UNDER PRESSURE: DEMOCRACY IN LOCAL GOVERNMENTS DURING TIMES OF FINANCIAL DISTRESS

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I. INTRODUCTION

The Great Recession's continuing impact on our nation's cities and towns is commonly conveyed through ongoing reports of severe financial stress in municipal budgets. Omitted from financial reporting however is the recession's impact on the democratic structures of local government.

Economic crisis is well-recognized as a threat to national governments. Democratic governance is particularly vulnerable during times of economic turmoil. Such crisis serves as a catalyst for proponents of concentrated political power pledging to deliver political, economic, and social stability in exchange for relinquishing democratic rights. The recession and the ongoing sluggish recovery exposed fragility within democracies across the globe. Commentary often focuses on weaknesses in those nations possessing developing economies or where change of political and legal structures is preceded by public displays of unrest or martial force. Vulnerabilities within nations possessing developed economies and fewer displays of civic turmoil are less examined. Yet, pressures caused by the recession's fallout are now testing democratic governance in our nation's municipalities as well.

In this paper I will examine some of the statutory mechanisms that, often subtly, erode democratic governance at the local level, and will discuss those changes within constitutional structures that

underpin the political and legal system of the United States.[2] First, I examine the underdevelopment of legal principles regarding a right to elected local government followed by a discussion of the recent impetus for state statutes infringing upon democratic local government. I close with a discussion of those provisions of federal and state constitutions that may be found to protect citizens against such infringements.

II. AN ASSUMED RIGHT AND UNDERDEVELOPED LEGAL PRINCIPLES

To date, American law does not clearly articulate a democratic right to elect the officials of local government. Opportunities to consider such a right rarely come before courts. A lengthy tradition of democratic elections for offices such as mayors, board of aldermen, and city councils mitigate against disputes arising where the existence of such right is at issue. With the growth of cities in the late 1800s, courts were infrequently asked to consider whether residents had a right to elect the officials of newly created local agencies and offices. These suits often involved peripheral offices and were often fact specific and thus, did not address the core issue of a right to elect local legislative bodies. As a result, residents often assume the existence of such right, but courts have not had the impetus to the right's source within existing law. Complicating understandings of a right to elected local government is the lingering presence of Dillon's rule and countervailing state constitutional home rule enactments.

During the latter half of the nineteenth century, Dillon's rule emerges from a turbulent era of rapid urbanization.[3] Cities were growing as the result of internal migration from rural communities, large-scale immigration, and other factors. At the same time, state and local governments were recognizing universal suffrage for men. These developments caused "alarm to some and opportunities for

2. When examining the right to democratic local governance, some common understandings must be established. In this paper, "municipalities" and "local government" refers to cities, towns, villages and other municipal entities traditionally possessing police power to enact local laws – generally charters and ordinances. "Democratic governance" is understood to mean the right of the people to elect, as their representatives, the people who will govern. The people who govern are those officials possessing legislative power. While these terms are at times contested terrain, these understandings serve as guideposts from which we can examine a right to a democratically elected local government.

3. *See* John G. Grumm & Russell D. Murphy, *Dillon's Rule Reconsidered*, 416 ANNALS AM. ACAD. POL. & SOC. SCI. 120 (1974).

others."[4] Alarm arose within previously dominant political elites who saw changing demographics and new voting populations as a threat to their positions and status.[5] Previously marginalized local communities saw opportunities to obtain political voice in the cities and towns where they lived.[6] During this period, state legislatures increasingly sought to intervene in the affairs of local communities through the adoption of local and special acts.[7] Such acts could be used to favor one local group over another.[8] Challenges to these laws presented courts with the occasion to define the rights of citizens in relation to local government. Within this context, Dillon's rule arose.

Iowa Supreme Court Justice John Forrest Dillon first articulated his namesake rule in *City of Clinton v. Cedar Rapids & Missouri River Railroad*.[9] In that case, Justice Dillon found that Iowa "[m]unicipal corporations owe their origin to, and derive their powers and rights wholly from"[10] the state legislature. As a result, "[u]nless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose . . . so great a wrong, sweep from existence all of the municipal corporations in the State."[11] Justice Dillon memorialized his understandings in a widely read treatise on municipal corporations.[12] Competing with Dillon's rule was the Cooley doctrine. Michigan Supreme Court Justice Thomas M. Cooley articulated his namesake doctrine in *People* ex rel. *v Hurlbut* where he wrote that "[t]he state may mould local institutions according to its views of policy . . . but local government is matter of absolute right; and the state cannot take it away."[13] In the contest between the two competing understandings, Dillon's rule achieved preeminence with the United States' Supreme Court's sanction.

In *Merrill v. Monticello,* the Supreme Court approvingly cited

4. *Id.* at 122.

5. *Id.*

6. *Id.*

7. Local and Special acts are generally statutes that do not apply throughout a state's jurisdiction but rather apply to one municipal jurisdiction or one group of people. *See* BLACK'S LAW DICTIONARY, 890, 950 (7th ed. 2000).

8. Grumm & Murphy, *supra* note 3, at 122.

9. City of Clinton v. Cedar Rapids & M. R. R. Co., 24 Iowa 455 (1868).

10. *Id.* at 475.

11. *Id.*

12. *See* JOHN F. DILLON, MUNICIPAL CORPORATIONS § 89 (Chicago, John Cockcroft & Co. 1872).

13. People *ex rel.* v. Hurlbut, 24 Mich. 44, 108 (1871).

Judge Dillon's[14] treatise in a case determining whether a city had an implied power to issue bonds where the state had expressly granted municipal corporations the power to borrow money and contract loans.[15] In *Hunter v. Pittsburgh*,[16] the Supreme Court considered whether the state had the power to take the property of a city without just compensation.[17] The Court found no impediments under the federal constitution and again applied Dillon's rule to determine whether the state could interfere with city affairs in the manner alleged. Subsequent rulings of various federal and state courts confirmed the primacy of Dillon's rule over the Cooley doctrine in most jurisdictions. Dissatisfaction with Dillon's rule grew however and contributed to the rise of the home rule cities movement.

The home rule cities movement began in response to an upsurge of encroachments upon local power achieved through the passage of local and special acts.[18] Judicial recognition of Dillon's rule resulted in courts upholding many such acts.[19] Court rulings nevertheless exposed an often-incomplete legal structure providing for the rights of communities to manage local affairs.[20] Local control through the election of officials and voting at town meetings had been common in practice.[21] Such practices were based on assumed traditions and rights and did not necessarily reflect state constitutional or statutory authority.[22] In response, the home rule cities movement sought to memorialize principles of local control in state constitutions and legislation.[23] Home rule provisions commonly took the form of new articles restricting state legislatures from adopting local or special acts, establishing the right of local citizens to adopt their own municipal charters, and prohibiting particular abuses in individual states.[24] By the early twentieth century at least twelve states had

14. At this time, Judge Dillon had left the Iowa Supreme Court to become a federal judge.

15. Merrill v. Monticello, 138 U.S. 673, 681 (1891).

16. Hunter v. Pittsburgh, 207 U.S. 161 (1907).

17. A takings was alleged to have occurred by the forced merger of a smaller municipality into the City of Pittsburgh.

18. *See* HOWARD LEE MCBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE, 17–28 (Columbia University Press 1916).

19. *Id.* at 15–16.

20. *See* Grumm & Murphy, *supra* note 3, at 122–23.

21. *See* MCBAIN, *supra* note 18, at 3–63.

22. *See* People *ex rel* v. Hulbut, 24 Mich. 44, 98–107 (1871).

23. *See id.*; MCBAIN, *supra* note 18, at 3–63.

24. *See* MCBAIN, *supra* note 18, at 3–63.

adopted home rule provisions by amendment of their constitutions or by statute.[25] A century later thirty-six states protect local home rule in their state constitutions[26] and another eight provide for home rule by statute.[27]

Dillon's rule provides minimal guidance respecting the right of citizens to elect the officials of their local government. Dillon's rule principally speaks to the issue of whether citizens have an inherent right to a local form of government. The rule finds that citizens do not. Once the state establishes a municipal corporation however and delegates police power to it, a very different question arises – whether the governed persons have a right to elect the officials who are vested with legislative authority. The answer to this question is less one of statutory interpretation, for which Dillon's rule might provide guidance, and more one of fundamental principles found within federal and state constitutions. The question implicates the consent of the persons governed in relation to their government and the continued validity of home rule ideals.

Whether persons have a right to elect the officials of local governments who possess legislative power has not yet been posed before any court. As a result, uncertainty lingers regarding whether a right to democracy in local government exists. Yet, with increasing state intervention in the governance of financially distressed communities, it is a question that will soon need to be answered.

III. MUNICIPAL FINANCIAL DISTRESS

Municipal finances across the nation continue to struggle, even after the end of the Great Recession. While the recession officially ended in 2009, municipalities' general revenues remain below pre-recession levels.[28] From the onset of the recession in 2007 through

25. Arizona, California, Colardao, Michigan, Minnesota, Missouri, Nebraska, Ohio, Oklahama, Oregon, Texas, and Washington. *See* MCBAIN, *see id.*, at 109–17.

26. Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin and Wyoming.

27. Arkansas, Delaware, Florida, Georgia, Kentucky, New Hampshire, New Jersey and North Carolina. Additionally, the District of Columbia has home rule protections by federal statute.

