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COOPER-WALSH COLLOQUIUM - BIG PROBLEMS, SMALL  
GOVERNMENT: ASSESSING THE RECENT FINANCIAL CRISIS'  
IMPACT ON MUNICIPALITIES

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## Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments

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# Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments

Michelle Wilde-Anderson

## Abstract

While state interventions to stabilize the finances of struggling municipalities date back to the Great Depression, the current fiscal crisis has brought a startling escalation in the powers granted to state intervention authorities. Aptly observed by Abby Goodnough in *The New York Times*, cities and states have tried “myriad ways of righting their fiscal ships as the recession plods on,” but until very recently, “locking the mayor out of City Hall [was] generally not one of them.” In 2010 and 2011, Michigan and Rhode Island, which have been watched closely by other states, dramatically reformed their laws governing state receiverships for local governments in fiscal crisis. The new legislation provided for suspension and displacement of local government in faltering cities during the period of intervention, replacing all elected local officials with a single state appointee. Such interventions leave the legal corporation of the city and its budget intact: the city’s borders do not change, regardless of the revenue potential and service costs of that land base, and the city must pay its own bills. Yet the city’s power to govern that territory and budget is drawn up to the state’s executive branch. The city’s elected officials and its governing charter are set aside for an unspecified period of years. This Article analyzes the new state receivership legislation in Michigan and Rhode Island and offers the concept of democratic dissolution to help interpret this new development. While the new laws are premised on a genuinely urgent and difficult public policy problem—local governments overwhelmed by debt they cannot service and bills they cannot pay—this Article argues that the reforms do both too little and too much. To cure the underlying structural causes of fiscal crisis, the laws do next to nothing; to improve local management, the laws enact a punishing cancelation of local democracy. For Michigan, Rhode Island, and the other states watching them, I propose legal reforms that more moderately balance the seriousness of the challenges of local fiscal stabilization with the importance of local democracy.

**KEYWORDS:** Local Government, Takeover, Fiscal Crisis, Rhode Island, Detroit

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*Michelle Wilde Anderson\**

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*While state interventions to stabilize the finances of struggling municipalities date back to the Great Depression, the current fiscal crisis has brought a startling escalation in the powers granted to state intervention authorities. Aptly observed by Abby Goodnough in The New York Times, cities and states have tried “myriad ways of righting their fiscal ships as the recession plods on,” but until very recently, “locking the mayor out of City Hall [was] generally not one of them.”<sup>1</sup>*

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1. Abby Goodnough, *One More Job Lost in the Recession: The Mayor’s*, N.Y. TIMES (Feb. 22, 2011), <http://www.nytimes.com/2011/02/22/us/22mayor.html?pagewanted=all>.

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#### INTRODUCTION

A haircut still looks a lot better than a beheading.

*Robert G. Flanders Jr., state-appointed receiver of  
Central Falls, Rhode Island<sup>2</sup>*

Democracy, the governor seems to suggest, is something [poor and minority cities] can't afford.

*Rainbow PUSH Coalition<sup>3</sup>*

2. Tad Friend, *Letter from California: Contract City, When a Town's Budget Fight Turns Deadly*, NEW YORKER, Sept. 5, 2011, at 35.

3. *Commentaries: Michigan's Governor Tramples Democracy*, RAINBOW PUSH COALITION (June 28, 2011), [http://rainbowpush.org/commentaries/single/michigans\\_governor\\_tramples\\_democracy](http://rainbowpush.org/commentaries/single/michigans_governor_tramples_democracy); see also Rick Ungar, *The Michigan Monarchy Legislates Financial Martial Law—Nation Yawns*, FORBES (Mar. 18, 2001), <http://www.forbes.com/sites/rickungar/2011/03/18/the-michigan-monarchy-legislates-financial->

Fiscal crisis is generally described in numbers. Here are a few from the city of Benton Harbor, Michigan. More than 48% of its residents live below the poverty line,<sup>4</sup> compared to just 7% in St. Joseph, Benton Harbor's sister city across the river.<sup>5</sup> Formerly a thriving industrial hub for the region, Benton Harbor saw the rapid flight of thousands of white families and jobs from the 1960s to the 1980s.<sup>6</sup> Today, the city is 91% black.<sup>7</sup> St. Joseph is 88% white.<sup>8</sup> At least five decades of bitter race relations separate the cities sometimes known to each other as "Benton Harlem" and "St. Johannesburg."<sup>9</sup> The number one attribute promoted on Benton Harbor's website is the city's status as an enterprise zone.<sup>10</sup> St. Joseph, by contrast, self-describes as "a growing resort community" that is "nestled on the southern tip of

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martial-law-nation-yawns/ (calling Snyder's law a "shocking, Draconian, democracy-destroying measure[]").

4. See Benton Harbor, Michigan—Selected Economic Characteristics: 2006–2010 American Community Survey 5-Year Estimates, U.S. CENSUS BUREAU [hereinafter Benton Harbor Economics Census], <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (Quick Start search: topic "DP03" for "Benton Harbor city, Michigan"; follow "2010 ACS 5-year estimates" hyperlink).

5. See *St. Joseph, Michigan—Selected Economic Characteristics: 2006–2010 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU [hereinafter *St. Joseph Economics Census*], <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (Quick Start search: topic "DP03" for "St. Joseph city, Michigan"; follow "2010 ACS 5-year estimates" hyperlink).

6. *History*, CITY OF BENTON HARBOR, <http://www.bentonharborcity.com/history.htm> (last visited Mar. 27, 2012); see also Jonathan Mahler, *Is There Anything Wrong with This Economy that a Jack Nicklaus-Designed Golf Course Can't Fix?*, N.Y. TIMES (Dec. 18, 2011), [http://www.nytimes.com/2011/12/18/magazine/benton-harbor.html?\\_r=2&partner=rss&emc=rss](http://www.nytimes.com/2011/12/18/magazine/benton-harbor.html?_r=2&partner=rss&emc=rss) (describing the history and current demographics of the city).

7. *Benton Harbor, Michigan—Profile of General Population and Housing Characteristics: 2010*, U.S. CENSUS BUREAU [hereinafter *Benton Harbor General Profile Census*], <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (Quick Start search: topic "DP-1" for "Benton Harbor city, Michigan"; then follow "2010 Demographic Profile SF" hyperlink).

8. *St. Joseph, Michigan—Profile of General Population and Housing Characteristics: 2010*, U.S. CENSUS BUREAU [hereinafter *St. Joseph General Profile Census*], <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (Quick Start search: topic "DP-1" for "St. Joseph city, Michigan"; then follow "2010 Demographic Profile SF" hyperlink).

9. See ALEX KOTLOWITZ, *THE OTHER SIDE OF THE RIVER: A STORY OF TWO TOWNS, A DEATH, AND AMERICA'S DILEMMA* 29–32 (1998). Kotlowitz's book provides a historical account of racial tensions between Benton Harbor and St. Joseph told through the lens of a 1991 murder of a black teenage boy.

10. *History*, *supra* note 6; *Business*, CITY OF BENTON HARBOR, <http://www.bentonharborcity.com/business1.htm> (last visited Mar. 27, 2012).

what has been termed “The Riviera of the Midwest.”<sup>11</sup> A March 2011 audit estimated Benton Harbor’s debt at \$6 million—quite a figure for a city of just over 10,000 people.<sup>12</sup> Deepening the fiscal crisis, appliance maker Whirlpool Corporation announced layoffs in 2011 of 5,000 employees, many of whom worked at the company’s world headquarters in Benton Harbor.<sup>13</sup>

The number three is now important in Benton Harbor as well. As a result of a law passed in 2011, the City Council is now limited to three powers: calling council meetings to order, adjourning meetings, and approving council minutes.<sup>14</sup> The authority, substance, and process in between—setting the meeting, proposing agenda items, determining policy, and managing operations—all lie in the hands of the city’s “emergency manager,” a state appointee.<sup>15</sup> Under the 2011 law, when the state places a city in receivership because of fiscal distress, the emergency manager assumes the responsibilities of all elected officials for the city.<sup>16</sup> In addition to functionally firing elected officials, the 2011 law gives emergency managers significant new powers. Most notably, they can now break existing collective bargaining agreements and other contracts, negotiate and approve any future agreements on the city’s behalf, and ban the city’s entry into new collective bargaining agreements for up to five years.<sup>17</sup> They can also privatize the city for the long-term, if not permanently, by contracting out for services, selling public assets, and cancelling local programs.

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11. *Tour of St. Joseph, Michigan*, CITY OF ST. JOSEPH, <http://sjcity.com/inside.php?a=PG:123> (last visited Mar. 27, 2012).

12. Brandon Lewis, *Audit Finds City of Benton Harbor \$6 Million in Debt*, WNDU.COM (Mar. 8, 2011), [http://www.wndu.com/politics/headlines/Audit\\_finds\\_City\\_of\\_Benton\\_Harbor\\_6\\_million\\_in\\_debt\\_117564384.html](http://www.wndu.com/politics/headlines/Audit_finds_City_of_Benton_Harbor_6_million_in_debt_117564384.html); *Benton Harbor General Profile Census*, *supra* note 7.

13. Tony Spehar, *Whirlpool Layoffs Worry Nearby Businesses*, ABC 57 NEWS (Oct. 11, 2011), <http://www.abc57.com/news/local/Whirlpool-Layoffs-Worry-Nearby-Businesses-131544803.html>; Mae Anderson, *Whirlpool to Cut 5,000 Jobs to Reduce Costs*, YAHOO! FIN. (Oct. 28, 2011), <http://finance.yahoo.com/news/Whirlpool-to-cut-5000-jobs-to-apf-3248783307.html>.

14. *Emergency Financial Manager Takes Power, Raises Tempers in Benton Harbor*, MLIVE.COM (Apr. 19, 2011), [www.mlive.com/news/grand-rapids/index.ssf/2011/04/emergency\\_financial\\_manager\\_ta.html](http://www.mlive.com/news/grand-rapids/index.ssf/2011/04/emergency_financial_manager_ta.html); *see also* Kevin Lewis, *Update: Tempers Flare at Benton Harbor Commissioners’ Meeting*, WNDU.COM (Apr. 19, 2011), [http://www.wndu.com/localnews/headlines/Benton\\_Harbor\\_commissioners\\_meeting\\_could\\_be\\_a\\_heated\\_one\\_120067674.html](http://www.wndu.com/localnews/headlines/Benton_Harbor_commissioners_meeting_could_be_a_heated_one_120067674.html).

15. MICH. COMP. LAWS § 141.1515(4) (2011).

16. *See id.*

17. *Id.* § 141.1519.

Michigan's law is similar in key respects to a new state receivership law passed in Rhode Island in 2010.<sup>18</sup> The new laws in Michigan and Rhode Island represent a major change from older models of state receiverships, in which states generally granted emergency bailout funding in exchange for local consent to the appointment of state receivers, and these receivers then guided financial recovery planning alongside local officials. Breaking with these models in the name of fiscal exigency, Michigan and Rhode Island now permit a state takeover without bailout funding or local consent, and they dramatically increase the powers granted to emergency managers.

The new laws suspend a city's charter and its sitting government, imposing the authority of the state through an appointee of the governor. A legislative sponsor of the Michigan bill thus referred to the legislation as "financial martial law."<sup>19</sup> A more precise description of the new statutes is, in my view, "democratic dissolution" — that is, changes that suspend local democracy, even though the city remains a legal entity. For an unbounded period of time, a city's corporate status is held in place while its charter and system of government are replaced by a single official acting with unprecedented authority, discretion, and autonomy. This unusual combination means that the receiverships dissolve democratic self-rule for the city, but not in a way that changes the taxable land base of the city or the service needs of its population. In other words, local power is absorbed by the state but the local budget is not — the struggling city must continue to sustain the costs of an independent municipal government (including the emergency manager's salary, staffing costs, and administrative expenses) through revenues collected locally. Whereas a true dissolution removes a locality's borders and thus merges its land base and people with a larger county or township government, a democratic dissolution preserves the municipal corporation but suspends its government.

This Article analyzes the state receivership laws in Michigan and Rhode Island, using the concept of democratic dissolution to interpret these recent developments. While local fiscal crisis is an urgent public

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18. See R.I. GEN. LAWS ANN. §45-9-3 (West 2011).

19. See Chad Selweski, *Michigan Senate Passes Emergency Manager Bills*, MACOMB DAILY TRIB. (Mar. 10, 2011), <http://www.dailytribune.com/article/2011/03/10/news/303099968/michigan-senate-passes-emergency-manager-bills> (describing a comment by Republican state senator Jack Brandenburg that emergency managers "will be deployed in communities that need 'financial martial law'"). Critics of the laws might prefer the phrase "colonial rule," a useful framing offered by Richard Briffault as commenter on this Article at the *Cooper Walsh Colloquium*.

policy problem for which there are no painless remedies, I argue that Michigan and Rhode Island have failed to enact effectual reform. Instead, they answer crisis with an extreme centralization of power that fails to restructure or rebuild the city's finances and management over the long term.

The clear message of these laws—that it is only local government management that stands in the way of solvency—is a gross oversimplification of the causes of fiscal decline. Centralization of power by the state on these terms does not ameliorate structural causes of financial distress, like concentrated poverty, the loss of middle-class jobs across a region, or local borders that fragment a single metropolitan area into socioeconomically segregated cities. Indeed, local democratic dissolution may only exacerbate fiscal malaise over the longer term by facilitating changes (like the abrupt sale of public assets) that produce quick returns at the cost of permanent sustainability. Along the way, radical state takeovers can enflame antagonism between state and local actors, further disempower a beleaguered local electorate, and dramatically undermine the transparency and accountability of local governance.

The consequences of these reforms matter nationally because several other states where municipalities are mired in debt and deficits are watching Michigan and Rhode Island.<sup>20</sup> Indeed, a bill borrowing elements of the Michigan law was passed in Indiana in March 2012.<sup>21</sup> For all of these states, I offer legal reforms to better address the serious challenge of local fiscal stabilization while upholding the virtues of local democracy.

