DETERMINING THE HISTORIOGRAPHICAL PROBLEM OF MUNICIPAL BANKRUPTCY: HATTON SUMNERS AND THE ENACTMENT AND AMENDMENT OF CHAPTER IX, 1933–1979

by

Josiah M. Daniel, III*

This article examines the historiographical problem of municipal bankruptcy law, in particular, the legislative history, passage, and experience of the First and Second Municipal Bankruptcy Acts, called Chapter IX, over the period 1933–1979. First, I identify the problem. An authoritative account has been lacking, and it has been academicians of the law and economics (L&E) school who have sought to tell the story of the genesis of municipal bankruptcy law in connection with their advocacy for inclusion of municipal bankruptcy within the "creditors' bargain" paradigm. Legal history provides, however, better tools and a clearer lens for learning and telling the story of this law and its effects. Second, the article solves the problem by providing the first archivally researched history of the beginning and early evolution of Chapter IX.

House Judiciary Committee chair Hatton Sumners was the key actor. The lengthy legislative process, punctuated by a pair of Supreme Court decisions, was a laboratory for new forms of relief under the Bankruptcy Clause for the insolvency in the 1930s of Texas irrigation districts, Florida towns, and elsewhere all types of political subdivisions that could not pay their bonds. The Municipal Bankruptcy Acts solved two conundrums, the

* Visiting Scholar, Department of History, The University of Texas at Austin; Retired Partner in Residence, Vinson & Elkins LLP, Dallas Office; Fellow, American College of Bankruptcy. I represented, pro bono, an insolvent rural public hospital in its successful 2013–2016 municipal bankruptcy case, *In re Hardeman County Hospital District*, 540 B.R. 229 (Bankr. N.D. Tex. 2015). That was my introduction to Congressman Hatton Sumners whose biography I am writing. Many thanks to archivists of the Dallas Historical Society; the National Archives in Washington, Hyde Park, and Fort Worth; the Texas State Archives; and the Dolph Briscoe Center for American History. Eric Madiar helpfully conferred with me over a half dozen years on this topic. More recently, Judge Glock, Zack Clement, Greg Hesse, Marc Levinson, Thomas Moers Mayer, Rich Levin, and Scott Dewey graciously commented on a draft. Finally, many thanks for the work of this journal's editors on my article. Statements about the law do not necessarily reflect the views of the law firm from which I am retired or its clients. I am solely responsible.

"holdout problem" that had prevented voluntary restructurings, and the helplessness of State governments under the Constitution's Contract Clause.

The device of composition with creditors succeeded politically. From 1933 to 1938 Congress legislated that device in the First and Second Municipal Bankruptcy Acts. L&E scholars credit freshman Florida congressman Mark Wilcox, who collaborated with a bondholders' group, as the critical actor, but it was Sumners who believed that the composition model was not only constitutional but also politically feasible. Sumners navigated through opposition that insisted "bankruptcy" required turnover of a debtor's assets in exchange for a discharge and that such legislation would destroy the credit market. Municipal bankruptcy did leave all assets in the debtor's hands; it granted a discharge; and the credit market survived. Chapter IX succeeded. And relevant to mass tort chapter 11 bankruptcy now, Sumners crafted the first and only statutory injunctive relief applicable in the case of an artificial entity for the protection of nondebtor third parties—here, all officers and inhabitants of a municipal debtor—against litigation by a debtor's claimants.

President Franklin Roosevelt pushed the legislation to enactment in spring 1934. The Supreme Court invalidated the first Municipal Bankruptcy Act in 1936's Ashton *case, but Justice Cardozo dissented, suggesting small changes that Sumners and Congress utilized in the Second Municipal Bankruptcy Act in 1937. Sumners then, in 1938, successfully argued the merits and constitutionality of the Second Municipal Bankruptcy Act before the Supreme Court in the* Bekins *case. Municipal bankruptcy law succeeded in effectuating municipal bond restructurings, and it lives in today's Bankruptcy Code as chapter 9, providing discharge of unpayable debt and as a platform for towns and taxing districts to negotiate such deals. Chapter IX worked in the past, and chapter 9 works today. The story demonstrates change over time, which is the essence of the study of history, with Sumners as the key actor.*

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When offered the representation of an insolvent rural public hospital, I quickly said yes. Then I set out to learn all the similarities and differences between chapter 11 and the mode of restructuring known as chapter 9 or municipal bankruptcy. I asked, "What's the history of this unusual and seldom used chapter of the national bankruptcy law?" No one could tell me more than "it happened during the Great Depression." The legislative history section in the bankruptcy treatise was only slightly informative, and the standard resources available on bankruptcy law's bookshelf—and online—were obviously incorrect or just unhelpful. The municipal bankruptcy process proved to work very well for my hospital client in restructuring and discharging its debt; and after the case, for my historical question, I resorted to and persisted in the archival and other primary sources. This article is the product of my research.

I. The Problem

A. Political Subdivision Insolvency in the Great Depression

When agricultural commodity prices and farmland values collapsed early in the Great Depression, numerous irrigation districts in "the Valley," the Texas counties along the lower Rio Grande River,[1] could not collect their assessed taxes and user fees from the farmers who had been using the supplied water.[2] Because of the economic conditions, and sometimes due also

[1] "What Texans call 'the Valley' centers on Starr, Cameron, Hidalgo, and Willacy counties in the lower Rio Grande region and extends from the mouth . . . up the river for . . . 100 miles." David M. Vigness & Mark Odintz, *Economic and Cultural Overview of the Rio Grande Valley*, HANDBOOK OF TEXAS ONLINE, https://www.tshaonline.org/handbook/entries /rio-grande-valley (last visited Dec. 15, 2025) (on file with author). Although she uses the term "the Valley" in her important book, historian and former bankruptcy lawyer Alicia Dewey prefers to call the area the "South Texas Border Region" or simply "South Texas." ALICIA M. DEWEY, PESOS AND DOLLARS: ENTREPRENEURS IN THE TEXAS-MEXICO BORDERLANDS, 1880–1940 4–5 (2014) [hereinafter DEWEY, PESOS AND DOLLARS]. I use the terms "South Texas" and "the Valley" interchangeably in this article.

[2] The Valley's water districts charged a "'flat rate,' . . . per acre . . . whether water is used or not; a [varying] 'toll' charge . . . each time water is delivered to a tract . . . four to six times a year; and a 'bond tax' . . . on an ad valorem basis . . . for the payment of bonded indebtedness." LEE STAMBAUGH & LILLIAN J. STAMBAUGH, THE LOWER RIO GRANDE VALLEY OF TEXAS 197 (1954). *See also* DEWEY, PESOS AND DOLLARS, *supra* note 1, at 102–03, 207–10. Moreover, concerning the agricultural collapse, "the index of prices received by farmers fell from 211 to 124 or over 40 per cent in one year. From 149 in 1929 the index again fell rapidly to 68 in 1932; this was a decline of about 55 percent in three years." Arthur C. Bunce, William H. Fisher & Earle L. Rauber, *Agricultural Adjustment and Income* 30, Bd.

to financial missteps, multiple districts defaulted on the municipal bonds they had issued to finance construction and improvement of canals and irrigation facilities[3] that had stimulated and enabled the development and operation of citrus orchards, truck gardens, and new towns during the 1920s. Many California agricultural districts also defaulted on their bonds' installments, and formerly fast growing Florida cities and towns, trapped in the aftermath of a mid-twenties land boom and crash, also exemplified the nationwide trend of municipal issuer financial default as early as 1927. The preeminent municipal bond authority of the day, A.M. Hillhouse, found 1,729 cities and special taxing districts in payment default under their bonds, nationwide, by the last

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Gov. Fed. Res. (1945). "[I]n 1920 . . . agricultural land values averaged $69 per acre. [I]n the 1920's, farm prices dropped due to huge agricultural surpluses, causing agricultural commodity prices and land values to drop steadily throughout the 1920's. Agricultural land values saw the largest percentage declines . . . in the early 1930's, the beginning of the Great Depression. Agricultural land values dropped 37 percent over a period of 3 years and remained between $30 and $33 per acre throughout the 1930's." *Trends in U.S. Agriculture: Land Values*, U.S. Dept. of Ag., Nat'l Ag. Statistics Serv. (2026), https://www.nass.usda.gov/Publications/Trends_in_U.S._Agriculture/Land_Values.

[3] Some history on the development and financing of this irrigation infrastructure is helpful background for purposes of this article. Initially, private firms began to construct irrigation facilities to lure farmers from the Midwest and the South, but the pace markedly increased after 1904 and 1919 amendments to the Texas Constitution enabled public development of Texas surface water by authorizing creation of local districts that could issue municipal bonds to finance purchases of water rights and build infrastructure. By 1920 the Valley's population almost doubled. John P. Tiefenbacher, *A Rio Grande "Brew*," *in* FLUID ARGUMENTS 188 (Char Miller, ed., 2001). Construction required both earth-moving equipment and substantial physical labor as photographs depict in Clint D. Wolfe et al., *An Overview of Operational Characteristics of Selected Irrigation Districts in the Texas Lower Rio Grande Valley: Delta Lake Irrigation District*, No. TR-290, TEXAS A&M UNIVERSITY, TEXAS WATER RESOURCES INSTITUTE, Appx. C, 48–50 (Dec. 2007). Legal history today includes consideration of the effects of law on people and society. One consequence of the infrastructure that municipal bonds financed there was that the operation of the irrigated farms required large numbers of laborers, who came from Mexico, forming "a new political landscape in the border region . . . . and a new laboring class . . . , subordinated by citizenship status, disinheritance, social exclusion, and its role as a primary object of police contact." C. J. ALVAREZ, BORDER LAND, BORDER WATER: A HISTORY OF CONSTRUCTION ON THE US-MEXICO DIVIDE 102 (2019). *See also* MONICA MUNOZ MARTINEZ, THE INJUSTICE NEVER LEAVES YOU: ANTI-MEXICAN VIOLENCE IN TEXAS 101 (2018); BILL MINUTAGLIO, A SINGLE STAR AND BLOODY KNUCKLES: A HISTORY OF POLITICS AND RACE IN TEXAS 68 (2021). *See also* DESTIN JENKINS, THE BONDS OF INEQUALITY: DEBT AND THE MAKING OF THE AMERICAN CITY 1, 1 (2021) (positing that "inequality in twentieth-century America is, in part, the history of municipal debt").

day of 1933.[4] With forty years' hindsight, a government report more than doubled that figure.[5]

Municipal bonds had occupied a sacrosanct place in the world of finance for two reasons. First, since the 1870s, defaults had been infrequent.[6] Second, under the Seventeenth Amendment, the first income tax in 1913 had exempted municipal bond interest which "effectively made the federal government a partner with state and local governments" for the building of a vast number of infrastructure projects including highways.[7] The amount of municipal bonds nearly equaled federal debt. So, payment defaults of the late 1920s and early 1930s shocked the bondholding community. Their lawyers' resort to litigation was reflexive, as more and more insolvent cities, special taxing districts, and other political subdivisions—and often their officers—found themselves haled into federal courts as defendants in mandamus suits seeking to compel greater tax collections in order to cure the bond arrearages.[8]

Such political subdivisions became "[u]nab[le] to pay [their] debts" or "insolvent" as defined by the Bankruptcy Act of 1898 (BA'98)[9] and the

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[4] A.M. HILLHOUSE, MUNICIPAL BONDS: A CENTURY OF EXPERIENCE 17 (1936) [hereinafter HILLHOUSE, BONDS] (by 1936, "[a]bout 10 per cent of [200,000 outstanding] municipal [bond]s ha[d] been affected" adversely by the economic conditions). *See also* Sanders Shanks, Jr., *The Extent of Municipal Defaults*, NAT'L MUNICIPAL REV. 33, 34 (1935); Henry W. Lehman, *The Federal Municipal Bankruptcy Act*, 5 J. FINANCE 241, 241 (1950).

[5] ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CITY FINANCIAL EMERGENCIES: THE INTERGOVERNMENTAL DIMENSION 75 (1973) (finding "approximately 4,770 municipal units defaulted").

[6] After the Panic of 1873, "many towns defaulted on the[ir] bonds, and courts [in multiple] states were besieged with lawsuits of disappointed municipal bondholders." MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 23 (1992). "Municipalities . . . defaulted after the Panic of 1893," but from then to the mid-twenties, "municipal defaults were not common." ALBERTA M. SBRAGIA, DEBT WISH: ENTREPRENEURIAL CITIES, U.S. FEDERALISM, AND ECONOMIC DEVELOPMENT 109 (1996).

[7] DAVID N. SCHLEICHER, IN A BAD STATE: RESPONDING TO STATE AND LOCAL BUDGET CRISES 61 (2023).

[8] "Suits by bondholders are, in the majority of instances, brought in the federal district courts" under either federal question or diversity of citizenship jurisdiction. HILLHOUSE, BONDS, *supra* note 4, at 290. "If issued, the writ [of mandamus] is against the particular officers who have the power and whose duty it is to levy and collect taxes." *Id*. at 280. *See also* Henry Pollock, *Advantages of Resorting to Federal Courts in Enforcing Municipal Bonds*, 27 ILL. L. REV. 432 (1932).

[9] An Act To establish a uniform system of bankruptcy throughout the United States, ch. 541, Pub. L. No. 55-541, 30 Stat. 544, originally codified 11 U.S.C. §§ 1 et seq. (1925) [hereinafter Original BA'98].

general understanding of lawyers and judges of the day.[10] On the eve of the Depression, however, that act afforded relief only for individuals, partnerships, and, since 1910, business corporations,[11] and limited relief to court supervised liquidation of assets in exchange for a discharge of debts for individuals or an opportunity for any type of debtor to reach a court enforced compromise known as a "composition with creditors."[12] Railroads and a few business organizations restructured outside of bankruptcy through the federal court device of equity receivership.[13] Receiverships for municipalities required a statutory basis and were only "rarely available."[14]

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[10] At the inception of municipal bankruptcy legislation in 1933, the BA'98 provided a balance sheet definition of "insolvent": "whenever the aggregate of [a debtor's] property . . . shall not at a fair valuation be sufficient in amount to pay his debts," *id.* § 1(15), but the act's definition of "acts of bankruptcy" included payment insolvency: "admitt[ing] in writing his inability to pay his debts . . . ." *Id.* (Supp. VI 1932), § 21(a)(6). The legal dictionary's definition included both payment insolvency and balance sheet insolvency. HENRY CAMPBELL BLACK, A DICTIONARY OF LAW, *insolvent*, at 983 (3d ed. 1933) (defining as "inability to pay one's debts; lack of means to pay one's debts. Such a relative condition of a man's assets and liabilities that the former, if all made immediately available, would not be sufficient to discharge the latter.").

[11] As originally enacted, the BA'98 did provide that any corporation "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits" and owing at least $1,000 could be subject to involuntary petitions. Original BA'98, *supra* note 9, § 4(b), 30 Stat. 544, 547.

[12] The 1910 legislation afforded voluntary relief for all corporations "except banks, insurance companies, and municipal corporations," and it made the form of relief known as composition with creditors available to all debtors. Act of June 25, 1910, 36 Stat. 839, § 4 (1910). The English law device of composition had entered American bankruptcy law in 1874 as an amendment to the short lived Bankruptcy Act of 1867. The composition form of relief was "precursor to modern corporate bankruptcy reorganization." ELIZABETH LEE THOMPSON, THE RECONSTRUCTION OF SOUTHERN DEBTORS: BANKRUPTCY AFTER THE CIVIL WAR 127 (2004).

[13] *See generally* Stephen J. Lubben, *Railroad Receiverships and Modern Bankruptcy Theory*, 89 CORNELL L. REV. 1420 (2004).

[14] Guardian Sav. & Trust Co. v. Road Imp. Dist. No. 7, 267 U.S. 1, 6, *modified*, 267 U.S. 580 (1925) (noting Arkansas law authorized municipal receivership). In a footnote in the appeal of a 1933 diversity of citizenship action to collect a small Texas town's defaulted waterworks bonds, the Supreme Court stated that a Texas statute "permitt[ed] receiverships for cities in certain situations." Bullard v. City of Cisco, 290 U.S. 179, 183 n.1 (1933). That was, however, incorrect. The Court overlooked the explanation in the Court of Appeals opinion: the State's "Act of October 1, 1929, . . . [had] authorized the appointment of a receiver for any incorporated town or city. . . . [*but* w]hile th[is] appeal was pending and before a hearing, the Legislature . . . repealed [that statute]." Bullard v. City of Cisco, 48 F.2d 212 (5th Cir. 1931). *See also* HILLHOUSE, BONDS, *supra* note 4, at 297. The 1993 survey of the nation's reported case law by two L&E scholars concluded that municipal receiverships were "rarely available." Michael McConnell & Randal Picker, *When Cities Go Broke: A*

Bondholder plaintiffs had little success with mandamus lawsuits.[15] Moreover, due to the Constitution's Article I, § 10, which forbade States from "impairing the Obligations of contract" (the Contract Clause),[16] State governments could do very little to address their political subdivisions' insolvency. The Texas Legislature, for instance, eased the terms for taxpayers' payment of property taxes, but the huge decrease in real estate values caused by the Depression could not be fixed by modifying taxes' due dates and collection procedures.[17] Moreover, voluntary restructuring of municipal bonds was impossible almost everywhere because of the "holdout problem," the ability of a dissident minority in a group of similarly situated holders to derail a compromise of the borrower's debts to which the majority wished to assent.[18] Commonly then referred to as "nuisances," holdouts hoped to coerce either the debtor or the consenting debtholders to pay them off because, absent unanimity, none of the parties would proceed. Counsel for the

Conceptual Introduction to Municipal Bankruptcy, 60 U. CHI. L. REV. 425, 436 (1993) [hereinafter McConnell & Picker, *Cities Go Broke*]. I found no reported cases or newspaper accounts about any municipal receivership in Texas.

[15] Such proceedings focused solely on the rights of the parties and ignored all other creditors. McConnell & Picker, *Cities Go Broke*, *supra* note 14, at 448–49. Their finding that success was rare is confirmed by the statements of the Supreme Court that "mandamus is the empty right to litigate," *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 510 (1942), and of Hillhouse that "[i]f inability to pay exists, the writ of mandamus will avail the bondholders little. . . . The courts can only grant judgments and order taxes levied. They have no supernatural powers of procuring money where it does not exist. . . . [A]lmost without exception, such equitable relief has been denied." HILLHOUSE, BONDS, *supra* note 4, at 284–85, 297.

[16] "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10. *See generally* JAMES W. ELY, JR., THE CONTRACT CLAUSE (2016).

[17] E.T. Miller, *The Historical Development of the Texas State Tax System*, 55 SW. HIST. Q. 1, 13 (1951). Around the nation, States attempted to help by "reducing penalties on . . . tax sale certificates, reducing the interest rates, . . . extending the time of redemption," and by enabling "installment payments." *Amendment of Bankruptcy Laws—Bankruptcy of Municipalities: S. 1868 and H.R. 5950 Before the S. Comm. on the Judiciary*, 73d Cong. 94–95 (1934) (statements of Mark Wilcox and Jacob M. Lashley) [hereinafter *1934 S. Subcomm. Hearing*].

[18] 6 COLLIER ON BANKRUPTCY ¶ 900.LH[1] (16th ed. 2025) (noting that prior to Chapter IX, "the existence of a few recalcitrant creditors made implementation of [a workout] agreement difficult"); McConnell & Picker, *Cities Go Broke*, *supra* note 14, at 426, 449 (observing that "individual creditors may find it in their interest to resist a solution even when it is in the interest of the creditors as a whole"; before municipal bankruptcy law, there were no "legal means to prevent holdouts from refusing to cooperate with the compromise solution").

assenting bondholders devised "bearing down" tactics and "pressure devices" to augment the jawboning of objectors, but they were ineffective.[19]

In the archive of unreported federal equity cases of the early 1930s involving defaulted water district bonds in the Valley, legal historian Charles Zelden discovered an interesting tactic by which lawyers for municipal bondholders' protective committees negotiated "refunding" agreements with debtor issuers to replace old bonds with new ones bearing easier interest and installment terms. Most bondholders consented, but a small minority always held out. Inventively, the committees' counsel filed for mandamus in the federal court in Brownsville, not to try to force the districts to pay the holdouts, but rather to enforce against the debtors their bargained for trust duties under the restructuring agreements to pay *only* the consenting creditors. The federal district judge in Laredo, Texas, Thomas M. Kennerly, obligingly entered the orders.[20] Yet, while effective in those specific instances, this innovation did not spread beyond South Texas.

In that context, Congress in the 1930s fashioned a new, statutory form of relief, a "special insolvency regime" backed by federal judicial power and known as municipal bankruptcy, to solve the holdout problem and to effectuate municipal bond restructuring agreements.[21] Many lawyers and

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[19] George H. Dession, *Municipal Debt Adjustment and the Supreme Court*, 46 YALE L.J. 199, 204–06 (1936) [hereinafter Dession, *Municipal Debt*] (revealing such tactics to include collaboration of the bondholders' committee with city officials to "keep the city in the red" and to sweep all cash to committee members).

[20] CHARLES L. ZELDEN, JUSTICE LIES IN THE DISTRICT: THE U.S. DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, 1902–1960 144–151 (1993) [hereinafter ZELDEN, JUSTICE LIES]. This adaptive mandamus action became a pattern for restructurings across the Valley. Local newspapers and the *Daily Bond Buyer* over several years of the early to mid-1930s carried taxing districts' notices to holdout bondholders, offering a last chance to assent because Kennerly was poised to "adjudicate, distribute, and allocate the said taxing power, tax pledges, moneys and property among all [consenting] parties"—with a bar to all other claims. *See, e.g.*, *Legal Notices*, MCALLEN MONITOR, Oct. 18, 1935, at 2. In these actions, the court's retention of jurisdiction occasionally came in handy such as when one Valley municipality later refused to tax as much as it had agreed, the bondholders filed with Kennerly an enforcement motion against county commissioners, see *Hidalgo Case Transferred*, VALLEY MORNING STAR, Oct. 16, 1937, at 1, and when the Texas Comptroller of Public Accounts refused to release State tax funds for a district's use under its refunding agreement, Kennerly held the State officer in contempt. ZELDEN, JUSTICE LIES, at 147.

[21] STEPHEN J. LUBBEN, THE LAW OF FAILURE: A TOUR THROUGH THE WILDS OF AMERICAN BUSINESS INSOLVENCY LAW 2 (2018) [hereinafter LUBBEN, LAW OF FAILURE]. Lubben is one of the few academicians writing about bankruptcy history to robustly utilize archival and original sources to find and tell the story accurately. *See* STEPHEN J. LUBBEN, TO PROTECT THEIR INTERESTS: THE INVENTION AND EXPLOITATION OF CORPORATE BANKRUPTCY (2026).

legislators doubted, however, the constitutionality of an amendment to the bankruptcy law to authorize a State's political subdivisions to seek relief in courts of bankruptcy due to the Constitution's Tenth Amendment, which reserves undelegated powers to the States or the people.[22] It was a Texan who was acquainted with the Valley, and, more importantly, expert in agriculture and concerned about commercial farmers,[23] personally experienced with lending, debt defaults, and workouts, and highly regarded for legal ability and endowed with legislative power, who took responsibility for amending the BA'98 to create municipal bankruptcy. He was Hatton W. Sumners, the House of Representative's fifth most senior member, then serving his eleventh term from Dallas and chairing that chamber's Committee on the Judiciary.

On January 21, 1933, Sumners filed the first ever bill proposing bankruptcy law relief for insolvent political subdivisions. During the next Congress, Sumners filed two more municipal bankruptcy bills, the latter of which the House passed in mid-1933, and nearly a year later, the Senate approved. President Franklin D. Roosevelt signed the first Municipal Bankruptcy Act (the "First MBA") into law as a New Deal measure in 1934, making available the device of composition with creditors for all insolvent political subdivisions that, with approval or authorization from their respective State governments, consented to federal bankruptcy process. But the Supreme Court declared it unconstitutional in the 1936 *Ashton* case.[24]

The next year Sumners filed a bill in response to the *Ashton* decision which again authorized insolvent public entities to file for bankruptcy relief, Congress enacted the bill and Roosevelt signed it as the second Municipal Bankruptcy Act (the "Second MBA") in 1937. The Congressman then presented the leadoff oral argument to the Supreme Court in the *Bekins* case[25] that easily held the Second MBA constitutional. By solving the holdout problem and enabling the judicially effectuated restructuring of municipal debtors, Sumners's two statutes, each known as Chapter IX of the BA'98,[26]

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[22] "The 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." U.S. CONST., amend. X.

[23] "I have had very considerable experience with agricultural leaders, and also have given a great deal of consideration to the economic problems of agriculture." Letter from Hatton W. Sumners [hereinafter HWS] to Franklin D. Roosevelt [hereinafter FDR] (Nov. 30, 1932) (*in* Pre-Presidential Papers, on file with FDR Library, Hyde Park, N.Y. [hereinafter FDR Libr.]).

[24] Ashton v. Cameron County Water Imp. Dist. No. 1, 298 U.S. 513, 532 (1936).

[25] United States v. Bekins, 304 U.S. 27, 51 (1938).

[26] The Second MBA was labelled "Chapter X" of the BA'98 for ten months, from August 16, 1937, to June 22, 1938. *See infra* notes 375 and 394 and accompanying texts. Otherwise, municipal bankruptcy law bore the designation "Chapter IX" continuously from 1934 to

rescued the nation's insolvent municipalities during the Depression years. Only relatively small numbers of them had to file bankruptcy petitions because the law quickly showed bondholders the futility of holding out in negotiated restructurings. Municipal bankruptcy has survived well into the twenty-first century as the Arabically numbered chapter 9 of the 1978 Bankruptcy Code (the "Code").[27]

Congress has subsequently added features to it, but the fundamental elements of Sumners's legislation persist. Municipal bankruptcy is formally similar to the plan based judicial restructuring found in chapter 11 business reorganization cases, but with differences due to the juridical nature of the debtor. In both types of cases, a debtor that is faced with unpayable amounts of claims, whether attributable to economic conditions or financial mistakes, files in a bankruptcy court a petition and then a plan that "scales" or modifies its indebtedness, unsecured and secured, liquidated, unliquidated, disputed, or contingent, as to interest rate and principal amount, protected by a stay of creditor collection activities and with notice to claimants. The plan process includes information disclosures, a claims resolution process, classification of claims, means for satisfaction of claims by cash or new debt instruments, voting by creditors, a requirement of good faith and other confirmation standards, cramdown of objecting classes of claims, binding effect, and discharge of debt.[28]

Although the two forms of bankruptcy are similar, significant differences exist. To be eligible to file, a municipal debtor must satisfy six factors: (i) it is a political subdivision of State government, (ii) its State authorized the filing, (iii) it is insolvent because it is not paying its debts as they come due, (iv) it desires to adjust its debts based on (v) negotiations with its creditors, and (vi) it filed the petition in good faith (the "Gateway Factors").[29] In addition, municipal debtors do not surrender their properties into a bankruptcy estate or otherwise into the control of the federal court; and sales or plan treatments of assets and rejection of executory contracts are discretionary with the debtor. Despite these differences, municipal debtors still receive a discharge upon plan confirmation. Third, while it is creditors

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[27] Bankruptcy Reform Act of 1978, Pub L. No. 95-598, 92 Stat 2549 (1978), codified at 11 U.S.C. §§ 101 et seq.

[28] 11 U.S.C. §§ 901(a), 943; 11 U.S.C. §§ 1123(a)(1)–(5), (b), (d); 1129(a)(2), (a)(3), (a)(6), (a)(8), (a)(10), (b)(1), (b)(2)(A)–(B) (2024).

[29] *See* 11 U.S.C. §§ 109(c), 921(c) (2024); *In re* City of Stockton, 493 B.R. 772, 783, 787, 791, 792, 794 (Bankr. E.D. Cal. 2013); *In re* City of Chester, 649 B.R. 633, 651–62 (Bankr. E.D. Pa. 2023).

who today largely control substantial chapter 11 cases,[30] the chapter 9 debtor retains substantial control and bargaining leverage to confirm a plan without the threat of liquidation or a conversion to a chapter 7 bankruptcy. It was Sumners, primarily, who, in the depth of the Depression, crafted the key terms of municipal bankruptcy and managed the enactment of the two MBAs through heavy political opposition in the 1930s. His structure and rationale survive and continue to justify municipal bankruptcy today.

Yet, in the wake of high profile municipal bankruptcy cases in the twenty-first century such as those of the City of Detroit,[31] Alabama's Jefferson County, and a few California cities, several academic commentators have reproached municipal bankruptcy practice as inefficient and inadequate[32]—even a "failure."[33] They have applied the legal academic theory known as "economic analysis of law" or "law and economics" (L&E) to advocate for implementation in municipal bankruptcy of a normative theory called the "creditors' bargain."[34] That is shorthand for the notion that idealized creditors

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[30] About creditors' control in contemporary Chapter 11 restructuring practice in large cases, see Kenneth M. Ayotte & Edward R. Morrison, *Creditor Control and Conflict in Chapter 11*, 1 J. LEGAL ANALYSIS 511, 512 (2009) (observing "creditors with senior, secured claims have come to dominate the Chapter 11 process"). About the debtor's substantial control in chapter 9 cases, note that only the debtor can file a plan, see 11 U.S.C. § 941, and see H. SLAYTON DABNEY, JR., ET AL, MUNICIPALITIES IN PERIL: THE ABI GUIDE TO CHAPTER 9 18 (2d ed., 2012) ("Creditor powers are limited in chapter 9 to a greater extent than under other chapters of the . . . Code. . . . The bankruptcy forum can 'level the playing field' for distressed debtors and provide a much stronger position from which to negotiate with and seek concessions from creditors."); Josiah M. Daniel, III, *Rx for Ailing Rural Public Hospitals: Chapter 9 Bankruptcy and Pro Bono Lawyering*, 18 HOUS. J. HEALTH L & POL'Y 205, 210 (2018) [hereinafter Daniel, *Ailing Rural Public Hospitals*] (describing the author's representation of a rural public hospital in a successful chapter 9 case).

[31] *See generally* GERALD E. ROSEN, GRAND BARGAIN: THE INSIDE STORY OF DETROIT'S DRAMATIC JOURNEY FROM BANKRUPTCY TO REBIRTH (2024).

[32] Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. REG. 351, 380–82 (2010) [hereinafter Kimhi, *Search of a Problem*].

[33] Vincent S.J. Buccola, *The Logic and Limits of Municipal Bankruptcy Law*, 86 U. CHI. L. REV. 817, 817 (2019) (assessing chapter 9 as "a marked failure") [hereinafter Buccola, *Limits of Municipal Bankruptcy*]; Laura Napoli Coordes, *Restructuring Municipal Bankruptcy*, 2016 UTAH L. REV. 307, 342 (2016) (calling chapter 9 "a failure of bankruptcy law") [Coordes, *Restructuring Municipal*].

