DEMOCRATIC DISSOLUTION: RADICAL EXPERIMENTATION IN STATE TAKEOVERS OF LOCAL GOVERNMENTS

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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 put by Abby Goodnough in *The New York Times*: "Across the nation, cities and states are trying myriad ways of righting their fiscal ships as the recession plods on. But locking the mayor out of City Hall is generally not one of them."[1]

Until 2010 and 2011, that is, when Michigan and Rhode Island, which are being watched closely by other states, dramatically reformed their legislation governing state receiverships for local governments in fiscal crisis. In those states, new legislation suspends and displaces 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 intact as a formal matter: the city's borders do not change, whatever the depressed revenue potential of that land base may be. Yet the city's local democracy is gone. Its elected officials and its governing charter are set aside for an unspecified period of years and replaced by an official selected by the governor.

This essay analyzes the new state receivership laws 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 public policy problem—local governments overwhelmed by debt they can't service and bills they can't pay—the essay argues that Michigan and Rhode Island's laws strike the wrong balance between state and local authority. For those states and the others watching them, I offer legal reforms to more moderately balance the seriousness of the challenges of local fiscal stabilization with the virtues of local democracy.

[§] Assistant Professor of Law, UC Berkeley School of Law. Richard Briffault and other participants at the Cooper Walsh Colloquium, as well as Andrea Peterson, provided wise comments and questions. I am also grateful for editing by Tricia Walsh; research assistance from student Liz Kim, librarian Dean Rowan, and statistician Su Li; and assistance with manuscript preparation from Leslie Stone.

[1] Abby Goodnough, *One More Job Lost in the Recession: The Mayor's*, THE NEW YORK TIMES, Feb. 21, 2011.

TABLE OF CONTENTS

DEMOCRATIC DISSOLUTION

"A haircut still looks a lot better than a beheading."

—*Robert G. Flanders Jr., State-appointed receiver of Central Falls, Rhode Island*[2]

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

—*Rainbow PUSH Coalition*[3]

I. Introduction

Stories of fiscal crisis are told with numbers. Here are a few from Benton Harbor, Michigan. More than forty-eight percent of its residents live below the poverty line, compared to just seven percent in St. Joseph, Benton Harbor's "twin city" across the river.[4] Formerly a thriving industrial hub for the region, Benton Harbor saw the rapid flight of both industry and white families in the 1960s-80s.[5]

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

[3] *See* Rainbow PUSH Coalition, *Commentaries: Michigan's Governor Tramples Democracy*, June 28, 2011, http://rainbowpush.org/commentaries/single/michigans_governor_tramples_democracy; *see also* Rick Ungar, *The Michigan Monarchy Legislates Financial Martial Law—Nation Yawns*, FORBES, March 18, 2001 (calling Synder's law a "shocking, Draconian, democracy-destroying measure[]").

[4] US Census, Selected Economic Characteristics: 2006-2010 American Community Survey 5-Year Estimates: Benton Harbor city, Michigan, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_DP03&prodType=table; US Census, Selected Economic Characteristics: 2006-2010 American Community Survey 5-Year Estimates: St. Joseph city, Michigan, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_DP03&prodType=table.

[5] Benton Harbor History, http://www.bentonharborcity.com/history.html; *see also* Jonathan Mahler, *Is There Anything Wrong with this Economy that a Jack Nicklaus-Designed Golf Course Can't Fix?* THE NEW YORK TIMES MAGAZINE, Dec. 18, 2011 at 40 (describing the history and current demographics of the city).

Today, the city is ninety-one percent black;[6] St. Joseph is eighty-eight percent white.[7] St. Joseph's website describes that city as "a growing resort community" that is "nestled on the southern tip of what has been termed 'The Riviera of the Midwest.'"[8] Benton Harbor's website has a different marketing emphasis: the city's status as an enterprise zone.[9] A March 2011 audit estimated the city's debt at $6 million—quite a number for a city of just over 10,000 people.[10] Appliance maker Whirlpool Corporation has recently announced that it will lay off 5,000 employees, many of whom work it the company's world headquarters in Benton Harbor.[11] At least five decades of bitter race relations separate the cities sometimes known to one other as "Benton Harlem" and "St. Johannesburg."[12]

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.[13] The

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[6] US Census, Profile of General Population and Housing Characteristics: 2010, Benton Harbor City, Michigan, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1&prodType=table [hereinafter Census 2010 Benton Harbor 2010].

[7] US Census, Profile of General Population and Housing Characteristics: 2010, St. Josheph City, Michigan, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1&prodType=table.

[8] Tour of St. Joseph, Michigan, http://sjcity.com/inside.php?a=PG:123.

[9] *See* Benton Harbor History, http://www.bentonharborcity.com/history.html; Benton Harbor Business, http://www.bentonharborcity.com/business1.html.

[10] Brandon Lewis, *Audit finds City of Benton Harbor $6 million in debt*, WNDU.com, Mar. 8, 2011; US Census, Profile of General Population and Housing Characteristics (2010): Benton Harbor City, Michigan, *available at*: http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1&prodType=table. http://www.wndu.com/politics/headlines/Audit_finds_City_of_Benton_Harbor_6_million_in_debt_117564384.html

[11] http://www.whirlpoolcorp.com/about/locations.aspx; Associated Press, *Whirlpool to cut 5,000 jobs to reduce costs*, WALL STREET J., Oct. 28, 2011, http://online.wsj.com/article/APe2f9cbe15411476ea33bdccbbeb6ac98.html?KEYWORDS=whirlpool+layoff; 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.

[12] *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.

[13] *Emergency Financial Manager takes power, raises tempers in Benton Harbor*, MLIVE.COM, Apr. 19, 2011, http://www.mlive.com/news/grand-rapids/index.ssf/2011/04/emergency_financial_manager_ta.html. *See also*, Kevin Lewis,

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. Under the 2011 law, when the state places a city in receivership for fiscal distress, the emergency manager assumes the responsibilities of all elected officials for the city. In addition to functionally laying off elected officials, the 2011 law gives emergency managers significant new powers. Most notably, they now have the power to 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.

Michigan's law, which is titled the "Local Government and School District Fiscal Accountability Act"—a title that conveys the blameworthiness with which it views local officials—is similar in key respects to a new state receivership law passed in Rhode Island in 2010. The new laws in Michigan and Rhode Island represent a major change from older models of state receiverships, in which states granted emergency bailout funding along with the appointment of receivers to steer financial recovery planning for the city. Both laws dramatically increase the powers granted to emergency managers, including the power to affect collective bargaining.

A legislative sponsor of the Michigan bill referred to the legislation as "financial martial law."[14] That's not quite right, of course, as military rule is nowhere to be found. But the laws do suspend a city's charter and its sitting government, imposing external authority. A better description is "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 territorial boundaries and corporate status are held in place while its charter and system of government are replaced by a single official and his or her discretion.