### I. THE NEW GENERATION OF STATE TAKEOVER LAWS

Compared to collective bargaining reform efforts in Wisconsin, the Michigan and Rhode Island laws went into effect with little public attention beyond the states' borders. Yet they were not unnoticed; indeed, Michigan's reforms attracted attention from the likes of Steven

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20. Similar changes may be under consideration or in development in Wisconsin, Pennsylvania, New Jersey, and other states. See Rick Ungar, *Gov. Scott Walker Reportedly Planning Financial Martial Law in Wisconsin*, FORBES (Apr. 16, 2011), <http://www.forbes.com/sites/rickungar/2011/04/16/gov-scott-walker-reportedly-planning-financial-martial-law-in-wisconsin>; *Initiative 1: Create a Statewide "Local Government Flexibility Toolkit"*, MAKE IT YOUR MILWAUKEE COUNTY, <http://makeityourmilwaukee.com/the-initiative/create-a-legislative-toolkit-for-true-long-term-change> (last visited Mar. 27, 2012) (seeking financial stress test legislation).

21. See HB 1192, 117th Gen. Assemb., 2nd Sess. (Ind. 2012), available at: <http://www.in.gov/legislative/bills/2012/HE/HE1192.1.html>.



Colbert and Rachel Maddow.<sup>22</sup> Maddow commented, “this could be the most important and most under-covered story of the year.”<sup>23</sup> To introduce these laws, this Part describes their scope and structure and situates them in the context of other laws that address local fiscal crisis.

### A. An Introduction to State Receiverships

Three categories of laws have evolved to address municipal fiscal meltdown: (1) traditional creditors’ remedies, i.e., state mandamus actions to compel increased taxes for payment of debts, which can be organized and enforced through a judicial receivership; (2) municipal bankruptcy under Chapter 9 of the U.S. Bankruptcy Code, if the state permits its municipalities to so file; and (3) state municipal insolvency laws, in which the state stages an intervention in the municipality’s affairs.<sup>24</sup> In the third category, intervention may be ad hoc or provided for under general state municipal insolvency legislation.<sup>25</sup> Such intervention is commonly called a state receivership.<sup>26</sup>

The Michigan and Rhode Island statutes fall in the third category. Laws permitting state intervention in the finances of struggling municipalities have been on the books in most states since the Great De-

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22. See, e.g., *Michigan’s Emergency Manager Law Disenfranchises African-Americans*, MADDOW BLOG (Dec. 8, 2011), [http://maddowblog.msnbc.msn.com/\\_news/2011/12/08/9311633-michigans-emergency-manager-law-disenfranchises-african-americans](http://maddowblog.msnbc.msn.com/_news/2011/12/08/9311633-michigans-emergency-manager-law-disenfranchises-african-americans) (emphasizing the racial demographics of the cities selected for intervention); *The Colbert Report: The Word—Autocratic for the People* (Comedy Central television broadcast May 9, 2011), available at <http://www.colbertnation.com/the-colbert-report-videos/385702/may-09-2011/the-word---autocratic-for-the-people>.

23. *The Rachel Maddow Show: “Tyrants” Replacing Local Democracy in Michigan* (MSNBC television broadcast Dec. 8, 2011), available at <http://video.msnbc.msn.com/the-rachel-maddow-show/45607138#45607138>.

24. For an overview of each of these approaches as well as an analysis of their costs and benefits, see Omer Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crises*, 88 B.U. L. REV. 633 (2008) [hereinafter Kimhi, *Reviving Cities*]. Local finance law for cities in crisis is one of the most important, understudied topics in local government law. In addition to Kimhi’s valuable contribution and other works cited herein, a few key resources on the subject include, *inter alia*: Heather M. Forrest, *State Court Receivership Alternative to Chapter 9*, 29 AM. BANKR. INST. J. 8, 12, 81 (2010); Clayton P. Gillette, *Bondholders and Financially Stressed Municipalities*, 39 FORDHAM URBAN L.J. 639 (2012) [hereinafter Gillette, *Bondholders*]; Clayton P. Gillette, *Fiscal Federalism, Political Will, and the Strategic Use of Municipal Bankruptcy*, 79 U. CHI. L. REV. 283 (2012) [hereinafter Gillette, *Fiscal Federalism*]; Michael W. McConnell & Randal C. Picker, *When Cities Go Broke, A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425 (1993).

25. See Kimhi, *Reviving Cities*, *supra* note 24, at 674–75.

26. See David R. Berman, *Takeovers of Local Governments: An Overview and Evaluation of State Policies*, 25 PUBLIUS J. FEDERALISM 55, 57 (1995).

pression.<sup>27</sup> Dozens of cities, both large and small, have come under state supervision since the 1970s.<sup>28</sup> The nature of this supervision has substantially varied along at least four dimensions: the existence of proactive state monitoring and audit programs; the trigger conditions and timing for intervention; the procedures, management, and leadership of the state intervention; and the circumstances and terms of the state's withdrawal.<sup>29</sup>

Municipal insolvency legislation generally establishes triggering conditions for intervention, such as specific economic criteria. It empowers a state financial board or state-appointed receiver to gather information about the city's financial condition, to manage its debt (usually by providing guarantees to creditors for the city's loans, thereby enabling the city to access credit markets), and to manage the city's finances through approval of a rehabilitation plan with revenue and spending changes.<sup>30</sup> State interventions have ranged from "oversight" systems with weak intervention authority to "control" systems with strong intervention authority.<sup>31</sup> Central to the differences among these approaches is the status of local officials during the period of intervention, as well as the power of the receiver to raise taxes and user fees, reduce expenditures, eliminate services, issue new service contracts, liquidate municipal assets, and engage in negotiations over collective bargaining agreements.<sup>32</sup>

Receivership laws reflect differing theories about why local governments fail. Some theories emphasize internal causes, such as the

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27. For a brief overview of the history and landscape of state interventions, see *id.* at 57–64. Intervention policies generally come in two forms: special legislation targeting a specific city in distress, or comprehensive legislation to govern monitoring and fiscal intervention across the state. *Id.* at 57.

28. *Id.* at 56 (estimating that at least fifty municipalities came under state control between the mid-1970s and the mid-1990s); see also Charles K. Coe, *Preventing Local Government Fiscal Crises: Emerging Best Practices*, 68 PUB. ADMIN. REV. 759, 759 (2008) (citing 2003 research identifying twenty-six states that "reported that one or more local governments had recently experienced a fiscal crisis").

29. See Berman, *supra* note 26, at 68; Coe, *supra* note 28, at 760. See generally Kimhi, *Reviving Cities*, *supra* note 24; Note, *Missed Opportunity: Urban Fiscal Crises and Financial Control Boards*, 110 HARV. L. REV. 733 (1997).

30. Kimhi, *Reviving Cities*, *supra* note 24, at 654–55.

31. In his analysis of Pennsylvania's intervention law, Berman offers a useful contrast between "oversight" arrangements that preserve local discretion in city operations and "control" arrangements in which the state "dictates specific policy steps." Berman, *supra* note 26, at 61. Coe's analysis of best practices in the context of local fiscal crisis prevention and management analyzes the states with prevention laws in terms of the strength of their "intervention authority," from strong to weak to no such power. Coe, *supra* note 28, at 760, 763–64.

32. See Coe, *supra* note 28, at 763–64.

incompetence and untrustworthiness of municipal officials, or defects in the local political economy, particularly the dominance of a narrow band of special interests in local politics.<sup>33</sup> Other explanations stress external factors, such as socioeconomic decline, regional change, and racial discrimination.<sup>34</sup>

If causal theories vary, so too do the legislative purposes of state intervention. Receiverships can serve any or all of four constituencies and their interests. First is the people of the city, who depend on the faltering local government to ensure public safety, provide services, protect property values, and the like. Second is other municipalities in the state, which may suffer a contagion effect of the local crisis if municipal bond markets deem all cities in the state to be a less secure investment because the state allowed one of its cities to default on debt obligations.<sup>35</sup> The third main constituency of municipal insolvency laws is bondholders or creditors, who have a strong interest in avoiding the restructuring of debt permitted in municipal bankruptcy. Lastly, receiverships affect local public employees and retirees, who depend on and have relied upon contracts with the local government for their household financial security. Like bondholders, these current and former employees have a vested interest in avoiding bankruptcy and its potential rupture of collective bargaining agreements. A state legislature's theory of the causes of fiscal distress and its purposes for intervention shape its legal intervention to ameliorate the crisis.

Traditionally, state receiverships were coupled with increased financial support from the state.<sup>36</sup> It is a familiar carrot and stick formula—bailout funds or loans tied to mandatory reform. Given the current degree of state fiscal stress and falling levels of state aid for local governments, however, states are loathe to send bailout funding to even the most troubled local governments.<sup>37</sup> States are thus look-

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33. Kimhi, *Reviving Cities*, *supra* note 24, at 642–46.

34. *Id.*

35. See Gillette, *Fiscal Federalism*, *supra* note 24, at 302 (defining contagion risks as “the possibility that local distress is indicative of more general fiscal difficulties or that unresolved local distress will cause disruption in other markets, because the risks of one are interconnected with risks elsewhere”).

36. See generally Berman, *supra* note 26.

37. While states saw stronger than expected growth in revenues in 2011, forty-two states and the District of Columbia have closed, or need to close, \$103 billion in budget gaps, and because these gaps come after multiple years of using up state reserves, budget cuts are likely to be even more severe in 2012. Elizabeth McNichol, Phil Oliff & Nicholas Johnson, *States Continue to Feel Recession's Impact*, CTR. ON BUDGET & POLICY PRIORITIES (Jan. 9, 2012), <http://www.cbpp.org/files/2-8-08sfp.pdf>.

ing for cheaper solutions to local problems — i.e., reforms that address local fiscal stress and its potential contagion impacts on the creditworthiness of other municipalities in the state without providing state financial support, whether offered as grants, loans, or loan guarantees.

Michigan and Rhode Island are thus conducting an experiment of great interest to states with troubled municipalities. Can a state slash funding for local governments while using an unprecedentedly strong state receivership as a backstop to fiscal distress?

### B. Michigan

In February of 2011, the emergency manager for the Detroit Public Schools announced a desperate plan to cut costs: He would close half of the district schools, thereby increasing class sizes to as many as sixty students.<sup>38</sup> The City of Detroit was faring little better, as it and other Michigan cities headed toward the shoals of municipal bankruptcy.<sup>39</sup> In March of that year, Governor Rick Snyder and the state legislature responded with a bill strengthening the “Local Government and School District Fiscal Accountability Act.”<sup>40</sup> The amend-

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Budgetary shortfalls in 2012 may reach \$112 billion dollars, or nearly 19% of all state spending commitments, due to the combined effects of declining tax revenues and increased demand for services. Robert Pollin & Jeffrey Thompson, *Fighting Austerity and Reclaiming a Future for State and Local Governments* (Political Econ. Research Inst., Working Paper No. 259, 2011), available at [http://www.peri.umass.edu/fileadmin/pdf/working\\_papers/working\\_papers\\_251-300/WP259.pdf](http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_251-300/WP259.pdf). Proposals for budget cuts often include funding cuts for local governments, and indeed, in 2011 more than twenty states cut funding to local governments. James C. Cooper, *The New Fiscal Nightmare: 2012 State Budget Cuts*, FISCAL TIMES (May 31, 2011), <http://www.thefiscaltimes.com/Columns/2011/05/31/The-New-Fiscal-Nightmare-2012-State-Budgets-Cuts.aspx#page1> (citing data from the National Association of Governors and National Association of State Budget Officers).

38. See Ben Rooney, *Michigan Approves Plan to Close Half of Detroit Schools*, CNN MONEY (Feb. 22, 2011), [http://money.cnn.com/2011/02/22/news/economy/detroit\\_school\\_restructuring/index.htm](http://money.cnn.com/2011/02/22/news/economy/detroit_school_restructuring/index.htm). Though the state approved such reforms, they did not ultimately go into effect. See Darrell Dawsey, *Detroit Won't Raise Class Sizes to 60 Students, but Is Five Years Enough Time to Eliminate Deficit?*, DETROIT FREE PRESS (Feb. 25, 2011), [http://www.mlive.com/news/detroit/index.ssf/2011/02/dps\\_deficit-elimination\\_plan\\_w.html](http://www.mlive.com/news/detroit/index.ssf/2011/02/dps_deficit-elimination_plan_w.html).

39. See, e.g., Jeff Green & Jonathan Keehner, *Muni Bankruptcy Threat Makes Michigan Train Financial-Emergency SWAT Teams*, BLOOMBERG NEWS (Apr. 17, 2011), <http://www.bloomberg.com/news/2011-04-18/muni-bankruptcy-threat-makes-michigan-train-financial-emergency-swat-teams.html>.

40. Local Government and School District Fiscal Accountability Act, 2011 Mich. Legis. Serv. 4 (West) (codified as amended at MICH. COMP. LAWS §§ 141.1501–1531 (2011)). The present analysis is limited to the provisions of the Act applicable to general purpose local governments. Its school district implications, however, are of great interest. For analysis of state takeovers of fiscally distressed school districts and

ments mark the third-generation legislative effort in the state to permit direct state intervention in local finance, but to a new degree, the recent reforms embody the statutory title's emphasis on "fiscal accountability" —if not punishment or blameworthiness— rather than local need.<sup>41</sup> The amendments significantly and controversially amplified the power given to emergency managers, and they permitted state intervention at earlier stages of financial deterioration and in a wider range of circumstances.<sup>42</sup>

The first key change in the law is to empower emergency managers to replace all officials elected to govern the city. The law provides that emergency managers will "act for and in the place and stead of the governing body and the office of chief administrative officer," further specifying that throughout the "pendency of receivership, the governing body and the chief administrative officer of the local government may not exercise any of the powers of those offices except as may be specifically authorized in writing by the emergency manager and are subject to any conditions required by the emergency manager."<sup>43</sup> It allows the receiver to literally lock local officials out of city offices, email accounts, and internal information systems, if needed to minimize disruption of "the emergency manager's ability to manage the government."<sup>44</sup>

Under the new law, emergency managers issue a "financial and operating plan," which must be presented to the public in an informational hearing, though no public approval is sought.<sup>45</sup> The plan must provide for payment in full of debt service on "bonds, notes, and mu-

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other measures to restore fiscal solvency, see Kristi L. Bowman, *Before School Districts Go Broke: A Proposal for Federal Reform*, 79 U. CIN. L. REV. 895, 925–30 (2011) (noting that seventeen states authorize a state or mayoral takeover of a local school district for fiscal, as opposed to academic, reasons, and fifty-six such takeovers were either primarily triggered by fiscal distress or were triggered by a combination of academic, management, and fiscal problems). Bowman's article, unfortunately, went to press prior to the enactment of the Michigan reforms.

