The Historiographical Problem of Municipal Bankruptcy Law: *Congressman Hatton W. Sumners and the Insolvency of Irrigation Districts in South Texas, 1933-1938*

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I. Political-Subdivision Insolvency during the Great Depression

A. Bond Defaults of Irrigation Districts in the Texas Rio Grande Valley

When farm incomes and agricultural land values collapsed early in the Great Depression, numerous irrigation districts in "the Valley," the Texas counties along the lower Rio Grande

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River,[1] could not collect their assessed taxes and user fees from farmers,[2] and the districts defaulted on the municipal bonds they had issued to the public to finance construction and improvement of canals and irrigation facilities that had stimulated ongoing development of citrus orchards, truck gardens, and new towns during the decade of the 1920s.[3] Contemporaneously, numerous California agricultural districts could not make 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 a nationwide trend of municipal-issuer financial default as early as 1927. Admitting an undercount, 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 day of 1933,[4] and later, with forty years' hindsight, a government report doubled that figure.[5]

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[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 of the Rio Grande up the river for a distance of some 100 miles." David M. Vigness & Mark Odintz, *Rio Grande Valley*, HANDBOOK OF TEXAS ONLINE (www.tshaonline.org/handbook/entries/rio-grande-valley), accessed Apr. 18, 2025. See also LEE STAMBAUGH & LILLIAN J. STAMBAUGH, THE LOWER RIO GRANDE VALLEY OF TEXAS xi (1954) ("that region of Texas along the American bank of the Rio Grande known locally as 'The Valley'. . . . composed of the four counties of Cameron, Hidalgo, Starr and Willacy"); Boggus Motor Co. v. Onderdonk, 9 F. Supp. 950, 952 (5th Cir. 1935) (those counties are "usually referred to as the valley"). Although she occasionally uses the term "the Valley" in her important book, historian Alicia Dewey prefers a slightly broader concept that she calls the "South Texas Border Region" or simply "South Texas." ALICIA M. DEWEY, PESOS AND DOLLARS: ENTREPRENEURS IN THE TEXAS-MEXICO BORDERLANDS, 1880-1940 (2014) at 4-5 (hereafter, DEWEY, PESOS AND DOLLARS). I use the terms "South Texas" and "the Valley" interchangeably.

[2] The water districts charged a "'flat rate,' . . . per acre . . . regardless of 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." STAMBAUGH, RIO GRANDE VALLEY 197 (1954). See also DEWEY, PESOS AND DOLLARS, supra n. 1 at 102-03, 207-10.

[3] Initially private firms built irrigation facilities to lure farmers from the Midwest and the South, but the pace increased after 1904 and 1919 amendments to the Texas Constitution enabled public development of Texas surface water by authorizing water districts. As political subdivisions they could purchase water rights and build infrastructure by selling public bonds. By 1920, the Valley's population almost doubled, the largest population boom the Valley ever experienced. John P. Tiefenbacher, *A Rio Grande "Brew*," FLUID ARGUMENTS (Char Miller, ed. 2001). Bond proceeds paid for both earth-moving equipment and substantial physical labor as depicted in photos. 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). Beyond my article's scope but not to be ignored is the social history of irrigated farming in the Valley that required large numbers of laborers from Mexico, creating "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 BILL MINUTAGLIO, A SINGLE STAR AND BLOODY KNUCKLES: A HISTORY OF POLITICS AND RACE IN TEXAS 68 (2021); MONICA MUNOZ MARTINEZ, THE INJUSTICE NEVER LEAVES YOU: ANTI-MEXICAN VIOLENCE IN TEXAS (2018).

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

[5] Advisory Commission on Intergovernmental Relations, City Financial Emergencies: The Intergovernmental Dimension 75 (1973) ("approximately 4,770 municipal units defaulted").

Municipal bonds had occupied a sacrosanct place in the world of finance for two reasons. First, there had been almost no defaults since the 1870s.[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 amount of capital projects and infrastructure such as highways.[7] And the amount of municipal bonds nearly equaled federal debt. So payment defaults of the late twenties and early thirties shocked the bondholding community. Their lawyers' resort to litigation was reflexive, and more and more insolvent cities, public authorities, special taxing districts, and other political subdivisions found themselves as defendants haled into courts in mandamus suits seeking to compel greater tax collections to force payment of bond arrearages.

Such municipalities were "insolvent" within the definitions in the Bankruptcy Act of 1898[8] (the BA'98)and the general understanding of lawyers and judges of the day,[9] but on the eve of the Depression, that act afforded relief only for individuals, partnerships, and, since 1910, corporations (but specifically excluding banks and insurance companies—and municipal corporations), and only in the forms of court-supervised liquidation of assets in exchange for a discharge of debts or an opportunity to reach an court-enforced composition with creditors.[10] Railroads and a few other firms imbued with some sort of public interest could restructure outside of bankruptcy through the federal-court device of equity receivership[11]; but while theoretically possible, receiverships for municipalities required a statutory basis and were "rarely available."[12]

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[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 28 (1992). "Municipalities also 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 (2023).

[8] 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." 11 U.S.C. § 1(19) (1925). The act's definition of "acts of bankruptcy" included payment insolvency: "admitt[ing] in writing his inability to pay his debts . . . ." Id. § 21(a)(5).

[9] HENRY CAMPBELL BLACK, A DICTIONARY OF LAW, *insolvent*, at 983 (3d ed. 1933) ("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.").

[10] 36 Stat. 839 (1910).

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

[12] Guardian Sav. & Trust Co. v. Road Impr. Dist. No. 7, 267 U. S. 1 (1925) (municipal receivership was authorized by Arkansas law). In a footnote in an appeal of a 1933 diversity-of-citizenship action to collect a small Texas town's defaulted waterworks bonds, the Supreme Court mentioned that a Texas statute "permitted receiverships for cities in certain situations." Bullard v. City of Cisco, 290 U.S. 179, 183 n. 1; Transcript of Record, Case No. 774, Bullard v. Cisco, Texas, Sup. Ct., 1933. The opinion by the Court of Appeals explained that the "Act of October 1, 1929, chapter 46, Acts 41st Legislature of Texas (1929), 2d Called Sess. (Vernon's Ann. Civ. St. art. 835a). . . . 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). A nationwide survey in 1993 of the reported case law by two law-and-economics scholars confirmed that municipal receiverships were "rarely available" across the nation, Michael McConnell & Randal Picker, *When Cities Go Broke: A Conceptual*

Mandamus lawsuits succeeded for the creditor-plaintiffs in only a tiny number of cases.[13] Moreover, due to Article I, § 10 of the U.S. Constitution (the Contract Clause) forbidding states to "impair the Obligations of contract,"[14] state governments could do very little to address the 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 could not be fixed by modifying taxes' due dates and collection procedures. [15]

In addition, voluntary restructuring of municipal bonds was impossible everywhere because of the "holdout problem," the ability of one or a minority in a group of similarly situated creditors to derail a compromise of the borrower's debts to which the majority desired to consent.[16] 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 other parties would proceed. Counsel for groups or committees of assenting bondholders devised "bearing down" tactics" and "pressure devices"[17] to augment mere jawboning of dissidents, but such were ineffective. Frustration reigned on all sides.

