# *NOTES*

## EXAMINING THE CONFLICT BETWEEN MUNICIPAL RECEIVERSHIP AND LOCAL AUTONOMY

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### INTRODUCTION

LIKE many in this economy, local governments are struggling to cope with the negative effects of the Great Recession.[1] Many cities have had to fire employees, reduce services, or file for bankruptcy.[2] Others have used the threat of bankruptcy to coerce unions to renegotiate pension agreements and agree to changes they would otherwise vehemently oppose.[3] These events have led to questions about how states can rectify local financial distress.[4] Importantly, how these questions are answered will have a significant effect on many people because of the vital role cities play in our society. For example, local governments employ about 60% of all

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[1] Michael Cooper, Tough Choices for Cities as Federal Aid Shrinks, N.Y. Times, Dec. 22, 2011, at A16.

[2] See, e.g., Daniel Wagner, Many Cities Imposing Broad Cuts as Revenue Shrinks, Memphis Daily News, Sept. 28, 2011, http://www.memphisdailynews.com/editorial/Article.aspx?id=62327.

[3] Recent holdings suggest that cities and states can legally reduce pensions without filing for bankruptcy. Mary Williams Walsh, Two Rulings Find Cuts in Pensions Permissible, N.Y. Times, July 1, 2011, at B1.

[4] Mary Williams Walsh, Bankruptcy Filing Raises Doubts About a Bond Repayment Pledge, N.Y. Times, Dec. 24, 2011, at B1; Mary Williams Walsh & Katie Zezima, Small City, Big Debt Problems, N.Y. Times, Aug. 2, 2011, at B1.

public employees in the United States,[5] and more than 80% of the people in the United States live in or near cities.[6] Local governments are also responsible for performing functions that comprise our most common and salient interactions with public power. Questions involving education, law enforcement, and zoning are largely resolved at the local level.[7] Given the prominence of cities in everyday life, solving local fiscal crises should be done carefully.

In almost all states, state officials can use municipal receivership to help cities cope with economic stress.[8] Municipal receivership usually begins with local finances. Once a city's financial woes become practically uncontrollable, the state can elect to forcibly place the city under the temporary direction of a receiver.[9] The receiver typically displaces elected officials and is not subject to democratic controls. He also has broad authority to make decisions in the interim to attempt to bring the city back to financial stability.[10] This authority commonly includes firing public employees, selling municipal property, reducing public services, or reorganizing the structure of local government.[11] Once the locality appears to have regained some measure of financial strength, public power is returned to the city's elected representatives.

[5] Number of Government Employees, Data360, http://www.data360.org/dsg.aspx?Data_Set_Group_Id=228 (last visited Jan. 15, 2012).

[6] The World Factbook, Cent. Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (last visited Jan. 11, 2012).

[7] Omer Kimhi, Reviving Cities: Legal Remedies to Municipal Fiscal Crises, 88 B.U. L. Rev. 633, 634 (2008).

[8] James E. Spiotto, Municipal Insolvency: Bankruptcy, Receivership, Workouts, and Alternative Remedies, *in* 2 State and Local Government Debt Financing ch. 14, § 14:41 (M. David Gelfand ed., 1993) (noting that forty-seven states statutorily authorize some form of municipal receivership).

[9] Two notes on terminology. First, this Note equates receivers with Financial Control Boards ("FCBs"). FCBs usually have the same powers and mandates as individual receivers; the only real difference is that power is shared among multiple people. To the extent an FCB does not have similar powers, this Note does not address that type of FCB. Second, this Note uses receivership to connote a forcible receivership in which a state forces a city into receivership notwithstanding local opposition. For voluntary receiverships, see infra text accompanying notes 233–37.

[10] Receiverships might also be used for school districts or special authorities. However, this Note focuses only on receiverships imposed upon general-purpose governments like cities.

[11] See, e.g., Local Government and School District Fiscal Accountability Act, Mich. Comp. Laws §§ 141.1501–31 (2011).

The complexities of municipal receivership and its potential political ramifications are well illustrated by a recent Michigan law.[12] Worried that ailing cities were a threat to the state's credit rating, the Michigan legislature passed the Local Government and School District Fiscal Accountability Act.[13] The Act allows cities to be placed in receivership if their economic health indicators are sufficiently dismal.[14] Even if local officials oppose the receivership, the city can be forced into it at the behest of state government officials as long as certain conditions are met.[15] Once the city is in receivership, the Act invests the receiver—what the law terms the "emergency manager"—with nearly unlimited authority.[16] One section of the law provides a non-exhaustive list of more than thirty things the emergency manager may do, including altering collective-bargaining agreements, entering into contracts with municipal creditors, and eliminating departments within city government.[17] At the same time, all locally elected officials are prohibited from doing anything without prior written approval from the receiver.[18] To emphasize this point, the law repeats several times that the emergency manager is superior to all elected officials for the duration of the receivership, and that he may file suit to enforce compliance with his orders.[19] Perhaps the most troubling aspect of the law is that the receiver is free to continue in his position until he alone is satisfied that the financial emergency has receded.[20]

This Note challenges the efficacy of municipal receivership along a number of dimensions. Part I discusses the history of local gov-

[12] See id. The law has already been challenged in court as a violation of numerous articles of and amendments to the Michigan Constitution. Complaint at para. 4, Brown v. Snyder, No. 00000, 2011 WL 2465466, at *3 (Mich. Cir. Ct. June 22, 2011).

[13] See Local Government and School District Fiscal Accountability Act § 141.1503. A receiver has already been appointed under this new law in Benton Harbor. Emergency Financial Manager Takes Power, Raises Tempers in Benton Harbor, MLive.com, Apr. 19, 2011, http://www.mlive.com/news/grand-rapids/index.ssf/2011/04/emergency_financial_manager_ta.html.

[14] See Local Government and School District Fiscal Accountability Act § 141.1514a(1).

[15] See id. § 141.1515.

[16] See id. § 141.1515(4).

[17] See id. § 141.1519.

[18] See id. § 141.1515(4).

[19] See id.

[20] See id. § 141.1524.

ernment law and municipal receivership. This history provides a foundation for understanding the legal relationship between local and state governments, as well as how that relationship affected the historical use of municipal receivership. Part II argues that home-rule provisions can, and should, be interpreted to prevent a municipality from being placed into receivership against its will. In addition to critiquing judicial opinions, this Part argues that the history of the home-rule movement suggests that it was designed to prevent the type of state interference in local affairs that is at the core of municipal receivership. Moreover, it contends that federal constitutional law might also afford local self-government some protection from state interference.

Part III goes beyond legal objections to municipal receivership and argues that there are both political and policy reasons to oppose municipal receivership. Receivership is politically questionable because it displaces democratic controls and creates undesirable incentives for local residents. Moreover, this Part argues that cities are subject to economic and social forces that they have little control over, but that nonetheless cause many local economic struggles. Punishing cities when they have little control over their economic fates is questionable policy. Finally, Part IV provides alternatives to municipal receivership and discusses why these alternatives are superior to the current use of municipal receivership.

## I. BACKGROUND

Municipal receivership did not arise in a vacuum. It developed against a background of laws and principles—local government law—that governed the operation of cities in our legal structure. Linking local government law and municipal receivership together allows one to understand why municipal receivership developed as it did. It also highlights that objections to the content of local government law can also be translated into objections to municipal receivership itself. This Part traces the history of both local government law and municipal receivership, and argues that the substance of local government law allowed municipal receivership to expand unimpeded.

### *A. The Development of Local Government Law*

American local government law has historically limited the scope of municipal power. The origins of this framework can be traced back to events in the mid-nineteenth century. At the time, poor infrastructure investments and a depressed economy caused many cities to experience a significant degree of economic stress.[21] Many cities struggled with debt and were forced to default on their loans.[22] This led some to view local governments as profligate institutions, even if they were not nearly as irresponsible as the public imagination suggested.[23] Based on this supposed irresponsibility, politicians and jurists sought to limit local power, and this limitation was best encapsulated in judicial doctrine by Dillon's Rule.[24] The rule was named after John Dillon, a state court judge who was committed to a limited form of governmental power.[25] Under Dillon's Rule, city policymaking was legal only if it was expressly authorized by the local charter, incidental to express powers in the local charter, or essential to accomplishing the declared objectives of the city.[26] Moreover, any doubts about the extent of a city's power were supposed to be resolved against the city.[27]

The one-two punch of express authorization and narrow construction severely limited the possibility of local self-governance, and effectively made cities creatures of the state. This paternalistic relationship was crystallized in federal constitutional law in *Hunter v. Pittsburgh*.[28] In ruling on whether the U.S. Constitution provided cities with some defense against state government intrusion, the

[21] Eric H. Monkkonen, The Local State: Public Money and American Cities 24–26 (1995).

[22] Id. Monkkonen reports that there were approximately 941 municipal bond defaults between 1854 and 1929. Id.

[23] Jon C. Teaford, The Unheralded Triumph: City Government in America, 1870–1900, at 306 (1984) ("The moral image of city government remained bleak even while the municipal ledgers told a different story.").

[24] For a general discussion of Dillon's Rule, see Kenneth A. Stahl, The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law, 29 Cardozo L. Rev. 1193, 1206–11 (2008).

[25] David J. Barron, The Promise of Cooley's City: Traces of Local Constitutionalism, 147 U. Pa. L. Rev. 487, 506–08 (1999).

[26] 1 John F. Dillon, Commentaries on the Law of Municipal Corporations § 237, at 449 (5th ed. 1911).

[27] Id. § 239, at 452–53.

[28] 207 U.S. 161 (1907).

Court did not hedge its conclusion. According to the Justices, the "number, nature and duration of the powers conferred upon [cities] . . . rests in the absolute discretion of the State."[29] Ultimately, this conception of local power operates at the most literal level. Cities are merely an agglomeration of individuals and organizations—they have no residual sovereignty or inherent powers. Instead of a city as an organic community with rights to self-government, it is only the sum of its parts.