28. *See* MICHAEL A. PAGANA & CHRISTIANA MCFARLAND, NATIONAL LEAGUE OF CITIES RESEARCH BRIEF ON AMERICA'S CITIES, CITY FISCAL CONDITIONS IN 2013, at 2–3 (2013), http://www.nlc.org/Documents/Find%20City%20Solutions/Research%20Innovation/F

2012, cities suffered six straight year-to-year declines in general revenues with no significant increase projected for the years ahead.[29]

Nationally, municipalities generate most of their revenue from four sources: state revenue sharing transfers; property taxes; sales taxes; and income taxes. State revenue sharing accounts for approximately 30%[30] of municipal income while property tax collections account for 26%.[31] Sales and income taxes generate roughly 10% of municipal revenue. Remaining revenue is generated through a variety of means, such as license fees, federal grants, utility fees, and water and sewerage fees.[32]

State revenue sharing has been cut significantly over the past fifteen years. Following the recession of 2001, state revenue sharing transfers were reduced and then reduced further following the recession beginning in 2007.[33] As a result, cities have experienced significant ongoing declines in revenue obtained through state programs.[34] Likewise, cities have experienced marked declines in property tax revenue.

Declines in property tax revenue typically lag the onset of any economic downturn and as a result, did not begin to decline until 2009.[35] Municipal property tax collections have declined each year since and are expected to decline again in 2013.[36] While the real estate market has improved in some regions, it remains flat in much of the country and housing prices remain well below pre-recession values and will for the foreseeable future.

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inance/Final_CFC2013.pdf.

29. *Id.* at 2.

30. CONG. BUDGET OFFICE, ECONOMIC & BUDGET ISSUE BRIEF: FISCAL STRESS FACED BY LOCAL GOVERNMENTS 3 (2010), http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/120xx/doc12005/12-09-municipalities_brief.pdf [hereinafter CONG. BUDGET OFFICE].

31. *Id.*; *see also* CHRISTOPHER W. HOENE & MICHAEL A. PAGANA, RESEARCH REPORT ON AMERICA'S CITIES, CITY & STATE FISCAL STRUCTURE 20 (National League of Cities 2008).

32. CONG. BUDGET OFFICE, *supra* note 30, at 3.

33. *Id.* at 2.

34. *Id.*

35. Property tax is collected based on the assessed value of real estate. Reassessment cycles may occur a year of more after a decline in property values. State regulations also commonly prohibit the reassessed value from increasing or decreasing beyond a certain percentage in a single reassessment cycle. As a result, it may take two or more reassessment cycles to reflect the current value of real property for purposes of taxation–particularly when there have been precipitous declines in home values without a corresponding market rebound as occurred during and following the Great Recession.

36. PAGANA & MCFARLAND, *supra* note 28, at 3–4.

Reflecting increased consumer confidence, municipal sales tax revenue increased in 2012 after several years of decline, but increases are expected to flatten in subsequent years.[37] The widely discussed jobless recovery following the end of the recession in 2009 has also impacted income tax collections. Over the past decade, income tax revenue was flat or declining for most municipalities.[38] With modest improvements in employment figures, modest increases in income tax revenue are anticipated, but have not yet materialized.[39]

Improvements in sales and income tax revenue provide some hope for future revenue growth for the nation's cities. The rate of growth for both is unlikely to recoup previous declines in state revenue sharing or offset declining or flat property tax collections in much of the country.[40] In short, "the pace and scope of the economic recovery to date is not sufficient to help cities recover from a deep and sustained economic downturn."[41]

Reducing expenditures along with modest service cuts have largely offset declines in revenues from state revenue sharing and property tax collections. Cutting services, laying-off municipal employees, and reducing workforce compensation and benefits have reduced expenditures.[42] At the same time as revenue declines and budget cuts, local governments have experienced an increased demand for services as a result of the recession and sluggish recovery. With job loss and entrenched unemployment, there are increased demands on public hospitals and clinics, public transportation, and job training and placement services often provided or accessed through local government.[43] Economic downturns also lead to increased demands upon public safety officers. Municipal governments struggle to fill the gaps between their revenue shortfalls and providing the services necessary to assist in a broader recovery in

37. *Id.* at 4.

38. *Id.*

39. *Id.*

40. *Id.* at 9.

41. *Id.*

42. *Id.*; *see also* CHRISTOPHER W. HOENE & JACQUELINE J. BYERS, NATIONAL LEAGUE OF CITIES RESEARCH BRIEF, LOCAL GOVERNMENTS CUTTING JOBS AND SERVICES (2010), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.nlc.org%2Fdocuments%2FFind%2520City%2520Solutions%2FResearch%2520Innovation%2FFinance%2Flocal-governments-cutting-jobs-services-rptul10.pdf&ei=sCD0U8vhEMPboASBj4KAAQ&usg=AFQjCNFsPT1TgVBUT4SYulG3fwoJH-SPnw&sig2=g19ZnJ7616k6qMq5puInrg&b vm=bv.73373277,d.cGU&cad=rja.

43. CONG. BUDGET OFFICE, *supra* note 30, at 3.

their community.[44]

As a percentage of gross national product, municipal revenue is not anticipated to return to pre-2007 levels before the year 2060.[45] Even after the historic budget cuts of recent years, the gap between local government's receipts and expenditures will likely continue growing throughout the coming decades.[46] The gap is primarily driven by increased costs of health care and for Medicaid expenditures.[47] The ongoing public pension funding crisis threatens to widen the gap between projected revenues and expenditures.[48] With declining revenues, increasing health care and pension costs, and fewer options for the reduction of expenditures in other areas, many cities are likely to encounter a period of financial crises into the foreseeable future.[49] When the threat of municipal default arises, state actors are likely to intervene.

IV. STATUTORY EROSIONS OF DEMOCRATIC GOVERNANCE IN MUNICIPALITIES IN RESPONSE TO FISCAL DISTRESS.

State governments have adopted a variety of methods to assist local governments facing severe financial distress. Generally, state

44. *Id.*

45. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-546SP, STATE AND LOCAL GOVERNMENTS' FISCAL OUTLOOK APRIL 2013 UPDATE, at 2 (2013), http://www.gao.gov/assets/660/654255.pdf.

46. *Id.*

47. *Id.* at 5.

48. *See id.* at 6–7; s*ee also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-322, STATE AND LOCAL GOVERNMENT PENSION PLANS ECONOMIC DOWNTURN SPURS EFFORTS TO ADDRESS COSTS AND SUSTAINABILITY 7 (2012), http://www.gao.gov/assets/590/589043.pdf (noting a "growing gap between actuarial assets and liabilities over the past decade, meaning that higher contributions from government sponsors are needed to maintain funds on an actuarially based path toward sustainability.").

49. Since the end of the recession, municipal financial distress has resulted in a steady stream of speculation regarding the next city to enter default or file for Chapter 9 bankruptcy. Over the past year, Chicago, Cincinnati, Fresno, North Las Vegas, Providence and others have been reported to be undergoing severe financial stress. *See, e.g.*, Liz Farmer, *This City is Heading Down Detroit's Path*, GOVERNING (May 5, 2014), http://www.governing.com/news/he adlines/gov-this-city-is-heading-down-detroits-path.html; Janette Neuman, *Major U.S. Cities Still Not Recovered From Crisis*, WALL ST. J. (Nov. 13, 2013), http://blogs.wsj.com/economics/2013/11/11/major-u-s-cities-still-not-recovered-from-crisis/; THE PEW CHARITABLE TRUSTS, AMERICA'S BIG CITIES IN VOLATILE TIMES, MEETING FISCAL CHALLENGES AND PREPARING FOR THE FUTURE (2013), *available at* http://www.pewtrusts.org/~/media/Assets/2013/11/11/AmericasBigCitiesinVolatileTimes.pdf'; Kathleen Miles, *LA Bankruptcy Could Be Two To Three Years Away, Says California Pension Reform President*, THE HUFFINGTON POST, July 24, 2013, http://www.huffingtonpost.com/2013/07/24/la-bankruptcy-california-pension-reform-president _n_3642054.html.

programs include increased state aid, permitting local governments to collect additional tax revenue, providing fiscal oversight, or taking control of local government functions.[50] State programs that take control of local government potentially implicate fundamental principles of democratic governance, particularly when they seek to transfer local legislative power to appointed state officials. Legislation in Massachusetts, Michigan, Pennsylvania, and Rhode Island potentially grants broad governing powers to appointed state officials, while legislation in Indiana grants state officers discrete legislative power.[51] Legislation in Maine is less clear, but has provisions that arguably grant local legislative powers to state officials.

A. Statutes Granting Full Governing Authority to State Appointees

Despite marked differences in each state's approach to municipal financial distress, Massachusetts, Michigan, Pennsylvania and Rhode Island's statutes have an important similarity. Each statute provides for circumstances where a state board or appointees may become the governing body of a city or town found to be in financial distress.[52]

1. Massachusetts' ad hoc legislation to address municipal financial distress

Massachusetts does not have a general statute providing for state oversight when a local government enters a financial emergency. Rather, the state takes an *ad hoc* approach where special acts are passed to address the circumstances of particular municipalities.[53] An

50. *See* CONG. BUDGET OFFICE, *supra* note 30, at 7–8.

51. These state's statutes are those that either explicitly or appear to imply a delegation of local legislative powers. Michigan's most directly grants full governing authority to a state appointee and the state's appointees have consistently exercised the full range of power granted. Other state's laws may stage the granting of such power and have rarely been used in practice. Most states have used local takeover legislation sparingly and, as a result, there is an undeveloped understanding of the full scope of powers delegated, since the limits of the grant of powers have not been tested by state officials or challenged by residents in affected communities.

