

Dictatorships for Democracy: Takeovers of Financially Failed Cities

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States have traditionally offered support to their fiscally distressed municipalities. When less intrusive forms of assistance fail to bring stability, some states employ supervisory institutions that exercise approval authority over local budgets or, more intrusively, displace locally elected officials. These “takeover boards” are frequently accused of representing an antidemocratic form of local government and a denial of local autonomy.

This Article suggests that the extent to which takeover boards are subject to an antidemocratic critique is frequently overstated. Those making efforts to revive near-insolvent localities cannot be oblivious to the causes that generated their distress. Depopulation, high unemployment, depleted municipal services, and blight do not arise spontaneously. They are frequently the consequence of long periods of local mismanagement, in which expenditures deviate substantially from those goods and services that residents prefer, inducing the most mobile among them to gravitate to more hospitable jurisdictions. Any viable response to such dysfunction must therefore address the causes of political dysfunction.

By addressing the political underpinnings of fiscal distress, takeover boards may be more capable of satisfying the interests of local residents for public goods than local elected officials and may also represent the interests of nonresidents and creditors who are not considered by those officials. Moreover, this Article suggests the authority of takeover boards should be expanded to allow them to engage in restructuring of municipal governance in order to avoid the entrenched and fragmented institutions that are often associated with local fiscal dis-

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tress. The temporary nature of takeover board jurisdiction means that when local governance returns to the realm of normal politics, residents will be in a more informed position to evaluate the optimal structure of local governance.

| | |
|---|------|
| INTRODUCTION | 1374 |
| I. STATE INTERVENTION IN MUNICIPAL GOVERNANCE..... | 1384 |
| A. State Monitoring Without Interference | 1385 |
| B. From Monitoring and Advice to Approval and Displacement.. | 1391 |
| II. TAKEOVER BOARDS AND LOCAL DEMOCRACY | 1397 |
| A. Local Officials and Local Preferences..... | 1401 |
| 1. Mobility as a Measure of Preferences | 1402 |
| 2. Transparency and Preferences | 1405 |
| B. State Interests and Municipal Fiscal Distress | 1412 |
| 1. State Capital Infusions and Moral Hazard..... | 1414 |
| 2. State Concern and the Risk of Contagion | 1416 |
| III. TAKEOVER BOARDS AND STRUCTURAL CHANGE | 1419 |
| A. Fragmentation as a Cause of Fiscal Distress..... | 1420 |
| B. Takeover Boards and Political Fragmentation | 1433 |
| 1. Redressing the Consequences of Fragmentation | 1434 |
| 2. Takeover Boards and Municipal Restructuring..... | 1438 |
| IV. CONSTRAINING TAKEOVER BOARDS | 1445 |
| A. Whose Interests Do Takeover Board Members Represent? | 1446 |
| B. Personal Objectives of Takeover Board Members..... | 1454 |
| C. Termination as a Constraint..... | 1456 |
| CONCLUSION | 1461 |

INTRODUCTION

Constitutional rule in the Roman Republic, notable for its synthesis of aristocracy, direct democracy, and representative assemblies, also contained what appeared to be the incongruous institution of a dictatorship.¹ The appointment of a dictator was usually associated with the waging of war and is captured in the popular imagination by the legend of Cincinnatus leaving his fields to lead the Romans to victory and

1. See John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 *Int'l J. Const. L.* 210, 211–12 (2004) (discussing appointment of dictator in emergency situations in ancient Rome); Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 *Oxford J. Legal Stud.* 189, 200 (2009) (noting “unique institution of . . . dictatorship” used by Rome to respond to crises); Andreas Kalyvas, *The Tyranny of Dictatorship: When the Greek Tyrant Met the Roman Dictator*, 35 *Pol. Theory* 412, 415 (2007) (comparing Greek theory of tyranny with Roman institution of dictatorship).

surrendering his authority after sixteen days.² Dictatorship had a far greater scope, however. It could be invoked to suppress civil insurrection, to conduct special trials, or to appoint new senators after war or other tragedies had decimated their ranks.³ The common theme that characterized the extraordinary intervention of an appointed dictator was the incapacity of the normal institutional structures of government to respond to a particular crisis. Clinton Rossiter suggests that the fragmented, decentralized decisionmaking process that characterized the Republic's system of governance made designation of a dictator more appropriate when emergencies arose. While the Republic's institutions were designed to provide both broad representation and checks on individual groups during periods of normal politics, those same structures precluded a prompt unitary response to crises, regardless of their sources.⁴ The perceived need to overcome the inertia of normal politics during emergencies is perhaps reflected in the denomination of some dictatorships as a *dictatura rei gerundae causa*, or "dictatorship for getting things done."⁵ The need to expedite decisionmaking during periods of crisis also meant that the dictator enjoyed absolute power, even over matters that bore at best a tangential relationship to the nature of the emergency. These included powers to arrest, to coin money, and to convoke and preside over assemblies.⁶

Certainly the appointment of a dictator was undertaken with an eye toward the risk of unitary authoritarian rule. Constraints on the dictator were sufficient to allow modern commentators to describe his rule as essentially "conservative."⁷ The appointment was limited to a six-month term, and dictators were required to abdicate earlier if they accomplished their objectives.⁸ They were precluded from making permanent changes to the constitutional system of the Republic.⁹ What is perhaps most surprising about the institution of the dictator, which ultimately was transformed into a device for dealing with bureaucratic inertia more

2. See Clinton L. Rossiter, *Constitutional Dictatorship* 16 (1963) (discussing dictator Cincinnatus); Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 *Minn. L. Rev.* 1789, 1791 (2010) (examining positive aspects of Cincinnatus's dictatorship).

3. 3 Titus Livius, *The History of Rome* bk. XXIII, ch. XXII, at 125–26 (George Baker trans., New York, Peter A. Mesier, Collins & Co. et al. 1823) (c. 216 BC) (describing creation of dictator "for the purpose of filling up the senate" after disaster and war "swept off such a number of its members" (quoting Spurius Carvilius)); Rossiter, *supra* note 2, at 21–23 (noting existence of dictatorships "for suppressing civil insurrections" and "for special trials" (internal quotation marks omitted)).

4. Rossiter, *supra* note 2, at 18 (discussing vulnerability of Roman cities to temporary emergencies).

5. *Id.* at 21.

6. See *id.* at 25 (discussing powers of Roman dictator).

7. Ferejohn & Pasquino, *supra* note 1, at 210–11.

8. Kalyvas, *supra* note 1, at 416.

9. Ferejohn & Pasquino, *supra* note 1, at 211.

than with crises,¹⁰ is that it was perceived as an institution wholly consistent with the democratic constitution of the Republic rather than as an abrogation of it.¹¹ The objective of the dictatorship was not to destroy the process of normal politics, but to restore it.

Fiscal crisis does not appear to have been the precipitating event for the appointment of any Roman dictator. But war, insurrection, and unrest—the crises that did instigate dictatorships—have consequences that are qualitatively similar to those of fiscal distress and that similarly complicate efforts to surmount it. Just as physical threats to the state threaten civic order, the deterioration of public services during periods of fiscal crisis translates into higher crime rates, diminution of public services, and high levels of blighted and abandoned property¹² as individuals and firms that are sufficiently mobile exercise options to migrate elsewhere. To the extent that the institutions of normal politics are inadequate to redress issues of debt overhang or budgetary impasses that underlie fiscal distress—and may even have been responsible for its creation—an alternative decisionmaker less responsive to normal politics may offer a solution.

At least, one might infer that several states have taken this position in reaction to fiscal distress within their political subdivisions during the recent recession. While municipal bankruptcy filings in Detroit, Michigan; Stockton, California; San Bernardino, California; Central Falls, Rhode Island; Harrisburg, Pennsylvania; and Jefferson County, Alabama, have attracted most of the popular attention to fiscal distress,¹³ states

10. For example, dictators were later appointed to conduct religious ceremonies when no other official was available, or to conduct elections. See Rossiter, *supra* note 2, at 22–23.

11. It is arguable, of course, that Roman democracy remained highly exclusive by contemporary standards of democracy. See, e.g., Karl-J. Hölkamp, *Reconstructing the Roman Republic: An Ancient Political Culture and Modern Research 1–2* (Henry Heitmann-Gordon trans., Princeton Univ. Press 2010) (2004) (explaining oligarchic ruling class in ancient Rome). As a consequence, the change from “democracy” to dictatorship did not represent as radical of a shift as it might under current conditions.

12. Detroit’s fiscal crisis serves as a prime example of this phenomenon. See City of Detroit, *Proposal for Creditors 9–22 (2013)* [hereinafter *Proposal for Creditors*], available at <http://www.detroitmi.gov/Portals/0/docs/EM/Reports/City%20of%20Detroit%20Proposal%20for%20Creditors1.pdf> (on file with the *Columbia Law Review*) (demonstrating relationship between reduced municipal services and high crime rates in Detroit).

13. See Bobby White, *Stockton Files for Bankruptcy Protection*, Wall St. J. (June 29, 2012), <http://online.wsj.com/article/SB10001424052702304058404577495412282335228.html> (on file with the *Columbia Law Review*) (noting Stockton’s formal bankruptcy filing). Harrisburg’s brief bout with bankruptcy was precipitated by an investment in an incinerator that was financially infeasible. See Romy Varghese, Michael Bathon & Linda Sandler, *Harrisburg Files for Bankruptcy on Overdue Incinerator Debt*, Bloomberg (Oct. 12, 2011), <http://www.bloomberg.com/news/2011-10-12/pennsylvania-capital-harrisburg-files-for-bankruptcy-over-incinerator-debt.html> (on file with the *Columbia Law Review*) (describing Harrisburg bankruptcy). Jefferson County’s bankruptcy was precipitated by investments in derivatives, which ultimately led to criminal prosecutions. See Renee Parsons, *JP Morgan and the Largest U.S. Municipal Bankruptcy*, Huffington Post (Mar. 15,

have engaged in less publicized but potentially more invasive displacement of local decisionmaking.

For example, California now requires municipalities that have not declared a financial emergency to mediate with stakeholders prior to filing under Chapter 9.¹⁴ Relatedly, while Detroit's filing for bankruptcy attracted national attention, few outside Michigan noted the state's earlier enactment of legislation that permitted state review of fiscally distressed municipalities and, in the case of Detroit, entry into a consent agreement that required the city to abdicate substantial control to a financial advisory board.¹⁵ Similarly, Rhode Island placed Central Falls into receivership prior to its filing for bankruptcy and more recently appointed a fiscal overseer in East Providence to address the city's budget issues.¹⁶

The current spate of state takeovers is reminiscent of earlier efforts by states to resolve fiscal distress within their political subdivisions. New York State famously (or notoriously) created the Municipal Assistance Corporation for the City of New York (MAC),¹⁷ the New York City

2012), http://www.huffingtonpost.com/renee-parsons/jp-morgan-and-the-largest_b_1347324.html (on file with the *Columbia Law Review*) (describing Jefferson County bankruptcy). Other municipalities have considered bankruptcy or taken first steps in that direction.

14. See Cal. Gov't Code §§ 53760.1–3 (West 2012) (providing “mandatory mediation” when local public entity “is or likely will become unlikely to meet its financial obligations”).

15. See Mich. Comp. Laws Ann. §§ 141.1541–1575 (West Supp. 2014) (providing “preliminary review” of local government by “state financial authority” under certain enumerated circumstances and allowing consent agreement between local government and state treasurer to provide “remedial measures considered necessary . . . to alleviate . . . financial emergency”). Legislation allowing more liberal use of financial managers at the initiation of the state was rejected in a November 2012 referendum. See Michael Aneiro, Muni Market Assesses California, Michigan Ballot Referendum Results, Barron's Income Investing (Nov. 7, 2012, 4:02 PM), <http://blogs.barrons.com/incomeinvesting/2012/11/07/muni-market-assesses-california-michigan-ballot-referendum-results> (on file with the *Columbia Law Review*) (rejecting ballot initiative that would have given state government special power to intervene when local governments faced urgent fiscal strains and possible insolvency).

16. See Ted Nesi, Gov Taps Trooper to Oversee EP's Budget, onPolitix (Dec. 2, 2011, 2:35 PM), <http://rhodeisland.onpolitix.com/news/84673/gov-taps-trooper-to-oversee-eps-budget> (on file with the *Columbia Law Review*) (noting appointment of fiscal overseer to address East Providence's budget problems). Central Falls, a relatively poor city of approximately 19,400, endured fiscal distress and ultimately entered bankruptcy in 2011 after it was unable to comply with promises of generous public pensions and health insurance benefits for retired police officers and firefighters. See Jess Bidgood, Plan to End Bankruptcy in Rhode Island City Gains Approval, N.Y. Times (Sept. 6, 2012), <http://www.nytimes.com/2012/09/07/us/central-falls-ri-to-emerge-from-bankruptcy.html> (on file with the *Columbia Law Review*) (reporting federal judge signing off on debt-adjustment plan for Central Falls).

17. Municipal Assistance Corporation for the City of New York Act, N.Y. Pub. Auth. Law §§ 3030–3041 (McKinney 2011).

Emergency Financial Control Board (EFCB),¹⁸ and the Office of Special Deputy Comptroller for New York City to address New York City's fiscal situation in the 1970s.¹⁹ More recently, New York appointed financial control boards for Nassau County,²⁰ Erie County,²¹ and Buffalo.²² Springfield, Massachusetts, was supervised by a financial control board from 2004 through 2009.²³ Pennsylvania established the Pennsylvania Intergovernmental Cooperation Authority (PICA) in 1991 to address budgetary imbalances in Philadelphia and the city's lack of access to capital markets.²⁴ Pennsylvania has appointed a coordinator to oversee fiscal affairs in twenty-five municipalities since the 1980s.²⁵ New Jersey appointed a business administrator for Camden under the state's law for rehabilitating localities²⁶ after finding the city to be in unsound financial condition.²⁷ After Orange County, California, declared bankruptcy, the state required a reallocation of powers from the county board of supervisors to a trustee in the event that the county failed to file a timely

18. New York State Financial Emergency Act for the City of New York, N.Y. Unconsol. Law §§ 5401–5420 (McKinney 2012).

19. See Robert W. Bailey, *The Crisis Regime: The MAC, the EFCB, and the Impact of the New York City Financial Crisis* 23–46 (1984) (describing establishment of MAC, EFCB, and Office of Special Deputy Comptroller for New York City to address city's fiscal situation in 1970s).

20. Nassau County Interim Finance Authority Act, N.Y. Pub. Auth. Law §§ 3650–3672 (McKinney 2011).

21. Erie County Fiscal Stability Authority Act, N.Y. Pub. Auth. Law §§ 3950–3973.

22. Buffalo Fiscal Stability Authority Act, N.Y. Pub. Auth. Law §§ 3850–3873; see Danny Hakim, *Deficits Push N.Y. Cities and Counties to Desperation*, N.Y. Times (Mar. 10, 2012), <http://www.nytimes.com/2012/03/11/nyregion/deficits-push-municipalities-to-desperation.html> (on file with the *Columbia Law Review*) (noting various New York counties placed under financial control boards).

23. Control Board, City of Springfield, Mass., http://www3.springfield-ma.gov/cos/control_board.0.html (on file with the *Columbia Law Review*) (last updated June 3, 2013) (“The Finance Control Board (FCB) took charge of the City of Springfield on June 30, 2004 and has been extended to continue until June 30, 2009.”).

24. 53 Pa. Cons. Stat. Ann. §§ 12720.101–.102 (West 1998); see *Actions Taken by Five Cities to Restore Their Financial Health: Hearing Before the Subcomm. on D.C. of the H. Comm. on Gov't Reform & Oversight, 104th Cong.* 74–78 (1995) [hereinafter *Actions Taken*] (providing overview of Pennsylvania financial control board structure).

25. See Eric Scorsone, *Senate Fiscal Agency, Local Government Financial Emergencies and Municipal Bankruptcy* 6 (Mich. 2010), available at <http://www.senate.michigan.gov/sfa/publications/issues/localgovfin/localgovfin.pdf> (on file with the *Columbia Law Review*) (describing number of municipalities in receivership and what receivership entails).

26. *Municipal Rehabilitation and Economic Recovery Act*, N.J. Stat. Ann. §§ 52:27BBB-1 to -79 (West 2010).

27. *City of Camden v. Kenny*, 763 A.2d 777, 781–82 (N.J. Super. Ct. App. Div. 2000) (affirming local finance board's power to appoint new business administrator).

plan of adjustment.²⁸ Congress created a financial control board for Washington, D.C., in the mid-1990s.²⁹

State seizure of the financial functions of municipalities through the appointment of entities authorized to oversee or displace elected officials—hereinafter referred to as “takeover boards”—can generate hostility within the affected locality. Critics view state-appointed takeover boards as violations of local democracy and local autonomy.³⁰ The least intrusive takeover boards still interfere with the capacity of locally elected officials to determine independently local tax rates, service levels, budgeting, and debt. The most invasive boards exercise plenary authority over local governance reminiscent of the unilateral authority of the Roman dictatorship. Takeover boards typically have a wide range of powers. They can veto budgetary decisions, dislodge local executives and legislatures, remove officials who disobey their mandates, cancel existing contracts or dictate the terms of new ones, or withhold necessary approvals for operating expenses until local officials meet board demands.³¹ If bankruptcy is an option, the takeover board is often the body that can exercise it.³²

Certainly states possess broad legal capacity to intercede in municipal fiscal affairs. While the scope of federal bankruptcy for municipalities may be constrained by federalism and Tenth Amendment considera-

28. Cal. Gov't Code §§ 30,401–30,402 (West 2008).

29. District of Columbia Financial Responsibility and Management Assistance Authority Act of 1995, Pub. L. No. 104-8, 109 Stat. 97 (codified as amended at D.C. Code §§ 47-391.01–393 (2014)).

30. Within the legal literature, two strong critics have been Michelle Wilde Anderson and Richard Schragger. See *infra* notes 131–135 and accompanying text (describing critiques of Wilde Anderson and Schragger). One commentator has described the appointment of an emergency manager for Benton Harbor, Michigan, as the dissolution of local democracy and disenfranchisement of more than half of the state's African American population. See Tyler C. Reedy, *Democracy & Despair: Riots, Economic Development, and an Emergency Manager in Benton Harbor, MI* 59, 78 (2013) (unpublished M.A. thesis, Iowa State University) (quoting Michelle Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 *Fordham Urb. L.J.* 577, 581 (2012)), available at <http://lib.dr.iastate.edu/cgi/viewcontent.cgi?article=4028&context=etd> (on file with the *Columbia Law Review*). Robert Bailey's thorough investigation of the New York City fiscal crisis in the 1970s provides a more complicated view of the benefits conferred by the financial control boards imposed by the state, but even he suggests that they raised questions of democratic legitimacy. See Bailey, *supra* note 19, at 127, 172–75 (explaining “[f]ew could be enthusiastic . . . for the curtailment of democratic processes the EFCB represented” and observing takeover board reoriented “policy choice away from integrating alienated groups into the city's political system and toward economic development”).

31. See *infra* text accompanying notes 86–127 (discussing examples of powers of various takeover boards).

32. See, e.g., N.Y. Local Fin. Law § 85.80 (McKinney 2011) (“A municipality or its emergency financial control board . . . may file a petition with any United States district court or court of bankruptcy under any provision of the laws of the United States . . . for the composition or adjustment of municipal indebtedness.”).

tions,³³ states enjoy plenary power over their political subdivisions and have historically used that authority to direct municipal fiscal affairs through mechanisms that range from extending emergency loans to displacing elected local officials.³⁴ States lack only the bite of adjusting the debts of nonconsenting creditors—the main benefit municipalities obtain in Chapter 9.³⁵

Still, a century of home rule advocacy,³⁶ predicated largely on the evolution of professionalized local management, an appreciation for a market for residence, and the possibility of interlocal cooperation, has elevated local autonomy over earlier conceptions of the municipality as a mere functionary of the state.³⁷ Antipathy toward state degradation of local autonomy has been embodied in constitutional prohibitions on special state commissions that assume municipal functions,³⁸ as well as in broad interpretations of municipal affairs within which localities may exercise independence and sometimes even trump conflicting state stat-

33. For the proposition that state consent to municipal bankruptcy filings and the limited judicial role permitted by 11 U.S.C. § 904 are constitutionally required, see, e.g., *In re City of Vallejo*, 403 B.R. 72, 75–76 (Bankr. E.D. Cal. 2009) (“Section 903 . . . allows states to act as gatekeepers to their municipalities’ access to relief under the Bankruptcy Code.”); *Bankruptcy Law Revision: Report of the H. Comm. on the Judiciary Together with Separate, Supplemental, and Separate Additional Views*, H.R. Rep. No. 95-595, at 398 (1977), reprinted in 1978 U.S.C.C.A.N. 5963.

34. See, e.g., *City of Camden v. Kenny*, 763 A.2d 777, 782 (N.J. Super. Ct. App. Div. 2000) (“[S]tate power over municipalities trumps local control.”). Omer Kimhi has been the most persistent and eloquent advocate of state-created remedies to municipal financial problems. E.g., Omer Kimhi, Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem, 27 *Yale J. on Reg.* 351, 385–95 (2010) [hereinafter Kimhi, Chapter 9]; Omer Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crises*, 88 *B.U. L. Rev.* 633, 664–84 (2008); Omer Kimhi, *A Tale of Four Cities: Models of State Intervention in Distressed Localities Fiscal Affairs*, 80 *U. Cin. L. Rev.* 881, 905–20 (2012) [hereinafter Kimhi, *Four Cities*].

35. See 11 U.S.C. § 903 (2012). Section 903 effectively abrogated *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502 (1942), in which the Supreme Court concluded that New Jersey’s statutory modification of bonds of a distressed municipality did not violate the Contracts Clause. See also David A. Skeel, Jr., *Is Bankruptcy the Answer for Troubled Cities and States?*, 50 *Hous. L. Rev.* 1063, 1080–84 (2013) (discussing limited ability of Chapter 9 to address issues other than debt adjustment).

36. A grant of home rule permits a municipality to initiate legislation without prior approval from the state, thus reversing the traditional doctrine that limited municipal authority to the exercise of power explicitly granted by the legislature or the state constitution. See Lynn A. Baker & Clayton P. Gillette, *Local Government Law* 281–364 (4th ed. 2009) [hereinafter Baker & Gillette, *Local Government Law*].

37. See David J. Barron, *Reclaiming Home Rule*, 116 *Harv. L. Rev.* 2257, 2280–2321 (2003) (describing history of home rule movement and distinguishing between home rule and legal local autonomy).

38. See Baker & Gillette, *Local Government Law*, *supra* note 36, at 253–59 (discussing development and application of state constitutional restrictions on special commissions).

utes.³⁹ Even without embracing a constitutional right of local self-government, home rule advocacy has at least endowed localities with the ability to define an independent view of which public goods and values to pursue. Implicitly, takeover boards that impose fiscal regimes not selected by residents threaten the capacity of localities to realize that self-defined vision.

One might be more tolerant of takeover boards if they systematically created financially stable municipalities. The evidence on the efficacy of takeover boards, however, is both anecdotal and equivocal. Some localities are recidivists, suggesting that even state takeover will not cure fundamental issues that generated the crisis. For example, Hamtramck, Michigan, which was under state receivership in the 1970s,⁴⁰ and again in 2007,⁴¹ requested permission from the state to file for Chapter 9 in 2010 and was declared by the state to be in a situation of financial emergency in 2013.⁴² Martin Shefter's monograph on New York City's fiscal crisis in the 1970s emphasizes that the city had suffered "brushes with bankruptcy" on numerous occasions and that the political alliances that explained the earlier crises had reemerged.⁴³

Even the absence of recidivism does not necessarily mean that takeover boards have been successful. Instead, attempts to attribute renewed local fiscal stability to takeover board interventions raise difficult issues regarding the conflation of causation and correlation. For example, single-family housing prices in New York City increased substantially more in the years immediately following the creation of its takeover boards, from 0.9% in 1974–1975 to 2.2% in 1975–1976 and 4.8% in 1976–1977. But those increases lagged behind annual increases in national

39. See generally Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 Va. L. Rev. 1347 (1997) (discussing instances in which decentralized government legislation prevails over its own central government authority).

40. See Advisory Comm'n on Intergovernmental Relations, *City Financial Emergencies: The Intergovernmental Dimension* 36–40 (1973) [hereinafter ACIR] (analyzing Hamtramck's financial crisis).

41. Hamtramck Financial Emergency Declared by Michigan Governor Rick Snyder, *Huffington Post* (June 3, 2013, 4:10 PM), http://www.huffingtonpost.com/2013/06/03/hamtramck-financial-emergency-declared-rick-snyder_n_3379629.html (on file with the *Columbia Law Review*) (noting Hamtramck previously underwent receivership from 2000 to 2007).

42. See Monica Davey, *Michigan Town Is Left Pleading for Bankruptcy*, *N.Y. Times* (Dec. 27, 2010), <http://www.nytimes.com/2010/12/28/us/28city.html> (on file with the *Columbia Law Review*) (reporting Hamtramck's financial difficulties); Press Release, Mich. Dep't of Treasury, *Review Team Finds "Financial Emergency" in Hamtramck* (May 23, 2013), http://www.michigan.gov/treasury/0,4679,7-121-1755_1963-304192-,00.html (on file with the *Columbia Law Review*) (declaring "local government financial emergency").

43. Martin Shefter, *Political Crisis/Fiscal Crisis*, at xi–xv (1991); see also Ester R. Fuchs, *Mayors and Money* 182 (1992) ("Since its 1975 crisis New York has been subject to stringent fiscal oversight . . . yet it faced severe fiscal problems in 1990–91."). The city also faced fiscal distress in the early 2000s, requiring refinancing of certain debts that were to mature at that time. See *Local Gov't Assistance Corp. v. Sales Tax Asset Receivable Corp.*, 813 N.E.2d 587, 590 (N.Y. 2004).

housing prices until 1979–1980.⁴⁴ It is, therefore, difficult to attribute New York City's improvements to changes in governance rather than to independent improvements in the general or local economy that would otherwise still have occurred.

Other potential measures of takeover board success are similarly ambiguous. Omer Kimhi, who has written extensively on municipal bankruptcy, draws an optimistic conclusion about state intervention from the fact that localities within states that utilize proactive intervention enjoy higher bond ratings.⁴⁵ But bond ratings reflect only the probability that a locality will default on payments to bondholders, which may depend less on resident welfare than on measures that localities take to secure creditors, potentially at the expense of residents.⁴⁶ New York City did exhibit signs of fiscal health that arguably resulted from administrative and organizational reforms mandated by takeover boards. Adjusted for inflation, city operating expenditures declined every year between 1976 and 1981, and then rose only modestly.⁴⁷ Municipal expenditures as a proportion of resident income declined during the same period, and the city's expense budget was balanced by 1981.⁴⁸ Nevertheless, average labor costs per employee rose seventy-five percent between 1975 and 1984.⁴⁹ The budgetary effects of that increase were offset by the elimination of 44,000 positions in the city,⁵⁰ and it would be difficult to determine whether that reduction represented superfluous positions or significantly diminished the quality of municipal services.⁵¹ Municipal budgets actually increased in Camden after a state takeover, although much of the increase was attributable to a state arbitration ruling on employee salaries and benefits rather than the largesse of those charged with running the city.⁵²

44. I am grateful to Sean Capperis of the Furman Center for Real Estate and Urban Policy at NYU School of Law for generating these calculations.

45. Kimhi, *Four Cities*, *supra* note 34, at 887–88, 920–21. One might draw similar inferences from the fact that Moody's reduced its rating on New York City debt from A to Ba in October 1975, and then to Caa, before increasing it to B in May 1977 after the imposition of takeover boards. *Financial Control Boards: Hearing Before the Subcomm. on the D.C. of the H. Comm. on Gov't Reform & Oversight*, 104th Cong. 46 (1995) [hereinafter *Financial Control Boards*].

46. See *infra* text accompanying notes 363–367 (discussing Central Falls, Rhode Island).

47. Shefter, *supra* note 43, at 138.

48. *Id.* at 137–38.

49. *Id.* at 141–42 & 248 n.26.

50. *Id.* at 142.

51. In some cases, state takeovers may even exacerbate the financial problem, as where those charged with providing municipal relief instead misappropriate municipal funds. See *Local Emergency Fin. Assistance Loan Bd. v. Blackwell*, 832 N.W.2d 401, 403 (Mich. Ct. App. 2013) (finding emergency financial manager made unauthorized payments to himself from public funds totaling \$264,000).

52. See Pew Charitable Trusts, *The State Role in Local Government Financial Distress* 37 (2013), available at <http://www.pewtrusts.org/~media/Assets/2013/07/23/>

The difficulty of measuring takeover board performance leaves open the claim that takeover boards substantially interfere with local democratic governance without generating offsetting local benefits. But even if financial control boards have failed to generate net local benefits, there are arguments for their implementation. First, exclusive focus on local consequences provides an insufficient basis for evaluating state supervision. Instead, a state may appoint a takeover board in order to prevent fiscal distress within one locality from imposing costs on other localities or on the state itself, to ensure adherence to the original bargain struck with creditors, or to preserve the distressed locality's access to capital markets. Pursuit of any of these objectives may entail some subordination of the welfare of current residents in the distressed locality, albeit in the name of creating offsetting welfare gains for nonresidents or for future residents. Second, as this Article argues, the failure of takeover boards to generate observable improvements for local fiscal affairs may reflect only a failure to exploit the primary advantage that state takeovers theoretically enjoy, that is, the capacity to restructure local institutions of governance.⁵³ If that is the case, the response may be more intrusive state intervention, not less.

Nevertheless, even those who defend the advantages of dictatorship recognize that it has the capacity to exceed its function of crisis resolution and to become an instrument of subjugating popular will. Certainly that became the case of the Roman dictator.⁵⁴ State imposition of a takeover board similarly has the capacity to overwhelm, rather than to advance, local autonomy. Conflicts among the multiple constituencies that command the attention of takeover boards—the locality, the state, the capital markets—complicate the ability to monitor or assess the quality of their performance. Ambiguity about the appropriate objectives of a takeover board can obfuscate state efforts to subordinate local interests for reasons less legitimate than resolving fiscal distress, such as allowing state officials to exercise control over local politics or requiring payment to creditors regardless of costs to local residents.⁵⁵ That is, the same conditions that invite intervention by central officials capable of countering the consequences of flawed local decisionmaking also permit takeovers by less benevolent officials whose interests align poorly with those of the stakeholders in municipal fiscal health.

Pew_State_Role_in_Local_Government_Financial_Distress.pdf?la=en (on file with the *Columbia Law Review*) (highlighting twenty percent rise in city spending in first year of state control resulting from raises in public employee salaries and benefits).

53. See *infra* Part III (examining relationship between structural change and ability to redress fiscal distress).

54. Rossiter, *supra* note 2, at 26–27 (stating dictatorship became increasingly used for purposes “other than the abatement of a severe crisis”); Kalyvas, *supra* note 1, at 420–21 (noting dictatorship was used as political weapon against internal opponents rather than military necessity directed at external enemies).

