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Dictatorships for Democracy: Takeovers of Financially Failed Cities

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Abstract

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, that displace locally elected officials. These "takeover boards" are frequently accused of representing an antidemocratic form of local government and a denial of local autonomy.

In this Article, I suggest that the extent to which takeover boards are subject to an anti-democratic critique is frequently overstated. 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 must therefore address the causes of political dysfunction.

I contend that 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, I suggest, 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 defragmented institutions that are often associated with local fiscal distress. 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.

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I. 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 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 surrendering his authority after 16 days.[2] The 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 and other tragedies had decimated the ranks of that body.[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. Rossiter suggests that the fragmented, decentralized decision-making 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 prompt, unitary response to crises, regardless of their source.[4] The need to overcome institutional inertia is perhaps reflected in the denomination of some dictatorships as a *dictatura rei gerundae causa*, or "the dictatorship for getting things done."[5]

[1] Samuel Issacharoff, Political Safeguards in Democracies at War, 1 Ox. J. L. Stud. 1, 12 (2009); Andreas Kalyvas, The Tyranny of Dictatorship: When the Greek Tyrant Met the Roman Dictator, 35 Pol.Theory 412, 415 (2007); John Ferejohn and Pasquale Pasquino, The Law of the Exception: A Typology of Emergency Powers, 2 Int'l J. Const. L. 210, 211-12 (2004).

[2] Clinton Rossiter, Constitutional Dictatorship 16 (1963); Sanford Levinson and Jack M. Balkin, Constitutional Dictatorship: Its Dangers and Its Design, 94 Minn. L. Rev. 1789, 1791 (2010).

[3] Rossiter, supra note 2, at 21-23; Titus Livius (Livy), 3 The History of Rome 23.22.

[4] Rossiter, supra note 2, at 18.

[5] Id. at 21.

Regardless of the specific cause for his appointment, the dictator enjoyed absolute power, even over matters that bore at best tangential relationship to the nature of the emergency. These included powers of arrest, to coin money, and to convoke and preside over assemblies. Certainly the appointment of a dictator was undertaken with an eye towards the risk of unitary, authoritarian rule. At the same time, constraints on the dictator were sufficient to allow modern commentators to describe his rule as essentially "conservative."[6] The appointment was limited to a six-month term, and dictators were required to abdicate earlier if they accomplished their objective.[7] They were precluded from making permanent changes in the constitutional system of the Republic.[8] What is perhaps most surprising about the institution of the dictator, which ultimately was transformed into a device for dealing with bureaucratic inertia more than with crises,[9] is that it was perceived as an institution wholly consistent with the democratic constitution of the Republic rather than as an abrogation of it. The objective of the dictatorship was not to destroy the democratic process, but to restore it.

Fiscal crisis does not appear to have been the precipitating event for the appointment of any Roman dictator. But the crises that did instigate dictatorships had characteristics common to those that generate fiscal distress and that complicate efforts to surmount it. To the extent that it threatens the breakdown of public services on which local residents depend, fiscal crisis resembles the dissipation of civic order that generated dictators in time of war, insurrection, or unrest. The deterioration of services during periods of fiscal crisis translates into higher crime rates, diminution of public services, and high levels of blighted and abandoned property as

[6] Ferejohn and Pasquino, supra note 1, at 210-11.

[7] Kalyvas, supra note 1, at 416.

[8] Ferejohn and Pasquino, supra note 1, at 211.

[9] 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.

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 decision-maker 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; 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,[10] states have engaged in less visible, but potentially more invasive displacement of local decision making. California now requires municipalities that have not declared a financial emergency to mediate with stakeholders prior to filing under Chapter 9.[11] 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,[12] and, ultimately, to an emergency financial manager who displaced elected officials.[13] Rhode Island placed the City of

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[10] See Bobby White, Stockton, Calif., Seeks Chapter 9 Bankruptcy Protection, Wall St. J., p. A2, June 29, 2012, available at http://online.wsj.com/article/SB10001424052702304058404577495412282335228.html?KEYWORDS=stockton+labor. Harrisburg's brief bout with bankruptcy was precipitated by an investment in an incinerator that was financially infeasible. Jefferson County's bankruptcy was precipitated by investments in derivatives that ultimately led to criminal prosecutions. Other municipalities have considered bankruptcy or taken first steps in that direction.

[11] Calif. Gov. Code § 53760.3.

[12] See Fiscal Stability Agreement between State Treasurer of Michigan and Mayor of Detroit, April 4, 2012 (on file with author); M.C.L.A. § 141.1548(1).

[13] M.C.L.A. § 141.1541 – 1575. 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, November 7, 2012, available at http://blogs.barrons.com/incomeinvesting/2012/11/07/muni-market-assesses-california-michigan-ballot-referendum-results/.

Central Falls into receivership prior to its filing for bankruptcy, and more recently did the same to East Providence.[14]

The current spate of state takeovers is reminiscent of earlier state efforts to resolve fiscal distress within their political subdivisions. New York State famously (or notoriously) created the Municipal Assistance Corporation of the City of New York ("MAC"),[15] the New York City Emergency Financial Control Board ("EFCB"),[16] and the Office of Special Deputy Comptroller for New York City to address New York City's fiscal situation in the 1970s.[17] New York more recently appointed financial control boards for Nassau County, Erie County, and Buffalo.[18] Springfield, Massachusetts was supervised by a financial control board from 2004 through 2009.[19] 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.[20] PICA has appointed a coordinator to oversee a municipality's fiscal affairs in 25 municipalities since the 1980s.[21] New Jersey appointed a business administrator for

[14] See Gov Taps Trooper to Oversee EP's Budget, available at http://www.wpri.com/dpp/news/local_news/providence/ri-to-name-overseer-to-handle-ep-finances.

[15] N.Y. Pub. Auth. L. §§ 3030-3041,

[16] N.Y. McKinney Unconsolidated Laws §§ 5401-5420.

[17] See Robert W. Bailey, The Crisis Regime 23-46 (1984).

[18] Buffalo Fiscal Stability Authority Act, N.Y. Pub. Auth. Law §§ 3850 - 3873 (McKinney); "Erie County Fiscal Stability Authority Act, N.Y. Pub. Auth. Law §§ 3950 - 3973(McKinney); Nassau County Interim Finance Authority, N.Y. Pub. Auth. Law §§ 3650-3669 (McKinney). See Danny Hakim, Deficits Push N.Y. Cities and Counties to Desparation, N. Y. Times, March 10, 2012, available at http://www.nytimes.com/2012/03/11/nyregion/deficits-push-municipalities-to-desperation.html?scp=2&sq=cities%20desperation%20buffalo&st=cse.

[19] http://www.springfield-ma.gov/COS/control_board.0.html.

[20] 53 Penn. Stat. § 12720.101. See Actions Taken by Five Cities to Restore Their Financial Health, Hearing Before the Subcommittee on the District of Columbia of the Committee on Government Reform and Oversight, House of Representatives, 104th Cong., 1st Sess., 74-75 (1995) (hereinafter "Actions Taken").

[21] Eric Scorsone, Local Government Financial Emergencies and Municipal Bankruptcy 6, available at http://www.senate.michigan.gov/sfa/publications/issues/localgovfin/localgovfin.pdf.

Camden under the state's law for rehabilitating localities[22] after finding the city to be in unsound financial condition.[23] 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 plan of adjustment.[24] Congress created a financial control board for Washington, D.C. in the mid-1990s.[25]

State seizure of the financial functions of municipalities through the appointment of entities authorized to oversee or displace elected officials – which I refer to collectively as "takeover boards" – typically generates hostility within the affected locality. Critics view state-appointed takeover boards as violations of local democracy and local autonomy. The least intrusive takeover boards still interfere with the capacity of locally elected officials to resolve issues of local tax rates, service levels, budgeting, and debt. The most invasive ones exercise authority over the local budget reminiscent of the unilateral authority of the Roman dictatorship. Takeover boards typically have veto authority over decisions of or even dislodge local executives and legislatures; can remove officials who disobey their mandates; can cancel existing contracts or dictate the terms of new ones, or are entitled to withhold necessary approvals for operating expenses until local officials meet board demands. If bankruptcy is an option, the takeover board is often the body that can exercise it.

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

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[22] Municipal Rehabilitation and Economic Recovery Act, N.J. Stat. Ann. §§ 52:27BBB-1. - 52:27BBB-79 (West).

[23] City of Camden v. Kenny, 763 A.2d 777 (N.J. Super. A.D. 2000).

[24] Calif. Gov. Code § 30402.

[25] District of Columbia Financial Responsibility and Management Assistance Authority Act of 1995, Public Law 104-8 (April 17, 1995).

the Tenth Amendment,[26] 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.[27] States lack only the bite of adjusting the debts of non-consenting creditors – the main benefit municipalities obtain in Chapter 9.[28] Still, a century of home rule advocacy, 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. Antipathy towards state degradation of local autonomy has been embodied in constitutional prohibitions on special state commissions that assume municipal functions,[29] and in broad interpretations of municipal affairs within which localities may exercise independence, and sometimes even trump conflicting state statutes.[30] If we have not embraced a constitutional right of local self-government, we have at least endowed localities with the ability to define an independent view of which public goods and values to pursue. To critics, state takeovers threaten the capacity of localities to realize that self-defined vision.

[26] 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., See Bankruptcy Law Revision: Report of the Committee on the Judiciary Together with Separate, Supplemental, and Separate Additional Views, HR Rep No 95-595, 95th Cong, 1st Sess 398 (1977); In re City of Vallejo, 403 Bank. Rep. 72, 75–76 (Bankr E.D. Cal. 2009).

[27] Omer Kimhi has been the most persistent and eloquent advocate of this position. See Omer Kimhi, Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem, 27 Yale J. Reg. 351 (2010) (hereinafter Kimhi, Chapter 9); Omer Kimhi.A Tale of Four Cities: Models of State Intervention in Distressed Localities Fiscal Affairs, 80 U. Cin. L. Rev. 881 (2012) (hereinafter Kimhi, Four Cities); Omer Kimhi, Reviving Cities: Legal Remedies to Municipal Financial Crises, 88 B.U.L. Rev. 633 (2008).

[28] See 11 U.S.C. § 903. Section 903 effectively overruled 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.

[29] See Lynn A. Baker and Clayton P. Gillette, Local Government Law (2009).

[30] See Clayton P. Gillette, The Exercise of Trumps by Decentralized Governments, 83 Va. L. Rev. 1347 (1997).

One might be more tolerant of state takeovers 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 does not cure fundamental issues that generated the crisis. Hamtramck, Michigan, which had been under state receivership in the 1970s,[31] subsequently requested permission from the state to file for Chapter 9.[32] Martin Shefter's monograph on New York City's fiscal crisis in the 1970s emphasized that the City had subsequently suffered "brushes with bankruptcy" on numerous occasions and that the political alliances that explained the earlier crises had re-emerged.[33] 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 percent in 1974-75 to 2.2% in 1975-76 and 4.8 percent in 1976-77. But those increases lagged behind annual increases in national housing prices until 1979-1980.[34] It is, therefore, difficult to attribute New York City's improvements to internal changes rather than to independent improvements in the general or local economy.

Other potential measures of takeover board success are similarly ambiguous. Kimhi draws an optimistic conclusion about state intervention from the fact that localities within states

[31] See Advisory Commission on Intergovernmental Relations, City Financial Emergencies: The Intergovernmental Dimension 36-40 (1973) (hereinafter "ACIR").

[32] See Monica Davey, Michigan Town is Left Pleading for Bankruptcy, N.Y. Times, Dec. 27, 2010, available at http://www.nytimes.com/2010/12/28/us/28city.html?pagewanted=all.

[33] Martin Shefter, Political Crisis Fiscal Crisis xi-xv (1991). See Ester R. Fuchs, Mayors and Money 182 (1992).