41. *Compare id.*, with Local Government Fiscal Accountability Act of 1990, MICH. COMP. LAWS ANN. §§ 141.1201–1291 (West 1990) (repealed 2011).

42. See J. HUNAUULT ET. AL., HOUSE FISCAL AGENCY, LEGISLATIVE ANALYSIS: LOCAL GOVERNMENT & SCHOOL DISTRICT FISCAL ACCOUNTABILITY ACT 1 (2011), available at <http://www.legislature.mi.gov/documents/2011-2012/billanalysis/House/pdf/2011-HLA-4214-6.pdf>; Citizens Research Council of Mich., *The Local Government and School District Fiscal Accountability Act: Public Act 4 of 2011* at 10–11 (Apr. 2011) (unpublished manuscript), available at <http://www.crcmich.org/PUBLICAT/2010s/2011/rpt368.pdf>.

43. MICH. COMP. LAWS § 141.1515(4).

44. *Id.* § 141.1517(2).

45. *Id.* § 141.1518(1), (4).

municipal securities . . . and all other uncontested legal obligations,”<sup>46</sup> but it permits emergency managers to reject, modify, or terminate service, purchase, or other non-labor contracts.<sup>47</sup> With respect to labor contracts, the emergency manager can “reject, modify or terminate” terms of an existing collective bargaining agreement after he determines—in his sole discretion—that a satisfactory, consensual modification of the agreement “is unlikely to be obtained” and that a list of statutory conditions have occurred.<sup>48</sup> The emergency manager can suspend collective bargaining for a period of up to five years, and he may assume the role of trustee of any pension funds that are not at least 80% actuarially funded.<sup>49</sup>

Emergency managers also have the power to consolidate or eliminate local departments and set aside minimum staffing requirements provided in the city charter or contracts.<sup>50</sup> At the most dramatic level of restructuring, the emergency manager may, upon approval by the governor, dissolve the local government unit itself without first satisfying the provisions of Michigan’s dissolution law or seeking approval through the state boundary change agency.<sup>51</sup> He may alternately recommend to the state boundary commission that the local government consolidate with one or more other municipal governments. The emergency manager, however, must first determine that such consolidation “would materially alleviate the financial emergency of the municipal government and would not materially and adversely affect the financial situation of the government or governments with which the municipal government in receivership is consolidated.”<sup>52</sup> This second requirement makes consolidations of a poor municipality with a neighboring wealthy one (like Benton Harbor with St. Joseph) extremely improbable. Indeed, it is hard to imagine a situation in which the second criteria could be met without a major state aid package accompanying a consolidation.

Prior to passage of the 2010 amendments to the Act, emergency managers were already in place in the Detroit Public School Dis-

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46. *Id.* § 141.1518(1)(b).

47. *Id.* §§ 141.1518 (1)(c), 1519(1)(j).

48. *Id.* § 141.1519(k).

49. *Id.* § 141.1519(m).

50. *Id.* § 141.1519(i).

51. *Id.* § 141.1519(cc) (establishing a mode of dissolution requiring approval by the emergency manager and governor alone, but preserving existing state laws regarding the assignment of assets, debts, and liabilities following dissolution); *cf. id.* § 141.1519(bb) (providing that any consolidation “shall proceed as provided by law”).

52. *Id.* § 141.1519(bb).

trict,<sup>53</sup> as well as in the cities of Pontiac, Benton Harbor, and Ecorse.<sup>54</sup> Upon passage of the reforms, those appointees received augmented authority. Flint, the Highland Park School District, and the Muskegon Heights School District were soon designated for state intervention.<sup>55</sup> The City of Detroit was widely reported as next in line, but a wave of protests led the governor's administration to consider publicly a consent-based alternative in which the city's democratically elected officials would carry out a state-mandated package of fiscal reforms.<sup>56</sup> Press reports indicate that state officials have a list of more than two dozen additional local governments and school districts also under consideration for intervention.<sup>57</sup>

With the stakes of state intervention set so much higher, however, the potential of an emergency manager takeover may have already affected local politics in struggling cities. For instance, one local columnist opined that the new law gives Detroit's Mayor Bing a new source of leverage: "the power to strike fear into the heart of unions and [the] City Council by quietly threatening to use that law."<sup>58</sup> Mayor Bing himself, the article reasoned, could seek appointment to become the city's emergency manager.<sup>59</sup> Under the new law, such a move could occur, but only at the governor's discretion—Bing would need to convince the governor that it was simply his lack of authority

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53. See Karen Bouffard, *House OKs Tougher Approach to Faltering Cities, Schools*, DETROIT NEWS, Feb. 24, 2011, at A1.

54. Tim Martin, *Lawsuit Targets Michigan Emergency Manager Law*, LEGAL NEWS (June 24, 2011), <http://www.legalnews.com/Oakland/989099>.

55. Karen Pierog, *Michigan Governor OKs Takeover of Flint*, REUTERS (Nov. 29, 2011), <http://www.reuters.com/article/2011/11/29/us-flint-michigan-emergency-idUSTRE7AS2MY20111129>; *Snyder Names Emergency Manager For Muskegon Heights Schools*, DETROIT FREE PRESS, Apr. 20, 2012, at A7.

56. John D. Stoll, *Michigan Governor Prefers No Detroit Emergency Manager*, REUTERS (Jan. 23, 2012), <http://www.reuters.com/article/2012/01/23/us-michgov-detroit-idUSTRE80M2AO20120123>.

57. See Jennifer Chambers, *Governor Targets 18 Area Districts*, DETROIT NEWS, Apr. 28, 2011, at A3 (noting that of the twenty-three fiscally distressed school districts identified by the governor, eighteen are in Metro Detroit); Eric Gaertner, *Muskegon Heights' Deficit Dilemma—Financial Emergency Law Casts Shadow*, GRAND RAPIDS PRESS, Apr. 4, 2011, at A10.

58. Laura Berman, *Super Powers Intrigue Bing*, DETROIT NEWS, Apr. 21, 2011, at A1.

59. *Id.*; see also Charles Sercombe, *Councilmember Is Ready to Act as EFM if Needed*, HAMTRAMCK REV. (Oct. 25, 2011), <http://www.hamtramckreview.com/2011/04/councilmember-is-ready-to-act-as-efm-if-needed> (reporting that a member of the city council of the distressed city of Hamtramck had received training to act as an emergency manager).

with the City Council, labor unions, contractors, or all of the above that stood between him and the city's fiscal recovery.

The impact of the law has disproportionately impacted the state's African-American population. The four cities already approved for intervention have proportionately large African-American populations: Benton Harbor is 91.4% African-American,<sup>60</sup> Flint is 59.5%,<sup>61</sup> Pontiac is 55.3%,<sup>62</sup> and Ecorse is 48.6%.<sup>63</sup> The press has widely and accurately reported that close to half of the state's African-American population will be governed by an emergency manager if Detroit is approved for state intervention, as threatened.<sup>64</sup> Indeed, that number climbs to 57% if one assesses the share of the African-American population currently governed by an emergency manager either in their city or in their school district.<sup>65</sup> Each of the cities selected for an emergency manager has a Latino population as well, such that the non-Hispanic white populations of the cities range from a meager

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60. *Benton Harbor General Profile Census*, *supra* note 7.

61. *Flint, Michigan—Profile of General Population and Housing Characteristics: 2010*, U.S. CENSUS BUREAU [hereinafter *Flint General Profile Census*], <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (Quick Start search: topic “DP-1” for “Flint city, Michigan”; then follow “2010 Demographic Profile SF” hyperlink).

62. *Pontiac, Michigan—Profile of General Population and Housing Characteristics: 2010*, U.S. CENSUS BUREAU [hereinafter *Pontiac General Profile Census*], <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (Quick Start search: topic “DP-1” for “Pontiac city, Michigan”; then follow “2010 Demographic Profile SF” hyperlink).

63. *Ecorse, Michigan—Profile of General Population and Housing Characteristics: 2010*, U.S. CENSUS BUREAU [hereinafter *Ecorse General Profile Census*], <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (Quick Start search: topic “DP-1” for “Ecorse city, Michigan”; then follow “2010 Demographic Profile SF” hyperlink).

64. See *Benton Harbor General Profile Census*, *supra* note 7; *Ecorse General Profile Census*, *supra* note 63; *Flint General Profile Census*, *supra* note 61; *Pontiac General Profile Census*, *supra* note 62; *Detroit—Demographic and Housing Characteristics: 2006–2010*, U.S. CENSUS BUREAU, <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (Quick Start search: topic “DP05” for “Detroit”; then follow “2010 ACS 5-year estimates” hyperlink); *Michigan—Demographic and Housing Characteristics: 2006–2010*, U.S. CENSUS BUREAU, <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (Quick Start search: topic “DP05” for “Michigan”; then follow “2010 ACS 5-year estimates” hyperlink); see also Rachel Maddow: *Mich Emergency Manager Story “the Most Important & Undercovered Story of the Year,”* DAILY KOS (Dec. 9, 2011, 5:10 AM), <http://www.dailykos.com/story/2011/12/09/1043610/-Rachel-Maddow-Mich-Emergency-Manager-story-the-most-important-undercovered-story-of-the-year> (reporting statistics).

65. Compare *supra* note 64, with *Michigan School District Demographic Profiles*, PROXIMITY, [http://proximityone.com/mi\\_sdc.htm](http://proximityone.com/mi_sdc.htm) (Quick Start search: topic “DP1” for “Detroit City School District,” “Highland Park City Schools,” and “Muskegon Heights School District”).



6.4% (in Benton Harbor) to a modest high of 36.5% (in Ecorse).<sup>66</sup> The cities selected for intervention are also very high poverty, with poverty rates ranging from a low of 32% in Pontiac to a high of 48.7% in Benton Harbor (compared to a 13.8% national average).<sup>67</sup> Opposition to the law thus emphasizes that the displacement of elected local governments by emergency managers is taking place in poor and minority cities.

Advocacy groups are fighting for a repeal of the law, claiming that the new authority granted to emergency managers “empowers an unaccountable and unelected czar to nullify worker contracts and sell off assets.”<sup>68</sup> Proponents of the repeal collected and submitted the requisite number of signatures to call a November 2012 referendum, though a legal challenge to the font size used on the petitions is wending up the ladder of appeals.<sup>69</sup> Possible appointment of an emergency manager in Detroit has created a particular storm of controversy, including a number of major protests.<sup>70</sup> An op-ed by David Alexander Bullock, the president of the Highland Park, Michigan chapter of the NAACP, argued that an illusory hero myth underlies the emergency manager law:

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66. See *id.*; *Benton Harbor General Profile Census*, *supra* note 7; *Flint General Profile Census*, *supra* note 61; *Pontiac General Profile Census*, *supra* note 62.

67. See *Benton Harbor Economics Census*, *supra* note 4; *Ecorse, Michigan—Selected Economic Characteristics: 2006–2010*, U.S. CENSUS BUREAU, <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (Quick Start search: topic “DP03” for “Ecorse city, Michigan”; then follow “2010 ACS 5-year estimates” hyperlink); *Flint, Michigan—Selected Economic Characteristics: 2006–2010*, U.S. CENSUS BUREAU, <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (Quick Start search: topic “DP03” for “Flint city, Michigan”; then follow “2010 ACS 5-year estimates” hyperlink); *United States—Selected Economic Characteristics: 2006–2010*, U.S. CENSUS, <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (Quick Start search: topic “DP03” for “United States”; then follow “2010 ACS 5-year estimates” hyperlink).

68. RAINBOW PUSH COALITION, *supra* note 4; see also Ungar, *supra* note 4 (calling Snyder’s law a “shocking, Draconian, democracy-destroying measure[ ]”).

69. See Chad Livengood, *Appeals Panel Throws More Uncertainty on EM Law Repeal*, DETROIT FREE PRESS, June 9, 2012, at A1; Jonathan Oosting, *Coalition Seeks Action on Emergency Manager Referendum in Wake of Appeals Court Victory*, MLIVE.COM (June 21, 2012), [http://www.mlive.com/news/detroit/index.ssf/2012/06/coalition\\_seeks\\_action\\_on\\_emer.html](http://www.mlive.com/news/detroit/index.ssf/2012/06/coalition_seeks_action_on_emer.html). It is not clear what the outcome of a successful repeal vote might be. Marcus Wright, *EM Opponents Closer to Goal*, MICH. CITIZEN (Sept. 11, 2011), <http://michigancitizen.com/em-opponents-closer-to-goal-p10221-1.htm>. Because the 2011 Bill repealed the 1990 Act that created the statutory authority for emergency managers, the repeal of the 2011 Act may result in a return to the 1990 law or result in both laws being suspended. *Id.*

70. See, e.g., Kathleen Gray & Steve Neavling, *Protesters at Snyder’s Subdivision Divided*, DETROIT FREE PRESS, Jan. 17, 2012, at A3 (covering the January 16, 2012 protest outside the gated community where Governor Snyder lives).

The emergency manager is supposed to be a hero. After receiving training by the Snyder administration, s/he will come in and do what no elected official and collective community action can—save Detroit. This is a destructive fiction. The Detroit Public School system, the City of Highland Park and the City of Benton Harbor prove that emergency managers are not miracle workers or supernatural saviors. Detroit doesn't need an emergency manager. Detroit needs emergency reconstruction. We don't need a consultant. We need community and civic engagement. It will take elected officials, labor, pastors, parents and citizens at large to turn this ship around before it collides into the impending iceberg of increasing decline.<sup>71</sup>

In addition, several legal challenges have been filed. The main case, which Governor Snyder called the Michigan Supreme Court to take up on an expedited basis,<sup>72</sup> challenges the emergency manager law as a violation of several state constitutional provisions, including its contracts clause, its home rule laws, and its ban on unfunded mandates.<sup>73</sup> The lawsuit alleges that the law “usurps the constitutionally mandated rights of local electors to a republican form of government and to choose the officials of local government by democratic elections.”<sup>74</sup> The challenge was brought by private plaintiffs with counsel from the Sugar Law Center for Economic and Social Justice in Detroit, the Center for Constitutional Rights in New York, the Detroit and Michigan National Lawyers Guild, and private firms.<sup>75</sup> A separate action, which challenged the pension provisions of the Act on federal and state constitutional grounds, was recently dismissed as unripe, because the Act had not yet impacted Detroit's pension funds.<sup>76</sup>

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71. David Alexander Bullock, *Emergency Managers Destroy Democracy*, HUFFINGTON POST (Jan. 27, 2012), [http://www.huffingtonpost.com/david-alexander-bullock/detroit-emergency-managers-democracy\\_b\\_1237031.html](http://www.huffingtonpost.com/david-alexander-bullock/detroit-emergency-managers-democracy_b_1237031.html).