In the archive of unreported federal equity cases of the early 1930s involving defaulted water-district bonds in South Texas, legal historian Charles Zelden discovered an interesting innovation. In improvised proceedings, lawyers for municipal-bondholders' protective committees negotiated "refunding" agreements with debtor-issuers to replace old bonds with new ones bearing easier interest-and-payment terms. Most bondholders consented, but always a small minority 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

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Introduction to Municipal Bankruptcy, 60 U. Chi. L. Rev. 425, 436 (1993) (hereinafter McConnell & Picker, *Cities Go Broke*), and I have found no reported cases of municipal-receivership cases in Texas.

[13] McConnell & Picker, *Cities Go Broke*, supra note 12, at 448-49. In searching the reported appellate cases and law-journal articles, which is obviously a very limited universe of historical evidence, these two scholars found "the principal remedy" that was "available to municipal creditors as they existed before there was a municipal bankruptcy law" was "a writ of mandamus requiring tax levy sufficient to pay principal and interest due." Such proceedings focused solely on the rights of the parties and ignored non-party creditors. Examples of success are rare. Id.

[14] See, generally, JAMES. W. ELY, JR., THE CONTRACT CLAUSE (2016).

[15] 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." Testimony of Jacob M. Lashley, in Senate Judiciary hearing Jan. 30, 1934, at 94.

[16] COLLIER ON BANKRUPTCY ¶ 900.LH (16th ed. 2024) (prior to Chapter IX, "the existence of a few recalcitrant creditors made implementation of [a workout] agreement difficult"); McConnell & Picker, *Cities Go Broke*, supra n. 12, at 428, 449 (stating 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" and that before Chapter 9, there were no "legal means to prevent holdouts from refusing to cooperate with the compromise solution").

[17] George H. Dession, *Municipal Debt Adjustment and the Supreme Court*, 46 YALE L.J. 199, 204-06 (1936) (e.g., collaboration of the majority's committee with the city to "keep the city in the red" and sweep all cash to the committee members).

consenting creditors. The federal district judge in Laredo, Texas, Thomas M. Kennerly, obligingly entered the orders.[18]

This adaptive mandamus action became a pattern for other restructurings across the Valley. Local newspapers and the *Daily Bond Buyer* over several years of the early 1930s carried taxing districts' notices addressed to holdout bondholders offering a last chance to climb on board because Judge 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.[19] In these actions the federal 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,[20] and more spectacularly when the Texas Comptroller of Public Accounts once refused to release state-tax funds for a district's use under its refunding agreement. Kennerly held the state officer in contempt.[21] Yet, while effective in those specific instances, this innovation did not spread beyond South Texas.

To truly solve the holdout problem and to effectuate municipal-bond restructuring required the statutory creation of a "special insolvency regime"[22] backed by federal judicial power. A significant amendment to the national bankruptcy law was necessary, but many lawyers and legislators doubted the constitutionality of authorizing a state's political subdivisions to seek relief in courts of bankruptcy. In these circumstances, a Texan well familiar with agriculture,[23] acquainted with the Valley, experienced with debt defaults and workouts, and endowed with legislative power took initiative and responsibility to sponsor and pass the necessary amendment, known as "municipal bankruptcy" or "Chapter IX" of the BA'98.

The fifth most senior Congressman, serving his eighth term from Dallas and chairing the House Judiciary Committee, Hatton W. Sumners filed on January 21, 1933, the first-ever bill to propose bankruptcy relief for insolvent municipalities, and a few months later in the next Congress he filed another bill whose successor the House passed in mid-1933 and nearly a year later the Senate, making available the device of composition with creditors[24] for all insolvent political subdivisions of states, including counties, who, with some sort of approval or acquiescence by their state governments, consented to federal bankruptcy process.[25]

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[18] CHARLES L. ZELDEN, JUSTICE LIES IN THE DISTRICT: THE U.S. DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, 1902–1960 (1993) at 144 et seq. (hereinafter ZELDEN, JUSTICE LIES).

[19] See, e.g., *Legal notices*, MCALLEN MONITOR, Oct. 18, 1935, at 2.

[20] See, e.g., *Hidalgo Case Transferred*, VALLEY MORNING STAR, Oct. 16, 1937, at 1 (reporting bondholders' post-restructure enforcement motion filed with Kennerly against county commissioners).

[21] ZELDEN, JUSTICE LIES at 147.

[22] STEPHEN J. LUBBEN, THE LAW OF FAILURE: A TOUR THROUGH THE WILDS OF AMERICAN BUSINESS INSOLVENCY LAW 2 (2018) (hereinafter LUBBEN, LAW OF FAILURE).

[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." HWS to FDR, Nov. 30, 1932, FDR Lib'y.

[24] Beyond the scope is the fact that composition with creditors was the precursor also of business reorganization.

[25] Harvey R. Miller & Erica M. Ryland, *The Role of Mega Cases in the Development of Bankruptcy Law*, in U.S. COURTS FOR THE SECOND CIRCUIT COMM. ON HISTORY & COMMEMORATIVE EVENTS, THE DEVELOPMENT OF BANKRUPTCY AND REORGANIZATION LAW IN THE COURTS OF THE SECOND CIRCUIT OF THE UNITED STATES 191, 201 (1995).

