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WHO NEEDS LOCAL GOVERNMENT ANYWAY?

DISSOLUTION IN PENNSYLVANIA'S DISTRESSED CITIES

Michelle Wilde Anderson *

I. INTRODUCTION.....	149
II. BACKGROUND: DISTRESS AND DISSOLUTION IN PENNSYLVANIA	158
<i>A. Decline in Steel and Coal Country</i>	158
<i>B. Act 47 and the Management of Fiscal Stress</i>	161
<i>C. The History of Dissolution Policy in Pennsylvania</i>	163
III. ADDING DISSOLUTION TO THE ACT 47 TOOLKIT	166
<i>A. Dissolution as Enacted in Act 199</i>	166
<i>B. Fitting Dissolution into Receivership Laws Without Thinning Democracy</i>	172
IV. CONCLUSION.....	180

I. INTRODUCTION

Pennsylvania is home to an exceptionally high number of small, fiscally troubled local governments—each one a monument to the decline of American manufacturing and its middle class jobs. The state has 2,561 municipalities and townships,¹ and most

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¹ U.S. CENSUS BUREAU, 2012 CENSUS OF GOVERNMENTS, LOCAL GOVERNMENTS BY TYPE AND STATE, tbl.2 (2012), http://www2.census.gov/govs/cog/2012/formatted_prelim_counts_23jul2012_2.pdf. These absolute numbers speak to significant state and regional administrative issues. They matter more than Pennsylvania's oft-quoted ranking as the second-highest number of local

of them govern areas with tiny populations,² extremely low tax revenue, and sagging real estate values.³ An extraordinary 98% of cities and 67% of boroughs in the state experienced a decline in their relative fiscal health between 1970 and 2003.⁴ The struggling Monongahela River Valley, for instance, is carved into more than a dozen boroughs, towns, and cities⁵ that have been draining away businesses, jobs, and residents for several decades of steel industry decline. Each town's borders are rooted in distinct histories as bedroom communities for this or that handful of industrial complexes, but in the present day their small size and fiscal vulnerability raise a difficult question: Should each of these municipalities continue to have its own municipal government?

governments in the country, because when the number of local governments is controlled for the size of the state's population, small, rural states have far more governments per capita than Pennsylvania. See Richard Florida, *Does Having Lots of Local Governments Help or Hurt Economic Development?*, THE ATLANTIC CITYLAB (May 6, 2013), <http://www.citylab.com/politics/2013/05/does-having-lots-local-governments-help-or-hurt-economic-development/3283/> (citing data from Zara Matheson of the Martin Prosperity Institute using numbers from the 2012 Census of Governments).

² A total of 768 municipal corporations and townships in the state have populations of fewer than 1,000 people, and only 252 municipalities and townships govern 10,000 people or more. See U.S. CENSUS BUREAU, CENSUS OF GOVERNMENTS, SUBCOUNTY GENERAL PURPOSE LOCAL GOVERNMENTS BY POPULATION-SIZE GROUP AND STATE, TABLE 7 (2012), <https://www.census.gov/govs/cog/>.

³ See Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, app. tbl.1 (2014) (documenting population loss, high poverty rates, and extremely low median home values in Pennsylvania's eight largest cities enrolled in the state's program for fiscal distress); see also *List of Act 47 Distress Determinations*, PA. DEP'T OF CMTY. & ECON. DEV. (Oct. 29, 2014), <http://www.newpa.com/local-government/services-we-provide-local-governments/request-assistance/list-act-47-distress-determinations> (showing Pennsylvania's eight largest cities' distress determinations).

⁴ METROPOLITAN POLICY PROGRAM, THE BROOKINGS INSTITUTION, COMMITTING TO PROSPERITY: MOVING FORWARD ON THE AGENDA TO RENEW PENNSYLVANIA 20 (2007) [hereinafter BROOKINGS, COMMITTING TO PROSPERITY], <http://www.brookings.edu/metro/pubs/committingtoprosperity.pdf>

⁵ *Other Cities, Towns, and Suburbs Near Monongahela, Pennsylvania*, TRAVELMATH, <http://www.travelmath.com/cities-near/Monongahela,+PA> (last visited Oct. 20, 2014).

That is the central inquiry of this article and the legal reform it evaluates.

Consider, for instance, the impoverished Rust Belt town of Braddock, Pennsylvania, a jewel of early twentieth century America. Braddock has fallen from a 1920s population of more than 20,000 to about 2,100 people today.⁶ Even though, as the mayor put it, "nine out of every ten buildings that existed in this community in the middle of last century are in a landfill,"⁷ the vacancy rate is incredible: of the housing units still standing, 24% are vacant.⁸ The median household income is \$22,885, and 66% of children live below the poverty line.⁹ Residents have long struggled amidst drugs and armed street violence.¹⁰ Citing the

⁶ See *Braddock Pennsylvania: Census 2010 and 2000 Interactive Map, Demographics, Statistics, Quickfacts*, CENSUSVIEWER, <http://censusviewer.com/city/PA/Braddock> (last visited Oct. 20, 2014); *Braddock Pennsylvania*, ENCYCLOPEDIA OF FORLORN PLACES (2012), <http://eofp.net/braddock.html>.

⁷ *Levi's Back to Braddock*, YOUTUBE (July 14, 2014), <https://www.youtube.com/watch?v=2YyOGKu6ds>.

⁸ U.S. CENSUS BUREAU, PROFILE OF GENERAL POPULATION AND HOUSING CHARACTERISTICS: 2010 DEMOGRAPHIC PROFILE DATA, BRADDOCK BOROUGH, PENNSYLVANIA, TABLE DP-1 (2010), <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF>.

⁹ For economic data on residents, see U.S. CENSUS BUREAU, SELECTED ECONOMIC CHARACTERISTICS, 2008-2012 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, BRADDOCK BOROUGH, PA, TABLE DP03 (2008-2012) <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF>.

¹⁰ TEDx Talks, *Renewal of Braddock Pennsylvania: Mayor John Fetterman at TEDxHarlem*, YOUTUBE (July 30, 2012) [hereinafter *Fetterman at TEDxHarlem*], <https://www.youtube.com/watch?v=S1tVBs1ZKjE> (describing the city's reputation in 2005 for violent crimes and shootings, a "Welcome to Historic Braddock" sign at the town border autographed "CRIPS" in spray-paint, and an average of 7,140 calls for police in 2006—an average of more than three per resident). Crime in the city has been trending down. See also Christine H. O'Toole, *Braddock Rising: Can Mayor John Fetterman Resurrect the Gritty Metropolis That was Once Left for Dead?*, PITTSBURGH MAGAZINE (Mar. 25, 2013), <http://www.pittsburghmagazine.com/Pittsburgh-Magazine/April-2013/Braddock-Rising/#sthash.H8DUZxZ7.dpuf> (noting that in 2013, the city marked its five-year anniversary without a murder, though "gunshots still echo" in the town); *Crime Rate in Braddock Hills, Pennsylvania (PA): Murders, Rapes, Robberies, Assaults, Burglaries, Thefts, Auto Thefts, Arson, Law*

high costs of treating so many poor patients, a regional hospital occupying a full block in Braddock was shut down, then torn down, in 2009; the closure removed the last significant IV from the town's employment base, as well as its only restaurant and ATM machine.¹¹ Braddock's government has met the state's definition of insolvency since 1988, with no fiscal recovery in sight.¹² The town is surrounded by other communities similarly worn down by Pittsburgh's declining steel-based regional economy.

Braddock has assets to be sure. Even if the town typically loses residents faster than it gains them, some people—fiercely, improbably, tenaciously—choose to stay. Most residents have roots decades deep in local soil, and each hard winter marks another year of their attachment. A few businesses have survived, including a 46 year-old family-run butcher and corner grocery store named Bell's Market that " 'always has the community's interest at heart.' "¹³ The city is home not only to Andrew Carnegie's first American steel mill, but also to Carnegie's first library.¹⁴ Preservationists have lovingly worked to resurrect the library by extensive, expensive repairs that shifted it from the

Enforcement Employees, Police Officers, Crime Map, CITY-DATA, www.city-data.com/crime/crime-Braddock-Hills-Pennsylvania.html (last visited Nov. 5, 2014) (illustrating how crime is trending downward).

¹¹ See Sharon Glassman, *What is Work? Small Town Hospital Closing Opens Health-Care Debate*, HUFFINGTON POST (Mar. 18, 2010, 5:12 AM), http://www.huffingtonpost.com/sharon-glassman/what-is-work-small-town-h_b_332256.html; see also Vince Galloro, *UPMC Plans to Close Braddock Hospital*, MODERN HEALTHCARE (Oct. 16, 2009), <http://www.modernhealthcare.com/article/20091016/NEWS/310169964>.

¹² See *List of Act 47 Distress Determinations*, *supra* note 3; see also 53 PA. STAT. ANN. § 11701.601 (2014) (defining insolvency).