72. Executive Message from Rick Snyder, Governor, Mich., to Chief Justice, Mich. Supreme Court (Aug. 12, 2011), *available at* <http://www.sugarlaw.org/wp-content/uploads/2011/08/Executive-Message-Aug-2011-Re-Brown-v-Snyder.pdf>. This expedite request remains pending with the Court. *See In re* Exec. Message of the Governor, 807 N.W.2d 302 (Mich. 2012), docket tracking available at Michigan Court of Appeals Docket Number Inquiry: 143563, <http://coa.courts.mi.gov/resources/asp/viewdocket.asp?casenumber=143563&inqtype=sdoc&yr=0&yr=0&SubmitBtn=Search> (last visited June 13, 2012).

73. Complaint at ¶¶ 67–68, 73, 78, 83, 90, *Brown v. Snyder*, No. 11-685-CZ (Mich. Ct. Cl. June 22, 2011), *available at* <http://op.bna.com/dlrcases.nsf/r?Open=edue-8j4qjt>.

74. *Id.* at ¶ 59.

75. *Id.* at ¶¶ 1–2.

76. *Gen. Ret. Sys. of Detroit v. Snyder*, No. 11-11866, 2011 WL 4506357 (E.D. Mich. Sept. 29, 2011).

### C. Rhode Island

Across the country, Michigan has a counterpart in state receivership reform. In 2010, Rhode Island significantly ratcheted up the power of state oversight and intervention in local government finance by amending the state's "Act Relating to Cities and Towns—Providing Financial Stability."<sup>77</sup> The earlier generation of the Act, promulgated in 1993, had empowered the state's director of administration to establish a budget commission for municipalities that satisfied specific triggering conditions, namely that the city's bond rating had fallen below investment grade and "there [was] an imminent threat of default on any or all of its debt obligations."<sup>78</sup> These budget commissions were composed of both state and local appointees (including the city council president, city residents, and ex-officio state officers), but they gave local stakeholders a two-thirds majority and required only a simple majority for action.<sup>79</sup> The weight of local interests on the board was a key tenet of the reasoning in a Rhode Island Supreme Court decision in 1994 finding that the law was constitutional, because the impact on local home rule authority and municipal structure was "at most incidental and temporary."<sup>80</sup>

In 2010, with some notable amendments in 2011,<sup>81</sup> the state General Assembly enacted a new, stronger version of the law.<sup>82</sup> The new regime establishes three stages of intervention: (1) the appointment of a fiscal overseer to examine the city's budget and make recommendations to local officials; (2) the appointment of a budget commission; and (3) the appointment of a state receiver.<sup>83</sup> The second

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77. Compare R.I. GEN. LAWS ANN. § 45-9-3 (West 2011), with Act Relating to Budget and Review Commission, 1993 R.I. Pub. Laws 242.

78. 1993 R.I. Pub. Laws 242.

79. Specifically, the commissions were composed of four state officers or their appointees, two officers of the city, and three residents of the city to be selected by the Governor from a list generated by the House and Senate. *Id.* (identifying the members of a budget commission).

80. See *Marran v. Baird*, 635 A.2d 1174, 1178 (R.I. 1994); Katherine Newby Kishfy, Note, *Preserving Local Autonomy in the Face of Municipal Financial Crisis: Reconciling Rhode Island's Response to the Central Falls Financial Crisis with the State's Home Rule Tradition*, 16 ROGER WILLIAMS U. L. REV. 348, 376–78 (2011).

81. As this Article went to press in June, 2012, members of Rhode Island's House and Senate had introduced legislation to further amend the receivership law. See H.B. 7353, 2012 Leg. Sess. (R.I. Feb. 2, 2012) (Westlaw); S.B. 2280, 2012 Leg. Sess. (R.I. Feb. 1, 2012) (Westlaw); H.B. 5604, 2011 Leg. Sess. (R.I. March 3, 2011) (Westlaw). Those proposed reforms are discussed *infra* in Part II-C.

82. R.I. GEN. LAWS ANN. § 45-9-1.

83. See *id.* §§ 45-9-3 to -17; Kishfy, *supra* note 80, at 379–82 (analyzing the 2010 bill in detail, and in comparison to the 1993 law).

stage budget commission is considerably more powerful than that provided for under the 1993 version of the Act, as it is dominated by a majority of state appointees and stakeholders and eliminates the seats for members of the local electorate.<sup>84</sup>

The most controversial changes to the law, however, lie in the process and powers associated with the strongest medicine, the state receiver.<sup>85</sup> The Act grants the receiver the “powers of the city or town council exercisable by resolution or ordinance,”<sup>86</sup> as well as the “power to exercise any function or power of any municipal officer or employee, board, authority or commission, whether elected or otherwise relating to or impacting the fiscal stability of the city or town including, without limitation, school and zoning matters.”<sup>87</sup> Elected officials are demoted to an “advisory” role, with the receiver enjoying decision-making authority in the face of conflict.<sup>88</sup> To make the hierarchy of authority even more indisputable, the Act further provides that “elected officials or [anybody of the city or town] shall not rescind or take any action contrary to such action by the receiver so long as the receivership continues to exist.”<sup>89</sup>

Critically, the Rhode Island law empowers emergency managers to negotiate and approve any future collective bargaining agreements signed by the city during the emergency manager’s term, and it requires them to provide certification to the state’s department of revenue that the city can afford the agreement “without a detrimental impact on the provision of municipal services.”<sup>90</sup> In contrast to the Michigan bill, however, the Act expressly denies the receiver any authority “to reject or alter any existing collective bargaining agreement, unless by agreement, during the term of [the agreement].”<sup>91</sup>

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84. R.I. GEN. LAWS ANN. § 45-9-6(a) (calling for a five-member budget commission with three appointees from the director of revenue, and one each from the elected chief executive officer of the city and the president of the city or town council).

85. For ease, I will refer to state receivers in Michigan and Rhode Island as both “emergency managers” and “state receivers,” though technically Michigan uses the former language and Rhode Island uses the latter.

86. R.I. GEN. LAWS ANN. § 45-9-20.

87. *Id.* § 45-9-7(b)(2).

88. *Id.* § 45-9-7(c) (“[T]he powers of the receiver shall be superior to and supersede the powers of the elected officials of the city or town [who] shall continue to be elected in accordance with the city or town charter, and shall serve in an advisory capacity to the receiver. . . . In the event a conflict arises between the chief elected official or city or town council and the receiver, the receiver’s decision shall prevail.”).

89. *Id.* § 45-9-18.

90. *Id.* § 45-9-9.

91. *Id.*

As compared with earlier versions of the law, the 2010 reforms loosen the triggering conditions for state intervention, making them much less objective. The state's director of revenue is empowered to establish a budget commission upon a determination by a financial overseer that the city or town meets any of four general criteria, including the inability "to present a balanced municipal budget" or a determination by the overseer that the city "[w]ill not achieve fiscal stability without the assistance of a budget commission."<sup>92</sup> To move from a budget commission to a receiver, the commission must simply "conclude[] that its powers are insufficient to restore fiscal stability" and state its reasons for that conclusion.<sup>93</sup> The Act also provides for immediate appointment of a receiver without first designating an overseer or budget commission in cases where "a city or town is facing a fiscal emergency and . . . circumstances do not allow for appointment of a fiscal overseer or a budget commission prior to the appointment of a receiver."<sup>94</sup> Fiscal emergency is not defined in the statute.<sup>95</sup>

A few remaining features of the law are worth noting. The law provides that the state director of revenue has authority to determine the receiver's salary, but that such salary will be paid by the city.<sup>96</sup> In addition, provisions added in 2011 expressly indemnify the state's director of revenue or any fiscal overseer, budget commission member, receiver, or staff thereto of any legal liability for wrongs including the "neglect or violation of the rights of any person under any federal or state law . . . except in the case of intentional malfeasance, malicious conduct or gross negligence."<sup>97</sup> A costs provision grants attorney's fees to a state intervener in the case of any non-prevailing party who has ignored a written demand made by that intervener.<sup>98</sup>

The 2010 legal reforms in Rhode Island were a reaction to a declaration of fiscal insolvency and a petition for judicial receivership by the City of Central Falls in May of that year.<sup>99</sup> Bond rating agencies

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92. *Id.* § 45-9-5.

93. *Id.* § 45-9-7(a).

94. *Id.* § 45-9-8.

95. *See id.* §§ 45-9-2, -7; *see also* Moreau v. Flanders, 15 A.3d 565, 583–84 (R.I. 2011) (confirming the absence of a definition of "fiscal emergency," but finding that omission to fall short of unconstitutional vagueness).

96. R.I. GEN. LAWS ANN. § 45-9-7(c).

97. *Id.* § 45-9-22.

98. *Id.* § 45-9-23.

99. Central Falls' economy declined over several decades beginning in the 1970s when textile manufacturers began moving overseas—taking nearly 1400 jobs with

downgraded the city's debt to junk bond status.<sup>100</sup> Fearful of contagion effects on the creditworthiness of other Rhode Island municipalities, the governor and General Assembly acted within one month to pass the 2010 receivership law, which covered Central Falls retroactively.<sup>101</sup>

In a letter issued three days after his appointment, the city's first receiver wrote to the city's elected mayor: "Effective immediately, I have assumed the duties and functions of the Office of Mayor. As a result of my role, your responsibility will be limited to serving in an advisory capacity, on such occasions as my office may seek input from you."<sup>102</sup> The letter also announced a reduction in the mayor's salary to \$26,000 per year.<sup>103</sup> Shortly thereafter, the receiver rescinded resolutions and canceled meetings of the City Council that were intended to engage legal counsel on the challenges facing the city and to express policy views on positions taken by the receiver.<sup>104</sup> As a consequence of these resolutions and meetings scheduled without the receiver's permission, in November 2010, he exercised his authority under the Act to, in his words, "relegate the City Council and its members to an advisory capacity. I will let you know if and when the advice of the City Council and/or its members is needed."<sup>105</sup> According to comments made by the city's elected officials to *The New York Times*, the receiver at no time sought their input or advice.<sup>106</sup>

For approximately two years, two sequential state receivers have constituted the sole government of Central Falls. They have raised taxes, renegotiated union contracts, closed the library and community center, and laid off city employees.<sup>107</sup> Nonetheless, on August 1, 2011

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them. Alan Farnham, *3 Most Desperate Cities Include Vallejo, Calif., Harrisburg, Pa., Central Falls, R.I.*, ABC NEWS (Sept. 8, 2011), <http://abcnews.go.com/Business/desperate-us-cities-counties-file-bankruptcy/story?id=14464314>. The state budget cuts following the 2008 recession hit Central Falls particularly hard because of its stagnant tax base and state limits on property tax increases, as well as dependency on state aid dating back to a school receivership implemented by the state in 1991. John Hill, *For City, Decades of Missed Chances; Central Falls*, PROVIDENCE J., Sept. 11, 2011, at A1.

100. Goodnough, *supra* note 1.

101. Nick Brown, *Analysis: Rhode Island Law May Transform Local Bankruptcies*, REUTERS (Aug. 11, 2011), <http://www.reuters.com/article/2011/08/11/us-bankruptcy-rhodeisland-idUSTRE77A2PK20110811>.

102. *Moreau v. Flanders*, 15 A.3d 565, 572 (R.I. 2011).

103. Goodnough, *supra* note 1.

104. *Moreau*, 15 A.3d at 572, 573 n.7.

105. *Id.* at 573 n.7.

106. Goodnough, *supra* note 1.

107. *See* Farnham, *supra* note 99.

the state-appointed receiver of Central Falls filed for municipal bankruptcy.<sup>108</sup> In December 2010, the receiver estimated that the city's annual budget of \$16 million was still facing annual deficits of \$5 million and retiree obligations of \$80 million.<sup>109</sup> The current receiver ordered reductions of up to 50% in pensions and suggested potential cuts to police and fire budgets of 40%.<sup>110</sup> Estimates of the state's legal bills related to the Central Falls receivership between June 2010 and August 2011—including approximately \$350,000 in salary for the two receivers who served sequentially during that period—amount to approximately \$1.4 million.<sup>111</sup>

At the same time of the state receivership reforms, also in response to the Central Falls meltdown, the state legislature acted to stave off contagion effects on the bond ratings of other municipalities in the state by passing legislation that guaranteed municipal bondholders payment even in a case of municipal bankruptcy.<sup>112</sup> Bondholders would receive liens on taxes and general revenues and would recover before other creditors.<sup>113</sup> The law, which would change pre-existing contracts between vendors and municipalities, may suffer retroactivity and contracts clause defects that are currently under legal consideration.<sup>114</sup> That bill's own shortcomings notwithstanding, it constituted a much more direct answer to contagion effect fears than the receivership legislation.<sup>115</sup>

Whatever the wisdom of the enacted reforms, the state legislature has had good reason to worry about Rhode Island's municipal bond

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108. Mike "Mish" Shedlock, *Central Falls Set to File Bankruptcy Exit Plan; 50% Pension Reductions, 40% Slash in Police and Fire Budgets Coming Up*, MISH'S GLOBAL ECON. TREND ANALYSIS (Sept. 1, 2011, 7:35 PM), <http://globaleconomicalysis.blogspot.com/2011/09/central-falls-set-to-file-bankruptcy.html>.

109. Michael McDonald & David McLaughlin, *'Dire' Finances Force R.I. City into Bankruptcy*, BLOOMBERG NEWS (Aug. 1, 2011), <http://www.bloomberg.com/news/2011-08-01/-dire-situation-forces-rhode-island-city-of-central-falls-into-bankruptcy.html>.