52. On June 25, 2014, the Commonwealth of Puerto Rico adopted legislation that permits the appointment of emergency managers over the island's public corporations. Under the law, the emergency manager possesses all the power of the corporations governing body and chief executive officer. However, the law does not presently apply to municipalities such as cities and towns. See S.B. 1164, 17th Leg. Assemb., 3d Ordinary Session, 2014 P.R. Laws 66, *available at* http://www.oslpr.org/legislatura/tl2013/tl_busca_avanzada.asp?rcs=P%20C1922.

53. Massachusetts has enacted such legislation to redress financial conditions for a

example of Massachusetts special legislation delegating legislative powers is *An Act Providing For The Financial Stability Of The City Of Lawrence*.[54]

The financial stability act for the City of Lawrence initially provides for the state to appoint a fiscal overseer over the city.[55] If the overseer determines that the city cannot achieve a balanced budget or there are other exigencies,[56] the state's secretary of administration and finance may then appoint a finance control board composed of five members.[57] The finance control board has broad powers over the city's budget and finances. The board also has the power to adopt rules and regulations regarding the "operation and administration of the city"[58] and has further authority to:

> [E]xercise all powers under the General Laws and this or any other special act, any charter provision or ordinance that any elected official of the city may exercise, acting separately or jointly; provided, however, that with respect to any such exercise of powers by the board, the elected officials shall not rescind or take any action contrary to such action by the board so long as the board continues to exist.[59]

If the efforts of the finance control board fail to return the city to sound financial footing, the statute further provides for the appointment of a non-judicial receiver by additional legislation.[60] Under these circumstances, the state secretary of administration and finance shall recommend to the governor that the board be dissolved and shall provide the governor with legislation to submit before the legislature.[61] The legislation shall include provisions that provide for the appointment of a receiver over the city and that the receiver shall

number of cities over the past three decades. However, only two such acts potentially delegated legislative powers. *See* Act of Mar. 31, 2010, ch. 58, 2010 Mass. Acts ch. 58 (providing for the financial stability of the city of Lawrence); Act of July 9, 2004, ch. 169, 2004 Mass. Acts ch. 169 (relating to the financial stability in the city of Springfield).

54. 2010 Mass. Acts ch. 58 (2013).

55. *Id.* § 4(a).

56. *Id.* § 6(b).

57. *Id.* § 6(d).

58. *Id.* § 7(d)(15).

59. *Id.* § 7(d)(20).

60. *Id.* § 10(a).

61. *Id.* § 10(a).

have all the powers of the finance control board.[62] Additionally, the receiver shall have "the power to exercise any function or power of any municipal officer . . . whether elected or otherwise."[63] The receiver also assumes all the powers of the mayor and that office is abolished.[64] Other elected officials of the city "shall continue to be elected . . . and shall serve solely in an advisory capacity to the receiver."[65]

The Constitution of the Commonwealth of Massachusetts grants cities and towns the legislative power to adopt, amend, and repeal local ordinances.[66] Likewise, the state statutes further grant legislative powers to adopt, amend and repeal ordinances.[67] The cities of Lawrence and Springfield are the two municipalities that have come under a finance control board possessing legislative power.

Through the grant of authority to exercise all powers possessed by local elected officials jointly, state finance control boards and non-judicial receivers may assume legislative power to adopt local laws and resolutions as is otherwise possessed by city and town councils, boards of aldermen, and other elected legislative bodies of Massachusetts' cities and towns.

2. Michigan's Local Financial Stability and Choice Act

Enacted in 2012, Michigan's *Local Financial Stability and Choice Act* is the most immediate and far-reaching in its delegation of legislative authority to appointed emergency managers.[68] The statute has its genesis in a prior law of the state. The previous statute was the *Local Government and School District Fiscal Accountability Act* (Public Act 4), which was enacted in 2011.[69] This statute was Michigan's first emergency manager legislation.[70] A citizens' referendum passed in November 2012 repealed Public Act 4. In

62. *Id.* § 10(b)(1).

63. *Id.* § 10(b)(2).

64. *Id.* § 10(b)(4).

65. *Id.*

66. MASS. CONST. art. LXXXIX, § 6.

67. MASS GEN. LAWS ch. 43B, §§ 13–18 (2013).

68. MICH. COMP. LAWS §§ 141.1541–1575 (2013).

69. 2011 Mich. Pub. Acts 4, *available at* http://www.legislature.mi.gov/documents/2011-2012/publicact/pdf/2011-PA-0004.pdf.

70. Public Act 4 replaced prior legislation, which permitted the appointment of an emergency *financial* manager over financially distressed municipalities.

December 2012, the state passed the new statute with the same emergency manager powers as existed in the repealed statute.

Under the current legislation, the state financial authority may undertake a review to determine whether a municipality is undergoing probable financial distress.[71] If a finding of probable financial distress is made, the governor then appoints a review team.[72] The review team makes certain findings regarding the municipality's financial condition and whether the municipality is undergoing a financial emergency.[73] The governor then makes a final determination of whether a financial emergency exists within the local government.[74]

If a financial emergency determination is made, the municipality can seek to negotiate a settlement agreement with its creditors, enter a consent agreement with the state, request to file for Chapter 9 bankruptcy, or have an emergency manager appointed.[75] If the state does not approve the terms of the settlement agreement,[76] consent agreement,[77]or a bankruptcy court filing,[78] the state appoints an emergency manager over the local government.[79]

The emergency manager is delegated broad local legislative powers. Upon appointment, the emergency manager "act[s] for and in the place and stead of the governing body and the office of chief administrative officer of the local government."[80] Following the appointment, elected officials' salaries are suspended and they are barred from exercising any of the powers of their offices "except as may be specifically authorized in writing by the emergency manager."[81] The emergency manager is explicitly granted exclusive authority concerning the "adoption, amendment, and enforcement of ordinances or resolutions of the local government" as provided by various state laws governing counties, cities, townships, and

71. MICH.COMP. LAWS § 141.1544 (2013).

72. *Id.* § 141.1544(3).

73. *Id.* § 141.1545(3)–(4).

74. *Id.* § 141.1546(1).

75. *Id.* § 141.1547(1).

76. *Id.* § 141.1565(22)(a).

77. *Id.* Under the terms of a consent agreement the state can appoint an official with emergency manager powers over the municipality.

78. *Id.* § 141.1549(1).

79. *Id.* § 141.1549(1). All emergency financial managers still in office at the time the new law took effect were automatically converted to become emergency managers.

80. *Id.* § 141.1549(2).

81. *Id.*

villages.[82] Finally, the emergency manager is granted the power to:

> Take any other action or exercise any power or authority of any officer, employee, department, board, commission, or other similar entity of the local government, whether elected or appointed . . . The power of the emergency manager shall be superior to and supersede the power of any of the foregoing officers or entities.[83]

Under Michigan law, the state constitution and state statutes delegate legislative power to counties,[84] cities,[85] townships,[86] and villages.[87] Financial emergencies have been declared and emergency managers have been appointed in the cities of Allen Park, Benton Harbor, Detroit, Ecorse, Hamtramck, Flint, Pontiac, and a number of school districts.

Less ambiguity exists in Michigan's statute than other states' laws. Michigan transfers local legislative powers to state emergency managers upon their appointment and Michigan's emergency managers actively exercise legislative powers previously held by city councils in each of the cities where they hold office.

3. Pennsylvania's Municipalities Financial Recovery Act

In Pennsylvania, the Municipalities Financial Recovery Act[88] is an extensive municipal financial distress statute providing state aid and oversight to financially distressed municipalities. A petition for a determination that a municipality is in financial distress may be initiated by state officials, the municipality, creditors, electors, and other stakeholders.[89] After review of the petition, investigation, and a hearing, Pennsylvania's Secretary of Community Affairs makes a determination whether to declare a municipality in financial distress.[90] The secretary then appoints a coordinator to develop a financial plan

82. *Id.* § 141.1552(1)(dd).

83. *Id.* § 141.1552(1)(ee).

84. *See* MICH. CONST. art. VII, § 8; MICH COMP. LAWS § 46.11(j).

85. *See* MICH. CONST. art. VII, § 22; MICH COMP. LAWS §§ 88.12, 117.3, 117.4j(3), 117.4l.

86. *See* MICH. CONST. art. VII, § 18; MICH COMP. LAWS §§ 42.15, 42.20.

87. *See* MICH. CONST. art. VII, § 22; MICH COMP. LAWS §§ 65.1, 66.2, 78.23, 78.25a.

88. 53 PA. CONS. STAT. §§ 11701.101–712 (2013).

89. *Id.* § 11701.202.

90. *Id.* § 11701.203.

for the municipality.[91] By ordinance, the municipality then adopts and implements the coordinator's plan or a permissible alternative plan.[92] If the municipality fails to adopt a suitable financial plan, various state funding is withheld.[93] A distressed third class city,[94] may also be declared by the Governor to be in a fiscal emergency when the city fails to implement the financial plan, is found to be insolvent, or is unable to perform vital services.[95]

After the governor declares a fiscal emergency in a city, the secretary then prepares an emergency action plan.[96] Throughout the emergency, the governor is granted the power to "exercise the authority of the elected . . . officials of the distressed city."[97] The governor may also exercise "[a]ny other power of the elected or appointed officials of the distressed city . . . to ensure the provision of vital and necessary services."[98] The governor may delegate these powers to the secretary or to the secretary's designee.[99] Elected officials remain in office and carry out their duties during the emergency. However, they are prohibited from taking any actions that conflict with the emergency action plan or the governor's orders or exercise of power.[100]

Among the powers elected officials of third class cities possess is legislative power. City Councils of third class cities are the legislative bodies vested with legislative power[101] and they are granted the power "to pass ordinances, resolutions, rules and regulations."[102] Historically, a number of Pennsylvania cities have

91. *Id.* § 11701.221.

