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Table of Contents

LETTER FROM THE EDITOR 1
INTRODUCTION 3

Governance

HOW SERPENTINE DISTRICTS BECAME LAW:
MICHIGAN REDISTRICTING IN 2011
JOCELYN BENSON 7

ASIAN AMERICANS & REDISTRICTING:
THE EMERGING VOICE
TERRY AO MINNIS 23

UTILIZING CORPORATE COMPLIANCE METHODOLOGY TO ASSESS THE EFFECTIVENESS OF ELECTIONS
SAMUEL C. DAMREN & NATHANIEL J. DAMREN 43

LOCAL GOVERNMENT FISCAL EMERGENCIES AND THE DISENFRANCHISEMENT OF VICTIMS OF THE GLOBAL RECESSION
JOHN C. PHILO 71

THE FATE OF THE DETROIT PUBLIC SCHOOLS:
GOVERNANCE, FINANCE AND COMPETITION
PETER J. HAMMER 111

SEMCOG'S BUSINESS AS USUAL: A FAILED MODEL
GARY A. BENJAMIN 155

CHANGING THE "RULES OF THE GAME": TOOLS TO REVIVE MICHIGAN'S FRACTURED METROPOLITAN REGIONS
DAVID RUSK 197

2011 Symposium

BORN IN JAIL: AMERICA'S RACIAL HISTORY AND THE INEVITABLE EMERGENCE OF THE SCHOOL-TO-PRISON PIPELINE
MARK P. FANCHER 267

SYSTEMIC FAILURE: THE SCHOOL-TO-PRISON PIPELINE AND DISCRIMINATION AGAINST POOR MINORITY STUDENTS
INDIA GERONIMO 281

THE DECRIMINALIZATION OF THE CLASSROOM: THE SUPREME COURT'S EVOLVING JURISPRUDENCE ON THE RIGHTS OF STUDENTS
JESSICA FEIERMAN 301

Notes

STOLEN VALOR ACT: A CONSTITUTIONAL INSTRUMENT TO PROSECUTE "PUBLIC FRAUD"
NICHOLAS MULL 317

THE AFTERMATH OF "THE DETROIT CONTROVERSY": EAVESDROPPING ON ACTING PUBLIC OFFICIALS AND THEIR PRIVACY RIGHTS
ERIC TURNBULL 353

LOCAL GOVERNMENT FISCAL EMERGENCIES AND THE DISENFRANCHISEMENT OF VICTIMS OF THE GLOBAL RECESSION

JOHN C. PHILO[1]

Table of Contents

I. INTRODUCTION 72
II. THE GLOBAL ECONOMIC CRISIS HAS CAUSED A WIDESPREAD LOSS OF HOUSEHOLD WEALTH AND INCOME ACROSS THE COUNTRY 72
III. DECLINING PROPERTY VALUES, LOST INCOME, AND REDUCED REVENUE TO LOCAL GOVERNMENT 77
IV. MICHIGAN AND RHODE ISLAND'S UNDEMOCRATIC RESPONSE TO CITIES IN FISCAL DISTRESS 80
A. Michigan's Public Act 4 of 2011 82
B. Rhode Island's Chapter 45-9 Amendments 87
V. ECONOMICALLY POOR PERSONS HAVE A RIGHT TO VOTE IN LOCAL ELECTIONS 91
A. The Equal Protection Clause Requires Strict Scrutiny Of State Laws That Severely Restrict Fundamental Rights 93
B. The Equal Protection Clause Prohibits Conditioning People's Right To Vote On One's Wealth 94
C. Michigan and Rhode Island's Statutes Violate the Equal Protection Clauses of the United States Constitution 98
1. Michigan And Rhode Island's Laws Condition The Right To Vote On Residents' Wealth 101
2. Michigan And Rhode Island's Laws Are Not Narrowly Tailored To Advance A Compelling State Interest And Are Not Related To Any Legitimate State Interests 105
VI. CONCLUSION 108

The deterioration of a government begins almost always by the decay of its principles.

–Charles de Montesquieu

1. Legal Director, Maurice and Jane Sugar Law Center for Economic and Social Justice.

I. INTRODUCTION

It has long been recognized that in crisis lay opportunity; conversely, emergencies may provide a pretext upon which the rights of individuals can be eliminated. The ongoing global economic crisis has created opportunities for necessary initiatives to move toward a fairer, more stable, and sustainable economy. However, the existing environment has also created the impetus for legislation of less virtuous nature. Whether adopted in excessive haste or for other motivations, Michigan's Local Government and School District Fiscal Accountability Act,[2] and Rhode Island's General Laws, Chapter 45-9 as amended in 2010 and 2011 (Chapter 45-9 amendments),[3] represent an undue infringement upon the democratic rights of their states' poorest citizens.

Since its inception in 2007, the global recession created an environment of economic instability in the United States and has resulted in widespread financial stress within local governments. Due to long-standing reliance on real property and income tax revenue, municipal financial stress is directly related to the loss of household wealth and income caused by sharp declines in home values, increased foreclosures, and widespread job loss. State laws that suspend voting rights during municipal fiscal instability ignore the causes of local governments' fiscal distress and condition voting rights upon the wealth of the community and local residents.

II. THE GLOBAL ECONOMIC CRISIS HAS CAUSED A WIDESPREAD LOSS OF HOUSEHOLD WEALTH AND INCOME ACROSS THE COUNTRY

Beginning in 2007, the global recession dramatically impacted household wealth and income across the nation. The recession is widely recognized as having been caused by a collapse in financial markets that was triggered most prominently by "significant losses on residential mortgage loans to subprime borrowers that became apparent shortly after house prices began to decline."[4] The collapse of real estate prices and massive losses in mortgage markets then triggered a series of events that resulted in a tightening of credit and lending to businesses, which in turn

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2. Local Government and School District Fiscal Accountability Act, Act No. 4, 2011 Mich. Pub. Acts (codified at MICH. COMP. LAWS §§ 141.1501 *et. seq.*), http://www.legislature.mi.gov/documents/2011-2012/publicact/pdf/2011-PA-0004.pdf.

3. R.I. GEN. LAWS § 45-9-1 *et. seq.*

4. *Hearing Before the U.S. Fin. Crisis Inquiry Comm'n* 1 (Sep. 2, 2010) (statement of Ben S. Bernake, Chairman, Board of Governors of the Federal Reserve System), *available at* http://www.federalreserve.gov/newsevents/testimony/bernanke20100902a.pdf

contributed to a rise in unemployment.[5] Pronounced features of the current economic downturn were, and continue to be, dwindling home values, unprecedented numbers of home foreclosures and historically high unemployment rates. These conditions created extreme pressures on the finances of households, which in turn created extreme pressures on the finances of local government.

Since 2007, through the first quarter of 2009, household wealth rapidly declined by $17 trillion largely as the result of collapsing housing prices.[6] From the onset of the recession through the first quarter of 2009, home prices declined by nearly one-third and have remained relatively flat since.[7] Prior to the recession, home equity represented forty-four percent of white households' net worth; fifty-nine percent of black households' net worth; and sixty-five percent of Latino households' net worth.[8] Between April 2007 and December 2009, however, the drop in home values caused a sixty percent loss in owners' equity.[9] While the loss in home equity has directly caused sharp declines in household wealth, another aspect of these declines is the foreclosure crisis.

By the middle of 2008, nearly four of every 100 mortgages were more than ninety days delinquent or were in foreclosure.[10] These were the highest rates seen since data had begun being tracked nearly thirty years prior.[11] New highs were established in 2009 and again 2010.[12] In the third quarter of 2011, the overall rate of residential mortgages in foreclosure or more than ninety days delinquent was found to be 4.32%.[13]

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5. U.S. FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES, FIN. CRISIS INQUIRY COMM'N 389, 394-396 (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf [hereinafter THE FINANCIAL CRISIS INQUIRY REPORT].

6. *See id.* at 391.

7. PAUL TAYLER ET AL., PEW RESEARCH CTR., TWENTY TO ONE: WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS 10 (2011).

8. *Id*. at 25.

9. RAJASHRI CHAKRABARTI, DONGHOON LEE, WILBERT VAN DER KLAAUS & BASIT ZAFAR, FED. RESERVE BANK OF N.Y., NO. 482, HOUSEHOLD DEBT AND SAVING DURING THE 2007 RECESSION 2 (2011).

10. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-231T, TROUBLED ASSET RELIEF PROGRAM: STATUS OF EFFORTS TO ADDRESS DEFAULTS AND FORECLOSURES ON HOME MORTGAGES 3 (2008), *available at* http://www.gao.gov/assets/130/121388.pdf.

11. *Id.*

12. *Id.*

13. Press Release, Delinquencies Decrease, Foreclosures Rise in Latest MBA Mortgage Delinquency Survey (Sep. 17, 2011) (on file with Mortgage Banking Assoc.), *available at* http://www.mortgagebankers.org/NewsandMedia/PressCenter/78538.htm.

The nation's racial and ethnic minority populations have been disproportionately impacted by the foreclosure crisis.[14] Of foreclosures occurring between 2007 and 2009 resulting from residential mortgage loans originated during the period of 2005 through 2008, 7.9% of black and 7.7% of Latino citizens lost their homes to foreclosure while 4.5% of white citizens lost their homes to foreclosure.[15] Among low-income borrowers, black borrowers accounted for 14.8% of loans originated between 2005 through 2008,[16] yet, black citizens comprised twenty-one percent of the foreclosures on those loans.[17]

The loss of household wealth from declining home values and foreclosures is only part of the picture of declining financial stability. Lost equity prohibits borrowing and prevents the sale of assets to stabilize finances during rough patches. Declining equity and even lost ownership may be overcome with stable income and earnings. When coupled with lost income and earnings however, the combination proves catastrophic not only for households but for municipalities. This combination has been a hallmark of the global recession and continuing economic downturn.

Principally, as a result of lost employment and reduced work hours, median household income has declined by approximately 6.4% since the beginning of the recession.[18] The decline of household income has hit hardest on middle and low-income families. For lowest income families, income has declined by approximately eleven percent.[19] For lower middle-income and middle-income families, income has declined by 8.2% and 6.6% respectively.[20] Household earnings dropped even more

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14. *See generally* DEBBIE GRUENSTEIN BOCIAN, WEI LI & KEITH S. ERNST, CTR. FOR RESPONSIBLE LENDING, FORECLOSURES BY RACE AND ETHNICITY: THE DEMOGRAPHICS OF A CRISIS, (2010), *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf [hereinafter *Foreclosures by Race and Ethnicity*]; *see also* RAUL HINOJOSA OJEDA, WILLIAM C. VELASQUEZ INST., THE CONTINUING HOME FORECLOSURE TUSNAMI: DISPROPORTIONATE IMPACTS ON BLACK AND LATINO COMMUNITIES (2009), *available at* http://www.wcvi.org/data/pub/WCVI_Publication_Homeownership102309.pdf; Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOCIOLOGICAL REV. 629 (2010).

15. *Foreclosures by Race and Ethnicity*, *supra* note 14, at 8.

16. *Id*. at 10.

17. *Id*.

18. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, U.S. CENSUS BUREAU, P60-239, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 5 (2011).