110. Shedlock, *supra* note 108.

111. John Hill, *RI Legal Bills for Central Falls Crisis Around \$1.4 Million*, PROVIDENCE J. (Aug. 10, 2011), <http://news.providencejournal.com/breaking-news/2011/08/ris-legal-bills-for-cf-crisis.html>.

112. Brown, *supra* note 101.

113. *Id.*

114. *Id.*

115. *See generally* Gillette, *Fiscal Federalism*, *supra* note 24, at 306 (arguing that "rational investors in municipal obligations would expect centralized governments to bail out fiscally distressed localities when the adverse consequences of default due to contagion or fear of systemic risk exceed the centralized bailout costs"); *see infra* Part II.B (arguing that the state receivership reforms discussed in this Article provide blunt instruments for containment of contagion effects).

markets. Several cities in the state are struggling financially and have entered the pipeline of state fiscal intervention. As noted, intervention advances from a state-appointed fiscal overseer, to a budget commission, to the strongest assertion of state control: a receiver. The City of Woonsocket has a budget commission, and, as of this writing, appointment of a receiver appears imminent.<sup>116</sup> East Providence has a fiscal overseer,<sup>117</sup> and the cities of Providence, Pawtucket, and West Warwick are currently receiving informal assistance from the state that may soon bring them under the receivership law.<sup>118</sup>

The slide into increasing levels of state control in these cities is revealing the broader ideological politics at stake in receivership laws. Woonsocket's state representatives in the General Assembly are advocating the appointment of a receiver, despite the budget cuts, credit risk, and stigma likely to result for Woonsocket's residents and local government.<sup>119</sup> As reported in *The New York Times*, one of those legislators, Jon Brien, sits on the national board of the American Legislative Exchange Council, a conservative advocacy group focused on reducing the size of state budgets.<sup>120</sup> Brien commented to the *Times* that the threat of a receiver was a good way to force the downsizing of the city government and the renegotiation of union contracts and pensions, because "you never move faster than when you have a piano hanging over your head . . . . The receiver is that piano."<sup>121</sup>

As in Michigan, the Rhode Island receivership law has generated heated public opposition. The ACLU Foundation of Rhode Island deemed it an "[a]nti-[c]ivil [l]iberties [b]ill[]" and a "troubling anti-democratic measure," because it "gives the receiver virtually dicta-

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116. Erika Niedowski, *2nd RI City Facing Receivership After Tax Stalls*, BUSINESSWEEK (June 13, 2012), <http://www.businessweek.com/ap/2012-06-13/2nd-ri-city-facing-receivership-after-tax-stalls>.

117. Ted Nesi, *Gov Taps Trooper to Oversee EP's Budget: Officials Stress City is Not Central Falls*, WPRI.COM (Nov. 14, 2011, updated Dec. 2, 2011), [http://www.wpri.com/dpp/news/local\\_news/providence/ri-to-name-overseer-to-handle-ep-finances](http://www.wpri.com/dpp/news/local_news/providence/ri-to-name-overseer-to-handle-ep-finances).

118. Ted Nesi, *Woonsocket Under Direct State Oversight: Commission put in Charge of Woonsocket's Finances*, WPRI.COM (May 29, 2012, updated June 14, 2012), [http://www.wpri.com/dpp/news/local\\_news/blackstone/woonsocket-third-ri-city-under-direct-state-oversight](http://www.wpri.com/dpp/news/local_news/blackstone/woonsocket-third-ri-city-under-direct-state-oversight).

119. Joe Nocera, *When ALEC Takes Over Your Town*, N.Y. TIMES (June 18, 2012), <http://www.nytimes.com/2012/06/19/opinion/nocera-when-alec-takes-over-your-town.html>.

120. *Id.*

121. *Id.*



torial authority.”<sup>122</sup> The mayor and city council of Central Falls challenged the constitutionality of the law under Rhode Island’s home rule guarantee against state laws that “affect the form of government of any city or town,”<sup>123</sup> among other claims.<sup>124</sup> The Rhode Island Supreme Court upheld the law in March 2011, finding that the receiver provisions did not affect the form or structure of government in Central Falls.<sup>125</sup> The court held that “although there has been a temporary impact on the form of government in this instance, because the director of the Department of Revenue and receiver have invoked their statutory powers, that impact is channeled, incidental, and temporary.”<sup>126</sup> The court acknowledged the receiver’s “broad and sweeping” powers, but found that those powers were limited by ongoing *state* controls, such as the requirement that his work pursue the purposes of the Act and the state’s potential to grant control to elected officials “depending on the circumstances.”<sup>127</sup> Yet the case had challenged the receiver’s intrusion on *local* autonomy and the receiver’s displacement of the local government. Whatever one thinks of the outcome of the case, the court’s reasoning that the law did not affect the form of government because of discretionary limits controlled at the state level was evasive and unsound; it was an act of deference to the state legislature with slim regard for local government constitutional autonomy.

## II. RECEIVERSHIPS AS DEMOCRATIC DISSOLUTION

Municipal insolvency laws are important and necessary, offering important advantages over municipal bankruptcy and traditional creditor remedies.<sup>128</sup> The budgetary deficits and debt currently bearing down on both state and local governments is a world of no easy options. Ongoing legislative experimentation in this area is thus important for local public policy, and the Rhode Island and Michigan laws each have commendable features. For instance, both laws engage the state earlier in proactive monitoring of local fiscal health, with stages of intervention that permit more modest involvement be-

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122. Rhode Island ACLU, *Enacted Anti-Civil Liberties Bills*, 2010 LEGISLATIVE WRAP-UP NEWSLETTER, Aug. 2010, available at <http://www.riaclu.org/News/Newsletters/2010Legislative.html>.

123. R.I. CONST. art. 13, § 4.

124. See *Moreau v. Flanders*, 15 A.3d 565 (R.I. 2011).

125. *Id.* at 579.

126. *Id.*

127. *Id.* at 577.

128. See Kimhi, *Reviving Cities*, *supra* note 24, at 656–72.

fore the suspension of local democracy. Early intervention has been consistently identified as a critical feature of successful state efforts.<sup>129</sup>

Yet I doubt both the wisdom and efficacy of the new generation of state receivership laws. I will leave it to pending litigation and other commenters to work through the significant legal vulnerabilities of the Michigan and Rhode Island statutes in terms of consistency with state and federal constitutional contract guarantees, labor law and collective bargaining rights, and home rule protections. Instead, the analysis that follows uses the concept of democratic dissolution first as an interpretative tool to separate the new legislation from the state takeovers of the past, and second as a normative tool to highlight the deficits in the new laws. In this Part, I explain democratic dissolution, critique the receivership reforms, and propose a more balanced reconciliation of the vital interests within and beyond a city experiencing fiscal distress.

### A. A Definition

The receivership laws passed in Michigan and Rhode Island preserve the municipal corporate form, thus leaving its territorial boundaries undisturbed. Yet they functionally suspend the municipal government for the duration of the receivership, giving the state-appointed receiver the power to suspend the city's charter and revoke any substantive authority held by elected officials. Charter provisions relating to matters such as elections, public meetings, form of government, and staffing requirements are all set aside.

The concept of "democratic dissolution" offered in this paper aims to capture this removal of the city's government without the termination of the city's corporate form. The concept of dissolution is expressive of the degree of local government annulment permitted by these laws. The dissolutions enacted in Michigan and Rhode Island, however, are incomplete: they enact a democratic, but not a financial, dissolution.

Understanding this argument requires an introduction to true dissolution. In the context of local government law, dissolution refers to the termination or revocation of an incorporated municipality's charter and the reversion of the city's territory to dependence on county

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129. See, e.g., Berman, *supra* note 26, at 63; Coe, *supra* note 28; Kimhi, *Reviving Cities*, *supra* note 24; Philip Kloha et al., *Someone to Watch over Me: State Monitoring of Local Fiscal Conditions*, 35 AM. REV. PUB. ADMIN. 236, 236–37 (2005).

or township government.<sup>130</sup> The implications of true dissolution are numerous: layoffs of all local public employees and officials; reorganization of an entity's revenues, assets, contracts, and debts; cessation or reassignment of local services; and nullification of a body of local laws. Over the long term, dissolution can lead to restructuring or recreation of one or more city governments over the same territory, but for the near term, the legal city is eliminated. A city that dissolves may not be dead in any way visible to the naked eye—it may be populated, and it may “retain markers of placehood and identity” like a name used by the Census and the Post Office.<sup>131</sup> Dissolution, then, describes the death of the legal corporate form *and* the associated municipal government.

Once limited to ghost towns, dissolution of populated cities is becoming more common as a means of restructuring in the face of economic stress. In a recent article, I identified an increase in dissolution activity by struggling cities across the country. Since 2000, at least 130 municipal governments have dissolved, a number higher than the total number of recorded dissolutions in the rest of the twentieth century.<sup>132</sup> Dissolutions were triggered by slow economic decline or acute fiscal crisis, with secondary themes of tax control, racial dynamics, and management reform emerging in significant numbers of cities.<sup>133</sup> The rationale for dissolution in the face of fiscal crisis or incompetent local government is twofold: (1) to cut the costs associated with running the city government itself; and (2) to merge the city's territory with a larger land area in order to aggregate a larger revenue base and improve economies of scale in service provision.

While one might imagine that state officials would pursue such restructuring goals for innumerable small towns across the country in the name of tax control and government streamlining, it is vanishingly rare—nearly non-existent in the modern era—for a state to dissolve a city without local consent.<sup>134</sup> This rarity conveys something important: States have made and maintained deep commitments, both legal and political, to local autonomy.<sup>135</sup> Dissolution without local

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130. Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1367–68 (2012).

131. *Id.* at 1368.

132. *Id.* at 1366.

133. *See id.* at 1399–1418.

134. *Id.* at 1368, 1377–78.

135. *See id.* at 1377.

consent has simply not been part of the toolbox for addressing fiscal crisis.

Michigan and Rhode Island change this picture, but not by dissolving the borders of struggling cities and merging them into the unincorporated territories of townships or counties without the cities' consent. Instead, the dissolutions enacted under these laws are incomplete—they dissolve democratic self-rule for the city, but they do not merge its territory or its budget with larger land areas or larger governments. The economic restructuring goals described above (i.e., changing the taxable land base or population of the local governments that serve a given territory) cannot be achieved by changing *who* governs within fixed municipal borders. Thus, the reforms do not seek, and cannot achieve, a major fiscal restructuring that relieves a struggling area of the costs of sustaining an independent municipal government through existing revenues. Indeed, the receivership reforms do not even necessarily offer new financial assistance or loans from the state to help cover the municipality's obligations, which was a traditional feature of state receiverships. Even the emergency manager's salary and the costs of her staff and administration must be covered by local revenue.<sup>136</sup>

Democratic dissolution differs from true dissolution in one other critical respect. True dissolution means that residents of the former city's territory will look to township or county officials as their most proximate governments. The new state receiverships, by contrast, represent a centralization of political power all the way up to the state level.<sup>137</sup> More narrowly than that, they confine all oversight authority within the state executive branch rather than state representative government as a whole. For cities under receivership, where a majority of voters align with a different political party than that of the governor, the state level audience for local concerns about an emergency manager's decisions may be, as a practical matter, deaf.

One might argue that the temporary, though indefinite, nature of the emergency manager terms contemplated by these laws should spare them the implicit critique in the term "democratic dissolution." State receivership terms are intended to be temporary—a step taken

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136. See MICH. COMP. LAWS § 141.1515(5)(e); R.I. GEN. LAWS ANN. § 45-9-7(c).

137. True dissolution can theoretically mean that territory dissolves into state, as opposed to county, control. Anderson, *supra* note 130, at 1376 n.31. Such is the case in Maine, where sparsely populated municipalities can revert to "disorganized territories" dependent directly on the state. *Id.* But in such cases, the disorganized territory and its budget will fall under the exclusive authority of state elected officials—no local government means no separate local territory for budgeting purposes. *Id.*

to stabilize the local government in its current territorial borders and return the area to control by the same municipality. Yet the full legal dissolution of a municipality need not be permanent either. A new legal city can incorporate all or part of the same territory following a dissolution.<sup>138</sup> Dissolutions followed by the incorporation of one or more new cities over the same territory may be undesirable, even regressive from the point of view of redistribution, but the point remains that a complete dissolution is actually more amenable to structural reform than democratic dissolution, because legal dissolution allows the mapping and chartering of new local governments according to local political will, changing times, and cost-revenue realities. Complete dissolution and democratic dissolution both shut down a local government for an indefinite period of time; the fact that emergency managers do not stay forever does not redeem or legitimate these laws. Even martial law eventually ends.

Democratic dissolution is a useful concept for understanding the Michigan and Rhode Island laws and their differences from prior generations of municipal insolvency law, even if one does not take a strong normative position on the reforms. Democratic dissolution captures the centralization of state power taking place and acknowledges the incapacitation of local officials. Where state receiverships were historically coupled with bailout funds or loans to stabilize the local government, democratic dissolution entails appointment of a replacement government. By marking a break with prior generations of state receivership laws, the term should remind legislators and the public of the need for transparency, objectivity, and clear sunset rules in state receivership legislation.

Separately, but significantly, I hope that the language of democratic dissolution reminds us that cities experiencing true fiscal meltdown may need more of a fresh start than a temporary management turnover. We should focus on more dramatic opportunities for restructuring to address underlying defects in a city's form. As articulated further in section II-C below, such defects might be assuaged by actual dissolution of a floundering city, including dissolutions that precede consolidation among cities in the region.

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138. Indeed, one of the most significant proposed dissolutions in national history took place in the city of Miami. *See* Anderson, *supra* note 130, at 1373–74. Dissolution proponents sought to dissolve the city back into the unincorporated land of the county, only to incorporate new, smaller, and wealthier cities. *Id.* Whatever one might think of the desirability of that restructuring, it nonetheless indicates that dissolution need not be permanent.

