnel, Navy vessels, and many other items or services.<sup>81</sup> In 1983, police departments received close to 1,000 aircrafts for providing 3,000 hours of aerial surveillance. Just one year later, that number increased to 3,000 aircrafts providing close to 10,000 hours of surveillance.<sup>82</sup> This transfer program expanded in 1990 when Congress enacted the National Defense Authorization Act and in section 1208 allowed the Secretary of Defense to temporarily “transfer to Federal and State agencies personal property of the Department of Defense, including small arms and ammunition, that the Secretary determines is—(A) suitable for use by such agencies in *counter-drug activities*; and (B) excess to the needs of the Department of Defense.”<sup>83</sup>

The availability of military technologies for domestic use again expanded with the National Defense Authorization Act of Fiscal Year 1997 with the creation of the 1033 Program, which now became a permanent program that allows “all law enforcement agencies to acquire property for bona fide law enforcement purposes that assist in their arrest and apprehension mission,” and that “[p]reference is given to counter-drug and counter-terrorism requests.”<sup>84</sup> Notice here that originally the program was for counterdrug measures, but now has expanded to both counterdrug and counterterrorism

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79. For a more detailed historical account of these programs, see Abigail R. Hall & Christopher J. Coyne, *The Militarization of U.S. Domestic Policing*, 17 INDEP. REV. 485, 495 (2013) [hereinafter Hall & Coyne, *Militarization*]; Christopher J. Coyne & Abigail R. Hall, *Perfecting Tyranny: Foreign Intervention as Experimentations in State Control*, 19 INDEP. REV. 165, 179–83 (2014).

80. Hall & Coyne, *Militarization*, *supra* note 79, at 495–97.

81. *Id.*

82. *Id.* at 495 (citing MANUEL GONZALES ET AL., PRESIDENT’S COMM’N ON ORGANIZED CRIME, AMERICA’S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME app. E (1986)).

83. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1208, 103 Stat. 1352, 1566 (1989) (emphasis added); DANIEL H. ELSE, CONG. RESEARCH SERV., R43701, THE “1033 PROGRAM,” DEPARTMENT OF DEFENSE SUPPORT TO LAW ENFORCEMENT app. A, at 5 (2014) (emphasis added), <https://fas.org/sgp/crs/natsec/R43701.pdf>.

84. 1033 Program FAQs, DEF. LOGISTICS AGENCY, <http://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement/ProgramFAQs.aspx> (last visited Sept. 23, 2017).

measures.<sup>85</sup> The equipment distributed through the 1033 Program includes used body armor, aircraft, armored vehicles, weapons, riot gear, watercraft, and surveillance equipment.<sup>86</sup> The Defense Logistics Agency estimates that since 1990 “more than \$4.2 billion worth of property has been transferred; in FY2011 alone, a record \$502 million worth of property was transferred to federal and state law enforcement agencies.”<sup>87</sup>

Police departments have taken full advantage of this program, which has led to recent controversies of the “militarization of police” concerns. For example, a small police department in Watertown, Connecticut acquired a mine-resistant ambush-protected (MRAP), a vehicle designed to protect soldiers from roadside bombs.<sup>88</sup> In Michigan and Indiana, local police have used the 1033 Program to acquire “MRAP armored troop carriers, night-vision rifle scopes, camouflage fatigues, Humvees and dozens of M16 automatic rifles.”<sup>89</sup> Police departments in Bloomington, Georgia also used the program to acquire grenade launchers.<sup>90</sup> These are just a few illustrations of the types of transfers happening between the federal government and state and local police. In an investigation of North Carolina police departments, officials found that 3,303 out of 4,227 equipment obtained through the 1033 Program were tactical items such as automatic weapons and military vehicles.<sup>91</sup>

Furthermore, one of the most visible signs of how these transfers have translated to local police is through the formation and use of police paramilitary units (PPUs), groups of police officers who are specially trained and organized in a militaristic fashion and equipped with military grade

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85. ELSE, *supra* note 83, at 2.

86. Peter J. Boettke, Christopher J. Coyne & Abigail R. Hall, *Keep off the Grass: The Economics of Prohibition and U.S. Drug Policy*, 91 OR. L. REV. 1069, 1087 (2013).

87. VALERIE BAILEY GRASSO, CONG. RESEARCH SERV., RS20549, DEFENSE SURPLUS EQUIPMENT DISPOSAL, INCLUDING THE LAW ENFORCEMENT 1033 PROGRAM, at 5 (2014), <https://www.fas.org/sgp/crs/natsec/RS20549.pdf>.