19. Lawrence Mishel & Nicholas Fino, *Inequality and Income Losses in the Recession: It's All About Lost Work*, ECON. POL'Y INST. BLOG (Sept. 19, 2011, 11:29 AM), http://www.epi.org/blog/inequality-income-losses-recession/.

20. *Id.*

dramatically for each of these groups.[21] The primary reason for declines in household income was caused by widespread job loss during the recession.

In 2008, the United States lost 3.6 million jobs – the largest annual loss of employment since the government began keeping such statistics.[22] By the end of 2009, the country lost another 4.7 million jobs.[23] Approximately one million jobs were regained during 2010,[24] and in 2011 job growth remained sluggish.[25] The loss of jobs has hit racial and ethnic minorities the hardest.[26] The current national unemployment rate among white citizens is approximately 7.6%.[27] For black citizens, the rate is 15.5%,[28] and for Latino workers, the rate is 11.4%.[29]

In many ways, Michigan and Rhode Island exemplify and magnify national economic trends. Both states were among those hardest hit by sharp declines in home values, high rates of home foreclosures, and unemployment. Between 2005 and 2008 in Michigan, housing prices deceased by more than ten percent and foreclosure starts increased by 32.4%.[30] In Rhode Island during the same time period, home prices decreased by 7.5% and foreclosure starts increased by 29.8%.[31] Only four states had higher foreclosure rates and greater declines in home values than Michigan and Rhode Island.

In 2009, Michigan had the eighth highest foreclosure rate in the country,[32] and in 2010 moved up to the sixth highest.[33] Likewise for 2009

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21. *Id.*

22. THE FINANCIAL CRISIS INQUIRY REPORT, *supra* note 5, at 390.

23. *Id.*

24. *Id.*

25. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL-12-0813, ECONOMIC NEWS RELEASE: BUSINESS EMPLOYMENT DYNAMICS SUMMARY (2011), *available at* http://www.bls.gov/news.release/cewbd.nr0.htm; *see also* Shaila Dewan, *Zero Job Growth Latest Bleak Sign for U.S. Economy*, N.Y. TIMES, Sept. 2, 2011, *available at* http://www.nytimes.com/2011/09/03/business/economy/united-states-showed-no-job-growth-in-august.html.

26. *See* THE FINANCIAL CRISIS INQUIRY REPORT, *supra* note 5, at 391.

27. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, ECONOMIC NEWS RELEASE: EMPLOYMENT STATUS OF THE CIVILIAN POPULATION BY RACE, SEX, AND AGE (2011), *available at* http://www.bls.gov/news.release/empsit.t02.htm [hereinafter EMPLOYMENT STATUS OF THE CIVILIAN POPULATION].

28. *Id.*

29. *Id.*

30. U.S. DEP'T OF HOUSING & URBAN DEV., REPORT TO CONGRESS ON THE ROOT CAUSES OF THE FORECLOSURE CRISIS, at A-1 (2010).

31. *Id.*

32. Kris Tanner & Greta Guest, *Database: Michigan Foreclosure Rates by County*, DET. FREE PRESS ONLINE, Jan. 13, 2010, http://www.freep.com/article/20100114/NEWS06/100113066/Database-Michigan-foreclosure-rates-by-county.

through 2010, Rhode Island has had the highest foreclosure rates in New England and ranked among the ten states with the highest foreclosure rates.[34] Michigan and Rhode Island have also been among the states with the highest rates of unemployment.

Between 2005 and 2008, Michigan's unemployment rate jumped from 6.8% to 8.4%[35] and between August 2008 and August 2009, the rate nearly doubled to 15.2%.[36] Since 2009, the unemployment rate has decreased but remains near 10%.[37] Throughout the global recession and economic downturn, the state's unemployment rate has ranked among the highest in the nation. Since the economic downturn began, the unemployment rate for black Michiganders has been more than double that of white citizens.[38] In 2010, the statewide average for whites, blacks, and Latinos was 10.5%,[39] 23.9%,[40] and 13.7%[41] respectively.

Between 2005 and 2008, Rhode Island's unemployment rate rose from 5.1% to 7.8%.[42] Between August 2008 and August 2009, the rate jumped to 12.8% – the second highest rate in the country, behind only Michigan.[43] Since 2009, the unemployment rate has decreased to 10.5% but continues to rank among the highest in the nation.[44] Similar to

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33. *Michigan Has Nation's Sixth Highest Foreclosure Rate*, CBS DETROIT, Sept. 15, 2011, *available at* http://detroit.cbslocal.com/2011/09/15/michigan-has-nations-sixth-highest-foreclosure-rate/.

34. HOUSINGWORKS RI, THIRD ANNUAL SPECIAL REPORT: FORECLOSURES IN RHODE ISLAND 3 (2011), *available at* http://www.housingworksri.org/sites/default/files/HWRI_SpecialRep_Foreclosures2011.pdf, [hereinafter SPECIAL REPORT: FORECLOSURES IN RHODE ISLAND].

35. *See* EMPLOYMENT STATUS OF THE CIVILIAN POPULATION, *supra* note 27.

36. *Id.*

37. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, USDL-09-1126, ECONOMIC NEWS RELEASE: REGIONAL AND STATE EMPLOYMENT AND UNEMPLOYMENT (2009), http://www.bls.gov/news.release/archives/laus_09182009.htm [hereinafter 2009 REGIONAL AND STATE EMPLOYMENT AND UNEMPLOYMENT].

38. *See* DOUGLAS HALL & ALGERNON AUSTIN, ECON. POL'Y IST., ISSUE BRIEF NO. 301, DISTRESSED MICHIGAN: UNEMPLOYMENT RATE FOR AFRICAN AMERICANS MORE THAN DOUBLE THAT OF WHITES (Apr. 2011).

39. MICH. LEAGUE FOR HUMAN SERV., LABOR DAY REPORT: LONG-TERM UNEMPLOYMENT HITS HIGH WATER MARK, LENGTHY JOB SEARCHES UNDERSCORE NEED FOR POSTSECONDARY EDUCATION 2 (2011).

40. U.S. DEP'T OF LABOR, THE BLACK LABOR FORCE IN THE RECOVERY 9 (2011) [hereinafter THE BLACK LABOR FORCE IN THE RECOVERY].

41. U.S. DEP'T OF LABOR, THE HISPANIC LABOR FORCE IN THE RECOVERY 7 (2011).

42. *See* U.S. DEP'T OF HOUSING & URBAN DEV., *supra* note 30.

43. *See* 2009 REGIONAL AND STATE EMPLOYMENT AND UNEMPLOYMENT, *supra* note 37.

44. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, USDL-12-0091, ECONOMIC NEWS RELEASE: REGIONAL AND STATE EMPLOYMENT AND UNEMPLOYMENT (2011), *available at* http://www.bls.gov/news.release/laus.nr0.htm.

Michigan, the unemployment rate is higher for racial and ethnic minorities. In 2010, the unemployment rate for white Rhode Islanders was approximately 10.1%,[45] while the rate for black and Latino workers was at 15.7%[46] and 21.6%[47] respectively.

Sharp declines in household wealth and income are well-recognized consequences of the global recession that began in late 2007 and have profoundly impacted the finances of local governments.

III. DECLINING PROPERTY VALUES, LOST INCOME, AND REDUCED REVENUE TO LOCAL GOVERNMENT

The global economic downturn has significantly impacted the finances of municipalities across the country. As a result of declining household wealth and income, the downturn has caused decreased revenue from property and income taxes and caused increased demand for services by local residents.

Since 2007, the nation's cities have suffered "five straight year-to-year declines" in revenues and four consecutive yearly declines in expenditures.[48] Noting the weak recovery, the potential for continued recession, and the traditional lag between economic volatility and their impact on city finances, local governments are likely to see further declines in revenues and expenditures in the years ahead.[49] Significant factors in the steep decline in revenues are lost taxes due to the collapse in home values and high rates of unemployment.

Cities' tax revenue has declined since 2009 and is expected to continue.[50] Property tax revenue represents a significant source of revenue for most cities throughout the country.[51] Declines in property tax revenue generally lag downturns in the economy.[52] Revenue declines

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45. ALGERNON AUSTIN, ECON. POL'Y INST., DEPRESSED STATES: UNEMPLOYMENT RATE NEAR 20% FOR SOME GROUPS 8 (2011).

46. THE BLACK LABOR FORCE IN THE RECOVERY, *supra* note 40, at 9.

47. AUSTIN, *supra* note 45, at 4.

48. *Id.* at 3.

49. *Id.; see also* THE FINANCIAL CRISIS INQUIRY REPORT, *supra* note 5, at 399.

50. THE FINANCIAL CRISIS INQUIRY REPORT, *supra* note 5, at 399.

51. *See generally* CHRISTOPHER W. HOENE & MICHAEL A. PAGANO, NAT'L LEAGUE OF CITIES, NATIONAL LEAGUE OF CITIES RESEARCH REPORT ON AMERICA'S CITIES: CITY & STATE FISCAL STRUCTURE (2008) [hereinafter CITY & STATE FISCAL STRUCTURE].

52. The lag is related to the manner in which property taxes are assessed and collected. These taxes are based on assessments of the value of residential and commercial property. Assessment and collection cycles vary among jurisdictions, but are typically are not more performed more frequently than once per year. Thus, the full measure of declines in property value and its impact on the amount of property tax revenue collected may not be evident until several years after an economic downturn has

resulting from the present economic recession are now being seen in most local budgets. The drop in cities' property tax revenue experienced in 2010 was the first such drop in fifteen years.[53] The anticipated drop in 2011 will be roughly double that of 2010.[54] Further drops are expected in 2012 and 2013.[55]

Income tax also represents a significant revenue source for many cities.[56] Persistent unemployment and reduced work hours has caused declines in income tax revenues.[57] Even in jurisdictions without municipal income taxes, high unemployment rates can cause lost revenue to state coffers, which reduce state revenue sharing and again, negatively impact local government's coffers.

Fiscal pressure on state government also negatively impacts the finances of local government. With decreased property, income, and other tax collections at the state level, state governments have, in turn, decreased revenue sharing with local governments. In 2011, the National League of Cities found that approximately half of surveyed cities reported declines in general aid and revenue sharing from their state governments.[58] Nearly one-third of cities also reported reductions in reimbursement programs and other transfers from the state.[59] The 2011 declines follow similar reductions in 2010.[60]

Along with declines in revenues, cities have experienced increased demand for services. Services such as job training, public transportation, education, before and after-school programs, and public safety are typically provided by local municipalities. With economic volatility, local residents often increase demand for such services. However in the presence of declining revenues, cities have felt compelled to lay off employees and scale-back services.[61]

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begun. *See* CHRISTOPHER W. HOENE & MICHAEL A. PAGANO, NAT'L LEAGUE OF CITIES, NATIONAL LEAGUE OF CITIES RESEARCH BRIEF ON AMERICA'S CITIES: CITY FISCAL CONDITIONS IN 2011, at 10 (2011) [hereinafter CITY FISCAL CONDITIONS IN 2011].

53. *Id.*

54. *Id.*

55. *Id.*

56. *See generally* CITY & STATE FISCAL STRUCTURE, *supra* note 51.

57. *Id.* at 4.