[34] *See* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW (1982) [hereinafter JACKSON, LOGIC]. Voices advocating application or adaptation of this paradigm to municipal bankruptcy include Clayton P. Gillette & David A. Skeel, Jr., *Governance Reform and the Judicial Role in Municipal Bankruptcy*, 125 YALE L.J. 1153 (2016) [hereinafter Gillette & Skeel, *Governance Reform*]; Buccola, *Limits of Municipal Bankruptcy*, *supra* note 33, at 819 (author "develops and applies a normative account that seeks to do for municipal bankruptcy what the 'creditors' bargain' rubric has done for the law of corporate

would prefer a collective debt collection device—bankruptcy—to the state law "race to the courthouse" when a debtor becomes financially distressed and, further, the notion that bankruptcy process ought to vindicate prebankruptcy contracts. Criticizing bankruptcy courts' treatment of union contracts[35] and underfunded pensions[36] in municipal cases, they advocate revising or applying chapter 9 to place the creditors in control.

More specifically, the L&E scholars argue that the bankruptcy process should allow creditors to intervene in chapter 9 debtors' state law based and locally situated political decision making so as to directly collect taxes to pay debts, reduce expenses, sell off municipal assets, and change jurisdictional lines or even dissolve the entity—in order to increase recoveries on the creditors' debt claims as much as possible and, more generally, make changes for the sake of economic efficiency and wealth maximization.[37] In an effort to buttress their prescriptions for a more muscular, creditor driven municipal bankruptcy process, a number of the L&E critics of municipal bankruptcy have taken a "turn to history." In doing so they have sought, without the benefit of the archival sources and the deep legislative history, to describe the inception and early years of Chapter IX.

That creates a significant *historiographical problem*: how *should* bankruptcy judges, restructuring lawyers, law professors, and other scholars *proceed* to find and to understand the *genesis of municipal bankruptcy*?

Eschewing L&E's theoretical constructs, I take a different approach. Paraphrasing legal historian Ed Purcell, I "seek to answer two basic historical questions: Where did the language of [Chapter IX] come from, and why did

reorganization"); Adam J. Levitin, *Bankrupt Politics and the Politics of Bankruptcy*, 97 CORNELL L. REV. 1399, 1405 (2012) (stating, "Despite numerous criticisms of the creditors' bargain theory, no clear alternative unified theory has emerged, and the creditors' bargain approach continues to dominate the field, if simply for lack of competition.").

[35] *See, e.g.*, *In re* City of Vallejo, 403 B.R. 72, 76–79 (Bankr. E.D. Cal. 2009), *aff'd*, 432 B.R. 262 (E.D. Cal. 2010); W. Richard Fossey & John M. Sedor, *In re Copper River School District: Collective Bargaining and Chapter 9 Municipal Bankruptcy*, 6 ALASKA L. REV. 133, 140–43 (1989).

[36] *See, e.g.*, *In re* City of Stockton, 526 B.R. 35, 52–55, 59–60 (Bankr. E.D. Cal. 2015), *aff'd in part, dism'd in part*, 542 B.R. 261 (B.A.P. 9th Cir. 2015). "Often the issue of pensions receives the most press coverage of a municipal restructuring." Kristin K. Going, *Representing Creditors in Chapter 9 Bankruptcy Cases, Considerations Unique to Chapter 9 Bankruptcy Cases, Section 904 of the Bankruptcy Code, Pension Obligations*, Practice Note, PRAC. LAW (2025).

[37] *See, e.g.*, Gillette & Skeel, *Governance Reform*, *supra* note 34, at 1152–62, 1173, 1208, 1220; Laura Napoli Coordes, *Restructuring Municipal*, *supra* note 33, at 308, 314–16, 340–46; Kimhi, *Search of a Problem*, *supra* note 32, at 380–82.

[Congress] adopt it?"[38] To answer those questions about municipal bankruptcy requires the scholarly discipline of *history*, "the art of reconstructing the past."[39] That endeavor, known as the historical method, requires, first, *finding the sources*. Indeed, "[i]t is with the sources that any account of the historian's working methods must begin."[40] A "source" is

> an object from the past or testimony concerning the past on which historians depend in order to create their own depiction of that past. . . . A source provides us evidence about the existence of an event; [in contrast,] a historical interpretation is an argument about the event.[41]

The *historian* requires *primary* sources, "the evidence that individuals, governments, organizations, and cultures or societies leave behind," found by researching not only in libraries but in *archives*.[42] Archival "testimonies of witnesses to the past . . . provide the historian information about *what* happened, *how* and in what circumstances the event occurred, and *why* it occurred."[43]

This article determines the historiographical problem, that is, identifies it and then resolves it, by applying the historical method to deeply researched sources. My account of the genesis of municipal bankruptcy differs from the

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[38] Edward A. Purcell Jr., *Understanding* Curtiss-Wright, 31 LAW & HIST. 653, 654 (2013).

[39] JOHN FEA, WHY STUDY HISTORY? REFLECTING ON THE IMPORTANCE OF THE PAST 3 (2013) [hereinafter FEA, WHY STUDY HISTORY?].

[40] JOHN TOSH, THE PURSUIT OF HISTORY: AIMS, METHODS AND NEW DIRECTIONS IN THE STUDY OF HISTORY 74 (7th ed. 2022) (emphasis added) [hereinafter TOSH, PURSUIT OF HISTORY]. *See also* LOUIS GOTTSCHALK, UNDERSTANDING HISTORY: A PRIMER OF HISTORICAL METHOD viii, 28 (2d ed. 1969) [hereinafter GOTTSCHALK, PRIMER]; MARTHA HOWELL & WALTER PREVENIER, FROM RELIABLE SOURCES: AN INTRODUCTION TO HISTORICAL METHODS 17–18 (2001) [hereinafter HOWELL & PREVENIER, RELIABLE SOURCES].

[41] HOWELL & PREVENIER, RELIABLE SOURCES, *supra note* 40, at 19. As historian Annette Gordon-Reed explained: "The discipline of history is, for the most part, wedded to the *documentary record*; how scholars engage with it is one way judgments are made about the quality of their work." Annette Gordon-Reed, *Rebellious History: How Should Historians Construct a More Complete and Truthful Version of the Past?*, N.Y. REV. OF BOOKS (Oct. 22, 2020) (emphasis added), https://www.nybooks.com/articles/2020/10/22/saidiya-hartman-rebellious-history/.

[42] The term "'primary sources' . . . generally mean[s] evidence contemporary with the event or thought to which it refers." TOSH, PURSUIT OF HISTORY, *supra* note 40, at 77. *See also* JENNY L. PRESNELL, THE INFORMATION-LITERATE HISTORIAN: A GUIDE TO RESEARCH FOR HISTORY STUDENTS 6, 108–16 (2019).

[43] HOWELL & PREVENIER, RELIABLE SOURCES *supra* note 40, at 17 (emphasis original).

L&E version and is based on deeply researched historical evidence concerning Chapter IX's origins in the 1930s. The process and the relief remain remarkably the same today as nine decades ago, enabling subdivisions and political units, with their States' consent, to invoke bankruptcy process in a federal court to solve the holdout problem and to effectively restructure their finances and their operations, avoiding destructive consequences of defaulted debt,[44] maintaining their local sovereignty and elective governance, and providing fair recoveries for their creditors.

Part I continues in Section B, comparing the methodologies of L&E and legal history. Because the L&E authors mistakenly identify a rookie congressman, J. Mark Wilcox, as the instrumental legislator, Section C provides comparative biographies of Sumners and him. Next, Part II describes and explains the enactment of the First MBA. Section A of that part explicates the three competing models of municipal bankruptcy—as business reorganization, as composition with creditors, and as debt collection moratorium—that resulted in multiple bill filings by Sumners, Wilcox, and other members of Congress during a crucial period, the last sixty days of the lame duck Congress following Herbert Hoover's defeat in November 1932. In the early New Deal, additional, innovative models came forth, but the composition model prevailed, so Section B reports the course of the legislative work from spring 1933 to summer 1934 that refined the legislation and enacted the First MBA for a two-year period, along with its two unremarked but significant amendments that shortly preceded the Supreme Court's 1936 invalidation of the law in the *Ashton* decision. That event is covered in Section C.

Part III's first section explains the 1937 enactment of Sumners's only slightly modified Second MBA. Section B discusses its quick affirmance in the Supreme Court's *Bekins* decision in 1938. Section C outlines the congressional actions from 1940 to 1946 that made Chapter IX permanent and expanded debtor eligibility, followed by the substantial rewriting of the Second MBA in 1976 in anticipation of a possible bankruptcy of New York City, and then the replacement of Chapter IX by chapter 9 in the Bankruptcy Reform Act of 1978. Part IV completes my argument that Sumners is the key legislator and that the historical method and the subdiscipline of legal history provide the most effective and insightful way to find and understand the origin of municipal bankruptcy.

[44] LUBBEN, LAW OF FAILURE, *supra* note 21, at 5–17.

B. Law and Economics versus Legal History

L&E is arguably "the most influential scholarly movement in law schools in the U.S. in the last half a century" and "also the most controversial."[45] The origins of L&E analysis are modest, dating from 1960 when an economics professor, Ronald Coase, published the article "The Problem of Social Cost,"[46] arguing that, as one scholar puts it, "the efficiency of legal rules can be evaluated using economic criteria," and inspiring a theoretical approach called economic analysis of law that "mainly aspire[s] to normatively evaluate legal rules and prescribe their modification."[47] The notion that common law rules should be so analyzed germinated in the Economics Department and Law School of the University of Chicago where in the following years economists such as Henry Manne[48] and legal theorists such as Richard Posner, law professor and later appellate judge, fleshed it out as a theory and pushed it forward into a broad array of subject matters, including a hypothesis that the common law trends toward efficiency.[49]

The prolific Posner made casual forays into history, utilizing secondary literature as sources and not conducting any archival research. He once wrote:

> the wrong kind of historical study can be very bad for "life," including law, while the *right kind*—the kind deployed by a *pragmatic* judge or a *policy-oriented* legal scholar—*may deviate from literal accuracy* in the direction of a *rhetorical and imaginative narrative* of

[45] Ron Harris, *The History and Historical Stance of Law and Economics* [hereinafter Harris, *Historical Stance of L&E*], *in* THE OXFORD HANDBOOK OF LEGAL HISTORY 23–41 (Markus D. Dubber & Christopher Tomlins, eds., 2018) [hereinafter HANDBOOK OF LEGAL HISTORY].

[46] Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

[47] Harris, *Historical Stance of L&E*, *supra* note 45, at 26, 34.

[48] David Gindis & Steven G. Medema, *One Man a Committee Does Not Make: Henry Manne, the AEA-AALS Joint Committee, and the Struggle to Institutionalize Law and Economics*, Center for the History of Political Economy, CHOPE Working Paper No. 2022-14 1, 1 (Dec. 2022) (asserting Manne was the most important of the "academic entrepreneurs and institution-builders" of L&E).

[49] Posner pushed the frontiers of L&E across a huge array of topics. *See, e.g.*, RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981); SEX AND REASON (1994); LAW AND LITERATURE (3d ed. 2009); PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 (2005); and ONE LITTLE BOOK: FIFTY CENTS' WORTH OF THOUGHTS ON THE FUTURE OF HUMANITY (2021).

> historical events *that can be constructively employed in a forward-looking approach to legal problems*.[50]

Indeed L&E scholarship has moved purposively to tack onto economic analysis that sort of history manqué, along with related L&E approaches such as "public choice analysis" that seeks the origins and intent of legislation.[51]

Although L&E scholars did not initially focus on bankruptcy law, L&E has been the prevailing theme of bankruptcy scholarship since the publication by a law professor, Thomas H. Jackson, of articles and, in 1982, a book titled *The Logic and Limits of Bankruptcy Law*.[52] Jackson formulated the "creditors' bargain":

> bankruptcy [ought to be] a system designed to mirror the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an ex ante position. [T]he "creditors' bargain" . . . provides an illuminating vantage point from which to analyze bankruptcy law's treatment of many non-bankruptcy entitlements, and a focus from which to examine the deviations made in the name of bankruptcy policy.[53]

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[50] Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 573 (2000) (emphasis added).

[51] Harris, *Historical Stance of L&E*, *supra* note 45, at 37. A L&E scholar posits this as studying "[l]aw as a dependent variable explain[ing] why societies have the laws they have and why laws change over time." Daniel Klerman, *Economics of Legal History*, *in* 3 OXFORD HANDBOOK OF LAW AND ECONOMICS 38 (Francesco Parisi, ed., 2017). The "public choice" branch of L&E is the analytical frame on which Skeel stretched his short history of U.S. bankruptcy law, DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2001) [hereinafter SKEEL, DEBT'S DOMINION], the first book attempting a general history of U.S. bankruptcy since CHARLES WARREN, BANKRUPTCY IN U.S. HISTORY (1935). *See also* David A. Skeel, Jr., *Debt's Dominion: A New Epilogue*, 51 BYU L. REV. 903 (2026) (the book's supplement).

[52] JACKSON, LOGIC, *supra* note 34. Jackson assumed, rather than established through the historical method, that "bankruptcy law's historical function, . . . its historical goals . . . what bankruptcy law exists to do, . . . we all agree on," is "debt collection." *Id*. at 2–3. He mentioned the Bankruptcy Clause only in passing. *Id*. at 3 n.4.

[53] Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 860 (1982). *See also* Thomas H. Jackson & Robert E. Scott, *On the Nature of the Creditors' Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 VA. L. REV. 155, 169–74 (1989).

His work presents what L&E academician David A. Skeel, Jr., has acknowledged to be "[t]he instrumental and creditor–oriented tendencies of law–and–economics scholarship" that are "anathema to traditional bankruptcy scholars."[54] And recently, L&E scholars have proposed to apply that paradigm to municipal bankruptcy.[55] One commentator goes so far as to contend "that municipalities are contractual structures with significant similarities to corporations" and to argue for "a modified version of the Creditors' Bargain theory that . . . creditors are the rightful owners of the current assets of a city."[56] The creditors' bargain theory does not, however, really fit chapter 9 bankruptcy because an insolvent municipal debtor, large or small, is not a privately owned firm in a financialized world, seeking to wring profits from capitalistic enterprise.

Rather, a municipality is a type or form of human community and, as the Code today defines, a "political subdivision or public agency or instrumentality of a State."[57] As a governmental structure, a municipal debtor, whether a city or an irrigation district, possesses and exercises (i) a delegated quantum of the State's sovereignty and governing power within a jurisdiction that is qualitatively and spatially fixed by State law; (ii) governance based on democratic, public elections of the residents or qualified voters within its jurisdiction; (iii) power to tax or assess fees against persons, both natural and artificial, resident or located within or subject to its jurisdiction, and to spend such proceeds for its designated purpose; (iv) power to provide, monopolistically in many instances, the public services of police, fire protection, sanitation, and other services not generally available for residents in the marketplace such as paved streets, parks and recreational infrastructure,

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[54] SKEEL, DEBT'S DOMINION, *supra* note 51, at 200.

[55] Gillette & Skeel, *Governance Reform*, note 34, at 1150, 1157 (stating "the creditors' bargain . . . is contested, but we take it as a given here"); David A. Skeel, Jr., *When Should Bankruptcy Be an Option (for People, Places, or Things)?*, 55 WM. & MARY L. REV. 2217, 2226 (2014) (author "naturally assume[s] that the best way to explain why cities are . . . permitted to file for bankruptcy is to compare municipal . . . bankruptcy to corporate bankruptcy"); Vincent S.J. Buccola, *Law and Legislation in Municipal Bankruptcy*, 38 CARDOZO L. REV. 1301, 1314 (2017) (contending the "problem with existing municipal bankruptcy law is that it lacks these properties," referring to the creditors' bargain and the "contract enforcement model of bankruptcy"); Clayton P. Gillette, *Fiscal Federalism*, 79 U. CHI. L. REV. 281, 330 (2012) (advocating "to explicitly permit bankruptcy courts to impose resource adjustments").

[56] Jonah Peppiatt, *The Waterfall of Tiers: A Relocation Cost-Based Theory of Municipal Insolvency and a Proposal for a New Municipal Bankruptcy Regime*, 32 EMORY BANKR. DEV. J. 335, 336 (2016).

[57] 11 U.S.C. § 101(40), (52). Accordingly, I capitalize the term State in this article.

or irrigation water, as well as, in the instance of revenue bond authorities, to facilitate capital raising for projects that benefit the residents; and (v) power to legislate or adopt positive law in the form of ordinances, rules, or regulations.[58] The differences between large cities and special taxing districts do not play a role in chapter 9 eligibility, but, of course, the larger the debtor entity's size, the more settlements to be negotiated and the more work generally required of the parties' bankruptcy lawyers and of the bankruptcy judge.

For today's bankruptcy judges and lawyers, and for scholars and others interested in the subject matter, L&E does not provide explanatory power equivalent to the historical method for the answering of the "why" question: why did Chapter IX enter the positive law of the nation during the 1930s and why has it persisted to today? Perhaps recognizing some limitations to that L&E analysis, several L&E proponents have undertaken to include *history* in their endeavor. Two economists concede, however, in their recent book *Bankrupt in America* that the full story of bankruptcy cannot be "trace[d] . . . without using . . . the tools of the *historian*."[59] Although L&E scholars focusing on municipal bankruptcy have been turning to history to support their normative prescriptions, they have been doing so without employing certain of history's specific tools, such as archival research.[60] In

[58] *See* SANDRA M. STEVENSON, UNDERSTANDING LOCAL GOVERNMENT 2, 5 (2d ed. 2009) (defining municipality as an "entity that has been given general governing authority to provide a broad spectrum of public services, exercise general police powers, and raise revenue by imposing taxes within a defined area . . . . Other special forms of local governments . . . . called special districts, improvement districts, authorities or public benefit corporations . . . provide services that are within the creating entity's responsibilities"); MARK MOSES, *What is City Government*, THE MUNICIPAL FINANCIAL CRISIS: A FRAMEWORK FOR UNDERSTANDING AND FIXING GOVERNMENT BUDGETING 113–16 (2022) (quoting MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (1946): "a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory."). Special districts do not necessarily have every listed feature or elected governance.

[59] MARY ESCHELBACH HANSEN & BRADLEY A. HANSEN, BANKRUPT IN AMERICA: A HISTORY OF DEBTORS, THEIR CREDITORS, AND THE LAW IN THE TWENTIETH CENTURY 13–14 (2020) (emphasis added). They do also argue that history has "limitations . . . in telling the story of the evolution of bankruptcy [because it] does not provide the tools for measurement that economics does." *Id*. at 14.

[60] This type of history has been criticized by legal historian John Philip Reid as "forensic history" and "law office history." John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 217 (1993). Such history, he observed, is both advocacy oriented and unlikely to be good history. *See also* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 (1965) (bemoaning "constitutional history [of] the 'law-office' variety"). The legal historian Christian Fritz adds:

contrast, I have worked extensively to find the relevant, contemporaneous sources.[61] And these efforts are not for the sake of legal argument,[62] but to let the sources reveal and instruct about the effects of municipal bankruptcy law on financially distressed political subdivisions and on their creditors.

One example of L&E history is a 2016 article by Skeel and co-author Clayton Gillette that presents their "careful analysis of the history of municipal bankruptcy, starting . . . in 1934."[63] The authors conjecture that "local fiscal crises . . . . are caused by a governance structure that tolerates financial decisions in which the benefits and costs of public expenditures are misaligned" and reason that "Chapter 9 offers [only] temporary relief before the next crisis, not a thoroughgoing remedy aimed at the root causes of municipal distress."[64] Because "financial distress of a substantial municipality nearly always signals that its politics are dysfunctional," the L&E scholars prescribe "governance reform" and "structural reforms" to be accomplished through municipal bankruptcy cases.[65] Specifically, they advocate authorization for creditors "to collect taxes to pay preexisting debt; to order reductions in expenditures; to sell municipal assets; and even to reorganize the boundaries of or to dissolve the debtor municipality."[66] Further, "the bankruptcy judge should and does have leeway to induce necessary reforms,"

> Forensic history not only eschews the constant struggle to deal even-handedly with historical evidence, but explicitly embraces that which most historians try hardest to avoid: partisan interpretation.
>
> The ultimate problem with forensic history is that by its nature it rigorously oversimplifies the past, driven by the necessity to establish a winning argument supported by incontrovertible evidence. The past on its own terms is rarely so uncomplicated . . . .

Christian G. Fritz, *Land Grants and Lawsuits in Northern New Mexico*, 11 W. LEGAL HIST. 93, 94 (1998) (reviewing MALCOLM EBRIGHT, LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO (1994)).

[61] Legal historian Elizabeth Dale observed that if it "[i]s written with an eye to advancing a particular cause, . . . [history i]s more likely to disregard evidence that contradict[s that] goal." Elizabeth Dale, *Spelunking, or, Some Meditations on the New Presentism*, ch. 17 in HANDBOOK OF LEGAL HISTORY, *supra* note 45, at 314.

[62] Legal historian R. B. Bernstein put it this way: "In forensic history, the disputants may cite historical examples, invoke historical precedents, and draw conclusions about the 'lessons' that history may teach, but they are not doing history at all—rather, they are making legal arguments." Richard B. Bernstein, *The Constitution as an Exploding Cigar and Other "Historian's Heresies" about a Constitutional Orthodoxy*, 55 N.Y. L. SCH. L. REV. 1073, 1091 (2010).

[63] Gillette & Skeel, *Governance Reform*, *supra* note 34, at 1156.

[64] *Id*. at 1152, 1153.

[65] *Id*. at 1154, 1180–82.

[66] *Id*. at 1154 (citing McConnell & Picker, *Cities Go Broke*, *supra* note 14, at 472–81).

but discussions of chapter 9 "consistently ignore" the possibility of governance reform, "even where it is essential to revive a financially failed municipality."[67]

Skeel and Gillette ask their own "why" question:

> why, if governance reform is so common in Chapter 11, [does] such reform . . . not currently occur in Chapter 9 cases[?] An obvious answer might be that state sovereignty precludes governance reform. However, . . . we offer an *alternative explanation: historical path dependence* is at least as important as constitutional concerns. At key junctures, lawmakers seriously considered explicitly incorporating governance reform into Chapter 9, but the proposals were overtaken by events . . . . [68]

Their following, fifteen paragraph account of Chapter IX's origins is under-researched—they did not access the archival sources—and accordingly is not accurate in several respects. They missed the creative legislative work leading to the First MBA that occurred in January and February of 1933, and their reliance on a few, selective quotations from the main hearings later in 1933 and in January 1934 led to a misunderstanding that Wilcox, the freshman congressman from Florida, was "the author of and leading advocate for" the First MBA.[69] They also failed to learn of the many other creative models of municipal bankruptcy advanced during the legislative processes.

The L&E authors also conclude that creditor friendly governance proposals were "overtaken by events." But according to the archival sources, of the multiple versions of municipal bankruptcy that were posited in 1933 and 1934, the one that succeeded was the one that was *politically feasible*. Further, while the deep evidence reflects the legislators' constant heed, the scholars assert that constitutional concerns about Chapter IX in the 1930s "are not nearly as complete an explanation as one might think" for the creditors' inability in municipal bankruptcy proceedings to pursue the creditors' bargain

[67] *Id*.

[68] *Id.* at 1156. "Path dependence" is another minor theory of L&E that "established legal approaches to the solution of issues will determine the way in which new situations or new problems are handled in the present and in the future." John Bell, *Path Dependence and Legal Development*, 87 TUL. L. REV. 787, 787 (2013).

[69] Gillette & Skeel, *Governance Reform*, *supra* note 34, at 1167.

remedy they normatively posit for the problem of "debt overhang,"[70] that is, the proposal for creditors in Chapter IX then (and chapter 9 today) to be able to compel municipal governance changes including setting and collecting municipal taxes. The reason: the municipal insolvencies were "due either to circumstances governance reform would not have addressed or to fiscal crises that superseded any aspirations for governance reform."[71] Skeel and Gillette argue alternatively that "Congress simply assumed rather than analyzed the constitutional scope"[72] or that legislative debate centered on the question of infringement on State sovereignty and "[l]ittle evidence suggests that Congress was attempting to define the limits of federal bankruptcy authority."[73] Those remarks do not square with the evidence provided by the primary sources found in the archives.[74]

Municipal bankruptcy law as proposed, filed, and shepherded to enactment by Sumners abrogated two givens of conventional constitutional wisdom: first, that, under the Constitution's Article I, § 8, Clause 4 (the "Bankruptcy Clause"),[75] statutory bankruptcy relief must require a debtor to surrender all assets for court administration in exchange for a discharge of debt, and, second, that political subdivisions could not become debtors in bankruptcy court. Moreover, *Bekins* followed *Ashton*—and municipal bankruptcy was never again subjected to a constitutional challenge—but the *Bekins* Court did not repudiate *Ashton*'s structural federalism concerns. So, legislators of the 1930s naturally kept their eyes on that ball even as they innovated to make municipal bankruptcy relief available. Finally, the rich story of the many models of bankruptcy brainstormed while legislating both the First and Second MBAs demonstrates that enactment of municipal

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[70] Borrowing from corporate finance literature, one L&E scholar defines "debt overhang" as "a condition in which an entity's existing obligations blunt investors' willingness to contribute new capital to finance new investment." Buccola, *Limits of Municipal Bankruptcy*, *supra* note 33, at 845. The term thus means, simply speaking, unpayable debt. It is, of course, the debtor's inability to timely pay "existing obligations" that constitutes the "insolvency" that is the reason for municipal bankruptcy.

[71] Gillette & Skeel, *Governance Reform*, *supra* note 34, at 1166.

[72] *Id.* at 1168.

[73] *Id*. at 1169.

[74] The L&E scholars also do not show how creditors taking control of municipal purse strings and putting more of those dollars into creditors' pockets would have corrected any "misalign[ment]" of "the benefits and costs of public expenditures." *Id*. at 1152. In any event, so long as the debtor agreed to it, the adjustment plan that the bondholders negotiated could contain, to quote the First MBA, "such *other provisions and agreements*, not inconsistent with this chapter, *as the parties may desire*." 11 U.S.C. § 303(b) (1934) (emphasis added).

[75] U.S. CONST. art. I, § 8, cl. 4.

bankruptcy represented a marked evolution of the understanding and application of the Constitution, namely, the Bankruptcy Clause. As discussed below, both the First and Second MBAs relatively easily passed the two chambers.

Skeel and Gillette go on to surmise that, during the legislative debates, members of Congress were "preoccupied" with municipal debtors' "inability to restructure debts" as "the immediate problem" and were not "attempting to provide a comprehensive solution."[76] But unpayable debt is more than an "immediate problem"; it is an *existential* crisis for a municipality. Sumners observed that in "a municipal corporation that owes more money than it can pay[,] t]he taxpayer has the privilege of continuing to live there or move . . . over the bridge to another town," and Wilcox testified about "a community . . . that has a bonded indebtedness of $10,500 per capita . . . . and then when everybody moved off and left it there were only about a hundred people remained.[77] Or as social scientists put it today, "[m]igration[,] the spatial reallocation of individuals[, is] driven by factors such as municipal services, social networks, amenities, and economic opportunities,"[78] and the phenomenon of ghost towns and disincorporated villages and districts is well known.[79] Second, the idea of municipal bankruptcy as expressed in bills leading to the First and Second MBAs was, in Congress during the 1930s, understood to be the full remedy for insolvency because it was based on wide ranging negotiations of debtors with bondholders in a bankruptcy law reorganizing process that mirrored the restructuring capability of corporate reorganization (albeit minus the executory contract power after *Ashton* and until the 1976 amendment).[80]

My telling of the story follows. In contrast to economic analysis, I use the *historical method* to learn and to explain how the First and Second MBAs were enacted. As historian Peter Laslett has written, "we can only properly

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[76] Gillette & Skeel, *Governance Reform*, *supra* note 34, at 1166.

[77] 1934 S. Subcomm. Hearing, *supra* note 17 at 59 (Sumners's statement); *To Amend the Bankruptcy Act, Municipal and Private Corporations: Hearing Before the H. Comm. on the Judiciary*, 72d Cong. at 73 (1933) 173 [hereinafter *1933 House Comm. Hearing*] (Wilcox's testimony).

[78] Pengjie Gao & Xiaodan Gao, *Municipal Finance and Labor Mobility* 1, 1 (14th Ann. Mun. Fin. Conf., 2025), https://www.brookings.edu/wp-content/uploads/2025/05/municipal-finance-and-labor-mobility-7.16.pdf.

[79] *See generally* Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364 (2012) [Anderson, *Dissolving*].

[80] For instance, in the 1934 Senate hearing, Wilcox testified that his city's restructuring agreement with its bondholders included terms for specific taxation, budgeting, and financial controls subject to creditor approval. *See infra* text accompanying note 256.

understand ourselves and our world, here and now, if we have something to contrast it with," and it is historians who "provide that something."[81] "History is a discipline [for] reconstructing the past" by vigilant scholars who discern and explain the "five C's": "change over time, context, causality, contingency, and complexity."[82] As legal historian Annette Gordon-Reed put it, "History is about people and events in a particular setting and context, and how those things have changed over time in ways that make the past different from our own time, with an understanding that those changes were not inevitable."[83]

The historical method is straightforward.[84] Sources are the foundation of intellectual work. As another historian explains, "historical facts are knowable only by the evidence they leave behind,"[85] and historical investigators "should never consider less than the total of the historical material which may conceivably be relevant to [their] inquiry."[86] The writing

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[81] *Peter Laslett*, *in* HISTORIANS ON HISTORY (John Tosh ed., 3d ed. 2018) 283 (reproducing PETER LASLETT, THE WORLD WE HAVE LOST 242 (1965)).

[82] FEA, WHY STUDY HISTORY?, *supra* note 39, at 3, 6 (emphasis added). *See also* ZACHARY M. SCHRAG, PRINCETON GUIDE TO HISTORICAL RESEARCH 62 (2025) [hereinafter SCHRAG, PRINCETON GUIDE] (characterizing history as "the analysis of change over time," quoting MICHAEL ROSSI, THE REPUBLIC OF COLOR: SCIENCE, PERCEPTION, AND THE MAKING OF MODERN AMERICA 243 (2019)).

[83] ANNETTE GORDON-REED, ON JUNETEENTH 58 (2021).

[84] The "four bare essentials" of the historical method are (i) collection of all available and relevant "printed, written, and oral materials," (ii) exclusion of unreliable materials, (iii) extraction of the "testimony that is credible," and (iv) "organization of that reliable testimony into a meaningful narrative or exposition." GOTTSCHALK, PRIMER, *supra* note 40, at 28. Step by step explanations are contained in historiographical texts such as D.C. BEHAN MCCULLAGH, JUSTIFYING HISTORICAL DESCRIPTIONS (1984) and the other authorities cited in these footnotes.

[85] G.R. ELTON, THE PRACTICE OF HISTORY 54 (2d ed. 2002) [hereinafter ELTON, THE PRACTICE].