55. See *infra* Part IV.A (highlighting concern about whose interests takeover boards actually represent).

This Article explores justifications for state takeovers, the capacity of takeover boards to play the role of benign dictator in the service of multiple constituencies, and the biases takeover boards might suffer that require constraints on their discretion. Because state appointment of a takeover board is often the last step in a long process of monitoring municipal fiscal health, Part I discusses steps that typically precede state takeovers and that are less intrusive of local autonomy. Part II addresses the argument that displacement of local democracy and reduction of local autonomy necessarily delegitimize takeover boards, even where more moderate interventions have been unsuccessful. Such arguments fail to recognize either the divergence between residents' preferences and the policies that have caused fiscal distress or the interest of the state in relieving fiscal distress once it materializes. Part III suggests that the root causes of severe local fiscal distress are likely to lie in political structures that cannot readily be reformed through normal politics, due to the entrenchment of political officials and the processes by which they make budgetary decisions. Takeover boards that operate outside the constraints of normal politics may provide a superior mechanism not only for addressing current fiscal distress, but also for preventing its recurrence through governmental restructuring, though there are obvious risks to assigning the task of institutional reform of local governments to nondemocratic entities. Part IV, therefore, investigates the interests that such takeover boards represent, the objective functions they might pursue that could deviate from those interests, and the means of constraining their conduct.

I. STATE INTERVENTION IN MUNICIPAL GOVERNANCE

The democratic critique of takeover boards⁵⁶ implies that states precipitously assume responsibility for municipal budgeting and governance. States, however, do not exercise substantial authority over municipal fiscal affairs without first using a series of tools to detect, deter, and resolve municipal fiscal distress.⁵⁷ This Part describes, in increasing degrees of intervention, the measures that states deploy to oversee local fiscal affairs. These measures typically begin with state monitoring and provision of advice. Should those measures prove insufficient to stem local fiscal distress, at least some states intervene more intrusively by requiring approval of local budgets or budgeting practices by state officials or takeover boards. When other measures are unsuccessful in restor-

56. See *infra* Part II (expressing concern that state takeover boards disregard opinions of residents in creating and implementing local fiscal policy).

57. See Juliet M. Moringiello, *Goals and Governance in Municipal Bankruptcy*, 71 *Wash. & Lee L. Rev.* 403, 457–78 (2014) (explaining how specific authorization requirement of Chapter 9 allows states to choose whether, and under what conditions, their municipalities can file for bankruptcy); see Pew Charitable Trusts, *supra* note 52, at 8–11 (demonstrating range of local distress policies).

ing fiscal stability, some states impose more invasive policies, including the imposition of more dictatorial takeover boards that displace democratically elected local officials.

A. State Monitoring Without Interference

States routinely monitor and provide assistance to localities in order to avoid fiscal distress in ways that do not formally interfere with the substantive fiscal decisions made by local elected officials. Although states vary in the means by which they perform these functions,⁵⁸ state monitoring frequently includes the imposition of regulations for budgeting, administrative oversight, and inducements for localities to implement standardized financial and budgeting systems.⁵⁹ Ohio, for example, allows the state auditor to examine a local government's financial statements and apply "fiscal watch" or "fiscal emergency" designations based on factors such as ability to pay current expenses and debt ratios.⁶⁰ The Michigan Treasury Department annually calculates "fiscal stress indicators" that aggregate a substantial number of factors into a single score for each municipality within the state, but that trigger no action other than publication of a locality's condition and the creation of fiscal monitoring.⁶¹ North Carolina uses an office of professional experts in the state's

58. See Pew Charitable Trusts, *supra* note 52, at 20–21 (outlining states' intervention programs in distressed localities).

59. An example is the International City/County Management Association's Financial Trend Monitoring System (FTMS), which considers more than forty indicators to evaluate local financial health. For surveys of state measures, see Beth Walter Honadle, *The States' Role in U.S. Local Government Fiscal Crises: A Theoretical Model and Results of a National Survey*, 26 *Int'l J. Pub. Admin.* 1431, 1441–54 (2003) (presenting findings of survey of role states play in addressing localities' fiscal crises); see also Jonathan B. Justice & Eric A. Scorsone, *Measuring and Predicting Local Government Financial Stress*, in *Handbook of Local Government Fiscal Health* 43, 44 (H. Levine et al. eds., 2013) (highlighting various methods of measuring local fiscal health); Philip Kloha et al., *Someone to Watch Over Me: State Monitoring of Local Fiscal Conditions*, 35 *Am. Rev. Pub. Admin.* 236, 236 (2005) (presenting results of fifty-state survey classifying indicators used to assess or monitor fiscal conditions in local governments). An older survey may be found in ACIR, *supra* note 40, at 69–86, 163–70 (outlining role of state governments in managing financial emergencies in cities). The FTMS is described in Sanford M. Groves, *Financial Trend Monitoring System: A Practitioner's Workbook for Collecting Data, Charting Trends, and Interpreting Results* 1–8 (4th ed. 2003).

60. Ohio Rev. Code Ann. §§ 118.01(Q), 118.01(T), 118.021 (West 2002) (outlining fiscal watch review procedure); see also Mary Taylor, *Fiscal Indicators: A Proactive Approach to Local Government Financial Assistance* 4 (2009) (discussing Ohio's fiscal watch and fiscal emergency procedures); Jane Beckett-Camarata, *Identifying and Coping with Fiscal Emergencies in Ohio Local Governments*, 27 *Int'l J. Pub. Admin.* 615, 618–21 (2004) (defining terms "fiscal distress/monitoring," "fiscal stress," and "fiscal emergency").

61. Christina Plerhoples & Eric Scorsone, *Mich. State Univ. Dep't of Agric., Food & Res. Econ., Staff Paper No. 2011-03, Proposed Alterations to the Local Government Fiscal Stress Indicator System for the State of Michigan* 4–8 (2011), available at

Local Government Commission to intervene in ways that can vary from letters that notify a locality of a specific fiscal issue to imposition of requirements for remedial action.⁶² These measures may be thought of as devices for disclosure or signals of quality to the locality, its residents, and its creditors. Of themselves, however, they do not mandate fiscal policies inconsistent with those selected by local officials.

Even when distress is detected, states do not immediately respond by taking over local governance. New York State initially addressed New York City's fiscal crisis by creating MAC, which was authorized to audit, review, and critique New York City's budget and revenue estimations.⁶³ Only when those limited powers proved inadequate to ensure market acceptance of New York City debt did the state empower a control board to develop a financial plan for the city, reject or amend that financial plan, and reject municipal contracts.⁶⁴ Similarly, the appointment of an emergency manager for Detroit was preceded by a "Financial Stability Agreement" negotiated between the city and the state. That agreement created a Financial Advisory Board that was empowered to consult with the city, to monitor the city's financial performance, and to make recommendations for a triennial budget.⁶⁵ An Ohio municipality placed on "fiscal watch" may receive technical assistance to develop a recovery strategy. Only after a municipality is designated as being in a financial emergency does the state auditor become the financial supervisor of the locality and a state commission become designated to approve financial decisions.⁶⁶ Florida creates no formal hierarchy of intervention when a municipality is in a state of financial emergency, but permits the governor to select among measures ranging from the provision of technical assistance to gubernatorial approval of local budgets.⁶⁷

States vary not only in their responses to fiscal crisis, but also with respect to the criteria that define municipal fiscal distress,⁶⁸ the parties

<http://purl.umn.edu/116167> (on file with the *Columbia Law Review*) (describing existing fiscal-stress indicator system).

62. See Charles K. Coe, Preventing Local Government Fiscal Crises: The North Carolina Approach, 27 *Pub. Budget & Fin.* 39, 42–45 (2007) (detailing fiscal and budgetary oversight provided by local government commission); see also Pew Charitable Trusts, *supra* note 52, at 33–35 (outlining local government commission and labeling it North Carolina's "local government lifeline").

63. See Bailey, *supra* note 19, at 27–29 (enumerating statutory powers of MAC).

64. See *id.* at 36–41 (discussing insufficiency of measures taken prior to enactment of Financial Emergency Act).

65. Financial Stability Agreement Between the State of Michigan and the City of Detroit 5, 13–15 (Apr. 4, 2012) [hereinafter *Financial Stability Agreement*], available at <http://www.detroitmi.gov/Portals/0/docs/mayor/pdf/Financial%20Stability%20Agreement.pdf> (on file with the *Columbia Law Review*).

66. See Ohio Rev. Code Ann. §§ 118.01–.14 (West 2002).

67. Fla. Stat. Ann. § 218.503 (West 2005).

68. See Justice & Scorsone, *supra* note 59, at 44–45 (describing how state fiscal monitoring systems have different definitions of fiscal health and different methods for evaluating fiscal health).

who may initiate action after a finding of distress, the corrective processes, and the criteria for termination of those processes.⁶⁹ Some states address the potential for local fiscal distress through ex post deterrence rather than ex ante monitoring. For example, Virginia maintains no program for intervention in fiscally distressed localities.⁷⁰ It does, however, statutorily authorize the state to withhold payment of all state funds appropriated to a locality in default on its general obligation bonds and mandates that those funds instead be paid to owners of defaulted bonds.⁷¹

One view of state monitoring is that more centralized governments attract greater administrative expertise and thus are in a position to provide technical assistance that local governments could not employ on their own.⁷² States are able to attract talent from a relatively broad geographical area, and those inclined to enter the sphere of public finance may believe that they attain more challenges and prestige working for the state than for a locality. Intervention in the form of expertise implies that both fiscal distress and its redress are apolitical issues, attributable to discrete, but nonrepeating, exogenous shocks, demographic or economic effects beyond the control of the affected locality, or a lack of proficiency that can be readily resolved through expert support and advice rather than substitution of centralized control for local decisionmaking about specific expenditures.⁷³

The appeal to expertise attributes no invidious motive to local elected officials—it addresses only their inability to provide desired goods and services at a tax price that residents are willing to pay. The expertise justification further implies neutrality towards the specific

69. See Anthony G. Cahill et al., *State Government Responses to Municipal Fiscal Distress: A Brave New World for State–Local Intergovernmental Relations*, 17 *Pub. Productivity & Mgmt. Rev.* 253, 255–61 (1994) (comparing ten states' responses to fiscal distress).

70. Pew Charitable Trusts, *supra* note 52, at 10 tbl.1.

71. See Va. Code Ann. § 15.2-2659 (2012) (requiring governor to order comptroller to withhold all funds from defaulting locality until default is cured); see also R.I. Gen. Laws Ann. § 45-12-32 (West 2012) (requiring general treasurer to pay owner of bonds, notes, or certificates of indebtedness amount due from treasury to city, town, or district).

72. See *Trainor v. City of Newark*, 368 A.2d 381, 385–86 (N.J. Super. Ct. App. Div. 1976) (discussing how exception from city residency requirement for certain employees is justified by difficulty of recruiting certain types of employees in city). This comports with the view of John Stuart Mill, who defended a limited role for local government because more centralized entities offer greater “capacity for the work, and security against negligence or abuse.” John Stuart Mill, *Considerations on Representative Government* 224 (Currin V. Shields ed., Liberal Arts Press 1958) (1861) (“[T]he local representative bodies and their officers are almost certain to be of a much lower grade of intelligence and knowledge than Parliament and the national executive.”).

73. See, e.g., Cahill et al., *supra* note 69, at 261–62 (discussing results of in-depth studies of distressed municipalities); Kloha et al., *supra* note 59, at 237 (discussing role of poor accounting methods, faulty estimation procedures, defective budgeting practices, and inept management in contributing to fiscal distress).

objectives of local residents; experts may help plan a budget and devise appropriate means of raising revenue, but do not purport to identify appropriate public goods on which those revenues are spent, at least as long as the proposed expenditure is not fiscally irresponsible. Nor does centralized supervision imply any structural defects in the local decisionmaking process. Instead, state provision of expertise implies an educational function in which state agents assist local officials to better implement, rather than to alter, locally preferred policies.

Perhaps state-provided professional assistance can be a curative where fiscal distress is attributable to the limited technical competence of elected local officials. An early report of the Advisory Commission on Intergovernmental Relations largely blamed municipal financial distress on “unsound financial management” that allowed municipalities to drift into financial emergency but that could be corrected by improvements in accounting, auditing, and reporting.⁷⁴

For example, North Carolina’s experience in dealing with distressed municipalities suggests that intervention by experts may be particularly useful where the distressed locality has a relatively small population of budget professionals.⁷⁵ The utility of technical expertise is also implicit in Robert Bailey’s attribution of New York City’s adoption of an integrated financial management system to the involvement of the private sector in oversight of the city’s management.⁷⁶ Bailey concludes that state monitoring and provision of advice can enhance accountability, accurate prediction of the fiscal future, and budget control in a manner that permits local officials to centralize policy and dilute the effects of independent bureaus.⁷⁷ Certainly some of the more notorious recent examples of fiscal distress involve sophisticated investments that were arguably inappropriate for municipal officials who had limited comprehension of the transactional risks to which they were exposed.⁷⁸ But as disastrous as these investments have proven to be, they tended to represent isolated,

74. ACIR, *supra* note 40, at 4–5.

75. See Beckett-Camarata, *supra* note 60, at 626 (noting problem of rural Ohio local governments lacking trained professionals working solely in financial management); Coe, *supra* note 62, at 45–47 (discussing benefits of local government commission, including lower debt costs, higher quality and lower costing financial reports, sound accounting, and safe investments).

76. See Bailey, *supra* note 19, at 140–42. Bailey notes, however, that other managerial reforms were adopted through amendments to the city’s charter. See *id.*

77. *Id.* at 141–42 (discussing how New York’s adoption of integrated management programs bolstered state’s “command, control and communication,” as well as enhanced role of mayor).

78. See Gretchen Morgensen, Police Protection, Please, for Municipal Bonds, N.Y. Times (Aug. 4, 2012), <http://www.nytimes.com/2012/08/05/business/muni-issuers-could-use-more-sec-protection-fair-game.html> (on file with the *Columbia Law Review*) (“It’s hard to believe that every municipality was made fully aware of the risks that these transactions posed.”).

though unfortunate, events that could be cured by invasive state intervention rather than systematic defects in local budgetary processes.⁷⁹

State monitoring and technical assistance short of takeover may also be appropriate where local fiscal distress results from discrete shocks or general economic conditions. Discrete shocks may be a consequence of less predictable events (e.g., large tort judgments or the closure of a major local employer due to industrial shifts rather than local economic policies) that may reflect little on the quality of local decisionmaking and that require redress by policies more centralized than those that can be implemented at the local level.⁸⁰ In one study of Ohio local governments, forty-seven percent of respondents from distressed localities attributed their local fiscal emergencies to local plant closings, which may depend more on the decisions of a firm's home office than on local economic conditions.⁸¹

State assistance, though not more invasive state interventions, may also be appropriate where municipal fiscal difficulties result from the state's own policies. State projects that remove substantial property from

79. Jefferson County's bankruptcy filing was precipitated in part by losses incurred on derivatives purchased in an effort to reduce the effects of possible increases in interest rates. See *In re Jefferson Cnty.*, 474 B.R. 228, 237 (Bankr. N.D. Ala. 2012) ("Some of what failed was the structure the so-called experts sold to the county as being able to counteract the impact of an increase in interest rates."). The Detroit Financial Review Team concluded the city was in "a condition of severe financial stress" as defined in the state's emergency financial manager statute and noted that the city had entered into swaps that assumed interest rates would increase. See Letter from Detroit Fin. Review Team to Rick Snyder, Governor of Mich. 1 (Mar. 26, 2012), available at <http://www.freep.com/assets/freep/pdf/C4187149327.PDF> (on file with the *Columbia Law Review*). The subsequent decrease in interest rates obligated the city to pay more than \$1.1 billion over the life of the debt and exposed the city to additional payment in excess of \$280 million if downgrades in its credit rating constituted a "termination event" under the terms of the derivative contracts. *Id.* at 5. One exception to the claim that single investments generated fiscal distress involves the bankruptcy of Orange County, California. That county's treasurer had made substantial investments in derivatives over a substantial period of time following state deregulation of the investments available to localities. See Mark Baldassare, *When Government Fails* 75 (1998).

80. See Kimhi, Chapter 9, *supra* note 34, at 360 (reporting cases where localities filed for bankruptcy after facing tort judgments).

81. See Beckett-Camarata, *supra* note 60, at 622 (discussing factors that led to Ohio fiscal government emergency); see also Annie Gasparo, *Tightfisted New Owners Put Heinz on Diet*, *Wall St. J.* (Feb. 10, 2014, 11:00 PM), <http://online.wsj.com/news/articles/SB10001424052702303743604579352640635188268> (on file with the *Columbia Law Review*) (detailing closing of plant in Idaho to achieve logistical economies in production chain). The recent decision of Toyota Motor Corporation to consolidate operations in Texas, for example, requires the closing of a headquarters in Torrance, California that accounted for more than five percent of that city's jobs and that was the city's third-highest taxpayer. See Robin Respaut & Paul Lienert, *Toyota Move to Texas Is Latest Blow to Southern California*, *Reuters* (Apr. 28, 2014, 6:32 PM), <http://www.reuters.com/article/2014/04/28/us-autos-toyota-motor-texas-move-idUSBREA3R1AF20140428> (on file with the *Columbia Law Review*) (reporting planned closure of Toyota headquarters). It is highly plausible that the result will be fiscal distress, though it is unclear how the city could have avoided a move motivated by a desire to locate the headquarters closer to its manufacturing plants.

a municipality's tax rolls, for example, may generate local fiscal distress, but not of the sort for which a remedy lies within the comparative competence of a takeover board.⁸²

Even with these external factors in mind, it can be difficult to disaggregate local conditions that emerge from demographic shifts from locally generated policies that cause them. Emigration from central cities may reflect a departure of jobs, but the departure of jobs may itself reflect a desire of prospective employers for localities that impose lower redistributive tax burdens from which employers obtain minimal benefit or more efficient delivery of municipal services from which they do benefit.⁸³ Some discrete shocks may be a consequence of local policies that represent either unwise or unfortunate gambles with municipal fiscal health.⁸⁴ One might make similar claims about municipalities that have suffered fiscal distress as a result of investments in complicated derivatives, the risks of which local officials appear to have had limited understanding.⁸⁵

82. The decision by the Port Authority of New York and New Jersey and the New Jersey State Highway Department to construct the George Washington Bridge and surrounding roads in a manner that removed large amounts of taxable property from Fort Lee, New Jersey, caused substantial financial distress for that locality, but—given those causes—there is little reason to believe that replacement of Fort Lee officials with a takeover board would provide a superior remedy to normal political processes. See ACIR, *supra* note 40, at 22.

83. See, e.g., Christopher R. Bollinger & Keith R. Ihlanfeldt, *The Intraurban Spatial Distribution of Employment: Which Government Interventions Make a Difference?*, 53 *J. Urb. Econ.* 396, 408–09 (2003) (showing tax incentives and highway spending attracted manufacturing jobs to distressed Atlanta region); Todd M. Gabe & Kathleen P. Bell, *Tradeoffs Between Local Taxes and Government Spending as Determinants of Business Location*, 44 *J. Regional Sci.* 21, 35 (2004) (showing businesses attracted by municipal services even when financed by increased local taxes); Thomas F. Luce, *Local Taxes, Public Services, and the Intrametropolitan Location of Firms and Households*, 22 *Pub. Fin. Rev.* 139, 155–56 (1994) (showing negative effects of taxing and insignificant effects of spending on employment location in Philadelphia metropolitan area); Ronald C. Fisher, *The Effects of State and Local Public Services on Economic Development*, *New Eng. Econ. Rev.*, Mar.–Apr. 1997, at 53, 53–57 (measuring effects of transportation, public safety, and education spending on economic development).

84. One might credibly ask whether the appointment of an emergency financial manager for Allen Park, Michigan, after its issue of \$31 million in bonds to purchase and improve real estate for a movie studio that ultimately failed was precipitated by an exogenous shock or a misguided investment that more sophisticated officials would have avoided. See Chris Christoff, *The Movie Flop that Sank a Michigan Town*, *Bloomberg BusinessWeek* (Aug. 23, 2012), <http://www.businessweek.com/articles/2012-08-23/the-movie-flop-that-sank-a-michigan-town> (on file with the *Columbia Law Review*) (discussing failed movie investment); Laura Strickler, *Michigan Town of Allen Park to Vote on Saving Itself from Failed Movie Deal*, *CBS News* (Nov. 5, 2012, 3:16 PM), <http://www.cbsnews.com/news/michigan-town-of-allen-park-to-vote-on-saving-itself-from-failed-movie-deal> (on file with the *Columbia Law Review*) (explaining dissolution of bond deal).

85. See Morgensen, *supra* note 78 (noting rules requiring fair dealing in municipal bond markets recognize public officials who issue municipal bonds can be financially unsophisticated).

In situations where fiscal distress is a consequence of factors other than unforeseen circumstances or lack of expertise, then, state monitoring and advice may be insufficient. If local conditions are instead a function of defects in an embedded structure of local decisionmaking, something closer to a *dictatura rei gerundae causa*, or “dictatorship for getting things done,” may be appropriate or necessary, notwithstanding its threat to local autonomy and local democracy.

B. From Monitoring and Advice to Approval and Displacement

That, at least, appears to be the conclusion of states that turn to more invasive measures when monitoring and advice alone prove inadequate to avoid or relieve fiscal distress. Of course, it is also at the point where state intervention transcends an advisory role that local fiscal autonomy is most controversially placed at risk.⁸⁶

Graduated intervention (like the type used in New York and Michigan⁸⁷) is common among states that utilize takeover boards. For example, Rhode Island authorizes appointment of a fiscal overseer to supervise and assist a distressed municipality in financial matters, review proposed contracts and obligations, approve the budgets of the municipality and its departments, and develop a three-year plan for financial stability.⁸⁸ Should that action prove insufficient to resolve distress, however, the state department of revenue appoints a budget review commission that must approve all proposed municipal contracts and that is entitled to reorganize, consolidate, abolish, or establish municipal offices.⁸⁹ As a last resort, the department of revenue is empowered to appoint a receiver who possesses the additional capacity to exercise the powers of any municipal officer and to file for bankruptcy.⁹⁰ The Rhode Island scheme reflects a common strategy in which state determination of fiscal distress triggers empowerment of a takeover board to approve or disapprove budgets, or to exercise other powers traditionally assigned to elected officials.⁹¹

A board authorized to approve local budgets may take a locality friendly posture in which the state role remains largely advisory, notwith-

86. See, e.g., *City of Camden v. Kenny*, 763 A.2d 777, 778 (N.J. Super. Ct. App. Div. 2000) (dealing with issue of whether local finance board violated longstanding traditions of home rule and local autonomy when it appointed a new business administrator for Camden); Note, *Missed Opportunity: Urban Fiscal Crises and Financial Control Boards*, 110 Harv. L. Rev. 733, 734–35 (1997) (defining “financial control board” (FCB) and arguing states that respond to urban financial crises with FCBs exempted from political considerations do so at expense of democratic decisionmaking and lasting prosperity).

87. See *supra* text accompanying notes 61, 63–65 (discussing “fiscal distress indicators” and states’ responses to detected distress).

88. R.I. Gen. Laws Ann. §§ 45-9-1 to -17 (West 2011).

89. *Id.* §§ 45-9-5 to -6.

90. *Id.* § 45-9-7.

91. *Id.* § 45-9-3(d); see, e.g., N.Y. Pub. Auth. Law § 3669 (McKinney 2011) (outlining duties and powers of Nassau County Interim Finance Authority).

standing the threat of disapproval. The Pennsylvania statutory scheme under which PICA operates requires an assisted city to prepare a five-year financial plan of projected revenues and expenditures subject to PICA review⁹² and entitles PICA to withhold the proceeds of bonds that it issues on behalf of the assisted city until there is agreement on the plan.⁹³ Nevertheless, David Berman describes the relationship between PICA and distressed localities in Pennsylvania as a cooperative effort that permits city officials to retain discretion over fiscal policy. Of course, the credible threat of stronger PICA intervention lurks in the background.⁹⁴

Approval authority creates substantial incentives for local officials to comply with board directives, because disapproval has serious consequences. Ohio law provides that a municipality that fails to submit a required financial plan may not make expenditures in excess of eighty-five percent of the expenditures from the general fund for such month in the preceding fiscal year and permits the board to restrict other expenditures.⁹⁵ If a board in Ohio disapproves a proposed financial plan, the municipality is prohibited from making any expenditure inconsistent with the stated reasons for disapproval.⁹⁶

Approval authority becomes all the more intrusive when it is backed by the capacity to withhold revenue that would otherwise have been paid directly to the municipality but that, during the period of financial control, are instead received by the board and allocated to the municipality only if benchmarks are satisfied. The District of Columbia Financial Control Board, for example, was authorized to withhold any funds deposited with it that would otherwise have been expended on behalf of the district government if revenues or expenditures were inconsistent with an approved financial plan or budget.⁹⁷ Even those funds available for residents may be deployed differently by a takeover board than by elected officials. For example, MAC transferred the proceeds of its bond sales to New York City in small increments rather than in one lump sum in order to induce compliance with MAC's expecta-

92. 53 Pa. Cons. Stat. Ann. § 12720.209(d) (West 1998).

93. *Id.* § 12720.209(a)–(b).

94. David R. Berman, *Local Government and the States* 116–17 (2003) [hereinafter *Berman, Local Government*]; see also Kimhi, *Four Cities*, *supra* note 34, at 902–05.

95. Ohio Rev. Code Ann. § 118.12 (West 2002).

96. *Id.*

97. District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub. L. No. 104-8, § 206(d)(1), 109 Stat. 97, 132 (codified as amended at D.C. Code § 47.392.06(d)(1) (2014)).

tions of budget cuts.⁹⁸ Similarly, MAC diverted revenues previously available to provide municipal services or to pay city bondholders.⁹⁹

Perhaps the most noteworthy exercise of approval power involves the authority of some takeover boards to reject existing contracts between municipalities and others, often including collective bargaining agreements. The emergency financial manager for the Detroit Public Schools, for example, imposed a ten percent wage cut and reordered the financing of benefits for employees,¹⁰⁰ and a financial review commission for a Michigan city is empowered to approve or reject collective bargaining agreements.¹⁰¹ New York State has tailored takeover boards for specific localities, such as Buffalo,¹⁰² Nassau County,¹⁰³ and Erie County,¹⁰⁴ but has consistently empowered each “to do any and all things necessary or convenient to carry out [their] purposes,”¹⁰⁵ a grant of broad authority that sanctions withholding of necessary approvals or funds until elected officials comply with takeover board demands.¹⁰⁶ An Illinois financial advisory authority for East St. Louis attempted to transform its statutory authority to approve budgets and withhold state funds from noncompliant officials into a more general power to impose a budget. Although the Illinois Supreme Court concluded that the state’s Financially Distressed City Law excluded that power, the court confirmed the authority’s discretion to approve or disapprove budgets and to withhold state funds from a city that had failed to satisfy budgetary requirements.¹⁰⁷

98. Bailey, *supra* note 19, at 31; Seymour P. Lachman & Robert Polner, *The Man Who Saved New York* 118 (2010) (“[T]he MAC board began transmitting bond sale proceeds to the city in smaller and smaller sums, the better to ensure [the city] cut the budget.”).

99. See *Quirk v. Mun. Assistance Corp.*, 363 N.E.2d 549, 550–51 (N.Y. 1977) (holding diversion of revenues to MAC rather than using revenues to pay bondholders did not violate the contractual rights of bondholders).

100. See *DPS to Save \$81.8 Million Through 10 Percent Wage Concession, and 80 Percent/20 Percent Cost Sharing for Health Care Benefits and Other Measures*, Detroit Pub. Sch. (July 29, 2011), <http://detroitk12.org/content/2011/07/29/dps-to-save-81-8-million-through-10-percent-wage-concession-and-80-percent-20-percent-cost-sharing-for-health-care-benefits-and-other-measures/> (on file with the *Columbia Law Review*).

101. See Mich. Comp. Laws § 141.1636(9) (2014) (authorizing financial review commission of city to approve or reject collective bargaining agreements).

102. N.Y. Pub. Auth. Law §§ 3850–3873 (McKinney 2011) (providing for Buffalo’s fiscal stability authority).

103. *Id.* §§ 3650–3669 (providing for Nassau County’s interim finance authority).

104. *Id.* §§ 3950–3973 (providing for Erie County’s fiscal stability authority).

105. See, e.g., *id.* § 3654(14).

106. The Nassau County Interim Finance Authority used that authority to reject a proposed budget submitted by the county on the grounds that it contained “risky” approximations of revenues and cost savings. See, e.g., *Cnty. of Nassau v. Nassau Cnty. Interim Fin. Auth.*, 920 N.Y.S.2d 873, 880 (N.Y. Sup. Ct. 2011).

107. *City of E. St. Louis v. E. St. Louis Fin. Advisory Auth.*, 722 N.E.2d 1129, 1136 (Ill. 1999).

The most detailed accounts of approval authority to control municipal officials arise from the experience of New York City in the 1970s. After years of incurring budget deficits and increasing rates of expenditures in excess of revenues, the city became unable to meet its financial obligations.¹⁰⁸ Credit markets that had previously accepted new short-term debt of the city intended to finance the city's deficits refused to continue the practice, especially after discovery of accounting irregularities and the withdrawal by one major credit rating agency of the city's investment-grade rating.¹⁰⁹ Some form of bailout by the state was ultimately required, but it was accompanied by the state's imposition of budgetary discipline through a series of financial control boards.¹¹⁰

Multiple accounts of New York City's fiscal crisis conclude that even though elected officials retained their statutory authority over budgetary decisions, their roles were substantially diminished by the advice and approval powers granted to MAC and the EFCB. MAC withheld funds that had been diverted from the city to the authority in order to ensure that the mayor reduced the city's budget in accordance with MAC's expectations.¹¹¹ The EFCB imposed a three-year wage freeze on city employees, rejected a contract that had been negotiated with the transport workers' union, required the imposition of tuition at the previously free City University of New York, and modified the city's financial plan.¹¹² This reallocation of local decisionmaking power is credited with reductions in the municipal workforce by 60,000, increases in taxes and fees, and substantial service cuts, notwithstanding initial resistance from New York City officials.¹¹³ Robert Bailey's account of the time concludes

108. See Bailey, *supra* note 19, at 3, 15–17 (discussing how New York's financial problems from 1965 to 1975 fostered lasting institutional alterations); Edward M. Gramlich, *The New York City Fiscal Crisis: What Happened and What Is to Be Done?*, 66 *Am. Econ. Rev. (Papers & Proc.)* 415, 421–23 (1976) (describing increasing marginal functions deficits in New York during 1960s and 1970s and resulting decrease in bond ratings); Donna E. Shalala & Carol Bellamy, *A State Saves a City: The New York Case, 1976* *Duke L.J.* 1119, 1123–30 (1977) (arguing fundamental cause of New York's crisis was its misuse of borrowing).

109. See Bailey, *supra* note 19, at 4 (explaining how semantic ambiguity between “fiscal” and “financial” helps explain New York's economic crisis); Shalala & Bellamy, *supra* note 108, at 1123–24 (discussing how New York City misjudged expenses and revenues due to particularities of its accounting system).

110. See Bailey, *supra* note 19, at 23–43 (explaining why MAC was created and how it is structured); Shalala & Bellamy, *supra* note 108, at 1127–30 (same).

111. See Lachman & Polner, *supra* note 98, at 5, 118 (explaining how MAC officials pushed city to make deeper cuts to budget).

112. Bailey, *supra* note 19, at 64–66, 75–77 (discussing application of New York City's financial plan following economic crisis).