¹³ See Gretchen McKay, *Bell's, a Tiny Market in Braddock, Keeps Serving Its Community*, PITTSBURGH POST-GAZETTE (June 1, 2012, 8:52 AM), <http://www.post-gazette.com/life/food/2012/05/31/Bell-s-a-tiny-market-in-Braddock-keeps-serving-its-community/stories/201205310409#ixzz3COEjtHd7>.

¹⁴ *Braddock History*, BRADDOCK BOROUGH MUNICIPAL WEBSITE, <http://braddockborough.weebly.com/history.html> (last visited Oct. 20, 2014).

town's demolition list to the National Historic Register.¹⁵ None of these assets produce much revenue to support public services, but they give Braddock a sense of placehood and community—the ambiance, if not the lifeblood, of local civic life and democracy.

Braddock's elected mayor John Fetterman is also one of the town's assets. On a salary of only \$150 per month from the city,¹⁶ he deserves credit for some of the town's relative stabilization in recent years. Elected in 2005,¹⁷ Fetterman's tenure has been marked by a creative and morally compelling vision of the work ahead of the city. His candor about the city's woes expresses love for the place and its future promise: "where some people see blight, I think it's malignant beauty."¹⁸ He markets the city with the slogan "Reinvention Is The Only Option" alongside black and white photographs evoking fledgling signs of recovery amidst a proud but tragic heritage.¹⁹ With his 6'8" frame and goatee—three parts tough guy, one part teddy bear—he looms as both a city father and brother, "a Paul Bunyan of hipster urban revival."²⁰ He tattooed the city's zip code on one arm, and on the other, he inked a running memorial to each person murdered in street violence during his tenure as mayor.²¹

¹⁵ *History of the Braddock Carnegie Library*, BRADDOCK CARNEGIE LIBRARY, <http://www.braddockcarnegielibrary.org/history> (last visited Feb. 7, 2015).

¹⁶ Sue Halpern, *Mayor of Rust*, N.Y. TIMES (Feb. 11, 2011), http://www.nytimes.com/2011/02/13/magazine/13Fetterman-t.html?pagewanted=all&_r=0.

¹⁷ Gretchen McKay, *Braddock Mayor Turns Warehouse into Home*, PITTSBURGH POST-GAZETTE (Nov. 24, 2012, 5:00 AM), <http://www.post-gazette.com/life/homes/2012/11/24/Braddock-mayor-turns-warehouse-into-home/stories/201211240116>.

¹⁸ Janet Reitman, *The Mayor of Hell*, ROLLING STONE, May 14, 2009, at 58, 61, available at <http://www.spiritandplace.org/spwebResources/pdf/Fetterman%20RS%20article.PDF>.

¹⁹ See *15104 Braddock Pennsylvania*, <http://www.15104.cc/> (last visited Feb. 7, 2015) (providing examples of the black and white photographs Fetterman has used to illustrate Braddock's history).

²⁰ Halpern, *supra* note 16.

²¹ Jim Straub & Bret Liebendorfer, *Braddock, Pennsylvania out of the Furnace and Into the Fire*, MONTHLY REVIEW (Dec. 1, 2008), <http://monthly>

For poor communities, economic development depends in large part on the ability to attract outside resources that bring jobs, tax revenues, and philanthropic dollars. In that endeavor, Fetterman has managed to put tiny Braddock on the national agenda. Reporters from *The New York Times*, *The Atlantic*, and other national outlets came to meet him and relay the city's story; *The Guardian* dubbed him "America's coolest mayor."²² His charismatic narrative about the city's righteous struggle to stand again has helped to attract a couple of art spaces, an urban farm, and a handful of new businesses and residents.²³ A combination of his public and private efforts have built a playground for children, an assisted living building for youth transitioning from foster care into adulthood, and a housing complex for low-income seniors. Levi's Jeans Company ran an ad featuring the town, created a documentary of residents' histories there, and helped to fund the transformation of a blighted historic church into a community center.²⁴ To his great credit, Fetterman's priorities (as mayor and through his private efforts) focus not only on the city's built environment—the costly but relatively straightforward work of blight abatement—but also on the harder work of youth programs to build human capital, promote local health and happiness, and

review.org/2008/12/01/braddock-pennsylvania-out-of-the-furnace-and-into-the-fire/.

²² See Ed Pilkington, *Coolest Mayor in America? Why John Fetterman Has His Postcode Tattooed on His Arm*, THE GUARDIAN (July 14, 2009), <http://www.theguardian.com/world/2009/jul/15/us-mayor-postcode-tattoo>; see also David Streitfeld, *Braddock Journal: Rock Bottom for Decades, but Showing Signs of Life*, N.Y. TIMES (Jan. 31, 2009), <http://www.nytimes.com/2009/02/01/us/01braddock.html?ref=magazine> (illustrating how younger residents in Braddock were impressed with Fetterman's commitment to the city as he displays Braddock's zip code, 15104, on his one arm, and the "dates memorializing the killings in Braddock during his time in office," on the other); *Brave Thinkers: John Fetterman*, THE ATLANTIC (Nov. 1, 2009), http://www.theatlantic.com/magazine/archive/2009/11/brave-thinkers/307692/?single_page=true.

²³ See, e.g., Patrick Bowman, *Breaking Braddock*, POPCITYMEDIA (June 25, 2014), <http://www.popcitymedia.com/features/braddock062514.aspx>.

²⁴ NPR Staff, *Levi's Gives Struggling Town Cinderella Treatment*, NPR (Oct. 3, 2010, 2:20PM), <http://www.npr.org/templates/story/story.php?storyId=130306219>.

reduce crime.²⁵ Crime rates in the city are down,²⁶ and some residents hope that the city is slowing the momentum of its "downward spiral . . . hitting a new equilibrium to rebuild and revitalize from."²⁷

Whatever incremental progress the city has to celebrate, Braddock's severe social and fiscal conditions nonetheless suggest that a wide range of recovery strategies should be on the table, including governmental reorganizations that could cut costs or increase revenues. Are there ways to increase the pool of revenues that fund city services? Is it possible to create economies of scale for service delivery or government administration that would allow the city to shift more public dollars toward teachers, public safety personnel, and poverty-related services? Commenters have long lamented that Pennsylvania is a state of "little boxes"—local governments that are too small, too weak, too expensive, and too competitive with one other.²⁸ Indices of fragmentation in

²⁵ See, e.g., *Fetterman at TEDxHarlem*, *supra* note 10; see also *Working Toward a Better, More Sustainable Braddock, PA*, BRADDOCK REDUX, http://braddockredux.org/?page_id=59 (last visited Feb. 2, 2015). Fetterman has taken some slack for being a go-it-alone executive, accomplishing many of his goals for the town through Braddock Redux rather than through the community planning processes of government. See also Halpern, *supra* note 16. But local majorities have re-elected him for his third term, and it is hard to argue that he should not be allowed to pursue the town's revival through his work outside city hall as well as his work inside. See Louis A. Corsaro, *John Fetterman: Moving Braddock Out of Shadows*, PITTSBURGH BUS. TIMES (Dec. 6, 2013, 6:00AM), <http://www.bizjournals.com/pittsburgh/print-edition/2013/12/06/john-fetterman-moving-braddock-out-of.html?page=all> (noting that Fetterman was re-elected for his third term).

²⁶ *Fetterman at TEDxHarlem*, *supra* note 10 and accompanying text.

²⁷ *Levi's Back to Braddock*, *supra* note 7.

²⁸ David Rusk, "Little Boxes"—*Limited Horizons: A Study of Fragmented Local Governance in Pennsylvania: Its Scope, Consequences, and Reforms*, THE BROOKINGS INSTITUTION 2, 12-14, 21 (Dec. 2003), <http://www.brookings.edu/~media/research/files/reports/2003/12/metropolitanpolicy%20pennsylvania/rusk.pdf>; see also PA. ECON. LEAGUE (PEL), STRUCTURING HEALTHY COMMUNITIES PART 1: REVENUE GENERATION AND FISCAL HEALTH 6 (2005) [hereinafter PEL, STRUCTURING HEALTHY COMMUNITIES], available at http://pelcentral.org/wp-content/uploads/2013/05/structuring-healthy-communities_final-2005.pdf ("[M]any municipalities do not have the fiscal capacity—due to size, economic

metropolitan public service delivery have found that "Pennsylvania has the nation's most fragmented, inflexible system of local government."²⁹ The state has seen vociferous calls to reduce the number of local governments in the state.³⁰

Disincorporation, merger, and consolidation of depopulated cities are attractive options for reorganization, because they allow cities to share administration and service costs with other areas. The fact that one Mon Valley town means something different (in terms of placehood, community, and history) to its residents than a neighboring town does not necessarily mean that each area requires a separate city government, rather than just a different neighborhood name. Pennsylvania's legislature has been considering how to promote each of these. Forced merger is

conditions, demographics, and other factors—to provide the necessary range of municipal services effectively or efficiently.").