[86] *Id*. at 60. "The relevant evidence has to be sought after in fairly out-of-the-way and improbable places." Of course, the fact that a source is old or in an archive does not mean it is perfectly reliable, or as historian John Tosh points out:

> The archives . . . have to be scrutinized for political or ideological distortion. Ingenuity and flair are required to grasp the full range of uses to which a single source may be put. Of each type of evidence the historian has to ask how and why it came into being, and what its real import is. Divergent sources have to be weighed against each other. . . . No document, however authoritative, is beyond question. . . . the rules cannot be reduced to a formula, and the exact procedures vary according to the type of evidence; but much of what the experienced scholar does almost without thinking can be described in terms that are comprehensible to the uninitiated.

of history "follows strict rules for ascertaining verifiable fact" from the sources that are reliable.[87] The method

> extract[s] from what the past has left the true facts and events of that past, and so far as possible their true meaning and interrelation, the whole governed by the first principle laid down of historical understanding, namely that the past must be studied in its own right, for its own sake, and on its own terms. It is a way of turning the evidence to account, and though there is nothing mysterious about it, it is nevertheless rigorous and not to be confused with the . . . approach of the intelligent but untutored enthusiast. Its fundamental principles are only two: *exactly what evidence is there,* and *exactly what does it mean?* Knowledge of *all the sources*, and competent criticism of them—these are the basic requirements of a reliable historiography.[88]

Under the historical method, in a nutshell, "it is with *all the sources* that any account of the historian's working methods must begin."[89]

"[A]ll histories deploy facts, and some histories answer only primarily factual questions."[90] That is neither the L&E advocates' nor my goal. Rather, historians usually research the facts in service of interpretative questions. A highly regarded historiographer, Louis Gottschalk, described the distinction as between the "who, where, what, and when of the original testimony and evidence" and the "why, the how, and the with-what-consequences of individual and social behavior in the past."[91] That distinction highlights the act of historical interpretation. Another historian, Zachary M. Schrag, writes that questions of interpretation "drive historical research" and "keep weary historians turning those pages, looking for answers."[92] In short, historians

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TOSH, PURSUIT OF HISTORY, *supra* note 40, at 123–24.

[87] GOTTSCHALK, PRIMER, *supra* note 40, at viii.

[88] ELTON, THE PRACTICE, *supra* note 85, at 59 (emphasis added). *See also* HOWELL & PREVENIER, RELIABLE SOURCES, *supra* note 40, at 69–71.

[89] TOSH, PURSUIT OF HISTORY, *supra* note 40, at 74 (emphasis added).

[90] SCHRAG, PRINCETON GUIDE, *supra* note 82, at 54.

[91] Louis Gottschalk, *A Professor of History in a Quandary*, 59 AM. HIST. REV. 273, 280 (1954) (emphasis deleted).

[92] SCHRAG, PRINCETON GUIDE, *supra* note 82, at 55.

must first do the hard work of archival, original source research before attempting to answer the "why" question.[93]

Within today's broad discipline of history, the field of *American legal history* is the specialized area that traditionally centered on the evolution of legal doctrines but over the past half century has widened its focus to the role of law in society and law's effects over time on a wide range of people and events.[94] This work requires "knowing the period [and] deeply situating law in the particularities of a specific time and place."[95] Legal history provides a lens more accurate and more insightful than L&E through which to examine and understand the origin of municipal bankruptcy, and to that end I rely on two specific legal historical forms or techniques. The first is legal biography, called by several historians "scholarship fit for the twenty-first century."[96] I utilize my research for Sumners's biography and have additionally investigated the life of Wilcox.

My second tool is legislative history, the "difficult and time-consuming" work to discover the process of enactments.[97] "A legislative history is the term used to designate the documents that contain the information considered by the legislature prior to reaching its decision to

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[93] At age five, Herodotus, the first historian, famously asked: "Mother, what did they fight each other for?" CHRISTOPHER PELLING, HERODOTUS AND THE QUESTION WHY 5 (2019) (referring to the Greeks' naval victory over the Persians in 480 BCE). On the work of historians, see DAVID HACKETT FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT xxi (1970) (asserting no "alternative to heavy labor in historical sources"). *See also* HARRY RITTER, DICTIONARY OF CONCEPTS IN HISTORY, *Evidence* 143 (1986) (stating that "sources" include "document, opinion, monument, artifact, tradition, and so on that can be used a basis for statements about the past"); FRANCIS X. BLOUIN, JR. & WILLIAM G. ROSENBERG, PROCESSING THE PAST: CONTESTING AUTHORITY IN HISTORY AND THE ARCHIVES 131 (2012) (stating that sources are "evidence of really lived pasts"); J. LAWRENCE HARE, JACK WELLS & BRUCE E. BAKER, ESSENTIAL SKILLS FOR HISTORIANS: A PRACTICAL GUIDE TO RESEARCHING THE PAST 127 (2019) (stating, "Primary sources are the most challenging, but also the most rewarding").

[94] *See, e.g.*, ROBERT W. GORDON, TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 354 (2017) (postulating that "the virtue of historical inquiry [is] that it destroys myth-making . . . it disabuses us of the notion that there is a simple linear progressive path of progress that we must adhere to").

[95] Steven Wilf, *Law/Text/Past*, 1 UC IRVINE L. REV. 543, 544 (2011).

[96] Victoria Barnes, Catharine MacMillan & Stefan Vogenauer*, On Legal Biography*, 41 J. LEGAL HIST. 115, 116 (2020). *See also* Laura Kalman, *The Power of Biography*, 23 L. & SOC. INQUIRY 479, 482 (1998); David Sugarman, *From Legal Biography to Legal Life Writing: Broadening Conceptions of Legal History and Socio-legal Scholarship*, 42 J. L. & SOC'Y 7, 11 (2015).

[97] JOHN B. NANN & MORRIS L. COHEN, YALE GUIDE TO RESEARCH IN AMERICAN LEGAL HISTORY at 179–80 (2018) [hereinafter YALE GUIDE].

enact a law. [It] is consulted in order *to better understand the reasons* for the enactment of the statute," according to a classic legal research textbook.[98] Yale's legal history research guide explains: "A *legislative history* gathers the materials that a legislature generated when considering proposed legislation . . . . [and for] tracking the *process of legislation* as it works its way through a legislature for other reasons."[99] A distinguished legal historian explained the value of such research:

> an historian . . . would never . . . suggest that one could understand a major piece of legislation *merely by reading its provisions*. One *needs legislative history*, a knowledge of the political pressures at work on the bill, the effect that public opinion had in moving the process forward, what pressure groups supported and opposed the bill, and a myriad of other considerations.[100]

But to truly learn the story of legislation it is necessary, I submit, to go farther and to perform "deep legislative history,"[101] a term that I define as conventional legislative history[102] *plus* assiduous research in *archives* to find relevant primary

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[98] J. MYRON JACOBSTEIN & ROY M. MERSKY, FUNDAMENTALS OF LEGAL RESEARCH 169 (1987) (emphasis added).

[99] YALE GUIDE, *supra* note 97, at 179–80 (emphasis added).

[100] Melvin I. Urofsky, *Beyond the Bottom Line: The Value of Judicial Biography*, 1998 J. SUP. CT. HIST. 143, 147–48 (1998) (emphasis added).

[101] A few before me have used the collocation "deep legislative history" to signify assiduous legislative research but not explicitly or necessarily requiring archival work. *See, e.g.*, Julie C. Suk, *A Dangerous Imbalance: Pauli Murray's Equal Rights Amendment and the Path to Equal Power*, 107 VA. L. REV. ONLINE 3, 26 (2021) (recommending "close attention to the ERA's *deep legislative history*"); David M. Forman, *Big Tobacco: An Impenetrable Industry Regulators Can Only Hope to Contain*, 31 SUFFOLK U. L. REV. 125, 134 n.45 (1997) (finding that "[t]he standard of objective intent under the FDCA has a *deep legislative history*"); Lucas Loafman & Andrew Little, *Race, Employment, and Crime: The Shifting Landscape of Disparate Impact Discrimination Based on Criminal Convictions*, 51 AM. BUS. L.J. 251, 256 (2014) (noting "the *deep legislative history* of Title VII's disparate impact provisions") (emphasis added for all three).

[102] Conventional legislative history finds and analyzes, as described by one specialist, "a fixed universe of statements and documents generated during the legislative process in Congress, consisting of committee reports and of statements made in hearings, committee markups, and on the floor of each chamber." Jesse M. Cross, *Legislative History in the Modern Congress*, 57 HARV. J. LEGIS. 91, 94 n.8 (2020) (citing WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION 981–1021 (4th ed. 2007)).

sources of and about the actors and their work[103]—here, Sumners, a newly elected congressman named J. Mark Wilcox, other involved legislators, debtors and bondholders, their respective attorneys and lobbyists—all shining light on the bare statutory language.[104] Those deep and difficult to find sources reveal important facts such as timeline, actors' thinking, wording of original and amended texts, and dealmaking by and between legislators and their correspondents, allies, and opponents.

C. Hatton Sumners and Mark Wilcox

The veteran legislator, Hatton W. Sumners,[105] rather than the rookie Wilcox,[106] played the instrumental role in creating bankruptcy relief for insolvent political subdivisions during the 1930s. Sumners was well situated by his experience and position in the House of Representatives to do so. Born in Tennessee, he moved with his family to Garland, Texas, while in high school, studied in a Dallas law office, and passed the Texas bar in 1899. After service as County Attorney and then high profile civil lawyering, voters elected him to Congress in 1912 as a Democratic Party candidate. Sumners served until retirement in 1947. During his 16 year chairmanship of the House Judiciary Committee, he initiated several significant contributions to the federal judicial and legal system including the First and Second MBAs, procedural and jurisdictional reforms, criminal law revisions, and administrative law. He argued before the Supreme Court four times as amicus curiae on behalf of his committee.[107] William Howard Taft called him "the

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[103] Josiah M. Daniel, III, *Cooptation of the Carmack Amendment by the Railroads, 1906–1917: A Study in Associational Lawyering*, 50 NO. KY. L. REV. 51, 55 (2023), https://ssrn.com/abstract=4559518 (defining "deep legislative history" as "conventional legislative history combined with careful research in the archives").

[104] In learning and explaining what the legislators went through and what they believed they were doing in passing bills, historians are, I submit, unconstrained by idiosyncratic and varying judicial rules and malleable case law doctrines about the ideal or proper grist for judges' decision-making in court cases.

[105] 1875–1962. For more about Sumners, see the biographical section of my article (to be a chapter in my book) about his role in resolving the court packing crisis. *See* Josiah M. Daniel, III, *"What I Said Was 'Here Is Where I Cash In'": the Instrumental Role of Congressman Hatton Sumners in the Resolution of the 1937 Court-Packing Crisis*, 54 UIC J. MARSHALL L. REV. 379, 384–93 (2021) [hereinafter Daniel, *Cash In*].

[106] 1890–1956.

[107] Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville, & Lake Indian Tribes or Bands of State of Washington v. United States, 279 U.S. 655 (1929); Jurney v. McCracken, 294 U.S. 125 (1935); Edwards v. United States, 286 U.S. 482 (1932); and United States v. Bekins, 304 U.S. 27 (1938).

best lawyer in Congress,"[108] and in 1939 he was most highly rated by a LIFE magazine poll for integrity among Congressmen.[109]

As the Judiciary Committee's ranking member, Sumners became involved in bankruptcy law developments during the Calvin Coolidge and Herbert Hoover administrations.[110] For instance, in 1925 Sumners investigated a bankruptcy ring involving Ohio federal District Judge George W. English.[111] The disclosures of several other bankruptcy rings across the country[112] and the growing interest in reform kindled by Paul King, head of the National Association of Bankruptcy Referees, District Judge Thomas D. Thacher, and bankruptcy intellectuals who soon organized as the National Bankruptcy Conference (NBC)[113], along with a judicial investigation in New York City[114] helped stimulate a general discontent with the bankruptcy

[108] Raymond Moley & Celeste Jedel, *The Gentleman Who Does Not Yield: Dallas Diogenes, Hatton Sumners*, SATURDAY EVENING POST 13, 100 (May 10, 1941).

[109] *Washington Correspondents Name Ablest in Life Poll*, LIFE MAG., Mar. 20, 1939, at 13, 15.

[110] For example, in 1926 when Massachusetts Senator David I. Walsh's bill to revise many provisions of the BA'98 stalled, Sumners stepped in and took the procedural step to move it through to passage. S. 1039, 69th Cong. (1926); H.R. Res. 219, 69th Cong. (1926); 66 CONG. REC. 9607–9610 (1926); to amend an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and Acts amendatory thereof and supplementary thereto., ch. 406, Pub. L. No. 69-301, 44 Stat. 662 (1926); Letter from HWS to J.W. Dickson (Apr. 5, 1926) (on file in the Sumner Papers at the Dallas Hist. Soc'y) (taking credit for "[my] motion several days ago . . . for the immediate consideration of the bill to amend the bankruptcy law").

[111] The House's impeachment caused English's resignation in 1926. *Conduct of George W. English, United States District Judge, Eastern District of Illinois: Hearing Before the Subcomm. of the H. Comm. on the Judiciary*, 69th Cong. (1925).

[112] *See, e.g.*, *Hint of 'Bankruptcy Ring,'* N.Y. TIMES, Oct 7, 1921, at 28; *Detroit Bankruptcy Ring Denied by Court*, 40 WOMEN'S WEAR DAILY, NEW YORK No. 84, Apr. 29, 1930, § 3, at 2.

[113] King's reformist group included not only Thacher but also New York attorney Lloyd Garrison, Randolph Montgomery of the New York Credit Men's Association, and Harvard Law Professor James A. MacLaughlin. J. Ronald Trost, *National Bankruptcy Conference History 1927–2021* at 3, http://nbconf.org/wp-content/uploads/2021/04/History-NBC-April-2021-JRT-April-15-2021-FINAL-WITH-Authors-Note.pdf (2021) (last visited Dec. 15, 2025) (on file with author). As new bankruptcy bills began to be filed in 1930, this elite group formalized as the NBC and dedicated itself to providing expert consultations to Congress on bankruptcy legislation. John D. Honsberger, *The Origins of the National Bankruptcy Conference: A Hinge-point of Change, 1932–1933*, http://nbconf.org/wp-content/uploads/2015/10/NBC-History-1.pdf (1985) (last visited Dec. 15, 2025) (on file with author). *See also* Russell L. Hiller, *A Conference Anniversary: Fifty Years in Retrospect*, 51 AM. BANKR. L.J. 31–33 (1977).

[114] In March 1929, right after Hoover's inauguration and only months before the Great

regime. Moreover, Sumners's interest in bankruptcy stemmed from his long acquaintance with commercial agriculture, debts, and land values, informed in part by personal engagement in real estate investing and secured lending.

With other Southern Democrats in Congress, Sumners joined Roosevelt's New Deal team in 1933.[115] As one of the dozen high profile invalidations of New Deal laws by the Supreme Court in 1935 and 1936, *Ashton*'s rejection of the First MBA was one of the Supreme Court decisions that impelled Roosevelt's court packing effort in 1937, and the Second MBA was enacted during the consequent turmoil. Sumners passed two bills during this period, one incentivizing voluntary retirement by guaranteeing undiminished lifetime retirement pay for the Justices and a second bestowing standing upon the government in any federal court action challenging the constitutionality of a federal law or program. I have argued that Sumners's two bills bookended the resolution of the court packing crisis.[116]

In contrast, for the primary role in Chapter IX's creation, the L&E academics nominate Wilcox, who entered the House on March 4, 1933, and served only three terms.[117] Born in 1890, he practiced law in southern Georgia until relocating in 1925 to West Palm Beach, Florida.[118] Founded in 1894, that city grew spectacularly during the Florida land boom of the early 1920s. The resulting mid-decade land crash caused this city significant financial distress. When Wilcox became City Attorney in 1928, he cut his own salary, so dire was the city's predicament. He led his city's negotiations with the bondholders and soon found himself also serving as General Counsel of the

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Crash, the three bar associations of New York retained William J. Donovan to investigate bankruptcy maladministration in that district. Report of Bankruptcy Committee, National Ass'n of Credit Men, 4 J. NAT'L ASS'N REFEREES IN BANKR. 139 (July 1930). Judge Thacher appointed Donovan to prepare a report, filed with the court on March 22, 1930, and as a House Judiciary Committee print in January 1931. *Id*. at 2–3. *See also* Charles S.J. Banks, *The National Bankruptcy Conference and the Bankruptcy Act*, 22 J. NAT'L ASS'N REFEREES IN BANKR. 115 (1948); *Administration of Bankrupt Estates*, Committee Print, H. Comm. on the Judiciary, 71st Cong., 3d Sess. (1931).

[115] IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 158, 160, 162 (2013) (Southern M.C.s made an implicit deal with FDR: they would support the New Deal, and he would keep hands off the South's racial system); SEAN P. CUNNINGHAM, BOOTSTRAP LIBERALISM: TEXAS POLITICAL CULTURE IN THE AGE OF FDR 106, 160 (2022) (finding HWS was a congressional supporter of FDR).

[116] Daniel, *Cash In*, *supra* note 105, at 414–19.

[117] Gillette & Skeel, *supra* note 34, at 1167 (Wilcox was "author of and leading advocate for a municipal bankruptcy law").

[118] JAMES CLARK FIFIELD, ED., THE AMERICAN BAR; A BIOGRAPHICAL DIRECTORY OF CONTEMPORARY LAWYERS OF THE UNITED STATES AND CANADA 156 (1922); 1 MARTINDALE HUBBELL LAW DIRECTORY 146 (1937).

League of Florida Municipalities, focusing on statewide municipal finance as Florida's cities and towns increasingly defaulted on their bonds.[119] Those twin perspectives informed his extensive testimonies in 1933, 1934, and 1937 hearings before congressional committees.

In the spring of 1932, with the congressional election half a year away, Wilcox resorted to creative lawyering to hold West Palm Beach's bondholders at bay. One newspaper reported: "Palm Beach county legislators . . . created a new district . . . which exactly coincided with the area of the city of West Palm Beach." The *new district* levied taxes, which the residents did pay, for the police and fire departments, garbage collection, and street maintenance; and *the city* levied taxes, which residents did *not* pay, allocated to "bonds and interest." The paper noted that the "community . . . is acting on the advice of . . . Wilcox."[120] In summer that year, Wilcox won the Democratic primary election for Congress in the district running the length of Florida's east coast. After taking office, Wilcox filed a corruption complaint against Halsted Ritter, the federal district judge in Miami, triggering an impeachment that fell to Sumners to manage through his Judiciary Committee to ultimate trial in the Senate in 1936. During his three terms, the bumptious Wilcox did play a useful, supporting role as a witness in hearings on municipal bankruptcy but did not appear to have otherwise made any major contributions.[121]

Sumners and Wilcox bore similarities. Both were Southern Democrats and white supremacists, the former a career long foe of anti-lynching bills[122] and the latter an opponent of the Fair Labor Standards Act on racial grounds.[123] As lawyers in Congress, both focused on crafting a federal

[119] About the land crash, see, e.g., MORTON C. PAULSON, THE GREAT LAND HUSTLE (1972); WILLIAM FRAZER & JOHN J. GUTHRIE, THE FLORIDA LAND BOOM: SPECULATION, MONEY, AND THE BANKS (1995). Information on Wilcox is available in multiple sources. *See, e.g.*, *J. Mark Wilcox: Leading Citizen*, PALM BEACH POST-TIMES 4, Feb 5, 1956 (obituary, recalling his salary cutting).

[120] *New Cities from Old*, MIA. HERALD 6 (Oct. 8, 1933). Wilcox must have known or learned that other municipalities had unsuccessfully attempted this stratagem as reported in federal jurisprudence: Memphis, Tenn.: Meriwether v. Garrett, 102 U.S. 472 (1880); Mobile, Ala.: Port of Mobile v. Watson, 116 U.S. 289 (1886); and Duluth, Minn.: Brewis v. City of Duluth, 9 F. 747 (C.C. D. Minn. 1881).

[121] Wilcox enacted a minor bill promoting aviation called the Frontier Defense Act and a bill to create Everglades National Park.

[122] Daniel, *Cash In*, *supra* note 105, at 389–91.

[123] Wilcox's deplorable Jim Crow reasoning was: "the problem of our Negro labor [is that] when we turn over to a federal bureau or board the power to fix wages, it will prescribe the same wages for the Negro that it prescribes for the white man. . . . You cannot put the Negro and the white man on the same basis and get away with it." 82 CONG. REC. 1404

statutory solution for municipal insolvency. But the differences were substantial. At age 58 in 1933, Sumners had two decades' experience in the House and wielded substantial power as Judiciary Committee chair. Fifteen years his junior, Wilcox was a novice representative serving on three minor committees.[124] When, in his second week as a new congressman. in the 73rd Congress, Wilcox filed a municipal bankruptcy bill, it was *not*—contrary to the L&E scholars' version of the story—the first filed but rather the *fifth* such bill. Moreover, *Wilcox* likely had *not* authored that bill; its author was more likely the New York lawyer for West Palm Beach's municipal bondholders, with whom Wilcox had been dealing and collaborating. And the evidence discloses that Sumners had already been working significantly for more than a year on legislation to reform, enlarge, and improve all the nation's bankruptcy law as a response to the Depression, and *he* had filed the *first* bill, in the prior Congress, to add a municipal bankruptcy option to the BA'98.

II. First Municipal Bankruptcy Act, 1934–1936

A. Efforts in the Lame Duck Congress

1. Hoover's Call for "Emergency Action"

On April 10, 1930, Thacher left the bench to become President Hoover's Solicitor General, and the Justice Department appointed his NBC colleague, attorney Lloyd Garrison, to conduct a nationwide study of bankruptcy case administration. The resulting Thacher-Garrison report is dated December 5, 1931, but was not released publicly until shortly before Hoover addressed Congress on February 29, 1932, to recommend revisions to federal bankruptcy law. Immediately, Senator Daniel O. Hastings of Delaware filed Senate Bill 3866[125] and Representative Earl C. Michener of Michigan filed House Bill 9968,[126] companions drafted by Garrison with the NBC's assistance, to amend the entire BA'98 in order to centralize bankruptcy

(1937).

[124] *Off. Cong. Directory*, 73d Cong. 223 (1934) (Wilcox served on Census, Public Buildings, and Revision of the Laws Committees).

[125] S. 3866, 73d Cong. (1932).

[126] H.R. 9968, 73d Cong. (1932). Adolph Berle asserted in a later letter to President Roosevelt that "the corporate section was pretty much a Wall Street bill drafted by Robert Swaine." Letter from Adolph A. Berle, Jr. to Marguerite LeHand (for FDR) (Mar. 30, 1933) (*in* Presidential Papers [hereinafter Pres. Papers], on file with FDR Libr.).

administration, improve compositions, and federalize the device of assignments for the benefit of creditors.

As noted, the BA'98 had provided composition with creditors relief for individual debtors since its inception and similar relief for private corporations beginning in 1910, but compositions had proven generally unworkable for any type of debtor due to the requirement that complete schedules of assets and liabilities be filed alongside the petition.[127] The companion bills proposed to add section 76, a new provision for corporate reorganization, requiring a two-thirds supermajority of the claim amounts of votes to confirm a plan, along with other modern day confirmation standards.[128] Those fundamental standards persisted, early the next year, in Sumners's business reorganization bill that also included the first ever proposal for the eligibility of municipalities. From April through June 1932, a joint subcommittee of the Senate and House Judiciary Committees held desultory hearings, but no consensus emerged as presidential electioneering began. None of the 1932 proposals included an option for municipal bankruptcy, but after Roosevelt's landslide election on November 8, and with large Democratic majorities about to control both chambers, new ideas emerged for expanded bankruptcy relief for all types of debtors.

While Congress passed no bankruptcy bill during 1932, it did create and soon expand the Reconstruction Finance Corporation (RFC).[129] Under its

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[127] *Need for Municipal Bankruptcy Legislation,* 6 COLLIER ON BANKRUPTCY ¶ 900.LH[1] (2025).

[128] In it, confirmation of a plan depended mainly on financial tests:

> (1) [the plan] is equitable; (2) all amounts to be paid by the debtor or by any corporation or corporations acquiring the debtor's assets, for services or expenses incident to the reorganization, have been fully disclosed and are reasonable, or are to be subject to the approval of the court; (3) the offer of the plan and its acceptance are in good faith and have not been made or procured by any means or promises forbidden by this Act; (4) the plan provides for the payment in cash of all costs of administration . . . ; and (5) [secured creditors will receive the value of their liens].

H.R. 9968, 73d Cong. § 73(g) (1932). In contrast, Michener's proposed confirmation standards for compositions focused on the bona fides of the debtor:

> (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or any means, promises, or acts herein forbidden.

Id. § 75(d). Municipal bankruptcy would blend the two.

[129] Reconstruction Finance Corporation Act, ch. 25, Pub. L. No. 72-2, 47 Stat. 5 (1932), codified at 15 U.S.C. § 605(c) (1932).

powerful second chairman, Jesse H. Jones of Houston, the RFC began refinancing industrial and business entities and shoring up financial institutions' capital.[130] When Congress established the RFC in 1932, it initially excluded public entity debtors as borrowers, but the Emergency Farm Mortgage Act of 1933 empowered the RFC to refinance the bonds of "drainage districts, levee districts, levee and drainage districts, irrigation and/or similar districts . . . organized under the laws of any State or Territory . . . to reduce and refinance its outstanding indebtedness."[131] Sumners supported that legislation. The RFC's creation turned out to be a necessary precondition for the effectiveness of municipal bankruptcy, and vice versa.[132] Right away, "the problem of the dissenting minority" stymied the RFC, particularly in situations that required the "scaling of principal" and interest rate reduction.[133]

A heightened sense of urgency about bankruptcy reform animated Hoover after the election. In his final State of the Union Address on December 6, 1932, the President stressed "the need for . . . revision of the bankruptcy acts."[134] Calling the matter "more urgent every day" in a special message one month later, Hoover connected the idea of reform and expansion of bankruptcy relief with the goal of national economic recovery. Hoover advocated "emergency action" to enable "voluntary readjustments through the extension or composition of individual debts and the reorganization of corporations . . . desirable to a large majority of the creditors," thus

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[130] *See generally* JESSE JONES WITH EDWARD ANGLY, FIFTY BILLION DOLLARS: MY THIRTEEN YEARS WITH THE R.F.C., 1932–1945 (1951); JAMES S. OLSON, SAVING CAPITALISM: THE RECONSTRUCTION FINANCE CORPORATION AND THE NEW DEAL (1988).

[131] Part 4-Refinancing of Agricultural Improvement Districts Indebtedness for the Benefit of Farmers: Loans by Reconstruction Finance Corporation, *in* Emergency Farm Mortgage Act of 1933, ch. 653, Pub. L. No. 10, 48 Stat. 49, 49–50 (1933). Further statutory authorization for the RFC included An Act Relating to direct loans for industrial purposes by Federal Reserve banks, and for other purposes, § 10, ch. 653, 48 Stat. 1105, 1110, 1269 (1934).

[132] A RFC staff attorney published a contemporaneous account that is reliable historical evidence for the story of municipal bankruptcy's origins in which he explained that the RFC served as the lender that funded virtually all the Chapter IX plans across the nation; the amount it committed to loan, based on its own appraisals, operated to determine the amount of discount that a Chapter IX plan would provide for the bondholders to accept. Walter C. Sauer, *An Experiment in Municipal Refinancing: Factual Background of Ashton v. Cameron County Water Improvement District No. One*, 5 GEO. WASH. L. REV. 1, 9–18 (1936).

[133] *Id*. at 8.

[134] Herbert Hoover, *Fourth State of the Union Address*, Dec. 6, 1932, Univ. of Va., Miller Center, https://millercenter.org/the-presidency/presidential-speeches/december-6-1932-fourth-state-union-address (last visited /Apr. 10, 2026) (on file with author).

highlighting the holdout problem and the new form of relief needed.[135] The President Elect concurred in the need for legislative action. Roosevelt said he understood business failure, and it was rumored that he was already in touch with Senators about a railroad reorganization bill.[136]

2. Three Models

The seminal period in the formulation of the municipal bankruptcy chapter of the BA'98 was January 9 through March 4, 1933, during the lame duck session of Congress. In this tension filled period, members of Congress advanced three models of municipal bankruptcy. No bankruptcy bill was enacted before Roosevelt took office, so the debate between these versions continued into the next Congress, with Sumners taking control in the first month and then authoring and revising the politically acceptable bill that the President signed the next year.

To begin, on January 9, 1933, Fiorello La Guardia, soon to exit Congress and win the New York City mayoralty, filed House Bill 14110 that he, Representative Thomas D. McKeown of Oklahoma, and Adolph Berle[137] had prepared to create a railroad reorganization chapter to supersede the judicial device of equity receiverships. The next day McKeown filed H.R. 14133 to revise the BA'98's individual debtor provisions for composition with creditors and to add a new chapter for private corporations' business reorganization.[138] The House Judiciary Committee's January 14 hearing on La Guardia's bill revealed disagreement about the role the Interstate Commerce Commission (ICC) should play in railroad reorganization cases. Immediately, Sumners called an executive session, and the Judiciary Committee approved him to combine and revise both bills.[139]

On January 21 Sumners filed his consolidated bill, House Bill 14359, proposing a new Chapter VIII with three new sections for the BA'98. The committee approved the bill within forty-eight hours. For individual debtors, its § 74 provided easier compositions. Section 76 essentially reprised La

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[135] Herbert Hoover, *A Recommendation that Legislation Revising the Bankruptcy Laws Be Passed at this Session of Congress* 1–2, H. Doc. No. 522, 72d Cong. (1933).

[136] Telegram from Edward Keating to FDR (Feb. 21, 1933) (*in* Pres. Papers, on file with FDR Libr.).

[137] H.R. 14110, 72d Cong. (1933). *See also* Letter from Thomas D. McKeown to FDR, Mar. 20, 1933; Letter from Adolph A. Berle, Jr. to FDR (Mar. 30, 1933) (all in Pres. Papers, on file with FDR Libr.).

[138] H.R. 14133, 72d Cong. (1933).

[139] Minute Book (Jan. 16, 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

Guardia's bill including the same ICC provision. In the middle, § 75 proposed corporate reorganization relief. Sumners innovated by enlarging the scope of dischargeable debt in all three sections to include claims "whether or not [they] would otherwise constitute provable claims under this Act"[140]; improved the terms for staying lien enforcement and for satisfying secured claims; provided stockholders with the opportunity to participate in a corporate case; added the unfair discrimination principle to the confirmation standards; and generally eased the requirements for confirmation.