### B. A Critique

On April 19, 2012, Governor Snyder of Michigan appointed an emergency manager to run Muskegon Heights School District, a high-poverty district in the Grand Rapids metropolitan area that is facing operating deficits, falling student enrollment, and indebtedness to the state government.<sup>139</sup> One month later, the emergency manager issued termination notices to all teachers and staff in the district and posted a request for proposals from private organizations to operate the district as a charter school system.<sup>140</sup> Muskegon Heights School District is thus set to become a highly experimental system of public school governance—apparently the first privatization of a full school district in the country—on the orders of a state appointee. In accordance with the requirements in Michigan’s new receivership law, the emergency manager explained his plan to the public but did not solicit public input or approval.<sup>141</sup>

Is this kind of strong management good for cities and school districts in crisis? We cannot yet know how Muskegon Heights will fare in its conversion to a chartered district, but as the number of cities and school districts under amplified receiverships ticks upwards, it is critical to evaluate these laws on their face. After identifying policy values by which to judge state receivership laws, this Part assesses the new statutes’ trade-offs among these values. I look at both procedural and substantive dimensions of the new generation of receivership reforms: procedurally, the legal process by which an emergency man-

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139. See *supra* note 55; *Michigan School District Demographic Profiles*, PROXIMITY, [http://proximityone.com/mi\\_sdc.htm](http://proximityone.com/mi_sdc.htm) (Quick Start search: topic “DP3” for “Muskegon Heights School District”); see also “Governor Snyder Determines a ‘Financial Emergency’ Exists in Muskegon Heights Schools,” Press Release from the State of Michigan Department of Treasury (April 10, 2012), available at [platform.publicbroadcasting.net/MHS\\_GovernorDetermination\\_4-10-2012.pdf](http://platform.publicbroadcasting.net/MHS_GovernorDetermination_4-10-2012.pdf).

140. OFFICE OF THE EMERGENCY MANAGER DONALD B. WEATHERSPOON, ORDER 2012-4: DIRECTING THE ISSUANCE OF NOTICES OF LAYOFFS TO DISTRICT EMPLOYEES, May 16, 2012, available at <http://www.mhpsnet.org/EM.htm>; OFFICE OF THE EMERGENCY MANAGER DONALD B. WEATHERSPOON, ORDER 2012-5: ORDER ISSUING REQUESTS FOR APPLICATIONS (RFAs) SEEKING PROPOSALS TO ORGANIZE AND OPERATE THE MUSKEGON HEIGHTS PUBLIC CHARTER SYSTEM, May 25, 2012, available at <http://www.mhpsnet.org/EM.htm>; see also *Draft Financial and Operating Plan for the School District of the City of Muskegon Heights*, CITY OF MUSKEGON HEIGHTS SCHOOL DISTRICT 16 (May 25, 2012), available at <http://www.mhpsnet.org/EM.htm> (providing that “the Manager has decided to discontinue the direct provision of public educational services by the District at the end of the 2011–2012 school year. The Manager will authorize a charter for a public school academy to provide public educational services at one or more public schools in a unified system of public schools to be known as the Muskegon Heights Public School Academy System.”).

141. MICH. COMP. LAWS § 141.1518(4) (2011).

ager is put in place, and substantively, the rules of city governance during a period of receivership.

The normative desirability of these laws should be measured against broad sets of values reflective of local democracy and good government in an area experiencing dramatic fiscal stress. In my view, the most critical such values are the following: (1) local health, safety, and welfare, including the particular needs and conditions of high-poverty communities; (2) democratic values, including electoral accountability, public transparency, access to government, and fairness; (3) public integrity, specifically the control of self-dealing or corruption; (4) efficiency, including cost-effective public services, administration, borrowing, and spending; and (5) the management of negative externalities affecting other cities and the state (including the credit worthiness of these governments).

All of these values are important – indeed, fundamental. Severe fiscal crisis will inevitably put some of them in tension with others, so much so that legislatures will naturally be tempted to give up on certain values for the duration of fiscal exigency. Complete suspension of any such fundamental tenets of local governance, however, should not be available even in the worst of times, whether it is a recession or the aftermath of a hurricane. Each value is simply too foundational to the purpose and legitimacy of government, and each one is so interconnected that it cannot be sacrificed without collateral damage to others. Efficiency values, for instance, rely on public integrity ones, which depend on democratic values like electoral accountability and transparency.

The core problem with the statutes in Michigan and Rhode Island is that legislators fell prey to the illusion that by entirely sacrificing one of these value sets, local democracy, they could ameliorate local fiscal crisis. They also set one public policy value above all others: the management of negative externalities, i.e., the preservation of municipal creditworthiness and bond markets in the state. In elevating this objective – even though, paradoxically, that objective lies farthest beyond a receiver's control – they explicitly eliminated local democracy and effectively demoted or endangered all of the other values.

Proceeding more carefully through this argument, the receivership laws discussed in this Article declare that a fiscal crisis leaves no time for local democracy. The formula for recovery is appealingly simple: If we get the city government out of the way, more efficient service provision will follow from the same budgetary resources, and the receiver's strong hand will restore investor confidence in the state's

municipal bond markets. To carry out this formula, the laws take four radical and highly problematic steps. First, they consolidate all local authority into a single unelected official, thus nullifying the local form of government (such as a separation of executive and legislative functions) provided under state law or a city charter. While local governments are generally not governed by a formal separation of powers rule,<sup>142</sup> states and their citizens have long signaled deference and respect for local choice as to the form of municipal government, most notably through home rule provisions in state constitutions.<sup>143</sup> The new laws retract that feature of local autonomy, entrusting a single outsider to the full function and responsibility of a government. They mark the triumph of the bureaucratic manager over messy participatory democracy.

The second move to “get city government out of the way” is to empower the governor to select that singular local official and then hold him or her accountable to the state executive branch. The laws sacrifice voter participation and deliberative democracy values, from the empowerment and educative roles of local participation to the public’s trust and respect for local government. Recourse to state government is available, of course, but the state is distant and its electorate is comparatively vast. Our legal system has thus long recognized that democratic participation and voting power are affected by proximity to government.<sup>144</sup> So too does our jurisprudence on local democracy recognize that consolidating several local elected officials into a single leader, or changing from an elected to an appointed official, can dilute voting rights.<sup>145</sup> By consolidating local authority

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142. See *Citizens for Reform v. Citizens for Open Gov’t, Inc.*, 931 So. 2d 977, 989–90 (Fla. Dist. Ct. App. 2006) (citing precedent from thirteen states).

143. See, e.g., R.I. CONST. art. XIII, § 1 (granting every city and town in the state the “right of self government in all local matters”); *id.* § 4 (“The general assembly shall have the power to act in relation to property, affairs and government of any city or town by general laws which shall apply alike to all cities and towns, but *which shall not affect the form of government of any city or town.*”) (emphasis added).

144. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973) (lauding the virtues of “local control,” which offers “freedom,” “participation,” adaptation to “local needs,” “experimentation,” “competition,” “a multiplicity of viewpoints,” and “a diversity of approaches”).

145. For that reason, a change in the number of elected officials within a district is both a “standard, practice, or procedure” under Section 2 of the Voting Rights Act of 1965 (though a Court plurality held that minority voters could not challenge the dilutive effects of such a change), and a “standard, practice, or procedure with respect to voting” under Section 5 of the Act. See *Holder v. Hall*, 512 U.S. 874, 886 (1994) (O’Connor, J., concurring) (finding that under both Section 2 and Section 5 of the Voting Rights Act, the size of a governing body is a covered change); *id.* at 946



in a state official, the laws provide a categorical answer to a longstanding debate in local government theory: Are local governments miniature democracies legally entitled to autonomy, or are they administrative subdivisions of state government subject to the revocation of their authority?<sup>146</sup> Rhode Island and Michigan gave an emphatic answer: Whatever local governments are in their prime, a fiscal crisis demotes them to the status of arms of the state.<sup>147</sup>

The third problematic legislative move to suspend local democracy is to withdraw transparency and public accountability mechanisms at the local level, implementing, at most, a “don’t ask, just tell” policy for communications. Rhode Island sets no requirements for public communication, and Michigan only requires that emergency managers present their financial and operations plans to the public at an informational hearing thirty days into the manager’s tenure.<sup>148</sup> These reports to the public fall far short of open meeting and sunshine laws,

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(Blackmun, J., dissenting) (“Five Justices today agree that the size of a governing body is a ‘standard, practice, or procedure’ under § 2”). In *Holder v. Hall*, the Court directly considered the application of a Section 2 vote dilution claim to governing body size in a challenge to a county governed by a single commissioner who held all legislative and executive authority. *See id.* at 885 (O’Connor, J., concurring) (finding that Court precedent “compel[s] the conclusion” that Section 5 of the Voting Rights Act covers changes in the size of a governing body); *see also* *Lockhart v. United States*, 460 U.S. 125, 131–32 (1983) (holding Section 5 of the Voting Rights Act applicable to an increase in the number of city councilors); *City of Rome v. United States*, 446 U.S. 156, 161 (1980) (holding that increasing the size of a board of education was “within the purview of the Act” and subject to preclearance under Section 5); *Presley v. Etowah Cnty. Comm’n*, 502 U.S. 491, 503, 506–07 (1992) (stating that Section 5 of the Voting Rights Act does require preclearance of changes that “increase or diminish the number of officials for whom the electorate may vote” because such changes affect voting power, though also holding that no such preclearance is required where changes alter “the relative authority of various governmental officials” or “alter[] an elected official’s powers” because such changes do not affect voting itself).

146. This central question was first articulated in this form by Richard Briffault. *See* Richard Briffault, *Who Rules at Home? One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 339, 346–48 (1993) (arguing that the Supreme Court relies on two competing conceptions of local governments as “locally representative bodies” or as “arms of the states”).

147. An important legal issue thus follows: Did the state reserve the power to annul local autonomy in this way? This Article does not venture into state-specific analysis of that question, though, as noted, I found the Rhode Island Supreme Court’s recent decision on the matter to be poorly reasoned. *See supra* notes 122 to 127 and accompanying text; *Moreau v. Flanders*, 15 A.3d 565 (R.I. 2011). A similar legal challenge to the emergency manager reforms is currently pending before the Michigan Supreme Court. *See* *Brown v. Snyder*, No. 11-685-CZ (Mich. Ct. Cl. June 22, 2011), available at <http://op.bna.com/dlrcases.nsf/r?Open=edue-8j4qjt>; *supra* notes 72-75 and accompanying text.

148. *Compare* MICH. COMP. LAWS § 141.1518(4) (2011), with R.I. GEN. LAWS ANN. § 45-9-7 (West 2010).

and indeed Governor Snyder's administration has taken the position that open meeting laws do not apply to the meetings of the state fiscal review board that chooses cities for intervention and hires emergency managers.<sup>149</sup> This policy is both unsound and delegitimizing. Open meeting laws allow journalists and members of the public to follow and scrutinize policymaking, and they engage the public in deliberation over important policy decisions. They are a primary backstop to corruption.

Last but not least, the new receiver laws betray local democracy values because they do not require local consent, i.e., the receivers are not requested or approved by local elected officials or citizens. This feature distinguishes the new laws from even the strongest state receivership in the past, namely an ad hoc state intervention to stabilize the finances of Chelsea, Massachusetts in 1991. There, a state-appointed receiver replaced the city's mayor and demoted the city's governing body to advisory status, and the receiver had strong powers to reorganize Chelsea's government and its budget.<sup>150</sup> Eventual fiscal recovery in Chelsea indicates that there are gains to be had in concentrating authority in a receiver, but that case differed significantly from the democratic dissolution discussed in this Article, because Chelsea's receivership was initiated and approved by the city itself.<sup>151</sup> As such, it was much less susceptible to antagonism (not to mention lawsuits) by displaced local officials, as well as state-local conflict and political polarization. Indiana apparently recognized this defect of the Michigan and Rhode Island bills, because although it recently amended its own emergency manager law in the shadow of the other two states' reforms, Indiana continues to require that the elected officials of a distressed unit formally petition for state assistance.<sup>152</sup>

These moves to set aside local democracy values are problematic on their own terms. Yet even so, temporary democratic suspension by a state would be more justifiable if emergency managers were simply number crunchers who stopped the leakage of public money to unauthorized or wasteful purposes and could thereby balance the local budget. If things were that easy, state receiverships might well restore public trust, make local government more efficient, and stabilize

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149. See *Davis v. City of Detroit Financial Review Team*, No. 309482 (Mich. Ct. App. May 21, 2012) available at <http://michiganlawyerblog.wordpress.com/tag/emergency-financial-manager/>.

150. Berman, *supra* note 26, at 63–64.

151. *Id.*, at 63.

152. See Ind. Code § 6-1.1-20.3-6; HB 1192, 117th Gen. Assemb., 2nd Sess. (Ind. 2012), available at <http://www.in.gov/legislative/bills/2012/HE/HE1192.1.html>.

municipal creditworthiness within and beyond the municipality. But we cannot assume such idealized returns from the receiverships permitted by the new laws. Fiscal crisis is nothing if not complicated, and emergency managers are, alas, mortal. Furthermore, the way these laws are crafted means that all the local public policy values of greatest concern—namely, health and safety, democratic values, public integrity, efficiency, and the control of negative externalities—are put in peril, both in spite of and because of the decision to suspend local self-government. I walk through the basis for this conclusion in the paragraphs that follow.

The first cluster of risks that emerges from the suspension of local democracy is related to the content and quality of decisions by a state receiver appointed under the conditions described here. Receivers' rushed timeline for decisionmaking and the lack of public accountability makes it more likely that local governments will sell assets under value and enter private contracts for services that fail to protect the public interest over the long term. For example, the emergency manager in Pontiac, Michigan sold the disused Pontiac Silverdome (which cost \$55 million to build) for \$580,000 to a Toronto-based company—a “firesale” price reflecting the depths of the recession, but money that the manager said was necessary to relieve the city of maintenance costs.<sup>153</sup> That price was a stunning fall from the \$20 million allegedly offered by a minority-owned, Michigan-based company several years before.<sup>154</sup> In addition, the lack of transparency and accountability makes the receivers themselves susceptible to capture by special interests, if not self-dealing and corruption. Pontiac exhibits this concern as well: The very same receiver in the City of Pontiac who sold the Silverdome then joined the buyer's company after leaving the emergency manager post.<sup>155</sup> Or as another example, from 2005 to 2006, an emergency manager appointed in Highland Park, Michigan allegedly misappropriated \$264,000 in city funds.<sup>156</sup> Receivership legislation must assume that emergency managers are as susceptible to capture and self-dealing as the local officials they replace.

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153. Alex P. Kellogg, *Judge Declines to Block Sale of Pontiac Silverdome*, WALL ST. J. (Nov. 24, 2009), <http://online.wsj.com/article/SB125903125547961739.html>.