President Franklin D. Roosevelt signed that first Municipal Bankruptcy Act (the First MBA) into law as a New Deal measure in 1934, but the Supreme Court declared it unconstitutional in the 1936 *Ashton* case.[26] Sumners refiled the legislation the next year with only slightly narrowed provisions; Congress reenacted it; and in 1938 Sumners presented the lead-off oral argument in the Supreme Court in the 1938 *Bekins* case[27] that easily affirmed his second Municipal Bankruptcy Act (the Second MBA). By solving the holdout problem and enabling the judicially enforceable restructuring of such debtors, Sumners's Chapter IX rescued the nation's insolvent municipalities during the Depression years. Only a small number of them had to file bankruptcy petitions because the law quickly showed bondholders the futility of holding out in negotiated restructurings.[28]

Municipal bankruptcy has survived, moreover, now well into the twenty-first century, as the Arabically renumbered Chapter *9* of the Bankruptcy Code adopted in 1978.[29] While Congress has added bells and whistles since original enactment,[30] the fundamental elements of Sumners's legislation persist. To begin, municipal bankruptcy is essentially similar to the judicial restructuring that proceeds in Chapter 11, business reorganization, but with divergences necessitated by the juridical nature of the debtor: a Chapter IX (or 9) debtor must be a political subdivision of state government and not a private, profit-oriented business association.[31]

The similarities are numerous. In a case in a bankruptcy court, an insolvent debtor files a plan that modifies or "scales" its indebtedness or claims, unsecured and secured, in both amount and amortization, providing means for their satisfaction by cash or other property or by new debt instruments, with creditors stayed from collection activities against the debtor or its officers or residents in the meantime, with disclosures of information, notice to all claimants, a claims objection process, classification of claims and voting by creditors, a requirement of good faith in plan filing, cramdown of objecting claims if necessary, binding effect, and discharge of debt. This is powerful law.

The first difference is that municipal debtors do not surrender their properties into a bankruptcy estate or otherwise into the control of the federal court; sales or plan treatments of assets and rejection of executory contracts are discretionary with the debtor. Nonetheless debtors receive a discharge upon plan confirmation. Second, the bankruptcy court determines a threshold set of six factors that characterize municipal bankruptcy's uniqueness: (i) a political subdivision of state government, (ii) with authorization by its state, (iii) that is insolvent, (iv) desiring to adjust its debts, (v) based on negotiations with its creditors, and (vi) with good faith in its act of filing (the Gateway Factors).[32] It was Sumners, primarily, who, in the depth of the Depression, crafted and

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[26] Ashton v. Cameron County Water Improvement Dist. No. 1, 298 U.S. 513, 527 (1936) (hereinafter *Ashton*)

[27] U.S. v. Bekins, 304 U.S. 27 (1938) (hereinafter *Bekins*).

[28] See text accompanying n. 384 infra.

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

[30] Additions include the "strong-arm clause" granting standing for the debtor to assert state-law fraudulent transfer claims; the exception to the preferential-transfer rule for payments to bondholders; and the plan-voting percentages. See 11 U.S.C. § 363(b), 365, 901(a), 926(b) & 1126(c).

[31] Of course an individual may be a debtor under today's Chapter 11.

[32] These fundamental elements find their source in both the First and Second MBAs and persist in today's Chapter 9. *See* 11 U.S.C. §§ 109(c) & 921(c); In re City of Stockton, 493 B.R. 772, 783, 787, 791, 792 & 794 (Bankr. E.D. Cal. 2013); In re City of Chester, No. 22-13032-AMC, 2023 WL 2504708 (Bankr. E.D. Pa. Mar. 14, 2023). Section 921(c)

enacted such legislation, with the foregoing characteristics, and that structure and its rationale survive and continue 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,[33] Alabama's Jefferson County, and a handful of California cities, several academic commentators have criticized municipal-bankruptcy practice as inefficient and inadequate. Focusing on controversial issues of the treatment in such cases of union contracts[34] and underfunded pensions,[35] they have advocated revising Chapter 9 to make it much more like today's private-company debt restructuring—with creditors in control. The critics have applied a mode of legal-academic theory called "economic analysis of law" or "law and economics" (L&E) and subsidiarily have advocated a normative theory of bankruptcy called the "creditors' bargain."[36] That is shorthand for the notion that idealized creditors would prefer a collective debt-collection device—bankruptcy—to the "race to the courthouse" under state law when a debtor becomes financially distressed and, moreover, the idea that bankruptcy process ought to vindicate prebankruptcy contracts.

Applied to municipalities, the L&E scholars argue that bankruptcy process ought to enable the creditors to intervene in those Chapter 9 debtors' customary, state-law-based, and locally-situated political decision-making in order to "to collect taxes to pay preexisting debt; to order reductions in expenditures; to sell municipal assets; and perhaps even to reorganize the boundaries of or to dissolve the debtor municipality"—in order to increase recoveries on the creditors' debt claims as much as possible and, more generally, for the sake of economic efficiency and wealth maximization.[37] Moreover, the L&E critics of municipal bankruptcy have recently taken a "turn to history" in an effort to buttress their prescriptions for a more muscular, creditor-centric municipal

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provides for dismissal if the filing was not in good faith; it is true that lack of good faith is ground for filing Chapter 11, so that this factor could be said not to be unique to municipal bankruptcy, but that requirement is jurisprudential, not statutory, in business reorganization. See, e.g., LTL Mgmt., LLC v. Those Parties Listed on Appendix A to Complaint and John and Jane Does 1-1000 (In re LTL Mgmt., LLC), 64 F.4th 84 (3d Cir. 2023); Little Creek Development Co. v Commonwealth Mortgage Corp. (In re Little Creek Development Co.), 779 F.2d 1068, 1072-73 (5th Cir. 1986)

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

[34] See, e.g., In re City of Vallejo, 403 B.R. 72 (Bankr. E.D. Cal. 2009). So I include good faith in filing as one of the Gateway Factors.

[35] See, e.g., In re City of Stockton, 526 B.R. 35 (Bankr. E.D. Cal. 2015); W. Richard Fossey & John M. Sedor, *In Re Copper River School District: Collective Bargaining and Chapter 9 Municipal Bankruptcy*, 6 ALASKA L. REV. 133 (1989). "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*, Prac. Law

[36] THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW (1982) (hereinafter, JACKSON, LOGIC).

[37] Clayton P. Gillette & David A. Skeel, Jr., *Governance Reform and the Judicial Role in Municipal Bankruptcy*, 125 Yale L.J. 1153, 1173, 1206 & 1220 (2016). See, also, Vincent S.J. Buccola, *The Logic and Limits of Municipal Bankruptcy Law*, 86 U. CHI. L. REV. 818 (2019) (the 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 reorganization."); Adam J. Levitin, *Bankrupt Politics and the Politics of Bankruptcy*, 97 CORNELL L. REV. 1399 (2012) ("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.").

bankruptcy process; but in doing so they are asserting a forensic and factually flawed version of the story of the inception and early years of Chapter IX.