Those who were unsatisfied with this restrictive view of local power mounted a challenge under the banner of home rule.[30] Home rule has traditionally been viewed as the intellectual counter to the *Hunter* and Dillon paradigm of local government power. Whereas proponents of Dillon's Rule saw poor investments and municipal defaults, home-rule advocates saw state-level corruption and the increasing needs of an urban society.[31] To home rulers, the burgeoning industrial city—which needed sanitation, housing, public transportation, and industrial regulations—was hamstrung by a legal order that privileged state power over local initiatives. Those home rulers were largely successful, as almost all states recognize some form of home rule today.[32] Most home-rule provisions can generally be divided into two categories: home-rule initiative and home-rule immunity.[33] Home-rule initiative empowers cities to regulate a wide range of activities without express authorization from the state.[34] Some states have also buttressed grants of home-rule initiative with complementary provisions repealing Dillon's Rule of narrow construction.[35] In contrast, home-rule immunity has been likened to a shield, as it supposedly protects cities from state interference in local matters. Home-rule immunity can include prohibi-

[29] Id. at 178.

[30] See generally David J. Barron, Reclaiming Home Rule, 116 Harv. L. Rev. 2255 (2003).

[31] Id. at 2289–93.

[32] Gerald E. Frug, Richard T. Ford & David J. Barron, Local Government Law 168 (5th ed. 2010).

[33] Id. at 167.

[34] See, e.g., Ill. Const. art. VII, § 6(a).

[35] See, e.g., Mich. Const. art. VII, § 34.

tions on special legislation,[36] as well as declarations that cities have some right to local self-government.[37]

Notwithstanding the twin protections of initiative and immunity, home rule has largely left in place the legal idea that cities are totally subservient to the state.[38] Some courts have even read home-rule charters to be a grant of, rather than a limit on, municipal authority, which transforms home rule into a modified version of Dillon's Rule.[39] The fact that almost one hundred years of home rule has been unable to overcome the ghosts of Dillon and *Hunter* is discouraging to those who see advantages in the exercise of local power. There is, though, potential for change. The home-rule movement launched a mainstream conception of local government power that provides an intellectual justification for local governance. That this conception has persisted in conventional discourse means our legal culture views home rule as an alternative rather than an aberration.

### *B. The History of Municipal Receivership*

The first interaction between municipalities and receivership arose in the 1860s.[40] When localities defaulted on bond payments, creditors sued to recover their money. Creditor lawsuits petitioned courts to appoint receivers to raise and collect taxes from defaulting cities, and then to transfer the proceeds to the creditors as payment.[41] However, courts consistently rejected these invitations.[42] Instead of basing their rulings on local sovereignty, many judges re-

[36] Special legislation refers to state laws that are directed at one city in particular instead of applying to all cities generally. See, e.g., Mo. Const. art. III, § 40.

[37] See, e.g., N.Y. Const. art. IX, § 1(a).

[38] Gerald E. Frug, City Making: Building Communities Without Building Walls 50 (1999); see also Michael Monroe Kellogg Sebree, Comment, One Century of Constitutional Home Rule: A Progress Report?, 64 Wash. L. Rev. 155, 155 (1989) ("Despite constitutional and statutory provisions providing for home rule, Washington municipalities continue to lack meaningful local autonomy.").

[39] Simons v. Canty, 488 A.2d 1267, 1271–72 (Conn. 1985); Philson v. City of Omaha, 93 N.W.2d 13, 14–15 (Neb. 1958).

[40] A.M. Hillhouse, Municipal Bonds: A Century of Experience 298 (1936).

[41] Id. at 297.

[42] See, e.g., Rees v. City of Watertown, 86 U.S. (19 Wall.) 107, 116–17 (1873); Walkley v. City of Muscatine, 73 U.S. (6 Wall.) 481, 482–83 (1867); Town of Wadley v. Lancaster, 52 S.E. 335, 336 (Ga. 1905); Hillhouse, supra note 40, at 297–300.

lied on the doctrine of separation of powers.[43] Courts thought judicial orders to raise taxes would tread on the province of the state legislatures, which had delegated their taxing authority to cities, not the courts.[44] The fact that these decisions were based on the separation of powers was critical. State legislatures could bypass the separation-of-powers objection by authorizing courts to issue writs of mandamus commanding receivers to raise and collect taxes.[45] With legislative approval, fear of upsetting the delicate balance between governmental branches disappeared. By not discussing the potential of a right to local self-government, courts implicitly condoned the idea that cities were mere creatures of the state.

Overall, though, these judicially imposed receiverships were for rather narrow purposes, as the receiver was only supposed to raise and collect taxes. Oregon is the only state that allowed for a more expansive use of judicially imposed receivership.[46] In the depths of the Great Depression, many cities in Oregon were experiencing extreme financial difficulties.[47] The state legislature responded by passing a statute allowing state courts to appoint a receiver for municipalities that defaulted on their bond payments.[48] The receiver's powers were quite expansive: he was given broad control over the city's general fiscal affairs.[49] The only limit on the receiver's authority was that he could not take certain steps, such as providing payment to creditors, without the approval of both the court and the governing body of the municipality.[50] The upshot, though, is that Oregon was an exception to the rule that judicially imposed receiverships were largely used for parochial purposes.

An alternative to judicially imposed receivership is receivership imposed by a state government. Missouri became the first state to

[43] Hillhouse, supra note 40, at 300.

[44] *Rees*, 86 U.S. (19 Wall.) at 116.

[45] Supervisors v. Rogers, 74 U.S. (7 Wall.) 175, 180 (1868); Hillhouse, supra note 40, at 304–05.

[46] Connecticut had a similar statute authorizing municipal receivership for general financial management, but the law was never used in practice. Hillhouse, supra note 40, at 316.

[47] See, e.g., Morris, Mather & Co. v. Port of Astoria, 15 P.2d 385, 390 (Or. 1932).

[48] Municipal Administration Act, ch. 433, 1933 Or. Laws 777 1933, amended by ch. 62, 1933 Or. Laws 2d Spec. Sess. 177 1933, repealed by ch. 303, 1939 Or. Laws 579 1939.

[49] See id.

[50] See id.; Hillhouse, supra note 40, at 314–16.

create a procedure for state-imposed receivership in the 1870s,[51] and the first use of state-imposed receivership took place in Memphis, Tennessee in 1879.[52] The Memphis receivership was so controversial that it resulted in a challenge to the state receivership law in *Meriwether v. Garrett*.[53] The facts were typical: Memphis was in dire financial straits and facing numerous suits by municipal creditors.[54] The state ultimately decided to repeal the city's charter and place the local government under state control.[55] In ruling on the case, the Supreme Court held that the state was still liable for contracts incurred by the city, despite the fact that the city no longer existed.[56] More relevant for the purposes of this Note, though, was the Court's affirmation of the state's right to force Memphis into receivership. Even though "[t]he receiver appointed by the court was invested with larger powers than probably any officer of a court was ever before intrusted with," the state law was constitutional.[57] In light of the almost unanimous acceptance of the substantive principles underlying Dillon's Rule,[58] the tenor of this holding is not surprising.

Subsequent objections to state-imposed receivership were nonexistent, as states fell into a pattern of imposing receiverships on fiscally stressed cities. New Hampshire provided for the supervision of Manchester's finances in 1921, and the local government of Bridgeport, Connecticut was stripped of its authority by a "ripper" bill in 1925.[59] In 1931, New Jersey and North Carolina established a permanent system of municipal receivership that applied to all cities generally.[60] More recent examples of municipal receivership involve Ecorse,[61] a small town downriver from Detroit, and Harris-

[51] Hillhouse, supra note 40, at 323–24.
[52] Id. at 324–25.
[53] 102 U.S. 472 (1880).
[54] Id. at 502–03.
[55] Id. at 503–04.
[56] Id. at 511–12.
[57] Id. at 508.
[58] 2 Eugene McQuillin, The Law of Municipal Corporations § 4.80 (3d ed. 2006).
[59] Hillhouse, supra note 40, at 326–27.
[60] Id. at 338.
[61] Michael W. McConnell & Randal C. Picker, When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy, 60 U. Chi. L. Rev. 425, 473, 485 (1993); Larry Green, City Takes Debt Medicine: Loses Its Power to Govern, L.A. Times, June 24, 1989, at 12.

burg, Pennsylvania, a city that is drowning in debt due to a failed trash incinerator project.[62] Perhaps the most well known state takeover occurred in New York City in 1976.[63] With the city on the edge of default, the state's Emergency Financial Control Board ("EFCB") took over and made major financial decisions for the city over the next ten years.[64] The EFCB was hardly responsive to local needs, as it was stacked with people appointed by the Governor.[65] Even though the city continued formally to elect local officials, the "locus of authority" began to shift as the EFCB became the de facto governing body during the receivership.[66]

This uninterrupted imposition of municipal receivership suggests that home rule was never thought to limit its use. Indeed, it was not until the last twenty years that residents began to harness the potential of home rule as a limit on state-imposed receivership. One instance of this involved the city of Chelsea, a small town in Massachusetts. Chelsea was in a grave financial predicament in the early 1990s,[67] and the city's problems prompted the state legislature to place the city in receivership. Local residents subsequently filed suit, and the case was ultimately resolved by the Massachusetts Supreme Judicial Court in *Powers v. Secretary of Administration*.[68] The plaintiffs alleged the imposition of the receivership violated certain home-rule provisions in the state constitution.[69] The court

[62] Sabrina Tavernise, Governor Moves to Take Fiscal Control of Pennsylvania's Capital, N.Y. Times, Oct. 21, 2011, at A25.

[63] For an analysis of the crisis, see generally William K. Tabb, The Long Default: New York City and the Urban Fiscal Crisis (1982); Donna E. Shalala & Carol Bellamy, A State Saves a City: The New York Case, 1976 Duke L.J. 1119 (1976).

[64] David R. Berman, Takeovers of Local Governments: An Overview and Evaluation of State Policies, Publius, Summer 1995, at 55, 60 [hereinafter Berman, Takeovers of Local Governments].

[65] David R. Berman, Local Government and the States: Autonomy, Politics, and Policy 115 (2003) [hereinafter Berman, Local Government and the States].

[66] Berman, Takeovers of Local Governments, supra note 64, at 60.

[67] Florin Pasnicu, Fiscal Fiasco for Tiny Chelsea, Mass., Christian Sci. Monitor, Aug. 9, 1991, at 8.

[68] 587 N.E.2d 744 (Mass. 1992).