[34] 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.

that utilize proactive intervention enjoy higher bond ratings.[35] 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 steps that localities take to secure creditors at the potential expense of residents. 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.[36] Municipal expenditures as a proportion of resident income declined during the same period,[37] and the city's expense budget was balanced by 1981.[38] Nevertheless, average labor costs per employee rose 75 percent between 1975 and 1984.[39] The budgetary effects of that increase were offset by elimination of 44,000 positions in the City,[40] and it would difficult to determine whether that reduction represented superfluous positions or significantly diminished the quality of municipal services.[41] 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.[42]

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[35] Kimhi, Four Cities, supra note 27, 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 District of Columbia of the H. Comm. on Government Reform and Oversight, 104th Cong. 4-5, 44, 46 (1995) (hereinafter "Financial Control Boards").

[36] Shefter, supra note 33, at 138.

[37] Id.

[38] Id. at 137.

[39] Id. at 141-42.

[40] Id. at 142.

[41] In some cases, state takeovers may even exacerbate the financial problem, as where those charged with providing municipal relief instead misappropriate municipal funds. See State v. Blackwell, 2013 WL 1007681 (Mich. Ct. App.) (emergency financial manager found to have made unauthorized payments to himself from public funds totaling $264,000).

[42] See Pew Charitable Trusts, The State Role in Local Government Financial Distress 37 (2013), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/Pew_State_Role_in_Local_Government_Financial_Distress.pdf.

The difficulty of measuring takeover board performance leaves open the claim that state takeovers substantially interfere with local autonomy without creating compensating local benefits. But even if that were the case, the argument for state takeovers may persevere. That is true for two reasons. First, focus on local consequences alone provides an insufficient basis for evaluating state supervision. Instead, intervention may be 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 residents in the distressed locality, albeit in the name of offsetting welfare gains for nonresidents. Second, as I will argue in this Article, 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. If that is the case, the response may be more 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 become an instrument of subjugating popular will. Certainly that became the case of the Roman dictator.[43] State imposition of a control board similarly has the capacity to overwhelm, rather than serve, local autonomy. It is well understood that governmental officials are more difficult to monitor than those of private firms because the objective function of the former is more complicated than the single-minded objective of profit maximization that characterizes firms. The difficulty of either monitoring or assessing the performance of takeover boards therefore creates opportunities to subordinate local interests for more controversial reasons, such as to ensure political control of the municipality by

[43] Kalyvas, supra note 1, at 420-21; Rossiter, supra note 2, at 26-27.

officials of the state or to ensure payment to creditors regardless of costs to local residents. That is, the same conditions that invite intervention by central officials capable of countering the consequences of flawed local decision-making also permit takeovers by less benevolent officials whose interests align poorly with those of the stakeholders in municipal fiscal health.

In this Article, I explore 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 that takeover boards might suffer that require constraints on their discretion. State takeovers are often the last step in a process that begins with review of local finances and provision of expert advice to deter, detect, or remedy local fiscal distress. Thus, in the next Part of this article, I discuss those steps that typically precede state takeovers and that are less intrusive of local autonomy. In Part III, I address the argument that state takeovers are flawed even where more moderate inventions are unsuccessful, because takeover boards displace local democracy and reduce local autonomy. I conclude that those 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. In Part IV, I suggest that the root causes of severe local fiscal distress are likely to lie in political structures that cannot readily be reformed through normal politics. I conclude that to the extent that the causes of fiscal distress entail matters of institutional design, local officials who have been successful within the existing structure have little incentive to take the measures necessary for reform. 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. There are obvious risks to assigning the task of creating fiscally stable local governments to state-appointed entities, even if their existence can be reconciled with principles of democratic governance. In Part V, therefore, I investigate the interests that such takeover boards represent, the objective functions they might pursue that could deviate from those interests, and means of constraining their conduct. Part VI concludes.

II. State Intervention in Municipal Governance

A. State Monitoring and Provision of Expertise

The critique of state takeovers may be read to imply that states are eager to assume responsibility for municipal budgeting. States, however, typically do not exercise substantial authority over municipal fiscal affairs as a first reaction to distress. Instead, state appointment of a takeover board follows less intrusive monitoring, advice, and oversight.[44] States often routinely monitor and provide advice to localities in order to avoid fiscal distress, although states vary in the means by which they perform these functions.[45] State monitoring frequently includes the imposition of regulations for budgeting, administrative oversight, and inducements for localities to implement standardized financial and budgeting systems.[46] 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

[44] See Pew Charitable Trusts, supra note 42, at 8-11; Juliet M. Moringiello, Goals and Governance in Municipal Bankruptcy, available at http://ssrn.com/abstract=2318017, forthcoming, Wash. & Lee L. Rev.

[45] See Pew Charitable Trusts, supra note 42, at 20-21.

[46] An example is the International City/County Management Association's Financial Trend Monitoring System (FTMS), which considers more than 40 indicators to evaluate local financial health. For surveys of state measures, see Jonathan B. Justice and Eric A. Scorsone, Measuring and Predicting Local Government Financial Stress, in Handbook of Local Government Fiscal Health (H. Levine et al., eds) 43, 44 (2013); Beth Walter Honadle, The States' Role in U.S. Local Government Fiscal Crises: A Theoretical Model and Results of a National Survey, 26 Intn'l J. Pub. Admin. 1431 (2003); Philip Kloha et al., Someone to Watch Over Me: State Monitoring of Local Fiscal Conditions, 35 Am. Rev. Pub. Admin. 236, 237 (2005). An older survey be found in ACIR, supra note 31, at 69-86, 163-70. The FTMS is described in Groves, S.M., et al., Evaluating Financial Condition: A Handbook for Local Government (4th ed. 2003).

debt ratios.[47] The Michigan Treasury Department annually calculates a "fiscal health index" that aggregates a substantial number of factors into a single score, but that triggers no action other than publication of a locality's condition. North Carolina uses an office of professional experts in the state's 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.[48]

Even when distress is detected, states do not immediately respond with efforts to take 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. Only when those limited powers proved inadequate to ensure market acceptance of City debt did the State empower a control board to develop a financial plan, reject or amend a financial plan of the City, and reject municipal contracts.[49] 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.[50] 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 is a state commission designated to approve financial decisions.[51] Florida creates no formal hierarchy of intervention when a municipality is in a state of financial

[47] See Ohio Rev. Code §§ 118.01(Q), (T), 118.021; Jane Beckett-Camarata, Identifying and Coping with Fiscal Emergencies in Ohio Local Governments, 27 Intn'l J. Pub. Admin. 615, 618-21 (2004); Mary Taylor, Fiscal Indicators: A Proactive Approach to Local Government Financial Assistance (2009) (available from author).

[48] Charles K. Coe, Preventing Local Government Fiscal Crises: The North Carolina Approach, 27 Pub. Bud. & Fin. 39, 42-45 (2007); Pew Charitable Trusts, supra note 42, at 33-35.

[49] Bailey, supra note 17, at 27-41.

[50] Financial Stability Agreement of April 4, 2012, on file with author.

[51] See Ohio Rev. Code § 118.01 - .14.

emergency, but permits the governor to select among measures ranging from the provision of technical assistance to gubernatorial approval of local budgets.[52]

States also vary with respect to the criteria that define municipal fiscal distress,[53] the parties who may initiate action after a finding of distress, corrective processes, and the criteria for termination of those processes.[54] Some states take less proactive steps to avoid municipal fiscal crisis, but create deterrents against municipal profligacy. For example, Virginia maintains no program for intervention in fiscally distressed localities.[55] 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.[56]

The underlying assumption 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. Intervention in the form of expertise implies that both fiscal distress and its redress are apolitical issues, attributable either to unique shocks, demographic or economic effects beyond the control of the affected locality, or a lack of proficiency that can be readily resolved through support and advice rather than substitution of centralized for local decision making about specific expenditures.[57] The appeal to expertise attributes no invidious motive to elected officials, only the inability to provide desired goods and services at a tax price that residents are willing to pay. The expertise justification further implies

[52] Fla. Stat. Ann. § § 218.503.

[53] Justice and Scorsone, supra note 46, at 44-45.

[54] Anthony G. Cahill et al., State Government Responses to Municipal Fiscal Distress: A Brave New World for State-Local Intergovernmental Relations, 17 Pub. Productivity & Manag. Rev. 253, 255-261 (1994).

[55] Pew Charitable Trusts, supra note 42, at 9.

[56] See Va. Code Ann. § 15.2-2659. See also R.I. Code § 45-12-32.

[57] See, e.g., Cahill, supra note 60 at 261-62 (citing sources); Kloha, supra note 56, at 237.

neutrality towards the specific 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 decision making 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.[58] The North Carolina experience suggests that intervention by experts may be particularly useful where the distressed locality has a relatively small population of professionals capable of dealing with budgeting issues.[59] Robert Bailey attributes 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, although other managerial reforms were adopted through amendments to the city’s charter.[60] 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.[61] Certainly some of the more notorious recent examples of fiscal distress involve sophisticated

[58] ACIR, supra note 31, at 4-5.

[59] See Coe, supra note 48; Beckett-Camarata, supra note 47, at 626.

[60] Bailey, supra note 17, at 140-42 .

[61] Id. at 141-42.

investments that were arguably inappropriate for municipal officials who had limited comprehension of the transactional risks to which they were exposed.[62] But as disastrous as these investments have proved to be, they tended to represent discrete, if unfortunate, events rather than systematic defects in local budgetary processes that could be cured by invasive state intervention.[63]

State monitoring and technical assistance short of takeover may also be appropriate where local fiscal distress results from discrete shocks, general economic conditions, or limited local expertise with financial planning. 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 decision making and that require redress by policies more centralized than those that can be implemented at the local level.[64] In one study of Ohio local governments, forty-seven percent of respondents from distressed localities attributed their local fiscal emergencies to local plant

[62] See See Gretchen Morgensen, Police Protection, Please, for Municipal Bonds, N.Y. Times, August 4, 2012, available at http://www.nytimes.com/2012/08/05/business/muni-issuers-could-use-more-sec-protection-fair-game.html?pagewanted=all.

[63] 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, e.g., In re Jefferson County, 2012 WL 32921*3-*6 (Bkrtcy.N.D.Ala.) ("Simplistically and at the behest of former county commissioners, the County believed it could lower the interest on warrants by shifting from fixed rates to adjusting ones. 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.. . . Some of those involved in the development and sales of the types of financial instruments used in part by the County for its sewer system's needs have committed crimes related to what was sold to the County. Others have not been charged with crimes, but have entered settlements with the United States Securities and Exchange Commission where there is no admission of wrongdoing, but payments in the tens of millions of dollars have been made.") The report of the Detroit Financial Review Team that concluded the city was in "a condition of severe financial distress" as defined in the state's emergency financial manager statute noted that the city had entered into swaps that assumed interest rates would increase. The subsequent decrease in interest rate 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 if downgrades in its credit rating constituted a "termination event" under the terms of the derivative contracts. See Report of the Detroit Financial Review Team, March 26, 2012, at page 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).

[64] See Kimhi, Chapter 9, supra note 27, at 376.

closings, which may be more attributable to the decisions of a firm's home office than to local economic conditions.[65] State projects that remove substantial property from a municipality's tax rolls may generate local fiscal distress, but not of the sort for which a remedy lies within the comparative competence of a takeover board.[66]

Nevertheless, 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.[67] Some discrete shocks may be a function of local policies that represent either unwise or unfortunate gambles with municipal fiscal health.[68] One might make similar claims about municipalities that have suffered fiscal distress as a result of investments in complicated

[65] Beckett-Camarata, supra note 47, at 622. See, e.g., Annie Gasparo, Tightfisted New Owners Put Heinz on Diet, Wall. St. J., Feb. 11, 2014, at A1 (detailing closing of plant in Idaho to achieve logistical economies in production chain).

[66] 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 31, at 22.

