From: Eric Fraser <truthintourism@gmail.com>
Sent: Thursday, June 30, 2022 1:59 PM
To: CA Office; CMOffice; Rogers, Chris; Fleming, Victoria; Schwedhelm, Tom; Alvarez, Eddie; Sawyer, John; Rogers, Natalie; _CityCouncilListPublic; dmacdonald@srcity.orgdianna
Subject: [EXTERNAL] Council Compensation, Charter Review Committee
Attachments: 70-Stan.-L.-Rev.-839.pdf

Dear Mayor Roger, City Council, City Manager, and City Attorney,

Our work group is taking a deeper dive into the City Attorney's presentations and process regarding the charter review and update, focusing on council compensation. We will probably expand our analysis into other issues relevant to the charter in the near term. *The charter can be reviewed at: https://srcity.org/152/City-Charter*

We recognize that the City Attorney's Office is responsible for drafting ordinances and referendums and advising the Council.

However, having the City Attorney Susan Gallagher as the lead sales representative for the average median income (AMI)-based Council Compensation schemes probably crossed the line, as it appears that she has a conflict of interest since she was hired by the Council. Didn't she also just get a raise?

The AMI-based compensation proposal seeks to raise council salaries from $9,600 plus benefits to a range of $61,000 - $130,000 plus benefits, **an increase of 1,350%** when current compensation is compared to the high end of that range**.**

Watching the meetings and following the presentation of her information, one can learn how the AMI-based index for compensation (at some percentage) was preordained and her mission was to sell the concept to a willing majority of committee members (political appointees). *Go to https://www.srcity.org/3657/City-Charter-Review-Committee for more information, however additional work is needed to locate information supporting City Council agenda items, or from public records requests. According to the City webpage: "The 21-member Charter Review Committee has significant responsibilities to research, deliberate and, as it deems appropriate, draft proposed revisions to the City Charter", so our assumption is that there was plenty of work product to aid their deliberations outside what was provided by the City Attorney's Office during the public meetings.*

Fortunately, City Attorney Gallagher did provide a reference to an important article in the Stanford Law Review called "Compensating City Council" (70-Stan-L-Rev-839, 2018), which we have attached for your review. While she did pick a few words from it to inform her slides, she apparently did NOT read the entirety of the article. Discussed in the article were procedures to avoid conflicts of interest, to gather information widely about both pecuniary and non-pecuniary compensation to inform the committee and public about current council compensation but also when creating comparisons to other jurisdictions, and to learn about the impacts of rent-seeking and other acts of corruption. This was easy to read and understand from the article and should not be overlooked now.

Pecuniary Compensation and reimbursable costs may include:
Salary
Retire Plan/Pension (value?)
Health Insurance (for how long? COBRA? Lifetime?)
Eye Care (for how long? COBRA? Lifetime?)
Dental Care (for how long? COBRA? Lifetime?)

Long-term Disability (LTD) (for how long? COBRA? Lifetime?)
Expense Account
Travel and per diem
Assistants
Paid time off
Perquisites
Other
(Corruption)

Non-pecuniary benefits may include:
Aspirations/preparation for higher office
Opportunity to be of service
Ceremonial trappings
Perquisites
Other
(Corruption)

Plus, the costs for the city to administer pecuniary compensation and non-pecuniary benefits must be considered.

City council members in Santa Rosa can pursue outside income, with no limits, but are subject to conflicts that may prevent them from voting on specific agenda items. They cannot hold another City position, however having a pension from another city job while serving as a council member is current practice (Charter Sec. 5).

Council members currently earn $9,600, which can easily be raised to $17,760 reflecting 17 years of nonfeasance. When added to the benefits received by council members it does equal a tidy sum, the extent of which was omitted by City Attorney Gallagher and is probably not clear to anybody on the committee, even after the extensive discussions. Why wasn't the current compensation for council members from all government sources, factoring in lifetime benefits for a complete and accurate financial report, presented by the City Attorney?

Regardless of our ideals about part-time vs. full-time councilmembers, compensation, citizen legislatures, rate of pay, and policies designed to promote equity and justice, the status quo in Santa Rosa does present a myriad of examples of potential, proven, or alleged corruption including "rent-seeking", personal enrichment and self-dealing, racketeering, conflicts-of-interests, and so on which negate any ideals. Research clearly shows where these "nefarious" activities erode civil rights.

"Rent-seeking" is defined as the effort to increase one's share of existing wealth without creating new wealth. Rent-seeking results in reduced economic efficiency through misallocation of resources, reduced wealth creation, lost government revenue, heightened income inequality, and potential civic decline. Another definition (Investopedia) defines it as "an economic concept that occurs when an entity seeks to gain added wealth without any reciprocal contribution of productivity. Typically, it revolves around government-funded social services and social service programs". Rent-seeking behaviors are endemic to governments; the opportunity to review our council compensation provides the opportunity to collectively reckon with corruption in our city in all its forms now.

Some of the examples that have surfaced from our work in the "tourism" and housing ecosystem and from which we have formed an opinion include the SRTBIA taxation scheme, Visit Santa Rosa, Out There! Santa Rosa, Ironman, Old Courthouse Square Reunification, Generation Housing, and a development called the "Arthouse". Because so many governmental and quasi-governmental programs escape oversight by the present city leadership with corruption unabated, it is appropriate to ask:

Is it possible citizens don't want to run for Council NOT because the part (full)-time job doesn't pay enough, but because of the stifling effects of corruption?

Let's be clear – we are not asserting that our Council Members, political appointees to the Charter Review Committee, or other public servants are all corrupt. Sincere public service is always sincerely appreciated by me. However, we have abundant proof of defective processes, rent-seeking and extracting schemes, and of course this example of conflict-of-interest (and more), to warrant further concern, research, dialogue, and mitigation.

Full vs. part-time job? We look forward to examining and interviewing current and former council members, city officials and staff to create an honest appraisal of actual work being done. When shown a couple frames of Mayor Roger's calendar during the Charter Review committee meetings, we noted plenty of open space, but also notations for "DP". What does "DP" mean? Anyway, we are looking forward to understanding the differences between the work elected officials are now paid to do as required under the Charter, and what should be extra-curricular non-compensatable activities or private work, even if it is political in nature.

Here are the action items for our work group:

- We will create Santa Rosa's Rent-Seeking Index (RSI), a directory of people and organizations with an assessment of how they are situated within the city's rent-seeking and extracting ecosystem.

- Public records request for the work calendars of Mayor Rogers, Councilmembers Fleming and Schwedhelm, past-Councilmember Olivares, and past city managers Kolin and McGlynn. (Nextrequest 22-0726)

- Public records request for a list of all council members who have served during the last twenty years, with annual costs of salaries/benefits to the city. Also, records showing the actual paid out (and budgeted) compensation/benefits for council members from the City's past seven fiscal years. (Nextrequest 22-0726)

- Public records requests to uncover emails and other information regarding the topic of council compensation. (Nextrequest 22-0726)

- Redo the City Attorney's misinformed spreadsheets showing comparisons to other jurisdictions, so they clearly show an apples-to-apples view of organizational characteristics, council compensation from ALL sources, processes for reviewing compensation, and perhaps other data that may indicate problems with corruption or equity.

- Polling of Charter Review Committee members to inform the RSI and to understand their attitudes toward the charter review process.

- Track the Council Compensation referendum so we can stand and deliver our information to either support or oppose.

- Examine other recommended charter-related referendums and form an educated opinion.

Thank you very much for your cooperation and respect. We look forward to robust discussion and debate concerning the topic of council compensation.

Eric Fraser (he/him, white, male, 55+, but committed to civil and equal rights)
Resident and Registered Voter in Santa Rosa
707.479-8247

Stanford Law Review

Volume 70 March 2018

ARTICLE

Compensating City Councils

Kellen Zale*

Abstract. How much of "other people's money" should city councils be paid? This Article analyzes the issue of city council compensation by exploring the institutional design of compensation procedures and unpacking the normative concerns surrounding the pay of our cities' elected leaders. Should city councils decide their own pay? Should voters? Should state legislatures?

This Article contends that existing compensation procedures—such as city council control and referenda—distort compensation outcomes. Where procedures enable financial self-dealing or manipulation of standards, or where they insufficiently account for nonsalary compensation, overcompensation is the likely result. Conversely, where procedures enable rent-seeking behavior, exacerbate the politicized nature of politicians' pay, or fail to account for pay stagnation, undercompensation tends to result. Neither outcome is desirable. Overcompensation increases burdens on taxpayers, increases the risk that elected officials will be motivated more by pecuniary incentives than civic duty, and inadequately accounts for nonmonetary benefits of elected office. Conversely, undercompensation can lead to elected office being open only to those wealthy enough to afford it; risks a less effective, accountable, and transparent government; and can result in conflicts of interest and corruption. To address these concerns, this Article recommends specific mechanisms to improve the institutional design of city council compensation procedures and explores the question of state versus local control over city council compensation.

While compensation amounts are not necessarily determinative of the quality of governance, compensation procedures affect who governs our cities. And who governs our cities matters because our cities matter. Cities large and small are responsible for an increasing share of public goods and services. In the face of deadlock at the federal and state levels, cities have engaged in innovative policymaking on issues as varied as climate

* Assistant Professor, University of Houston Law Center. Many thanks to Benjamin Cover, David Fagundes, John Infranca, Renee Knake, James Nelson, and Teddy Rave for their valuable comments on early drafts of this Article, as well as to participants at the 2016 State & Local Government Law Works-in-Progress Conference at the University of Houston and to colleagues at the internal faculty workshop series at the University of Houston Law Center. Thanks also to Thomas Ginsberg at the Philadelphia Research Initiative of The Pew Charitable Trusts for a helpful conversation about city councils. I am also grateful to Robert Clark for library assistance and to Leah Lebeau, Collin Marshall, Andrew Quesada, Lindsay Thorpe, and Crystal Walsh for research assistance.

change, civil rights, campaign finance, and consumer protection. By better understanding the impact of compensation processes on compensation outcomes, we can better understand the future of our cities.

Table of Contents

Introduction

If you could set your own salary, how much would you pay yourself? Would you give yourself a raise? Would you care what other people thought if you did? What if your pay hadn't increased in over a decade? Would you consider whether increasing your salary would lead to pay cuts for other people in your workplace?

These questions may seem like the daydreams of *Office Space* employees,[1] but they are the very real concerns that city councils[2] across the United States must grapple with. While some city councilmembers' salaries are fixed by state law or subject to voter approval, in vast numbers of cities—particularly large and midsize cities—city councils have the authority to decide their members' compensation.[3] Like members of Congress and state legislators,[4] city councilmembers are placed in the uncomfortable position of determining how much of other people's money they should pay themselves. And when put in this position, lawmakers face an inherent conflict of interest.

Most obviously, when in control of their own compensation, city councilmembers can engage in financial self-dealing by increasing their own pay when doing so would not be in the public interest. As James Madison recognized in the context of congressional compensation, "[T]here is a seeming impropriety in leaving any set of men without control to put their hand into the public coffers, to take out money to put in their pockets . . . ."[5]

But another form of self-dealing can occur when councilmembers opt *not* to increase their own compensation when doing so *would be* in the public interest.[6] This type of self-dealing is best understood as a form of reelection

1. OFFICE SPACE (20th Century Fox 1999) (portraying a group of underpaid and disgruntled employees who devise a plot to siphon money from their company).

2. Throughout this Article, unless otherwise specified, the term "city council" is used to refer to the local legislative body of a municipal corporation. Local legislative bodies may be formally referred to by other terms, such as "commission" or "board of aldermen."

3. *See infra* Part I.C.

4. *See* David L. Sollars, *Institutional Rules and State Legislator Compensation: Success for the Reform Movement?*, 19 LEGIS. STUD. Q. 507, 507 (1994) ("Few political issues cause as much controversy as the compensation (and changes in compensation) of our elected officials, especially the members of [state] legislatures. The controversy is historically a result of the process: legislators determine, or at least have a major role in determining, their level of pay."); Michael J. Teter, *Recusal Legislating: Congress's Answer to Institutional Stalemate*, 48 HARV. J. ON LEGIS. 1, 27-29 (2011) (discussing the "vexing" problem of Congress's setting its own pay).

5. 1 ANNALS OF CONG. 457 (1789) (Joseph Gales, Sr. ed., 1834) (statement of Rep. Madison).

6. The precise amount of pay that would optimally advance the public interest is a complex question. *See infra* Part II.A. For purposes of this Article's focus on institutional design, however, the precise number is less important than recognizing that it should be the amount an impartial decisionmaker would select.

rent-seeking.[7] As Adrian Vermeule has observed in his scholarship on congressional compensation, "[T]he political benefits of conspicuous self-denial may dominate purely financial losses."[8] That is, although a salary increase would boost councilmembers' welfare in terms of monetary gain, if they think that increasing their own salaries is likely to hurt their chances of reelection, then they may opt not to increase their own pay.

At first blush, it might appear that this variant of self-dealing is not particularly harmful. After all, the city council is saving public money by denying itself increased compensation. But there are a number of reasons to be concerned about the systemic effects of reelection rent-seeking. While pay should not become the incentive for government service, most would agree that lawmakers' compensation should be set at a "rate that fairly compensates [lawmakers] for their work and attracts highly qualified candidates."[9] While few go into government work to get rich, common sense, as well as the political science research on the issue, tells us that pay is a consideration for at least some people in making the decision to enter—or continue with—government service.[10] Without adequate compensation, legislative office simply is not an option for some who would otherwise be interested in serving but who cannot afford to.[11]

Compensation also has implications for the quality of governance. While the public might appreciate city councilmembers' decision not to spend additional public funds on their own salaries in the short term, failing to raise compensation to adequate levels may be a "penny-wise, pound foolish" decision that is not ultimately in the public interest.[12] Lawmakers may not be given the resources needed to adequately handle the complex issues they face and may then be cast out by voters for failing to accomplish the tasks they lack the resources to deal with.[13] In addition, while one might intuitively assume that

7. *See infra* notes 254-57 and accompanying text.

8. *See* Adrian Vermeule, Essay, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501, 520 (2002).

9. *See, e.g.*, Pub. Officials Compensation Comm'n, Or. Dep't of Admin. Servs., Frequently Asked Questions 1 (n.d.), https://perma.cc/7HQ9-WAXJ.

10. *See infra* Part II.A (discussing how compensation could play into an individual's decision to run for office).

11. *See* Morgan Cullen, *Pay Problem*, NAT'L CONF. ST. LEGISLATURES (Jan. 2011), https://perma.cc/XH2H-66VG ("Maintaining adequate legislative compensation promotes diversity among elected officials so the entire population is adequately represented. If pay is a significant barrier to public service, many potential candidates will not be able to serve . . . .").

12. *See* Johhny Kauffman, *Low Pay in State Legislatures Means Some Can't Afford the Job*, NPR (Jan. 9, 2017, 4:02 AM ET), https://perma.cc/B6E2-GPE8 (quoting Neil Malhotra, professor of political economy at Stanford University).

13. *See infra* Part II.A.2.b.

corruption correlates with excessive compensation, low compensation can also raise concerns about corruption and conflicts of interest because councilmembers are more likely to hold outside jobs or seek other forms of remuneration to afford serving in elected office.[14]

These concerns are not just theoretical. Across the country, city councils that control their own compensation routinely deny themselves pay increases, even when the amount would be relatively minor and they have gone decades without a raise. For example, every year for the past decade, city councilmembers in San Diego have rejected an independent citizens' commission's recommendation that councilmembers' pay be increased to reflect the rising cost of living and growing council responsibilities.[15] In Fairfax, Virginia, council salaries remained unchanged for over thirty years, while housing costs increased about 2000% in the overlapping forty-year period.[16] In Tucson, Arizona, the mayor and council actively campaigned against a proposal by an independent commission recommending a modest increase in council pay—$24,000 to $27,500—that, along with an increase in the mayor's pay, would have cost each city resident just five cents per year.[17] Conversely, some city councils in control of their own compensation have engaged in financial self-dealing, even as their cities are in the midst of financial crisis, with small cities like Bell, California attracting media attention for the excessive salaries of their elected officials.[18]

Procedures that give a city council control over its own compensation are thus problematic because they can produce both overcompensation distortions due to financial self-dealing and undercompensation distortions due to reelection rent-seeking. Neither result is normatively desirable. Compensation that is too high may result in elected officials motivated more by pecuniary incentives than civic duty; increased burdens on taxpayers; and inadequate

14. *See infra* Part II.A.2.c.

15. *See infra* notes 270-72 and accompanying text.

16. *See* Bonnie Hobbs, *City of Fairfax Approves Future Pay Raises for Mayor, Council*, CONNECTION NEWSPAPERS (Oct. 22, 2015), https://perma.cc/2Q89-9BL2. If Fairfax officials' salaries had kept up with housing prices, the mayor's salary would have been $100,000 and the councilmembers' salaries just under that; yet the mayor and councilmembers were still being paid just $6500 and $4500, respectively, the same amounts they had been paid since the early 1980s. *See id.* The failure to enact regular, incremental increases in council compensation can have a particularly pernicious effect. The longer it has been since a salary increase, the more current salaries should be raised, but the greater the size of the needed raise, the more likely countervailing concerns about overcompensation will make raises politically infeasible, creating a vicious cycle. *See infra* Part II.B.

17. *See City of Tucson Mayor and Councilmember Salary Increase Amendment, Proposition 405 (November 2015)*, BALLOTPEDIA, https://perma.cc/8H4Y-WXHE (archived Feb. 2, 2018).

18. *See, e.g.*, Jeff Gottlieb & Ruben Vives, *Is a City Manager Worth $800,000?*, L.A. TIMES (July 15, 2010, 12:00 AM), https://perma.cc/S5U3-H6HX.

recognition of nonsalary benefits of elected office (such as pension benefits). Conversely, compensation that is too low can result in elected office being open only to those wealthy enough to afford it; a less effective, accountable, and transparent government; and increased risks of conflicts of interest and corruption.

Yet alternative procedures that allocate the decision about compensation to another institution—such as voters or state legislatures—are also unlikely to result in pay determinations that an impartial decisionmaker acting in the public interest would reach. For example, a number of cities require voter approval of any proposed changes to city council compensation.[19] While a referendum process reduces financial self-dealing by councilmembers, the inherently politicized nature of politicians' pay tends to produce election pathologies, resulting in voters reflexively rejecting any proposed increase in city council compensation.[20]

Another alternative to city councils controlling their own pay is for compensation to be set by the state. But while such an approach limits the opportunity for councilmembers to engage in reelection rent-seeking or financial self-dealing, state control poses a risk of aggrandizement by the state. States—which already have significant control over local governments—can use compensation as yet another tool to gain leverage over cities. If "a power over a man's subsistence amounts to a power over his will,"[21] then state governments that disagree with their cities' substantive policymaking—on issues ranging from environmental protection to civil rights—may use state control of city council compensation as a way of further limiting the role of cities.

The institutional design of congressional and state legislative pay has attracted some scholarly attention.[22] However, the legal literature has almost entirely overlooked the issue at the local level. This Article aims to remedy that oversight. Questions surrounding the institutional design of city council compensation are not merely derivative of those at the state and federal levels. While the existing scholarship on federal and state legislative compensation

19. *See infra* Part I.C.1.b.

20. *See infra* Part II.B.2.

21. THE FEDERALIST NO. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted).

22. *See* Vermeule, *supra* note 8, at 502; *see also, e.g.*, PEVERILL SQUIRE & GARY MONCRIEF, STATE LEGISLATURES TODAY: POLITICS UNDER THE DOMES 65-73 (2d ed. 2015) (discussing the effect of state legislators' salaries on the professionalization of state legislatures); Nicholas Carnes & Eric R. Hansen, *Does Paying Politicians More Promote Economic Diversity in Legislatures?*, 110 AM. POL. SCI. REV. 699, 699-709 (2016); Sollars, *supra* note 4, at 507. There is also a substantial amount of scholarship on judicial compensation. *See, e.g.*, James M. Anderson & Eric Helland, *How Much Should Judges Be Paid?: An Empirical Study on the Effect of Judicial Pay on the State Bench*, 64 STAN. L. REV. 1277, 1282 (2012).

offers valuable insights, there are a number of distinct features of local governments—and cities in particular—that warrant independent study of city council compensation.

First, from a purely quantitative perspective, legislative compensation at the local level presents vastly more variations than at the federal or state level. There is only one Congress and only fifty state legislatures. But there are almost 20,000 municipalities in the United States.[23] Were all of these cities identical, the simple numerical fact might not be significant. But there are major qualitative differences between cities. Massive urban metropolises have annual budgets exceeding those of some nations and are responsible for governing millions of residents who have a diverse range of needs.[24] Small municipalities have far more limited resources and more limited needs. Because of the vast number of cities and their diversity—in both substantive characteristics and governance approaches—questions of institutional design for compensation at the local level are likely to require a more nuanced approach than at the federal level, with its single legislative entity, or even at the state level, with fifty legislative entities.

Second, the structure of local government differs from federal and state government in ways that can affect institutional design options. For example, there is no separation of powers constraint at the local level.[25] City councils perform not only legislative tasks but also executive, administrative, and quasi-

23. *Number of Municipal Governments & Population Distribution*, NAT'L LEAGUE CITIES, https://perma.cc/TAA2-A56C (archived Feb. 2, 2018). The term "municipal governments" includes both cities and towns. *Local US Governments*, NAT'L LEAGUE CITIES, https://perma.cc/E7GF-EUZ8 (archived Feb. 2, 2018). Cities and towns are similar. The different terms reflect population differences, but most towns, like cities, are governed by elected councils, thus effectively acting as small cities. *See id.* In addition to municipal corporations, there are a number of other local government entities, such as counties and special purpose districts. *See id.* Counties are administrative subdivisions created by the state; like cities, counties can raise revenue and are politically accountable to their citizens. *See id.* To the extent counties operate under similar legal constraints as do cities, this Article's discussion of compensation-setting procedures is applicable. Special purpose districts are a less standardized form of local government focused on one specific issue (rather than general government) and may be governed by either elected or appointed officials. *See* Sara C. Galvan, *Wrestling with MUDs to Pin Down the Truth About Special Districts*, 75 FORDHAM L. REV. 3041, 3042-49 (2007) (discussing municipal utility districts, a type of special district).

24. *Compare* Kellen Zale, Detailed Empirical Data on City Council Compensation (2018), https://perma.cc/4552-LWWU [hereinafter Data Supplement] (listing annual budgets of the 100 most populous U.S. cities), *with Field Listing: Budget*, CENT. INTELLIGENCE AGENCY: THE WORLD FACTBOOK, https://perma.cc/JWT4-FRRD (archived Feb. 15, 2018) (listing the budgets of nations worldwide).

25. *See* 1 JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 9:7 (West 2017) (discussing how states may choose to, but need not, create separate branches of local government through state statutes).

judicial ones.[26] Relatedly, the power of the executive branch in cities varies widely.[27] And unlike federal and state legislative bodies, city councils are unicameral and often nonpartisan.[28] While such structural differences may not ultimately preclude analogizing the question of compensating city councils to that of compensating federal and state legislative bodies, the implications of these structural differences should be considered before assuming institutional design features used at other levels of government track at the local level.

The first-order institutional design question—what procedures should be used to set city council compensation?—also leads to a second-order institutional design question: Who should implement those procedures? The dual nature of cities, as both top-down, state-created entities and bottom-up, autonomous polities, complicates this second-order question. Cities are considered creatures of the state, with no independent legal status under the Constitution.[29] Thus, one level of government, the state, may be able to control the compensation rules for another level of government—the city, town, or other form of municipal corporation. The result is a possible mismatch between the rules set by the state and the rules that would most benefit the local community.

Finally, there are certain institutional design tools available at the local level that are either not available at all or less readily available at the state and federal levels. For example, direct democracy in the form of referenda allows residents to petition to hold an election on local ordinances.[30] Popular

26. *See id.* §§ 9:9, :13; Richard A. Briffault, *Beyond Congress: The Study of State and Local Legislatures*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 23, 29 (2003) ("At the local level there is often a complete blurring of the distinction between executive and legislature. Many localities do not even have a chief executive. They may be governed by a multimember commission or council rather than a single executive. In these settings, lawmaking and administration, and legislation and regulation, are fused.").

27. For example, in strong mayor cities, the elected mayor holds executive powers, but in cities with council-manager forms of government, a professional manager appointed by the council holds those powers. *See infra* Part I.A. "Strong mayor" is a term of art used to indicate the relative strength of the mayor compared to that of the city council. *See infra* notes 65-71 and accompanying text.

28. *See* Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 385 (noting that almost 70% of U.S. cities have nonpartisan elections); Noah M. Kazis, *American Unicameralism: The Structure of Local Legislatures*, 69 HASTINGS L.J. (forthcoming 2018) (manuscript at 4) (on file with author) ("Each and every [local government in the United States] has a single legislative chamber."). Forty-nine states have bicameral legislatures; one (Nebraska) has a unicameral state legislature. *See* 49 THE BOOK OF THE STATES 46 tbl.3.1 (Council of State Gov'ts ed., 2017).

29. *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907).

30. *See* THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 2-3 (1989); Tari Renner, *Local Initiative and Referendum in the U.S.*, INITIATIVE & REFERENDUM INST., https://perma.cc/H9UX-6BBY (archived Feb. 2, 2018).

referenda are not available at all at the federal level and are available in only about half the states.[31] However, many cities—including cities in states without statewide popular referenda—authorize popular referenda, and a number of cities mandate their use for any change in city council compensation.[32]

The distinct structural features of local government discussed above, standing on their own, are evidence of the need for a nonderivative account of city council compensation. But the call for such an account is even clearer when one considers the expansive—and expanding—role of local governments. Local governments are responsible for a vast range of substantive policymaking, from education and public employment to land use and infrastructure.[33] Furthermore, cities are increasingly taking on broader, more innovative roles in the face of deadlock at the federal and state levels. In recent years, city councils have enacted legislation on climate change,[34] the minimum wage,[35] anti-obesity efforts,[36] campaign finance reform,[37] and payday lending.[38] Those issues not only affect city residents but also can often have wide-ranging effects, influencing other cities—as well as states and the federal government—

31. *See* CRONIN, *supra* note 30, at 2-3.

32. *See infra* notes 156-63 and accompanying text.

33. *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 2 (8th ed. 2016) (discussing areas in which state and local governments have traditionally had authority to legislate).

