CHAPTER 9'S CONSTITUTIONAL TIMEBOMB OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE UNIFORMITY REQUIREMENT

Connor Fitch*

I. INTRODUCTION

What happens when unresolvable public debt meets an unmovable political stalemate? Without congressional action, some American municipalities may find out.

Chapter 9 of the U.S. Bankruptcy Code establishes bankruptcy procedures for municipalities and other local government entities.[1] The municipal bankruptcy provisions found there represent the exclusive bankruptcy relief available to these state-level political subdivisions.[2] Providing this relief implicates two competing constitutional principles: federalism and uniformity.[3] The federal government must respect states' authority to govern their own affairs,[4] including the affairs of their political subdivisions, while also ensuring that bankrupt debtors are treated uniformly, wherever they may be located.[5] The Constitution requires that bankruptcy laws "must at least apply uniformly to a defined class of debtors."[6]

The current Chapter 9 framework is controlled almost entirely by federal law and the federal courts, but it includes a statutory requirement that all political subdivisions, including municipalities,[7] must receive express permission from their state before filing for Chapter 9 protection.[8] Many states have no statutory process at all for allowing subdivisions to proceed with a Chapter 9 petition,[9] while Georgia expressly prohibits any subdivision

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1 UNITED STATES COURTS, CHAPTER 9 – BANKRUPTCY BASICS, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-9-bankruptcy-basics (last visited Nov. 7, 2022).

2 11 U.S.C. §§ 901-46.

3 *See generally* Andrew B. Dawson, *Beyond the Great Divide: Federalism Concerns in Municipal Insolvency*, 11 HARV. L. & POL'Y REV. 31 (2017).

4 U.S. CONST. amend. X.

5 U.S. CONST. art. I, § 8, cl. 4.

6 Ry. Lab. Execs.' Ass'n v. Gibbons, 455 U.S. 457, 473 (1982).

7 *See generally* Dawson, *supra* note 3.

8 11 U.S.C. § 109(c)(2).

9 Tom D. Hoffman, *Municipal Bankruptcy Authorization Under Chapter 9: A Call for Uniformity Among States*, 34 ST. LOUIS UNIV. PUB. L. REV. 215, 224 (2014).

from filing.[10] This mismatch among states calls into question the uniformity of Chapter 9 of the Bankruptcy Code.[11]

This note explores the various considerations involved in the tug-of-war between federalism and uniformity in Chapter 9. In particular, it explores the recent circuit court split involving uniformity and the U.S. Trustee Program, and how the resolution of that issue may result in the current authorization statute being considered non-uniform and unconstitutional. To avoid this outcome and resolve current uncertainty, this note proposes a new, more functional statutory authorization standard. This would entail creating a category of implied authorization where states will have implicitly consented to Chapter 9 filings if they have given that particular subdivision a sufficient degree of fiscal and administrative autonomy.

This framework would allow states to adjust the powers of their political subdivisions accordingly if they do not want municipalities to be authorized while preventing states from completely removing debt-incurring entities from the federal bankruptcy scheme. Such a standard would be based on objective factors, such as whether these subdivisions have the independent ability to incur debt, the degree to which they govern themselves, and the State's authority to control the subdivision's decision-making.

The remainder of this note is organized as follows: Part II provides background on the Bankruptcy Clause, the Contracts Clause, the Tenth Amendment, and the constitutional parameters in which they are currently found; Part III covers Chapter 9 municipal bankruptcy, both historically and as a matter of contemporary legal development; Part IV explores the uniformity requirement within the Bankruptcy Clause, as well as the current circuit court split regarding its application to the U.S. Trustee Program; Part V covers Chapter 9's state authorization requirement; and Part VI sets forth a proposal for reforming the authorization requirement to allow for implied authorizations.

II. CONSTITUTIONAL BACKGROUND

A. The Bankruptcy Clause

Article I, Section 8, Clause 4 of the U.S. Constitution states that "The Congress shall have Power . . . To establish an uniform Rule of Naturalization, and uniform Laws in the subject of Bankruptcies throughout the United States."[12] This provision is commonly known as the "Bankruptcy

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10 GA. CODE ANN. § 36-80-5 (2022).

11 *See generally* Hoffman, *supra* note 9.

12 U.S. CONST. art. I, § 8, cl. 4.

Clause."[13] Congress has broad authority to formulate bankruptcy procedures, and the Supreme Court has held that Congress "may embrace within its legislation whatever may be deemed important to a complete and effective bankrupt system."[14]

The Bankruptcy Clause "necessarily implies the power to affect vested rights of many kinds."[15] Its scope and purpose encompass protections for both creditors and debtors, so long as congressional interference with creditors is neither arbitrary nor unjust.[16] As for debtors, Congress may "provide for the fair and equitable distribution of a debtor's property among his creditors; may discharge the debtor from the liability for preexisting debts; may impair or destroy the obligation of private contracts; and may effect changes in the lienholder's remedy or delay its enforcement."[17]

Congress has used this enumerated authority to confer to federal courts the exclusive jurisdiction to adjudge bankruptcies in the United States.[18] Some scholars and political figures have suggested that states are entitled to enough constitutional latitude to devise their own bankruptcy regimes to some extent, but the current system involves nearly universal federal control.[19]

Additionally, Congress is afforded broad discretion when formulating bankruptcy laws. Where Congress establishes the procedures and limitations of bankruptcy proceedings, its actions "are not ordinarily subject to re-examination in the courts."[20] Congress is generally considered "the sole judge of the means and their appropriateness to the purpose of the

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13 *Id*.; Stephen J. Lubben, *Promesa and the Bankruptcy Clause: A Reminder About Uniformity*, 12 BROOK. J. CORP. FIN. & COM. L. 53, 53 (2017).

14 United States v. Fox, 95 U.S. 670, 672 (1877).

15 In re Grand Rapids R. Co., 28 F. Supp. 802, 803 (W.D. Mich. 1939) (holding that vested rights can be infringed by federal bankruptcy laws under the power granted to it by Bankruptcy Clause, and that the "mere fact that [11 U.S.C. § 501] affects vested rights does not render it unconstitutional.").

16 Dallas Joint Stock Land Bank v. Davis, 83 F. 2d 322, 323-24 (5th Cir. 1936) (holding that Section 75 of the Bankruptcy Act "merely transfers the liquidation of the indebtedness from state courts to the court of bankruptcy." While Section 75 did infringe on the creditors rights by authorizing a stay of collection for up to three years, the stay is not an absolute one. Since "the act grants no absolute stay" it therefore "permits no arbitrary or unjust interference with creditors.").

17 Ginsberg v. Lindel, 107 F. 2d 721, 726 (8th Cir. 1939) (citing Continental Illinois Nat. Bank v. Chicago Rock Island & P. Ry. Co., 294 U.S. 648 (1935); Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440, 445 (1937); Van Huffel v. Harkelrode, 284 U.S. 225 (1931); Local Loan Co. v. Hunt, 292 U.S. 234 (1934).

18 New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U.S. 656, 661 (1875) ("Authority to establish uniform laws upon the subject of bankruptcy is conferred upon Congress; and, Congress having made such provision in pursuance of the Constitution, the jurisdiction conferred becomes exclusive throughout the United States.").

19 *See generally* Dawson, *supra* note 3.

20 Thompson v. Siratt, 95 F.2d 214, 217 (8th Cir. 1938) (citing Kuehner v. Irving Trust Co., 299 U.S. 445 (1937)).

legislation," so long as it does not violate other protections afforded by the U.S. Constitution.[21]

Regarding state regulation, congressional power to "establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount."[22] The Supreme Court has held that the purpose of a nationally uniform bankruptcy system "necessarily excludes state regulation."[23] This construction of the Bankruptcy Clause allows federal bankruptcy statutes to "abrogate state law entitlements in bankruptcy" so long as they abide by other constitutional limitations.[24] However, this abrogation is neither automatic nor absolute.[25] State laws are only preempted when there is "actual conflict" with federal bankruptcy law, thus leaving some possibility of concurrent federal and state authority regarding bankruptcy.[26] Some district courts have held that there is an assumption that federal preemption only exists in the bankruptcy context when there is explicit statutory language indicating such, or when preemption is compelled "due to an unavoidable conflict between the state law and federal law."[27]

B. The Tenth Amendment

The Tenth Amendment to the U.S. Constitution states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[28] While the Tenth Amendment was mentioned in a couple of important Supreme Court decisions, it was sparsely mentioned by name in the legislative history

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21 In re Chicago, R.I. & P.R. Co., 72 F.2d 443, 450 (7th Cir. 1934) ("Upon the authority expressly granted by the Constitution to Congress (article 1, Sec. 8), that body is authorized to enact such bankruptcy legislation as it may deem wise and appropriate. The constitutional grant of authority is not conditional nor limited, save that its laws be uniform throughout the United States.").

22 Int'l Shoe Co. v. Pinkus, 278 U.S. 261, 265 (1929) ("The purpose to exclude state action for the discharge of insolvent debts may be manifested without specific declaration to that end; that which is clearly implied is of equal force as that which is expressed." (citing New York Central R.R. Co. v. Winfield, 244 U.S. 147, 150 (1917); Erie R.R. Co. v. Winfield, 244 U.S. 170 (1917); Savage v. Jones, 225 U.S. 501, 533 (1912))).

23 *Id*. ("States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations.").

