Defining the Relationship Between Municipal Bankruptcy and Modern Federalism Jurisprudence

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Online ISSN: 2643-7759

Recommended Citation
John A. Livingston, Defining the Relationship Between Municipal Bankruptcy and Modern Federalism Jurisprudence, 18 FIU L. Rev. 879 (2024).
DOI: https://dx.doi.org/10.25148/lawrev.18.4.13

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I. INTRODUCTION

As the COVID-19 pandemic ravaged health systems and upended the United States’ economy, municipalities have found themselves considering bankruptcy as a means for overcoming unique financial challenges. Once-stable regional enterprises, such as healthcare systems and energy distributors, are beginning to buckle under the burden placed on them during the pandemic. With our national economy slowing and federal pandemic aid drying up, reliance on municipal bankruptcy proceedings under Chapter 9 of the Bankruptcy Code could soon rise to levels not seen since the 2008 recession.

Building on the lessons learned over a decade prior from the subprime mortgage crisis, Chapter 9 reform has become a growing body of scholarly debate. Scholars have criticized Chapter 9 as dysfunctional and inefficient

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* Juris Doctor Candidate, 2024, Florida International University College of Law. My sincerest thanks to the Honorable Laurel M. Isicoff (Bankr. S.D. Fla.) for igniting my interest in bankruptcy law while interning in her chambers and for her continued support thereafter.
because it does not provide bankruptcy courts the power to interfere with the political will of the municipal debtor. Examples of authorities sought by such scholars include the ability to impose tax increases and service reductions or to conduct oversight of politicians’ fiscal decision-making.

This Article argues that the proposed reforms to further empower bankruptcy courts in Chapter 9 proceedings are constitutionally infirm in light of doctrines of federalism, which protect state sovereignty from federal interference.

Part II of this Article provides a brief history of Chapter 9 and discusses the recent rise of municipal bankruptcy as a means for solving financial crises in a post-pandemic world. Part III summarizes the academic developments in reforming Chapter 9 to better empower bankruptcy courts in resolving municipal financial crises. Part IV analyzes the Supreme Court’s contemporary understanding of federalism and how such doctrines relate to the constitutional limits of federal bankruptcy courts. Building on that analytical framework, Part V conceptualizes the limits of municipal bankruptcy law as necessary features of federalism that nevertheless give room for Chapter 9 to be an invaluable tool to address fiscal crises.

II. MUNICIPAL BANKRUPTCY

A. A Brief History

The Bankruptcy Clause states that “[t]he Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . .” Yet in the century-and-a-half following ratification, municipal bankruptcy legislation was nonexistent at both the state and federal level. That changed in the midst of the Great Depression, as states were unable to provide relief to municipalities struggling to service their debt. Congress passed its first iteration of Chapter 9 (then Chapter IX) in May 1934, and two years later the Supreme Court struck it down as unconstitutionally interfering with states and their political subdivisions. Congress made minor revisions to its municipal bankruptcy law in 1937, and in 1938, the Supreme Court revisited its earlier decision, this time upholding

1 U.S. CONST. art. I, § 8, cl. 4.
5 Ashton, 298 U.S. at 531–32.
Chapter IX as “in aid” of state sovereignty rather than a derogation of it. But the 1937 Act was intended to be a temporary emergency measure, with an automatic sunset in 1940. Instead, it remained unchanged until 1976.

The 70s presented another municipal debt crisis, this time caused by a wave of tax reforms that swept the nation. These new laws placed limits on income and property taxes, depressing municipal budgets. In response, Congress fundamentally changed Chapter 9 to better reflect business reorganization proceedings under Chapter 11, which were seen as more successful. This is perhaps due to Chapter 11’s ability to confirm negotiated debt plans as in the best interests of the debtor and creditors as a group, notwithstanding the holdouts of a minority of creditors. Nevertheless, Congress retained features from earlier Chapter 9 iterations that were intended to protect federalism concerns. Surprisingly, the corporate-adjacent version of Chapter 9 remained wholly intact as it weathered the next big financial crisis—the 2007–2008 subprime mortgage meltdown. In the years that followed, Chapter 9 filings repeatedly broke records as the largest municipal bankruptcies in American history.

When the city of Vallejo, California, filed in 2008 due to a recession-based slump in tax revenues, its deficit had reached $18 million. Filing enabled it to reject its obligations to organized labor that had ballooned to $79.4 million of its $95 million annual budget. Notably, the city did not seek a discharge of its pension liabilities, which by then had reached $195

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8 Municipal Bankruptcy Act of 1937 § 84.
11 Id. at 1267 n.7.
13 McConnell & Picker, supra note 2, at 450–51.
14 See infra text accompanying note 76.
18 See In re City of Vallejo, 408 B.R. 280, 287 (B.A.P. 9th Cir. 2009).
million.19 Vallejo’s notoriety was soon engulfed by Jefferson County, Alabama’s 2011 filing that involved $4.23 billion in debt—then the largest amount of municipal debt in a Chapter 9 proceeding.20 Most of the county’s debt could be traced to sewer system financing that occurred between 1997 and 2003, for which county commissioners made the poor decision to use variable rates.21 When the municipal bond markets became illiquid in 2007, the shortsightedness of financing long-term debt based on short-term interest rates became the final nail in the county’s budgetary coffin.22 Both Vallejo and Jefferson County exited bankruptcy with confirmed debt restructuring plans and, despite bumps in the road, have remained solvent.