In some ways, democratic dissolution as provided by the Michigan and Rhode Island laws is founded on a paradox: to preserve the local government over the longer run requires deep cuts to the very democracy that have defined the purposes of local government. It is purportedly an amputation necessary to save the rest of the body. In the local government context, however, the amputation of local democracy kills the thing itself. In one sense it is the "local" that has died, because the management of the city is held exclusively by the state and is no longer accountable to a local electorate. In another sense, it is the "government" that has been

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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

[14] *See* Chad Selweski, *Michigan Senate Passes Emergency Manager Bills*, MACOMB DAILY TRIBUNE, Mar. 10, 2011 (describing a comment by Republican state senator Jack Brandenburg that emergency managers "will be deployed in communities that need 'financial martial law.'")

fundamentally suspended, because the democratic institutions previously associated with the city are set aside.

This essay analyzes the state receivership laws in Michigan and Rhode Island, using the concept of dissolution to interpret their recent developments. While local fiscal crisis is an urgent public policy problem for which there are no remedies that won't hurt some group of persons, I argue that Michigan and Rhode Island's laws fail to make meaningful and effectual reform. Instead, they answer crisis with an extreme centralization of power—one that fails to come with legal change to restructure and rebuild the city's finances and management. The consequences of these reforms matter beyond the two states' borders, as several other states where municipalities are mired in debt and deficits are vocally watching Michigan and Rhode Island.[15] Indeed, a bill closely tracking the reforms in Michigan was approved by the Indiana senate in January of 2012.[16] 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.

II. 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 outside the states' borders. Yet they were not unnoticed; indeed, Michigan's reforms attracted attention from the likes of Steven Colbert and Rachel Maddow,[17] the latter of whom commented that "this could be the most important and under-covered story of the

[15] 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; Make it Your Milwaukee County, Initiative 1: Create a Statewide "Local Government Flexibility Toolkit," http://makeityourmilwaukee.com/the-initiative/create-a-legislative-toolkit-for-true-long-term-change/ (seeking financial stress test legislation).

[16] *See* Indiana Senate Bill 355, available at: www.mygov365.com/legislation/view/id/4f0bf3c149e51bad5e300600/tab/overview/; *see also* Chelsea Schneider Kirk, *Senate OKs emergency manager bill for government units*, POST-TRIBUNE, Jan. 30, 2012, available at: http://posttrib.suntimes.com/news/10332220-418/senate-oks-emergency-manager-bill-for-government-units.html (reporting passage by the Indiana Senate on a vote of 45-5).

[17] *See e.g.* The Colbert Report, "The Word—Autocratic for the People," May 9, 2011, http://www.colbertnation.com/the-colbert-report-videos/385702/may-09-2011/the-word---autocratic-for-the-people; The Maddow Blog, "Michigan's emergency manager law disenfranchises African-Americans," Dec. 8, 2011, 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).

year."[18] This Part describes the scope and structure of the laws and situates them in the context of other laws that address local fiscal crisis.

A. An Introduction to State Receiverships

Three legal options have evolved to address municipalities experiencing a fiscal meltdown: (1) traditional creditors' remedies, i.e., a state mandamus action 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 the municipality to so file, and (3) state municipal insolvency law, in which the state stages a legal intervention in the municipality's affairs.[19] In the third category, intervention may be ad hoc or it may be provided for under general state municipal insolvency legislation. Such intervention is commonly called a state receivership.

The Michigan and Rhode Island statutes fall in the third category. Laws permitting and guiding state intervention in the financial affairs of struggling municipalities have been on the books in most states since the Great Depression.[20] Dozens of cities, from large to small, have come under state supervision since the 1970s.[21] The nature of this supervision has substantially varied along at least four

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[18] The Rachel Maddow Show, "'Tyrants' Replacing Local Democracy in Michigan," Dec. 8, 2011, http://video.msnbc.msn.com/the-rachel-maddow-show/45607138#45607138.

[19] For an overview of each of these approaches as well as an analysis of their costs and benefits, see Omar Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crises,* 88 B. U. L. REV. 633 (2008). 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*: Michael W. McConnell & Randal C. Picker, *When Cities Go Broke, A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425 (1993); Clayton P. Gillette, *Political Will and Fiscal Federalism in Municipal Bankruptcy* (Public Law & Legal Theory Research Paper Series Working Paper No. 11-22, Law & Economics Research Paper Series Working Paper No. 11-13) (2011); Heather M. Forrest, *State Court Receivership Alternative to Chapter 9*, 29 AM. BANKR. INST. J 8, 12, 82-83 (2010). [TRICIA: Please add to this list the citations for the final works included in the Cooper Walsh 2012 volume—a chance for a shameless plug for the other articles!]

[20] For a brief overview of the history and landscape of state interventions, see David R. Berman, *Takeovers of Local Governments: An Overview and Evaluation of State Policies*, 25 PUBLIUS 55, 57-64 (Summer 1995). 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.

[21] Berman, *supra* note 20, at 56 (estimating that at least 50 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 26 states that reported that "one or more local governments had recently experienced a fiscal crisis").

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.[22]

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, manage its debt (usually by providing guarantees to creditors for the city's loans in order to enable the city to access credit markets), and manage the city's finances through approval of a rehabilitation plan with revenue and spending changes.[23] State interventions have ranged from "oversight" systems with weak "intervention power" to "control" systems with strong "intervention power."[24] 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.[25]

Receivership laws reflect differing theories for why local governments fail. Some theories emphasize internal causes, such as (1) the competence and/or integrity limitations of municipal officials, or (2) defects in the local political economy, particularly the dominance of a narrow band of special interests in local politics. Other explanations stress external factors, such as socioeconomic decline, regional change, and racial discrimination.[26] One's theory of the causes of fiscal problems, of course, is the basis for designing a legal intervention to solve it.

Traditionally, it has been the case that state receiverships have come with increased financial support from the state. It is a familiar carrot and stick formula—bailout funds tied to mandatory reform. Given the current degree of state fiscal

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[22] *See generally* Coe, *supra* note 21, at ___ ; Berman, *supra* note 20, at ___; *Note: Missed Opportunity: Urban Fiscal Crises and Financial Control Boards*, 110 HARV. L. REV. 733 (1997); Omar Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crises,* 88 B. U. L. REV. 633 (2008).

[23] Kimhi, *supra* note 22, at 655.

[24] In his analysis of Pennsylvania's intervention law, Berman offers one state officer's useful conceptualization of "oversight" duties that retain city discretion in city operations and remedies versus "control" duties in which the state "dictates specific policy steps." Berman, *supra* note , 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 power," from strong to weak to no such power. Coe, *supra* note 21, at 760, 763-64.

[25] *See* Coe, *supra* note 21, at 763-64.

[26] Kimhi, *supra* note , at 642-46.

stress,[27] however, states seem to be looking for a magic bullet for local problems; i.e., something that can address local fiscal stress and its potential "contagion" impacts on the creditworthiness of other municipalities in the state without providing state bailout funds. Faltering state finances mean that states are loathe to send additional funding to even the most troubled local governments, and falling state funds for local governments in general are causing increasing numbers of local governments to fall into fiscal distress.