113. *Id.* at 26, 68 (discussing how passage of MAC impacted mayor and budgets he proposed); Berman, *Local Government*, *supra* note 94, at 116 (discussing how state interventions into the financial planning process of cities in early 1990s brought financial relief, but severely impacted municipal employees); Lachman & Polner, *supra* note 98, at 116–22 (describing friction between MAC officials and New York officials and how MAC was able to get New York to change its budget).

that, while it “did not remove [Mayor] Beame from office, the MAC Act did seem to remove the office from Beame.”¹¹⁴ The results explicate Ed Koch’s remark that, had he been mayor of New York City, he would not have acceded¹¹⁵ and Abraham Beame’s near-resignation in the face of budgetary adjustments directed by MAC and the EFCB.¹¹⁶

Notwithstanding the decisions in New York City concerning specific expenditures and revenue sources, takeover boards tend to leave the allocation of expenditures within an approved budget to elected local officials. Even the financial control authorities created by New York never assumed jurisdiction over the day-to-day operations of a controlled locality. Indeed, one check on the EFCB was a statutory prohibition on prescribing specific expenditures.¹¹⁷ Retaining allocative discretion within an approved budget ensures that democratically elected officials have substantial flexibility presumably to provide local goods and services, direct spending, and raise revenues in a manner consistent with the preferences of the constituents who elected them. Thus, the ability of local officials to determine how much money to raise, from whom to raise it, and how to spend it—even during a control period—minimizes the dictatorial effects of state takeovers.

But other jurisdictions, most recently Michigan and Rhode Island, have authorized takeover boards to exercise the more radical measure of fully displacing local officials. Once conditions sufficient to justify appointment of a receiver for a Rhode Island municipality exist, for example, that official has “the right to exercise the powers of the elected officials.”¹¹⁸ The powers of the receiver “shall be superior to and supersede the powers of the elected officials,” who are themselves reduced to an advisory role.¹¹⁹ Michigan municipalities under state supervision retain the capacity for independent decisionmaking, subject to little more than advisory intervention, as long as they can pass a series of stress tests. But a Michigan municipality that fails those tests may elect to have the governor appoint an emergency manager “to act for and in the place and stead of the governing body and the office of chief administrative officer” of a distressed locality.¹²⁰ The relevant statute prohibits the

114. Bailey, *supra* note 19, at 139.

115. Jonathan Soffer, *Ed Koch and the Rebuilding of New York* 120 (2009) (“[I]f I were the Mayor, I would never have gone along with it: I don’t think I could have accepted a state of affairs that made me one-seventh of a mayor.” (quoting Ed Koch)).

116. See Lachman & Polner, *supra* note 98, at 121–22 (recounting conversation between Mayor Beame and public relations expert Howard Rubenstein where mayor discussed his frustrations with MAC).

117. N.Y. Unconsol. Law § 5405 (McKinney 2012).

118. R.I. Gen. Laws Ann. § 45-9-7(c) (West 2012).

119. *Id.*

120. Mich. Comp. Laws §§ 141.1547(1)(b), 141.1549(2) (2014). A law adopted by the state legislature in 2011 would have permitted the governor to appoint an emergency financial manager for a locality that failed stress tests. That law was defeated at a referendum in November 2012 and was replaced with the current law. See Paul Egan,

governing body and chief administrative officer of any locality placed in receivership from exercising any of their statutory powers without the written approval of the emergency financial manager, and terminates the compensation and benefits of the elected officials.¹²¹ A 1991 law that placed Chelsea, Massachusetts, in receivership eliminated the position of mayor and reduced the role of other elected officials to an advisory one.¹²² An amendment to an act creating fiscal supervision for Washington, D.C., expanded the control board's powers to "stand in the shoes" of any mayoral agency, or the City Council, and to pass statutes or regulations accordingly.¹²³

The direct takeover and displacement of local officials certainly comes closest to the Roman dictatorship model of temporarily suspending a representative body of decisionmakers in favor of an unelected autocracy.¹²⁴ But even takeover boards that are limited to powers of approval or disapproval of the actions of local officials retain substantial discretion to achieve their own preferences for expenditure reductions, revenue increases, or readjustment of budgetary priorities. Notwithstanding the statutory prohibition on the EFCB's intervention in setting

Snyder Signs Emergency Manager Bill; New Law Will Take Effect in Spring, Detroit Free Press (Dec. 27, 2012, 2:25 PM), <http://www.freep.com/article/20121227/NEWS06/121227027/Snyder-signs-new-emergency-manager-bill-new-law-will-take-effect-in-spring> (on file with the *Columbia Law Review*) (reporting repeal of 2011 emergency-manager law and passage of replacement law in 2012).

121. Mich. Comp. Laws §§ 141.1549(2), 141.1553. The emergency manager for Detroit, however, issued orders reinstating the city officials and their compensation, and authorizing them to conduct the daily affairs of the city. See Emergency Manager Order No. 1, Restoration of Salary and Benefits of Mayor and City Council (Mar. 25, 2013) [hereinafter Order No. 1], available at <http://www.detroitmi.gov/Portals/0/docs/EM/Order1.pdf> (on file with the *Columbia Law Review*); Emergency Manager Order No. 3, Authorization for the Detroit Mayor and City Council to Conduct the Day-to-Day Business of the City (Apr. 11, 2013) [hereinafter Order No. 3], available at <http://www.detroitmi.gov/Portals/0/docs/EM/Order%203.pdf> (on file with the *Columbia Law Review*). He subsequently suspended one member of the city council for failure to fulfill his obligations and duties as a member and president of the city council. See Emergency Manager Order No. 9, Order Modifying Orders Nos. 1 and 3 (June 27, 2013) [hereinafter Order No. 9], available at <http://www.detroitmi.gov/Portals/0/docs/EM/Order%209.pdf> (on file with the *Columbia Law Review*).

122. See David R. Berman, Takeovers of Local Governments: An Overview and Evaluation of State Policies, 25 *Publius* 55, 63 (1995) [hereinafter Berman, Takeovers] (noting how Chelsea, Massachusetts, went into receivership in September 1991 after having its budget rejected by an appointed state board tasked to straighten out city's finances).

123. See Stephen R. Cook, Comment, Tough Love in the District: Management Reform Under the District of Columbia Financial Responsibility and Management Assistance Act, 47 *Am. U. L. Rev.* 993, 1010–11 (1998) ("The new Section 207(d)(1) [of the District of Columbia Financial Responsibility and Management Assistance Act] allows the [Control Board] to 'stand in the shoes' of the Mayor or any department or agency head and issue any orders within their power to issue.").

124. See *supra* text accompanying notes 1–6 (discussing how Roman Republic's constitutional rule sometimes involved appointing a dictator in times of crisis).

budgetary priorities for New York City,¹²⁵ for example, Robert Bailey's study of the crisis reveals that EFCB decisions necessarily affected the expenditures that elected officials could authorize.¹²⁶ As Bailey concludes, "Debt was limited, debt service ensured and increased, a wage freeze was imposed, programs for increased productivity were demanded."¹²⁷ Given that even those boards nominally limited to "approval" authority can induce substantial changes in expenditures or revenue raising from what local officials otherwise would have done, the existence of a dictatorial state takeover is perhaps best understood as applying to both displacement and "approval" bodies. What remains to be determined is whether such a takeover is justifiable given its obvious constraints on local autonomy.

II. TAKEOVER BOARDS AND LOCAL DEMOCRACY

The broad scope of takeover board powers inevitably leads to the claim that, at best, they interfere with local autonomy and, at worst, they are antidemocratic. Elected officials subjected to supervisory authority have frequently denounced their displacement in these terms. Marion Barry, who served as mayor when Congress imposed a financial control board on the District of Columbia, once called the measure a "rape of democracy";¹²⁸ the mayor of Camden, Massachusetts, remarked that proposed state takeover legislation was "arrogant, antidemocratic, and racist";¹²⁹ and the mayor of Central Falls, Rhode Island, dismissed a state-appointed receiver as a "dictator."¹³⁰

Scholarly commentators commonly express similar concerns that municipalities governed by takeover boards suffer from a democratic deficit. The strongest academic criticism of takeover boards has come from Michelle Wilde Anderson, who maintains that recent statutory suspensions of elected officials in favor of state-appointed ones amount to "democratic dissolution" of the cities themselves.¹³¹ They "sacrifice voter

125. N.Y. Unconsol. Law § 5405 (McKinney 2012).

126. See Bailey, *supra* note 19, at 49, 52–53 (explaining city set priorities for expenditures while EFCB "set the environment").

127. *Id.* at 50.

128. Mike DeBonis, D.C. Still Haunted by Federal Takeover, *Wash. Post* (Jan. 31, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/30/AR2011013004444.html> (internal quotation marks omitted) (on file with the *Columbia Law Review*).

129. Howard Gillette, Jr., *Camden After the Fall: Decline and Renewal in a Post-Industrial City 200* (2005) [hereinafter *Gillette, Camden*] (internal quotation marks omitted).

130. Central Falls Mayor Calls Receiver a 'Dictator,' *Boston.com* (Dec. 7, 2010), http://www.boston.com/news/local/rhode_island/articles/2010/12/07/central_falls_mayor_calls_receiver_a_dictator/ (on file with the *Columbia Law Review*).

131. Michelle Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 *Fordham Urb. L.J.* 577, 581 (2012) [hereinafter *Anderson, Democratic Dissolution*] ("A more precise description of the new [suspension] statutes is, in my view, 'democratic dissolution' . . .").

participation and deliberative democracy values, from the empowerment and educative roles of local participation to the public's trust and respect for local government."¹³² She also argues that the democratic deficit created by state takeovers has a socioeconomic bias: In Michigan, for example, the localities governed by an emergency manager are predominantly minority, and all have poverty rates substantially above the national average.¹³³ Democracy, on this account, anomalously becomes something only for those who can afford it or who already hold the very authority that democratic processes are intended to promulgate. Richard Schragger expresses a similar concern that state intervention will take forms that "undermine local self government"¹³⁴ and describes the Michigan emergency manager law as "punitive" of the controlled jurisdiction.¹³⁵

These reactions are not without foundation. Takeover boards are created at the state level, and their members are typically appointed by state officials. Even the Michigan model, which allows a municipality in a state of financial emergency to permit the appointment of an emergency manager, requires the governor to make the selection.¹³⁶ Members of takeover boards may have little or no political experience in the distressed locality and little commitment to retaining long-term relationships with the community, notwithstanding that the boards exercise substantial authority over local budgets, expenditures, taxes, and contracts.¹³⁷ Indeed, in some jurisdictions, an existing political role disqualifies individuals from membership on a takeover board.¹³⁸

132. *Id.* at 606.

133. *Id.* at 590–91; see also John C. Philo, *Local Government Fiscal Emergencies and the Disenfranchisement of Victims of the Global Recession*, 13 *J.L. Soc'y* 71, 87 (2011) (maintaining that in each Michigan city in which an emergency manager has been appointed, "citizens have been disenfranchised from their local government"); Chris Lewis, *Does Michigan's Emergency-Manager Law Disenfranchise Black Citizens?*, *Atlantic* (May 9, 2013), <http://www.theatlantic.com/politics/archive/2013/05/does-michigans-emergency-manager-law-disenfranchise-black-citizens/275639/> (on file with the *Columbia Law Review*) (exploring impact of emergency manager law on black population in Michigan).

134. Richard C. Schragger, *Democracy and Debt*, 121 *Yale L.J.* 860, 879 n.80 (2012).

135. Richard C. Schragger, *Citizens Versus Bondholders*, 39 *Fordham Urb. L.J.* 787, 801 (2012).

136. *Mich. Comp. Laws Ann.* §§ 141.1547(1)(b), 141.1549(1) (West Supp. 2014).

137. See, e.g., *id.* § 141.1549(3)(b) (stating emergency manager need not be "resident of the local government"). But see, e.g., 50 *Ill. Comp. Stat. Ann.* 320/5(b)(3)(B)(ii) (West 2005) (noting appointed members of commission should "to the extent possible" have "residency, office, or principal place of professional or business activity . . . within the unit of local government"); *Ohio Rev. Code Ann.* § 118.05(B)(2)(b) (West 2002) (stating appointed commission members must have "residency, office, or principal place of professional or business activity" in unit of local government); Nonna A. Noto & Lillian Rymarowicz, *Cong. Research Serv.*, 95-328 E, *Financial Control Boards for Cities in Distress* 10 (1995) (noting several states specify appointed members "should have their residency, office, or principal place of professional or business activity" in municipality). Two of the most prominent current emergency managers lacked particular

Nevertheless, this Part contends that the critique of takeover boards based on a democratic deficit or dilution of local autonomy is substantially overstated. The emphasis in the critique on issues such as putative loss of enfranchisement, voter participation, respect for local government, and the importance of self-governance suggests that the difficulty with state takeover boards lies in their ability to impose policies that elected local officials would have rejected at the behest of their constituents.¹³⁹ Those who object to takeover boards do not appear primarily concerned with voting as an expressive or civic function. After all, even residents of localities subject to takeover boards remain able to vote for nonlocal officials. Indeed, where takeover boards coexist with elected bodies, residents continue to vote for local officials, notwithstanding that those officials may exercise substantially diminished authority.¹⁴⁰ Instead, the concern appears to be that residents are denied the ability to indicate effectively their interests in the provision of local public goods and services through the apparatus of democratic elections.¹⁴¹ In effect, the device of state takeover allegedly denies them voice in the creation and implementation of local fiscal policy.¹⁴²

ties to the local community when they were selected: The emergency manager for Detroit was previously a bankruptcy lawyer in Washington, D.C., and the second receiver for Central Falls, Rhode Island, was a former justice of the Rhode Island Supreme Court who had never lived in Central Falls. Steven Yaccino, Detroit's Leaders Carry On, but Know Who's Really in Charge, N.Y. Times (Apr. 12, 2013), <http://www.nytimes.com/2013/04/13/us/detroits-leaders-adjust-to-life-under-a-manager.html> (on file with the *Columbia Law Review*); Press Release, State of R.I., Governor Lincoln D. Chafee Names Justice Robert G. Flanders, Jr. Central Falls Receiver (Jan. 31, 2011), <http://www.ri.gov/press/view/13094> (on file with the *Columbia Law Review*).

138. See, e.g., 50 Ill. Comp. Stat. Ann. 320/5(b)(3)(B)(ii) (noting commission members cannot have held elected public office in prior two years and cannot be candidate while serving); Ohio Rev. Code Ann. § 118.05(B)(2)(c) (stating members may not become candidate for public office while serving on takeover board); 53 Pa. Cons. Stat. Ann. § 12720.202(f)(1) (West 1998) (“Except for the Secretary of the Budget of the Commonwealth and the Director of Finance of an assisted city, neither members of the board nor the executive director shall seek or hold a position as any other public official . . . while in the service of the authority.”).

139. Anderson, Democratic Dissolution, *supra* note 131, at 601 (claiming municipal receivership constitutes “democratic dissolution” of local government); Philo, *supra* note 133, at 87 (arguing in cities with emergency managers, “citizens have been disenfranchised from their local government”).

140. Detroit residents elected a mayor and city council in November 2013, while the city was under the control of an emergency manager. Matt Helms & Joe Guillen, Mike Duggan Defeats Benny Napoleon in Detroit Mayoral Race, *Detroit Free Press* (Nov. 6, 2013, 12:10 AM), <http://www.freep.com/article/20131105/NEWS01/311050148/Mike-Duggan-defeats-Benny-Napoleon-Detroit-mayoral-race> (on file with the *Columbia Law Review*).

141. Anderson, Democratic Dissolution, *supra* note 131, at 602 (arguing state is “deaf” to local concerns about actions taken by emergency manager).

142. It is possible that there is a related objection implicit in the democratic critique of takeover boards. Where localities are governed by multimember legislatures, different interest groups may have access to different representatives. As a result, groups have

That critique is therefore predicated on two assumptions: first, that the local officials who are subordinate to or displaced by a takeover board have been faithful representatives of their local constituents, and, second, that state intervention fails to represent the constituents adversely affected by local fiscal distress. The first assumption is correct only if it can be assumed that local residents actually preferred the policies that produced fiscal distress. If those policies were enacted contrary to the preferences of residents,¹⁴³ and if a state takeover can make a local

mechanisms for having their views represented, even if they cannot command a majority of the decisionmaking body. See Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 *Harv. C.R.-C.L. L. Rev.* 173, 216–17 (1989) (discussing importance of coalition building and “logrolling” among elected representatives in supporting interests of blacks). If a takeover board comprises a small number of individuals and if those individuals have relatively monolithic objectives for the municipality, then interest group pluralism is less likely to operate. The difficulty with this objection is that it ignores the possibility that interest group pluralism is one of the primary causes of municipal fiscal distress, insofar as it fosters the adverse effects of fragmented decisionmaking. See *infra* notes 234–240, 243–246 and accompanying text (discussing how normal political processes can create or exacerbate fiscal distress).

143. Speaking of the preferences of residents does not imply that all residents of the municipality share the same preferences for local goods and services. Instead it implies only the following: A major objective of municipalities is to provide a minimum level of goods and services that individuals desire but that are not readily available from the private market; as a result, the failure to provide that minimum level constitutes a failure of the municipality to achieve the very reason for which it was created. See Michelle Wilde Anderson, *The New Minimal Cities*, 123 *Yale L.J.* 1118, 1158–59 (2014) [hereinafter Anderson, *New Minimal Cities*] (stating one major purpose of municipalities is to “provide or facilitate services” to “residents, businesses, visitors, and people who work in the city,” even if “reasonable minds might disagree about which goods are vulnerable to the kind of market failure that necessitates some degree of public involvement”); cf. Clayton P. Gillette, *Equality and Variety in the Delivery of Municipal Services*, 100 *Harv. L. Rev.* 946, 955–59 (1987) (reviewing Charles M. Haar & Daniel W. Fessler, *The Wrong Side of the Tracks: A Revolutionary Rediscovery of the Common Law Tradition of Fairness in the Struggle Against Inequality* (1986)) [hereinafter Gillette, *Equality and Variety*] (discussing obligations of local governments to provide minimal level of services). Municipalities compete for mobile residents by offering different bundles of goods and services that exceed the minimum level. Relatively mobile residents gravitate to municipalities that hold themselves out as offering a particular bundle at a particular tax price. See, e.g., Jan Brueckner, *A Test for Allocative Efficiency in the Local Public Sector*, 19 *J. Pub. Econ.* 311, 312 (1982) (discussing previous research showing consumers migrate in and out of municipalities in response to changes in levels of public spending); Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 *J. Pol. Econ.* 957, 959, 968 (1969) (demonstrating empirically that local property values decrease in response to higher tax rates and increase in response to higher education spending, suggesting consumers out-migrate in response to higher tax rates and in-migrate in response to higher educational spending). Residents and prospective residents find that bundle attractive if it is superior to any alternative they can obtain at a tax price they are willing to pay. Outside the ideal Tiebout world in which every resident finds a municipality that offers the ideal service bundle at an acceptable tax price, residents necessarily engage in tradeoffs, in which mobile residents favor some parts of the bundle over others, but are satisfied with the package as a whole. To speak of a municipality’s satisfaction of preferences, therefore, is only to say that municipal officials offer local public goods and

government more responsive to local demands for goods and services, then the claim of a democratic deficit is significantly diluted.

The second assumption is incorrect if the state represents *nonresidents* of the municipality who are adversely affected by local policies, and if statewide interests properly prevail in a conflict between the state and locality. Even if local residents prefer policies that generate fiscal distress, deference to local autonomy may be inappropriate where the costs of those policies fall on others who were not represented in the decision to implement them.

Thus, state intervention may either vindicate the interests of the local electorate against their own local officials or serve the interests of a broader constituency that local officials ignore. These possibilities complicate claims that takeover boards are associated with a democratic deficit or the degradation of local autonomy.

Of course, even if the assumptions underlying the democratic deficit critique are questionable, it is not necessarily the case that takeover boards will provide public goods that are consistent with resident preferences or will address the external consequences of local fiscal distress. Part IV addresses the issue of whether takeover boards have defects that call their deployment into question, even if the democratic critique is overstated.

A. Local Officials and Local Preferences

As noted above, the democratic critique implicitly assumes that local officials who govern during a period leading to fiscal distress will adopt policies consistent with their constituents' preferences, while appointed takeover boards that displace those officials will not. It is in that sense that the subordination of local officials to takeover boards is inconsistent with democratic decisionmaking. That assumption initially appears appropriate, since one might readily conclude that officials who have been democratically elected represent the views of the electorate. If, however, it were the case that local officials had allowed fiscal distress by disregarding the preferences of their constituents, then it is possible that takeover boards could preserve local autonomy in the substantive sense of providing goods and services that residents prefer, albeit that result occurs through procedures formally less democratic than those that prevailed during the period that generated fiscal distress.¹⁴⁴ This section

services that provide all residents with a minimal level of public goods and that attract a discrete set of individuals and firms who favor the service bundle that the municipality offers. The negative implication of the Tiebout model, of course, is that a municipality is obligated to provide at least minimal public goods to relatively immobile residents, because they do not have the option of migrating to a jurisdiction that offers their preferred bundle.

144. Even as a procedural matter, the degree of inconsistency between takeover board decisionmaking and principles of local democracy may vary. The claim of antidemocratic procedures is somewhat diluted in the common case where elected

offers two observations that belie the claim that local officials in fiscally distressed localities have been faithful agents of their constituents. The first is that fiscally distressed localities tend to suffer significant population losses, which suggests that residents believe that they are not receiving public goods and services that are worth the tax price necessary to obtain them. Where migration is substantial, it may be that those who remain face high exit costs rather than that they are satisfied with the services they are receiving. The second observation is that fiscal distress is often accompanied by opaque budgeting tactics. Where municipal residents cannot easily discover financial measures that threaten fiscal distress, it is more difficult to conclude that residents have acceded to them.

1. *Mobility as a Measure of Preferences.* — The notion that appointed takeover board officials can be better proxies than elected ones for local residents seems oxymoronic, since the objective of local elections is presumably to allow residents to register their preferences. Indeed, in the idealized Tieboutian world of perfect mobility, the threat of exit would fully constrain local officials from offering bundles of goods and services or tax prices inconsistent with residents' preferences.¹⁴⁵ As a result, the actions of elected officials would necessarily reflect the interests of their constituents. But outside that highly stylized world, there is substantial room for divergence between the goods and services that residents prefer and those that officials provide. Elected officials may direct expenditures toward avenues of political support with electoral impunity due to such factors as the binary nature of voting,¹⁴⁶ the proclivity to vote for officials who represent a bundle of services rather than for a level of provision for

officials serve as members of takeover boards. For example, the special act that created the Bridgeport, Connecticut, Financial Review Board provided that its nine members would include the mayor of the city and two representatives appointed by the mayor. 1988 Conn. Acts 191, 197 (Spec. Sess.). While local officials could not control the decisionmaking process, they retained substantial representation. Membership of other takeover boards includes both state and local elected officials. For instance, elected officials composed a majority of the membership of the EFCB. See Bailey, *supra* note 19, at 115, 124 (noting specific composition of EFCB board membership and majority of elected officials). This majority included the governor and comptroller of the state and the mayor and comptroller of New York City. *Id.* at 115. In these cases, claims of antidemocratic procedures may be overstated, though claims of interference with local autonomy could still prevail.

145. See Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 *Pol. Econ.* 416, 419 (1956) (presenting theoretical model assuming perfect mobility resulting in adoption of resident preferences); see also Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 *Colum. L. Rev.* 473, 514–28 (1991) (evaluating and affirming Tiebout's core proposition). For the limits of this proposition, even within the limits of the Tiebout model, see Dennis Epple & Allan Zelenitz, *The Implications of Competition Among Jurisdictions: Does Tiebout Need Politics?*, 89 *J. Pol. Econ.* 1197, 1216 (1981) (concluding immobility of land permits self-interested local officials to usurp land rents even with interjurisdictional competition).

146. See Clayton P. Gillette, *Local Redistribution and Local Democracy* 15–28 (2011) [hereinafter Gillette, *Local Redistribution*] (explaining problems with binary nature of voting).

each service,¹⁴⁷ the capacity of interest groups to influence decisions of officials,¹⁴⁸ the techniques of fiscal illusion that frustrate low-cost efforts to trace expenditures, and the standard collective action problems that discourage investment in citizen monitoring.¹⁴⁹ The result is that the presumption of accountability and transparency in local decisionmaking by elected officials dissipates in the presence of resident apathy; divergent size, organizational skills, and intensity of interests among different groups within the electorate; and fiscal opacity.¹⁵⁰ Officials can exploit these tendencies to provide a level of services that a majority of constituents would reject, but to which that majority is inattentive because the costs of discovery are too great or which they are unable to avoid by relocating to a more hospitable jurisdiction.¹⁵¹ Constituents may be more concerned with expenditures or revenue raising measures that are personally salient, such as having their neighborhood parks clean or their taxes reduced, than with the consequences of any particular budget item for the overall fiscal health of the municipality.

More to the point, unless one makes the counterintuitive assumption that residents prefer to live under the conditions that have generated fiscal distress, its very existence implies that elected local officials have failed either to pursue the interests of their constituents or to govern in the transparent light that critics of takeover boards assume characterizes normal local politics.¹⁵² As indicated above,¹⁵³ fiscal distress sufficient to require imposition of a takeover board typically entails systemic and longstanding financial instability rather than a discrete, exogenous shock to the local economy. To take an extreme case, at the

147. See *id.* at 17–18 (highlighting problems with bundling preferences); James D. Gwartney & Richard E. Wagner, Public Choice and the Conduct of Representative Government, *in* *Public Choice and Constitutional Economics* 3, 10 (James D. Gwartney & Richard E. Wagner eds., 1988) (discussing bundle purchase nature of representative democracy).

148. See Gillette, *Local Redistribution*, *supra* note 146, at 23–28 (noting locality as battleground for interest group competition).

149. See *id.* at 15–28 (discussing collective action problem of public goods and describing local governance as public good); Gwartney & Wagner, *supra* note 147, at 11 (discussing reasons voters do not investigate candidates).

150. See, e.g., Roger D. Congleton, Rational Ignorance, Rational Voter Expectations, and Public Policy: A Discrete Informational Foundation for Fiscal Illusion, 107 *Pub. Choice* 35, 46–47 (2001) (explaining voter ignorance can be manipulated by officials to produce unwanted policies and political competition serves interests of relatively informed voters); Werner W. Pommerehne & Friedrich Schneider, Fiscal Illusion, Political Institutions, and Local Public Spending, 31 *Kyklos* 381, 394–402 (1978) (analyzing how fiscal illusion increases governmental spending).

151. Thomas Romer & Howard Rosenthal, Bureaucrats Versus Voters: On the Political Economy of Resource Allocation by Direct Democracy, 93 *Q.J. Econ.* 563, 564 (1979) (exploring how agenda setting officials can generate higher degree of spending than median voter desires).

152. See Anderson, *Democratic Dissolution*, *supra* note 131, at 582 (criticizing state takeovers as ineffective and possibly harmful).

153. *Supra* notes 80–85 and accompanying text.

time of the appointment of its emergency manager, Detroit residents suffered the highest per capita tax burden in Michigan,¹⁵⁴ while the city had the lowest credit rating of any major U.S. city.¹⁵⁵ The city was not making pension payments as they became due,¹⁵⁶ and residents endured higher crime rates and lower levels of municipal services than comparable jurisdictions, both within Michigan and elsewhere.¹⁵⁷ Total municipal revenues in Detroit had declined approximately twenty percent between 2008 and 2013 (based on preliminary figures), so that, even while expenditures decreased, the municipal budget was in deficit in the hundreds of millions of dollars each year.¹⁵⁸ Some indication that residents disfavored the policies that generated these results is apparent from the fact that the city's population declined by twenty-six percent between 2000 and 2012.¹⁵⁹ One would have to make a heroic leap to conclude from these characteristics that elected city officials were implementing policies consistent with resident preferences.

Nor is Detroit atypical. If there is divergence between residents' preferences and the goods and services delivered at the city's current tax price, then, consistent with the assumptions of the Tiebout model, one would expect to see substantial exit from the locality preceding state takeovers. The data bear out that just such exit occurs.¹⁶⁰ Were the world

154. Proposal for Creditors, *supra* note 12, at 4.

155. *Id.* at 8.

156. *Id.*

157. *Id.* at 9–15 (summarizing selected data on Detroit's crime rates and municipal services, including emergency services response times and streetlights, and comparing to other Midwest cities).

158. *Id.* at 43 (tabulating Detroit municipal budget data from fiscal years 2008 through 2012).

159. *Id.* at 1 (providing overview of Detroit's demographic trends since 1960).

160. Between 1970 and 1980, New York City's population declined from 7,894,862 to 7,071,639, only to recover, along with the city's finances, to 7,322,564 by 1990. Campbell Gibson, Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990 tbls.20–22 (U.S. Bureau of the Census Population Div., Working Paper No. 27, 1998), available at <https://www.census.gov/population/www/documentation/twps0027/twps0027.html> (on file with the *Columbia Law Review*). Detroit's population of 713,777 in 2010 places it at less than half its size in 1970. See *id.* tbl.20; U.S. Bureau of the Census, Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2013 Population: April 1, 2010 to July 1, 2013 (2014), <http://factfinder2.census.gov/bkmk/table/1.0/en/PEP/2013/PEPANRSIP.US12A> (on file with the *Columbia Law Review*); see also Anderson, *New Minimal Cities*, *supra* note 143, at 1137 (noting cities in insolvency tend to be shrinking, with high levels of vacant or abandoned structures, and half of such cities have populations less than seventy-five percent of what they were in 1960).

Exit might exist without fiscal distress if a locality alters the bundle of goods and services in line with majoritarian preferences. Under those circumstances, residents whose preferences are no longer being served have incentives to relocate, even though the locality remains fiscally sound. Perhaps Boston under Mayor James Curley provides an example. Curley's policies were embraced by many Bostonians, though they induced many aristocratic residents to leave. The result was economic stagnation, but perhaps a stagnation that was not opposed by residents who remained. See Edward L. Glaeser &

to reflect the Tieboutian assumptions of costless mobility, even substantial exit would not be problematic because it would reflect migration to localities that offer the bundle of goods and services desired by each individual.¹⁶¹ Emigration from one locality would indicate only that it previously housed a population in excess of the optimal size.¹⁶² But in a world of costly mobility—the world in which we live—failure to exit does not necessarily reveal satisfaction with the existing bundle of goods and services that the municipality offers.¹⁶³ Indeed, where large numbers of residents are willing to incur the cost of exit, the appropriate inference from the Tiebout model might be that those who remain do so more because they are constrained by the costs of mobility—commitments to jobs or family, or personal financial conditions—than by satisfaction with the existing level of services.¹⁶⁴ To the extent that mobility increases with resources, exit will involve wealthier residents, thus exacerbating the fiscal distress for those who remain, since they are likely to be less able to obtain from the private market services that the municipality fails to deliver.

Of course, localities might suffer substantial exit notwithstanding that officials were faithfully complying with residents' electoral signals. A locality that suffers an exogenous shock, or that is the victim of a shift in the national economy or technological change, may simply be unable to recover. Ultimately, residents may simply leave, even without rancor toward political leaders.¹⁶⁵ Exit, therefore, serves only as evidence of a potential political failure. Other financial characteristics of distressed localities, such as fiscal opacity, may strengthen the inference from that evidence.