34. For example, a number of cities have set carbon goals and taken a variety of approaches, from energy benchmarking to the adoption of solar technologies, to achieve those goals. *See* U.S. CONFERENCE OF MAYORS, HOW ENERGY TECHNOLOGIES ARE RESHAPING AMERICA'S CITIES: A 178-CITY SURVEY 3, 6-7, 12-15 (2016), https://perma.cc/Z3JD-G68V; *Mayors Climate Protection Center*, U.S. CONF. MAYORS, https://perma.cc/8H9W-2UYU (archived Feb. 2, 2018).

35. *See, e.g.*, Reg Chapman, *Minneapolis City Council Approves Minimum Wage Increase*, CBS MINN. (June 30, 2017, 10:52 AM), https://perma.cc/F7TB-AFUX (reporting that the Minneapolis City Council adopted legislation increasing the city's minimum wage to $15 per hour); Julia Horowitz, *Here's Where the Minimum Wage Is Going Up in 2018*, CNN MONEY (Dec. 29, 2017, 7:46 AM ET), https://perma.cc/J4AH-TH96 (reporting that minimum wage increases will take effect in about twenty cities and counties in 2018).

36. *See, e.g.*, Paul A. Diller, *Why Do Cities Innovate in Public Health?: Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1221-22 (2014) (discussing public health regulation by cities).

37. *See* Robert M. Stern, *Public Financing in the States and Municipalities*, *in* PUBLIC FINANCING IN AMERICAN ELECTIONS 62, 73 (Costas Panagopoulos ed., 2011).

38. *See, e.g.*, Kathleen C. Engel, *Local Governments and Risky Home Loans*, 69 SMU L. REV. 609, 616 (2016) (discussing how in Texas, where state law imposes no limits on what payday lenders can charge, cities have used their land use authority to limit payday loan businesses).

to adopt similar approaches.[39] If cities are going to "save the world,"[40] it is important to better understand the positive features and normative implications of the mechanisms used to compensate the people who govern our cities.

To frame this Article's discussion of city council compensation, a few preliminary comments are warranted. In talking about compensation, it is important to recognize that two interrelated questions are raised. First, *how much* are city councilmembers compensated? Second, *how* is compensation determined? These two questions—while analytically separate—are inextricably connected. The procedures used to determine compensation affect how much city councils are paid, and how much we think city councils should be paid affects our choice of procedures.

While cognizant of the connection between the "how much" and "how" questions, this Article focuses on the second inquiry: how the procedures used to determine city council compensation can be better designed to reduce over- and undercompensation distortions. In the course of unpacking this question of institutional design, this Article engages with data on how much city councils are paid. It does not, however, propose a definitive answer to the "how much" question. While that question is worthy of further study, the precise amount of compensation that is appropriate will vary based on city-specific empirical data and on different approaches to balancing normative concerns about compensation for elected officials.[41] Regardless of one's views on whether over- or undercompensation is more widespread, procedures that systematically

39. *See, e.g.*, Diller, *supra* note 36, at 1223 ("National and state officials have frequently copied local action in the realm of public health after cities have regulated first."); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 62-63 (2010) (discussing the influence of San Francisco's decision to issue marriage licenses to same-sex couples on subsequent developments in marriage equality at the national level and noting that "San Francisco, for good or for ill, remapped the politics of the possible, something that allowed it to elicit and shape majority preferences"); Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & C.R. L. REV. 371, 375 (2008) ("In many ways, local governments have led the way in many areas of public policy where the federal and state governments have either failed, avoided issues altogether, or been unable to reach an agreement . . . ."); *see also, e.g.*, Charles R. Shipan & Craig Volden, *Bottom-Up Federalism: The Diffusion of Antismoking Policies from U.S. Cities to States*, 50 AM. J. POL. SCI. 825, 825-29, 840 (2006) (discussing the diffusion of antismoking policies from the local level to the state level and finding that such policies are more likely to diffuse upward from the local to state level in states with professional state legislatures and strong policy advocates).

40. *See generally* HOW CITIES WILL SAVE THE WORLD: URBAN INNOVATION IN THE FACE OF POPULATION FLOWS, CLIMATE CHANGE AND ECONOMIC INEQUALITY (Ray Brescia & John Travis Marshall eds., 2016).

41. For a discussion of relevant factors, see Part I.B below.

distort compensation outcomes—in either direction—should be of concern.[42] By offering a theoretical analysis of the "how" question, this Article provides a foundation for future empirical study of the "how much" question.[43]

It is also important at the outset to acknowledge both that compensation is one of several factors that affect an individual's decision about whether to run for office[44] and that the effects of compensation on the quality of officeholders can be difficult to assess.[45] But as scholars of state legislatures have recognized, compensation of elected officials—and how that compensation is determined—is a central aspect of governance design.[46] Understanding the normative implications of compensation procedures at the local level can thus help us better design governance for our cities.

---

42. For a discussion of how various compensation-setting procedures can systematically produce either increases or stagnation in councilmembers' salaries, see Part II.B below.

43. Even with future empirical research, the "how much" question may not have a definitive answer. *See* Steve Litz, *Salaries of South Florida Mayors*, NBC MIAMI (May 14, 2013, 12:17 AM EDT), https://perma.cc/2K8K-DXT7 ("If you are looking for some kind of scientific way to determine what is the actual value of an [elected official], . . . there is just none." (quoting George Gonzales, professor of political science at the University of Miami)); *see also* Cullen, *supra* note 11 ("One of the great challenges to setting legislator salaries is that there is no precise way of determining fair market value. In the private sector, employers can establish an adequate pay scale by comparing the salaries of similar positions. The way legislatures operate can differ greatly . . . . This can make the process of setting reasonable legislative salaries extremely difficult.").

44. Other factors, such as the cost of campaigning—both financial and personal—and underlying attitudes about the role of government, also influence who runs for office. *See, e.g.*, Timothy Besley, *Paying Politicians: Theory and Evidence*, 2 J. EUR. ECON. ASS'N 193, 213 (2004) ("In thinking about what makes office holding valuable, wages may not be of first order importance. . . . [I]t is likely that the selection and discipline of politicians depend importantly on the costs and benefits of public life."); Sollars, *supra* note 4, at 508 ("While legislative compensation may not be the most important factor motivating the decision to seek (or attempt to retain) legislative office, it is reasonable to assume that purely financial concerns are meaningful to legislators.").

45. *Cf.* Anderson & Helland, *supra* note 22, at 1280 n.8, 1282 (discussing the challenge of measuring how salaries affect "quality" in the context of judicial compensation and noting that "[e]conomic theory is indeterminate with respect to predictions about how salaries will affect the quality of judges").

46. *See* SQUIRE & MONCRIEF, *supra* note 22, at 65-73; Sollars, *supra* note 4, at 507-10; *see also* Peverill Squire, Hicks & Martha Griffiths Chair in Am. Political Insts., Dep't of Political Sci., Univ. of Mo., Testimony to the New York State Commission on Legislative, Judicial, and Executive Compensation 1-3 (July 22, 2016), https://perma.cc/LYA4-2ES5 (discussing the history of debates over state legislative pay and noting that "the current questions facing the [state compensation] commission are of longer standing than most realize"). *See generally* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940 (2013) (discussing the compensation of elected officials).

Finally, this Article's analysis of city council compensation procedures and its suggested reforms are primarily limited to midsize and large cities because city councilmembers' role in these types of cities is likely to be qualitatively different from their role in small cities. Small cities may be more susceptible to budget constraints and local norms that may swamp the effect of compensation of elected leaders. As a result, membership on the city council in small cities may be considered a quasi-volunteer role: The position is often unpaid or provides a de minimis stipend, and members are expected to devote only a few hours a month to council responsibilities.[47] Thus, the types of over- and undercompensation distortions this Article identifies may be less likely to manifest themselves in such cities, and structural reforms may not be as necessary.[48]

This Article proceeds in three Parts. Part I begins with a descriptive account of city councils, highlighting their distinctive features and functions. Part I also analyzes the "how much" question by examining empirical data on city council compensation. It then pivots to the "how" question, outlining the various procedures used to set city council compensation and situating them in a broader context by providing a comparison to compensation-setting methods used for legislative bodies at the federal and state levels. Part II grapples with the normative implications of city council compensation procedures, unpacking theories of legislative compensation and analyzing how existing procedures for city council pay can distort compensation outcomes. Part III explores the governance possibilities for improving the institutional design of city council compensation procedures and identifies specific structural reforms that can reduce over- and undercompensation distortions. Part III also considers the second-order institutional design question of which level of government—state or local—is best suited to implement those procedures.

47. *See infra* notes 94-96 and accompanying text (discussing an example of a small city with such characteristics).

48. Even in smaller cities, however, some compensation-setting procedures may be more problematic than others. For example, procedures that give the city council control over its own members' pay—even if that pay is relatively minimal—still offer the opportunity for those councilmembers to engage in self-dealing as described in Part II.B below. Thus, this Article's discussion of structural reforms in Part III below may still be worth considering even in small cities. Furthermore, small cities can grow into midsize cities, and a one-time quasi-volunteer council with de minimis pay may evolve into one that requires increasing time and attention from councilmembers, as has occurred in growing cities like Spokane, Washington. *See infra* notes 228-33 and accompanying text. When and if this evolution occurs, a reexamination of compensation procedures may be appropriate.

I. City Council Compensation

This Part begins with an overview of city councils in Subpart A, highlighting their distinctive features and functions, as well as their role in local governance. Subpart B then considers the "how much" question, analyzing the components and determinants of city council compensation and providing empirical data. Finally, Subpart C turns to the "how" question. It outlines the various procedural mechanisms used to set city council compensation and provides a comparison with methods used for federal and state legislative compensation.

A. City Council: Forms and Functions

City councils are the legislative engine of local government. They have a vast range of responsibilities, from determining how tax revenues are spent to making decisions about long-term debt to overseeing the performance of public employees.[49] Pursuant to a city's police powers, city councils enact a range of public health, safety, and welfare measures, often extending beyond their traditional role of managing public goods such as education and infrastructure and into areas as diverse as environmental regulation, campaign finance reform, and consumer protection.[50]

While city councils are in some ways analogous to federal and state legislative bodies, there are three key differences between city councils and other types of legislative bodies. First, unlike at the state and federal levels of government, there is no constitutionally mandated separation of powers at the local level: City councils perform both legislative and nonlegislative functions.[51] States have the ability to dictate the exact contours of separation of powers required for local governments, and the approaches taken vary from state to state. Some states require separation of powers for certain local governmental bodies. For example, if a municipality adopts a particular form of government—such as a council-manager system—then, under state law, it may be subject to certain separation of powers requirements.[52] In other states,

49. *See* BRIFFAULT & REYNOLDS, *supra* note 33, at 2 (discussing the scope of state and local government responsibilities).

50. *See supra* notes 33-39 and accompanying text.

51. *See* 1 MARTINEZ, *supra* note 25, § 9:7 (noting that under their plenary legislative authority, state legislatures may, but need not, create separate branches of local government by statute); *see also* Kellen Zale, *Changing the Plan: The Challenge of Applying Environmental Review to Land Use Initiatives*, 40 ECOLOGY L.Q. 833, 849 & n.89 (2013) (discussing city councils' legislative and nonlegislative roles in the land use context).

52. *See, e.g.*, UTAH CODE ANN. § 10-3b-201 (LexisNexis 2017) ("The powers of municipal government in a municipality operating under the council-mayor form of government are vested in two separate, independent, and equal branches of municipal government consisting of: (1) a council . . . ; and (2) a mayor . . . .").

courts have explicitly rejected the separation of powers doctrine at the local level[53] and, as a result, local legislative bodies may engage in executive, administrative, and quasi-judicial activities.

Second, local legislative elections often are nonpartisan, a stark departure from congressional and most state elections; almost 70% of cities have nonpartisan elections.[54] Nonpartisan elections originated as a Progressive Era reform to limit the influence of party machine systems in cities and focus attention on managerial, not political, issues.[55] However, nonpartisan elections have also been criticized as contributing to low voter turnout, advantaging incumbents, and leaving "[v]oters deprived of easy access to partisan cues[, which leads them to] give much more weight to candidates' race, ethnicity, religion, and social status."[56]

A third difference between city councils and other types of legislative bodies is that local governments are structured in a number of different forms. The forms vary both in how powers are distributed between elected representatives and appointed professionals and in how much power the elected council has as compared to the elected mayor. The governing structure of cities typically falls within one of four forms: mayor-council, council-manager, commission, or town meeting.[57]

The mayor-council form of government is used in approximately one-third of U.S. cities, particularly larger ones.[58] Under this form of government, the mayor is elected separately from the council and typically has significant budgetary and administrative authority.[59] The elected city council holds legislative authority.[60]

---

53. *See, e.g.*, Moreau v. Flanders, 15 A.3d 565, 579 (R.I. 2011) ("After considering the arguments raised by the parties, we hold that the separation of powers doctrine is a concept foreign to municipal governance.").

54. Elmendorf & Schleicher, *supra* note 28, at 385.

55. *See* Nancy Northup, Note, *Local Nonpartisan Elections, Political Parties and the First Amendment*, 87 COLUM. L. REV. 1677, 1681 (1987) (discussing the history and goals of nonpartisan local elections).

56. *See* Elmendorf & Schleicher, *supra* note 28, at 386; *see also* David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 421 (2007).

57. *See Forms of Municipal Government*, NAT'L LEAGUE CITIES, https://perma.cc/Y6B2-VYES (archived Feb. 2, 2018). In addition to differences in government structures, there are also differences in the role of local agencies and how they interact with other branches of local government. For a thorough analysis of local agencies, see Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564 (2017).

58. *See Forms of Municipal Government*, *supra* note 57.

59. *Id.*

60. *See id.* The city council may also hold administrative or quasi-judicial powers, depending on relevant state law and charter provisions. *Cf.* Zale, *supra* note 51, at 849

footnote continued on next page

The council-manager form of government is used in over half of all cities, particularly small and midsize cities.[61] Like nonpartisan elections, this form of government developed during the Progressive Era as an attempt to depoliticize local government.[62] The city council is elected and has budgetary, administrative, and legislative authority.[63] The council is responsible for hiring a professional manager who oversees the administrative operations of the city.[64]

Council-manager and mayor-council forms of government can be characterized as either "strong mayor" or "weak mayor" systems. Strong mayors tend to be associated with the mayor-council form of city government, and weak mayors with the council-manager form.[65] The terms "distinguish[] the level of political power and administrative authority assigned to the mayor in the municipal charter."[66] There is no clear division separating the two "but rather a continuum of authority and power along which cities are spread."[67] Strong mayors typically have authority to supervise city agencies and the power to appoint or remove agency heads, as well as veto power over council legislation.[68] In cities with a council-manager structure, the mayor is often considered a weak mayor, but the precise role of the mayor varies[69]: In some cities, the mayor is independently elected, while in others, she is chosen from a rotation of city councilmembers and plays a largely ceremonial role.[70]

(describing how in the context of land use decisions, city councils may perform both legislative and nonlegislative functions).

61. *See Forms of Municipal Government*, *supra* note 57.

62. *See* Harold Wolman, *Local Democratic Institutions and Democratic Governance*, *in* THEORIES OF URBAN POLITICS 135, 138-39 (David Judge et al. eds., 1995) ("A city is a great business enterprise whose stockholders are the people . . . . Our municipal affairs would be placed upon a strict business basis and directed, not by partisans either Republican or Democratic, but by men who are skilled in business management . . . ." (quoting RICHARD J. STILLMAN II, THE RISE OF THE CITY MANAGER: A PUBLIC PROFESSIONAL IN LOCAL GOVERNMENT 8 (1974), in turn quoting John N. Patterson, Progressive Era reformer)).

63. *See* Int'l City/Cty. Mgmt. Ass'n, Council-Manager Form of Government: Frequently Asked Questions 3-4 (n.d.), https://perma.cc/8SFV-CXHX.

64. *See id.* at 2-3.

65. *Mayoral Powers*, NAT'L LEAGUE CITIES, https://perma.cc/TUD9-S9QE (archived Feb. 2, 2018).

66. *Id.*

67. *Id.*

68. *See id.*

69. *See id.*

70. *See* Evelina R. Moulder, *Municipal Form of Government: Trends in Structure, Responsibility, and Composition*, *in* 75 THE MUNICIPAL YEAR BOOK 2008, at 27, 31-32 (Int'l City/Cty. Mgmt. Ass'n ed., 2008) (describing the different responsibilities and authorities of chief elected officials, such as mayors); *Roles and Responsibilities of Local Government Leaders*, MUN. RES. & SERVS. CTR., https://perma.cc/H4XS-VBQX (last modified Mar. 30, 2017)

footnote continued on next page

Furthermore, the mayor in some council-manager cities may have full voting rights on city council or may only have power to break a tie.[71]

Approximately 90% of U.S. cities use either the council-manager or the mayor-council form of government.[72] Other forms of local government include the commission and town meeting.[73] In a commission form of government, the city is governed by an elected commission, with no elected executive or appointed professional manager.[74] The commission has both legislative and executive functions, and each member is responsible for a specific aspect of city governance (such as fire, police, or public works).[75] In a town meeting form of government, all eligible voters make decisions about policy, either directly or through elected selectmen.[76]

Local legislative bodies not only differ from analogous federal and state legislative bodies but also vary from city to city. In addition to the formal legal structures that distinguish city councils from each other, city councils can be distinguished in a number of other legally relevant ways, which may or may not be a matter of formal legal status.

For example, city councils can be characterized as professional or nonprofessional. Professionalism refers to "the extent to which a legislature can command the full attention of its members, provide them with adequate resources to do their jobs in a manner comparable to that of other full-time political actors, and set up organizations and procedures that facilitate lawmaking."[77] In the state legislative context, researchers have focused on four factors as indicators of professionalism: "the amount of staff and other forms of support, length of session, turnover, and level of compensation."[78] "[M]ore

(describing the varying roles and responsibilities of mayors in council-manager cities in Washington state).

71. *See* Moulder, *supra* note 70, at 31-32. For an example of a city where the mayor provides a tiebreaking vote, see Rachel Sapin, *Lawmakers Say Council Job Descriptions Should Come Before Raises*, AURORA SENTINEL (Aurora, Colo.) (updated May 8, 2014, 10:09 AM), https://perma.cc/E4BE-W4BD.

72. *See Forms of Municipal Governments*, *supra* note 57.

73. *See id.*

74. *See id.*

75. *Id.* While commissions thus differ structurally from city councils, this Article's analysis of compensation procedures is generally applicable because they otherwise function similarly.

76. *See id.*

77. James D. King, *Changes in Professionalism in U.S. State Legislatures*, 25 LEGIS. STUD. Q. 327, 328-29 (2000) (quoting Christopher Z. Mooney, *Citizens, Structures, and Sister States: Influences on State Legislative Professionalism*, 20 LEGIS. STUD. Q. 47, 48-49 (1995)).

78. *See* Sollars, *supra* note 4, at 508; *see also* Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 649 (2001) ("[P]rofessionalism may be difficult to define precisely, but one key operational definition concerns whether state legislatures are made up of

footnote continued on next page

support [staff], longer sessions, less turnover, and higher pay are [all] . . . indicators" of professional state legislatures.[79]

Those factors can also be used to gauge the professionalism of city councils, with the number of regular and special meetings per month standing in for length of legislative session. As a general matter, larger cities tend to have more professional city councils because larger cities face more complex policy decisions, requiring more time and resources.[80]

Relatedly, councils may be categorized as either full-time or part-time. City councils characterized as professional are also likely to be considered full-time.[81] However, the categories are not coextensive. For example, the Chicago City Council could be considered part-time because members can maintain outside employment, but it could also be considered professional because members receive significant compensation—$109,000 annually—and have a relatively long average tenure of thirteen years.[82]

---

professional politicians charged with the responsibility to meet regularly and to conduct legislative business as their principal avocation.").

79. *See* Sollars, *supra* note 4, at 508.

80. *Cf.* George F. Carpinello, *Should Practicing Lawyers Be Legislators?*, 41 HASTINGS L.J. 87, 126 (1989) ("As the issues facing state legislatures become more numerous and complex, the legislatures become more institutionalized. Larger staffs, longer sessions, and more responsibility delegated to committees are required to increase institutional capacity." (footnote omitted)); King, *supra* note 77, at 334-36 (developing a model for assessing the professionalism of state legislatures and linking the model to factors relating to "the complexity of problems facing the legislature" and the resulting devotion of more time and resources).

81. There is, however, a lack of definitional clarity around what is considered "part-time" versus "full-time" in the legislative context. *See Full- and Part-Time Legislatures*, NAT'L CONF. ST. LEGISLATURES (June 14, 2017), https://perma.cc/9DZ2-NQGF ("It seems like an easy question: Which legislatures are full-time and which ones are part-time? But with 50 different formulas for designing a state legislature, it's difficult to paint this issue in black and white."). Part of the definitional difficulty stems from the fact that elected officials are typically not considered government employees. *See, e.g.*, CHICAGO, ILL., MUN. CODE § 2-152-140(b)-(c) (2017) (defining "[e]mployees" as "individuals employed by the City of Chicago, either full-time or part-time," and separately defining "[e]lected officials" as "the mayor, city clerk, city treasurer, and aldermen of the City of Chicago"); Karen Murphy, *County Commissioners: Full- or Part-Time?*, TALLAHASSEE REP. (Apr. 25, 2017), https://perma.cc/E499-H3B4 (noting that a Florida county's "commission positions are not specified as full- or part-time" in the county's charter or in any "ordinance or Florida statute because the commissioners are not employees[;] they are elected officials"). Furthermore, there is often no official designation of full- or part-time status for members of local legislative bodies, and so proxies such as professionalism, permissibility of outside employment, and level of compensation can be used to categorize the position as full- or part-time.

82. *See* PHILA. RESEARCH INITIATIVE, PEW CHARITABLE TRS., CITY COUNCILS IN PHILADELPHIA AND OTHER MAJOR CITIES: WHO HOLDS OFFICE, HOW LONG THEY SERVE, AND HOW MUCH IT ALL COSTS 3 fig.1, 10 fig.7 (2011), https://perma.cc/TC3M-LUMX. City councilmembers themselves may be uncertain whether their positions are considered full- or part-time: In my own telephone poll of several Chicago aldermen's offices on

footnote continued on next page

Furthermore, official designations of full- or part-time status may fail to accurately reflect the duties and responsibilities of the position. Many officially part-time councilmembers would contend that the time commitment and responsibilities are closer to full-time. As the National Association of Counties advises potential candidates for county commissioner: "[T]he position is a part time job; at least that is what they tell you. But the reality is that as an elected official you are on duty and on call for 24 hours a day."[83] While more populous cities and counties are likely to require greater time commitments from their councilmembers, local legislators in midsize municipalities often express similar sentiments.[84]

A number of other features of city councils vary widely across cities, including the number of members, ratio of residents per member, expenditures per member, average number of regularly scheduled meetings per month, average number of additional special meetings per month, nonsalary forms of compensation, whether there are term limits and what they are, whether outside employment is permitted and whether there are any limits on it, whether elections are partisan or nonpartisan, and whether elections are by district or at large. Many of these differences across city councils reflect variations across cities, such as differences in population, annual budgets, and

whether the position is full- or part-time, three indicated that the position was full-time; two indicated it was part-time; and one indicated it was part-time but with full-time hours. Telephone Interview with the Office of Michelle Harris, Alderman, Ward 8, City of Chi. (Sept. 28, 2017) (full-time); Telephone Interview with the Office of Brian Hopkins, Alderman, Ward 2, City of Chi. (Sept. 29, 2017) (full-time); Telephone Interview with the Office of Harry Osterman, Alderman, Ward 48, City of Chi. (Sept. 28, 2017) (full-time); Telephone Interview with the Office of Willie Cochran, Alderman, Ward 20, City of Chi. (Sept. 28, 2017) (part-time); Telephone Interview with the Office of Joe Moreno, Alderman, Ward 1, City of Chi. (Sept. 27, 2017) (part-time); Telephone Interview with the Office of Daniel Solis, Alderman, Ward 25, City of Chi. (Sept. 28, 2017) (part-time with full-time hours).

83. Jacqueline J. Byers, Nat'l Ass'n of Ctys., What Do County Commissioners Do All Day? 2 (2008), https://perma.cc/PB6U-7G7H.

84. *See* Chris Suarez, *City Council Approves Pay Raise, Taking Its Salaries to Maximum*, DAILY PROGRESS (Charlottesville, Va.) (May 2, 2017), https://perma.cc/RQH8-ZR4D (reporting that a council member of Charlottesville, Virginia stated that "being a councilor is a 40-hour-a-week job, given the demand from constituents and time required to research policy proposals"); Daniel Walters, *How Spokane City Council Members Changed Their Tune on Council's Role, Salaries*, INLANDER: BLOGLANDER (Spokane, Wash.) (Mar. 31, 2016, 10:31 AM), https://perma.cc/HT4E-37RK ("This is a bigger than a full-time job masquerading as a part-time job . . . . It takes time and effort and energy and hours to do it effectively." (emphasis omitted) (quoting Jon Snyder, member of the Spokane City Council)); *cf.* Chad Lawhorn, *Lawrence City Commissioners to Consider Increasing Commission Pay*, LAWRENCE J.-WORLD (Dec. 16, 2013), https://perma.cc/NY3P-XNDK (reporting that an officially part-time city commission member of Lawrence, Kansas "said the job is time consuming" and that "[i]t doesn't take very many issues before you are spending 20 to 30 hours per week at it" (quoting Mike Amyx, Lawrence City Commissioner)).

home rule status. The next Subpart considers how differences in these and other distinguishing characteristics of cities and city councils affect the amount of compensation city councilmembers receive.

B. The Question of How Much: Compensation Amounts

This Subpart examines empirical data on city council compensation amounts. While the question whether specific compensation amounts are the "right" amounts for specific cities is beyond the scope of this Article, this Subpart's discussion of the components and determinants of compensation provides context for its primary analysis of the procedures used to set compensation.