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

B. Michigan

Several of Michigan's local governments are facing acute fiscal crisis[28]—one that was perhaps captured most dramatically by the Detroit Public School District's emergency manager's plan to close half of the district schools, which press reports estimated would result in class sizes of 60 students.[29] Governor Rick Snyder of

[27] While states have seen stronger than expected growth in revenues this year, 42 states and the District of Columbia have closed, or need to close $103 billion in budget gaps, and cecause these gaps come after multiple years of using up state reserves, budget cuts are likely to be even more severe in 2012. Elizabeth Nichol, Phil Oliff and Nicholas Johnson, *States Continue to Feel Recession's Impact*, CENTER ON BUDGET AND POLICY PRIORITIES, Jun. 17, 2011, http://www.cbpp.org/cms/?fa=view&id=711. A recent working paper predicted budgetary shortfalls of $112 billion dollars in 2012, or nearly 19 percent of all state spending commitments due to the combined effects of declining tax revenues and increased demand for services. Robert Pollin and Jeffrey Thompson, *Fighting Austerity and Reclaiming a Future for State and Local Governments* (Political Economy Research Institute, Working Paper No. 259, 2011), New Labor Forum (forthcoming Fall 2011) *available at*, http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_251-300/WP259.pdf. *See also* http://www.cbpp.org/cms/index.cfm?fa=view&id=711. Proposals for budget cuts often include funding cuts for local governments, and indeed, in 2011 more than 20 states cut funding to local governments. James C. Cooper, *The New Fiscal Nightmare: 2012 State Budget Cuts*, THE 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).

[28] *See, e.g.*, Jeff Green and 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.

[29] *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.ht

Michigan and the state legislature responded in March 2011 with the bill one sponsor had called "financial martial law,"[30] in which the governor appoints an "emergency manager" who is given legal authority to assume the responsibility of local officials in a distressed city or school district.[31] The law is the third generation legislative effort in the state to permit direct state intervention in local finance.[32] It significantly and controversially amplifies the power given to emergency managers and permits state intervention in earlier stages of financial deterioration and in a wider range of circumstances.[33] Its title is unchanged from prior versions of the law, but to a new degree, the amended version embodies the law's longstanding emphasis on "fiscal accountability," if not punishment or blameworthiness, rather than local need.

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 of the local government," further specifying that "during 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."[34] It allows the receiver to literally lock local officials out of office as needed:

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m. 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, *available at* http://www.mlive.com/news/detroit/index.ssf/2011/02/dps_deficit-elimination_plan_w.html.

[30] *See* Selweski, *supra* note .

[31] 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 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 (Spring 2011) (noting that 17 states authorize a state or mayoral takeover of a local school district for fiscal (as opposed to academic) reasons, and 56 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.

[32] 2011 Mich. Pub. Acts 4.

[33] CITIZENS RESEARCH COUNCIL OF MICHIGAN, REPORT 368: THE LOCAL GOVERNMENT AND SCHOOL DISTRICT FISCAL ACCOUNTABILITY ACT, PUBLIC ACT 4 OF 2011 at [pin] (April 2011); 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.

[34] M.C.L.A. 141.1515 (4) (Sec. 15).

> If an order of the emergency manager . . . is not reasonably carried out and the failure to carry out an order is disrupting the emergency manager's ability to manage the local government, the emergency manager, in addition to other remedies provided in this act, may prohibit the local elected or appointed official or employee, agent, or contractor of the local government from access to the local government's office facilities, electronic mail, and internal information systems.[35]

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.[36] The plan must provide for payment in full of debt service on "bonds, notes, and municipal securities . . . and other uncontested legal obligations,"[37] but it permits emergency managers to reject, modify, or terminate service, purchase, or other non-labor contracts.[38] 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.[39] The emergency manager can suspend collective bargaining for a period of up to five years, and it may assume the role of trustee of any pension funds that are not at least 80% actuarially funded.[40]

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.[41] At the most dramatic level of restructuring, the emergency manager may dissolve the local government unit itself upon approval by the governor, without first satisfying the provisions of Michigan's dissolution law or seeking approval through the state boundary change agency.[42] It may alternately recommend to the state boundary commission that the local government consolidate with one or more other municipal governments; however, the emergency manager 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

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[35] M.C.L.A. 141.1517 (2) (Sec. 17).
[36] M.C.L.A. 141.1518 (4) (Sec. 18).
[37] M.C.L.A. 141.1518 (1)(b) (Sec. 18).
[38] M.C.L.A. 141.1518 (1) (c) (Sec. 18); M.C.L.A. 141.1519 (1)(j) (Sec. 19).
[39] M.C.L.A. 141.1519 (k) (Sec. 19).
[40] M.C.L.A. 141.1519 (m) (Sec. 19).
[41] M.C.L.A. 141.1519 (i), (n) (Sec. 19).
[42] M.C.L.A. 141.1519 (cc) (Sec. 19) (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); *c/f* M.C.L.A. 141.1519 (bb) (Sec. 19) (providing that any consolidation "shall proceed as provided by law").

receivership is consolidated."[43] 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 District,[44] as well as in the cities of Pontiac, Benton Harbor, and Ecorse.[45] Upon passage of the reforms, those appointees received augmented authority. Flint and the Highland Park School District were soon designated for state intervention.[46] The City of Detroit has been widely reported as next in line, but a wave of protests (discussed further, *infra*) has led the Governor's administration to consider publically a consent-based alternative in which the city's democratically elected officials would carry out a state led package of fiscal reform.[47] 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.[48]

With the stakes of state intervention set so much higher, however, the potential of an emergency manager takeover may have already inspired local political chemistry in struggling cities. One local columnist opined, for instance, 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."[49] Mayor Bing himself, the article reasoned, could seek appointment to become the city's emergency manager.[50] 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 that stood between him and the city's fiscal recovery.

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[43] M.C.L.A. 141.1519 (bb) (Sec. 19).
[44] Monica Davey, *Michigan Residents Sue over Law on Emergency Management of Struggling Cities*, N.Y. TIMES, Jun. 22, 2011, *available at* http://www.nytimes.com/2011/06/23/us/23michigan.html.
[45] Tim Martin, *Lawsuit Targets Michigan Emergency Manager Law*, ASSOCIATED PRESS, Jun. 24, 2011, http://www.legalnews.com/Oakland/989099.
[46] 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;
[47] 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.
[48] *See* Eric Gaertner, *Muskegon Heights' Deficit Dilemma—Financial Emergency Law Casts Shadow*, THE GRAND RAPIDS PRESS, Apr. 4, 2011; Jennifer Chambers, *Governor Targets 18 Area Districts*, THE DETROIT NEWS, Apr. 28, 2011 (noting that of the 23 fiscally distressed school districts identified by the Governor, 18 are in Metro Detroit).
[49] Laura Berman, *Super Powers Intrigue Bing*, THE DETROIT NEWS, Apr. 21, 2011.
[50] *Id.*; *see also* Charles Sercombe, *Councilmember is Ready to Act as EFM if Needed*, THE HAMTRAMCK REV., Oct. 25, 2011 (reporting that a member of the city council of the distressed city of Hamtramck had received training to act as an emergency manager).