92. *See id.* §§ 11701.245–46.

93. *Id.* § 11701.248.

94. Cities below 250,000 in population that have not adopted a second class city ordinance. In Pennsylvania, there are fifty-six incorporated cities. Fifty-three are third class cities. Philadelphia is the only city with over 1 million residents and therefore the only first class city. Pittsburgh is the only other city with over 250,000 residents and therefore the only second class city. Scranton has over 80,000 residents and has adopted a second class city ordinance and therefore is also categorized as a second class city.

95. 53 PA. CONS. STAT. § 11701.602 (this provision was added by amendments in 2011).

96. *Id.*

97. *Id.* § 11701.604(a).

98. *Id.* § 11701.604(a)(5).

99. *Id.* § 11701.604(a).

100. *Id.* § 11701.605.

101. *Id.* § 36002.

102. *Id.* § 36006.

been declared in financial distress.[103] Since amendments to Pennsylvania's statute in 2011, only Harrisburg has been declared in a fiscal emergency. The Governor's declaration was rescinded shortly thereafter and before exercising local legislative power.

Upon the declaration of a fiscal emergency in a third class city, Pennsylvania's statute transfers local legislative power to the state's governor or his designee by granting them the authority to exercise all the powers of local elected officials. This transfer is substantially similar to Michigan's, but only occurs after the failure of preceding steps. Moreover, the governor and designee's legislative power is more circumscribed. The governor and designee's legislative power is likely limited to financial matters and ensuring the delivery of vital and necessary services to city residents.[104] Vital and necessary services are defined as basic and fundamental services and include matters such as police and fire services, ambulance response, water supply, waste removal, pension obligations, and the payment of debts.[105] To date, neither the governor nor a designee has assumed such powers.

4. Rhode Island's financial stability statute for cities and towns

Rhode Island's statute is written as a general financial oversight statute, but appears to have been interpreted more broadly by the state's highest court. In response to severe fiscal distress in the City of Central Falls, the state's General Assembly drafted and enacted *An Act Relating to Cities and Towns—Providing Financial Stability*[106] in 2010. The statute amended existing law and established a tiered system of oversight for financially troubled cities and towns.

After a request from the municipality's chief executive and council or upon the state's own initiative, the state may review the municipality's ability to meet its fiscal obligations.[107] If certain conditions are met, the state may then appoint a fiscal overseer to review and supervise the city or town's finances.[108] If the fiscal

103. These include Aliquippa, Altoona, Ambridge, Braddock, Chester, Clairton, Duquesne, East Pittsburgh, Farrell, Franklin, Greenville, Harrisburg, Homestead, Johnstown, Millbourne, Nanticoke, New Castle, North Braddock, Pittsburgh, Plymouth, Rankin, Reading, Scranton, Shenandoah, West Hazleton, Westfall, and Wilkinsburg.

104. 53 PA. CONS. STAT. § 11701.604(a)(5).

105. *Id.* § 11701.601.

106. R.I. GEN. LAWS § 45-9-1–23 (2013).

107. *Id.* § 45-9-3(a).

108. *Id.* § 45-9-3(b)–(e).

overseer recommends it or if the municipality cannot achieve a balanced budget, the state director of revenue may replace the fiscal overseer with an appointed budget commission.[109] A budget commission possesses the supervisory powers of a fiscal overseer plus broader powers of control over the municipality's budget and finances.[110] Among the powers granted is an apparent delegation of legislative power. The statute grants the budget commission, the authority to: "Exercise all powers under the general laws . . . that any elected official of the city, town, or fire district may exercise, acting separately or jointly."[111]

If the budget commission is unable to restore fiscal stability, the director of revenue may then appoint a non-judicial receiver over the city or town.[112] Appointment of a receiver is the last step before the filing of Chapter 9 bankruptcy for a financially troubled city or town in Rhode Island. The receiver possesses all the powers of a budget commission. Additionally, the receiver is explicitly granted: "The power to exercise any function or power of any municipal . . . officer or employee, board, authority or commission, whether elected or otherwise relating to or impacting the fiscal stability of the city, town."[113]

And the receiver:

> [S]hall have the right to exercise the powers of the elected officials under the general laws . . . ordinances and rules and regulations relating to or impacting the fiscal stability of the city, town . . . provided, further, that the powers of the receiver shall be superior to and supersede the powers of the elected officials . . . [city and town officials] shall continue to be elected in accordance with the city or town . . . and shall serve in an advisory capacity to the receiver. . . . In the event a conflict arises between the chief elected official or city or town council . . . and the receiver, the receiver's decision shall prevail.[114]

While the text of Rhode Island's statute appears to limit the

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109. *Id.* § 45-9-5.
110. *Id.* § 45-9-6.
111. *Id.* § 45-9-6(d)(20).
112. *Id.* § 45-9-7 (2013).
113. *Id.* § 45-9-7(b)(2).
114. *Id.* § 45-9-7(c).

scope of the receiver's legislative power to matters relating to or impacting a municipality's financial stability, a decision of the Rhode Island Supreme Court suggests otherwise. After the appointment of a receiver over the City of Central Falls, conflict arose between the receiver and the elected mayor. The mayor believed that the receiver was usurping powers vested in the mayor's office. The receiver then relegated the elected mayor and city council to advisory roles and the mayor then initiated a declaratory judgment action against the receiver.[115]

Ultimately, the Rhode Island Supreme Court upheld the state receiver's actions. The mayor contested the law on a variety of grounds, but did not directly contest the general grant of local legislative power to an appointed official. The court upheld the state statute and the receiver's actions relying heavily on reasoning that elected officials had not been removed from office, but rather "are temporarily acting in an advisory capacity to the receiver."[116] Thus the court endorsed the receiver's broad understanding of his powers.[117]

The court's understanding of the receiver's powers was legislatively confirmed by further amendments to Rhode Island's statute. In the summer of 2011, additional amendments passed the Rhode Island legislature and were signed into law by the governor. The 2011 amendments explicitly state that elected officials solely serve in an advisory capacity to the receiver and that the receiver's powers and decisions supersede those of all local elected officials.[118]

Rhode Island's constitution directly grants local legislative powers to every city and town[119] and requires each to have a legislative body chosen by local electors.[120] State statutes also empower Rhode Island cities and towns to adopt ordinances for the health, safety, and welfare of residents.[121] Budget commissions have

115. *See* Moreau v. Flanders, 15 A.3d 565, 572 (R.I. 2011).

116. *Id.* at 589.

117. The court's understanding of the receiver's powers was legislatively confirmed by further amendments to Rhode Island's statute. In the summer of 2011, additional amendments passed the Rhode Island legislature that explicitly state elected officials solely serve in an advisory capacity to the receiver and that the receiver's powers and decisions supersede those of all local elected officials.

118. *See* R.I. Gen. Laws §§ 45-9-7(c), 45-9-18.

119. R.I. CONST. art. VIII, § 2.

120. R.I. CONST. art. VIII, § 3.

121. R.I. Gen. Laws § 45-6-1–11.

been appointed over the towns of West Warwick and Johnston before 2010 and later in the cities of East Providence and Woonsocket.[122] The budget commissions commonly operate in a supervisory role, approving or disapproving the proposed actions of mayors and city councils. To date, only one Rhode Island city or town has been appointed a receiver–Central Falls. Within a year of the appointment, the Central Falls entered Chapter 9 bankruptcy.

In Rhode Island, legislative powers may be conferred first upon budget commissions and then upon non-judicial receivers. Budget commissions are conferred local legislative powers by the grant of authority to exercise all the powers of local elected officials as granted by the general laws. Receivers are granted all the powers of budget commissions, plus additional explicit authority to exercise the legislative powers of local elected city and town councils. The statute's grant of authority appears to be limited to matters relating to the fiscal stability of the local government. However the decision of *Moreau v. Flanders* and the 2011 amendments appear to transfer the full scope of local elected officials' legislative power to appointed receivers by reducing the role of elected officials to a purely advisory role.

B. Statutes Granting Discrete Legislative Power to State Officials

Another category of legislation are state statutes that, under particular circumstances, grant specific legislative power to state officials. In this case, the appointed official's legislative power is confined to matters related to rectifying the financial emergency. Indiana's statute is an example.[123]

1. Indiana's distressed political subdivisions law

Indiana's distressed unit appeal board statute was amended to establish certain conditions when state officials are granted legislative powers to adopt, amend, and repeal local ordinances.[124] To come within the statute's provisions and thereby receive state assistance, the

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122. Appointments in West Warwick and Johnston were made under the previous version of the statute before the 2010 amendments.

123. Excluded from consideration are those state municipal financial distress laws that *permit* state financial overseers to advise, recommend, or even direct a local government's governing body to make changes to ordinances relating to fiscal policy, often in exchange for state aid. *See, e.g.*, 50 ILL. COMP. STAT. 320/9(b)(1) (2013).