The salaries of city councilmembers in the United States vary enormously. To illustrate this extensive variation, I prepared a supplement setting out empirical data on city council compensation for the 100 most populous cities in the United States.[85] In the ten largest cities, annual salaries range from a high of about $179,000 in Los Angeles to a low of about $46,000 in San Antonio.[86] While differences in population and budgets—and the likely corresponding differences in councilmembers' responsibilities—may account for some differences in pay, cities with similar objective characteristics may pay vastly different salaries. For example, Milwaukee, Wisconsin and Memphis, Tennessee are both midsize cities with populations roughly between 600,000 and 650,000, mayor-council forms of government, and similar total numbers of councilmembers.[87] Yet city councilmembers in Milwaukee make about $73,000 annually, while those in Memphis are paid about $29,000.[88]

While the disparities in city council compensation present a complex issue that remains to be explored in future research, to some extent, differences in city council compensation should not be surprising if one considers how vastly different cities are. For example, Houston, Texas, the fourth-largest city in the nation, has 2.3 million residents across 600 square miles.[89] It is a charter city

85. *See* Data Supplement, *supra* note 24.

86. *See id.*

87. *See id.*

88. *See id.*

89. *See QuickFacts: Houston City, Texas*, U.S. CENSUS BUREAU, https://perma.cc/3B5C-PHF5 (archived Feb. 2, 2018); *see also* Data Supplement, *supra* note 24.

with broad home rule powers.[90] Its city council has sixteen members,[91] resulting in a ratio of approximately 144,000 residents per councilmember. The council meets twice a week year-round, with additional meetings for committees and special sessions.[92] City council salaries in Houston, Texas are $62,983 annually.[93]

Compare this to the city of Houston, Alaska, which has about 2000 residents, is 22.4 square miles, and is a general law city without home rule powers.[94] Its city council meets once a month and is made up of seven members (including the mayor, who is a member of the council), resulting in a ratio of roughly 300 city residents per member.[95] City councilmember compensation is $25 per meeting attended, resulting in an annual salary of $300 if the city council meets for only its twelve regularly scheduled meetings.[96]

A city like Houston, Texas, with its massive infrastructure and population, is vastly different from Houston, Alaska. Thus, we would reasonably expect councilmembers to be paid differently to reflect differences in the complexity of their jobs, in the extent of their responsibilities, and in the range of services they are responsible for overseeing. While assigning causality (or even correlation) is difficult without additional statistical analysis, a number of determinants are likely to affect how much city councilmembers in different cities are paid.

These determinants can be broadly broken down into two categories: characteristics of the city and characteristics of the council. Characteristics of

90. *See* TERRELL BLODGETT, TEXAS HOME RULE CHARTERS 2-3, 114-15 (Kelly McBridge & Scott Houston eds., 2d ed. 2010) (discussing the history and powers of home rule charter cities in Texas and listing those cities, including Houston); *see also* TEX. LOC. GOV'T CODE ANN. §51.072(a) (West 2017) (providing that home rule municipalities shall have full powers of self-government).

91. *City Council*, CITY OF HOUSTON, https://perma.cc/55XC-8X7C (archived Feb. 2, 2018). The Mayor of Houston presides over the city council and has voting privileges. *See Mayor's Office*, CITY OF HOUSTON, https://perma.cc/YH72-D6FE (archived Feb. 2, 2018).

92. *See City Council: Meetings Information, Etc.*, CITY OF HOUSTON, https://perma.cc/7CXP-AB9D (archived Feb. 2, 2018); *see also City Council Committees and Agendas*, CITY OF HOUSTON, https://perma.cc/MCX5-ZNV2 (archived Feb. 2, 2018) (providing links to agendas for committee meetings separate from meetings of the full council).

93. *See* Data Supplement, *supra* note 24.

94. *See About Us*, HOUSTON, ALASKA, https://perma.cc/WTM7-YEG8 (archived Feb. 2, 2018). Houston, Alaska is classified as a "second-class city." *Id.* In Alaska, second-class cities "are general-law cities." *See* Alaska Dep't of Commerce, Cmty. & Econ. Dev., Local Government in Alaska 3 (2015), https://perma.cc/3ENH-C3TG.

95. *See Houston City Council*, HOUSTON, ALASKA, https://perma.cc/2N5Y-6BVP (archived Feb. 2, 2018).

96. *See* HOUSTON, ALASKA, MUN. CODE § 2.04.050(B) (2018) ("Council members shall be compensated $25.00 for each regular meeting, special meeting, or work session attended.").

the city include factors such as population, median income, annual operating budget, form of local government, whether it is a home rule (or charter) city, regional location, cost of living, and partisan characterization. Characteristics of the council include factors discussed in Part I.A above, such as number of members, full-time or part-time status, and whether outside employment is allowed. These factors are not meant to be exhaustive but are representative of the types of objective characteristics that likely affect the amount of city council pay.

Further complicating the question of city council compensation is the fact that overall compensation includes not only salary but also a variety of other components, such as committee stipends, travel allotments, pensions, and other forms of nonsalary compensation. Nonsalary forms of compensation make it "remarkably difficult to get a coherent picture" of elected officials' overall compensation.[97] The difficulty stems in large part from the fact that nonsalary components of compensation are not standardized: Whether a particular nonsalary component is offered varies widely by city.[98] Furthermore, nonsalary forms of compensation are not only city specific but also councilmember specific. For example, pension benefits, if made available to city councilmembers on the same terms as other public employees, typically vest only after a public employee has served a specified number of years; thus,

97. *See* Besley, *supra* note 44, at 198; Brian Libow, City Council Salaries and Benefits 1 (2011), https://perma.cc/Z63S-3ZYJ ("[T]he various statutes that govern these matters form a nearly incomprehensible morass of ambiguous and seemingly contradictory provisions.").

98. My empirical research into nonsalary forms of compensation found wide variation across cities and no standardized format or location in which information about nonsalary compensation is disclosed. Types of nonsalary compensation include allowances or stipends for technology, travel, housing, and other expenses; medical, dental, and life insurance; and retirement benefits. *See, e.g.*, Charlotte, N.C., Mayor & Council Compensation and Benefits 1 (n.d.), https://perma.cc/CZQ4-RNWR (noting that in addition to their salaries, city councilmembers receive an expense allowance of $5800, a vehicle allowance of $4000, and a technology allowance of $3100 and are eligible for insurance and retirement plans); *Compensation and Benefits Information*, CITY OF LOS ALTOS, CAL., https://perma.cc/T8GS-6F47 (archived Feb. 15, 2018) (noting that city councilmembers do not receive salaries or retirement benefits but do receive a monthly stipend and are eligible for dental and medical insurance); *Mayor/City Council/Executives Compensation*, FONTANA, CAL., https://perma.cc/P5CS-4WUW (archived Feb. 15, 2018) (noting that city councilmembers receive a $1170 monthly stipend, a $50 per meeting housing stipend, and a $100 per meeting "Fire District" stipend).

State legislative compensation is similarly nonuniform. *See* Sollars, *supra* note 4, at 511 ("Compensation for a legislator can take many forms. For example, some states use an annual salary and others a per diem salary. Most states pay extra for special sessions. Travel, housing during the session, and other expenses are generally reimbursed. A few states also have some form of annual expense allowance . . . . The best measure of a legislator's compensation would be a postsession accounting, perhaps using an IRS definition of income. Unfortunately, these data do not exist for all states.").

even within the same city, some councilmembers may be entitled to this form of compensation, while others may not.[99]

C. The Question of How: Compensation Procedures

Building on the discussion in the previous two Subparts about what city councils do and how much they are paid to do it, this Subpart outlines the procedures used to determine councilmembers' compensation. It begins with a discussion of the threshold issue whether compensation procedures are a matter of state or local law. It then discusses the four most prevalent methods used to set city council compensation: city council control, use of independent commissions, benchmarking systems, and referenda. Finally, this Subpart closes by situating these mechanisms within the broader legal context by comparing them to procedures used to set congressional and state legislative compensation.

1. Procedural mechanisms: city council compensation

City council compensation may be set through a variety of procedures, which themselves can be established as a matter of state law, local law, or a combination of the two.

a. Threshold issue: state or local control

The procedures used to set city council compensation may be implemented as a matter of state or local law. At first glance, it may seem odd that state law could potentially determine compensation for local legislative bodies. After all, Congress does not tell California or New Hampshire how to compensate their state legislatures. However, as this Subpart will make clear, the state-local relationship is different from the federal-state one, and states can dictate to local governments how to determine compensation for city councils, although states may choose to leave the issue up to local governments.

99. *See, e.g.*, City of Norwalk, City Council Members Summary of Benefits 1 (2012) https://perma.cc/454N-ZVD6 (providing different formulas calculating pension benefits for councilmembers in Norwalk, California depending on what date they were elected to office); *see also* Dustin Gardiner, *Phoenix Council's Spending on Staff Varies Widely*, ARIZ. REPUBLIC (updated Apr. 30, 2014, 11:56 AM MT), https://perma.cc/V2W6-SZ3B (noting that some city councilmembers in Phoenix had "voluntarily given up their cell phone or car allowance"); Ann Doss Helms, *Are Mecklenburg Commissioners Worth Twice as Much as CMS Board Members?*, CHARLOTTE OBSERVER: YOUR SCHS. (updated June 21, 2016, 5:26 AM), https://perma.cc/GM45-F675 ("Tallying [the total amount of a proposed compensation increase for county commissioners] gets tricky because most of it involves changes in expense allowances. That means the actual increase to taxpayers . . . depends on how much [the commissioners are] spending now and what they spend next year.").

As a matter of federal constitutional law, local governments are nonentities. There is no equivalent to the Tenth Amendment[100] for local governments; unlike states' relationships with the federal government, local governments' relationships with their state governments receive no formal federal constitutional protections. Local governments are considered creatures of the state,[101] and the state has broad power to shape, control, and even eliminate them.[102]

This top-down view of local government has meant that local power has traditionally been viewed narrowly: Unless explicitly authorized by the state, local governments have been presumed not to have the power to act.[103] However, the value of local autonomy has long been recognized, and most states grant significant autonomy to local governments, primarily through home rule.[104] Home rule refers to the delegation of power by the state to local

100. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

101. *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State."). Under *Hunter*, a state could theoretically decide not to have any local governments at all and to administer all services from the state level. *See id.* at 178-79.

102. *See id.* at 178-79; *see also* City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923) ("In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self government which is beyond the legislative control of the State. A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit." (footnote omitted)). Subsequent cases have narrowed the seeming absoluteness of a state's power over its localities to make clear that the state cannot engage in actions that otherwise violate the federal Constitution. *See* Gomillion v. Lightfoot, 364 U.S. 339, 342 (1960) ("We freely recognize the breadth and importance of this aspect of [a] State's political power. [But t]o exalt this power into an absolute is to misconceive the reach and rule of this Court's decision[] in the leading case of *Hunter*. . . .").

103. *See* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (1990) (discussing the top-down view of local government). This view of limited local autonomy is also reflected in Dillon's Rule, which provides that municipal corporations possess and can exercise only the following powers: those expressly granted, those necessarily implied by the powers expressly granted, and those essential to accomplish the purposes of the corporations. *See* BRIFFAULT & REYNOLDS, *supra* note 33, at 327. Under Dillon's Rule, doubts about existence of power are resolved against the municipality. *See id.*

104. *See* Richard C. Schragger, *Can Strong Mayors Empower Weak Cities?: On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2557 (2006) (noting that different "conceptual and descriptive accounts of local power can co-exist" and that "[a]s a formal matter, cities in the United States enjoy a significant amount of legal autonomy"). In addition to a broad grant of home rule authority, states can also empower local governments through specific grants of authority. *See* Briffault, *supra* note 103, at 10.

governments.[105] The parameters of home rule vary, depending both on the type of home rule authority granted by the state and on how courts interpret the scope of the authority.

With regard to the types of home rule, home rule can either be *legislative* or *imperio*.[106] Under legislative home rule, local governments are broadly delegated authority to act unless the state specifically prohibits action.[107] However, while local governments are free to act on any matter under this type of home rule, they may still be preempted if the state chooses to do so.[108] Under imperio home rule, local governments are granted the authority to act on "municipal affairs" only.[109] Thus, these cities have a narrower range of affairs on which to act than cities in legislative home rule states.[110] However, in imperio home rule jurisdictions, for those subjects determined to be exclusively municipal affairs the normal rules of preemption are inverted: If the local government acts in an area of exclusively municipal concern, it cannot be preempted by conflicting state law.[111]

While this inversion of supremacy rules in imperio home rule jurisdictions offers a potential sphere of immunity for certain local actions, the scope of immunity depends on how courts construe what is exclusively local.[112]

105. To assert home rule powers, typically a local government must enact a charter; thus, home rule cities are sometimes referred to as charter cities. *Cf.* League of Cal. Cities, General Law City v. Charter City 1 (n.d.), https://perma.cc/54XH-GUH3 (noting that charter cities control their own affairs).

106. *See* BRIFFAULT & REYNOLDS, *supra* note 33, at 346-51. But many states combine aspects of each into a kind of "hybrid" home rule. *See id.* at 348-51.

107. *See id.* at 348.

108. *See id.* Examples of state preemption of local action abound. *See, e.g.*, MINN. STAT. § 471.633 (2017) ("preempt[ing] all authority of a home rule" city to regulate firearms except as expressly provided); Connors v. City of Boston, 714 N.E.2d 335, 340, 342 (Mass. 1999) (holding that Massachusetts state law expressly preempted Boston from providing health insurance benefits to same-sex couples).

109. *See* BRIFFAULT & REYNOLDS, *supra* note 33, at 347-48.

110. *See id.*

111. *See id.* at 347; *see also, e.g.*, State Bldg. & Constr. Trades Council v. City of Vista, 279 P.3d 1022, 1024, 1034 (Cal. 2012) (holding that a local government's determination of wages for contracts for the construction of local public buildings was not preempted by the state's prevailing wage law because the issue was a matter of local, not statewide, concern). *But see* BRIFFAULT & REYNOLDS, *supra* note 33, at 347 (noting, however, that in practice courts tend to narrow the scope of things that are purely municipal concerns and thus limit the power of municipalities relative to the state).

112. *See* Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. U. L. REV. 1271, 1276 n.32 (2009) ("The scope of [home rule] immunity varies among the imperio states. In Colorado, for instance, home rule immunity from conflicting state legislation extends to all matters deemed exclusively local—while in Oregon the immunity is much narrower." (citation omitted)); *see also* 1 SANDRA M. STEVENSON & WENDY VAN WIE, ANTIEAU ON LOCAL GOVERNMENT LAW § 21.02 (2d ed. LexisNexis

footnote continued on next page

Some imperio home rule states interpret local affairs very broadly, such that the concept seemingly covers as many areas as a legislative home rule delegation.[113] Other states construe municipal affairs more narrowly, such that local governments are left with only a narrow area in which to legislate free from preemption.[114]

An obvious tension exists between the top-down view of state control over local government and local autonomy under home rule. This tension can be seen playing out in an array of state-local conflicts around local governments' authority to regulate issues ranging from ridesharing to plastic bags to gender discrimination protections.[115] With regard to city council compensation procedures, however, the tension has resulted less in outright conflicts and more in a variety of possible legal bases of authority for the procedures.

Thus, city council compensation procedures may be set by local law, if a state has delegated to local governments broad authority to act through home rule or specific authority to act on compensation procedures. For example, in some states, home rule cities are free to determine what procedures to use for city council compensation.[116]

Conversely, state law may set out the specific requirements for city council compensation-setting procedures. For example, California law dictates the procedures used to determine city council compensation for general law (that is, non-home rule) cities: State law sets out a compensation formula based on city population, with a cap on how much salaries can increase per year, and allows for an optional citizen vote.[117] In contrast, California state law imposes no specific requirements with regard to council salary in charter (home rule)

2017) ("[T]he most important thing to understand about the concept of 'matters of local concern' and 'matters of statewide concern' is that there are no definitions, lists, or standard analyses. . . . Every State court with an imperio provision has developed its own factors to apply to reach that conclusion, on a case by case basis, and there can be much confusion and inconsistency."). Courts often focus on uniformity and externality concerns in determining what is local. *See infra* note 332 and accompanying text.

113. *See, e.g.*, Reynolds, *supra* note 112, at 1276 n.32.

114. *See id.*

115. *See, e.g.*, Ross Ramsey, *Analysis: A Week to Test Local Powers in Texas*, TEX. TRIB. (Mar. 13, 2017, 12:01 AM), https://perma.cc/5NGY-AZPM (discussing state-local conflicts in Texas).

116. *See, e.g.*, CAL. CONST. art. XI, § 5(b) (providing that charter cities have the authority to determine how municipal officers whose compensation is paid by the city are compensated); Loux v. City of Lakewood, 193 N.E.2d 710, 713 (Ohio Ct. App. 1963) (rejecting a challenge to an ordinance increasing city councilmembers' compensation during their terms because the council acted "in a manner prescribed by" the city's charter and thus "was rightfully exercising the powers of local self-government").

117. *See* CAL. GOV'T CODE § 36516 (West 2017).

cities, leaving the decision about compensation rules to individual charter cities.[118]

As the California example illustrates, states may delegate authority on the issue of city council compensation to some local governments but not to others. Typically, home rule local governments are given authority to set their procedures for city council compensation while general law cities' council compensation procedures are set by state law. For example, Minnesota state law authorizes only one specific compensation procedure for most cities: City councils are required to determine compensation for themselves at a level deemed "reasonable," with any changes taking effect after the next election.[119] However, state law gives certain home rule cities the choice of using other procedures.[120]

City council compensation-setting procedures are frequently a combination of state and local law. The level of control retained by the state can vary. State control may be fairly minimal. For example, Texas law provides that city councils in home rule cities "may" set compensation but does not require that they do so,[121] leaving open the possibility that a home rule city's charter may set out an alternate procedure.[122] Similarly, in Minnesota, state law mandates that city council compensation not include provisions for vacation or sick leave; otherwise, home rule cities of the first class have broad authority to determine their own city council compensation procedures.[123] Other states retain a more significant level of control over council compensation procedures while still giving limited authority to local governments. For example, Virginia law requires city councils in non-home rule cities to

118. *See* CAL. CONST. art. XI, § 5(b).

119. *See* MINN. STAT. § 415.11 subdiv. 1 (2017) ("[T]he governing body of any statutory or home rule charter city of the second, third or fourth class may by ordinance fix their own salaries . . . in such amount as they deem reasonable."). For first-class home rule cities, state law does not require any specific procedure. *See* Susan Naughton, *Changing City Council Salaries*, MINN. CITIES, Sept. 2002, at 39, 39 (noting that most home rule cities are authorized but not required to follow the statutory procedures for other cities).

120. *See* MINN. STAT. § 415.11 subdiv. 1 (imposing requirements only on second-, third-, and fourth-class home rule or statutory cities); Naughton, *supra* note 119, at 39.

121. *See* TEX. LOC. GOV'T CODE ANN. § 141.004 (West 2017).

122. *See* Christy Drake-Adams, Tex. Mun. League, Legal Q&A 1 (2014), https://perma.cc/TW2Z-UJFG.

123. *See* MINN. STAT. § 43A.17 subdiv. 10 (prohibiting vacation or sick leave but providing that elected officials' salaries "may not be diminished because of [their] absence from official duties because of vacation or sickness"); *id.* § 415.11.

determine their own salaries and sets out the maximum allowable amounts based on city population.[124]

As the Minnesota and Texas examples above illustrate, even where states broadly delegate authority to local governments to determine their own procedures for setting city council compensation, one common mandate of state law is that any changes in compensation not go into effect until after the next election. This type of requirement, which this Article refers to as an "election cycle delay rule," has also been adopted by local governments even when not required by state law.[125] Election cycle delay rules are not a standalone type of compensation-setting procedure but rather a very common feature of a number of compensation-setting mechanisms discussed below, including procedures used for congressional and state legislative compensation.[126] By introducing uncertainty about who the precise beneficiaries of any legislative salary increase will be, such rules represent an attempt to reduce the reality and appearance of self-dealing in setting compensation, particularly where the legislative body has control over its own members' salaries.[127]

b. Compensation-setting procedures

Having described how procedures used to set city council compensation may be a matter of state law, local law, or a combination of the two, I now turn to a discussion of the most prevalent procedures used to set city council compensation: city council control, independent commissions, benchmarking and other formulas, and referenda. For purposes of analytical clarity, each

124. *See* VA. CODE ANN. § 15.2-1414.6 (2017). Charter cities are exempt from the state law maximums and are permitted to compensate city councilmembers pursuant to their charter provisions. *See id.* § 15.2-1414.5.

125. *See, e.g.*, PALM COAST, FLA., CHARTER § 5(6)(a) ("The Council members . . . shall receive compensation as established by ordinance. Such compensation shall not take effect until the date of commencement of the terms of council members elected at the next regularly scheduled election that follows the adoption of said ordinance by at least six months.").

126. *See, e.g.*, U.S. CONST. amend. XXVII ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."); N.Y. CONST. art. III, § 6 ("Neither the salary of any member nor any other allowance [for service as an officer or in another special capacity] may be increased or diminished during, and with respect to, the term for which he or she shall have been elected . . . ."); VA. CONST. art. IV, § 5 ("The members of the General Assembly shall receive such salary and allowances as may be prescribed by law, but no increase in salary shall take effect for a given member until after the end of the term for which he was elected."). For further discussion of the Twenty-Seventh Amendment, see text accompanying notes 173-76 below.

127. *See* Adrian Vermeule, Essay, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 421 (2001) (discussing how the Twenty-Seventh Amendment prevents legislative self-dealing by delaying pay increases).

procedure is discussed separately. However, compensation-setting procedures may combine multiple mechanisms. For example, an independent commission might make recommendations that take effect only if affirmatively approved by the city council or through a referendum.[128] Or pay might be set through a benchmarking formula that gives the city council authority to set the specific amount within the prescribed formula while also giving citizens the option of holding a referendum on any proposed changes.[129] The impact of combining various mechanisms will be discussed further in Parts II and III below.

City council control: In many cities, city councils have unilateral or ultimate control over their own compensation. Ultimate control means that there may be other intervening procedural steps, but the city council has the final decisionmaking authority. For example, an independent commission may be required to make a nonbinding recommendation on council compensation, but if the city council still has the authority to decide whether to accept the recommendation, then the procedure gives the city council ultimate control. Even where state law broadly delegates control over compensation to the council itself, state law may still mandate some aspects of a procedure in which the city council has control over its own compensation. For example, changes in salary may not be permitted to take effect until after the next election—but otherwise, state law may largely delegate the issue to city councils to decide for themselves.[130]

The mechanics of city council control are fairly straightforward, even if the politics and normative implications of this type of procedure are not. In cities where the council has control over its own pay and can make any changes in its compensation, the council simply must pass an ordinance authorizing the changes. In some cities where city councils control their own compensation, there may be a potential check in the form of a mayoral veto. Mayoral vetoes are most likely to be available where there is a council-mayor form of government and a strong mayor.[131] In such cities, any ordinance passed by the city council—including an ordinance regulating its own pay—can be vetoed by the mayor. The salience of the mayoral veto may turn on political considerations rather than legal ones, with a mayor who is looking for support from the city council for her agenda presumably less likely to use the veto

128. *See infra* text accompanying notes 270-72.

129. *See, e.g.*, CAL. GOV'T CODE § 36516(a)-(b) (West 2017) (authorizing city councils to set salaries by ordinance subject to population-based maximums and authorizing voters to override a council's decision and the statutory maximums by referendum).

130. *See supra* notes 119-22 and accompanying text.

131. *See Mayoral Powers*, *supra* note 65.

power.[132] Furthermore, in many cities, councils can override a mayoral veto,[133] allowing the council to retain ultimate control over its compensation.

Independent commissions: Independent commissions have gained traction in a number of cities as a tool to attempt to take politics out of the issue of pay for elected officials.[134] Commissions may be authorized as a matter of state or local law.[135] Commission members may be appointed by elected leaders, selected through a lottery of voters, or determined through a combination of the two approaches.[136] The particular enabling legislation for the creation of an independent commission may also have requirements regarding members' professional background, race, gender, and political party to ensure diversity on the commission.[137] How regularly the commission convenes depends on the

132. *Cf.* Luke Broadwater & Paul McCardell, *Mayoral Vetoes: Sometimes Common, Sometimes Not*, BALT. SUN (Nov. 22, 2014, 12:18 AM), https://perma.cc/AR73-BQMS (discussing the political repercussions of mayoral vetoes).

133. The voting threshold for overriding a mayoral veto varies. *See* Mark Reutter, *City Council Votes Not to Challenge Mayor's Veto Power*, BALT. BREW (Mar. 30, 2015, 6:30 PM), https://perma.cc/9FKK-CDJ9 (noting that twenty-three of the twenty-five largest U.S. cities require a two-thirds vote or less to override a mayoral veto, while Baltimore requires a three-quarters vote).

134. *See* Amie Rose, *Provo City Council Considering New System for Their Raises*, UTAHVALLEY360 (Jan. 4, 2017), https://perma.cc/GG2X-HA6L ("Determining and giving yourself a raise is uncomfortable for council members everywhere . . . . 'An independent group is a positive way to accomplish it without it being overly political.'" (quoting Clifford Strachan, Executive Director of the Provo City Council)).

135. *See, e.g.*, WASH. REV. CODE § 35.21.015 (2017) (authorizing commissions as a matter of state law); SAN DIEGO, CAL., CHARTER art. V, § 41.1 (creating a commission as a matter of local law).

136. *See, e.g.*, PHOENIX, ARIZ., CHARTER ch. III, § 12(c) (providing for an independent commission's members to be appointed by the city council); SAN DIEGO, CAL., CHARTER art. V, §§ 41(b), 41.1 (providing for members of the Salary Setting Commission to be appointed by the Civil Service Commission, whose members are in turn appointed by the mayor); TACOMA, WASH., CHARTER art. II, § 2.3(a)(1) (providing for five of the seven members of an independent commission to "be selected by lot by the County Auditor from among . . . registered City of Tacoma voters").