The impact of the new law has fallen hardest on 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, Flint is 56.6%, Pontiac is 52.1%, and Ecorse is 46.4%.[51] They 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 percent national average).[52] Opposition to the law thus emphasizes that the displacement of elected local governments by emergency managers is taking place in poor and minority cities. Indeed, the press has reported demographic projections that half of the state's African-Americans will be governed by an emergency manager if Detroit and Inkster are approved for state intervention, as expected.[53]

Advocacy groups are fighting for a repeal of the law, claiming that the new powers granted to emergency managers "challenge democracy head on"[54] and "empower an unaccountable and unelected czar to nullify worker contracts and sell off assets."[55] A current effort is underway to conduct a referendum on the law, and proponents claim to be well on their way to obtaning the requisite number of signatures needed.[56] Possible appointment of an emergency manager in Detroit has

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[51] Accounting for Latino populations in the cities makes the point even more stark that the cities chosen are majority non-white: the non-Hispanic white population of the cities ranges from a meager 6.4 percent (in Benton Harbor) to a high of 36.5 percent in Ecorse. *See* US Census, Profile of General Population and Housing Characteristics (2010): Benton Harbor, Ecorse, Flint, and Pontiac (Michigan) *available at*: http://factfinder2.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t.

[52] *See* US Census, Selected Economic Characteristics, 2006-2010 American Community Survey 5-year estimates for Benton Harbor, Ecorse, Flint, and Pontiac (Michigan) *available at*: http://factfinder2.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t.

[53] Daily Kos, *Rachel Maddow: Mich Emergency Manager story "the most important & undercovered story of the year,"* Dec. 9, 2011, *available at* http://www.dailykos.com/story/2011/12/09/1043610/-Rachel-Maddow:-Mich-Emergency-Manager-story-the-most-important- (reporting that if Inkster and Detroit, two cities under consideration, are added to the list of local governments run by an emergency manager, "the percentage of African Americans in Michigan without representative local government will be 50.7%").

[54] *See* michiganforward.org/?page_id=862.

[55] *See* Rainbow PUSH Coalition,*supra* note 3; *see also* Ungar, *supra* note 3 (calling Synder's law a "shocking, Draconian, democracy-destroying measure[]").

[56] Opponents of the law have until March to collect the remaining signatures in order to suspend the law until the November 2012 ballot, but it is less clear what the outcome of a successful repeal vote might be. 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. *See* Marcus Wright, *EM Opponents Closer to Goal*, THE MICHIGAN CITIZEN, Sep. 11, 2011, http://michigancitizen.com/em-opponents-closer-to-goal-p10221-1.htm; Kathleen Gray, *Drive to Repeal Emergency Manager Law Still Needs 130,000 Signatures on Petitions, Organizers Say*, DETROIT FREE PRESS, Aug. 17, 2011.

created a particular storm of controversy, including a number of major protests.[57] 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:

> The emergency manager is supposed to 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.[58]

In addition, several legal challenges have been filed. The main case, which Governor Snyder unsuccessfully called the Michigan Supreme Court to take up on an expedited basis,[59] 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.[60] The lawsuit alleges that Public Act 4 "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."[61] The challenge was brought by 28 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. A separate action, which challenged the pension provisions of the Act on

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[57] *See, e.g.,* Kathleen Gray and Steve Neavling, *Protesters, mostly peaceful, rally outside Snyder's subdivision to decry emergency manager law*, DETROIT FREE PRESS, Jan. 16, 2012 http://www.freep.com/article/20120116/NEWS06/120116005/Protesters-mostly-peaceful-rally-outside-Snyder-s-subdivision-decry-emergency-manager-law (covering the Jan. 16, 2012 protest outside the gated community housing Governor Snyder).

[58] David Alexander Bullock, *Emergency Managers Destroy Democracy*, THE HUFFINGTON POST, Jan. 27, 2012, http://www.huffingtonpost.com/david-alexander-bullock/detroit-emergency-managers-democracy_b_1237031.html.

[59] *Executive Message of Governor Richard Snyder to the Justices of the Michigan 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.

[60] Brown v. Snyder (Circuit Court for Ingham County, Mich. June 22, 2011), *available at* http://op.bna.com/dlrcases.nsf/r?Open=edue-8j4qjt.

[61] *Id.* at ¶59.

federal and state constitutional grounds was recently dismissed as unripe, because the Act had not yet impacted Detroit's pension funds.[62]

C. Rhode Island

Across the country, Michigan has a counterpart in state receivership reform. In 2010, Rhode Island also 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." The earlier generation of the Act (1993) had empowered that state's director of administration to establish a budget commission for municipalities that satisfied strict triggering conditions, namely when the "city's bond rating has been assigned by one or more recognized rating agencies to a rating which is below investment grade and there is an imminent threat of default on any or all of its debt obligations."[63] Such commissions were composed of both state and local appointees (including the city council president, city residents, and ex-officio state officers), but they established a two-thirds majority for local stakeholders on a board requiring a simple majority for action.[64] The weight of local interests on the board seemed to influence the Rhode Island Supreme Court's determination that the Commission's impact on local home rule authority and municipal structure was "at most incidental and temporary."[65]

In 2010, with some notable amendments in 2011, the state General Assembly enacted a new, stronger version of the law.[66] 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.[67] The second stage is considerably more powerful than that provided under the 1993 version of the bill, as

[62] General Retirement System of the City of Detroit, et al., v. Richard D. Snyder, 2011 WL 4506357 (E.D.Mich.).
[63] R.I. Stat. § 45-9-3 (1993).
[64] 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. R.I. Stat. § 45-9-3 (1993) (identifying the members of a budget commission).
[65] *See* Marran v. Baird, 635 A.2d 1174, 1176 (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).
[66] The Act Relating to Cities and Towns — Providing Financial Stability, G.L. 1956 § 45-9-1 et seq.
[67] *See* R.I. Stat. § 45-9-3 to -17 (2011); Kishfy, *supra* note 65, at 380-82 (analyzing the 2010 bill in detail, and in comparison to the 1993 law).

it is dominated by a majority of state appointees and stakeholders and eliminates the seats for members of the local electorate.[68]

The most controversial changes to the law, however, lie in the process and powers associated with the strongest medicine, the state receiver.[69] The Act grants to the receiver the "powers of the city or town council exercisable by resolution or ordinance,"[70] as well as the "power to exercise any function 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."[71] Elected officials are demoted to an advisory role, with the receiver enjoying decision-making authority in the face of conflict:

> The 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. The receiver shall allow the city or town's elected officials to serve their constituents by providing advice to the receiver on the matters relating to the operation of the city or town. *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.*[72]

To make the hierarchy of authority even more indisputable, the Act further provides that "elected officials or [any body 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."[73]

Critically, the bill 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."[74] In contrast to the Michigan bill, however, the Act expressly denies the receiver any authority "to reject or alter any existing

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[68] R.I. Stat. § 45-9-6 (calling for a five-member budget commission with three appointees from the director of revenue, the elected chief executive officer of the city, and the president of the city or town council).
[69] For ease, I'll refer to state receivers in Michigan and Rhode Island as both "emergency managers" and "state receivers," though technically Michigan chooses the former language and Rhode Island the latter.
[70] R.I. Stat. § 45-9-20.
[71] R.I. Stat. § 45-9-7(b)(2).
[72] R.I. Stat. § 45-9-7(c) (emphasis added).
[73] R.I. Stat. § 45-9-18.
[74] R.I. Stat. § 45-9-9.

collective bargaining agreement, unless by agreement, during the term of [the agreement]."[75]

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.[76] 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.[77] The Act also provides for immediate appointment of a receiver without first designating an overseer or budget commission in cases where (notably with no further particulars specified) "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."[78] Fiscal emergency is not defined in the statute.[79]