That creates the instant historiographical problem: how to find, understand, and then tell the story of the origin of municipal bankruptcy.

Eschewing 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 [Congress] adopt it?"[38] In Herodotean terms, the "[what historical] explanation hope[s] to achieve . . . is to make [the event] more *understandable*."[39] To answer those questions about municipal bankruptcy requires what a few scholars and I are calling "deep legislative history,"[40] a term that I have defined as conventional legislative history[41] combined with assiduous research in *archives* to find relevant primary sources of and about the involved legislators and their work—here, Sumners, a freshman representative named J. Mark Wilcox, other involved legislators, as well as bondholders and debtors, and those parties' respective lobbyists, attorneys, and other representatives—applying the historical method to learn and explain the event.

"[I]t is with *the sources* that any account of the historian's working methods must begin."[42] The historian seeks primary sources, "the evidence that individuals, governments, organizations,

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

[39] CHRISTOPHER PELLING, HERODOTUS AND THE QUESTION WHY CHRISTOPHER PELLING, THE QUESTION WHY 5 (2019) (hereinafter PELLING, QUESTION WHY)at 5 (emphasis original).

[40] 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) ("close attention to the ERA's *deep legislative history* reveals a framer in Pauli Murray, who was way ahead of her time"); David M. Forman, *Big Tobacco: An Impenetrable Industry Regulators Can Only Hope to Contain*, 31 SUFFOLK U. L. REV. 125, 134 n. 45 (1997) ("The 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) ("The debate extends all the way down to the *deep legislative history* of Title VII's disparate impact provisions") (emphasis added for all three). See also 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), corrected at papers.ssrn.com/sol3/papers.cfm?abstract_id=4559518) (defining "deep legislative history" as "conventional legislative history combined with careful research in the archives").

[41] "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 enact a law. [It) is consulted in order *to better understand the reasons* for the enactment of the statute." J. Myron JACOBSTEIN & ROY M. MERSKY, FUNDAMENTALS OF LEGAL RESEARCH 169 (1987) (emphasis added). Yale's legal-history research guide explains: "A *legislative history* gathers the materials that a legislature generated when considering proposed legislation. . . . It might be conducted in an attempt to determine the *legislature's intent* when passing some legislation. . . . [H]istorians . . . are interested in tracking the *process of legislation* as it works its way through a legislature for other reasons." YALE LAW SCHOOL GUIDE TO RESEARCH IN AMERICAN LEGAL HISTORY at 179-80 (2018). 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).

[42] TOSH, PURSUIT OF HISTORY, supra n. 1, at 74. See also LOUIS GOTTSCHALK, UNDERSTANDING HISTORY: A PRIMER OF HISTORICAL METHOD viii, 28 (hereinafter GOTTSCHALK, PRIMER) (2d ed. 1969) (explaining the historical method's "strict rules for ascertaining verifiable fact"); MARTHA HOWELL & WALTER PREVENIER, FROM RELIABLE

and cultures or societies leave behind,"[43] by researching "not only in libraries" but in *"archives."*[44] Archival sources "provide the historian information about *what* happened, *how* and i*n what circumstances* the event occurred, and *why* it occurred. A source may be defined as "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."[45]

This is where the L&E scholars have fallen short. They have conducted no appreciable research in archives; they have collected and reviewed no more than a handful of the available legislative sources[46]; and their methodology, L&E, provides no basis for evaluating and understanding even those limited sources. Consequently, their story is unreliable. In contrast, applying the historical method to deeply researched *archival* and other *primary*[47] sources produces an account of the genesis of municipal bankruptcy that is unclouded by academic theorizing about market-clearing prices, economic efficiency, and wealth maximization and that also corrects the inaccuracies of the L&E version and sets forth a factually reliable history of Chapter IX's origins in the 1930s.

Municipal bankruptcy succeeded in its original purpose[48] and remains remarkably the same today as in the 1930s. Congressman Sumners was the central actor. He worked through the constitutional issues and objections and navigated the contemporary politics to devise the exact terms for positive law, municipal bankruptcy, that has enabled subdivisions of states' governments to invoke bankruptcy process in a federal court in order to solve the holdout problem and to effectively restructure their finances and their operations, avoiding destructive consequences of defaulted debt,[49] maintaining their local sovereignty and elective governance, and providing fair recoveries for their creditors. The archivally grounded, accurate history rebuts the L&E academicians' vision of Chapter IX.

This article's first part advances in two more sections. Section B more closely compares L&E and legal history and discusses why the genesis of municipal bankruptcy law is a story for legal

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SOURCES: AN INTRODUCTION TO HISTORICAL METHODS 17 (2001) (same) (hereinafter HOWELL & PREVENIER, RELIABLE SOURCES).

[43] Jenny L. Presnell, The Information-Literate Historian: A Guide to Research for History Students 6 (2019).

[44] Id. at 34 (emphasis added).

[45] Id.; JOHN FEA, WHY STUDY HISTORY? REFLECTING ON THE IMPORTANCE OF THE PAST 3, 6 (2013) (hereinafter FEA, WHY STUDY HISTORY?); HOWELL & PREVENIER, RELIABLE SOURCES; TOSH, PURSUIT OF HISTORY.

[46] As the great historian Marc Bloch put it, "What religious historian would be satisfied by examining a few theological tracts or hymnals?" MARC BLOCH, THE HISTORIAN'S CRAFT at 106, 108 (1953).

[47] "'[P]rimary sources' . . . generally mean[s] evidence contemporary with the event or thought to which it refers." TOSH, PURSUIT OF HISTORY, supra n. 1, at 77.

[48] The L&E scholars contend that recidivism is a current problem with municipalities that adjust their debts. See Clayton P. Gillette & David A. Skeel, Jr., *Governance Reform and the Judicial Role in Municipal Bankruptcy*, 125 Yale L.J. 1153, 1173, 1206 & 1220 (2016) (hereinafter Gillette & Skeel, *Governance Reform*); Adam J. Levitin, *Bankrupt Politics and the Politics of Bankruptcy*, 97 CORNELL L. REV. 1399, 1445 (2012). However, that has not been the experience in the four judicial districts of Texas of which I have knowledge, and the latest study finds Chapter 9 cases filed by municipal debtors that are public hospitals have been highly successful across the states that authorize municipal bankruptcy filings. Michael A. Francus, *Death, Bankruptcy, and the Public Hospital*, SSRN-id4366170 (Feb. 27, 2023).