[67] See, e.g., Todd M. Gabe & Kathleen P. Bell, Tradeoffs Between Local Taxes and Government Spending as Determinants of Business Location, 44 J. Reg. Sci. 21 (2004); Christopher R. Bollinger & Keith R. Ihlanfeldt, The Intraurban Spatial Distribution of Employment: Which Government Interventions Make a Difference?, 53 J. Urb. Econ. 396 (2003); Ronald C. Fisher, The Effects of State and Local Public Services on Economic Development, New Eng. Econ. Rev. 53 (1997); Thomas F. Luce, Local Taxes, Public Services, and the Intrametropolitan Location of Firms and Households, 22 Pub. Fin. Rev. 139 (1994).

[68] 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, August 23, 2012; available at http://www.businessweek.com/articles/2012-08-23/the-movie-flop-that-sank-a-michigan-town; Michigan Town of Allen Park to Vote on Saving Itself from Failed Movie Deal, available at http://www.cbsnews.com/8301-201_162-57545171/michigan-town-of-allen-park-to-vote-on-saving-itself-from-failed-movie-deal/.

derivatives, the risks of which local officials appear to have had limited understanding.[69] Thus, in some circumstances, advice and expertise may be insufficient. If local conditions are a function of defects in an embedded structure of local decision-making, rather than discrete events, then the answer may lie in state intervention more threatening to local autonomy and arguably to local democracy.

B. From Monitoring and Advice to Approval and Displacement

Local fiscal autonomy is most controversially placed at risk when state intervention transcends an advisory role and instead either controls or displaces the fiscal or political organization of the municipality.[70] Typically that occurs when centralized monitoring and advice alone prove inadequate to avoid or relieve fiscal distress. Graduated intervention of the type used in New York and Michigan[71] is common among states that utilize takeover boards. 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.[72] 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. As a last resort, the Department of Revenue is empowered to appoint a receiver who would have the additional rights to exercise the powers of any municipal officer and the power to file for bankruptcy.

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[69] See Morgensen, supra note 62.

[70] See, e.g., City of Camden v. Kenny, 763 A.2d 777 (N.J. Super. A.D. 2000); Note, Missed Opportunity: Urban Fiscal Crises and Financial Control Boards, 110 Harv. L. Rev. 733, 734-35 (1997).

[71] See text accompanying notes __-__ supra.

[72] See, e.g., R.I. Stat. § 45-9-1 to -17 (2011).

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.[73] A board authorized to approve local budgets may take a locality-friendly posture in which the state role remains largely advisory, notwithstanding the threat of disapproval. The 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 review,[74] 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.[75] 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.[76]

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 85 percent of the expenditures from the general fund for such month in the preceding fiscal year, and permits the board to restrict other expenditures. 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.[77] The District of Columbia takeover board was authorized to withhold any funds deposited with it that would otherwise have been expended on behalf of the

[73] See, e.g., R.I. Stat. § 45-9-3(d); Nassau County Financial Control Board.

[74] 53 Pa. Stat. § 12720.209(d).

[75] 53 Pa. Stat. § 12720.209(a), (b).

[76] David R. Berman, Local Government and the States 116-117 (2003). See also Kimhi, Four Cities, supra note 27, at 902-05.

[77] Ohio Rev. Code § 118.12.

District government if revenues or expenditures were inconsistent with an approved financial plan or budget.[78]

Approval authority becomes all the more intrusive when it is backed by the capacity to withhold revenues 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 takeover board may give priority in those funds to debt payment to bondholders rather than payment for services to residents.[79] 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 expectations of budget cuts.[80]

Perhaps the most noteworthy exercise of approval power involves the rejection of existing contracts, often including collective bargaining agreements. The emergency financial manager for the Detroit Public Schools imposed a 10 percent wage cut and reordered the financing of benefits for employees.[81] New York State has tailored takeover boards for specific localities, such as Buffalo,[82] Nassau County,[83] and Erie County,[84] but has consistently empowered

[78] Public Law 104-8, 109 Stat. 97, § 206(d)(1) (1995).

[79] See Quirk v. Municipal Assistance Corp., 363 N.E.2d 549 (N.Y. 1977).

[80] Bailey, supra note 17, at 31 (1984); Seymour P. Lachman & Robert Polner, The Man Who Saved New York 118 (2010).

[81] 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, available at http://detroitk12.org/content/2011/07/29/dps-to-save-81-8-million-through-10-percent-wage-concession-and-80-percent20-percent-cost-sharing-for-health-care-benefits-and-other-measures/.

[82] N.Y. Pub. Auth. Law §§ 3850 - 3873 (McKinney).

[83] N.Y. Pub. Auth. Law §§ 3650 - 3669 (McKinney).

[84] N.Y. Pub. Auth. Law §§ 3950 - 3973(McKinney).

each "to do any and all things necessary or convenient to carry out [their] purposes,"[85] a grant of broad authority that sanctions withholding of necessary approvals or funds until elected officials comply with takeover board demands.[86] 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 that the authority's discretion to approve or disapprove budgets and to withhold state funds from a city that had failed to satisfy budgetary requirements.[87]

The most detailed accounts of approval authority to control municipal officials arise from the experience of New York City in the 1970s. Multiple accounts of the 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 of 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.[88] 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.[89] The reallocation of local decision making power is credited with reductions in the municipal workforce by 60,000, increases in taxes and fees, and substantial service cuts,

[85] See, e.g., N.Y. Pub. Auth. L. § 3644(14) (McKinney's).

[86] 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., County of Nassau v. Nassau County Interim Finance Authority, 33 Misc.3d 227 (N.Y. Sup. Ct. 2011).

[87] City of East St. Louis v. East St. Louis Financial Advisory Authority, 722 N.E.2d 1129 (Ill. 1999).

[88] See Lachman and Polner, supra note 80, at 5 118.

[89] Bailey, supra note 17, at 64-66, 75-77 (1984).

notwithstanding initial resistance from New York City officials.[90] Robert Bailey's account concludes that, while it "did not remove [Mayor] Beame from office, the MAC Act did seem to remove the office from Beame."[91] The results explicate Ed Koch's remark that, had he been mayor of New York City, he would not have acceded,[92] and Abraham Beame's near-resignation rather than accept the budgetary adjustments directed by MAC and the EFCB.[93]

Notwithstanding the decisions in New York City concerning specific expenditures and revenue sources notwithstanding, 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.[94] But other jurisdictions, most recently Michigan and Rhode Island, have authorized and exercised 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."[95] 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.[96] Michigan municipalities under state supervision retain the capacity for independent decision making, subject to little more than advisory intervention, as long as they can pass a series of stress tests. But a Michigan

[90] Berman, supra note 76, at 116; Bailey, supra note 17, at 26, 68; Lachman and Polner, supra note 80.

[91] Bailey, supra note 17, at 139.

[92] Jonathan Soffer, Ed Koch and the Rebuilding of New York 120 (2009) ("if 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").

[93] See Lachman and Polner, supra note 80, at 121-22.

[94] N.Y. Unconsol.Laws § 5405 (McKinney).

[95] R.I. Gen. Laws § 45-9-7(c).

[96] Id.

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.[97] The relevant statute prohibits the 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 the compensation and benefits of those officials is terminated.[98] Earlier, 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.[99] The act creating fiscal supervision for Washington, D.C. permits the control board to "stand in the shoes" of any mayoral agency, or the City Council, and to pass statutes or regulations accordingly.[100]

The direct takeover and displacement of local officials certainly comes closest to the Roman dictatorship model of temporarily suspending a representative body of decision makers in favor of an unelected autocracy. But given the statutory ability of "approval" boards to accomplish much the same effect of disempowering local officials, combined with the frequent exercise of that authority, the notion of a 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.

[97] M.C.L.A. §§ 141.1547(1)(b), 1549(2). 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.

[98] M.C.L.A. § 141.1519a. 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, available at http://www.detroitmi.gov/Portals/0/docs/EM/Order1.pdf; Emergency Order No. 3, available at http://www.detroitmi.gov/Portals/0/docs/EM/Order%203.pdf. 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 Order No. 9, available at http://www.detroitmi.gov/Portals/0/docs/EM/Order%209.pdf.

[99] See David R. Berman, Takeovers of Local Governments: An Overview and Evaluation of State Policies, 25 Publius 55, 63 (1995)

[100] See Comment, Stephen R. Cook, Tough Love in the District: Management Reform Under the District of Columbia Financial Responsibility and Management Assistance Act, 47 Am. U. L. Rev. 993 (1998).

III. 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, that they are anti-democratic. Elected officials subjected to supervisory authority have frequently denounced their displacement in these terms. Marion Barry called the financial control board for the District of Columbia a "rape of democracy;"[101] the mayor of Camden remarked that proposed state takeover legislation was "arrogant, antidemocratic, and racist,"[102] and the mayor of Central Falls, Rhode Island dismissed a state-appointed receivership as a "dictatorship."[103] Commentators commonly express similar concerns. 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.[104] They "sacrifice voter participation and deliberative democracy values, from the empowerment and educative roles of local participation to the public's trust and respect for local government."[105] 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 majority minority and all have poverty rates substantially above the national average.[106] Democracy, on this

[101] Mike deBonis, D.C. Still Haunted by Federal Takeover, Washington Post, Jan. 31, 2011, available at http://www.washingtonpost.com/wp-dyn/content/article/2011/01/30/AR2011013004444.html.

[102] Howard Gillette, Jr., Camden After the Fall 200 (2005) (Camden mayor referring to state takeover as a "dictatorship").

[103] City Mayor Calls RI Receiver a "Dictator," available at http://www1.whdh.com/news/articles/local/south/12004703320297/city-mayor-calls-ri-receiver-a-dictatorship/; Gillette, supra note 102, at 196.

[104] See Michelle Wilde Anderson, Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments, 39 Ford. Urb. L.J. 577 (2012).

[105] Id. at 606.

[106] Id. at 590-91. See Chris Lewis, Does Michigan's Emergency Manager Law Disenfranchise Black Citizens?, The Atlantic, May 9, 2013, available at http://www.theatlantic.com/politics/archive/2013/05/does-michigans-emergency-manager-law-disenfranchise-black-citizens/275639/.

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,"[107] and describes the Michigan emergency manager law as "punitive" of the controlled jurisdiction.[108]

One can easily understand these reactions. Takeover boards are created at the state level and their members are typically appointed by state officials. Even the Michigan model which grants the municipality authority to allow an emergency manager leaves to state officials the task of appointing one.[109] 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.[110] Indeed, in some jurisdictions, an existing political role disqualifies individuals from membership on a takeover board.[111]

Nevertheless, in this Part, I contend that the critique of takeover boards based on a democratic deficit or dilution of local autonomy is substantially overstated. That critique is predicated on two assumptions: first, that the local officials who are subordinate to or displaced

[107] Richard C. Schragger, Democracy and Debt, 121 Yale L.J. 860, 879 n. 80 (2012).

[108] Richard C. Schragger, Citizens Versus Bondholders, 39 Ford. Urb. L.J. 787, 801 (2012).

[109] See M.C.L.A. §§ 141.1547(1)(b); 141.1549(1).

[110] See, e.g., M.C.L.A. § 141.1549(3)(b). The Emergency Manager for Detroit was previously a bankruptcy lawyer in Washington, D.C.

[111] See, e.g., Ill. St. Ch. 50 § 320/x (members cannot have held elected public office in prior two years, and cannot be candidate while serving); Ohio Rev. Code Ann. § 118.0x (members may not have held public office for 5 years prior to appointment, or become a candidate while serving on the takeover board); Pa. Stat. Ann. tit. 53 § 12720.202(f) provides: "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 within this Commonwealth or as a party officer while in the service of the authority. Members of the board and the executive director shall not seek election as public officials or party officers for one year after their service with the authority. Members of the authority and the executive director may serve as appointive public officials any time after their periods of service with the authority."