58. CITY FISCAL CONDITIONS IN 2011, *supra* note 52, at 7.

59. *Id.*

60. CHRISTOPHER W. HOENE & MICHAEL A. PAGANO, NAT'L LEAGUE OF CITIES, NATIONAL LEAGUE OF CITIES RESEARCH BRIEF ON AMERICA'S CITIES: CITY FISCAL CONDITIONS IN 2010, AT 5 (2010).

61. *See* CHRISTOPHER W. HOENE & JACQUELINE J. BYERS, NAT'L LEAGUE OF CITIES, NATIONAL LEAGUE OF CITIES RESEARCH BRIEF: LOCAL GOVERNMENTS CUTTING JOBS AND SERVICES (2010).

Michigan and Rhode Island municipalities provide a microcosm of national trends revealing declining property and income revenue and reduced revenue sharing from the state. In 2011, approximately half of Michigan's local governments reported that they were less able to meet financial needs than in 2010. [62] The number increases to sixty-one percent for cities with more than thirty thousand residents.[63] Rhode Island cities are equally distressed. Of surveyed cities and towns, more than half will to require increases in property tax rates beyond state caps just to pay for the higher pension costs this year.[64]

Prior to 2008, property taxes accounted for forty-two percent,[65] income taxes nine percent,[66] and payments from state government thirty-four percent[67] of the general revenue received by Michigan's cities. On top of declines reported in 2009 and 2010, seventy-one percent of Michigan's local governments reported additional declines in property tax revenues in 2011.[68] For cities with a population of more than ten thousand persons, the number jumps to ninety percent.[69] Sixty-one percent of local governments also reported further reductions in payments from the state in 2011 and the percentages were, again, markedly higher for the state's larger cities.[70]

Local governments in Rhode Island receive most of their general revenue funds from property tax assessments. Rhode Island municipalities cannot assess either income or sales taxes.[71] Property taxes equal more than eighty percent of the own-source revenue generated by Rhode Island municipalities.[72] Through 2012, foreclosures are anticipated to cause a loss of $6,624 billion in home values

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62. CTR. FOR LOCAL, STATE & URBAN POL'Y, MICHIGAN PUBLIC POLICY SURVEY: OCTOBER 2011, at 1 (2011) [hereinafter MICHIGAN PUBLIC POLICY SURVEY OCTOBER 2011].

63. *Id.* at 2.

64. *See* Paul Edward Parker & Tom Mooney, *R.I.'s Pension Puzzle: Local Leaders Peer 'Over the Edge of a Cliff'*, PROVIDENCE J., Oct. 9, 2011, *available at* http://www.providencejournal.com/business/pensions/content/RISING_PENSION_COSTS_10-09-11_PNQP5KH_v149.6dde1.html.

65. CITY & STATE FISCAL STRUCTURE, *supra* note 51 at 20.

66. *Id.*

67. *Id.* at 22.

68. MICHIGAN PUBLIC POLICY SURVEY OCTOBER 2011, *supra* note 62, at 4.

69. *Id.*

70. *Id.*

71. CITY & STATE FISCAL STRUCTURE, *supra* note 51, at 19.

72. *Id.*

statewide.[73] State aid to local governments and revenue sharing between state and local government has declined every year since 2007.[74]

Dramatic revenue declines have caused financial distress in local governments across the country, and state legislatures are considering legislation to address the heightened risk of defaults to bondholders and creditors by local governments. While a number of states have considered, few states have adopted general legislation providing common procedures to address financial emergencies occurring within local governments. Severe conditions in several cities caused both Michigan and Rhode Island to consider and adopt such legislation.

The measures adopted by Michigan and Rhode Island however, assume an inherent incompatibility between democratic government and the resolution of economic crisis. If permitted to stand, these laws may serve as a model for other states, leading to an erosion of electors rights to democratic forms of local government.

IV. MICHIGAN AND RHODE ISLAND'S UNDEMOCRATIC RESPONSE TO CITIES IN FISCAL DISTRESS

While Michigan and Rhode Island's response is unprecedented, the occurrence of municipal fiscal distress during national economic downturns is not. The nation has a long history of cyclical economics causing fiscal instability within local governments. The depression of the 1930s provides an example.[75]

During the Great Depression, 4,770 cities defaulted on their debt.[76] At that time, government officials sought new procedures to assist local governments to achieve economic stability. During the depression, creditors of defaulting cities were commonly required to file a mandamus action in state courts seeking to compel the municipality to raise taxes to pay debt obligations. To improve procedures for creditors and municipal debtors, the federal government adopted Chapter 9 of the federal bankruptcy code in 1937,[77] which permits the use of federal bankruptcy procedures for debt-ridden municipalities.

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73. SPECIAL REPORT: FORECLOSURES IN RHODE ISLAND, *supra* note 34, at 8.

74. *See* H. FISCAL ADVISORY STAFF ON RHODE ISLAND LOCAL AID 1, 15 (2011).

75. Michigan had the highest number of default in 1935 and had the fourth highest number of defaulting municipalities throughout the depression years. *See* Natalie R. Cohen, *Municipal Default Patterns: An Historical Study*, 9 PUB. BUDGETING & FINANCE 58-60 (1989).

76. *Id.* at 55, 57.

77. *See* An Act to Amend an Act Entitled An Act to Establish a Uniform System of Bankruptcy Throughout the United States, Pub. L. No. 302, 50 Stat. 653 (codified as amended in scattered sections of 11 U.S.C.). Initial legislation was passed in 1934,

Since the Great Depression, Chapter 9 bankruptcy has been the procedure of last resort for distressed local governments. Under Chapter 9, elected officials remain in office and retain significant autonomy while bankruptcy procedures oversee the development of a plan to adjust debts and pay creditors. Before a Chapter 9 petition may be filed however, the State must authorize the municipality to file for bankruptcy.[78] Due to fears attached to the stigma of bankruptcy, state officials are often reluctant to authorize Chapter 9 filings and local officials are often equally reluctant to seek bankruptcy protections.[79] As a result, fewer than 500 petitions for Chapter 9 bankruptcy have ever been filed.[80]

The economic recessions of the early 1970s and early 1980s again caused widespread financial stress within local governments across the country. Particularly on the East Coast and in the industrial Midwest, many urban areas suffered significant financial instability. New York City and Cleveland both went into default and Boston, Buffalo, and Chicago narrowly managed to avoid default.[81] During the municipal financial crises of the 1970s and 1980s, states undertook new and novel initiatives to stabilize municipalities, outside of bankruptcy procedures.

States adopted both special legislation and general legislation to stabilize the finances of local government. Bridgeport (CT),[82] New York City, Saco (ME), and other cities were stabilized by state initiatives that included special legislation tailored to the fiscal conditions of the particular municipality.[83] Other states such as Michigan,[84] Ohio,[85] and

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however was found to violate the Constitution in *Reed v. McIntyre*, 98 U.S. 507 (1878). The Act was then amended to address the constitutional concerns. *See, e.g.*, *Simonton v. Pontiac*, 255 N.W. 608 (1934) (applying the Act's amendment to address the constitutional concerns).

78. *See Chapter 9: Municipal Bankruptcies*, UNITED STATES COURTS, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter9.aspx (last visited May 16, 2012).

79. David R. Berman, *Takeovers of Local Governments: An Overview and Evaluation of State Policies*, 25 PUBLIUS 55, 58-59 (1995) [hereinafter *Takeovers of Local Governments*].

80. *See Chapter 9: Municipal Bankruptcies*, *supra* note 78.

81. Natalie R. Cohen, *supra* note 75, at 55, 61.

82. *Takeovers of Local Governments*, *supra* note 79, at 55, 62.

83. *See generally* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, BANKRUPTCIES, DEFAULTS AND OTHER LOCAL GOVERNMENT FINANCIAL EMERGENCIES 24-26 (1985).

84. *See* Local Government Fiscal Responsibility Act, Act No. 101, 1988 Mich. Pub. Acts (repealed).

85. *See* Ohio's Local Fiscal Emergencies Act of 1979 (codified at OHIO REV. CODE § 118.01 *et seq.*).

Pennsylvania[86] developed general legislation to address municipal financial instability.

While Connecticut, Massachusetts, and New York have no general legislation to address local fiscal emergencies, each of these states has a history of adopting ad hoc legislation that, in part, provides financial review boards to oversee the finances of particular cities experiencing financial distress.[87] In addition to the laws of Michigan, Ohio, and Pennsylvania, approximately five other states have general legislation that permit the appointment of a state board or manager to oversee a city or town's finances during a fiscal crisis.[88]

Twenty-six states have laws that authorize and detail procedures for local government to file for Chapter 9 bankruptcy during a local financial crisis.[89] One state prohibits local governments from seeking Chapter 9 bankruptcy and the remaining states have no existing legislation.[90]

The past has thus provided impetus for the development of both federal and state legislation to address local fiscal emergencies. Still, few states have adopted standing legislation to proactively address future instances of fiscal distress in local governments. Michigan's new statute and Rhode Island's revised law represent the two most prominent efforts to address municipal distress since the beginning of the global recession that began in 2007. The two statutes represent a significant departure from prior models developed since the Great Depression of the 1930s and in response to the recession of the 1970s and 1980s.

A. Michigan's Public Act 4 of 2011

Prior to passage of Public Act 4 of 2011, municipal financial emergencies were not unknown to the state of Michigan. The state experienced widespread municipal defaults during the Great Depression and during the economic recessions in the latter half of the twentieth century.

Since 1937, two Michigan cities have defaulted on bond payments or been placed in receivership due to insolvency. Muskegon Township defaulted on revenue bond payments in the early 1960s and the City of

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86. *See* Pennsylvania's Municipalities Financial Recovery Act of 1987 (codified at PA. CONS. STAT. §§ 11701.1–11701.501).

87. *See generally Takeovers of Local Governments*, *supra* note 79, at 55, 60-64.

88. States known to have such laws include: Florida, Michigan, New Jersey, New Mexico, North Carolina, Ohio, Pennsylvania, and Rhode Island. *See* CONG. BUDGET OFFICE, ECONOMIC AND BUDGET ISSUE BRIEF: FISCAL STRESS FACED BY LOCAL GOVERNMENTS 8 (2010).

89. *Id.* at 9.

90. *Id.*

Ecorse was placed in receivership by a judge of the Wayne County Circuit Court following the city's failure to make pension contributions and pay creditors.[91] Muskegon Townships' default resulted in a judgment providing for a payment plan that had been negotiated between the parties.[92] The City of Ecorse's insolvency, however, did not proceed as smoothly.

During litigation in Wayne County Circuit Court, the City of Ecorse was sued by creditors and ordered to develop a balanced budget. When the city repeatedly failed, the court ordered the appointment of a receiver over the city.[93] The court granted the receiver all necessary power to balance the city's budget.[94] The court's receiver remained in place from 1986 through 1990 and provided continued oversight through 1999.[95]

In response to the effects of the 1980s recession and experiences with the troubled insolvency of the City of Ecorse, the state enacted Public Act 101 of 1988 (PA 101). PA 101 allowed the state to intervene when local municipalities were found to be in financial distress. The statute allowed the state to appoint emergency financial managers over cities experiencing a financial emergency. The legislation was revised by Public Act 72 of 1990 (PA 72), which broadened the state's powers and brought school districts within the statute.