124. IND. CODE §§ 6-1.1-20.3-1–15 (2013).

governing body and chief executive of a municipality must petition the state's distressed unit appeal board for designation as a distressed political subdivision.[125] If the petition is approved and the designation is made, the board then appoints an emergency manager over the distressed municipality.[126]

The legislation grants the emergency manager the power to: "[A]ssume and exercise the authority and responsibilities of both the executive and the fiscal body of the political subdivision concerning the adoption, amendment, and enforcement of ordinances and resolutions relating to or affecting the fiscal stability of the political subdivision."[127] The emergency manager is thus directly granted local legislative power over Indiana cities, towns, and townships, which by statute have a local legislative body for the adoption of ordinances and resolutions.[128]

The emergency manager provisions of Indiana's statutes were added through amendments adopted in 2012. Since that time, the board has received petitions from Wayne Township and several school districts. The township's petition was denied, and no emergency manager was appointed.

The transfer of local legislative power in Indiana occurs when an emergency manager is appointed over a financially distressed city, town, or township. The transfer limits emergency manager's legislative authority to matters affecting the fiscal stability of the distressed municipality.

C. Statutes Where a Grant of Legislative Authority Is Unclear

Finally, state statutes are not always clear regarding whether their municipal financial distress statutes intend to delegate local legislative power to state oversight boards and officials. Maine's law provides an example. The statute permits sound arguments that there was no legislative intent to delegate local legislative powers or, if there was such intent, the powers delegated are narrow in scope. Regardless, proponents of such delegated legislative authority might advance arguments in the opposite direction.

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125. *Id.* § 6-1.1-20.3-6.
126. *Id.* § 6-1.1-20.3-7.5.
127. *Id.* § 6-1.1-20.3-8.5.
128. *Id.* § 36-1-3-6.

1. Maine's Board of Emergency Municipal Finance law

Maine has a general statute providing for state aid and oversight when municipalities undergo financial distress. The statute arose during the Great Depression and was one of the first statutes providing for direct oversight of financially troubled municipalities in the nation. Enacted in 1937, the statute permits the state to take control of a municipality when two criteria are met. First, the municipality must be one year and six months behind in tax payments owed to the state or be in default on certain payments due.[129] Second, the municipality must be one that has received state funds "in support of the poor."[130] If these conditions are met and after an audit and investigation, the state's municipal finance board may: "[T]ake over and regulate the administration of the government of the municipality and the management of the municipality's financial affairs and administer the municipality's government and financial affairs to the exclusion of or in cooperation with any other local government or governmental agency, as otherwise provided by law."[131]

When the board takes over administration of the local government, it may appoint commissioners to supervise the financial affairs of the municipality.[132] In towns with a population less than 5,000 persons, the board may appoint a single commissioner and in larger municipalities a three person commission is required.[133] The board may also temporarily remove and replace any "managers, officers and agents" of the municipality during the term of the take-over.[134] All commissioners and temporary officials remain under the supervision and control of the municipal finance board.[135]

While Maine's constitution establishes home rule by granting municipalities the power to adopt their own charters, the power to adopt ordinances and resolutions in Maine is granted by state statute. All municipalities are granted legislative power to adopt, amend, and repeal ordinances in all areas not otherwise prohibited by state law.[136] A number of cities and towns in Maine have been placed under the

129. ME. REV. STAT. ANN. tit. 30-A, § 6105 (2013).
130. *Id.*
131. *Id.* § 6106(1).
132. *Id.* § 6107(2).
133. *Id.* § 6106(2).
134. *Id.* § 6108(2).
135. *Id.* § 6106(2).
136. *Id.* § 3000.

control of the municipal finance board. These include Connor, Eastport, Frenchville, St. Agatha, St. Vincent Plantation, and Van Buren.[137]

Maine's statute may not transfer any local legislative power to the municipal finance board and its commissioners. The statute grants the board broad authority over the administration of the local government and over the management of financial affairs. Administration and management are traditionally recognized as the role of executive branch officials such as mayors. Legislative functions are generally not within the purview of town administration and management. Nevertheless, contrary arguments can be conceived. If state lawmakers intended a transfer of legislative power, the transfer may be limited to matters relating to the local government's financial affairs. Until a state court clarifies legislative intent of these provisions, the scope of legislative power transferred, if any, remains uncertain.

Massachusetts, Michigan, Pennsylvania, Rhode Island, Indiana, and Maine's statutes either directly or potentially transfer local legislative power to unelected officials as the result of a local financial emergency. Under each of these states' statutes, there is no finding of corruption or neglect of office by the local officials whose powers are either eliminated or circumscribed. The communities that become subject to these laws, in most instances, will be cities and towns with disproportionate numbers of households that are economically poor and will frequently be comprised of higher percentages of racially and ethnically minority populations. Such communities typically do not have the financial reserves to bridge from prolonged economic downturns to recovery. Rather, they are more often caught in a spiraling cycle of declining revenues and increased demands on services contributing to a series of escalating budgetary challenges.

By transferring legislative power from elected representatives in such communities, local residents lose voice in the difficult decisions that will have to be made to achieve economic stability and sustainability. Citizens lose this voice, yet are the ones who will have to buy-into the choices made and will live with those choices in the years to come. By removing citizens' voice from such decisions through such transfers of legislative power, the state is implicitly

137. Each of the cited cities and towns were placed under control of the board during the time period of 1937 through 1941.

establishing a two-tiered system of local governance in the state. It is a system where democratic governance remains sacrosanct in affluent communities, but less so in communities with economically poorer households. Such a system should raise constitutional concerns in a nation founded on constitutional principles of democracy.

V. CONSTITUTIONAL FOUNDATIONS OF ELECTED LOCAL GOVERNMENT

The transfer of local legislative power by state legislatures to appointed executive branch officials raises fundamental issues of governance in a representative democracy. The transfer of such powers calls into question traditional notions that the government gains legitimacy through the consent of the governed, and long-held ideals that the separation of powers among branches of government ensures accountability and preserves our liberties.

A. Federal Constitutional Issues When Local Legislative Power is Vested in State Appointees

The United States is founded upon an ideal that government gains its legitimacy the governed people's consent.[138] The government derives its authority to enforce laws from such consent.[139] State governments are no different. A state "is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government . . . established by the consent of the governed."[140] Institutionally, the consent of the governed is expressed in two ways: first, through citizen's approval of their government's foundational documents–federal and state constitutions and the charters of local government; and second, through citizens' election of their representatives in federal, state, and local government.

The consent of the governed is compromised when legislative power is transferred to unelected officials. "People govern themselves through their elected representatives."[141] Their elected representatives' power to pass legislation is an essential characteristic

138. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

139. McCreary Cnty. v. ACLU, 545 U.S. 844, 873 (2005); *see also* Duro v. Reina, 495 U.S. 676, 694 (1990) ("[T]he consent of the governed that provides a fundamental basis for power within our constitutional system.").

140. McPherson v. Blacker, 146 U.S. 1, 25 (1892).

141. Bd. of Estimate v. Morris, 489 U.S. 688, 693 (1989) (quoting Reynolds v. Sims, 377 U.S. 533, 565 (1964)).

of self-governance. Legislative power is the "supreme authority" of government.[142] The transfer of legislative power is the transfer of the power to govern. Officials imbued with legislative power over a defined population cannot fairly be called the representatives of those citizens when those officials have not been placed in office by a vote of the citizens governed. Yet, the state municipal distress laws discussed seek to sanction this transfer of local legislative power to unelected state officials without the consent of the people governed.

Massachusetts laws are local acts, commonly adopted at the invitation of the governor or local elected officials in those communities experiencing financial instability. Indiana's statute is also invoked when local elected officials petition the state for a declaration of fiscal distress. In each of these states, the consent of the governed might be argued as obtained by the consent of their local elected representatives when they request the state to intervene. But, legislative power is fundamental to governance. It is granted by citizens to local legislative bodies through state constitutions and city charters. This power, granted from the people governed, cannot be transferred by state or local legislative bodies. Only the people themselves may delegate the power to other bodies or persons.

When a financial emergency is declared, the plain terms of Michigan's law grants the full scope of municipal legislative power to unelected emergency managers. While Michigan's law nominally gives local elected officials a choice of whether to receive an emergency manager, that choice is illusory. The statute does not give a municipality choice regarding whether a financial emergency will be declared and it is solely within the state's discretion whether to permit a municipality to avail itself of any alternatives to the appointment of an emergency manager. As a result, consent of local elected officials is substantively very limited and, even if found, raises the same concerns as exist in Massachusetts' and Indiana. More substantively, Michigan's law is similar to Rhode Island's statute, and potentially Maine's, where the transfer of legislative power is made without the meaningful consent of local officials or the local electorate.

Pennsylvania's legislation grants local legislative power to the state's governor, or the governor's designee. The governor's status as an elected official provides an illusion of consent. Nonetheless, direct governance by the governor is no less problematic than when a

142. *McPherson*, 146 U.S. at 25.

municipality is governed by appointees designated by other state executive branch officials, as occurs in each of the other states considered. The governor's office is not a legislative body, and she or he was not elected into such role either by the state or local electorate.[143] The further delegation of power to a governor's designee raises issues of consent substantially similar to each of the other states' statutes.