In June 2012, Stockton, California, became the most populous city to file for bankruptcy, with debts exceeding $4 billion.23 Stockton was one of the hardest hit cities by the housing market’s collapse; property values had declined by 50% and foreclosure rates were topping national charts.24 Like nearby Vallejo, insolvency became unavoidable as tax revenues plummeted amid high labor costs.25 Two months after Stockton, San Bernardino became the third city in California to file for bankruptcy, citing the same causes for its $45 million annual deficit and over $1 billion in liabilities.26 Stockton and San Bernardino both achieved plan confirmation and have avoided running a budget deficit thus far.27 Detroit, Michigan’s $18 billion filing in 2013 is by far the largest municipal bankruptcy in American history, even today.28 Like

21 In re Jefferson Cnty., 474 B.R. at 237, 240.
22 Id. at 240 n.1.
24 In re City of Stockton, 493 B.R. 772, 778 (Bankr. E.D. Cal. 2013).
25 See id. at 779.
others, Detroit’s poor financial management over pension liabilities created its budget crisis, and it exited bankruptcy with a path forward by eliminating over $7 billion in liabilities.²⁹

More recently, Puerto Rico has been an interesting example into the limits of municipal bankruptcy. Puerto Rico’s status is unique in that, for reasons unknown,³⁰ Congress excluded the territory from Chapter 9 eligibility in a 1984 amendment to section 101(52).³¹ When the insurmountable $70 billion debt of Puerto Rico’s public service corporations caused the island to lose its investment bond rating in 2014,³² Puerto Rico attempted to create its own Chapter 9 at the territory level.³³ In Puerto Rico v. Franklin California Tax-Free Trust, the Supreme Court ruled that even though section 101(52) excluded Puerto Rico from Chapter 9 relief, the territory is still a “state” under section 109(c).³⁴ Therefore, section 903(1) federally preempted Puerto Rico from enacting any municipal bankruptcy laws.³⁵ In response to the Court’s ruling, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”),³⁶ which created a debt restructuring process akin to that available in Chapter 9 and established a financial oversight board to manage the island’s budget.³⁷

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³⁵ Id. at 126–28.
Nevertheless, the buzz of Chapter 9 has lullèd from its peak during the 2008 financial crisis. Today, municipal bankruptcy is beginning to be the subject of renewed interest in a post-pandemic economy.

**FIGURE 1.** Chapter 9 cases filed, during the 12-month periods ending March 31.\(^{38}\)

From March 2021 to March 2022, Chapter 9 filings grew thirty-three percent.\(^{39}\) Multiple factors could be contributing to this trend. For one, research suggests that municipal bond investors price statewide lockdowns as negative financial events, which increases the borrowing cost of issuers in the municipal bond market.\(^{40}\) This increased volatility can exacerbate municipal budgetary strains if poor management is at the helm. Furthermore, a majority of states are reckoning with massive budget surpluses as inflation drives up their tax revenues.\(^{41}\) While state legislatures set out on unprecedented spending sprees, economists warn of the looming challenge: slowed revenue growth due to persistently high inflation and a tapering of


federal COVID-19 aid. If the next generation of state and local government leaders fail to use better judgment, municipal bankruptcies could soon reach 2013 levels before the end of the decade.

B. Pandemic Pressures

Through myriad ways, the pandemic has created or exacerbated fiscal crises in once-stable enterprises. Two sectors stand out as particularly affected: the healthcare industry and municipal entities.

1. Healthcare Industry

COVID-19 has greatly impacted the healthcare industry—hospitals especially. According to the American Hospital Association, for the period of March to June 2020, hospitals suffered $202.6 billion in losses. Many factors have contributed to such an impact, including the cancellation of all elective surgeries, significant reductions in emergency room visits, increased costs of personal protective equipment, labor issues, and even the cancellation of several high-profile mergers and acquisitions.

But the industry’s doom and gloom narrative is not immune to skepticism. After all, Congress appropriated funds to reimburse health care providers for health care-related expenses or lost revenues attributable to COVID-19 through several laws, including the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), the Paycheck Protection Program and Health Care Enhancement Act (the “PPP Act”), the Coronavirus Response and Relief Supplemental Appropriations Act (the

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“CRRSA Act”), 48 and the American Rescue Plan Act of 2021. 49 The CARES Act created an emergency fund that, with appropriations from the subsequent laws, has awarded $161 billion to date in outlays to bolster hospitals, in addition to $6.8 billion in reimbursements for uninsured patients receiving COVID-19 testing, treatment, and vaccination. 50 Separately, financial support to healthcare entities under the PPP Act totaled $58 billion in 2020 alone, or 11% of all PPP-loaned dollars. 51 And Medicare and Medicaid spending grew substantially during the pandemic as enrollment peaked, buoying providers’ revenues. 52

Despite the federal government’s stimulus in health expenditures, the pandemic’s casualties continue to mount. The University of North Carolina at Chapel Hill maintains a database of rural hospital closures and has tallied thirty-three closures since the COVID-19 pandemic, with nineteen in 2020 alone. 53 Faith Community Health System, a rural hospital district near Fort Worth, Texas, feared being part of that tally when it filed for Chapter 9 bankruptcy in 2020, citing increased operational strain as a result of the COVID-19 pandemic. 54 Specifically, Faith Community named Texas’ emergency order that hospitals cancel all non-essential medical procedures, which “significantly curtailed” its income. 55 It also blamed increased labor costs due to emergency paid leave requirements enacted under the federal Families First Coronavirus Response Act. 56 Despite its bankruptcy petition,

55 Id. ¶ 20.
Faith Community was added to the rural hospital closure database in February 2023. The database could soon need new entries, as more Chapter 9 bankruptcies of healthcare districts seem imminent.