A few last 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 salary will be paid by the city.[80] 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 cases of "intentional malfeasance, malicious conduct or gross negligence."[81] 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.[82]

The legal reforms in Rhode Island in 2010 came in reaction to the City of Central Falls, which declared fiscal insolvency in May of that year and petitioned for judicial receivership.[83] Bond rating agencies downgraded the city's debt to junk bond

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[75] R.I. Stat. § 45-9-9.
[76] R.I. Stat. § 45-9-5.
[77] R.I. Stat. § 45-9-7(a).
[78] R.I. Stat. § 45-9-8.
[79] *See* R.I. Stat. § 45-9-2 (definitions); R.I. Stat. § 45-9-7 (appointment of receiver); see also Moreau, 15 A.3d at 583-84 (confirming the absence of a definition of "fiscal emergency," but finding that gap to fall short of unconstitutional vagueness).
[80] R.I. Stat. § 45-9-7(c).
[81] R.I. Stat. § 45-9-22.
[82] R.I. Stat. § 45-9-23.
[83] Central Falls' economy declined over several decades beginning in the 1970s when textile manufacturers began moving overseas—taking nearly 2,000 jobs with them. Alan Farnham, *3 Most Desperate Cities Include Vallejo, Calif., Harrisburg, Pa., Central Falls, R.I.*, ABC NEWS, Sept.

status.[84] Fearful of effects on the credit worthiness of other Rhode Island municipalities, the General Assembly and Governor acted within one month to pass the 2010 receivership law, which covered Central Falls retroactively.

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."[85] The letter also announced a reduction in the mayor's salary to $26,000 per year. 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.[86] 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."[87] 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.[88]

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.[89] Nonetheless, on August 1, 2011 the state-appointed receiver of Central Falls filed for municipal bankruptcy.[90] In December 2010, the receiver estimated that the city's annual budget of $18 million was still facing annual deficits of $5 million and retiree obligations of $80 million.[91] The current receiver ordered reductions of up to 50

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 by the state in 1991. John Hill, *For Central Falls, Decades of Missed Chances*, THE PROVIDENCE JOURNAL, Sep. 11, 2011, http://www.projo.com/news/content/Central_Falls_tax_levy.154013531.html.

[84] Goodnough, *supra* note 1.

[85] Moreau v. Flanders, 15 A.3d 565, 572 (R.I., 2011).

[86] *Id.* at 572-73.

[87] *Id.* at 573.

[88] Goodnough, *supra* note 1.

[89] Farnham, *supra* note 83.

[90] 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 ECONOMIC TREND ANALYSIS, Sept. 2, 2011.

[91] Michael McDonald and David McLaughlin, *'Dire' Finances Force R.I. City Into Bankruptcy*, BLOOMBERG, Aug. 1, 2011, http://www.bloomberg.com/news/2011-08-01/-dire-situation-forces-rhode-island-city-of-central-falls-into-bankruptcy.html.

percent in pensions and suggested potential cuts to police and fire budgets of 40 percent.[92]

To stave off a contagion effect (that is, downgraded ratings for other municipalities in the state), Rhode Island immediately passed legislation guaranteeing municipal bondholders payment even in a case of municipal bankruptcy.[93] Bondholders would receive liens on taxes and general revenues and would take before other creditors.[94] The law, which purports to change pre-existing contracts between vendors and municipalities, may suffer retroactivity and contracts clause defects that are currently under legal consideration.[95] Meanwhile, 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.[96]

As in Michigan, the state receivership law generated heated public opposition. The ACLU Foundation of Rhode Island deemed it an "anti-civil liberties bill" and a "troubling anti-democratic measure," because it "gives the receiver virtually dictatorial authority."[97] 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,"[98] among other claims.[99] 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. 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."[100] The Court acknowledged the receiver's "broad and sweeping" powers, but found that those powers were "contained and channeled" by on-going *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."[101] The case, after all, challenged the receiver's intrusion on local autonomy and its displacement of the local government. Whatever one thinks of the

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[92] Shedlock, *supra* note .
[93] Nick Brown and Dave Zimmerman, *Rhode Island law May Transform Local Bankruptcies*, REUTERS, Aug. 11, 2011.
[94] *Id.*
[95] *Id.*
[96] John Hill, *RI Legal Bills For Central Falls Crisis Around $1.4 Million*, PROVIDENCE J., Aug. 10, 2011.
[97] Rhode Island Affiliate, American Civil Liberties Union, *2010 Legislative Wrap-Up Newsletter* , Aug. 2010, http://www.riaclu.org/News/Newsletters/2010Legislative.html.
[98] Rhode Island Constitution, Article 13, Sect. 4.
[99] Moreau v. Flanders, 15 A.3d 565 (R.I., 2011).
[100] *Id.* at 579.
[101] *Id.* at 577.

outcome of the case, the Court's reasoning that the form of government was unaffected because of discretionary limits controlled at the state level appears evasive and unsound—merely a stamp for state politics that enjoyed the Court's sympathy.

III. Receiverships as Democratic Dissolution

Though sympathetic to the reality of both state and local fiscal crisis—a world of no easy options—I am unconvinced of the wisdom or efficacy of the Michigan and Rhode Island laws. I will leave it to pending litigation and other commenters to work through significant legal vulnerabilities in terms of consistency with state and federal constitutional contract guarantees, labor law and collective bargaining rights, home rule protections, and other domains. Here, I will instead comment on these laws using the concept of democratic dissolution to separate the new legislation from the "state takeovers" of the past. In this section, I offer a normative critique of the laws and propose a more balanced reconciliation of state interests and local democracy.

A. The Analogy to 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 or township government.[102] Its implications are numerous: lay-offs of all local public employees and officials, the reorganization of an entity's revenues, assets, contracts, and debts, cessation or reassignment of local services, and the 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 orally or recognized by the post office."[103] Dissolution, then, describes only the death of the legal corporate form and the municipal government associated with it.

In forthcoming work, I identified an increase in dissolution activity by struggling cities across the country: Since 1995, nearly 400 municipal governments have dissolved, a number higher than the total number of recorded dissolutions in the rest of the twentieth century.[104] Across the board, I found that such activity was triggered by slow economic decline or acute fiscal crisis, with secondary themes of tax

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[102] Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. __ (forthcoming April 2012). [TRICIA—these proofs with final pagination will be ready on 2-19, so I can fill in page numbers then.]
[103] *Id.* at __.
[104] *Id.* at __.

control, race, and management reform emerging in significant numbers of cities. The vast majority of dissolutions are voluntary, i.e., initiated and/or approved locally. The fact that it's extremely rare for a state to take action to involuntarily dissolve a city—even in cases of dramatic corruption—highlights the degree to which our dissolution laws reflect the value of local autonomy.[105]

The receivership laws passed in Michigan and Rhode Island preserve the municipal corporate form, thus preserving its territorial integrity. Yet they functionally dissolve its government for the duration of the receivership, giving the state-appointed receiver the power to revoke any substantive authority held by elected officials, both executive and legislative. Any grant of authority made to elected officials in the city's charter or state statutory authority is overridden, and all such powers are vested in the receiver.