[49] LUBBEN, LAW OF FAILURE, *supra* note 22, at 5-17.

historians, rather than L&E scholars, to find and tell. Because one mistake of the L&E scholars is to have identified the rookie legislator Wilcox as the instrumental legislator, Section C next provides comparative biographies of him and the Judiciary Committee chair, Sumners.

Part II describes and explains the enactment of the First MBA. Section A uncomplicates the multiple bill filings by Sumners, Wilcox, and several other members of Congress and the course of legislative proceedings during the crucial period, the last sixty days of the lame-duck Congress following Herbert Hoover's defeat at the polls, that produced a dialectic of three models of municipal bankruptcy—as business reorganization, as composition with creditors, or as moratorium—after the first New Deal Congress convened. Section B presents the course of the legislative work from spring 1933 to summer 1934 that enacted the composition model as the First MBA, along with its two previously unnoticed amendments in 1936. Section C describes the law's invalidation as unconstitutional in the Supreme Court's 1936 *Ashton* decision.

Then Part III's first section explains the reenactment in 1937 and quick affirmance by the Supreme Court in 1938 of Sumners's only slightly modified Second MBA. Section B lays out the Supreme Court's affirmance of the second act in the 1938 *Bekins* decision, for which Sumners presented the lead-off oral argument. Section C outlines the subsequent congressional extensions of Chapter IX's effectiveness including the revisions in 1976 in anticipation of a possible bankruptcy of New York City and the replacement of Chapter IX by Chapter 9 in the Bankruptcy Reform Act of 1978. Finally, the concluding Part IV completes my argument that the historical method and its subdiscipline of legal history provide the more insightful and useful way to find and understand the origin of, and a firmer foundation from which to make policy recommendations about, municipal bankruptcy.

B. Methodology: Law and Economics vs. Legal History

L&E is arguably "the most influential scholarly movement in law schools in the U.S. in the last half a century" but "also the most controversial."[50] The origins of L&E analysis are modest, dating from 1970 when an economics professor, Ronald Coase, published the article "The Problem of Social Costs,"[51] 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 "aspire[s] to normatively evaluate legal rules and prescribe their modification."[52] The notion that common-law rules should be so analyzed initially germinated in the faculties of the Economics Department and the Law School of the University of Chicago where economists such as Henry Manne[53] and legal theorists such as Richard Posner, law professor and later appellate judge, fleshed

[50] Ron Harris, *The History and Historical Stance of Law and Economics*, in MARKUS D. DUBBER & CHRISTOPHER TOMLINS, THE OXFORD HANDBOOK OF LEGAL HISTORY at 23 et seq. (2018) (hereinafter Harris, *Historical Stance of L&E*).

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

[52] Harris, *Historical Stance of L&E*, *supra* n. 50.

[53] 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 (Dec. 2022) (Manne was the most important of the "academic entrepreneurs and institution-builders" of L&E).

it out as a theory and pushed it forward into a broad range of topics, including a thesis that the common law trends toward efficiency.[54]

Nor was history of much concern. The prolific Posner made casual forays into history, selectively relying on secondary literature and not conducting any archival research, and in one article he called for the "right kind" of history that will be useful for "a policy oriented scholar" to construct "a forward-looking approach to legal problems."[55] And indeed L&E scholarship has moved purposively to tack onto the economic analysis certain historical-type approaches, such as "path dependency" and another called "public choice analysis" that seeks to discover the origins and intent of legislation[56] through economic analysis.

L&E's exponents initially did not examine bankruptcy, which is a statutory, not common-law, regime for dealing with the debts and assets of insolvent or financially distressed debtors. And although some critics have asserted that it may be running its course, L&E has been the prevailing theme of bankruptcy scholarship since the publication by a law professor, Thomas H. Jackson, of articles and a book titled *The Logic and Limits of Bankruptcy Law* in the early 1980s.[57] 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.[58]

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[54] Posner pushed the analysis across an incredibly broad range of topics and issues. See, e.g., 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).

[55] Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573 (Summer 2000) (arguing, "following Nietzsche that 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 historical events that can be constructively employed in a forward- looking approach to legal problems").

[56] Harris, *Historical Stance of L&E*, *supra* note 50, at 37. A L&E scholar posits this a bit differently: 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 FRANCESCO PARISI, ED., OXFORD HANDBOOK OF LAW AND ECONOMICS 38 (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), the first book attempting a general history of U.S. bankruptcy since CHARLES WARREN, BANKRUPTCY IN U.S. HISTORY (1935) (hereinafter SKEEL, DEBT'S DOMINION).

[57] JACKSON, THE LOGIC 3-4. Jackson assumed, rather than established through historical analysis, "bankruptcy law's historical function, . . . its historical goals . . . what it 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. His work is thus entirely normative. See also Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 859-71 (1982) (hereinafter Jackson, *Creditors' Bargain*); 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).

[58] Jackson, *Creditors' Bargain*, supra n. 57 at 857.

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," one that is "anathema to traditional bankruptcy scholars."[59]

More recently, L&E scholars have argued to apply that paradigm to municipal bankruptcy.[60] 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."[61] But the creditors' bargain theory does not fit an insolvent municipality, large or small, because it is not a privately owned firm in a financialized world seeking to wring profits from capitalistic enterprise but rather is a unit of State government possessing and exercising, by State law and subject to oversight and control by the State government that created it or authorized its creation, (i) a delegated quantum of the State's sovereignty and power within a jurisdiction spatially fixed by state statute, (ii) governance based on democratic public elections of the residents or qualified voters within its territorial jurisdiction, (iii) the power to tax persons, both natural and artificial, resident or located within its jurisdiction, and to spend such tax proceeds, and (iv) the power to legislate or adopt positive law to apply within its jurisdiction in the form of its ordinances or rules and regulations. Municipalities are political subdivisions that exist for public benefit, sometimes missioned by state law to provide otherwise unavailable public services such as irrigation infrastructure for agriculture or healthcare for residents and needy inhabitants.[62] A municipality is not best understood as a congeries of contracts, I submit.