[69] *Powers*, 587 N.E.2d at 746; see also Mass. Const. amend. art. II, § 1 (as amended by Mass. Const. amend. art. LXXXIX) ("It is the intention of this article to reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government, and to grant and confirm to the people of every city and town the right of self-government in local matters, subject to the provisions of this article and to such standards and requirements as the general court may establish by law in accordance with the provisions of this article.").

dismissed this argument by holding that regardless of what powers the Home Rule Amendment granted the city, it imposed almost no disabilities on the state, and therefore did not take away the state's right to force the city into receivership.[70]

A much more recent challenge to municipal receivership involved Central Falls, a small and densely populated city in northeastern Rhode Island. Central Falls was struggling so significantly in 2010 that it petitioned the state legislature for permission to file for bankruptcy.[71] After a series of events, the state chose to place the city in receivership.[72] The city government retaliated by filing a lawsuit, claiming the receivership was unlawful.[73] In *Moreau v. Flanders*, the Rhode Island Supreme Court gave this issue more consideration than did the Massachusetts Supreme Judicial Court in *Powers*, but still found for the state. The *Moreau* court based its holding on the belief that the receivership was "channeled, incidental, and temporary," thus making it constitutionally acceptable.[74]

Overall, what can be gleaned from the history of municipal receivership is that its evolution has been one of unhindered expansion.[75] Receivership began with modest roots and eventually blossomed into a political tool with dramatic consequences.[76] Throughout its application to newer and increasingly complex circumstances, there is little evidence that politicians or judges seriously considered the costs and benefits of a working system of municipal receivership.[77] The reason for this most likely lies in the fact that municipal receivership is a byproduct of local government

[70] *Powers*, 587 N.E.2d at 748.

[71] Moreau v. Flanders, 15 A.3d 565, 570 (R.I. 2011).

[72] Id.

[73] *Moreau*, 15 A.3d at 573; see also R.I. Const. art. XIII, § 1 ("It is the intention of this article to grant and confirm to the people of every city and town in this state the right of self government in all local matters.").

[74] 15 A.3d at 579.

[75] Receivership more generally has also expanded unimpeded, as it is now used to bring a variety of institutions into compliance with various laws. See, e.g., Catherine Megan Bradley, Note, Old Remedies Are New Again: Deliberate Indifference and the Receivership in *Plata v. Schwarzenegger*, 62 N.Y.U. Ann. Surv. Am. L. 703, 706–08 (2007).

[76] The use of receivership in other contexts, like prison reform, has significant consequences as well. Id. at 708.

[77] The legislative history in those states that were among the first to adopt procedures for state-imposed municipal receivership indicates that the issue was not extensively debated.

law—challenging municipal receivership in a legal regime that views cities as powerless is futile. Cities, though, are no longer the corrupt machines or rural villages of the nineteenth century; they are intricate political bodies that provide services and regulate activities. As such, the legitimacy of municipal receivership should not be driven by a legal theory that was a product of simpler times, but rather should be answered in light of the realities of local government today.

## II. LEGAL OBJECTIONS TO MUNICIPAL RECEIVERSHIP

The great expansion of municipal receivership and the failure to successfully challenge its implementation in court could be read to imply an absence of legal arguments against its use. After all, a number of courts and political institutions have addressed the issue, and most have found little reason to restrict state power in the realm of municipal receivership. The problem, however, is that many of these courts and political institutions never took the legal objections seriously. This Part explores those legal objections in more depth.[78] The first Section discusses the home-rule analyses in *Moreau v. Flanders* and *Powers v. Secretary of Administration*. It notes that while each court confronted a state constitution that could have been used to strike down the use of municipal receivership, both ruled for the state government on questionable grounds. Moreover, neither court considered the history of the home-rule movement in making its decision. After a brief description of some key historical points, this Section argues that the history of the

[78] In addition to the arguments discussed in this Note, there are other legal objections to the use of municipal receivership. One is that the implementation of municipal receivership might violate non-delegation clauses in state constitutions. *Moreau*, 15 A.3d at 582–84; Powers v. Sec'y of Admin., 587 N.E.2d 744, 748–50 (Mass. 1992); Benjamin M. McGovern, Note, Reexamining the Massachusetts Nondelegation Doctrine: Is the "Areas of Critical Environmental Concern" Program an Unconstitutional Delegation of Legislative Authority?, 31 B.C. Envtl. Aff. L. Rev. 103, 124–26 (2004). Another argument focuses on the racial effect of municipal receivership laws. If the use of municipal receivership has a tendency to affect majority-minority cities disproportionately, the implementation of those receivership laws could be subject to an Equal Protection challenge under the Fourteenth Amendment. Emergency Manager Near for Inkster[;] With Detroit and Inkster, Over Half of Michigan Blacks Disenfranchised, Eclectablog (Dec. 03, 2011), http://www.eclectablog.com/2011/12/emergency-manager-near-for-inkster-with.html (noting that the Michigan receivership law has disproportionately affected African Americans).

home-rule movement indicates home rule was supposed to prevent state intrusions like municipal receivership. Finally, this Part concludes with an analysis of federal law and its potential to protect local self-government. When analyzed in the context of local voting rights, the federal case against municipal receivership is not as farfetched as one might initially think.

### *A. The Incompatibility of Home Rule and Municipal Receivership*

Home-rule provisions are one mechanism through which municipal receivership can be contested. While both *Moreau* and *Powers* rejected the home-rule argument, each court based its conclusion on suspect reasoning. *Powers* was concerned with the receivership in Chelsea, Massachusetts.[79] The court's analysis focused on Section One of the Massachusetts Home Rule Amendment, which recognizes a "right of self-government in local matters."[80] Even though this could be read to provide a defense against municipal receivership, the court attempted to rebut this reading by making two arguments. The first relied on precedent. The court had previously noted that the Massachusetts Home Rule Amendment imposes few disabilities on the state.[81] Thus, the Home Rule Amendment did not prevent the state from placing Chelsea in receivership. Yet the difficulty with this reasoning is that it ignores the fact that the distribution of power between local and state governments is a zero-sum game. A constitutional amendment giving cities the upper hand in particular circumstances necessarily implies that the state is simultaneously disabled from acting. That is, even if the amendment does not specifically impose disabilities on the state, the fact that it supports local autonomy in some situations cannot be squared with unlimited state power. The court should have examined the constitutional balance between local and state power in light of Section One and the receivership law. Instead, the court avoided a detailed analysis and relied on an earlier ruling that was questionable.

[79] See supra notes 67–70 and accompanying text.
[80] Mass. Const. art. II, § 1.
[81] Town of Arlington v. Bd. of Conciliation & Arbitration, 352 N.E.2d 914, 918 (Mass. 1976).

The court's second argument was a two-part textual argument.[82] The first part noted that the receivership law was passed in accordance with the procedural rules outlined in the Home Rule Amendment, labeled as Section Eight.[83] Oddly, the court held that this also meant it did not conflict with Section One, explaining, "We have held that the Receivership Act was passed in accordance with § 8. Therefore, to the extent that there was a conflict between exercise of the authority granted to the receiver and the authority held by Chelsea's elected government, § 1 required that the elected government give way."[84] This argument is troubling because nothing indicates the two sections are codependent. Why would the fact that the law complied with procedural requirements foreclose the substantive issues addressed in a different provision? The court treats this as a simple exercise in a priori reasoning, but it is not obvious from the text of the constitution or the opinion that its conclusion is sound.

The second part of the court's textual argument focused on the language in Section One, which states that the right to local self-government in local matters is subject to "standards and requirements" passed in accordance with the Home Rule Amendment.[85] Reading between the lines, it seems that the court thought the receivership law itself was one of the "standards and requirements" to which cities are subject to under Section One. But this reasoning is incomplete. The text allows the legislature to pass laws "in accordance" with the Home Rule Amendment.[86] Whether the receivership law was in accordance with the Home Rule Amendment is the question the plaintiffs were asking the court to resolve. Instead of answering it, the court inexplicably assumed that the mere passage of the receivership law was enough to prove that it was in accordance with the Home Rule Amendment.

One argument not addressed in *Powers*, but that might justify the receivership, posits that the existence and structure of local government is a question of state concern, and not within the ambit

[82] *Powers*, 587 N.E.2d at 748.
[83] Id.
[84] Id.
[85] Id. (quoting Mass. Const. art. II, § 1).
[86] Mass. Const. art. II, § 1.

of "local matters" reserved to local governments.[87] There are two reasons to doubt this argument, though. First, traditional criteria used to separate state and local concerns—such as the need for uniformity and the presence of externalities—point to classifying the existence and structure of local government as a local issue.[88] Regulations pertaining to local electoral processes, which go to the structure of local governments, have been categorized as local matters.[89] Moreover, the structure and existence of a local government does not threaten to impose meaningful externalities on neighboring cities.[90] Second, the argument proves too much. One could suggest the structure and existence of a local government is a state matter because the state created the local entity in the first place. But if this is enough to justify intrusion, state interference will always be warranted. Indeed, if the existence of local government is a state concern, how that local government ever exercises its power is also a state concern, because the latter is merely incidental to the former. Such logic cannot be squared with home rule provisions that assume some issues are so local that they are exclusively the concern of local government.[91]

The Rhode Island Supreme Court's analysis in *Moreau* is similarly unsatisfying. *Moreau* involved the very recent financial struggles of Central Falls, Rhode Island.[92] In that case, the plaintiffs argued that the receivership law was inconsistent with a state constitutional provision declaring that state laws "shall not affect the form of government of any city or town."[93] Instead of analyzing this language, much of the court's inquiry focused on the fact that

[87] Id.

[88] Town of Telluride v. Lot Thirty-Four Venture, 3 P.3d 30, 37 (Colo. 2000) (describing criteria used to distinguish between state and local issues); Richard Briffault, Home Rule and Local Political Innovation, 22 J.L. & Pol. 1, 19 (2006) ("What really seems to matter is the judicial recognition that local control of local governance or politics . . . pos[es] little or no threat or cost to the localities or the state beyond local borders.").

[89] Johnson v. Bradley, 841 P.2d 990, 1004 (Cal. 1992).

[90] Some commentators have noted that courts recognize that local control over the structure of local government is "part of the core of local self-determination . . . ." Briffault, supra note 88, at 24.