To capture this removal of the city's government without the termination of its corporate form, I'll call these laws democratic dissolution. It is an imperfect label, for unlike de jure dissolution, the state receivership laws are intended to be temporary—a step taken to stabilize the local government in its current territorial borders and return the area to control by the same municipality. And whereas true dissolution involves reversion of the territory to unincorporated status in a township or country, state receiverships represent a centralization of control to the state government, specifically the governor and her appointees. Yet the concept of dissolution is nonetheless appropriate and proportional to the degree of restructuring contemplated by these laws. They dissolve democratic self-rule for the city.

If the similarities between dissolution and the new emergency manager regimes are important, so too are their differences. The dissolution of democratic self-rule without the corresponding dissolution of the municipal corporation and its borders fails to confer the potential benefits of the latter. True dissolution amounts to a major restructuring with significant budgetary implications. It changes local borders, such that the land in the struggling city no longer must sustain an independent municipal government through the local sales and property taxes. The typical dissolution means that land within the dissolving city will instead join the budget for the county or township's unincorporated areas. But interestingly, dissolution law provides one setting in which local territory dissolves into state, as opposed to county, control. That's the nature of dissolution law in Maine, where sparsely populated municipalities can revert to "disorganized territories" dependent directly on the state.[106] Such disorganized territory falls under the exclusive authority

[105] *See id.* at __. I have offered two other classifications for dissolution laws: Voluntary dissolution describes dissolutions undertaken by a local governing body and/or its electorate (i.e., a local decision made without coercion by the state), passive dissolutions occur by operation of law when a city has been inactive for a statutory period. *See id.* at __.
[106] *See* Anderson, *Dissolving Cities*, *supra* note 102, at __.

of state elected officials, but so too do its budgets—no local government means no separate local territory for budgeting purposes.

While the context in Maine is distinct in key respects, most obviously the population levels of disorganized territories, it highlights the one-sidedness of the Michigan and Rhode Island receiverships. Although they strip away local government and replace it with the state, the state in no way steps in to cover the municipality's financial obligations. Indeed, even the emergency manager's salaries are covered by local revenue. A dissolution framework thus illuminates that under the Michigan and Rhode Island laws, the state absorbs the governance but not the territory or its people's service needs.

Even if one did not take a strong normative position on the Michigan or Rhode Island laws, democratic dissolution is a useful concept for understanding these laws and their differences from prior generations of municipal insolvency law. Democratic dissolution captures the centralization taking place and acknowledges the powerlessness of local officials. Where "state receiverships" historically brought bailout funds with them, 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 the state receivership legislation itself. Separately, and at least as importantly, I hope that the language of democratic dissolution nurtures contemplation of a "fresh start"—a focus on more dramatic opportunities for restructuring to address underlying structural defects in the city's form that might be assuaged by de jure dissolution itself, including dissolutions that are way stations to merger and consolidation.

B. The Values at Stake in Democratic Dissolution

The Michigan and Rhode Island statutes enact both procedural and substantive reforms: Procedurally they establish a legal process by which an emergency manager is put in place, and substantively they determine the government of a city during a period of receivership. In both dimensions, the normative desirability of these laws should be measured against broad sets of values associated with local democracy and good government. These include at least the following: (1) local democracy values, including local autonomy, electoral accountability, public transparency, and fairness; (2) local health, safety, and welfare; and (3) efficiency values, including the cost-effective management of public services, the control of externalities on other local governments and the state (most importantly, the credit worthiness of other municipalities),[107] and front-end incentives for competent and

[107] *See* Clayton Gillette, *Political Will and Fiscal Federalism in Municipal Bankruptcy*, __ FORDHAM URBAN L. J. __ (forthcoming 2012).

honest governance (including encouraging responsible borrowing and spending). And of course, a core feature of sustainable legislation is consistency with other state constitutional and statutory law, including the delegation of authority to local units through home rule doctrines and the like.

By definition, a severe local fiscal crisis will bring some of these values into conflict with one another. Indeed, the inevitability of that conflict is an operating assumption of Michigan and Rhode Island's laws, which are premised on the expectation that limiting overflow harms to other local governments and to the state warrants curbing local autonomy and democratic self-determination. Better versions of these laws should avoid such polarization between local democracy and efficiency values, instead pursuing greater balance between them. To that end, I offer here normative analysis of the state's laws and propose specific reforms to help maximize fulfillment of these values.

As a preliminary matter, municipal insolvency laws are important and necessary, offering important advantages over municipal bankruptcy and traditional creditor remedies.[108] The prior generation of these laws, including older versions within Michigan and Rhode Island but also laws in Pennsylvania and elsewhere, have had notable successes and failures. The strongest state intervention covered in academic commentary—and thus the closest legal analogy to the laws discussed here—occurred in 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.[109] State intervention in Chelsea would not constitute democratic dissolution as defined here, however, because the receivership was city-initiated, if not consensual. It was requested by the mayor and undisputed by several of the city's aldermen. In addition, that state intervention came with substantial state funding, both through emergency bailout funds issued in the same year and annual state contributions that funded half of the city's budget.[110]

At a minimum, the range of experience with these laws shows the importance of on-going legislative experimentation in this area. 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 before the suspension of local democracy. Early intervention has been consistently identified as a critical feature of successful state

[108] Kimhi, *supra* note 22 at 656-72.
[109] Berman, *supra* note , at 63-64.
[110] *Id*. at 63.

efforts.[111] The Michigan law makes a modest effort at public communication (too modest, but salutary in comparison to Rhode Island) with a requirement that emergency managers present their financial and operations plan to the public at an informational hearing.

Having given state governments credit for the seriousness of the problems faced, the Michigan and Rhode Island laws nonetheless do too little and too much—they go too far, too aggressively in certain dimensions; they barely move at all in others. Their root defect is their limited vision of the causes of municipal insolvency. By focusing solely on 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 a widely held theory for why local governments fail, namely because of: (1) the competence and/or integrity limitations of municipal officials, and (2) defects in the local political economy, particularly the dominance of a narrow band of special interests in local politics.[112] The laws' cure for local fiscal crisis is accordingly focused on two goals: replace local officials and break the power of public employee unions. The laws assume the superior wisdom and capacity of emergency managers in all domains of policy, from operations to zoning, and their provisions regarding collective bargaining (i.e., both states' rules permitting emergency managers to approve any such agreements going forward, and in Michigan's case, to also permit emergency managers to nullify existing collective bargaining agreements and pass a five-year moratorium on future collective bargaining agreements) 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.

Yet the statistics in Benton Harbor remind us that there are structural reasons that cities flounder.[113] Historic racial discrimination and segregation policies built the racial and socioeconomic polarization of Benton Harbor from its neighbors.[114] These policies reveal their on-going impact today 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.[115] Add to that external forces—

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[111] *See, e.g.,* Kimhi, *supra* note 22; Philip Kloha, Carol S. Weissert, & Robert Kleine, *Someone to Watch Over Me: State Monitoring of Local Fiscal Conditions*, 35 AM. REV. PUB. ADMIN. 236 (2005); Charles K. Coe, *supra* note 21; Berman, *supra* note 20.

[112] Kimhi, *supra* note 22, at 642-46.