2. *Transparency and Preferences.* — If municipal officials make expenditures consistent with resident preferences, then one would expect budgets to be relatively transparent so that officials could demonstrate their fidelity to constituents and facilitate resident monitoring. Alter-

Andrei Shleifer, *The Curley Effect: The Economics of Shaping the Electorate*, 21 *J.L. Econ. & Org.* 1, 2 (2005) (defining Curley Effect as “increasing the relative size of one’s political base through distortionary, wealth-reducing policies”).

161. Tiebout, *supra* note 145, at 418 (“The consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods [T]he consumer-voter moves to that community whose local government best satisfies his set of preferences.”).

162. *Id.* at 420.

163. *Id.* at 423 (“Consumer-voters do not have perfect knowledge and set preferences, nor are they completely mobile.”); see also Gillette, *Equality and Variety*, *supra* note 143, at 959 (explaining why some dissatisfied residents do not emigrate).

164. Gillette, *Equality and Variety*, *supra* note 143, at 961 (“For better or worse, some persons live closer to the Tiebout world than others.”).

165. See Bruce Saxon, *Fall River and the Decline of the New England Textile Industry, 1949–1954*, 16 *Hist. J. Mass.* 54, 67–68 (1988) (explaining that loss of New England textile firms, which triggered decline in social services and exodus of northern textile workers to low-wage southern states, did not generate political reaction due to recognition of limited capacity to formulate local solution).

natively, officials may want to make expenditures transparent only to groups that are highly informed, in order to credibly commit that expenditures benefitting those groups were being made.¹⁶⁶ Conversely, one would expect opacity where local officials deviate from those preferences. Again, New York City prior to its fiscal crisis in the 1970s provides the exemplar. The crisis evolved in large part from longstanding practices of concealing cash flow difficulties that had emerged from budget shortfalls.¹⁶⁷ Funding periods for pension payments were extended and projected interest rates were overstated, thereby reducing the city's required payments.¹⁶⁸ The shifting of payments or receipts from one fiscal year to the next had the effect of crediting to a particular fiscal year more revenues than the city had actually received in a twelve-month period.¹⁶⁹ The city borrowed against uncollectible receivables.¹⁷⁰ Items were shifted from the operating budget to the capital budget to exploit greater borrowing authority for the latter.¹⁷¹ The existence of cash shortfalls was withheld from prospective creditors, arguably with the assistance, or inattention, of underwriters¹⁷² and bond counsel.¹⁷³ Given the lack of transparency provided to sophisticated investors who had the capacity and incentive to understand the city's financial position, there is little reason to believe that residents less schooled in the nuances of public budgeting would have been able to evaluate the city's financial position or to have ensured that expenditures were being made in a manner consistent with preferences or prudence.

New York's fiscal crisis provides the most thorough evidence of official misconduct preceding the imposition of a takeover board because it has been studied so thoroughly. Nevertheless, the fiscal mismanagement that underlay New York's decline does not appear to be unique among distressed jurisdictions.¹⁷⁴ Charles Coe's account of North Carolina's state takeovers involves municipalities whose officials failed to comply with

166. See Congleton, *supra* note 150, at 46–51 (finding knowledgeable voters most influence electoral results).

167. See Staff of SEC, 95th Cong., Rep. on Transactions in Sec. of the City of N. Y., ch. 1, at 1 (Comm. Print 1977) [hereinafter SEC Report] (investigating “‘unsound budgeting and accounting practices’ of the City of New York”).

168. Charles R. Morris, *The Cost of Good Intentions: New York City and the Liberal Experiment, 1960–1975*, at 132 (1980) (describing “budgetary gimmicks to defer the problem just a while longer”).

169. *Id.* at 133–34.

170. *Id.* at 134–35.

171. *Id.* at 135–36 (describing ways in which city eased budget pressures).

172. See SEC Report, *supra* note 167, ch. 4, at 16 (“The underwriters and the City were brought together in a series of meetings at which the fundamental concerns about the . . . City's budget gap and its constant need for new debt were aired in great detail.”).

173. *Id.* ch. 6, at 81–82 (describing role and responsibilities of municipal bond counsel).

174. See Beckett-Camarata, *supra* note 60, at 620 (describing factors affecting Ohio local governments' budget deficits).

balanced budget requirements, failed to collect property taxes, misappropriated state funds, and spent local funds for other than legally required purposes.¹⁷⁵ Detroit similarly appears to have overstated expected revenues, since it predicted balanced budgets on a regular basis, only to use short-term borrowing to fill revenue shortfalls each year.¹⁷⁶ Given the divergence between what local officials in these municipalities represented as their fiscal behavior and their actual fiscal behavior, the practices of elected officials within these jurisdictions may not have been more consistent with the objectives of local democracy than the interventions of a state takeover board that eliminated deficits, replaced opaque financial practices, and subsequently returned authority to elected local officials.

Indeed, lack of transparency in local budgeting appears to be evident in numerous recent municipal fiscal crises. The bankruptcies of Vallejo, California; San Bernardino, California; Stockton, California; and Detroit¹⁷⁷ have been attributed in large part to pension obligations: Pension benefits may be particularly susceptible to fiscal opacity, because they can provide salient benefits to one group, while the related costs are difficult for nonbeneficiaries to detect.¹⁷⁸ One discrete feature of pension obligations is that their costs can be deferred. In this way, officials who contract for them on behalf of the municipality can obtain immediate benefits, in the form of electoral support and labor peace from public sector unions, while any related tax costs imposed on residents need not be realized until the future. Even the current payments toward future obligations are subject to manipulation by the assumption of an aggressive rate of return. Many public plans assume an annual return of around eight percent, compared to an average of four percent to five percent in the private sector.¹⁷⁹ A report issued by Detroit's Auditor General and Inspector General in 2013 alleged the use of procedures inconsistent with sound pension practices and fiduciary responsibilities. These included the assumption of unrealistic interest rates that artificially

175. See Coe, *supra* note 62, at 44–45 (describing reasons for state takeovers).

176. See Proposal for Creditors, *supra* note 12, at 6 (tracking limited tax general obligation and accumulated deficit).

177. See *supra* note 13 (discussing various city bankruptcies); *infra* note 299 (discussing pension burdens leading to bankruptcy in Detroit).

178. See, e.g., Jack Beermann, *The Public Pension Crisis*, 70 *Wash. & Lee L. Rev.* 3, 31–33 (2013) (describing fiscal uses of pension arrangements); Juita-Elena Yusuf et al., *For the People: Popular Financial Reporting Practices of Local Governments*, *Pub. Budgeting & Fin.*, Spring 2013, at 95, 97–98 (noting even when information is available, it is not necessarily easy for ordinary citizens to understand).

179. Odd J. Stalebrink, *Public Pension Funds and Assumed Rates of Return: An Empirical Examination of Public Sector Defined Benefit Pension Plans*, 44 *Am. Rev. Pub. Admin.* 92, 94 (2012) (comparing discount rates of state governments to those of publicly traded companies).

reduced the city's apparent pension liabilities and the inclusion of overtime pay and bonuses in pension calculations and distributions.¹⁸⁰

The most extreme versions of budgetary opacity often take forms that amount to public corruption, which is difficult to reconcile with the attention to resident interests that local democracy is expected to engender. Pervasive corruption in the city government of Chelsea, Massachusetts, with the attendant demise of fiscal discipline, ultimately caused the state to appoint a receiver for the city. The receiver ultimately proposed an eleven-member city council with an appointed city manager to replace the previous mayoral system.¹⁸¹ Given the local electorate's approval of the plan,¹⁸² the consensus view that Chelsea's government prior to receivership had been dominated by bribery, and the substantial involvement of organized crime, it is difficult to conclude (though some do¹⁸³) that prereceivership Chelsea was more democratic than it was subsequently. Camden, New Jersey, and Detroit suffered long histories of official corruption prior to state takeovers.¹⁸⁴ The bankruptcy of Jefferson County, Alabama, was precipitated by political decisionmaking sufficiently infected by officials' self dealing to generate criminal convictions, an SEC settlement with underwriters, and the return of fees.¹⁸⁵

Of course, one might respond that even if fiscal distress emerges from incompetence, deliberate use of fiscal illusion, or even corruption that negates budgetary safeguards and service delivery preferred by residents, it does not follow that the remedy lies in the appointment of a

180. Mark Lockridge & James Heath, City of Detroit, Emergency Manager Order No. 8 Initial 60 Day Report 8–9 (2013), available at <http://www.detroitmi.gov/Portals/0/docs/OfficeInspGen/Reports/EMO8%20FINAL%20REPORT%20Sept%2026%202013%202.24.06%20PM.pdf> (on file with the *Columbia Law Review*) (noting irregularities in interest rates and overtime pay).

181. Berman, Local Government, *supra* note 94, at 120 (detailing receiver's efforts); Asha Ghosh Rao, Political Rush Hour on the Tobin Bridge: Receivership and the Redevelopment of Chelsea, Massachusetts 30–31 (May 20, 2002) (unpublished Master in City Planning thesis, Massachusetts Institute of Technology), available at <http://dspace.mit.edu/handle/1721.1/66399> (on file with the *Columbia Law Review*) (attributing local fiscal difficulties to involvement in organized crime by city officials and administrators, and use of receivership to alter decisionmaking structure indebted to criminals).

182. Chelsea voters approved a new charter sixty percent to forty percent. See Rao, *supra* note 181, at 38.

183. See Lyle Kossis, Note, Examining the Conflict Between Municipal Receivership and Local Autonomy, 98 Va. L. Rev. 1109, 1134 (2012) (“Even though democracy is ingrained in our political culture, municipal receivership is specifically designed to avoid it. The receivership in Chelsea, for example, was an attempt to bypass local elections that had ratified existing public union contracts.”).

184. See Gillette, Camden, *supra* note 129, at xii (describing Camden as “dangerous and inhospitable place marked by crime as well as corruption”); Pew Charitable Trusts, *supra* note 52, at 37 (noting three mayors were imprisoned in pretakeover Camden); Davidde A. Stella, Public Corruption Symposium: An Introduction, 52 Wayne L. Rev. 1351, 1352–53 (2006) (discussing high-profile prosecutions of public corruption in Detroit in 2005 and 2006).

185. See, e.g., *In re Jefferson Cnty.*, 474 B.R. 228, 239–40 (Bankr. N.D. Ala. 2012).

nondemocratic alternative. Part III discusses why normal politics may be unable to respond to these defects in the democratic process. However, assuming that residents do not prefer fiscal crisis, it is disingenuous to argue that the governance structures that have produced fiscal failure are accurately implementing the objectives of democratic representation. The failure of a democratic governance structure to provide services consistent with resident interests at least raises an important question: whether a less democratic regime, such as an appointed takeover board, could reproduce the substantive outcomes that would arise from an ideal democratic structure, reflect preferences of residents, and thus better approximate the results that would exist if the Tieboutian assumptions of perfect mobility could be realized.

This is not to denigrate the claim that democratic principles demand procedural rights of self-governance—including the right to elect imperfect officials—and that, as unelected bodies, takeover boards necessarily violate procedural democratic norms, regardless of the quality of services they deliver.¹⁸⁶ But even procedural justifications for local democracy that include objectives such as civic education or the promotion of civic virtue cannot be indifferent to substantive outcomes. Participation in governance, ranging from voting to serving as an official, may promote civic virtue in the sense that those who participate consider the interests of others. But at least some literature suggests a relationship between resident participation in municipal elections and institutional stakes in the outcome.¹⁸⁷ Higher voter turnout occurs when elections decide among policy alternatives.¹⁸⁸ Where localities are in financial straits sufficient to justify a state takeover, little is at stake, as a practical matter, simply because the combination of entrenched political structure and scarce resources precludes any meaningful policy choice.¹⁸⁹ If one

186. See, e.g., Robert A. Dahl, *Democracy and Its Critics* 163–75 (1989) (describing dispute regarding extent to which democratic process should have substantive limits).

187. See, e.g., Zoltan L. Hajnal & Paul G. Lewis, *Municipal Institutions and Voter Turnout in Local Elections*, 38 *Urb. Aff. Rev.* 645, 645–62 (2003) (describing relationship between voter turnout and institutional changes such as less outsourcing of municipal services); Curtis Wood, *Voter Turnout in City Elections*, 38 *Urb. Aff. Rev.* 209, 209–29 (2002) (describing contribution of institutional factors such as direct mayoral election to higher voter turnout in city elections).

188. See, e.g., Hajnal & Lewis, *supra* note 187, at 660–62 (concluding institutional features that tend to increase stakes of city elections also tend to increase turnout).

189. There is at least some anecdotal evidence that voter turnout is reduced during periods of fiscal distress. As New York endured its fiscal crisis during the 1970s, voter turnout diminished from the prior decade. See Charles Brecher et al., *Power Failure: New York City Politics and Policy Since 1960*, at 93–98 (1993) (showing diminished voter participation throughout 1970s); Frank Lynn, *Indifference Counted for Much*, *N.Y. Times*, Nov. 11, 1973, at 4 (showing New York turnout dropped more dramatically than other cities in area). Detroit saw a twenty-five percent turnout in its 2013 mayoral election, which exceeded turnout for 2009 but was significantly lower than any other mayoral election since the 1990s. See Zlati Mayer, *Voter Turnout Tops 25% in Detroit*, *Detroit Free Press* (Nov. 6, 2013), <http://www.freep.com/article/20131105/NEWS01/311050165/voter-turn>

takes seriously the Tiebout model's objective of allowing municipal residents to migrate to those jurisdictions that offer a preferred bundle of local public goods at a particular tax price, then this result is quite perverse. Financially distressed localities will have the least capacity to provide goods and services to residents whose mobility is constrained; thus, one might conclude that those localities are most in need of assistance to ensure that local residents receive at least a minimal level of desired municipal services.¹⁹⁰ Indeed, multiple doctrines of local

out-detroit-19-percent-absentee (on file with the *Columbia Law Review*). Vallejo, California, which filed for bankruptcy in 2008, saw turnout for its mayoral election dip to thirty-three percent in 2011, down from forty-six percent in the 2007 election. See Cal. Sec'y of State, Report of Registration as of January 1, 2008: Registration by Political Subdivision by County 175 (2008), available at <http://www.sos.ca.gov/elections/ror/ror-pages/154day-stwddirprim-08/politicalsub.pdf> (on file with the *Columbia Law Review*) (reporting 45,773 registered voters in Vallejo); Cal. Sec'y of State, Report of Registration as of January 3, 2012: Registration by Political Subdivision by County 161 (2012), available at <http://www.sos.ca.gov/elections/ror/ror-pages/154day-presprim-12/politicalsub.pdf> (on file with the *Columbia Law Review*) (reporting 54,908 registered voters in Vallejo); Solano Cnty. Registrar of Voters, November 8, 2011 Consolidated Districts Election Summary Results (Nov. 28, 2011), <http://www.solanocounty.com/civicax/filebank/blobdload.aspx?BlobID=12087> (on file with the *Columbia Law Review*) (reporting 18,225 votes cast in 2011 election for Vallejo mayor); Solano Cnty. Registrar of Voters, Vallejo Mayoral Recount: December 7, 2007, <http://www.solanocounty.com/civicax/filebank/blobdload.aspx?BlobID=2703> (on file with the *Columbia Law Review*) (reporting 19,875 votes cast in 2007 election for Vallejo mayor). Fremont, a nearby city in strong fiscal condition, enjoyed a turnout of 71.4% in 2012 local elections. City Clerk's Office, City of Fremont, Chronology of Elections 27 (2012), available at <http://www.fremont.gov/DocumentCenter/Home/View/583> (on file with the *Columbia Law Review*). San Bernardino also saw lower turnout after its bankruptcy filing in 2013; only sixteen percent of registered voters showed up in the 2014 mayoral election, a notable decline from the twenty-three percent voter turnout in its 2006 election. City of San Bernardino General Election February 4, 2014, San Bernardino Cnty. Elections Office of the Registrar of Voters, http://www.sbcounty.gov/rov/current_elections/020414/ElectionResults/defaultDNN.htm (on file with the *Columbia Law Review*) (last updated Feb. 11, 2014, 3:39 PM); San Bernardino Mayor Run-Off Election Results February 7, 2006, San Bernardino Cnty. Elections Office of the Registrar of Voters, http://www.sbcountyelections.com/Portals/9/Elections/Past_Elections/2006-02-07%20ElectionResults.pdf (on file with the *Columbia Law Review*) (last updated Feb. 16, 2006, 9:21 AM). By contrast, Irvine, a nearby city with a very healthy financial outlook, has had much higher voter turnout with sixty-eight percent voter participation in 2012. City Clerk's Office, City of Irvine, Municipal Election History: 1971–Present 1 (2012), available at <http://www.cityofirvine.org/civica/filebank/blobdload.aspx?BlobID=17609> (on file with the *Columbia Law Review*); cf. Lauren Jow, Irvine to Pay Off Unfunded Pension Liability 10 Years Early, Orange Cnty. Reg. (June 28, 2013), <http://www.ocregister.com/articles/city-514863-liability-year.html> (on file with the *Columbia Law Review*) (describing Irvine's healthy financial state).

Of course, numerous other factors (such as whether the election was in an even or odd year, wealth of residents, or demographic composition) preclude drawing strong conclusions from this information. But the data nonetheless indicate that voter interest in democratic participation is compromised when a city is in fiscal distress.

190. This is the core argument in Anderson, Democratic Dissolution, *supra* note 131, at 613–14, which notes that Michigan and Rhode Island's reliance on democratic dissolution without additional aid has resulted in "deep budget cuts and asset sales in some of the poorest communities in [those] states."

government law, such as the requirement of “equal service” provision, are best understood as legal efforts to bring about the results that would be generated if the assumptions of the Tiebout model could be realized.¹⁹¹ If state intervention can resolve political and fiscal concerns, the ultimate result may be to allow plausible choices among service-delivery options and thus to induce the kind of service delivery and public participation for which local autonomy is properly commended.

One might respond that local officials have been faithfully representing the preferences of their constituents but that those preferences are themselves inconsistent. Residents may, inconsistently but sincerely, prefer low taxes and high services, and municipal officials may simply be responding to such constituent irrationality.¹⁹² Alternatively, the multidimensional nature of municipal budgets implies that preferences for any given service are subject to cycling or intransitivity.¹⁹³ The very conception of majoritarian preferences for a municipality, therefore, arguably is misguided. Even the inevitable absence of unanimity or complete transitivity, however, does not predict fiscal chaos, as evidenced by the fact that few municipalities actually encounter severe fiscal distress. There is a substantial difference between the less-than-unanimous agreement on a multidimensional budget that complicates the concept of majority rule and the radical divergence between desired and provided services that characterizes localities that require state takeovers. Thus, even in an environment where residents disagree on the appropriate fiscal tradeoffs, one might still expect less mismanagement, corruption, fiscal opacity, and exit than in fiscally distressed localities. Finally, if fiscal distress is a function of inconsistent preferences, that might be an argument for less democracy rather than more, as electorally driven fidelity to a regime of high service levels and low taxes is unsustainable.

These responses necessarily engage, if not resolve, the racial and socioeconomic critiques of state takeovers that some commentators have offered.¹⁹⁴ These critiques constitute a subset of the general democratic critique insofar as they claim that takeover boards of relatively poor or predominantly minority cities disproportionately infringe on the right of

191. See Gillette, *Local Redistribution*, *supra* note 146, at 44 (noting local redistributive programs may be justified as promoting efficiency-enhancing benefits associated with Tiebout model); Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 *Harv. L. Rev.* 1662, 1712–47 (1979) (analyzing whether redistributive goals of equal service spending and proportional local taxation are likely to be achieved through interventionist judicial strategy).

192. Thanks to John Ferejohn for bringing this possibility to my attention.

193. See Kenneth A. Shepsle & Mark S. Bonchek, *Analyzing Politics* 49–81 (1997) (discussing complications in determining majority preferences where multiple issues are decided simultaneously).

194. See Philo, *supra* note 133, at 87 (maintaining “citizens have been disenfranchised from their local government” in each Michigan city where an emergency manager has been appointed.); *supra* text accompanying notes 128–138 (recounting critiques of takeover boards as antidemocratic).

racial minorities or socioeconomically disadvantaged groups to govern themselves.¹⁹⁵ As Anderson has forcefully demonstrated, fiscally distressed municipalities tend to provide fewer local public services of the nature that benefit those who are economically disadvantaged, and there appears to be significant overlap in distressed localities between racial minorities and the relatively poor.¹⁹⁶ The cogency of the racial and socioeconomic critique may depend, at least in part, on whether state takeover processes confer on those groups benefits closer to what they would demand through their votes than they received through more democratic procedures. That, in turn, may depend on whether takeover boards act benignly or can be constrained from acting in a self-interested manner, an issue addressed in Part IV. Moreover, if state takeover boards ensure that local services are provided in a manner consistent with resident preferences, then the possibility of discrimination in the provision of services based on race also dissipates, particularly in those distressed municipalities with a predominantly minority population.¹⁹⁷

B. *State Interests and Municipal Fiscal Distress*

Even if the conditions that generate local fiscal distress are consistent with the desires of local constituents, those conditions may impose adverse effects on nonresidents who themselves have no voice in the formation of the relevant local policies. The democratic critique of takeover boards ignores the possibility that the state has an obligation to redress those effects and that, in doing so, the state is entitled to constrain local autonomy. Even jurisdictions that embrace strong conceptions of local autonomy or constitutional home rule elevate state interests above municipal ones where the two are in conflict or where municipal action implicates areas of state concern.¹⁹⁸ While the boundaries of state preemption necessarily remain hazy, the degree of concern sufficient to justify the state's trump of local policies is typically predicated on the external consequences of local action. It is on that basis that courts have evaluated the viability of local autonomy over matters such as pollution controls,¹⁹⁹ minimum-wage requirements,²⁰⁰ or banking regula-

195. See Philo, *supra* note 133, at 103–05 (noting traditional economic disenfranchisement of racial and ethnic minorities disproportionately affected by Michigan and Rhode Island emergency manager appointments).

196. See Anderson, *New Minimal Cities*, *supra* note 143, at 1140–41, 1160–67 (describing racial and ethnic composition of distressed localities and disparate provision of public services).

197. Of the twenty-eight financially distressed municipalities that Anderson studies, sixteen had a predominantly minority population. See *id.* at 1140.

198. See, e.g., Baker & Gillette, *Local Government Law*, *supra* note 36, at 313–90 (discussing home rule policy and state preemption of local government regulations).

199. See, e.g., *Envirosafe Servs. of Idaho, Inc. v. Cnty. of Owyhee*, 735 P.2d 998, 1002 (Idaho 1987) (“[T]he field of hazardous waste disposal[] is fraught with such unique concerns and dangers to both the state and the nation that its regulation demands a statewide, rather than local, approach.”).

tions²⁰¹ that allegedly would burden nonresidents. If nonresidents would be significantly disadvantaged by local conduct, then allowing local policies to trump those of the state would itself generate an antidemocratic result insofar as affected nonresidents of the locality would have played no role in determining the local policy that was costly to them. In John Stuart Mill's more dramatic language, "[L]ocalities may be allowed to mismanage their own interests, but not to prejudice those of others" ²⁰²

The extent to which state takeover boards offend democratic principles, therefore, depends on an empirical inquiry into whether local fiscal distress would otherwise impose adverse effects beyond municipal boundaries, thus triggering the "state concern" exception present in even the strongest home rule provisions. At least one court has implicitly acknowledged such effects: The Rhode Island Supreme Court rejected a home rule challenge to a state appointed receiver for Central Falls on the grounds that the locality's "right to self-government granted under our state constitution is limited strictly to local matters,"²⁰³ and thereby implied that fiscal crisis could have extramural consequences.²⁰⁴

200. See, e.g., *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So. 2d 1098, 1100 (La. 2002) (holding local minimum wage requirement "abridges the police power of the state and is unconstitutional").

201. See, e.g., *Am. Fin. Servs. Ass'n v. City of Oakland*, 104 P.3d 813, 815 (Cal. 2005) (holding local predatory lending regulation preempted by similar state statute).

202. Mill, *supra* note 72, at 226.

203. *Moreau v. Flanders*, 15 A.3d 565, 580 (R.I. 2011). The court also appeared to rely on the general supervisory authority that states have over their political subdivisions, see *id.*, which was also the ground primarily used to uphold the appointment of a business administrator for Camden, New Jersey, in *City of Camden v. Kenny*, 763 A.2d 777, 782 (N.J. Super. Ct. App. Div. 2000). The Massachusetts Supreme Judicial Court reached a similar ruling with respect to the state's appointment of a receiver for the city of Chelsea. See *Powers v. Sec'y of Admin.*, 587 N.E.2d 744, 750–51 (Mass. 1992).

204. Certainly that is the explanation provided by state legislatures when they enact provisions that permit intervention in local fiscal affairs. The relevant Michigan statute provides an example:

The legislature finds and declares all of the following:

(a) That the health, safety, and welfare of the citizens of this state would be materially and adversely affected by the insolvency of local governments and that the fiscal accountability of local governments is vitally necessary to the interests of the citizens of this state to assure the provision of necessary governmental services essential to public health, safety, and welfare.

(b) That it is vitally necessary to protect the credit of this state and its political subdivisions and that it is necessary for the public good and it is a valid public purpose for this state to take action and to assist a local government in a financial emergency so as to remedy the financial emergency by requiring prudent fiscal management and efficient provision of services, permitting the restructuring of contractual obligations, and prescribing the powers and duties of state and local government officials and emergency managers.

Mich. Comp. Laws Ann. § 141.1543(3) (West 2014). A student commentator rejects the "state concern" justification on the grounds that "the existence and structure of local governments [is] a local issue . . . and does not threaten to impose meaningful

Where states take over distressed localities, plausible arguments for “state concern” arise from two sources. First, states may intervene in local fiscal distress by injecting capital to avoid the locality’s immediate cash flow difficulties. Doing so not only places state funds paid by nonresidents of the distressed locality at risk, but inherently creates moral hazard because municipalities that anticipate rescue by the state will be insufficiently deterred from incurring excessive liabilities.²⁰⁵ Second, capital markets may identify one locality’s fiscal distress with imminent financial difficulties in other localities of the same state and thus raise interest rates to the latter as well as to the former—a contagion effect.²⁰⁶ Each of these potential results suggests that state intervention in local governance is more justifiable than the democratic critique of state takeovers admits.

1. *State Capital Infusions and Moral Hazard.* — Most directly, relief of municipal distress requires capital infusions from the state.²⁰⁷ At the outset of New York’s efforts to relieve New York City’s fiscal crisis in the 1970s, the state first advanced \$800 million in state aid and then created MAC, which was authorized to issue \$3 billion in long-term bonds to refund New York City’s outstanding obligations and pay some of the city’s operating expenses.²⁰⁸ PICA borrowed \$475 million for the benefit of Philadelphia in 1992, more than half of which was used for reducing the city’s deficit.²⁰⁹ Michigan agreed to provide Detroit with \$137 million to provide liquidity after the city instituted a series of structural reforms.²¹⁰

Capital infusions do not necessarily reflect the state’s charitable instincts towards the distressed locality. If a municipality is unable to provide basic services to its residents, the state itself could be obligated, as a political if not a legal matter, to provide adequate funding for those purposes. New York State officials expressed concern that state finances would be strained by a New York City default, due largely to the state’s

externalities on neighboring cities”; moreover, if the fact that states create local entities makes this a “state matter,” then “state interference will always be warranted.” See Kossis, *supra* note 183, at 1122–23. But that analysis is based on a quite parsimonious description of the basis for state intervention, see *id.*, and ignores the possible spillover effects of local fiscal distress.

205. Cf. Nat’l Ass’n of State Budget Officers, *Municipal Bankruptcy & the Role of the States* (2012), available at <http://www.nasbo.org/sites/default/files/pdf/Municipal%20Bankruptcy%20%26%20the%20Role%20of%20the%20States.pdf> (on file with the *Columbia Law Review*) (describing states as cautious about stepping in for “fear that setting such a precedent will lower the incentive for other localities to manage their finances wisely and cautiously”).

206. See Pew Charitable Trusts, *supra* note 52, at 16 (describing “contagion” as concern that “distress in one city spreads to the state or other local governments”).

207. *Id.* at 19.

208. Shalala & Bellamy, *supra* note 108, at 1127–28.

209. Financial Control Boards, *supra* note 45, at 61 (statement of Bernard E. Anderson, Assistant Sec’y for Emp’t Standards, U.S. Dep’t of Labor).

210. Financial Stability Agreement, *supra* note 65, at 21.

obligation to absorb the costs of providing welfare to one million recipients.²¹¹ At the time that Massachusetts essentially reduced the role of elected officials of Chelsea to an advisory one, the state was funding more than half of the city's \$48 million budget and had just made a \$960,000 contribution to the city.²¹² But these capital contributions arguably imply the exercise of state control to ensure that funds collected from elsewhere in the state are not squandered by the political forces that generated local fiscal distress in the first instance. Just as a bank might wish to create a control mechanism that facilitates monitoring of funds loaned to a corporation, or a venture capitalist firm may demand a seat on the board of a firm to which it has provided funding, a state that finances a distressed municipality may demand a mechanism to ensure that municipal expenditures are consistent with expectations.²¹³

State injection of capital into distressed localities also raises the issue of moral hazard, because local officials who anticipate state bailouts unaccompanied by substantial personal costs have reduced incentives to avoid fiscal distress.²¹⁴ State oversight or displacement of local officials reduces moral hazard by imposing a penalty on any city that seeks financial aid from the state. Moreover, states provide funding contingent on the implementation of specific reforms, and the institution of a takeover board may be viewed as a signal to credit markets that necessary reforms will be implemented, because they lie within the control of the state rather than the city.²¹⁵

Both moral hazard and administrative oversight of state funds are illustrated by the powers of the EFCB. The EFCB possessed statutory authority to administer the fund into which city revenues were deposited, and to remove public officials who violated its policies.²¹⁶ The EFCB never exercised either of those powers,²¹⁷ but the very threat of draco-

211. See Lachman & Polner, *supra* note 98, at 132 (noting New York State officials believed state would be required to support New York City welfare recipients if city defaulted).

212. Berman, *Local Government*, *supra* note 94, at 119.

213. See, e.g., George G. Triantis, *Financial Contract Design in the World of Venture Capital*, 68 *U. Chi. L. Rev.* 305, 315 (2001) (reviewing Paul Gompers & Josh Lerner, *The Venture Capital Cycle* (1999)) (discussing various monitoring devices for banks and venture capitalists); see also George W. Dent, Jr., *Venture Capital and the Future of Corporate Finance*, 70 *Wash. U. L.Q.* 1029, 1077 (1992) (suggesting giving lenders seats on board in event of serious default reduces corporate opportunism).

214. See Robert P. Inman, *Transfers and Bailouts: Enforcing Local Fiscal Discipline with Lessons from U.S. Federalism*, in *Fiscal Decentralization and the Challenge of Hard Budget Constraints* 35, 48–49 (Jonathan Rodden et al. eds., 2003) [hereinafter Inman, *Enforcing*] (noting central governments that “adopt a tough no-bailout stance” deter local governments from counting on bailouts).

215. See, e.g., Gillette, *Camden*, *supra* note 129, at 197 (noting proposed bailout plan for Camden requires \$102 million in capital investment by state to be made only if tied to extensive management reform and savings).