[91] See, e.g., Mass. Const. art. II, § 1 (as amended by Mass. Const. art. LXXXIX).

[92] See supra text accompanying notes 71–74.

[93] R.I. Const. art. XIII, § 4.

the receivership was not permanent.[94] The relevance of this factor comes from an earlier case, *Marran v. Baird*.[95] There, the court held that a state law allowing a state commission to impose a budget on the town of West Warrick did not alter the form of local government because the commission only existed for one year.[96] There are, however, crucial differences between *Marran* and *Moreau*. For one, the law in *Marran* only allowed the commission to impose a budget on West Warrick; it did not vest complete governmental authority in a single individual as the receivership law did in *Moreau*.[97] Moreover, the law establishing the West Warrick commission had a sunset provision,[98] whereas the receivership law in *Moreau* contained no similar requirement.[99] Unfortunately, the court never explained why the different facts of *Marran* and *Moreau* did not trigger distinct analyses.

After relying on precedent that was likely inapplicable, the court invoked a plethora of arguments based on policy and statutory text to buttress its holding.[100] These considerations, though, are unconvincing. One of the court's reasons was that since the state provides the city with varying levels of support, the receiver does not have dictatorial powers.[101] Yet the state's support does not limit the receiver—he is still the sole official at the local level during the receivership.[102] In reality, the state's support might actually compound the insult to local residents, as they are placed under not one, but two levels of government supervision: one being the receiver, the other being the state government. The court also provided another policy justification, stating that there is little reason to worry because the receiver is constrained by language in the law that says he must act with "due regard for the needs of the citizens . . . ."[103] But "due regard" is unmistakably ambiguous, and one

[94] *Moreau*, 15 A.3d at 577–79.
[95] 635 A.2d 1174 (R.I. 1994).
[96] Id. at 1178.
[97] R.I. Gen. Laws § 45-9-3 (2009).
[98] *Marran*, 635 A.2d at 1178 (noting that "[t]he commission's role . . . lasts no longer than 'the end of the fiscal year'").
[99] *Moreau*, 15 A.3d at 577–78.
[100] Id. at 577–79.
[101] R.I. Gen. Laws § 45-9-1 (2011); id. at 577.
[102] Id. § 45-9-7(b).
[103] Id. § 45-9-1; *Moreau*, 15 A.3d at 577.

need only look to due process jurisprudence to discover how little guidance phrases of this ilk actually provide.[104] Moreover, at the risk of missing the forest for the trees, one might ask why the court even discusses policy rationales and inapplicable precedent in the first place. The text of the constitution says the state legislature "shall not affect the form" of city government, and the receivership law quite clearly affects this form by displacing locally elected officials.[105] Thus, based on constitutional text alone, the city should win; but the court instead used a maze of policy and precedent to justify the receivership law.

Taken together, *Powers* and *Moreau* provide little more than a superficial analysis. *Powers* devotes three short paragraphs to answering the home-rule question.[106] The sparse reasoning and questionable justifications lead one to think that the court's arguments are nothing more than ipse dixit. Likewise, the court in *Moreau* obsesses over temporary effects and policy considerations, both of which work to contravene constitutional text. It is plausible to think these decisions are products of discomfort or disinterest in addressing how home rule and state power should be reconciled. The cursory analysis and subjugation of the city to the state in both *Moreau* and *Powers* may, however, be remnants of the Dillon's Rule paradigm of city power.[107] Finding for the state in each case is consistent with the view that local government is undesirable and easily corruptible. Indeed, this is why, as the reasoning goes, the receivership must be imposed from above: reform cannot occur at the local level.

Much of the critique of *Moreau* and *Powers* rests on state constitutional provisions that could have been used to prohibit municipal receivership. Yet municipal receivership is also liable to an objection that transcends the text of state constitutions: it is incompatible with the history of the home-rule movement. One of the driving forces behind the home-rule movement was frustration with the

[104] See, e.g., City of Chicago v. Morales, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting) (arguing substantive due process amounts to "judicial usurpation" because it provides little guidance to the judiciary); Moore v. City of East Cleveland, 431 U.S. 494, 543 (1977) (White, J., dissenting) (noting that substantive due process analysis is very open-ended).

[105] R.I. Const. art. XIII, § 4.

[106] *Powers*, 587 N.E.2d at 748.

[107] See supra text accompanying notes 21–27.

use of state "ripper bills."[108] Ripper bills were state laws that transferred control of local matters to state officials.[109] For example, one ripper bill in Michigan was used to transfer the provision of local utilities to state boards,[110] and another in New York was used to lodge control over local police forces in the state capitol.[111] Perhaps most strikingly, Pennsylvania used a ripper bill to transfer control over the construction of City Hall in Philadelphia to the state.[112] What is more, ripper bills were quite common. In New York alone, the state passed 212 laws in 1870 that controlled local functions in towns and villages throughout the state.[113]

While the intrusions themselves were bad enough, they were usually made worse because so many ripper bills were the products of corruption.[114] Residents in New York City, for example, were ordered to pave roads and buy worthless land simply because of special interests in the state legislature.[115] Locals in Louisville were equally agitated by the state's decision to meddle in local affairs, which prompted the mayor to remark that ripper bills were "'lobbied' through by individuals who have private and selfish ends to attain."[116] And in Detroit, the mayor was so disturbed by the abuse of state authority that he issued a formal apology to the city, declaring that his predecessor acquiesced in this scheme because he was beholden to special interests.[117] Even more disheartening, state oversight during this time rarely led to an improvement in local fiscal management.[118] For instance, during the most intense period of state control of New York City in the late nineteenth century, the

[108] Richard Briffault, Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination, 92 Colum. L. Rev. 775, 805–06 (1992).

[109] Id.

[110] People ex rel. Le Roy v. Hurlbut, 24 Mich. 44, 53 (1871).

[111] People ex rel. Wood v. Draper, 15 N.Y. 532, 535 (1857).

[112] Jon Teaford, City Versus State: The Struggle for Legal Ascendency, 17 Am. J. Legal Hist. 51, 65 (1973).

[113] Howard Lee McBain, The Law and Practice of Municipal Home Rule 8 (1916).

[114] Berman, Local Government and the States, supra note 65, at 58–59 (noting ripper bills were frequently used to punish cities that were politically opposed to the party in control of the state government).

[115] McBain, supra note 113, at 9.

[116] Id. at 10–11.

[117] Id. at 11.

[118] Berman, Local Government and the States, supra note 65, at 61.

city's debt increased nearly seven-fold and local taxes more than tripled.[119] Considering this history, it is apparent that those who fought for and won home-rule protections condemned state interference in local affairs. Naturally, they would have been terrified of a state program that empowered state officials to eliminate local voting rights and take over a city at will.

Of course, ripper bills have not disappeared. The modern conception of municipal receivership is functionally equivalent to the ripper bills of the late nineteenth and early twentieth centuries. The recent Michigan municipal receivership law is a perfect example.[120] By transferring local government authority from the city to the state-appointed emergency manager, the receivership law rips local government from local residents.[121] But as described above, the history of the home-rule movement suggests this modern-day ripper bill is inconsistent with Michigan's adoption of home rule, especially because the state has a strong commitment to home rule.[122] Additionally, the Michigan Constitution also has provisions that suggest local self-government is an important feature of the state's constitutional structure. One constitutional provision expressly repeals Dillon's Rule and implements a rule of liberal construction for municipal powers.[123] Another section declares that "[e]ach such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government . . . ."[124] A constitutional provision guaranteeing cities the power to pass ordinances is in tension with a receivership law eliminating local government. Indeed, Michigan cities will no longer have the power to adopt "resolutions and ordinances" if the state has displaced locally elected officials.

[119] McBain, supra note 113, at 10.

[120] See supra text accompanying notes 12–20. Distaste toward ripper bills continues today, as evidenced by the efforts of one organization in Michigan that collected enough signatures to put the Michigan receivership law up for referendum in 2012. Citizens' Referendum to Repeal Emergency Manager Law Has Enough Signatures, Eclectablog (Jan. 03, 2012), http://www.eclectablog.com/2012/01/citizens-referendum-to-repeal-emergency.html.

[121] See supra text accompanying notes 12–20.

[122] Alco Universal, Inc. v. City of Flint, 192 N.W.2d 247, 249 (Mich. 1971).

[123] Mich. Const. art. VII, § 34.

[124] Id. § 22.

This, though, is no guarantee that cities in Michigan will prevail in their home-rule arguments; the majorities in both *Powers* and *Moreau* had little trouble casting aside their state's home-rule provisions.[125] Yet connecting the modern use of municipal receivership to the older implementation of ripper bills demonstrates that the concept of home rule was intended to transcend generations. It was not designed to attack antiquated problems or reach narrow goals.[126] Instead, the language and values of the home-rule movement were fundamentally about the distribution of power between state and local governments, a problem that will persist as long as government is divided among different institutions. Linking the present to the past allows us to see that home rule was a referendum on the legitimacy of state takeovers. Thus, the existence of home rule cannot be harmonized with the use of municipal receivership.

### *B. A Federal Constitutional Right to Local Self-Government?*

Local government autonomy will remain difficult to secure through federal law as long as *Hunter v. Pittsburgh* remains on the books.[127] Nonetheless, a number of federal cases can be read to suggest that there might be some federal protection for local self-government. One such case is *Romer v. Evans*.[128] There, the Court struck down a state constitutional amendment that prohibited localities from enacting ordinances protecting homosexuals from private discrimination.[129] The majority, however, was not clear about what was driving its decision, and its somewhat obscure reasoning has led to a number of interpretations.[130] One reading is that the Court was concerned with the level of government that enacted the

[125] See supra text accompanying notes 70, 74.

[126] For example, home-rule advocate Frank Goodnow spoke in 1895 about the general benefits of strong local government, and not the peculiars of a particular city or generation. Berman, Local Government and the States, supra note 65, at 61.

[127] See supra text accompanying notes 28–29.

[128] 517 U.S. 620 (1996).

[129] Id. at 635–36.