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 incorrect if fiscal distress has been generated as a consequence of local policies that have been disfavored by local residents. The second assumption is incorrect if the state represents nonresidents who are adversely affected by local policies, and if statewide interests prevail in a conflict between the state and locality. If those assumptions are incorrect, then, at least in theory, takeover boards can effectively enhance democratic governance by inducing or implementing budgetary decisions that are consistent with majoritarian interests at either the local or state level. State intervention that vindicates the interests of the local electorate against their own local officials or that serves the interests of a broader constituency that local officials ignore complicates claims of a democratic deficit or degradation of local autonomy.

A. Local Officials and Local Preferences

1. Mobility as a Measure of Preferences

The first assumption underlying the democratic critique is that the elected local officials that are overseen or overridden by takeover boards reflect the preferences of local residents, so that their subordination is inconsistent with democratic decision making. If that is not the case, then takeover boards may preserve local autonomy in the substantive sense of providing goods and services preferred by residents, albeit they do so through procedures that are formally less democratic than those that prevailed during the period that generated fiscal distress. But even as a procedural matter, the degree of inconsistency between takeover board decision making and principles of local democracy may vary. The claim of anti-democratic procedures is somewhat diluted in the common case where elected 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.[112] While local officials could not control the decision making process, they retained substantial representation. Other takeover boards contain elected officials, but also include state and local ones. Elected officials composed a majority of the membership of the EFCB.[113] These included the governor and comptroller of the state and the mayor and comptroller of New York City. In these cases, claims of anti-democratic procedures may be overstated, though claims of interference with local autonomy could still prevail.

Regardless of composition, 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 constrain local officials from offering bundles of goods and services or tax prices inconsistent with residents' preferences.[114] 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 towards avenues of political support with electoral impunity due to such factors as the binary nature of voting, the capacity of interest groups to influence decisions of officials, techniques of fiscal illusion that frustrate low-cost efforts to trace expenditures, and the standard collective action problems that discourage investment in citizen

[112] Act of June 9, 1988, 1988 Conn. Laws, Special Act 88-80 §9.

[113] See Bailey, supra note 17, at 115, 124.

[114] Charles Tiebout, A Pure Theory of Local Expenditures, 64 Pol. Econ. 416 (1956); Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 Colum. L. Rev. 473 (1991).

monitoring.[115] The result is that the presumption of accountability and transparency in local decision making 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.

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.[116] As I indicated above, 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 time of the appointment of its Emergency Manager, Detroit residents suffered the highest per capita tax burden in Michigan,[117] had the lowest credit rating of any major United States city,[118] was not making pension payments as they became due,[119] and had higher crime rates and lower levels of municipal services than comparable jurisdictions both within Michigan and elsewhere.[120] Total municipal revenues had declined approximately 20 percent between 2008 and 2012, so that, even while expenditures decreased, the municipal budget was in deficit in the hundreds of millions of dollars each year.[121] Some indication that the policies that generated these results were

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[115] See Clayton P. Gillette, Local Redistribution and Local Democracy 15-28 (2011).

[116] See Anderson, supra note 104, at 582.

[117] City of Detroit, Proposal For Creditors 4 (June 14, 2013), available at http://www.detroitmi.gov/Portals/0/docs/EM/Reports/City%20of%20Detroit%20Proposal%20for%20Creditors1.pdf (hereinafter "Proposal for Creditors").

[118] Id. at 8.

[119] Id.

[120] Id. at 9-15.

[121] Id. at 43.

disfavored by residents is apparent from the fact that the city's population declined by 26 percent between 2000 and 2012.[122] 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.[123] Were the world to reflect the Tiebout assumptions of perfect mobility, even substantial exit would not be problematic because it would reflect universal migration to localities that offer the bundle of goods and services desired by each individual. But outside the Tiebout model, substantial exit may more realistically reflect that those who can exit, do, and those who do not are constrained more by immobility – tied to

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[122] Id. at 1.

[123] 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. U.S. Bureau of the Census, "Population of the 100 Largest Urban Places: 1970" Table 20 (June 15,1998), http://www.census.gov/population/www/documentation/twps0027/tab20.txt;U.S. Bureau of the Census, "Population of the 100 Largest Urban Places: 1980" Table 21 (June 15, 1998), http://www.census.gov/population/www/documentation/twps0027/tab21.txt; U.S. Bureau of the Census, "Population of the 100 Largest Urban Places: 1990" Table 21 (June 15, 1998), http://www.census.gov/population/www/documentation/twps0027/tab22.txt. Detroit's population decline from 951,270 in 2000 to 713,777 in 2010 places it at less than half its size in 1970. U.S. Bureau of the Census, "Cities with 100,000 or More Population in 2000 ranked by Population, 2000 in Rank Order," http://www.census.gov/statab/ccdb/cit1020r.txt (last visited June 24, 2013); U.S. Bureau of the Census, "Annual Estimates of the Resident Population for Incorporated Places Over 50,000, Ranked by July 1, 2012 Population: April 1, 2010 to July 1, 2012" (May 2013), http://www.census.gov/popest/data/cities/totals/2012/index.html (follow "Annual Estimates of the Resident Population for Incorporated Places Over 50,000, Ranked by July 1, 2012 Population: April 1, 2010 to July 1, 2012" hyperlink).

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 and Andrei Shleifer, The Curley Effect: The Economics of Shaping the Electorate, 21 J. L. Econ. & Org. 1 (2005).

commitments to jobs or family, or to personal financial conditions – than by satisfaction with city services.

2. Transparency and Preferences

If municipal officials were making 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. 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. That crisis evolved in large part from longstanding practices that concealed cash flow difficulties that had emerged from budget shortfalls.[124] Funding periods for pension payments were extended and projected interest rates were overstated, thereby reducing the city's required payments.[125] 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 had actually been received in a 12-month period.[126] The city borrowed against uncollectible receivables.[127] Items were shifted from the operating budget to the capital budget to exploit the capacity of greater borrowing authority against the latter.[128] The existence of cash shortfalls was withheld from prospective creditors, arguably with the assistance, or inattention, of underwriters[129] and bond counsel.[130] Given the lack of transparency to sophisticated investors who had the capacity and incentive to understand the city's financial position, there is little

[124] Securities and Exchange Commission Staff Report on Transactions in Securities of the City of New York, Subcommittee on Economic Stabilization of the Committee on Banking, Finance and Urban Affairs, H.R. 95[TH] Cong. 1[st] Sess 1 (August 1977) (hereinafter "SEC Report").

[125] Charles Morris, The Cost of Good Intentions: New York City and the Liberal Experiment 132 (1980).

[126] Id. at 133-34.

[127] Id. at 134-35.

[128] Id. at 135-36.

[129] SEC Report, supra note 124, Chapter 4, 13-16.

[130] Id., Chapter 6, 81-82.

reason to believe that residents less schooled in the nuances of public budgeting would be able to evaluate the City's financial position or to ensure that expenditures were being made in a manner consistent with expectations 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.[131] Charles Coe's account of North Carolina's state takeovers involve municipalities whose officials failed to comply with balanced budget requirements, failed to collect property taxes, misappropriated state funds, and spent local funds for other than legally required purposes.[132] It is problematic to argue that policies within these jurisdictions were more consistent with local democracy than the interventions of the state local government commission that eliminated the deficits created by deviations from democratically enacted legal requirements, and subsequently returned authority to the local officials. 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.[133]

At the extreme, local fiscal distress has been preceded, and plausibly precipitated by public corruption that is difficult to reconcile with the attention to resident preferences that local democracy is expected to engender. The receiver for Chelsea, Massachusetts ultimately proposed an 11-member city council with an appointed city manager to replace the previous mayoral system that had been riddled with corruption leading to convictions of several Chelsea

[131] See Beckett-Camarata, supra note 47, at 620.

[132] See Coe, supra note 48, at 44-45.

[133] Proposal for Creditors, supra note 117, at 6.

mayors.[134] Given the local electorate's approval of the plan, and 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 oddly do[135]) that pre-receivership Chelsea was more democratic than it was subsequently. Camden and Detroit suffered long histories of official corruption prior to state takeovers.[136] The bankruptcy of Jefferson County, Alabama was precipitated by bond deals sufficiently infected by officials' self-dealing to generate criminal convictions, an SEC settlement with underwriters, and the return of fees.[137]

Of course, one might respond that even if fiscal distress emerges from either incompetence or corruption that negates budgetary practices and service delivery preferred by residents, it does not follow that the remedy lies in the appointment of a non-democratic alternative. I leave to Part IV the argument that the conditions that generate fiscal distress may simultaneously signify that normal politics cannot respond, so that state takeovers may be appropriate in the same way that the limitations of normal politics explain the suspension of representative processes and dictatorships in the Roman Republic. For the moment, I suggest only that state takeovers tend to occur under circumstances in which local service delivery is so irreconcilable with residents' interests that one cannot readily conclude that a procedurally less democratic form of government should be disfavored on the grounds that it will interfere with

[134] Berman, supra note 76, at 120; Asha Ghosh Rao, Political Rush Hour on the Tobin Bridge: Receivership and Redevelopment of Chelsea, Massachusetts, 30-31, available at http://dspace.mit.edu/handle/1721.1/66399 (attributing local fiscal difficulties to involvement in organized crime by city officials and administrators and use of receivership to alter decision-making structure indebted to criminals).

[135] See Lyle Kossis, Note, Examining the Conflict between Municipal Receivership and Local Autonomy, 98 Va. L. Rev. 1109 (2012).

[136] See Gillette, supra note 102, at xii; Pew Charitable Trusts, supra note 42, at 37 (three mayors were imprisoned in pre-takeover Camden); Davidde A. Stella, Public Corruption Symposium: An Introduction, 52 Wayne L. Rev. 1351, 1352-53 (2006).

[137] See, e.g., In re Jefferson County, 474 B.R. 228, 239-240 (Bankr. D. Ala. 2012).

local autonomy or democratic preferences. Instead, takeover boards may instantiate substantive versions of democracy that require compliance with majoritarian preferences and come closer to reflecting the results that would exist if the Tiebout 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.[138] 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.[139] Higher voter turnout occurs when elections decide among policy alternatives.[140] Where localities are in financial straits sufficient to justify a state takeover, little is at stake, simply because the combination of entrenched political structure and scarce resources preclude any meaningful policy choice. 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 public participation or civic education 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

[138] See, e.g., Robert A. Dahl, Democracy and Its Critics 163-175 (1989).

[139] See, e.g., Zoltan L. Hajnal and Paul G. Lewis, Municipal Institutions and Voter Turnout in Local Elections, 38 Urb. Aff. Rev 645 (2003); Curtis Wood, Voter Turnout in City Elections, 38 Urb. Aff. Rev. 209 (2003).

[140] See, e.g., Hajnal & Lewis, supra note 139.

simply be responding to constituent irrationality.[141] If that were the case, however, then one might still expect less mismanagement and corruption than we see in fiscally distressed localities, and arguably less exit. In addition, officials would still want to signal their fidelity by making expenditures more transparent. 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 services level and low taxes is unsustainable.

B. State Interests and Municipal Fiscal Distress

The second assumption that underlies the "antidemocratic" critique of takeover boards is that the state has no overriding interest that justifies constraints on 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."[142] 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,[143] minimum wage requirements,[144] or banking regulations[145] 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 had no role in determining the

[141] I thank John Ferejohn for bringing this possibility to my attention.

[142] See, e.g., Baker and Gillette, supra note 29, at 313-90.

[143] See, e.g., Envirosafe Services of Idaho, Inc. v. County of Owyhee, 735 P.2d 998 (Ida. 1987).

[144] See, e.g., New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So.2d 1098 (La. 2002).