²⁹ Rusk, *supra* note 28, at 5.

³⁰ See, e.g., *id.* at 15-16, 19, 44-45 (outlining recommendations to reduce the number of local governments in Pennsylvania); see also Alison Gold, *Norristown: The Best Argument for Reducing Local Government Fragmentation in PA*, ECON. LEAGUE OF GREATER PHILA., <http://economyleague.org/node/1010?f=issues/governance> (last visited Oct. 19, 2014) (recommending the empowerment of counties in order to reduce local government fragmentation in Pennsylvania); *Reducing Government Fragmentation Through Consolidation of the Earned Income Tax Collection System*, ISSUESPA (June 1, 2008), <http://issuespa.org/content/reducing-government-fragmentation-through-consolidation-earned-income-tax-collection-system> (explaining that local income tax collection in Pennsylvania is "complex, fragmented and inefficient" and that "[c]onsolidating the collection of earned income tax into . . . new locally established collection bureaus provides significant improvement," thus reducing government fragmentation); Jon Geeting, *Pennsylvania is an Urban State. How Come its Cities have so Little Power?*, THIS OLD CITY BLOG, <http://thisoldcity.com/policy/graphics-pennsylvania-urban-state-how-come-its-cities-have-so-little-power#.VA4t20iSGmE> (last updated Mar. 7, 2014) (framing local government fragmentation in Pennsylvania as a reason why cities in Pennsylvania have so little power). One local news article lamented: "The complicated web of little governments snares tax dollars like a spider traps insects. Residents must demand an end to the steady feeding . . ." See Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1432 (2012) (quoting FRANK J. LUCCHINO, ALLEGHENY CNTY CONTROLLER'S OFFICE, RECLAIMING HOPE: VOLUNTARY DISINCORPORATION IN ALLEGHENY COUNTY 3 (1994), available at <http://www.briem.com/files/LucchinoDisincorporate1.pdf>).

politically off the table, because it would be extremely unpopular to compel viable municipalities to merge with non-viable ones, or even to merge non-viable towns with one another. As a result, dissolution of troubled cities has risen on the political agenda. Recently enacted Public Law 2983, No. 199 (Act 199) amends Act 47 to permit economically distressed municipalities to dissolve their borders and hand local management over to a state appointee.³¹ While the final version of the law does not permit the state to dissolve municipalities without local consent, it does permit voluntary dissolution.³²

In principle, dissolution is a good addition to the tool kit available to manage local fiscal distress, especially in the context of depopulation. Towns that cannot afford basic services and are losing population year after year may not wish to hold borders drawn in more flush times, and they may be too small to need their own city managers, public works directors, and other personnel. But in Pennsylvania, dissolution is tricky. Municipalities cannot dissolve into the unincorporated territory of a democratically elected county government because Pennsylvania's counties lack the authority to govern unincorporated areas.³³ Instead, the new dissolution law keeps the city locked in its borders for the purposes

³¹ Municipalities Financial Recovery Act – Omnibus Amendments, Act of Oct. 31, 2014, P.L. 2983, No. 199 (Pa.), *available at* http://www.legis.state.pa.us/cfdocs/legis/CH/Public/ucons_pivot_pge.cfm?session=2014&session_ind=0&act_nbr=0199.&pl_nbr=2932 (to be codified at 53 P.S. §§ 11701.101-11401.712).

³² An earlier version of the law did permit the state to disincorporate a municipality involuntarily, but as discussed in Part III, opposition to that provision prevailed. *See* H.B. 1773, 198th Gen. Assemb., Reg. Sess. § 432(c) (Printer's No. 2526) (Pa. 2013), *available at* <http://www.legis.state.pa.us/cfdocs/Legis/pn/Public/btCheck.cfm?txtType=PDF&sessYr=2013&sessInd=0&billBody=H&billType=B&billNbr=1773&pn=2526>; COMMENTS OF FRATERNAL ORDER OF POLICE, PA. STATE LODGE, PA. PROF'L FIRE FIGHTERS ASS'N AND AFSCME COUNCIL 13, at 1-2 (Apr. 10, 2014), <http://local-government.pasenategop.com/files/2014/04/SB-1157-Remarks-fop-ppffa-afscme.pdf> (expressing opposition to S.B. 1157).

³³ Kate Lao Shaffner, *Municipal Mergers and Consolidations: Solution for Distressed Municipalities?*, KEYSTONE CROSSROADS (Sept. 5, 2014), <http://crossroads.newsworks.org/index.php/local/keystone-crossroads/72320-mergers-and-consolidations-how-municipalities-change-boundaries>.

of revenue and services, but hands the rein of finance and management over to a state appointee supervised by the state's Department of Community & Economic Development.³⁴ The law reflects a vision of urban recovery that emphasizes management over leadership—the idea that what small, poor communities need is administrators rather than elected officials. Act 199 posits that the best bet for finding smart, straight-shooting turnaround leaders is through statewide hiring processes rather than local elections.

This brief article comments on the proposed legislation. Part I offers some background on local fiscal distress in Pennsylvania and the programmatic legislation, known as Act 47, to support distressed cities. For reasons described therein, dissolution has never before been on the menu of interventions available to either residents or the state, despite some past efforts to make it an option. Part II describes recently enacted legislation that created a dissolution option. I offer my own view of the strengths and shortcomings of these changes, as well as a rubric for voters and local officials to use in thinking about the utility and potential of dissolution in their own town. Unfortunately, I am afraid that Act 199's version of disincorporation is neither here nor there—unlikely to be used, and unlikely to be helpful if invoked.

II. BACKGROUND: DISTRESS AND DISSOLUTION IN PENNSYLVANIA

A. Decline in Steel and Coal Country

"Today an American is significantly more likely to work in a restaurant than a factory."³⁵ Each year since 1985, "the United States has lost an average of 372,000 manufacturing jobs"³⁶ Those losses have been spatially concentrated in the regions where industry flourished in the post-World War II period—the hubs of steel production, coal mining and processing, the large-scale manufacturing of consumer products, and related industries.³⁷

³⁴ See Act of Oct. 31, 2014, P.L. 2983, No. 199, §§ 431-47 (Pa.).

³⁵ ENRICO MORETTI, *THE NEW GEOGRAPHY OF JOBS* 22 (2012).

³⁶ *Id.*

³⁷ For histories of the decline of American manufacturing centers, including in Pennsylvania, see JON C. TEAFORD, *CITIES OF THE HEARTLAND*:

Pennsylvania housed many such regions. The southwest region, including Pittsburgh, was the national capital of steel mining and manufacturing, which lost hundreds of thousands of jobs in the 1970s and 80s as well as the construction and service jobs that depended on manufacturing paychecks.³⁸ Philadelphia, Scranton, and other Eastern Pennsylvania cities were major industrial centers in their own right that suffered severe decline in industries like anthracite coal mining, textile manufacturing, iron and steel works, and shipping.³⁹ Pennsylvania has struggled mightily with a population that is growing much more slowly than the American population as a whole and "tepid" job growth that has been "constrained by the state's relatively low (although improving) higher-education attainment rates."⁴⁰

Decline in steel and coal country has been accelerated by suburban sprawl and the rapid conversion of the state's forested hillsides into tree-lined subdivisions of developer-built tract mansions.⁴¹ The state has seen a significant shift of businesses and residents away from cities and historic boroughs to outer suburban townships. Indeed, in the twenty years from 1980-2000, an extraordinary 2.9 million acres of greenfield property—22% of the

THE RISE AND FALL OF THE INDUSTRIAL MIDWEST 211 (1993); JOHN HOERR, AND THE WOLF FINALLY CAME: THE DECLINE OF THE AMERICAN STEEL INDUSTRY 21 (1988); THOMAS DUBLIN & WALTER LICHT, THE FACE OF DECLINE: THE PENNSYLVANIA ANTHRACITE REGION IN THE TWENTIETH CENTURY 88 (2005).

³⁸ See Rusk, *supra* note 28, at 13 ("Manufacturing bulked larger than the national average in most of Pennsylvania regional economies," leading to severe, locally concentrated job losses.).

³⁹ See *id.* at 6, 23.

⁴⁰ BROOKINGS, COMMITTING TO PROSPERITY, *supra* note 4, at 3; see also Jason Cato, *Census Shows Slow Pa. Population Gains*, TRIB TOTAL MEDIA (Jan. 4, 2014, 12:01 AM), <http://triblive.com/news/allegheeny/5339987-74/state-growt-h-pennsylvania#axzz3Jkptla6g>.