137. *See, e.g.*, MODESTO, CAL., CHARTER art. VII, § 703(b) (providing for members of Modesto's Citizen's Salary Setting Commission to be appointed by the Modesto City Council and requiring that the Council give "strong consideration . . . to composing the Commission of" (1) a retired judge; (2) a member of a local taxpayers' association; (3) a member of a local nonpartisan political organization; (4) a member who has served on a civil grand jury in the last five years; and (5) "additional members who have demonstrated civic involvement and a capacity to serve in an honest, independent, and impartial fashion"); SAN DIEGO, CAL., CHARTER art. V, § 41.1 ("[When appointing members to the Salary Setting Commission, t]he Civil Service Commission . . . shall take into consideration sex, race and geographical area so that the membership of such Commission shall reflect the entire community.").

specifics of the state or local law authorizing the commission, but every two to four years appears standard.[138]

Independent commissions typically hold public hearings, at which the public and councilmembers themselves may offer testimony.[139] In making their recommendations for city council compensation, independent commissions may have significant leeway with respect to what factors to consider, or they may be required to consider certain factors pursuant to the enabling legislation. The types of factors considered vary by city, but those frequently considered include: (1) councilmembers' duties and responsibilities; (2) salaries for councils in similarly situated cities (including factors such as population and geographic location); (3) salaries for other elected and appointed officials; (4) private sector and nonprofit salaries for positions with similar responsibilities; (5) fiscal conditions; (6) socioeconomic data; (7) historical data on council compensation; and (8) other nonsalary forms of compensation.[140]

The level of influence of commission recommendations varies, typically falling into one of three categories. The commission recommendation may go into effect automatically unless the city council affirmatively acts to reject it.[141] Or the recommendation may simply be presented to the city council, which retains ultimate authority to accept, reject, or modify the recommendation.[142] In a subset of cities taking this approach, the city council may accept

138. *See, e.g.*, SAN DIEGO, CAL., CHARTER art. III, § 12.1 ("On or before February 15 of every even year, the Salary Setting Commission shall recommend to the Council the enactment of an ordinance establishing the salary of members of the Council for the period commencing July 1 of that even year and ending two years thereafter."); SAN JOSE, CAL., CHARTER art. X, §1001.1(d) (directing the Salary Setting Commission to make biennial recommendations regarding city councilmembers' compensation).

139. *See, e.g.*, VANCOUVER, WASH., CHARTER art. II, § 2.18 (requiring the Vancouver Citizen's Commission on Mayor/City Council Salaries to hold at least two public hearings); *see also* Letter from City Council Salary Setting Comm'n, City of San Jose, to Mayor & City Council, City of San Jose 2-3 (Apr. 10, 2013), https://perma.cc/PXJ8-24KZ [hereinafter San Jose Commission Recommendation] (noting that the commission held three public hearings and took testimony from councilmembers in addition to conducting a public survey via the city website).

140. *See, e.g.*, San Jose Commission Recommendation, *supra* note 139, at 4 (listing such factors as considerations in San Jose's process); Letter from Salary Setting Comm'n, City of San Diego, to Mayor & City Councilmembers, City of San Diego 1-2 (Feb. 12, 2016), https://perma.cc/SX98-UTRL [hereinafter San Diego Commission Recommendation] (listing similar factors).

141. *See, e.g.*, MICH. COMP. LAWS § 117.5c (2018) (authorizing home rule cities to create "local officers' compensation commissions" and providing that such commissions' salary decisions are automatically effective unless rejected by a two-thirds vote of the city council within thirty days); Marlee Breakstone, *Pay Raise Proposed for Mayor, City Council*, MICH. DAILY (Jan. 6, 2016, 3:06 PM), https://perma.cc/9QDE-GGAC (reporting on Ann Arbor's independent commission process).

142. *See, e.g.*, N.Y.C., N.Y., ADMIN. CODE § 3-601 (2018) (providing for an independent commission to make recommendations regarding compensation for consideration by

footnote continued on next page

the recommendation or modify it downward but may not modify it upward.[143] Finally, in some jurisdictions, the recommendation may only go into effect if approved by voters in a mandatory referendum.[144]

Benchmarking and other formulas: Like independent commissions, benchmarking or other formulas to set city council compensation have been adopted in a number of jurisdictions as an attempt to depoliticize the issue. Under this procedure, city council compensation is linked to a relevant benchmarking measurement or other formula.

Benchmarking is used in the private sector and refers to the practice of "collecting data on compensation for comparable jobs in other organizations . . . to establish a reasonable market rate."[145] The practice has become particularly prevalent for executive compensation: Firms look to the pay practices of peer firms in "similar industries and of similar size and complexity" to set compensation for their own executives.[146]

In the context of city councils, approaches differ as to what should be considered a "peer" for benchmarking. Some benchmarking procedures consider other city councils in their geographical region with similar objective characteristics, such as population and annual budget.[147] Other procedures

---

the New York City Council "in its discretion"); J. David Goodman, *New York City Council Votes to Raise Members' Pay*, N.Y. TIMES (Feb. 5, 2016), https://perma.cc/7NWC-9USR (reporting that after an independent commission recommended that New York City Council salaries be increased to $138,315 (from $112,500), the Council further increased its members' salaries to $148,500).

143. For example, the San Diego City Council can adopt compensation amounts "by ordinance as recommended by the Commission, or in some lesser amount, but in no event may it increase the amount." SAN DIEGO, CAL., CHARTER art. III, § 12.1.

144. *See, e.g.*, TUCSON, ARIZ., CHARTER ch. V, § 9.1(g) ("The Commission's salary recommendations shall be placed on the ballot for voter approval or rejection at the next general election, and shall be effective only if approved by a majority of the voters voting thereon.").

145. Thom Reilly, *A Better Way to Set Public Pay*, GOVERNING (June 29, 2015), https://perma.cc/VFN3-7ACZ.

146. *See* Charles M. Elson & Craig K. Ferrere, *Executive Superstars, Peer Groups, and Overcompensation: Cause, Effect, and Solution*, 38 J. CORP. L. 487, 493 (2013); *see also* Lucian A. Bebchuk & Jesse M. Fried, *Pay Without Performance: Overview of the Issues*, J. APPLIED CORP. FIN., Fall 2005, at 8, 13 ("It is now widely recognized that the rise in executive compensation has in part been driven by many boards seeking to pay their CEO more than the industry average; this widespread practice has led to an ever-increasing average and a continuous escalation of executive pay."); David I. Walker, *A Tax Response to the Executive Pay Problem*, 93 B.U. L. REV. 325, 334 (2013) ("Because no board believes (or is willing to publicly admit) that its executives are below average, firms generally seek to pay their executives at or above the 50th percentile of peer executive compensation.").

147. *See, e.g.*, City of Hallandale Beach, Fla., Commission/Council Salary & Benefit Survey Comparison Study: FY 2013/2014, at 2 (2013), https://perma.cc/AD64-F4XX (describ-

footnote continued on next page

consider salaries of other public employees in similar positions of responsibility, such as police and fire chiefs or other management personnel.[148] And although city councilmembers have no directly analogous private sector counterparts,[149] benchmarking procedures may also consider salaries of managerial positions in private firms or nonprofit entities.[150]

A number of jurisdictions have also adopted formula-based standards to set city council compensation. These formulas may link councilmembers' pay to salaries of other local or state employees[151] or to the median income in the jurisdiction.[152] Some jurisdictions have also adopted formulas for automatic adjustments to councilmembers' salaries based on inflation or changes in the cost of living, as measured by standard economic indices.[153] In addition, state laws setting out permissible council salaries for non-home rule cities by population bands are another type of formula used to automatically set city council compensation.[154]

Referenda: The final type of procedure used to set city council compensation is the referendum. A form of direct democracy, along with the initiative

---

ing the peer cities used in its study as those "similar in terms of population mix, services provided, and geographic location, size of budget, etc.").

148. *See, e.g.*, San Diego Commission Recommendation, *supra* note 140, at 1.

149. *See* Reilly, *supra* note 145 ("Many public-sector jobs have no private-sector equivalent, particularly when it comes to public-safety positions.").

150. *See, e.g.*, San Diego Commission Recommendation, *supra* note 140, at 1.

151. *See, e.g.*, L.A., CAL., CHARTER art. II, § 218(1) ("Members of the City Council shall be paid a salary equal to that prescribed by law for judges of the Municipal Court of the Los Angeles Judicial District . . . ."); JACKSONVILLE, FLA., ORDINANCE CODE § 129.102(a) (2017) ("Each member of the Council, other than the Council President, shall receive an annual salary equal to one-half of the salary allowed for a member of the Board of County Commissioners in a county with a population equal to that of Duval County . . . .").

152. *See* ALA. CODE § 11-43-7.3 (2017) (requiring that councilmembers' salaries in Class 1 municipalities be adjusted every four years to "the median household income of the city rounded up to the nearest thousand"); *cf. City of San Antonio Council and Mayor Salaries, Amendment 2 (May 2015)*, BALLOTPEDIA, https://perma.cc/YVY7-V44L (archived Feb. 2, 2018) (discussing a 2015 ballot measure approved by voters in San Antonio that raised salaries of city councilmembers to the city's median household income of $45,722).

153. *See, e.g.*, VISALIA, CAL., MUN. CODE § 2.04.080(B) (2017) ("[M]onthly compensation for council members shall be determined at the commencement of each new term, according to the following formula: $800 multiplied by a fraction equal to the [Consumer Price Index (CPI) for the Western Region] for the month preceding the commencement of the council member's term divided by the CPI for December 1, 2007."); Erin Adler & Shannon Prather, *Pay Raises for Mayors, Council Members Vary Widely Among Cities*, STAR TRIB. (Minneapolis) (July 27, 2014, 4:30 PM), https://perma.cc/8VRV-5UKW (noting that mayors and councils in Edina and Plymouth, Minnesota "get automatic raises tied to the [CPI]").

154. *See, e.g.*, CAL. GOV'T CODE § 36516 (West 2017).

and the recall, the referendum allows voters to accept or reject legislation passed by a legislative body.[155] Thus, in the context of city council compensation, a referendum is held after the city council passes an ordinance authorizing a change in its pay (either on its own initiative or based on the recommendations of an independent commission).

Referenda on city council compensation may be either mandatory or optional.[156] Jurisdictions with mandatory referenda vary as to when changes in city council salary are subject to the referendum requirement. In some jurisdictions, any proposed increase in city council compensation must be put on the ballot, regardless whether the change is initiated by the council itself or is the result of an independent commission recommendation.[157] In other jurisdictions, only certain types of changes to councilmembers' salaries are subject to a mandatory referendum.[158]

Optional referenda are available in any jurisdiction that authorizes the use of the popular referendum for legislative actions. While only twenty-four states allow popular referenda on state legislation, almost all states allow popular referenda at the local level, although their use may be limited to home rule cities.[159] Voters in municipalities where the local popular referendum is authorized are entitled to use the process to require a popular vote on any legislation passed by the city council, including an ordinance passed by the city council authorizing a change in its compensation.[160]

---

155. The popular referendum, in which a vote on legislation is initiated by citizens, differs from the legislative referendum, in which legislation is submitted by the legislative body to voters. *See* Initiative & Referendum Inst., Univ. of S. Cal., Comparison of Statewide Initiative Processes 1-2 (n.d.), https://perma.cc/HPZ2-2UVK (archived Feb. 2, 2018).

156. *Compare, e.g.*, ASHLAND, OR., CHARTER art. 3, § 3 (mandatory), *with, e.g.*, WASH. REV. CODE § 35.21.015(6)-(7) (2017) (optional).

157. *See, e.g.*, GLENDALE, ARIZ., CHARTER art. II, § 8 (providing that the city council "may" appoint a salary commission to make compensation recommendations for councilmembers and that regardless whether a commission is appointed, "[a]ny proposed increase in council salaries must be approved by the voters at the next election").

158. *See, e.g.*, CAL. GOV'T CODE § 36516(b) (providing that salaries for city councilmembers in general law cities may be increased above the population-based limits set out in CAL. GOV'T CODE § 36516(a) if a majority of voters approve of it at a municipal election).

159. *Cf.* Initiative & Referendum Inst., *supra* note 155, at 2 ("[T]he initiative and referendum process is available in thousands of counties, cities and towns across the [United States] and is utilized far more frequently than [its] statewide counterpart."); *Laws Governing Local Ballot Measures*, BALLOTPEDIA, https://perma.cc/RQY3-CN2W (archived Feb. 2, 2018) (depicting which states authorize local initiatives and referenda as well as whether the state authorization applies to all cities or only to home rule cities).

160. *Cf., e.g.*, Carter v. Lehi City, 269 P.3d 141, 144-45, 160-61, 161 n.54 (Utah 2012) (holding that questions of public officials' compensation are legislative matters eligible for citizen decisionmaking through Utah's initiative process and analogizing decisions about compensating public officials to Congress's setting its own pay).

In order to put a popular referendum on the ballot, the sponsor of the referendum must typically circulate the legislation and gather a certain number of signatures.[161] Once signatures are verified, the measure is put on the ballot for the next election.[162] If voters approve the measure, then the ordinance passed by the council changing its compensation goes into effect; if voters reject it, then the ordinance—and the salary change contained therein—is nullified.[163]

2. Procedural mechanisms: state and federal legislatures

The problem of how to determine legislators' pay is not unique to local government. While there are structural and legal differences between city councils and state and federal legislative bodies, understanding the compensation-setting procedures used in these other legislative contexts can inform the analysis of institutional design for compensation procedures at the local level.

At the state level, compensation-setting procedures for state legislatures largely mirror those used for city councils, although there are some additional procedures employed at the state level not used at the local level. Thus, as with city councils, the most common mechanisms used to set state legislature compensation are state legislature control,[164] use of independent commissions,[165] benchmarking

161. Signature requirements vary but are often a percentage of the number of voters in the last general election. *See Initiative Petition Signature Requirements*, NAT'L CONF. ST. LEGISLATURES (Sept. 20, 2012), https://perma.cc/A3Z3-A4FR.

162. *See Initiative, Referendum and Recall*, NAT'L CONF. ST. LEGISLATURES (Sept. 20, 2012), https://perma.cc/6T2N-9B68.

163. *See id.*

164. *See, e.g.*, N.J. CONST. art. IV, § 4, ¶ 8 ("The compensation of members of the Senate and General Assembly shall be fixed at the first session of the Legislature held after this Constitution takes effect, and may be increased or decreased by law from time to time thereafter, but no increase or decrease shall be effective until the legislative year following the next general election for members of the General Assembly.").

165. According to a 2011 study, nineteen states use independent commissions, although as Morgan Cullen notes,

> [c]ommissions' levels of influence varies [sic]. Some serve only an advisory role and make proposals the legislature can modify. In other states, commission recommendations are binding unless lawmakers vote to reject them or the governor turns them down. In Arizona and Nebraska, commission recommendations must be approved by voters before going into effect. [In] California and Washington, commissions have carte blanche to raise or lower salaries.

Cullen, *supra* note 11.

and other formulas,[166] and referenda.[167] In addition, legislative compensation in some states is set pursuant to state constitutional provisions.[168] As with city council compensation procedures, these mechanisms may operate as standalone mechanisms or may be combined.[169] A few states have also enacted performance pay legislation, which temporarily displaces normal compensation procedures by either prohibiting any compensation or prohibiting raises in years in which state lawmakers have not passed a budget.[170]

At the federal level, the procedures used to determine compensation for members of Congress are derived from constitutional requirements as well as federal law. The starting point for congressional compensation is Article I, Section 6 of the Constitution: "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States."[171] While this provision leaves the exact procedures "to be ascertained by Law," its clear directive that compensation be paid out of the federal Treasury reflects the rejection of a proposal made by

166. *See, e.g.*, COLO. REV. STAT. § 2-2-307(1)(b) (2017) ("[A]ll members of the general assembly . . . shall receive as an annual base compensation for their services an amount equal to twenty-five percent of the total annual salary paid as of such day to the judges of the county court in Class B counties . . . ."); IND. CODE § 2-3-1-1(a) (2017) ("[T]he annual salary of the members of the general assembly shall be an amount equal to eighteen percent (18%) of the annual salary of a judge . . . .").

167. *See, e.g.*, *Arizona State Legislators' Salaries, Proposition 304 (2014)*, BALLOTPEDIA, https://perma.cc/39MM-S5FB (archived Feb. 2, 2018) (discussing a referendum proposed by an independent commission to increase state legislators' salaries).

168. State constitutional provisions may set the actual amount of compensation. *See, e.g.*, N.H. CONST. art. XV (setting legislative salaries at $250 per term for the presiding officer of each house and $200 per term for all other members). Or the provisions may set procedural rules that interact with other compensation-setting mechanisms. *See, e.g.*, CAL. CONST. art. III, § 4(a) (prohibiting decreases in legislative pay during a legislative term).

169. For example, in Texas, the state constitution sets legislative salaries at $600 per month, plus a per diem determined by the Texas Ethics Commission; however, the Commission is authorized to recommend raises in lawmakers' salaries, which go into effect if approved by voters in a mandatory referendum. *See* TEX. CONST. art. III, § 24. For a complete list of state constitutional or statutory provisions on how legislative compensation is determined, see 49 THE BOOK OF THE STATES, *supra* note 28, at 61 tbl.3.8.

170. *See* Jonathan D. McPike, Note, *Merit Pay and Pain: Linking Congressional Pay to Performance*, 86 IND. L.J. 335, 349-50 (2011) ("New York's No Budget, No Pay Law withholds pay from state legislators while their annual budget is late." (citing N.Y. LEGIS. LAW § 5)); *cf.* CAL. CONST. art. III, § 8(g) (providing that state officers' salaries cannot be increased for the next year if "the Director of Finance certifies to the [California Citizens Compensation Commission] . . . that there will be a negative balance on June 30 of the current fiscal year in the Special Fund for Economic Uncertainties in an amount equal to, or greater than, 1 percent of estimated General Fund revenues").

171. U.S. CONST. art. I, § 6, cl. 1.

some delegates at the Constitutional Convention that states should determine the pay of their representatives to Congress.[172]

The only other provision of the Constitution that directly addresses congressional compensation procedures is the Twenty-Seventh Amendment, which provides: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."[173] While the Twenty-Seventh Amendment's path to ratification was unusual,[174] the Amendment itself is a fairly standard version of an electoral cycle delay rule; such rules have also been adopted at the state and local levels.[175] Like those state and local election cycle delay rules, the Twenty-Seventh Amendment is a kind of a veil-of-ignorance rule, which reduces the risks of legislative self-dealing by introducing uncertainty about who the precise beneficiaries of any legislative salary increase will be.[176]

With the Constitution otherwise leaving the contours of congressional compensation procedures "to be ascertained by Law," the specific procedures used to set congressional compensation have been a matter of federal legislation. A variety of procedures have been used over the last 200 years,[177] but for nearly thirty years, congressional compensation has been set by the Ethics Reform Act of 1989.[178] That law established a process that automatically adjusts congressional salaries (based on changes in private sector wages as measured by a standard economic index) unless Congress statutorily prohibits

172. *See* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 503 (1992) ("George Mason . . . suggested two reasons why it would be unwise to permit states to regulate their members' wages. First, the various pay scales among the states would tend to create an atmosphere of inequality in chambers where members were equal in all other respects. Second, because 'the parsimony of the States might reduce the provision so low [that] as had already happened in choosing delegates to Congress, the question would be not who were most fit to be chosen, but who were most willing to serve.'" (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 216 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND'S RECORDS] (Madison's notes))).

173. U.S. CONST. amend. XXVII. For a complete history of the Twenty-Seventh Amendment, see Bernstein, *supra* note 172.

174. *See* Bernstein, *supra* note 172, at 498; Matt Largey, *The Bad Grade That Changed the U.S. Constitution*, NPR (May 5, 2017, 5:00 AM ET), https://perma.cc/63WP-A4DC.

175. *See supra* notes 125-27 and accompanying text.

176. *See* Vermeule, *supra* note 127, at 421; *supra* notes 125-27 and accompanying text.

177. For a history of congressional compensation amounts and procedures, see Bernstein, *supra* note 172, at 533-38.

178. *See* IDA A. BRUDNICK, CONG. RESEARCH SERV., NO. 97-1011, SALARIES OF MEMBERS OF CONGRESS: RECENT ACTIONS AND HISTORICAL TABLES 2 (2018); *see also* Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (codified as amended in scattered sections of the U.S. Code).

or revises the adjustment.[179] Since 2009, congressional salaries have remained unchanged: The automatic increases that would otherwise have occurred have been statutorily rejected by Congress each year.[180]

II. How Process Affects Outcomes

As discussed above, the amount of compensation for city councils and the procedures used to determine those amounts vary widely across cities. This Part explores the normative implications of these differences and makes two arguments.

First, while determining the "right" amount of compensation for city councilmembers is challenging, governments must meet that challenge because both over- and undercompensation are normatively undesirable. Overcompensation is problematic because it can undermine civic republican ideals of public service; result in negative fiscal effects; and inadequately account for nonpecuniary benefits of elected office. Undercompensation is also problematic because it may result in making elected office an option only to those wealthy enough to afford it; produce a less effective, accountable, and transparent government; and exacerbate conflicts of interest and the risk of corruption.

Second, because neither over- nor undercompensation is desirable, procedures used to determine compensation should be designed to minimize distortions in either direction. While there is no such thing as a perfect design that can eliminate all distortions, the procedures currently in use for setting city council compensation contain design features likely to produce both types of bias, albeit to varying degrees. For example, procedures that give city councilmembers control over their own pay enable both financial self-dealing (leading to overcompensation) and reelection rent-seeking (leading to undercompensation). Benchmarking procedures may not fully account for nonsalary benefits (leading to overcompensation) or may rely on peer comparisons that produce reverse ratcheting (leading to undercompensation). These and other design features of compensation-setting procedures can have systematic impacts on compensation outcomes that have not been fully appreciated to date.

This Part unpacks each of these arguments in turn. Subpart A begins with a discussion of theories of legislative compensation and analyzes why both

179. *See* BRUDNICK, *supra* note 178, at 2.

180. *See id.* at 2, 16 tbl.1 (noting that the last pay adjustment for Congress was in January 2009, when salaries increased by 2.8% from $169,300 to $174,000); *see also* Christina Marcos, *House Votes to Keep Lawmaker Pay Freeze in Place*, HILL (June 10, 2016, 1:11 PM EDT), https://perma.cc/W8GH-FGNN (noting that the House "passed legislation to maintain the freeze on lawmakers' salaries that's been in place since 2010").

over- and undercompensation are normatively undesirable. Subpart B then turns to how the procedures used to set city council compensation can systematically result in outcomes that over- or undercompensate.

A. Theories of Legislative Compensation

The debate over how much to pay elected legislators is not new. The Framers of the Constitution debated the issue with respect to members of Congress, and it has been a constant in U.S. politics at every level of government ever since.[181] How much legislators and other elected officials should be paid is a complex topic, and the political science literature on it is immense.[182] But in the broadest terms, political scientists recognize that legislative pay should neither overcompensate nor undercompensate elected officials. Drawing on political science theory, this Subpart unpacks the normative concerns raised by both over- and undercompensation, focusing on aspects that have particular salience in the context of city councils.

1. The problem of overcompensation

There are three key normative concerns with overcompensating legislators: the undermining of civic republican ideals of public service; negative fiscal effects; and inadequate consideration of nonpecuniary benefits.

a. The civic republican ideal

The civic republican aspiration that elected officials should serve out of a sense of civic duty, and not for pecuniary reasons, runs deep in the American psyche.[183] During the Constitutional Convention, Benjamin Franklin proposed that federal elected officials and officers "receive no salary, stipend, fee, or reward whatsoever for their services," out of the concern that compensating officials "would select for selfish and intemperate persons who would skew their decisions to serve themselves."[184] Drafters of the Pennsylvania state constitution were similarly concerned that high

181. *Cf.* PARRILLO, *supra* note 46, at 9-10, 121 (discussing the early history of pay for government officials).

182. *See supra* note 22 (collecting representative literature on the issue).

183. *See* PARRILLO, *supra* note 46, at 121 ("Hostility to men making fortunes in public office was a deep-rooted feature of American political culture . . . . [C]ivic republican leaders of the revolutionary period, such as [Benjamin] Franklin, had tried to divorce political power from self-interest and ensure the reign of virtue by prohibiting official income altogether.").

184. *See id.* at 10 (quoting 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 144 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d. ed. 1891)).

compensation would lead to "faction, contention, corruption, and disorder among the people."[185] Therefore, "they mandated that 'whenever an office, through increase of fees or otherwise, becomes so profitable as to occasion many to apply for it, the profits ought to be lessened by the legislature.'"[186]

While it has long been recognized that expecting legislators to work for no pay is a "utopian ideal" that is neither practical nor necessarily desirable,[187] there remains a strong sense that financial compensation should not be the motivating reason for seeking elected office.[188] Government, after all, is not a for-profit enterprise. The term "public servant" reflects the fact that we want and expect our elected officials to serve the public, not to profit from government service. The concept of "currency effects" suggests that those who are motivated to engage in public service because they "derive intrinsic satisfaction from [the position] will perform better than instrumentally-motivated officeholders."[189] The argument from currency effects thus provides a potential justification for keeping salaries relatively low: to attract candidates motivated primarily by public service.[190]

Overcompensation may also undermine another aspect of government closely associated with the civic republican tradition: citizen legislatures.

185. *See id.* at 121 (quoting PA. CONST. of 1776, § 36).

186. *See id.* (quoting PA. CONST. of 1776, § 36).

187. *See id.*

188. *See, e.g.*, Pub. Officials Compensation Comm'n, *supra* note 9 (noting the Oregon Public Officials Compensation Commission's view that elected officials should be compensated "at a rate that fairly compensates them for their work and attracts highly qualified candidates, while at the same time does not become the incentive for seeking public office"); *see also* Susannah Bryan & Heather Carney, *How Much Do Your Local Elected Officials Make?: Think High Pay, Low Pay and Plenty of Perks*, SUN SENTINEL (Deerfield Beach, Fla.) (Sept. 3, 2012), https://perma.cc/SE94-842P ("You don't serve in elected office to get rich. Public service should be neither a bonanza nor . . . an undue financial strain." (quoting Dominic M. Calabro, President and CEO of Florida TaxWatch)).

189. *See* Vermeule, *supra* note 8, at 536; *see also id.* (noting that the argument from currency effects assumes that "'better' is defined by whatever criteria of performance underpin the competing argument from selection effects").

190. *See id.* (noting that the argument from currency effects postulates that "lowering pecuniary income selects for those candidates for whom the intrinsic satisfaction is most rewarding"). The public service motivation is frequently cited by elected officials. *See, e.g.*, Adler & Prather, *supra* note 153 ("[T]he mayor of Savage[, Minnesota] said she and City Council members haven't considered a pay raise for more than a decade. The question 'never came up,' she said, in a group that sees the job as public service." (quoting Janet Williams, Mayor of Savage, Minnesota)); Bertrand M. Gutierrez, *On Salary, County and City Officials Are Miles Apart*, WINSTON-SALEM J. (June 5, 2013), https://perma.cc/P7NS-3CA4 ("The council and mayor salary has always been almost an honorary thing . . . . There's never been an appetite to raise it. It's more of a public-service thing." (quoting Allen Joines, Mayor of Winston-Salem, North Carolina)).