24 In re Farmers Markets, Inc., 792 F. 2d 1400, 1403 (9th Cir. 1986).

25 In re Lucas, 317 B.R. 195, 204 (D. Mass. 2004) ("although federal legislation may displace state law, courts 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)))).

26 Stellwagen v. Clum, 245 U.S. 605, 613 (1918) (citing Sturges v. Crowninshield, 17 U.S. 122, (1819); Ogden v. Saunders, 25 U.S. 213 (1827)).

27 The Plan Comm. v. PricewaterhouseCoopers, LLP, 335 B.R. 234, 244 (D.D.C. 2005) (citing In re Princeton-New York Invs., Inc., 219 B.R. 55, 60 (D.N.J. 1998)).

28 U.S. CONST. amend. X.

of the Bankruptcy Act of 1976.[29] This distinction led one bankruptcy scholar to conclude that there is no point "in trying to treat state sovereignty, federalism and the Tenth Amendment as separate constitutional doctrines."[30] This is important to note when reconciling the legal scholarship and judicial decisions that use these terms interchangeably.

The Supreme Court has held that, while uniformity of laws is preferable, uniformity cannot be achieved by "establishing overlapping authority over the same subject matter in the state and in the Federal Government."[31] The Court also held that the Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs States' integrity or their ability to function effectively in a federal system."[32]

In the context of bankruptcy law, the federal courts' ability to compel municipal action is "severely curtail[ed]" by the Tenth Amendment.[33] The Constitution does not "confer upon Congress the ability to require the States to govern according to Congress' instructions."[34] *Ashton v. Cameron County Water Improvement District* was the first major Supreme Court decision relating to Chapter 9's Tenth Amendment implications.[35]

C. The Contracts Clause

Article I, Section 10 of the U.S. Constitution, known as the "Contracts Clause," provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."[36] The specific intention of this clause was "to prevent states from enacting laws relieving debtors of their contractual obligations and thereby depriving creditors of their contractual rights, as several states had done in the decade prior to the adoption of the Constitution."[37]

While the Contracts Clause prohibits states from impairing existing contractual obligations, it does allow states to impair contracts that were formed after the state law was enacted.[38] In the context of remedying municipal debt, this option is of little help to states.[39] If states passed

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29 Thomas Moers Mayer, *State Sovereignty, State Bankruptcy, and a Reconsideration of Chapter 9*, 85 AM. BANKR. L.J. 363, 370-71 (2011).

30 *Id*.

31 Davies Warehouse Co. v. Bowles, 321 U.S. 144, 155 (1944).

32 Fry v. United States, 421 U.S. 542, 559 n.7 (1975).

33 In re New York City Off-Track Betting Corp., 427 B.R. 256, 264 (Bankr. S.D.N.Y. 2010).

34 New York v. United States, 505 U.S. 144, 162 (1992).

35 *See generally* Ashton v. Cameron Cnty. Water Imp. Dist. No. 1, 298 U.S. 513 (1936).

36 U.S. CONST. art. I § 10, cl. 1.

37 CALVIN MASSEY & BRANDON P. DENNING, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 619 (Rachel E. Barkow et al. eds., 6th ed. 2019).

38 *See Ogden*, 25 U.S. at 260.

39 *See* Dawson, *supra* note 3, at 37.

legislation that allowed them to modify future municipal debt obligations, the bond market for municipalities within that state would likely experience higher interest rates to account for the increased risk that municipal debt would be discharged by the state.[40] Additionally, "[w]hether such an alteration would give rise to a constitutional 'impairment' [is uncertain], meaning that any such attempt [is] likely to be mired in bondholder litigation."[41]

III. CHAPTER 9 "MUNICIPAL BANKRUPTCY"

Under the Bankruptcy Act of 1898,[42] Congress provided no provisions for municipalities to use bankruptcy proceedings to resolve debts.[43] This omission quickly became consequential. During the Great Depression, there were around 5,000 municipal bond defaults in the United States.[44] In response to the increase in municipal fiscal instability, Congress in 1934 allowed municipalities to seek bankruptcy relief for the first time.[45] The provisions were modified in 1936 and extended to 1940.[46] Shortly thereafter, the Supreme Court in *Ashton* struck down the municipal bankruptcy provisions for violating state rights under the Tenth Amendment.[47]

A. *Ashton v. Cameron County Water Imp. Dist. No. 1*

The *Ashton* decision arose from a water-improvement district in Cameron County, Texas.[48] Established in 1914, the special district declared itself insolvent in 1934 and petitioned the U.S. District Court for Chapter 9 bankruptcy protection.[49] A minority of bondholders asked the petition to be held insufficient on the grounds that the petitioner was not actually insolvent, and even if it was, the federal courts lacked jurisdiction.[50] The district court agreed, holding that (1) "[t]he petitioner is a mere agency or instrumentality of the state"; (2) "Congress lacks power to authorize a federal court to readjust obligations, as provided by the act"; and (3) "the allegations of fact

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40 *See id*. at 55.
41 *Id*. at 40.
42 Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).
43 *Id*.
44 Marc Joffe, *What the Great Depression Tells Us About How the Coronavirus Could Impact Municipal Bonds*, REASON FOUND. (May 6, 2020), https://reason.org/commentary/what-the-great-depression-tells-us-about-how-coronavirus-could-impact-municipal-bonds/.
45 CONG. RSCH. SERV., R41738, CHAPTER 9 OF THE U.S. BANKRUPTCY CODE: "MUNICIPAL BANKRUPTCY" 11 (2011).
46 *Id*.
47 *See generally Ashton*, 298 U.S. 513.
48 *Id*. at 523.
49 *Id*.
50 *Id*. at 523-24.

are insufficient."[51] The Circuit Court of Appeals reversed the district court's rulings regarding jurisdiction and sufficiency of the evidence, and the bondholders appealed to the Supreme Court.[52]

Writing for the Supreme Court, Justice McReynolds expressed the idea that, when the Bankruptcy Clause potentially conflicts with the Tenth Amendment, the scope of the Bankruptcy Clause should be construed similarly to the scope that the Court has given to the Taxation Clause.[53] McReynolds' majority opinion cited numerous Supreme Court decisions that struck down taxing powers for infringing upon states' rights.[54] From these decisions, the Court held "that the taxing power of Congress does not extend to the states or their political subdivisions" and that the "same basic reasoning which leads to that conclusion . . . requires like limitation upon the power which springs from the bankruptcy clause."[55]

An important aspect of the *Ashton* decision is that the federal bankruptcy power that Congress sought was not only held to be invalid, but the Court also held that the power could not arise even by "consent [or] submission by the states."[56] Under this view, the bankruptcy procedures at issue would interfere with state control over their political subdivisions to such an extent that states themselves would lack the authority to consent to federal court jurisdiction for bankruptcy proceedings.[57] This view can be described as the "non-delegable" approach to federal and state conflict in bankruptcy.[58]

B. *United States v. Bekins*

In 1937, the year after *Ashton* was decided, Congress re-established Chapter 9 of the Bankruptcy Code.[59] The new legislation contained only minor changes to the previous one struck down by the Supreme Court in *Ashton.*[60] While the differences may have been minimal, the Supreme Court upheld the new law because it "expressly avoid[ed] any restriction on the

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51 *Id*. at 524.

52 *Id*.

53 *Ashton*, 298 U.S. at 532 (citing United States v. Butler, 297 U.S. 1, 53 (1936)).

54 *Id*. at 528-30 (1936) (citing Collector v. Day, 78 U.S. 113, 125-26 (1870); Indian Motorcycle Co. v. United States, 283 U.S. 570, 575 (1931); United States v. Baltimore & Ohio R.R. Co., 84 U.S. 322, 329 (1872); Pollack v. Farmers' Loan & Trust Co., 157 U.S. 429, 586 (1895)).

55 *Id*. at 532 (citing *Butler*, 297 U.S. 1).

56 *Id*. at 531 (citing *Butler*, 297 U.S. 1).

57 *See* Dawson, *supra* note 3, at 75.

58 *See id*. ("Whereas *Ashton* focused on the dual federalism model in which the states have non-delegable control over their own municipalities, in *Bekins* the Court moved away from this model, instead focusing on the federal-state cooperative framework for resolving municipal distress.").

59 CONG. RSCH. SERV., R41738, CHAPTER 9 OF THE U.S. BANKRUPTCY CODE: "MUNICIPAL BANKRUPTCY" 11 (2011); Pub. L. No. 75-302, 50 Stat. 653.

60 Dawson, *supra* note 3, at 43.

powers of the States or their arms of government in the exercise of their sovereign rights and duties."[61] The Court specified that the new law avoided the federalism issues that doomed its predecessor because under the revised legislation: (1) "[n]o interference with the fiscal or governmental affairs of a political subdivision is permitted," (2) the "taxing agency itself is the only instrumentality which can seek the benefits of the proposed legislation," and (3) "[n]o involuntary proceedings are allowable."[62]

The *Bekins*[63] decision marked a noticeably pragmatic shift from the Court's decision in *Ashton*.[64] The Court noted that allowing some federal bankruptcy authority over insolvent municipalities was the only "hope for relief . . . because the Constitution forbids the passing of State laws impairing the obligations of existing contracts."[65] To ensure adequate relief for insolvent municipalities, the Court allowed for some degree of interference, so long as the bankruptcy proceedings: (1) are "authorized by state law" and (2) the "State retains control of its fiscal affairs."[66]

C. Chapter 9 Today

Currently, Chapter 9 is unique compared to the better-known portions of the bankruptcy code, such as Chapter 11 or 13, both in substance and procedure, largely due to the fact that Chapter 9 bankruptcies are much less common.[67] From 2001 to 2020, only thirty-one general-purpose local governments and ninety-five special-purpose districts filed for Chapter 9 bankruptcy.[68] By comparison, 8,333 Chapter 11 petitions were filed in 2020 alone.[69]

Procedure differs in Chapter 9 from other bankruptcies, for example, as to who may initiate proceedings and whether a proceeding brought under one chapter can be converted to a proceeding under another chapter.[70] In Chapter

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61 United States v. Bekins, 304 U.S. 27, 51 (1938).