[145] See, e.g., American Financial Services Assn v. City of Oakland, 104 P.3d 813 (Cal. 2005).

local policy that is costly to them. In Mill's more dramatic language, "localities may be allowed to mismanage their own interests, but not to prejudice those of others . . . ."[146]

The extent to which state takeover boards offend democratic principles, therefore, conditions on the empirical question of whether local fiscal distress would otherwise impose adverse effects beyond the boundaries of the locality, and thus trigger the "state concern" exception to even strong home rule provisions. Some courts have 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,"[147] and thereby implied that fiscal crisis had extramural consequences.[148]

Where states take over distressed localities, plausible argument for "state concern" arises from two sources. Most directly, relief of municipal distress requires capital infusions from the

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[146] J.S. Mill, Considerations on Representative Government 226.

[147] Moreau v. Flanders, 15 A.3d 565, 581 (R.I. 2011). The court also appeared to rely on the general supervisory authority that states have over their political subdivisions, 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 (N.J. Super. Ct. 2000).

[148] Certainly that is the explanation provided by state legislatures when they enact provisions that permit intervention in local fiscal affairs. See, e.g., Mich. Comp. L. Ann. § 141.1543(3):

> 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.

A student commentator rejects the "state concern" justification on the grounds that financial control boards entail only governance structures of municipalities and that the structure of local government constitutes a matter of local concern. Kossis, supra note 135, at 1123. But that analysis is based on a quite parsimonious description of the basis for state intervention and ignores the possible spillover effects of local fiscal distress.

state.[149] 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 the Municipal Assistance Corporation for the City of New York, 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.[150] PICA borrowed $475 million for the benefit of Philadelphia in 1992, more than half of which was used for reducing the city's deficit.[151] Michigan agreed to provide Detroit with $137 million to provide liquidity after the city instituted a series of structural reforms.[152]

Capital infusions do not necessarily reflect the state's charitable instincts towards the distressed locality. It is plausible that if a municipality is unable to provide basic services to its residents, the state would 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 obligation to absorb the costs of providing welfare to one million recipients.[153] 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.[154] 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 fiscal distress in the first instance.

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[149] Pew Charitable Trusts, supra note 42, at 14.

[150] Donna E. Shalala and Carol Bellamy, A State Saves a City: The New York Case, 1976 Duke L.J. 1119, 1127-28.

[151] Financial Control Boards, supra note 35, at 61.

[152] See Financial Stability Agreement, April 4, 2012, § 2.5(a).

[153] See Lachman and Polner, supra note 80, at 132.

[154] Berman, supra note 76, at 119.

State injections 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.[155] State oversight or displacement of local officials imposes a penalty that reduces moral hazard. 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.[156] 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.[157] The EFCB never exercised either of those powers, but the very possibility of draconian measures may have limited the need to do so. Since both the moral hazard issue and the administration of monetary relief to the distressed city entail the availability of state funds, the appointment of a board that addresses those issues readily falls within the domain of state concern.

The second potential source of state concern is that local fiscal distress creates a risk of contagion in which other localities and perhaps the state itself will bear the costs of local insolvency.[158] At the extreme, the risk entails the closure of capital markets to both the state and its municipalities.[159] At the very least, it is plausible that the costs of accessing those markets

[155] See Robert P. Inman, Transfers and Bailouts: Enforcing Local Fiscal Discipline with Lessons from U.S. Federalism, in Jonathan Rodden, Gunnar S. Eskeland, and Jennie Litvack, eds, Fiscal Decentralization and the Challenge of Hard Budget Constraints 35, 39-41 (2003); Robert P. Inman, Transfers and Bailouts: Institutions for Enforcing Local Fiscal Discipline, 12 Const Polit Econ 141, 145 (2001).

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

[157] Bailey, supra note 17, at 118-19.

[158] See TAN __-__ infra; Pew Charitable Trusts, supra note 42, at 16.

[159] Actions Taken, supra note 20, at p. 47; Financial Control Boards, supra note 35, at 37.

will increase for other localities in the state.[160] 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 ensure the ability to raise funds for capital projects. 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 traditionally justified state trumps of local policies.[161] 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 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."[162]

Of course, state officials may be employing the threat of contagion as a pretext for expanding their own jurisdiction.[163] 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

[160] See Kelly Nolan, Muni Investors Make Michigan Pay, Wall St. J., August 14, 2013, p. C1, available at http://online.wsj.com/article/SB10001424127887323455104579013151393668482.html?KEYWORDS=bonds+battle+creek ;Mike Cherney, Ben Kesling, and Kelly Nolan, Michigan's Saginaw County Postpones Debt Sale, Wall St. J., August 9, 2013, p. C1, available at http://online.wsj.com/article/SB10001424127887323977304579000760206400856.html?KEYWORDS=detroit+borrowing+michigan;, Kelly Nolan, Battle Creek, Mich. Delays Bond Sale, August 5, 2013, available at http://online.wsj.com/article/SB10001424127887323968704578650572754023926.html; Kelly Nolan and Ben Kesling, Michigan County Pulls Bond Offering, Wall St. J., August 1, 2013 at p. C1, available at http://online.wsj.com/article/SB10001424127887323681904578642153798696788.html?KEYWORDS=detroit+county+bond+sale.

[161] See text accompanying notes 143-146 supra.

[162] Calif. Gov. Code § 30400(a).

[163] 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).

empirical evidence that contagion beyond the distressed locality exists, and anecdotal evidence that states perceive the possibility of contagion and intervene to prevent it.[164] Michigan municipalities saw borrowing costs increase in the wake of the Detroit bankruptcy.[165] New York State's 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.[166] A former comptroller of New York State testified before Congress that New York City's bankruptcy would have caused fiscal disaster within the state.[167] The unsuccessful efforts by Alabama to forestall the state's most populous county from declaring bankruptcy was largely attributed to the consequences of default for the rest of the state.[168]

The combination of state contribution, moral hazard, and contagion complicates the claim that state takeovers violate principles of local autonomy or democratic decision making. While the claim that takeover boards foster efficient provision of municipal services suggests that they are intended to serve the interests of local residents, the desire to neutralize negative spillovers suggests that takeover boards are intended to serve the interests of the state, and the desire to ensure capital flows implies that takeover boards should attend to the interests of capital markets. Of course, conflict among these objectives is not absolute. Reduction of the risk of default, for instance, benefits all stakeholders because it reduces borrowing costs. But, as I explore in

[164] For a general discussion of contagion from default in municipal markets, see Clayton P. Gillette, Fiscal Federalism, Political Will, and Strategic Use of Municipal Bankruptcy, 79 U. Chi. L. Rev. 281, 302-04 (2012). See also Hwang, Frances Haeuck In, & Tong Suk Kim, Contagion Effects of the U.S. Sub-Prime Crisis on International Stock Markets, Finance and Corporate Governance Conference 2010 Paper. Available at SSRN: http://ssrn.com/abstract=1536349.

[165] See note 160 supra.

[166] See Lachman and Polner, supra note 80, at 131-32.

[167] Financial Control Boards, supra note 35, at 44 (statement of Edward V. Regan).

[168] See Mary Williams Walsh and Campbell Robertson, Just Before Deadline, County in Alabama Delays Bankruptcy Move, N.Y. Times, July 28, 2011, available at http://www.nytimes.com/2011/07/29/business/economy/alabamas-jefferson-county-postpones-a-decision-on-bankruptcy.html?scp=1&sq=alabama%20county%20bankruptcy%20before&st=cse.

greater depth in Part V, some tension remains insofar as avoiding default may mean 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 lead to one allocation of losses, while a decision to honor all debt contracts in full, but to reduce pension payments or service levels would lead to another. Takeover boards might be thought to have nondemocratic characteristics to the extent that they strike the balance among stakeholders differently than local officials would. But that conclusion becomes more contestable if the constituencies to which takeover boards are responsive 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 more 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 I have noted above, it does not entail interventions in expenditure decisions or restructure the process by which decisions are made. But it may be that suspension of normal politics is 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 I turn next.

IV. Takeover Boards and Structural Change

A. Fragmentation as a Cause of Fiscal Distress

As with the appointment of Roman dictators, the case for a state takeover to approve or displace 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 they are the source of fiscal distress rather than of its solution.[169]

Why might that be the case? One 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. 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. Officials who can obtain immediate benefits from issuing debt (job creation, 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.[170] In short, the parochial incentives of individual officials may limit the scope to which normal politics internalize the interests of nonresidents and creditors.

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

[169] The distrust of normal politics is evident in the appointment of non-political actors to state takeover boards. Famously, the original members of the MAC included Felix Rohatyn, a senior partner at the investment banking firm of Lazard Frères. But other members included Simon Rifkind, a former federal judge and law firm partner; the former Secretary of the 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 17, at 27. Current directors of the Nassau County Interim Finance Authority include representatives from banking, investment banking, law, and business consulting. See http://www.nifa.state.ny.us/directors.html. 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.

[170] See Robert S. Amdursky, Clayton P. Gillette, and G. Allen Bass, Municipal Debt Finance Law 207-09 (2d ed. 2013); Clayton P. Gillette, Direct Democracy and Debt, 13 J. Contemp. Legal Issues 365 (2003).

decision making structure, though there is some variance in the meaning of the term.[171] As I use the term, fragmentation essentially entails a budgetary system in which, for any given proposed expenditure, there are multiple points of access and review before a decision is finalized. The access 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 a particular branch, but in which multiple members of that branch are entitled to a vote on the expenditure, as where expenditures in one district of the city are contingent on approval by representatives from multiple districts. In either case, the multiplicity of actors involved in the decision process has various effects. Some of these effects are positive. For example, different decision makers can serve as checks against distorted decision makers. As David Schleicher has argued, however, checks and balances between executive and legislative bodies are less likely to be an issue at the local level because one party likely controls both branches.[172] Thus, at the local level, the negative implications of fragmentation may predominate.

Those negative implications revolve around the vulnerability of fragmented structures to the demands of well-organized, politically preferred groups that have access to different agencies involved in the 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. A decision making body such as a city council that comprises representatives elected from separate districts may deteriorate into a cooperative

[171] See Wallace S. Sayre and Herbert Kaufman, Governing New York 710-12 (1965); Robert P. Inman and Michael A. Fitts, Political Institutions and Fiscal Policy: Evidence from the U.S. Historical Record, 6 J.L. Econ. & Org. 79, 81-82 (1990); Kimhi, Chapter 9, supra note 27, at 378-79; Kimhi, Four Cities, supra note 27, at 892-93, 914-17.

[172] 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).

logrolling game in which each member supports projects useful in colleagues' districts in return for reciprocal support in the member's own district, regardless of the disutility of any of the projects from the perspective of the locality as a whole.[173] While it might be in the interest of the locality to have the decision making body reject projects that generate net costs, 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.[174]

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. Decision makers 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. Fragmentation thus underlies the model of urban governance captured in Sayre and 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 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."[175] Within such a system, bureaucrats and elected officials with budgetary discretion have incentives to deliver

[173] See, e.g., Reza Baqir, Districting and Government Overspending, 110 J. Pol. Econ. 1318 (2002); Clayton P. Gillette, Expropriation and Institutional Design in State and Local Government Law, 80 Va. L. Rev. 625, 635-41 (1991); Robert P. Inman, Financing Cities, in R. Inman (ed.), Making Cities Work (2009).

[174] Baqir, supra note 173; Barry R. Weingast, A Rational Choice Perspective on Congressional Norms, 23 Am. J. Pol. Sci. 245 (1979). For general treatments and literature reviews, see, e.g., Roberto Ricciuti, Political Fragmentation and Fiscal Outcomes, 118 Public Choice 365 (2004).

[175] Bailey, supra note 17, at 167, summarizing Sayre and Kaufman, supra note __.

services inefficiently either to maximize budgets or to assist clients who provide electoral support or post-public service opportunities rather than net local benefits.[176] The result is the use of public funds to redistribute wealth to groups that are able to exercise disproportionate influence in the budgeting process. Although 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).[177] This is not to say that localities should not engage in any redistribution. Some redistributive policies attract residents and capital that will enhance the value of the locality. Some municipalities enjoy sufficient agglomeration economies that they can engage in redistribution without significant risk that net payers will migrate to more hospitable jurisdictions.[178] The point is only that, regardless of the beneficiary, 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. In effect, fiscal crises arise when political competition among interest groups for scarce resources that 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

[176] See, e.g., William A. Niskanen, Jr., Bureaucracy and Representative Government (1971). Tests of Niskanen's theory of bureaucracy has generated a bit of a cottage industry, though results are inconclusive. See, e.g., Dennis C. Mueller, Public Choice III 362-68 (2003).