216. Bailey, *supra* note 19, at 118–19.

217. *Id.* at 118.

nian measures may have limited the need to do so. The EFCB, however, threatened to reject a proposed settlement between the city and its teachers' union, notwithstanding that doing so imperiled potential investments by the union pension fund necessary to a state rescue plan.²¹⁸ In effect, the need to reduce moral hazard and enhance the credibility of promises to reform the city's finances transforms the appointment of a board that addresses those issues into the domain of state concern.

2. *State Concern and the Risk of Contagion.* — The second source of state concern is that local fiscal distress creates a risk of contagion in which other localities and perhaps the state itself bear costs of local insolvency.²¹⁹ At the extreme, the risk entails the closure of capital markets to both the state and its municipalities.²²⁰ At the very least, it is plausible that the costs of accessing those markets will increase for other localities in the state.²²¹ Access to capital markets is necessary both to smooth cash flows between the time when municipalities make expenditures and the time that they collect taxes and to raise funds for capital projects.²²² If fiscal distress in one locality adversely affects access to capital markets in other jurisdictions, the extramural effects are no less salient than the externalities associated with pollution, crime, or taxes that have tradi-

218. See Lachman & Polner, *supra* note 98, at 138–39, 144–45 (detailing terse negotiations between teachers' union and EFCB, with both sides threatening to withdraw from settlements needed to avoid New York City default).

219. See Pew Charitable Trusts, *supra* note 52, at 16 (“Closely related to the worry about lowered credit ratings as a motivating factor for state intervention is concern over a phenomenon called contagion, when distress in one city spreads to the state or other local governments.”).

220. Actions Taken, *supra* note 24, at 49 (“In the worst case, access to the bond market might be closed for [the state and its municipalities].”); Financial Control Boards, *supra* note 45, at 37 (noting investors became increasingly unwilling to purchase city's bonds starting in February and March 1975).

221. See Mike Cherney et al., Michigan's Saginaw County Postpones Debt Sale, *Wall St. J.* (Aug. 8, 2013, 7:34 PM), <http://online.wsj.com/article/SB10001424127887323977304579000760206400856.html> (on file with the *Columbia Law Review*) (reporting other Michigan counties postponed debt sale after Detroit bankruptcy); Kelly Nolan, Battle Creek, Mich. Delays Bond Sale, *Wall St. J.* (Aug. 5, 2013), <http://online.wsj.com/article/SB10001424127887323968704578650572754023926.html> (on file with the *Columbia Law Review*) (noting similar information for other Michigan municipalities); Kelly Nolan & Ben Kesling, Michigan County Pulls Bond Offering, *Wall St. J.* (Aug. 1, 2013), <http://online.wsj.com/article/SB10001424127887323681904578642153798696788.html> (on file with the *Columbia Law Review*) (noting same for Genesee County, Michigan); Kelly Nolan, Muni Investors Make Michigan Pay, *Wall St. J.* (Aug. 14, 2013), <http://online.wsj.com/article/SB10001424127887323455104579013151393668482.html> (on file with the *Columbia Law Review*) (“Detroit's bankruptcy has sparked concerns that municipal bonds may not be as safe as many investors once assumed.”).

222. See Robert S. Amdursky et al., *Municipal Debt Finance Law* 9–14, 45–46 (2d ed. 2013) (explaining use of municipal debt to finance capital expenditures and to regulate cash flow).

tionally justified state trumps of local policies.²²³ Certainly state officials seize on the adverse consequences of local fiscal distress for borrowing costs of other jurisdictions when they authorize oversight of the affected locality. For example, the statutory scheme for resolving the Orange County, California, bankruptcy began with a recital that “[i]t is in the interest of the state and all public debt issuers within the state to enable the County of Orange to finance an acceptable plan of adjustment in order to improve the credit standing of California public debt issuers and to preserve and protect the health, safety, and welfare of the residents of the county and the state.”²²⁴ New York’s bailout plan of New York City was largely predicated on claims that the city’s default would affect the credit of other localities in the state.²²⁵ Indeed, New York’s efforts to obtain federal assistance for New York City relied on assertions that other states and the federal government itself would suffer financial repercussions of the city’s bankruptcy.²²⁶

Of course, state officials may be employing the threat of contagion as a pretext for expanding their own jurisdiction rather than to address a real threat to the finances of nondistressed localities.²²⁷ That explanation seems all the more plausible if one concludes that capital markets are sufficiently sophisticated to distinguish between fiscally distressed localities and their more secure neighbors. Nevertheless, there is at least some empirical evidence that contagion beyond the distressed locality exists and anecdotal evidence that states perceive the possibility of contagion and intervene to prevent it.²²⁸ Michigan municipalities saw borrowing costs increase in the wake of the Detroit bankruptcy.²²⁹ New York State’s

223. See *supra* text accompanying notes 154–159 (describing decline in Detroit’s municipal revenues, and associated consequences, despite higher per capita tax burden and lower interest rate).

224. Cal. Gov’t Code § 30400(a) (West 2008).

225. Lachman & Polner, *supra* note 98, at 132.

226. *Id.* at 152–58 (indicating efforts by New York officials to demonstrate consequences of New York City default on value of the dollar and borrowing by other states and cities).

227. See Clayton P. Gillette, *The Tendency to Exceed Optimal Jurisdictional Boundaries*, in *The Tiebout Model* at Fifty 264, 267–69 (William A. Fischel ed., 2006) [hereinafter *Tiebout Model*] (discussing appropriate allocation of governmental responsibility in federal systems).

228. For a general discussion of contagion from default in municipal markets, see generally Clayton P. Gillette, *Fiscal Federalism, Political Will, and Strategic Use of Municipal Bankruptcy*, 79 *U. Chi. L. Rev.* 281, 302–08 (2012) [hereinafter *Gillette, Fiscal Federalism*] (discussing evidence of and expected reactions to contagion risk); see also Inchang Hwang et al., *Contagion Effects of the U.S. Subprime Crisis on International Stock Markets* 8–11 (Jan. 13, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1536349> (on file with the *Columbia Law Review*) (using stock indices to examine financial contagion).

229. See Mary Williams Walsh, *Woes of Detroit Hurt Borrowing by Its Neighbors*, *N.Y. Times: Dealbook* (Aug. 8, 2013, 7:55 PM), <http://dealbook.nytimes.com/2013/08/08/detroit-blocks-other-cities-from-bond-market> (on file with the *Columbia Law Review*)

intervention in New York City's fiscal crisis in the 1970s was largely motivated by concerns that a state default would inevitably follow from a city default and instances of reduced investor interest in New York investments.²³⁰ The unsuccessful efforts by Alabama to forestall the state's most populous county from declaring bankruptcy were in part attributed to the consequences of default for the rest of the state.²³¹

The combination of state contribution, moral hazard, and contagion complicates the claim that state takeovers violate principles of local autonomy or democratic decisionmaking. The use of takeover boards to neutralize these negative spillovers of local fiscal distress suggests that their appointment is intended to serve the interests of the state, not the distressed locality alone. Of course, conflict between serving the locality and the state is not absolute. Reducing the risk of local default benefits all stakeholders because it reduces borrowing costs. But, as explored in greater depth in Part IV, some tension remains insofar as resolving distress requires sacrificing the interests of one set of stakeholders to those of another. A decision to renegotiate outstanding debt, backed by a threat of bankruptcy, might benefit residents at the expense of bondholders, while a decision to honor all debt contracts in full but to reduce pension payments or service levels would allocate losses to retirees or residents. Takeover boards might be thought to have nondemocratic characteristics to the extent that they strike the balance among stakeholders differently than elected local officials would. But whether that conclusion implicates a democratic deficit becomes more contestable if the constituencies to which takeover boards appropriately respond include groups other than residents of the distressed locality.

At the very least, one might conclude that any state intervention should take a form that imposes the least restrictive constraints on local autonomy. That principle might point in favor of takeover boards limited to approval rights over budgets rather than displacement of elected officials. But the dictatorial features of displacement may provide more effective remedies against moral hazard and recidivism than approval authority alone. Approval authority appears relatively attractive because it allows the locality to operate largely within the realm of normal politics. As noted above, approval authority does not entail interventions in

(describing other Michigan municipalities' increased borrowing costs due to Detroit's bankruptcy).

230. See Lachman & Polner, *supra* note 98, at 89, 131–32 (discussing overwhelming pressure on state legislature to bail out New York City due to state default risk). A former comptroller of New York State testified before Congress that New York City's bankruptcy would have caused fiscal disaster within the state. Financial Control Boards, *supra* note 45, at 44 (statement of Edward V. Regan, former Comptroller of N.Y.State).

231. See Mary Williams Walsh & Campbell Robertson, *Just Before Deadline, County in Alabama Delays Bankruptcy Move*, *N.Y. Times* (July 28, 2011), <http://www.nytimes.com/2011/07/29/business/economy/alabamas-jefferson-county-postpones-a-decision-on-bankruptcy.html> (on file with the *Columbia Law Review*) (noting Alabama's governor was told Jefferson County's bankruptcy would have negative impact statewide).

expenditure decisions or restructure the process by which decisions are made. But suspension of normal politics could be precisely what is required to avoid financial distress because existing institutions are entrenched in ways that preclude structural changes necessary to avoid recidivism. It is to that possibility that this Article now turns.

III. TAKEOVER BOARDS AND STRUCTURAL CHANGE

Ultimately, the propriety of takeover boards depends, at least in part, on the success with which they can redress the causes of fiscal distress. This Part considers the causes discussed above and the reasons why an appointed, indeed dictatorial, takeover board may be better positioned to resolve the underlying issues of fiscal instability than more democratic alternatives. As noted above, takeover boards are neither necessary nor utilized where fiscal distress is the result of general economic conditions disaggregated from local policies or from exogenous shocks to the local economy.²³² Takeover boards, however, may be appropriate where fiscal distress is a consequence of longstanding budgetary practices that result from an entrenched political system less capable than effective democratic systems of necessary reform. Indeed, the manipulation of democratic procedures by local officials may be responsible for the conditions that ultimately cause distress.

The next section describes how fragmented decisionmaking permits multiple groups to have access to budgetary decisions but provides no effective overall fiscal discipline on the system. Such a system operates democratically, in the sense that constituents have opportunities to elect and then to influence their officials. But that very feature of openness allows groups with organizational advantages and disproportionate influence to encourage increasing expenditures for their favored projects without offsetting efforts to maintain revenues. One solution to such a state of affairs is the creation of a more centralized budgetary process that internalizes both the costs and benefits of all revenue and expenditure decisions. Indeed, there is some evidence that localities that employ more centralized budgetary processes exercise greater fiscal responsibility.²³³ A takeover board represents just such a defragmented budgetary body.

The subsequent section of this Part suggests a more radical role for takeover boards. If governmental structure is associated with fiscal distress, then deploying a temporary dictatorship may permit resolution of the current crisis. But that action alone is unlikely to resolve the long-term difficulties of an entrenched political system. Instead, one might rationally anticipate that, left intact, that same structure will lead to

232. See *supra* text accompanying notes 72–82 (discussing situations where state monitoring without interference is appropriate or preferred).

233. See *infra* text accompanying notes 238–242 (discussing how fragmentation may result in less fiscal control).

renewed fiscal distress within a relatively short period of time after dissolution of the takeover board. At the same time, the entrenched political system accountable for fiscal distress lacks incentives to create the structural reforms associated with fiscal stability. Thus, the Part concludes with a recommendation that takeover board authority include restructuring of the local government to create more centralized fiscal decisionmaking. Local residents would ultimately be entitled to amend these powers through revision of the city charter. But their opportunity to do so would arise only after they had been exposed to the more centralized, and arguably more fiscally responsible, system imposed by the takeover board.

A. Fragmentation as a Cause of Fiscal Distress

As with the appointment of Roman dictators, the case for a state takeover to approve or disapprove the policies of elected officials implies the existence of structural obstacles that are not amenable to remedy through normal politics. Indeed, the suspension of normal politics signifies that it is the source of fiscal distress rather than its solution.²³⁴

Why might that be the case? One potential answer lies in the external effects of fiscal distress. Local officials who are accountable only to residents have little incentive to consider the geographical externalities of local fiscal policy on neighbors. As noted above, that is the basis for subordinating local autonomy to the state when the external effects of

234. The distrust of normal politics is evident in the appointment of nonpolitical actors to state takeover boards. Famously, the original members of MAC included Felix Rohatyn, a senior partner at the investment banking firm Lazard Frères. But the other members included Simon Rifkind, a former federal judge and law firm partner; the former Secretary of the U.S. Department of Housing and Urban Development; a political science professor; the head of New York Telephone; a stock broker; an investment banker; and the head of a New York City-based business. See Bailey, *supra* note 19, at 27 (discussing history of MAC membership). Current directors of the Nassau County Interim Finance Authority include representatives from banking, investment banking, law, and business consulting. NIFA Directors, Nassau Cnty. Interim Fin. Auth., <http://www.nifa.state.ny.us/directors.html> (on file with the *Columbia Law Review*) (last visited Aug. 31, 2014). Emergency managers in Michigan cities have included a former General Motors officer (in charge of personnel administration) turned private equity manager; a former chief financial officer of Detroit; a former city manager and president of a firm providing services to municipalities; and the head of a firm providing statistical services to underwriters of municipal bonds. See, e.g., Dave Herndon, Detroit: Allen Park Emergency Manager Wins Award from Michigan Municipal League, *News-Herald* (Nov. 22, 2013), <http://thenewsherald.com/articles/2013/11/22/news/doc528e31485d147169208086.prt> (on file with the *Columbia Law Review*) (discussing city manager's role in emergency management of Ecorse, Michigan); see also Amy Lane, Crain's Detroit Business, Former GM Exec Roy Roberts to Succeed Robert Bobb as Detroit Schools' Financial Manager, *Crain's Detroit Bus.* (May 4, 2011, 2:22 PM), <http://www.crainsdetroit.com/article/20110504/FREE/110509948/former-gm-exec-roy-roberts-to-succeed-robert-bobb-as-detroit-schools> (on file with the *Columbia Law Review*) (describing appointment of GM official to emergency manager board).

local decisionmaking become significant.²³⁵ But those same officials, whose interests are limited by the time horizon of the next local election, are also likely to ignore temporal externalities. Local officials have incentives to spend in excess of revenues to the extent that marginal expenditures generate short-term personal gains and officials have the capacity to defer reduction of deficits.²³⁶ Officials who can obtain immediate benefits from issuing debt (for example, job creation and political support from beneficiaries of bond proceeds) have incentives to overstate both the need for the capital expenditures and the prospects for repayment, since any difficulties concerning debt service are likely to arise only in the distant future.²³⁷ In short, the parochial incentives of individual officials may limit the extent to which normal politics internalize the interests of stakeholders who are not current residents of the locality.

Ultimately, however, the more compelling reason for circumventing normal politics lies in the possibility that fiscal distress emerges from the very political environment that the most intrusive takeover boards displace. Commonly, fiscal distress is attributed to a fragmented local decisionmaking structure, though there is some variance in the meaning of the term.²³⁸ As used in this Article, fragmentation essentially entails a

235. See *supra* notes 228–231 and accompanying text (discussing real or perceived contagion effect and resultant impact on policies).

236. See Richard Briffault, Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law, 34 Rutgers L.J. 907, 917–18 (2003) (arguing constitutional limits on government debt may be justified as necessary check on officials' incentives to overspend on short-term investments at expense of future generations).

237. See Amdursky et al., *supra* note 222, at 207–09 (concluding short-term electoral benefits of capital projects drive local officials to pay “scant attention” to long-term effects of debt financing); Clayton P. Gillette, Direct Democracy and Debt, 13 J. Contemp. Legal Issues 365, 391–92 (2004) (discussing incentives for current residents to favor overinvestment in debt at expense of future residents).

238. See Wallace S. Sayre & Herbert Kaufman, *Governing New York City: Politics in the Metropolis* 710–12 (1960) (describing city government as system of core groups and satellites with authority to legitimize or influence expenditure decisions); Robert P. Inman & Michael A. Fitts, Political Institutions and Fiscal Policy: Evidence from the U.S. Historical Record, 6 J.L. Econ. & Org. (Special Issue) 79, 81–83 (1990) (contending “decentralized legislature” leads to situation in which “[w]ithout suitable incentives to consider the implications of their actions on all other elected representatives, each ‘player’ adopts an own-best political strategy, which together may harm the legislature’s collective benefit”); Kimhi, Chapter 9, *supra* note 34, at 378–79 (“[F]ragmentation measures the degree to which the cost of a dollar of aggregate expenditure is internalized by the individual decisionmaker in the government.”); Kimhi, *Four Cities*, *supra* note 34, at 892–93, 914–17 (attributing political fragmentation to “number of decision makers that participate in the budgetary process” and “procedure by which fiscal policy is ultimately decided”); Andrés Velasco, Debts and Deficits with Fragmented Fiscal Policymaking, 76 J. Pub. Econ. 105, 106 (2000) (explaining fragmented decisionmaking involves process in which “each of the interest groups can influence fiscal authorities to set net transfers on the group’s target item at some desired level”); Guntram B. Wolff, *Fiscal Crises in U.S. Cities: Structural and Non-Structural Causes* 11, 17 (Ctr. for European Integration Studies, Univ. of Bonn, Working Paper No. B 28-2004, 2004), available at <https://www.econstor.org/>

budgetary system in which fiscal policy is decentralized in a manner that allows a decisionmaker to determine expenditures without simultaneously internalizing their costs.²³⁹ Instead, the municipal budget constitutes a common pool from which each decisionmaker may extract benefits while costs are shared with other participants in the pool.²⁴⁰ For example, it may be that there are multiple points of access and review before a decision concerning any proposed expenditure is finalized. These points may involve executive and legislative decisions, as where an executive agency's ability to allocate funds within its budget is subject to legislative or city council approval. Alternatively, fragmentation may involve a decision wholly within one particular branch, but in which multiple members of that branch are entitled to vote on an expenditure, as where expenditures in one city district are contingent on approval by representatives from multiple different districts. In either case, the multiplicity of actors involved in the decisionmaking process has various effects.

Some of these effects are positive. For example, the need to obtain simultaneous consent from different branches of government with different constituencies can serve as a check against distorted decisions serving only the interests of a single branch.²⁴¹ As David Schleicher has argued, however, checks and balances between executive and legislative bodies are less likely to be effective at the local level because one party

eu/dspace/bitstream/10419/39523/1/478945442.pdf (on file with the *Columbia Law Review*) (discussing effects of decentralization and fragmentation on fiscal policymaking).

239. See, e.g., Roberto Perotti & Yianos Kontopoulos, *Fragmented Fiscal Policy*, 86 *J. Pub. Econ.* 191, 194 (2002) (defining fragmentation as "degree to which the costs of a dollar of aggregate expenditure are internalized by individual fiscal decision-makers"); accord Kimhi, Chapter 9, *supra* note 34, at 378–79 ("[F]ragmentation measures the degree to which the cost of a dollar of aggregate expenditure is internalized by the individual decisionmaker in the government.").

240. See Perotti & Kontopoulos, *supra* note 239, at 195 (discussing common pool problem); see also Robert Elgie & Iain McMenamin, *Political Fragmentation, Fiscal Deficits and Political Institutionalisation*, 136 *Pub. Choice* 255, 255–56 (2008) (discussing political fragmentation hypothesis and common pool problem as explanation for fiscal performance).

241. See, e.g., Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 *Duke L.J.* 679, 760 (1997) (concluding constitutional allotment of powers and process of legislation encourage argument "designed to maximize the chance that national policy would balance and reflect the priorities of all these constituencies, not merely the values of one"). Alexander Hamilton justified a bicameral legislature in part on the grounds that different governmental bodies would serve different constituencies and thus prevent the government as a whole from advancing only narrow interests. The *Federalist No. 60*, at 368 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("But [what] will be likely to have the greatest influence [in preventing federal government from distorting elections schemes to favor certain classes], will be the dissimilar modes of constituting [different parts of] government . . . [T]here would be little probability of a common interest [cementing] different branches in [such] a predilection . . .").

likely controls both branches.²⁴² Thus, at the local level, the negative implications of fragmentation may predominate.

In this sense, all multimember decisionmaking bodies reflect a degree of fragmentation. But, of course, fragmentation does not necessarily generate fiscal distress. At most, it creates conditions in which that distress can materialize. Fiscal crises arise when political competition among interest groups for scarce resources, which is supposed to occur through normal politics subject to budgetary constraints, is displaced by a political system in which potential expenditures are treated as cumulative, and in which structural constraints to promote fiscal discipline, such as borrowing limitations, are neglected to fund deficits.²⁴³ The possibility that interest groups will not compete, but will instead support (or at least not oppose) each other's demands, emerges from the presence of nebulous budget constraints and the indifference of public officials to inefficient expenditures because they are spending public money rather than their own, and because their personal compensation (both monetary and intangible) is not based on efficient expenditures.²⁴⁴ While even profligate local officials presumably face some budget constraints in the form of tax or debt limitations, as well as monitoring by political opponents, good government groups, or state officials, the fuzzy nature of those constraints provides substantial latitude for municipal officials who can exploit the ambiguous definitions of debt and taxes subject to limitations, and the availability of off-budget expenditures.²⁴⁵ The Madisonian dream of public interest emerging from offsetting factions is then supplanted by what Richard Stewart has termed "Madison's Nightmare": factions dividing an expanded pie in which each group receives an enlarged slice.²⁴⁶

Whether fiscal distress actually materializes from fragmented budgetary processes, therefore, largely depends on the manner in which municipalities respond to the demands of well organized, politically preferred groups that have access to different agencies involved in the

242. See David Schleicher, *I Would, but I Need the Eggs: Why Neither Exit nor Voice Substantially Limits Big City Corruption*, 42 *Loy. U. Chi. L.J.* 277, 291 (2011) (discussing likelihood separation of powers is effective check on local government).

243. See Inman, *Enforcing*, *supra* note 214, at 150–51 (listing institutions needed to control deficit behavior).

244. See, e.g., Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 *U. Chi. L. Rev.* 345, 347–48 (2000) (describing how incentives of public officials are skewed because they are not spending personal funds).

245. See, e.g., Alberto Alesina & Roberto Perotti, *Fiscal Discipline and the Budget Process*, 86 *Am. Econ. Rev. (Papers & Proc.)* 401, 401–04 (1996) (discussing factors preventing budget deficits); see also Briffault, *supra* note 236, at 950–52 (discussing tax and expenditure limitations); M. David Gelfand, *Seeking Local Government Financial Integrity Through Debt Ceilings, Tax Limitations, and Expenditure Limits: The New York City Fiscal Crisis, the Taxpayers' Revolt, and Beyond*, 63 *Minn. L. Rev.* 545, 546–55 (1979) (discussing traditional controls on local government finance).

246. Richard B. Stewart, *Madison's Nightmare*, 57 *U. Chi. L. Rev.* 335, 342 (1990).

budgetary process. That may occur, on the demand side, if interest groups can obtain support for projects that return net benefits for their members, notwithstanding that they impose net costs on the municipality. Familiar examples include developers who seek support for proposed projects from city council members in the affected district, or parents who lobby for a playground in their district, even if other areas are less well served. While it might be in the interest of the locality to have the decisionmaking body reject projects that generate net costs, the dynamics of local democracy in a fragmented system suggest that the local legislature is likely to approve a greater than optimal number of projects rather than to reject the inefficient ones. That, at least, may be the case if the decisionmaking body, such as a city council that comprises representatives elected from separate districts, deteriorates into a cooperative logrolling game in which each member supports projects useful in colleagues' districts in return for reciprocal support of projects in the member's own district, regardless of the disutility of any of the projects from the perspective of the locality as a whole.²⁴⁷ No member will desire to risk his or her own preferred projects by voting against those that are self-interestedly supported by representatives of another district. The result is a net increase in local expenditures without offsetting benefits in local value.²⁴⁸

Alternatively, fragmentation may have consequences on the supply side where public expenditures are made by agencies with substantial discretion over their budgets, but without the incentive to internalize the consequences of their decisions for the entire municipal budget. Decisionmakers who are authorized, for instance, to enter into long-term arrangements may commit the future resources of the municipality without the obligation to generate offsetting revenues or identify programs that will require reduction to avoid budgetary excess. For example, much of the criticism of municipal asset sales or privatization of municipal revenues focuses on the likelihood that municipalities will strike deals that favor politically advantaged private entities rather than that return an

247. See, e.g., Reza Baqir, *Districting and Government Overspending*, 110 *J. Pol. Econ.* 1318, 1318–20 (2002) (finding city governments with many districts often engage in pork barrel projects); Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 *Va. L. Rev.* 625, 635–41 (1994) [hereinafter *Gillette, Expropriation*] (discussing social cost of logrolling); Robert P. Inman, *Finances: Financing City Services*, in *Making Cities Work* 328, 332 (Robert P. Inman ed., 2009) [hereinafter *Inman, Financing*] (discussing council gridlock).

248. See Baqir, *supra* note 247, at 1346 (claiming district systems lead to more government spending); Barry R. Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 *Am. J. Pol. Sci.* 245, 259–60 (1979) (concluding legislators have incentive to follow reciprocity rule when voting for projects). For general treatments and literature reviews, see generally Roberto Ricciuti, *Political Fragmentation and Fiscal Outcomes*, 118 *Pub. Choice* 365, 365–74 (2004) (reviewing and expanding upon literature focused on political fragmentation).

optimal price to the locality.²⁴⁹ Long-term debt incurred for specific projects necessarily has this feature because it requires localities to pay principal and interest for substantial periods, even if the project financed with the proceeds of debt turns out to be unnecessary or undesirable.²⁵⁰

Fragmentation thus underlies the model of urban governance captured in Wallace Sayre and Herbert Kaufman's classic study of New York City governance in the 1960s: "a system of isolated decision centers growing around functional issue areas, each dominated by a particular functional elite who resist[s] central control and external threats to their own dominance, all operating in a social environment of diverse political identities and a maldistribution of political influence."²⁵¹ Within such a system, bureaucrats and elected officials with budgetary discretion have incentives to deliver services inefficiently either to maximize budgets or to assist clients who provide electoral support or post-public-service opportunities rather than net local benefits.²⁵² The result is the use of public funds to redistribute wealth to groups that are able to exercise disproportionate influence in the budgeting process.²⁵³

This is not to say that localities should not engage in any redistribution. Some redistributive policies, such as tax abatement programs that generate jobs or adult education classes that invite immigrant populations necessary to fill jobs or to occupy vacant housing, attract residents and capital that will enhance the value of the locality.²⁵⁴ Some municipal-

249. See Anderson, *New Minimal Cities*, supra note 143, at 1168–69 (illustrating such deal as occurred in Chicago in 2008); Julie A. Roin, *Privatization and the Sale of Tax Revenues*, 95 *Minn. L. Rev.* 1965, 2018–21 (2011) (discussing Chicago Skyway transaction that favored politically advantaged private entity).

250. See Gillette, *Fiscal Federalism*, supra note 228, at 288–89 & n.27 (citing *State v. City of Lakeland*, 16 So. 2d 924, 925 (Fla. 1944) (holding city is obligated to use its resources and taxing power for full and prompt payment of principal and interest of debt obligation)).

251. Bailey, supra note 19, at 146 (summarizing Sayre & Kaufman, supra note 238).

252. See, e.g., William A. Niskanen, Jr., *Bureaucracy and Representative Government* 29 (1971) (explaining behavior of bureaucrats through their incentives). Tests of Niskanen's theory of bureaucracy have generated a bit of a cottage industry, though results are inconclusive. See, e.g., Dennis C. Mueller, *Public Choice* III 362–68 (2003) (modeling bureaucracy's ability to maximize budgetary funding).

253. Although the term "redistribution" is frequently associated with the transfer of funds from the wealthy to the poor, inefficient redistribution may take the form of transfers to the relatively wealthy, such as through tax abatements for development that might have occurred even without government subsidy or transfers to groups that can provide electoral support either in terms of funds (real estate developers) or in terms of votes (public sector unions). See Gillette, *Local Redistribution*, supra note 146, at 102–05 (exploring concept of malign redistribution not designed to enhance local welfare).

254. Glaeser and Shapiro, for example, conclude that cities that attracted immigrants in the 1990s grew faster than cities that did not. Edward L. Glaeser & Jesse M. Shapiro, *City Growth and the 2000 Census: Which Places Grew, and Why* 12 (2001), available at <http://www.brookings.edu/es/urban/census/whygrowth.pdf> (on file with the *Columbia Law Review*). Gianmarco Ottaviano and Giovanni Peri find that persons born in the United States who live in culturally diverse cities with higher proportions of foreign born residents

ities enjoy sufficient agglomeration economies that they can engage in redistribution without significant risk that net payers will migrate to more hospitable jurisdictions.²⁵⁵ Regardless of the beneficiary, however, redistribution that does not redound to the net benefit of the locality is likely to induce net contributors to the tax base of the locality to exercise exit options and generate a downward spiral into fiscal distress.

The concern for fragmentation is consistent with Martin Shefter's²⁵⁶ and Charles Morris's²⁵⁷ analyses of the origins of New York City's fiscal crisis in the 1970s and Ester Fuchs's explanation for the different fiscal histories of New York and Chicago.²⁵⁸ Shefter attributes the deterioration of New York's finances to the prior efforts of mayors to maintain their political coalitions by directing municipal funds to projects that would assist the component groups. These included public service unions who benefited from generous contracts. When new groups, primarily relatively poor racial minorities, attained political access in the 1960s, they also received substantial shares of the municipal budget. Expenditures to the new influential groups, however, did not substitute for expenditures to those groups that had previously attained political access. Rather, both existing and new groups received appropriations, a result that could not be achieved with current revenues alone and that ultimately was financed with borrowed funds rather than tax increases.²⁵⁹ Shefter reports that expenditures for welfare services increased 940% between 1961 and 1976, while open enrollment for the City University of New York required an increase in expenditures of 1,224% for higher education during that period. At the same time, expenditures for police, fire, sanitation, and education (other than higher education) increased 277%, 217%, 178%, and 305%, respectively.²⁶⁰ Shefter contends that public sector unions protected the interests of current members at a time when pressures existed to increase the number of nonwhites on the municipal payroll.²⁶¹ As a result, the size of the municipal workforce increased almost 50% between 1961 and 1975, and the average cost per employee almost tripled.²⁶² These expansions resulted in unsustainable increases in expenditures. Clearly, the argument here is not that traditionally disenfranchised groups lacked entitlement to share in

pay higher rents and are paid higher wages than those living in more homogeneous cities. Gianmarco I. P. Ottaviano & Giovanni Peri, *The Economic Value of Cultural Diversity: Evidence from U.S. Cities*, 6 *J. Econ. Geography* 9, 39 (2006).

255. See Gillette, *Local Redistribution*, *supra* note 146, at 96–102 (“[A]gglomeration economies constrain the location decisions of firms in the same way that proximity to a natural resource or more costly transportation networks did in an earlier era.”).

256. Shefter, *supra* note 43.

257. Morris, *supra* note 168.

258. Fuchs, *supra* note 43.

259. Shefter, *supra* note 43, at 105–24.

260. *Id.* at 114.

261. *Id.* at 117.

262. *Id.*

municipal largesse. Rather, the argument is that, in meeting the demands and needs of those groups, the city failed to find a responsible means of paying for that expansion, either by reductions in spending elsewhere or by increases in taxes.