62 *Id*.

63 *Id*. at 27.

64 *Ashton*, 298 U.S. 513.

65 *Bekins*, 304 U.S. at 51.

66 *Id*.

67 *See generally* Marc A. Levinson, *Chapter 9 v. Chapter 11 Comparison Chart*, PRAC. L., https://www.westlaw.com/w-002-1928?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0.

68 Jeff Chapman et al., *By the Numbers: A Look at Municipal Bankruptcies Over the Past 20 Years*, PEW TRUSTS (Jul. 6, 2020), https://www.pewtrusts.org/en/research-and-analysis/articles/2020/07/07/by-the-numbers-a-look-at-municipal-bankruptcies-over-the-past-20-years.

69 *Annual Bankruptcy Filings Fall 29.7 Percent*, U.S. CT.'S (Jan. 28, 2021), https://www.uscourts.gov/news/2021/01/28/annual-bankruptcy-filings-fall-297-percent.

70 Levinson, *supra* note 67.

11 proceedings, unsecured creditors[71] can initiate involuntary proceedings against debtors,[72] and courts have the power to convert a Chapter 11 case to a Chapter 7 case.[73] Additionally, debtors in Chapter 11 proceedings are required to seek court approval before using, selling, or leasing property out of the ordinary course of business.[74] None of these provisions apply to municipal debtors under Chapter 9.[75]

However, municipal debtors do have specific requirements under Chapter 9 that don't apply to other debtors. The first such requirement is that the debtor must be a municipality.[76] The term "municipality" includes any "political subdivision or public agency or instrumentality of a State."[77] The statutory meaning of this phrase is ambiguous,[78] but the term "political subdivision" has been held to mean "any county or parish or any city, town, village, borough, township, or other municipality . . ."[79] As for whether an entity is a public agency, the generally accepted test is "whether the authority or agency is subject to control by public authority, state or municipal."[80] Whether an entity is an instrumentality of the state is more complicated, and it depends on the degree of "control a state exerts over an entity's 'day-to-day activities.'"[81]

Next, the municipality filing for Chapter 9 protection must be "specifically authorized . . . to be a debtor."[82] This note will go into further detail about this requirement in Section V, but it has been held that in order to meet the "specifically authorized" standard, the authorizing language "must be exact, plain, and direct with well-defined limits so that nothing is left to inference or implication."[83] This interpretation is relatively restrictive; however, it does not necessarily require a statute to provide the authorization. In *In re New York City Off-Track Betting Corporation*, a bankruptcy court held that the governor's executive order satisfied the authorization

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71 An unsecured creditor is an individual or institution that lends money without obtaining specified assets as collateral. *See* James Chen, *Unsecured Creditors*, INVESTOPEDIA (Sept. 26, 2022), https://www.investopedia.com/terms/u/unsecuredcreditor.asp.

72 11 U.S.C. § 303(a).

73 11 U.S.C. § 1112(b).

74 11 U.S.C. § 163.

75 *See* Levinson, *supra* note 67.

76 11 U.S.C. § 109(c)(1).

77 11 U.S.C. § 101(40).

78 In re Cnty. of Orange, 183 B.R., 594, 601 (Bankr. C.D. Cal. 1995).

79 *Id*. at 602; *see also* Kristin K. Going, *Representing Creditors in Chapter 9 Bankruptcy Cases*, PRAC. L., https://www.westlaw.com/w-001-1016?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0.

80 Going, *supra* note 79 (citing In re Connector 2000 Ass'n, Inc., 447 B.R. 752 (Bankr. D.S.C. 2011) (quoting Ex parte York Co. Natural Gas Auth., 238 F. Supp. 964, 976 (D.C.S.C. 1965))).

81 Going, *supra* note 79 (quoting In re Las Vegas Monorail Co., 429 B.R. 770, 788 (Bankr. D. Nev. 2010)).

82 11 U.S.C. § 109(c)(2).

83 *Cnty. of Orange*, 183 B.R. at 604 (quoting Black's Law Dictionary 581 (6th ed. 1990)).

requirement "despite there being no statute granting the debtor power to file."[84]

The third requirement is that the debtor must be insolvent.[85] A municipality is insolvent when there exists a "financial condition such that the municipality is generally not paying its debts as they become due unless debts are the subject of a bona fide dispute; or unable to pay its debts as they become due."[86] When determining whether a municipality will be unable to pay its future debts, courts generally rely on financial information from the current or subsequent fiscal year, rather than more remote future projections.[87]

The final requirements are: (1) that the debtor must first negotiate with creditors in good faith and fail to obtain an agreement with creditors representing a majority in amount of claims before a Chapter 9 petition may be filed;[88] (2) that creditors representing a majority in amount of the claims that the debtor intends to impair must agree to the filing;[89] and (3) that the debtor must be unable to practically negotiate with creditors or reasonably believe that a creditor may attempt to obtain a preferential transfer.[90] Each of these requirements has resulted in some form of dispute.

These requirements differentiate Chapter 9 proceedings from other forms of bankruptcy, and some of them provide the basis for unique constitutional problems. In particular, it is the authorization requirement[91] that raises significant constitutional concerns related to the U.S. Constitution's uniformity requirement.[92]

IV. THE UNIFORMITY REQUIREMENT

The Constitution's uniformity requirement mandates that bankruptcy statutes must be "uniform . . . throughout the United States."[93] In *Gibbons*, the Supreme Court decided that for federal bankruptcy statutes to survive judicial review, they "must at least apply uniformly to a defined class of debtors."[94] This has been interpreted by courts to allow for the different

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84 Going, *supra* note 79 (citing *New York City Off-Track Betting Corp.*, 427 B.R. at 267).

85 11 U.S.C. § 109(c)(3).

86 11 U.S.C. § 101(32)(C).

87 Going, *supra* note 79 (citing In re Bridgeport, 129 B.R. 332, 338 (Bankr. D. Conn. 1991)).

88 11 U.S.C. § 109(c)(5)(B).

89 11 U.S.C. § 109(c)(5)(A).

90 11 U.S.C. § 109(c)(5)(C)-(D).

91 11 U.S.C. § 109(c)(2).

92 U.S. CONST. art. I, § 8, cl. 4 ("[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States").

93 *Id*.

94 *Gibbons*, 455 U.S. at 473 ("A bankruptcy law, such as [the statute under review], confined as it is to the affairs of one named debtor can hardly be considered uniform. To hold otherwise would allow Congress to repeal the uniformity requirement from Art. 1, § 8, cl. 4, of the Constitution.").

treatment of debtors and creditors "so long as the classification scheme applies in the same manner to all similarly situated parties."[95] Under this standard, courts accept federal bankruptcy statutes as uniform, even if "its effect may vary due to differences in state law."[96] This is known as "geographic uniformity," a principle under which deference is given to state law providing for differing standards, procedures, and restrictions that may have substantive effects on outcomes for debtors and creditors, so long as federal law treats all debtors and creditors equally.[97]

A federal statute may discriminate against different debtors while maintaining geographic uniformity only when the statute addresses a "geographically isolated problem."[98] The Supreme Court first addressed this concept with its decision in *Blanchette v. Connecticut General Insurance Corporations*.[99] There, the statute at issue was The Regional Rail Reorganization Act of 1973[100] ("The Rail Act"), which was passed in part because, at the time, "essential rail service [was] threatened with cessation or significant curtailment because of the inability of the trustees of such railroads to formulate acceptable plans for reorganization."[101] The Rail Act was challenged for creating a designated "region" where the statute governed railroad bankruptcies.[102] Railroads declaring bankruptcy outside the designated region would theoretically be governed by different bankruptcy procedures.[103] This scenario was only theoretical because no railroads were

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95 In re Urb., 375 B.R. 882, 891 (B.A.P. 9th Cir. 2007) ("Geographic uniformity and class uniformity are separate concepts, and when a law is applied to a specified class of debtors, the uniformity requirement is met so long as the law applies uniformly to that defined class of debtors." (quoting In re Chandler, 362 B.R. 723, 728 (Bankr. N.D.W.Va. 2007) (citing *Gibbons*, 455 U.S. at 473)).

96 *Id*. ("The law is uniform because it applies to all debtors who have not been domiciled in the forum state for at least two years preceding bankruptcy, regardless of where a bankruptcy petition is filed.").

97 St. Angelo v. Victoria Farms, Inc., 38 F.3d 1525, 1531 (9th Cir. 1994) ("A bankruptcy law may have different effects in various states due to dissimilarities in state law as long as the federal law itself treats creditors and debtors alike… the effect of a law may differ due to variations in state law as long as the 'existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country, regardless of the State in which the bankruptcy court sits.'" (quoting Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 172 (1946) (Frankfurter, J., concurring))).

98 In re Clinton Nurseries Inc., 998 F.3d 56, 67 (2nd Cir. 2021) (citing Blanchette v. Connecticut Gen. Ins. Corps., 419 U.S. 102 (1974)).