In § 75, Sumners also granted eligibility not only to private business corporations but also to "*drainage, irrigation, levee, sewer, and paving improvement districts* established under the laws of the State of their creation,"[141] thus utilizing and slightly revising the description of the covered political subdivisions from the RFC Act. *This* is the first ever municipal bankruptcy bill, and it would have dealt a strong hand to the municipal debtor. If a receivership were in place, the bankruptcy petition would divest that nonbankruptcy court of jurisdiction. Restructuring terms would be familiar to today's bankruptcy lawyer: a plan could "modify or alter the rights of creditors," generally or by classes, reduce principal amount and interest rate and extend maturities through the exchange of new securities for the outstanding bonds, and otherwise provide "adequate means for . . . execution" including transfer to or consolidation of its properties with another entity, "for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes."[142]

Sumners's initial version of municipal bankruptcy indicated no trepidation about the juridical nature of a political subdivision's property and the jurisdiction a bankruptcy court would have. His bill created a bankruptcy estate, and a reorganization plan could "deal with all or any part of the property of the debtor" with State law authorization unnecessary. Sumners also provided several creditor friendly provisions. The debtor did not enjoy plan filing exclusivity. A plan supported by 25% of the amount of each creditor class could be filed either "by the debtor or by any creditor," with the minimum for acceptance set at two-thirds in amount of the claims in each class. Plan confirmation required findings that the plan was offered and

[140] H.R. 14359, 72d Cong. § 74(a) at 2, 75(b) at 11, § 76(b) at 27 (1933) [hereinafter H.R. 14359].

[141] *Id.* § 75(a).

[142] *Id*. § 75(b). Additionally, "the judge shall confirm the plan if satisfied that . . . the debtor . . . has obtained such authority as may be required by the laws of the United States or of any State or Territory or subdivision thereof, to take all action necessary to carry out the plan." *Id*. § 75(f).

accepted in good faith, contained "adequate provision" for secured claims, and mandated cash payment of administrative expenses.[143] Furthermore, three creditors could file an involuntary petition, the same as against any other debtor.[144] The court of bankruptcy would have the option to appoint a trustee but must order the debtor to file asset and liability schedules and provide other financial information "necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan." If a plan were not proposed or confirmed, the court could dismiss the case or even direct a trustee "to liquidate the estate."[145] As assiduous a constitutionalist as he was, this was not careless drafting.

In other ways, Sumners's bill favored debtors. House Bill 14359 did not require creditor consent as a precondition for a taxing district to commence its case. One of the two forthcoming models did. The plan could "modify or alter the rights of creditors generally, or of any class of them, secured or unsecured"; the bill contained no standard or concept of "ability to pay" for the debtor; all lawsuits and lien enforcements "shall be . . . stayed . . . until the question of the confirmation of a proposed plan of reorganization has been determined"; and confirmation would bind all creditors and discharge all debts.[146] In his report, Sumners directed "[a]ttention . . . to the fact . . . that drainage, irrigation, levee, sewer, and paving improvement districts established under the laws of the State of their creation come within the scope of this section," a provision that "is new to existing bankruptcy law."[147] Sumner's designation of rural and agricultural taxing districts as eligible debtors in H.R. 14359 constituted the initial model for municipal bankruptcy (the "Corporate Reorganization Model").

The bill said nothing about cities or towns, but in any event the Senate deleted all its § 75 corporate reorganization provisions. The Senate kept and slightly amended the other two parts of H.R. 14359, reorganization relief for railroads and compositions for individuals. Nonetheless, Sumners's January 21, 1933, proposal initiated a dialectical type process leading to the 1934 enactment as the First MBA on a different basis, for political reasons. The Corporate Reorganization Model sparked the presentation of two alternatives while Hoover remained in office: municipal bankruptcy as *composition with creditors* and qua *debt payment moratorium*. Still several elements of H.R. 14359 persisted in those subsequent models and on into the First MBA—but

[143] *Id*. § 75(b), (d)–(f).
[144] *Id*. § 75(d).
[145] *Id*. § 75(c).
[146] *Id*. § 75(g).
[147] H.R. REP. 1897, 73d Cong. at 16 (1933).

not until the new Congress had convened, and then after a great deal more work by Sumners over sixteen months.

To begin the process, the House passed H.R. 14359 on January 30 by a 201–43 vote.[148] Two days earlier in the Senate, Hastings filed S. 5551, copying Sumners's bill and proposing the same § 75 on the topic of business reorganization for private corporations plus those same certain local governmental districts. The Senate Judiciary Committee received both bills leerily. Shortly after February 10, its staff published a 140-page committee print titled "Amending the Bankruptcy Act, Criticisms and Suggestions Relating to H.R. 14359 and S. 5551" that reproduced the "letters and briefs" submitted by nearly a hundred organizations and individuals expressing widely divergent views about the bills and conceptions of bankruptcy law relief. Some critiques included detailed edits of bill language, even for the two earlier House bills now subsumed in Sumners's version.[149] Labeled "anonymous," several submissions may have been authored by Donovan, Garrison, the NBC, or other legal sophisticates. Others came from chambers of commerce, district judges and referees in bankruptcy, landlords, lawyers for clients, and bondholders. Bankruptcy treatise writer Harold Remington's letters in the report fulminated against all but the tiniest tweaks to the BA'98.[150]

Almost all the documents in this Senate print pertained to relief for railroads and business corporations, and only five addressed the inclusion of agricultural and local taxing districts as debtors in H.R. 14359 and the broader topic of municipal bankruptcy. Senator Arthur R. Robinson of Indiana submitted one of those five letters to express a fear—a constant theme of moral hazard, voiced by opponents over all the years—that by "enabl[ing] these [municipal] corporations to evade, or at least attempt to evade, their just liabilities. . . . issues which are liable to be wiped out by this method [will] run high in the millions."[151] It was the other four documents of the committee

[148] H.R. JOURNAL, 72d Cong., at 202 (1933).

[149] STAFF OF SENATE JUDICIARY COMM., AMENDING THE BANKRUPTCY ACT, CRITICISMS AND SUGGESTIONS RELATING TO H.R. 14359 AND S. 5551, 73d Cong. (1933) [hereinafter CRITICISMS & SUGGESTIONS]. The committee print is undated, but the latest date of letters and memos reproduced in it was February 10, 1933.

[150] Letter from Harold Remington to Sen. George W. Norris (Jan. 19, 1933); Letter from Harold Remington to Sen. Peter Norbeck (Jan. 27, 1933); Letter from Harold Remington to Norris (Feb. 1, 1933) (all reprinted in CRITICISMS & SUGGESTIONS, *supra* note 149, at 48–49, 55–56, 89–90). Remington sent the same sort of letter directly to HWS. Letter from Remington to HWS (Jan. 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives). His treatise was HAROLD REMINGTON, REMINGTON ON BANKRUPTCY (1915).

[151] Letter from Arthur R. Robinson to Daniel O. Hastings (1933), *in* CRITICISMS &

print that presented the second model for municipal bankruptcy relief, composition with creditors.

The author was Vincent D. Wyman, Mayor of insolvent Coral Gables, Florida. He was allied with a bondholders' committee by common opposition to holdouts preventing his city from effectuating an otherwise substantially consensual restructuring agreement. The committee comprised investment banker Edwin H. Barker, investor Prentiss de V. Ross, and *Daily Bond Buyer* publisher Sanders Shanks, Jr. Its counsel was nationally prominent bond lawyer David M. Wood of the Wall Street firm Thompson, Wood & Hoffman (TW&H).[152] The same individuals composed the protective committee for Wilcox's city, West Palm Beach, and twenty-six other Florida cities. Those men, known as the Florida Municipal Bondholders' Protective Committee (FMBPC),[153] acting as both a creditors' committee and a lobbying group, had been creative and active in seeking solutions for the holdout problem. For instance, as later disclosed in testimony to the SEC based on confidential information provided by Wood, the FMBPC had been scheming with Wyman since as early as 1931 "to keep [Coral Gable's] cash drawer cleaned out" in order to frustrate a recalcitrant creditor's mandamus filing. The committee later loaned back what was needed to pay the city's bills.[154]

Insight into the formation of the FMBPC is found in a document privately forwarded to Sumners, an April 1 legal opinion by Florida lawyer Giles Patterson to United Mutual Life Insurance (United Mutual), a small insurer that persistently opposed municipal bankruptcy.[155] Patterson connected the negotiations of the FMBPC with both Coral Gables and West Palm Beach as forging an alliance of those cities' lawyers with the committee that then collaborated on the congressional bill that Wyman sent to select senators and that Wilcox later filed. Patterson added that after Coral Gables reached a restructuring agreement with the FMBPC, the Florida Legislature passed a bill authorizing the city to perform it, but the holdouts persisted, and the next step for the FMBPC was "to have Congress enact an amendment to

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SUGGESTIONS *supra* note 149, at 118.

[152] Untitled newspaper solicitation by Coral Gables, Florida, Bondholders Protective Committee, MIA. HERALD, Jan. 30, 1931, at 17.

[153] HILLHOUSE, BONDS, *supra* note 4, at 286.

[154] PROCEEDINGS BEFORE THE SECURITIES AND EXCHANGE COMMISSION IN THE MATTER OF PROTECTIVE COMMITTEES FOR BONDHOLDERS OF THE CITY OF CORAL GABLES, FLORIDA 634 et seq. (1935); Dession, *Municipal Debt*, *supra* note 19, at 204–06.

[155] Letter from Giles J. Patterson to Harry Wade, United Mutual Life Ins. Co. (Apr. 1, 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives) [hereinafter Patterson to Wade].

the bankruptcy act."[156] Thus, by early 1933 Wyman and the FMBPC began focusing their lobbying efforts on Congress.

In his second letter contained in the print, Wyman informed Senator George W. Norris of Nebraska, Chair of the Senate Judiciary Committee, that

> [t]he matter of including the composition proceeding *for municipalities* was taken up before the Judiciary Committee in the House . . . [but] resulted in including *only special improvement districts* on the ground that to include a municipality would be an invasion of the authority of the State.[157]

In the records of Congress, the only other reference to that House committee meeting is a terse mention—"considered by the Committee on the Judiciary of the House in executive session"—in the report that Sumners prepared and filed two days after his January 21 filing of H.B. 14359.[158] Wyman was, of course, correct that Sumners's bill included only the rural type districts, not cities and towns, as eligible for relief.

Wyman's letters in the Senate committee print heralded the intensive efforts of the FMBPC to promote a related but different model of municipal bankruptcy. Wyman's January 31 letter informed Florida's Senator Duncan U. Fletcher about objections to "the bill," which was not "the bill which has already passed the House [H.R. 14359]" but rather S. 5551. Wyman did not object to the bill in that it "is, in fact, antinuisance legislation, the fundamental object being to effect a speedy and expeditious settlement, which will bind the small minority of bondholders[, but t]he municipalities [cities] are entitled to the same antinuisance legislation."[159] For that, Wyman had a proposal. On February 4, Fletcher forwarded Wyman's letter to Norris with "a copy of the amendment [Wyman] suggests to the bankruptcy bill."

But Wyman had already sent his draft legislation directly to Norris by a separate letter dated February 1 in which he argued that "no distinction" could be made between rural, agricultural districts and cities and towns. "[O]f course," Wyman argued, under composition with creditors, "a bankruptcy court could not encroach upon the political powers of a municipality." He also rejected Sumners's Corporate Reorganization Model on the ground that *a city*

[156] *Id*.

[157] Letter from Vincent D. Wyman to Sen. George W. Norris (Feb. 1, 1933), *in* CRITICISMS & SUGGESTIONS, *supra* note 149, at 80.

[158] H.R. 14359, 72d Cong. (1933); H.R. REP. 1897, 72d Cong. at 1 (1933).

[159] Letter from Vincent D. Wyman to Sen. Duncan U. Fletcher (Jan. 31, 1933), *in* CRITICISMS & SUGGESTIONS, *supra* note 149, at 129.

"ought to compose its debts on the basis of *ability to pay*."[160] He pointed out defaults on $600 million of Florida cities' bonds. The bill for a composition remedy for insolvent municipalities that he sent to Norris is set forth verbatim in the committee print (the "Wyman Draft"). A lawyer, Wyman called it "my bill" although his legislative proposal is styled as "Amendments" to Sumners's bill, H.R. 14359, and its real author was Wood, counsel for the FMBPC.[161]

In his third letter in the committee print, dated February 3 and addressed to Hastings, Wyman expounded on the dire situation of Florida towns and cities and advanced the rationale for composition with creditors as the solution to the holdout problem. "The situation is unparalleled in history, and demands new remedy," one based on capacity to pay and the consent of the municipality, he asserted. Further,

> this remedy [composition] by Congress is no invasion of a State's political powers. The remedy afforded is permissive only. The composition can not occur without the municipality's agreement, authorized by State law. The bankruptcy court could not interfere with any of the political powers of the municipality.[162]

One important point Wyman mentioned only in passing was that the proposed relief would not be purely voluntary on the part of a municipal debtor, in contrast to Sumners's model, but rather would depend on creditors granting advance consent.

A comparison of the terms of the Wyman Draft with H.R. 14359's § 75 shows that Wood worked from Sumners's core terms of corporate reorganization beginning with the contents of the petition, requiring the admission "insolvent or unable to meet its debts as they mature,"[163] and the plan, now called "plan of adjustment" rather than "plan of reorganization," serving as the instrument of restructuring, with provisions for modification or alteration of the claims of creditors generally or any class of them, secured or

[160] Letter from Vincent D. Wyman to Sen. George W. Norris (Feb. 1, 1933), *in* CRITICISMS & SUGGESTIONS, *supra* note 149, at 80 (emphasis added).

[161] *Id.*; HILLHOUSE, BONDS, *supra* note 4, at 402 ("The legal firm that drafted the bill [was] Thomson, Wood & Hoffman").

[162] Letter from Vincent D. Wyman to Sen. Daniel O. Hastings (Feb. 3, 1933), *in* CRITICISMS & SUGGESTIONS, *supra* note 149, at 120–21.

[163] *See supra* notes 9–10. Admission of insolvency by a municipal debtor has always been required in its petition.

unsecured, adequate means for execution such as transfer or pledging of property to trustees and the issuance of new securities for cash or in exchange for and satisfaction of claims, asset and liability schedules, claim allowance, reasonable compensation for professionals, co-exclusivity for proposing another plan supported by a quarter of the claims, classification of claims and voting by amounts, and secured claim treatment. The Wyman Draft eliminated the no unfair discrimination principle but otherwise presented the same confirmation standards, binding effect, and discharge of debt provisions.[164] Added to those common elements were two new rubrics for "reasonable capacity of the taxing district to pay" and for the court "not [to] assume the control of or interfere with the exercise of the political powers" of the debtor. These points constituted the fundaments of the second model for municipal bankruptcy (the "Composition Model").

On February 13, the Senate Judiciary Committee met on H.R. 14359 and, based on "a very general sentiment," excised Sumners's § 75, removing altogether the business reorganization proposal,[165] and substituted slightly revised versions of § 74 for individual compositions and § 76 for railroad reorganization. The new § 75 became a special form of bankruptcy for farmers. On February 24, the Senate approved that rollup in an amended bill by Hastings but still bearing the designation of Sumners's bill, H.R. 14359. Thus died the first model for municipal bankruptcy, Sumners's Business Reorganization Model that the House had passed as part of his original H.R. 14359. Back on the House floor on March 1, with "only two days remaining in this session of Congress," Sumners called up the Senate's amended version of H.R. 14359, advising:

> The most important change has been the elimination of the section dealing with [reorganization of] corporations. . . . There are many things in the Senate's revision that I do not like. . . . it is not as good a bill as it was when it left the House. . . . [but t]he sole question before the House today is, Will we

[164] Letter from Vincent D. Wyman to Sen. Daniel O. Hastings (Feb. 3, 1933), *in* CRITICISMS & SUGGESTIONS, *supra* note 149, at 120–21.

[165] Berle blamed a simple lack of time for the deletion. Letter from Adolph A. Berle to Marguerite LeHand (Mar. 30, 1933) (*in* Pres. Papers, on file with FDR Libr.) ("The Senate in the closing days of the last Congress found themselves without sufficient time to consider both . . . Corporations [and] Railroads[;] so they were bound to choose between the two and properly chose the Chapter on Railroads because they were in great distress.").

> take the bill, with its objections, or take no bill?[166]

After short debate, the House acquiesced by a 207 to 26 vote, and Hoover signed it on March 3, 1933.[167] It was the only bankruptcy bill enacted during Hoover's presidency and during all of 1933. On that same day, Sumners presented to the Senate the Articles of Impeachment the House had voted against U.S. District Judge Harold Louderback based on findings of corruption in his handling of bankruptcies.[168] The next day was Roosevelt's inauguration.

But just before adjournment, a third model for municipal bankruptcy unexpectedly arrived in both houses. The City of Detroit was experiencing significant financial distress, and the State of Michigan could not solve the problem. On February 29, 1933, at the urging of Mayor Frank Murphy, that city's congressman and Judiciary Committeeman, Clarence J. McLeod, filed H.R. 14789, and Norris, who was on the verge of losing his chairmanship of the Senate Judiciary Committee due to the 1932 Democratic sweep of Congress, simultaneously filed S. 5699. These companion bills proposed to add a Chapter IX to the BA'98, authorizing cities with a population of at least 50,000 and owing at least $1 million to file cases with the sole measure of relief to be the stay of payment and extension of maturities of funded debt—that is, without interest rate reduction or scaling of principal and requiring no State or creditor consent.[169] Agents of Detroit thus presented to Congress the third model for municipal bankruptcy (the "Moratorium Model").

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[166] 76 CONG. REC. 5355, 5360 (1933).

[167] Act of Mar. 3, 1933, ch. 204, Pub. L. No. 420, 47 Stat. 1467 (1933).

[168] U.S. SENATE, TRIAL OF HAROLD LOUDERBACK, UNITED STATES DISTRICT JUDGE (1933).

[169] H.R. 14789, 72d Cong. §§ 4–9 (1933); S. 5699, 72d Cong. §§ 4–9 (1933). One scholar argues that H.R. 14789 is noteworthy because, as compared to the forthcoming Wilcox bill, "the McLeod bill was the more far reaching of the two proposals, because it granted the Federal courts significant power; in contrast, the Wilcox bill was a mild amendment to existing bankruptcy law." Richard M. Flanagan, *Roosevelt, Mayors and the New Deal Regime: The Origins of Intergovernmental Lobbying and Administration*, 31 POLITY 415, 421–22 (1999). I disagree. The McLeod bill was the more feared by the bondholding community—but that was because its intended outcome would have interrupted the stream of timely payments for a temporary but potentially long period. His bill did not authorize any other types or measures of court enforced restructuring.

3. "Some gentlemen here from Florida"

Norris convened a Senate Judiciary Committee hearing on S. 5699 the next day, March 3. Murphy testified at length. He had served as a state court judge and U.S. attorney, soon would become governor-general of the Philippines, later was elected governor of Michigan, and still later was appointed by Roosevelt as attorney general and then associate justice of the Supreme Court.[170] Murphy had just participated in organizing the nation's larger cities as the National Conference of Mayors. He had obtained the "best legal talent we could get in the city and in the Northwest . . . to draft this bill," and he brought it to Congress "at this late date is because we know it is either the adoption of this bill or default [by Detroit]. It is one thing or the other."[171] Murphy brought his lawyer, Edward A. Zimmerman, who opined that the Bankruptcy Clause provided ample authority for the new bill's stay of creditor collection activities for two years, extensible to ten. When committee members spoke up during this testimony in favor of widening this bill to cover all towns and cities, not just the larger ones, Murphy and Chair Norris quickly acceded.[172]

The hearing was closed door, but at this point Senator Hastings received a request for admittance by "some gentlemen here from Florida who are interested in this bill." The three were not residents of that State—they lodged in excellent hotels when they traveled there from their homes in New

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[170] *Frank Murphy*, Biographical Directory of Article III Federal Judges, 1789–present, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/murphy-frank (on file with author).

[171] *Uniform System of Bankruptcy: Hearing Before the S. Comm. on the Judiciary*, 72d Cong. 3 (1933) (testimony of Frank Murphy) [hereinafter *1933 S. Jud. Comm. Hearing*]. Illustrating that the legislating of municipal bankruptcy law carried racial and social implications, Murphy went on to explain why he had placed the 50,000 population qualification for relief in his bill:

> A city like Detroit has some very perplexing problems, due to the heterogeneous population. We have a very large Negro problem. We have from 130,000 to 150,000 colored people in Detroit. That has its social aspect. They are the last to be hired and the first to be fired. They have no work in Detroit.
>
> Then we have a large communistic population. We have a large problem in respect to the foreign group, which has particularly trying social problems. We have the problem of labor and the like, that smaller communities do not have. They have more of a homogeneous population. That is why we drew the line as we did.

Id. at 4.

[172] INSOLVENT MUNICIPAL CORPORATIONS, S. REP. 72-1360 (Mar. 3, 1933) (deleting the size-of-population limitation in S. 5699).

York and Connecticut.[173] They were the FMBPC members: Barker, Shanks, and Rose. "[A]ll they knew of [S. 5699] was what they had seen in the newspapers, and they gathered . . . that it would not meet their situation," explained Hastings, so they "would like an opportunity to be heard briefly." Norris instructed, "Open the door and let them come in." Hastings added that one of the three "is very much opposed to this bill [S. 5699]." Senator Hugo Black of Alabama jumped in: "If this gentleman is opposed to it, he might give you his views in 5 or 10 minutes as to why he desires something different."[174]

But the group spokesman, Barker, must have anticipated having or creating a lengthier opportunity to speak because he arrived with an impressive stack of handouts: a long memorandum on the topic of municipal bankruptcy, signed by all three, an even longer legal memorandum by their counsel, Wood, and a draft bill slightly revised from the Wyman Draft of three weeks earlier. The change in the new version of their bill was one unfavorable to potential debtors: it upped the acceptance percentage for plan confirmation from two-thirds to three-fourths of the debt amount in each class.[175] Barker seized the stage and glibly promoted the unfiled FMBPC bill for much longer than ten minutes.[176] At the end, Zimmerman, who with Murphy must have been aghast at what was transpiring, interrupted Barker to ask why not enact S. 5699 now and the FMBPC bill later. Barker replied acidly: "in my opinion [your] bill [S. 5699] would destroy the credit of the city of Detroit, which I am sure you do not want to do."[177] The hearing ended; battle was joined; Norris was stymied; Hastings and the FMBPC must have been pleased. The Committee did follow through the next day to amend S. 5699 to eliminate the population threshold as Norris had stipulated during the hearing, but time expired for enactment of any bill as the Hoover Congress gasped its last breath. The two competing models for municipal bankruptcy had to be reintroduced as new bills, and the contest resumed, in a new Congress and with the new President.

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[173] Untitled item, MIA. HERALD, July 20, 1931, at 3 ("Edwin H. Barker, president of the Guaranty Life Insurance Company, Sanders Shanks, jr., Prentiss V. Ross and David M. Wood have returned to New York after a stay at the Pancoast Hotel.").

[174] *1933 S. Jud. Comm. Hearing*, *supra* note 171, at 40.

[175] *Id*. at 32–39.

[176] *Id*. at 40–46.

[177] *Id*. at 46.

B. Sumners's Bill

1. House Passage in Roosevelt's First Term

The First MBA is the result of the competition of the models through the lobbying efforts of the FMBPC and the legislative work of Sumners. The archival records demonstrate that Sumners was primarily responsible for preparing, revising, and shepherding the acceptable bill, a mélange of key elements of both his H.R. 14359 and the bills drafted by the FMBPC and introduced by Wilcox, as revised through the contested legislative process for House passage on the 97th of the President's famous Hundred Days. President Roosevelt then supported and even fostered the process of fashioning the final terms of municipal bankruptcy as it became a high profile item on the New Deal agenda at the end of the proceedings, eleven months later. And when the *Ashton* ruling came down two years later, Sumners continued to work, with the President's firm support, for reenactment of municipal bankruptcy and other bankruptcy reforms.[178] The story illustrates the breadth and adaptability of the Bankruptcy Clause to authorize new forms of relief for the perpetually evolving problem of how to address the insolvency of American institutions, entities, and organizations, private and public.

After Roosevelt's March 4 inauguration, bankruptcy bills were some of the early legislative filings in the 73rd Congress. Filed first, on March 9, was House Bill 1670 by McLeod, reprising his Moratorium Model from ten days earlier for judicially granted delays of payment by insolvent municipalities. This bill again excluded smaller towns and rural taxing districts.[179] At the end of March, McLeod's subsequent H.R. 4311 decreased cities' qualifying threshold to a population of 5,000 but retained the high debt amount threshold to voluntarily file a petition for a simple district court decree establishing a two to ten year payment moratorium on defaulted bonds.[180]

[178] In his first month Roosevelt wrote Congressman McKeown: "I have always been deeply interested in the improvement of the present costly and cumbersome bankruptcy machinery." Letter from FDR to Thomas McKeown (Apr. 3, 1933) (*in* Pres. Papers, on file with FDR Libr.). "I do not need to tell you," he replied a few weeks later to a letter from Manhattan federal Judge John C. Knox, "I am utterly opposed to returning to the old methods we used to use in the administration of bankrupt estates." Letter from FDR to John C. Knox (Apr. 18, 1933) (*in* Pres. Papers, on file with FDR Libr.).

[179] H.R. 1670, 73d Cong. § 2 (1933).

[180] H.R. 4311, 73d Cong. § 2 (1933).

On March 11, newly sworn in Representative Mark Wilcox filed the second municipal bankruptcy bill of the 73rd Congress, his H.R. 3083, based on the Composition Model. It subsumed the Wyman Draft: eligible debtors would be "any municipality or any political subdivision of any State" that qualified under the other Gateway Factors; the court would be forbidden to "assume control of or interfere with any of the property of the taxing district except in the manner and to the extent specified in the plan of adjustment agreed to by the taxing district"; there would be no property of the estate and yet "confirmation . . . shall discharge the taxing district from its debts"; and modification of claims would be "based upon the "reasonable capacity of the taxing district to pay."[181] H.R. 3083 fixed creditor consent to the petition at 51%; preserved the two-thirds minimum for plan voting by classes; and, reflecting the FMBPC's involvement, added the creditor control terms of an option for court appointment of a "comptroller of the revenues" who would receive the debtor's tax revenues and make payments on the bonds pending final decree. The bill prohibited withdrawal of the petition except on consent of those creditors who had agreed to its filing, and the acceptance by a class of bonds of a restructuring proposal would bind those holders and survive dismissal of other classes of claims from the case.[182]

After buttonholing Sumners on the House floor on March 14, Wilcox sent him a "Memorandum re Power of Federal and State Governments to Pass Bankruptcy and Insolvency Laws" dated February 11 by an unidentified author, along with a Wood legal opinion dated March 1, likely the same papers the FMBPC had provided the Senate committee on March 2.[183] Sumners decided not to respond.[184] But two days later Wilcox wrote again, submitting a copy of his H.R. 3083 and, with the preface that "I have no desire to annoy you with too many documents," enclosing editorials of Florida newspapers and the *Daily Bond Buyer* as "an expression from each side," cities and bondholders, about his bill.[185] Wilcox admitted his bill's provenance:

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[181] H.R. 3083, 73d Cong. (1933). So, considering all the bills filed in the first three months of 1933, contrary to Gillette and Skeel, Wilcox filed not the first but the fifth bill proposing municipal bankruptcy.

[182] *Id*. Wilcox was not synchronized with Fletcher because the latter's S. 403 was essentially the superseded Wyman Draft.

[183] Letter from Wilcox to HWS (Mar. 15, 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

[184] *See id*.

[185] Letter from Wilcox to HWS (Mar. 17, 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives) (enclosing Thompson, Wood & Hoffman, *Proposed Municipal Refinancing Law Constitutional, Eminent Legal Authority Believes*, DAILY BOND BUYER n.p.

> I have had assistance for the past several months of numerous municipal experts, many of whom represent bond holders and some of whom represent municipalities. Among those . . . was the editor of the Daily Bond Buyer [Shanks]. Apparently he has submitted the draft of the bill to Messrs Thompson, Wood and Hoffman . . . and has secured from them their legal opinion as to the constitutionality of the bill.[186]

Wilcox thanked the chairman for "your consideration in handling this bill." At this point, Sumners had chaired the Judiciary Committee for just over two years and had been quite loaded with work from January through March, including the Louderback impeachment. Renowned for legal acumen, Sumners had exhibited no doubts about the constitutionality of municipal bankruptcy when he filed H.R. 14359 two months earlier in the prior Congress, but after Wilcox's statement and receipt of Wood's opinion, he re-examined that issue.

Opinions were flying. The March 16 issue of *The Bond Buyer* reproduced yet another legal opinion of Wood, dated March 14,[187] with the conclusion that the Wilcox bill "would constitute a bankruptcy law" and "Congress possesses power to enact such a law."[188] On March 21 Wood sent a third opinion letter to Sumners on "the question you submitted to me through Mr. Shanks, regarding the power of Congress to enact a bankruptcy law applicable to municipalities." That one concluded: "Where power upon the subject has been conferred upon Congress there is no vacancy between the limits of State and national jurisdictions . . . . This is especially true of the interpretation of the bankruptcy clause . . . ." Although "we are blazing a new trail," the courts would sustain the legislation.[189]

(Mar. 16, 1933)).

186 In hearing testimony a few weeks later, Wilcox again acknowledged "assistance and advice of the representatives not only of municipalities but of large investing interests" and some "gentlemen interested in the securities of municipalities" had "helped me draw" the bill. He mentioned Wood. *1933 House Comm. Hearing*, *supra* note 77, at 35, 38–39.

187 *Proposed Municipal Refinancing Law Constitutional, Eminent Legal Authority Believes*, DAILY BOND BUYER, Mar. 14, 1933 (reproducing legal opinion from Thompson, Wood & Hoffman to Editor). The day before, Fletcher had filed into the Congressional Record a copy of that opinion that he had received from "the mayor of Coral Gables," that is, Wyman.

188 *Id*.

189 Letter from David Wood to HWS (Mar. 21, 1933) (*in* House Jud. Comm. Papers, on

Sumners heard to the contrary from other bondholders' lawyers. United Mutual had already sent Patterson's April 1 opinion letter that disclosed the existence and activities of the FMBPC; the letter begrudgingly acknowledged the constitutionality of compositions, but it criticized that holdout creditors "can be forced to accept the same terms or lose their entire vested rights . . . for which he has received nothing tangible or in-tangible."[190] On April 13 the prominent Wall Street bond law firm Clay, Dillon & Vandewater (CD&V) submitted to Sumners its legal opinion that Wilcox's bill was unconstitutional under the Bankruptcy Clause because it did not mandate distribution of the debtor's property to the creditors.[191]

Additional, knowledgeable voices also contacted Sumners. On April 13, Los Angeles law firm O'Melveny, Tuller & Myers pointed to 200 California taxing districts stranded in the middle of refinancings, with RFC takeout funds committed but blocked by holdouts and thus needing the assistance of municipal bankruptcy. The firm approved the legislation but requested a clarification in H.R. 3083 to also name "unincorporated and special assessment" districts as eligible debtors.[192] About the same time, H.H. Cotton of that city's Municipal Bond Company suggested to Sumners an implementing detail that "for such tax and assessment districts [that lack

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file with Nat'l Archives) [hereinafter Wood Opin.]. Wood anticipated a counterargument "that there are such limitations . . . analogous to the immunity of State instrumentalities from federal taxation." But on that very day, he pointed out, the Supreme Court in *University of Illinois v. United States*, 289 U.S. 48, 58 (1933), had held that an instrumentality of a State was not exempt from custom duties on imported equipment because the State has no power "with respect to the subject over which the federal power has been exerted"—and "the same reasoning will support the power of Congress to enact . . . the Wilcox bill." The framers of the Constitution "knew, or must be presumed to have known," the "dual capacity of the municipal corporations of the States," governmental and corporate or proprietary. *Id*. Additionally, Wyman tried to argue to Sumners on March 24 that, because "reserved exclusively to Congress," the bankruptcy power placed a *duty* on the body to enact legislation "on the basis of capacity to pay," a key element of the Composition Model the FMBPC was promoting. Letter from Wyman to HWS (Apr. 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

190 Patterson to Wade, *supra* note 155.

191 Legal Opinion from Clay, Dillon & Vandewater to George B. Gibbons & Co. (1st opin.), at 2–3, 6 (Apr. 4, 1933) (citing Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902), and Nelson v. Carland, 42 U.S. (1 How.) 265, 277 (1843)); Legal Opinions from Clay, Dillon & Vandewater to George B. Gibbons & Co. (1st and 2d opins.) (each dated May 15, 1933) (all in House Jud. Comm. Papers, on file with Nat'l Archives).