[177] See Gillette, supra note 115, at 102-05.

[178] See id. at 96-102.

fund deficits.[179] The Madisonian dream of public interest emerging from offsetting factions is then supplanted by what Richard Stewart has termed “Madison’s Nightmare” of factions dividing an expanded pie in which each group receives an enlarged slice.[180]

The concern for fragmentation is consistent with Martin Shefter’s and Charles Morris’ analyses of the origins of New York’s fiscal crisis in the 1970s[181] and Ester Fuchs’ explanation for the different fiscal histories of New York and Chicago.[182] 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. Expenditures to some subgroups, however, did not substitute for expenditures to other groups. Rather, both existing and new groups received appropriations, which ultimately were financed with borrowed funds rather than tax increases.[183] As relatively poor racial minorities attained political access in the 1960s, expenditures for services that were highly utilized by that group increased substantially more than other expenditures. Shefter reports that expenditures for welfare services increased 940 percent between 1961 and 1976, while open enrollment for the City University of New York required an increase in expenditures of 1224 percent for higher education during that period. At the same time, expenditures for police, fire, sanitation, and education (other than higher education) increased 277 percent, 217 percent, 178 percent, and 304 percent respectively.[184] 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

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[179] See Robert P. Inman, Transfers and Bailouts: Enforcing Local Fiscal Discipline with Lessons from U.S. Federalism, in Jonathan Rodden et al., Fiscal Decentralization and the Challenge of Hard Budget Constraints 35, 50-51 (2003)

[180] Richard D. Stewart, Madison’s Nightmare, 57 U. Chi. L. Rev. 335 (1990).

[181] Shefter, supra note 33, at ; Morris, supra note 125.

[182] Fuchs, supra note 33, at

[183] Shefter, supra note 33, at 105-24.

[184] Id. at 114.

payroll.[185] As a result, the size of the municipal workforce increased almost 50 percent between 1961 and 1975, and the average cost per employee almost tripled.[186] Of course, the argument here is not that new groups lacked entitlement to share in municipal largesse. Rather, the argument is that the city failed to find a responsible means of paying for that expansion.

Morris provides a more benevolent story in which 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 amounts of expenditures to particular groups were idiosyncratically high in New York.[187] 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 use of financial gimmicks to make the costs of labor agreements less transparent.[188]

Fuchs tells a complementary story about the relative ability of Chicago to withstand 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 resisting demands from interest groups will cost them politically. Mayor in cities with weak party systems, on the other hand, require electoral support from groups over which they have less control. These mayors are susceptible to interest group demands, which typically require distribution of a disproportionate share of the local budget to

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[185] Id. at 117.

[186] Id.

[187] Morris, supra note 125, at 171-94.

[188] Id. at 144.

their constituents.[189] On Fuchs' 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 decisions, with the exception of when fiscal crisis materializes.[190] 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.[191] 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. 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.[192] Similar arguments are implicit in recommendations by Haughwout and Inman to reorganize central city 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.[193]

This is not to say that fragmentation will necessarily generate fiscal responsibility. Monopolized authority generates its own costs. Trounstine concludes that expenditure decisions by monopolistic leadership within cities – both traditional machine monopolies and reform

[189] Fuchs, supra note 33, at 238-39.

[190] Id. at 242-44.

[191] Id. at 251-54.

[192] Id. at 255-56.

[193] See, Andrew F. Haughwout and Inman, Robert P., Should Suburbs Help Their Central City?. Brookings-Wharton Papers on Urban Affairs 45, 79 (2002).

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.[194] Glaeser and Shleifer identify extreme cases of the phenomenon in which monopolist executives spend funds intended to solidify their political base and eliminate political competition rather than to enhance constituents' welfare.[195]

Nor does interest group pluralism necessarily generate fiscal irresponsibility. 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. But even profligate local officials presumably face some, if fuzzy, budget constraints in the form of tax or debt limitations, monitoring by political opponents, good government groups, or state officials concerned about contagion effects of local fiscal distress.

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, understandably, is the subject of more analysis of its fiscal distress than any other municipality), or at most of other large cities. For instance, Ferreira and 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, and one might conclude that since partisan politics translate into a greater need to use government expenditures

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[194] See Jessica Trounstine, Political Monopolies in American Cities 139-71 (2008).

[195] See Edward L. Glaeser and Andrei Shleifer, The Curley Effect: The Economics of Shaping the Electorate, 21 J. L. Econ. and Org. 1 (2005).

to maintain a coalition, we should expect less linkage between fragmentation and budgetary difficulties at the local level.[196] But the conclusions in the New York studies are also consistent with more general findings in the political economy literature that the size of 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.[197] Baqir's study of approximately 2,000 local governments reveals that increases in the size of the legislative body are associated with an increase in the size of government.[198] 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 mayoral system did. An additional political district in the average city is associated with a budgetary increase of approximately $0.72 million.[199] Inman provides supporting evidence of budgetary effects of constituent service. He demonstrates that movement to a city council more representative of the demographics of their constituents translated into a 23 percent increase in nonlabor spending, and that the spending was for neighborhood services rather than poverty services.[200]

[196] Fernando Ferreira and Joseph Gyourko, Do Political Parties Matter? Evidence from U.S. Cities, NBER Working Paper No. 13535 (October 2007).

[197] Thomas Romer and Howard Rosenthal, Bureaucrats versus Voters: On the Political Economy of Resource Allocation by Direct Democracy, 93 Q. J. Econ. 563 (1979).

[198] Baqir, supra note 173. For analogous findings of relationships between the number of parties and the size of the public sector, see Kathleen Bawn and Frances, Rosenbluth, Short versus Long Coalitions: Electoral Accountability and the Size of the Public Sector, 50 Am. J. Pol. Sci. 251 (2006); Inman, supra note 173.

[199] Baqir, supra note 173, at 1319. Baqir's study was published in 2002 and used budgetary data from the early 1990s. See Barry R. Weingast, Kenneth A. Shepsle, and Christopher Johnsen, The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics, 89 J. Pol. Econ. 642 (1981).

[200] See 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.

These results must be contrasted with those in municipalities that have governance structures that are less likely to feature fragmented decision making. Strong mayor systems – those that concentrate municipal budgetary authority in the executive branch – generate higher property values. Inman finds that "cities run by council systems have significantly lower home values, by perhaps as much as 4 percent."[201] Haughwout and Inman make similar findings, and also conclude that weak city governance lowers suburban mean income growth by 2.4 percent.[202] 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.

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 tax-paying 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.[203] 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;

[201] Inman, supra note 173, at 331.

[202] Haughwout and Inman, supra note 193, at 60.

[203] See, e.g., Congressional Budget Office, Fiscal Stress Faced by Local Governments 3 (December 2010) (emphasizing that "political dynamics" play an important role in the structural budget imbalances that can cause fiscal distress).

instead, it appears that officials were involved in deliberate efforts to mask deficits and expenditures.[204]

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 form of a strong mayor form of government and the placement of the budgetary process under unitary control, including the possibility of appointed financial officers, a practice that may be correlated with higher market confidence and lower borrowing rates.[205] But transition to a more unitary budgetary process through normal politics is likely to be frustrated by the same forces that induced or profited from the conferral of inefficient benefits from the municipal budget. It is not in the interest of agencies or elected representatives of 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 those offices themselves.[206] 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 the existing structure to implement favored policies.

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[204] See Congressional Budget Office, New York City's Fiscal Problem: Its Origins, Potential Repercussions, and Some Alternative Policy Responses 14-15 (1975), available at http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/108xx/doc10806/1975_10_10_origan.pdf; SEC Report, supra note 124, at __.

[205] See Alexander Whalley, Elected Versus Appointed Policymakers: Evidence from City Treasurers, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1533676 (appointive treasurers reduce city's borrowing cost by 13% to 23%). Congress required an appointed chief financial officer when it created a financial control board for the District of Columbia. See text accompanying notes 228-29 infra.

[206] On the entrenchment of political actors, see Richard Pildes, The Constitutionalization of Democratic Politics, 118 Harv. L. Rev. 28, 55-60 (2004);

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.[207] 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

1. Redressing the Consequences of Fragmentation

Takeover boards possess two characteristics that diminish fragmentation. First, the appointed nature of takeover boards renders them less vulnerable to the entreaties of multiple interest groups since takeover board membership is not conditioned on the support of politically influential local constituents. Second, to the extent that there is a relationship between logrolling within multi-member bodies or bureaucratic discretion and the size of government, the relatively small size of takeover boards should reduce expenditures. 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, 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; Cleveland, Yonkers, and the New York City

[207] See Fuchs, supra note 33, at

Emergency Financial Control Board consisted of seven, and the New York City Municipal Assistance Corporation had nine members.[208]

These characteristics suggest that takeover boards can take individual measures that are unpopular with groups that have exercised disproportionate influence during periods of normal politics. There is at least anecdotal evidence that takeover boards exploit that capacity. Bailey concludes that claims of anti-democratic 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."[209] David Berman quotes an assistant receiver for Chelsea to the effect that a new contract that reduced benefits for firefighters "was only possible because the receiver did not have to run for re-election and face the wrath of an organized, focused opposition."[210] Even Marion Barry, who as mayor resisted appointment of the District of Columbia Financial Review Board, concluded that "the 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."[211]

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

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[208] Actions Taken, supra note 20, at 50.

[209] Bailey, supra note 17, at 127. Bailey thus 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.

[210] David R. Berman, Takeovers of Local Governments: An Overview and Evaluation of State Policies 25 Publius 55, 64 (1995).

[211] See deBonis, supra note 101.

collective bargaining agreements,[212] perhaps on the theory that public sector unions have received benefits linked to political support rather than productivity.[213] 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.[214] If mayoral complicity in maintaining a defragmented regime has been motivated primarily by the need for electoral support, then the existence of a body that can act 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.[215]

Takeover boards may also reduce the likelihood of recidivism by restructuring the budgeting process in ways that may become sticky even after a control period has expired. Some jurisdictions require that municipalities subject to state control adopt long-term budgets.[216] Multi-year 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

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[212] M.C.L.A. § 141.1519(1)(k).

[213] See, e.g., Morris, supra note 125, at 98 (provision of half-pay retirement to union members after 20 years of service created settlements of work disputes, but "reinforced a growing tendency to trade off future benefits to sweeten current contracts").

[214] The Consent Agreement between the State of 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 benefit benefits. See Financial Stability Agreement, April 4, 2012, Annex D. Frequently, pension arrangements can only be adjusted with respect to new employees. See, e.g., Il St. Ch. 65 § 5/8-12-17(c); M.C.L.A. § 141.1519(1)(k); R.I. Gen. Laws Gen.Laws 1956, § 45-9-9. 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, Illinois, see http://www.senatedem.ilga.gov/index.php/component/content/article/108-public-information-brochures/1517-pension-debate. 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 (2012).

[215] See Berman, supra note 76, at 116-17 (describing the use of the Pennsylvania Intergovernmental Cooperation Authority to provide political cover for local officials to make unpopular decisions).

[216] See, e.g., R.I. Stat. § 45-9-1 to -17 (2011).

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,[217] for example, may cabin the city's capacity to favor particular groups on an ad hoc basis, and the enhanced budgetary transparency could reduce 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, i.e., 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. In Detroit, for example, legacy costs consume approximately 38 percent of the budget, so that before any municipal services can be provided, 38 cents of each revenue dollar is already committed to debt, pension liabilities, or other than pension employee benefits.[218] Much of those costs is attributable to the substantial debt incurred by Detroit to fill deficits in the annual budget.[219] There can be little doubt that debt burden frustrates efforts to attract human and financial capital. Potential employers and residents 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

[217] 53 Pa. Stat. § 12720.209(d).