[113] Omar Kimhi has classified these explanations for fiscal distress as falling within a "socio-economic decline approach." Kimhi, *supra* note 22, at 638-42.

[114] *See supra* notes 4-12 and accompanying text.

[115] The poverty rate in Benton Harbor is 48.7%, compared with 16.4% in the county as a whole. *Id.*; US Census, Selected Economic Characteristics: 2006-2010 American Community Survey 5-Year Estimates: Berrien County, Michigan,

including the meltdown of manufacturing jobs on which Benton Harbor's population depended[116]—and the story of success and failure in Michigan municipalities looks much more complicated than defective leadership.

The poverty rates in Benton Harbor and all the cities under emergency management in both states also make the point that the population of the local government's territory may be an extremely unwise—an unjust—choice to bear the costs 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. Scholar Omar 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."[117] Ironically, the emergency manager of the Detroit public schools, who launched a plan to radically consolidate district schools (discussed *supra*) illustrates Kimhi's point: is it good public policy for class sizes to soar in Detroit schools?

In assessing the landscape of tools available to address local fiscal crisis (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.[118] 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.[119] 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.[120] Yet the Michigan and Rhode Island reforms mark a turning point in 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 measures like those in impoverished Benton Harbor, where the state appointee tried to address high delinquency rates on user fees for trash service by combining garbage and water bills.[121] His theory was that having their water shut off will hurt so much that residents will find some way to pay their trash bills.[122] Such changes at the desperate margins of reform surely inflict more harm than the revenue they generate.

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http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_DP03&prodType=table;

[116] Mahler, *supra* note , at 38.
[117] *See* Kimhi, *supra* note , at 673.
[118] *See* Kimhi, *supra* note , at 656-60.
[119] *See* Kimhi, *supra* note , at 657-58.
[120] *See* Kimhi, *supra* note , at 673-78.
[121] Mahler, *supra* note , at 41.
[122] *Id*.

State receivership laws should be built to respond to structural understandings of why cities struggle financially. The current assumption of the laws seems to be that if there was 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 itself provides an example of that: 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.[123] Put simply, there is ample reason to think that Michigan and Rhode Island's laws won't work.

Defenders of the laws, including Michigan's Governor Synder, have emphasized that the status quo is not an option for cities that are truly facing a fiscal crisis.[124] That's 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 housing market consequences that will further slow recovery. 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.

At least as important as their limited vision, these laws constitute a dramatic incursion into local democracy. With their complete suspension of local political processes, including even an advisory role for elected officials or the local public, the new generation of emergency manager laws reduces accountability/transparency to the electorate. They sacrifice voter participation and deliberative democracy values, from the empowerment and educative roles of local participation to the legitimacy of local government. Recourse to state government is available, of course, but our legal system has long recognized that the scope of democratic participation is affected by proximity to government—the state is distant and the local electorate is small. Our discourse has thus lauded the salutary benefits of locally based political participation.[125] If the exclusive recourse to state officials for local affairs signifies

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[123] Hill, *supra* note 96; Shedlock, *supra* note 90.

[124] *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.

[125] *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

democratic retreat and a loss of voting power, so too does consolidating several local elected officials into a single leader, or changing from an elected to appointed official.[126]

In addition, the emergency manager role created by these laws conflates all executive and legislative management into a single appointed official, thus nullifying any separation of executive and legislative functions chosen by the city's charter or state general law. While local governments are generally not governed by a formal separation of powers rule,[127] states and their citizens have long signaled deference and respect for local election as to its form of municipal government, most notably through home rule provisions in state constitutions.[128]

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needs," "experimentation," "competition," "a multiplicity of viewpoints," and "a diversity of approaches.")

[126] 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, 886-87 (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); Holder v. Hall, 512 U.S. 874, 886-87 (1994) (Blackmun, J., dissenting) ("Five Justices today agree that the size of a governing body is a "standard, practice, or procedure" under § 2"); Holder v. Hall, 512 U.S. 874, 874 (1994) (Kennedy, J., plurality) (holding that "[t]he size of a governing authority is not subject to a vote dilution challenge 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* Holder v. Hall, 512 U.S. 874, 886-87 (1994) (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) and 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 County Comm'n, 502 U.S. 491, 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).

[127] *See* Citizens for Reform v. Citizens for Open Government, Inc., 931 So.2d 977, 989-90 (Fla. Dist. Ct. App. 2006) (citing precedent for that propositions from 13 states).

[128] *See, e.g.*, R.I. Const., Art. 13, Sect. 1 (granting every city and town in the state the "right to self government in all local matters); R.I. Const., Art. 13, Sect. 4 ("The general assembly shall have the power to act in relation to property, affairs and government of any city or town 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).)

If emergency managers were simply number crunchers who stopped the leakage of public money to unauthorized, inefficient, or unaffordable purposes or restored market confidence in municipal authority, democratic suspension might have stronger defenses in necessity, if not efficacy. On the contrary, however, emergency managers have the power to make local policy. In particular, their leadership has been characterized by the privatization of asset management, if not ownership, and the outsourcing of service provision to the private sector. Perhaps most famously, the emergency manager in Pontiac, Michigan sold the disused Pontiac Silverdome (a $55 million project) for $580,000 to a Toronto-based company—a "firesale" price that the manager said was necessary to relieve the city of maintenance costs—but a price that was a stunning fall from the $20 million allegedly offered by a minority-owned, Michigan-based company several years before.[129] 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 during the suspension of local government, they lose legitimacy and raise concerns about political economy defects at the state level, where private contractors may enjoy a higher level of influence and access under certain state administrations. If 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 both the integrity and efficiency of long-term reform in public services.

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, its leaders and union politics in particular. They do much too little, by contrast, at addressing the underlying causes of persistent decline.

C. Reforming Democratic Dissolution Law

For the sake of other states considering their own 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 here 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 that receivers wield, (4) receiver oversight, and (5) closure of the receivership period. Taken together, the reforms seek greater transparency and uniformity in application, more input from local elected leaders in receivership processes, more information and

[129] Alex P. Kellogg, *Judge Declines to Block Sale of Pontiac Silverdome*, WALL STREET J., Nov. 24, 2009.

engagement with the public, greater support from the state, and a process for seeking structural reform.

Triggering conditions. Due to the severe costs in local democratic self-rule, states must be held to strict, objective, and uniformly applicable criteria for appointing an emergency manager. Broad statutory language, let alone open discretion, is an invitation for real and suspected unfairness in the selection among a state's struggling municipalities for intervention. When the stakes are so high, statutes must control real and perceived biases held by state officials along political (i.e., contrasting partisan majorities at the state and local level) and racial dimensions. Appointment of an emergency manager in racially isolated cities, for instance, may be perceived as selective enforcement of the law. 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."[130]

Rhode Island's law gets a failing grade on this score, with a statute that lists five general criteria for identifying a fiscal crisis ripe enough for appointment of a receiver (themselves not sufficiently precise to expect uniform state application), but additionally adding a blanket "fiscal emergency" criteria which is undefined. Michigan did a better job handling this stage in the law, both because it contains more precise criteria and because it calls for a 30-day and 60-day staged review process to determine a qualifying fiscal crisis.