In each of these states, the consent of the governed is absent or thinly argued when municipal financial distress statutes transfer local legislative power. Consent of the electorate is wholly absent following invocation of statutory provisions found in Michigan, Rhode Island, Indiana, and potentially in Maine. In Massachusetts and Indiana, a façade of consent exists when local elected representatives sanction the transfer. Pennsylvania's law maintains a façade of consent from the local electorate through the delegation of power to an elected governor. In no state is consent of the governed meaningfully satisfied.

While it does not directly address local governments, the United States Constitution may provide protections against forms of local government that transfer legislative powers to unelected state officials. Related to the idea of consent of the governed, the Fourteenth Amendment substantive due process and the Guarantee Clause may require democratic governance of state officials granted legislative powers.[144]

143. Moreover, local citizens in affected Pennsylvania cities do not have an equal vote in the selection of the governor as their local legislative officer as do the citizens of other cities do in their selection of local officials. The vote of the governed in affected municipalities is diluted by the participation of voters living outside the boundaries of the local government's jurisdiction. Through their vote for the governor, all Pennsylvania citizens receive an equal indirect vote in the local government of those cities declared to be in fiscal emergency. At the same time, residents in cities experiencing a fiscal emergency do not receive a reciprocal vote in other local governments. Thus, residents of cities that are not in a fiscal emergency possess a greater vote in their local elections than those who live in cities undergoing one.

144. The transfer of local legislative power raises additional constitutional concerns—most notably, equal protection issues related to the right to vote. Once a state has granted citizens the right to vote for local legislative offices to incorporated cities and towns, it cannot withhold that right on the basis of the race or wealth of citizens in a particular locality. Cities and towns that come under financial distress statutes are commonly composed of majority minority populations and comprised of a disproportionate number of economically poor households. The transfer of legislative power to unelected officials effectively deprives those residents of their right to vote for local officials. Moreover, the transfer occurs without any finding of malfeasance or misfeasance by local elected officials. Transfers of legislative power under such circumstances raises real concerns regarding the discriminatory application or impact of these statutes.

1. The transfer of local legislative power to unelected officials violates liberty interests in a democratically-elected government

The lengthy tradition of democratic governance in the nation's cities and towns is well documented. From the earliest days of the republic, elected legislative bodies commonly governed cities and towns.

By the 1790s, the nation's five largest cities and towns were Baltimore, Boston, Charleston, New York, and Philadelphia. Elected officials governed each of these cities. Baltimore was granted a city charter in 1797 and an elected mayor and city council governed it.[145]

In Boston town meetings prevailed throughout the colonial era with elected mayors and selectmen to administer affairs until a city council was approved in 1822.[146] Charleston became governed by an elected mayor and city council in the 1790s.[147] New York City was governed first by a council of legislators followed by a common council and then a board of alderman.[148] The nation's history with participatory democracy and elected governance at the local level has long been celebrated by observers of the nation's political institutions.

Alexis de Tocqueville found participatory democracy at the local level to be the cornerstone of the nation's democracy. He wrote: "It is incontestably true that the love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies . . . which are engendered and nurtured in the different States, to be afterwards applied to the country at large."[149]

As a cornerstone to the nation's democracy, elected governance is not simply a privilege to be granted or withheld at the pleasure of state officials. Its tradition and significance is of greater import. Supreme Court Justice Lewis F. Powell recognized further that citizens "cannot learn the lessons of self-government if their local efforts are devoted to reviewing proposals formulated by a faraway

145. Baltimore City Council, History of the Baltimore City Council, http://www.baltimorecitycouncil.com/history.htm (last updated Apr. 23, 2007).

146. See JOSIAH QUINCY, A MUNICIPAL HISTORY OF THE TOWN AND CITY OF BOSTON DURING TWO CENTURIES 1, 32–33 (Applewood Books 1852).

147. RICHARD DILWORT, CITIES IN AMERICAN POLITICAL HISTORY 111 (2011).

148. MARY LOUISE BOOT, HISTORY OF THE CITY OF NEW YORK: FROM ITS EARLIEST SETTLEMENT TO THE PRESENT TIMES, 209–10 (1859).

149. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 181 (H. Reeve trans., 1961).

national legislature."[150] He wrote:

> If we want to preserve the ability of citizens to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer, their local problems.[151]

"In a word, institutions of local government have always been a major aspect of" the nation's political system.[152] The tradition of elected governance of local legislative officials and its role in such fundamental values as the consent of the governed and the preservation of individual liberties argues for Fourteenth Amendment protections.

Fourteenth Amendment protections will be applied in reviewing a state's practices concerning the electoral practices related to the local government. The fact that a state legislature is composed of elected representatives from properly apportioned districts "does not exempt subdivisions from . . . Fourteenth Amendment" scrutiny.[153] The state's delegation of "general governmental powers" to an appointed official over a local government does not "insulate" the recipient of the power from constitutional standards. Thus, while a state may have wide latitude in experimenting with the structure of political subdivisions, it "cannot manipulate its subdivisions to defeat a federally protected right."[154]

The Fourteenth Amendment protects against violations of fundamental rights that are rooted in tradition and implicit within the nation's concepts of liberty. The Court described its analysis of substantive due process protections as follows:

> First . . . the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," . . . and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were

150. FERC v. Mississippi, 456 U.S. 742, 789–90 (1982) (Powell, J., concurring in part and dissenting in part).

151. *Id.*

152. Avery v. Midland County, 390 U.S. 474, 481 (1968).

153. *Id.*

154. Sailors v. Bd. of Ed. of Kent Cnty., 387 U.S. 105, 108 (1967).

sacrificed."[155]

The fundamental right at issue is a right to elect those officials who possess legislative (i.e. lawmaking) power.[156] No court has yet considered this issue, but certain principles are well-recognized within case law.[157]

Limited only by federal and state constitutions, legislative power has been recognized as the supreme authority in the states.[158] The right to vote for governing officials is long acknowledged by the Court. The right is "regarded as a fundamental political right, because [it is] preservative of all rights."[159] Additionally, the fundamental nature of a legislative body as a representative body elected by the people is equally well-recognized. In *Reynolds v. Sims*, the Court stated that "[a]s long as ours is a representative form of government . . . the right to elect legislators . . . is a bedrock of our political system."[160] The Court found that "representative government is in essence self-government."[161] Citizens have "an inalienable right to full and effective participation in the political processes of his State's legislative bodies."[162] Through the election of representative to legislative bodies, citizens realize their right to participate in the political processes of their government.[163]

The primacy of legislative power and the fundamental nature of legislative bodies as composed of elected representatives is most commonly analyzed by the Court in the context of state government. The principles enunciated in the Court's decisions however are more fundamental. They find that governing power reposes in legislative power and it is only through citizens' right to vote for their

155. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (citations omitted).

156. It is important to note that under the laws examined, the state has not dissolved municipalities and undertaken direct rule by the state. Rather, the state has maintained the local body corporate with legislative and corresponding police powers transferred to state appointees.

157. In *Sailors v. Bd. of Ed. of Kent Cnty.*, the Court did not directly address the issue, but recognized that states have latitude to determine how nonlegislative state and local officers might be chosen, but suggested that such latitude may not exist regarding the selection of local officers with legislative powers. 387 U.S. at 109–11.

158. McPherson v. Blacker, 146 U.S. 1, 25 (1892).

159. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

160. *Id.*

161. *Id.* at 565.

162. *Id.*

163. *Id.*

representatives in legislative bodies that citizens achieve self-governance. These principles were recognized at the founding of our nation and should be found universal. They are rooted in our nation's long valued tradition of local government and our nation's concepts of ordered liberty. The primacy of such rights within our nation's traditions is also reflected in the Constitution's Guarantee Clause protections.

2. The transfer of local legislative power to unelected officials violates the Guarantee Clause

The United States Constitution's Guarantee Clause provides: "The United States shall guarantee to every State in this Union a Republican Form of Government."[164] The Supreme Court has held that: "[T]he distinguishing feature of that form [of republican government] is the right of the people to . . . pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves."[165]

While, in many instances, courts ultimately find that Guarantee Clause claims raise nonjusticiable political questions, federal courts have not eliminated such causes of action.[166] In *New York v. United States*, the Court recognized that "[m]ore recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions."[167] Writing for the majority, Justice Sandra Day O'Connor criticized sweeping applications of the Court's decision in *Luther v. Borden*[168] where nonjusticiability was first articulated and noted that nonjusticiability has not always been the rule of the Court.[169] Justice O'Connor then proceeded to assume that the claims were justiciable, but found that a right to a republican form of government had not been violated.[170]

164. U.S. CONST. art. IV, § 4.

165. *In re* Duncan, 139 U.S. 449, 461 (1891).

166. *See* Kerr v. Hickenlooper, 744 F.3d 1156 (10th Cir. 2014) (applying the Court's test for evaluating justiciability and finding that Guarantee Clause claim was not subject to dismissal).

167. New York v. United States, 505 U.S. 144, 185 (1992).

168. Luther v. Borden, 48 U.S. 1 (1849).

169. *New York*, 505 U.S. at 185 (stating that the merits of Guarantee Clause claims, without any suggestion of nonjusticiability were decided in Kies *ex rel.* Att'y Gen. of Mich. v. Lowrey, 199 U.S. 233, 239 (1905)); Forsyth v. Hammond, 166 U.S. 506, 519 (1897); *In re* Duncan, 139 U.S. 449, 461–62 (1891); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175–76 (1875)).