From the time of its enactment through the 1990s, no emergency financial managers were appointed pursuant to either PA 101 or PA 72 and only the City of River Rouge and Royal Oak Township are known to have entered into consent agreements under the statutes – both in the late 1980s.[96] However in the late 1990s, severe reductions in state revenue sharing caused significant financial stress to Michigan's cities.[97] Public Act 72 procedures were implemented and emergency financial managers were appointed in the cities of Hamtramck (2000), Highland Park (2001), Flint (2002), Ecorse (2009), Pontiac (2009) and Benton Harbor (2010), the village of Three Oaks (2008), and the Detroit Public School System

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91. *See generally* Charter Twp. of Muskegon v. City of Muskegon, 303 F.3d 755, 756 (2002).

92. *Id.* at 757.

93. *Ecorse Placed in Receivership*, TOLEDO BLADE, Dec. 4, 1986, at § 1.

94. Mike Wowk, *Ecorse Regains its Solvency: City Makes Final Payment to Michigan on Aug. 1, Ending 13 Years of Receivership*, DET. NEWS, July 18, 1999, at 3C.

95. *Id.* The City of Ecorse was subsequently found to again be in a financial emergency in the 2009.

96. CITIZENS RESEARCH COUNCIL OF MICH., AN ANALYSIS OF THE EFFECTIVENESS OF THE LOCAL GOVERNMENT FISCAL RESPONSIBILITY ACT (PUBLIC ACT 72 OF 1990, FORMERLY PUBLIC ACT 101 OF 1988) (Aug. 1990), *available at* http://crcmich.org/PUBLICAT/1990s/1990/pa72analysis.pdf.

97. ERIC SCORSONE, MICH. S. FISCAL AGENCY, LOCAL GOVERNMENT FINANCIAL EMERGENCIES AND MUNICIPAL BANKRUPTCY 1 (2010).

(2009).[98] In each of these localities, the state appointed emergency financial managers with substantial autonomy over the finances of the municipality.

Under PA 72, once a financial emergency was declared, the governor could empower the local emergency financial assistance loan board to appoint an emergency financial manager. The emergency financial manager possessed all the authority of the local government over the finances of the city, including spending and budgetary decisions. While the scope of power retained by local elected officials was somewhat ambiguous, PA 72 was generally understood to permit local officials to remain in office and retain power over policy and administrative matters outside the scope of the emergency financial manager's fiscal authority. This understanding was substantially confirmed during the course of litigation in 2010.

In the case of *Adams v. Bobb*, the Detroit Public Schools' elected school board filed suit against the school system's emergency financial manager alleging that the manager had overstepped his powers.[99] In a lengthy opinion, the court found that the emergency financial manager had exceeded his powers under PA 72, by seeking to establish academic policies and school curriculum.[100] The court held that authority in these areas remained vested in the elected school board.[101] Within four months of the court's decision, however, Public Act 72 was replaced by Public Act 4 of 2011.

Following elections in November of 2010[102] and the turnover of state offices in January, the Michigan legislature introduced House Bill 4214 (2011) on February 9, 2011.[103] The Bill was passed by the House of Representatives and transmitted to the Senate on February 23.[104] The Bill

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98. A PA 72 consent agreement was also entered into with the City of River Rouge, however an emergency manager was not appointed. Hamtramck, Highland Park, Flint, and Three Oaks' financial emergencies were declared resolved and control over fiscal matters was returned to elected officials in 2007, 2010, 2004, 2009 respectively. Flint was again found in a financial emergency in 2011.

99. Anthony Adams v. Robert Bobb, No. 09-020160-AW, at 2 (Wayne Cnty. Cir. Ct., Dec. 6, 2010).

100. *Id.* at 31.

101. *Id.*

102. The elections saw the Governor's office, a majority of legislators in each chamber, and a majority of justices of the State Supreme Court become unified under one political party.

103. H.R. 4214, 96th Leg., Reg. Sess. (Mich. 2011), http://www.legislature.mi.gov/documents/2011-2012/billintroduced/House/pdf/2011-HIB-4214.pdf.

104. Mich. H.R. 4214 (as passed by the Michigan House of Representatives), http://www.legislature.mi.gov/documents/2011-2012/billengrossed/House/pdf/2011-HEBH-4214.pdf.

was then passed by the State Senate with amendments on March 9 and returned to the House.[105] The House concurred in the Senate revisions, was enrolled, and presented to the Governor on March 15, 2011.[106] The bill became law as the Local Government and School District Fiscal Accountability Act (Public Act 4) when signed by the Governor on March 16, 2011.[107] In less than six weeks, a historic overhaul of state law governing municipal financial emergencies was thus accomplished.

In language illustrative of their expanded powers, Public Act 72's emergency financial managers became emergency managers under Public Act 4. Among other changes, the new statute permits the appointment of an emergency manager without a finding that a financial emergency actually exists or is likely to occur in the affected municipality. Public Act 4 permits such appointments through provisions that empower the state's financial review team to enter into early consent agreements with local government and that grant the Governor sole discretion to declare a financial emergency.

Under Section 13 of Public Act 4, the state's financial review team is permitted to negotiate and sign a consent agreement prior to a finding of financial stress or a financial emergency.[108] The consent agreement is negotiated with the locality's chief administrative officer and becomes effective upon approval by the city's legislative body.[109] Under a consent agreement, the state treasurer is permitted to appoint a local official with all the powers of an emergency manager.[110] Each such agreement is required to include a provision that permits the State Treasurer to place the local government in receivership upon any breach of the consent agreement by the local government.[111] Once declared in receivership, the Governor appoints an emergency manager to govern the city.[112] Notably, the law requires no finding of an existing or impending financial emergency prior to the negotiation of consent agreement or, in the event of breach, prior to placing the city in receivership. Regardless of the existence of a consent agreement, the Governor may also appoint an

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105. Mich. H.R 4214 (as passed by the Michigan State Senate with amendments), http://www.legislature.mi.gov/documents/2011-2012/billengrossed/House/pdf/2011-HEBS-4214.pdf

106. Mich. H.R. 4214 (version presented to Governor Rick Snyder), http://www.legislature.mi.gov/documents/2011-2012/billconcurred/House/pdf/2011-HCB-4214.pdf.

107. Local Government and School District Fiscal Accountability Act, *supra* note 2.

108. MICH. COMP. LAWS § 141.1513(1)(c).

109. *Id.*

110. MICH. COMP. LAWS § 141.1514a(9).

111. MICH. COMP. LAWS § 141.1513(1)(c).

112. MICH. COMP. LAWS § 141.1515(4).

emergency manager without finding that a financial emergency actually exists or is likely to occur within the affected city.

Under Public Act 4, the financial review team is also tasked with drafting a report for review by the Governor.[113] The report is required to identify the existence of certain financial indicators and any other conditions indicative of financial stress or indicative of a financial emergency.[114] The report is required to draw conclusions whether the local government is in severe financial stress or in a financial emergency.[115]

The statute lists a number of factors for determining when a local government is in financial stress or in a financial emergency. A local government is considered in a financial emergency if it fails to provide timely and accurate information to the review team or fails to comply in all material respects with the terms of a consent agreement, continuing operations plan, recovery plan, or deficit elimination plan.[116] Additionally, whenever a local government's chief administrative officer recommends it, a local government can be considered in severe financial stress.[117] The local government can further be declared to be in a financial emergency when found in severe financial stress and the local government has not agreed to a consent agreement.[118] Thus, the local government can simply be declared to be in a financial emergency upon the request of the chief administrative officer in the absence of an existing consent agreement with the state, regardless of the city's actual financial condition.

After the financial review team's report is submitted, the Governor, in his or her sole discretion, then makes a declaration of whether the local government is in severe financial stress or a financial emergency.[119] Under Public Act 4, once the Governor declares that a financial emergency exists, and concludes that the local government has no satisfactory plan to resolve the emergency, the Governor is empowered to appoint an emergency manager *who acts in the place of the governing body and local government unit* – setting aside the structure of local government and all separation of powers established by local electors in municipal charters.[120]

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113. MICH. COMP. LAWS § 141.1513(3).
114. MICH. COMP. LAWS §§ 141.1513(3)(a)–(l).
115. MICH. COMP. LAWS §§ 141.1513(4)(a)–(d).
116. MICH. COMP. LAWS §§ 141.1514(3)(b)–(d).
117. MICH. COMP. LAWS § 141.1514(2)(b).
118. MICH. COMP. LAWS § 141.1514(3)(e).
119. MICH. COMP. LAWS § 141.1515(1).
120. MICH. COMP. LAWS § 141.1515(4) (emphasis added).

In fact, the emergency manager not only assumes all the power and authority of all the local elected officials, but also assumes markedly greater power – the power to, in his or her sole discretion, enact local law or disregard existing local law as contained in municipal charters and ordinances.[121] An emergency manager also has the power to terminate collective bargaining agreements and contracts[122] and can even dissolve the local municipality.[123] The emergency manager is thus granted unlimited governing power over all matters of municipal concern, including subject matters wholly unrelated to the city's financial condition.

The statute converts the powers of emergency financial managers-previously appointed in the cities of Ecorse, Pontiac, Benton Harbor, and the Detroit Public Schools– to emergency managers vested with the powers granted by Public Act 4. Since passage of the Act, an emergency manager has been newly appointed in the City of Flint and over Highland Park's public schools.[124] In each of these cities, democracy has been suspended. In each of these cities, citizens have been disenfranchised from their local government.

B. Rhode Island's Chapter 45-9 Amendments

Like Michigan, Rhode Island's municipalities have also experienced financial distress in past decades. As a result, the state also had existing legislation addressing certain types of financial emergencies.

Since 1993, Rhode Island has had legislation permitting the state to appoint a budget and review commission to assume control of the finances of local government. The legislation arose in response to fiscal distress occurring within the town of West Warwick.[125] After several years of poor planning and unrealistic budgets coupled with unique structural problems within local government, West Warwick faced a further downgrading of its already poor bond rating.[126] The downgrade

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121. *See e.g*. MICH. COMP. LAWS §§ 141.1519(1)(g), (i), (n), (y), (z), (aa), (bb), (cc), (dd), (ee), (ff); § 141.1519 (2).

122. MICH. COMP. LAWS § 141.1519(k).

123. MICH. COMP. LAWS § 141.1519(cc).

124. At the time of writing, a financial review of the City of Detroit's finances has been initiated following the city's refusal to enter into a consent agreement with state government.

125. *See generally*, Jerry O'Brien, *How Movers and ShakersHatched Plan*, PROVIDENCE J., July 23, 1993, at A-01.

126. *See* Tony DePaul, *West Warwick Has Itself to Blame,* PROVIDENCE J., July 25, 1993 at A-01.

warned investors of the town's potential default on outstanding bond payments.

Fearing that the downgraded rating would lead to higher lending costs and increase the risk of default, officials believed that state action was needed to assure investors and prevent further deterioration of the town's finances.[127] State officials then drafted legislation providing for the appointment of a budget and revenue commission to oversee the finances of cities and towns when their "bond rating has been assigned … a rating which is below investment grade and [that] there is an imminent threat of default on any or all of its debt obligations."[128] Under the law, budget and revenue commissions were empowered to impose taxes and reduce, suspend, or make appropriations to develop and maintain a balanced budget.[129] The legislation was quickly passed and a commission was appointed to oversee the finances of West Warwick. Rhode Island's statute, section 45-9-3, remained substantially unchanged until the current economic downturn.