Appointment and Selection of the State Receiver. Following the decision to appoint an emergency manager, the selection and appointment of an emergency manager is another critical and highly contestable step that can either improve or undermine the local legitimacy and participatory impact of the law. As a preliminary matter, local public officials, whether elected or not, should be eligible to serve in the role of emergency manager. If these laws are correct in their diagnosis 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 presumably know the city's finances and operations best, are in the best position to use the law's augmented powers for curative ends. "The law could have been worse" is faint praise, but it is worth noting here that an earlier version of the Michigan law included a provision that cut in the opposite direction to that suggested here—it would have enacted a six-year ban on elected officials in place at the time of

[130] Kristi L. Bowman, *Before School Districts Go Broke: A Proposal for Federal Reform*, 79 U. CIN. L. REV. 895, 928 (Spring 2011); *see also id.* at 927-28: ("if the district is racially isolated, as so many districts are, members of the community may question whether the state intervention is racially-motivated").

receivership from running for office again.[131] Such a provision expressed disdain for locally elected officials, specifically their blameworthiness for financial straits. Such missives by the state are unwarranted, unwise, and delegitimizing.

Emergency manager selection and appointment processes can gain democratic and local legitimacy by involving a broader segment of officials. Both Michigan and Rhode Island give the governor sole and discretionary selection rights, something that invites accusations of centralization with unchecked discretion. Instead, both 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 both state and local actors, with ex officio representation as necessary, with something like the following seats: (1) the governor, (2) the state official most squarely 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 public member. With a simple majority vote to approve a nomination, there is no reason to think that such a committee would derail or unduly burden selection of an emergency manager.

The Receiver's Authority. Once in place, the million-dollar question arises: what powers will the emergency manager wield with respect to local elected officials? The recent history of emergency managers in 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," in large part due to a power struggle with the sitting mayor, who, in the emergency manager's words, "'strongly believed he should be in charge of daily city operations.'"[132] Functionality, of course, is an important value to be observed in the design of state takeover laws, but so too is the claim on behalf of local democracy embodied in the mayor's view.

In my view, if all other reforms and safeguards described here are in place—most importantly, an objectively defined fiscal "emergency," local involvement in emergency manager selection, and strong sunset clause or public reauthorization provisions (see below)—a formally temporary substitute of state authority in a time of crisis is warranted if three additional features attach: (1) regular advisory meetings between the emergency manager and, first, the mayor and city council, and second, the local public; (2) the state offsets the suspension of local democracy with state financial support directed at long term recovery, and (3) a regional council is formed

[131] Karen Bouffard, *House OKs Tougher Approach to Faltering Cities, Schools*, THE DETROIT NEWS, Feb. 24, 2011.
[132] Jennifer Chambers and Mike Martindale, *Pontiac's Clashes Put Takeovers in Spotlight*, THE DETROIT NEWS, June 18, 2010.

to facilitate structural change, including service sharing, consolidation, dissolution, and revenue sharing. Alongside that portfolio of reforms, a formal suspension of the legal authority of elected officials has the potential to be both more legitimate and more effective.

The first of these proposals is straightforward: some communication between the emergency manager and local elected officials is critical for reasons of accountability and oversight, as well as transparency and legitimacy. Michigan seems to have recognized this in a minimal way with its requirement of a public informational hearing after an emergency manager has drafted a financial and operations plan for the city 60 days into her tenure. Such public informational meetings should occur on at least a quarterly basis during the period of the receivership, as should private meetings between the emergency manager and the elected local leadership. Though they are formally sidelined in authority, the long-term government efficacy of the city relies on incumbent 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 a re-empowered elected officials. So too does an emergency manager, who may have little prior knowledge of the city, have much to learn from elected officials on topics ranging from public priorities to past experiences with private contractors.[133]

Within the question of an emergency manager's powers, the most controversial matter is surely the right to alter existing collective bargaining agreements, and this is the key difference between current and prior generations of state receivership laws. In my view, one that would likely be shared by contracts clause and labor law experts, Rhode Island's more moderate position with respect to collective bargaining (i.e., to give the emergency manager the power to negotiate and approve new agreements, but not the power to break existing contracts) is strong enough to change the chemistry of negotiations with public employee unions. Emergency managers and all mayors already have the existing threat of bankruptcy to extract concessions on existing collective bargaining agreements, and indeed unions have yielded extremely large concessions, in areas ranging from pensions to health care benefits. In Central Falls, for instance, the emergency manager obtained very deep cuts to pensions (50%) and service budgets (40%)—cuts that would cause tremendous financial disruption and stress for public employee families and pensioners—in existing agreements from unions without enjoying the sword granted by the Michigan law. When estimating the added value of the Michigan law's collective bargaining repeal features, one must inevitably factor in the cost of litigation that is sure to follow it on state and federal contracts clause grounds, among others.

[133] 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.

Structural Reform Processes. At least as important as on-going communication between an emergency manager and the city, is the principle that with the centralization of state power should come something important gained locally that has the potential to affect structural conditions that are limiting a city's recovery potential. This can take two forms: economic benefits and the potential for structural reform. As to the first of these, it has traditionally been the case that state receiverships have come with increased financial support from the state. It is a simple carrot and stick formula: bailout funds come with mandatory reform. By deviating from this model, Michigan and Rhode Island seem to be expressing the view that the current revenue picture of the city is enough to provide for public safety, debt service, and other core expenses—if only, the laws suggest, they had competent management. A more encompassing view of the causes of a fiscal emergency, and one that, like the notion of an "emergency" manager itself, assumes that the fiscal crisis can eventually pass, must support struggling localities with funds.

State bailout funds need not be without policy strings, however. We need look no farther than Michigan itself under Governor Snyder to see that states can tie funding to local policy. The governor has put in place a broader state policy agenda of significant fiscal policy changes for all local governments in the state, with an emphasis on encouraging service consolidation, improving transparency in local government finance, 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 Synder 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 1/3 increment of allowable state support.[134]

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[134] Ryan Stanton, *Synder 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; *see also* State of Michigan Department of the Treasury, *Economic Vitality Incentive Program*, at http://www.michigan.gov/treasury/0,1607,7-121-1751_2197-259414--,00.html. 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. Stanton, *supra* note 134. *See also*, Kristin Longley, *Flint working on Gov. Rick Synder'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. The change thus ties state funding directly to state policy views about sound local management.

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 long term revenue picture. So too can the state use the lever of financial coercion to support formation of a regional council composed of officials from the state, the municipality (here to include both the emergency manager and an elected official), neighboring municipalities, and the township and/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 cut 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 so 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.

Oversight. If elected officials can fall prey to corruption, so too can state receivers. In 2005-06, for instance, an emergency manager appointed in Highland Park, Michigan allegedly misappropriated $264,000 from the city. Given extreme powers and relatively strong insulation from public scrutiny, oversight of these positions is critical. State receivership laws 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 legitimacy of the suspension of a city charter and elected government. Yet Michigan and Rhode Island's laws include no 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, so too should state receivership laws mark the point and processes by which local democracy recovers.

IV. Conclusion

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 survives but it 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. Instead, these and future state receivership laws should be designed to enable reforms that address causes of fiscal distress beyond local leadership failures or the dominance of special interests, most importantly public employee unions. Such bills should pursue the amelioration of short-term crisis as well as the need for long-term reform.