In fine, L&E fails to answer for today's bankruptcy lawyers and judges the "why" question[63]: why did Chapter IX enter the positive law of the nation during the thirties and why has it persisted to today? Acknowledging that L&E analysis per se cannot answer those questions, several L&E proponents have sought to make *history* a helpful servant to their effort. As two economists acknowledge in their recent book *Bankrupt in America*, the full story of bankruptcy

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[59] SKEEL, DEBT'S DOMINION, supra n. 56 at 200.

[60] Gillette & Skeel, *Governance Reform* , supra n. 48, at 1150, 1156 ("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) ("naturally assume 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, 1331 (2017) (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) ("to explicitly permit bankruptcy courts to impose resource adjustments"); ("a modified version of the Creditors' Bargain theory . . . suggests that . . . creditors are the rightful owners of the current assets of a city").

[61] 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, (2016).

[62] See In re Hardeman County Hosp. Dist., 540 B.R. 229, 237 (Bankr. N.D. Tex. 2015) ("The Plan [of Adjustment] is intended to achieve two primary objectives: first, the continued operation of Hardeman County Memorial Hospital and its related rural health clinics in order to provide medical care to the residents of Hardeman County, including its needy inhabitants, which is its statutory mission under Article IX, Section 9 of the Texas Constitution, § 286.073 of the Texas Health & Safety Code, and § 1038.101 of the Special District Local Laws Code . . . ." and resolution of debt).

[63] At age five, the first historian, Herodotus, famously asked: "Mother, what did they fight each other for?", PELLING, QUESTION WHY, supra n. 39 at 1 (referring to the Greeks' naval victory over the Persians in 480 BCE).

cannot be "trace[d] . . . without using . . . the tools of the historian."[64] Although the L&E scholars focusing on municipal bankruptcy have been turning to history to reinforce their normative prescriptions, they have been doing so without employing those *tools of the historian*.

The resulting L&E version of the history of municipal bankruptcy is "a species of history" decried by legal historian John Philip Reid as "forensic history" and "law office history." Such history, he observed, is both advocacy-oriented and unlikely to be good history.[65] "The practice of forensic history," as he defines it, "is to find, argue, or invent some history that bears on the question at bar and assert it as authority similar to a judicial precedent, rather than as evidence to explain the past." He adds:

> [t]he forensic historian . . . searches the past for material applicable to a current issue. The purpose of the advocate, unlike that of the historian, is to use the past for the elucidation of the present, to solve some contemporary problem or, most often, *to carry an argument*.[66]

The L&E authors' version of the history of Chapter IX's genesis is forensic within that meaning.

A primary example is the 2016 article by Skeel and co-author Clayton Gillette that purports to set forth "a careful analysis of the history of municipal bankruptcy, starting . . . in 1934."[67] The authors contend that "local fiscal crises" usually "are caused by a governance structure that tolerates financial decisions in which the benefits and costs of public expenditures are misaligned" and that "Chapter 9 offers [only] temporary relief before the next crisis, not a thoroughgoing remedy aimed at the root causes of municipal distress." Because "financial distress of a substantial municipality nearly always signals that its politics are dysfunctional," the L&E scholars prescribe

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[64] 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). 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.

[65] John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 217 (1993).

[66] John Phillip Reid, *The Jurisprudence of Liberty: The Ancient Constitution in the Legal Historiography of the Seventeenth and Eighteenth Centuries*, in THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW 147, 158 (1993). 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:

> 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). Legal historian R. B. Bernstein puts 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, R. 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).

[67] Gillette & Skeel, *Governance Reform*, supra n. 48, at 1150, 1156.

"governance reform" and "structural reforms," meaning "authority to collect taxes to pay preexisting debt; to order reductions in expenditures; to sell municipal assets; and perhaps even to reorganize the boundaries of or to dissolve the debtor municipality."[68] Further, "the bankruptcy judge should and does have leeway to induce necessary reforms. Because discussions of Chapter 9 "consistently ignore" the possibility of governance reform, "even where it is essential to revive a financially failed municipality,"[69] Skeel and Gillette ask:

> 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* . . . .

The L&E authors then proffer their version of that history.

Their fifteen-paragraph version of Chapter IX's origins is both under-researched and factually incorrect. For instance, Skeel and Gillette aver that 1934 was the key year for the genesis of Chapter IX, but by far the most difficult and meaningful legislative work leading to the First MBA occurred the year earlier, in the first half of 1933. But more significant than just getting the dates wrong are the incorrect factual averments that Wilcox, the freshman congressman from Florida, was "the author of and leading advocate for" the First MBA.[70] It is clearly Sumners, not the novice legislator, who deserves that credit.

Moreover, constitutionality bulks large but problematically in Skeel's and Gillette's historical account. The authors assert that the constitutional concerns about Chapter IX in the thirties "are not nearly as complete an explanation as one might think" for the creditors' inability to pursue the creditors' bargain remedy to the problem they normatively posit, for creditors in Chapter IX then (and Chapter 9 today) to be able to force municipal governance changes including setting and collecting municipal taxes themselves. The asserted reason: "[t]he municipal debt crises" were "due either to circumstances governance reform would not have addressed or to fiscal crises that superseded any aspirations for governance reform.[71] This contention does not square with the evidence of the sources.[72]

Skeel and Gillette argue that "Congress simply assumed rather than analyzed the constitutional scope,"[73] that legislative debate centered on the question of infringement on state sovereignty, and that "[l]ittle evidence suggests that Congress was attempting to define the limits

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[68] Id. at 1154 (quoting McConnell & Picker, supra n. 12 at 472-81).
[69] Id. at 1154.
[70] Id. at 1167.
[71] Id. at 1166.
[72] The unpayable debts of insolvent municipalities were the overwhelming issue, and creditros taking control of municipal purse strings would not have solved "governance problems," if any; but in any event, so long as the debtor agreed to it, the adjustment plan that the bondholders negotiated to contain such provisions.
[73] Id. at 1168.

of federal bankruptcy authority."[74] Of course, Congress cannot define the limit of the Constitution's article II, section 8, clause 4 (the Bankruptcy Clause),[75] and enactment of municipal bankruptcy in fact represented a highly significant evolution of the understanding and application of that constitutional grant. Specifically, municipal bankruptcy as proposed and filed by Sumners abrogated the conventional wisdom that a bankruptcy law required a surrender of all assets by a debtor for administration under court supervision.