88. Taylor Wofford, *How America's Police Became an Army: The 1033 Program*, NEWSWEEK (Aug. 13, 2014, 10:47 PM), <http://www.newsweek.com/how-americas-police-became-army-1033-program-264537> (quoting Christian Sheckler, *Local Police Acquire More Firepower*, S. BEND TRIB. (July 21, 2014), [http://www.southbendtribune.com/news/local/local-police-acquire-more-firepower/article\\_9d74c2aa-0ff4-11e4-ad41-001a4bcf6878.html](http://www.southbendtribune.com/news/local/local-police-acquire-more-firepower/article_9d74c2aa-0ff4-11e4-ad41-001a4bcf6878.html)).

89. *Id.*

90. *Id.*

91. Elisse Ramsey, *Local Police Departments Benefit from Military Surplus Program*, WITN (Mar. 8, 2015, 5:17 PM), <http://www.witn.com/home/headlines/The-Military-Excess-Property-Program-in-Eastern-North-Carolina.html?ref=761>.

weapons and technology.<sup>92</sup> The use of PPUs in domestic settings in the United States is attributed to Los Angeles police officer Daryl Gates, who developed the Special Weapons and Tactics (SWAT) team in response to his experiences as a police officer during the Watts Riots.<sup>93</sup> The first SWAT team was deployed in 1969.<sup>94</sup> Although at first SWAT teams would be used sparingly, the use of military technology and tactics in domestic situations became common in the 1980s.<sup>95</sup> During the 1970s, there were about 300 SWAT raids a year.<sup>96</sup> In 2005, there were about 100 to 150 per day.<sup>97</sup> Kraska and Kappeler found a fifty percent increase in the number of PPUs and a fivefold increase in the deployment of those units between 1980 and 1995.<sup>98</sup> Although PPUs were initially created to take on situations such as violent riots, PPUs have since been formed for the purposes of combating gangs, narcotics distributors, and even police patrol in high-risk areas.<sup>99</sup> As of the year 2000, more than eighty percent of the deployments of PPUs were in the name of the war on drugs.<sup>100</sup>

Similar to the 1033 Program, the 1122 Program began in the 1990s to combat the war on drugs by providing state and local governments with new but “cheap” purchases of gear and parts.<sup>101</sup> Items available for purchase include: pistols, rifles, ammunition, aviation parts, night-vision goggles, personnel carriers, boats, aircraft parts, and body armor.<sup>102</sup> The 1122 Program was amended in 2009 to include not only counterdrug measures, but also counterterrorism measures.<sup>103</sup>

The 1033 Program and these other procedures that transfer both physical and human capital to state and local police departments are able to incentivize

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92. See Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBS. 1, 3 (1997).

93. RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* 53 (2013).

94. *Id.* at 76.

95. *Id.* at 139–75.

96. John Stossel, *Beware Warrior Cops*, FOX NEWS (Aug. 22, 2013), <http://www.foxnews.com/opinion/2013/08/22/beware-warrior-cops.html>.

97. See BALKO, *supra* note 93, at 308; Peter B. Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, 1 POLICING 501, 506 (2007).

98. Kraska & Kappeler, *supra* note 92, at 6–7.

99. *Id.* at 7–9.

100. Kraska, *supra* note 97, at 506–07.

101. See CHRISTOPHER J. COYNE & ABIGAIL R. HALL, CATO INST., *FOUR DECADES AND COUNTING: THE CONTINUED FAILURE OF THE WAR ON DRUGS* 10–11 (2017), <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa-811-updated.pdf>.

102. U.S. GEN. SERVS. ADMIN., *1122 PROGRAM EQUIPMENT AND SUPPLIES CATALOG* 6–13 (2014), [https://www.gsa.gov/graphics/fas/1122\\_Catalog.pdf](https://www.gsa.gov/graphics/fas/1122_Catalog.pdf).

103. *Id.* at 1.

departments to pursue federal initiatives through two main ways. First, some of the stipulations of these programs, especially in the early renditions, explicitly stated that state and local police departments would only get this “free” or “cheap” assistance if they engaged in counterdrug measures.<sup>104</sup> This is especially true of section 1208 and the 1033 Program when they first began.<sup>105</sup> As another example, the language in the National Defense Authorization Act in the early 1990s directly stated that the federal government granted the use of the National Guard to state and local agencies that were involved in *counterdrug activities*.<sup>106</sup> As a result of these programs, departments choosing not to participate in counterdrug or counterterrorism initiatives would be forgoing non-monetary forms of aid for their departments—i.e. “free stuff.”