⁴¹ The state's hills and trees have made sprawl less visible in Pennsylvania (and in the South and East in general) than in the flat, arid West. See Rusk, *supra* note 28, at 8; *Short History of the Evolution of Coal Hill (Mount Washington)*, BROOKLINE CONNECTION (Oct. 10, 2014), <http://www.brooklineconnection.com/history/Facts/CoalHill.html> (explaining how forested hills have become tree-lined subdivisions).

state's rural land—was developed.⁴² The urbanization of land in state is several times faster than the rate of population growth in all but one metropolitan area.⁴³ This shifting of population away from historic towns towards undeveloped land imposes steep costs on taxpayers and government, because it requires new roads, housing, and infrastructure, even as past investments are underutilized and in need of maintenance and repairs.⁴⁴ Allegheny County, for instance, must bring "its aging and overwhelmed sewer system" up to code—changes that will cost the region \$21 billion dollars through the year 2026.⁴⁵ Yet the county has invested heavily in new services, roads, and utilities for outer townships and new subdivisions marketing a "blend of small town living with beautiful new home community."⁴⁶

Sprawl has become both a cause and consequence of racial segregation and discrimination in the state. While low-income

⁴² BROOKINGS, COMMITTING TO PROSPERITY, *supra* note 4, at 4.

⁴³ See Rusk, *supra* note 28, at 6 (referencing the Scranton/Wilkes-Barre metropolitan area).

⁴⁴ See *id.* at 14 (illustrating how sprawl and abandonment of existing cities, boroughs, and townships is "fiscally wasteful").

⁴⁵ Anderson, *Minimal Cities*, *supra* note 3, at 1151; ALLEGHENY CNTY. CONTROLLER'S OFFICE, REVIEW OF THE ALLEGHENY COUNTY SANITARY AUTHORITY 1 (Apr. 2, 2009), <http://www.alleghenycounty.us/controll/pdf/2009/2009-13.pdf> (assessing the costs to regional public agencies of compliance with consent orders by the US Environmental Protection Agency); *This is Sprawl, Pittsburgh Edition*, URBANOPHILE BLOG (Jan. 24, 2012), <http://www.urbanophile.com/2012/01/04/this-is-sprawl-pittsburgh-edition/> (depicting the three to four-fold increase in the footprint of urbanized land around Pittsburgh and Southwestern Pennsylvania between 1950 and 2010, with no increase in population); see also *Executive Summary of the Study on the Costs of Sprawl in Pennsylvania*, CLARION ASSOCIATES, INC. (Jan. 2000), http://www.sustainablepittsburgh.org/pdf/Costs_of_Sprawl_in_Pennsylvania.pdf (explaining how urban sprawl has consistently led to increased costs for taxpayers); *Sewage Facilities and Land Development*, 10,000 FRIENDS OF PENNSYLVANIA (2009), <http://10000friends.org/sewage-facilities-and-land-development> (explaining how increased infrastructure and utilities place a greater burden on resources).

⁴⁶ *About Brandywine*, MARONDA HOMES (2014), <http://www.maronda-homes.com/new-homes-pittsburgh-pa-15037/brandywine/> (located in Allegheny County in the town of Elizabeth); *PennDOT Announces 2014 Allegheny County Projects*, CBS PITTSBURGH (Apr. 3, 2014, 4:15 PM), <http://pittsburgh.cbslocal.com/2014/04/03/penn-dot-announces-2014-allegheny-county-projects/>.

whites are scattered across suburban and rural areas, low-income minorities are heavily concentrated in impoverished neighborhoods in declining historic cities.⁴⁷ Poor and minority households thus grow up surrounded by other poor households, which impact their school districts, access to jobs and employment networks, personal safety, home values, and access to credit for business and housing investments. The state land-use planning system has no serious commitment to integrating affordable housing into suburban areas—if anything, the regional planning systems strengthen suburban areas' ability to keep out low-income households.⁴⁸

The downturn in individual fortunes among Pennsylvania households, as well as the leapfrogging of growth to fringe greenfield sites, has fueled the deterioration of older local governments' finances. The vast majority of the state's historic cities and suburbs have experienced a decline in their fiscal health since 1970.⁴⁹ Nineteen of the state's twenty-two central cities are trapped in a downward trajectory of population and economy.⁵⁰ Closure of manufacturing plants across the state has led to depopulation, causing high levels of abandoned, blighted property (with an associated increase in public costs) and the draining away of business and property taxes from local governments. This decline impacts "rural, suburban and urban areas; in the north, south, east, west and places in between."⁵¹

B. Act 47 and the Management of Fiscal Stress

Pennsylvania's Act 47 was enacted in 1987 as a means to help financially troubled municipalities "help themselves" by adopting a fiscal recovery plan without relying on bailouts from the state.⁵²

⁴⁷ Rusk, *supra* note 28, at 12.

⁴⁸ *Id.* at 40.

⁴⁹ BROOKINGS, COMMITTING TO PROSPERITY, *supra* note 4, at 3; *see also* PEL, STRUCTURING HEALTHY COMMUNITIES, *supra* note 28, at 10 (suggesting a fiscal decline since 1970).

⁵⁰ Rusk, *supra* note 28, at 9.

⁵¹ PEL, STRUCTURING HEALTHY COMMUNITIES, *supra* note 28, at 4.

⁵² LOCAL GOV'T COMMISSION, PA. GEN. ASSEMB., ACT 47 OF 1987 MUNICIPALITIES FINANCIAL RECOVERY ACT, 2013 TASK FORCE REPORT 7 (Oct. 16, 2013), [hereinafter ACT 47 TASK FORCE REPORT], available at <http://www>

The law establishes a process to identify municipalities in fiscal distress, then hire a state-appointed coordinator who drafts and implements a recovery plan in cooperation with the distressed municipality's governing body.⁵³ Since Act 47's enactment, the Department of Community and Economic Development has declared twenty-eight municipalities to be financially distressed and only rescinded that determination for nine of those municipalities.⁵⁴ Several municipalities have been in the program for more than twenty-five years.⁵⁵

When Act 47 was originally enacted, one of its four objectives was to establish a method for consolidation or merger of distressed municipalities that were no longer fiscally viable.⁵⁶ The state-appointed Act 47 coordinator is charged with proposing a plan to relieve financial distress,⁵⁷ and that plan must conduct "[a]n analysis of whether the economic conditions of the municipality are so severe that it is reasonable to conclude that the municipality is no longer viable and should consolidate or merge with an adjacent municipality or municipalities."⁵⁸

Pursuant to that analysis, an Act 47 coordinator can recommend consolidation in a recovery plan. While Act 47 does not outline a special consolidation process for distressed

.lgc.state.pa.us/act47/101713/Act%2047-of-1987-2013-Task-Force-Report-FINAL-10-16-2013.pdf ; see Financially Distressed Municipalities Act, Act of July 10, 1987, P.L. 246, No. 47.

⁵³ See ACT 47 TASK FORCE REPORT, *supra* note 52, at 12-14.

⁵⁴ *List of Act 47 Distress Determinations*, *supra* note 3.

⁵⁵ See *id.*

⁵⁶ LOCAL GOV'T COMMISSION, PA. GEN. ASSEMB., PENNSYLVANIA LEGISLATOR'S MUNICIPAL DESKBOOK 185-86 (3d ed. 2006) [hereinafter PA. LEGISLATOR'S MUN. DESKBOOK], available at http://www.lgc.state.pa.us/deskbook06/Issues_Taxation_and_Finance_11_Municipal_Fiscal_Distress.pdf. Legislators later made consolidation available to all municipalities in the state; in 1994, Act 47's section governing merger and consolidation was repealed and replaced by the Municipal Consolidation or Merger Act, which is applicable to municipalities regardless of their inclusion in Act 47. *Id.* at 186; Municipal Consolidation or Merger Act, Act of Oct. 13, 1994, P.L. 596, No. 90, §§ 732-33.

⁵⁷ 53 PA. STAT. ANN. § 11701.221(a), (d) (West 2012).

⁵⁸ *Id.* § 11701.241(7).

municipalities,⁵⁹ municipalities can merge and restructure their boundaries under Pennsylvania law.⁶⁰ That is, they can merge if they overcome a very formidable obstacle—namely, "find[ing] neighbors willing to do so."⁶¹ Even after passing 2010 legislation to aid municipalities in consolidation,⁶² very few municipalities have successfully merged, and none have ever done so where the municipalities differ in terms of their race or class demographics.⁶³ As the nonpartisan Pennsylvania Economy League found, "combining local governments in Pennsylvania is a lengthy and often expensive process. Merging long existing municipalities is generally inconsistent with powerful forces like local culture, pride, and 'the way things have always been done.'"⁶⁴

C. *The History of Dissolution Policy in Pennsylvania*

Pennsylvania is one of only a few states in the country without unincorporated territory managed by a county, township, or state government.⁶⁵ Every inch of the state is governed by a municipal

⁵⁹ Act 47 does provide the controlling provision on collective bargaining agreements where a municipality under Act 47 undergoes a consolidation, see 53 PA. CONS. STAT. § 739(a)-(b) (2013), and it governs collective bargaining agreements in the event of a consolidation, 53 PA. STAT. ANN. § 11701.408(a)-(d) (2013). Act 47 also notes that merger/consolidation does not impact a municipality's eligibility for state financial assistance. *Id.* § 11701.281.