But Chapter IX did not require any such turnover; rather, the debtor retained, managed, and even disposed of its properties without any court approval, and upon plan confirmation it received a full discharge of debt. The evidence is that the members of Congress who participated in the legislative process shared a consensus that they were legislating constitutionally. Sumners, but *not* Wilcox, believed there was constitutional room to go further—in the direction of greater creditor control of the proceedings—but Sumners proceeded with the model that he gauged capable of gaining political acceptance in 1933-1934 and again in 1937, and that has stood the test of time.

Skeel and Gillette further maintain that, during the legislative debates, members of Congress were "preoccupied with municipalities' inability to restructure debts" as "the immediate problem" and were not "attempting to provide a comprehensive solution."[76] First of all, unpayable debt is an existential problem for a municipality. As Sumners recognized and modern commentators have suggested, the residents of an insolvent town can move to another place, and the phenomenon of ghost towns is not unknown. Second, the idea of municipal bankruptcy was, in Congress during the thirties, understood to be the complete remedy needed for the problem of municipal insolvency because it was based on negotiations of the debtor with the bondholders in a bankruptcy reorganizing process that mirrored the restructuring ability of corporate reorganization. It worked, and only a relatively few cases were ever filed. The story follows.

In contrast to L&E's theorizing, I use the *historical method* to find and understand the enactment of the First and Second MBAs. As historian Peter Laslett has written, "we can only properly understand ourselves and our world, here and now, if we have something to contrast it with," and it is historians who "provide that something."[77] "History is a discipline [for] reconstructing the past" by vigilant scholars who can and do discern the "five C's": "change over time, context, causality, contingency, and complexity."[78] As 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."[79]

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[74] Id. at 1169.

[75] U.S. Const., art. II, § 8, cl. 4.

[76] Id. 1166.

[77] PETER LASLETT, THE WORLD WE HAVE LOST, *Methuen* 1965 at 242 et seq., reproduced in JOHN TOSH, ED., HISTORIANS ON HISTORY 283 (3d ed. 2018).

[78] FEA, WHY STUDY HISTORY?, supra n. 45, at 3, 6 (emphasis added); SCHRAG, PRINCETON GUIDE, supra n. 85 at 62, quoting MICHAEL ROSSI, THE REPUBLIC OF COLOR: SCIENCE, PERCEPTION, AND THE MAKING OF MODERN AMERICA 243 (2019) (history is "the analysis of change over time").

[79] ANNETTE GORDON-REED, ON JUNETEENTH 58.

Sources are the foundation of the intellectual work. As another historian explains, "historical facts are knowable only by the evidence they leave behind,"[80] and historical investigators "should never consider less than the total of the historical material which may conceivably be relevant to [their] inquiry."[81] The writing of history "follows strict rules for ascertaining verifiable fact" from the reliable sources.[82] 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.[83]

Under the historical method, in a nutshell, "it is with *all the sources* that any account of the historian's working methods must begin."[84]

"[A]ll histories deploy facts, and some histories answer only primarily factual questions."[85] That is neither the L&E advocates' nor my goal. Rather, most historians 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."[86] 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."[87] In fine, the historian must first do the hard work of archival, original-source research before attempting to answer the "why" question.[88]

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

[81] Id (Elton) at 60.

[82] GOTTSCHALK, PRIMER, supra n. 42 at viii.

[83] G.R. ELTON, THE PRACTICE OF HISTORY 101 (1967) (hereinafter ELTON, PRACTICE OF HISTORY) (emphasis added). See also HOWELL & PREVENIER, RELIABLE SOURCES, supra n. 42.

[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 n. 42 at 28.

[85] ZACHARY M. SCHRAG, PRINCETON GUIDE TO HISTORICAL RESEARCH (2025) (hereinafter SCHRAG, PRINCETON GUIDE).

[86] Louis Gottschalk, *A Professor of History in a Quandary*, 59 AM. HIST. REV. 279 (1954).

[87] SCHRAG, PRINCETON GUIDE, supra n. 85 at 55.

[88] See also DAVID HACKETT FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT (1970); HARRY RITTER, DICTIONARY OF CONCEPTS IN HISTORY (1986).

Within today's broad discipline of history, the field of *legal history* is the specialized area that traditionally centered on the evolution of legal doctrines and on the history of courts 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.[89] This work requires "knowing the period [and] deeply situating law in the particularities of a specific time and place."[90] Legal history provides a lens more accurate and more insightful than L&E through which to examine and understand the origin of municipal bankruptcy.

I rely on two legal history tools. One is legal biography, which several historians call "scholarship fit for the twenty-first century."[91] A "natural nosiness" about others' lives draws readers to legal, as it does to other types of, biography, according to legal historian Laura Kalman.[92] Then "legal biography creates an access point for scholars in other disciplines as well as for ordinary people into the life and development of the law."[93] As another legal historian remarks, "legal life writing, broadly conceived, offers new ways of advancing legal history and socio-legal scholarship, and of encouraging inter-disciplinary dialogue between them, and also with other fields and audiences."[94] I am writing the biography of the key legislator, Congressman Sumners, and I draw from my research; additionally, I have researched and now present a short biography of Wilcox.

My second legal-history tool is legislative history, the tedious, down-in-the-weeds work to discover and find the process and course of enactments by Congress, a tradecraft traditionally taught in legal-research courses at law schools[95] but considered unimportant today with

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[89] See, e.g., ROBERT W. GORDON, TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 354 (2017) ("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").

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

[91] Victoria Barnes, Catharine MacMillan & Stefan Vogenauer*, On Legal Biography*, 41 J. LEGAL HIST. 115, 116 (2020) [hereinafter Barnes et al, *Legal Biography*].

[92] Laura Kalman, *The Power of Biography*, 23 L. & SOC. INQUIRY 479, 482 (1998); PAUL MURRAY KENDALL, THE ART OF BIOGRAPHY 4 (1965) ("The biographer explores the cosmos of a single being. History deals in generalizations about a time . . . .").

[93] Barnes et al, *Legal Biography*, *supra* note ___ at 116.

[94]. 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).