Rhode Island's local governments have been profoundly impacted by the current global economic crisis. Downturns in investment returns for the state's public pension funds threaten the fiscal stability of cities and towns throughout the state. Employees of Rhode Island's thirty-nine cities and towns are covered by more than one hundred and fifty-five separate pension plans.[130] Approximately 110 of these plans are funded by the state and require defined annual contributions from local government.[131] Sixty-nine of those plans are underfunded.[132] Thirty-seven plans are directly operated by municipal governments.[133] Thirty-two of those plans are underfunded.[134] Eight other plans are operated by the state through agencies established as separate, public, corporations.[135] Each of those is also underfunded.[136]

The state treasurer estimates that ten percent of revenues raised by state and local government go to pay pension obligations and this

127. O'Brien, *supra* note 125.

128. Marran v. Baird, 635 A.2d 1174, 1180 (1994) (citing Section 45-9-3).

129. *See Id.*

130. *See* Paul Edward Parker, *R.I.'s Pension Plans Facing Gap of $9.4 billion*, PROVIDENCE J., May 11, 2011, at A1. By contrast, New York State's nearly one thousand cities and towns operate eight municipal pension plans.

131. *Id.* at A7.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Parker, *supra* note 130, at A7.

number could rise to twenty percent in the years ahead.[137] To meet existing pension obligations, more than one-third of the state's cities and towns are expected to need to raise taxes by more than state law allows.[138] Rhode Island's fiscal difficulties have been most prominently highlighted by events in the city of Central Falls.

After years of financial setbacks, budget deficits, and ballooning shortfalls in funding of its pension liabilities, Central Falls faced imminent defaults to creditors, employees, and bondholders in 2010. As a result, city officials filed a petition for receivership in Rhode Island Superior Court stating that the city was insolvent.[139] Receivership is the state equivalent to federal bankruptcy.[140] The city sought the protections of a court appointed receiver with the power to approve or reject payments and purchases and, with court approval, to alter the obligations of existing collective bargaining agreements and other contracts.[141] The court granted the petition and appointed a receiver to oversee the city's finances.[142]

State officials had not been consulted prior to Central Falls' court filing.[143] Rhode Island's governor and legislature expressed concern with the unilateral actions taken by Central Falls and its failure to explore other avenues short of filing for receivership or bankruptcy.[144] State officials feared they would establish a precedent that may be followed by other cities and towns and began work on a legislative alternative.

The Rhode Island General Assembly quickly drafted and enacted An Act Relating to Cities and Towns—Providing Financial Stability, P.L.2010, ch. 27, § 1. The Act amended Chapter 45-9 of the state's General Laws and established a "tiered system of oversight, including appointments of a fiscal overseer, a budget and review commission, and

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137. Mary Williams Walsh, *The Little State with a Big Mess*, NEW Y. TIMES, Oct. 22, 2011, http://www.nytimes.com/2011/10/23/business/for-rhode-island-the-pension-crisis-is-now.html?pagewanted=all.

138. Paul Edward Parker & Tom Mooney, *R.I.'s Pension Puzzle: Local Leaders Peer 'Over the Edge of a Cliff,'* PROVIDENCE J., Oct. 9, 2011, http://www.providencejournal.com/business/pensions/content/RISING_PENSION_COSTS_10-09-11_PNQP5KH_v149.6dde1.html.

139. Heather M. Forrest, *State Court Receivership Alternative ot Chapter 9,* AM. BANKRUPTCY INST. J., Oct. 2010, *http://images.jw.com/com/publications/1501.pdf* (finding Central Falls had not yet had its bond rating downgraded and had not yet defaulted on payments to creditors or bondholders; thus, the city was not subject to potential oversight by a state budget and revenue commission under state law).

140. *Id*.

141. *Id.*

142. *Id*.

143. *Id.*

144. *Receivership History*, PROVIDENCE J., Dec. 27, 2010, at A12.

finally a nonjudicial receiver."[145] The amendments further permitted the director of revenue to appoint a receiver when the local government is facing a fiscal emergency and circumstances do not permit the appointment of an overseer or budget review commission.[146] Pursuant to these powers, the governor then appointed a non-judicial receiver over the city of Central Falls.

The 2010 amendments to Rhode Island's statute provided that non-judicial receivers have the power of any local official "relating to or impacting the fiscal stability of the city or town."[147] This qualifying language appeared to limit the scope of receivers' authority to financial matters of the city or town. However, upon his appointment, the Central Falls receiver informed city officials that he possessed the same authority of the office of the mayor. The receiver then relegated the elected mayor to an advisory role.[148] After the city council passed resolutions in support of the elected mayor, the receiver then rescinded the resolutions and also relegated the elected city council to an advisory role.[149] As a result of these actions, the state's non-judicial receiver effectively assumed all authority and power of the local government.

The receiver's actions were challenged by the mayor, but were ultimately upheld by the Rhode Island Supreme Court. The Court reasoned that elected officials had not been removed from office, but rather "are temporarily acting in an advisory capacity to the receiver."[150] Thus while the Court's decision did not directly consider the scope of power possessed by receivers over nonfinancial matters, the court's decision upheld the receiver's assumption of powers of the office of the mayor and his relegating of elected officials to purely advisory roles. Despite the Court's claim that elected officials had not been removed from office, one cannot escape recognizing that the powers which these officials had been elected to exercise have been removed.

The Rhode Island Supreme 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

145. Moreau v. Flanders, 15 A.3d 565, 569 (R.I. 2011).
146. R.I. Gen. Laws § 45-9-8.
147. R.I. Gen. Laws § 45-9-7(b)(2). The same qualifying language is also used at § 45-9-7(c).
148. *Moreau*, 15 A.3d at 572.
149. *Id.*
150. *Id.* at 589.

in an advisory capacity to the receiver, and that the receiver's powers and decisions supersede those of all local elected officials.[151]

With the removal of any meaningful authority or power from offices for which local elections are held, citizens in Central Falls have been disenfranchised from their local government and democracy has been suspended.

The laws enacted in Michigan and Rhode Island thereby suspend the power of elected officials once the state appoints an emergency manager or non-judicial receiver over local government. In so doing, the laws nullify the electors' choice of local officials and render future elections meaningless until the fiscal crisis is resolved.

It cannot be denied that the wealth of the community often control whether the community will be affected by a fiscal emergency. In only the rarest of instances will severe financial deficits arise in wealthy locales. As a result, Michigan and Rhode Island's laws condition the right to vote on the wealth of communities and the persons who reside in there.

V. ECONOMICALLY POOR PERSONS HAVE A RIGHT TO VOTE IN LOCAL ELECTIONS

The right of economically poor persons to have equal voting rights had long been contested terrain within the United States. After more than a century of struggle however, various strains of political and legal thought coalesced to unequivocally recognize that one's wealth has neither an ethical or rational basis as a voting qualification.

At the outset of the republic, political and legal thought often reflected long-standing bigotries against the poor. In the late 1760s, Sir William Blackstone expressed a sentiment shared by many at the time of the United States revolution. Mr. Blackstone's commentaries state a commonly held belief that poor persons would not vote of their own free will.[152] Rather, due to their dire economic circumstances, indigent persons would be influenced by wealthier individuals to vote according to others' will.[153] As a consequence, contemporary voter qualifications often included provisions requiring a certain measure of economic affluence.

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

152. 1 WILLIAM BLACKSTONE, COMMENTARIES 165-66 (while Blackstone and others do not specify the nature of such influence, presumably it consisted of bribes, threats, or other suspect tactics intended to corrupt the vote).

153. *Id.*

Even Mr. Blackstone acknowledged that "[i]f it were probable that every man would give his vote freely, and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a [right to] vote."[154] The potential for undue influence required the disenfranchisement of the poor rather than the criminalization and vigorous prosecution of influence peddlers from the wealthier classes. However, the stated reasons for such choices may mask motivations of self-influence.

Rather than a concern that the poor might vote in favor of the interests of the wealthy, an equal or greater fear also existed that the poor might vote in their own interests if permitted. The second president of the United States, John Adams expressed such sentiment when he cautioned that granting voting rights to men without property would cause an immediate revolution.[155] In other words, if poor persons were permitted to vote, they might vote in their own interests leading to the enactment of laws and policy less favorable to the privileged classes. In practice, Blackstone's commentaries thereby acted to defend the interests of property holders against the interests of the poor.[156]

Thus, many states had laws that disenfranchised the poor during the early years of the nation. These laws generally took the form of property or taxpaying requirements as a condition to one's right to vote. A number of states also excluded those receiving public assistance.[157] However with increasing acceptance of the right to vote as an inherent right of all men, increasing industrialization and urbanization, and events such as the Dorr rebellion in Rhode Island, states gradually dropped property and taxpaying requirements as a condition of one's right to vote.[158]

Beginning in the late 1800s, a number of states adopted poll-taxes as a means to exclude economically disadvantaged racial minorities and poor persons from voting. Poll taxes were gradually eliminated in most northern states during the 1900s, but remained entrenched in many Southern states. By the 1960s, institutional recognition that one's wealth is not a proper basis for withholding a right to vote had become near universal and the case of *Harper v. Virginia Bd. of Elections.* The United States Supreme Court affirmed these principles based on the Equal Protection Clause of the United States Constitution.

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154. *Id.*

155. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 11 (2000).

156. *Id.*

157. *Id.* at app. (Table A.6).

158. *See id.* at 29-30.

A. The Equal Protection Clause Requires Strict Scrutiny Of State Laws That Severely Restrict Fundamental Rights

The Fourteenth Amendment to the United States Constitution requires that each state provide equal protection under the law to all people living within a state's borders.[159] The equal protection clause is particularly concerned with statutes that treat some groups of persons differently than others under the law.[160] The equal protection clause does not take away all power from a state to treat groups differently.[161] Many statutes classify persons into groups and treat the groups differently without raising constitutional concerns. To determine whether constitutional limitations are reached, the United States Supreme Court has established a tiered test.

When a statute discriminates against persons in the exercise of a fundamental right or where a statute classifies persons based on protected characteristics, the statute will generally receive strict-scrutiny from the courts. Strict-scrutiny requires that when the state treats groups of citizens differently than other groups of citizens, that state's actions must be narrowly tailored to further a compelling state interest.[162] Embedded with concepts of narrow tailoring is a requirement that the statute employ the least restrictive means available to advance the state's compelling interest.

Fundamental rights that have been found to require strict-scrutiny include voting rights[163], interstate travel[164] and other rights protected by the Bill of Rights. Race-based classifications[165] and alienage[166] have commonly been subjected to strict-scrutiny as well.

In more limited circumstances, courts will employ an intermediate level of scrutiny where a statute must be shown to bear "a close and substantial relationship to important governmental objectives."[167] Intermediate-scrutiny has been used in cases involving gender

159. U.S. CONST. amend. XIV, §1.

160. *See* McGowan v. Maryland, 366 U.S. 420, 425 (1961).

161. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271-272 (1979).

162. Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

163. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666 (1966) (noting that under some circumstances, the Court may impose an intermediate type standard when analyzing state election law); *see also* Burdick v. Takushi, 504 U.S. 428, 434 (1992) ("under this standard, the rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment protections.").

164. Saenz v. Roe, 526 U.S. 489, 499 (1999).

165. *Grutter*, 539 U.S. at 326.

166. Graham v. Richardson, 403 U.S. 365, 372 (1971).

167. *See generally,* Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).

classifications,[168] classifications based on whether a person was born out of wedlock,[169] and a limited number of other circumstances.[170] When a statute does not implicate a fundamental right and is not based on historical discrimination towards a particular group, the statute will generally be upheld if it is rationally related to a legitimate governmental purpose.[171] The Supreme Court has called this test rational-basis.

In cases based on voting qualifications, the United States Supreme Court has not strictly adhered to the three-tiered analysis; however, it has made clear that qualifications that severely restrict fundamental rights or involve suspect classifications will face strict-scrutiny while qualifications that do not, will receive a lower level of scrutiny commensurate with the degree of infringement that the qualification imposes.

Both Michigan and Rhode Island's state constitutions have an equal protection clause.[172] Michigan[173] and Rhode Island[174] case law also employ analysis similar to that found in federal law; strict-scrutiny, intermediate-scrutiny, and rational-basis.

B. The Equal Protection Clause Prohibits Conditioning People's Right To Vote On One's Wealth

The United States Supreme Court has long recognized voting as a fundamental right[175] and Michigan and Rhode Island courts recognize the same.[176] The equal protection clauses of both the federal and state constitutions "guard[s] against subtle restraints on the right to vote, as well as their outright denial."[177] Wealth restrictions that impinge upon a person's right to vote are rarely justified and will be strictly scrutinized by the courts.

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168. United States v. Virginia, 518 U.S. 515, 532-533 (1996).

169. Reed v. Campbell, 476 U.S. 852, 855 (1986).

170. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 230 (1982).

171. *See* Romer v. Evans, 517 U.S. 620, (1996).

172. *See* MICH CONST. art I, § 2 (1963); R.I. CONST. art I, §2 (1986).

173. *See* Estate of Kasuba, 258 N.W.2d 731, 735-36 (Mich 1977); *see also* People v. McLeod, 288 N.W.2d 909, 919 (Mich 1980).

174. *See generally*, Kaveny v. Town of Cumberland Zoning Bd. of Rev., 875 A.2d 1, 10-11 (R.I. 2005); Sweetman v. Town of Cumberland, 364 A.2d 1277, 1288 (R.I. 1976).

175. Yick Wo v. Hopkins, 118 U.S. 356, 370-371 (1886).

176. *See In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444 (Mich 2007); Wilkins v. Bentley, 189 N.W.2d 423 (Mich 1971); *In re* Advisory Opinion to the House of Representatives Bill 85-H-7748, 519 A.2d 578, 583 (R.I. 1987).

177. *See Wilkins*, 189 N.W.2d 423.

In *Harper v. Virginia Bd. of Elections*,[178] the United States Supreme Court considered whether restrictions that act as a barrier to economically poor persons voting in state elections violate the equal protection clause. The Court struck the relevant law, holding that once the right to vote is granted within a jurisdiction, the state cannot condition the right to vote on a person's wealth. Wealth is simply an impermissible standard by which to determine who and who will not have the right to vote within a state.

In *Harper*, residents challenged a clause of the Virginia state constitution authorizing a poll tax. The Court recognized that the right to vote is a fundamental right.[179] The Court acknowledged that the right to vote in state or local elections is not expressly stated in the federal Constitution.[180] The Court however found that the right to vote "is a fundamental matter in a free and democratic society"[181] since the right "is preservative of other basic civil and political rights."[182]

The *Harper* decision recognized that a handful of states, at that time, still "condition the franchise on the payment of a poll tax."[183] The Court reasoned that a person's qualifications to vote have "no relation" to one's race, wealth or one's ability to pay a tax.[184] The *Harper* Court drew from its decision in *Gray v. Sanders* where the Court found that all voters have an equal right to vote in a state's elections "whatever their race … whatever their occupation, whatever their income, and wherever their home may be in that geographical unit."[185] The Court then extended its prior reasoning finding that "the same must be true of requirements of wealth or affluence."[186]

The Court then held that the state violates the Fourteenth Amendment's equal protection clause "whenever it makes the affluence of the voter…an electoral standard."[187] The Court held that "[w]ealth, like race…is not germane to one's ability to participate intelligently in the electoral process" and that "[t]o introduce wealth…as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant."[188] The Court recognized that

178. *Harper*, 383 U.S. at 665.
179. *Id.* at 667.
180. *Id.* at 665.
181. *Id.* at 667 (citing Reynolds v. Sims, 377 U.S. 533 (1963)).
182. *Id.* at 667.
183. *Id.* at 666 n.4.
184. *Harper*, 383 U.S. at 666.
185. Gray v. Sanders, 372 U.S. 368, 380 (1963).
186. *Harper*, 383 U.S. at 667.
187. *Id.* at 666.
188. *Id.* at 668.

"[l]ines drawn on the basis of wealth or property, like those of race" are disfavored.[189] The *Harper* Court concluded:

> We say the same whether the citizen, otherwise qualified to vote, has $ 1.50 in his pocket or nothing at all, pays the fee or fails to pay it. *The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors* by analogy bars a system which excludes those unable to pay a fee to vote.[190]

Applying strict-scrutiny, the Court then struck Virginia's poll tax.

Subsequent courts have consistently affirmed the *Harper* Court's holding[191] As a result, a state statute conditioning a right to vote based on wealth or affluence, or one's ability to pay a tax, will be strictly scrutinized and only survive constitutional review if narrowly tailored to further a compelling state interest.

The holding in *Harper* is muddied by the Court's recognition of a general rule that states may adopt "evenhanded restrictions that protect the integrity and reliability of the electoral process itself."[192]

In *Burdick v. Takushi*[193], the Court recognized differences between restrictions such as those in *Harper* that invidiously discriminate and other electoral regulations that inevitably impose burdens, however slight, on voters. The *Burdick* Court found that "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."[194] When the state imposes "severe" restrictions on the rights of voters, the involved statute or regulation must be "narrowly drawn to advance a state interest of compelling importance."[195] But, when state law imposes reasonable and nondiscriminatory restrictions, the law will generally be upheld as justified by the state's interest in protecting the integrity of elections.[196]

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189. *Id.*

190. *Id.* (emphasis added).

191. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189 (2008); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1,18 (1973); Goosby v. Osser, 409 U.S. 512, 520 (1973); Bullock v. Carter, 405 U.S. 134, 142 (1972); McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807 (1969).

192. Anderson v. Celebrezze, 460 U.S. 780, 788, n.9 (1983).

193. *Burdick*, 504 U.S. at 435.

194. *Id.* at 434

195. *Id.*

196. *Id.*

Since the *Burdick* decision, the Court has struggled to clarify the contours of the less stringent standard for evaluating less than severe restrictions on voters' rights. The Court's recent decision in *Crawford v. Marion County Election Board*[197] clarifies the positions of individual justices, but few conclusions can be drawn regarding which understanding will prevail in future cases.

In *Crawford*, the Court upheld the constitutionality of an Indiana election law that required voters to show photo identification at the polls. Justice Stevens authored the opinion,, joined by Chief Justice Roberts and Justice Kennedy. Justice Stevens found that even rational restrictions on voters' rights are invidious if they are unrelated to legitimate voter qualifications, but his opinion recognized that "evenhanded" restrictions that protect the legitimacy of the electoral process will satisfy the standard established in *Harper*.[198] The opinion recognized that *Burdick* established a more flexible standard of review than strict scrutiny for evaluating such restrictions.[199] Justice Stevens described the more flexible review as requiring a weighing of the burden imposed against the state's precise justification and interests.[200] Justice Stevens finds that "[h]owever slight burden may appear . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation."[201]

Justice Scalia authored a concurring opinion that was joined by Justices Thomas and Alito. Justice Scalia's understanding of *Burdick* finds that the Court must first determine whether or not the voter restrictions are severe – i.e., burdens that go beyond the merely inconvenient.[202] Though not expressing a specific standard, the concurring opinion appears to reason that if the state's restriction does not impose a severe burden on voters generally and there is no finding of specific intent to discriminate against a protected class, the restriction will be justified by the state's interests.

A dissenting opinion was authored by Justice Souter and was joined by Justice Ginsburg. Justice Souter expresses a standard consistent with the lead opinion.[203] The dissent however rigorously examines the burdens advanced by the law's challengers and would correspondingly more rigorously examine the factual basis of the state's interests.[204] Justice

197. *Crawford,* 553 U.S. 181.
198. *Id.* at 188-89.
199. *Id.* at 190.
200. *Id.* at 190.
201. *Id.* at 191.
202. *Id.* at 205.
203. *Crawford*, 553 U.S. at 210-11.
204. *Id.* at 211.

Souter's dissent found the burdens significant and a lack of facts in support of the state's generalized statement of interests.

Finally, a dissenting opinion, authored by Justice Breyer, suggests a balancing test, but would balance the burdens imposed against the positive effects of the law in advancement of the state's interests.[205] Justice Breyer would find that the state's interests were significantly outweighed by the burdens imposed on voters.

Crawford's four opinions confirm that severe restrictions will be strictly scrutinized and a balancing test will be used when restrictions on voters' rights are less than severe. However, the opinions provide little guidance on how future courts will apply the test. Because the restrictions are severe, Michigan and Rhode Island's laws should not survive constitutional review and should not provide a model for legislation in other states.

C. Michigan and Rhode Island's Statutes Violate the Equal Protection Clauses of the United States Constitution

Michigan's Public Act 4 and Rhode Island's Chapter 45-9 amendments violate the fundamental right of persons living within municipalities where an emergency manager or receiver has been appointed. In each of these municipalities, electors have lost the right to vote in local elections – a right that is otherwise granted to all persons across the state.

During the early years of the state's history, the Michigan Supreme Court found that citizens possess an inherent right to local government and also possess a right to elect the essential officers of such governments. These types of fundamental rights were recognized by Justice Thomas Cooley in *People* ex rel. *Le Roy v. Hurlbut*:

> Such are the historical facts regarding local government in America. Our traditions, practices and expectations have all been in one direction. And when we go beyond the general view to inquire into the details of authority, we find that it has included the power to choose in some form the persons who are to administer the local regulations.[206]
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> ....

205. *Id.* at 237.
206. People *ex rel*. Le Roy v. Hurlbut, 24 Mich. 44, 102-103 (1871).

> The state may mould local institutions according to its views of policy or expediency; but local government is matter of absolute right; and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at discretion sent in its own agents to administer it.[207]

This view of local government, as a matter of inherent right regardless of the express language of any state Constitution, is known as the Cooley doctrine. Within Michigan and in other states, the Cooley doctrine competes with Dillon's rule. Dillon's rule holds that the right to local government only exists to the extent explicitly written into a state's constitution or statutes.[208] Regardless of whether Michigan and Rhode Island are found to be Cooley doctrine or Dillon's rule jurisdictions, both states provide explicit rights to local government in their Constitutions and statutes.