170. *Id.*; *see also* Reynolds v. Sims, 377 U.S. 533, 582 (1963) (finding that Guaranty

Consistent with the principle that states cannot do through their political subdivisions what they cannot do directly to avoid Constitutional prohibitions, the Court applied Guarantee Clause analysis to state legislative actions relating to local governments in *Kies ex rel. Att'y Gen. of Mich. v. Lowrey* and *Forsyth v. Hammond*.[171]

The First Circuit provides guidance for analysis of Guarantee Clause claims. In *Largess v. Supreme Judicial Court*, the court found that "[t]he first portion of the Clause is only implicated when there is a threat to a 'Republican Form of Government'."[172] The court recognized a definition of republican government as "a government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives responsible to them."[173]

The forms of government established when local legislative power is transferred to unelected officials, boards and commissions violates the Court's definition of a republican form of government. These officials, boards and commissions are delegated legislative powers and become the legislative body governing the cities and towns over which they are appointed. Moreover, they are legislative bodies of the state and subject to Guarantee Clause analysis. As such, this delegation of legislative power violates any recognized definition of a republican form of government.

While Fourteenth Amendment substantive due process and Guarantee Clause claims are uncommon, the forms of local government being established by state municipal financial distress laws are rarer still within the nation's history. The novelty of such claims is occasioned not by established legal doctrine precluding such claims, but rather by a long tradition in the states of local elected government and the trajectory of municipal home rule over the past century confirming the practice. Against this background, common state constitutional provisions may further prohibit the transfer of local legislative power to unelected state officials.

Clause are nonjusticiable *when they raise issues* that are political in nature and there is a clear absence of manageable standards).

171. Kies ex rel. Att'y Gen. of Mich. v. Lowrey, 199 U.S. 233, 239 (1905); Forsyth v. Hammond, 166 U.S. 506, 519 (1897).

172. Largess v. Supreme Judicial Court, 373 F.3d 219, 227 (1st Cir. 2004), *cert. denied by* 543 U.S. 1002 (2004).

173. *Largess*, 373 F.3d at 227 (citations omitted and emphasis added).

B. State Constitutional Challenges on the Delegation of Local Legislative Power to State Officials

Fundamental separation of powers and home rule principles underpin state constitutional challenges to the transfer of local legislative authority to appointed officials, boards, and commissions. Potential challenges are most readily apprehended through challenges based on violation of the nondelegation doctrine and constitutional prohibitions limiting a state legislature's ability to adopt local acts.[174]

1. The nondelegation doctrine maintains separation of powers between the executive and legislative branches of government

State political structures are modeled on the separation of powers principles established at the founding of our nation by the federal government. The nation's founders recognized separation of powers as necessary for the protection of individual liberties. In so doing, they embraced Charles de Montesquieu and John Locke's political philosophies.

While setting forth his concepts of government based on a separation of powers, Charles de Montesquieu cautioned that "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty."[175] In support of ratification of the U.S. Constitution, James Madison agreed, stating: "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[176]

Locke further recognized that the powers of each branch of government are an exclusive grant of power from the people and therefore, such powers cannot be delegated to others. As applied to the legislature's power to make and pass laws, John Locke described the nondelegation doctrine as follows: "[t]he legislat[ure] . . . cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others."[177]

174. The state constitutions' home rule charter provisions provide another basis for challenges to such laws. These constitutional provisions and court understandings vary widely between states and, as a result, are not addressed herein.

175. 1 CHARLES DE MONTESQUIEU, THE SPIRIT OF LAWS, at ch. XI (Cosimo Inc. 2007).

176. THE FEDERALIST NO. 47 (Alexander Hamilton).

177. John Locke, *Second Treatise of Civil Government*, *in* TWO TREATISES OF

The Supreme Court explained the relationship between separation of powers and the nondelegation doctrine, writing "[t]he nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government . . . the integrity and maintenance of the system of government . . . mandate[s] that Congress generally cannot delegate its legislative power to another Branch."[178]

Like democracy itself, separation of powers can be less expedient and efficient than other models of government. However, through the Constitution, its framers and the people of this nation consciously chose to place a higher value on separation of powers.[179] Moreover, separation of powers is not only to be protected in times of economic calm, but in times of strife as well.[180] Derived from federal constitutional principles, the state constitutions adopt models of government founded on separations of powers.

The constitutions of Indiana, Maine, Massachusetts, Michigan, Pennsylvania, and Rhode Island each vest legislative powers in the state's legislative body. Indiana,[181] Pennsylvania[182] and Rhode Island[183] vest such power in the states' general assemblies. Maine[184] and Michigan[185] vest that power in a state legislature, and Massachusetts[186] in the state's General Court. The laws of each state also prohibit the delegation of legislative power to executive branch officials and other entities.[187]

While nondelegation is the rule, each state recognizes limited rules permitting the legislature to delegate rulemaking powers to state

GOVERNMENT AND A LETTER CONCERNING TOLERATION 100, 163 (Ian Shapiro ed., 2003).

178. Mistretta v. United States, 488 U.S. 361, 371–72 (1989) (citations and internal quotations omitted).

179. *See* United States v. Brown, 381 U.S. 437, 443 (1965); Am. Fed. of Labor v. Am. Sash & Door Co., 335 US 538, 545 (1949); and Myers v United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

180. *See* Youngstown Sheet & Tube Co. v Sawyer, 343 US 579, 629 (1952).

181. IND. CONST. art. 3, § 1.

182. PA. CONST. art. II, § 1.

183. R.I. CONST. art. VI, § 2.

184. ME. CONST. art. III, §§ 1–2.

185. MICH. CONST. art. IV, § 1.

186. MASS. CONST. Second Part, ch. 1, art. I.

187. *See* ME. CONST. art. III, § 2; State v. Monfort, 723 N.E.2d 407, 411 (Ind. 2000); Commonwealth v. Clemmey, 447 Mass. 121, 134–35 (2006); King v. Concordia Fire Ins. Co., 103 N.W. 616, 619 (Mich. 1905); Ins. Fed. of Pa., Inc. v. Dep't of Ins., 889 A.2d 550, 553 (Pa. 2005); and Town of East Greenwich v. O'Neil, 617 A.2d 104, 107 (R.I. 1992).

administrative agencies, similar to the federal government.[188] Although the nuances of permissible delegation rules vary, each state generally requires that the legislature must state a clear policy or purpose to be served and must provide reasonably precise standards to guide agencies who have been delegated rulemaking powers. In each state considered, compliance with the nondelegation doctrine is uncertain.

Application of exceptions to the nondelegation doctrine arising from the growth of administrative agencies in the mid-twentieth century are not likely to apply to the new forms of governance established by states during municipal financial distress. Indiana's emergency managers, Maine's municipal finance board and its commissioners, Massachusetts' finance control boards and non-judicial receivers, Michigan's emergency managers, Pennsylvania's governor and his designees, and Rhode Island's local budget commissions and non-judicial receivers do not fairly equate to state administrative agencies. Nor do traditional ordinances reasonably equate to administrative rules and regulations. Municipal fiscal distress has occurred throughout nation's history. The offices of

188. *See* Stanton v. Smith, 429 N.E.2d 224, 228 (Ind. 1981) ("the Legislature may delegate authority to an administrative agency if the legislature lays down in the same statute a reasonable standard to guide that discretion."); Commonwealth v. Clemmey, 849 N.E.2d 844, 855 (Mass. 2006) ("While "[n]o formula exists for determining whether a delegation of legislative authority is 'proper' . . . three factors that bear on our determination: "(1) Did the Legislature delegate the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy; (2) does the act provide adequate direction for implementation, either in the form of statutory standards or, if the local authority is to develop the standards, sufficient guidance to enable it to do so; and (3) does the act provide safeguards such that abuses of discretion can be controlled?"); State v. Boynton, 379 A.2d 994, 995 (Me. 1977) ("the legislative authority must declare the policy or purpose of the law and set up standards or guides to indicate the extent, and prescribe the limits, of the discretion it is delegating."); People v. Turmon, 340 N.W.2d 620, 623 (Mich. 1983) ("While no hard and fast rule exists for determining whether a given statute has provided sufficient standards, a number of guiding principles have evolved . . ."First, the act in question must be read as a whole . . . Second, the standard should be 'as reasonably precise . . .Third, if possible the statute must be construed in such a way as to 'render it valid, not invalid', as conferring 'administrative, not legislative' power." (internal citations omitted)); Gilligan v. Pennsylvania Horse Racing Commission, 422 A.2d 487, 489 (Pa. 1980) ("It is axiomatic that the Legislature cannot constitutionally delegate the power to make law . . . It may, however, . . . establish primary standards and impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the act." (internal citations and quotations omitted)); and Marran v. Baird, 635 A.2d 1174, 1179 (R.I. 1994) ("A delegation is reasonable, and thus constitutional . . .[a]s long as the Legislature that creates the agency demonstrates standards or principles to confine and guide the agency's power." (international citations and quotations omitted).

mayors and city councils have existed and have been selected by the electorate since the eighteenth century and in some cases, earlier. City and town ordinances have been recognized as local law for centuries. The new grants of traditional local legislative powers as established through these statutes cannot likely be justified by tortured application of legal principles developed in response to the modern rise of administrative agencies.

Even if one assumes that administrative rulemaking exceptions to the nondelegation doctrine apply, significant issues remain. Indiana, Maine, Massachusetts, Michigan, Pennsylvania, and Rhode Island's statutes all transfer legislative powers from local governments to state executive branch officials.