99 *Blanchette*, 419 U.S. 102 (holding that the Regional Rail Reorganization Act did not contravene the uniformity requirement of the Bankruptcy Clause of the U.S. Constitution.).

100 Regional Rail Reorganization Act, Pub. L. No. 93-236, 87 Stat. 985 (1973).

101 45 U.S.C. § 701(a)(2).

102 The Rail Act was enacted as a supplement to § 77 of the Bankruptcy Act, 11 U.S.C. § 205, in response to eight major railroads entered reorganization proceedings. *See Blanchette*, 419 U.S. at 108-09. The relevant "region" that these railroads were located consisted of several states in the midwest and northeast areas of the country. *See id*.

103 *Blanchette*, 419 U.S. at 156.

experiencing bankruptcy reorganization outside of the defined region.[104] The Court held that the "definition of the region does not obscure the reality that the legislation applies to all railroads under reorganization," and thus, the Rail Act did not violate the uniformity requirement.[105] In *In re Penn Central Transportation Company*, the Special Court, created under The Regional Rail Reorganization Act of 1973, went on to hold that the Bankruptcy Clause was not intended to force Congress "into nationwide enactments to deal with conditions calling for remedy only in certain regions."[106]

A. The U.S. Trustee Uniformity Debate

Until recent clarification from the U.S. Supreme Court, appellate circuit courts were split regarding the application of the "geographically isolated problem" exception in the context of bankruptcy proceedings.[107] This exception is especially relevant when it comes to uniformity challenges related to the United States Trustee Program fees.[108]

The United States Trustee Program involves trustees who serve as "an auxiliary to the Bankruptcy Court."[109] It was first created as an experimental pilot program under the Bankruptcy Reform Act of 1978,[110] with Congress originally establishing the program in eighteen judicial districts.[111] The Trustee Program was created, in part, to

> alleviate some of the administrative burdens faced by bankruptcy judges, to eliminate the appearance of favoritism arising from the close relationship that existed between judges and trustees, and to address the problem of "cronyism that exists in many parts of the country in the appointment of trustees by bankruptcy judges."[112]

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104 *Id*. at 159-60 ("The uniformity clause requires that the Rail Act apply equally to all creditors and all debtors, and plainly this Act fulfills those requirements" (quoting Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 172, 67 S. Ct. 237 (1946))).

105 *Id*. at 161.

106 In re Penn Cent. Transp. Co., 384 F. Supp. 895, 915 (1974) (citing *Wright*, 300 U.S. at 463 n.7) ("upholding a provision in the amended Frazier-Lemke Act permitting bankruptcy courts to determine whether the Act should continue to apply in particular locations.")).

107 Shane G. Ramsey, *U.S. Supreme Court Seems Poised to Address Constitutionality of 2018 U.S. Trustee Fee Increase*, NAT'L. L. REV. (October 11, 2021).

108 *See generally* Dan J. Schulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and Bankruptcy Administrator Programs*, 74 NEB. L. REV. 91 (1995).

109 CONG. RSCH. SERV., R45137, BANKRUPTCY BASICS: A PRIMER 5 (2018) (updated Oct. 12, 2022) (citing In re Vance, 120 B.R. 181, 185 (Bankr. N.D. Okla. 1990)).

110 Pub. L. No. 95-598.

111 *St. Angelo*, 38 F.3d at 1529.

112 *Id*. (quoting H. Rep. No. 595, 95th Cong., 2d Sess. 108 (1978)).

The U.S. Trustee works "under the general supervision of the Attorney General, who [provides] general coordination and assistance to the United States trustees."[113] Each U.S. Trustee is appointed to a specific jurisdiction[114] and supervises "a panel of private trustees."[115] These private trustees, or "case trustee[s]," have different roles "depending on which Chapter of the Bankruptcy Code the bankruptcy case proceeds under."[116]

To finance the U.S. Trustee Program, Trustees are required to collect fees from certain classes of debtors.[117] In 2017, Congress increased this fee, paid by a certain class of large Chapter 11 debtors in bankruptcy proceedings.[118]

The U.S. Trustee program operates within bankruptcy courts in "nearly all states."[119] However, the six federal judicial districts in Alabama and North Carolina use "Bankruptcy Administrators" in what are known as "Bankruptcy Districts."[120] The primary difference between a "Trustee District" and a "Bankruptcy District" is that the courts in the former category are funded by quarterly fees paid to the U.S. Trustee, while courts in the latter category are funded by the general budget of the federal judiciary.[121] Debtors in "Trustee Districts" experienced the fee increase beginning on January 18, 2018, while debtors in "Bankruptcy Districts" only paid the increased fees if their reorganization began in October 2018 or later.[122]

The Second and Tenth Circuits ruled that this disparity violated the "uniformity aspect of the Bankruptcy Clause," while the Fourth and Fifth Circuits upheld the fee increases against constitutional challenges to the statute's uniformity.[123] Prior to these decisions, the Seventh Circuit had addressed the uniformity issue under a separate set of circumstances that were relevant to the reasoning applied by the other circuits.[124]

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113 28 U.S.C. § 586(c).

114 28 U.S.C. § 586(a).

115 28 U.S.C. § 586(a)(1).

116 CONG. RSCH. SERV., R45137, BANKRUPTCY BASICS: A PRIMER 5 (2018) (updated Oct. 12, 2022); *Compare* 11 U.S.C. § 704(a) (defining a Chapter 7 trustee's duties), *with* 11 U.S.C. § 1106(a) (defining a Chapter 11 trustee's duties), *with id.* S. 1202 (defining a Chapter 12 trustee's duties), *with* 11 U.S.C. § 1302 (defining a Chapter 13 trustee's duties).

117 28 U.S.C. § 586(e)(2).

118 *Clinton Nurseries*, 998 F.3d at 61 ("In 2017, Congress amended §1930(a)(6) to temporarily add to the existing fee schedule an even higher fee where disbursements equaled or exceeded $1 million.").

119 C. Craig Eller, *Confusion Involving Constitutionality of U.S. Trustee Fee Increase*, NAT'L L. REV. (July 27, 2021), https://www.natlawreview.com/article/confusion-involving-constitutionality-us-trustee-fee-increase.

120 *Id*.

121 Donald L. Swanson, *U.S. Trustee & Bankruptcy Administrator Programs: Is This Constitutional? (St. Angelo v. Victoria/ In re Buffets)*, MEDIATEBANKERY (Nov. 25, 2020), https://mediatbankry.com/2020/11/25/u-s-trustee-v-bankruptcy-administrator-programs-is-this-constitutional-st-angelo-v-victoria-in-re-buffets/.

122 Eller, *supra* note 119.

123 Ramsey, *supra* note 107.

124 *See* In re Reese, 91 F.3d. 37, (7th Cir. 1996).

B. Seventh Circuit

The Seventh Circuit addressed the bankruptcy uniformity issue in its 1996 *Reese* decision.[125] In *Reese*, the debtor sought to discharge debt related to liability for punitive damages stemming from an automobile accident where the debtor was intoxicated.[126] Under the U.S. Bankruptcy Code, a discharge of debts in bankruptcy proceedings does not discharge any debt "for death or personal injury caused by the debtor's operation of a motor vehicle . . . if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance."[127] The debtor challenged this section of the Code, claiming that it violated the Uniformity Clause.[128] The basis of this challenge was that "in roughly half the states . . . punitive damages are not available in wrongful deaths suits," and therefore, the discharge exception[129] relating to tort damages does not uniformly apply across every state.[130] According to the court, this made "the drunk-driver section of the Bankruptcy Code affect bankrupt, accident-causing drunk drivers differently depending on whether the accident inflicts a fatal injury or not."[131] Not only did the Seventh Circuit reject the idea that this provision violated the uniformity requirement, but the court also found the argument "so devoid of any possible foundation in reason or history or precedent" that it initiated sanctions[132] against the debtor's attorney.[133]

The Seventh Circuit held that, besides prohibiting private bankruptcy bills, the Uniformity Clause only prohibits "arbitrary regional differences in the provisions of the Bankruptcy Code."[134] The decision, authored by Richard Posner, tied the scope of the Uniformity Clause to "a major objective of the framers of the Constitution," which was "protecting creditors."[135]

Under this theory, the purpose of the Uniformity Clause is accomplished by "reducing the incentive of debtors to relocate in or shift property to an area that might, as a result of their lobbying Congress, have a more lenient bankruptcy regime."[136] This standard is then contrasted with "perfect uniformity," which would prevent Congress from, among other things, "allowing the states to fix exemptions from the debtor's estate, since

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125 *Id*. at 38-39.

126 *Id*. at 39. The civil judgment was issued in Indiana state court, where punitive damages are unavailable for wrongful death lawsuits.

127 11 U.S.C. § 523(a)(9).

128 *Reese*, 91 F.3d. at 39.

129 11 U.S.C. § 523(a)(9).

130 *Reese*, 91 F.3d. at 39-40.

131 *Id*. at 40.

132 *See* Fed. R. Civ. Pro. 11(c).

133 *Reese*, 91 F.3d. at 40.

134 *Id*. at 39 (citing *Gibbons*, 455 U.S. at 472); *see* Schulman, *supra* note 108.

135 *Id*. at 39.