Article VII, section 21 of Michigan's Constitution requires the state legislature to adopt laws that provide for the incorporation of cities and villages. While the state Constitution does not explicitly grant a right to elect the law-making officials of cities and villages, the scheme of municipal government established by Michigan's Constitution clearly contemplates that such officials will be elected by popular vote. As a result, Michigan courts have long recognized that residents have a right to elect the local government's essential officers.[209]

Michigan's constitutional scheme of local government is revealed through a reading of several articles. With respect to counties, the state Constitution specifically provides for the election of its officers.[210] Within Michigan's townships, the Constitution again requires the election of local officers.[211] These provisions, exhibit a constitutional intent to provide for the election of local officials and to remove from the state governor and legislature discretionary control over the selection of

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207. *Id.* at 108.

208. Dillon's rule was first stated by Justice John Forrest Dillon of the Iowa Supreme Court in the case of City of Clinton v. Cedar Rapids, 24 Iowa 455 (1868).

209. *See* Coffin v. Bd of Election Comm'rs, 56 N.W. 567 (Mich. 1893); Attorney Gen. *ex rel*. Lawrence v. Trombly, 50 N.W. 744 (Mich. 1891); Attorney Gen. v. Common Council of Detroit, 29 Mich. 108 (1874); *People* ex rel. *Le Roy*, 24 Mich. 44 (opinion of Christiancy, J. at 66-68; opinion of Campbell, J. at 88-90; opinion of Cooley, J. at 95-112; opinion of Graves, J. at 114). *See generally*, Brouwer v. Bronkema, 141 N.W.2d 98 (Mich. 1966).

210. MICH. CONST. art. 7, § 4.

211. MICH. CONST. art. 7, § 18.

local officials. The grant of legislative powers to cities and villages reflects the same constitutional intent.

Article Art VII, section 22 of Michigan's Constitution grants the residents of Michigan's cities and villages home rule over the structure of local government and governance of local affairs. Subject to the general laws of the state, the first sentence of Art VII, section 22 vests sole authority to frame and adopt charters in the electors of Michigan's cities and villages. The charter is the formative document that establishes the structure of local government. Since first adopted in 1909 as the result of changes to the state Constitution requiring such legislation, the Home Rule Cities Act has always required that local charters provide for the election of the chief administrative officer and the local legislative body[212] and in every Michigan city, electors have chosen a form of government where local officials are elected by residents.

The second sentence of Art VII, section 22 vests cities and villages with the legislative power to adopt ordinances and resolutions. This clause substantially removes from state officials the power to legislate over local affairs.[213] Reading the two sentences together, Art VII, section 22 exhibits a clear intent for local electors to choose the structure of the local government through their unique power to adopt a charter and thereby determine the particular local officials and legislative body that will exercise legislative power to adopt ordinances and resolutions.

Notably, Michigan's Constitution only permits the state to remove local elected officials "for the causes provided by law."[214] The state Constitution thereby establishes a "for cause" standard for state officials to remove local elected officials from office and state statutes have embodied this understanding, allowing a governor to only remove elected local officials from office for criminal acts or serious neglect of office.[215]

Rhode Island's Constitution grants equally strong rights to local government and explicit rights to elect local officials. Rhode Island's Constitution grants the "people of every city and town in this state the right of self-government in all local matters."[216] The state Constitution further provides a right to local electors to adopt their city and town charters and to elect all legislative officers.[217] State statutes also

212. *See* MICH. COMP. LAWS § 117.3.

213. The state is granted limited power to adopt local acts pursuant to MICH. CONST. art. 4, § 29.

214. MICH. CONST. art 7, § 33.

215. *See* MICH. COMP. LAW § 168.327.

216. R.I. CONST. art XIII, § 1.

217. *See* R.I. CONST. art XIII, §§ 3, 6, 7.

recognize the primacy of local charters establishing the governance structure of cities and towns.[218] Under Rhode Island's Constitution and related statutes, the state can only remove local elected officials through the state Ethics Commission, for violations of the state's code of ethics for public officials.[219]

Thus, both Michigan's and Rhode Island's Constitution provide a right to local government and recognize a right to elect local officials. These states' Constitutions further limit the power of state officials to remove local elected officials from office. In each state, these constitutional provisions coupled with a constitutional and statutory trajectory of greater home rule for cities, towns, and villages, reveal that the election of officials by local electors is a deeply embedded right. In Michigan and Rhode Island, *state law has thereby conferred a right to vote in local elections to all citizens residing in each state*.

Public Act 4 and the Chapter 45-9 amendments are subject to Equal Protection Clause scrutiny, because each statute revokes the right to vote in local elections for citizens living in particular localities that are experiencing economic distress. In other words, the right to vote in local elections is granted to all and then withheld from some. As such, Michigan and Rhode Island's statutes are subject to review under the Equal Protection Clause.

Public Act 4 and the Chapter 45-9 amendments violate the Equal Protection Clause because each statute impermissibly denies the right to vote to some citizens based on the wealth of the communities in which they live.

1. Michigan And Rhode Island's Laws Condition The Right To Vote On Residents' Wealth

On their face, Michigan's Public Act 4 and Rhode Island's Chapter 45-9 amendments condition citizen's right to vote in local elections on the wealth of their communities. Both statutes suspend citizens' right to vote in poorer communities that are particularly vulnerable to economic cycles and corresponding downturns.

The laws suspend the right to vote, by replacing local elected officials with state appointed managers and receivers. These managers and receivers then become the governing bodies of the affected municipalities, while other cities, towns, and villages within these states continue to be governed by their elected representatives. By removing all power from officials in affected communities, the state negates prior

218. R.I. GEN. LAWS § 45-2-1.

219. *See* R.I. CONST. art. III, § 8; R.I. GEN. LAWS § 36-14-14.

elections and effectively suspends future elections until the manager or receiver is removed. In so doing, the state unequally applies citizens' right to vote between wealthy and poorer communities.

Michigan and Rhode Island's statutes suspend the right to vote in municipalities experiencing financial distress – distress caused by declining wealth within the households of those municipalities. In so doing, these laws unconstitutionally condition the right to vote on the wealth of communities and local residents.

After declaring that a financial emergency exists in a city, village or other municipality, Michigan's Public Act 4 permits the Governor to appoint an emergency manager over the local government.[220] In general, the Act contemplates that a financial emergency will exist when a municipality is unable to pay principal or interest on bond obligations, is unable make certain transfer payments to the state, is unable to pay employees or pay benefits to retirees, is operating at a deficit, and other factors indicating that the municipality is unable to meet its financial obligations.[221] Thus, the sole professed criterion for the suspension of local electors' right to vote is that the community in which they live is economically poor.[222]

In Rhode Island, the Chapter 45-9 amendments permit the governor or state revenue director to appoint a non-judicial receiver. Under such circumstances, the city or town is generally found to be unable to achieve a balanced budget, faces a fiscal crisis that poses imminent danger to citizen's welfare, or has other conditions of fiscal distress. Similar to Michigan, the receiver is appointed in circumstances where the city's revenues do not meet is financial obligations. In other words, the city is poor and its poverty reflects the economic circumstances of its residents.

The wealth of cities, towns, and villages, as corporate entities cannot be separated from the financial circumstances of local residents. Rather, the economic circumstances of cities, towns, and villages are directly impacted by the financial circumstances of individuals within the community. Within the United States few cities or towns are truly economically diverse among their residents' social classes. The nation has long been one where rich, middle class, and poor live in enclaves apart from each other, often in separate cities, towns, or villages.

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220. *See* MICH. COMP. LAWS § 141.1515.

221. *See* MICH. COMP. LAWS § 141.1514(3)(f). A municipality may also be found in a financial emergency where local officials fail to cooperate with the state's financial review team or where the municipality has breached the terms of certain consent agreements that the municipality had entered into with the state.

222. There is no requirement that budget shortfalls were caused in whole or part by local corruption or even gross financial mismanagement. If either were the case, other state laws and procedures would likely permit the removal of responsible officials.

As previously noted, the revenue of Michigan municipalities is overwhelmingly provided by local property and income tax and the revenue of Rhode Island municipalities is largely provided by property taxes. These revenue streams for local government have been sharply negatively impacted by the widespread loss of household wealth caused by declining home values, the foreclosure crisis, and high unemployment rates. These declines are occurring in poor communities, as well as wealthier ones; however, poorer communities have less economic reserves upon which to draw and are far more likely to have an emergency manager or non-judicial receiver appointed.

In Michigan, emergency managers have been appointed over disproportionately poor communities that have been hardest hit by the national economic downturn. Emergency managers have been appointed over the cities of Benton Harbor, Ecorse, Flint, and Pontiac and over school districts in Detroit and Highland Park. In the state of Michigan as a whole, approximately 14.8% of state residents live below the poverty level.[223] However, in each of the cities with emergency managers one-third to nearly one-half of local residents live below the poverty level. In emergency manager cities, the percentage of persons living below the poverty level is the following: Benton Harbor – 48.7%;[224] Ecorse – 32.7%;[225] Flint – 36.6%;[226] Pontiac- 32%;[227] Detroit – 34.5%;[228] and Highland Park – 43.7%.[229]

Likewise, households in each of these cities have income significantly below statewide averages. In cities with emergency managers, household income ranges from approximately one-third to two-thirds of the average Michigan home.[230] Finally, each of these

223. *Michigan*, U.S. CENSUS BUREAU: STATE & COUNTY QUICK FACTS, http://quickfacts.census.gov/qfd/states/26000.html (last visited Mar. 11, 2012).

224. *Benton Harbor, Michigan*, U.S. CENSUS BUREAU: STATE & COUNTY QUICK FACTS, http://quickfacts.census.gov/qfd/states/26/2607520.html (last visited Mar. 11, 2012).

225. *Ecorse, Michigan*, U.S. CENSUS BUREAU: STATE & COUNTY QUICK FACTS, http://quickfacts.census.gov/qfd/states/26/2624740.html (last visited Mar. 11, 2012).

226. *Flint, Michigan*, U.S. CENSUS BUREAU: STATE & COUNTY QUICK FACTS, http://quickfacts.census.gov/qfd/states/26/2629000.html (last visited Mar. 11, 2012).

227. *Pontiac, Michigan*, U.S. CENSUS BUREAU: STATE & COUNTY QUICK FACTS, http://quickfacts.census.gov/qfd/states/26/2665440.html (last visited Mar. 11, 2012).

228. *Detroit, Michigan*, U.S. CENSUS BUREAU: STATE & COUNTY QUICK FACTS, http://quickfacts.census.gov/qfd/states/26/2622000.html (last visited Mar. 11, 2012).

229. *Highland Park, Michigan*, U.S. CENSUS BUREAU: STATE & COUNTY QUICK FACTS, http://quickfacts.census.gov/qfd/states/26/2638180.html (last visited Mar. 11, 2012).