⁶⁰ See *Act 47: A Short-Term Fix to a Long-Term Problem*, TEAM PA. FOUNDATION (Dec. 16, 2011), <http://teampa.com/2011/12/act-47-a-short-term-fix-to-a-long-term-problem/> (noting that "municipalities have the ability to merge and restructure their boundaries as part of Act 47").

⁶¹ *Id.*; see also ACT 47 TASK FORCE REPORT, *supra* note 52, at 27 (explaining that as early as 1991, analysts noted "the limitations on voluntary consolidation of a distressed municipality with an adjacent municipality").

⁶² S.B.1429, 2010 Gen. Assemb., Reg. Sess. (Pa. 2010), *available at* <http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2009&sind=0&boddy=S&type=B&bn=1429>; see also *Municipal Reform Bill Signed Into Law*, TEAM PA. FOUNDATION (Aug. 19, 2010), <http://teampa.com/2010/08/business-leaders-back-municipal-reform/>.

⁶³ See Rusk, *supra* note 28, at 18.

⁶⁴ PEL, STRUCTURING HEALTHY COMMUNITIES, *supra* note 28, at 43.

⁶⁵ See Anderson, *Dissolving Cities*, *supra* note 30, at 1376.

corporation (i.e., a city, borough, or incorporated township).⁶⁶ Land governed by incorporated townships, the most rural/exurban municipal form, cannot be annexed by older cities or boroughs.⁶⁷ This means voluntary reorganizations or reclassifications of local governments (e.g., through merger) have been legally permissible, but dissolution has not.

Policymakers in Pennsylvania have made two prior efforts to establish dissolution laws and unincorporated territory in the state. In 1994, in response to depopulation and economic decline in many small towns from the Mon Valley to the Delaware Valley, Frank Lucchino, the Controller for Allegheny County, Pennsylvania, drafted a policy report championing dissolution.⁶⁸ In 2001, based on Lucchino's efforts, Pennsylvania House Bill 1321 proposed the creation of unincorporated areas and a mechanism for dissolution.⁶⁹ This 2001 bill described the need for dissolution, explaining that some municipalities "have significantly diminished populations and have become sufficiently economically distressed that their viability as independent municipalities is doubtful, but such municipalities are not attractive candidates at this time for merger or consolidation."⁷⁰ Dissolution, the bill asserted, would "substantially" reduce "[t]he administrative duties and costs of such municipalities," and management by county government would "stabilize them, facilitate their economic revitalization and make them more attractive candidates for merger with other municipalities."⁷¹

⁶⁶ FRANK J. LUCCHINO, ALLEGHENY CNTY. CONTROLLER'S OFFICE, RECLAIMING HOPE: VOLUNTARY DISINCORPORATION IN ALLEGHENY COUNTY I (1994), available at <http://www.briem.com/files/LucchinoDisincorporate1.pdf>; see PA. LEGISLATOR'S MUN. DESKBOOK, *supra* note 56, at 11 (explaining the different types of local political subdivisions within Pennsylvania).

⁶⁷ Rusk, *supra* note 28, at 3.

⁶⁸ See LUCCHINO, *supra* note 66, at 3.

⁶⁹ H.B. 1321, 185th Gen. Assemb., Reg. Sess., § 3102-D (Pa. 2001), available at <http://www.legis.state.pa.us/cfdocs/Legis/PN/Public/btCheck.cfm?txtType=pdf&sessYr=2001&sessInd=0&billBody=H&billTyp=B&billNbr=1321&pn=1550>.

⁷⁰ *Id.* § 3102-D(2).

⁷¹ *Id.* § 3102-D(3)-(4).

Lucchino's bill was ultimately unsuccessful, but some lawmakers revived his efforts in 2010 with a more radical legislative proposal in H.B. 2431: to pass a constitutional amendment to eliminate nearly 2,500 local governments—all but sixty-four of the state's municipalities and towns—and make counties the basic level of government in Pennsylvania.⁷² The prime sponsor, Representative Caltagirone, argued that the change would improve services, reduce costs, and trim bureaucracy by cutting down on duplication of services and creating economies of scale.⁷³ Advocates for township and borough governments (the suburban and rural areas most likely to be eliminated by the new system) stridently opposed the change,⁷⁴ and H.B. 2431 had "virtually no chance" of clearing the high bar for a constitutional amendment.⁷⁵ In an online op-ed titled "Forced Merger Bills are a Slap in the Face to our Founding Fathers," the Executive Director of the Pennsylvania State Association of Township Supervisors said the bill would create an "out-of-sight mega-bureaucracy" in each county and undermine residents' "fundamental right to govern themselves locally."⁷⁶ Online discussions about the bill were more mixed; though all commentators opposed local bureaucracy and its

⁷² See H.B. 2431, 194th Gen. Assemb., Reg. Sess. (Pa. 2010), available at <http://www.legis.state.pa.us/cfdocs/Legis/PN/Public/btCheck.cfm?txtType=pdf&sessYr=2009&sessInd=0&billBody=H&billTyp=B&billNbr=2431&pn=3570>; see also, Jan Murphy, *Bill Calls for Eliminating Pennsylvania's Municipal Governments*, PENNLIVE.COM (Apr. 28, 2010, 12:00 AM), http://www.pennlive.com/midstate/index.ssf/2010/04/bill_calls_for_eliminating_pen.html. For the total number of subcounty general-purpose local governments in Pennsylvania, see *supra* note 1 and accompanying text.

⁷³ See Murphy, *supra* note 72.

⁷⁴ See Betty Ann Moyer, *Forced Municipal Consolidation House Bill 2431 PA House Local Government Committee* (Aug. 18, 2010), <http://www.pahouse.com/Freeman/documents/CommitteeTestimony/HB2431%20-%20Boroughs%20Testimony.pdf>; David M. Sanko, *Forced-Merger Bills are a Slap in the Face to our Founding Fathers* (Sept. 9, 2010), <http://www.psats.org/subpage.php?pageid=OpEdForcedMergersSept2010>.

⁷⁵ See Murphy, *supra* note 72.

⁷⁶ See Sanko, *supra* note 74.

costs, they made different assumptions about whether county rule would make this problem better or worse.⁷⁷

III. ADDING DISSOLUTION TO THE ACT 47 TOOLKIT

Completely restructuring and reorganizing a state's local government system would be a tough sell in any state, and that may be particularly true in Pennsylvania, where an unusually high number of residents were born in the state and lack experience with other local government systems.⁷⁸ So if H.B. 2431, discussed in Part I, could never get off the ground, how about a law permitting the state to dissolve struggling municipalities (leaving wealthier ones alone) and turn them over to state management? An early draft of Act 199, H.R. 1773 (Printer No. 2526) proposed just that, but opponents subsequently succeeded in removing the language permitting the state to dissolve a city without local approval.⁷⁹ The final version of Act 199 does, however, create a voluntary "disincorporation" option for Act 47 municipalities.⁸⁰ This Part describes and evaluates the new approach.

A. Dissolution as Enacted in Act 199

In October 2013, Pennsylvania's Local Government Commission convened a task force to propose improvements to Act 47.⁸¹ The Task Force drafted a lengthy report and introduced a

⁷⁷ See, e.g., Rachel R. Basinger, *Democrat Attempt to Control Local Municipalities at County Level (Pennsylvania H.B. 2431)*, FREE REPUBLIC BLOG (May 1, 2010), <http://www.freerepublic.com/focus/news/2514334/posts>.

⁷⁸ Gregor Aisch, et al., *Where We Came From and Where We Went, State by State*, N.Y. TIMES, Aug. 19, 2014 (finding that Pennsylvania has "one of the nation's highest percentages of residents born in the state").

⁷⁹ Compare H.B. 1773, 198th Gen. Assemb., Reg. Sess. § 432 (P.N. 2526) (Pa. 2013), with Act of Oct. 31, 2014, P.L. 2983, No. 199, § 432 (Pa.).

⁸⁰ Act of Oct. 31, 2014, P.L. 2983, No. 199, § 432.