136 *Id*.

the absence of uniformity of exceptions creates an incentive for debtors who are on the verge of bankruptcy."[137] Judge Posner decided that there is no reason to apply a different standard of uniformity for exemptions[138] compared to state-specific factors that have substantive impacts on bankruptcy proceedings.[139]

C. Second and Tenth Circuits

The 2017 Trustee fee increase resulted in some debtors paying more in fees than comparable debtors in judicial districts that used Bankruptcy Administrators. The Second Circuit was the first appellate court to decide that this arrangement violated the Constitution's uniformity requirement. In *In re Clinton Nurseries*, the U.S. Trustee argued that (1) the 2017 amendment[140] is not subject to Bankruptcy Clause, and (2) even if it is subject to the Bankruptcy Clause, it does not violate the uniformity requirement.[141] The Second Circuit summarily rejected the former argument,[142] noting that the "subject of the 2017 amendment plainly fits within the Supreme Court's broad definition of 'bankruptcy' as 'the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors extending to his relief.'"[143] As for the latter argument, the Trustee further argued that (1) the 2017 Amendment's fee increase statutorily mandated *equal* fee increases for UST and BA Districts,[144] and alternatively, (2) the "geographically isolated problem" exception prevented the statute from violating the Uniformity Clause.[145] The court found "neither argument persuasive."[146]

The Trustee's argument that the 2017 Amendment actually mandated equal fee increases was undercut by the fact that Congress used the term

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137 *Id*. ("The Supreme Court has made clear that perfect uniformity is not required." (citing *Gibbons*, 455 U.S. at 469)).

138 *See* 11 U.S.C. § 523 for a list of exemptions.

139 *Reese*, 91 F.3d. at 39 ("What we do not understand is why [the debtor] thinks that exemptions from discharge should be held to a degree of uniformity not required of exemptions. She gives no reasons or authorities for such a difference in treatment").

140 28 U.S.C. § 1930(a)(6).

141 *Clinton Nurseries*, 998 F.3d at 63.

142 *Id*. at 64 ("The Trustee's argument has been repeatedly rejected by other courts."); *see also* In re MF Glob. Holdings Ltd., 615 B.R. 415, 446 (Bankr. S.D.N.Y. 2020)).

143 *Id*. (quoting *Gibbons*, 455 U.S. 466).

144 *Id*. at 65 (" . . . the Trustee contends that . . . Congress mandated equal implementation of the 2017 Amendment's fee increase in UST and BA Districts, and the delayed and inconsistent implementation of the fee increase in the BA Districts actually contravened statutory language that was facially uniform.").

145 *Id*.

146 *Id*.

"shall"[147] in reference to the UST fee increase, but used the term "may"[148] in reference to the BA fee increase.[149] As for the applicability of the "geographically isolated problem" exception, the Second Circuit noted that the fee increase applied to debtors whose third-party disbursements exceeded $1 million.[150] Therefore, that group was the defined class of debtors, and if some members of that class who were located in Trustee Districts had to pay the fee increase while other members of that class located in Bankruptcy Districts did not,[151] then the fee increase violates the standard set out in *Gibbons*, requiring that "the law must at least apply uniformly to a defined class of debtors."[152]

The Tenth Circuit largely agreed with the Second Circuit's reasoning when it addressed the fee uniformity issue recently in *In re John Q. Hammons.*[153] There, the Trustee made essentially the same arguments that were made in *Clinton Nurseries*.[154]

The Tenth Circuit similarly concluded that the fee increase for "all large Chapter [Eleven] bankruptcy debtors in Trustee Program districts" required a showing that "members of that broad class are absent in [Bankruptcy Administrator] districts."[155] Accordingly, the court held that "[c]ommon sense tells us that in 2018 through 2020, debtors like those here had bankruptcy cases pending in Alabama and North Carolina."[156]

Once the court determined that the affected debtors were of the same class as those in the Bankruptcy Districts,[157] it addressed whether the "Trustee Program underfunding is a geographically isolated problem

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147 28 U.S.C. § 1930(a)(6) ("a quarterly fee shall be paid to the United States trustee . . .").

148 *Clinton Nurseries*, 998 F.3d at 65 ("By contrast, before the 2020 Act, S.1930(a)(7) stated that the Judicial Conference 'may' impose the same fees from S.1930(a)(6) in BA Districts.").

149 *Id*. ("Thus, by the plain terms of the statute, while S.1930(a)(6) *required* application of the increase in UST Districts, S.1930(a)(7) *permitted* application of the increase in BA Districts.").

150 *Id*. at 68-69 ("Here by contrast, the 2017 Amendment's fee increase applies to the class of debtors whose disbursements exceed $1 million, and there has been no suggestion that members of that broad class are absent in the BA districts.").

151 *Id*. ("This case therefore presents the exact problem avoided in *Blanchette*: Two debtors, identical in all respects save the geographic locations in which they filed for bankruptcy, are charged dramatically different fees.").

152 *Gibbons*, 455 U.S. at 473.

153 In re John Q. Hammons, 15 F.4th 1011, 1023 (10th Cir. 2021) ("But we agree with the Second Circuit's well reasoned and unanimous ruling…").

154 *Id*. at 1022 (10th Cir. 2021) ("the Trustee argues to alternative theories: (1) that the pre-2020 Amendment versions of S.1930(a)(6) and (7) together in fact already require uniform quarterly disbursement fees in all judicial districts, and (2) more narrowly, that the 2017 Amendment is constitutionally uniform because it increased quarterly fees on all large debtors in Trustee districts."); *see also Clinton Nurseries*, 998 F.3d at 59.

155 *Hammons*, 15 F.4th at 1024 (quoting Clinton Nurseries, 998 F.3d at 68-69).

156 *Id*.

157 *Id*. at 1025 ("we reject the Trustee's argument that the relevant class of debtors is exclusively Trustee-district debtors . . .").

warranting geographic specific legislation."[158] At the center of this determination is the Supreme Court's decision in *Blanchette*,[159] which the Tenth Circuit interpreted as allowing "geography-specific legislation" so long as "no members of the class of debtors existed outside the defined region."[160] Therefore, the Rail Act was uniform, not because Congress is allowed to treat individual railroads differently based on geographic proximity, but because the Rail Act did not actually treat any railroads differently at all.[161] No railroads were treated differently because the statutory differences only applied to railroads filing for bankruptcy protections, and there were no bankrupt railroads outside of the designated region.[162] Applying this reasoning to the current case, the Tenth Circuit concluded that debtors of the same class clearly existed in the Bankruptcy Districts, meaning that the fee disparity violated the uniformity requirement.[163]

D. Fifth and Fourth Circuits

The Fifth Circuit came to the opposite conclusion in its *Buffets* decision.[164] The court cited *Reese* when it held that "the uniformity requirement forbids *only* 'arbitrary regional differences in the provisions of the Bankruptcy Code.'"[165] This standard differs from the approach taken by the Second and Tenth Circuits in that it allows nonuniformity amongst the same class of debtors so long as the legislation is fashioned "to resolve geographically isolated problems." The Second and Tenth Circuits held that the "geographically isolated problem" exception does not negate the requirement that "[t]o survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors."[166]

The Fifth Circuit's interpretation is especially limiting because it implies that the only way a statute can violate the uniformity clause is by implementing "arbitrary regional differences in the provisions of the Bankruptcy Code."[167] As the court went on to note, "the Supreme Court has

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158 *Id*.

159 *Blanchette*, 419 U.S. 102.

160 *Hammons*, 15 F.4th at 1024.

161 *Clinton Nurseries*, 998 F.3d at 68.

162 *Id*. ("all members of the class of debtors impacted by the statute were confined to a sole geographic area…").

163 *Hammons*, 15 F.4th at 1023.

164 In re Buffets, L.L.C., 979 F.3d. 366, 378 (5th Cir. 2020).

165 *Id*. ("Its problem is that only 'arbitrary' geographic differences are unconstitutional." (quoting *Reese*, 91 F.3d at 39).

166 *Clinton Nurseries*, 998 F.3d at 68 ("But the Supreme Court clarified in *Gibbons* that, '[t]o survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors.'").

167 *Buffets*, 979 F.3d. at 378 (quoting *Reese*, 91 F.3d. at 39).

never held that a law violated the Bankruptcy Clause because of arbitrary geographic distinctions."[168]

Even accounting for this difference in reasoning among the appellate courts, the Fifth Circuit could have still reached the same conclusion as the other circuits if it found that the geographic differences at issue were "arbitrary."[169] However, the court concluded that this was not the case and that the fee increase differential was the result of a "program-specific distinction that only indirectly has geographic dimension."[170] This result relies on the conclusion that the fee increase differential "is not an arbitrary distinction based on the residence of the debtor or creditors," but rather "a product of the [Trustee District Debtor's] use of the Trustee."[171]

In contrast, the Second and Tenth Circuits held that the legal distinctions between UST and BA Districts were created by Congress "for politically expedient reasons"[172] and, therefore, did not constitute a "geographically isolated problem."[173] The Tenth Circuit described the existence of this dual bankruptcy system as an unintended consequence, resulting from the political interests of a small number of lawmakers.[174] Accepting the fact that this dual bankruptcy system is "irrational and arbitrary," the Tenth Circuit held that this did not prevent the "geographically isolated problem" exception from applying.[175] From the Fifth Circuit's perspective, the dual bankruptcy system lacked justification when it was created,[176] but the 2017 Amendment's fee increase "provided that justification."[177]

The Fifth Circuit reasoned that (1) Congress created an "irrational and arbitrary" geographic distinction between debtors in BA Districts and debtors in UST Districts; (2) a legitimate need arose to remedy a funding shortfall within the U.S. Trustee Program;[178] and (3) Congress permissibly remedied

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168 *Id*. at 378.