Second, as per the guidelines, participating police departments are *required* to use any transferred equipment within one year of receipt or otherwise they must return it.<sup>107</sup> Police departments are not going to use SWAT gear, PPUs, or tanks for your local domestic abuse case or traffic incident. These capital goods are complementary to uses specifically for higher-level activities, mainly, counterdrug and counterterrorism cases. Furthermore, because the civil asset forfeiture program provides financial rewards for engaging in drug raids and confiscations and police departments need higher-level equipment in order to do these drug raids, the programs reinforce the incentives of police to pursue these federal initiatives. As a result, these programs have lowered the costs to police for acquiring the very tools needed to pursue federal initiatives.

### C. Direct Federal Grants

In the late 1960s, President Lyndon Johnson created the first federal agency to directly provide subsidies and grants to state and local police.<sup>108</sup> The creation of the Law Enforcement Assistance Administration (LEAA) was a component of the Omnibus Crime Control and Safe Streets Act of

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104. ELSE, *supra* note 83, at 1–2.

105. *Id.* at 2.

106. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1208, 103 Stat. 1352, 1566 (1989).

107. ELSE, *supra* note 83, at 3; Richard Walker, *US Police Go Military with 1033 Program*, DEUTSCHE WELLE (Aug. 15, 2014), <http://www.dw.com/en/us-police-go-military-with-1033-program/a-17857709> (discussing guideline that a police department must use transferred equipment within one year of receipt or else it is required to return the equipment).

108. BALKO, *supra* note 93, at 65.



1968.<sup>109</sup> This direct subsidization gave the LEAA the ability to threaten to pull financial support from state and local agencies that were unwilling to cooperate with favored initiatives.<sup>110</sup> The use of the LEAA increased in the early 1970s under Richard Nixon's call to combat narcotics.<sup>111</sup> During this time, the agency's annual budget jumped from \$75 million to \$500 million.<sup>112</sup> As was the case with the other federal government programs, the LEAA grants favored police departments that were willing to cooperate with the early federal counterdrug initiatives.<sup>113</sup> Balko explains that with the LEAA funding, the director of the Office of Drug Abuse Law Enforcement was able to "target specific state and local police departments that would carry out the drug war the way he wanted."<sup>114</sup> For example, in the 1970s Richard Nixon's federal initiatives to combat drugs led to the creation of various narcotics "strike forces."<sup>115</sup> These strike forces would consist of personnel from federal law enforcement agencies and local law enforcement.<sup>116</sup> To incentivize the local police departments to cooperate, the LEAA would give grants to police departments that joined the narcotics strike forces.<sup>117</sup>

Although the LEAA was discontinued in 1982, it was replaced by the Office of Justice Programs in 1984, which continued to provide direct federal subsidization of state and local law enforcement agencies.<sup>118</sup> The trend of federal spending to combat local crime continued through the 1980s and 1990s in the name of the war on drugs and associated initiatives designed to address related violence.<sup>119</sup> These grants are still available today through Byrne JAG, the State Criminal Alien Assistance Program, the Victims of Crime Act, the Juvenile Justice and Delinquency Prevention Act, the Violence Against Women Act's STOP program, and other initiatives designed to address crime.<sup>120</sup>

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109. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 101, 82 Stat. 197, 198 (current version at 34 U.S.C. § 10101 (2012)).

110. BALKO, *supra* note 93, at 64–67.

111. *Id.* at 71–73.

112. *Id.* at 96.

113. *Id.* at 73.

114. *Id.* at 119.

115. *Id.* at 105.

116. *Id.*

117. *Id.* at 104.

118. Jeffery T. Wennar, *The United States is Not a Police State; There Needs To Be Restoration of the Criminal Justice System Through Adjustment in Order To Alleviate Discontent Expressed by the American Public*, 6 WAKE FOREST J.L. & POL'Y 371, 389 (2016).

119. *See* BALKO, *supra* note 93, at 139–238 (discussing government programs used to fight drugs and related crime and the role of federal spending during the 1980s and 1990s).

120. *Id.* at 167.

The largest and most impactful of these grants is the Byrne grant, which was started in 1988.<sup>121</sup> The grants are given to each state and states open up a competitive application process by which local police departments can apply to receive them.<sup>122</sup> At the end of the fiscal year, each participating department must send an annual report to their states, which then gets sent to the federal government, indicating how the Byrne funds were spent and tracking certain performance measures of productivity in order to qualify for renewed funding.<sup>123</sup> These performance measures consist of number of arrests, number of warrants served, and number of drug seizures.<sup>124</sup> That is, states can renew their Byrne grant funding if they are able to show “productive” uses of it—measured by arrests, warrants, and drug seizures.<sup>125</sup> Several different studies assessing the Byrne grant (especially in its early years) found that the states distributed the grants to local police departments based *solely* on their drug policing statistics.<sup>126</sup> This is not surprising given that the Byrne grant’s original intent was to assist police departments in combating drug crimes.<sup>127</sup> Because the grants rewarded police departments on the *number* of drug seizures, police were incentivized to make a lot of easy arrests—which meant many low-level drug offenders (for marijuana) and lots of seizures (regardless of the size of the seizure).