While professional legislatures have advantages in terms of resources, expertise, and experience, legislative professionalism can raise concerns about a "separate class" of professional bureaucrats.[191] Nonprofessional citizen governance, in contrast, can "serve[] as a democratic check on government and ensure[] that government is responsive to the interests of the public."[192] Keeping legislative pay low can help ensure that such a "separate class" does not develop because lower-paying legislative bodies are more likely to attract "regular" citizens who maintain their prior careers, while higher-paying ones are more likely to attract those interested in government service as a full-time career.[193]

Relatedly, higher-paying, professional legislative bodies may be more likely to result in entrenchment of career politicians. Electoral entrenchment may make political change "more difficult than it otherwise would (or should) be" and may result in the manipulation of "ground rules of the democratic process" through mechanisms such as gerrymandering.[194] In addition, entrenchment may lead to a disproportionate amount of legislators' time and attention being devoted to reelection as opposed to lawmaking: "If a legislator views the job as a career rather than a temporary interlude, keeping the job becomes a paramount concern, and many incentive problems arise . . . . Hence, a vast amount of time and effort is spent in pursuit of reelection."[195] Term limits

191. *See* Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 84 (1992).

192. *Id.*; *see also id.* ("In general, the democratic goal of government in the public interest is served by citizen governance, while the concept of a permanent governing elite is antithetical to the principles of democracy.").

193. *But see* Carpinello, *supra* note 80, at 128-29 (rebutting the argument "that a full-time legislature would consist only of a professional class that is completely isolated from the community it represents"). As Carpinello notes:

> Th[at] argument . . . ignores the fact that representatives' views are probably shaped much more by the occupations from which they come, than from the part-time occupations they may pursue while in the legislature. Surely a farmer, for example, does not lose his empathy for farmers' problems when he assumes full-time duties as a congressman.
>
> *Id.*

194. *See* Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 408 (2015).

195. Sollars, *supra* note 4, at 517 (citation omitted); *see also* Mark Reagan, *Weighing Costs: San Antonio City Council Mulls Pay Increase*, SAN ANTONIO CURRENT (Feb. 18, 2015), https://perma.cc/972H-Z9A3 ("Career politicians have ruined Congress. When they have a government salary to protect, they start making policy decisions motivated by protecting that salary. I want my representatives to stand up and have the difficult conversations, without fear of getting pushed out." (quoting Andrew Correll, opponent of a proposed council raise)).

are one response to entrenchment concerns;[196] ensuring that salaries do not overcompensate legislators is another.[197]

b. Fiscal effects

Legislative overcompensation can also be problematic because of the costs imposed on taxpayers. Salaries and other benefits typically come out of a city's budget. Thus, the higher the city council compensation, the greater the impact on the budget. While council compensation alone is unlikely to be a significant proportion of a city's overall budget, increasing council compensation will likely have some—even if relatively minimal—negative impact on the amount of funds available to provide for other core local services, requiring either increased taxation or a decrease in services to support the pay raises.[198] Particularly in light of the constraints state laws impose on the ability of local governments to raise revenues,[199] any discretionary increase in spending on council salaries may be perceived as ill advised.

In addition to the direct fiscal effects of overcompensation on city budgets, there may be indirect fiscal effects as well. For example, if councilmembers receive relatively high salaries, it may "undermine the credibility of council members during contract negotiations, making it harder for lawmakers to

196. *See, e.g.*, Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 501 (1997) ("Legislative term limits also raise an entrenchment concern, though in an inverse way; it is the *failure* to adopt term limits that marks legislative entrenchment.").

197. However, external factors such as population growth may make the shift to legislative professionalism—and associated higher pay—somewhat inevitable. *See* Sollars, *supra* note 4, at 508 (discussing this issue in the context of state legislatures).

198. *Cf.* Besley, *supra* note 44, at 204 ("Obviously there is a cost to paying politicians more in the form of higher taxes needed to finance wage payments."). A recent study of fifteen large U.S. cities found that city councils "consumed a median of 0.46 percent of their cities' general fund budgets for their own salaries, employee benefits and operations." PHILA. RESEARCH INITIATIVE, *supra* note 82, at 9 fig.6.

199. *See, e.g.*, Rodriguez, *supra* note 78, at 637-38 ("[R]estrictions on local governments' taxing authority—ostensibly created in order to safeguard the power of the state to implement a comprehensive statewide tax regime—limit the capacity of local governments to respond adequately to the service provision needs of their communities."). Examples of state laws restricting local governments' revenue-raising abilities abound. *See, e.g.*, CAL. CONST. art. XIII A, §§ 1-2 (limiting property tax assessments by local governments to a maximum of 1% of the assessed value and limiting increases in assessed value to no more than 2% annually unless there is a change in ownership or new construction); COLO. CONST. art. X, § 20 (establishing a revenue cap formula for local governments and requiring any revenue in excess of the cap to be returned to the citizens of the locality); MO. CONST. art. X, § 22 (prohibiting local governments "from increasing the current levy of an existing tax, license or fee[] . . . without the approval of the required majority of the qualified voters of that . . . political subdivision voting thereon").

argue that city workers should agree to concessions on pay raises, healthcare and retirement benefits."[200] This trickle-down effect of overcompensation may result in other public employees also being overcompensated, further limiting the funds available for other public needs.

Furthermore, public perception of overcompensation—accurate or not—can be an independent cause for concern because it can undermine public trust and confidence in government.[201] As the Supreme Court has recognized, "[A] democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when . . . officials . . . engage in activities which arouse suspicions of malfeasance and corruption."[202] In the context of legislative compensation, such suspicions may arise when elected representatives are paid substantial salaries: "One of the things the public clearly has an interest in is how their money is being spent, and they tend to take a greater interest when it comes to paying public employees who are getting paid a lot more than they are."[203] Furthermore, when legislative compensation is high, voters may be concerned that monetary incentives motivate those running for office and that such individuals may be more likely to fall prey to corruption.[204]

200. *See* David Zahniser & Emily Alpert Reyes, *L.A. City Council Candidates Pledge to Take Pay Cut If Elected*, L.A. TIMES (Feb. 6, 2015, 4:00 AM), https://perma.cc/6CQC-YLG6; *see also* Bill Turque, *Phased-In 17.5% Raise Approved for Montgomery County Council*, WASH. POST (Oct. 22, 2013), https://perma.cc/Z726-H7XA ("Some [council] members expressed concern about a backlash [against a 17.5 percent raise for councilmembers recommended by an independent commission] from the county's public employee unions, which received raises averaging 7 to 10 percent in contracts approved by the council . . . .").

201. For a comprehensive discussion of appearance-based justifications, see Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563 (2012).

202. United States v. Miss. Valley Generating Co., 364 U.S. 520, 562 (1961).

203. Jan Murphy, *Commissioners in Some Pennsylvania Midstate Counties Make More Than State Legislators*, PENNLIVE (updated Aug. 21, 2010, 10:32 PM) https://perma.cc/G9NZ-LNHV (quoting Barry Kauffman, Executive Director of Common Cause Pennsylvania) (reporting on concerns about the $95,000 salary of county commissioners in one Pennsylvania county).

204. *See, e.g.*, Anderson & Helland, *supra* note 22, at 1278 ("Plato warned of paying public servants too much for fear of encouraging men of selfish motivations to seek public office."); *see also* Vermeule, *supra* note 8, at 536 n.142 ("There is a . . . pro-and-con dialectic about the effect of official salaries on the incidence of official corruption. On one view, officeholders should be paid high salaries because low paid officials will turn to corruption to supplement their incomes. On another view, high salaries will attract the venal to office, plausibly increasing rather than decreasing the incidence of corruption.").

c. Nonpecuniary benefits

In addition to the monetary benefits legislators receive—in the form of salaries as well as expense allotments and pension benefits—legislators also receive nonpecuniary benefits.[205] The importance of nonpecuniary benefits to those entering public service will necessarily vary by individual. Thus, it is challenging to determine whether legislators are being overcompensated without surveying elected officials about their personal perceptions of how much the nonpecuniary benefits of office are worth to them. But a wide range of nonpecuniary benefits are likely to factor into elected officials' decisions to enter, and remain in, public service.

For example, some elected officials may receive nonpecuniary benefits from the experience of holding a position at the local level that can help facilitate their entry into higher office.[206] For others, a legislative position that may have a relatively low salary can eventually pay off in monetary terms when the legislator returns to private employment and benefits from the "springboard value" of her time in office by obtaining more lucrative or desired private employment.[207] Others may find that the ability to advance causes or promote legislation on issues in which they have a particular interest serves as a form of nonpecuniary compensation that offsets low pay.[208] Still others may find other aspects of the legislative role—such as the sense of giving back or contributing to the public good—to be a form of nonpecuniary benefit that adequately compensates for relatively low monetary compensation.[209] Thus,

205. *See* Adrian Vermeule, Essay, *Selection Effects in Constitutional Law*, 91 VA. L. REV. 953, 966 (2005) ("Compensation can take many forms, of which cash salary is only one. A given position may yield a stream of implicit compensation in the form of inherent interest, the opportunity to promote the officeholder's vision of good government, prestige, power, leisure, or any number of other goods.").

206. Yet holding elected executive office at the local level may not translate into higher elected office. *See* Schragger, *supra* note 104, at 2546 ("Mayors have experienced periods of influence in national policymaking, but, except in rare circumstances, mayors are not serious players in national politics and rarely use the mayoralty as a stepping stone to national political prominence.").

207. *See* Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623, 653 (1996) ("Elected office also provides experience that can lead to lucrative private employment. A person contemplating a run for a particular office will consider this 'springboard value' . . . ."); *see also* George J. Stigler, Miscellany, *The Economics of Conflict of Interest*, 75 J. POL. ECON. 100, 101 (1967) (suggesting that the government can pay lower salaries because employees recoup income upon reentry into the private sector).

208. If legislators go too far in advancing their own interests or causes to which they have personal connections, they may run afoul of conflict of interest rules. *Cf.* Nolan, *supra* note 191, at 82-84 (discussing financial conflicts of interest).

209. *See supra* note 190.

focusing solely on monetary compensation may fail to adequately account for these various types of nonpecuniary benefits and result in overcompensation.

2. The problem of undercompensation

Just as overcompensation of legislators raises normative concerns, so too does undercompensation. This Subpart analyzes three concerns raised by undercompensation: the limiting effect of making elected office open only to those who can afford it; the potential for decreased effectiveness, accountability, and transparency in governance; and the increased risk of conflicts of interest and corruption.

a. Limiting office to those who can afford to serve

A core aspect of democratic governance is that elected office is open to all citizens who satisfy the legal requirements for holding office.[210] However, when compensation for elected officials is too low, the validity of that assumption—and the underlying democratic norms of equality and fairness—comes into question.

Although the precise effect of pay on an individual's decision to run for—or remain in—legislative office is specific to each individual, political science scholarship, as well as anecdotal evidence from elected officials, tells us that pay can affect who decides to serve.[211] While low pay may not be a barrier to those who have other sources of income—such as the retired or independently wealthy—low salaries for legislative positions can be a significant deterrent to public service for those who rely on their jobs for financial support.[212] As a city

210. *See, e.g.*, Eugene D. Mazo, *Residency and Democracy: Durational Residency Requirements from the Framers to the Present*, 43 FLA. ST. U. L. REV. 611, 613 (2016) (noting that while "democracy involves not only the right to cast a free vote, but also the right to run freely for elected office," candidates for office must typically satisfy durational residency requirements).

211. *See, e.g.*, Sollars, *supra* note 4, at 508 (noting that "[w]hile legislative compensation may not be the most important factor motivating the decision to seek (or attempt to retain) legislative office, it is reasonable to assume that purely financial concerns are meaningful to legislators" and citing studies showing that "the level of compensation can influence the decision of sitting legislators to vacate office"). It is a separate—and much more difficult—question whether compensation affects the quality of elected officials (however quality is defined). But some studies have found that higher pay does have positive effects on quality. *See* Besley, *supra* note 44, at 201, 212 (finding that "paying higher wages leads to more congruent governors" and defining "congruent" as "shar[ing] voters['] objectives").

212. *See, e.g.*, L. Anthony Sutin, *Check, Please: Constitutional Dimensions of Halting the Pay of Public Officials*, 26 J. LEGIS. 221, 221 (2000) ("Very few public servants would say that they are in their job 'for the money.' Nevertheless, for the vast majority, the continued receipt of a paycheck is understandably vital to their support and that of their families.
footnote continued on next page

councilmember in San Antonio, Texas observed: "[T]he thing that I've learned in my experience on council is that for a lot of the council members it is a very serious financial problem."[213] Another mayor who was personally undeterred by low pay admitted: "I think if you needed a livable wage, you probably wouldn't run for elected office."[214]

Low pay not only can exclude those who depend on a salary to support themselves, thereby shrinking the overall size of the pool of candidates, but also may lower the quality of those in the pool. Individuals with a higher education and more professional experience typically would have to accept a larger pay cut from their private sector salaries to run for office when legislative compensation is low.[215] Furthermore, low pay may have a disproportionate impact on already underrepresented groups, such as minorities and women, who on average have lower levels of wealth and are thus less likely to have sources of outside income to support themselves.[216]

Regular receipt of salary for a public official safeguards not only sustenance but also the independence needed to perform one's assigned duties in the public interest.").

213. *See* Reagan, *supra* note 195 (quoting Mike Gallagher, District 10 Councilman, San Antonio). Other elected local officials feel similarly. A Pembroke Pines, Florida city commissioner—who earns $23,386 per year—said, "I don't think any of us do it for the money . . . . But if this job didn't pay anything, a lot of people wouldn't be able to accept it." Bryan & Carney, *supra* note 188 (quoting Angelo Castillo, Commissioner, Pembroke Pines, Florida). Concerned that setting pay too low would mean that "only the rich would run for office," the commissioner said, "I hope people understand the amount of work it takes in order to do these jobs well . . . . I average 25 hours a week on my city commission job." *Id.* (quoting Angelo Castillo); *see also Getting Paid: Debating the Council's Outside Income and Salaries*, GOTHAM GAZETTE (Dec. 10, 2007), https://perma.cc/UZ7W-TGN9 (noting that councilmembers "[take] an oath of office to serve, not an oath of poverty" (quoting Larry Seabrook, member of the New York City Council)).

214. *See* Adler & Prather, *supra* note 153 (quoting Mary Giuliani Stephens, Mayor of Woodbury, Minnesota).

215. *See, e.g.*, Cullen, *supra* note 11 ("Salary increases . . . encourage people with higher educational attainment and professional expertise." (quoting Peverill Squire, professor at the University of Missouri)); *cf.* Sollars, *supra* note 4, at 517 ("As a whole, the electorate might be better off if pay were much higher, since improved wages might attract better candidates."); Jack Penchoff, *Legislative Pay Daze*, ST. NEWS, Feb. 2007, at 10, 11 ("You can't expect to attract good candidates with pay that is lower when compared to other jobs and professions." (quoting Keon Chi, Editor-in-Chief of the Council of State Governments' annual *Book of the States*)).

216. *See* Erin Ruel & Robert M. Hauser, *Explaining the Gender Wealth Gap*, 50 DEMOGRAPHY 1155, 1155 (2013) ("A burgeoning body of literature has found that women do not accumulate as much wealth as men, resulting in a gender wealth gap."); Lisa J. Dettling et al., *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*, BOARD GOVERNORS FED. RES. SYS. (Sept. 27, 2017), https://perma.cc/5WZM-MPUV (finding "long-standing and substantial wealth disparities between families of different racial and ethnic groups"); *cf.* Cullen, *supra* note 11 ("Maintaining adequate legislative compensation promotes diversity among elected officials so the entire population is adequately represented.").

footnote continued on next page

Part-time legislative positions raise special concerns in this regard. On one hand, a part-time legislative position, even if low paid, allows for continued outside employment. In theory, then, low compensation for a part-time position should not deter as many people as if the position were full-time. But in practice, there are a limited number of careers that offer the flexibility needed to maintain outside employment while also serving twenty hours per week in a part-time council position. Small business owners or independent contractors may be able to do so, but hourly and salaried employees are less likely to have the flexibility to devote the additional hours needed for a part-time council position, which may entail attending weekly midday council meetings and responding to time-sensitive constituent requests.[217] Furthermore, as noted in Part I above, many officially part-time city councils actually impose nearly full-time responsibilities, further limiting the pool of candidates who have outside careers that can accommodate such a schedule.[218]

b. Good governance

A second concern with legislative undercompensation is the potential negative consequences for the effectiveness, accountability, and transparency of government. The effectiveness concern is in part related to the concern that low compensation may fail to attract highly qualified candidates and thus may result in less effective representatives.[219] However, a distinct concern also is

I am not aware of any empirical studies analyzing the relationship between legislative pay and diversity at the local level. A number of studies have analyzed the relationship between diversity and professionalism (which includes higher pay) in state legislatures, and the results have been mixed. *See, e.g.*, SQUIRE & MONCRIEF, *supra* note 22, at 77-78 (discussing mixed evidence from studies on professionalism and the representation of women, black, and Latino legislators). With regard to economic diversity, one study found that higher salaries at the state legislative level may negatively affect the number of legislators from working class backgrounds. *See* Carnes & Hansen, *supra* note 22, at 703.

217. *See* Note, *Conflicts of Interest of State Legislators*, 76 HARV. L. REV. 1209, 1210 (1963) ("Few occupations are sufficiently flexible to permit time off for [part-time] legislative participation: statistics indicate that most of the legislators are lawyers, farmers, merchants, or insurance or real estate brokers.").

218. *See, e.g.*, Liz Shepard, *Counties Differ in How They Pay Board Members*, TIMES HERALD (Port Huron, Mich.) (updated Dec. 6, 2014, 8:12 PM ET), http://perma.cc/NU7V-EPYF ("You almost have to be retired or be a business owner in order to manage the schedule." (quoting Karl Tomion, District 2 County Commissioner, St. Clair County, Michigan)); Walters, *supra* note 84 ("Now that I have served, it clearly is not possible to have a regular part time job on the schedule." (quoting Candace Mumm, member of the Spokane City Council)).

219. *See* Vermeule, *supra* note 8, at 536 ("[C]urrency effects and selection effects trade off against one another—excessively low compensation might produce a cadre of insufficiently talented amateur enthusiasts, but excessively high compensation might produce a cadre of talented but venal opportunists.").

raised here: Even if highly qualified candidates are undeterred by low pay, if elected representatives are not provided with the resources required to do quality work—including compensation adequate to ensure that they can devote the needed attention to public service—then they are unlikely to be able to produce quality results. As one scholar observed, undercompensation creates a kind of catch-22: "It's really irrational . . . . We don't want to equip politicians with the resources to do their jobs, and then we blame them when things don't work the way we want."[220]

The effectiveness argument can be made at any level of government, but it has particular salience for city councils for two reasons. First, to be effective leaders, city councilmembers typically must devote significant time to their council duties. But low compensation means that unless they have independent sources of income, they will likely need to hold outside employment, thus reducing the time available for council responsibilities. While city councils' specific responsibilities necessarily vary across cities, the role of city governments, particularly those in large and midsize cities, has expanded not only quantitatively—providing more of the traditional public services, such as education and public safety—but also qualitatively. Cities are increasingly responsible for a range of nontraditional policymaking activities, some taken on voluntarily, others essentially forced on local governments by inaction at the state and federal levels. For example, in recent years, cities have taken action in areas traditionally associated with state or federal government by enacting minimum wage laws, payday loan regulations, and environmental legislation.[221]

Furthermore, it is not unusual for lawmakers of even midsize cities to be responsible for managing multimillion-dollar budgets, coordinating services for hundreds of thousands of residents, and overseeing thousands of public employees.[222] For major cities, the numbers exceed those for some states and countries: City councils in Los Angeles and Chicago oversee $9 billion and $8 billion annual budgets, respectively, while New York City's 2016 budget was a staggering $78 billion.[223] City councils thus serve as a kind of "board of

220. Amelia Thomson-DeVeaux, *How Much Should State Legislators Get Paid?*, FIVETHIRTYEIGHT (Apr. 7, 2016, 7:00 AM), https://perma.cc/3BRH-PXWX (quoting Neil Malhotra, professor of political economy at Stanford University).

221. *See supra* notes 34-38 and accompanying text.

222. *See* Data Supplement, *supra* note 24. For example, Honolulu, Hawaii is the fifty-fifth most populous city in the United States with 351,792 residents, an annual budget of $246 million, and more than 8500 employees. *See id.* (providing population and budget data); *Department of Human Resources*, CITY & COUNTY OF HONOLULU, https://perma.cc/2QER-QA32 (last updated June 29, 2017) (providing public employment data).

223. *See* Data Supplement, *supra* note 24; *see also Field Listing: Budget*, *supra* note 24 (listing the budgets of nations worldwide). By highlighting these budget numbers, I do not mean to suggest that councilmembers in these three cities are necessarily *under*com-

footnote continued on next page

directors" for the multimillion-dollar organizations many cities are,[224] and together with the mayor, councils are responsible for increasingly complex policy decisions.

Low compensation for city councilmembers not only has a signaling effect with respect to the value of their roles, but also can have real repercussions in terms of a city council's ability to effectively represent residents' needs. Low pay is not without consequences: "[T]here is a certain cost to having council members fulfill their obligations."[225] When compensation is low, councilmembers are likely to need to maintain outside employment. Councilmembers who hold outside jobs may be less able to spend the time needed to effectively negotiate with private parties—who are typically represented by full-time lawyers, lobbyists, and other consultants—on city contracts, and citizens will be deprived of the full attention that may be needed for local governance.[226] Furthermore, policymaking may take longer, thereby increasing the long-term costs to residents.[227]

A second reason undercompensation may raise effectiveness concerns about governance is because of the often ambiguous full- or part-time status of city councilmembers. While low salaries for city council are sometimes justified on the grounds that city councilmembers officially work part-time and are allowed, or even expected, to maintain outside employment, the official job description often does not align with the actual responsibilities of

---

pensated. (Annual salaries exceed $100,000 in each of these three cities. *See id.*) Rather, the significant budgets—and the accompanying council responsibilities—are offered in support of the argument that because of their governance responsibilities, councilmembers in these cities are not necessarily *over*compensated.

224. *Cf.* Cullen, *supra* note 11 ("Legislators essentially serve as board of directors for multibillion dollar organizations that are our state governments." (quoting Alan Rosenthal of the Eagleton Institute of Politics at Rutgers University)).

225. *See* Deirdre Fernandes, *Beach City Council Pay Cuts Proposed as Symbolic Gesture*, VIRGINIAN-PILOT (Norfolk, Va.) (Feb. 14, 2009), https://perma.cc/U747-SPG4 (quoting Louis Jones, Vice Mayor of Virginia Beach).

226. *See, e.g.*, Ted S. McGregor, Jr., *What You Pay For*, INLANDER (Spokane, Wash.) (Feb. 12, 2001), https://perma.cc/785X-N9RZ ("[T]he shortcomings of a part-time council have become most clear in issues like the Lincoln Street Bridge, which no single part-time council member could ever defuse, and the River Park Square parking garage, where, it appears, a part-time council was ground into submission by its partner (made up of full-time consultants, lawyers, etc.). This is not to say that a full-time council would have averted these and other disasters, but at least the citizenry would know that their elected officials were expected to devote their full attention to the city's business.").

227. *See, e.g.*, Turque, *supra* note 200 ("The president of the Montgomery Taxpayers League, which generally takes a dim view of increased county spending, gave her blessing to the [17.5%] raises [for county councilmembers:] . . . 'This pay raise is not about performance, it's because of the responsibilities of your position and the expectations that you will meet them.'" (quoting Joan Fidler, President of the Montgomery Taxpayers League)).

the job. Population growth may make it inevitable that policy issues become increasingly numerous and complex, requiring more lawmaker work and attention.[228] And regardless whether a council is officially categorized as full- or part-time, councilmembers typically work all week, providing their constituents with services as needed.[229] As one city councilmember in Spokane, Washington observed: "I don't believe that it's *possible* to do this as a part-time job . . . [u]nless you are making uninformed decisions, not attending to the needs of the citizens, or just straight not attending [board meetings]."[230]

Furthermore, there appears to be a disconnect between what voters say they want their city councils to be—groups of part-time citizen legislators doing the job as a public service—and the expectations voters have, including 24/7 responsiveness and availability to address an ever-increasing range of responsibilities.[231] The "mission creep" of what was once a part-time city

228. *See, e.g.*, McGregor, *supra* note 226 ("Perhaps in the 1960s and '70s, when Spokane was a less complicated place with challenges that had simpler solutions, part-time council members were more than enough. But today, in a city that is swimming upstream against just about every issue it faces, . . . Spokane clearly needs all the help it can get."). "[S]maller, more homogeneous communities" often are able to use "technocratic" governance forms such as part-time councils and professional city managers "because those communities have found ways to insulate themselves from larger economic and demographic dislocations." Schragger, *supra* note 104, at 2576. "As economic and demographic circumstances change, however, suburban municipalities will increasingly need political—not just technocratic—governance." *Id.*

229. *See* Reagan, *supra* note 195 ("What happens is the job really becomes 40, 50 or even 60 hours a week because we're attending meetings all the time." (quoting Mike Gallagher, District 10 Councilman, San Antonio)); Shepard, *supra* note 218 ("I spend more time doing this job than I do my real job." (quoting Jeff Bohm, part-time commissioner in St. Clair County, Michigan)); *Getting Paid*, *supra* note 213 ("We don't work five days a week . . . . You go to church and you still deal with constituent service." (quoting Larry Seabrook, member of the New York City Council)).

230. *See* Walters, *supra* note 84 (last alteration in original) (emphasis omitted) (quoting Ben Stuckart, President of the Spokane City Council). The demands of the job are also amplified by the pressures of social media. *See, e.g.*, Turque, *supra* note 200 ("A . . . citizens panel appointed by the [Montgomery County Council] . . . said the complexity of the job, compounded by the power and reach of social media, has created unprecedented demands on the time and energy of council members.").