2. General Municipal Entities

In addition to the healthcare industry, general municipal entities have also been significantly affected by the pandemic, with some experiencing budget crises that were either created or worsened by the pandemic.

Western Community Energy, a rural electricity provider in Southern California, filed for Chapter 9 protection in May 2021. It blamed its fiscal crisis in part on customers who stopped paying during the pandemic, which was exacerbated by the California governor’s emergency order prohibiting the disconnection of energy services to non-paying customers. The energy provider closed permanently just a few weeks later, transferring its customers to a private utility. The unanticipated impacts of statewide emergency orders are a common thread in many pandemic petitions, evidencing how once-stable enterprises are beginning to buckle under the burdens placed on them during the pandemic.

57 Rural Hospital Closures, supra note 53.
However, the pandemic seemingly has been only a small contributing factor to other municipal entities’ budget crises, with bad leadership being mostly to blame. In June 2021, the Texas Student Housing Authority filed for Chapter 9 bankruptcy protection. The organization owns and manages off-campus housing near the University of North Texas in Denton and Texas A&M University in College Station. While the Authority contended that the pandemic brought about its filing, some opined that it was insolvent due to bonds it issued years ago for troubled private student housing projects.

Perhaps the most notable example of mismanagement is Chester, Pennsylvania, a city of over 32,000 outside of Philadelphia. In 1995, the state designated Chester as a distressed city and subjected it to oversight due to its multimillion-dollar deficits. In June 2020, as the pandemic began to take its toll, the state finally put Chester in a receivership. Yet, after two years of effort to reduce spending and increase efficiencies, the city’s receiver determined that Chapter 9 bankruptcy relief was necessary to resolve the budget crisis, filing its petition in November 2022.

The COVID-19 pandemic has created or exacerbated fiscal crises in the healthcare industry and with general municipal entities. While federal stimulus efforts have provided financial support, municipal bankruptcy filings persist due to various factors, including the pandemic, but also bad leadership and fiscal mismanagement. Warren Buffett’s infamous addition to the aphorism a rising tide lifts all boats comes to mind—"you only find out who is swimming naked when the tide goes out." As the national economy slows, a swath of naked swimmers could soon be filing for Chapter 9 bankruptcy relief.


65 Id.


67 Motion of Debtor for Entry of an Order (A) Directing and Approving Form of Notice of Commencement of Case and Manner of Service and Publication of Notice, (B) Establishing a Deadline for Objections to Eligibility, and (C) Granting Related Relief at ¶ 5, In re City of Chester, No. 2:22-bk-13032 (Bankr. E.D. Pa. Nov. 10, 2022), ECF No. 8.

68 Id. ¶¶ 6–7.

69 Id. ¶¶ 9–10.

III. CHAPTER 9 REFORMATION

And therein lies the problem: bankruptcy scholars persistently lament about the dysfunction of Chapter 9 and how little use it serves. Such dysfunction purportedly exists in part because Chapter 9 was an attempt by Congress to transplant the successful structure of business reorganizations under Chapter 11. In the three decades since Michael McConnell and Randal Picker first assessed the limits placed on bankruptcy courts in municipal bankruptcy proceedings by doctrines of federalism, the topic has maintained the legal academy’s interest and sparked divergent reform proposals.

According to McConnell and Picker, Chapter 9 “arose in a context of substantial uncertainty over the appropriate relationship between federal and state law,” which still exists today. This constitutional uncertainty caused Congress to impose a series of restrictions, one of which being the requirement of state authorization to file under sections 109(c)(2) and 903, and another being the preservation of municipalities’ political powers under section 904. McConnell and Picker view these restrictions as enshrining doctrines of federalism, or federal noninterference in state and local government, because state laws routinely impose an override of local politicians’ authority.

In examining the constitutional contours of expanding the bankruptcy courts’ powers, McConnell and Picker pointed out an obvious limit that does not exist in private bankruptcy: involuntary municipal bankruptcy. The authors dismissed the state authorization requirement under section 904 as a potential solution for two reasons. First, a federal bankruptcy court coercively assuming “municipal powers of taxation, property disposition,

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71 See, e.g., McConnell & Picker, supra note 2, at 470; Kimhi, supra note 12, at 380; Dawson, supra note 30, at 33.
72 See Kimhi, supra note 12, at 368–69.
73 McConnell & Picker, supra note 2, at 472.
75 McConnell & Picker, supra note 2, at 454.
76 Id. at 457.
77 See U.S. CONST. amend. X; McConnell & Picker, supra note 2, at 462–63.
78 McConnell & Picker, supra note 2, at 463.
79 Id. at 478–79.
80 Id.
and spending—even with state authorization—” immediately raises separation of powers concerns. And relatedly, the unconstitutional conditions doctrine would prevent federal courts from conditioning the substantial benefit of a discharge on states and their cities waiving such constitutional rights. Second, if a state’s authorization of municipal bankruptcy was permissive—meaning the decision to file is ultimately left with the municipality—then an involuntary proceeding could occur despite neither the state nor the municipality affirmatively authorizing it. The authors posited that exercising such a federal power would refuse to give effect to the state’s decision to permissively authorize municipal bankruptcy. This position was based on the then-infant doctrine of anti-commandeering announced in *New York v. United States*. Notably, the authors correctly foreshadowed the anti-commandeering doctrine’s younger sister, the anti-coercion doctrine, when they argued that Congress could not constitutionally condition federal monies on states authorizing involuntary bankruptcies of its municipalities.