Morris offers a more benevolent story that relies on ideological preferences rather than political influence, but that generated the same result of an overextended budget in which benefits to newly preferred groups were not offset by budgetary reductions elsewhere. According to Morris, expenditures in New York City increased in the period before the fiscal crisis in order to satisfy philosophical and political objectives of redistribution rather than as a concession to powerful interest groups. Morris argues that neither the underlying motivations for, nor the amounts of expenditures to, particular groups were idiosyncratically high in New York.²⁶³ Rather, they were indicative of national movements in favor of public-sector unionization and the expansion of welfare services for the relatively poor (for which New York City bore a disproportionate cost relative to other cities). Nevertheless, Morris also notes that political deals motivated by a desire to obtain electoral support explained expansion of the police and sanitation forces and the use of financial gimmicks and less salient forms of compensation to public employees (higher pensions and fringe benefits²⁶⁴) to make the costs of labor agreements less transparent.²⁶⁵

Fuchs tells a complementary story about the relative ability of Chicago to avoid New York's fate in the 1970s. She suggests that mayors in cities with strong party systems are able to set the fiscal agenda without fear that dissatisfied interest groups—ranging from developers to public unions to organized communities—will be able to impose political costs, because mayoral control over patronage swamps the influence of those groups. Mayors in cities with weak party systems, on the other hand, require electoral support from groups over which they have less control or can less easily ignore. Weak party mayors are therefore susceptible to interest group demands, which typically require distribution of a disproportionate share of the local budget to their constituents.²⁶⁶ On Fuchs's account (and that of Sayre and Kaufman), prior to its 1970s fiscal crisis, New York suffered from the latter. New York mayors, Fuchs contends, historically ignored the revenue-side implications of expenditure deci-

263. Morris, *supra* note 168, at 171–94.

264. Cf. *id.* at 175–82 (analyzing New York City pension and fringe benefits under Mayor Lindsay's administration and comparing to national trends).

265. See *id.* at 144 (describing “election pressures” in New York during late 1960s that “dictated an expansion of the police and sanitation forces” among other things, and which led to \$95 million teacher's union contract being “simply buried to avoid political embarrassment”).

266. Fuchs, *supra* note 43, at 238–39 (discussing interactive relationship between parties and interest groups).

sions, with the exception of when fiscal crisis materialized.²⁶⁷ During the period preceding New York's financial meltdown, Fuchs argues, Chicago enjoyed a strong party system controlled by a mayor who effectively eliminated alternative points of access for financial demands. The result was that interest groups were relatively incapable of fragmenting the budgetary process.²⁶⁸ Chicago's fiscal stability declined only when reformers ascended to the mayoralty, simultaneously reducing the role of the party and the centralization of budgetary decisions. As access points to the budgetary process increased, city council members were able to develop their own fiscal agenda.²⁶⁹ One measure of the financial consequences is that Chicago bonds were downgraded in 1984, and recovery occurred only when the mayor was able to use patronage and programs congenial to large segments of the electorate in order to establish an autonomous basis for political support.²⁷⁰ Similar arguments are implicit in recommendations by Andrew Haughwout and Robert Inman to reorganize municipal public finance by replacing ward-based politics with at-large politics, requiring cities to elect an at-large mayor, and conferring on the mayor broad agenda setting and veto authority.²⁷¹

This is not to say that defragmentation will necessarily generate fiscal responsibility. Centralized authority generates its own costs. Jessica Trounstine concludes that expenditure decisions by monopolistic leadership within cities—both traditional machine monopolies and reform monopolies—tend to spend a disproportionate share of the budget on members of their governing coalition and on core constituents at the expense of the general public.²⁷² Edward Glaeser and Andrei Shleifer identify extreme cases of the phenomenon in which monopolist executives direct expenditures to solidify their political base and eliminate political competition rather than to enhance constituents' welfare.²⁷³

267. See *id.* at 243–44 (commenting on this history).

268. See *id.* at 251–54 (describing how Chicago's politics came to be free from interest group competition and contrasting with New York).

269. See *id.* at 255 (noting “city council which had previously acted as nothing more than a rubber stamp for the mayor's political agenda became obstructionist”).

270. See *id.* at 255–56 (addressing fiscal consequences of reformer Harold Washington's ascendancy to mayor).

271. See Andrew F. Haughwout & Robert P. Inman, *Should Suburbs Help Their Central City?* 45, 79 (Nov. 21, 2002) (unpublished manuscript), available at <http://ssrn.com/abstract=348980> (on file with the *Columbia Law Review*) (suggesting inefficient redistributive policies can be countered by empowering mayors and making them responsible to larger segments of electorate).

272. See Jessica Trounstine, *Political Monopolies in American Cities* 148–55 (2008) (supporting claim through “analysis of the proportion of machine and reform city budgets spent during the monopoly period as compared to other periods”).

273. See Glaeser & Shleifer, *supra* note 160, at 9–16 (discussing historical evidence of “Curley Effect,” in cases of Boston Mayor James Michael Curley, Detroit Mayor Coleman Young, and Zimbabwe President Robert Mugabe).

Nevertheless, the consistent stories of fiscal crisis at least give credence to the claim that fragmentation leads to relaxation of local fiscal discipline. One might conclude that Shefter, Morris, and Fuchs have simply told a story about New York (which, perhaps due to the city's prominence, the seriousness of the crisis, the extraordinary efforts of the state and federal governments to avoid default,²⁷⁴ and the availability of data for study,²⁷⁵ is the subject of more analysis of its fiscal distress than any other municipality), or at most of other large cities. For instance, Fernando Ferreira and Joseph Gyourko find that partisan politics has a much lower effect on the size of government at the local level than at the state or federal level,²⁷⁶ and one might conclude that since partisan politics translate into a greater need to use government expenditures to maintain a coalition, we should expect less linkage between fragmentation and budgetary difficulties at the local level. But the conclusions in the New York studies are also consistent with more general findings in the political economy literature, which indicate that local budgets increase with the size of a legislative body (because enhanced logrolling in large bodies increases expenditures) and that local officials have incentives to propose more costly projects than those preferred by the median voter.²⁷⁷ Reza Baqir's study of approximately 2,000 local governments reveals that an increase in the size of the legislative body is associated with an increase in the size of government.²⁷⁸ Baqir also concluded that, while shifting from a district system to an at-large system did not affect the result, concentration of budgetary powers in a strong mayor system did. An additional political district in the average city is associated with a budgetary increase of approximately \$720,000.²⁷⁹ Inman provides supporting evidence of budgetary effects of constituent service.

274. See, e.g., *Flushing Nat'l Bank v. Mun. Assistance Corp.*, 358 N.E.2d 848, 850 (N.Y. 1976) (holding unconstitutional New York State Moratorium Act enacted "because of the city's desperate fiscal paralysis").

275. See, e.g., SEC Report, *supra* note 167, ch. 2, at 1–3 (outlining results of detailed nineteen-month study on New York City accounting practices and financial reporting).

276. See Fernando Ferreira & Joseph Gyourko, *Do Political Parties Matter? Evidence from U.S. Cities 23* (Nat'l Bureau of Econ. Research, Working Paper No. 13535, 2007), available at <http://nber.org/papers/w13535> (on file with the *Columbia Law Review*) (finding no evidence of strong partisan influence on size of local government and public spending).

277. See, e.g., Romer & Rosenthal, *supra* note 151, at 580 (finding local officials' optimal series of spending proposals involves choosing high proposal on first try).

278. Baqir, *supra* note 247, at 1351; see also Kathleen Bawn & Frances Rosenbluth, *Short Versus Long Coalitions: Electoral Accountability and the Size of the Public Sector*, 50 *Am. J. Pol. Sci.* 259–61 (2006) (showing analogous findings of relationships between number of parties and public sector size).

279. Baqir, *supra* note 247, at 1351–57. Baqir's study was published in 2002 and used budgetary data from the early 1990s. See Barry R. Weingast et al., *The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics*, 89 *J. Pol. Econ.* 642, 658 (1981) (finding districting increases spending beyond efficient point by "attenuating the relationship between beneficiaries and revenue sources").

He demonstrates that movement to a city council more demographically representative of members' constituents translated into a twenty-three percent increase in nonlabor spending and that the spending was for neighborhood services other than poverty services.²⁸⁰

These results contrast with those in municipalities that have governance structures that are less likely to feature fragmented decisionmaking. Strong mayor systems—those that concentrate municipal budgetary authority in the executive branch—generate higher property values. Inman finds that “cities run by weak governance rules have significantly lower home values, by perhaps as much as 4 percent.”²⁸¹ Haughwout and Inman make similar findings and also conclude that weak city governance lowers suburban mean income growth by 2.4%.²⁸² The latter finding suggests that weak municipal governance creates a substantial externality, notwithstanding the initial intuition that the structure of local governance is a matter of purely local concern. Mark Crain and Timothy Muris find similar results at the state level.²⁸³ They report that, during their period of study, state legislatures that included a centralized spending committee spent eight percent less than states that did not have such a committee.²⁸⁴ Robert Elgie and Iain McMenamin find a positive relationship at the international level between governmental deficits and the number of political actors involved in expenditure decisions.²⁸⁵ Moreover, they find that older democracies are more prone to the effect,²⁸⁶ perhaps because institutions that can exploit the consequences of fragmentation become more embedded.

A recent paper by Peterson is consistent with these results.²⁸⁷ She examines the impact of governance structures on the findings of audits

280. Robert P. Inman, *How to Have a Fiscal Crisis: Lessons from Philadelphia*, 85 *Am. Econ. Rev.* 378, 382 (1995). It is plausible that historic underrepresentation of residents would mean that there were greater neighborhood needs to be met when representative city councilors were elected. Thus, the increase in expenditures did not necessarily mean that the financed projects were wasteful. Nevertheless, the increases suggest that constituent service becomes a focal point for representatives that motivates political deals with financial implications.

281. Inman, *Financing*, *supra* note 247, at 332.

282. Haughwout & Inman, *supra* note 271, at 60.

283. Mark W. Crain & Timothy J. Muris, *Legislative Organization of Fiscal Policy*, 38 *J.L. & Econ.* 311, 326–31 (1995); see also Thomas W. Gilligan & John G. Matsusaka, *Fiscal Policy, Legislature Size, and Political Parties: Evidence from State and Local Governments in the First Half of the 20th Century*, 54 *Nat'l Tax J.* 57, 79 (2001) (reporting positive relationship between state legislative body size and spending, but only for upper house).

284. Crain & Muris, *supra* note 283, at 327.

285. See Elgie & McMenamin, *supra* note 240, at 266 (finding “size of budget deficit” correlated with “number of spending ministers” and “size of the government’s majority in the legislature”).

286. *Id.* at 264–66.

287. Amanda N. Peterson, *The Impact of Municipal Governance on Cities’ Audit Outcomes* (May 8, 2014) (unpublished manuscript), available at <http://ssrn.com/abstract=2417971> (on file with the *Columbia Law Review*).

required by rules of the Governmental Accounting Standards Board.²⁸⁸ She finds that using a city manager rather than a mayor-council structure positively impacts audit outcomes.²⁸⁹ But she does not differentiate among mayor-council structures that feature a strong mayor and those that feature a weak mayor. Thus, it is possible that the benefits of a city manager arise from centralized decisionmaking rather than simply from the unelected nature of the city manager. One interesting result Peterson finds is that staggered election terms for city council members positively affect audit results.²⁹⁰ While municipalities cannot be “taken over” as corporate entities, political contests make individual city council members highly susceptible to replacement. Perhaps staggered boards increase political competition because the smaller number of candidates allows voters to focus on the performance of any one, and that could have a disciplining effect on incumbents. That explanation, however, would apply only where members of staggered boards are subject to review by all voters within the municipality, that is, in at-large systems. Where city council members run from specific districts, one would expect that performance is linked to the ability to generate benefits for the district, the very condition that leads to expenditures that, from the municipal perspective, are inefficient.²⁹¹

Peterson reports an additional curious result. While she suggests that independent finance department leadership is related to audit performance, her data imply that cities that select the head financial official through elections report fewer weaknesses in audits than cities that select the official through nonelective appointments.²⁹² A study by Whalley, however, suggests the opposite. He finds that appointive treasurers reduce a city’s cost of borrowing by thirteen to twenty-three percent, and he extrapolates from that finding that a shift from elected to appointed

288. *Id.* at 3–4.

289. *Id.* at 20–21.

290. *Id.* at 21. That finding is inconsistent with some corporate law literature that suggests staggered terms for boards of directors are negatively correlated with financial results. See, e.g., Lucian A. Bebchuk & Alma Cohen, *The Costs of Entrenched Boards*, 78 *J. Fin. Econ.* 409, 410, 430 (2005) (finding staggered boards established in corporate charter reduce firm value more than those established in bylaws); Lucian A. Bebchuk et al., *Staggered Boards and the Wealth of Shareholders: Evidence from Two Natural Experiments* 23 (Nat’l Bureau of Econ. Research, Working Paper No. 17127, 2011), available at <http://nber.org/papers/w17127> (on file with the *Columbia Law Review*) (evaluating effects of two court rulings on antitakeover force of staggered boards and finding staggered boards reduce firm value). The latter finding is typically explained by suggestions that staggered terms inhibit takeover threats that might improve the firm’s performance. A newer literature suggests that the findings of reduced firm value may depend on variables such as concentration of firm ownership. See, e.g., Morgan J. Rose, *Heterogeneous Impacts of Staggered Boards by Ownership Concentration*, 15 *J. Corp. Fin.* 113, 115, 127 (2009).

291. See *supra* text accompanying notes 238–242 (arguing fragmentation leads to inefficient expenditures).

292. Peterson, *supra* note 287, at 22.

treasurers would save California cities more than \$20 million annually.²⁹³ Again, the effect of a municipal governance structure may vary with other features of the municipality. But each of these studies demonstrates that political structure affects fiscal performance and thus implies that the stories about the fiscal consequences of a fragmented governance structure can, at least in some circumstances, be substantial.

Moreover, the alternative explanations for fiscal distress cannot be fully segregated from political fragmentation. One cannot, for instance, treat demographic shifts or job losses independently of fragmentation, because one reason why firms and individuals may exit is to avoid paying taxes that reflect the cost of deals made with interest groups from which those firms and individuals receive insufficient benefit.²⁹⁴ Similarly, the absence of budgetary or financial controls may be less a function of ignorance of sophisticated accounting mechanisms than of a desire to obfuscate expenditures in order to perpetuate appropriations that might be viewed skeptically by the electorate if more transparent procedures were in place. It would, for example, be difficult to complain that New York City lacked financial expertise in the 1970s; instead, it appears that officials were involved in deliberate efforts to mask deficits and expenditures.²⁹⁵

More importantly for the role of state takeover boards, fragmentation not only explains the evolution of fiscal distress; it also explains the incapacity or unwillingness of local officials to extricate themselves from fiscal adversity once it materializes. If fragmentation is a problem for municipal governance, the most plausible response lies in defragmentation of budgetary institutions, perhaps in the strong mayor form of government and the placement of the budgetary process under unitary control, including the possibility of appointing independent financial

293. Alexander Whalley, *Elected Versus Appointed Policymakers: Evidence from City Treasurers 3* (Nat'l Bureau of Econ. Research, Working Paper No. 15643, 2010), available at <http://nber.org/papers/w15643> (on file with the *Columbia Law Review*). Peterson also finds that cities that utilize term limits tend to perform better on audits. Peterson, *supra* note 287, at 21. While term limits might be thought to be ineffective as a financial constraint because they simply advance the "last period" during which rent seeking behavior might be thought to occur, the dilution of entrenched decisionmakers could have an offsetting effect.

294. See, e.g., CBO, *Fiscal Stress Faced by Local Governments 3* (2010), available at http://permanent.access.gpo.gov/gpo1927/12-09-Municipalities_Brief.pdf (on file with *Columbia Law Review*) (emphasizing "political dynamics" play important role in structural budget imbalances that can cause fiscal distress).

295. See CBO, *New York City's Fiscal Problem: Its Origins, Potential Repercussions, and Some Alternative Policy Responses 14* (1975), available at http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/108xx/doc10806/1975_10_10_origan.pdf (on file with the *Columbia Law Review*) (stating many practices that allowed New York City's budget to appear balanced were suggested by state officials); SEC Report, *supra* note 167, ch. 3, at 22–42 (analyzing extent of New York City officials' knowledge of sale of city debt securities).

officers, a practice that may generate higher market confidence and lower borrowing rates.²⁹⁶

But transition to a more centralized budgetary process through normal politics is likely to be frustrated by the same forces that generated the inefficient expenditures underlying the very distress for which centralization may be a remedy. It is not in the interest of agencies or elected representatives from discrete districts to abdicate their authority to more centralized entities; nor is it in the interest of those groups that benefit from having access to a point in the budgetary process to see that point eliminated. The result is that, just as political actors may become entrenched in particular offices, so may the structure of their offices.²⁹⁷ Even a mayor who might obtain greater power from centralization is not necessarily well positioned to encourage it, because he or she may need the political support of those who benefit from the existing structure to implement favored policies. That possibility is more likely where there is no centralized, strong party structure, so that individual agencies and local legislators have substantial independent constituencies whose support the mayor may need.²⁹⁸ While it may be in the interest of residents to reorganize local government, they suffer from classic collective action problems, in that the effort to consider institutional change imposes substantial costs on those who design new institutions and lobby for their enactment, while the benefits of implementation are enjoyed even by those who contributed nothing to the effort. No one resident, by virtue of that status alone, is likely to enjoy sufficient personal benefits from municipal restructuring sufficient to outweigh the personal costs of organizing the necessary effort.

B. Takeover Boards and Political Fragmentation

This Part suggests that takeover boards possess characteristics that directly address the costs of fragmentation. Their very lack of democratic accountability and small size provides takeover boards with a defragmented structure and immunizes them from the entreaties of interest groups that exploit the common pool of the local budget. Takeover boards, therefore, may be better positioned to respond to fiscal crisis than the more democratic governments that they augment or displace.

296. See Whalley, *supra* note 293, at 3 (noting appointive treasurers reduce city's borrowing cost by thirteen to twenty-three percent). Congress required an appointed chief financial officer when it created a financial control board for the District of Columbia. See District of Columbia Financial Responsibility and Management Assistance Authority Act of 1995, Pub. L. No. 104-8, § 302, 109 Stat. 97, 142-43.

297. On the entrenchment of political actors, see Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 *Harv. L. Rev.* 28, 60-61 (2004) (discussing how gerrymandering entails two forms of entrenchment).

298. See Fuchs, *supra* note 43, at 243 (noting absence of strong party organization increases difficulty of mayoral managing of budget process).

But takeover boards that simply redress the current fiscal crisis treat symptoms, rather than causes. If municipalities that have fallen into fiscal distress revert to precrisis patterns once the takeover board returns power to the democratically elected local government, recidivism may ensue. Thus, a broader scope of takeover board authority that allows restructuring of the municipal government may be appropriate. That restructuring would entail creation of more centralized decisionmaking by the democratically elected government through city charter reforms imposed by the takeover board. While any such restructuring would be subject to reversal by municipal residents in a subsequent period, proposals for reversion to precrisis structures would be informed by the experience of budget making under more centralized, and thus plausibly more fiscally stable, processes.

1. *Redressing the Consequences of Fragmentation.* — Municipal budgets may be able to absorb the financial consequences of fragmentation outside of periods of fiscal crisis. Once crisis materializes, however, inefficient expenditures are likely to become more salient, and demands to avoid wasteful obligations may increase.²⁹⁹ Unfortunately, fragmented governance—indeed, democratic governance generally—may be poorly positioned to deal with those demands. Municipal fiscal crisis, like emergencies generally, often requires relatively prompt and decisive action.³⁰⁰ Municipalities may have limited cash to pay employees and vendors, and the threat of imminent default may foreclose access to capital markets within relatively short periods of time.³⁰¹ The prospect of long-term crisis

299. For example, New York City's fiscal crisis had been percolating for several years. Persistent annual budget deficits could be managed, however, as long as the capital markets were willing to accept the short-term debt that funded those deficits. Once the capital markets proved unwilling to accept additional debt, the capacity of the city to pay obligations deteriorated rapidly. See Bailey, *supra* note 19, at 16, 24–25 (detailing New York City's fiscal situation leading up to and at start of crisis). Detroit similarly had been operating with budget deficits for several years prior to its bankruptcy. A bankruptcy filing occurred only after Detroit's cash flow situation caused it to defer payment of pension contributions and default on certificates of participation. See, e.g., *In re City of Detroit*, 504 B.R. 97, 114–19 (Bankr. E.D. Mich. 2013) (describing high levels of pension liability that triggered Detroit's filing for bankruptcy).

300. See Eric A. Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* 16 (2007) (“The real cause of deference to government in times of emergency is institutional: both Congress and the judiciary defer to the executive during emergencies because of the executive's institutional advantages in speed, secrecy, and decisiveness.”); Joshua L. Friedman, *Emergency Powers of the Executive: The President's Authority When All Hell Breaks Loose*, 25 *J.L. & Health* 265, 267 (2012) (defending broad executive authority during public health emergencies); Jim Rossi, *State Executive Lawmaking in Crisis*, 56 *Duke L.J.* 237, 259–64 (2006) (arguing for broad authority for state executives during crises).

301. See, e.g., *Detroit*, 504 B.R. at 123 (explaining city “was experiencing significant cash flow shortages”); Lachman & Polner, *supra* note 98, at 99 (noting New York City was on verge of default if action was not taken).

raises the risk that the exodus of mobile capital will escalate.³⁰² Nevertheless, fragmented decisionmaking—indeed, democratic governance generally—is ill-suited to the processes that are necessary to address crisis. Democratic governance typically entails deliberation, consultation, and compromise among competing groups. For all the benefits that these characteristics confer on governance during periods of normal politics, democratic politics are “too slow for a world that increasingly require[s] rapid responses” in times of crisis.³⁰³ Fragmentation exacerbates these effects, because any given decision will require the assent of multiple entities, and different entities may be influenced by different groups, each of which has an incentive to protect its existing benefits during a period of retrenchment.

Takeover boards possess two characteristics that diminish the consequences of fragmentation (and of democratic inertia), and that therefore become particularly appropriate during periods of crisis. First, the appointed nature of takeover boards renders them less vulnerable to the entreaties of dominant interest groups since takeover board membership is not conditioned on the support of politically influential local constituents. As a result, takeover boards are able to take action that is unpopular with constituencies that are necessary to the electoral success of officials during periods of normal politics. Second, historically, takeover boards have been of relatively small size. Takeover boards may consist of as few as one person, as in the case of the financial emergency manager position in Michigan or a receiver in Rhode Island,³⁰⁴ and membership appears rarely to exceed single digits. That appears to be true even for cities with large legislatures. The takeover boards for Chicago’s school district and Philadelphia consisted of five members; the takeover boards for Cleveland and Yonkers, New York, and EFCB consisted of seven; and MAC had nine members.³⁰⁵ The small size of takeover boards should be able to eliminate inefficient expenditures made possible or necessary by normal politics.

These characteristics suggest that the dictatorial character of takeover boards allows them to ignore, or at least resist, interests that have exercised disproportionate influence during periods of normal politics and that drive expenditures inconsistent with majoritarian preferences. There is at least anecdotal evidence that takeover boards exploit that capacity. David Berman quotes an assistant receiver for Chelsea, Massachusetts, to the effect that a new contract that reduced benefits for firefighters “was only possible because the receiver did not have to run

302. See Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 *Harv. L. Rev.* 482, 503–04 (2009) (describing how fiscally declining cities suffer losses of capital and population).

303. David Runciman, *The Confidence Trap* 80 (2013).

304. See *Mich. Comp. Laws Ann.* § 141.1549(3)(c) (West 2013); *R.I. Gen. Laws Ann.* § 45-9-7 (West 2012).

305. *Actions Taken*, *supra* note 24, at 50.

for re-election and face the wrath of an organized, focused opposition.”³⁰⁶ Bailey concludes that claims of antidemocratic rule in New York emanated largely from those whose access to “channels of access and participation that they had previously relied on and found effective were now either closed off or significantly less useful in affecting policy choice.”³⁰⁷ Even Marion Barry, who as mayor resisted appointment of the District of Columbia Financial Review Board, concluded that “[t]he financial control board ‘was able to do some things that needed to be done that, politically, I would not do, would not do, would not do’—for example, ordering the firings of about 2,000 human-service workers.”³⁰⁸

In at least some jurisdictions, takeover boards may alter or avoid previously incurred obligations that tend to be associated with groups that possess disproportionate political influence. Michigan controversially, but explicitly, permits an emergency manager to rescind collective-bargaining agreements,³⁰⁹ perhaps on the theory that public-sector unions have received benefits linked to political support rather than productivity.³¹⁰ In some cases, takeover boards may regulate contractual outputs, for example, by reforming pension arrangements that generate substantial future liabilities ignored by budget managers who do not have to cover future costs out of current revenues.³¹¹ If mayoral complicity in maintaining a fragmented regime has been motivated primarily by the need for electoral support, then the existence of a body that can act

306. Berman, *Takeovers*, supra note 122, at 64.

307. Bailey, supra note 19, at 127. Bailey notes that “[m]any taxpayers, tired of escalating tax rates and declining services, were willing to accept dramatic surgery on the city’s political system. Some, broadly suspicious that the city had become the hostage of its own employees and welfare clients, were actually enthusiastic for the new regime governing New York.” *Id.* at 126.

308. DeBonis, supra note 128.

309. Mich. Comp. Laws Ann. § 141.1552(12)(k) (West 2013).

310. See, e.g., Morris, supra note 168, at 98 (explaining how half-pay retirement to union members after twenty years of service facilitated settlements of work disputes but “reinforced a growing tendency to trade off future benefits to sweeten current contracts”).

311. The financial stability agreement between Michigan and Detroit that preceded appointment of an emergency manager, for example, required that new collective bargaining agreements entered into by the city provide for defined-contribution retirement benefits rather than defined benefits. See *Financial Stability Agreement*, supra note 65, annex D. Frequently, pension arrangements can only be adjusted with respect to new employees. See, e.g., Mich. Comp. Laws Ann. § 141.1552(12)(k) (West 2013); R.I. Gen. Laws Ann. § 45-9-9 (West 1956). The ability to alter pension arrangements with respect to current employees is a matter of substantial debate and varies from state to state. For the debate within a single state, see *The Great Pension Debate: A Detailed Analysis of the Illinois Constitution’s Pension Clause*, Ill. Senate Democrats, <http://www.illinoisenatedemocrats.com/index.php/component/content/article/108-public-information-brochures/1517-pension-debate> (on file with the *Columbia Law Review*) (last updated Dec. 12, 2013). For general discussion, see Amy B. Monahan, *Statutes as Contracts? The “California Rule” and Its Impact on Public Pension Reform*, 97 *Iowa L. Rev.* 1029, 1046–51 (2012) (discussing California Rule, in which pension changes can apply only to new hires).

without fear of electoral redress and to which the mayor is subordinate allows the mayor to implement reforms by using other board members as “cover” or by bypassing resistant local legislators in order to impose policies that would have little likelihood of enactment under the conditions of normal politics.³¹²

Takeover boards may also reduce the likelihood of recidivism by reforming the budgeting process in ways that may become sticky even after a control period has expired. For example, some jurisdictions require that municipalities subject to state control adopt long-term budgets.³¹³ Multiyear budgeting is consistent with defragmentation because it reduces the variability of annual expenditures and thus induces potential recipients of local funds to compete for portions of a fixed pool rather than to accede to mutual division of an expandable budget pie. The requirement in Pennsylvania that a controlled city provide a five-year financial plan of revenues and expenditures,³¹⁴ for example, may cabin the city’s capacity to favor particular groups on an ad hoc basis, and the enhanced budgetary transparency reduces the costs of monitoring by competing interest groups. The consequence can be to increase accountability, as organized interest groups have incentives not only to demonstrate the relative utility of their proposed projects, but also to expose the inefficiency of proposals that compete for the same dollars, even if not for the same project.

Takeover boards enjoy one additional advantage over elected officials: the ability to address debt overhang that results from the deficit financing to cover the additional expenditures that fragmentation fosters. The commitment of scarce revenue to service debt constrains the ability of the municipality to retain tax base, encourage productive activity, and provide a modicum of municipal services. At the time of Detroit’s bankruptcy filing, for example, legacy costs in the city consumed approximately thirty-eight percent of the city’s revenue, so that before any municipal services could be provided, thirty-eight cents of each revenue dollar was already committed to debt, pension liabilities, or other-than-pension employee benefits.³¹⁵ Much of those costs is attributable to the substantial debt incurred by Detroit to fill deficits in the annual budget.³¹⁶ There can be little doubt that debt burden frustrates efforts to attract human and financial capital. Potential employers and residents

312. See, e.g., Berman, *Local Government*, supra note 94, at 116–17 (describing use of PICA to provide political cover for local officials to make unpopular decisions).

313. See, e.g., Mich. Comp. Laws Ann. 141.1636(4) (West 2014) (requiring approval of city’s four-year financial plan); R.I. Gen. Laws Ann. § 45-9-1 to -17 (West 2011) (same).

314. 53 Pa. Cons. Stat. Ann. § 12720.209(d) (West 2013).

315. *In re City of Detroit*, 504 B.R. 97, 115 (Bankr. E.D. Mich. 2013); Proposal for Creditors, supra note 12, at 24.

316. The emergency manager estimated that at the end of fiscal year 2012, Detroit had accumulated a general fund deficit of \$326.6 million. Proposal for Creditors, supra note 12, at 6. The city issued \$75 million of debt in fiscal year 2008, \$250 million in fiscal year 2010, and \$129.5 million in fiscal year 2013 to fund the city’s operating deficits. *Id.*

are unlikely to migrate to a jurisdiction obligated to pay substantial portions of its revenue to past services from which new migrants obtain little benefit. Thus, debt reduction becomes a necessary element of a strategy of shared sacrifice in resolving distress³¹⁷ and creates analogies in municipal bankruptcy to the “fresh start” policy that characterizes individual bankruptcy.³¹⁸ Indeed, the relative advantage that creditors enjoy over residents in detecting and deterring excessive debt suggests that there is a plausible argument for substantially reducing obligations owed to municipal creditors.³¹⁹

Even if circumstances favor debt reduction, however, there remains a question about the conditions under which that strategy can be pursued. Local officials who have unadvisedly incurred burdens on behalf of their constituents are poorly positioned to seek debt forgiveness while remaining immune from sanction. For the same reason, they may be less effective in negotiating debt reduction with creditors than are third parties who were not involved in the initial decision to issue the obligations that created debt overhang. Appointment of a takeover board that reduces the authority of the responsible officials at the very least creates a context in which creditors may be more willing to accept some degree of self-sacrifice in order to avoid further deterioration of municipal services.³²⁰

2. *Takeover Boards and Municipal Restructuring.* — Takeover boards, then, might provide immediate fiscal relief to distressed localities because, unlike elected officials, they need not respond to the interest group pressures that dominate normal politics and that benefit from the various entry points and client support associated with fragmented decisionmaking. These characteristics allow takeover boards to facilitate capital infusions by the state and capital markets, negotiate debt reduction, force reductions in expenditures, or increase taxes. But exercise of that authority only responds to a crisis that has already materialized. Relief of the current crisis does not of itself protect against recidivism. If the seeds of fragmentation lie in the nature of local government structures, then

317. See David Graeber, *Debt: The First 5,000 Years* 391 (2011) (concluding, while debt is not always repaid, it is important to “wipe the slate clean for everyone” in bankruptcy); Anna Gelpern, *Bankruptcy, Backwards: The Problem of Quasi-Sovereign Debt*, 121 *Yale L.J.* 888, 926–30 (2012) (highlighting three approaches to debt reduction that demonstrate need for shared sacrifice).