169 *Reese*, 91 F.3d at 39.

170 *Buffets*, 979 F.3d. at 378.

171 *Id*.

172 *Clinton Nurseries*, 998 F.3d at 69 (citing *Buffets*, 979 F.3d. at 383 (Clement, J., concurring in part and dissenting in part) (identifying distinction as an "arbitrary political relic")).

173 *Id*.

174 *Id*. at 68 ("the UST program was intended to be a uniform, nationwide program, but lawmakers in Alabama and North Carolina resisted and, after receiving a number of extensions, ultimately were granted a permanent exemption from the UST program in an unrelated law." (citing *Buffets*, 979 F.3d. at 383 (Clement, J., concurring in part and dissenting in part)).

175 *Buffets*, 979 F.3d. at 378 ("The issue presented to use is much narrower: whether a recent, short-term change in fees for Trustee districts is unconstitutional because it lacks a reasonable justification").

176 *Id*. at 379 ("the establishment of Trustee and Administrator Districts was an 'irrational and arbitrary' distinction for which Congress gave 'no justification.'" (quoting *St. Angelo*, 38 F.3d at 1532).

177 *Id*. ("a need to ensure that the Trustee Program remains funded by users of the bankruptcy court rather than taxpayers").

178 *Id*. at 378 ("Congress sought to remedy a shortfall in the program's funding.").

this shortfall by requiring a fee increase for specified debtors within UST Districts, while merely permitting fee increase for debtors in BA Districts.[179]

Another split between the Second and Fifth Circuits arose when they attempted to identify who belongs to the "class" of debtors at issue. In *Buffets*, the Fifth Circuit implied that the debtors in Trustee Districts are a different class of debtors than those in Bankruptcy Districts.[180] Under this interpretation of the decision, debtors in Bankruptcy Districts would be members of one class of debtors, while debtors in Trustee Districts would be members of another class. Therefore, legislation that treated these debtors substantively differently would not violate the constitutional requirement that bankruptcy legislation must "apply uniformly to a defined class of debtors."[181]

The Second Circuit expressly rejected this application, stating that the 2017 Amendment's fee increase "applies to the class of debtors whose disbursements exceed $1 million."[182] Under this interpretation, the 2017 Amendment's fee increase clearly treats members of the defined class of debtors non-uniformly, since debtors with disbursements exceeding $1 million in BA districts would pay a lower fee rate than debtors with disbursements exceeding $1 million in TA districts.[183]

The Second Circuit's interpretation also appears to be more analogous to the Supreme Court's decision in *Blanchette*, where bankrupt railroads were considered the defined class of debtors.[184] The U.S. Supreme Court reasoned that no bankrupt railroads were treated differently since "[n]o railroad reorganization proceeding was . . . pending outside of that defined region."[185] Likewise, if no debtor bound by the 2017 Amendment's fee increase existed in any of the BA districts, then the Second and Tenth Circuits would certainly have held that the 2017 Amendment applied uniformly.

Under the Fifth Circuit's reasoning, the existence of bankrupt railroads outside of the defined region would still result in uniformity.[186] The Fifth Circuit would presumably characterize bankrupt railroads inside the defined region as one class of debtors, while bankrupt railroads outside the defined region would be a separate and distinct class of debtors. So long as the

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179 *Id*. ("Congress confronted the problem of an underfunded Trustee Program where it found it: in the Trustee districts. It drew a program-specific distinction that only indirectly has a geographic dimension.")

180 *See id*. ("It does make it more expensive for a debtor in Texas than a debtor in North Carolina to go through bankruptcy, but that is not an arbitrary distinction based on the residence of the debtor or creditors; it is a product of the Texas debtor's use of the Trustee.").

181 *Gibbons*, 455 U.S. at 473.

182 *Clinton Nurseries*, 998 F.3d at 69.

183 *Id*. ("there has been no suggestion that members of that broad class are absent in BA Districts").

184 *Blanchette*, 419 U.S. at 160 ("the Rail Act in fact operates uniformly upon all bankrupt railroads then operating in the United States…").

185 *Gibbons*, 455 U.S. at 469.

186 *See generally Buffets*, 979 F.3d. 366.

standards imposed on those different classes were not due to "arbitrary geographic differences," then the standards would be considered uniform.[187]

The Fourth Circuit cited the *Buffets* decision extensively when it upheld the fee increase differential against a uniformity clause challenge.[188] While the court did acknowledge the requirement to treat classes of debtors uniformly, it did not directly address whether BA and UST debtors could possibly be considered members of the same defined class.[189]

The court's decision relies on the same two possibilities to justify its conclusion: Either (1) the debtors specified under the 2017 amendment are not members of the same class of debtors, or alternatively, (2) debtors of the same defined class are not required to be treated uniformly, so long as the differences are based on non-arbitrary geographic distinctions,[190] even if those distinctions were originally created under arbitrary circumstances.[191]

The Fourth and Fifth Circuits' reasoning can be summarized as follows: (1) Congress created an "irrational and arbitrary" dual bankruptcy system that had "no justification";[192] (2) this arrangement eventually resulted in a budget shortfall in TA Districts, since those districts were more dependent on usage fees;[193] and (3) Congress "reasonably solved this shortfall problem with fee increases in the underfunded districts,"[194] which was permissible under the "geographically isolated problem"[195] exception.

E. *Siegel v. Fitzgerald*

After the Fourth Circuit ruled in favor of the U.S. Trustee, the U.S. Supreme Court granted the debtor a writ of certiorari on September 21, 2021, and unanimously reversed the Fourth Circuit's decision.[196]

First, the Court summarily rejected the U.S. Trustee's argument that the Bankruptcy Clause's uniformity requirement does not apply to

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187 *See id*. at 378.

188 In re Cir. City Stores, Inc., 996 F.3d. 156, 165-66 (4th Cir. 2021).

189 *See id.* at 165 ("to be constitutionally uniform '[a] law enacted pursuant to the Bankruptcy Clause must: (1) apply uniformly to a defined class of debtors; and (2) be geographically uniform.").

190 *Id*. at 166 ("Because only those debtors in Trustee districts, Congress reasonably solved the shortfall problem with fee increases in the underfunded districts.")

191 *Id*. ("As recognized by the Fifth Circuit, the Ninth Circuit has observed in 1995 that the establishment of separate Trustee and administrator districts was an 'irrational and arbitrary' distinction for which Congress had given 'no justification.'" (quoting *St. Angelo*, 38 F.3d at 1532)).

192 *Id*. (quoting *St. Angelo*, 38 F.3d at 1532); *Buffets*, 979 F.3d. at 379 (quoting *St. Angelo*, 38 F.3d at 1532).

193 *Buffets*, 979 F.3d. at 379; *Cir. City Stores*, 996 F.3d. at 166.

194 *Cir. City Stores*, 996 F.3d. at 166.

195 *St. Angelo*, 38 F.3d at 1532.

196 *Siegel v. Fitzgerald*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/siegel-v-fitzgerald/ (last visited Nov. 7, 2022).

procedural provisions.[197] The Court noted that even the Circuits that ruled in favor of the U.S. Trustee found that the fee change "is subject to the Bankruptcy Clause's uniformity requirement."[198]

Next, the Court turned its attention to the three prior occasions where it had offered decisions regarding the scope of the uniformity requirement.[199] In doing so, it reaffirmed the Court's precedent that "[w]hile the uniformity requirement allows Congress to account for 'differences that exist between different parts of the country,' it does not give Congress free rein to subject similarly situated debtors in different states to different fees because it chooses to pay the costs for some, but not others."[200] In sum, these precedents held that "the Bankruptcy Clause offers Congress flexibility, but does not permit the arbitrary, disparate treatment of similarly situated debtors based on geography."[201]

The Court held that the Bankruptcy Clause "does not permit Congress to treat identical debtors differently based on an artificial funding distinction that Congress itself created."[202] This language seems to limit the decision's scope to funding disparities and gives support to the opinion that Chapter 9's state authorization requirement is not under direct threat from the *Siegel* decision.[203] The Court further bolstered that view by stating that its decision does not "address the constitutionality of the dual scheme of the bankruptcy system itself, only Congress' decision to impose different fee arrangements in those two systems."[204]

While this language seems to indicate that Chapter 9's state authorization requirement is not under *direct* threat from the *Siegel* decision, the reasoning and precedents relied on by the Court could eventually lead to a reconsideration of Chapter 9's federalism/uniformity status quo. If the Court did not believe that the fee disparity between BA and TA districts stemmed from "an external and geographically isolated need," then it could find that neither does the issue of municipalities being categorically removed from filing a Chapter 9 petition. Both of these issues were created by congressional actions that delegated the ultimate authority over uniformity to non-federal parties. The 2017 fee adjustment amendment gave the judicial conference the discretion of whether to keep the fees uniform, while the 1994

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197 *See* Siegel v. Fitzgerald, 142 S. Ct. 1770, 1778-79 (2022) ("[n]othing in the language of the Bankruptcy Clause itself, however, suggests a distinction between substantive and administrative laws.").

198 *Id*. at 1779.

199 *See id*. at 1780-81.

200 *Id*. at 1781(citing *Blanchette*, 419 U.S. at 159).

201 *Id*.

202 *Id*. at 1782.