Ultimately, McConnell and Picker took a limited view of the federal government’s role in municipal bankruptcy, arguing that Chapter 9 ought not to exist at all. They concluded that it would be wholly inconsistent with our federal system to give federal bankruptcy courts the powers necessary to deal with “cities that have gone broke.” Therefore, they recommended that Congress repeal Chapter 9 and instead empower states to establish municipal bankruptcy courts. Professor Omer Kimhi similarly found Chapter 9 problematic because it is unable to provide municipalities with a fresh start when their fiscal crises have structural origins. Agreeing with McConnell and Picker, Professor Kimhi believed states are better situated than federal bankruptcy courts to remedy the socioeconomic and political factors that create municipal fiscal crises.

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81 *Id.* at 478.
82 *Id.* at 478 n.220.
83 *Id.* at 478–79.
84 *Id.* at 479.
85 *See infra* Part IV.A.
86 McConnell & Picker, *supra* note 2, at 479 n.221 (arguing that a federal statute allowing involuntary bankruptcy in the absence of affirmative state authorization “rests upon the view that Congress has authority to impose conditions on its expenditure of funds. Such a principle, if extended to other federal powers, would swallow up federalism principles.” (citation omitted)).
87 *Id.* at 479.
88 *Id.* at 479, 494.
89 *Id.* at 479.
91 *Id.* at 385–87.
Yet Professor Clayton Gillette finds the importance of the noninterference principle’s presence in section 904 to be misguided.92 He and Professor David Skeel take the opposite position of McConnell and Picker, construing section 904 to include a “large escape hatch” that allows the bankruptcy court to implement governance reforms so long as the debtor consents.93 Even where such consent is not given, Professor Gillette contends that bankruptcy courts may still indirectly impose higher taxes or reduced services.94 Specifically, he argues that judges can exercise the discretion entrusted to them at three stages of a Chapter 9 proceeding to condition relief on a municipality’s acceptance of such resource adjustments.95

First, the court has discretion over whether a municipality must use revenue-raising capacity before claiming inability to pay its debts.96 Second, the court can evaluate a municipality’s good faith negotiations by taking into account its willingness to increase taxes.97 Third, the court can exercise discretion when confirming a plan for adjusting municipal debts to ensure that the amount received by creditors under the plan is all they can reasonably expect, given the municipality’s circumstances, which can include the fiscal capacity of the debtor to bear additional resource adjustments.98 Professor Gillette also suggests that allowing relief under bankruptcy law is impliedly contingent on a finding that destitution, rather than a lack of political will, was responsible for the locality’s failure to satisfy obligations.99

Taking Professor Gillette’s perspective even further, Colin McGrath argues that the Bankruptcy Clause is an exception to notions of federalism and provides bankruptcy courts with constitutional authority to intervene in the core functions of local governments.100 McGrath bases his position on what he perceives to be a limited scope of the doctrine of federalism in Chapter 9.101 McGrath seemingly points to the dispensation of any anti-

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92 Gillette, supra note 74, at 298.
93 Gillette & Skeel, Jr., supra note 74, at 1204.
94 Gillette, supra note 74, at 293.
95 Id. at 293–95.
96 Id. at 293; see also 11 U.S.C. § 109(c)(3) (“An entity may be a debtor under chapter 9 of this title if and only if such entity is insolvent.”); 11 U.S.C. § 101(32)(C)(i)-(ii) (“The term ‘insolvent’ means with reference to a municipality, financial condition such that the municipality is (i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or (ii) unable to pay its debts as they become due.”).
97 Gillette, supra note 74, at 294; see also 11 U.S.C. §109(c)(5)(B) (“An entity may be a debtor under chapter 9 of this title if and only if such entity has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter.”).
98 Gillette, supra note 74, at 294–95.
99 Id. at 295.
100 McGrath, supra note 10, at 1296, 1306.
101 Id. at 1297.
 commandeering doctrine-adjacent arguments in early bankruptcy proceedings, where courts compelled state officials to release debtors from debtors’ prisons.\textsuperscript{102} McGrath further posited that increased federal authority in municipal bankruptcy is desirable, as it guards the interests of the municipality’s residents by ensuring accountability in governance.\textsuperscript{103}