192 Letter from O'Melveny, Tuller & Myers to HWS (Apr. 13, 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

officers,] the petition . . . shall be filed by the municipality, county, or political subdivision whose officials [had acted to] issue[] the bonds."[193]

The President understood that municipal financial distress was a national problem. On March 31 Roosevelt wrote his Attorney General Homer Cummings that "hundreds of chartered municipalities and counties will default on their bonds this year and next" and asked for a legal opinion on municipal relief "from the broad constitutional principle."[194] But he mentioned a reservation: "It is my off-hand thought that because municipalities are the creatures of State Legislatures, the primary duty is on the State to see to their solvency." Meanwhile, for outside legal analysis of the bills, Sumners relied on his own counsel in Dallas, the law firm Thompson & Knight; that firm had advised him on politics and assisted him in difficult matters throughout his career. On March 18 and 20, 1933, that firm's partner Alex F. Weisberg sent the congressman a negative review of McLeod's H.R. 1670. In reply, Sumners asked the lawyer to evaluate the Wilcox bill. Weisberg then prepared a detailed legal analysis of both bills and illustrated it with his own experience in representing bondholders in municipal debt restructurings in Texas.[195] He strongly recommended Wilcox's bill.

Undated, but apparently typed and edited in late March after receiving Wood's, CD&V's, and Weisberg's opinions, is a syllogistic memo to himself in which Sumners précised his constitutional analysis of "the question of the inclusion of municipalities within the scope of the bankruptcy power":

> [D]oes the fact that the constitution prohibits States from impairing the obligation of a contract bear with any persuasive effect upon the probable ~~constitutionality or including~~ *inclusion of* municipalities within the exercise of the bankruptcy power of the Federal Government?
>
> The Federal government possesses the power of establishing uniform bankruptcy laws.

[193] Letter from H.H. Cotton to HWS (Apr. 14, 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

[194] Letter from FDR to Homer Cummings (Mar. 31, 1933) (*in* Pres. Papers, on file with FDR Libr.).

[195] Letter from Alex F. Weisberg to HWS (Mar. 18 and 20, 1933); Letter from HWS to Alex F. Weisberg (Mar. 28, 1933) ("I find the statements made by some of the proponents of the [Wilcox] Bill are not in line with the information contained in your letter and I am especially appreciative."); Telegram from Weisberg to HWS (Mar. 31, 1933) (all in House Jud. Comm. Papers, on file with Nat'l Archives).

> Municipalities do become insolvent. The limitation upon the power of the States contained in the tenth Section of the first Article of the Constitution prevents the States from rendering the necessary assistance to the Bankrupt municipality. Their only recourse would be to the Federal government, exercising its powers under the Bankruptcy provisions of the Constitution.[196]

With a pen, Sumners struck the typed words "constitutionality or including" in his question about the Contract Clause and inserted "inclusion of" before the noun "municipalities" in the reference to the Bankruptcy Clause, indicating that the question for him was a straightforward issue of whether Congress may legislate bankruptcy eligibility for political subdivisions of States under that clause.

In this situation, he indicated in his second paragraph, the Contract Clause served as persuasive or supporting authority that accorded with the "inclusion" of municipalities in the ambit of "the bankruptcy power." Insolvency was the need or the key that activated or justified access to the Bankruptcy Clause, a provision sufficiently powerful to undergird legislative relief to a "municipality [that became] insolvent," which he also referred to as a "Bankrupt municipality." Undoubtedly, Sumners knew the essence of the legal term "insolvent."[197] Of course, he was aware of the arguments that "bankruptcy" and "discharge" required a liquidation, or at least court administration, of a debtor's assets. CD&V's opinion had so stated, and numerous parties had asserted that in the Senate committee print of February during the prior Congress. That he never even remarked it here shows that he

[196] HWS, memo to file (n.d.) (*in* House Jud. Comm. Papers, on file with Nat'l Archives). This is a typed draft of the memo on which, by hand, Sumners struck out and then added words as indicated by italics in the blacklining. A clean, retyped and final version is also in the archive. The syllogism may have been inspired by the statement in Wood's opinion that

> the framers of the Constitution deliberately prohibited the States from enacting a bankruptcy law by restraining them from enacting laws impairing the obligation of contract. . . . [T]herefore, it must be presumed that the Constitution contemplates that any relief for insolvent municipalities from the burden of their indebtedness must be obtained through the medium of enactment under the express power conferred upon Congress to enact uniform bankruptcy laws.

Wood Opin., *supra* note 189, at 3.

[197] *See supra* text accompanying notes 9–10.

rejected that argument completely. Nor did Sumners even mention the Tenth Amendment in his file memo; by ignoring it, he dismissed it too.

We may infer from his precise wording that he understood the specific grant to the Congress of power to enact "uniform laws of . . . bankruptcy" meant that legal process for the restructuring of debts was not reserved to the States. After all, just a few months before, he had filed H.R. 14359 that included certain agricultural and local political subdivisions in a process for business reorganization relief. Furthermore, in his private memo, Sumners discussed none of the models of municipal bankruptcy that had been advanced, so his constitutional analysis pertained to all of them. Obviously, if the Corporate Reorganization Model as he had conceived and drafted it into H.R. 14359 was constitutional, then so were the lesser or more restrictive forms of relief, the Composition Model and the Moratorium Model.

The distinct and remaining question for Sumners was political feasibility. Sumners had to decide how to "handle" Wilcox's bill and what to do with McLeod's, their bills representing antipodal models of municipal bankruptcy. Sumners had promised another congressman he would refile in the new Congress the business reorganization provisions of his prior H.R. 14359,[198] but McKeown now filed it, omitting the insolvent rural taxing districts.[199] So in that context and with the benefit of two decades in national politics, Sumners next sought to gauge "the urgent need of this legislation" as Wilcox asserted and to ascertain how the interested parties would line up. He solicited views from both the cities and the bondholders' community. On March 22, with the impeachment trial in the Senate about to begin, he gave Wilcox and Wood ten minutes each to make a presentation to his Judiciary Committee and then called a hearing for March 30 and April 4.

At the end of 1932, outstanding municipal bonds aggregated $18.5 billion, with individual holders the largest cohort followed by business corporations, then public trust funds, and insurance companies the smallest but most vociferous subset.[200] Through March and April 1933, Sumners

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[198] Letter from HWS to Robert Ramspeck, M.C. (Mar. 15, 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

[199] "The corporations find themselves in a very bad situation and anxious to have legislation passed that is similar to that proposed in the 72nd Congress. It would appear . . . [to] be wise to include quasi-public corporations, such as drainage, irrigation, levee, sewer and paving and improvement districts, as well as plan for adjustment for municipal and other political subdivisions." Letter from Thomas D. McKeown to FDR (Mar. 20, 1933) (*in* Pres. Papers, on file with FDR Libr.). *See also* H.R. 5009, 73d Cong. (1933). But McKeown's bill did not include them.

[200] Comment, *Administration of Municipal Credit*, 43 YALE L.J. 924, 925 n.3 (1934).

received a large volume of letters and telegrams from these bondholders.[201] There was no consensus, but clearly the responding correspondents feared the proposal would adversely affect all parties who held or handled bonds. With a sense of the political winds, Sumners took charge and set a hearing for March 30 and April 4.[202]

[201] A few examples (all in House Jud. Comm. Papers, Nat'l Archives): A "crippled carpenter" in Charleston, "67 years old and incapacitated and have three women in the fifties to support," with his savings of $30,000 invested in large cities' bonds, objected. Letter from James J. [last name illegible] to H. Jud. Comm. (June 3, 1933). A businessman wrote: "the warp and woof of the credit structure of the country is so inextricably interwoven with the integrity of Municipal Bonds that it would . . . be suicidal to destroy it as this bill would tend to do." Letter from Chas. F. Cole, Pres., Va. Mach. & Well Co., to HWS, May 7, 1934. United Mutual cited a vulture investor currently making "attempts to frighten owners" into selling—"18 flat" for a $25,000 Florida school bond—based on the prospect of Wilcox's bill. Letter from Harry Wade, United Mut. Life Ins. Co., to HWS (Mar. 30, 1933) (enclosing letter from William Morris & Co. to United Mut. Life Ins. Co. (Mar. 23, 1933)). A U.S. Chamber of Commerce committee and the Bankruptcy Committee of the American Bar Association (ABA) wrote to express fear of the consequences. Letter from H.S. Harriman, President, U.S. Chamber of Commerce to HWS (May 8, 1933); Telegram from Jacob M. Lashley to HWS (May 8, 1933), at 1. As Presiding Judge of Jackson County, Missouri, the as-yet-unknown Harry S. Truman protested that any bill would both "injure the market for our county bonds" and "be unfair to present holders of such securities." Letter from Harry S. Truman to HWS (May 9, 1933), at 1. Citing vulture investing but making the reverse argument to that of United Mutual, a California lawyer reported:

> a certain money-grabbing speculator is actively buying bonds from among the 20% not [committed to a deal]. He is getting these bonds for from 5 to 10 cents on the dollar from holders in desperate circumstances. As he gets these bonds he makes demand on the district for payment in full of the interest; and then he brings suit for the same.

Letter from W. C. Felchner to HWS (Apr. 13, 1933). Some correspondents to Sumners focused on the McLeod bill. One bond house called it "vicious and far-reaching." Letter from A.C. Mittendorf, Prudden & Co., to HWS (Mar. 27, 1933). Another stated it was "the most harmful legislation which could be enacted." Letter from W. Wallace Payne, Central Trust Co. to HWS (Mar. 20, 1933). An "old man" from Detroit opposed "Mayor Murphy's proposed law," writing that "municipal bonds are a savings account for one's old age . . . . [Those] who invest their savings in municipal bonds are our most frugal class of citizens." Letter from A.G. Collins to HWS (Apr. 6, 1933). A commercial bank preferred the Wilcox bill to McLeod's because "any moratorium of general nature at least on interest would precipitate another dangerous financial disturbance that would affect everybody." Telegram from First Nat'l Trust & Sav. Bank to HWS (Apr. 3, 1933). Asserting that "bankruptcy" required liquidation of assets, Remington wrote again, "hop[ing] this freak bill will be defeated" and calling municipal bankruptcy "a monstrosity" in "these latter days of helter skelter bankruptcy amendatory bills." Letter from Harold Remington to HWS (Apr. 4, 1933).

[202] *See, e.g.*, Letter from Elmore Whitehurst, Clerk, House Jud. Comm., to Paul Benners, League of American Municipalities (Mar. 26, 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

The topic was to be, he informed a startled Wilcox who apparently assumed the hearing would focus solely on his H.R. 3083, "the general proposition" and "nobody's bill."[203] The chairman permitted Wilcox both to testify and manage the witnesses for his bill. The young representative chose to testify first, making the points that every municipal restructuring was plagued with holdouts, that no municipal debtor "can be imposed on" under the Composition Model "because its consent is essential," and that the supermajority voting requirement protected minority creditors against unfair treatment.[204] In all, the Floridian testified five times during the two days; his supporting witnesses included Wood, Shanks, municipal finance expert Carl H. Chatters, and Paul V. Betters of the U.S. Conference of Mayors.

The hearing also covered the Moratorium Model as expressed in McLeod's pending bill. When Zimmerman testified as special counsel for Murphy, Sumners asked, "What is your objection" to the Composition Model? The lawyer replied that there is "a class of municipalities whose indebtedness is such that manifestly it is clearly out of the question for them to do anything else except to consider the scaling down of interest or principal or both," but those are smaller towns, whereas Detroit and the large cities require only "a standstill for a reasonable time" as "a safety measure rather than a measure of financial relief." Charts prepared by *The Bond Buyer* showing default by 895 cities and large taxing districts were inserted into the record.[205]

It became apparent that the Detroit team had attempted to compromise by wholly incorporating Wilcox's bill into an amended H.R. 5009 by McLeod and seeking support for it among the cities. But the FMBPC was in no mood for concessions. The idea of any payment moratorium was anathema, and McLeod's bill contemplated unilateral decisions by municipal debtors to file petitions, also objectionable. Only one Florida city endorsed McLeod's bill.[206] When Sumners asked the moratorium supporters whether the Wilcox bill's provisions for a stay of creditor collections during a composition proceeding would not give them the functional equivalent of the moratorium they sought,

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[203] *1933 House Comm. Hearing*, *supra* note 77, at 33. *See also* Sumners's handwritten witness list for the hearing, (n.d. [c. Mar. 30, 1933]) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

[204] *1933 House Comm. Hearing*, *supra* note 77, at 22–23.

[205] *Id*. at 107.

[206] Letter from W.A. Johnson, City of Tampa, to HWS (Apr. 27, 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

Zimmerman would not concede; but the Moratorium Model, and its up to ten year stay of collection, died at that point in the hearing.[207]

On April 20, Cummings submitted to Sumners the Justice Department's legal opinion on the constitutionality of H.R. 3083 that the President had requested three weeks earlier. The opinion quoted *Hanover National Bank v. Moyses*, the Supreme Court's 1902 decision, that the Bankruptcy Clause "extends to all cases where the law causes to be distributed, the property of the debtor among his creditors; this is its least limit. Its greatest is the discharge of a debtor from his contracts."[208] But that was dictum from a very early case after the BA'98's enactment, and Cummings's opinion said no more about the role of property as a required element of a law under the clause. Rather, of the political subdivisions needing restructuring, it fixated upon "municipal corporations" and opined that they were the only local government units a State could authorize to file a bankruptcy petition. The reason, Cummings asserted, was that municipal corporations, unlike other units and taxing districts, were subject to the proprietary/governmental distinction found in State tort law.[209] Cummings's attempted justification of bankruptcy for cities but not for the other political subdivisions was ignored in the legislative discourse.[210]

At that point, Sumners wrote a second memo to himself, characterizing the hearing's first and second day testimonies of "many important investment banks" as favoring the Wilcox bill as "the least of evils" and most insurance companies similarly preferred "the principle laid down in the Wilcox bill to th[at] . . . in the McLeod bill." He took notes during the hearings of both the "details" of language that drew objections and the "alternatives suggested."[211] But it was Wilcox who moved first with another bill filing during the recess of the hearing until May 4. The Floridian

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[207] The original Corporate Reorganization Model did resurface briefly during the hearing when McKeown obliquely asked Wilcox and Wood, each in the middle of his testimony, why not resurrect Sumners's old H.R. 143539's provisions for municipal bankruptcy as a part of a chapter on corporate reorganization. *1933 House Comm. Hearing, supra* note 77, at 37, 55. Both Wilcox and Wood demurred, and Sumners stated plainly, "No; do not do that." *Id*. at 38.

[208] Legal Opinion from Homer S. Cummings to Hatton W. Sumners (Apr. 20, 1933), *in 1933 House Comm. Hearing*, *supra* note 77, at 174–175, citing Hanover National Bank v. Moyses, 186 U.S. 181 (1902) and *In re* Klein, reprinted in Nelson v. Carland, 42 U.S. (1 How.) 265, 281 (1843).

[209] *1933 House Comm. Hearing*, *supra* note 77, at 178–80.

[210] In the Senate Judiciary subcommittee hearing in January 1934, Wood carefully refuted it. *1934 S. Subcomm. Hearing*, *supra* note 17, at 47–50.

[211] HWS, *Memorandum on the Wilcox Bill* (n.d. [c. after the April hearing dates]) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

submitted a doubly long bill, H.R. 5267, on April 26. Comparison of Wilcox's two bills shows continued drafting input by the FMBPC, with new terms intended to increase bondholders' control over the municipal debtor.

In addition to the debtor filing a plan, now called a "plan of readjustment," the new bill provided for "any creditor" to file a plan that 20% of the bondholders approve.[212] The new bill also added to the confirmation standard of "equitable" the requirements that the plan be "fair" and "for the best interests of the creditors and . . . not discriminate unfairly in favor of any class."[213] Wilcox again proposed that creditors could take control of debtors' tax collections and purse strings via a court appointed "comptroller of the revenues" who had "exclusive jurisdiction . . . of the property and revenues . . . not necessary for essential governmental purposes . . . [equivalent to] appoint[ing] a receiver in equity."[214] To fund the plan and reorganize the insolvent entity, Wilcox included such alternatives as the sale of property "not necessary for governmental purposes," the "increase . . . of existing rates of taxation" and imposition of "new or additional taxes," and, post-effective date, "require[ment], by mandamus or other appropriate order," of debtor performance of its confirmed plan.[215]

H.R. 5267 enlarged filing eligibility to include public schools and the agricultural and local taxing districts that Sumners obviously cared about and lowered the consent to file percentage to one-third of bondholders. The bill also authorized debtors to restructure their secured debt by bifurcating undersecured claims and cramming down the secured portion via property sales subject to liens or free and clear with liens to attach to proceeds, cashout, substitution of obligations, or what today is called the indubitable equivalent.[216] Wilcox's bill also contained one more improvement from the perspective of the insolvent municipal debtor, that a plan could contain an operational restructuring provision for "assumption or rejection of executory contracts [and] unexpired leases," and, outside a plan, executory contract rejection required only the "authorized written approval" of the debtor.[217]

In early May, Sumners completed the committee hearing. The three days proved inconsequential for municipal bankruptcy. Soon after the hearings, the CD&V lawyers sent Sumners two more legal opinions, this time asserting that Wilcox's revised bill, H.R. 5267, "would be unconstitutional . . .

[212] H.R. 5267, 73d Cong. § 81(d) (1933).
[213] *Id.* § 81(f).
[214] *Id.* § 81(c)(2).
[215] *Id.* § 81(a), (b)(7) & (h).
[216] *Id.* § 81(a) & (b).
[217] *Id*. § 81(b)(4) & (c)(6).

as an unlawful interference with the rights of the States to administer their own affairs"; the opinions also argued a lack of necessity based on a purported trend of reported cases showing that federal courts favored cities when adjudicating mandamus actions.[218] Neither dissuaded the chairman. While Judiciary Committeeman Warren J. Duffy of Ohio tried to mediate between Zimmerman and Wilcox, Sumners exercised control and prepared his own bill. With June only a few days away, Betters telegraphed Sumners with his organization's "unqualified support" for a bill to be authored by him,[219] and several interested parties that had straddled the fence, such as Prudential Insurance, now joined Sumners's side.[220]

Soon the *Dallas Morning News* reported, "Mr. Roosevelt favors legislation of this character."[221] On May 31, Sumners met alone with the President, and on June 1 Sumners and two committee members met with administration representatives at the White House. Municipal bankruptcy suddenly became an item on the New Deal agenda, and apparently the President tasked the Treasury Department to assist Sumners because its undersecretary, Dean Acheson, sent a revised bill to Sumners in a mimeographed document. Sumners hand-marked it against H.R. 5267 to see what changes Treasury had in mind. Acheson had added an elaborate preamble detailing the economic "emergency," substituted "public debtor" for "municipal debtor,"[222] and inserted a sentence that if the debtor's population exceeded 100,000, the "plan shall, before confirmation, be approved by the Governor of the State."[223]

A New Deal team player, Sumners filed Acheson's version as H.R. 5885,[224] but his committee split 8-8 on it, so he moved to reconsider and announced that he would amalgamate Acheson's provisions together with new terms into his own new bill to address all the objections raised during the

[218] Legal Opinions from Clay, Dillon & Vandewater to George B. Gibbons & Company (each dated May 15, 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

[219] Telegram from Paul V. Betters, U.S. Conf. of Mayors, to HWS (May 29, 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

[220] Letter from Alfred Murrell, Prudential Ins. Co., to Sen. A.H. Vandenburg (June 8, 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives). *See also List Endorsing Wilcox Bill* (n.d.) (*in* House Jud. Comm. Papers, on file with Nat'l Archives) (2-1/2 page, single-spaced list of supporting firms, groups, and individuals).

[221] *Roosevelt to Ask for Mortgage Holiday for Home Owners*, DAL. MORNING NEWS, June 3, 1933, at 1.

[222] *Memorandum for Honorable Hatton Sumners* from Dean Acheson to HWS (June 2, 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

[223] *Id*.

[224] H.R. 5885, 73d Cong. (1933).

hearings. Filed five days later, Sumners's H.R. 5950 synthesized the other proposals and reprised the essential elements of municipal bankruptcy restructuring that survive today: the Gateway Factors, no property of the estate, and full discharge of debts.[225] He reverted to the term "taxing district" for an eligible debtor, and he kept two additional types of entities, "sanitary" and "port" districts suggested by Acheson. He discarded Acheson's requirement of State gubernatorial approval. Responsive to continuing fears of abusive filings, he added an opportunity for five percent of the bondholders to contest the debtor's grounds for relief and seek dismissal, and to deal with grumblings about the role and bona fides of protective committees of bondholders, he elaborated on their disclosure filings.[226]

Sumners also added a special and highly significant provision extending a bankruptcy court's preconfirmation stay of creditors' mandamus litigation, and debt collection efforts to protect related and potentially numerous nondebtor third parties. Requiring only a simple court order, this enlarged stay protected related nondebtors against attempts to collect bonds or other claims owed by the debtor entity in these terms:

> in addition to the [existing BA'98] provisions . . . for the staying of pending suits against the [debtor] taxing district, the court may enjoin or stay the commencement or continuation of suits against the taxing district, or *any officer or inhabitant of the taxing district, on account of the indebtedness of such taxing district*, until after final decree . . . . [227]

No one had spoken to this problem in the hearings, but "[i]n a number of states local officials [were] made personally liable for failure to make the tax levy as ordered" by a court in mandamus actions; in some States, "a landowner can be held liable for the delinquencies of all other landowners"; and in certain New England States a bondholder's unsatisfied judgment against a municipality could be executed against the property of its inhabitants.[228] Sumners protected those individuals against the debtors' claimants. Significantly, Sumners's extended, preconfirmation stay was the first—and remains today the only—provision in statutory bankruptcy law for an injunctive order protecting nondebtor third parties during the pendency of a

[225] H.R. 5950, 73d Cong. § 81(a), (b), (f), (h) (1933).
[226] H.R. 5950, 73d Cong. § 81(a), (h) (1933).
[227] *Id*. § 81(c) (emphasis added).
[228] HILLHOUSE, BONDS, *supra* note 4, at 285, 294.

bankruptcy case of any artificial person or entity.[229] This innovation demonstrates that Sumners believed the Bankruptcy Clause to be very broad indeed.

Sumners helped municipal debtors in other ways in his new bill. To expedite relief, the congressman creatively added that when the debtor and 30% of its creditors have accepted the plan, the court could enter an interlocutory decree putting the plan temporarily into effect.[230] He ameliorated Wilcox's and the FMBPC's latest pro-creditor terms in H.R. 5267 by reducing the 75% supermajority of all claims required for confirmation to two-thirds, eliminating Wilcox's provisions for appointment of "comptrollers of the property and revenues" of debtors, and deleting the provision for postconfirmation enforcement orders should the debtor default on a confirmed plan.[231]

Furthermore, Sumners crafted an inventive two-clause provision to facilitate early petition filings.[232] The first clause generally acknowledged the State's authority to control its political subdivisions that may wish to resort to the federal bankruptcy court. The second clause then specified:

> whenever there shall exist or shall hereafter be created . . . any agency of such State authorized to exercise supervision or control over the fiscal affairs of . . . political subdivisions thereof, and . . . such agency has assumed such supervision or control . . . , then no petition of such political subdivision may be received hereunder unless accompanied by the written approval of such agency, and no plan of readjustment shall be put into temporary effect or finally confirmed without the written approval of such agency . . . .[233]

Sumners thus ingeniously nodded toward the Tenth Amendment and federalism concerns while permitting municipal entities to file bankruptcy petitions before, or in the absence of, a State's specific authorization for such.

[229] This provision survives in Bankruptcy Code § 922 today and is automatic since 1976. In the text of the Code today, only in chapters 12 and 13 are found another nondebtor stay, there, a co-debtor stay that automatically protects an *individual debtor's* co-borrowers and co-signers. 11 U.S.C. §§ 1201(a), 1301(a).

[230] H.R. 5950, 73d Cong. § 80(c)(9), *proviso* (1933).

[231] *Id*. § 80(e).

[232] HWS (undated file draft) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

[233] H.R. 5950, 73d Cong. § 80(l) (1933).

The debtor in the constitutionality test case, *Ashton*, took advantage of this provision.[234]

On the same date, June 7, the House's Judiciary Committee issued its report on the bill, in which Sumners explained that because "the States do not possess the power necessary to effectively deal with the situation which exists with regard to bankrupt taxing districts," the valid purpose of the bill was

> to provide a forum where distressed cities, counties, and minor political subdivisions . . . of their own volition, free from all coercion, may meet with their creditors under the necessary judicial control and assistance in an effort to effect an adjustment of their financial matters upon a plan deemed mutually advantageous.[235]

That was his easy answer to the constitutional question. The report disclosed an assiduous concern for the insolvent political subdivision's duties to and for the benefit of its residents.

> The committee . . . regards of great importance, the public necessity of making it possible for cities, by mutual and effective agreement with their creditors, so to adjust their existing indebtedness as to carry forward without too hurtful a diminution the discharge of their governmental duties of fire, police, and sanitary protection, and education, and meet the increased burden incident to caring for those who must seek public assistance in order to live.[236]

Subsidiary points included that, unlike a private corporation, a municipal debtor may not be involuntarily forced into bankruptcy court and that bankruptcy jurisdiction would cease on the plan effectiveness. The "coercive features are . . . directed solely against the nonconsenting minority holding out, often, for its pound of flesh against the judgment of two thirds of the other creditors."[237] This passage prefigured the oral argument he would make

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[234] *See infra* text accompanying note 292.

[235] AMEND THE BANKRUPTCY ACT—MUNICIPAL INDEBTEDNESS, H.R. REP. NO. 73-207, at 1 (1933) [hereinafter H.R. REP. 207].

[236] *Id*. at 2.

[237] *Id*. at 3.

to the Supreme Court in 1938 on the constitutionality of the Second MBA in the *Bekins* case.[238]

All the Republicans and three Democrats of the Committee filed a minority report, protesting that the bill exceeded the scope of the Bankruptcy Clause because it did not require liquidation of debtor property and repeating the dire forecasts of moral hazard and municipal doom heard all along the legislative pathway.[239] However, House Bill 5950 easily passed the House on June 10 and went to the Senate—where it languished for the rest of 1933 due to the adjournment of the First Session of the 73rd Congress.

Sumners recounted to his Dallas counsel Weisberg:

> I had to take charge of the matter in order to give it any chance to get through. I had the most difficult fight I have ever had with regard to any legislation in which I have been interested. There is very definite, deep seated opposition to the legislation. In addition to fundamental objections, a great many Members of Congress are holders of municipal bonds. There are also all sorts of apprehensions as to what municipalities would be inclined to do in the event this bill should become a law.
>
> The bill was twice defeated in the Committee on the Judiciary, but I felt that the proposed legislation ought to be enacted and I was able to bring about a reconsideration. Finally we got it out of the Committee by a vote of 13 to 9 after a very hard fight, passed it in the House. I do not know what chance it has to be passed in the Senate.[240]

Sumners's trepidation was understandable.

In August, the organization of lawyers generally representing "stand-pat conservatism,"[241] the American Bar Association (ABA), featured the opposing viewpoints on H.R. 5950 at its annual meeting. Barker ably spoke to

[238] *See infra* text accompanying note 382.

[239] *See, e.g.*, H.R. REP. NO. 73-207, *supra* note 235, at 4, 6–8.

[240] Letter from HWS to Alex F. Weisberg (June 12, 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

[241] JOHN AUSTIN MATZKO, BEST MEN OF THE BAR: THE EARLY YEARS OF THE AMERICAN BAR ASSOCIATION, 1878–1928 215 (2019). But in only a few more years, the ABA awarded its ABA Medal to Sumners.

all the issues raised during the House hearing and highlighted the bondholder friendly features of municipal bankruptcy such as the ability to pay test for confirmation.[242] Afterward he reported to Sumners, however, that the speech did not go over well with the attendees.[243] They preferred the stolid argument of St. Paul lawyer Asa G. Briggs that the bill was either unconstitutional or unjustified under the Bankruptcy Clause because it did not condition a discharge upon turnover of debtor's property and that a composition was a private agreement, not a form of bankruptcy. The ABA approvingly published the speech by Briggs, who mailed a copy to Sumners.[244]

Public and private discussions continued. For instance, the October issue of this *Journal* (then the *Journal of the National Association of Referees in Bankruptcy*) included an essay by McLeod advocating Sumners's H.R. 5950[245] and another endorsement in the January edition by E. Fleetwood Dunstan of Bankers Trust Co., who argued against the objection "that it would encourage defaults in many cities."[246] In December, Barker wrote two letters to the President, offering himself as an advisor and touting his experience from committee work on bond defaults in 126 municipalities in twenty-three States that aggregated a sixth of all such bonds and a half of those in default. While that offer was ignored, the President was duly concerned.

When Betters wired on behalf of the National Conference of Mayors on December 5 that the banks were trying to "sabotage" the administration's national recovery efforts, citing San Francisco's difficulty placing a new bond issue, Roosevelt replied on the 18 that he "[h]opes that thru [sic] the P[ublic] W[orks] A[dministration] and the RFC the credit will ease up, but if the situation remains unchanged, other efforts will he made."[247] Just as 1933 expired, an advisory committee of New York State's Conference of Mayors wrote Roosevelt to disapprove of Sumners's bill as "abhorrent to the citizens

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[242] His speech was published in *Bond Buyer*. Edwin H. Barker, *Federal Legislation Needed to Adjust Debts of Insolvent Municipalities*, BOND BUYER, Sept. 2, 1933, at 2.

[243] Letter from Edwin Barker to HWS (Sept. 6, 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

[244] Asa G. Briggs, *Shall Bankruptcy Jurisdiction Be Extended to Include Municipalities and Other Taxable Subdivisions?*, reprint from ABA JOURNAL (Nov. 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives). (with the U.S. Mail envelope to HWS).