318. Kimhi, Chapter 9, *supra* note 34, at 372–74 (noting how bankruptcy may offer municipalities opportunities to move beyond previous financial problems).

319. See Clayton P. Gillette, *Bondholders and Fiscally Stressed Municipalities*, 39 *Fordham Urb. L.J.* 639, 667–70 (2012) [hereinafter Gillette, *Bondholders*] (discussing relative advantages and disadvantages of monitoring by municipal creditors in comparison to residents).

320. Certainly, that appears to have been the strategy of the current emergency manager for Detroit, who prefaced his offer of substantial debt reduction for unsecured creditors with illustrations of the consequences of debt burden for the average citizens of the city. See *Proposal for Creditors*, *supra* note 12, at 3–34 (detailing high tax burdens, debt burdens, crime rates, and absence of municipal services for Detroit).

why would we not believe that distressed localities will revert to the practices that precipitated the crisis once the supervisory body disappears, as seems to have occurred in the past?³²¹

The desire to avoid new fiscal crises justifies a closer look at the underexploited capacity of takeover boards to go beyond the provision of immediate relief from the consequences of fragmentation and to impose a governmental structure that is identified with fiscal stability. If the underlying source of fiscal distress lies in governmental structure, then short-term palliatives that treat symptoms rather than causes will be insufficient to avoid recidivism.

One may be skeptical of imposing a particular form of governance on municipalities. After all, given the large number of municipalities and the relative ease of exit, the various forms of municipal governance certainly warrant both experimentation and choice.³²² That is so even where the objective of a mandatory governance structure is to enhance fiscal stability by defragmenting governmental decisionmaking. While fragmentation may be costly, defragmentation carries its own risks and inherent ideological implications that municipalities may wish to embrace or avoid. For example, fragmentation or its consequences may be reduced by financing local public goods through cost based user fees rather than general taxes, since user fees—which are determined by the cost of the financed service—are less susceptible than taxes to redistribution to favored groups. The selection of a payment device, however, also entails distributive consequences that compete with any efficiency-enhancing effects, since the use of municipal services will inevitably be linked to ability to pay rather than to demand alone. Thus, where normal politics creates diversity in municipal governance, but does not generate fiscal distress that undermines delivery of the very local public goods for which the municipality is created, there seems little reason to make any particular form of governance mandatory.

That calculus changes in favor of imposed restructuring, however, where municipal residents suffer persistent fiscal failure and normal politics prove inadequate to produce appropriate changes because those who benefit from the status quo dominate decisionmaking. As Michael McConnell and Randal Picker conclude, typically “chronic financial difficulty is a sign that ordinary political processes are not functioning properly.”³²³ Temporary interventions through takeover boards that

321. See *supra* text accompanying notes 40–43 (discussing example of city that repeatedly dealt with financial crisis).

322. See Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 *Colum. L. Rev.* 775, 779 (1992) (“[T]here may be no neutral, ‘scientific’ answer concerning the optimal structure for metropolitan governance: different structures will favor or harm different interests.”).

323. Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 *U. Chi. L. Rev.* 425, 472 (1993).

provide expertise and impose managerial and budget constraints may solve the immediate crisis. But if the underlying governance structure contributes substantially to the risk of fiscal distress, and if entrenchment of those who benefit from the existing structure precludes its revision, then changes necessary to avoid recidivism are less likely to materialize intramurally. Declining populations in fiscally distressed areas imply that by the time a takeover board is appointed, Tieboutian forces have done much of the work of which they are capable in inducing necessary reforms; residents who remain within the locality likely do so as a consequence of immobility rather than preference for the service levels they receive.³²⁴ If neither political voice nor Tieboutian exit generates reform, the best viable alternative may lie with external intervention.

Even those who recognize the ability of takeover boards to generate short-term relief, however, have failed to advocate the authority related to extraordinary politics, or dictatorship, to restructure fragmented government institutions that have become dysfunctional. Kimhi, who persistently advocates state intervention in local fiscal crisis caused by fragmentation, concludes that an oversight board “should be equipped with sufficient tools to sanction the city; but it should not replace the elected officials in running the city.”³²⁵ This moderate prescription overlooks the potential for state intervention to require more radical reform that can strengthen the long-term fiscal position of the locality, but that deploys the most controversial, nondemocratic characteristic of restructuring local government outside of the avenues of normal politics. McConnell and Picker, whose concern about the need to reorganize failed municipal governments leads them to advocate municipal reorganization that could include geographic and institutional redesign,³²⁶ nevertheless conclude that the existing political leadership of the municipality would have to accept any restructuring in bankruptcy.³²⁷ Nevertheless, they recognize that officials unwilling to redesign dysfunctional municipal institutions prior to bankruptcy would likely continue their intransigence during bankruptcy.³²⁸

One could, however, imagine more invasive restructuring of local governmental institutions by takeover boards. If, as the literature investi-

324. See *supra* note 143 and accompanying text (discussing Tieboutian model in which mobile constituents migrate out of communities that do not provide desired level of services).

325. Kimhi, *Four Cities*, *supra* note 34, at 921.

326. See McConnell & Picker, *supra* note 323, at 472–81 (noting bankruptcy courts should be empowered to sell municipal properties and order reductions in wasteful expenditures).

327. *Id.* at 475 (“[E]ven if the bankruptcy court has authority to engage in this kind of decisionmaking, implementation of the ‘deal’ would require action by the city’s political leadership.”).

328. *Id.* (“[E]ven if a rational city administration would agree to the court’s proposals, the same failed administration that created the financial crisis would likely fail to agree to the steps to solve it.”).

gating the relationship between governance forms and fiscal stability suggests,³²⁹ centralization is the key to fiscal stability, it must remain in place even after termination of the control period. The necessary transition can more readily be made by the takeover board itself, in large part because its dictatorial powers allow it to circumvent the political conditions that constrain efforts to enact governance reforms through normal politics.³³⁰

The kinds of governmental restructuring that would be appropriate for a takeover board to impose reflect the centralizing reforms that are associated with fiscal stability. Depending on the circumstances of the particular municipality, these reforms could include reallocating authority between the mayor and the city council in order to create a strong mayor system; entering into agreements with neighboring municipalities for regional, rather than local, provision of services; eliminating redundant agencies that compete for clients or that serve as proxies for competition between the executive and legislative branches;³³¹ or reducing the number of districts from which the local legislature was elected in order to reduce expenditures attributable to negative sum logrolling.

The possibilities are evident from perusing the Detroit City Charter, which contains numerous provisions characteristic of entrenched fragmentation. The charter, for example, limits the city's capacity to privatize services currently performed by city employees and constrains the mayor's choice of a police chief to a list recommended by an elected board of police commissioners.³³² It appears that those who drafted it explicitly attempted to balance the authority of the mayor and city coun-

329. See *supra* text accompanying notes 266–271 (discussing budgetary impact of having larger legislative bodies, strong mayors in cities, and stronger centralized systems of government).

330. These allocations of authority that determine the level of fragmentation are typically made within the city charter. Although residents may approve city charters, their contents and scope lie within the control of the state legislature. See, e.g., Mich. Comp. Laws Ann. § 117.4i (West 2014) (discussing provisions cities may include in their charters relating to building regulations, regulations on public conduct, regulations on trades and occupations, etc.); N.Y. Mun. Home Rule Law § 10 (McKinney 2014) (noting powers of local governments to adopt and amend laws as defined by state legislature); Okla. Stat. Ann. tit. 11, § 13-101 (West 2012) (permitting cities and towns with populations with at least 2,000 residents to create charters for local government); 53 Pa. Cons. Stat. Ann. § 13131 (West 1998) (outlining powers and limitations permitted for municipal self-governance).

331. See Janet Anderson, Powerpoint: Redundancy in City Government, Highlighting the Detroit City Charter (2013) (on file with the *Columbia Law Review*) (discussing ways to eliminate redundancies in Detroit government); see also Actions Taken, *supra* note 24, at 82–83 (noting that competition among city manager, mayor, and city council frustrated budget reconciliation in Yonkers, New York).

332. See Charter of the City of Detroit § 6-307 (2012) (providing example of fragmentation).

cil.³³³ The Detroit City Charter also contains multiple levels of oversight—thus purporting to engender integrity in government at the cost of duplication of effort.³³⁴ Each of these provisions frustrates creation of a unified vision and fiscal operation for the city, complicates efforts to keep expenditures within budgetary constraints, and foments fiscal distress.

Those few efforts to alter municipal decisionmaking structures that have occurred in response to fiscal crisis appear to have focused on centralized processes and have generated some degree of success. Bailey attributes the reversal of fiscally destructive “devolution of allocative decisionmaking to the bureaucracies, reinforced by unionized employees”³³⁵ to the shift in New York City governance from a strong mayor–legislative council to a mayor–takeover board model that allowed for more centralized decisionmaking.³³⁶ Perhaps the most intrusive external imposition of structural change to a charter involves the congressional reallocation of authority in the District of Columbia during the 1990s after appointment of a takeover board. Congress created the position of a chief financial officer and then conferred on the person holding that office virtually all control over the district’s budget and finances. The mayor and city council members were essentially reduced to figureheads on financial matters.³³⁷

The District of Columbia may appear to be a special case because of its uniquely subordinate relationship to Congress. But that unique relationship perhaps represents only the willingness of a legislative body to intervene in municipal governance, not the desirability of such a move after fiscal distress emerges from structural failures. Where entrenched political structures frustrate reforms, similarly invasive intrusions by takeover boards unilaterally to reform city charters to defragment municipal governance are both plausible and, arguably, desirable.

The grant of any authority to engage in restructuring municipal governance would dramatically transform the conception of a takeover board from the Cincinnatus model of resolving intractable fiscal difficulties through short-term circumvention of the political process into more permanent interference with local autonomy. Indeed, it would allow takeover boards to exceed the limits of the Roman dictator, who was prohibited from making changes to the constitutional structure of the

333. The commentary to section 4-111 of the city charter recites that “[t]his new section seeks to balance the power between the executive and legislative branches of government.” *Id.*

334. See *id.* art. 7.5 (listing independent departments and offices of Detroit).

335. Bailey, *supra* note 19, at 147.

336. *Id.*

337. D.C. Code § 1-204.24a (LexisNexis 2001) (diminishing power of mayor). Notwithstanding the chief financial officer’s substantial authority, the position is held by an appointee of the mayor and city council, and is only removable by the mayor and two-thirds of the city council. *Id.* §§ 1-204.24b to -204.24c (describing appointment and removal process for chief financial officer).

republic.³³⁸ Moreover, the discussion above indicates that while certain characteristics of municipal governance are correlated with fiscal performance, there is ambiguity about the optimal governance structure.³³⁹ Implementation of institutions that might facilitate defragmentation implicates tradeoffs about both particular services and institutional design over which reasonable people could disagree. Those tradeoffs arguably should be resolved through normal politics and Tieboutian mobility rather than by the extraordinary intervention of apolitical bodies.

It is, for example, by no means clear that imposing a strong mayor form of government or reducing the number of legislative districts returns unqualified benefits. Strong mayor systems may crowd out political opposition and allow entrenchment that ultimately diminishes interest group competition.³⁴⁰ Logrolling within legislative bodies populated by representatives elected from multiple districts may enhance participation and increase opportunities for members of minority groups to become part of a winning coalition.³⁴¹ The success of privatization of municipal services or securitization of municipal revenue streams may depend on the nuances of the programs and are vulnerable to mismatched time horizons of the public officials and their constituents.³⁴²

This more radical deployment of takeover boards, therefore, intensifies the objection of a democratic deficit in the governance of financially distressed localities. After all, the whole idea of a city charter arguably is to permit the residents of a municipality to select a political structure of their liking,³⁴³ so external imposition of a governance structure by an unelected board seems antithetical to, not just inconsistent with, the concept of local autonomy.

But the democratic objection to such invasive intervention is diluted by three features. First, state legislatures can already constrain city charters by requiring or prohibiting particular provisions.³⁴⁴ Second, the imposition of a particular form of government infringes on democratic

338. Ferejohn & Pasquino, *supra* note 1, at 211.

339. See *supra* Part I.A–B (discussing finance mechanisms that help avoid financial distress and their impact on fiscal performance).

340. See Fuchs, *supra* note 43, at 254 (detailing how strong mayor in Chicago reduced interest group influence).

341. See Karlan, *supra* note 142, at 217 (noting where minority community is represented in legislature, logrolling can be used by representative to protect their interests); see also Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 *Chi.-Kent L. Rev.* 707, 727–28 (1991) (discussing impact of logrolling on racial minorities' ability to prevent harmful legislation).

342. See, e.g., Roin, *supra* note 249, at 2027 (discussing difficulty of setting contract terms in way that forces public officials to internalize costs).

343. See, e.g., Barron, *supra* note 37, at 2289–90 (discussing rise of home rule in United States).

344. See, e.g., Mich. Comp. Laws Ann. §§ 117.3, 117.5 (West 2006) (outlining mandatory and prohibited provisions for home rule charters).

governance only in a limited way if the primary officials who exercise authority within the mandated system are either elected or appointed by elected local officials. For example, Michigan's response to the financial crisis in Detroit included a requirement that, notwithstanding any city charter provision to the contrary, large cities within the state must include a chief financial officer within their governance structure.³⁴⁵ That position, however, is filled by mayoral appointment.³⁴⁶ Third, any mandatory restructuring of the city's governance necessarily faces temporal limitations. As discussed below, takeover boards exercise authority for a limited duration.³⁴⁷ After that period, the return to normal politics permits affirmation or rejection of the regime instituted by the takeover board. The municipal charters that embody the mandated regime are far more susceptible to amendment and revision than are state or federal constitutions that similarly allocate authority at those levels of government.³⁴⁸ As a consequence, even structural changes imposed by a takeover board are subject to reversal when normal politics resume.

City charter revisions, however, are likely to require a sufficiently complex process of hearing and referendum that any attempt to reverse the structural mandates of a takeover board will occur only after there has been substantial experience with the new governance structure.³⁴⁹ Residents, therefore, will have an opportunity to engage in informed consideration of whether they prefer the prior form of governance, or whether a more defragmented structure would better provide fiscal stability and preference satisfaction. In effect, unilateral authority to overhaul the local governance structure entitles the takeover board to

345. *Id.* § 117.4s (West 2014).

346. *Id.* § 4s(1). The appointment must also be approved by the governing body of the city and a state takeover board if one is in place during the time of appointment. *Id.*

347. See *infra* text accompanying notes 400–404 (describing limiting authoritative duration as clearest way to restrain nondemocratic aspects of takeover boards).

348. City charters usually can be amended by only a simple majority of the city electorate voting in a referendum or voter initiative. See, e.g., Cal. Const. art. XI, § 3(a) (indicating city charter can be amended by majority vote of constituents); Fla. Stat. Ann. § 166.031(2) (West 2014) (same); Mich. Comp. Laws Ann. § 117.5(1)(e) (West 2014) (same); N.Y. Mun. Home Rule Law § 37(13) (McKinney 2014) (same). Moreover, only a relatively small number of signatures is required for a proposed amendment to qualify for the ballot via voter initiative. See, e.g., Cal. Elec. Code § 1415(b) (West 2014) (prohibiting municipalities from requiring more than fifteen percent of voters for a petition to qualify for the ballot); Mich. Comp. Laws Ann. § 117.25(1) (five percent of voters); N.Y. Mun. Home Rule Law § 37(2) (ten percent of voters or 30,000 voters, whichever is less); Or. Rev. Stat. Ann. §§ 250.255, 250.305 (West 2013) (fifteen percent of voters); 53 Pa. Cons. Stat. Ann. § 2943(a) (West 2014) (ten percent of voters).

349. See, e.g., Pa. Const. art. IX, § 2 (requiring ten percent of electorate or majority of governing body for referendum); Mich. Comp. Laws Ann. § 117.5(1)(b) (noting amendment election cannot occur more frequently than once every two years); *id.* § 117.5(1)(e) (incorporating referendum requirement for adoption or amendment of city charter); Or. Rev. Stat. Ann. § 250.305(2) (requiring fifteen percent of voters in city to sign petition for referendum to be put to voters).

create a new default that may become sticky after a return to normal politics. As in the case of any default, residents would have the opportunity to opt out. But they would be doing so only after being informed of the possibilities of a governance regime plausibly more consistent with their interests.

To assign that task to takeover boards, however, assumes that they have the capacity to balance the interests of various stakeholders in fiscal health both in terms of emerging from current fiscal distress and also in terms of designing institutions that deter recidivism. In the next Part, this Article asks whether it is plausible to demand so much of takeover boards, and how they themselves might be structured to increase the probability of success.

IV. CONSTRAINING TAKEOVER BOARDS

The argument to this point asserts that a state's interest in redressing local fiscal distress may be sufficient to justify imposition of procedurally nondemocratic control of local governance through an appointed takeover board with broad, dictatorial powers. The justification lies in the state's interest and relative capacity to avoid negative externalities, prevent moral hazard problems that might otherwise exist when the state assists distressed localities, and protect access to capital markets necessary to state and local fiscal health.³⁵⁰ The common theme of these justifications for assigning substantial authority to takeover boards is that resident preferences, both local and statewide, can better be realized through the intervention of a benevolent dictator than through the continued operation of a failed local government that has fallen into the pitfalls of fragmentation and interest group rent-seeking at the expense of majoritarian governance. The temporary dictatorship, therefore, is not intended to deviate from the results that a more democratic regime would generate, but to allow them to be realized.

This Part considers an additional perspective on realizing that goal. It takes into account two characteristics of takeover boards not previously considered. First, to state the "objective" of takeover boards in monolithic terms oversimplifies a complicated issue. Both the objective that a takeover board is to pursue and the means by which to pursue it present contestable issues. Given the various stakeholders in a distressed municipality—residents, creditors, and the state—there will be multiple means of balancing competing claims to a limited municipal fund, none of which necessarily trumps alternatives. Moreover, even if there is agreement on a particular objective, such as balancing the local budget, there will be multiple means for achieving that goal without any particular means being optimal. It is not clear that takeover boards enjoy

350. See *supra* Part II (dealing with propriety of takeover boards, their broad powers, and their effects on state interests and local democracy).

an advantage over normal politics in deciding among reasonable substitutes that have similar fiscal effects.

This leads to the second point. The decisions that takeover boards make, concerning both objectives and means of achievement, may be influenced by considerations other than the preferences of a benevolent dictator. The prior Part of this Article implicitly assumed that takeover boards are composed of individuals who seek optimal governance structures for failed localities. This Part instead assumes, more realistically, that takeover boards are necessarily political bodies comprising individuals appointed by state executives who may have an underlying agenda. Given the political nature of all the relevant actors, it would be incongruous to assume that local decisionmaking processes distorted by political interests will be replaced by one devoid of political motivations that tend to deviate from majority preferences. For example, the recent decision by the Nassau County Financial Control Board to require the county to rewrite its budget was met with claims that the takeover board was dominated by Democrats who preferred property tax increases to the tax cuts and wage concessions preferred by Republican elected officials to reach the same fiscal objective.³⁵¹

On this view, the conception of a politically neutral takeover board that enters the fray, resolves fiscal chaos by instituting an ideal governance structure, and retreats in favor of a revived local democracy defies reality. Instead, takeover boards make choices among contestable alternatives, and they may do so in a manner that reduces the likelihood that their actions are consistent with the substantively democratic justifications for their existence.

Given the inevitably political nature of the decisions they implement, the legitimacy of takeover boards does not simply rely on whether there exist cogent justifications for their appointment. In addition, it is essential to consider whether it is possible to define a set of objectives that are acceptable for takeover boards, and then to design mechanisms by which they can be constrained so that their activities are consistent with the conduct of a benevolent dictator who seeks to achieve one or more of those objectives. The following sections address those issues in order.

A. Whose Interests Do Takeover Board Members Represent?

Ideally, elected local officials have a relatively clear objective: pursue the interests of the local electorate. To this point, this Article has contended that, in order to satisfy those interests, it is appropriate to impose a takeover board when electoral and Tieboutian constraints on officials

351. See David M. Halbfinger, *New York State Seizes Finances of Nassau County*, N.Y. Times (Jan. 26, 2011), <http://www.nytimes.com/2011/01/27/nyregion/27nassau.html> (on file with the *Columbia Law Review*) (reporting County Executive Edward P. Mangano criticized takeover board and accused board of partisanship).

fail or when intramural fiscal decisions have impacts on nonresidents whose interests local officials will likely disregard. The failure of local officials to satisfy local interests—whether by misfortune, incompetence, or corruption—might be thought to entail that the takeover boards replacing local officials must serve the same objective of advancing local interests. If state creation of a takeover board were triggered solely by the failure of local officials to serve local interests, the assumption that takeover boards serve the same function would be justified. But given that justifications for state takeover are at least partially predicated on considerations external to the interests of the locality,³⁵² appointment of a takeover board implies protection of those interests, even if that requires subordination of local interests.³⁵³

The statutory framework for appointing takeover board members in most jurisdictions confirms that view. State officials are typically charged with naming takeover board members, and the relevant officials often represent a broad spectrum of the state's political and fiscal interests.³⁵⁴ In addition, because state intervention is frequently triggered by concerns for contagion from the nonpayment of the distressed municipalities' debts, the appointment of a takeover board typically entails signaling to creditors that they will receive payment of their obligations notwithstanding the adverse impact on municipal residents.³⁵⁵ For example, the creation of the EFCB with substantially more authority over the New York City budget than MAC was predicated at least in part on the perceived distrust between the mayor and the banking community, which doubted the former's sincerity in making changes to the fiscal structure of the city.³⁵⁶ Thus, the potential constituents of the takeover board include residents of the distressed municipality, residents of the state, and creditors.

352. See *supra* text accompanying notes 203–214 (suggesting desire to avoid state absorption of local welfare costs justifies state capital infusions to struggling municipalities).

353. See, e.g., R.I. Gen. Laws Ann. § 45-9-1 (West 2014) (requiring state-appointed receiver to act with “regard for the needs of the citizens of the state and of the city or town, . . . as will best preserve the safety and welfare of citizens of the state and their property, and the access . . . to capital markets”).

354. See, e.g., 53 Pa. Cons. Stat. Ann. § 12720.202(a) (West 2013) (requiring five members of PICA to be appointed by state executive and legislative leaders).

355. See, e.g., Mary Williams Walsh & Michael Cooper, *Faltering Rhode Island City Tests Vows to Pensioners*, N.Y. Times (Aug. 13, 2011), <http://www.nytimes.com/2011/08/13/us/13bankruptcy.html> (on file with the *Columbia Law Review*) (recounting how law passed requiring Central Falls to pay creditors was in conflict with promises to make pension payments to retired public servants).

356. See Lachman & Polner, *supra* note 98, at 126–31 (stating “bankers . . . shared with . . . private sector advisers their belief that Mayor Bianne was not up to . . . balancing the city's books,” due to various concerns, including waning federal aid for popular programs, conflicts with unions, and failure to provide adequate estimate of budget shortfall).

Initially one might conclude that there is no conflict among these constituencies, because pursuit of the interests of each one depends on ensuring the long-term fiscal stability of the distressed locality. But there are multiple ways of accomplishing fiscal stability, and the different groups of constituents may prefer different paths. Local residents may prefer that budget balancing occur at the expense of creditors, who are likely largely to comprise nonresidents, rather than at the expense of higher taxes or reduced services for themselves, or reduced pay and pensions for neighbors who are active or retired public employees. The decision to impose costs on creditors is not necessarily an effort to externalize costs, since any reputational harm to the locality caused by debt restructuring could cause increased interest rates when the locality returns to the capital markets.³⁵⁷ Thus, resident preferences to impose costs on creditors cannot be dismissed as pure opportunism, although residents' myopia could cause them to apply high discount rates to future tax increases and prevent full capitalization of future obligations into current property values. Moreover, although one might conclude that creditors were not the cause of fiscal distress, prospective creditors, or at least underwriters who might be seen as their representatives, have opportunities to detect fiscal distress through due diligence and may have charged interest rates commensurate with a higher risk of default.³⁵⁸ As a consequence, they have been paid to take the very risk that has materialized and should not be heard to complain when they are asked to bear a proportionate share of that risk.

But even if residents' preference for imposing costs on creditors is nonopportunistic, the state that creates a takeover board may have a different perspective. The state may prefer that residents of the controlled city, rather than creditors, bear the adverse effects of fiscal distress. The state may demand reduced municipal services or pension payments prior to making any capital infusion into the distressed city in order to reduce the moral hazard traditionally associated with bailouts.³⁵⁹ Moreover, the state may be more attentive than municipal officials to concerns that failure to pay creditors in full will generate higher borrowing costs elsewhere as potential creditors consider the debt of those entities to be riskier.³⁶⁰ Bailey contends that the demands of MAC toward New York City were intended "to link the creditworthiness of the city, and thus also the MAC, with dramatic and partly symbolic policies aimed at reducing the

357. See, e.g., Michael Tomz, *Reputation and International Cooperation* 39–69 (2007) (noting sovereign debtors in default are unable to access capital markets); Walsh & Robertson, *supra* note 231 (noting distressed country unable to borrow at any price).

358. See Gillette, *Bondholders*, *supra* note 319, at 664–76 (explaining superior monitoring capacity of bondholder representatives).

359. See *supra* notes 207–218 and accompanying text (discussing moral hazard and state demand for reduced municipal services).

360. See *supra* note 206 and accompanying text (discussing fear of default creating higher interest rates in nearby localities).

budget deficits of New York.”³⁶¹ One former state official testified before Congress that the oversight structure in New York City was created “to restore confidence to the bond markets, which function as the true control on the city with credit ratings that, in effect, withhold money or charge excessively for money.”³⁶²

Perhaps the most dramatic recent example of state efforts to favor creditors over residents involves Central Falls, Rhode Island, a city of 19,000 that had been placed in receivership by the state, but that ultimately filed for bankruptcy under Chapter 9.³⁶³ Shortly before the filing of the city’s bankruptcy petition in the summer of 2011, the state enacted a statute that required cities to impose ad valorem taxes sufficient to pay general obligation indebtedness and that purported to give creditors a first lien on those revenues.³⁶⁴ The receiver for the city—essentially a one-person takeover board—supported the statute, which some contended required him to pay creditors prior to making pension payments for city workers, and presumably prior to paying for ongoing city services.³⁶⁵ State officials reportedly defended the statute as necessary to ensure that investors would continue to purchase bonds of Rhode Island and its municipalities.³⁶⁶ The Democratic chairman of the Rhode Island House Finance Committee explained the legislation as essential to the financial safety of all municipalities within the state:

If bond rating agencies were to decide that it’s too easy for communities in Rhode Island to enter receivership and stop paying creditors, they’d consider every municipality in the state a credit risk, and that would have a very negative effect on bond ratings all over the state. In the end, it would cost every city and town more every time they borrow money.³⁶⁷

361. Bailey, *supra* note 19, at 31.

362. Financial Control Boards, *supra* note 45, at 45 (statement of Edward V. Regan, former Comptroller of N.Y. State).

363. Scott Malone, Rhode Island’s Central Falls Files for Bankruptcy, Reuters (Aug. 1, 2011, 4:47 PM), <http://www.reuters.com/article/2011/08/01/us-rhodeisland-central-falls-idUSTRE7703ID20110801> (on file with the *Columbia Law Review*).

364. R.I. Gen. Laws Ann. § 45-12-1 (West 2014). Other states similarly create first liens on municipal-tax revenues in favor of municipal bondholders. E.g., Cal. Gov’t Code § 53829 (West 2014); Mich. Comp. Laws Ann. § 141.108 (West 2014).

365. Michael Corkery, Bondholders Win in Rhode Island, Wall St. J. (Aug. 4, 2011, 12:58 PM), <http://online.wsj.com/news/articles/SB10001424053111903885604576486610528775994> (on file with the *Columbia Law Review*); see also *Moreau v. Flanders*, 15 A.3d 565, 571 (R.I. 2011) (discussing process by which Central Falls entered into state receivership).

366. *Moreau*, 15 A.3d at 571 (noting legislators enacted statute after financial rating agencies told state officials “as a result of Central Falls’ receivership . . . debt financing . . . would become more expensive for Rhode Island municipalities”).

367. Press Release, State of R.I. Gen. Assembly, Assembly and Governor OK Measure to Prevent Municipal Receivership (June 17, 2010), http://www.rilin.state.ri.us/press-release/_layouts/RIL.PressRelease.ListStructure/Forms/DisplayForm.aspx?List=c8baae31-3c10-431c-8dcd-9dbbe21ce3e9&ID=6152# (on file with the *Columbia Law Review*) (quoting Steven Costantino, Chairman, Rhode Island House Finance Committee). It is interesting

Other provisions of state law similarly appear to elevate the interests of creditors at the expense of residents of a distressed municipality. For instance, the New York State Emergency Fiscal Control Board for Yonkers was succeeded by legislation that appointed the state comptroller as the “fiscal agent” for that city.³⁶⁸ In that capacity, the comptroller was granted the power to approve municipal budgets, control a segregated debt service account, segregate bond proceeds, and approve the issuance of new securities.³⁶⁹ The state comptroller was legislatively authorized to exercise these powers until retirement of the bonds issued to cover the deficit that led the state to impose a takeover board in the first instance. But those powers were subsequently expanded, not through the legislative process, but instead through bond covenants.³⁷⁰

Even where the objectives of the city and the state do not patently diverge, it is plausible that measures taken by a takeover board may have long-term negative implications for municipal residents. Efforts to resolve fiscal distress typically involve some combination of revenue enhancement, cost reduction, and borrowing. Residents might prefer either a different mix among these alternatives than is offered by the takeover board, or at least a process that permits the choice among reasonable alternatives to be made by elected officials. For example, in the 1970s, MAC issued thirty-year bonds to support New York City.³⁷¹ MAC secured the bonds through a portion of state sales tax revenue that otherwise would have been available to the city.³⁷² As those bonds approached maturity, however, the city was in the midst of a new financial downturn, the consequences of which could have been partially averted if the funds earmarked for payment of the 1970s MAC bonds had instead been made available to the city.³⁷³ The state responded by creating a new mechanism that effectively rolled over the 1970s debt for an additional thirty years.³⁷⁴ In effect, the scheme required that New York City residents in the 2030s pay the MAC debt incurred in the 1970s.

to compare the choice made by Rhode Island to favor creditors over pensioners with the proposal made in Michigan to assist in a “grand bargain” that would dedicate state funds to increasing payments to pensioners under the plan of adjustment in bankruptcy, but would not be made available to other creditors. See generally Mary Williams Walsh, *Detroit Bankruptcy Deadline May Be Missed, Imperiling State Funds*, N.Y. Times: Dealbook (May 15, 2014, 8:59 PM), <http://dealbook.nytimes.com/2014/05/15/detroit-bankruptcy-deadline-may-be-missed-imperiling-state-funds> (on file with the *Columbia Law Review*) (discussing Detroit’s proposal for “grand bargain” in bankruptcy plan).

368. *Actions Taken*, supra note 24, at 78.