In contrast, Professor Andrew Dawson sees Chapter 9 as taking a formalist approach to doctrines of federalism by treating financial and operational restructuring as separate and independent exercises, with federal bankruptcy law only authorizing interference with the former.\textsuperscript{104} Professor Dawson argues that the formalist approach in Chapter 9 does not strike the right balance between the competing interests of state sovereignty and federal supremacy.\textsuperscript{105} Calling on Professor Gillette’s scholarship, he warns that the formalist approach obscures the real analysis, potentially giving bankruptcy courts the ability to “exercise considerable control over municipal governance under the guise of debt restructuring.”\textsuperscript{106} Instead, Professor Dawson advocates for a functional approach—one that allows for explicit interference with a bankrupt municipality’s power to control governance matters, but limited to the goal of restructuring the municipality’s finances.\textsuperscript{107} He finds constitutional affirmation of such a shared sphere of power in municipal insolvency in the Supreme Court’s 1938 decision upholding the first iteration of Chapter 9.\textsuperscript{108} However, this concept warrants caution from another separation of powers problem: it may be constitutionally impermissible for Congress to assign control over state financial decisions to federal bankruptcy judges who exist outside the political branch.\textsuperscript{109} Nevertheless, Professor Dawson argues his functional approach better addresses federalism concerns by imposing limits on the reach of federal bankruptcy courts.\textsuperscript{110}

Even still, at least one student commentator, Tejas Dave, believes that bankruptcy scholars’ criticisms of Chapter 9 are overstated.\textsuperscript{111} Instead, he argues that the bad actors frustrating municipal bankruptcy are states, not

\begin{itemize}
\item \textsuperscript{102} Id. at 1302–03.
\item \textsuperscript{103} Id. at 1306–07.
\item \textsuperscript{104} Dawson, supra note 30, at 33–34.
\item \textsuperscript{105} Id. at 68.
\item \textsuperscript{106} Id. at 70.
\item \textsuperscript{107} Id. at 74.
\item \textsuperscript{108} Id. at 75–76 (citing Ashton v. Bekins, 304 U.S. 27 (1938)).
\item \textsuperscript{109} Dawson, supra note 30, at 84 (citing Emily D. Johnson & Ernest A. Young, The Constitutional Law of State Debt, 7 DUKE J. CONST. L. & PUB. POL’Y 117, 158–59 (2012)).
\item \textsuperscript{110} Id. at 89–90.
\item \textsuperscript{111} Dave, supra note 74, at 295–97.
\end{itemize}
their municipalities. \(112\) Dave concludes that bankruptcy courts have sufficient power to resolve municipal budget crises, yet Congress has hamstrung that power’s potential by littering the bankruptcy code with roadblocks to restructuring. \(113\) Dave concludes by proposing section 109(c)(2)’s opt-in scheme be modified to an opt-out scheme, and hints at an idea of Congress “induc[ing]” states into authorizing more Chapter 9 filings. \(114\)

In sum, the academic discourse of the constitutional implications of municipal bankruptcy evidences the pragmatic mentality of the bankruptcy bar. After all, bankruptcy practitioners are regularly charged with grabbing the yokes of flailing enterprises and pulling them out of their nosedives. Through that lens, a municipality is no different, except perhaps that the stakes are much higher when the shareholders are an entire populace. Nevertheless, constitutional law may be increasingly incongruous with such pragmatism.

**IV. Defining the Relationship Between Municipal Bankruptcy and Modern Federalism Jurisprudence**

Despite continued proposals to expand the power of bankruptcy courts in Chapter 9 proceedings, the constitutional implications of such proposals remain unresolved. This is especially true considering the decisions of the ascendant conservative majority in the Rehnquist and Roberts Courts, under whom constitutional law has seen a new emphasis on federalism doctrines and vertical separation of powers. \(115\)

\(A. \) Anti-Commandeering Doctrine

The Court first considered the issue of commandeering in *New York v. United States*, in which the majority held that Congress could not compel states to regulate. \(116\) New York challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 \(117\) as inconsistent with the Tenth Amendment. \(118\) After two out of the nation’s three remaining sites for low-level radioactive waste disposal closed, the possibility that the nation

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112 Id. at 284–88.
113 Id. at 300–06.
114 Id. at 314–15.
would be left with no disposal sites precipitated Congress’s enactment of the law.\textsuperscript{119} To assist states in disposing of radioactive waste, the law authorized states to enter into regional compacts, and encouraged such compact formation through three main incentives.\textsuperscript{120} First, states were monetarily incentivized to operate disposal sites through the ability to impose surcharges on other states’ waste, from which a portion would be placed in escrow and available to the disposal-hosting state upon meeting certain objectives.\textsuperscript{121} Second, Congress incentivized states without disposal sites to meet federal deadlines by allowing states and regional compacts with disposal sites to deny access to non-compliant states.\textsuperscript{122} While the Court affirmed the constitutionality of these first two incentives under the Commerce and Spending Clauses, it found Tenth Amendment infirmity in the third—the “take title provision.”\textsuperscript{123}

The third incentive gave states two options: regulate radioactive waste in accordance with Congress’s direction or take title to the radioactive waste generated within their borders.\textsuperscript{124} Justice Sandra Day O’Connor, writing for the majority, held the take title provision was inconsistent with the “federal structure of our Government established by the Constitution,” whether seen as beyond Congress’s enumerated powers or as “infringing upon the core of state sovereignty reserved by the Tenth Amendment.”\textsuperscript{125} The Court then concluded: “The constitutional authority of Congress cannot be expanded by the ‘consent’ of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.”\textsuperscript{126}