154. *Id.*

155. *The Rachel Maddow Show: The Plundering of Pontiac* (MSNBC television broadcast May 12, 2012) available at <http://video.msnbc.msn.com/the-rachel-maddow-show/47395558#47395558>.

156. Jeff T. Wattrick, *Jury Orders Ex-Highland Park EFM Art Blackwell to Repay \$264,000; Why Did He Even Have that Job?*, MLIVE.COM (June 8, 2011), [http://www.mlive.com/news/detroit/index.ssf/2011/06/jury\\_orders\\_ex-highland\\_park\\_e.html](http://www.mlive.com/news/detroit/index.ssf/2011/06/jury_orders_ex-highland_park_e.html).

Perhaps these concerns would be less significant if emergency managers did not have substantial public policy authority. On the contrary, however, emergency managers have the power to make dramatic local policy changes within and beyond fiscal matters. In particular, their leadership has been characterized by the privatization of asset management, sales of public assets, and the outsourcing of service provision to the private sector. The sale of the Pontiac Silverdome and the privatization of Muskegon Heights School District, each described above, offer just two examples. Reasonable minds disagree about the advantages of a stronger role for the private sector in delivery of public goods, but it should be beyond dispute that privatization constitutes a significant public policy shift. When such decisions are made while local democracy is suspended, they lose legitimacy and raise concerns about political capture at the state level, where private contractors may enjoy a higher level of influence and access under certain state administrations. Just as privatization signifies an important and durable policy change, so too do cancellations or reductions in services. Here again, public input, approval, or discourse about service priorities is important for the integrity as well as the efficiency of long-term reform in public services.

The second main set of reasons the new state receiverships are likely to do more harm than good is that they risk severe collateral damage to local health, safety, and welfare values. The laws fail to address the structural causes of fiscal deterioration, and therefore they leave the emergency managers with few tools other than service cuts. At root, this defect reflects the laws' limited vision of the causes of municipal insolvency. By remediating the crisis only by replacing local government with state-appointed experts, the laws reflect theories of fiscal crisis that assume that local management—or more to the point, mismanagement—is solely to blame for fiscal meltdown. The laws reflect the theory that local governments fail because of: first, the competence and/or integrity limitations of municipal officials; and second, defects in the local political economy, particularly the dominance of a narrow band of special interests in local politics.<sup>157</sup> As described in Part I-A, this view does not take into account external causes of fiscal decline, like state and regional job losses, socioeconomic decline, and racial discrimination in employment, housing, and education.<sup>158</sup> A receivership law built without regard to these external causes will be too narrowly focused on replacing local officials and

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157. Kimhi, *Reviving Cities*, *supra* note 24, at 642–46.

158. *See supra* notes 33–34 and accompanying text.

breaking the power of local special interests, including public employee unions. The laws assume the superior wisdom and capacity of emergency managers in all domains of policy, from operations to zoning. Their provisions regarding collective bargaining<sup>159</sup> reveal the view that it is public employee unions alone — as opposed to other local special interests, like developers, private contractors, major local employers, or others — whose influence must be forcibly diluted in local politics. While all these parties are critical to fiscal recovery, so too are unions. Public employee unions are, after all, simply pools of people who work, consume, and potentially live in the city. In an area of very concentrated poverty, they are likely to represent a critical share of the local working and middle class.

Yet the statistics from Benton Harbor, offered in the introduction to this paper, remind us that there are structural reasons that cities flounder.<sup>160</sup> Historic racial discrimination and segregation policies built the racial and socioeconomic polarization of Benton Harbor from its neighbors.<sup>161</sup> These policies reveal their ongoing impact in nearly pure racial segregation in the county today, as well as the extremely high levels of poverty concentrated in Benton Harbor in contrast to Berrien County as a whole.<sup>162</sup> Add to that external forces — like the meltdown of manufacturing jobs on which Benton Harbor and much of Michigan's population depended<sup>163</sup> — and the story of success and failure in the state's municipalities looks much more complicated than defective leadership.

The poverty rates in Benton Harbor and other cities under emergency management also make the point that the population of the local government's territory may be an unwise — and unjust — choice to bear the costs and risks of municipal insolvency. The high poverty rates make the city extremely vulnerable to further cuts in basic services and virtually incapable of producing additional tax revenues.

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159. See *supra* notes 45–49 and accompanying text; *supra* notes 90–91 and accompanying text; MICH. COMP. LAWS § 141.1519(g)–(k); R.I. GEN. LAWS ANN. § 45-9-9.

160. Omer Kimhi has classified these explanations for fiscal distress as falling within a “socio-economic decline approach.” Kimhi, *Reviving Cities*, *supra* note 24, at 638–42.

161. See *supra* notes 4–11 and accompanying text.

162. The poverty rate in Benton Harbor is 48.7%, compared with 16.4% in the county as a whole. *Benton Harbor Economics Census*, *supra* note 4; *Berrier County, Michigan—Selected Economic Characteristics*, U.S. CENSUS BUREAU [hereinafter *Berrier County Economics Census*], <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (Quick Start search: topic “DP03” for “Berrier County, Michigan”; then follow “2010 ACS 5-year estimates” hyperlink).

163. Mahler, *supra* note 6, at 38.

Scholar Omer Kimhi put it well: “Local economic failure does not justify leaving the residents without education or police, and the competition among localities should not cast away localities or leave residents behind.”<sup>164</sup> The emergency manager of the Detroit public schools who launched a plan to radically consolidate schools in the city<sup>165</sup> inadvertently illustrated Kimhi’s point by forcing the question: Is it good public policy for class sizes to soar in Detroit, the state’s most populous city? Are children the appropriate bearers of the risk of municipal insolvency?

In assessing the landscape of tools available to address local fiscal crises (including bankruptcy and traditional creditor’s remedies through judicial receiverships), Kimhi argued that residents’ limited ability to produce more revenue, bear service cuts, or substantively influence local budgeting meant that they were a poor choice as bearers of municipal insolvency risk.<sup>166</sup> Neither residents nor local officials have strong tools to address macroeconomic changes like manufacturing decline or socioeconomic patterns like the flight of wealth to suburban municipalities.<sup>167</sup> And even where public employee unions and local politicians signed retirement or compensation agreements that the city could not afford, the city’s population is likely nonetheless to depend heavily on those city workers for public safety and economic development. At the time he wrote, it appeared that municipal insolvency legislation, unlike the alternative routes of Chapter 9 and creditor remedies, inevitably made the state—not residents—the risk bearers.<sup>168</sup> Yet the Michigan and Rhode Island reforms mark a turning point at which municipal insolvency legislation makes residents the primary bearers of the costs of fiscal crisis—emergency management comes without state aid, tax reform, new financing levers, or other means to change the big picture of the city budget. Instead, emergency managers must take desperate measures. For instance, in impoverished Benton Harbor, the state appointee tried to address high delinquency rates on user fees for trash service by combining garbage and water bills.<sup>169</sup> His theory was that having the wa-

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164. See Kimhi, *Reviving Cities*, *supra* note 24, at 673.

165. See *supra* note 38 and accompanying text.

166. See Kimhi, *Reviving Cities*, *supra* note 24, at 656–60. Clayton Gillette has made a related but distinct argument that bondholders may be superior bearers of risk when it comes to municipal default, as compared to city residents, due to their advantages as fiscal monitors. See Gillette, *Bondholders*, *supra* note 24, at 664–70.

167. See *id.*, at 638–42.

168. See *id.*, at 673–78.

169. Mahler, *supra* note 6, at 41.

ter shut off would hurt so much that residents would find some way to pay their trash bills.<sup>170</sup> Such changes at the margins of reform surely inflict more harm than the revenue they generate.

State receivership laws should be built to respond to structural understandings of why cities struggle financially. The laws' current assumption seems to be that if there were simply more competence, more technical expertise, less corruption, and weaker public employees unions, cities would recover. That narrow view is belied by the reality that even emergency managers empowered with the maximum degree of authority have no magic wand to overcome systemic, long-term decline. Indeed, Central Falls, Rhode Island, itself provides an example: after a year under two emergency managers with impressive management pedigrees and over \$1.4 million of compensation and legal fees associated with the takeover itself, Central Falls still ended up in municipal bankruptcy.<sup>171</sup> Put simply, there is ample reason to think that the reforms in Michigan and Rhode Island will not work.

The question remains, however, even if the laws will not work according to the full set of values that I advance here, will they achieve the goal they most sought, the containment of contagion effects? In other words, can the laws limit the risk that municipal default will spread to markets for the municipal bonds of fiscally healthy municipalities? Clayton Gillette has argued that empirical evidence of actual contagion impacts is mixed, but the perception of that risk by markets and by legislators is real.<sup>172</sup> Yet the range of evidence on the question has been developed in more traditional circumstances—state bailouts of distressed municipalities. The new legal era described in this Article is experimenting with the stronger medicine of democratic dissolution without additional state aid or loans. Legislators seem to believe that rational investors will be reassured by the exaggerated concentration of power with emergency managers, especially the power to break contracts with unions and others. It is not yet possible to know if they are correct, but one proposition should nonetheless govern: A state should see substantial change in the creditworthiness of both healthy and ailing municipalities if it is to continue exacting such extreme sacrifices of democratic, public integrity, and health and safety values. At this point, the legislatures in Michigan and Rhode Island are just casting bets in favor of that proposition, and along the way, their gamble is resulting in deep budget cuts

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170. *Id.*

171. Hill, *supra* note 98; Shedlock, *supra* note 107.

172. See Gillette, *Fiscal Federalism*, *supra* note 24, at 302–08.

and asset sales in some of the poorest communities in their states. Given the paucity of empirical evidence supporting this bet, one naturally wonders whether in fact, it was not contagion containment that drove these legislatures after all. Instead, it may have been ideological commitments to cutting local budgets, selling local assets, and outsourcing local services—i.e., shrinking and privatizing local government—that were the true objectives behind the reforms. Indeed, conservative representatives in Rhode Island’s General Assembly have made it clear that they view receiverships as a promising means of forcing reductions in the scale of local government.<sup>173</sup>

This brings us to the final risk of the municipal insolvency reforms, that following a receivership, critical political legitimacy and participation assets at the local level may be damaged, with heightened local-state political polarization and lower rates of local electoral participation. One must wonder, in essence, what happens after a receivership is over. Where a receivership was unwelcomed by the local electorate, which media reports suggest is the case in most of the jurisdictions covered in this Article, the elected local officials that have been sidelined may await their chance to return to power and reverse policy changes made by the receiver. And logic would indicate (here again, we are in uncharted empirical territory) that in high poverty electorates, moves like shutting off water service for unpaid garbage bills (the emergency manager’s policy in Benton Harbor, noted above) will be wildly unpopular, if not demoralizing to a beleaguered public. In Michigan, this is an even more predictable outcome, given the partisan rancor and racially disparate impact of receiverships on minority cities.

Defenders of the laws, including Michigan’s Governor Snyder, have emphasized that the status quo is not an option for cities that are truly facing a fiscal crisis.<sup>174</sup> That is certainly true—there are few painless options in the face of fiscal insolvency. Bankruptcy, for instance, is certainly no panacea. The recent history in Vallejo, California has shown that cities with severe structural problems left to face bankruptcy emerge even more battered than before they went in, with severe public safety and land market consequences that will fur-

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173. See *supra* notes 119–21 and accompanying text.

174. See, e.g., Editorial, *Calling the Shots on Insolvency—What Is It About the Word ‘Crisis’ that Some Don’t Understand?*, KALAMAZOO GAZETTE, Mar. 20, 2011, at A9.



ther slow recovery.<sup>175</sup> But so too is it deceptive for our public debate to frame local leaders and public employee unions as simple villains, as if the primary defect in local management is the inability to break union contracts and restrain unions from future political influence over weak local leaders. Systemic challenges require systemic reforms—municipal leadership and rent seeking by public employees cannot bear sole responsibility for financial insolvency. A democratic freeze in the spirit of martial law is not a wise or ethical response to fiscal stress, especially when it is premised on uncertain and potentially unsound claims that emergency management can limit overflow harms to other local governments.

In short, the Michigan and Rhode Island laws go too far in suspending local democracy and ascribing fiscal crisis to matters internal to a city's territorial boundaries, particularly its leaders and union politics. They do too little, by contrast, at addressing the underlying causes of persistent socioeconomic decline.

### C. Tempering Reforms

For the sake of other states considering enactment of or revisions to municipal insolvency legislation, as well as for Michigan and Rhode Island, where the new laws are generating intensive legal and political opposition, I offer a set of reforms to the Michigan and Rhode Island laws that promise a better balance among the values identified in the prior Section. The reforms offered here span several dimensions of these laws: (1) their triggering conditions, (2) the procedure for appointment and selection of emergency managers, (3) the authority granted to receivers, (4) receiver oversight, and (5) closure of the receivership period. Taken together, the reforms seek greater transparency and uniformity in application, increased input from local, elected leaders in receivership processes, more consultation and engagement with the public, greater funding from the state, and development of a process for seeking structural reform.

*Triggering Conditions.* Due to the high costs of revoking local democratic self-rule, states must be held to strict, objective, and uniformly applicable criteria for appointing emergency managers. Broad statutory language, let alone open discretion, is an invitation for real and perceived unfairness in the state's selection of struggling municipalities needing intervention. When the stakes are so high, statutes

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175. See Jonathan Weber, *For Vallejo, Bankruptcy Isn't Exactly a Fresh Start*, N.Y. TIMES (Jan. 22, 2011), <http://www.nytimes.com/2011/01/23/us/23bcweber.html>.

must control explicit and implicit biases held by state officials along political lines (i.e., contrasting partisan majorities at the state and local level), as well as racial ones (i.e., a denigration of the efficacy of democratic self-government in majority African-American communities). In the context of the Michigan state takeover of the Detroit public schools, for instance, one commenter noted that the “dynamics at work in the [Detroit public schools] takeover are amplified by a long history of what some would describe as racially-tinged acrimony between the city of Detroit and the rest of the state.”<sup>176</sup> Whatever biases may be operational in fact, appointment of an emergency manager in politically or racially distinctive cities will be understandably perceived as selective enforcement of the law in the absence of narrow, specific triggering conditions that bind the state to implement receiverships based on non-discretionary determinations.