231. *Cf.* Emily Adams, *Juggling Full-Time Jobs and City Council Seats Can Create Strains at Work and Home for These 2-Career Families*, L.A. TIMES (Mar. 9, 1995), https://perma.cc/SAT2-LDSX ("[I]f local politicians are overworked to exhaustion, they also know many of their neighbors would balk at one possible cure: full-time council jobs accompanied by hefty pay raises. . . . 'If you give [councilmembers] a living wage, you hear criticism that they're out of touch with normal people. But if you don't, they complain that they can't devote time to constituents and the increasingly complex problems they face.'" (quoting Sherry Bebitch Jeffe, senior associate at Claremont Graduate School's Center for Politics and Government)); Erica Orden, *Poll: New Yorkers Say Full-Time Legislature Would Curb Corruption*, WALL ST. J. (updated Feb. 1, 2016, 7:09 PM ET), https://perma.cc/WEG6-V4HM ("A majority of New York voters believe state government is plagued by malfeasance and think making lawmakers work full

footnote continued on next page

council into a de facto full-time one may be something voters oppose in theory,[232] but in practice, voters often demand actions and responses from city council that require full-time attention from councilmembers.[233]

In addition to the negative consequences for effectiveness, undercompensation may also negatively affect government accountability and transparency. With regard to accountability, low pay for councilmembers may make it more likely that those in the position view it as a quasi-volunteer role and therefore do not devote the necessary time or attention to the job. While voters can signal their disapproval of such councilmembers by voting them out of office, low-paid legislative positions may not even attract enough electoral competition to offer voters an alternative option.[234] In addition, subsequent candidates may have little incentive to perform more effectively because councilmembers are essentially serving as low-paid volunteers.[235]

Finally, low pay can raise concerns about government transparency. As noted at the outset, decisions about lawmakers' salaries are inherently political and thus tend to attract attention. As a result, individual citizens, opposition candidates, and good-government groups can usually keep track of such decisions with relatively low monitoring costs.[236] However, decisions about nonsalary forms of compensation can be more difficult to monitor and their effects more difficult to calculate. For example, increases in expense allotments

---

time on their legislative duties would curb corruption, a new poll shows. The catch: Voters don't want to give those lawmakers a raise.").

232. *See* Bryan & Carney, *supra* note 188 ("[Supporters of high county commissioner salaries] are going to argue it's not part time. But this is supposed to be a part-time job." (quoting Dominic M. Calabro, President and CEO of Florida TaxWatch)); Walters, *supra* note 84 (discussing former councilmembers' concerns that the Spokane City Council "was experiencing serious 'mission creep,' [its] limited role expanding, inch-by-inch, year after year" (emphasis omitted)).

233. *See* Walters, *supra* note 84 ("'[I] expected a 40-hour workweek but is experiencing a 50-60 hour workweek as citizens expect a response immediately.' . . . [T]he role of the city council had changed. . . . 'Councilmembers now treat their job as full-time and citizens expect more than the minimum.'" (emphasis omitted) (quoting Lori Kinnear, member of the Spokane City Council)).

234. *See* Squire, *supra* note 46, at 2 ("Inadequate pay can have profound consequences for democracy. In Georgia, for example, state lawmakers earn less than $18,000 annually and 80 percent of legislative seats go uncontested . . . . Voters in states with lower paid legislators are often provided no electoral choices.").

235. *Cf.* Recess Appointments, 41 Op. Att'y Gen. 463, 480 (1960) (noting that "it is the basic policy of the United States" to pay government employees such that they may "be expected to perform [their] work zealously" and not be "subjected to a host of corrupting influences").

236. *Cf.* Vermeule, *supra* note 8, at 505 ("The high visibility of formal salary payments, as opposed to regulatory benefits, kickbacks, and other off-budget forms of self-dealing, make monitoring of congressional salaries easy and profitable for good-government organizations and potential opponents.").

or changes to retirement benefits may involve complicated formulas and may not clearly translate into a simple up or down movement in government spending like a change in salary would.[237] Thus, if councilmembers engage in less transparent ways of increasing their overall compensation to make up for low salaries, it may be harder for the public to keep track of the overall cost of council compensation.[238]

c. Conflicts of interest and corruption

Finally, undercompensation may increase the risk of conflicts of interest and corruption. Conflicts of interest are likely to arise to some extent regardless of compensation amounts, simply because lawmakers legislate on a wide range of issues, some of which invariably affect them personally.[239] When lawmakers are paid relatively low salaries, however, they will be likely to hold outside employment unless they have an independent source of income.[240] More outside employment, in turn, increases the prospect of conflicts of interest.[241] While existing conflict of interest laws may be adequate

237. *Cf. infra* notes 303-05 and accompanying text (discussing the use of benchmarking and how it may conceal compensation changes).

238. *See, e.g.*, Bernstein, *supra* note 172, at 535 ("As congressional salaries and perquisites mounted, public resentment of Congress grew. So, too, did the circumspection of Senators and Representatives, who sought to develop increasingly subtle and invisible ways of ensuring that congressional salaries would continue to increase, while avoiding the politically risky method of simply voting for pay-raise legislation."); *see also* Jason Grotto & Hal Dardick, *Generous Rules Govern Aldermen's Pensions*, CHI. TRIB. (May 1, 2012, 7:29 AM), https://perma.cc/WT6T-3AER (discussing the generous pension benefit plan that was approved in the early 1990s for Chicago city aldermen that gained attention only two decades later, when retirements took place and the costs of the plan to the public, and benefits to councilmembers, became clear).

239. *See* Nolan, *supra* note 191, at 62 n.8 (discussing the almost inevitable conflicts of interest facing elected officials).

240. *See* Ctr. for the Advancement of Pub. Integrity, An Honest Day's Work: Regulating State Lawmakers' Outside Income 1 (2016), https://perma.cc/Y7RY-26WZ (discussing the challenge of developing conflict of interest rules for state legislators in light of the facts that state legislative positions "are generally low-paid and part-time" and that legislators "have the right—perhaps even the need—to supplement their salaries").

241. *See* Nicholas Kusnetz, *Conflicts of Interest Run Rampant in State Legislatures*, CTR. FOR PUB. INTEGRITY (updated Mar. 19, 2014, 12:19 PM), https://perma.cc/A7SX-25G6 (discussing the widespread prevalence of conflicts of interest in New Mexico's legislature, where legislators receive a $154 per diem while in session but no salary, meaning that "unless they are retired or wealthy, they must find another way to earn a living"); *cf.* Patrick J. Dellay, Note, *Curbing Influence Peddling in Albany: The 1987 Ethics in Government Act*, 53 BROOK. L. REV. 1051, 1076 (1988) (noting that arguments against an ethics law in New York that limited legislators' ability to engage in outside employment in order to curb conflicts of interest "bec[a]me less persuasive [after legislators'] salaries were increased").

to respond to the increased risk that results,[242] the greater stress put on conflict of interest rules in lower-paid legislative bodies may limit their utility as prophylactic rules.[243]

In addition to potentially exacerbating the risk of conflicts of interest, low legislative pay also may lead to a greater risk of outright corruption. While establishing causation between low pay and corruption is challenging, a number of recent high-profile government corruption prosecutions have involved local elected officials taking bribes to supplement their low government salaries.[244] Higher levels of compensation could serve as a kind of insulating device, protecting legislators "to some degree" from "the corrupting influences that are out there."[245] Additionally, because higher-paid officials risk losing more if they are found guilty of corruption, they may have less of an incentive to engage in corrupt transactions than lower-paid officials.[246]

B. The Distorting Effects of City Council Compensation Procedures

As set out above, neither over- nor undercompensation of legislators is desirable. Overcompensation may result in elected officials motivated more by pecuniary incentives than by civic duty; increased burdens on taxpayers; and inadequate recognition of the nonmonetary benefits of elected office. Conversely, undercompensation can result in elected office being open only to

242. Conflict of interest laws are premised on the idea that elected officials who have a duty to make decisions for others (their constituents) should not be permitted to inject personal interests into their decisionmaking. *See* Nolan, *supra* note 191, at 83-85 (discussing the revolving door between public and private employment).

243. *Cf. id.* at 82-83, 105-06 (noting conflict of interest rules' prophylactic aspect but questioning the ability of existing federal rules to handle situations where a government employee does not receive full-time compensation); Ctr. for the Advancement of Pub. Integrity, *supra* note 240, at 2-3 (noting that bright-line approaches to conflict of interest rules, such as caps on outside income, may be appropriate for full-time state legislatures but that developing rules for part-time state legislatures is more challenging).

244. *See, e.g.*, Matt Zapotosky, *This Might Be the Most Corrupt Little Town in America*, WASH. POST (Mar. 5, 2016), https://perma.cc/WWD8-2HS6. Zapotosky reports on a corruption scandal in Crystal City, Texas, where the Federal Bureau of Investigation (FBI) indicted four out of five city councilmembers. *See id.* An FBI official attributed the corruption, in part, to the fact that "elected leaders, who are not paid for their duties, are tempted to take a cut" of money that "flows in from traffickers, state grants or other sources." *Id.* (quoting Rob Saale, assistant special agent in charge at the San Antonio Division of the FBI). "When they are offered a $500, $1,000 bribe, that's a very large sum of money for them," the official said. *Id.* (quoting Rob Saale).

245. *See* Litz, *supra* note 43 (quoting George Gonzales, professor of political science at the University of Miami); *cf.* Vermeule, *supra* note 205, at 962-63 ("[A]s to the fact of payment [for members of Congress], the [Constitutional] Convention feared that unpaid legislators would turn to corruption to supplement their incomes.").

246. *See* Robert G. Vaughn, *Ethics in Government and the Vision of Public Service*, 58 GEO. WASH. L. REV. 417, 442 (1990).

those wealthy enough to afford it; produce a less effective, accountable, and transparent government; and increase risks of conflicts of interest and corruption.

Determining the amount of compensation that neither overcompensates nor undercompensates is a challenging endeavor. Not only does it require a city-specific inquiry into relevant determinants of compensation, but reasonable minds may also differ about what those determinants should be. Furthermore, depending on one's normative views as to whether the negative consequences of undercompensation are more or less problematic than those of overcompensation, the weight given to such concerns may differ. As Vermeule recognizes in his scholarship on congressional pay, "[N]ot all of these ends can be simultaneously maximized, and the choice between alternative rules becomes a difficult negotiation of conflicting aims."[247] City council compensation procedures, therefore, will necessarily entail tradeoffs between design features that mitigate for overcompensation versus undercompensation.

While tradeoffs in the institutional design of compensation procedures are inevitable, each of the four procedures used to determine city council compensation discussed in Part I above—city council control, independent commissions, benchmarking, and referenda—suffer from design defects that are likely to result in systematic over- or undercompensation distortions.[248] This Subpart analyzes each of these procedures to identify how the compensation process influences compensation outcomes. Where procedures enable financial self-dealing, standards manipulation, or the failure to fully account for nonsalary compensation, overcompensation bias is likely to result. Conversely, where procedures enable reelection rent-seeking, election pathologies, or reverse ratcheting, undercompensation bias is likely.

1. City council control

Procedures that give city council control over compensation are problematic because they enable both financial self-dealing, which poses a risk of overcompensation, and reelection rent-seeking, which poses a risk of undercompensation. Moreover, the perception of inappropriate self-dealing created by such procedures erodes public trust and confidence in local government, even where no actual self-dealing occurs. This Subpart analyzes each of these concerns in turn.

Self-dealing occurs when someone in a fiduciary position, such as a trustee or agent, acts for her own gain rather than in the best interests of those she

247. *See* Vermeule, *supra* note 8, at 505.

248. Undercompensation distortions may be the result of the failure to increase compensation rather than outright pay cuts. While the source of distortions can vary, the important point for this Article's discussion is that the distortions exist.

represents.[249] As elected representatives, city councilmembers are trustees or agents of their constituents and are responsible for overseeing the use of public funds to achieve the goals of the community.[250] Therefore, if city councilmembers divert public funds to increase their own compensation where doing so is not in the best interest of their constituents, they have engaged in financial self-dealing.

While procedures that allow city councils to control their own compensation create the risk of this type of self-dealing, it is unclear how often the activity occurs in practice. It can be challenging to assess whether a particular increase in council salary is or is not in the best interests of constituents when the entity making that decision is inherently self-interested. For example, if council pay has not been raised in several years while city council responsibilities have increased, a pay increase may actually be in the public interest.[251] Yet if a council controls its own pay, it may award itself an inappropriately large raise, which may not be in the public interest. For example, in 2014, Boston city councilmembers proposed a $25,000 salary increase on the ground that their salary—$87,500 at the time—had not been increased in eight years.[252] While the increase was ultimately reduced to $12,000—and the Massachusetts State Ethics Commission stepped in to prohibit it from going into effect until after the next election—the size of the increase and the plan for it to immediately go into effect raised red flags that financial self-dealing was at play.[253]

While financial self-dealing can occur when city councils control their own pay, anecdotally at least it appears that city councils are more likely to

249. *See* Bruce A. McGovern, *Fiduciary Duties, Consolidated Returns, and Fairness*, 81 NEB. L. REV. 170, 178-89 (2002) (discussing fiduciary self-dealing in a variety of legal contexts).

250. *See* D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 706-13 (2013) (discussing elected officials as agents and fiduciaries); *see also* Max Schanzenbach & Nadav Shoked, *Reclaiming Fiduciary Law for the City*, 70 STAN. L. REV. 565, 573 (2018) (discussing city officials' status as fiduciaries).

251. *See supra* Part II.A.2.

252. *See September 17, 2014 Regular Meeting of the City Council of the City of Boston* at 35:14-41:15, CITY OF BOSTON (Sept. 17, 2014), https://perma.cc/S6PW-BAFM (statement of Councilor Linehan) (offering the salary increase amendment).

253. *See* Andrew Ryan, *City Council Raises Also May Boost Pensions*, BOS. GLOBE (Oct. 21, 2014), https://perma.cc/3K2P-FYRT [hereinafter Ryan, *City Council Raises*] (reporting the State Ethics Commission's intervention); Andrew Ryan, *City Councilors Approve 14 Percent Raise for Themselves*, BOS. GLOBE (Oct. 28, 2015), https://perma.cc/6K25-KGQW (reporting that after the mayor vetoed a $20,000 increase, the mayor and council settled on a compromise amount of $12,000); *cf.* Press Release, Ohio Ethics Comm'n, Ethics Commission Files Appeal with Supreme Court (June 22, 1998), https://perma.cc/SU6C-HLYS (discussing a state court case challenging the Ohio Ethics Commission's finding that a postelection, preterm vote by the Canton City Council to increase its own salary raised concerns that the Council was engaged in financial self-dealing in violation of state conflict of interest laws).

undercompensate, rather than overcompensate, themselves. That is, even where increased pay would be in the public interest, councilmembers engage in a different type of self-dealing through reelection rent-seeking, resulting in undercompensation.

Self-dealing in the form of reelection rent-seeking finds theoretical support in public choice theory. Public choice theory views elected officials not as disinterested, objective actors pursuing the public interest, but as individuals who act to maximize their own self-interest.[254] For voters, that interest is their economic self-interest.[255] For elected officials, the interest is their chance of reelection.[256] As Vermeule has observed, "[T]he political benefits of conspicuous self-denial may dominate purely financial losses."[257] That is, although a salary increase would boost lawmakers' welfare in terms of monetary gain, if increasing their own salaries is likely to hurt their chances of reelection (or is perceived as likely to do so), then under this form of self-dealing, lawmakers will not increase their own compensation.

Lawmakers have ample reason to believe that raising their own salaries would hurt their reelection prospects.[258] Congress learned this lesson early in its history, after public outcry against a proposed pay change in 1817: "So traumatized was Congress by the public reaction that it did not attempt to enact new salary legislation for nearly forty years."[259] Legislators at the state and local levels have experienced similar reactions. For example, in Louisiana, in 2008, after a thirty-year period with no pay raises, legislators passed a salary

254. *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 265-81 (1962) (discussing an individual's behavior in politics in terms of economic rationality); Robert D. Tollison, *Public Choice and Legislation*, *in* PREDICTING POLITICS: ESSAYS IN EMPIRICAL PUBLIC CHOICE 15 (W. Mark Crain & Robert D. Tollison eds., 1990) (providing an overview of economic theories of legislation).

255. *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 36-38 (1957).

256. Public choice theory assumes that reelection is in the politician's self-interest. *See* BUCHANAN & TULLOCK, *supra* note 254, at 19-20. The same outcome is likely to result under a public interest model because elected officials are generally risk averse. *See* Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 605 (1980) (arguing that secure incumbents have little motivation to engage in innovative policymaking for which they might be punished by voters at the next election).

257. Vermeule, *supra* note 8, at 520.

258. *See* Cullen, *supra* note 11 ("In most legislatures, it's up to lawmakers to decide if they should raise their own salaries, making it almost impossible to do so. The issue is often too politically charged to touch."). Relatedly, candidates seeking elected office may have reason to believe that campaigning on a promise to cut their own salary will help them win the election. *See, e.g.*, Litz, *supra* note 43 ("Miami-Dade's strong mayor Carlos Gimenez . . . campaigned on a promise to slash the mayor's salary in half.").

259. Bernstein, *supra* note 172, at 533.

increase from $16,800 to $37,500.[260] The proposed increase reflected not only the proportional amount needed to keep up with inflation but also the expanded responsibilities of the job.[261] But after harsh public outcry, the governor vetoed the bill.[262]

Even where lawmakers succeed in their efforts to increase their pay, the repercussions may lead to political backlash. For example, after Atlanta city councilmembers voted to accept the recommendation of an independent commission to increase salaries by approximately 50%, from about $40,000 to about $60,000 annually, commentators immediately noted that the issue could be a potent one in the next election.[263] In 2015, the Birmingham City Council voted to increase its members' own salaries (as permitted under existing state law) from $15,000 to $50,000 annually to reflect the full-time duties of the officially part-time position.[264] But after public outcry over the size of the raise, the state passed legislation mandating that city council salaries for Class 1 municipalities—a category that includes just one city, Birmingham—be set by the Alabama State Personnel Board at the median household income of the city, while leaving other non-Class 1 home rule municipalities free to set city council salaries as they see fit under existing state law.[265] And when former Fort Worth city councilmember (and later state legislator) Wendy Davis ran for governor of Texas in 2014, newspaper headlines reminded voters that "Wendy Davis sought fat pay increases for herself as city council member," citing a 2006 Fort Worth referendum to increase council pay from $3900 to $25,000, which Davis had supported.[266]

---

260. *See* Cullen, *supra* note 11.

261. *See id.*

262. *See id.*

263. *See* Jeremiah McWilliams, *Atlanta City Council Votes for 50 Percent Pay Increase*, ATLANTA J.-CONST. (updated Dec. 3, 2012, 4:45 PM), https://perma.cc/5YBK-KN6Z.

264. *See* Kelsey Stein, *Birmingham City Council President Says 233 Percent Raises Are "In the Best Interest of the City,"* AL.COM (Aug. 11, 2015, 3:04 PM), https://perma.cc/J6Q4-L9BA (reporting that the president of the Birmingham City Council supported the raise because it "offer[ed] fair compensation for a part-time job with full-time responsibilities" on which councilmembers "spend about 50 hours a week").

265. *See* ALA. CODE § 11-43-7.3 (2017) ("[T]he annual salary for each member of the city council of the Class 1 municipality shall be set and adjusted each regular four-year term by the State Personnel Board, by determining the median household income of the city rounded up to the nearest thousand . . . ."); S. 247, 2017 Leg., Reg. Sess. (Ala. 2017) (enacted); DOUGLAS J. WATSON, CTR. FOR LEADERSHIP AND PUB. POLICY, ALA. STATE UNIV., HOME RULE IN ALABAMA AND THE SOUTH 13 (2013), https://perma.cc/23FQ-2ZDZ (noting that Birmingham is Alabama's only Class 1 municipality).

266. *See* Ashe Schow, Opinion, *Wendy Davis Sought Fat Pay Increases for Herself as City Council Member*, WASH. EXAMINER (Aug. 8, 2014, 1:30 PM), https://perma.cc/ZU6S-K5GV.

Thus, like state legislatures[267] and Congress,[268] when faced with the decision whether to raise their own salaries, city councils routinely do not do so. Even when the increase is relatively small or where they have gone decades without a pay increase, with rising cost of living and median incomes far outpacing lawmakers' salaries, the pressures of "paycheck politics" are often so great that authorizing an increase in salary for themselves is simply a nonstarter.[269]

Furthermore, even where intermediary procedures, such as nonbinding independent commission recommendations, have been instituted to counteract reelection rent-seeking and financial self-dealing pressures, a "fatal flaw" remains if "the commission's recommendations have to return to the City Council, ultimately allowing members to have the final say on salaries."[270] Leaving the final decision in councilmembers' hands is likely to result in the same types of distortions that occur when the city council has unilateral control.[271] For example, after the San Diego City Council repeatedly refused to approve salary increases recommended by that city's independent salary-setting commission over the course of a decade, the commission essentially gave up. In its 2016 recommendation, while finding that objective criteria made a pay raise appropriate, the commission declined to recommend one:

> [T]he Salary Setting Commission believes that any recommended pay increase at this time would simply be politicized by the City Council and would take the focus away from the real dysfunction here, which is the fact that [when] Councilmembers vote on their own pay, a gross conflict of interest exists. . . . The City Council is encouraged to . . . eliminate the ability of Councilmembers to benefit from a vote on their own pay.[272]

If procedures that give city councils control over their own compensation produce both overcompensation distortions (from financial self-dealing) and

---

267. *See* SQUIRE & MONCRIEF, *supra* note 22, at 68-73 (discussing how state legislators' compensation is set and describing votes by state legislators in a number of states not to increase pay).

268. S*ee* BRUDNICK, *supra* note 178, at 2 (noting that Congress has rejected automatic pay increases every year since 2010); *see also* Bruce Moyer, *The Rise of Paycheck Politics*, FED. LAW., April 2013, at 10, 10 ("The use of pay as a political weapon has risen to a new level in Congress.").

269. *See, e.g.*, Adler & Prather, *supra* note 153 ("This summer and in previous years, it took just minutes for Burnsville[, Minnesota]'s City Council to unanimously dismiss the idea of a raise, though salaries haven't gone up since 2007."); *cf.* Moyer, *supra* note 268, at 10 (discussing "paycheck politics").

270. *See* Patricia Fleming & Roger Talamantez, Opinion, *Council Members Should Not Vote on Own Pay*, SAN DIEGO UNION-TRIB. (Feb. 26, 2016, 4:30 PM), https://perma.cc/VG9X-RFKE.

271. *See id.* (describing the problems with San Diego's compensation-setting procedure).

272. *See* San Diego Commission Recommendation, *supra* note 140, at 2-3.

undercompensation distortions (from reelection rent-seeking), one might argue that the opposing pressures might cancel each other out and that the resulting wages, on average, neither over- nor undercompensate. While additional empirical research would be needed to definitively respond to this argument, anecdotally at least there appears to be more evidence of city councilmembers not increasing their pay than increasing it.[273] Thus, there appear to be asymmetrical effects from the two types of self-dealing, with greater downward pressure on salaries from reelection rent-seeking than upward pressure from financial self-dealing.[274]

Even if the over- and undercompensation distortions produced by the two variants of self-dealing were to cancel each other out, procedures that give city councils control over their own compensation are normatively undesirable for two additional reasons. First, when city councils determine their own pay—regardless what they decide—their time and attention will be diverted. The highly politicized nature of the issue tends to make it a time-consuming one, potentially forcing councilmembers to spend a disproportionate amount of time on it and taking time away from other city business. Second, when councilmembers control their own salaries, even if they do not actually engage in financial self-dealing, the perception that they can do so, and that any salary

273. While there are numerous examples of city councils' voting to increase their own members' salaries, in my unscientific review of recent media coverage, there appear to be more examples of city councils' voting against salary increases. *See, e.g.*, Ignazio Messina, *Toledo City Council Votes Against Pay Raises for Mayor, Councilmen*, TOLEDO BLADE (May 30, 2017), https://perma.cc/P4XF-YZQX (noting that the Toledo City Council voted against an increase in pay from $27,500 annually to either $31,500 or $39,500 annually, even though the increase was recommended by an independent commission); Alejandra Molina, *Santa Ana City Council Votes Against Pay Raises*, ORANGE COUNTY REG. (July 16, 2014, 9:45 PM), https://perma.cc/MJU9-3VCP (noting that although salaries for city councilmembers in Santa Ana, California had remained unchanged since 1958 at $1500 annually, the Santa Ana City Council voted against putting a proposal on the 2014 ballot for voters to decide whether to approve a salary increase to $12,000); San Diego Commission Recommendation, *supra* note 140, at 2 (describing how city councilmembers in San Diego rejected every salary increase proposed by an independent commission for more than a decade); *City of Tucson Mayor and Councilmember Salary Increase Amendment*, *supra* note 17 (describing how the mayor and city council of Tucson, Arizona campaigned against a modest increase in pay recommended by an independent commission).

274. How the pressures of financial self-dealing or reelection rent-seeking balance out may depend on the particular mix of councilmembers and whether term limits prevent them from running for reelection. *Cf.* Alison St. John, *Despite Opposition, County Supervisors Vote to Increase Their Salaries*, KPBS (Jan. 10, 2017), https://perma.cc/NDE5-B8X7 (reporting that all four term-limited-out commissioners in San Diego County voted in favor of a pay raise while the remaining commissioner voted against it).

increase might be motivated by financial self-dealing, is likely to undermine public trust in elected officials and government more generally.[275]

2. Referenda

Referenda to determine city council compensation, while eliminating the possibility for reelection rent-seeking or financial self-dealing by lawmakers, are likely to produce election pathologies resulting in undercompensation. Few actions engender greater voter antipathy than elected officials' trying to raise their own salaries. As one commentator bluntly stated: "People don't want to pay politicians more money because they don't like politicians very much."[276]

There is a well-recognized tension in the United States "between the beliefs that strong government protects and provides for its citizens and that big government leads to tyranny."[277] This tension plays out in a range of contexts but is particularly evident in the debates over lawmaker pay. While voters may recognize in theory the need for a fair salary for elected officials, the failings of government—both real and perceived—often lead to public outcry when politicians' pay is at issue. Politicians consistently poll as one of the least trusted groups in U.S. society.[278] Although local government leaders fare somewhat better than state and federal politicians, chants to "drain the swamp" and get the "fat cats" off the government "gravy train" pervade politics at all levels.[279]

275. Furthermore, lawmakers who decline pay raises because of reelection rent-seeking may nonetheless engage in economic self-dealing with respect to nonsalary forms of compensation, which tend to attract less voter attention and negative political repercussions. *See, e.g.*, Sollars, *supra* note 4, at 516 ("Why might legislators seek to increase the compensation they realize through expense accounts and per diem salary? Increasing the number of days in session and the size of unvouchered expense accounts would tend to be politically less damaging ways of increasing pay.").