[245] Clarence J. McLeod, *Municipal Debt Moratorium Legislation*, 8 J. NAT'L ASS'N REF. BANKR. 11–12 (Oct. 1933).

[246] E. Fleetwood Dunstan, *Federal Legislation to Help Defaulting Municipalities*, 8 J. NAT'L ASS'N REF. BANKR. 73, 74 (Jan. 1934).

[247] File memo, Municipalities file (n.d. [c. Dec. 1933]) (*in* Pres. Papers, on file with FDR Libr.).

of New York State municipalities,"[248] alleging it would dry up municipal credit.

In 1934, Sumners would re-encounter not only the same prudential and constitutional objections in the Senate but also Wilcox's continuing efforts to control the legislation and advance the concept and details of municipal bankruptcy as desired by the FMBPC, while grandstanding for himself in the process. Sumners also faced the ongoing opposition of smaller life insurance companies, the last minute intervention of a tiny trade group, the National Drainage, Levee and Irrigation Association (Drainage Association), and an onset of additional, creative models of municipal bankruptcy resulting from the President's consultations with people he trusted. The enactment of municipal bankruptcy in the late spring required not only Sumners's skill but also the personal involvement of the President.

2. Senate Passage and Presidential Signing

At the turn of 1934, legislative attention to Sumners's House Bill 5950 resumed. Opponents abounded. Having recently called on Roosevelt at the White House, San Francisco banker and bond broker J. Rupert Mason sent written objections on February 8,[249] and a month later added: "I know their [sic] is a powerful lobby working for this [Sumners] Bill. It is more than doubtful that even a handfull [sic] of cities are paying it."[250] Indeed that "powerful lobby," the FMBPC, remained assiduously involved and continually urged Sumners to press his bill through the Senate. Opposition had seemingly strengthened, and whether influenced by such comments and opinions of Mason and other consultants, or independently, Roosevelt began to involve himself in the project of enacting municipal bankruptcy.

Sumners knew the necessity for his bill had increased. For instance, in January a Texas lawyer informed him that Burkburnett, a high profile oil boomtown in a neighboring Texas congressional district, had defaulted and its creditors were organizing a committee.[251] On January 19, Wilcox wrote Sumners that a Senate Judiciary subcommittee would be holding a hearing on

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[248] Letter from Advisory Committee, Conf. of Mayors of the State of N.Y. to FDR (Dec. 29, 1933) (*in* Pres. Papers, on file with FDR Libr.).

[249] Letter from J. Rupert Mason to Marvin H. McIntyre (February 8, 1934) (*in* Pres. Papers, on file with FDR Libr.).

[250] Letter from J. Rupert Mason to Marvin H. McIntyre (Mar. 16, 1934) (*in* Pres. Papers, on file with FDR Libr.).

[251] Letter from Jordan Morrow to HWS (Jan. 29, 1934) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

the 23 and presumptuously added, "I will greatly appreciate it if you can arrange to be present at 10:30 o'clock" because "this first hearing will be important [to] thoroughly impress the subcommittee with the importance of this legislation and of the necessity for reporting the Bill out at the earliest possible date."[252] Barker followed up with Sumners the next day, suggesting that he, Barker, wished to testify in the Senate hearing—under friendly questioning by Sumners.[253]

That hearing commenced on January 24 before a decidedly unfriendly Senate subcommittee chaired by Senator Frederick Van Nuys of Indiana. Wilcox testified first, at great length, followed by Sumners, Wood, and others. The senators were well prepared to demonstrate their opposition. For instance, Nevada Senator Patrick McCarran initiated a telling exchange with Wilcox when the latter carelessly referred to "hopelessly *bankrupt* municipalities and other governmental units":

> Senator McCarran: Do you use the term "bankrupt" advisedly or do you mean "insolvent"?
>
> . . . Wilcox: I mean insolvent.
>
> . . . McCarran: Very well; I thought perhaps you did.[254]

McCarran scored more points:

> . . . McCarran: Do you believe the greatest benefit will come from this bill to those who hold the securities or to those who have issued the securities?
>
> . . . Wilcox: That is rather difficult to answer . . . .
>
> . . . McCarran: . . . the debtor is benefited by having his debts scaled down.
>
> . . . Wilcox: Not necessarily scaled down.
>
> . . . McCarran: If it is not scaled down, where does the benefit come to the debtor?
>
> . . . Wilcox: It comes in the thing about which I have just been talking.

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[252] Letter from Wilcox to HWS (Jan. 19, 1934) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

[253] Letter from Edwin H. Barker to HWS (Jan. 20, 1934) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

[254] *1934 S. Subcomm. Hearing*, *supra* note 17, at 18. Senator Henry F. Ashurst filed Senate Bill 1868, a replica of Sumners's bill on June 8, 1933, three days after House passage of H.R. 5950. *See* S. 1865, 73d Cong. (1933).

> . . . McCarran: In the delay?[255]

Now alert, Wilcox replied in fulsome detail about how restructuring relief would be available for both the unpayable debt and for municipal operations, based on his experience negotiating for West Palm Beach:

> In the rearrangement of the terms of his debt according to his ability to meet it. The creditor obtains the benefit in that he procures a bond which can be paid and which will be paid according to its terms, whereas he now holds a security upon which he probably is collecting absolutely nothing. . . . I sat around the table with my city officials and with our creditors to work out a plan of adjustment. . . . many things were given to the creditor . . .—additional means [and] forms of taxation, a scaling down of the operating expenses, and the guaranty as to what the operating budget would be for 10 years in advance, provisions that the operating budget could not be increased without the approval of the creditor [giving him] more security for his new bond than he had for his old one. . . .[256]

McCarran persisted:

> . . . McCarran: Does that mean a reconstruction of the organization of the debtor whereby the creditor comes in as a part of the [municipal] organization?
>
> . . . Wilcox: Not necessarily; no.
>
> . . . McCarran: Then how does he reconstruct it so that it is more to his advantage?[257]

Wilcox's reply correctly emphasized, as the key to the process, the compromise negotiations of the parties such that "each case [will] be adjusted according to the facts of its own particular situation, according to an agreement with its own creditors based upon what its creditors and its officials determine to be the proper method of adjustment."[258]

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[255] *1934 S. Subcomm. Hearing*, *supra* note 17, at 18–19.
[256] *Id*. at 19.
[257] *Id*.
[258] *Id*. at 20.

McCarran and all his fellow Senate subcommittee members disfavored H.R. 5950, acknowledging freely that bondholder opponents had been heavily lobbying them. Sensing the hearing was going poorly, Sumners stepped up to testify in his folksiest manner, invoking his lawyering experience on behalf of wholesalers who had assembled when a customer became financially distressed and negotiated for an accord, but there was always one "fellow who is standing back with a selfish purpose . . . throwing a monkey wrench into the machinery" and "trying to get 100 cents on the dollar."[259] He continued:

> If I should make a private contract . . . with the Senator, . . . I would feel that I had a better contract if I knew that some misfortune had come to him if we could sit down about the table and arrange some method of payment. . . . [N]othing [should] prohibit us from having that plain, ordinary, practical, common-sense privilege which men have deemed to be valuable in the ordinary affairs of life. That is what we are trying to do here.[260]

McCarran retorted: "There is nothing to prevent that now." Sumners replied: "that fellow with the monkey wrench. That is all. He is the man we are legislating against, the hijacker." And: "The desire of everybody concerned is to avoid those defaults if possible, and I believe this bill will do it. I cannot see how it will harm anybody."[261] Van Nuys thanked him for his "very understandable language."[262]

The second day of the committee hearing ended with a surprise appearance in opposition to Sumners's H.R. 5950. He was James A. McLaughlin, a Harvard law professor and member of the NBC, who displayed a confident mastery of insolvency and bankruptcy court process as he predicted delay and small recoveries. He also criticized the lack of provision for participation by ordinary citizens and the emphasis on bondholders rather than on all creditors.[263] But when Garrett A. Brownback, an attorney in attendance, asked specifically, McLaughlin acknowledged that no constitutional infirmity infected the concept of municipal bankruptcy.[264]

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[259] *Id*. at 58–59.
[260] *Id*. at 59.
[261] *Id*.
[262] *Id*. at 60.
[263] *Id*. at 125–27.
[264] *Id*. at 128.

Many observers were pessimistic about H.R. 5950 after the Senate hearing,[265] and opposition seemed to be building. On February 10, a manufacturers' association wrote the President opposing municipal bankruptcy,[266] and United Mutual submitted to the President yet another in its long string of memos that included the constitutional objection based on a debtor's property.[267] Meanwhile, FDR reached out to people in whom he had confidence, such as the well-known Mayor of Pawtucket, Thomas McCoy. He responded on March 11 with a creative out of court alternative: in lieu of bankruptcy, the RFC could loan the insolvent municipality the amount of 25% of its fixed debt charges, repayable with interest over twenty years. The debtor would report its finances quarterly to the federal government, which would hold approval rights on the budget and any new bond issuance. Based on $20 billion of municipal bonds outstanding, the mayor estimated a federal revolving loan fund of $300 million would be adequate (the "McCoy Model").[268] But the idea went nowhere, probably because Jesse Jones and the RFC were opposed to direct lending to municipalities.

Soon the White House sent word to the Senate Judiciary Committee to hold up, pending submission of amendments to the bill, but the committee surprisingly proceeded to approve H.R. 5950 on March 5.[269] Still, Roosevelt now believed that modification of H.R. 5950 was necessary to obtain full Senate approval, specifically an increase to the creditor approval percentage for principal reductions. "[V]ery anxious to make it possible that some of the municipalities that are now wrecks should be cleaned up and got[ten] out of the picture," on March 9 Roosevelt tasked one of his dollar-a-year men, Henry Bruere (President of Bowery Savings Bank), to assist in obtaining a bill amendment in the Senate and to begin by first speaking with Sumners, "[and second] tak[ing] it up with the insurance company people [and then to] get Sumners and Senators [Joseph T.] Robinson[, the Senate Majority Leader,] and [Henry F.] Ashurst[, the Senate Judiciary Committee chair,] to work it up and put it through."[270] A week later, Bruere advised that "a redraft of the

[265] *See, e.g.*, Ralph West Robey, *Report that Sumners Municipal Bankruptcy Bill Is Again to Come Before Congress Raises Hopes of Constructive Action in this Field*, WASH. POST, Jan. 31, 1934, at 18 (reporting bill is "stalled in the Senate").

[266] Letter from Otto H. Berndt, Merchants & Mfrs. Ass'n to FDR (Feb. 10, 1934) (*in* Pres. Papers, on file with FDR Libr.).

[267] Letter from Harry V. Wade to FDR (Feb. 14, 1934) (*in* Pres. Papers, on file with FDR Libr.).

[268] Letter from Thomas McCoy to FDR (Mar. 11, 1934) (*in* Pres. Papers, on file with FDR Libr.).

[269] *City Bankrupt Bill Approved in Senate Vote*, WASH. POST, Mar. 6, 1934, at 7.

[270] Letter from H.M. Kanee (for FDR) to Marvin McIntyre (Mar. 9, 1934) (*in* Pres.

measure has been made by [my colleague,] Major [Fred N.] Oliver, and submitted this morning to the Senator [Ashurst] and Judge Sumners."[271]

To address the objection by "certain institutional holders" that the bill "offers an inducement to municipalities to default," Bruere and Oliver's redraft raised the 30% creditor approval needed for filing a petition to 51% and the minimum for confirmation from 66-2/3 to 75% of the amount of all claims, while retaining the two-thirds rule for each class (the "Bruere Modification"). Sumners and Ashurst signaled support for the Bruere Modification if "those who are in opposition" would climb on board. Bruere and Oliver were indeed working for approval by the insurance companies.[272] Bruere reminded Roosevelt that opposition remained alive by forwarding still another letter from an objector, a life insurance company, asserting again the constitutional objection regarding a municipal debtor's properties.[273] Satisfied with the Bruere Modification, Roosevelt immediately met with Sumners and Ashurst to discuss it. On April 12, Sumners wrote Bruere, "You have done excellent service in helping to get the difficulties ironed out, and to quiet the apprehensions of opponents."[274]

A few weeks earlier, in late March or early April, an unidentified advisor (one obviously quite expert in bankruptcy) submitted a new model to the White House, this one advocating the most radical broadening of municipal and reorganizational bankruptcy yet and, further, promised "not [to] cost the government anything."[275] From the premise that "the recovery program of the Administration rests on the assumption that the national debt load, public and private, is a direct hindrance to recovery and prosperity because the necessity of paying principal and interest absorbs too much of national income," the memorandum proposed enlarging H.R. 5950 to include the gamut of both eligible and previously ineligible entities: "*all* debtors, viz. *municipalities*, *states*, private corporations, including *banks*, *insurance*

Papers, on file with FDR Libr.) (requesting outreach to Bruere). For information on Henry Bruere and his service as one of Roosevelt's dollar-a-year men, see, e.g., *Bankers Face Much Trouble on the Way*, COMM. W., at 20 (Oct. 14, 1933).

[271] Letter from Henry Bruere to FDR (Mar. 16, 1934) (*in* Pres. Papers, on file with FDR Libr.). Oliver was Maj. Fred N. Oliver, a bank association leader.

[272] *Id.*

[273] Letter from Northwestern Mutual Life Ins. Co. to Fred N. Oliver (Mar. 13, 1934) (*in* Pres. Papers, on file with FDR Libr.).

[274] Letter from HWS to Henry Bruere (Apr. 12, 1934) (*in* Pres. Papers, on file with FDR Libr.).

[275] Based on the dates of surrounding documents in the archival folder, the President received this memo in April.

companies, railroads, *building and loan associations*, industrial corporations, etc."[276] The advisor continued:

> Instead of . . . written consent . . . in advance, it should be provided that when a composition . . . is approved by the court, it will be effective unless __% [sic] of the creditors themselves object in writing within 30 or 60 days. This variation in procedure is of the utmost importance. . . . [Advance consent] absolutely doesn't work . . . . If the method of lightening the load by cancelation becomes necessary, it is most important that it be done speedily and, from the angle of delay, nothing causes more delay than the securing in advance of the written consent of the creditors. . . . The procedure of assuming consent unless written objection has been made has been expressly approved by the U.S. Supreme Court . . . .[277]

It is not known whether Sumners and Ashurst saw this proposal, and it did not advance. But this model's submission further demonstrates the breadth of innovative explorations during the New Deal of the Bankruptcy Clause's power to help all nonindividual debtors, even States, to restructure, here by the simple device of negative notice in lieu of disclosure and balloting (the "Negative Notice Model").

McLaughlin's observation during January's hearing that no one was paying any attention to creditors other than bondholders was validated when, on May 1, 1934, an American Federation of Teachers local union submitted to Roosevelt the legal memorandum of its attorney, analyzing "possible unfavorable effects [of H.R. 5950] upon the status of the members . . . in relations to the various . . . school districts," specifically, that their unpaid salaries and employment contracts were at risk. Teachers' "salaries, under the provisions of a plan of readjustment, may be modified or scaled down," and "their employment [under] their contracts and compensation" would be executory contracts subject to rejection by court order, leaving the teachers with breach of contract claims for damages.[278] The lawyer understood

[276] Memorandum from unidentified author to FDR (Mar. 26, 1934) (*in* Pres. Papers, on file with FDR Libr.) (emphasis added).

[277] *Id*. at 3 (citing Gilfillan v. Union Canal Co., 109 U.S. 401 (1883)).

[278] Letter from Grover C. Ramsey to Marvin McIntyre (May 1, 1934) enclosing Legal Opinion of John Potts Barnes to Ramsey, at 2, 3 (n.d.) (*in* House Jud. Comm. Papers, on file

correctly that the executory contract power could powerfully restructure the relations between a school district or other public debtor and its teachers or employees. But his memo did not cause any change in the pending bill.

Sumners's grand legislative achievement was his ability to overcome persistent constitutional and legal objections while forging politically acceptable terms. With the assistance of the veteran Wall Street investment banker Josiah Hewitt,[279] Sumners continued through the first five months of 1934 to seek to persuade the representatives of municipal bond firms and insurance companies and other financial officials, while Wood liaised between Sumners and senators and the bondholder committees.[280] For example, on March 28 Sumners sought to sell the Bruere Modification to B.A. McKinney, President of the Federal Reserve Bank of Dallas, by confessing that he had "felt all the time there should be required for initiating proceedings the consent to a plan of at least a majority [of the creditors]."[281]

House Bill 5950 was returned to the House with Senate approval, as amended by McCarran.[282] One edit proposed the removal, without comment, of "the [debtor's] reasonable capacity to pay" rubric in the bill's confirmation standards, an objective fact finding that had been a requirement since the Wyman Draft.[283] By May 2, 1934, telegram, Sumners asked Barker: "Are you and associates [the FMBPC] satisfied with the Senate amendment to the Municipal Bankruptcy Bill?"[284] They were; but at the eleventh hour, the Drainage Association had stepped forward to complain that the 51% creditor consent threshold for filing a petition was not feasible for its members

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with Nat'l Archives).

279 Letter from Josiah M. Hewitt to HWS (June 1, 1934); Letter from HWS to Hewitt (June 6, 1934) (all in House Jud. Comm. Papers, on file with Nat'l Archives).

280 Letter from David M. Wood to HWS (Apr. 19, 1934) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

281 Letter from HWS to B.A. McKinney, President of Dallas Federal Reserve Bank (Mar. 28, 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives). Later, the President of Great Southern Life Insurance, sent Sumners a note of thanks, that the amended bill "seems to be in pretty fair shape, and thanks to you for an improvement of my first understanding of it. Possibly it will work out all right." Letter from E.P. Greenwood to HWS (May 7, 1934) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

282 Amendment, H.R. 5950 (*in* Senate), 73d Cong. (1934); Public Print, H.R. 5950, 73d Cong. (1934) (striking "that it desires to effect a plan of readjustment of its debts upon the basis of its capacity to pay" in § 80(a)).

283 Functionally, the amount of credit the RFC committed to advance served the same purpose of limiting the amount a debtor could agree to pay in bargaining with its creditors. *See supra* note 132.

284 Telegram from HWS to Edwin H. Barker (May 2, 1934) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

because their bondholders were uniquely difficult to locate. Representative John E. Miller of Arkansas, a Judiciary Committee member Sumners trusted,[285] appeared with the association's leader C.H. Scott before Sumners's committee on April 30. According to his handwritten notes, Sumners then forged a compromise in a conference committee meeting with senators: for the "drainage, irrigation, levee and reclamation [districts,] go 30[% minimum creditor consent for petition filing] and 66[-]2/3[% for plan confirmation;] all other [debtors] 51[%] and 75[%]."[286] As thus modified,[287] Sumners's H.R. 5950 easily passed both houses, and on May 24, 1934, in the New Deal's second year, President Roosevelt signed the First MBA,[288] designated as Chapter IX of the BA'98.[289]

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[285] Letter from HWS to J. Hugh Wharton (June 16, 1934) (*in* House Jud. Comm. Papers, on file with Nat'l Archives) (Miller "has been most valuable in connection with the Municipal Bankruptcy Act").

[286] HWS, handwritten notes to file "Conference H.R. 5950" (May 11, 1934) (*in* House Jud. Comm. Papers, on file with Nat'l Archives) (conference committee meeting attended by Sens. Neely & Austin, and Reps. Sumners, Montague, McKeown, & Perkins—"also Rep. Wilcox").

[287] H.R. REP. 1592, CONF. REP., AMEND ACT TO ESTABLISH UNIFORM SYSTEM OF BANKRUPTCY, 73d Cong. (1934); HWS, notes to file (May 11, 1934) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

[288] Municipal Bankruptcy Act, ch. 345, Pub. L. No. 251,48 Stat. 798 (§§ 78, 79, 80 of the BA'98).

[289] With Senate passage at hand, another last-minute obstacle for Sumners had been Harold L. Ickes, a prominent New Dealer heading the Public Works Administration, who telephoned Sumners on May 12, 1934, and sent over a bill draft, only the first page of which survives, stating, "I hope very much indeed that you will see fit to introduce [it]. . . and that it may be enacted into law at this session of the Congress." The bill purported to exempt debts to the federal government from discharge under a municipal bankruptcy plan. Sumners rebuffed Ickes:

> [I]f what is known as the municipal bankruptcy act was an act which provided in itself for a scaling down of debts, the situation would be somewhat different from that which would [actually] develop under the bill. It would perhaps be well for you to send a representative down here Tuesday because it is my opinion that the Committee will not be very favorably impressed with the suggestion. To be candid with you, I am not very favorably impressed myself. It seems to me that it would probably interfere with any agreement between creditors of the municipalities.

Letter from HWS to Harold L. Ickes (May 12, 1934) (*in* House Jud. Comm. Papers, on file with Nat'l Archives). Ickes replied that he would send his agency's counsel E.M. Foley "to appear before your committee and explain my views." Letter from Ickes to HWS (May 17, 1934) (*in* House Jud. Comm. Papers, on file with Nat'l Archives). Nothing came of Ickes's proposal.

3. Amendments and Test Case

The First MBA was effective upon its May 24 signing. Historian Alicia Dewey found in the federal judicial archive a veritable parade, beginning within two months, of insolvent irrigation districts and municipalities in the Valley invoking Chapter IX in the federal court:

> At least five [irrigation] districts from Cameron County . . ., six from Hidalgo County, and two from Willacy County [and] eight of the Hidalgo County Road Districts . . . filed for [Chapter IX] bankruptcy.
>
> Even more serious than the failures of the irrigation and road districts were the insolvencies of the cities, towns, and school districts of the Valley. Seven of the new farm towns filed for bankruptcy in the 1930s, including Edinburg, Lyford, Donna, Mercedes, Pharr, San Benito, and San Juan. Both the City of Brownsville and the Brownsville Independent School District filed bankruptcy cases . . . [as well as four other school districts].[290]

Altogether, Dewey found 38 municipal bankruptcy filings in South Texas from 1934 through the decade.[291]

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[290] ALICIA M. DEWEY, RISK AND OPPORTUNITY ON THE U.S./MEXICO BORDER: CREDIT, BANKRUPTCY, AND THE EMERGENCE OF THE ANGLO AND MEXICAN-AMERICAN MIDDLE CLASSES IN SOUTH TEXAS, 1898–1941, at 266–67 (Aug. 1, 2007) (Ph.D. dissertation, SMU, Dept. of History; on file with author). Dewey's work is particularly valuable because she practiced bankruptcy law for years before joining academia and, most importantly, she invested the time to deeply research these primary sources in the federal judicial archives.

[291] *Id.* Additional Chapter IX filings included the Corpus Christi in the Valley and Electra 500 miles to the north, see Hearing before Special Subcomm. on Bankr. & Reorg., H. Comm. on the Jud., 77th Cong. (1942) (listing 28 cities that filed under the First MBA, including both). Elsewhere in Texas, filers included the Cities of Belton, see Supreme Forest Woodmen Circle v. City of Belton, 100 F.2d 655 (5th Cir. 1938); Eastland, see *City of Eastland Seeks Bankruptcy*, DAL MORNING NEWS 7, Oct. 22, 1938; Ennis, see Women's Catholic Order of Foresters v. City of Ennis, 116 F.2d 270 (5th Cir. 1940); Cisco, and a Dallas area levee district. Kaufman County Levee Imp. Dist. No. 4 v. Mitchell, 116 F.2d 959 (5th Cir. 1941). Nationwide, just before the Supreme Court's *Ashton* ruling, Hillhouse found "out of approximately 3,000 in default[,] a total of eighty-four [Chapter IX] petitioners, scattered through twenty states. . . . . There have been an increasing number of petitions since January 1, 1936." A. M. Hillhouse, *The Federal Municipal Debt Adjustment Act*, 25 NAT'L MUN.

On July 17, 1934, without any State governmental approval, the first of the Valley's insolvent irrigation districts, Cameron County Water Improvement District No. One (CCWID), filed Case No. 520 in the federal district court of South Texas, the petition that served as the test for the First MBA.[292] Referring to itself as "an irrigation district, . . . a municipality and a political subdivision of this State," the debtor also filed its plan and the RFC's commitment for a loan to pay off the district's bonds at 49.8 cents on the dollar.[293] Created in 1914 and covering 42,000 acres, the district had issued bonds with a filing date balance of $802,000 to finance its civil improvements, but the "general financial depression" had so reduced the price for its farmers' fruits and vegetables such that the growers could not recover their costs and pay their taxes to the district.[294] The farmlands' per acre market value was $75 but the bond debt was $100 per acre. Tax delinquencies averaged $23.19 per acre and were "rapidly growing worse."[295] The district acknowledged itself "insolvent and wholly unable to pay its debts as they mature" and attached to its petition the written acceptances of 30% of the bondholders.[296] Because it was an irrigation district, under the last minute amendment to H.R. 5950 at the instance of the Drainage Association, CCWID did not have to meet the 51% minimum otherwise applicable for municipal debtors to commence a case.[297]

Local lawyer W.B. Lewis signed as debtor's counsel, but the hand of more sophisticated counsel is apparent in the high quality of the debtor's court papers, and the collaboration of lawyers for the key parties later became clear. On August 22, after newspaper notice, and acting as the district court's presiding judge, Fifth Circuit Court of Appeals Judge Joseph C. Hutcheson, Jr. of Houston conducted the initial hearing, approved the filing as in good faith, and set a next hearing for October 1 in that city.[298] Chapter IX permitted creditors holding five percent of the claims to oppose the petition, and on that second hearing date, the judge's half-brother, Palmer Hutcheson, a partner of the firm Baker, Botts, Andrews & Wharton, representing Houstonian C.L.

REV. 328, 328, 332 (1936).

[292] First Amended Petition, Transcript of Record, Ashton v. Cameron Cnty. Water Imp. Dist. No. 1, 298 U.S. 513 1936) (No. 859), at 3 [hereinafter Ashton Transcript].

[293] *Id*. at 6.

[294] *Id*. at 4–5, 12.

[295] *Id*. at 59.

[296] *Id*. at 31–50.

[297] *See supra* text accompanying notes 285–86.

[298] Order Approving Amended Petition and Directing Notices to Be Given to Bondholders, Etc., of Hearing of Petition, Ashton Transcript, *supra* note 292, at 51–52.

Ashton and joined by other objectors' counsel, filed a verified motion to dismiss CCWID's case "because there is no provision in the Constitution . . . which authorizes Congress to pass the Act [and] this is not a proceeding in bankruptcy as contemplated by the [Bankruptcy C]lause."[299] It observed that the Texas Legislature had not authorized the debtor to seek relief under the First MBA, and for good measure it challenged the RFC loan as ultra vires.

Judge Kennerly conducted the third hearing. Considering his prior willingness to assist consenting parties in multiple improvised mandamus cases in his court to implement municipal bond restructurings over the dissent of holdouts, the judge proved surprisingly unreceptive to CCWID's petition. Although there was no requirement in Chapter IX or the national bankruptcy rules[300] for a debtor to aver and prove such, Kennerly noted the petition made "no allegation and apparently no claim" that it had attempted to collect its defaulted taxes to pay the bonds or even that the property subject to the debtor's fees and taxes had declined in value. He assumed to the contrary and found the debtor to be "merely an Agency or Instrumentality of the state of Texas . . . for the purpose of the local exercise of the State's sovereign powers" and "exercising Governmental functions."[301] He rejected the Act's assertion of national emergency.[302] The *Federal Supplement* published his December 1 decision dismissing the petition as unconstitutional.[303] Soon decisions from district courts in California and Florida appeared, but all of those sustained the First MBA's constitutionality.[304]

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[299] Contest to Petition and Motion to Dismiss, Ashton Transcript, *supra* note 292, at 103–13.

[300] Pertinent *General Orders in Bankruptcy*, the national bankruptcy rules, such as they were, did not require specific averments. *See, e.g.*, Rule IV ("All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion.") and Rule V ("All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation . . . ."), *in* General Orders in Bankruptcy, Nov. 28, 1898, and amended May 31, 1932, U.S. Sup. Ct.

[301] Order of Dismissal, *Transcript of Record, supra* note 292, at 124–25; Opinion of the Court, *id.* at 113–24 [hereinafter Kennerly's Opinion].

[302] Kennerly's Opinion, *supra* note 301 at 119–20.

[303] *In re* Cameron Cnty. Water Imp. Dist. No. 1, 9 F. Supp. 103, 106–07 (S.D. Tex. 1934), *rev'd sub nom.* Cameron Cnty. Water Imp. Dist. No. 1 v. Ashton, 81 F.2d 905 (5th Cir. 1936), *rev'd sub nom.* Ashton v. Cameron Cnty. Water Imp. Dist. No. 1, 298 U.S. 513 (1936).

[304] *In re* East Contra Costa Irrig. Dist., 10 F. Supp. 175 (N.D. Cal. 1935); *In re* Imperial Irrig. Dist., 10 F. Supp. 832 (S.D. Cal. 1935), *rev'd sub nom.* S. Sierras Power Co. v. Imperial Irrig. Dist., 85 F.2d 1019 (9th Cir. 1936).

Wood and Barker had predicted that the First MBA would be appealed by creditors,[305] but it was a debtor, CCWID, that fulfilled his prophecy by filing for appeal six months later, on May 31, 1935.[306] The Justice Department was not a party to the constitutional issue in the trial court, the Court of Appeals, or the Supreme Court. Enactment of another bill by Sumners to rectify the Attorney General's standing deficiency was two years away, during the court packing crisis.[307] With a seasoned Washington lawyer, Vincent M. Miles, joining Lewis in representing the debtor, and Palmer Hutcheson continuing as counsel for the bondholders, the Fifth Circuit accepted the debtor's arguments and ruled for the debtor.[308]

Several legislative developments occurred in the next fourteen months. First, on April 27, 1935, the Texas Legislature enacted a statute authorizing its political subdivisions to file Chapter IX cases in federal courts.[309] The Court of Appeals noted this statute in its decision, and the Supreme Court at least mentioned it six months later. Second, two bills in Congress resulted in important amendments to the First MBA that became effective prior to the Supreme Court's reversal, albeit only by six weeks. While they did not play a role in the Supreme Court's decision, the enactments are germane to understanding the genesis of municipal bankruptcy.

This untold story began March 13, 1935, when Robinson filed Senate Bill 2471, and twelve days later Miller filed its companion, H.R. 6982, the bill that proceeded.[310] The bill proposed yet another model of municipal bankruptcy. Passage of an amended version of Miller's bill took thirteen months but was never really contested. The tweak that it made to the First MBA further illustrates that the constitutional objections about empowering debtor friendly relief for political subdivisions were never an insurmountable hurdle for House or Senate legislators in the 1930s. Scott, an Arkansan who, as head of the Drainage Association, had injected his organization's needs into the Senate proceedings at the last minute before passage of the First MBA a year earlier, had now procured these bill filings by two of his state's

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[305] Wood Opin., *supra* note 189; Edwin H. Barker, *Federal Legislation Needed to Adjust Debts of Insolvent Municipalities*, BOND BUYER 2 (Sept. 1933) (*in* House Jud. Comm. Papers, on file with Nat'l Archives (text of ABA speech)).

[306] Order Allowing Certiorari, April 13, 1936, Ashton Transcript, *supra* note 292, at 153.