⁸¹ See LOCAL GOV'T COMMISSION, PA. GEN. ASSEMB., SUMMARY OF AMENDMENTS TO ACT 47 OF 1987, <http://www.lgc.state.pa.us/act47/summary-of-hb1773.pdf> (providing that in 2012, the Local Government Commission had asked the agencies and organizations that participated in the original creation of Act 47 to reconvene "with the goal of improving the ability of Act 47 to address municipal fiscal distress"). The Task Force subsequently convened by the Local

comprehensive set of amendments as identical bills in the House and Senate (House Bill 1773 and Senate Bill 1157).⁸² On October 31, 2014, the amendments were enacted as Municipalities Financial Recovery Act – Omnibus Amendments, Public Law 2983, No. 199.⁸³ The amendments sweep broadly, but the main changes include creating an early intervention program, limiting the duration of Act 47 status, and creating a disincorporation mechanism for "non-viable municipalities."⁸⁴ For municipalities that enter Act 47, the basic structure of the amended program is a five-year period in Act 47 status, followed by one of only four options: (1) termination of Act 47 status on the basis of a fiscal recovery, (2) voluntary disincorporation, (3) a declaration of fiscal emergency and the commencement of a state receivership, or (4) a three-year exit plan to reach termination of status (equivalent to a three-year extension of status).⁸⁵ The discussion below centers on the second of these options—Act 199's creation of a disincorporation process for non-viable municipalities.⁸⁶

The Task Force explained the addition of a disincorporation process to Act 47 as follows:

[This proposed legislation] provide[s] a new approach under Pennsylvania law for addressing municipalities that simply have an inadequate tax base to provide for a functional municipality even if the municipality reorganizes its debts through bankruptcy. Complex political, economic and case-by-case challenges have interfered with voluntary merger or consolidation of

Government Commission included four legislators and seventeen other members from organized labor, business groups, and municipal associations. *Id.*

⁸² *See id.*; ACT 47 TASK FORCE REPORT, *supra* note 52.

⁸³ Act of Oct. 31, 2014, P.L. 2983, No. 199..

⁸⁴ *See id.* § 432.

⁸⁵ *See id.* § 254(a) (limiting Act 47 status to a five-year duration dating from the adoption of a recovery plan); *see also id.* § 255(a) (mandating that in the final year of Act 47 status, the coordinator issue a report making one of these four findings).

⁸⁶ *See id.* §§ 255(a), 431-49; *see also* ACT 47 TASK FORCE REPORT, *supra* note 52, at 59.

nonviable municipalities with neighboring municipalities to date, and efforts to force a consolidation or merger, though constitutionally possible, are widely considered to be politically unachievable.⁸⁷

Act 199 sets up a process for the disincorporation of these "non-viable" municipalities. The process is set in motion when an Act 47 coordinator or receiver recommends that the Secretary of the Department of Community & Economic Development ("DCED") evaluate the viability of a "municipality"—which is defined inclusively as a town, township, borough, city, or county, but is limited to those that do not have their own police or fire employees.⁸⁸ The Secretary must consider three criteria in assessing viability: (1) whether the city is unable to "provide essential services," (2) whether the municipality faces "such deteriorated economic conditions and a collapse of its tax base that all reasonable efforts to restore economic vitality have failed," and (3) whether merger or consolidation are either "unachievable or will not result in viability."⁸⁹ There is no further elaboration to help quantify or assess these factors.

If the municipality is found to be non-viable, its governing body or its citizens can voluntarily initiate the dissolution process.⁹⁰ If either one of those steps is taken, a court then holds a public hearing to consider testimony about the municipality's financial condition, its progress on its Act 47 recovery plan, and the projected effects of disincorporation on services and obligations.⁹¹ Any of the municipalities' taxpayers, elected officials, creditors, collective bargaining units, or contractors may present testimony objecting to the disincorporation.⁹² The court is

⁸⁷ ACT 47 TASK FORCE REPORT, *supra* note 52, at 59.

⁸⁸ Act of Oct. 31, 2014, P.L. 2983, No. 199, § 431.

⁸⁹ *Id.* § 431.1(a).

⁹⁰ *Id.* § 432 (giving the governing body forty-five days to initiate dissolution, and if they fail to do so, granting residents an additional sixty days to generate a disincorporation petition with signatures from at least 51% of the number of electors who voted in the last gubernatorial election).

⁹¹ *Id.* § 433(c).

⁹² *Id.* § 433(a), (c).

instructed to issue a decree approving the disincorporation unless "clear and convincing evidence" demonstrates "a reasonable expectation that the municipality is viable."⁹³

As initially drafted, the legislation allowed a state official to trigger a dissolution proceeding before a court if the governing body and residents failed to do so within a statutory window of time.⁹⁴ In testimony before the Senate opposing the bill, the state's three advocacy groups for municipalities vigorously opposed this approach.⁹⁵ Yielding to these objections, the involuntary dissolution provisions were struck by house amendment.⁹⁶ Under the final version of the law, if the governing body or citizens fail to initiate dissolution, it is removed from the options available to the Act 47 coordinator. Instead, the coordinator is left with only four other options: (1) to allow the municipality to return to its Act 47 recovery plan or exit plan until the time limit runs, (2) to terminate the municipality's Act 47 distressed status on the basis of fiscal recovery, (3) to declare a fiscal emergency subject to a receivership, or (4) to initiate bankruptcy proceedings via a state receivership.⁹⁷ As a practical matter, this means that if a municipality has not recovered sufficiently to exit Act 47 but decides not to dissolve, it will be put under the management of a

⁹³ *Id.* § 433(e).

⁹⁴ *Id.* § 432(c).

⁹⁵ See PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS ET AL., JOINT TESTIMONY BY THE PENNSYLVANIA STATE ASSOCIATION OF BOROUGHES, THE PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS, THE PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP COMMISSIONERS, AND THE PENNSYLVANIA MUNICIPAL LEAGUE BEFORE THE SENATE LOCAL GOVERNMENT COMMITTEE ON S.B. 1157 AND H.B. 1773, (April 10, 2014) [hereinafter MUNICIPALITIES' JOINT TESTIMONY AGAINST H.B. 1773], <http://boroughs.org/ckfinder/userfiles/files/Act%2047%20final%20joint%20testimony%20SB%201157%20and%20hb%201773%20with%20logos%20%282%29.pdf>.

⁹⁶ Compare H.B. 1773, 198th Gen. Assemb., Reg. Sess. § 432 (P.N. 2526) (Pa. 2013), with Act of Oct. 31, 2014, P.L. 2983, No. 199, § 432.

⁹⁷ Act of Oct. 31, 2014, P.L. 2983, No. 199, § 433.1(b); see also *id.* § 255(a) (mandating that in the final year of Act 47 status, the coordinator issue a report making one of four findings: recovery, disincorporation, fiscal emergency, or a three-year exit plan).

state receiver, losing its fiscal autonomy and potentially leading into federal bankruptcy proceedings.⁹⁸

The advantage of the statute as amended is that local elected officials and voters alone—not state officials—get the power to decide whether or not to disincorporate. However, if a municipality decides against incorporation but does not stabilize fiscally during the allotted time, it will nonetheless surrender its fiscal autonomy to the state through a receivership. In that case, a city's name and legal identity will survive, but its governing body will lose the power to manage finances and service delivery. This raises a question: Is disincorporation really a greater enemy than this transfer to state authority?

No matter which path a troubled municipality follows at the expiration of the time limit, the city will be stuck with the revenue and spending implications of its unchanged borders—the limits of the current tax base, the service needs of the residents, and costs of serving residents at the scale of the city alone.⁹⁹ Of course this is true for receiverships and bankruptcy, but oddly Act 199 makes it true for disincorporation as well. If disincorporation is initiated by electors or the governing body, an "unincorporated service district" is created as a special purpose entity of the state.¹⁰⁰ The goal of such a district is "to provide for the essential needs of the residents and property owners," and ultimately to "remove . . . barriers" to the area's consolidation with a neighboring municipality.¹⁰¹ The district is governed by an administrator who is appointed and initially paid by DCED (though the state may then require reimbursement from locally generated revenues).¹⁰² The

⁹⁸ See *id.* §§ 601-712 (fiscal emergency and receivership chapters); *id.* § 706(a)(9) (giving a receiver the power to initiate federal bankruptcy proceedings upon written authorization from the state Secretary of DCED).

⁹⁹ Except, of course, in the exceedingly unlikely scenario that a willing municipal partner suddenly shows up to pursue consolidation of borders or services.

¹⁰⁰ ACT 47 TASK FORCE REPORT, *supra* note 52, at 60-61; H.B. 1773, 198th Gen. Assemb., Reg. Sess., Sec. 24, Ch. 4, Subch. D § 441 (Pa. 2013).

¹⁰¹ ACT 47 TASK FORCE REPORT, *supra* note 52, at 60.