[130] See, e.g., Lino A. Graglia, *Romer v. Evans*: The People Foiled Again by the Constitution, 68 U. Colo. L. Rev. 409, 424–26 (1997); John C. Jeffries, Jr. & Daryl J. Levinson, The Non–Retrogression Principle in Constitutional Law, 86 Calif. L. Rev. 1211, 1227 (1998).

amendment.[131] Professor Richard Schragger has termed this the "localist reading" of *Romer*.[132] This reading focuses on the fact that the state amendment was "ill-fitting" relative to the harm it was regulating, primarily because it was both over-inclusive and under-inclusive at the state level.[133] The Sixth Circuit adopted this reading of *Romer* in *Equality Foundation v. City of Cincinnati*, a case with similar facts.[134] Whereas *Romer* involved a state amendment, *Equality Foundation* featured a Cincinnati ordinance that sought to accomplish the same end.[135] The Sixth Circuit found *Romer* inapplicable because the local ordinance originated at a different level of government.[136] It concluded that based on the legitimacy of the city's interest in this area of policy, as well as the importance of local self-government,[137] the Cincinnati ordinance was constitutional.[138]

This reasoning also has analogs in school desegregation cases. In *Milliken v. Bradley*, the majority argued that local control of school boards was so rooted in our nation's history that it prevented shifting control of public education beyond local government.[139] And in *Washington v. Seattle School District*, the Court found a state-level initiative unconstitutional because it made it more difficult for local residents to control public education.[140] The question remains, though, whether this is a constitutionally legitimate reading of these cases. The localist interpretation certainly contradicts the central holding in *Hunter*.[141] Nonetheless, the advantages of local government drove the outcomes in a number of opinions, and the Supreme Court has avoided condemning the legitimacy of the lo-

[131] Barron, supra note 25, at 586–94; Richard C. Schragger, Cities as Constitutional Actors: The Case of Same-Sex Marriage, 21 J.L. & Pol. 147, 168–70 (2005).

[132] Schragger, supra note 131, at 168.

[133] Id. at 169.

[134] 128 F.3d 289, 297 (6th Cir. 1997).

[135] Id. at 291–92.

[136] Id. at 297.

[137] The court suggested that the right to local self-government borders on fundamental. Id. at 297–99.

[138] Id. at 301. For a review of the implications of this reasoning, see Schragger, supra note 131, at 171–74.

[139] 418 U.S. 717, 741–43 (1974); see Barron, supra note 25, at 568–69.

[140] 458 U.S. 457, 483 (1982); see Barron, supra note 25, at 570–71, 576.

[141] Joan C. Williams, The Constitutional Vulnerability of Local Government: The Politics of City Status in American Law, 1986 Wis. L. Rev. 83, 110.

calist reading.[142] Therefore, it is plausible to imagine that there is some room in federal law for a right to local self-government.[143]

Assuming such a right exists, one would need to identify what is included in the phrase "local self-government" to determine if it provides protection against municipal receivership. For the purposes of this Note, it is enough to determine whether the right to vote for local officials is included in local self-government. If it is, municipal receivership should theoretically fail because its elimination of local voting rights means it has eliminated local self-government. With this in mind, it seems obvious that local voting rights are a necessary condition for local self-government. Indeed, the right to vote is required by the phrase itself due to the reference to "*self*-government." Moreover, local voting rights and local self-government have been connected throughout America's history. This was reflected in city charters in colonial America[144] and in Thomas Cooley's nineteenth-century defense of local self-government.[145] In short, local voting rights are inseparable from local self-government, and it is probably more accurate to think of the former as a component of the latter. Taking local self-government seriously, which was arguably done in *Romer*, *Milliken*, *Seattle Schools*, and *Equality Foundation*, among others,[146] means placing local voting rights on the same constitutional rung.

Predictably, though, *Hunter* creates a large obstacle to protecting local voting rights through federal power. The decision in *Holt Civic Club v. City of Tuscaloosa* is representative.[147] There, the Court was confronted with an Alabama law that extended the police jurisdiction of Tuscaloosa three miles beyond the city's bor-

[142] Equality Found. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997), cert. denied, 525 U.S. 943 (1998).

[143] Others have argued for a substantive right to local self-government based on political theory and judicial doctrine. See Barron, supra note 25, at 511–12 (discussing Thomas Cooley's defense of local constitutionalism and making the case for a modern right to local self-government).

[144] Thomas R. White, Constitutional Changes in Matters of Home Rule and Municipal Government, 25 Temp. L.Q. 428, 428 (1951).

[145] Barron, supra note 25, at 511–12.

[146] See, e.g., Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256 (1985) (holding school district could spend federal monies even if its choice was prohibited by state law).

[147] 439 U.S. 60 (1978).

ders.[148] This meant that unincorporated towns outside of Tuscaloosa, but within that three-mile radius, were subject to the city's ordinances even though they were not concurrently given the right to vote for city officials.[149] The Court found nothing constitutionally infirm about that state of facts. Indeed, the Court did not conceive of the situation as a voting-rights issue, but rather as an issue about local boundaries.[150] According to the Court, local boundaries are arbitrary lines, and just because some people outside a city are affected by that city's policies does not mean they have the right to vote in that city's elections.[151] One sees a similar unwillingness to wrestle with questions about local voting rights in *May v. Town of Mountain Village*.[152] In that case, residents of the town of Mountain Village alleged that a local charter provision giving nonresident landowners the right to vote in local elections violated the Equal Protection Clause.[153] The Tenth Circuit noted that nonresident landowners had an interest in the town because they paid local property taxes there.[154] That was a sufficient reason to extend local voting rights under rational basis review.[155]

Yet neither *Holt* nor *May* directly addressed municipal receivership. In contrast, these cases can be thought of as disputes over local boundaries.[156] *Holt* was concerned about the outer bound of the city's political authority.[157] Lower federal courts have adopted this reading, claiming *Holt* was about the state's authority to territorially limit the right to vote, not whether the state may disenfran-

[148] Id. at 61.
[149] Id. at 62–63.
[150] Id. at 69–70.
[151] The Court noted the implausibility of holding otherwise: every city imposes externalities on nonresidents, and holding that this creates a constitutional requirement to extend the right to vote would generate myriad problems. Id.
[152] 132 F.3d 576 (10th Cir. 1997).
[153] Id. at 577.
[154] Id. at 579.
[155] Id. at 582.
[156] There are a number of articles that discuss local boundaries and the distinction between residents and non-residents. See, e.g., Michelle W. Anderson, Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe, 55 UCLA L. Rev. 1095 (2008); Richard Briffault, The Local Government Boundary Problem in Metropolitan Areas, 48 Stan. L. Rev. 1115 (1996).
[157] See supra text accompanying notes 147–51.

chise everyone at one time.[158] Likewise, *May* addressed an attempt by local residents to restrict political influence to those within the city's borders.[159] These readings illustrate the assumption common to *Holt* and *May*: both courts took the existence of local voting rights as a given. This distinction is critical because the pivotal issue in municipal receivership is not the relevance of local boundaries, but rather the right to vote. Because the mere existence of local voting rights was not at the forefront in *Holt* and *May*, those decisions might be inapplicable to arguments about the legality of municipal receivership.

Adding force to this line of reasoning is the fact that some federal courts have already recognized that schemes that reduce or eliminate local voting rights might be suspect. This is encapsulated in what can be called the "voting effects test."[160] The test focuses on the effect a voting scheme has on local voting rights. Voting arrangements that expand the right to vote always receive great deference from courts in the form of rational basis review.[161] This is likely driven by the intuition that expanding the right to vote is a positive thing.[162] Yet some federal courts have suggested that they will not be as forgiving when asked to assess the constitutional validity of voting schemes that restrict local voting rights. To both the district court[163] and the Tenth Circuit[164] in *May*, the fact that the voting scheme in question expanded the franchise was important. The Tenth Circuit even went so far as to label this "[o]f critical importance."[165] Because municipal receivership eliminates local voting

[158] See, e.g., St. Louis Cnty. v. City of Town and Country, 590 F. Supp. 731, 737–39 (E.D. Mo. 1984); Moorman v. Wood, 504 F. Supp. 467, 472–75 (E.D. Ky. 1980).

[159] See supra text accompanying notes 152–55.

[160] In this Note, this language is confined to the issue of local voting rights, and this Note does not express an opinion on effects tests in other areas of law. See, e.g., Note, Credit Scoring and the ECOA: Applying the Effects Test, 88 Yale L.J. 1450 (1979); Evan M. Tager, Comment, The Supreme Court, Effect Inquiry, and Aid to Parochial Education, 37 Stan. L. Rev. 219 (1984).

[161] May v. Town of Mountain Vill., 944 F. Supp. 821, 824 (D. Colo. 1996) (collecting cases).

[162] More Amendments to the U.S. Constitution concern voting rights than any other issue. See U.S. Const. amends. XV, XVII, XIX, XXIV & XXVI.

[163] *May*, 944 F. Supp. at 824.

[164] *May*, 132 F.3d at 580.

[165] Id.

rights, it conversely could be subject to a heightened level of scrutiny.

While the case against municipal receivership in federal law is not insignificant, *Hunter* continues to dampen arguments for a robust right to local self-government. Thus, one can say this series of arguments is aspirational rather than concrete. Nevertheless, these arguments demonstrate that there is at least *some* basis in federal law to argue for a right to local self-government, even if it is not as strong as it should be. Moreover, the contradictions in the Court's holdings, as well as concerns over the effects of local voting arrangements, suggest that courts today may not be too enthusiastic about the central premise in *Hunter*. Those contradictions might also mean that courts are looking for an opportunity to chip away at the unconditional authority *Hunter* lodged in the state legislature. The upshot of all of this is that a federal argument for local self-government may not be as fanciful as *Hunter* initially suggested.

## III. EXTRALEGAL CRITICISMS OF MUNICIPAL RECEIVERSHIP

The case against municipal receivership is not built on a foundation comprised solely of legal arguments. There are numerous political and policy objections that can be made against the modern use of municipal receivership as well. These arguments range from the abstract to the practical, and pull from a variety of disciplines. A skillful advocate could weave these extralegal arguments into the legal claims made above, and use them to bolster doctrinal arguments in court. More fundamentally, the political and policy objections to municipal receivership only strengthen the notion that municipal receivership is ill-suited for the problems it is intended to solve. This Part first examines some of the political objections to municipal receivership. These include theoretical arguments about the benefits of democracy, practical claims about the effect receivership has on local voters, and the propriety of constantly shifting power among different institutions. It next examines the policy assumptions that underlie municipal receivership. This Section argues that by narrowly defining success and misapprehending how local financial crises arise, municipal receivership fails to create long-term financial stability.