203 *See Fitzgerald*, 142 S. Ct. at 1782.

204 *Id*.

Chapter 9 amendment gave states the ultimate authority to deny Chapter 9 protections to insolvent municipalities within their jurisdiction.

V. STATE AUTHORIZATION

The Supreme Court, in *Bekins*, made clear that state authorization is a prerequisite for a municipality to file a bankruptcy petition in federal court.[205] For years, the Bankruptcy Code allowed municipalities to file for Chapter 9 bankruptcy if "it was 'generally authorized' to do so under state law."[206] A majority of courts interpreted this language broadly, meaning that "the authority to file could be implied from the general powers granted to a municipality by the state."[207] One Tennessee state court held that the term "means only that the state should give some indication that the municipality has the necessary power to seek relief under the federal bankruptcy law."[208] The court ruled that the state had indeed authorized the debtor municipality "because the state of Tennessee had vested the municipality with 'broad powers, including the ability to sue and be sued, to make and enter contracts, and to incur debts.'"[209]

Some courts, however, did not infer a broad grant of implied authorization, which "yielded unpredictable results across the country."[210] For example, in *In re Carroll Township Authority*, the federal bankruptcy court determined that "only affirmative action from the state would suffice to demonstrate such power."[211]

Congress responded to these differing interpretations by passing the Bankruptcy Reform Act of 1994, which, amongst other changes, amended the Bankruptcy Code[212] to replace "generally authorized" with "specifically authorized."[213] Under the new standard, state authorization must not only be

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205 *Bekins*, 304 U.S. at 51 ("[n]o involuntary proceedings are allowable").

206 Municipal Bankruptcy – State Authorization, 15 MCQUILLIN MUN. CORP. §39:75 (3d ed. 2021).

207 Peter J. Benvenutti & Joseph M. Witalec, *State Law Authorization for a Chapter 9 Filing, in* CHAPTER 9 BANKRUPTCY STRATEGIES: LEADING LAWYERS ON NAVIGATING THE CHAPTER 9 FILING PROCESS, COUNSELING MUNICIPALITIES, AND ANALYZING RECENT TRENDS AND CASES 35 (2011).

208 *Id*. (citing In re Pleasant View Utility Dist., 24 B.R. 632, 638 (Bankr. M.D. Tenn. 1982)).

209 *Id*. (quoting *Pleasant View Utility Dist.*, 24 B.R. at 638-39).

210 Hoffman, *supra* note 9, at 221 (citing Daniel J. Freyberg, Note, *Municipal Bankruptcy and Express State Authorization to be a Chapter 9 Debtor:Current State Approaches to Municipal Insolvency – And What Will State Do Now?*, 23 OHIO N.U. L. REV. 1001, 1007 (1997)).

211 Daniel J. Freyberg, Note, *Municipal Bankruptcy and Express State Authorization to be a Chapter 9 Debtor: Current State Approaches to Municipal Insolvency – And What Will State Do Now?*, 23 OHIO N.U. L. REV. 1001, 1007 (1997) (citing *In re* Carroll Twp. Auth., 119 B.R. 61, 63 (Bankr. W.D. Penn. 1990)).

212 11 U.S.C. § 109(c)(2).

213 Hoffman, *supra* note 9, at 222.

recorded in writing, but "also must be exact, plain, and direct with well-defined limits so that nothing is left to inference or implication."[214]

Requiring express action on the part of the states raises serious questions: What happens if states don't authorize bankrupt municipalities to file for Chapter 9, and how does that affect the uniformity of the Bankruptcy Code? Approximately only fifteen states currently have laws granting their municipalities the right to file for Chapter 9 Bankruptcy, "[w]hile Georgia expressly forbids municipalities for filing for bankruptcy under any circumstances."[215]

The answer to the latter question may depend largely on how the Supreme Court's *Siegel* decision is interpreted. In *Siegel*, the Court states that:

> [t]he problems prompting Congress' disparate treatment in this case, however, stem not from an external and geographically isolated need, but from Congress' own decision to create a dual bankruptcy system funded through different mechanisms in which only districts in two States could opt into the more favorable fee system for debtors.[216]

It could be argued that by mandating state authorization for Chapter 9 filings, Congress created a dual bankruptcy system for those municipalities that exist in states that authorize Chapter 9 filings, and those who reside in states that do not. However, it could also be argued that this distinction is not a problem created by Congress, but rather a problem created by a state government and isolated to that state's geographic area. If the latter argument is accepted, then the state authorization requirement appears to fit neatly within the isolated geographic problem exception.

If the Supreme Court follows the Second and Tenth Circuits' reasoning, it may conclude that all municipal debtors belong to the same "defined class."[217] It may also conclude that excluding some municipalities from the mere possibility of bankruptcy relief, simply because their state has failed to codify a Chapter 9 authorization policy, may constitute an "arbitrary geographic"[218] distinction. Even then, federalism considerations would make it extremely difficult for the Court to eliminate the authorization requirement completely.[219]

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214 *Cnty. of Orange*, 183 B.R. at 604 (quoting *Express Authority*, BLACK'S LAW DICTIONARY (6th ed. 1990)) ("Express authority is defined as '[t]hat which confers power to do a particular identical thing set forth and declared exactly, plainly, and directly with well-defined limits.").

215 Hoffman, *supra* note 9, at 221.

216 *Fitzgerald*, 142 S. Ct. at 1782.

217 *See Clinton Nurseries*, 998 F.3d at 68; *Hammons*, 15 F.4th 1011.

218 *Cir. City Stores*, 996 F.3d. at 166.

219 *See generally* Dawson, *supra* note 3.

This problem may be avoided if Congress changes the statutory authorization standard to more accurately reflect when states *functionally* authorize municipalities to become insolvent, rather than simply leaving states the opportunity to deny municipalities the opportunity for relief after they have already become insolvent. Phrased another way, municipalities do not create their own authority to exist and incur debt; these powers are granted by the state.

The relationship between a state's delegation of political authority and the accumulation of its political subdivisions' debt raises even more questions. Do states have the right to create political subdivisions that can unilaterally incur debt without expressed state permission, while simultaneously denying those semi-autonomous subdivisions any opportunity to seek relief under the Federal Bankruptcy Code? Additionally, if the federal government has the exclusive constitutional authority to resolve unresolvable debts, do states have the right to both create debtors, then keep those debtors completely outside of the domain of federal bankruptcy laws?

Ideally, a revised authorization statute would account for the federal government's interest in maintaining a uniform and comprehensive bankruptcy code, while giving states adequate notice as to what delegated powers would result in municipalities becoming authorized to file for Chapter 9 protection. This would finally result in all municipalities being treated equally under the Bankruptcy Code while giving states the opportunity to adjust the powers of their municipalities based on whether they want those subdivisions to be able to file for Chapter 9 protections.

VI. THE *BRIDGEPORT* STANDARD: IMPLIED AND CLEAR

When determining the best standard for implied state authorization, a logical starting point is the purpose of the Bankruptcy Clause itself. While there is very little evidence of what the framers meant by "uniform," there is some historical evidence that sheds light on the provision's purpose.[220] James Madison argued that uniform bankruptcy laws were so "intimately connected with the regulation of commerce," that the increased efficiency of such a system would be obvious.[221] The idea that uniform bankruptcy laws are tied to the regulation of interstate commerce is bolstered by the contention that the primary purpose of the Bankruptcy Clause is to protect creditors, rather

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220 Schulman, *supra* note 108, at 99.

221 THE FEDERALIST No. 42 (James Madison) ("The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie of be removed to different states, that the expediency of it seems not likely to be drawn into question").

than debtors.[222] This position is also supported by Judge Posner, who wrote that protecting creditors through the uniformity requirement "was a major objective of the framers of the Constitution."[223] Preventing disparate impacts on creditors, for no reason other than geographic location, fits squarely within Madison's attributed purpose for uniform bankruptcy laws.[224]

In the context of municipal bankruptcy, the effects on interstate commerce are obvious. As of 2021, the municipal bond market has grown into a $4.2 trillion behemoth.[225] With a plurality of bonds held by households and non-profits, it can be assumed that affected creditors could be found not only across the United States but across the globe.[226] When a municipality is deemed insolvent, as defined in the U.S. Code,[227] bankruptcy proceedings may represent the creditors' only reasonable opportunity to collect on those outstanding liabilities.

A situation could arise where a state decides whether to authorize a municipality to petition for Chapter 9 protections depending on the percentage of bondholders located within that state, as opposed to out-of-state bondholders. Therefore, allowing states to remove municipal bondholders from the bankruptcy system completely appears to contradict the purpose of the Bankruptcy Clause, as expressed by Madison.[228]

If a municipality becomes insolvent and cannot come to an agreement with its creditors on how to resolve the outstanding obligations, then the creditors' only hope for recovery may be through Chapter 9 proceedings. However, if that municipality is barred from filing a Chapter 9 petition, creditors could be left without any reasonable recourse. One solution to this problem is to link Chapter 9 eligibility to the main objective of the Bankruptcy Clause: Protecting creditors from insolvent debtors.[229] This can be achieved by embracing the implied authorization standards articulated by bankruptcy courts before Congress decided to eliminate the "generally authorized" language in Chapter 9.[230] One such example of this involved a bankruptcy petition submitted by the city of Bridgeport, Connecticut.[231]

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222 Todd J. Zywicki, *Bankruptcy*, ECONLIB, https://www.econlib.org/library/Enc/Bankruptcy.html (last visited Nov. 8, 2022).