¹⁰² Act of Oct. 31, 2014, P.L. 2983, No. 199, §§ 434(b), 436(a)(7), 443(a)(4).

administrator is charged with preparing and implementing an "essential services plan" to govern services, property assessments, and debt payments in the district.¹⁰³ The statute empowers the administrator to dispose of municipal property by sale, lease, or conveyance, but also creates a system by which he or she can instead pass such property to the Commonwealth to hold in trust for residents of the district.¹⁰⁴ The essential services plan must also adopt "governing standards" for the unincorporated services district—standards that exclude land-use controls but otherwise establish rules and conduct for other traditional realms of local regulation such as property maintenance, conduct in public space, and vehicle parking.¹⁰⁵

As a practical matter, a dissolved municipality has no local, democratically elected officials. The elected county government that contains the disincorporated city's territory takes over the area's land-use policy¹⁰⁶—an important but limited policy lever in the absence of other policymaking authority. Apart from the state-appointed administrator and the county's limited jurisdiction, the remaining leadership of a disincorporated area is a three-member service district advisory committee, which is initially populated by appointments of the dissolving municipal governing body. The committee advises the administrator about district services and assessment levels, and it advises the county about land-use matters.¹⁰⁷ Unlike the administrator, this body is accountable to state open meeting laws.¹⁰⁸ The system of the administrator working with the advisory committee is comparable to a mayor

¹⁰³ *Id.* § 436.

¹⁰⁴ *Id.* § 436(a)(5); *id.* § 441 (d) (providing that any assets of the unincorporated service district that are not sold will be held in trust by the state).

¹⁰⁵ ACT 47 TASK FORCE REPORT, *supra* note 52, at 62; Act of Oct. 31, 2014, P.L. 2983, No. 199, § 436(c). As one final piece, the essential services plan must also cover emergency management (i.e., disaster planning). Act of Oct. 31, 2014, P.L. 2983, No. 199, § 436(a)(2).

¹⁰⁶ *Id.* § 439(c) (establishing the duties of a county over an unincorporated service district).

¹⁰⁷ *Id.* § 442.

¹⁰⁸ *Id.* § 442(j).

with a three-member city council except for one critically important difference: none of the four officials are elected.

Because unincorporated service districts created pursuant to Act 199 would be governed primarily by the state, rather than a county, the law is highly unusual among American states. Land without any form of general purpose, elected local government is rare. The only examples of such a system are in states with large expanses of undeveloped, rural land. Maine, for instance, has a category of "unorganized territory" that covers the state's vast, thinly populated rural interior.¹⁰⁹ Maine's unorganized territories fall within county boundaries for purposes of tax assessment and some services, but neither the county nor any municipal government has regulatory jurisdiction over these areas.¹¹⁰ Instead, the unorganized territories are governed by the Maine Legislature, which sets land-use regulation and purchases services from the county.¹¹¹ Maine's unorganized territories do not have individual service districts or state-appointed district administrators.

*B. Fitting Dissolution into Receivership Laws
Without Thinning Democracy*

We do not have to keep city governments around—not as a matter of law or habit. Dissolution of cities is a legal option that increasing numbers of cities are taking, particularly in response to fiscal distress.¹¹² I am a strong proponent of state efforts to modernize and expand disincorporation law, thereby offering an additional mode of restructuring to struggling cities. Act 199's version of dissolution, however, is a strange bird. It is not dissolution in the sense that any other state uses that word, because

¹⁰⁹ Anderson, *Dissolving Cities*, *supra* note 30, at 1402.

¹¹⁰ *Unorganized Territory*, MAINE REVENUE SERVICES, <http://www.maine.gov/revenue/propertytax/unorganizedterritory/unorganized.htm> (last visited July 3, 2014).

¹¹¹ *Id.*; *Maine's Land Use Planning Commission (LUPC)*, NATURAL RESOURCES COUNCIL OF MAINE (2014), <http://www.nrcm.org/projects-hot-issues/woods-wildlife-and-wilderness/north-woods-protection-lupc/maines-land-use-planning-commission-lupc/>.

¹¹² Anderson, *Dissolving Cities*, *supra* note 30, at 1364.

the new statute does not allow a disincorporated city's borders to fall away and merge the city with a larger zone of unincorporated territory. Although land-use authority passes to the county, dissolving cities in Pennsylvania are still limited to their borders for revenues and service delivery. The particular form of dissolution enacted in Act 199 thus raises a particular set of normative concerns, which I describe below.

1. *If local management is not the problem, then management changes are unlikely the solution.*

The Pennsylvania Economy League, a nonpartisan think-tank, conducted a comprehensive analysis of municipal finances from 1970 to 2003, finding that the vast majority of the state's cities, boroughs, and townships are fiscally deteriorating.¹¹³ The study found that the causes of this decline were not mismanagement, but rather the underlying rules of the game related to municipal borders and finances.¹¹⁴ "[F]iscal distress is often inevitable under existing state laws that govern municipalities," the study reported.¹¹⁵ "Current legislation and codes leave those who lead the Commonwealth's cities, boroughs, and townships with revenue streams that are largely inelastic, capped, and out of sync with budget needs."¹¹⁶ Even the "best fiscal management and programs of economic and community development" cannot change their fortunes.¹¹⁷ The study dispelled "the myth" that mismanagement was the cause of fiscal stress, finding instead that "the great majority of Pennsylvania's cities, boroughs and townships are managed by knowledgeable, educated and well-qualified public

¹¹³ PEL, STRUCTURING HEALTHY COMMUNITIES, *supra* note 28, at 4; see also *id.* at 38 ("An analysis of revenues, tax effort and tax capacity reveals systematic patterns of fiscal decline, with some pockets of improving fiscal health, in Pennsylvania's municipalities. No region is left untouched by distress, and fiscal decline impacts all types of municipalities, including townships, cities, and boroughs.").

¹¹⁴ *Id.* at 8, 43.

¹¹⁵ *Id.* at 4.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

officials—elected and appointed—who have the best interests of their municipalities at heart."¹¹⁸

Therein lies the main problem with the amended Act 47 disincorporation provisions. The law's primary solution to chronic fiscal decline is to replace local elected officials with a state appointee—purely a management change. The best argument in favor of Act 199's approach is that state appointees will be tougher negotiators with public sector employees or city contractors, because these appointees need not stand for elections in which they can be punished for drawing a hard line on city contracts. A similar logic would suggest that state appointees will be better positioned to make unsentimental, apolitical decisions about controversial issues like the sale of public assets, privatization or contracting out of services, or service cuts. Yet it is unclear as an empirical matter whether this is usually the case, and even if it is, there is a great deal of evidence that state receivers, like elected officials, will be tempted to balance their short term budgets in ways that create higher downstream expenses and opportunity costs.¹¹⁹ Furthermore, there have been some unfortunate examples of state appointees captured by private interests for the very reason that they are *not* democratically accountable.

Even if unelected state appointees are a better bet for keeping costs down in negotiations over major city contracts, and even if we assume that they are superior number crunchers and financial managers than the average elected mayor, those gains must be traded against other losses. Can a state appointee serve as a community leader and advocate? Can they build and invigorate a city? Braddock's John Fetterman certainly comes to mind here. As the leader of a youth development program before his election as mayor, Fetterman would never have been appointed by the state as a fiscal manager. Yet he has been able to inspire people to invest in Braddock in spite of its visible and lasting destitution. His professional background enabled an agenda focused not only

¹¹⁸ *Id.* at 8.

¹¹⁹ Anderson, *Minimal Cities*, *supra* note 3, at 1118, 1120-22 (cataloguing a wide range of service cuts and asset sales made by cities in distress, many of which lead to lasting losses and later costs).

on getting the fiscal spreadsheets right and improving the built environment, but also on building human capital among children and youth in the city. An outside hire brought in for a finite period to balance a budget does not have the same incentive or credentials to be a turnaround leader.

I do not dispute that some municipalities (those that face a persistent problem finding competent or honest elected officials) might well be better served by a state appointee for some period of years. But the receivership provisions of Act 47 already offer that pathway. Indeed, Act 47 receivers successfully stabilized Harrisburg's rocky fiscal position.¹²⁰ Given that the receivership option is available, it is unclear what more an indefinite period of unelected state management offers a troubled city. A mismatch of problem and solution makes the Act 47 disincorporation option look unlikely to be used or useful.

2. *Turning a city's administration over to the state without dissolving its borders for fiscal purposes cannot change the territory's tax base or provide economies of scale in service provision.*

If the Economy League study is correct that management is not the problem with Pennsylvania's troubled municipalities, then what is? Above all, the answer is sagging revenues alongside high needs for services.¹²¹ The Economy League found that local governments are struggling because of laws and rules passed by the state—everything from the ease of municipal incorporation by suburbs to the tools available to cities seeking to capture tax revenues from commuters. These rules will constrain state appointees just as they do elected local officials, leaving historic

¹²⁰ See Romy Varghese, *Harrisburg Shows Path from Distress Besting Detroit*, BLOOMBERG (Dec. 16, 2013), <http://www.bloomberg.com/news/2013-12-17/harrisburg-shows-path-from-distress-besting-detroit-muni-credit.html>.

For a valuable and comprehensive look at Harrisburg's efforts to file for bankruptcy and its reliance instead on a state receivership for restructuring, see Juliet M. Moringiello, *Specific Authorization To File Under Chapter 9: Lessons from Harrisburg*, 32 CAL. BANKR. J. 237, 243-44 (2012).