Furthermore, another aspect of the Byrne grant program is the funding of the multijurisdictional narcotics task forces.<sup>128</sup> The task force is staffed with local police from nearby jurisdictions who loosely report to the state department and whose funding is tied to drug arrests.<sup>129</sup> Local officials have limited control of the local police officers in these task forces because they work directly under this federal government grant.<sup>130</sup> These police officers’ salaries are thus tied to funding coming from the federal government, and whatever proceeds they receive from civil asset forfeiture drug raids.<sup>131</sup> In this

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121. The original name of this grant was the Edward Byrne Memorial State and Local Law Enforcement Assistance Program (Byrne Formula). In 2005, Congress fused this program with another local law enforcement grant, creating the current name as the “Byrne JAG” program. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 500, 119 Stat. 2959, 3094 (codified at 42 U.S.C. § 3751 (2012)).

122. BALKO, *supra* note 93, at 243.

123. *Id.*

124. *Id.*

125. *Id.* at 243–44.

126. *See id.* at 221–22.

127. DRUG POLICY ALLIANCE, 2013 ANNUAL REPORT 7 (2013), [http://www.drugpolicy.org/sites/default/files/DPA\\_Annual\\_Report\\_2013\\_ONLINE.pdf](http://www.drugpolicy.org/sites/default/files/DPA_Annual_Report_2013_ONLINE.pdf).

128. BALKO, *supra* note 93, at 244.

129. *Id.*

130. *Id.*

131. *Id.*

way, these local police officers are not in any way constrained by the community needs or preferences. They seek to satisfy federal performance stipulations to increase their budgets. As an example, consider how the task forces reacted when George W. Bush cut the Byrne program from \$500 million a year to \$170 million in 2008:

In March 2008, Byrne-funded task forces across the country staged a series of coordinated drug raids dubbed Operation Byrne Blitz. The intent was to make a series of large drug seizures to demonstrate how important the Byrne grants were to fighting the drug war. In Kentucky alone, for example, task forces uncovered 23 methamphetamine labs, seized more than 2,400 pounds of marijuana, and arrested 565 people for illegal drug use [in just twenty-four hours].<sup>132</sup>

Thus, regardless of what makes communities safer and regardless of what citizens perceive as threats, the Byrne grant encourages police departments to shift their resources onto pursuing drug-related offenses. And specifically the creation of the Byrne multijurisdictional narcotics task force is a textbook illustration of how the link between the service providers (police) and the customers (citizens) is eliminated when the payments for the service of police protection are no longer coming from the communities—narcotics force police salaries are now tied to the federal grants.

## V. CONCLUSION

In this paper, we developed a theory of how federal government programs and policies can alter the incentives of local police departments and thus the provision of local policing. The federal subsidization of policing drives a wedge between the recipients of the service (the local community), the service providers (the local police), and the payments to the service providers (federal funds). Because police departments now have an external fund of money coming from the federal government, their actions are not constrained by local taxpayers. While it is true that local taxpayers are still paying police and thus they are in some sense constrained, the importance of federal aid and certain federal programs is that it *weakens* the incentives to be more accountable to local taxpayers and citizens. The directives to police departments are now also tied to the federal government initiatives that provide the funds in order to enforce these specific directives. As a result, local police begin to shift their priorities toward their funding source, and in some cases, can begin to enforce federal government initiatives.

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132. *Id.* at 247.

We discussed how this framework can be used to understand the transformation of U.S. local policing in the twentieth century by illustrating this intervention and providing preliminary analysis of the breakdown of community-orientated policing.

We believe our analysis can be used to better understand the tensions between community and policing today, where the attention of local police is more captured by the federal government than by the local community. The importance of this process through the twentieth and into the twenty-first century is how the federal government can move local policing to more federal policing, and as a result create, on the margin, more federally-focused local law enforcement agencies rather than community-focused law enforcement agencies. In general terms, it sheds light on how the provision of a local public good changes when the financing of that service also changes. Although many advocates call for the restoration of community policing as a solution, our analysis implies that such a move would have to begin with removing the federal funding that is incentivizing police to focus their attention on federal initiatives rather than pursuing community and local public safety needs.