[307] *See* Daniel, *Cash In*, *supra* note 105, at 406–07, 416.

[308] Cameron Cnty. Water Imp. Dist. No. 1 v. Ashton, 81 F.2d 905 (5th Cir. 1936), *rev'd sub nom.* Ashton v. Cameron Cnty. Water Imp. Dist. No. 1, 298 U.S. 513 (1936).

[309] Act of Apr. 27, 1935, ch. 107, 1935 TEX. GEN. LAWS 293.

[310] S. 2471, 74th Cong. (1935); H.R. 6982, 74th Cong. (1935).

congressional delegation, and he and Miller served as the witnesses in Sumners's Judiciary Committee hearing on April 2–3, 1935.

Scott began by testifying that "754 applications [by drainage and irrigation districts] filed with the RFC for refinancing purposes, [but only] 434 approved . . . . for a total of $88,000,000, of the total of $196,000,000 that has been appropriated."[311] The reason so few rural districts had received relief in Chapter IX even after obtaining RFC loan commitments was due to the districts' inability to obtain the consent of the requisite percentage of bondholders. He had raised this issue a year earlier, which resulted in the formulation of the special, lower percentages for drainage and irrigation districts: 30% approval to file a petition, rather than 51%, and 66-2/3%, rather than 75% of all claims, for plan acceptance. Even this formula was not working because

> the debtor and attorney are unable to find or contact the bondholders . . . the bonds of drainage, levee, irrigation and reclamation districts were sold through brokerage houses mostly to individuals and, as a result of method employed in marketing the bonds of different districts, it is impossible for groups except those of the bondholders' protective committees to be in position to really find any percent of bonds, whether it be 6, 10 or 30 percent of different issues. That situation does not exist with municipalities, school bonds, or road improvement bonds . . . .[312]

He therefore "c[a]me to the Judiciary Committee today hoping that the Committee will liberalize the requirements of [such] districts desiring to go into bankruptcy for the sole purpose of getting the benefit of the [RFC] loans."[313]

Observing that the First MBA would expire in a year, Scott stated his request: "We feel that drainage, levee, irrigation, and reclamation districts should be permitted *to file petition* for bankruptcy proceedings *the same as individuals*,"[314] that is, as a unilateral decision. Moreover, under questioning by Sumners, Scott acknowledged that he also "want[ed] the matter [of plan

[311] *Unpublished hearing on H.R. 6982 Before the H. Comm. on the Judiciary*, 74th Cong. 1–2 (1935) [hereinafter Unpub. 1935 Hearing].

[312] *Id*. at b4–6.

[313] *Id*. at b6.

[314] *Id*. at b12–13 (emphasis added).

confirmation] determined *without* the consent of 66-2/3," that is, "on the Judgment of the court, *without any percent*."[315] Specifically, Miller's bill would amend the First MBA to provide

> [T]hat it shall *not* be requisite to the confirmation of the plan that there be acceptance by any creditor or class of creditors . . . of a petitioning tax district to which a loan shall have been authorized by an agency of the United States Government, for the purpose of enabling the petitioning district to reduce and refinance its outstanding indebtedness.[316]

In short, so long as a taxing district of any kind covered by the First MBA held an RFC loan commitment, it could file a case and proceed to plan confirmation, all *without* any creditor consents to case filing or balloting; the court would simply rule on the adequacy of the RFC's funding and, presumably, on the First MBA's other, nonvoting confirmation standards (the "No Creditor Consent Needed Model").[317]

The unpublished transcript of the hearing that Sumners conducted on April 3, 1935, discloses the pointed consideration given by the House committee to the No Creditor Consent Needed Model. Sumners asked Scott: "What you are doing in your proposed amendment is wiping out the whole scheme of the consent of any part of the minority holders, either to the taking of jurisdiction by the court or the determination by the court?" Scott replied, "That is correct."[318] Congressman Wesley Lloyd of Washington inquired: "Do you think it is constitutional?" Scott: "Yes, sir."[319] Sumners did not address that, but he contrasted the Composition Model in the First MBA with the proposed model: the former "is a voluntary agreement, and here you have [only] the judgment exercised by the court."[320] Michener jumped in: "You change here the entire theory of our new bankruptcy law [the First MBA]."[321] Sumners agreed that consent to filing was not essential, but he remembered the political dealing that had preceded the enactment of the First MBA, so he proposed a deal on the spot: "If the Committee would agree to relax with

[315] *Id*. at b6 (emphasis added).

[316] H.R 6982, § 80(b), 74th Cong. (1935).

[317] To be sure, the Moratorium Model of 1933 had also not required such creditor consent.

[318] Unpub. 1935 hearing, *supra* note 311, at 13–14.

[319] *Id*. at 15.

[320] *Id.* at 19.

[321] *Id*.

reference to jurisdictional requirements [i.e., not require creditor consent to petition filing], then could you get along with requiring the consent of, say, the majority of the bondholders [for confirmation]?" Scott agreed: "I would state it this way, Congressman: Eliminate the 30 and require the majority. The main thing is to give us the power."[322]

Sumners's committee continued the requirement of creditor voting on a plan but reduced the approval level for a plan to 51% for irrigation and rural districts; and it authorized unilateral case filing decisions by those types of debtors.[323] Enactment was delayed for a year; but on April 11, 1936, the Miller amendment to the First MBA obtained presidential approval and became effective.[324] Scott's and Miller's proposal to eliminate creditor voting for plan acceptance was too large a step politically in light of the rather recent efforts required to obtain Senate approval of the First MBA. [325] But both houses' acceptance of fully voluntary or unconsented petitions by at least this particular type of municipality was a significant step of debtor empowerment in the evolution of the law.[326] The inclusion of that one part of the No Creditor Consent Needed Model marks the freest yet exercise of the Bankruptcy Clause power for the seeking of relief by an insolvent municipal debtor.[327]

The second pre-*Ashton* amendment was H.R. 10490 filed by Wilcox on January 22, 1936. The year before, McKinney had predicted to Sumners that "measures of that kind are so often extended and become more or less permanent."[328] But the impetus for extension of the First MBA in early 1936 was a real need: a significant number of Chapter IX cases were in midstream with the statute's two-year expiry fast approaching. Wilcox's bill proposed to

[322] *Id*. at 23.

[323] H.R. REP. No. 1499, 74th Cong. (1935).

[324] Act of Apr. 11, 1936, Pub. L No. 74-515, ch. 210, 49 Stat. 1203.

[325] *See* text accompanying *supra* notes 285–86.

[326] After *Ashton* invalidated the First MBA, the opportunity for a unilateral petition filing by a debtor, that is, without creditors' consent, did not return to municipal bankruptcy law until the 1976 amendments added it (with a condition of inability to bargain beforehand), and today that right is found in 11 U.S.C. §§ 109(c)(5)(C), 301, 901, 921.

[327] Interestingly, the Senate Judiciary Committee would have even further widened municipal bankruptcy. That committee amended Robinson's S. 2471 to add as eligible debtors "mutual nonprofit companies and incorporated water users' associations"—*private*, not governmental, entities. S. REP. NO. 500, 74th Cong. (1935). But the Senate deleted that. S. 2471, 74th Cong. (1935) (as passed by the Senate, May 1, 1935).

[328] Letter from B.A. McKinney, Pres., Dallas Fed. Res. Bank, to HWS (Mar. 24, 1934) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

extend the statute's effectiveness to January 1, 1945.[329] The House committee trimmed that to 1940. After Wilcox informed both chambers that the ABA had changed its position and now supported municipal bankruptcy and its extension, both houses easily passed the bill, and the President signed it on April 10.[330] This second bill is significant because by extending the sunset date, Congress in essence re-enacted Chapter IX and reaffirmed its decision to make available statutory restructuring relief for municipal debtors under the BA'98—only moments before the High Court ruled.

The two amendments were not, however, included in the record on appeal, and the *Ashton* Court either ignored or was ignorant of them.

C. *Ashton*

In New Orleans on March 3, 1936, the Fifth Circuit reversed Kennerly's order of dismissal. Its March 3, 1936, published decision held that the new act fell within the scope of the Bankruptcy Clause and was otherwise valid. It found that Chapter IX preserved the essential sovereignty of the State and that no advance consent by Texas was necessary.[331] Quickly seeking review, the dissident bondholders claimed that both the First MBA and the Texas Legislature's enabling statute were unconstitutional. The Supreme Court granted certiorari on April 13. Miles again joined Lewis on the brief, and Wood switched sides to present oral argument for the debtor, CCWID. Justice James Clark McReynolds authored the decision of May 25, which reversed the Fifth Circuit and held that the First MBA was unconstitutional. The other members of the "Four Horsemen"[332] and the swing justice, Owen Roberts, joined McReynolds and formed the majority.

The decision discounted the severity of the financial crisis of CCWID and, without mentioning the Tenth Amendment, concluded that Chapter IX's provisions to adjust bonds that had been issued on the promise of the State's political unit to use its taxes to repay the debt impaired the independence and sovereignty of Texas within the structure of the federal union.[333] The First MBA had the improper intent "to authorize a federal court to require

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[329] H.R. 10490, 74th Cong. (1936).

[330] Act of Apr. 10, 1936, ch. 186, Pub. L. No. 507, 49 Stat. 1198 (1936).

[331] Cameron Cnty. Water Imp. Dist. No. 1 v. Ashton, 81 F.2d 905, 908 (5th Cir. 1936), *rev'd*, 298 U.S. 513 (1936).

[332] *See* Daniel, *Cash In*, *supra* note 105, at 395. McReynolds, Van Devanter, Butler, and Sutherland were popularly known by that sobriquet due to their judicial antipathy to New Deal legislation. *Id.*

[333] Ashton v. Cameron Cnty. Water Imp. Dist. No. 1, 298 U.S. 513, 543 (1936).

objecting creditors to accept an offer by a public corporation to compromise, scale down, or repudiate its indebtedness without the surrender of any property whatsoever,"[334] reflecting the majority's embrace of the traditional conception of "bankruptcy." To be sure, the Court found that CCWID was a "political division[] of the State, with power to sue and be sued, issue bonds, and levy and collect taxes," and it acknowledged that the State had in 1935 authorized its political subdivisions to "proceed" under the federal act.[335] Moreover, the decision conceded that "[t]he enactment is adequately related to the general 'subject of bankruptcies'"[336]—so Sumners had been correct that municipal bankruptcy was permissible under the Bankruptcy Clause—and the Court declined to consider the petitioners' Fifth Amendment claim.

The *Ashton* majority accepted the bondholders' argument that the Contract Clause *was* involved and that impairment of contracts may not be accomplished indirectly "under the form of a bankruptcy act or otherwise. . . . [A State] can[not] accomplish the same end by granting any permission necessary to enable Congress so to do." The bulk of the opinion spun out the majority's overarching or structural concept of State sovereignty. The Court put it bluntly: "the federal government, acting under the bankruptcy clause, may [not] impose its will and impair state powers—pass laws inconsistent with the idea of sovereignty."[337] Emphasizing how seriously it regarded its understanding of State sovereignty, it quoted from *Texas v. White*.[338]

Commentators have consistently impugned *Ashton*. For instance, McConnell and Picker characterized it as "impossible to defend":

> The federal act carefully preserved local control over fiscal decisions from judicial interference, as well as state power over whether localities could take advantage of it. All the Act did was to free cities of the limitations of the Contract Clause and enable them to negotiate settlements with their creditors without the holdout problem. It is hard to see how the "will of Congress" is made to prevail over the cities; on the contrary, cities are given an additional tool

[334] *Id*. at 527.
[335] *Id*.
[336] *Id*.
[337] *Id*. at 531.
[338] *Id.* at 528 (citing Texas v. White, 74 U.S. 700, 725 (1869) ("an indestructible Union, composed of indestructible States" (*overruled by* Morgan v. United States, 113 U.S. 476 (1885)).

> for the management of their own affairs. . . . [T]he *Ashton* decision seems unnecessary and misguided.[339]

More recently, the constitutional scholar Mark Tushnet found "the opinion's logic . . . difficult to discern." In the decision's reliance on the limited reach of the taxation power,

> [t]he thought appears to be that, just as the power to tax did not extend to state activities, neither did the bankruptcy power: state sovereignty operated as an external limit on the enumerated powers granted to Congress. That interpretation of the opinion was muddied up, though, by some other statements it contained [about] "laws inconsistent with the idea of sovereignty," and perhaps that "idea" included the proposition that sovereigns cannot consent to surrendering some essentials of sovereignty, of which management of fiscal affairs is one.[340]

But the vote was only 5-4.

In his dissent, Justice Benjamin Cardozo spotlit the truth of the financial distress suffered by CCWID and other agricultural districts. For instance, 89% of its taxpayers were in default, and the market value of agricultural land per acre was $75 compared to $100 in bonded debt. State law offered no hope for the holdout problem that the majority ignored:

> Often the holders of the bonds to the extent of ninety per cent or more were ready to scale down the obligations and put the debtor on its feet. A recalcitrant minority had capacity to block the plan. Nor was there hope for relief from statutes to be enacted by the states . . . .[341]

Cardozo read the Bankruptcy Clause as Sumners did, permitting Congress to authorize local governmental units, with the consent of the respective States,

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[339] McConnell & Picker, *Cities Go Broke*, *supra* note 14, at 452.

[340] Mark V. Tushnet, The Hughes Court: From Progressivism to Pluralism, 1930–1941, *in* 11 THE OLIVER WENDELL HOLMES DEVISE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 247 (2021).

[341] Ashton v. Cameron Cnty. Water Imp. Dist. No. 1, 298 U.S. 513, 534 (1936).

to file voluntary cases, suggesting that the wording of the first statute could be rejiggered.[342]

III. Second Municipal Bankruptcy Act, 1937–1976

A. Sumners's Bill During the Court Packing Crisis

Sumners was displeased if not angered.[343] As Sumners recalled it in a memo to his file in 1940, "the Judiciary Committee did not accept the determination of the Supreme Court in [*Ashton*] but reintroduced the bill, making some immaterial modifications."[344] Wilcox too remained committed to municipal bankruptcy. West Palm Beach had agreed to a new bond restructuring with the FMBPC, but *Ashton* caused four percent of the creditors to back out, spoiling the deal. Wilcox was, moreover, considering a run in 1938 for the Senate seat being vacated by Fletcher. A political success in reenacting municipal bankruptcy would subserve a campaign in Florida with its still numerous insolvent towns and cities.

The starting point was, of course, *Ashton* and the re-drafters' identification of the specific problems in the First MBA that the Court raised. The drafters concluded *Ashton*'s characterization of eligible debtors under the First MBA as "[a]ny municipality or *other political subdivision of any State*" indicated that the First MBA's designation of eligible to file entities that might be considered to constitute parts of a State itself must have been the statute's offending element for the Supreme Court. Around Christmas of 1936, likely at Sumners's request, John D. McCall, a Dallas bond lawyer experienced "in [municipal] bankruptcy cases ranging from West Texas all the way to Florida" and who had filed an amicus brief in *Ashton*,[345] travelled

[342] *Id*. at 532–40.

[343] "He had been angered in particular by its decision declaring the Municipal Bankruptcy Act unconstitutional. . . . he felt the Court's reasoning was both unrealistic and untenable." Anthony Champagne, *Hatton Sumners and the 1937 Court-Packing Plan*, 26 E. TEX. HIST. J. 46, 46 (1988).

[344] "Memoranda" [sic], HWS to file (Apr. 13, 1940) (*in* Sumners Papers, on file with Dallas Hist. Soc'y) [hereinafter Sumners, 1940 Memo to File].

[345] Rodolfo Segura, Jr., *Defaults, Bankruptcies and Depression: How a Century Old Firm Came to Be*: *McCall Parkhurst & Horton—Our 100+ Year History*, https://mphlegal.com/100-years/defaults-bankruptcies-and-depression/ (last viewed Apr. 10, 2026) (on file with author); Motion for Leave to File Brief as Amicus Curiae, Ashton v. Cameron Cnty Water Imp. Dist. No. 1, U.S. Sup. Ct. (Apr. 28, 1936) (filed as "bond counsel for municipal and other public corporations which are now in process of refinancing their indebtedness, including thirteen Water Improvement or Irrigation Districts in the State of

to Washington to work with Wilcox on new bills. Filed on January 11, 1937, House Bill 2505 was a slightly paler version of the First MBA, and H.R. 2506 was an altogether new model of municipal bankruptcy. The former initiated a legislative process leading to reenactment, in essence, of the First MBA as the Second MBA; the latter did not proceed.

Nevertheless, H.R. 2506 is significant today as another experiment in municipal bankruptcy, presenting yet another model.[346] The drafters abridged municipal bankruptcy to a proceeding to enforce a basic composition agreement reached by creditors, eliminating the role of debtor (the No Debtor Model). This bill provided that a two-thirds majority in creditors' claim amounts could confirm a plan over the objections of the minority. The debtor, here defined as a "taxing agency," would have only to agree to the deal but not be a party to the proceeding in bankruptcy court. H.R. 2506 eliminated all other features of municipal bankruptcy that creditors could object to; for instance, the bill deleted the discharge as well as the stay provisions of the First MBA. This bill did not survive its hearing.

In the other bill, H.R. 2505, Wilcox and McCall word-smithed the text of the First MBA, first by substituting the term "composition" for "adjustment"—"plan of readjustment" became "plan of composition"—and they inserted the adjective "Uniform" before all references to the BA'98 and provided a unique filing fee in the reduced amount of $100. Those edits did not change substance but created a connotation of the limited nature of a composition and reminded that the relief *was* grounded upon the Bankruptcy Clause. But the drafters retained the essential elements of the Gateway Factors and continued to rely on the plan as the vehicle of restructuring. As before, a plan could "include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured."[347]

In a salutary broadening of the prior terms, the bill enlarged the definition of "security" to include "*judgments, claims and demands, liquidated or unliquidated,* and other evidences of indebtedness, either

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Texas").

[346] H.R. 2506, §§ 82, 82(a), (d), 83(a) (1937).

[347] H.R. 2505, § 83(a), 75th Cong. (1937). The drafters retained the same plan confirmation standards but added these emphasized words: "and does not discriminate unfairly in favor of *any creditor or* class of creditors." *Id*. § 83(e) (emphasis added). I found no archival sources to explain, but later Justice Douglas said of that wording: "A secret advantage would not meet that test." Mason v. Paradise Irrig. Dist., 326 U.S. 536, 543 (1946). Today's chapter 9 does not include the "any creditor or" words. *See* Andrew B. Dawson, *Pensioners, Bondholders, and Unfair Discrimination in Municipal Bankruptcy*, 17 U. PA. J. BUS. L. 1, 15 n.76 (2014).

secured or unsecured, and certificates of beneficial interests in property."[348] The bill made debtor favorable changes to lower creditor approval for case filing from 51 to 30% and plan acceptance from 75% to two-thirds, as well as to remove the option for five percent of the bondholders to controvert the petition in the first 90 days, and it also preserved the discharge and the debtor and nondebtor preconfirmation stay to be available by simple court order.[349]

One improvement of bankruptcy process was H.R. 2505's requirement of not only the disclosure but also court approval or modification of fees incurred by attorneys and agents for creditor groups, any special master, and the debtor. This change was a response to the criticisms of the practices and unreasonable fees of protective committees revealed in William O. Douglas's SEC investigation, in which Wilcox had testified.[350] But removing "a county or parish" as eligible debtors, shortening the case timeline, and deleting the restructuring tool of executory contract rejection represented real retreats from Sumners's conception. Moreover, the bill excised Sumners's ingenious clause regarding State governments' acquiescence in or approval for their taxing districts and municipalities to file, thus acknowledging that the States had complete control over the entrance into Chapter IX.

Perhaps quixotically, the bill's § 82(h) provided that the new statute "shall not be construed as to modify or repeal any prior existing statute relating to the refinancing or readjustment of indebtedness of municipalities and political subdivisions, or districts . . . but shall be cumulative of and in addition to all other Acts."[351] That language could only refer to the First MBA, so this provision addressed what is today called the "zombie law" situation that occurs when the Supreme Court declares a statute unconstitutional but the statute is not repealed by legislative action and remains "on the books" in United States Statutes.[352] The following subsection

[348] H.R. 2505, § 83(a) (emphasis added).

[349] *Id.* § 83(a), (c), (d).

[350] William O. Douglas, *The Legal Problem of Control Over Protective Committees for Municipal and Quasi-Municipal Obligations*, 2 LEGAL NOTES ON LOCAL GOV'T 81, 84–85 (1936) ("The [First MBA had] left practically untouched the problem of supervision and control presented by protective committees [including fees]").

[351] H.R. 2505, § 83(h).

[352] *See* Howard M. Wasserman, *Zombie Law*, 25 LEWIS & CLARK L. REV. 1047, 1050 (2022) ("A law remains on the books, even if a court has declared that the law is inconsistent with the Constitution."). Wilcox's H.R. 10490 and then Sumners's H.R. 5969 had included a 1940 expiry date in § 83(h) of the Second MBA. Perhaps the thought was that, after the resolution of the packing crisis in 1937, the now Roosevelt friendly Supreme Court might overrule *Ashton* in a future case, resuscitating the First MBA. In any event, no post-*Bekins* case explicitly reversed *Ashton*, and the subsequent extensions of the Second MBA carried

(j) then stated that "[t]he fact that any petitioner . . . shall previously have obtained a discharge under the provisions of [the First MBA] . . . shall not prevent such petitioner from proceeding under [this new act]." Thus, the bill also permitted serial filings.

Sumners appointed a subcommittee and sagely named Henry Chandler of Tennessee as chairman. Although relatively new to the Judiciary Committee, he was an experienced lawyer with substantial bankruptcy knowledge who already had the confidence of the President for his revised corporate reorganization bill that, in the Second Session, gained enactment as § 77B of the BA'98.[353] Sumners appointed to the subcommittee only congressmen elected after or who had not served in the 72nd Congress in which the First MBA had been adopted: Michener of Michigan, Sam Hobbs of Alabama, Chauncey W. Reed of Illinois, and Frank W. Towey, Jr., of New Jersey. Sumners tasked his subcommittee to conduct hearings on the Wilcox bills beginning March 1, 1937. Sumners himself was exceedingly busy that month with other matters, including his instrumental work to resolve the crisis ignited by the President's February 5 court packing proposal,[354] as well as conducting the Senate trial from March 10 to April 17 of the House's impeachment of Judge Ritter,[355] charges that Wilcox had instigated back in 1933.

In the three day hearing of early 1937, Chandler proved to be the most significant participant and Wilcox the most voluble. Although the L&E scholars characterize the constitutional discussions of municipal bankruptcy as cursory,[356] the hearing transcript discloses robust discussions about that dimension of the law in the light of *Ashton*. Chandler granted Wilcox carte blanche to "speak as if we know nothing about it, take the matter from the beginning, and deal with it in such a way as [you] would like." The Floridian rambled on and on about the First MBA as "a means of giving effect to composition settlements on the part of [political subdivisions] below the grade of State."[357] But, more importantly, under Chandler's management,

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this provision forward.

[353] Letter from FDR to HWS (May 24, 1937) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

[354] Daniel, *Cash In*, *supra* note 105.

[355] PROCEEDINGS OF THE UNITED STATES SENATE IN THE TRIAL OF IMPEACHMENT OF HALSTED L. RITTER, UNITED STATES DISTRICT JUDGE, S. DOC. 200 , 74th Cong. (1936).

[356] Gillette & Skeel, *Governance Reform*, *supra* note 37, at 1168.

[357] MUNICIPAL BANKRUPTCY COMPOSITIONS, HEARING BEFORE SUBCOMM. ON BANKR. & REORG., H. COMM. ON JUD., 75th CONG., ON H.R. 2505, H.R. 2506, H.R. 5403, H.R. 5969 at 18 (1937).

subcommittee members and sometimes the witnesses posed questions and comments that explored the constitutionality of municipal bankruptcy. The subcommittee was well prepared, and Chandler and Towey demonstrated substantial knowledge of bankruptcy process. Although Wilcox "made a good speech," as Chandler put it, his contribution was limited.

At one point the Floridian surprisingly denied that the "real purpose of the bill" was to "impair or change contracts," which the subcommittee members found incredible.[358] "[S]peaking as a lawyer," Towey pointed out to Wilcox, all bonds' terms expressly provided that "at a certain time you *shall pay* a certain number of dollars." Michener added that "fundamentally, bankruptcy is for the purpose of *changing* [those] contractual relations . . . . and taking away from the [creditor] parties the other rights which they have." Formerly "you could . . . impair a contract . . . under the old theory of bankruptcy . . . [only] when a man was insolvent[, i.e., resulting in adjudication of bankruptcy and court administration of assets; but a] new philosophy . . . has grown up, so that we are considering bankruptcy a little differently."[359] In any event, the alteration of creditors' contractual rights is "purely fundamental bankruptcy law."[360] Chandler completed the schooling of Wilcox on this point by reading to him the sentence of *Ashton* to that effect.[361] Michener also recalled that "[s]omebody in New York . . . had worked out a municipal bankruptcy theory . . . and some of us could not understand how we could do a thing like that." That "somebody" was obviously David Wood, author of those widely distributed legal memoranda of the spring of 1933.

Later in the hearing, Wilcox contested *Ashton*'s finding that political subdivisions in municipal bankruptcy "are no longer free to manage their own affairs" including taxation.[362] Towey again took him on, pointing out that any municipal bankruptcy case necessarily involves "an attempt to allocate the taxing power." Towey then asked Wilcox about the role and determination of the issue of insolvency in the scheme of municipal bankruptcy, particularly with respect to large cities such as Detroit. Wilcox tried to sidestep, calling Detroit irrelevant because, with Wood representing its bondholders, that city had successfully compromised its debt as soon as the First MBA became effective—"a shining example of the value of the [prior] statute."[363] Towey had one more important question for Wilcox germane to constitutionality and

[358] *Id*. at 25.
[359] *Id*. at 27 (emphasis added).
[360] *Id*.
[361] *Id*. at 28.
[362] *Id*.
[363] *Id*. at 29–30.

bankruptcy process generally, and that was: "Is there any limitation on the number of times" a municipal debtor could file? Wilcox again changed the subject, this time to Miller's H.R. 6982 of 1936 that covered "the smaller districts," ignoring that his H.R. 2505 did permit serial filings.

At that point, Chandler refocused the hearing on the differences constitutionally between Wilcox's bill and the First MBA. Wilcox responded that the "essential difference" was omission of counties from eligibility. While only one county had filed under the First MBA, Wilcox excluded counties because structurally that unit "undoubtedly is a part of the sovereign government of a State."[364] Second, comparison of H.R. 2505 to the prior text "made it perfectly obvious that this is a composition bill and in no sense of the word anything other."[365] Chandler inquired whether Wilcox was seeking to cover "quasi-public corporations, rather than political subdivisions," and Wilcox agreed.[366] A lengthy discussion ensued about the juristic nature and possible categorizations of taxing districts in relation to State government and the Bankruptcy Clause.

All that was straightened out after lunch when W.R. Satterfield, RFC inhouse counsel who handled rural districts' restructuring loans and was one of the most knowledgeable persons about the actual operation of the First MBA, testified that municipal bankruptcy was the necessary means for the RFC to make loans to all kinds of insolvent rural districts on its standardized terms, namely, interest only during the first three of its thirty-year term loans, then payable in amortized installments at four percent on a principal amount based on "the ability of the lands to pay." Satterfield found "a clear distinction between H.R. 2505 and the [First MBA] although the machinery or procedure for carrying it out is practically the same." The old law applied to "political subdivisions" but the new bill to "a local taxing district." Admittedly, crafting the wording to explain such a distinction was difficult, but helpfully Satterfield brought to the hearing his own definition of municipal debtors, and it was in the form of a list that both described and named each type of taxing district that would be eligible so "that anyone could see at a glance [H.R. 2505] applied only to local improvement districts and not to political subdivisions."[367] The first day of the hearing recessed after insurance company representatives testified ineffectually against the bill.[368]

[364] *Id*. at 31.
[365] *Id*. at 32.
[366] *Id*. at 33.
[367] *Id*. at 46. His list of eligible debtors follows:

> the following-named public taxing agencies: (1) Drainage, drainage and levee, levee, levee and drainage, reclamation, water, irrigation, or other

Two days before the hearing resumed on March 10, Wilcox filed another bill, H.R. 5403, incorporating Satterfield's exact laundry list of the municipalities approved to be debtors.[369] Three bondholder favorable changes made here by Wilcox reflect the continuing hand of the FMBPC: raising the threshold for creditor consent for a case filing from 30% to 51%, inserting a requirement that publication notice be made in periodicals circulating among bond dealers and holders, and engrafting an exception to the Sumners conceived debtor and nondebtor stay of collection activity in situations "where rights have become vested under peremptory writs" of mandamus. Immediately after the hearing, the full committee "agreed that in its final form the Municipal Bankruptcy Bill should be re-introduced as a Committee bill in the name of the Chairman and reported favorably to the House by Mr. Chandler."[370]

Sumners then prepared House Bill 5969 and filed it,[371] just two days after the Supreme Court's issuance of *West Coast Hotel v. Parrish*, the 5-4 decision[372] that signaled the juristic turning of the Court such that it thereafter sustained all other challenged New Deal laws. Scholars have long referred to the turning as the "Constitutional Revolution of 1937" but popularly the event came to be known as the "switch in time that saved nine," even though the shifting justice, Owen Roberts, had voted in that case well prior to the court

> similar districts, commonly designated as agricultural improvement districts or local improvement districts, organized or created for the purpose of constructing, improving, maintaining, and operating certain improvements or projects devoted chiefly to the improvement of lands therein for agricultural purposes; or (2) local improvement districts such as sewer, paving, sanitary, or other similar districts, organized or created for the purposes designated by their respective names; or (3) local improvement districts such as road, highway, or other similar districts, organized or created for the purpose of grading, paving, or otherwise improving public streets, roads, or highways; or (4) public-school districts or public-school authorities organized or created for the purpose of' constructing, maintaining, and operating public schools or public-school facilities; or (5) local improvement districts such as port, navigation, or other similar districts, organized or created for the purpose of constructing, improving, maintaining, and operating ports and port facilities; or (6) any city, town, village, borough, township, or other municipality.

Id. at 48–49.

[368] *Id*. at 61–85.

[369] H.R. 5403, 75th Cong. § 80 (1937).

[370] *Minute Book*, H. Comm. on the Judiciary, n.p. (Mar. 25, 1937) (*in* House Jud. Comm. Papers, on file with Nat'l Archives).

[371] H.R. 5969, 75th Cong. (1937).

[372] West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

packing plan's announcement.[373] Also significant had been Sumners's work to achieve this change in the Court's direction by incentivizing the retirement of superannuated justices to open seats for the President's appointment of new blood.