369. *Id.*

370. *Id.*

371. *Local Gov’t Assistance Corp. v. Sales Tax Asset Receivable Corp.*, 813 N.E.2d 587, 589 (N.Y. 2004).

372. *Id.* at 589–90.

373. *Id.* at 590.

374. *Id.* at 589–90. The New York Court of Appeals ultimately upheld the laws creating the extension. See *id.* at 589.

While one may question whether elected officials in the 1970s would have contemplated such a scenario in deciding whether and how much debt to issue at that time, there is at least similar skepticism about the capacity or willingness of MAC officials to engage in that analysis.

Thus, it is plausible that, where the interests of local residents, state residents, and creditors diverge, a state-appointed takeover board may not identify its objective with the interests of the first group. Perhaps that result is acceptable on the assumption that the takeover board internalizes the interests of all those affected by local fiscal distress. But there is a risk that takeover boards serve the interests of the state in more nefarious ways than marginally favoring creditors over local residents.

Partisan politics, for example, may induce the state to jump quickly to control a distressed locality whose officials belong to a party other than the one that controls the state house. The opportunity to embarrass a mayor of a city with a different party affiliation could, in theory, explain why some fiscal crises are addressed through state takeover rather than through less invasive measures. Once again, analogy to the Roman dictatorship may be instructive. Notwithstanding its characterization as a protector of the public good and “guardian of the republican order,”³⁷⁵ at least by some accounts a dictator was often appointed primarily to advance the interests of a discrete group.³⁷⁶ Even Rossiter, an ardent admirer of the Roman dictatorship, acknowledged that suspension of normal politics could be utilized as a “weapon” of a dominant class to frustrate political advances by others.³⁷⁷

Similarly, states may deploy takeover boards to expand the scope of their jurisdiction beyond clear cases in which the externalities imposed by local fiscal crisis justify state intervention.³⁷⁸ States are likely to exercise their expansionist tendencies in the financial area because control over local budgets not only reduces the risk of contagion from fiscal crisis, but also favors the state in the vertical tax competition that they face with localities.³⁷⁹ Indeed, the history of the home rule movement has largely been written as a reaction to state interventions that were considered to constitute pretexts for denying localities the authority to make autonomous decisions, notwithstanding the absence of substantial statewide

375. Kalyvas, *supra* note 1, at 416.

376. See *id.* at 420 (“Dictatorship was therefore deliberately designed to stop the political ambitions of the multitude . . .”); see also Rossiter, *supra* note 2, at 21–22 (explaining dictatorship could be used as “instrument of class warfare”).

377. Rossiter, *supra* note 2, at 21–22.

378. See Roderick M. Hills, Jr., Compared to What? Tiebout and the Comparative Merits of Congress and the States in Constitutional Federalism, *in* Tiebout Model, *supra* note 227, at 239, 249 (explaining tendencies of centralized governments to expand scope of their jurisdiction).

379. Clayton P. Gillette, Fiscal Home Rule, 86 *Denv. U. L. Rev.* 1241, 1249–51 (2009) (noting potential “race to the bottom” when states compete with low tax rates to attract mobile capital).

effects.³⁸⁰ State constitutional prohibitions on special legislation and on “special commissions” have frequently been viewed as efforts to countermand the legislature’s tendency to impose burdens or benefits on localities at the behest of residents unable to command a majority within the local political process or nonresidents who were able to organize at the state level to constrain localities involved in activities that the nonresidents found distasteful.³⁸¹ In short, the risk of contagion may be in the eye of the beholder, and state officials, who are likely to identify their objective functions more with state goals than with those of the residents of controlled localities, may favor takeovers of local budgets for political reasons unrelated to the efficient provision of local public goods.

It is difficult to evaluate the extent to which state officials or their appointees to takeover boards are motivated by political partisanship or a desire to expand state jurisdiction. One measure of political motivation might be divergent party affiliations among the mayor, the governor, and the legislature. No studies test whether localities headed by mayors with a party affiliation different from that of the state leadership are more likely to be taken over than localities in similar financial condition but governed by mayors with a party affiliation the same as that of state leaders. There is, however, anecdotal evidence that takeover boards tend to arise when the state house is occupied by a different party than city hall.

Harrisburg, Pennsylvania’s recent abbreviated foray into Chapter 9 was precipitated by a Democratic city council’s efforts to resist the imposition of financial reforms by a Republican governor and Republican state legislators.³⁸² Although Connecticut created a financial review board for Bridgeport when the city had a Democratic mayor and the state had a Democratic governor, a cooperative relationship that had existed between the board and the city apparently disintegrated when the city elected a Republican mayor.³⁸³ When board and city officials disagreed on whether to close the city’s deficit through tax increases (favored by the state, though potentially politically suicidal for the mayor during an election year) or through wage concessions and borrowing, the mayor

380. See *supra* notes 36–37 and accompanying text (describing history of home rule movement).

381. See *supra* note 204 and accompanying text (discussing special legislation as avenue for state interference); see also Jon C. Teaforde, *The Unheralded Triumph: City Government in America 1870–1900*, at 84–94, 105–07 (1984) (discussing historical prevalence of deference to localities, including during constitutional conventions).

382. See Paul Burton, *Harrisburg Fate in Judge’s Hands, Bond Buyer* (Nov. 18, 2011, 6:56 PM), http://www.bondbuyer.com/issues/120_224/harrisburg-pa-bankruptcy-1033367-1.html (on file with the *Columbia Law Review*) (describing pending decision on Democratic city council’s Chapter 9 filing).

383. See Dorothy A. Brown, *Fiscal Distress and Politics: The Bankruptcy Filing of Bridgeport as a Case Study in Reclaiming Local Sovereignty*, 11 *Bankr. Dev. J.* 625, 633–37 (1995) (discussing election of Republican mayor and explaining “Bridgeport’s bankruptcy filing was not the result of economics but of politics”).

filed for bankruptcy.³⁸⁴ Similarly, Howard Gillette's account of Camden, New Jersey, indicates that partisan politics played as great a role as fiscal policy in designing a state bailout.³⁸⁵ The recent extension of powers for emergency financial managers in Michigan and the appointment of an emergency manager for Detroit occurred after a transition from a Democratic to Republican governor and Republican capture of majorities in the state senate and house of representatives.³⁸⁶ That is not to say that none of the target localities was fiscally sound at the time of state action. Indeed, one reasonable interpretation of these events is that appropriate state intervention may have been improperly delayed by the state's unwillingness to intervene in a municipality governed by the same party as the state house.

One important exception to the claim that partisanship explains the appointment of takeover boards is New York City, which was headed by Democrat Abraham Beame when Democratic governor Hugh Carey led the takeover effort. The city's situation may have been so dire that, politics aside, state intervention was incontrovertibly necessary to avoid municipal bankruptcy and widespread contagion. Even in that situation, however, it is notable that it was the Republican leader of the state assembly who insisted on significantly increased conditions for state assistance and who rejected pleas from the city for assistance prior to the creation of MAC, notwithstanding more sympathetic support from the governor and chief financial officers of the state.³⁸⁷ In negotiations about MAC's powers, Republicans demanded that the board have veto power over city debt issues, that tax revenues be segregated for MAC's use, that the board include state legislative representation, and that limits be

384. See *id.* at 635–37 (describing mayor's move to file for bankruptcy in lieu of raising property taxes during election year when Bridgeport residents were in worsening financial straits).

385. See Gillette, Camden, *supra* note 129, at 191–215 (explaining how various elements of recovery effort “highlighted the ways in which political influence triumphed over economic need”).

386. While Detroit, which has been dominated by members of the Democratic Party, has been in decline for several decades, appointment of an emergency manager occurred only after the 2010 elections, which placed Republicans in charge of the state legislature and the governorship. See Kate Abbey-Lambertz, Michigan Emergency Manager Law in Effect in Six Cities After Detroit Appointment (MAP), Huffington Post (Mar. 15, 2013, 11:40 AM), http://www.huffingtonpost.com/2013/03/15/michigan-emergency-manager-law-cities_n_2876777.html (on file with the *Columbia Law Review*) (discussing appointments of emergency financial managers in Detroit and throughout Michigan); Election 2010: Michigan, N.Y. Times, <http://elections.nytimes.com/2010/results/michigan> (on file with the *Columbia Law Review*) (last visited Aug. 31, 2014) (showing Republican control of governorship and U.S. House of Representatives following 2010 elections); Michigan State Legislature, Ballotpedia, http://ballotpedia.org/Michigan_State_Legislature (on file with the *Columbia Law Review*) (last modified June 6, 2014, 9:06 AM) (showing Republican control over state house of representatives and senate).

387. Bailey, *supra* note 19, at 25.

placed on long-term city debt.³⁸⁸ The subsequent Financial Emergency Act, which placed greater restrictions on the city's self-government, was not opposed by the city, but was opposed by Republicans who wanted no state appropriations for the city. The Republican leader of the assembly apparently voted for the bill only after meeting with Ford Administration officials and representatives of New York banks.³⁸⁹

Still, the New York experience indicates that it is difficult systematically to reach conclusions about the effects of partisanship on a state's decision to appoint or avoid a takeover board. Other jurisdictions confirm the ambiguity. For example, a Democrat held the governorship in Pennsylvania when Philadelphia was placed under state oversight in 1991 and Pittsburgh in 1993. Washington, D.C., was placed under a financial control board in 1995,³⁹⁰ when Republicans held majorities in both the House and the Senate. Nevertheless, the proposal for an oversight board was initiated by a councilman from the district, and its congressional delegate, Eleanor Holmes Norton, supported the proposal.³⁹¹ In the absence of compelling evidence of partisanship or political motivations, it is difficult to contend that either the appointment of a takeover board or the measures that a board implements are inherently driven by inappropriate objectives. That said, the multiplicity of potential legitimate objectives, which may license a range of activity that is also consistent with more invidious motivations, at least demands a level of explanation and transparency for both budgetary and structural changes that a board implements. One is likely to look askance even at structural changes that are empirically related to fiscal stability if one is skeptical that they are being implemented less to relieve fiscal distress than to replace an entrenched local government with one more likely to reflect the will of equally entrenched, and not necessarily more benign, state officials.

B. *Personal Objectives of Takeover Board Members*

Assuming agreement on an appropriate objective for a takeover board, why would its members not pursue an alternative goal, such as maximizing the interests of one of the multiple constituencies the board serves or optimizing personal leisure time? This is not to say that takeover board members would be corrupt or intentionally deviate from the interests of their intended constituents. It is only to say that, immune from democratic constraints, they might filter the priority they attribute to different constituents, or their conception of how to serve various constituents, through a lens informed by objectives other than the optimal

388. *Id.* at 26.

389. *Id.* at 40.

390. District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub. L. No. 104-8, 109 Stat. 97 (codified as amended at D.C. Code §§ 47-391.01-393 (2014)).

391. *Actions Taken*, *supra* note 24, at 1 (statement of Rep. Davis, Chairperson, H. Subcomm. on D.C.).

strategy defined through the democratic procedures that takeover boards dominate or displace. Local officials who are members of takeover boards may favor the interests of local residents on whom they remain dependent for their political office over those of nonresidents and creditors, even if it were otherwise agreed that those other constituencies deserved equal consideration. Members of takeover boards appointed from the private sector may have difficulty abandoning the incentives and interests that they bring to their public roles, especially when those roles are prized as providing the knowledge and expertise necessary to remedy the distress created by public officials.

For example, the chief operating officer appointed for Camden had been mayor of the city and the state commissioner of community affairs. But just prior to his appointment, he ran a firm that had become the most active underwriter of short-term municipal bonds in New Jersey.³⁹² It is plausible that such roles could skew the selection that board members make among various alternatives when serving as benevolent dictator, not out of mendacity, but because their backgrounds color their view of how best to fulfill that role. Felix Rohatyn, an investment banker, was perceived by some as being too lenient on creditors at the expense of residents.³⁹³ Bailey, for example, concluded that, under Rohatyn's leadership, MAC transformed from serving as an advocate for the city to advocating on behalf of the credit markets to the city.³⁹⁴

Unlike unelected judges, for whom long terms of office, repeat play with other judges and litigators, and the obligation to publish opinions provide a basis for believing that reputational constraints will offset the absence of democratic controls,³⁹⁵ the temporary nature of takeover boards, the relative anonymity of takeover board members, and the reduced likelihood that members will be active in multiple takeover boards make it difficult to rely on extralegal sanctions to motivate fidelity to even well-defined objectives. Legal sanctions are similarly unlikely to impose substantial constraints for two reasons. First, takeover boards will necessarily have statutory latitude in selecting which fiscal tools among multiple viable alternatives will create fiscal stability for the locality.

392. See Gillette, Camden, *supra* note 129, at 208 (“[Camden Chief Operating Officer Randy] Primas’s Commerce Capital Markets . . . was the most active underwriter of short-term municipal bonds in New Jersey for six straight years through 2002, issuing \$1.3 billion in bonds in 214 issues in 2002 alone.”).

393. See, e.g., Julian Brash, *Invoking Fiscal Crisis: Moral Discourse and Politics in New York City*, 21 Soc. Text 59, 69 (2003), available at http://muse.jhu.edu/journals/social_text/v021/21.3brash.pdf (on file with the *Columbia Law Review*) (detailing perception of Rohatyn “as a trusted ally of business”).

394. Bailey, *supra* note 19, at 31 (explaining MAC became “advocate for the market with the city”).

395. See, e.g., Richard A. Posner, *Overcoming Law* 109–44 (1995) (discussing judges’ “incentives and restraints”); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 *Sup. Ct. Econ. Rev.* 1, 113–15 (1993) (describing utilitarian motivations underlying judicial behavior).

Second, courts are likely to defer to the presumed expertise of board members.³⁹⁶ The result is that takeover boards can implement their visions of desirable budgetary programs with little in the way of formal political or legal constraints.

C. Termination as a Constraint

Of course, issues arising from both the multiple objectives that takeover boards might serve and the possibility that board members will deviate even from an accepted objective dissipate to the extent that takeover boards enjoy only limited jurisdiction over a locality. The most obvious mechanism for constraining the nondemocratic characteristics of takeover boards, therefore, is to limit the scope of their authority and their terms of office. Any acceptable sacrifice of procedural democracy for substantive results more consistent with popular preferences presumably would take into account both the range of decisions over which the takeover board has hegemony and the period for which that hegemony exists. Even an intrusive takeover board is less objectionable if it operates only with respect to the financial affairs of the municipality, only when the normal political processes for taxing and spending threaten fiscal crisis, and only until those processes regain public trust.³⁹⁷ If takeover board members can enter the fray on a temporary basis, resolve budgetary imbalances, and return—like Cincinnatus—to the fields that they previously plowed, the fact that they are not formally elected may do little damage to the principles of democratic governance.

Substantial variation exists along both jurisdictional and temporal authority in those states that have sanctioned takeover boards. The court in the Bridgeport, Connecticut, bankruptcy proceedings concluded that the state's appointment of a takeover board did not usurp local authority contrary to a state prohibition on special legislation because the purpose of the statute was only to enhance the city's capacity to issue debt and did not affect "Bridgeport's authority to conduct day to day operations."³⁹⁸ Those provisions in Michigan and Rhode Island legislation that allow the takeover board fully to displace elected officials obviously entail a much greater procedural intrusion on local democracy. Insofar as it implicates

396. See, e.g., *Cnty. of Nassau v. Nassau Cnty. Interim Fin. Auth.*, 920 N.Y.S.2d 873, 885–91 (Sup. Ct. 2011) (interpreting home rule provision broadly and stating "where, as here, the judgment of the agency involves factual evaluations in the area of the agency's expertise . . . such judgment must be accorded great weight and judicial deference" (quoting *Flacke v. Onondaga Landfill Sys.*, 507 N.E.2d 282, 286 (N.Y. 1987))).

397. See *Actions Taken*, supra note 24, at 52–55 (statement of Nonna A. Note, Specialist in Pub. Fin., and Lillian Rymarowicz, Analyst in Pub. Fin.) (discussing powers of successful boards); *Financial Control Boards*, supra note 45, at 11, 14, 17, 38–39 (statement of Rudolph W. Giuliani, Mayor, N.Y.C., and statement of Hugh L. Carey, Former Governor of N.Y. State, and Edward V. Regan, former Comptroller of N.Y. State) (advocating careful use of emergency control boards until possible to return to "normal political structure").

398. *In re City of Bridgeport*, 128 B.R. 688, 699–701 (Bankr. D. Conn. 1991).

the general decisionmaking process for municipal policy, the proposal to permit takeover boards to restructure municipal governance, although rooted in a desire to achieve fiscal stability, obviously involves a much greater scope of municipal affairs.³⁹⁹ Nevertheless, avoidance of recidivism requires governmental restructuring to which normal politics are resistant if not immune, and that implies a very broad and autocratic use of takeover board authority. Limiting the scope of takeover board authority to fiscal affairs, narrowly defined, reduces the capacity to institute the kinds of institutional reforms that are associated with fiscal stability.

Temporal limitations therefore initially appear more attractive than jurisdictional ones. Temporal limitations permit full exercise of takeover board potential, but avoid entrenchment of nondemocratic characteristics and can be linked to benchmarks that measure the need for continued displacement of normal politics. Roman dictators were required to abdicate control of the Republic when their assigned task was completed or in six months, whichever came first.⁴⁰⁰ Michigan allows a municipality to remove an emergency manager after eighteen months.⁴⁰¹ But the assumption that budgetary and structural issues can be resolved within predetermined time periods defies the variability of causes of fiscal distress and the measures necessary to address them. The control period in the North Carolina takeovers mentioned above lasted less than one year.⁴⁰² Some takeover periods last longer: New York City was at least nominally subject to the supervision of MAC until 2008.⁴⁰³ Indeed, a strict temporal limitation may have perverse effects if it induces a takeover board to take precipitous measures within its term that it would have deferred or avoided if its jurisdiction were more open-ended.⁴⁰⁴

399. Even the broadest authority to displace local officials does not necessarily translate into its exercise. It is noteworthy that the emergency manager for Detroit, perhaps sensitive to the claims of antidemocratic rule, immediately restored all compensation and quotidian duties to the mayor and city council. See Order No. 1, *supra* note 121, at 2. The emergency manager subsequently authorized the mayor and city council to operate the day-to-day business of the city. Order No. 3, *supra* note 121, at 2. When one member of the city council failed to participate, the emergency manager revoked the restoration of compensation and duties to him. See Order No. 9, *supra* note 121, at 3.

400. See Rossiter, *supra* note 2, at 23; Kalyvas, *supra* note 1, at 416.

401. See Mich. Comp. Laws Ann. § 141.1549(6)(c) (West 2014).

402. See Coe, *supra* note 62, at 40.

403. See A. Lisberg, Municipal Assistance Corp., New York's 1975 Savior, Says "See Ya," N.Y. Daily News (Sept. 27, 2008), <http://www.nydailynews.com/news/money/municipal-assistance-corp-new-york-1975-savior-ya-article-1.325509> (on file with the *Columbia Law Review*).

404. Numerous news reports indicate that the emergency manager for Detroit was concerned about addressing certain issues within the eighteen-month period before the city council was entitled to remove him from office. See, e.g., Matthew Dolan, In Detroit Bankruptcy, a Battle over Speed, Wall St. J. (Feb. 25, 2014), <http://online.wsj.com/news/articles/SB10001424052702304834704579405502019613842> (on file with the

Nor is it necessarily desirable from the perspective of the locality itself to minimize the term of financial control. One measure of fiscal stability is the return to a balanced budget. Nevertheless, it is not necessarily the case that a municipal budget should be balanced as quickly as possible, even if that achievement is a prerequisite to the return to democratic governance. If a locality is placed under supervision only after it has accumulated substantial deficits, the dedication of current revenues to liquidating debt may frustrate efforts to provide basic services to residents. As a result, it may be desirable to extend the period of financial control beyond the period necessary to eliminate the deficit, if only to ensure that local services are not sacrificed in favor of short-term debt relief.

Termination of the control period, therefore, is better measured by objective benchmarks than by predetermined time periods. Many of the statutory schemes for creating financial control boards adopt a similar strategy. The District of Columbia control period terminated after the district could access credit markets and had maintained a balanced budget, measured by generally acceptable accounting principles, for four years.⁴⁰⁵ Ohio allows termination of a financial supervision commission on realization of multiple benchmarks, including implementation of an accounting and financial system, elimination or good-faith implementation of measures to eliminate fiscal emergency conditions, and preparation of a five-year financial plan.⁴⁰⁶ Michigan conditions termination of the control period on the assent of the emergency financial manager and the governor.⁴⁰⁷ Michigan's recently enacted statute that creates a financial review commission to oversee cities subject to a plan of adjustment under Chapter 9 (that is, Detroit) dissolves state review if the city has met specified conditions for ten consecutive fiscal years.⁴⁰⁸

Other statutes, however, prolong the life of the takeover board based on characteristics that have limited relationship to the nature of financial stability of the locality. One common condition requires the continuing existence of the takeover board while any of its indebtedness is outstanding.⁴⁰⁹ That condition may be necessary in order to induce

Columbia Law Review) ("Detroit, concerned about spending millions on lawyers and other professionals, wants to move quickly out of court and on to investing in the city again."). One can speculate that the emergency manager might have adopted different measures if his term was not so constrained.

405. District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub. L. No. 104-8, 109 Stat. 97 (codified as amended at D.C. Code § 47-392.09(b) (2014)).

406. Ohio Rev. Code Ann. § 118.27(B) (West 2002).

407. Mich. Comp. Laws § 141.1562 (2014).

408. See *id.* § 141.1642.

409. See, e.g., 105 Ill. Comp. Stat. Ann. 5/34A-604 (West Supp. 2014) ("The Authority shall be abolished one year after all its Obligations have been fully paid and discharged . . ."); 53 Pa. Cons. Stat. Ann. § 11701.253 (West 2011) (making retiring of

prospective creditors to purchase bonds issued during a period of supervision. The effect, however, is to create both a perverse incentive for takeover board members to issue additional bonds in order to maintain their position (reminiscent of Robert Moses's issuance of bonds to continue the life of public authorities after the costs of constructing their projects had been paid⁴¹⁰) and potentially to allow continuation of the takeover board long after termination of an emergency. Even if the premise that state supervision reduces the risk of default is correct, however, creditor assurances could be provided by other means, such as through state guarantees, after the termination of a takeover board.

Additionally, the need for a takeover board may be reflected in the creditworthiness of a municipality. Since one objective of takeover boards is to regain or stabilize access to credit markets, a period during which credit agencies have assigned investment-grade ratings to the municipality's debt may also indicate that a return to democratic governance is appropriate.

These fiscal measures, however, do not fully capture the extent to which a municipality has emerged from fiscal failure. The function of municipalities is not simply to balance a budget or achieve a bond rating, each of which may be attained by sacrificing preferred services of residents to the interests of other constituencies. Instead, fiscal stability both requires and is desirable to ensure the delivery of services consistent with the reasons for which localities are created in the first instance.⁴¹¹ This does not mean that all municipalities must deliver the same or the same level of services. But if a mismatch between service delivery at particular tax prices and resident preferences is a measure of fiscal distress, then reducing that gap should be a measure of the need for nondemocratic intervention. It is perhaps for this reason that the emergency manager's report to creditors that sought to portray the dire condition of Detroit emphasized not only budgetary deficits, but the city's inadequate provision of police and fire services, street lighting, property assessment, public transportation, public parks, ambulance services, and blight removal.⁴¹²

debt obligations to finance deficits one factor in terminating jurisdiction of state coordinator for municipality).

410. See Robert Caro, *The Power Broker* 625–26 (1974) (discussing how New York City Triborough Authority strategically delayed repayment of bonds).

411. The assumption that municipalities are created in large part to provide public goods and services not available in the market unites scholars who otherwise have different perspectives on the role of local government. See Anderson, *New Minimal Cities*, *supra* note 143, at 1195–1204 (assessing possible heuristics for understanding minimally required urban services); Gerald E. Frug, *City Services*, 73 *N.Y.U. L. Rev.* 23, 33 (1998) (examining public goods theory of municipalities and arguing it leads to undesirable consequences); Gillette, *Equality and Variety*, *supra* note 143, at 948 (proposing theoretical bases to undergird a municipal “duty of equal service”).

412. See *Proposal for Creditors*, *supra* note 12, at 9–22.

It can, of course, be difficult to evaluate the quality of service delivery. Quantifying the cleanliness of streets or the condition of parks in order to measure fiscal distress is problematic. But some services are susceptible to calculation, and they may serve as proxies for overall municipal health. For example, Detroit's claim that it was insolvent, and thus qualified for bankruptcy, was frequently articulated in terms of comparative crime rates, police response times, and population decline.⁴¹³ Similar metrics have been used by bankruptcy courts that have adjudicated whether a municipality qualifies for Chapter 9 purposes by considering "service insolvency."⁴¹⁴ The court in the Stockton, California, bankruptcy concluded that the city's experience with increased crime rates, record homicide levels, increases in aggravated assaults, and limited capacity of police to respond demonstrated that it was suffering cash insolvency.⁴¹⁵ Vallejo, California, filed a petition under Chapter 9 only after reducing employee rolls and municipal services to the point that the bankruptcy court concluded that further cuts would threaten the city's ability to provide for the basic health and safety of its citizens.⁴¹⁶ The court in Bridgeport, Connecticut's efforts to adjust debts in bankruptcy accepted as evidence of fiscal distress the city's reduction in police force, high automobile theft rate, reduction of residential garbage collection, and minimal snow plowing and street cleaning.⁴¹⁷ Note that the metrics that enter most commonly into the bankruptcy courts' analyses of fiscal distress involve crime rates. While one might contend that crime rates are used simply because they are readily available, there may be a more substantive reason to utilize them. Paul Romer, for example, argues that increased crime provides a more accurate explanation for depopulation that accompanies fiscal crisis than negative economic shocks.⁴¹⁸ Crime reduction, on this view, is essential to revitalization of distressed cities. For the same reason, the use of crime rates may indicate the extent to which a municipality is sufficiently capable of performing the functions for which it was created to justify return to the processes of local democracy and normal politics. Other metrics may have similar evidentiary value. Indicators of service quality such as average age of capital equipment (fire trucks, police cars, ambulances), expenditures on

413. See *id.*

414. See, e.g., *In re City of Detroit*, 504 B.R. 97, 169 (Bankr. E.D. Mich. 2013) ("[I]t is the City's service-delivery insolvency that the Court finds most strikingly disturbing . . ."); *In re City of Stockton*, 493 B.R. 772, 789-90 (Bankr. E.D. Cal. 2013) (finding crime rates establish "service insolvency"); see also Anderson, *New Minimal Cities*, *supra* note 143, at 1190-92 (noting bankruptcy courts' willingness to consider failure to provide services for Chapter 9 purposes).

415. See *Stockton*, 493 B.R. at 789-90.

416. See *In re City of Vallejo*, 408 B.R. 280, 294 (B.A.P. 9th Cir. 2009).

417. See *In re City of Bridgeport*, 129 B.R. 332, 335 (Bankr. D. Conn. 1991).

418. Brandon Fuller, Paul Romer: Getting Detroit Back Across the Viability Threshold, NYU Stern Urbanization Project (May 6, 2014), <http://urbanizationproject.org/events/detail/paul-romer1> (on file with the *Columbia Law Review*).

public workforce (public employees per capita, public-employee salaries), or functioning levels of municipal assets (working streetlights per square mile, age of technology) relative to municipalities of similar size or geography provide a more robust picture of overall fiscal health than the presence of multiyear balanced budgets alone. To the extent that these measures involve basic public goods that residents of virtually any municipality would desire, they serve as surrogates for the capacity of the municipality to avoid the mismatch between officials' objectives and resident preferences that motivates exit and fiscal crisis.⁴¹⁹ By focusing on measurable outputs of basic services, rather than on budgetary factors alone, takeover boards necessarily pursue a set of objectives consistent with, if not identical to, those that would be sought by a more democratic regime. The result is to reduce the risk that takeover boards would abuse rather than temporarily displace the democratic process.

Perhaps, therefore, the best mechanism for balancing the capacities of takeover boards to restructure local institutions against the risk of divergence from optimal substantive decisions is a two-fold strategy that links their lifespan to characteristics of fiscal distress, but that also requires them, while active, to practice procedural elements of democracy other than susceptibility to election. To give just a single example embodied in some statutes, nothing about the desirability of radical intervention in municipal governance precludes takeover board compliance with the requirements of public deliberation, transparency, and explanation that are indicative of normal politics.⁴²⁰ The combination of termination once objective criteria of fiscal stability have been attained and procedural safeguards that reduce the costs of monitoring takeover board activity may reduce fears concerning the most antidemocratic effects that temporary dictatorships threaten.

CONCLUSION

It is tempting to respond to municipal fiscal distress by advocating a panacea of capital investments by states and private markets, increased employment opportunities, and re-created living spaces that will entice individuals and firms to repopulate abandoned areas.⁴²¹ Such ideals should certainly be pursued. But efforts to revive near-insolvent localities cannot be oblivious to the causes that generated their distress. Depopulation, high unemployment, depleted municipal services, and blight do not

419. See *supra* Part II.A (arguing no democracy deficit exists when takeover boards use authority to obtain universally needed services).

420. See, e.g., 53 Pa. Cons. Stat. Ann. § 11701.607 (West Supp. 2014) (allowing coordinator appointed under PICA to hold public meetings, but permitting private negotiation sessions with individual creditors).

421. See, e.g., Detroit Future City, 2012 Detroit Strategic Framework Plan 8 (2d prtg. 2013), available at http://detroitfuturecity.com/wp-content/uploads/2014/02/DFC_ExecutiveSummary_2ndEd.pdf (on file with the *Columbia Law Review*) (outlining strategy for addressing fiscal distress in Detroit).

arise spontaneously. They are frequently the consequence of long periods of local mismanagement, in which expenditures deviate substantially from those goods and services that residents prefer, inducing the most mobile among them to gravitate to more hospitable jurisdictions. Crisis is likely to emerge when long periods of inefficient expenditures accumulate or are brought to a head by more widespread economic downturns. Any viable response must therefore address the causes of political dysfunction. Since those causes are typically found in the processes of normal politics and are largely immune from remedy through those same processes, redress may require less democratic intervention.

Takeover boards with near-dictatorial powers, including those that coerce or displace the authority of elected local officials, may be the most effective means of addressing the shortfalls and consequences of normal politics. The least contentious models of takeover boards allow them to demand compliance with financial plans and budgets designed outside the usual process of local governance. A substantial literature suggests that particular forms of municipal governance can promote fiscal stability. The more contentious model proposed here seeks to take advantage of that literature and thus would permit extensive takeover board restructuring of governance to extricate the locality from an entrenched pattern of costly and fragmented decisionmaking.⁴²² The increased democratic deficit created by such authority certainly presents certain risks, but the temporal limitations on takeover boards and the possibility of city-charter amendment means that any restructuring must ultimately receive at least implicit approval of local residents. If we are to discover whether the relevant literature has any purchase, it may be worthwhile to take the risks inherent in implementing its lessons.

422. The point here is quite different from the one made in Note, *supra* note 86. The author of that Note observed that takeover boards did not address regional issues that could adversely affect the financial security of cities and suggested that states create financial reform boards that would restructure urban boundaries. This Article argues that internal political interactions, not insufficient regionalization, cause fiscal instability.