### *A. Political Objections*

The main American tool used to settle political disputes and solve governmental problems is democracy, in both its representative and deliberative capacities.[166] People elect officials who remain responsive because they must periodically face re-election, and the populace itself may make law directly through referendum-like procedures.[167] Even though democracy is ingrained in our political culture, municipal receivership is specifically designed to avoid it. The receivership in Chelsea, for example, was an attempt to bypass local elections that had ratified existing public union contracts.[168] This is troublesome because representative democracy has been effectively used throughout America's history as a means for controlling and regulating government.[169] Moreover, the increase in civic knowledge that representative democracy encourages is a good in and of itself.[170] Because of democracy's historic use and its tendency to create politically active citizens, the burden of justification for municipal receivership should be high. Adding to that burden is the fact that local government is the most fertile ground for deliberative democracy because it occurs at the smallest scale.[171] Since municipal receivership diminishes opportunities for participation in government policymaking, it should be considered suspect.

One can also question the efficacy of municipal receivership because the power it vests in receivers is disproportionate to their abilities. Receivers are usually empowered to do nearly everything that normal political bodies could do.[172] Because transferring public

[166] Theoretically, some have argued that democracy is a form of consent to government authority, while others have argued that democracy is more about an affirmation of belonging. James Fishkin, The Voice of the People: Public Opinion and Democracy 44 (1995).

[167] For a summary of referendums and similar procedures, see generally Steven L. Piott, Giving Voters a Voice: The Origins of the Initiative and Referendum in America (2003).

[168] Ed Cyr, Thoughts on the Chelsea Receivership, 9 Gov't Fin. Rev. 23, 23 (1993).

[169] There is no shortage of literature that addresses the benefits of an informed citizenry, as well as the potential of citizen deliberation to overcome misinformation. See, e.g., Harry C. Boyte, CommonWealth: A Return to Citizen Politics (1989); Michael X. Delli Carpini & Scott Keeter, What Americans Know About Politics and Why It Matters (1996); Fishkin, supra note 166.

[170] Carpini & Keeter, supra note 169, at 59.

[171] Id.

[172] See supra text accompanying notes 16–19.

power from democratic bodies to unelected receivers is so drastic, a principle of proportionality would suggest that the receiver ought to have novel or unique ideas to balance out the enormous shift in power that receivership entails. Unfortunately, this is not the case. Most receivers do things that were previously debated and rejected by the city, such as cutting services, raising taxes, or firing public employees.[173] The fact that these choices were debated and rejected further reinforces the point that receivers are specifically designed to bypass local political processes. Perhaps worse, some receivers have made baffling economic decisions, such as the emergency manager in Pontiac who decided to sell the Silverdome for $500,000 when another buyer offered twenty million dollars.[174] And unsurprisingly, municipal receivers can be just as irresponsible as some elected officials.[175] Without special talents to cure local government problems, giving receivers nearly unlimited power makes little sense.[176]

Municipal receivership is also politically questionable because of the effect it has on local residents. Wresting control from local residents during bad times reduces the residents' incentives to become educated about the problems that led to the financial struggles in the first place.[177] True, there is some motivation to pay attention if voters want to avoid receivership. But that motivation is dampened when the state simply removes control from the locality when things get particularly dire.[178] If the city were required to

[173] Berman, Local Government and the States, supra note 65, at 116; Cyr, supra note 168, at 23; McConnell & Picker, supra note 61, at 473.

[174] Alex P. Kellogg, Judge Declines to Block Sale of Pontiac Silverdome, Wall St. J., Nov. 24, 2009, at A8.

[175] Michelle W. Anderson, De Facto Dissolution: Radical Experimentation in State Takeovers of Local Governments, 39 Fordham Urb. L.J. (forthcoming 2012) (manuscript at 29) (on file with author).

[176] For example, Central Falls spent one year under the direction of emergency managers with impressive resumes and still filed for bankruptcy. Anderson, supra note 175 (manuscript at 22); see Benton Harbor Still Deep in the Red. Is the Magic of an Emergency Manager Simply not Enough?, Eclectablog (Jan. 6, 2012), http://www.eclectablog.com/2012/01/benton-harbor-still-deep-in-red-is.html.

[177] Carpini & Keeter, supra note 169, at 59–61 (making the case for an informed citizenry); Note, Missed Opportunity: Urban Fiscal Crises and Financial Control Boards, 110 Harv. L. Rev. 733, 746–47 (1997) [hereinafter Missed Opportunity] (same).

[178] This disincentive to learn about the political decisions that generated the fiscal crisis might eventually lead to less rational voting. See Carpini & Keeter, supra note

work through these problems at the local level, voters would be more cognizant of why the crisis occurred, and more driven to monitor local finances closely in the future.[179] This does not mean, though, that a city in distress must be on its own to maintain the correct balance of incentives; state assistance would not induce local ignorance as long as the city remains accountable for both the problem and the solution. Maintaining this accountability is critical because it provides local residents with the greatest incentive to learn about the crisis and use the political process to prevent similar financial calamities in the future.[180]

Furthermore, municipal receivership does not attempt to fix the political process problem that allegedly created the crisis. A state takeover is commonly justified as correcting a failure in the local political process.[181] The reasoning goes: "if only the voters were more informed or less subject to interest group pressure, they would have rejected the city's decisions which led to financial ruin." Municipal receivership thus might be justified in the short run if it provided an avenue for correcting the political process failure in the long run. Yet receivership is only supposed to fix finances in the short run; it does not provide long-term solutions.[182] Additionally, the receivership fails to encourage the locality to correct the political pathologies that led to these economic struggles. Like the residents above, there is little incentive for action at the local level because control over local problems is eliminated by the receivership. The result is that the city is locked in a cycle in which city finances decay, state officials come in to fix the problem, and control is returned to the residents without ever fixing the alleged

169, at 56 (noting that more political information leads to more rational voting, and consequently, less political information is likely to lead to more irrational voting).

[179] Carpini & Keeter, supra note 169, at 58 (noting that an informed citizenry is more likely to be cognizant of the public interest, and thus to make decisions that do not threaten the financial integrity of the government); Brian Wampler, Participatory Budgeting in Brazil: Contestation, Cooperation, and Accountability 68 (2007) (highlighting this effect in numerous cities in Brazil).

[180] See Boyte, supra note 169, at 156 (noting the need for a dynamic process of citizen education if democracy is to be successful).

[181] This note argues that there is no political process problem to begin with. See infra text accompanying notes 184–195.

[182] This is also true for financial control boards, which are only designed to provide short-term solutions. Missed Opportunity, supra note 177, at 744–45.

democratic flaw.[183] Thus, even on its own terms, municipal receivership misses the mark.

We do not have to take municipal receivership on its own terms, though. One can see that it is another solution to an old problem—the proper distribution of power between different levels of government. As described above, the economic struggles in the nineteenth century led many to champion greater state control.[184] After decades of corruption and failed oversight at the state level, the home-rule movement emerged to regain local autonomy.[185] In the late twentieth century, Proposition 13 proposals and anti-tax advocates have sought to shift power from local officials back to the state capital.[186] These are just a few examples of the constant struggle for power among different institutional levels of government.

Municipal receivership is simply one more attempt to shift power up from the local to the state level.[187] Like other attempts, however, the use of receivership is based on faulty premises. First is the idea that shifting power up is a universally effective way to solve problems—history suggests it is not. If it were, power would have shifted away from the local level a long time ago, and there would not be such a significant history of movements advocating for more decentralized authority. What is more, the same interest group politics and political process defects we perceive at the local level reappear at the higher level once power shifts.[188] This continuous struggle for power should give pause to those who think receivership will be any different than the institutional shifts before it.

[183] This Note discusses below why some cities are locked in a cycle of economic decay, and find themselves unable to generate economic growth on their own. See infra text accompanying notes 209–214.

[184] See supra text accompanying notes 21–27.

[185] See supra text accompanying notes 30–37.

[186] See Jonathan Schwartz, Note, Prisoners of Proposition 13: Sales Taxes, Property Taxes, and the Fiscalization of Municipal Land Use Decisions, 71 S. Cal. L. Rev. 183, 183–84 (1997).

[187] See Richard C. Schragger, Democracy and Debt, 121 Yale L.J. 860, 875–76 (2012).

[188] See, e.g., Dorothy A. Brown, Fiscal Distress and Politics: The Bankruptcy Filing of Bridgeport as a Case Study in Reclaiming Local Sovereignty, 11 Bankr. Dev. J. 625, 642–43 (1995) (noting that the state financial control board in Bridgeport, Connecticut "enabled State officials to make politically motivated decisions . . .").

The second premise is that higher levels of government are more competent and less financially reckless than those at the local level. This is especially untrue today. Some states are just as financially unstable as the struggling cities that prompted calls for municipal receivership.[189] In addition, the federal government is currently liable for more than fifteen trillion dollars of debt,[190] and the summer of 2011 witnessed a budget dispute that nearly brought the U.S. government to a halt.[191] The claim that higher levels of government possess better management skills when it comes to public finances simply lacks empirical evidence.[192] In fact, there may be even greater risks of corruption at higher levels of government where large private entities hold significant sway.[193] Unsurprisingly, no one has seriously advanced the idea that either states or the federal government be placed in a program akin to municipal receivership.[194] But why cities should be singled out for discipline when other levels of government are just as, if not more, financially irresponsible is difficult to answer. One can guess that the answer is likely based on the belief that cities are uniquely careless when it comes to money. Yet without evidence for this claim, higher levels of government should be wary of imposing penalties on localities. More importantly, they should also accept that local political processes are probably just as stable, developed, and dynamic as political processes at higher levels.[195]

[189] Michael Cooper & Mary Williams Walsh, Mounting Debts by States Stoke Fears of Crisis, N.Y. Times, Dec. 5, 2010, at A1; see also Elizabeth McNichol et al., States Continue to Feel Recession's Impact, Ctr. on Budget & Policy Priorities 1–2 (Mar. 21, 2012), http://www.cbpp.org/files/2-8-08sfp.pdf.