223 *Reese*, 91 F.3d. at 39.

224 *See* THE FEDERALIST No. 42 (James Madison).

225 *Trends in Municipal Bond Ownership*, MSRB, https://msrb.org/sites/default/files/2022-09/MSRB-Brief-Trends-Bond-Ownership.pdf (last visited Nov. 8, 2022).

226 *Id*.

227 11 U.S.C. § 101(32)(C) ("financial condition such that the municipality is generally not paying its debts as they become due unless debts are the subject of a bona fide dispute; or unable to pay its debts as they become due").

228 *See* THE FEDERALIST No. 42 (James Madison).

229 *See Reese*, 91 F.3d. at 39.

230 Hoffman, *supra* note 9, at 222.

231 *See generally* In re City of Bridgeport, 128 B.R. 688, 692 (Bankr. D. Conn. 1991).

In 1988, Bridgeport's municipal budget deficit was expected to reach $34.4 million.[232] Some attributed Bridgeport's financial woes to the idea that it was a "one-time manufacturing hub whose jobs went overseas as factories moved away in the late 20th Century."[233] With an eroding tax base and an increasingly dire financial situation, Bridgeport agreed to let the state monitor its finances through the Bridgeport Financial Review Board (The Board), in exchange for the state's backing of $58.3 million in bonds to erase the municipalities deficit.[234] This, however, did not end the city's fiscal troubles.

In 1991, Bridgeport's budget deficit was expected to increase to $55 million within the next year, then balloon to approximately $250 million within five years.[235] The recently elected Republican mayor, Mary Moran, believed that the city's problems were caused by excessively generous union contracts.[236] To address this issue, the city filed a Chapter 9 petition later that year.[237]

The Board, along with the State of Connecticut, objected to the bankruptcy petition on the basis that Bridgeport was not authorized to be a debtor under state law.[238] The State further argued that "a city is not generally authorized to be a debtor under Chapter 9 unless the state permits the city to control its own operation and financial affairs, including its ability to incur debt, and the state deprived Bridgeport of such control."[239]

The bankruptcy court rejected this assertion and determined that the City of Bridgeport was "generally authorized by state law to be a debtor," and therefore, the city was authorized under Chapter 9.[240] The court pointed to the state's "home rule legislation" as an indication that the state had effectively granted Bridgeport debtor authorization.[241] The home-rule statute at issue empowered cities to "make contracts, institute actions and proceedings, establish and maintain a budget, assess and collect taxes,

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232 Associated Press, *Bucci Offers Huge Tax Increase to Cure Crisis*, THE HOUR (Apr. 6, 1988), https://news.google.com/newspapers?id=pCpJAAAAIBAJ&sjid=uQYNAAAAIBAJ&pg=1112,728057.

233 Alena Semeuls, *The Epicenter of American Inequality*, THE ATLANTIC, (Sept. 23, 2016), https://www.theatlantic.com/business/archive/2016/09/378airfield-county/501215/.

234 *Bucci Offers Huge Tax Increase to Cure Crisis*, *supra* note 232.

235 *City of Bridgeport*, 128 B.R. at 692.

236 Mary C. Moran, *In 1991, bankruptcy was best for Bridgeport*, CTPOST (Sept. 14, 2012), https://www.ctpost.com/opinion/article/In-1991-bankruptcy-was-best-for-Bridgeport-3866176.php.

237 *Id*.

238 *City of Bridgeport*, 128 B.R. at 691.

239 *Id*. at 692-93.

240 *Id*. at 703.

241 *Id*. at 698.

borrow,[242] purchase property, provide for public services . . . and construct public works."[243]

Under this standard, the operative question is "has [the state] delegated to its cities home rule authority as to which the right to be a debtor is an appropriate part"?[244] Following this approach, states would not be able to completely remove heavily indebted municipalities from the federal bankruptcy scheme, thus guaranteeing that out-of-state creditors would have some involvement in recovering liabilities from insolvent municipalities.

This standard not only addresses the issue of insolvent municipalities being categorically removed from the federal bankruptcy system, but also provides states with a clear basis for preventing municipalities from filing for Chapter 9 protections at all. States could simply deny their municipalities the right to incur their own debt without state oversight.

The court in *Bridgeport* dismissed the state's argument that the creation of the Financial Review Board eliminated Bridgeport's status as an independent debtor.[245] The court reasoned that while the Board did forbid the city from borrowing without Board approval, that "does not affect obligations incurred by Bridgeport prior to its passage."[246] Therefore, under the *Bridgeport* standard, if states want to limit their municipalities' ability to discharge debt through Chapter 9 bankruptcy, they can simply limit their municipalities' ability to borrow independently.[247] Under this standard, any debt incurred after that point can be removed from Chapter 9 proceedings by the state.[248]

This approach would limit states' abilities to prevent municipalities from filing for Chapter 9 protections, but it would still allow them broad latitude to limit municipal debt.[249] Currently, states have utilized numerous strategies to control municipal debt, with a presumptive intent of preventing insolvency.[250] Kansas, for example, essentially prohibits independently incurred debt by its political subdivisions by requiring that they operate on a cash-only basis.[251] Under the *Bridgeport*[252] standard, Kansas would presumably have a valid objection to a municipal bankruptcy petition since

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242 Italicized for emphasis.
243 *City of Bridgeport*, 128 B.R. at 698.
244 *Id*. at 696.
245 *Id*. at 701("the Special Act neither effects Bridgeport's authority to conduct day to day operations not its right to institute proceedings, including bankruptcy").
246 *Id*. at 700.
247 *Id*.
248 *Id*.
249 *City of Bridgeport*, 128 B.R. at 700.
250 *See* Freyberg, *supra* note 211, at 1015.
251 *Id*.
252 *City of Bridgeport*, 128 B.R. at 700.

the state has not "delegated to its cities home rule authority as to which the right to be a debtor is an appropriate part."[253]

Massachusetts also has a unique system that would allow it to prevent its municipalities from filing a Chapter 9 petition.[254] Under Massachusetts law, if a municipality is unable to pay its debtors, it must notify the Commissioner of Revenue.[255] If the Commissioner of Revenue agrees that the municipality cannot pay its debtors, then the money owed by the municipality will be paid by the State Treasurer, and the state then has the right to recover that amount, plus costs and interests, "from the money otherwise payable from the state to the local entity."[256] This system would also allow the state to prevent a Chapter 9 filing by preventing insolvency in the first place.

VII. CONCLUSION

The U.S. system of federalism poses unique problems in resolving debt incurred by insolvent municipalities.[257] The Bankruptcy and Supremacy Clauses make it impossible for states to establish intrastate municipal bankruptcy proceedings since the federal government has already occupied that field.[258] Additionally, the Contracts Clause prevents states from adjusting existing debts held by any given municipality's creditors.[259] Conversely, while the federal government has nearly exclusive power to discharge municipal debt, federalism considerations currently make it impossible for the federal government to remove state authorization from Chapter 9's procedures completely.[260]

For nearly one hundred years, municipal bankruptcy laws have balanced federalism and uniformity by granting the states veto power over municipal bankruptcy petitions.[261] However, the Supreme Court's recent decision in *Siegel v. Fitzgerald* casts some doubt that the status quo balance between federalism and uniformity can continue.[262] Since the Court appears to consider all Chapter 11 debtors as members of the same defined class, regardless of whether they are located in BA or TA districts, then it may

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253 *Id*. at 696.

254 *See* Freyberg, supra note 211, at 1015.

255 *Id*.

256 *Id*.

257 *See Ashton*, 298 U.S. at 524.

258 *See* Dylan Lackowitz, *Federal Preemption and the Bankruptcy Code: At what Point does State Law Cease to Apply during the Claims Allowance Process?*, 9 ST. JOHN'S BANKR. RSCH. LIBR. NO. 14 (2017), https://www.stjohns.edu/sites/default/files/uploads/lackowitz_abi.pdf.

259 Laura N. Coordes, *Gatekeepers Gone Wrong: Reforming the Chapter 9 Eligibility Rules*, 94 WASH. U. L. REV. 1191, 1207 (2017).

260 *See Bekins*, 304 U.S. at 54.

261 *Fitzgerald*, 142 U.S. at 1176.

262 *Id*.

consider all Chapter 9 municipal debtors as members of the same defined class as well.[263] Furthermore, if the Court considers the current mismatch between the states of different standards and procedures for Chapter 9 authorization as "arbitrary geographic" distinctions, then the current state authorization statute would almost certainly be struck down for violating the Bankruptcy Clause's uniformity requirement.

The next step would be to create a new standard for state authorization that maintains uniformity while respecting a state's right to control its own political subdivisions. Applying the *Bridgeport*[264] standard to Chapter 9 state authorizations would not preclude states from successfully objecting to Chapter 9 petitions, and it certainly would not prevent states from adopting policies that curtail runaway municipal debt. Rather, it recognizes the federal government's interest in maintaining a comprehensive and uniform bankruptcy system by implying that states authorize their subdivisions to independently file for Chapter 9 protections when they *functionally*[265] authorize their subdivisions to become independent debtors. This standard would also respect states' rights by giving states the ability to prevent their political subdivisions from filing Chapter 9 petitions by simply denying them the ability to incur substantial debts without state approval. By recognizing these historically competing constitutional requirements, the *Bridgeport*[266] standard would guarantee a constitutionally sound system of uniform municipal bankruptcy laws.

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263 *Id*.

264 Italicized for emphasis.

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