In his opinion for the majority in \textit{Printz v. United States}, Justice Antonin Scalia expanded on Justice O’Connor’s anti-commandeering doctrine to prohibit Congress from compelling state officers to execute federal law.\textsuperscript{127} This case revolved around a provision of the Brady Handgun Violence Prevention Act that created a waiting period before a handgun could be sold, and required the chief law enforcement officers in every local jurisdiction to check whether the applicant was legally barred from purchasing a handgun.\textsuperscript{128} Justice Scalia declared that the Act intruded upon states’

\begin{itemize}
\item \textsuperscript{119} Id. at 150.
\item \textsuperscript{120} Id. at 151–52.
\item \textsuperscript{121} Id. at 171.
\item \textsuperscript{122} Id. at 173.
\item \textsuperscript{123} Id. at 173–74, 177.
\item \textsuperscript{124} Id. at 174–75.
\item \textsuperscript{125} Id. at 177.
\item \textsuperscript{126} Id. at 182.
\item \textsuperscript{127} Printz v. United States, 521 U.S. 898, 935 (1997).
\end{itemize}
independence and autonomy in violation of the Constitution’s establishment of the states and federal government as dual sovereignties. The Court based its analysis on the vertical separation of powers as “one of the Constitution’s structural protections of liberty,” finding that federal commandeering of state officials contravened this structure.

Analyzing the doctrine’s applicability to municipal bankruptcy, it becomes evident that scholars improperly rely on the consent language in sections 109(c)(2) and 904 as justification for reforms to further empower bankruptcy courts. As Justice O’Connor explained in New York, consent of the states cannot be the hook upon which Congress hangs its hat for infringing on state sovereignty. Further, that bankruptcy courts apparently commandeered state officials to release debtors from debtors’ prisons in early bankruptcy proceedings does not evidence the constitutionality of judicially imposed resource adjustments. Instead, it demonstrates early judicial acknowledgment of federal preemption in bankruptcy law; it would be unconstitutional for states to jail debtors for debts that have been discharged in federal bankruptcy court.

The logical question then becomes this: if Congress itself cannot commandeer states or their subdivisions to legislate according to its will, how can Congress empower bankruptcy judges exercising Article I power to so commandeer? Professor Gillette’s scholarship does not provide an answer, but McGrath’s response is that when a bankruptcy judge decides whether to impose resource adjustments on municipalities, they are exercising Article III power to interpret the authority granted by Chapter 9. He argues this upholds horizontal separation of powers principles and is therefore constitutional. Even ignoring the potential delegation problem as beyond the scope of this paper, McGrath’s position is flawed under further scrutiny. Congress cannot delegate a power that the Constitution prohibits it from having in the first place. So, if it would be unconstitutional for Congress to enact a law requiring an insolvent municipality to adjust its resources itself, then Congress cannot enact a statute enabling judicial discretion to impose resource adjustments on municipalities. The Supreme Court’s other doctrines of federalism further illuminate this point.

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129 Printz, 521 U.S. at 928.
130 Id. at 921.
131 See supra text accompanying notes 93, 103.
132 See supra text accompanying note 126.
133 See supra text accompanying note 103.
134 See supra text accompanying note 93.
135 See McGrath, supra note 10, at 1290–91.
136 Id.
B. Anti-Coercion Doctrine

The Rehnquist and Roberts Courts created another doctrine of federalism in *South Dakota v. Dole*\(^{137}\) and *National Federation of Independent Businesses v. Sebelius*\(^{138}\) (NFIB). These cases concern Congress’s exercise of power under the Spending Clause, wherein Congress provides federal funds to states who, in return, agree to comply with the conditions that Congress places on such funds. Supreme Court jurisprudence has established four bright line limits on such legislation: (1) the object of Congress’s spending must be in pursuit of the general welfare;\(^{139}\) (2) any condition on states’ receipt of federal funds must be unambiguous, so as to make states “cognizant of the consequences of their participation;”\(^{140}\) (3) the conditions must be related to the federal interest in the national program at issue;\(^{141}\) and (4) there can be no independent constitutional bar to the conditions.\(^{142}\)

In *South Dakota v. Dole*, Congress enacted a law directing the Secretary of Transportation to withhold a percentage of federal highway funds from states that allowed the purchase or public possession of alcoholic beverages by people under the age of twenty-one.\(^{143}\) South Dakota sued, based in part on the theory that the law exceeded Congress’ Spending Clause powers by financially coercing states into raising the minimum drinking age.\(^{144}\) In upholding the law, the Court clarified that the fourth limit—no independent constitutional bar—is not “a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly.”\(^{145}\) Instead, it means that Congress cannot induce states to engage in unconstitutional activities, such as invidious discrimination or inflicting cruel and unusual punishment.\(^{146}\) The Court took special notice of the fact that the federal highway funds being conditioned amounted to five percent of what would otherwise be obtainable by South Dakota, calling it “relatively mild encouragement.”\(^{147}\)

\(^{144}\) Dole, 483 U.S. at 205–06.
\(^{145}\) Id. at 210.
\(^{146}\) Id. at 210–11.
\(^{147}\) Id. at 211.
In contrast, the Supreme Court struck down Congress’ expansion of Medicaid in *NFIB* as unduly coercive.\(^\text{148}\) Congress enacted the Affordable Care Act, which instructed the Secretary of Health and Human Services to halt all Medicaid payment to states that did not comply with the Act’s expanded Medicaid coverage requirements.\(^\text{149}\) At the time, Medicaid spending constituted over twenty percent of the average state’s overall budget, of which fifty to eighty-three percent was paid for by Congress.\(^\text{150}\) Accordingly, the Court found that states had no “genuine choice” as to accepting Medicaid expansion.\(^\text{151}\)