[190] Monthly Statement of the Public Debt of the United States, U.S. Treasury Department (Dec. 31, 2011), http://www.treasurydirect.gov/govt/reports/pd/mspd/2011/opds122011.pdf.

[191] Carl Hulse & Helene Cooper, Leaders Agree on Outlines of Deal to End Debt Crisis, N.Y. Times, Aug. 1, 2011, at A1.

[192] State officials may be so obsessed with political considerations that they ultimately adopt policies that hurt local taxpayers. Brown, supra note 188, at 663.

[193] Anderson, supra note 175 (manuscript at 28).

[194] There are sovereignty concerns that would probably foreclose such a suggestion. Nonetheless, it may be that many who fail to suggest this option are not driven by concerns over sovereignty, but rather by the belief that local governments are particularly irresponsible in handling public money.

[195] Schragger, supra note 187, at 886.

### *B. Municipal Receivership as Bad Policy*

Beyond political objections, municipal receivership also represents bad policy in that it narrowly defines success and misunderstands how local financial crises arise. One can see this in Professor Omer Kimhi's piece on local financial problems.[196] Kimhi argues that municipal receivership is a useful tool to correct local financial distress. A large component of his argument is that the receiver's ability to circumvent a democratic process laden with interest group demands makes him very valuable.[197] This is because the gifts interest groups customarily bestow on local officials "are not as relevant" to receivers.[198] It is also driven by the fact that the receiver does not have to worry about maintaining political viability since he is not subject to democratic controls.[199] Kimhi then cites the Chelsea receivership as a specific example of these advantages. There, the state receiver ignored the demands of local unions and significantly reduced local labor costs by firing firefighters.[200] Barely six months into his term, the Chelsea receiver slashed five million dollars from the city budget, which allegedly helped Chelsea "recover[] from a grave financial crisis . . . ."[201]

The difficulty with the "recovery" narrative is that it is misleading.[202] Chelsea did not recover; it simply cut spending to balance its budget. That the receivership ensured local expenditures closely tracked local revenues says nothing about the quality of life in Chelsea or the potential for healthy urban growth. Indeed, as is often the case,[203] some of the receiver's decisions produced adverse consequences for many local residents. The spending cuts caused a reduction in both the public labor force and city services. The ter-

[196] Kimhi, supra note 7.
[197] Id. at 671.
[198] Id.
[199] Jonathan Mahler, When All Else Fails . . . Fore!, N.Y. Times, Dec. 18, 2011 (Magazine), at MM36 (noting that the emergency manager in Benton Harbor is "[b]lissfully free of the checks and balances of democratic governments . . .").
[200] Cyr, supra note 168.
[201] Kimhi, supra note 7, at 672.
[202] Other commentators have noted that receivers and financial control boards narrowly focus on revenues and expenditures, as opposed to broader issues like long-term financial management or urban growth. Missed Opportunity, supra note 177, at 740.
[203] See id.

mination of public officials increased local unemployment, which was very costly for a small city like Chelsea[204]—with little diversity in jobs or industries, Chelsea was ill situated to absorb an abrupt increase in the number of unemployed persons. The reduction in municipal services also created significant costs for those who previously relied on those public services. Ultimately, defining success as balancing the budget is misleading. It leads one to think that the city's problems were solved, when in fact many residents were likely forced to cope with even more economic hardship than before the receiver came to town.

Statistics also show that Chelsea was not transformed into a budding metropolis after the receiver left. More than 34% of current Chelsea residents do not have a high school diploma, which is roughly triple the average in the state of Massachusetts.[205] In addition, about 24% of individuals live below the poverty line, which is nearly twice as high as the state average.[206] Even middle-class residents in Chelsea are forced to cope with serious financial struggles, as both median household income and per capita income are significantly below average households in other parts of the state.[207] This snapshot illustrates that Chelsea has a number of problems that cannot be cured by the brief imposition of a state takeover. It also reinforces the fact that it is disingenuous to claim the receivership generated a meaningful local recovery.[208]

None of this is surprising, though, when one considers the larger social and economic trends that affect local development, but that are relatively immune from local influence. Deindustrialization and suburbanization are two well-known forces that affected local economic health in the latter half of the twentieth century. The debilitating effects of deindustrialization principally revolved around the decline of the manufacturing industry, the chief source of economic

[204] Chelsea only had a population of 35,177 in 2010, and is comprised of just over 2.2 square miles. State & County Quickfacts: Chelsea (city), Massachusetts, U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/25/2513205.html (last visited Jan. 15, 2012).

[205] Id.

[206] Id.

[207] Id.

[208] See also Berman, Local Government and the States, supra note 65, at 116 (noting that New York City experienced considerable financial distress in the 1990s even though the EFCB had left only ten years prior).

production for most major cities.[209] Few municipalities were able to cope with this decline, and many were subsequently victimized by the movement of labor and capital to better opportunities in the Sun Belt. Economic decline in cities was also exaggerated by the exodus of residents from the cities to the suburbs.[210] Cities lost a substantial portion of their tax base due to suburban migration, while those who desperately needed costly public services largely remained in the city.[211] The combination of these movements placed enormous fiscal strain on many localities.[212] Kimhi even acknowledges as much, observing that three of the four factors that contributed to New York City's economic struggles were beyond the city's control.[213] The presence of these forces sheds doubt on the belief that a brief imposition of municipal receivership can generate long-term economic stability at the local level.[214]

What is more, most cities are not just constrained by large, macroeconomic forces and demographic trends—they are also subject to several political and constitutional restraints on their authority. Politically, cities are substantially dependent on funds from state and federal governments.[215] This dependence is bad for cities because state and federal aid can be highly volatile, making it difficult for localities to budget appropriately.[216] It also lessens cities' capac-

[209] See generally Barry Bluestone & Bennett Harrison, The Deindustrialization of America (1982); Michael J. Greenwood & Gary L. Hunt, Migration and Interregional Employment Redistribution in the United States, 74 Am. Econ. Rev. 957 (1984).

[210] See, e.g., Pearl M. Kamer, Crisis in Urban Public Finance: A Case Study of Thirty-Eight Cities 25–30 (1983).

[211] Missed Opportunity, supra note 177, at 741.

[212] This traditional account is less common today, as many suburbs are also experiencing significant financial stress. Sabrina Tavernise, Outside Cleveland, Snapshots of Poverty's Surge in the Suburbs, N.Y. Times, Oct. 25, 2011, at A1.

[213] Kimhi, supra note 7, at 647; see also Shalala & Bellamy, supra note 63, at 1119–23 (cataloguing the forces New York City had little control over which nonetheless created numerous fiscal difficulties for the city).

[214] Three cities in Michigan that were placed in receivership over the last ten years have continued to encounter financial hardship well after the receiver left. Proof that Michigan's Emergency Mgrs Don't Work: 3 Cities That Had Them in Financial Trouble Again, Eclectablog (Dec. 28, 2011), http://www.eclectablog.com/2011/12/history-proves-michigans-emergency.html.

[215] See, e.g., U.S. Census Bureau, Federal Aid to States for Fiscal Year 2009, at vii–x (2010).

[216] Phil Oliff & Iris J. Lav, Hidden Consequences: Lessons from Massachusetts for States Considering a Property Tax Cap, Ctr. on Budget & Policy Priorities 7 (May 25, 2010), http://www.cbpp.org/files/5-21-08sfp.pdf.

ity to influence their economic fates, and makes them beholden to the interests of bureaucrats and legislators at higher levels of government.[217] Even more troubling for many municipalities is that those bureaucrats and legislators know they can "stiff cities with impunity" while catering to the interests of more politically important constituents.[218]

Constitutionally speaking, cities are limited in their ability to generate revenue due to state tax and expenditure limitations ("TELs"),[219] while some are simultaneously required to spend money on certain projects due to constitutional spending commitments.[220] Some TELs even limit the amount of debt a city can take on without first undergoing a special referendum.[221] The result is that responding to the boom-and-bust cycle of the global economy becomes difficult for cities handcuffed with limitations that require consistency.[222] This has led some to say that instead of leading to fiscal accountability, TELs have led to economic hardship.[223] In light of the macroeconomic, demographic, political, and constitutional restraints on local autonomy, one can see a picture of cities wrapped up in a complex political and economic network that leaves little room for agency at the local level.[224]

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[217] Berman, Local Government and the States, supra note 65, at 36.

[218] Id. at 42 (quoting Nancy Hill-Holtzman, Cities' PAC Gets More Flak Than Influence in State Capitol, L.A. Times, June 1, 1999, at B1).

[219] For a thorough summary, see Richard Briffault, Foreword, The Disfavored Constitution: State Fiscal Limits and State Constitutional Law, 34 Rutgers L.J. 907, 927–39 (2003).

[220] California, for example, has constitutionalized education spending. Cal. Const. art. IX, § 6.

[221] Briffault, supra note 219, at 915–18.

[222] Schragger, supra note 187, at 869, 872–73, 884.

[223] Susan P. Fino, A Cure Worse than the Disease? Taxation and Finance Provisions in State Constitutions, 34 Rutgers L.J. 959, 959–60 (2003).

[224] Even if one is skeptical of the claim that local governments have little control over their economic fates, providing cities with more autonomy might still be preferable to the alternatives of either maintaining the current division of authority or increasing centralization. Likewise, while some cities are struggling due to poor management and bad choices, increasing local autonomy might still generate more benefits than increasing centralization. This is especially true in light of the fact that people tend to trust local governments more than state or federal governments. See Lydia Saad, In U.S., Local and State Governments Retain Positive Ratings, Gallup (Oct. 3, 2011), http://www.gallup.com/poll/149888/Local-State-Governments-Retain-Positive-Ratings.aspx?version=print.

If this is really what is going on, it makes little sense to punish cities for fiscal profligacy by placing them in receivership. Indeed, why take away local control of local finances if the city did nothing wrong in the first place? We can hardly fault localities for being subject to forces beyond their control, especially in light of the political and constitutional restrictions placed on their authority. To the extent municipal receivership seeks to penalize cities when they may have only marginal influence over their economic fates, it is bad policy. Perhaps better policy might be to accept that some cities will be financially better off because they have more resources, a more robust tax base, or simply better luck. A city like Chelsea may always be in need of economic assistance because it did not have the fortune to evolve into a transportation hub like New York City or Chicago.[225] Once we acknowledge the many factors that constrain local autonomy, we can design alternatives to municipal receivership that provide fair and workable solutions to this complicated problem.