[218] Proposal for Creditors, supra note 117, at 24.

[219] The Emergency Manager estimated that at the end of fiscal year 2012, Detroit had an accumulated general fund deficit of $326.6 million. The city issued $75 million in 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. Report to Creditors at 6.

shared sacrifice in resolving distress,[220] and creates analogies in municipal bankruptcy to the "fresh start" policy that characterizes individual bankruptcy.[221] Indeed, the relative advantage of creditors over residents in detecting and deterring excessive debt suggests that there is a plausible argument for substantial reduction of obligations owed to municipal creditors.[222]

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.[223]

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 decision making. These characteristics allow takeover boards to

[220] See David Graeber, Debt (2012); Anna Gelpern, Bankruptcy, Backwards: The Problem of Quasi-Sovereign Debt, 121 Yale L. J. 888, 926-30 (2012).

[221] Kimhi, Chapter 9, supra note 27, at 372-74.

[222] Clayton P. Gillette, Bondholders and Fiscally Stressed Municipalities, 39 Ford. Urb. L.J. 639 (2012).

[223] 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 117 (detailing high tax burdens, debt burdens, crime rates and absence of municipal services for Detroit).

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 why wouldn't we believe that distressed localities will revert to the practices that precipitated crisis once the supervisory body disappears, as seems to have occurred in the past?[224]

The answer lies in the underexploited capacity of takeover boards to go beyond the provision of immediate relief from the consequences of fragmentation. Implementation of managerial changes and budgetary requirements such as multi-year budgeting and requirements that financial statements comply with generally accepted accounting principles may be appropriate, but if the underlying source of fiscal distress lies in governmental structure, then these palliatives treat symptoms rather causes. Even those who recognize the ability of takeover boards to generate short-term relief, however, have failed to use the power related to extraordinary politics, or dictatorship, to restructure fragmented government institutions that generate fiscal dysfunction but benefit sufficiently from current structures that they resist more efficient governmental organization. Even Kimhi, perhaps the most persistent advocate of state intervention in local fiscal crisis, 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."[225] 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, non-democratic characteristic of restructuring local government outside of the avenues of normal politics.

[224] See text accompanying notes 30-34 supra.

[225] Kimhi, Four Cities, supra note 27, at 921.

Because restructuring requires deeper intrusions into the organization of local government, it is likely to occur only through the intervention of a unitary decision maker that has the legal authority to reorganize municipal government and that is not obligated to the interests that have theretofore dominated the allocation of municipal resources. It was largely on that basis that McConnell and Picker contended that Chapter 9 should adhere more closely to the Chapter 11 restructuring process and allow a bankruptcy court to apply the principles of corporate reorganization to a municipality for which the offered bundle of services, boundaries, or organizational structure had become unsuitable.[226] Their recommendation recognized that changed circumstances could render obsolete the geographical and institutional design that had been created to serve a very different composition of residents and firms than existed at a time of fiscal distress. But even they concluded that the current political leadership of the municipality would have to accept any court-recommended restructuring, and that officials unwilling to redesign dysfunctional municipal institutions prior to bankruptcy would likely continue their intransigence during bankruptcy.[227]

One could imagine more invasive restructuring of local governmental institutions by takeover boards. Bailey attributes reversal of fiscally destructive "devolution of allocative decision making to the bureaucracies, reinforced by unionized employees"[228] to the shift in New York City governance from a strong mayor/legislative council to a mayor/takeover board model in which the boards created during the period of constituted a more centralized organization.[229] More generally, these allocations of authority that determine the level of fragmentation are

[226] Michael W. McConnell and Randal C. Picker, When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy, 60 U Chi L Rev 425, 472-81 (1993).

[227] Id. at 475.

[228] Bailey, supra note 17, at 146-47.

[229] Id. at 147.

typically made within the city charter. 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. 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.[230]

While the District of Columbia may appear to be a special case because of its uniquely subordinate relationship to Congress, similarly broad intrusions by takeover boards unilaterally to reform city charters to defragment municipal governance are both plausible and, arguably desirable. These reforms could include reallocating authority between the mayor and the city council in order to centralize decision-making authority into 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;[231] or reducing the number of districts from which the local legislature was elected in order to reduce expenditures attributable to negative-sum logrolling. Detroit's city charter, for example, limits the city's capacity to privatize services currently performed by city employees, constrains the mayor's choice of a police chief to a list recommended by an elected board of police commissioners, and explicitly attempts to balance the authority of the mayor and city council. The Detroit City Charter also contains multiple levels of oversight – thus purporting to engender integrity in government at the cost of

[230] D.C. City Code § 1-204.24a. Notwithstanding the chief financial officer's substantial authority, the position is held an appointee of the mayor and city council,[230] and is only removable by the mayor and 2/3 of the city council. D.C. City Code § 1-204.24c. During a control period, federal officials and a takeover board are also involved in the appointment and removal process.

[231] See Janet Anderson, Redundancy in City Government: Highlighting the Detroit City Charter (March 2013) (copy on file with author); Actions Taken, supra note 20, at 82-83 (competition among city manager, mayor, and city council frustrated budget reconciliation in Yonkers, New York).

duplication of effort. 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.

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 republic.[232] Takeover boards are most defensible when they provide short-term constraints on budgetary excess. Implementation of institutions that might facilitate defragmentation implicate tradeoffs about both particular services and institutional design over which reasonable people could disagree and thus that 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 mayoral systems may crowd out political opposition and allow entrenchment that ultimately diminishes interest group competition.[233] 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.[234] The success of privatization of municipal services or securitization of municipal revenue streams may

[232] Ferejohn and Pasquino, supra note 2, at 211.

[233] See Fuchs, supra note 33.

[234] See Lynn A. Baker, Direct Democracy and Discrimination: A Public Choice Perspective, 67 Chi.-Kent L. Rev. 707, 727-28 (1991); 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, 217 (1989).

depend on the nuances of the programs and are vulnerable to mismatched time horizons of the letting public officials and their constituents.[235] Fragmentation may also be reduced by financing local public goods through cost-based user fees rather than general taxes. That choice, however, also entails distributive consequences that compete with any efficiency-enhancing implications, since services will inevitably 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 normal politics are attended by fiscal failure and entrench a system of governance that has engendered that failure. Under those circumstances, something closer to a *dictatura rei gerundae causa*, or "dictatorship for getting things done," may be appropriate or necessary. As I have suggested above, states deploy takeover boards where localities have systematically failed to provide local public goods and where that failure is due to long-term internal dysfunction rather than exogenous shocks. Temporary interventions that 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 precludes revision of that structure, then changes necessary to avoid recidivism are less likely to materialize. 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

[235] See, e.g., Julie A. Roin, Privatization and the Sale of Tax Revenues, 95 Minn. L. Rev. 1965 (2011).

immobility rather than preference for the service levels they receive.[236] If neither political voice nor Tieboutian exit is likely to generate reform, the best viable alternative may lie with external intervention.

This more radical deployment of takeover boards certainly raises the objection of a democratic deficit in the governance of financially distressed localities. But the democratic objection to such invasive intervention is diluted by the temporal limitations on mandatory restructuring. As I discuss below, takeover boards exercise authority for a limited duration.[237] After that period, the return to normal politics permits affirmation or rejection of the regime instituted by the takeover board. Intramural allocations of municipal authority are embodied in municipal charters. While those charters have a constitutional character, they typically are far more susceptible to amendment and revision than state or federal constitutions. 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 process of hearing and referendum that any attempt to reverse the structural mandates of a takeover board is likely to occur only after there has been substantial experience with the new governance structure.[238] 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 has more successfully brought fiscal stability and preference satisfaction. In effect, unilateral authority to overhaul the local governance structure entitles the takeover board to 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

[236] See text accompanying notes __-__ supra.

[237] See text accompanying notes 276-285 infra.

[238] See, e.g., Mich. Comp. L. Ann. §117.5(1)(e) (incorporating referendum requirement for adoption or amendment of city charter).

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, I ask whether it is plausible to demand so much of takeover boards, and how they themselves might be structured to increase their probability of success.

V. Constraining Takeover Boards

I have suggested that the state's interest in redressing local fiscal distress may be sufficient to justify imposition of procedurally non-democratic control of local governance through an appointed takeover board. 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. The common theme of these justifications for 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 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 would be generated by a more democratic regime, but to allow them to be realized.

In this section, I take an alternative tack. I suggest that takeover boards are necessarily political bodies, not only in the narrow sense that they are appointed by state executives who may have an underlying agenda, but also in the broad sense that they must balance priorities among the various constituencies (local residents, state residents, creditors) that they serve and therefore must make choices that inevitably favor one class of claimants to limited municipal funds over others. Given the political nature of all the relevant actors, it would be incongruous to assume that a local decision making processes distorted by political interests could be replaced by one devoid of political motivations. The consequence is that state intervention may be motivated by objectives other than benevolence. In short, 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 may do so in a manner that reduces the likelihood that their actions are consistent with what I have described as the democratic justifications for their existence. 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 priorities. Notwithstanding the statutory prohibition on the EFCB's intervention in setting budgetary priorities for New York City,[239] Bailey's study of the crisis reveals that EFCB decisions necessarily affected the expenditures that elected officials could authorize. As Bailey concludes, "[d]ebt was limited, debt service ensured and increased, a wage freeze was imposed, programs for increased productivity were demanded."[240] Even if all agree that budget balancing and restructuring is desirable, the means of achieving those objectives will be politically contestable, and it is not clear that takeover boards enjoy an advantage over normal politics in deciding among alternatives. The recent decision by the Nassau County Financial Control Board to require the county to rewrite its budget was met with claims that the board was dominated by

[239] N.Y. Unconsol.Laws § 5405 (McKinney).

[240] Bailey, supra note 17, at 49-50 (1984).

Democrats who preferred property tax increases to the tax cuts and wage concessions preferred by Republican elected officials.[241]

Given the inevitably political nature of the decisions they implement, the issue is not whether takeover boards can aspire to some apolitical role. Rather, the issue is whether, in making decisions, they are motivated by objectives that could cause deviation from the optimal balance among the multiple constituencies they serve. Like the case of the elected local officials that takeover boards oversee or displace, incentives to deviate from the optimal would be a function of (1) the interests that takeover board members represent, and (2) in the absence of electoral checks, the presence of mechanisms that allow takeover board members to pursue personal rather than public objectives.

A. Whose Interests Do Takeover Board Members Represent?

Ideally, elected local officials have a relatively clear objective: pursue the interests of the local electorate. It is for that reason that it is appropriate to impose a takeover board when electoral and Tieboutian constraints on officials 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 that replace them 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, appointment of a

[241] See David M. Halbfinger, New York State Seizes Finances of Nassau County, N.Y. Times, January 26, 2011, available at http://www.nytimes.com/2011/01/27/nyregion/27nassau.html?_r=1&scp=1&sq=seizes%20finances%20nassau%20county&st=cse.

takeover board implies protection of those interests, even if that requires subordination of local interests.[242]

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 interests.[243] And because state intervention is frequently triggered by concerns for contagion from the non-payment of the distressed municipalities' debts, the appointment of a takeover board typically entails signaling creditors that they will receive payment of their obligations notwithstanding the adverse impact on municipal residents.[244] The creation of the EFCB with substantially more authority over the New York City budget than MAC, for example, 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.[245]

Initially one might conclude that there is no conflict between serving the interests of local residents and those of the state or creditors, because pursuit 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 precise path chosen may favor one of the affected groups over others. Local residents may prefer that budget balancing occur at the expense of creditors, who are likely

[242] See, e.g., R.I. Gen. L. § 45-9-1, which requires a state appointed receiver to act with "due 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 of the state and its municipalities to capital markets, all to the public benefit and good."