Rhode Island’s law, a prime example of this dangerously vague statutory language, only lists four general criteria for identifying a fiscal crisis sufficiently dire to trigger appointment of a receiver. The provisions are so ambiguous that uniform state application would be impossible.<sup>177</sup> Adding to the problem, the statute contains a blanket “fiscal emergency” criteria, which is undefined.<sup>178</sup> Michigan’s law is more responsible, both because it contains more precise criteria<sup>179</sup> and because it requires a thirty-day and sixty-day staged review process to determine a qualifying fiscal crisis.<sup>180</sup> Nonetheless, the governor’s office and the state treasury department has not been forthcoming about the cities under consideration for receiverships and the fiscal calculations from which its selections are being made. More than two dozen cities are thought by journalists to be under scrutiny, but there is no basis for the public to determine how that number has been whittled down to the seven cities and school districts selected for intervention.<sup>181</sup>

*Appointment and Selection of the State Receiver.* Following the decision to appoint an emergency manager, the selection of that individual is another critical and highly contestable step. The selection process can either improve or undermine the local legitimacy and par-

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176. Bowman, *supra* note 40, at 928; *see also id.* at 927–28 (“[I]f the district is racially isolated, as so many districts are, members of the community may question whether the state intervention is racially-motivated.”).

177. *See* R.I. GEN. LAWS ANN. § 45-9-5 (West 2010).

178. *See id.* §§ 45-9-8.

179. MICH. COMP. LAWS § 141.1514(3) (2011).

180. *Id.* §§ 141.1512(2), (3).

181. *See supra* note 57 and text accompanying notes 53–57.

ticipatory impacts of the law. On the preliminary matter of eligibility, local public officials, whether elected or not, should be eligible to serve in the role of emergency manager. If these laws are correct that a key barrier to reform is the powerlessness of local officials to overcome the influence of special interests, then the laws should permit the possibility that existing officials, who earned electoral majorities and are familiar with the city's finances and operations, may be in the best position to use the law's augmented powers for curative ends.

The Michigan law could have been worse on this score, given that an earlier version included a provision that cut in the opposite direction to that suggested here. Namely, the earlier version would have enacted a six-year ban on elected officials in place at the time of receivership from running for office again.<sup>182</sup> Such a provision expressed disdain for locally elected officials, if not blameworthiness for the city's financial straits. Such missives by the state are unwarranted, unwise, and delegitimizing.

Emergency manager selection and appointment processes can also gain democratic and local legitimacy by involving a broader segment of officials. Michigan gives the governor sole and discretionary selection rights,<sup>183</sup> while Rhode Island gives such a right to the director of the Department of Revenue.<sup>184</sup> Both laws have provoked accusations of centralization with unchecked discretion. Instead, city and state leadership, as well as the general public, should be invited to nominate candidates for the position. Selection should be made by a committee with a mix of state and local actors, with *ex officio* representation as necessary. An adequately representative selection committee would include the following seats: (1) the governor, (2) the state official most responsible for public finance or administration, (3) the city's mayor or chief executive, (4) the president (or a nominee) of the city council, (5) one state assemblyman serving a district in which the largest portion of the city's population is located, (6) the state senator for the district in which the city is located, and (7) one member of the public. With a simple majority vote to approve a nomination, it is unlikely that such a committee would derail or unduly burden the selection of an emergency manager.

*The Receiver's Authority.* Once the emergency manager is in place, the key question becomes: What powers will she wield over local elected officials? The recent history of emergency managers in

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182. Bouffard, *supra* note 53.

183. See MICH. COMP. LAWS § 141.1515(4).

184. See R.I. GEN. LAWS ANN. § 45-9-7.

Michigan shows the difficulty of genuine power sharing. In 2010, the year before passage of that state's new emergency manager laws, the emergency manager of Pontiac, Michigan resigned from his post after "liken[ing] his tenure to working in a M\*A\*S\*H\* unit."<sup>185</sup> His resignation was, in large part, due to a power struggle with the sitting mayor, who, in the emergency manager's words, "'strongly believed he should [have been] in charge of daily city operations.'"<sup>186</sup> Functionality, of course, is an important value in the design of state takeover laws, but so too is the local democracy embodied in the mayor's claim to authority.

If a state's experience with receiverships in the past indicates that clear lines of authority are absolutely necessary to the receiver's efficacy, then that authority should come with a number of safeguards to protect the fundamental values described in Part II-B. A state receiver's authority in a time of crisis should be held in check by three conditions. First is that all of the reforms and safeguards outlined in this section are in place, including narrowly defined triggering conditions, a locally inclusive selection process, structural reform efforts, stronger state oversight, and clear sunset provisions.

The second condition is that the elected officials for the city, including both the mayor and city council, should retain their general governing authority. Most critically, they should continue to control city land use law and policy, arguably the most powerful dimension of local authority when it comes to shaping a city and its revenues over the long term. Essentially, this reform would limit the emergency manager to fiscal authority, including all control of revenues and spending. Such authority should be defined by statute to include the power to operate, manage, and curtail services for the locale—critical tools for controlling spending locally. If all other safeguards described in this section are in place, I would even define that authority to include the power to contract out for the provision of services, as long as the contract term does not exceed the longer of five years or the length of the emergency manager's first term (as limited by the statutory sunset provision, described below). This fiscal authority, however, should be specifically defined to exclude the power to sell public land assets. Though the receiver could dispose of other replaceable city property, such as by auctioning vehicles or terminating lease agreements, an emergency manager's authority should not in-

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185. Jennifer Chambers & Mike Martindale, *Pontiac's Clashes Put Takeovers in Spotlight*, DETROIT NEWS, June 18, 2010, at A13.

186. *Id.*

clude the power to sell real property, which is among the most valuable and non-fungible assets for economic development and land use planning in a city, even in a down market.

The third essential provision is to restore the public accountability mechanisms established by the city charter or state general law, including the schedule of public hearings and city council meetings. The elected mayor and city council should preside over these meetings as they would normally, but with allocated time for a detailed report from the emergency manager. Though it might be messy at times, this arrangement would correct some of the most urgent democratic defects of the new receivership laws. Some communication between the emergency manager, local elected officials, and the public is critical for reasons of accountability and oversight, as well as transparency and legitimacy. Though their authority over fiscal affairs is formally sidelined, the long-term efficacy of the city's government depends upon voters' and elected officials' understanding of their city's finances and operations. It is hard to imagine a sustainable recovery if emergency managers toil in relative secrecy, then upon their exit, simply hand spreadsheets to re-empowered elected officials. In addition, an emergency manager, who may have little prior knowledge of the city, can learn from elected officials about topics ranging from public priorities to past experiences with private contractors.<sup>187</sup> Alongside that trio of reforms, a formal suspension of the legal authority of elected officials will be both more legitimate and more effective.

Within the question of an emergency manager's powers, the most controversial matter is surely the right to alter existing collective bargaining agreements; this is a key difference between current and prior generations of state receivership laws. In my view, which is likely shared by contracts clause and labor law experts, Rhode Island's more moderate position with respect to collective bargaining (i.e., giving the emergency manager the power to negotiate and approve new agreements, but not the power to break existing contracts)<sup>188</sup> is strong enough to change the chemistry of negotiations with public employee unions. Emergency managers and mayors already wield the threat of bankruptcy to extract concessions on existing collective bargaining agreements. Indeed, unions have yielded extremely large concessions

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187. To the extent that meetings between disgruntled local officials and an anointed replacement are bound to be contentious, they should be conducted with formal mediation.

188. See R.I. GEN. LAWS ANN. § 45-9-9.

in areas ranging from pensions to health care benefits. In Central Falls, for instance, the emergency manager used the sword granted by the Rhode Island law and the threat of bankruptcy to secure union agreement to pensions cuts of 50% and service budget cuts of 40%.<sup>189</sup> These cuts caused tremendous financial disruption and stress for public employee families and pensioners.<sup>190</sup> When estimating the added value of the Michigan law's collective bargaining repeal features, one must inevitably factor in the cost of litigation that will follow on state and federal contracts clause grounds, among others.

*Structural Reform Processes.* At least as important as ongoing communication between an emergency manager and the city is the principle that with the centralization of state power should come changes to structural conditions that are limiting a city's recovery potential. This can take two forms: economic benefits and structural reforms. As for economic benefits, traditionally, state receiverships have come with increased financial support from the state. It is a simple carrot and stick formula: bailout funds and loans come with mandatory reform. For instance, the state receivership in the city of Chelsea, Massachusetts, discussed in the previous section, came with substantial state funding. This included emergency bailout funds along with annual state contributions that funded no less than half of the city's budget.<sup>191</sup> That meant that not only did Chelsea's elected officials consent to state assistance, but the state assumed financial accountability when it took over political power during city's recovery. By deviating from this traditional model, Michigan and Rhode Island seem to be expressing the view that the current revenue picture of the city is adequate to provide for public safety, debt service, and other core expenses—if only, the laws suggest, the city had competent management. A more encompassing view of the causes of a fiscal emergency recognizes that, like the notion of an “emergency” manager itself, the fiscal crisis can eventually pass if struggling localities receive additional funds.

State bailout funds need not come without policy strings attached, however. In fact, Michigan itself, under Governor Snyder, is an example of how to tie funding to local policy. The Governor has put in place a broad state policy agenda of significant fiscal reform objectives for all local governments, with an emphasis on encouraging service consolidation, improving transparency in local government fi-

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189. See Shedlock, *supra* note 108.

190. *Id.*

191. Berman, *supra* note 26, at 63.

nance, and—of greatest focus for the governor—reducing local government employee compensation costs. After revoking the past statutory revenue-sharing system for state aid to local governments, Governor Snyder replaced it with an “Economic Vitality Incentive Program” that transforms state aid to local governments in two ways: it reduces the maximum allowable state funding to 67% of a local government’s 2010 funding, and it establishes three domains of performance criteria that must be met to “earn” each one-third increment of allowable state support.<sup>192</sup> With a similar model, the state can render the city eligible for bailout funds and financing tools like tax increment financing directed toward the city’s long-term fiscal health—for instance, to support a specific land redevelopment plan to enhance the city’s future revenue picture.

The state should also use the lever of financial coercion to support formation of a regional council to facilitate structural changes that promote financial sustainability. The council should be composed of officials from the state, the municipality (including both the emergency manager and an elected official), neighboring municipalities, and the township or county government. The council would be charged with considering long-term structural reform at the regional level, particularly service sharing, consolidation, merger, dissolution, and revenue-sharing. Any resulting deals developed within this body could be rewarded with front-end subsidization by the state as an incentive for cooperation. Such coordination would support the goal of local defragmentation, which has become critical in Michigan and other states, and it would permit long-term thinking about the way that a city’s existing borders may impede recovery.

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192. See Ryan Stanton, *Snyder Tells Cities to Consolidate, Reduce Employee Compensation to Win Back State Aid*, ANNARBOR.COM (Mar. 21, 2011), [http://annarbor.com/news/snyder-tells-cities-to-consolidate-reduce-employee-compensation-to-win-back-state-aid/?cmpid=NL\\_DH\\_mainphoto](http://annarbor.com/news/snyder-tells-cities-to-consolidate-reduce-employee-compensation-to-win-back-state-aid/?cmpid=NL_DH_mainphoto); see also *Economic Vitality Incentive Program*, MICH. DEP’T TREASURY, [http://www.michigan.gov/treasury/0,1607,7-121-1751\\_2197-259414--,00.html](http://www.michigan.gov/treasury/0,1607,7-121-1751_2197-259414--,00.html) (last visited Mar. 28, 2012). The performance criteria include: (1) greater transparency regarding city finances (including a citizens’ guide and online dashboard that reveals items like unfunded liabilities); (2) consolidation and services sharing; and (3) employee compensation cuts applicable to future labor contracts, including the establishment of hard caps on employer retirement contributions, minimum healthcare contributions by employees, and other measures. See Stanton, *supra*; see also, Kristin Longley, *Flint Working on Gov. Rick Snyder’s Transparency, Consolidation, Compensation Reforms*, MLIVE.COM (Aug. 21, 2011), [http://www.mlive.com/news/flint/index.ssf/2011/08/flint\\_working\\_on\\_gov\\_rick\\_snyd.html](http://www.mlive.com/news/flint/index.ssf/2011/08/flint_working_on_gov_rick_snyd.html). The change thus ties state funding directly to state policy views about sound local management.

*Oversight.* Given extreme powers and relatively strong insulation from public scrutiny, oversight of these positions is critical. State treasury departments must closely audit receivers' work and outcomes against objective standards.

*Termination of the Receivership.* The concept of a fiscal "emergency" implies that it is temporary. Indeed, the fact that these receiverships are intended to be temporary is the most important argument for the legitimate suspension of a city charter and elected government. Yet, Michigan and Rhode Island did not include sunset provisions for the reinstatement of local governance. Such legislation should include explicit termination or public reauthorization provisions. Just as passive dissolution laws include a statutory period (usually five years) after which inactivity matures into dissolution by operation of law,<sup>193</sup> state receivership laws should mark the point where and processes by which local democracy recovers.

### CONCLUSION

Where budget cuts are necessary, should we cut local government? The new generation of municipal insolvency legislation signified by the Michigan and Rhode Island laws represents an intrusion so deep into local governance that it constitutes temporary dissolution of the local democracy—its charter and elected government both. As such, it constitutes a form of democratic dissolution in which the legal city and its borders survive, but the territory no longer enjoys local self-rule. While dissolution and receiverships do not give a fresh start in relation to creditors the way that Chapter 9 does, they do offer a chance for genuine restructuring. In that way, the Michigan and Rhode Island laws take the worst of dissolution—its loss of local democratic self government—without its upside potential for structural reform to the revenue picture that supports public health, safety and welfare. The comparison to dissolution highlights the fact that under the Michigan and Rhode Island laws, the state absorbs the governance, but not the territory, its people's service needs, or its revenue constraints. The city governed by the emergency manager is thus a ward of the state in terms of independence and self-government, but not so in terms of money. Instead, these and future state receivership laws should be designed to address the causes of fiscal distress beyond local leadership failures or the dominance of special interests. Such

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193. See Anderson, *supra* note 130, at 1364.



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bills should pursue the amelioration of short-term crises as well as address the need for long-term reform.