Just at the end of the packing crisis,[374] Sumners's H.R. 5969 glided to adoption as the Second MBA on August 16, 1937, designating the new act as Chapter *X* rather than IX.[375]

B. *Bekins*

Most commentators have found little to remark about *Bekins*. Eminent bankruptcy scholar and practitioner Kenneth Klee has written: "A comparison of [the First and Second MBAs] leads one to wonder what statutory differences were constitutionally significant. Perhaps there were none."[376] Skeel characterized the Second MBA as "differ[ing] only in minor details from its ill-fated predecessor."[377] Law professor Gerald T. Dunne has called the new act "a resuscitated statute whose peripheral and superficial changes nervously bound to states rights' sensitivities."[378] In fact, those few revisions of the text had been carefully thought out and debated, and when the test case for the Second MBA, another irrigation district case, from California this time, came up, the Supreme Court readily upheld the law as constitutional.

That litigation began in the District Court for the Southern District of California when a California irrigation district filed a Chapter X petition in circumstances analogous to CCWID's of 1934. The district judge notified the Justice Department on October 11 that parties had raised a constitutional issue about the Second MBA, a step that was required under Sumners's Attorney General Standing Act of just seven weeks earlier. When that court, citing *Ashton*, held the statute unconstitutional, the Justice Department appealed directly to the Supreme Court in the case *Bekins v. Lindsay Strathmore Irrigation District*.[379]

Sumner's chairmanship of the Judiciary Committee played a key role in the enactment of the Second MBA. At his committee's urging, Sumners

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[373] *See generally* Daniel, *Cash In*, *supra* note 105, at 410 n.194.

[374] *Id.* at 417–19.

[375] Act. of Aug. 16, 1937, ch. 657, Pub. L. No. 302, 50 Stat. 657 (1937).

[376] KENNETH N. KLEE, BANKRUPTCY AND THE SUPREME COURT 152 (2008).

[377] David A. Skeel, Jr., *States of Bankruptcy*, 79 U. CHI. L. REV. 677, 708 (2012).

[378] Gerald T. Dunne, *Bankruptcy Reform: A New IX?*, 92 BANKING L.J. 671, 671 (1975).

[379] Order Allowing Appeal, In the Matter of the Petition of Lindsay-Stratemore Irrigation District, United States v. Milo W. Bekins, Transcript of Record, at 101 (1938).

requested the Chief Justice's leave to present argument as amicus curiae for the committee. Emblematic of the forthcoming judicial victory was the message in Sumners's leadoff argument on April 7, 1938—at the exact time the House was feting Sumners back in the Capitol on the twenty-fifth anniversary of his becoming a congressman.[380] Sumners addressed directly the ground of reversal in *Ashton* by noting that the debtor like all municipalities had always been subject to action in the federal court for nonpayment of debt and upon judgment "could be brought into court again and subjected to the coercion of the court, even to the extent of the incarceration of its officers. . . . That was the only procedure [mandamus], and that will continue to be the only procedure under existing law if this Act is unconstitutional."[381]

Accordingly, *Ashton*'s exalting of structural State sovereignty in face of the history of debt collection and mandamus practice with respect to political subdivisions was untenable. In contrast, the municipal debtor under Chapter X

> comes in under its own will. Nobody is compelling it to come. . . . In the exercise of its sovereign right to arrange its indebtedness, it had been sitting around a table with its creditors, and in the instant case 87 percent had agreed [to] 59 cents on the dollar . . . . There are 13 per cent who do not consent. ["]Will you be good enough to examine to determine whether or not this agreement is fair to the 13 per cent[?] . . . . There is nowhere else myself and my creditors can go, and won't you please write our agreement into the book of judgments[?"][382]

Continuing the theme of sovereignty, he turned *Ashton*'s rationale upside down: "there is no higher act of sovereignty than for the sovereign voluntarily to submit itself to the judgment of a court."[383] The Federal Government waives its sovereignty "all the time" and so do the States. "[I]nstead of this Act impinging upon the sovereignty of the State . . . this Act clearly is in line with the nature and philosophy of sovereignty of the State, and . . . to declare

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[380] *House Honors Hatton Sumners on Twenty-Five Years' Service*, DAL. MORNING NEWS, April 8, 1938, at 9.

[381] Transcript of Proceedings, United States v. Bekins, 304 U.S. 27 (1938), Nos. 757 and 772, Sup. Ct., Apr. 7, 1938, at 4, 5 (*in* Sumners Papers, on file with Dallas Hist. Soc'y).

[382] *Id*. at 5.

[383] *Id*. at 6.

this Act unconstitutional . . . would impinge upon the sovereignty of the State."[384] Satisfied with his argument, Sumners sat down before his time expired.[385] Solicitor General Robert H. Jackson spoke next, followed by the lawyers for the actual parties, the irrigation district and its dissident bondholders.

Eighteen days later, on April 25, 1938, the Court reversed and held the Second MBA constitutional.[386] Indeed, the Supreme Court's decision quoted at length from the favorable report on the new act by Sumners's Judiciary Committee.[387] Two reasons account for this outcome. First, the second iteration of municipal bankruptcy afforded even clearer assurance that the federal court could not dictate to the debtor municipality how to conduct itself and how to deal with its property and its taxes; rather, the Second MBA was explicitly drafted to create a platform for negotiation of consensual plans of readjustment between debtor and creditors. Second, by the time a new challenge to the constitutionality of the second act reached the Supreme Court, the court packing crisis was over. Justice van Devanter had resigned, Roosevelt had appointed Hugo Black, and the Justice Department participated as a party to the constitutional issue from the outset for the first time.[388] The vote was 6-2, with Roberts joining the majority, to validate the Second MBA.[389]

A transcript was prepared, and Jackson gave his to Sumners.[390] Sumners's immediate correspondence with one figure, in particular, discloses his sense of vindication. When Wood wrote Sumners that "I am one of the few who knows *how much of the credit of this legislation is due to you*, and I want to be among the first to congratulate you upon the successful outcome of a long and difficult struggle,"[391] the congressman replied by sending him a copy of the text of his oral argument, remarking that it "will probably amuse you . . . but it goes rather directly to the point." He added:

> For the life of me, I could not see how we were impinging upon the sovereignty of

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[384] *Id*.
[385] *Id*. at 7.
[386] United States v. Bekins, 304 U.S. 27, 54 (1938).
[387] *Id*. at 50–51.
[388] HWS, 1940 Memo to File, *supra* note 344.
[389] Terminally ill, Justice Cardoza did not participate in the case. He died July 9, 1938.
[390] The Sumners Papers contain an original transcript of the oral argument addressed on its jacket to "Mr. Jackson."
[391] Letter from David M. Wood to HWS, Apr. 28, 1938 (*in* Sumners Papers, on file with Dallas Hist. Soc'y).

> whatever sovereign was involved, which sovereign before we arrived on the scene with this bankruptcy law was being dragged into court by the nape of the neck, scratching gravel and raising the dickens to no avail, being proceeded against as an ordinary defaulting debtor and in danger of being put in jail if the debt were not paid.
>
> When we arrived we made the marshall [sic] unhand the sovereign, gave him a good, round lecture for treating a sovereign that way, lifted this sovereign to his feet, dusted off his clothes and let him march into court leading the procession of consenting creditors as a sovereign ought to go. Certainly we took care of the matter otherwise by making the right of the municipality to enter subject to the consent of the creator and denied the court in its judgment the right to interfere with the state's governmental control of its creature.[392]

C. Pre-Code Extensions and Precedents

Less than two months later, Congress adopted the Chandler Act of 1938.[393] The Act incorporated the Second MBA simply by redesignating the act from "Chapter X" to "Chapter IX" of the BA'98 and added a provision that authorized pending cases to continue.[394] But the Chandler Act's absorption of the Act did not cabin municipal bankruptcy law, and Congress widened its relief for debtors over the next eight years and beyond by legislation emanating from the House Judiciary Committee. Representative Arthur Patrick Cannon, Wilcox's successor, presented an easily enacted bill, H.R. 9139, that extended the Act from 1940 to 1942 and returned "county or parish" back to the litany of eligible political subdivisions and added "borough" too.[395] His bill included a new provision, deterrent if not punitive

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[392] Letter from HWS to David M. Wood (May 2, 1938) (*in* Sumners Papers, on file with Dallas Hist. Soc'y).

[393] H. R. 8046, 75th Cong. (1938); Act of June 22, 1938, ch. 575, Pub. L. No. 696, 52 Stat. 840.

[394] *Id*. §§ 703, 3(a), (b).

[395] H.R. 9139, 76th Cong. (1940); Act of June 28, 1940, ch. 438, Pub. L. No. 669, 54

as to creditors: the judge was required to examine all "papers relating to the plan" at the end of the confirmation hearing and determine whether any agent or attorney

> promoting the composition, or doing anything of such a nature, has been or is to be compensated, directly or indirectly, by both the petitioner and the creditors thereof, or any of such creditors—either by fee, commission, or other similar payment, or by transfer or exchange of bonds or other evidence of indebtedness whereby a profit could accrue[,]

and if "any such practice [would] be possible," then the court must dismiss the petition and charge all costs against such promoters, whether the debtor acting together with creditors, or only the creditors—which was more likely—unless the plan were revised to eliminate such a possibility.[396]

A member of Sumners's committee, William F. Cravens of Arkansas, authored the simple extension of the Act from 1942 to 1946.[397] Then in 1946, Sumners's last full year in Congress, a Republican member of his committee, John W. Gwynne of Iowa, sponsored House Bill 6682 that made municipal bankruptcy law permanent.[398] Flying through Congress in 25 days, it also extended the scope of relief available to debtors in multiple ways, some significant. The Judiciary Committee's report articulated H.R. 6682's multiple additional purposes.

First, Chapter IX had always included public entities without officers as debtors.[399] But the new bill enlarged eligibility for composition relief to include municipal debt payable "out of income derived . . . from any income-producing property, whether or not secured by a lien upon such property," and the bill identified the additionally eligible debtors as "incorporated authorities, commissions, or similar public agencies organized for the purpose of constructing, maintaining, and operating revenue-producing enterprises."[400] The committee reports explain that the amendment responded to the growth of

Stat. 667 (1940).

[396] *Id*. § 3.

[397] H.R. 7066, 77th Cong. (1942); Act of June 22, 1942, ch. 434, Pub. L. No. 622, 56 Stat. 377 (1942).

[398] H.R. 6682, 79th Cong. (1946); Act of July 1, 1946, ch. 532, Pub. L. No. 481, 60 Stat. 409 (1946) [hereinafter 1946 Amendment].

[399] *See supra* note 288.

[400] 1946 Amendment, *supra* note 398, § 81(c)(6).

"revenue-bond financing" by "a new type of municipality known as an authority" or a "public agency":

> The extension of the act along these lines is singularly appropriate because the revenue bonds issued by municipalities or authorities are for the purpose of *financing revenue-producing enterprises rather than governmental functions*. They are essentially business enterprises. . . . Obviously these businesses are subject to the same hazards as other businesses financed by private capital.[401]

That easily enacted amendment made the subject matter of Chapter IX "less distinctively municipal in character than the corporations originally embraced in the bankruptcy legislation on this topic," as the NBC put it in a hearing statement a few years later.[402] No one questioned its constitutionality.

Furthermore, to facilitate the debtor's prepetition negotiations with its claimants, a provision of H.R. 6682 authorized a court of bankruptcy, on the debtor's request, to issue an unusual "preliminary stay" of "the commencement or continuation of [a] suit or process" or "several suits or processes brought or threatened by the same or different creditors or persons claiming to be creditors . . . attempting or threatening to obtain [preferential] payment" for one or two 60-day periods—*before* the debtor filed its Chapter IX petition.[403] This prepetition innovation was another unique feature of municipal bankruptcy vis-a-vis all other chapters of the BA'98. The amendment also made clear that the district judge, not a referee, was to hear and determine municipal bankruptcy cases.[404]

Third, the 1946 statutory amendment took away from the State of a municipal debtor and gave to the court of bankruptcy the authority "to determine the validity of the new bonds which the final decree will require the creditors to accept, and the validity of the provisions for the payment of the new bonds." The rationale expressed by the House committee was:

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[401] AMENDING THE MUNICIPAL BANKRUPTCY ACT, H. REP. NO 2246, 79th Cong. 2 (1946) [hereinafter AMENDING THE MUNICIPAL BANKRUPTCY ACT] (emphasis added).

[402] Peter B. Olney, *Statement on Behalf of the National Bankruptcy Conference*, AMENDING THE BANKRUPTCY ACT (SECTIONS 60 AND 70), HEARINGS BEFORE SUBCOMM. ON BANKRUPTCY AND REORGANIZATION OF THE COMM. ON THE JUDICIARY, 80th Cong., on H.R. 2412 and H.R. 5834 at 48 (1948).

[403] 1946 Amendment, *supra* note 398, § 83(c).

[404] The 1946 Amendment gave referees a role in municipal bankruptcy, but it was limited to taking certain testimony if district judges were too busy. *Id.* § 83(b).

> New bonds should not be issued unless they have been declared by the [bankruptcy] court to be valid in every respect. [A] bankruptcy law under which bondholders of a municipality are required to surrender or cancel their obligations should be uniform throughout the 48 States, as the bonds of almost every municipality are widely held. Only under a Federal law should a creditor be forced to accept such an adjustment without his consent.[405]

This enactment expressed congressional willingness for uniform municipal bankruptcy law to supersede varying, and previously controlling, State law in this instance.

Predictions of moral hazard after enactment of municipal bankruptcy law did not come true, as only about half the States authorized their subdivisions to avail themselves of the relief, and only a relative handful of municipal debtors ever had to file.[406] Some municipalities in States that did not authorize access to Chapter IX, such as Ohio and Massachusetts, had their insolvencies resolved through more arduous and difficult means.[407] And when New Jersey adopted in 1940 what amounted to a State law composition with creditors, the convoluted dispute as to whether that statute violated the Contract Clause went to the Supreme Court which surprisingly held the State law valid in the 1942 *Faitoute* case.[408] H.R. 6682 addressed this by

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[405] AMENDING THE MUNICIPAL BANKRUPTCY ACT, *supra* note 401, at 4.

[406] In the year 1938, thirty-five petitions were filed, compared to 1,135 Chapter 77B corporate reorganization cases. 1937 ATT'Y GEN. ANN. REP. Ex. 3A *Bankruptcy Cases in the U.S. District Courts During Fiscal Year 1938* (1937–1938) 236–39. The 1946 House committee checked the statistics of filing and found declining numbers of filings, from 140 cases pending in 1940 to 64 in 1946. About half the cases had been filed in Florida. A later source states: "[F]ewer than 700 municipal bankruptcy cases have been filed, an average of eight cases a year. About half of these Chapter [IX] filings (just over 360) were filed between 1937 and 1972." Kristin K. Going, *Representing Creditors in Chapter 9 Bankruptcy Cases, Chapter 9 Origins and Historical Data*, PRAC. LAW n.p. (2025).

[407] For instance, during this period the City of Cincinnati overcame its huge debt and avoided "an almost complete breakdown of government, which, if continued, could only have resulted in eventual municipal bankruptcy," through innovative administration and civic leadership. Murray Seasongood, *The Triumph of Good Government in Cincinnati*, 199 ANN. AM. ACAD. POL. & SOC. SCIENCE 83, 87–88 (1938). *See generally* Kenneth A. Scherzer, *The Politics of Default: Financial Restructure and Reform in Depression Era Fall River, Massachusetts*, 26 URBAN STUDIES 164, 166 (1989).

[408] Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502 (1942).

legislatively overruling *Faitoute* with respect to State law remedies for municipal insolvency.[409]

In nailing down some brass tacks in the four other post-Chandler Act decisions, *Avon Park*,[410] *Chicot County Drainage,*[411] *Everglades Drainage*,[412] and *Paradise District*,[413] the Supreme Court never indicated any doubt about Chapter IX's efficacy, preemption of State law, and constitutionality.[414]

From 1947 until the 1970s, Congress made only a few technical changes to Chapter IX. Created by Congress in 1973, the Commission on Bankruptcy Laws of the United States then began to develop and propose legislation to fundamentally revise and replace all the BA'98. By 1975 the City of New York teetered on the brink of insolvency. Congress declined to provide financial assistance but two reform bills including municipal bankruptcy revisions were pending and more were soon filed. On April 8, 1976, Congress passed An Act to Amend Chapter IX of the Bankruptcy Act that reformed only the municipal bankruptcy provisions of the BA'98.[415] New York avoided, however, having to make use of the amended Chapter IX,[416]

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[409] The 1946 amendment added this proviso: "That no State law prescribing a method of composition of indebtedness of such agencies shall be binding upon any creditor who does not consent to such composition, and no judgment shall be entered under such State law which would bind a creditor to such composition without his consent." 1946 Amendment, *supra* note 398, § 83(i). The essence of that prohibition is today contained in 11 U.S.C. § 903.

[410] American United Mutual Life Ins. Co. v. City of Avon Park, 311 U.S. 138 (1940) (reversing plan confirmation under the unfair discrimination rule).

[411] Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940) (holding confirmation of a plan under the First MBA prior to *Ashton* was res judicata to a subsequent challenge).

[412] Kelley v. Everglades Drainage Dist., 319 U.S. 415 (1943) (holding failure of the court to make findings in support of confirmation of a Chapter IX plan was reversible error).

[413] Mason v. Paradise District, 326 U.S. 536 (1946) (holding the RFC's position in Chapter IX cases is statutorily authorized).

[414] In Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 433 n.42 (1946), the Supreme Court stated: "Ashton . . . may be said in effect to have been overruled by . . . Bekins, 304 U.S. 27." Evidently no court has sought or recommended to revivify of *Ashton* in order to invalidate municipal bankruptcy law. The author's review of all reported federal court cases citing *Ashton* found none. For this reason, I have not mentioned the Tenth Amendment again, but it continues to receive analysis in the bankruptcy literature. *See generally* Thomas Moers Mayer, *State Sovereignty, State Bankruptcy, and a Reconsideration of Chapter 9*, 85 AM. BANKR. L.J. 363 (2011).

[415] Municipal Debt Adjustment Act of 1976, Pub. L. No. 94-260, 90 Stat. 315 (1976).

[416] KATRIN B. ANACKER, NEW YORK CITY: THE BASICS 37 (2025) ("From 1975 to 1978, New York City experienced the largest citywide municipal fiscal crisis in the history of the United States").

and Congress then substantially incorporated the revised version as the new chapter 9 in the Bankruptcy Reform Act of 1978 that President Jimmy Carter signed on November 6, 1978, effective on October 1, 1979.[417] Today the fundamental terms for municipal bankruptcy relief that Sumners drafted and filed in House Bills 5450 in 1933 and 5969 in 1937 essentially live on in today's chapter 9 of the Code, continuing to provide relief for insolvent political subdivisions that have State authorized access.

IV. The Historical Method Matters Here[418]

According to the primary sources, Congress from 1933 to 1937 enacted successive statutes, and later amended and extended them, providing an effective debt resolution and restructuring remedy for the irrigation districts in the Valley and elsewhere and for other types of political subdivisions around the nation that found themselves unable to pay their publicly held bonds during the Great Depression. The Tenth Amendment and notions of structural federalism posed but a temporary problem. In *Bekins*, the Supreme Court overruled that objection, and no court has ever since then sought to revive *Ashton*.[419] In States that approved, the intended relief was an immediate success for units of local government facing unpayable debt,[420] and Chapter IX's bones live on in the fleshed out version we know today as chapter 9, providing for bankruptcy court orders discharging debt and approving terms of financial and operational restructuring.[421] Much more commonly, municipal bankruptcy serves as the backdrop or alternative against which towns and taxing districts negotiate out of court debt

[417] *See supra* note 27.

[418] Statements in this Part IV, which is the conclusion of the article, that are not footnoted constitute the analyses, generalizations, observations, or comments of the author.

[419] *See, e.g.*, *In re* City of Detroit, 504 B.R. 97, 141–43 (Bankr. E.D. Mich. 2013).

[420] Knowledgeable observers found Chapter IX to accomplish the statutory purpose from the beginning and then continuing. *See* Sanders Shanks, Jr., 28 AM. POL. SCI. REV. 1072, 1073 (1934) (noting that "the mere presence of the law on the statute books has resulted in breaking down the resistance of minority creditor groups to proposed plans of debt settlement"); George H. Hempel, *An Evaluation of Municipal "Bankruptcy" Laws and Procedures*, 28 J. FIN., 1339 (1973) (summarizing debts and results of all 273 concluded Chapter IX cases, 1938–1972; the recovery rates for creditors averaged 64%).

[421] For advice about lawyering municipal bankruptcy cases today, see Zack A. Clement & R. Andrew Black, *How City Finances Can Be Restructured: Learning from Both Bankruptcy and Contract Impairment Cases*, 88 AM. BANKR. L.J. 41 (2014). *See also* CHAPMAN & CUTLER LLP, MUNICIPALITIES IN DISTRESS?: HOW STATES AND INVESTORS DEAL WITH LOCAL GOVERNMENT FINANCIAL EMERGENCIES, *Ch. VII. Municipal Bankruptcy* 125–395 (2d ed. 2016).

restructuring deals with their creditors. Chapter IX worked in the past, and chapter 9 works today.[422]

Three themes emerge in the story. First is the capaciousness of the Bankruptcy Clause to authorize Congress to innovate new remedies for conditions of financial distress that take different guises and afflict various indebted entities over time. The First and Second MBAs made three remarkable changes in statutory bankruptcy law: (i) municipalities became eligible debtors in bankruptcy courts; (ii) the discharge of their indebtedness no longer required the debtors' surrender of assets; and (iii) the debtors could relatively easily obtain a statutory injunctive relief of two kinds, first, under the 1946 amendment, even before the filing of a petition for composition relief, the court could grant the debtor an up to 120 day "preliminary stay" of litigation by creditors seeking to obtain a preferential payment, and, second, a nondebtor stay of creditor collection activities to protect not only themselves but also innumerable individuals who bore vicarious liability relationships to the debtors, that is, their officers and residents. Those achievements were unimaginable before 1933. And after 1938, Congress added additional types of political subdivisions as eligible debtors.

From 1933 to 1937, moreover, the legislative process served as a laboratory of what could be possible under the Bankruptcy Clause. Congressmen Sumners, Wilcox, McLeod, and others drafted and filed bills whose essences I have characterized as the Business Reorganization Model, the Composition Model (with the Wyman Draft its first iteration and the Bruere Modification its last pre-enactment modification), and the Moratorium Model. After enactment of Sumners's H.R. 5950 as the First MBA, Senator Robinson introduced S. 2471 that would have added two types of private, *non*-governmental entities as eligible debtors under Chapter IX. Contemporaneously, the bill offering the No Creditor Consent Needed Model, Congressman Miller's H.R. 6982 filed in 1935, resulted in the Act of April 11, 1936, that eliminated creditor consent to petition filing—at least for the drainage and irrigation districts—and only 44 days before *Ashton*. Finally, in 1937 Wilcox's H.R. 2506 presented the No Debtor Model. All those steps

[422] *See, e.g.*, Reynolds Farley, *Detroit in Bankruptcy: What Are the Lessons to be Learned?*, *in* WHY DETROIT MATTERS: DECLINE, RENEWAL AND HOPE IN A DIVIDED CITY 58 (Brian Doucet ed., 2022) ("What may we learn from the bankruptcy of Detroit? Local governments may have much brighter futures after bankruptcy than before."); Daniel, *Ailing Rural Public Hospitals*, *supra* note 30 at 210 ("Chapter 9 worked to save [this] insolvent rural public hospital"); Michel Francus, *Death, Bankruptcy, and the Public Hospital*, 41 YALE J. REG'N 524, 530 (2024) ("[municipal] bankruptcy has much to offer the public hospital and other government businesses.").

explored the frontier of statutory municipal bankruptcy that can be legislated by Congress under the Bankruptcy Clause.

An unrecognized and important facet of this history is the involvement of President Roosevelt. Not only did he involve himself in spring 1934 to push H.R. 5950 over the hill in the Senate, but he received additional, innovative models from those close to him and other private consultants. Those include the McCoy Model and the Negative Notice Model. These proposals did not reify in filed bills in Congress and were unknown to the public and even to most legislators, but they did receive the written expressions that continue to exist today as public records in the National Archives, and they help illuminate the genesis of municipal bankruptcy. Of all those models, if pursued, the No Creditor Consent Needed Model together with the No Debtor Model would have projected farthest Congress's power to create new forms of relief for insolvency and debt. To educate present and future legislators and bankruptcy scholars and legal historians, not to mention those who actually utilize bankruptcy law, that is, the bankruptcy judges and the bankruptcy lawyers, of that rich heritage of bankruptcy creativity is one way my full story of the two Municipal Bankruptcy Acts may prove useful.

Another upshot of the first theme, the capaciousness of the Bankruptcy Clause, is the relevance of my Chapter IX history to the Supreme Court's 2024 mass tort bankruptcy decision, *Purdue Pharma*.[423] The 5-4 majority held "that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants."[424] The majority sought to support that holding by including in a dictum a claim about the legal history of bankruptcy discharge. That should not be surprising because the Court today considers itself expert in all areas of legal history, and, as shown by cases such as *Dobbs*[425] and *Bruen*,[426] its decision-making in recent years has supposedly made a "turn to history" in several subject matters.[427]

[423] Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024) [hereinafter *Purdue Pharma*].
[424] *Id*. at 227.
[425] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).
[426] New York State Rifle & Pistol Assn, Inc. v. Bruen, 597 U.S. 1 (2022).
[427] *See, e.g.*, Reva B. Siegel, *The "Levels of Generality" Game: History and Tradition in the Roberts Court*, 47 HARV. J.L. & PUB. POL'Y 563 (2024); Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs's Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99 (2023); Riley T. Keenan, *Functional Federal Equity,* 74 ALA. L. REV. 879 (2023).

But the *Purdue Pharma* majority's bid here to buttress its holding by invoking legal history abjectly fails. The majority per Justice Gorsuch avowed:

> *history* offers a third [strike against the dissent's contrary position]. When Congress enacted the present bankruptcy code in 1978, it did "not write 'on a clean slate.'" . . . Recognizing as much, this Court has said that pre-code practice may sometimes inform our interpretation of the code's more "ambiguous" provisions. . . . While we discern no ambiguity in §1123(b)(6) for the reasons explored above, *historical practice* confirms the lesson we take from it. *Every bankruptcy law* the parties and their amici have pointed us to, *from 1800 until 1978*, generally *reserved* the benefits of *discharge* to *the debtor* who offered a "fair and full *surrender of [its] property*."[428]

That is incorrect. As seen throughout my article, there is *one entire chapter* of the statutory bankruptcy law that was adopted and effective for multiple decades during the 178 year period Gorsuch posited—a restructuring chapter, no less—that unequivocally and specifically provided for a debtor in a case in a court of bankruptcy to receive a full *bankruptcy discharge* of claims *without* surrendering *any of its assets*. That chapter remains in effect today. In short, for the decades from 1934 to 1978, *municipal bankruptcy law* plainly afforded the statutory relief of judicial discharge of all claims but *without* asset surrender.[429] A new or amended statute ought to be able to provide the equivalent relief for additional, related mass tortfeasor parties without an upfront "*surrender of [his, her, its, or their] property*."

Additionally, municipal bankruptcy history is pertinent to the *Purdue*-related question whether a bankruptcy court can enter postpetition *injunctive* relief to protect nondebtor third parties from litigation by the debtor's claimants during the preconfirmation phase of chapter 11 cases. One commentator has asserted that "*Purdue Pharma* not only gutted nonconsensual third-party releases, but it also gutted preliminary injunctions of suits against third parties *unless there is a basis for the injunction in an*

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[428] *Purdue Pharma*, 603 U.S. at 223–24 (emphasis added).

[429] Justice Gorsuch did not limit his historical claim to business reorganization cases, so his proclamation about "[e]very bankruptcy law" is just incorrect.

express provision of the Bankruptcy Code. There isn't."[430] In chapter 11 today, the automatic stay of Code § 362(a) only covers the debtor and its estate; but if Congress were willing to amend the Code in just one way to facilitate plan settlements in mass tort chapter 11 cases, there is historical precedent for adding a specific authorization for a court to grant such injunctive relief to protect nondebtors, even very numerous third parties, during that phase of a case. Again, the statutory precedent is Chapter IX (then) and chapter 9 (today), with the very broad postpetition stay—innovated by Sumners—that protects not only the debtor but also two groups of related third parties, individuals, its officers, and a larger set, all its inhabitants.

A second theme of my archivally researched history is that Hatton Sumners, rather than Mark Wilcox, deserves primary credit for the formulation and adoption of the politically feasible form of municipal bankruptcy, the Composition Model as expressed in the First and Second MBAs. The legislative acumen and skill of Sumners is on full display in this episode. Wilcox could not have done it. He lacked the structural power that Sumners wielded as committee chair and with high seniority, and Wilcox appeared beholden to the Florida Municipal Bondholders Protective Committee. Like today's creditors' bargain proponents, the FMBPC desired, and maneuvered through Wilcox seeking to obtain, creditor control of, among other things, the municipal purse strings and even the power of taxation itself. Those efforts failed as Sumners drafted and enacted provisions that protected and empowered the municipal debtor and facilitated the bargaining of compromises.

In the progress of this legislation, Sumners acted independently during 1933 but thereafter in coordination with the Roosevelt Administration. With the President's support, Sumners's political skills enabled the approval of the First and Second MBAs and Chapter IX's survival through the enactment of the Chandler Act of 1938 and beyond. Success in enacting municipal bankruptcy required both congressional buy-in on its constitutionality and the development of a political consensus in both the House and the Senate around the public need for broad municipal bankruptcy law and appropriate terms of relief. Sumners helped to persuade Congress of the constitutionality, which he never doubted, and he steered the political and legislative course for the most acceptable model of municipal bankruptcy. Sumners was the key actor.

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[430] Adam Levitan, *Preliminary Injunctions After Harrington v. Purdue Pharma*, CREDIT SLIPS, https://creditslips.org/2024/07/18/preliminary-injunctions-after-harrington-v-purdue-pharma/#more-66 (July 18, 2024) (last visited Dec. 15, 2025) (on file with author) (emphasis added).

Third, in solving the historiographical problem posited in Part A of Section I, my article shows that legal history is the best methodology for the intellectual project at hand. The historical method requires not only searching the conventional and secondary sources pertinent to bankruptcy law (such as are found in electronic banks of law journal articles) but also deep, difficult research into the primary, original sources that are found in archives of Congress, the involved legislators, and even the president. The historical method then informs the analysis of the facts and evidence disclosed by such primary sources and the formulation of the story. Nothing about the creation of municipal bankruptcy law was assured; the story demonstrates the classic historiographical factors of "change over time, context, causality, contingency, and complexity."[431] Application of the historical method solves the historiographical problem here, finding and telling reliably the story of the genesis and development of municipal bankruptcy law from 1933 to 1979.[432]

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[431] *See* FEA, WHY STUDY HISTORY?, *supra* note 39, at 6.

[432] As one historian put it, "the ultimate function of history [is] the pursuit of truth, together with the correction of untruth, and the gaining of understanding even more than accuracy, though without the latter the former will not be achieved." Stanley G. Payne, *On the Future of History*, 12 HISTORICALLY SPEAKING No. 2 at 34, 34 (2011).