¹²¹ See PEL, STRUCTURING HEALTHY COMMUNITIES, *supra* note 28, at 11-17.

cities and boroughs mired in the hard problems of concentrated poverty; the hollowing out of historic business districts; and the high costs of an aging, obsolete built infrastructure. Without changing their revenue model or borders, these municipalities cannot realistically compete with newer townships for private investment by residents or businesses. The state legislature, as well as any DCED appointees, cannot make progress on deep problems without facing their root causes.

Unfortunately, Act 199 does not reach these harder issues. The Act offers democratic dissolution without fiscal dissolution—a change to the mode of government alone with a reorganized territory for tax or service area purposes. Using a word like "disincorporation" suggests that Act 199 can eliminate a city's borders, but in fact the Act fails to offer fiscal reorganization, thus leaving an area trapped with the same revenues and expenditures. It is hard to see how the law can impact the things that matter most: (1) fiscal outcomes (such as citizen taxes and fees, the city's ability to pay its bills and obtain affordable financing), (2) improvements in the quality and availability of local services, and (3) democratic participation and empowerment, including citizen input on policy and fiscal issues. Sacrificing the third goal without major gains in the first and second is hard to justify.

3. *If administrative cost controls are the primary focus, then the legislation should protect municipal taxpayers from sustaining a pricey administration by a state appointee.*

Municipal advocacy groups criticized Act 199 in its draft phase for failing to articulate any clear benefits from dissolution, while vesting control of municipal affairs in an "unelected bureaucrat," limited only by an advisory commission with "no real powers."¹²² That is a fair concern. The point of Act 199's disincorporation provisions may be to allow tiny, depopulated municipalities to reduce their administrative carrying costs, for instance, by consolidating all of a city's full-time municipal

¹²² See MUNICIPALITIES' JOINT TESTIMONY AGAINST H.B. 1773, *supra* note 98, at 5.

managers (such as the city manager and public works director) into a single position, the state appointee. One could argue that dissolution is a useful option when a municipality's population is too small to sustain a full-blown elected government. Though such staffing reorganizations can be made by elected local officials, they may fall into the class of "tough choices" that are arguably easier for an unelected official to make. But if the primary theory is that such restructurings will save the city money, then the provisions governing unincorporated service district management should contain cost and staffing controls. As written, there are no limits to the extent or costs of staffing a district administrator. The state appointees are full-time, highly qualified state employees¹²³ that will necessarily be paid considerably more than honorary elected figures like mayors and will likely be paid more than most small town managers. If they bring in private consultants to staff and support their offices, which they are free to do under the proposed law, the legislature's basis for assuming fiscal savings on administration is not clear.

It may be that the legislature wanted to create a "small government option" for Pennsylvania voters to express their disinterest in elected local government. But here too, if that is the goal, the state should do more to protect voters from channeling their tax dollars toward administrative costs subject to exceedingly weak democratic accountability.

4. *Few, if any, municipalities in Pennsylvania will be eligible for dissolution.*

While it is not clear that municipalities will benefit from Act 199's disincorporation provisions, it is also not clear that they will be eligible to use them anyway. Act 199 limits eligibility for disincorporation to municipalities that do "not provide police service or fire service through [their] employees."¹²⁴ For now at least, this limitation would seem to render all listed Act 47 municipalities ineligible for dissolution. A cursory review of

¹²³ Act of Oct. 31, 2014, P.L. 2983, No. 199, § 434(a)-(b).

¹²⁴ *Id.* § 431 (defining "municipality").

police and fire protection in the current Act 47 municipalities suggests that none of them would satisfy this criteria. As a practical matter, this makes disincorporation considerably harder to achieve: a city would have to restructure its police and fire service (for instance, by contracting with another public entity) in order to become eligible for dissolution. It would take a highly motivated governing body to successfully navigate the tricky politics of dissolving police and fire services—arguably the most politically persuasive and popular city departments—as a mandatory prerequisite to dissolution. Without a willing majority of city councilmembers, dissolution is effectively unavailable, even if a majority of voters would be motivated to disincorporate. A resident-led disincorporation campaign would require a dramatically burdensome path: dissolution proponents must first win a council majority, then see that majority effectively restructure and renegotiate public safety provision, then run a successful petition drive to get dissolution on the ballot, and finally, prevail in that election.

The fact that no current Act 47 municipalities would be eligible for the disincorporation provisions suggests that Act 199 is either poorly written (i.e., drafters failed to research the eligibility of listed municipalities), or that it is not genuinely intended to be used in the near future (i.e., it appears helpful and productive, but legislators do not actually intend or expect it to be operationalized).

5. *Genuine dissolution belongs on the menu of reforms available in Pennsylvania and other states, but that means that a municipality's territory dissolves and a larger, democratically elected government takes over.*

Nonviability is a real phenomenon—some municipalities simply cannot, in the words of Act 199, "provide essential services," because the municipality faces "such deteriorated economic conditions and a collapse of its tax base that all reasonable efforts to restore economic vitality have failed," and it cannot find a willing partner to alter its borders through merger or

consolidation.¹²⁵ When a city faces such straits, the tools available to policymakers in this setting include: (1) bailouts from state government (i.e., wider constituencies of taxpayers), (2) management assistance from state government (for instance, to help restructure debts, monetize or liquidate assets, bring down service costs, and so forth), (3) new revenue-raising devices (e.g., special fees or taxes that distressed governments are permitted to levy), and (4) access to Chapter 9 bankruptcy to open contracts and restructure debt. Structural reforms such as changing a local government's border are a critical addition to this list—without that lever, concentrated poverty can keep a local government trapped in the same dilemma of lower revenue and higher costs. Other than the bailouts option and the right to levy new taxes (which rarely yield much when applied to poor populations), none of the other options actually change the revenue side of a municipality's problems. If we were imagining fiscal crisis law on a blank slate, we would absolutely expect border changes to be an available restructuring tool.

Indeed, I am a strong proponent of adding dissolution to the list of tools available to struggling municipalities.¹²⁶ But that term does and should mean that a city's territory is merged into that of another elected government—a change that promotes fiscal redistribution as well as metropolitan defragmentation. The elected government into which a dissolving municipality merges could be a state; for instance, Maine has a huge, sparsely populated territory under state fiscal and policy management.¹²⁷ Or more commonly, the receiving elected government is a county, as in most of the South or the West, where dissolution means that a city's territory blends back into the county's unincorporated area for all purposes except the service of that territory's debts incurred prior to

¹²⁵ See *id.* § 431.1(a).

¹²⁶ See generally Anderson, *Dissolving Cities*, *supra* note 30, at 1445-46 (advocating for a modernization of dissolution law in most states, as well as attentive research as to its costs and benefits).

¹²⁷ See Michelle Wilde Anderson, *A Western, Rural Rustbelt: Learning From Local Fiscal Crisis in Oregon*, 50 WILLAMETTE L. REV. 465 (2014) (describing Maine's system in detail).

dissolution.¹²⁸ Either way, the dissolving city moves from one democratically elected local government into the jurisdiction of another one. As I have found in previous research, counties are no panacea when it comes to the management of concentrated poverty, but at least they are democratic bodies subject to some level of public accountability.¹²⁹ While Act 199's disincorporation model does transfer land-use authority to a county, thus securing a very consequential arena of policymaking with an elected body, that authority is insufficient. Local democratic accountability is also needed for matters such as tax rates, spending priorities, governing standards for conduct, property maintenance rules, and more.

IV. CONCLUSION

"There are 250 tonnes of steel in a windmill," Braddock Mayor John Fetterman told Congress.¹³⁰ Rooted in steel and reaching for a place in a renewable energy economy, Fetterman's vision is both historically rooted and historically defiant. It is leadership, not simply administration. It is exceedingly unlikely that such a city—or any city in Pennsylvania, for that matter—will opt to hire a state manager through voluntary disincorporation. Act 199's dissolution provisions are part of a tradition of worthy attempts to reform local government in the state, but they are not the best of their kind. If the legislature wishes to add a meaningful dissolution law to the toolkit for troubled cities, as it should do, state legislators should go back to the drawing board—the one that Frank Lucchino drafted for them years ago.

¹²⁸ See Anderson, *Dissolving Cities*, *supra* note 30, at 1367, 1381 (explaining the rule, rooted in the Contracts Clause of the Federal Constitution, that a dissolving city cannot pass its debts off to the taxpayers of a receiving county).

¹²⁹ See Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1133 (2008).

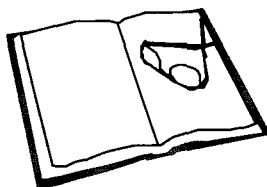
¹³⁰ Pilkington, *supra* note 22 (internal quotation marks omitted).

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