Between these two cases, doubt exists as to how big of a carrot Congress can dangle before the anti-coercion doctrine is implicated; five percent of a funding program is constitutional whereas at least ten percent of a state’s overall budget is not. Setting aside this doctrinal ambiguity, a state’s receipt of federal funds is nevertheless analogous to a municipality’s receipt of a discharge of indebtedness in Chapter 9. A state may permissively authorize its municipalities to file for Chapter 9 relief,\(^\text{152}\) and when a municipality in such state is in financial distress, it may feel it has no choice but to avail itself of the bankruptcy court. If a bankruptcy judge were to condition confirmation of the municipality’s plan on its acceptance of certain resource adjustments, then, at least according to Professor Gillette and McGrath, the municipality still has a choice—accept the judicial imposition or suffer the fiscal distress without a discharge. Post-*NFIB*, it becomes clear that such “choice” is really no choice at all, but instead impermissible coercion.

This conclusion likely withstands a rebuttal that the judicial imposition is on a municipality instead of an entire state. Even though state laws routinely impose an override of local politicians’ authority,\(^\text{153}\) the key fact is that the state is an imposing party. Municipalities derive their sovereignty from the powers explicitly granted to them by the state, or implicitly from the powers the state does not otherwise use.\(^\text{154}\) Therefore, the federal bankruptcy judiciary cannot step into the state’s shoes and impose resource adjustments without potentially running afoul of doctrines of federalism. Even though the court would be imposing on a municipality’s power, that power is still a derivative of state sovereignty.

\(^{149}\) *Id.* at 542, 581; 42 U.S.C. § 1396c.
\(^{150}\) *NFIB*, 567 U.S. at 581.
\(^{151}\) *Id.* at 588.
\(^{152}\) See *supra* text accompanying notes 83–84.
\(^{153}\) See *supra* text accompanying note 78.
Further, arguments that the anti-coercion doctrine is inapplicable because it was propounded under the Spending Clause and not the Bankruptcy Clause\(^{155}\) have little merit. The Supreme Court advanced the anti-coercion doctrine because Congress failed to restrain itself from enacting unconstitutional legislation. In municipal bankruptcy thus far, Congress has self-imposed doctrines of federalism.\(^{156}\) If Congress reverses course tomorrow and adopts the reforms proposed by Professor Gillette, McGrath, or Professor Dawson, the Court may then find it necessary to read an anti-coercion adjacent doctrine into the Bankruptcy Clause.

Additionally, Tejas Dave may have unknowingly invoked the anti-coercion doctrine when he advocated for Congress to “induce” states to authorize more Chapter 9 filings.\(^{157}\) This warrants special consideration because any financial inducement by Congress should amount to no more than mild encouragement.\(^{158}\) If, as alleged by McConnell and Picker, state municipal bankruptcy courts are the only productive forum to fix insolvent municipalities,\(^{159}\) Congress could offer funding to states that create such court systems. Yet the Rehnquist Court’s interpretation of the fourth limit on conditional funding may be implicated in that scenario. Congress cannot induce states to engage in unconstitutional activities, and a state municipal bankruptcy court could be unconstitutional as federally preempted by section 903(1), as was the case for Puerto Rico.\(^{160}\) So, Congress would need to repeal section 903(1) or, if the Bankruptcy Clause’s uniformity requirement is interpreted to disallow contemporaneous state and federal municipal bankruptcy laws, repeal Chapter 9 altogether.

McConnell and Picker did propose a wholesale repeal of Chapter 9,\(^{161}\) but that may not be the solution they imagined. If a state decides not to take up Congress’s financial support to create a municipal bankruptcy system, instead altogether ignoring its insolvent municipalities in crisis, then to fix that state’s insolvent municipalities—even imperfectly—Congress would need to reenact Chapter 9. But reenacting Chapter 9 to regain such power may upset the conditional funding program for all states if the Bankruptcy Clause requires uniformity. Perhaps McConnell and Picker understood this as an inevitable result, but it is unpersuasive to argue that Chapter 9 is so broken that such an outcome is more desirable than an imperfect reorganization of a municipality in federal bankruptcy court.

\(^{155}\) See supra text accompanying note 100.

\(^{156}\) See supra text accompanying note 76.

\(^{157}\) See supra text accompanying note 114.


\(^{159}\) See supra text accompanying note 89.

\(^{160}\) See supra text accompanying note 35.

\(^{161}\) See supra text accompanying note 87.
C. Clear Statement Rule


In \textit{Gregory v. Ashcroft}, Missouri judges filed suit, alleging their subjection to a mandatory retirement age under the state constitution violated the federal Age Discrimination in Employment Act of 1967 (the “ADEA”).\footnote{\textit{Id. at} 455–56. \textit{See generally} Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634.} Invoking the clear statement rule, the Court found that establishing the qualifications of state judges “lies at ‘the heart of representative government,’” and any congressional interference with such decisions would upset the usual constitutional balance of state and federal powers.\footnote{\textit{Gregory}, 501 U.S. at 460, 463.} Therefore, the ADEA needed to “plainly cover[]” state judges.\footnote{\textit{Id. at} 467.} In finding that the ADEA did not so plainly cover Missouri’s judges, the Court pointed to ambiguity in the ADEA’s exemption for appointees “on the policymaking level,” which Congress may or may not have intended to include judges.\footnote{\textit{Id. at} 465–67.}