276. Kauffman, *supra* note 12 (quoting Neil Malhotra, professor of political economy at Stanford University).

277. *See* Nikole Hannah-Jones, *Have We Lost Sight of the Promise of Public Schools?*, N.Y. TIMES MAG. (Feb. 21, 2017), https://perma.cc/287B-AJCF.

278. *See, e.g.*, *Honesty/Ethics in Professions*, GALLUP, https://perma.cc/6DKT-JWT5 (archived Feb. 2, 2018) (showing that the public viewed members of Congress as dishonest as compared to members of twenty-one other professions in a 2017 poll and that such a view has held relatively constant over time).

279. *See, e.g.*, Bryan & Carney, *supra* note 188 ("Those without term limits can stay on the so-called gravy train until voters kick them out of office, or in some cases, until death comes knocking."); Mike Maciag, *The Implications of Long-Term Pay Freezes for States, Localities*, GOVERNING (June 11, 2013), https://perma.cc/K3ZD-K768 ("There's a sense of government workers still being fat cats . . . . When coupled with this anti-government mentality, it becomes tough to raise salaries." (quoting Neil Reichenberg, Executive Director of the International Public Management Association for Human Resources)); John Kelly, *What's With All Trump's Talk About "Draining the Swamp"?*, SLATE (Oct. 26, 2016, 10:59 AM), https://perma.cc/7YPE-KTWX ("Politicians have long colored calls to clean up government corruption with *drain the swamp*.").

While such sentiments may ebb and flow in different political eras, they are to some extent inevitable: As one delegate to the Constitutional Convention observed in 1787, a "principal evil" of democracy is "the want of due provision for those employed in the administration of [Government]. It would seem to be a maxim of democracy to starve the public servants."[280]

In light of the highly politicized nature of politicians' pay, there are a number of concerns raised by the use of referenda—particularly mandatory referenda—to determine city council compensation. Mandatory referenda on city council compensation are an exception to the norm that voters are not given an up or down vote on individual laws passed by legislative bodies.[281] While arguments might be made that this particular type of law—providing for legislative salaries—is so central to democracy that it should be carved out for a mandatory citizen vote, there are any number of other issues arguably as important to democratic functioning that are not singled out for such treatment, from the use of taxpayer funds to the functioning of the court system to the salaries of other elected officials such as judges and members of Congress. Whether mandatory referenda should be expanded to such topics is a debate for another day, but requiring referenda for changes to city council compensation is likely to exacerbate the already politicized issue. Particularly in an era of severe partisan divides,[282] the portion of the populace unhappy with a particular lawmaker's substantive actions is likely to be *very* unhappy about it. Thus, if given the opportunity to vote on lawmakers' pay through the referendum process, voters may use the opportunity to "punish" lawmakers for their substantive decisions, rather than waiting until the next election to vote out the lawmakers.

The use of mandatory referenda to determine councilmembers' salaries is also problematic for reasons that plague the referendum process as a lawmaking tool more generally, such as the influence of special interests and lack of deliberation.[283] In addition, the exceedingly low voter turnout levels in

280. *See* 1 FARRAND'S RECORDS, *supra* note 172, at 48 (statement of Mr. Gerry).

281. In many states, however, amendments to state constitutions passed by the state legislature require the approval of voters. *See* BRIFFAULT & REYNOLDS, *supra* note 33, at 60.

282. *See, e.g.*, *Partisanship and Political Animosity in 2016*, PEW RES. CTR. (June 22, 2016), https://perma.cc/5YWA-CUCF.

283. The referendum process is generally considered less problematic than the initiative process, but both forms of direct democracy have been criticized as less deliberative than legislative lawmaking. *Cf., e.g.*, Jonathan L. Marshfield, *Improving Amendment*, 69 ARK. L. REV. 477, 490-501 (2016) (discussing various criticisms of legislature- and citizen-initiated processes for amending state constitutions, including a lack of citizen interest and participation, the threat of capture by special interests, and the exacerbation of majoritarian abuses); Zale, *supra* note 51, at 835-39, 836 n.7 (discussing criticisms of direct democracy in the context of initiative processes related to environmental review laws).

local elections—turnout of less than 20% is typical, and in some local elections the turnout percentage is in the single digits—raise significant questions about how representative the outcomes of referendum are.[284]

While there is little empirical data on the effect of referenda on elected officials' salaries, my research into referenda for city council salaries yielded many more news reports of voters rejecting proposed increases than approving them.[285] Voters presented with the opportunity to determine the pay of their local leaders tend to reflexively reject any proposed increase, even where the amount of the increase is modest and where it has been decades since the last raise. Possibly in some cases voters rejected proposed increases because the raises were not in the public interest. But the combined evidence—of pay stagnation, the fact that many of the increases were proposed not by councils themselves but by independent commissions, and the rhetoric surrounding the issue in media accounts—indicates that election pathologies likely affected the outcomes.

For example, in 2015, voters in Tucson, Arizona rejected a proposal to increase annual compensation for the full-time city council from $24,000 to $27,500.[286] The raise would have cost each resident five cents per year and was recommended by an independent commission.[287] Nonetheless, voters rejected it, with local media arguing that it was "not the time to give pay raises to the

284. *See* WHO VOTES FOR MAYOR?, https://perma.cc/6FDV-5WA2 (archived Feb. 2, 2018) (discussing the findings of a 2015-2016 study showing that 15 of the 30 most populous cities in the United States had voter turnout of less than 20% in recent mayoral elections and that some cities had turnout in the single digits); *see also, e.g.*, Sandra Baker, *Fort Worth Voters Narrowly Back Bigger Council Size*, STAR-TELEGRAM (Fort Worth) (updated May 7, 2016, 10:46 PM), https://perma.cc/4CC2-VR4S (reporting less than 5% turnout in a 2016 election in Fort Worth, Texas in which voters defeated a proposed salary increase for Fort Worth's city council).

285. *See, e.g.*, Baker, *supra* note 284 (reporting the defeat of a ballot measure to increase city councilmembers' pay in Fort Worth); Emily Miller, *Boca Councilman Back with Another Pay-Raise Proposal*, SUN SENTINEL (Deerfield Beach, Fla.) (May 23, 2016, 6:36 PM), https://perma.cc/K7D7-LXVR (discussing a proposed pay increase and noting that since 2004, voters had twice rejected pay increases); *City of Tucson Mayor and Councilmember Salary Increase Amendment*, *supra* note 17 (describing a ballot measure to raise councilmember salaries in Tucson, Arizona that was defeated by voters).

An unusual example of voters approving a significant pay increase occurred in 2014, when San Antonio voters approved an increase in councilmembers' pay from $20 per meeting ($1040 per year) to $45,722 annually. *City of San Antonio Council and Mayor Salaries*, *supra* note 152. The referendum's success may have been because the $45,000 salary was based on the city's median income and because councilmembers' compensation had lagged "far behind other major cities across the state." *See* Reagan, *supra* note 195.

286. *See City of Tucson Mayor and Councilmember Salary Increase Amendment*, *supra* note 17.

287. *See id.*

bosses."[288] Similarly, voters in Boca Raton, Florida have twice since 2004 rejected proposals to increase compensation for their part-time city councilmembers, whose $7200 annual salary has not been raised in over thirty years.[289]

It is worth emphasizing that this Article does not mean to suggest that voters should not have a say in how much their representatives are paid. They should. The issue here is how they should have that say. Referenda to determine council pay are "a blunt object to achieve policy objectives that often can be pursued in a more direct manner[,] or one that is less intrusive to the operations of the affected branch of government."[290] Mandatory referenda, in particular, are likely to exacerbate election pathologies and result in undercompensation distortions. Other compensation procedures—such as benchmarking and independent commissions—produce fewer distortions in outcomes while still giving residents input into the process.

3. Benchmarking and other formulas

City council compensation procedures that use benchmarking or other formulas, as well as those that use independent commissions, have been designed to address some of the over- and undercompensation distortions that characterize council control and referenda. However, even these better-designed procedures are still vulnerable to distortions resulting from standards manipulation, inadequate accounting for other forms of compensation, and reverse ratcheting. This Subpart discusses these concerns in the context of benchmarking and other formula-based procedures; Subpart 4 below discusses independent commissions.

The use of benchmarking or other formulas to determine city council compensation eliminates the opportunity for direct financial self-dealing or reelection rent-seeking by councilmembers because they are no longer in control of their own compensation. However, if city councils can manipulate the standards for benchmarking or the formula used, overcompensation distortions may nonetheless result. Take the example of a formula-based procedure that links city council compensation to the compensation of other elected officials (such as state judges or county commissioners) by setting it at a specified percentage of the other officials' salaries. There are two possible ways a city council could manipulate this procedure and engage in indirect economic self-dealing. First, city councilmembers can change the mathematical formula to benefit themselves without directly changing the amount of their pay. For

288. *See, e.g.*, Editorial, *Two No-Brainer Votes to Make City Government Run Better*, ARIZ. DAILY STAR (Oct. 12, 2015), https://perma.cc/ELR6-KVCU.

289. *See* Miller, *supra* note 285.

290. *Cf.* Sutin, *supra* note 212, at 222 (discussing "no budget, no pay" laws).

example, for decades, the salaries of county supervisors in San Diego County were set at 80% of that of superior court judges.[291] But in 2016, the supervisors voted to amend the benchmarking ordinance and increase the percentage to 90%, thereby essentially evading the restriction on their control over their salaries.[292] In a sense, then, these types of benchmarking procedures, where city councils can control the benchmarking metrics, can be analogized to procedures that give city councils direct control over their members' salaries and are subject to similar structural biases.

A second way in which city councils can engage in indirect self-dealing is if they are able to influence the salaries of the outside officials to which theirs are tied. In the example above, because county supervisor salaries are tied to superior court judges' salaries, if the judges' salaries increase, then the county supervisors' would as well. While it may be unlikely for a city council to have direct control over salaries of the outside officials to which councilmembers' salaries are tied,[293] city councils theoretically may be able to engage in indirect means of influence, through lobbying, political pressure, or simply informal networking with those who set the outside officials' salaries.

Nor are benchmarking procedures immune from undercompensation distortions. For example, reverse ratcheting can occur when a benchmarking procedure includes a comparison to the salaries of similarly situated city councils. While such a comparison makes intuitive sense, it may result in stagnation of salaries if the council salaries being used as comparators suffer from their own undercompensation distortions. This is particularly likely if the council salaries in comparator cities are determined by referendum or city council control, which both tend to produce stagnation in pay. While further empirical analysis would be necessary to determine the extent of this effect, using council salaries from those cities as comparators could result in further undercompensation.

4. Independent commissions

As with benchmarking procedures, using independent commissions to determine city council compensation avoids the most blatant distortions in compensation that characterize council control and referenda. However, the

291. *See* St. John, *supra* note 274.

292. *See id.*

293. *But cf.* Thomas Frank, *How State Lawmakers Pump Up Pensions in Ways You Can't*, USA TODAY (Apr. 16, 2012, 12:54 PM), https://perma.cc/T65P-HHUB (noting that in Texas, state legislators' pensions—a nonsalary form of monetary compensation—are tied to state judges' salaries and that state legislators have repeatedly voted to increase state judicial salaries, thereby ensuring that their own pensions will also increase).

use of independent commissions still raises concerns about both over- and undercompensation.

Overcompensation is a potential concern because of the possibility of capture. The capture theory of regulation predicts that agencies and other regulatory bodies do not act objectively in the public interest, but rather are likely to be "captured" by the actors they regulate.[294] In the context of independent salary-setting commissions, concerns about capture effects may be more or less significant depending on how membership on the commission is determined. Where members of the commission are appointed by the city council itself, concerns about capture are greater because commission members may have preexisting connections to councilmembers or city business that could affect their recommendations. Conversely, lottery systems or hybrid lottery-appointment systems can help reduce, if not entirely eliminate, capture effects.[295] Overall, capture concerns in the context of independent commissions are likely to be less pervasive than in the traditional agency context, both because of the lower likelihood of a revolving door between the regulated actors (city councilmembers) and commission members, and because the highly visible issue the commission is concerned with—politicians' pay—is likely to generate intense public interest, which should lower the risk that the commission's decisionmaking will be dominated only by the regulated entity.

With respect to undercompensation distortions, reverse ratcheting of the type described above is a concern because independent commissions typically use comparative benchmarking as part of their processes. Additionally, when commission recommendations are nonbinding and the final decision about compensation is left to either council control or referendum, the problematic elements associated with those two mechanisms—reelection rent-seeking and financial self-dealing with the former, and election pathologies with the latter—may result in either over- or undercompensation.

* * *

This Part has shown how existing compensation-setting procedures for city councils are characterized by structural defects that can distort compensation outcomes. When these procedures enable economic self-dealing, manipulation of standards, or inadequate accounting for nonsalary compensation, overcompensation distortions are likely. Conversely, when procedures enable reelection rent-seeking, voter pathologies, or reverse ratcheting, undercompensation distortions can occur. The next Part considers

294. *See* Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 108 (2002). *See generally* Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974) (discussing the public interest theory and the capture theory of regulation).

295. *See infra* Part III.A.

how the procedures used to determine city council compensation might be reimagined to respond to these institutional design defects.

III. Improving the Institutional Design of City Council Compensation Procedures

This Part explores the governance possibilities for improving the institutional design of city council compensation procedures. Subpart A outlines several institutional design options that respond to over- and undercompensation distortions produced by existing city council compensation procedures. Subpart B then turns to the second-order institutional design question of who should implement these institutional design options, analyzing the legal and policy arguments for state versus local control.

A. First-Order Institutional Design: Structural Tools

To respond to the over- and undercompensation distortions in current city council compensation procedures, this Subpart identifies and analyzes four distinct structural tools: improving independent commission procedures, fine-tuning benchmarking, limiting mandatory referenda, and implementing election cycle delay rules.

This Article's recommendations are intentionally modest—nudges, not shoves—and intended to provide practical adjustments that can be made to existing procedures. Which of these approaches is appropriate—or legally possible—depends in part on the existing compensation procedures in a particular city and the transaction costs involved, as well as the relevant constraints on local authority under applicable state law.[296] To be sure, independent commission procedures and benchmarking procedures are generally preferable to city council control and mandatory referenda because such procedures have been specifically designed to reduce the opportunities for financial self-dealing, reelection rent-seeking, and election pathologies. But for both legal and political reasons, it may not be feasible for a particular city to adopt such procedures. Thus, the institutional design options discussed in this Subpart offer a menu of approaches from which policymakers can choose, depending on the circumstances in their city.

Improving independent commissions: From an institutional design perspective, the use of independent commissions can reduce both over- and undercompensation distortions in pay. As such, they offer a promising middle path between city council control and referenda. While there may be legal limitations under state law or transaction costs associated with implementing

296. *See infra* Part III.B.

this type of compensation-setting procedure, the use of independent commissions should be encouraged. But for such commissions to be truly effective, those who design them must pay careful attention to three key structural elements: the selection of members; the factors the commission considers in making its recommendations; and the effect of binding versus nonbinding recommendations.

The selection of members for independent commissions matters because of the problem of indirect financial self-dealing noted in Part II.B.4 above. If members of the commission have ties to councilmembers or other conflicts of interest, they may not be able to truly act as independent decisionmakers. Furthermore, even if commission members act independently, the perception of conflicts of interest can undermine the public's confidence in the process.

Thus, the selection of members to the commission should be conducted in a manner that reduces as much as possible both the reality and perception of conflicts of interest. One method would be to select members through a lottery of registered voters in the city. Another approach would be a hybrid selection process in which some commission members are selected through a lottery while others are appointed by the mayor or council, giving each party an equal number of political appointees. While the latter system makes the selection process more partisan, it may also help ensure that there is greater institutional knowledge among commission members or make the adoption of an independent commission more acceptable to a city council that has become accustomed to controlling its own salary. This type of hybrid approach is used in Oregon to appoint members to its independent citizens commission for state legislative salaries.[297] Similarly, Snohomish County, Washington uses a hybrid system to select members of its salary-setting commission, with six members selected by lottery from registered voters in the county plus four nominated by the county executive, confirmed by the county council, with each of the four required to have a background in a different specified sector.[298]

A second institutional design feature to consider is which factors an independent commission should weigh in making its salary recommendations. As noted in Part I above, typical factors considered include the scope of the job's duties, data on economic conditions, socioeconomic considerations, and comparative salary data.[299] While most factors are logically relevant to how much councilmembers should be paid and are thus appropriately considered,

297. *See* Pub. Officials Compensation Comm'n, *supra* note 9.

298. *See Salary Commission*, SNOHOMISH COUNTY WASH., https://perma.cc/9UPY-SWD6 (archived Feb. 2, 2018) (explaining the structure of the salary commission and noting that the four members appointed by the county executive must have "experience in the field of personnel management and come from four sectors: business, professional personnel management, [the] legal profession, and organized labor").

299. *See supra* text accompanying note 140.

some raise concerns. For example, comparative data on councilmembers' pay in similarly situated cities may result in reverse ratcheting if the pay of the comparator councilmembers has been subject to undercompensation distortions.[300] This is not to say that this type of data should not be considered; however, there should be awareness of the potential bias that may be present.

In making recommendations, independent commissions also typically take testimony from current and former councilmembers.[301] While such firsthand consultations are obviously relevant to the commission's understanding of the scope of the council's responsibilities, and councilmembers may honestly report on their workload, councilmembers' testimony may also reflect either financial self-interest or reelection rent-seeking. To address this concern, the commission should consider other factors that can help confirm (or disprove) the testimony from councilmembers about their workload. For example, committees can look to public records regarding the time spent by council at public meetings; take testimony from nonelected city council staff and former councilmembers; analyze the scope of official duties (and any changes over time); and take public testimony from residents.

A final institutional design feature of independent commissions is whether their recommendations are binding or nonbinding. Binding or mandatory recommendations are those that go into effect automatically unless affirmatively rejected by the city council. Nonbinding recommendations leave the final substantive decision about whether to implement the recommendation to another actor, typically either the city council itself or voters.

Binding recommendations are preferable to nonbinding ones for several reasons. First, if recommendations are nonbinding and the final decision is left to the city council, then councilmembers are still able to engage in financial self-dealing or reelection rent-seeking, with the associated distortions. While the existence of the independent commission's recommendation may dampen these effects, anecdotally at least there appears to still be significant reelection rent-seeking by councilmembers in cities with independent commissions that make nonbinding recommendations.[302]

Similar concerns arise if recommendations are nonbinding and the final decision is determined through a mandatory referendum. Although the independent commission's recommendation may have a dampening effect on election pathologies—by signaling to voters that the recommendation is based on an independent analysis as opposed to originating from self-interested councilmembers—nonetheless, by requiring final approval through a referendum, the issue is invariably politicized.

---

300. *See supra* Part II.B.3.

301. *See supra* note 139 and accompanying text.

302. *See supra* Part II.B.

An additional concern with nonbinding recommendations is that if the recommendations are not approved by the final decisionmaker—either because the city council yielded to pressures of reelection rent-seeking or because voters fell victim to election pathologies—the council may go for long periods of time without salary increases. The failure of regular, incremental increases in councilmembers' compensation can have a particularly pernicious effect: The longer it has been since a salary increase, the greater the recommended increase is likely to be, but the greater the recommended increase, the more likely it will trigger reelection rent-seeking or election pathologies.

Mandatory recommendations by independent commissions can help avoid—if not entirely eliminate—these concerns. Although the city council can still vote against the recommendations, by making the recommendations automatically self-implementing, opportunities for reelection rent-seeking are reduced because a councilmember now has to initiate action to reject the increase (and convince a majority of fellow councilmembers to similarly vote against it).

Fine-tuning benchmarking: As with independent commissions, benchmarking and formula-based procedures are designed to avoid the reelection rent-seeking and financial self-dealing that characterize city council control and the election pathologies associated with referenda. In addition, benchmarking procedures potentially involve lower transaction costs than independent commission procedures and thus may be attractive to cities that do not have the resources to create an independent commission.

However, benchmarking and formula-based procedures are only as good as the standards on which they are based. There are a number of formulas and benchmarking standards currently in use,[303] some of which are better designed than others. For example, as noted in Part II.B.3 above, if benchmarking uses a comparative analysis of compensation for councilmembers in other cities, reverse ratcheting may result if those comparative cities suffer from undercompensation distortions. One way to avoid this is for benchmarking formulas to use comparative data from similarly situated cities whose council compensation is set by independent commissions or benchmarking procedures of their own, given such compensation is less likely to suffer from distortions than that in cities whose council pay is set by council control or referendum.

If a benchmarking procedure uses salaries of other government officials as a basis for council salaries, then care should be taken to ensure that those

303. *See, e.g.*, VISALIA, CAL., MUN. CODE § 2.04.080(B) (2017) (connecting compensation to inflation); Adler & Prather, *supra* note 153 (discussing the use of automatic pay adjustment formulas in some Minnesota cities, where "mayors and councils get automatic raises tied to the [CPI] used by the state Office of Management and Budget"); City of Hallandale Beach, Fla., *supra* note 147, at 2 (analyzing a range of factors relevant to salaries of city commissions and providing a comparison to peer cities).

outside salaries cannot be manipulated by the city council. Ensuring that the outside salaries are not ones city council has direct control over is an obvious precaution. However, associated institutional design measures may be needed to lessen the opportunities for the city council to indirectly influence outside public employees' salaries. For example, if city council salaries are set at some percentage of county commissioner salaries, and county commissioners in turn control their own salaries, then city councilmembers should be discouraged from contributing to the campaigns of county commissioners to avoid the reality or perception of indirect self-dealing.

Benchmarking—both when used as a standalone procedure or when used by independent commissions in making their recommendations—may use median household income in the jurisdiction as a basis for councilmembers' salaries.[304] Tying council salaries to median incomes is intuitively appealing: Doing so directly links councilmembers' salaries to the economic well-being of the community. However, if median income is particularly low, using median income as a standard may limit the pool of potential candidates. Those in professional private sector careers and those with higher levels of education would have to be willing and able to accept a greater reduction from their current salaries to serve on city council than would individuals in nonprofessional careers or with lower levels of education. One type of candidate is not necessarily better than the other, but institutional designers should be aware of this potential effect of using median income as a benchmark for council pay.

Finally, benchmarking procedures should be designed, to the extent possible, to reduce lawmakers' ability to engage in indirect financial self-dealing. For example, a compensation procedure that uses an automatic formula to set council salaries—such as a specified percentage of another public employee's salary—may be effective in limiting councilmembers' ability to directly control their own salaries. However, if councilmembers can change the formula or increase the other employee's salary, then they can indirectly control their own pay.[305] Institutional designers should anticipate the most likely forms of indirect financial self-dealing and devise mechanisms to avoid them. For example, any changes in the formula used to set council salaries

304. *See, e.g.*, ALA. CODE § 11-43-7.3 (2017) (requiring that city councilmembers' salaries for Class 1 municipalities—that is, Birmingham, *see supra* note 265—be adjusted every four years to "the median household income of the city rounded up to the nearest thousand"); MODESTO, CAL., CHARTER art. VII, § 703(c) (limiting city councilmembers' salaries to no more than 50% "of the median family income for the Modesto Metropolitan Statistical Area as reported by the United States Census Bureau").

305. *See* Frank, *supra* note 293 (discussing how Texas state legislators have voted to increase state judicial salaries, thereby indirectly increasing their own pensions, which are based on judicial salaries); St. John, *supra* note 274 (discussing how San Diego's city council voted to increase its benchmark compensation from 80% to 90% of the salary for superior court judges).

should be approved by an independent commission, rather than allowing the council to change the formula itself. But completely eliminating the indirect financial self-dealing that may occur through informal networking and associations between city councilmembers and other institutional actors may be impossible.

Limiting mandatory referenda: Mandatory referenda are likely to result in undercompensation distortions because of election pathologies associated with the issue of elected officials' pay.[306] The issue of elected officials' salaries is almost inevitably politicized; as a result, objective considerations tend to get lost in the din of political rhetoric.[307] Thus, jurisdictions that do not already use mandatory referenda to determine council compensation should not begin to do so.

Limiting mandatory referenda on city council compensation does not mean that voters are deprived of the opportunity to have their voices heard on the issue. In many jurisdictions, the optional form of popular referendum would still remain available to voters.[308] Furthermore, voters have an opportunity to make their opinion heard on what lawmakers do (or promise to do) when they decide whether to elect or reelect them. If voters believe lawmakers are being paid too much, they can support candidates who offer reform proposals for council compensation.[309] "Elections provide the basic accountability device by which voters register their approval or disapproval with legislator actions" and allow "citizens to track legislator behavior and to hold their legislator accountable for his or her behavior at election time."[310]

---

306. *See supra* Part II.B.2.

307. *See supra* notes 258-69 and accompanying text.

308. *See supra* notes 159-60 and accompanying text.

309. Elections are unlikely to operate as an effective check on undercompensation. As noted above, researchers have found that elections can be uncompetitive and fail to offer voters alternatives when the elected position provides relatively low compensation. *See* Squire, *supra* note 46, at 2; *supra* note 234 and accompanying text. And more generally, few candidates run on the promise to raise their own salaries—even if doing so would be in the public interest. Accordingly, to adequately address undercompensation concerns, other reforms discussed in this Article, such as benchmarking and independent commission recommendations, should be considered.

    Conversely, elections may be an effective check on overcompensation. Elections are more likely to be competitive where the elected position provides relatively high compensation. *See* Squire, *supra* note 46, at 2. And common sense indicates that elections for city council positions with relatively higher salaries might draw in candidates campaigning on promises to reduce their compensation. *Cf., e.g.*, Zahniser & Reyes, *supra* note 200 (noting that "several candidates" were running for Los Angeles City Council—which had the highest compensation "among the nation's largest cities"—on promises to take a voluntary pay cut or donate part of the salary).

