underpin the political and legal system of the United States.[2] First, I examine the underdevelopment of legal principles regarding a right to

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 ths, Jssillo(Iow).8( )]TJ0.0152 Tw -82-2 -1.135 Td[n[m]muncipnieRive

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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

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]

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..

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, pa

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.

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

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 s

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

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.

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 tr,2(of theee)7.6(derv)11.6(86.6(6.6)eC1)10.eleun11.off, and

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

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.

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 go

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.*

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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]

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 . . .

administrative agencies, similar to the federal government.[188] Although the nuances of permissible delegation rules vary, each state generally requires that the legislat

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

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 t A

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

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.