230. Michigan's median household income is approximately $48,432. The median household income in Benton Harbor is $17,301; in Ecorse – $28,463; in Flint – $27,199; in Pontiac – $30,753; in Detroit – $28,357; and in Highland Park – $20,205. *Michigan*, U.S. CENSUS BUREAU: STATE & COUNTY QUICK FACTS, http://quickfacts.census.gov/qfd/states/26000.html (last visited Mar. 11, 2012).

communities has had foreclosure and unemployment rates largely above state averages. Michigan's statewide foreclosure rate was one in every 346 homes in December 2011 and its unemployment rate in March 2011 was at eleven percent.[231] Michigan communities with emergency managers had foreclosure and unemployment rates as follows: Benton Harbor – one in every 330 homes and 11%; Ecorse – 1 in 270 homes and 12.7%; Flint – one in 292 homes and 20.4%; Pontiac one in 216 homes and 25.2%; Detroit – one in 224 homes and 20.1%; and Highland Park – one in 441 homes and 26.1%.[232]

In Rhode Island, Central Falls is the only municipality to have had a nonjudicial receiver appointed under the Chapter 45-9 amendments. Similar to Michigan's cities with emergency managers, Central Falls households are economically fragile and particularly vulnerable to downturns in the national economy. While 12.2% of Rhode Island residents live below the poverty level, the percentage of Central Falls residents living below the poverty level is more than double. In Central Falls, approximately 25.4% of residents live below the poverty line.[233] Household income is $34,389 in the city, while median household income within the state is $54,902. Central Falls' per capita income is also approximately one half the statewide average.[234] Central Falls foreclosure rate does not currently exceed the statewide average however, its unemployment rate is 14.6% compared with a statewide rate of 11.3%.[235]

Moreover, economic wealth in the United States has long been recognized as disproportionately spread among our nations' racial and ethnic groups. The foreclosure and unemployment crises have disproportionately impacted racial and ethnic minorities. In each of the cities where emergency managers or a nonjudicial receiver has been appointed, racial and ethnic minorities comprise a majority of residents.[236] The racial and ethnic makeup of these localities indicates the

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231. *Michigan Real Estate Trends*, REALTYTRAC, http://www.realtytrac.com/trend center/mi-trend.html (last visited March 11, 2012); *Michigan Bigger Cities (Over 6000 Residents)*, CITY DATA, http://www.city-data.com/city/Michigan.html (last visited Mar. 11, 2012).

232. *See id.*

233. *Central Falls, Rhode Island*, U.S. CENSUS BUREAU: STATE & COUNTY QUICK FACTS http://quickfacts.census.gov/qfd/states/44/4414140.html (last visited Mar. 11, 2012).

234. *See id.*

235. *Rhode Island Bigger Cities (Over 6000 Residents)*, CITY DATA, http://www.city-data.com/city/Rhode-Island.html (last visited Mar. 11, 2012).

236. *Supra* notes 219–25, 229. In Michigan, black persons comprise 14.2% and Latinos comprise 4.4% of the state's population. However, black person comprise 89.2 % of Benton Harbor; 46.4 % of Ecorse; 56.6% of Flint; 52.1% of Pontiac; 82.7% of Detroit;

impact of these laws on historically economically disenfranchised communities, while also raising significant questions concerning the discriminatory impact of these laws on persons of color.[237]

Arguments that the law applies equally to wealthy and poor communities are unpersuasive. In only the rarest of instances will a community composed of financially wealthy households become subject to either Public Act 4 or the Chapter 45-9 amendments and see its local government suspended by the appointment of a state manager or receiver.

Moreover, because some poorer communities may escape falling into financial distress during any particular economic downturn does not mitigate against a finding that Michigan and Rhode Islands' laws condition the right to vote in local elections upon economic wealth. Undoubtedly, many economically poor persons saved their sums and paid poll taxes to ensure their ability to vote. However, the very conditioning of the right to vote on financial qualifications violates the Equal Protection clause and Public Act 4 and the Chapter 45-9 amendments do precisely that.

Under Equal Protection Clause analysis, once the exercise of a fundamental right is conditioned on economic status such as wealth, then the law must be narrowly tailored to advance a compelling state interest.

2. Michigan And Rhode Island's Laws Are Not Narrowly Tailored To Advance A Compelling State Interest And Are Not Related To Any Legitimate State Interests

Public Act 4 and the Chapter 45-9 amendments severely restrict voting rights of persons in affected communities and are not narrowly tailored to serve a compelling state interest. The statutes are offered as necessary measures to resolve financial instability in local communities. However, both laws serve as very blunt tools in service of stated interests.

The laws severely restrict voting rights by eliminating residents' electoral voice in local government. Once an emergency manager or non-

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and 93.5% of Highland Park's population. Latinos comprise 13.4% of Ecorse; 16.5% of Pontiac; and 6.8% of Detroit's population. In Rhode Island, black persons comprise 5.7% and Latinos comprise 12.4% of the state's population. In Central Falls, black persons comprise 10.1% and Latinos comprise 60.3% of the city's population. *See generally* U.S. CENSUS BUREAU: STATE & COUNTY QUICK FACTS, http://quickfacts.census.gov/qfd/index.html (last visited Mar. 11, 2012).

237. Nearly fifty percent of the state's black population is currently living in a community with an emergency manager and have thereby been disenfranchised from their right to vote for city officials or their local school board.

judicial receiver is appointed, residents' elected representatives are divested of the powers of their office. Local Residents have no input regarding the decision whether such managers or receivers will be appointed. Residents have no input regarding who will be selected to fill these positions and no input regarding the actions that managers and receivers take while in office. Furthermore, residents have no input regarding if and when these appointments end and local governance is returned to elected officials. In short, at the sole discretion of state officials, the law permits the state to suspend voting rights in affected communities and there is no action that residents can take to remove the restrictions on their voting rights. Given the blanket removal of voting rights at the discretion of the state, the lack of alternative voice regarding local governmental decisions, and the inability to have any control or rights of appeal, the restrictions of Michigan and Rhode Island are severe and warrant application of strict scrutiny review.

The overbreadth of both Public Act 4 and the Chapter 45-9 amendments is revealed in the powers granted to emergency manager and non-judicial receivers. Each of these laws entirely replaces elected government with a singular official. That official is vested with sole authority over all aspects of local government – including legislative power to adopt, amend, repeal, and act in contravention to local charters and ordinances.

Managers and receivers' powers are not confined to fiscal matters, but rather extend the full breadth of police powers granted to local government by the respective states. As a result, managers and receivers have supervening authority not only over finances – budgets, expenditures, payments, etc., but also over matters of pure policy such as zoning decisions, historical designations, community honorary awards, the individuals who are selected to serve on various boards, and a host of other matters. Such authority is grossly overbroad to serve a state interest in the financial stability of local governments.

In determining whether legislation is narrowly tailored to serve a compelling state interest, courts look to see if less restrictive alternatives are available to serve the aims sought to be achieved by the challenged legislation. A multiplicity of less restrictive alternatives exists and can be conceived, which serve the goals sought by Michigan and Rhode Island's legislation.

Prior to passage of these laws, Michigan and Rhode Island possessed alternative models that established processes to provide fiscal oversight while preserving the democratic structure of local government. In Michigan, legislation existed that allowed for the appointment of emergency financial managers to assume full authority over fiscal matters after the declaration of a financial emergency. Emergency

financial managers' authority however did not tread into non-financial realms and as such, democratic structures were preserved. Rhode Island had existing legislation that effectively preserved local democratic governance. The state's legislation established procedures confining a board of commissioners' authority to fiscal oversight – including the power to levy taxes, establish budgets, and approve expenditures.

Both Michigan and Rhode Island also had procedures whereby local courts could appoint judicial receivers over a local government's finances. Judicial receivership is the equivalent of federal bankruptcy procedures, which are also available to Michigan and Rhode Island's municipalities.[238] Typically court receivers and bankruptcy trustees allow a court receiver varying degrees of oversight over finances, but do not remove elected officials from their elected authority in matters of governance.

In addition to prior legislation in both Michigan and Rhode Island, as discussed *supra* other states' legislation provide models for less restrictive laws to address financial emergencies within local government. During past decades, Massachusetts and New York municipalities faced financial emergencies. These states passed legislation specific to the conditions existing within the particular affected city. Ohio and Pennsylvania have also adopted general legislation providing for state oversight of financially troubled municipalities.

Both the special legislation of Massachusetts and New York and the general legislation of Ohio and Pennsylvania typically provide financial oversight through a person, board, or commission that is empowered to recommend or establish budgets, manage revenues, marshal assets, approve expenditures, and otherwise establish fiscal policy for the locality. However, such legislation typically preserves the power of local officials over nonfinancial issues and often permits local officials authority over the manner in which proscribed budgets are implemented.

In the presence of less restrictive alternatives within Michigan and Rhode Island, alternative models existing in other states, and federal and state bankruptcy procedures, Public Act 4 and the Chapter 45-9 amendments cannot be found narrowly tailored to serve legitimate interests of the state. As a result, each Act violates the equal protection clause of both the United States Constitution and each state Constitution.

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238. *Supra* note 137. Notably, approximately one year after the appointment of Central Falls' nonjudicial receiver, the city has filed a petition in federal court seeking the protections of Chapter 9 bankruptcy.

VI. CONCLUSION

For the first time in the known history of the United States, local economic crises are being used to justify the broad suspension of democratic governance in municipalities across two states. Enabling legislation in Michigan and Rhode Island arose in part from legitimate concerns regarding fiscal distress existing within local governments. These concerns are shared by many states that are also looking for legislative models to bring financial stability to troubled municipalities. Michigan and Rhode Island's laws however are models that dangerously rest upon a belief that democratic governance is incompatible with financial recovery.

The nation's founders long ago recognized that a democracy is often not the most expedient form of government. The constitutional tradition of our country however has always placed a higher importance on democracy than on temporary efficiencies. We have done so because democratic governance gains legitimacy through the consent of the governed and, with attendant checks and balances, precludes the exercise of arbitrary power. The consolidation of political power, at any level of government, in one unelected individual risks losing the consent of the governed and is rife with opportunities for abuse.

In times of economic crisis, more democracy is needed - not less. During such times, changes in policy and administrative practices are often necessary. Past services may need to be reduced, new programs added, and revenues increased. The causes and consequences of the present global economic downturn highlights the need for federal, state, and local governments to adopt measures creating opportunities for a fairer and more sustainable economy. Hard choices will inevitably have to be made, and those choices cannot and should be made without the input, cooperation, and consent of residents.

Regardless of particular legislative motivations, Michigan and Rhode Island's measures evoke old biases. They suggest that the economically poor make inherently bad choices in their elected officials. Yet, the decisions of local officials did not cause the recession of 2007 and did not cause the repercussions that are being felt in the budgets of municipalities across the country. As in days past, these laws exhibit distrust, by some, in alternative paths to financial recovery that might be identified by local residents whose household wealth and income has been eviscerated by the economic downturn. As such, these laws represent a return to a past that should remain in the past and cannot serve as legislative models for the present.

Public Act 4 and the Chapter 45-9 amendments blame the victims of the global recession by targeting their state's poorest communities for the

suspension of basic voting rights – rights that are otherwise shared by all communities throughout Michigan and Rhode Island. As a result, these states condition voting rights upon the wealth of communities and the people who live there. By conditioning the right to vote for local officials on a community's wealth, these statutes violate the democratic traditions of our country and the equal protection clauses of the Federal and state Constitutions.