The Roberts Court significantly expanded this clear statement rule as part of the major questions doctrine it announced in \textit{West Virginia v. Environmental Protection Agency}.\footnote{\textit{West Virginia v. EPA}, 577 U.S. 697 (2020).} In that case, the Environmental Protection Agency (the “EPA”) attempted to regulate power plant emissions under the Clean Air Act\footnote{\textit{See Clean Air Act}, 42 U.S.C. § 7411(a)(1).} such that coal-fired facilities would be required to reduce operations or offset emissions through alternative fuel sources.\footnote{\textit{West Virginia v. EPA}, 577 U.S. 697, 706 (2020).} Under the major questions doctrine, an assertion of regulatory authority needs to be of extraordinary “economic and political significance,” so as to give the Court doubt that Congress intended to confer that much authority.\footnote{\textit{Id. at} 721.} When such doubt exists, as it did in this case, the government must point to “clear congressional authorization” of its regulation.\footnote{\textit{Id. at} 732 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).}

The Court then identified three reasons why the EPA’s regulation, notwithstanding that it “may be a sensible ‘solution to the crisis of the day,’”
failed to meet the clear statement rule. First, the Court found it doubtful that Congress directed the EPA to set an emissions cap to an indeterminate degree; that is, authorizing the EPA to cap emissions wherever it sees fit. Second, “Congress went out of its way to amend” a statute creating a regime similar to the EPA’s emissions regulation to make absolutely clear what measures and means could be used, but did nothing for the statute relied on by the EPA. Third, ambiguity existed in Congress’s lack of explicit measures applicable to emission reduction regulations when compared with other parts of the Clean Air Act, which “explicitly limited the permissible components of a particular system” of emission reduction.

These justifications for striking down the EPA’s regulatory scheme under the clear statement rule are particularly illuminating for how the Supreme Court might respond to bankruptcy scholars’ proposals to expand Chapter 9. Just like the EPA’s regulation, the fact that Chapter 9 reformation “may be a sensible ‘solution to the crisis of the day’” is not outcome determinative. Further, ambiguities in the bankruptcy code likely are not the strong foundation that many scholars consider them to be. This calls into question Professor Gillette’s proposition that bankruptcy courts wield the instances of judicial discretion afforded to them in Chapter 9 as a bargaining chip. The use cases he envisions are seemingly “extraordinary” in their economic and political significance, at least to the residents of the municipality. Determining the level of services provided and the amount of taxes imposed are perhaps the only economic and politically significant decisions made by special taxation districts, such as those created for hospitals and healthcare provisioning.

To argue that such discretion exists, without any congressional guideposts as to the measures or means of using it, leaves judicial impositions of reduced or eliminated services or increased taxes in a tenuous position. The tenuity is aggravated when considering that both Gregory v. Ashcroft and West Virginia v. EPA involved a political branch—Congress in the former and the executive in the latter—attempting to interfere with decisions that “lie[] at ‘the heart of representative government.’” Yet Professor Gillette and Professor Dawson propose that an apolitical branch do the interfering: the bankruptcy judiciary. Contrary to Professor Dawson’s

172 Id. at 735 (quoting New York v. United States, 505 U.S. 144, 187 (1992)).
173 Id. at 733.
174 Id. at 734.
175 Id.
176 See id. at 734–35 (quoting New York v. United States, 505 U.S. 144, 187 (1992)).
assertions,\textsuperscript{178} this proposal does not address federalism concerns; it inflames them.

V. CONCLUSION

The Bankruptcy Clause is no exception to federalism, even if the majority of bankruptcy scholars have argued otherwise. The current Court has consistently found issue with federal attempts to impede on state sovereignty, and it would likely do so in a reformed Chapter 9 that expands the bankruptcy court’s power to judicially impose resource adjustments on municipalities.

Perhaps bankruptcy scholars are pragmatic to a fault. While it may be convenient to reimagine the bankruptcy judiciary to more actively intervene in municipalities’ political affairs, such a plan contravenes our constitutional structure. And although there may be merit in the qualms with Chapter 9 as ineffective, the limits of municipal bankruptcy’s use can be better understood as a feature, not a bug, under principles of federalism. Further, solutions that involve tasking the bankruptcy judiciary with imposing political solutions as an apolitical branch are fatally convenient; they abdicate the responsibility of the political branches of preventing the need for such a solution in the first place.

As Chapter 9 filings increase, proposals to reform municipal bankruptcy may gain new interest. Yet, such interest should be cautioned by an understanding of the limits our federal system imposes.

Finally, returning to the early scholarly work in this topic, McConnell and Picker’s suggestion that states create schemes to intervene in municipalities on a trajectory to insolvency deserves renewed attention. While such a scheme was ultimately unable to prevent a Chapter 9 filing for Chester, Pennsylvania, its invocation still has value by remedying the fiscal mismanagement that often impedes the usefulness of Chapter 9 proceedings. If states truly want to solve the problem of why cities go broke, they should create systems to ensure local authorities have the necessary political will to address the fiscal crisis. Arguably, PROMESA demonstrates a unique modern example of such an accountability system by establishing a financial oversight board for a distressed federal territory.

That accountability, combined with resource adjustments, may avoid a municipality’s insolvency altogether. However, if destitution is truly the reason why a municipality cannot satisfy obligations, Chapter 9 provides an invaluable fresh start. Without Chapter 9, we remove a tool of last resort from our toolkit.

\textsuperscript{178} See supra text accompanying note 110.