310. Rodriguez, *supra* note 78, at 652. While limiting the use of mandatory referenda could help reduce undercompensation distortions, this structural reform alone would not eliminate the causes of all undercompensation distortions. For example, candidates

footnote continued on next page

In jurisdictions where referenda on council salary are already mandatory, either as a matter of state law or pursuant to the city charter, such mechanisms are likely here to stay. If a referendum is mandated by city charter, eliminating it would require voters to amend the city charter to take away their own ability to vote on the issue, which would seem to be an unlikely outcome.[311] If referenda are required as a matter of state law, then cities must continue to hold them unless state law is changed. But even in jurisdictions where referenda are required and are likely to remain required, additional steps could be inserted into the process to reduce distortions. For example, a compensation proposal put before voters should be recommended by an independent commission, not by the city council itself. Election pathologies may still prompt voters to reject any proposed increase, but by injecting the independent commission into the process, those pressures may at least be dampened.

Implementing election cycle delay rules: A final method to address over- and undercompensation distortions in existing city council compensation procedures is to implement election cycle delay rules. As outlined in Part I above, these rules postpone the implementation of any changes in compensation until after the next election cycle. Such rules are particularly valuable when existing procedures give the city council control over its own compensation because they create a "veil of ignorance" about whether the officials voting on the pay change will benefit from it themselves. Many cities have already implemented election cycle delay rules, and it would benefit other cities to do the same.

Additional considerations: Undercompensation distortions produced by reelection rent-seeking can be particularly challenging to design against, in part because of constitutional limitations. While discontinuing the use of procedures that give city councils control over their own compensation and

might engage in reelection rent-seeking by pledging to reduce their own pay or refuse a salary increase. Thus, additional reforms, such as implementing binding independent commission recommendations or developing an improved benchmarking system, may be appropriate.

311. While it is theoretically possible to do so, no state has ever repealed the initiative or referendum once granted, and studies and polling on direct democracy at the state level indicate that once voters have been given the power of the initiative and referendum, they are unlikely to be willing to give up that power. *See, e.g.*, Deborah K. McKnight, Research Dep't, Minn. House of Representatives, Initiative and Referendum 7 (1999), https://perma.cc/HPX7-QALF ("No state has ever repealed [the] initiative or referendum."); *see also, e.g.*, MARK BALDASSARE ET AL., PUB. POLICY INST. OF CAL., PPIC STATEWIDE SURVEY: CALIFORNIANS & THEIR GOVERNMENT 14 (2013), https://perma.cc/X3QM-UM6K (finding as of 2013 that 72% of Californians polled believed it is a good thing that voters can "make laws and change public policies" using the initiative process and that 65% were satisfied with the way the initiative process works, although a majority also supported reforms to the process).

adopting alternatives, such as benchmarking or independent commissions, can greatly reduce the opportunities for reelection rent-seeking, city councilmembers may still engage in reelection rent-seeking by refusing to accept any proposed salary increase or campaigning on such a promise, as they are constitutionally entitled to do.[312] The U.S. Supreme Court has held that any attempt to limit a candidate's or elected official's ability to refuse to accept her salary or to campaign on that promise is subject to strict scrutiny and would likely violate the First Amendment.[313] As the Court explained:

> [While a] State might legitimately fear that such emphasis on free public service might result in persons of independent wealth but less ability being chosen over those who, though better qualified, could not afford to serve at a reduced salary . . . [,] [t]he State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.[314]

Furthermore, there is a long history of independently wealthy elected officials refusing any salary at all,[315] and there are normative reasons to support such a practice.

Thus, even if a city adopts a benchmarking procedure or makes independent commission recommendations binding, city councilmembers who want to engage in reelection rent-seeking can refuse all or part of their salary and return it to the city coffers or donate it to charity.[316] Yet while eliminating reelection rent-seeking entirely may not be possible, this Article's suggested

312. The Contracts Clause of the U.S Constitution, which prevents the impairment of contracts, does not pose a bar to councilmembers voluntarily returning their salary to the city. *See* Opinion No. 97-103, 80 Op. Cal. Att'y Gen. 119, 125 (1997) (noting that the relationship between a city councilmember and a city is contractual and that the city therefore would be in violation of the Contracts Clause if it decreased a member's compensation during the member's term in office but adding that officials "may contribute back to the city whatever portion of their salaries they wish"); *see also* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

313. *See* Brown v. Hartlage, 456 U.S. 45, 48, 53-54, 60-62 (1982) (holding that a state violated the First Amendment when it nullified a candidate's election victory for violating a state law by promising to reduce his salary if elected, even though he could not fulfill the promise because the salary was set by law, at least where the promise was made "in good faith and without knowledge of its falsity").

314. *Id.* at 59-60.

315. *See, e.g.*, PARRILLO, *supra* note 46, at 10 ("George Washington, with his huge private fortune, pointedly refused all pay as commander of the Continental Army."); Noah Rayman, *How to Make a Buck in America*, TIME (July 16, 2013), https://perma.cc/M55G-62DN (noting that Michael Bloomberg promised to serve as mayor of New York City for $1 a year but ultimately "offered New Yorkers a better deal" by never cashing his paychecks).

316. *See, e.g.*, Dakota Smith, *3 LA City Council Members Decline Pay Raises*, L.A. DAILY NEWS (updated Aug. 28, 2017, 6:38 AM), https://perma.cc/JE27-K3W6 (discussing how city council salaries in Los Angeles are automatically tied to municipal court judges' salaries but noting that councilmembers can—and do—opt to decline automatic increases).

structural reforms should dampen it by making pay adjustments more routine through procedures such as automatic benchmarking and binding independent commission recommendations.

An additional consideration for reform of compensation-setting procedures is how to account for nonsalary compensation. As noted in Part I above, the overall compensation of city councilmembers includes not only salary but also nonsalary components, such as per diem payments, expense allotments, and health and pension benefits. There is enormous variation across cities in whether these other components are included as part of overall compensation for city council and, if so, how the amounts are calculated, making it challenging to develop standardized institutional design responses.

The issue of public pensions presents a particularly thorny issue. This is not the place to consider in depth the varied and complex problems raised by public pensions, a subject that has attracted significant scholarly attention.[317] However, a few observations are warranted here to illustrate the complexity of the pension issue and its interplay with city council compensation.

First, whatever one's general views on public pensions as a form of deferred compensation for public employment might be, pensions for elected legislators raise somewhat distinct concerns because of the elected nature of the position. As a report from California's Legislative Analyst's Office explained:

> Given that most elected officials serve for only a limited time, a[n] . . . argument can be made that few, if any, . . . elected officials should receive [state pensions or retirement] benefits. On the other hand, some elected officials serve for significant periods of their lives in state or local elected office, sometimes in a full-time capacity similar to that of other public employees. Accordingly, an argument can be made that some elected officials should be able to accrue benefits similar to those of other full-time or part-time governmental workers.[318]

Thus, whether city councilmembers should even be eligible for public pensions will depend on one's normative views about the role of city council as well as factual considerations that vary from city to city, such as councilmembers' full- or part-time status (and how that status should be determined);[319] whether term limits apply and what those term limits are; and the scope of the council's responsibilities. If public pensions are included as a part of overall compensation for city councilmembers, a host of additional questions are

317. *See generally* T. Leigh Anenson et al., *Reforming Public Pensions*, 33 YALE L. & POL'Y REV. 1, 2-3 (2014) (examining teachers' pensions); Paul M. Secunda, *Litigating for the Future of Public Pensions*, 2014 MICH. ST. L. REV. 1353 (discussing pension litigation).

318. LEGISLATIVE ANALYST'S OFFICE, EXAMINING STATEWIDE PENSION BENEFIT POLICY FOR ELECTED OFFICIALS 6 (2012), https://perma.cc/Y323-BWE7.

319. *See, e.g., id.* at 7 ("Should full-time elected officials be eligible for more pension benefits than part-time officials? If so, who makes the determination that officials are full-time or part-time?").

raised, such as whether the same procedures should be used to determine salaries and pensions, or whether these two components of pay differ in ways that make it appropriate or even legally necessary to use different approaches.[320]

Finally, while designing compensation procedures for city council poses a number of political and practical challenges, there are existing procedures in operation in cities across the country that can serve as models of how structural reforms could address over- and undercompensation distortions. For example, Washington state law authorizes cities to establish independent commissions to set city councilmembers' salaries.[321] If a city chooses to establish such a commission, the commission's recommendations go into effect once filed with the city clerk without any additional actions required by the council,[322] thus avoiding many of the problems of reelection rent-seeking and financial self-dealing when councils must approve independent commission recommendations. Over- and undercompensation distortions remain possible in this system if regulatory capture affects members of the commission or if councilmembers decline recommended pay increases. However, the fact that commissions established pursuant to this law in different cities in Washington have made recommendations to increase, as well as decrease, city councilmembers' compensation based on city-specific factors[323] offers a model of how procedures can be designed to address many of the over- and undercompensation distortions discussed above.

B. Second-Order Institutional Design: State vs. Local Control

The previous Subpart offered several first-order institutional design recommendations to address distortions in city council compensation procedures. This Subpart now turns to the second-order institutional design

320. Another question is how procedures used to set city council compensation should account for the potential impact of current salary levels on future pension payouts. *See, e.g.*, Ryan, *City Council Raises*, *supra* note 253 (noting that "[a] $20,000 raise for Boston councilors . . . could substantially increase their pensions" because "[f]or most councilors, pensions are based on the average of their three highest consecutive years of salary").

321. *See* WASH. REV. CODE § 35.21.015(1) (2017).

322. *Id.* § 35.21.015(3).

323. *See, e.g.*, Amelia Dickson, *Commission Approves 25 Percent Pay Raise for Olympia's Elected Officials*, OLYMPIAN (updated Sept. 21, 2017, 9:34 AM), https://perma.cc/5B5E-U2QL (reporting that Olympia, Washington's independent salary commission approved a pay increase for the city's mayor and councilmembers and discussing the commission's rationale for the increase); Citizen Comm'n on Elected Salaries, City of Tacoma, Decision Presented to City Council 1-2 (2015), https://perma.cc/3RR4-TA25 (approving a pay decrease for Tacoma, Washington's mayor and city councilmembers and providing justifications for the decrease).

question: Should the structural changes outlined above be implemented as a matter of state or local law? In other words, who should decide how city council compensation is decided?[324]

There is both a descriptive and normative aspect to the question of state versus local control over city council salaries. As a descriptive matter, whether the state or local government controls city council compensation procedures requires considering the parameters of home rule in the state and other relevant state law. As noted in Part I above, a local government has the authority to act only if the state has authorized it to do so. However, states have generally granted significant autonomy to local governments, particularly to home rule municipalities.[325] To what extent local governments can control city council compensation procedures therefore requires considering what type of home rule is at issue.

In legislative home rule states, home rule municipalities are presumed to have the authority to act on any matter they have not otherwise been prohibited from addressing under state law.[326] Thus, in these states, home rule cities have the authority to determine the procedures used to set city council compensation, barring any state law to the contrary. But states are free to take away control from local governments on the issue, either completely or partially.[327] For example, a state law requiring that any changes in compensation only go into effect after the next local election would mean that cities could still choose the procedures used to set compensation but would need to comply with the relevant state election cycle delay rule or be preempted.

In imperio home rule states, home rule municipalities are granted a narrower range of authority on which to act than in legislative home rule states: They may legislate on local affairs only.[328] However, if the matter is determined to be an exclusively local matter, then under imperio home rule, the local government's actions receive immunity and cannot be preempted by the state.[329] Thus, in these states, home rule cities have the authority to determine the procedures to set city council compensation if it is considered a local matter. And if city council compensation is determined to be an *exclusively* local matter,

---

324. *Cf.* Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 LAW & SOC. INQUIRY 959, 991 (1997) (book review) ("If the critical aspect of reform is assigning a goal to the correct institution, then who decides which institution is to get the assignment?").

325. *See supra* Part I.C.

326. *See supra* text accompanying note 107.

327. *See supra* note 108 and accompanying text.

328. *See supra* notes 109-11 and accompanying text.

329. *See supra* note 111 and accompanying text.

then the city's decision about such procedures will be immunized from state preemption.

With regard to the first issue, procedures used to set city council compensation would likely be considered a local matter: Local governments have an obvious interest in how local employees, including local elected officials, are compensated.[330] The second question—whether city council compensation procedures are an exclusively local matter and thus whether local choices about compensation procedures are immunized from state interference—is less clear-cut. The question which procedures should be used to set the compensation of a local legislative body is a matter at the heart of the local government's internal operations, and thus a strong argument could be made that the issue is an exclusively local one.[331] However, when considering whether a particular issue is an exclusively local affair rather than a mixed state-local affair, courts look to whether there are uniformity or externality concerns.[332] States could make a colorable argument that there is a need for uniform city council compensation procedures throughout the state to avoid "haphazard" and "inequitable" outcomes that might result under local control.[333]

Thus, as a descriptive matter, the outcome in imperio home rule states as to whether local or state law controls city council compensation procedures is

330. *See* 1 STEVENSON & VAN WIE, *supra* note 112, § 22.08 ("The determination of the tasks to be performed by local officers and employees, and the compensation to be paid to them, are local matters." (footnote omitted)).

331. *See* County of Riverside v. Superior Court, 66 P.3d 718, 721 (Cal. 2003) (holding that local procedures concerning compensation of local government employees are municipal matters and thus that a state law requiring mandatory arbitration violated the state constitution); *see also* LEGISLATIVE ANALYST'S OFFICE, *supra* note 318, at 6 ("Should local voters and officials have control over elected [local] officials' pensions, or should there be uniform statewide policies? . . . If the Legislature wishes to impose statewide policies . . . , a constitutional amendment would be required, given the independence of charter cities and counties in establishing compensation levels for their own officials.").

332. *See, e.g.*, State Bldg. & Constr. Trades Council v. City of Vista, 279 P.3d 1022, 1029-34 (Cal. 2012) (analyzing uniformity and externality concerns in the context of conflicting state and local wage laws); Fraternal Order of Police, Colo. Lodge No. 27 v. City & County of Denver, 926 P.2d 582, 589-91 (Colo. 1996) (examining uniformity and externality concerns raised by local standards for peace officer training).

333. *See* OFFICE OF ECON. & DEMOGRAPHIC RESEARCH, FLA. LEGISLATURE, SALARIES OF ELECTED COUNTY CONSTITUTIONAL OFFICERS AND SCHOOL DISTRICT OFFICIALS FOR FISCAL YEAR 2017-18, at 1 (2017), https://perma.cc/3PW8-NTCK (discussing the legislative history of a Florida law setting salaries for elected officials of non-home rule counties); *see also id.* ("[T]he Legislature determined that a uniform salary law was needed to replace the previous local law method of determining compensation, which was haphazard, preferential, inequitable, and probably unconstitutional. In addition, the Legislature intended to provide for uniform compensation of county officers having substantially equal duties and responsibilities and basing these uniform salary schedules on countywide population." (footnote omitted)).

likely to vary. Local procedures are more likely to receive immunity from attempts by the state to interfere in strong imperio states, such as California and Colorado, where courts have extended immunity to local governments on a broad array of issues.[334] In weaker imperio home rule states, such as Oregon, where courts have more narrowly defined the scope of immunity for local government action,[335] the outcome may be similar to that in legislative home rule states, where local compensation procedures may be preempted or limited by state law.

In addition to asking the descriptive question of how control over city council compensation procedures is allocated between state and local governments, this Article also raises a normative question: Which level of government *should* have control over city council compensation procedures? On one hand, the significant substantive differences across cities and the value of preserving local autonomy regarding internal affairs weigh in favor of local control. Local control over council compensation procedures also finds support from a type of matching principle, which suggests that "the level of government that can best internalize externalities has the superior incentives to make socially optimal decisions."[336] This principle suggests that local governments are the most appropriate institutional actors to make decisions about their own elected officials' compensation because they will bear most of the costs and benefits of their particular design choice. For example, if a city chooses to give its council control over its members' compensation, then that city's residents will bear the risks of both over- and undercompensation produced by the reelection rent-seeking and financial self-dealing associated with that procedure.

---

334. *See, e.g.*, Johnson v. Bradley, 841 P.2d 990, 991, 1004 (Cal. 1992) (holding that a local law providing for partial public funding for candidates for city office was a municipal matter and was not preempted by a state law prohibiting public funding of election campaigns); Mackey v. Thiel, 68 Cal. Rptr. 717, 719-20 (Ct. App. 1968) (holding that local regulations on the manner in which municipal elections are held are a municipal affair and not preempted by contrary state election code standards); *see also Fraternal Order of Police*, 926 P.2d at 587-88, 592 (collecting cases finding that local concern trumped state law).

335. The Oregon Supreme Court has said:

> When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the amendments to the citizens of local communities. . . .
>
> Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so . . . .

City of La Grande v. Pub. Emps. Ret. Bd., 576 P.2d 1204, 1215 (Or.), *aff'd on reh'g*, 586 P.2d 765 (Or. 1978).

336. *See* Clayton P. Gillette, *Who Should Authorize a Commuter Tax?*, 77 U. CHI. L. REV. 223, 225 (2010).

On the other hand, an argument can be made for state control over compensation procedures precisely because local governments are inherently self-interested in the mechanisms used to set council compensation. Particularly where existing procedures give the city council control over its members' compensation, in order to effect any institutional design changes the city council would have to agree to take power away from itself. Furthermore, even if a majority of councilmembers would prefer another procedure, because the issue of elected officials' pay is so politicized, city councils may be reluctant to act at all to improve the institutional design of compensation procedures—even if they believe that doing so would be in the public interest.

Yet there are reasons to believe that city councils may be receptive to implementing at least some of the institutional design recommendations above, particularly if existing procedures put them in the untenable position of having to decide their own salaries. It appears, anecdotally at least, that many city councilmembers recognize the inherent conflict of interest that having control of their own compensation places them in and that they would be likely to welcome—or at least be willing to try—an alternate mechanism to give them some distance from the decisionmaking process.[337]

Furthermore, state control over city council compensation procedures can raise concerns about erosion of local autonomy. Although giving the power to set compensation to another branch or level of government can address self-dealing concerns, it creates a risk of aggrandizement. As Vermeule has recognized in his analysis of interbranch control of congressional compensation: "If no branch enjoys untrammeled power to set its own compensation, some institution will necessarily enjoy the power, shared or exclusive, to set its rivals' most immediate rewards and penalties."[338]

While Vermeule's focus is on horizontal separation of powers at the federal level—whereas the concern highlighted here is about vertical separation of powers between states and local governments—the underlying danger is similar: "[A]ggressor branches" may use "compensation-setting authority to control the subsistence, and thus the will, of less powerful rivals."[339] State power over city council compensation procedures is particularly problematic given current tensions in many states between state

337. *See* Walters, *supra* note 84 ("The whole idea behind salary review commissions was that it would put the power to raise council salaries in the hands of someone other than the council."); *see also* Hal Dardick, *Most Aldermen Accept 2015 Raise*, CHI. TRIB. (Nov. 29, 2014, 7:07 AM), https://perma.cc/LP8S-E35B (noting that an automatic benchmarking formula to determine the salaries of Chicago aldermen "allows aldermen to avoid the kind of politically risky votes on pay increases that some local and state lawmakers must take prior to elections if they want a pay increase").

338. Vermeule, *supra* note 8, at 502.

339. *See id.* at 506.

governments and cities on a range of substantive issues, from equal rights ordinances to environmental regulations.[340] State lawmakers displeased with substantive lawmaking at the local level may welcome the opportunity to use state control over city council compensation procedures as a means of further limiting the power of local governments whose policies they disagree with.[341] Thus, in addition to relying on the traditional legislative approach of preempting local actions on an issue-by-issue basis, state lawmakers can also influence local actors indirectly by controlling the local actors' compensation.

Which level of government should decide compensation procedures may also depend on the type of city at issue because the effectiveness of a particular procedure may vary depending on which level of government sets it. For example, uniformity and efficiency concerns, as well as the transaction costs of local control, may make state control over city council compensation appropriate for small, non-home rule cities with part-time councils. In such cities, council service often involves a limited time commitment, with the structure of those local governments designed to limit the responsibilities of city councilmembers.[342] As such, it might be appropriate for state law to set

340. *See, e.g.*, Ramsey, *supra* note 115 (discussing conflicts in Texas).

341. While I am not aware of any empirical studies analyzing the correlation between a state's disagreement with local substantive decisions and the state's exercising control over city council compensation procedures, recent events in Alabama illustrate the potential for this type of state aggrandizement. In 2017, the state legislature passed the Alabama Memorial Preservation Act of 2017, S. 60, 2017 Leg., Reg. Sess. (Ala. 2017) (enacted) (codified at ALA. CODE §§ 41-9-230 to -237 (2017)), which prohibits any local government from removing, relocating, altering, renaming, or "otherwise disturb[ing]" any "architecturally significant building, memorial building, memorial street, or monument" that has been on public property for forty years or more, ALA. CODE § 41-9-232(a). When the elected leaders of Birmingham subsequently covered a Confederate monument in a city park, the state attorney general sued the city for violating the state law. *See* Esther Ciammachilli, *In Birmingham, the Debate over Confederate Monuments Is Renewed After Charlottesville*, NPR (Aug. 17, 2017, 4:36 PM ET), https://perma.cc/R97Q-SJKN. During the same 2017 legislative session, the Alabama Legislature also passed a law changing the way Birmingham's city councilmembers' salaries are determined, requiring that salaries be set by a state agency at the city's median household income, thereby preempting the city council's decision a year earlier to increase salaries. *See supra* note 265 and accompanying text. Using median income to determine compensation may be an appropriate benchmarking formula, but the Alabama law does not apply to any other city in the state, and the city council in every other home rule city in the state remains free to determine its own members' salaries. *See supra* note 265 and accompanying text. Although the two state laws appear to have been initiated separately in the state legislature, the fact that the state has chosen to control city council compensation procedures in Birmingham—and only Birmingham—at the same time it is seeking to exercise control over the substantive decisions of Birmingham's elected leaders illustrates the potential state aggrandizement concerns raised in this context.

342. Examples of such structures include fewer regular meetings, no official office hours, and no or minimal pay. *See, e.g.*, *City Council*, CITY OF PEARLAND, TEX., https://perma.cc

footnote continued on next page

salary ranges based on population bands, rather than requiring the councils themselves to determine what procedures to use, so that councils in such cities can focus their limited time and resources on substantive policymaking decisions.[343] But for larger cities with home rule powers and full-time councils, concerns about local autonomy and aggrandizement motivations of the state may make it more appropriate to leave the decision about city council compensation procedures to local government.

In sum, the normative question of state versus local control over city council compensation procedures requires a nuanced analysis of whether the state or local government will be more likely to successfully implement institutional design improvements. It also requires a balancing of the risks of aggrandizement by the state as against the efficiency gains that may be produced by state control. As noted above, for larger, home rule cities, local control over compensation procedures is generally preferable because the risk of state aggrandizement outweighs the efficiency costs of such a system, while for smaller, non-home rule cities, state control over compensation procedures may strike a better balance.[344]

* * *

While I am optimistic that city council compensation procedures can be improved and that the distorting effects of over- and undercompensation can be reduced through the structural reforms this Article has discussed, I also recognize that the necessarily politicized nature of politicians' pay may limit the extent of reform possible. As one commentator noted: "No matter how [elected officials'] salaries are determined, it's still difficult to have an open discussion about them, given the public's hostility toward the issue."[345] Even when independent commission procedures are put in place or automatic benchmarking standards

/8RW3-R96S (archived Feb. 15, 2018) (noting that councilmembers serve part-time and meet twice per month); *City Council Responsibilities*, CITY OF SUNNYSIDE, WASH., https://perma.cc/SP38-7WTQ (archived Feb. 15, 2018) ("Members of the City Council serve part-time and do not maintain office hours at City Hall."); *Mayor and Council*, CITY OF NOVI, MICH., https://perma.cc/G2AV-J4SD (archived Feb. 15, 2018) (noting that councilmembers serve as part-time "volunteers without benefits" and meet twice per month); *see also supra* notes 94-96 and accompanying text (describing the Houston, Alaska city council).

343. Some states take this approach for non-home rule cities. *See, e.g.*, CAL. GOV'T CODE § 36516 (West 2017).

344. A well-designed benchmarking system—one that allows for local variation in population, council responsibilities, cost of living, and other factors—and an independent commission procedure authorized by state law are examples of procedures that would seem to strike an appropriate balance between efficiency concerns and excessive state control. *See supra* notes 321-23 and accompanying text (discussing the Washington state model of independent commissions).

345. Cullen, *supra* note 11 (discussing the issue in the context of state legislators' salaries).

adopted, the issue of politicians' pay still tends to cause controversy.[346] But even if city council compensation "is something that nobody likes to talk about, . . . it's important to talk about."[347] By exploring the institutional design of city council compensation procedures and offering a prescriptive toolkit for policymakers, this Article aims to encourage that conversation.

Conclusion

This Article's goals have been threefold. First, it has offered a comprehensive descriptive account of the four most commonly used procedures to set city council compensation and situated them in a broader context by providing a comparison to compensation-setting methods used for legislative bodies at the federal and state levels. Second, it has unpacked the normative implications of compensation-setting procedures and demonstrated how existing procedures for city council pay can distort compensation outcomes in ways that legislative compensation theory predicts are problematic. Third, this Article has advanced a prescriptive framework to improve the institutional design of city council compensation procedures and identified specific structural reforms that may reduce over- and undercompensation distortions.

This Article's claims are modest. It does not purport to dictate the "right" amount of compensation for city councilmembers. Nor does it claim that all over- and undercompensation that may result from the procedures used to determine city council pay can be eliminated. But it does seek to bring an awareness of how the mechanisms used can produce distortions—and why such distortions are normatively undesirable—and thus to shed light on the effects of process on outcomes.

Whether managing the provision of traditional services, such as education and sanitation, or developing innovative policies in areas as diverse as environmental protection, public health, and civil rights, the decisions made by our cities' elected leaders have an enormous impact not only on the day-to-day lives of residents, but also on state and national policy conversations. The compensation of those leaders—and how that compensation is determined—is an important part of the governance design of our cities. By analyzing the structural mechanisms that determine city council pay and recommending policy reforms that can improve those mechanisms, this Article aims to bring cities one step closer to the institutional foundations they need to "save the world."[348]

346. *See supra* Parts II.B.3-.4.

347. Adler & Prather, *supra* note 153 (quoting Brad Tabke, Mayor of Shakopee, Minnesota).

348. *Cf.* HOW CITIES WILL SAVE THE WORLD, *supra* note 40.