Michigan and, perhaps, Rhode Island's transfers of legislative power are the broadest. In each case, the recipient of that power is vested with all the legislative power possessed by city and town officials. In Michigan, these officials lose their salary and explicitly can only exercise any authority upon the written consent of the emergency manager. In Rhode Island, elected officials are reduced temporarily to an advisory role. The legislative power previously possessed by local officials is broad. In most states, municipal police power has generally evolved to include the power to pass ordinances on any subject of local concern to promote the general health, safety, and welfare of local residents. Generally, only a state's general laws and constitution limit local police power. In both Michigan and, likely in Rhode Island, the transfer of legislative power is without limiting standards or guidelines or at least difficult to discern except by reading the statutes' overriding policy–to resolve fiscal distress–into the law as a limitation on the appointees' legislative powers. Massachusetts' law suffers from similar defects.

Indiana and potentially Maine and Pennsylvania's statutes possess some limiting language. In Indiana and likely Maine, the appointees' legislative power is restricted to fiscal matters. In the case of Pennsylvania, legislative power should be restricted to financial matters and the provision of vital and necessary public services. In each of these states, the qualifiers appear more as broad categorizations of the subjects over which appointees might legislate and less as a standard or precise guide to the recipient of legislative power. If accepted as sufficiently limiting to evade separation of powers concerns, one is left to consider whether future legislation concerning consumer protection, workplace, environmental, financial practices, or a host of other regulatory issues might pass muster with

equally expansive limiting standards and guidelines identified by subject matter alone.

If the transfer of local legislative power in these states is found akin to the delegation of rulemaking authority to administrative agencies, the state's appointed officials, boards, and commissions are likely required to issue ordinances in compliance with state administrative procedures statutes. The municipal financial distress statutes of each state provide no required process for the state's appointees to enact ordinances or other legislative instruments. Appointees are also seemingly exempted from compliance with charter provisions and existing ordinances establishing legislative procedures in a municipality.[189] Rather, appointees act solely by discretionary orders and directives. Yet, Indiana, Maine, Massachusetts, Michigan, Pennsylvania, and Rhode Island all have administrative procedures laws and regulations that mandate the process for the administrative rulemaking by state officials. Each requires compliance by all state boards, commissions, and officials.[190] If the delegation of local legislative power is akin to administrative rulemaking, then these laws and regulations should be found to apply to state appointees overseeing communities in financial distress.

Finally, it is axiomatic that a state legislature may not delegate powers that the legislature itself does not possess. With the development of the home rule movement in the late nineteenth century, many states implemented home rule through constitutional provisions restricting state legislative power to enact local or special acts.

2. Constitutional restrictions on the enactment of local acts may curtail the delegation of local legislative powers

The constitutions of Indiana, Maine, Massachusetts, Michigan, Pennsylvania, and Rhode Island all contain home rule provisions. While differing in substance, each also has constitutional provisions

189. Michigan's emergency managers have been most active in the adoption of local ordinances. Dozens of ordinances have been adopted simply by an order or directive of the emergency manager in each of the cities where appointed. No ordinances are believed to have been adopted by state appointees in Rhode Island and no appointees have yet been transferred local legislative power in Indiana or Pennsylvania. The extent of which ordinances may have been adopted in either Maine or Massachusetts is presently unknown.

190. *See* IND. CODE § 4-22-2-3 (2013); ME. REV. STAT. tit. 5, § 8002 (2013); MASS GEN. LAWS ch. 30A, § 1 (2) (2013); MICH. COMP. LAWS § 24.203(2) (2013); 2 PA CONS. STAT. § 101 (2013); R.I. GEN. LAWS § 42-35-1 (2013).

restricting the state legislature's ability to enact local acts.

The Indiana state constitution prohibits the state's General Assembly from adopting local or special acts concerning certain enumerated subjects, but has no general restriction with respect to the regulation of city and town affairs.[191] Maine's constitution likewise has few restrictions on the enactment of such laws by the state legislature.[192] Massachusetts has markedly greater restrictions. The Massachusetts constitution prohibits the general court from adopting special acts concerning cities and towns, except in limited circumstances. These circumstances include upon a petition filed or approved by the local mayor and city council or a upon two-thirds vote of each branch of the General Court following a recommendation of the Governor.[193] Similarly in Michigan, the constitution provides that the state legislature may only adopt local acts with a two-thirds majority of state legislators in office and a majority vote of local electors.[194] The General Assembly in Pennsylvania is broadly prohibited from enacting local or special acts "regulating the affairs of counties, cities, townships, wards, boroughs, or school districts."[195] And, in Rhode Island the General Assembly may generally only pass legislation concerning the "property, affairs and government of a particular city or town . . . upon approval by a majority of the qualified electors of the said city or town voting at a general or special election."[196]

Consideration of whether municipal financial emergency laws violate local act restrictions involves two tiers of review. At the first level, the municipal financial distress law itself must be presented as general legislation or otherwise satisfy constitutional requirements for the enactment of local or special acts. The laws of Indiana, Maine, Michigan, Pennsylvania, and Rhode Island are general legislation, while Massachusetts *ad hoc* laws are adopted as local acts in compliance with state law.

The second level of review presents greater difficulties for proponents of the statutes in these states. Local and special acts are defined as legislation that applies to a specific place or a particular

191. IND. CONST. art. 4, § 22.
192. ME. CONST. art. III, § 13.
193. MASS. CONST. art. LXXXIX, § 8.
194. MICH. CONST. art. IV, § 29.
195. PA. CONST. art. II, § 32.
196. R.I. CONST. art. XIII, § 4.

group of persons rather than applying throughout a state's jurisdiction. City and town ordinances apply in only one particular locality and are local or special acts when adopted by state officials. In each of the states considered, the appointees who receive local legislative power are state officials. Each time that these state officials exercise local legislative power by adopting, amending, or repealing ordinances, they enact a local or special act. If the state legislature were to adopt, amend, or repeal a city or town's ordinance directly, the legislature would most certainly have to comply with state constitutional requirements for the enactment of local and special acts by state officials. The state is either directly or implicitly seeking to evade these requirements through delegation of a local legislative power to state appointees.

None of the municipal financial distress statutes acknowledge the requirements of state law for adopting local or special acts. While the local act provisions of Indiana and Maine's constitutions present fewer barriers, the constitutions of Massachusetts, Michigan, Pennsylvania, and Rhode Island present meaningful obstacles. These obstacles are rooted in fundamental values that elevate consent of the governed, separation of powers, and local decision-making over expediency and centralized control. The state legislature's attempt to delegate local legislative power in this manner raises concerns that the legislatures in Massachusetts, Michigan, Pennsylvania, and Rhode Island are delegating local legislative powers they do not possess. And, each time the state's appointee exercises such powers they may violate state constitutional provisions concerning the adoption of local or special acts.

VI. CONCLUSION

The nation's sluggish recovery following the Great Recession has placed extreme financial pressures upon cities and towns across the nation. State governments have struggled to respond. Some State government responses have, at times, placed extreme pressures on the ideals of democratic governance within our nation's cities and towns.

States' responses to ongoing financial distress with local government have included an increasing number of statutory provisions that transfer local legislative power to appointed state boards and officials. Massachusetts, Michigan, Pennsylvania, Rhode Island, Indiana, and Maine's statutes all now either directly or potentially transfer local legislative power to unelected officials in

local communities experiencing financial distress. These transfers are not made with any predicate finding of financial wrongdoing or neglect by local officials.[197] Nor are the recipients of that transfer bound to follow established laws of procedure and process in exercising their newly granted powers. The transfer of governing power from local elected officials to state appointees in this manner elevates centralized control and legislative expediency over democratic processes.

In the exercise of democracy within the United States, the nation's founders and citizens have long valued the consent of the governed as an ideal expressed through democratic elections for legislative representatives. This ideal is long recognized as a conscious choice of our nation's founders, and the people themselves, to value consensual government over the expediency of other forms of government where control is centralized. This choice is memorialized through separation of powers principles held as fundamental to the protection of individual liberties. With state municipal financial distress laws that transfer local legislative power from elected officials to state appointees, our fundamental principles become inverted whereby expediency through centralized control is elevated above consent of the governed and separation of powers. But, such transfers of power do not occur in a vacuum and do not apply broadly to all cities and towns. Rather, the transfer of power occurs in the context of particular communities.

The communities that become subject to these laws are overwhelming poor and predominately communities of color. They are typically communities that have long struggled to overcome political and economic disenfranchisement. These communities are ones most impacted by broader economic cycles. Such transfers of governing power risk establishing a precedent permitting one form of government during good times and a quite different form during periods of economic, political, and social strife, which have occurred throughout the history of our nation and will most certainly occur again. The transfer of legislative power from officials elected to give voice to residents' concerns also risks an incremental step back in time, towards a period when disenfranchisement of the poor and certain racial and ethnic groups was prevalent. Implicitly, such transfers of governing power diminish the voting rights of affected

197. Nonetheless, such transfer of power away from elected officials implies that presumption.

communities and risk institutionalizing one form of government for wealthier communities and another for communities of more modest means.

Our nation's constitutions are a bulwark against the realization of such risks. The Fourteenth Amendment's due process clause and the Guarantee Clause can be conceptualized to protect citizens' rights to elect those governing officials who possess local legislative powers. Additionally, separation of powers principles and restrictions on the enactment of local and special acts commonly found in state constitutions provide immediate checks on the transfer of legislative power to unelected officials. Whether a right to elect the legislative officials of local government will be explicitly recognized, is a question that the nation's courts may soon face.