## IV. ALTERNATIVE TOOLS TO COPE WITH LOCAL FISCAL DISTRESS

Parts I, II, and III have raised a number of objections to municipal receivership. However, given that cities will always experience periods of intense fiscal distress, it is important to design alternatives to municipal receivership that are both less objectionable and more effective. Temporally speaking, these alternatives can be either reactive or proactive. Reactive alternatives are those that are triggered once local distress becomes unmanageable; that is, they react to financial struggles. Proactive solutions, conversely, seek to anticipate fiscal distress and mitigate it before it becomes uncontrollable.

One proactive alternative is the implementation of an early warning system. Whereas receivership merely responds to a fiscal crisis, an early warning system continuously monitors local finances to detect problems before they reach a breaking point. Few states have early warning systems, and those that do are not using them

[225] Richard C. Schragger, Rethinking the Theory and Practice of Local Economic Development, 77 U. Chi. L. Rev. 311, 321 (2010) ("[T]he reason that Chicago beat St. Louis, Cincinnati, and Milwaukee . . . had as much to do with luck as with any set of policies.").

as effectively as they could.[226] But it is difficult to understand why so many states fail to take advantage of these programs, as they deliver many benefits. For one, they foster cooperation between state and local officials.[227] By working together to monitor local fiscal distress, state and local officials share information and listen to alternative perspectives, both of which can lead to more efficient governance.[228] This also ensures that cities are involved in decisions that affect them, thereby enhancing local autonomy. An additional benefit is that early warning systems create tangible results, as evidenced by North Carolina's Local Government Commission ("LGC").[229] The LGC acts as an early warning system by constantly monitoring local fiscal health.[230] Due to the LGC, North Carolina cities have lower interest rates and higher bond ratings than average.[231] These local credit ratings also reflect positively on the state's credit rating.[232] Given that an early warning system lessens the risk of local crises and enhances local autonomy, state and city officials should actively work together to develop such systems in every state.

Even if states fail to create early warning systems, there are still better reactive alternatives to municipal receivership. One alternative could be voluntary municipal receivership. In contrast to forcing cities into receivership, voluntary receivership would allow a city to place itself in receivership if the city thought this was the

[226] Philip Kloha, Carol S. Weissert & Robert Kleine, Someone to Watch Over Me: State Monitoring of Local Fiscal Conditions, 35 Am. Rev. Pub. Admin. 236, 252–53 (2005).

[227] Some have argued that programs that encourage multi-level government planning have important political benefits for cities. See, e.g., Printz v. United States, 521 U.S. 898, 976–78 (1997) (Breyer, J., dissenting); Richard C. Schragger, Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System, 115 Yale L.J. 2542, 2555–70 (2006).

[228] Intergovernmental Cooperation, Mun. Res. & Serv. Ctr. of Wash., http://www.mrsc.org/subjects /governance/ig-cooperation.aspx (last visited Jan. 15, 2012) ("[I]nterjurisdictional cooperation . . . generally enhances governmental efficiency."); Thomas S. Kurtz, Intergovernmental Cooperation Handbook, Pa. Governor's Ctr. for Local Gov't Servs. 2–4 (2006), available at http://www.newpa.com/webfm_send/1545.

[229] See Local Government Finance Act, N.C. Gen. Stat. §§ 159-1 to -210 (2007).

[230] Kimhi, supra note 7, at 679–680.

[231] Id. at 680; Tedra Desue, Moody's: North Carolina Counties Come out on Top, Bond Buyer, July 12, 2000, at 4, available at 2000 WLNR 849996.

[232] Kimhi, supra note 7, at 679.

best option.[233] This mechanism avoids the legal and political pitfalls of involuntary receivership. Vesting this power with the city is consistent with home rule because it maintains local political sovereignty.[234] Similarly, consensual receivership is in harmony with the political values embodied in participatory local self-government. By allowing the city to decide which financial recovery mechanism would be most effective, voluntary receivership reinforces government by democracy and encourages local participation.[235]

It is worth examining in some detail how a city should decide whether to enter voluntary receivership. There appear to be two possibilities: either local government officials decide, or voters themselves make the decision in a referendum. A referendum has a number of advantages. One is that residents may already be familiar with making local fiscal decisions. Many states currently require referenda for decisions that are far less serious than the choice to enter receivership.[236] Using a referendum for voluntary municipal receivership fits comfortably in state constitutional regimes that look favorably upon direct democracy at the local level. Furthermore, a referendum on municipal receivership creates an attractive political symmetry, as the choice to suspend the political existence of the municipality is lodged in the group that created the city as polity in the first place—the residents. That a referendum on receivership is administratively similar to local financial procedures and harmonious with local self-government demonstrates that voluntary receivership can be both viable and desirable.[237]

One is not limited, though, to looking for alternatives to municipal receivership that do not currently exist.[238] Municipal bankruptcy

[233] It would complicate matters if states were allowed to blackmail cities into entering "voluntary" receivership. The normative implications of that possibility are not addressed in this Note.

[234] See supra text accompanying notes 108–126.

[235] See supra text accompanying notes 166–183.

[236] See Cal. Const. art. XVI, § 18 (requiring approval of two-thirds of local electorate for local government debts); Mo. Const. art. X, § 22(a) (requiring voter approval through referendum for local government to raise taxes); Wash. Const. art. VIII, § 6 (requiring approval of three-fifths of local electorate for local government debts).

[237] This note does not discuss whether there should be a supermajority requirement for the referendum because it would likely depend on the peculiar circumstances of each city. For a critique of supermajority requirements, see Derrick A. Bell, Jr., The Referendum: Democracy's Barrier to Racial Equality, 54 Wash. L. Rev. 1 (1978).

[238] No state currently employs a regime of voluntary receivership.

is presently permitted under Chapter Nine of the Bankruptcy Code, and it can act as an effective substitute for municipal receivership.[239] Fiscally struggling cities may file under Chapter Nine if they meet a variety of conditions outlined in the statute.[240] But the decision is exclusively the city's, as neither creditors nor the state government can force a city into bankruptcy.[241] Once the bankruptcy proceedings have begun, the process evinces a respect for local autonomy. The city's elected officials are given the exclusive right to submit debt readjustment plans to the court.[242] In addition, all collection actions initiated by creditors are stayed for the duration of the bankruptcy proceeding.[243] Moreover, Chapter Nine prohibits the court from interfering with either the city's political powers or its property.[244] The concern for local autonomy in bankruptcy proceedings suggests that cities would prefer it to municipal receivership. The recent events in Harrisburg provide support for this claim.[245]

Aside from maintaining procedures that accommodate local autonomy, municipal bankruptcy also does an admirable job balancing incentives. On the one hand, cities get the advantage of increased leverage in creditor negotiations by having the exclusive right to submit debt readjustment plans. On the other hand, cities are deterred from entering bankruptcy due to potentially higher borrowing costs in the future.[246] This deterrence highlights that autonomy cuts both ways, as cities that file for bankruptcy might find it harder to borrow money in the future. Of course, this deterrence is also woven throughout political discourse, as countless officials at every level of government publicly obsess over fiscal responsibility and do everything they can to avoid bankruptcy.[247] In short, municipal bankruptcy effectively maintains local account-

[239] For a general overview of municipal bankruptcy, see McConnell & Picker, supra note 61.

[240] 11 U.S.C. § 109(c) (2006).

[241] See id. § 303(a).

[242] See id. § 941.

[243] See id. §§ 901(a), 362(a).

[244] See id. § 904.

[245] See Tavernise, supra note 62.

[246] Tamim Bayoumi et al., Do Credit Markets Discipline Sovereign Borrowers? Evidence from U.S. States, 27 J. Money, Credit & Banking 1046, 1046, 1057 (1995).

[247] Schragger, supra note 187, at 883.

ability while attempting to fix local finances. Thus, the draconian conditions of municipal receivership should be viewed as excessive.

## CONCLUSION

Because few have devoted much thought to the conflict between municipal receivership and local autonomy, many have latched onto theories or propositions that allow for quick and easy resolutions. Dillon's Rule and *Hunter* say cities are always subject to state prerogatives, and human intuition might suggest that cities are in control of, and responsible for, their economic fates. On closer examination, the picture is much more complex. Based on the history of home rule and specific state constitutional provisions, the question whether municipal receivership is consistent with home rule is much closer than many judges have let on. There is also language in federal constitutional law that suggests that there might be some federal protection for local voting rights. Moreover, one cannot ignore the disturbing political implications of municipal receivership, as there are serious objections to its use in both theory and practice. With a number of arguably more effective alternatives readily available, the propriety of state takeovers should be judged with reference to these tools, not in a vacuum.

To be clear, two particular value judgments underlie this Note's argument. First, examining the conflict between municipal receivership and local autonomy implies that cities, at some level, matter. If cities were irrelevant, municipal receivership would likely be unobjectionable. But cities do matter, most importantly because they have been one of the most significant forces for economic advancement in human history.[248] Modern experiences have confirmed this as well, as cities have been hailed as the engines that drive much of global economic growth.[249] The second value judgment is that we should be concerned about policies that displace local democratic procedures. If displacement were acceptable, municipal receivership would not be problematic. Democratic proc-

[248] Jane Jacobs, Cities and the Wealth of Nations: Principles of Economic Life 32 (1984); The World Goes to Town, The Economist: A Special Report on Cities, May 5, 2007, at 1, 3.

[249] Richard C. Schragger, Cities, Economic Development, and the Free Trade Constitution, 94 Va. L. Rev. 1091, 1100–03 (2008).

esses, though, should be valued, and democracy at the level in which it is most easily realized should be valued most. New Jersey State Senator Richard Codey, in commenting on the takeover of Camden, expressed this sentiment when he said, "[i]t is simply wrong to tell voters in New Jersey they might wake up one morning and discover their votes don't count anymore."[250] These two values should inform future discussions about remedies to local financial distress, mainly because they assume local government occupies a meaningful economic and political role within our society.

[250] David Kinney, Camden Balks at Handing Reins to State, Star-Ledger (Newark, N.J.), Oct. 22, 2000, at 19.