[243] See, e.g., Pa.Stat. Ann. tit. 53 § 12720.202(a) (five members of PICA are appointed by state executive and legislative leaders).

[244] See, e.g., Mary Williams Walsh and Michael Cooper, Faltering Rhode Island City Tests Vows to Pensioners, N.Y. Times, August 13, 2011, available at http://www.nytimes.com/2011/08/13/us/13bankruptcy.html?_r=1&scp=1&sq=faltering%20rhode%20island&st=cse .

[245] See Lachman and Polner, supra note 80, at 126-131.

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. Thus, resident preferences to impose costs on creditors cannot be dismissed as pure opportunism, although resident 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.[246] 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 non-opportunistic, 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. 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

[246] See Gillette, supra note 222, at 664-76.

potential creditors consider the debt of those entities to be risker.[247] Bailey contends that the demands of MAC towards 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 budget deficits of New York."[248] 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."[249]

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.[250] 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.[251] The receiver for the city – essentially a one-person takeover board – contended that the statute required him to pay creditors prior to making pension payments for city workers, and presumably prior to paying for ongoing city services.[252] State officials reportedly defended the statute as necessary to ensure that investors would continue to purchase bonds of Rhode Island and its municipalities. The Democratic chairman of the 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

[247] See text accompanying notes __-__ supra.

[248] Bailey, supra note 17, at 31.

[249] Financial Control Boards, supra note 35, at 45 (statement of Edward V. Regan).

[250] See Central Falls files for bankruptcy, available at http://www.wpri.com/news/local/blackstone/central-falls-receiver-robert-flanders-to-make-bankruptcy-announcement.

[251] See R.I. Code § 45-12-1.

[252] Michael Corkery, Creditors Win in Rhode Island, August 4, 2011. See Moreau v. Flanders, 15 A.3d 565, 571 (R.I. 2011).

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."[253]

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 Control Board for the City of Yonkers was succeeded by legislation that appointed the State comptroller as the "fiscal agent" for that city. 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.[254] 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.[255]

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

[253] See Press Release, Assembly and Governor OK Measure to Prevent Municipal Receivership, June 17, 2010, available at http://webserver.rilin.state.ri.us/News/pr1.asp?prid=6591.

[254] Actions Taken, supra note 20, at 78.

[255] Id.

1970s, MAC issued 30-year bonds to support New York City. The bonds were secured by a portion of state sales tax revenue that otherwise would have been available to the city. As those bonds approached maturity, however, the city was in the midst of a new financial downturn, the consequences of which could be partially averted if the funds scheduled to be diverted to payment of the 1970s MAC bonds were instead available to the city. The state responded by creating a new mechanism that effectively rolled over the 1970s debt for an additional 30 years. In effect, the scheme required that New York City residents in the 2030s pay the MAC debt incurred in the 1970s.[256] 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 and 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. Once again, analogy to the Roman dictatorship may be instructive. Notwithstanding its characterization as a protector of the public good and "guardian of the public order,"[257] at least on some accounts a dictator was often appointed primarily to advance the interests of a discrete group.[258] Even as ardent of an admirer of the Roman

[256] The New York Court of Appeals ultimately upheld the laws creating the extension. See Local Government Assistance Corp. v. Sales Tax Asset Receivable Corp., 813 N.E.2d 587 (N.Y. 2004).

[257] Kalyvas, supra note 1, at 416.

[258] Id. at 420; Rossiter, supra note 2, at 21-22.

dictatorship as Rossiter acknowledged that suspension of normal politics could be utilized as a "weapon" of a dominant class to frustrate political advances by others.[259]

Similarly, states may deploy takeover boards to expand the scope of their jurisdiction beyond clear cases of externalities.[260] States are likely to exercise their expansionist tendencies in the financial area since 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.[261] 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 effects.[262] 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.[263] In short, the risk of contagion may be in the eyes 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.

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[259] Rossiter, supra note 2, at 21-22.

[260] Roderick Hills, in William A. Fischel (ed.), The Tiebout Model at Fifty (2006).

[261] Clayton P. Gillette, Fiscal Home Rule, 86 Den. U.L. Rev. 1241, 1250-51 (2009).

[262] David Barron, Reclaiming Home Rule, 116 Harv. L. Rev. 2255 (2003).

[263] See id; Jon C. Teaford, The Unheralded Triumph: City Government in America 1870-1900, at 84-94, 105-07 (1984).

It is difficult to evaluate the extent to which the states or their appointees to takeover boards are motivated by rent seeking or partisanship. One measure of political motivation might be divergent party affiliations among the mayor, the governor, and the legislature. The opportunity to embarrass a mayor of a city who had a different party affiliation could, in theory, explain why some fiscal crises are addressed through state takeover rather than through less invasive measures. I have not found any studies that 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.[264] 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.[265] When board and city officials disagreed on whether to close the city's deficit through tax increases (favored by the state, though potentially suicidal for the mayor during an election year) or through wage concessions and borrowing, the mayor filed for bankruptcy.[266] Similarly, Howard Gillette's account of Camden indicates that

[264] Paul Burton, Harrisburg Fate in Judge's Hands, Bond Buyer, Nov. 21, 2011, available at http://www.bondbuyer.com/issues/120_224/harrisburg-pa-bankruptcy-1033367-1.html.

[265] See Dorothy A. Brown, Fiscal Distress and Politics: The Bankruptcy Filing of Bridgeport as a Case Study in Reclaiming Local Sovereignty, 11 Bank. Dev. J. 625, 634-35 (1995).

[266] Id. at 635-37.

party politics played as great of a role as fiscal policy in designing a state bailout.[267] 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. That is not to say that none of the target localities was fiscally sound at the time of state action. It is only to suggest that in determining how to handle fiscal distress, the political incentives of state officials to err on the side of takeover cannot be dismissed.

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 uncontrovertibly 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 the MAC, notwithstanding more sympathetic support from the governor and chief financial officers of the state.[268] 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 placed on city long-term debt.[269] 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

[267] See Gillette, supra note 102, at 191-215 (highlighting how various elements of the recovery effort "highlighted the ways in which political influence triumphed over economic need").

[268] Bailey, supra note 17, at 25.

[269] Id. at 26.

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.[270]

Still, the New York experience indicates that it is difficult systematically to attribute state takeovers to partisanship. 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,[271] 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.[272] The evidence on partisanship as an explanation for unnecessary takeovers of distressed localities, at least as measured by party affiliations at the state and local level, therefore, appears inconclusive.

B. Personal Objectives of Takeover Board Members

Assuming for the moment that we could identify the appropriate objective for a takeover board, why would we believe that takeover board members would seek to maximize it when self-interest dictates some alternative course of action, such as maximizing the interests of one of the multiple constituencies 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 strategy defined through the democratic procedures that takeover boards supplement or displace. Local officials

[270] Id. at 40.

[271] Public Law 104-8.

[272] See Actions Taken, supra note 20, at 1-2.

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. 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 situation 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 most recently prior to his appointment, he ran a firm that had become the most active underwriter of short-term municipal bonds in New Jersey.[273] It is plausible that such roles could skew the selection among various alternatives in the temporary setting of serving as even a benevolent dictator of a city. Felix Rohatyn, an investment banker, was perceived by some as being too lenient on creditors at the expense of residents. Bailey, for instance, 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.[274]

Unlike unelected judges, for whom long term of office, repeat play, and the obligation to publish opinions provide a basis for believing that reputational constraints will offset the absence of democratic controls,[275] 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 extra-legal sanctions to motivate fidelity to even well-defined objectives. Legal sanctions are similarly unlikely to impose substantial constraints, as the absence of statutory admonitions to implement specific policies or to create priorities

[273] See Gillette, supra note 102, at 208.

[274] Bailey, supra note 17, at 31.

[275] See, e .g., Richard A. Posner, Overcoming Law 109-44 (1995); Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does), 3 Sup. Ct. Econ. Rev. 1 (1993).

among budgetary practices implies deference to the decisions of takeover boards. Courts are likely to review substantive budgetary decisions of takeover boards under a standard that allows substantial discretion and defers to the presumed expertise of members.[276] 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.[277] 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.

[276] See, e.g., County of Nassau v. Nassau County Interim Finance Authority, 2011 WL 1044556 at *18-19 (N.Y. Sup. Ct.).

[277] See Financial Control Boards, supra note 35, at 38-39; Actions Taken, supra note 20, at 2.

Substantial variation exists along both jurisdictional and temporal metrics in those states that have authorized 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 to enhance the city's capacity to issue debt and did not affect "Bridgeport's authority to conduct day to day operations."[278] 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. Yet 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 anti-democratic rule, immediately restored all compensation and quotidian duties to the Mayor and City Council.[279] Nevertheless, I have suggested above that 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

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[278] In re City of Bridgeport, 128 B.R. 688, 699-701 (D. Bankr. Conn. 1984).

[279] See Emergency Manager City of Detroit Order No. 1 (March 25, 2013), available at http://www.detroitmi.gov/Portals/0/docs/EM/Order1.pdf. The Emergency Manager subsequently authorized the Mayor and City Council to operate the day to day business of the City. Emergency Manager City of Detroit Order No. 3 (April 11, 2013), available at http://www.detroitmi.gov/Portals/0/docs/EM/Order%203.pdf. When one member of the City Council failed to participate, the Emergency Manager revoked the restoration of compensation and duties to him. See Emergency Manager City of Detroit Order No. 9 (June 27, 2013), available at http://www.detroitmi.gov/Portals/0/docs/EM/Order%209.pdf.

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.[280] But assuming that resolving budgetary and structural issues can be resolved within defined time periods defies the variability of causes of fiscal distress and the measures necessary to address them. 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, 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 to retirement of debt in the short term. The control period in some of the North Carolina takeovers mentioned above lasted between 3 and 11 months. Some takeover periods last longer: New York City was at least nominally subject to the supervision of MAC until 2008. The difficulty of defining the ideal conditions for termination is perhaps reflected in these periods and in current statutory limitations on state control.

Termination of the control period, therefore, is better measured by objective benchmarks than by predetermined 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.[281] 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

[280] Rossiter, supra note 2, at 23; Kalyvas, supra note 1, at 416.
[281] Public Law 104–8, § 209(b) (April 17, 1995).

of measures to eliminate fiscal emergency conditions, and preparation of a five-year financial plan.[282] Michigan conditions termination of the control period on the assent of the emergency financial manager and the governor.[283]

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.[284] That condition may be necessary in order to induce 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' issuance of bonds to continue the life of public authorities after the costs of constructing their projects had been paid[285]) 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, however, creditor assurances could be provided by other means, such as through state guarantees, after the termination of a takeover board.

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

[282] Ohio Rev. Code § 118.27(B).

[283] Mich. Comp. L. Ann. § 141.1562.

[284] See, e.g., 53 Penn. Stat. § 11701.253 (making retiring of debt obligations to finance deficits a factor in terminating jurisdiction of state coordinator for municipality) , Illinois School Finance Authority Act, 105 Ill. Comp. Stat. Ann. 5/34A-5/34B-15.

[285] See Robert Caro, The Power Broker 625-28 (1974).

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.[286]

VI. 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 recreated living spaces that will entice individuals and firms to repopulate abandoned areas.[287] 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 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

[286] See, e.g., 53 Penn. Stat. § 11701.223 (allowing coordinator appointed under PICA to hold public meetings, but permitting private negotiation sessions with individual creditors).

[287] See, e.g., Detroit Future City, available at http://detroitfuturecity.com/.

of local governance. A substantial literature suggests that particular forms of municipal governance can promote fiscal stability. The more contentious model that I propose 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 defragmented decision making.[288] 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.

[288] The point here is quite different from the one made in Note, Missed Opportunities, supra note 421. 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. My argument is that internal political interactions, not insufficient regionalization, causes fiscal instability.