[95] A venerable law-school text, J. MYRON JACOBSTEIN & ROY M. MERSKY, FUNDAMENTALS OF LEGAL RESEARCH (1987 ed.) (hereinafter, JACOBSTEIN & MERSKY), remains a solid instructional manual except that legislative texts more and more can be found via electronic sources. Traditionally, as an excellent explanation of legislative history's uses states,

> the greatest weight is usually accorded to the joint explanatory statement in a bill's conference report . . . followed by the explanations and summaries in committee reports. Next, congressional debate or remarks. . . are usually accorded stature followed closely by the text of the bill(s) as it developed from earlier versions (differing language may show intent). Then congressional hearings and statements of witnesses . . . have bearing followed by committee prints . . . and markup amendments and other documents in committee (not usually published). When no explanations are available from official sources sometimes secondary source material, like news articles, may be accorded some weight as to why Congress is taking a particular action . . . .

"textualism" prevalent in courts' interpretative endeavors.[96] It is enormously useful here.[97] And to fully grapple with the L&E scholars anointing of the freshman representative Wilcox as "the author" of municipal bankruptcy,[98] it is important to perform what a few scholars and I are calling "deep legislative history,"[99] a term that I define as conventional legislative history combined with assiduous research in the archives to find all relevant documents of and about the work of key legislators and actors, here, Sumners and other members of Congress together with the interested parties,[100] in order to learn and explain, pursuant to the historical method, who was responsible and why and how this legislation came about.

Richard J. McKinney & Ellen A. Sweet, Law Librarians Society of Washington, D.C., *Federal Legislative History Research: A Practitioner's Guide to Compiling the Documents and Sifting for Legislative Intent* (2021), available at www.llsdc.org/federal-legislative-history-guide#Introduction. This traditional hierarchy of "weight" to be accorded those pieces of the record are based on Supreme Court cases cited in JACOBSTEIN & MERSKY at 169-_____. Historians are not bound by the views of judges in evaluating, ranking, and using legislative-history sources, but the above description indicates the importance of examining *all* those sources in searching origins and meaning. See also 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).

[96] On today's textualism in the courts, see, e.g., ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012). In contrast to the scholarly enterprise, in litigated matters "[c]ourts now generally appear less willing to credit legislative history, whatever the source." John M. De Figueiredo & Edward H. Stiglitz, *Signing Statements and Presidentializing Legislative History*, 69 ADMIN. L. REV. 841, 866 (2017). *See also* James J. Brundey & Corey Ditslear, *The Decline and Fall of Legislative History?,* 89 JUDICATURE 220 (2005-2006).

97. "A legislative history of a statute is consulted in order *to better understand the reasons* for the enactment of the statute." JACOBSTEIN & MERSKY, supra n. 95 at 169 (emphasis added). Yale's guide posits that legislative history

> might be conducted in an attempt to determine the *legislature's intent* when passing some legislation. . . . historians, political scientists, and others are interested in tracking the *process of legislation* as it works its way through a legislature for other reasons.

YALE LAW SCHOOL GUIDE at 179-80 (2018) (emphasis added). A distinguished legal historian's appreciation of the value of legislative history states:

> 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.

Melvin I. Urofsky, *Beyond the Bottom Line: The Value of Judicial Biography*, 1998 J. SUP. CT. HIST. 143, 148 (1998)(emphasis added).

[98] See Gillette & Skeel, *Governance Reform*, supra n. 48 at 98.

[99] 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) ("close attention to the ERA's *deep legislative history* reveals a framer in Pauli Murray, who was way ahead of her time"); David M. Forman, *Big Tobacco: An Impenetrable Industry Regulators Can Only Hope to Contain*, 31 SUFFOLK U. L. REV. 125, 134 n. 45 (1997) ("The 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) ("The debate extends all the way down to the *deep legislative history* of Title VII's disparate impact provisions") (emphasis added for all three).

[100] While certain case law impugns the value of individual legislators' declarations as to intent, see MERSKY supra n. 95 at 169 n. 2, I agree with those authorities who find them helpful. And even if the statement was made after the legislative event, so long as it bears indicia of truthfulness, I submit that the statement is germane to the quest for legislative purpose. See also Peter J. Mazzei, Laura C. Tharney, Samuel M. Silver, Jennifer D. Weitz, Joseph A. Pistritto & Rachael M. Segal, *Legislative Archeology: It's Not What You Find, It's What You Find Out*, 43 SETON HALL LEGIS. J. 247 (2019) ("Identifying pre-introduction, non-legal, documentary information that explains the problem a bill was intended to address may provide a richer understanding of the law's original purpose.").

Conventional legislative history is "difficult and time-consuming" work, requiring persistence in "gather[ing] the materials that a legislature generated" and then interpreting what those materials meant for the enacted bill.[101] Deepening the research by going into the archives is even more laborious and challenging. The historian must not only find the drafts of the texts and the filings of bills, committee reports and proceedings, published and unpublished reports of hearings, legislative journals, committee prints, records of floor debates, committee minutes, and the versions of the Congressional Record but also dig doggedly into individual legislators' correspondence and bill drafts in archives.[102] Some archival sources such as the Congressional Record and transcripts of Supreme Court cases are available via the internet, but the archival papers of significant legislators are not easily accessible—the Papers of Congressman Sumners, for instance, reside in two archives far apart.[103] Archival sources such as pertinent letters, telegrams, memos to the file, and handwritten notes are essential for finding the facts, timeline, thinking, and deal-making of the legislators and their correspondents, allies, and opponents in the genesis of Chapter IX as a mode of financial and operational restructuring.

C. Key Legislator: Hatton Sumners vs. Mark Wilcox

The veteran legislator, Hatton W. Sumners, rather than the rookie, J. Mark Wilcox, played the instrumental role and deserves the primary credit for creating bankruptcy relief for insolvent municipalities during the thirties. He was well positioned by his life experiences and position in the House of Representatives to do so.[104] Sumners was an important member of Congress across four decades, and during his 16-year tenure as House Judiciary chair, he caused a number of permanent contributions to the federal judicial and legal system, and those include his First and Second MBAs.

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[101] YALE LAW SCHOOL GUIDE at 184, 179.

[102] Id. at 179-89. Paper copies of such materials reside in government depository libraries; electronic copies are more and more available from multiple online providers including the Library of Congress and commercial firms.

[103] Sumners's documents and correspondence reside in two archives: (i) the collection named "Hatton W. Sumners Papers" in the Dallas Historical Society at its headquarters, the Hall of State, in Dallas, Texas, and in these footnotes are called the "Sumners Papers, DHS" and (ii) the Legislative Archives Division of the National Archives in Washington, D.C., Jud. Comm. Papers, Nat'l Archives. In these footnotes, Sumners is referred to as "HWS" such that correspondence to and from HWS in either archive will be cited as: "[name] to HWS, [or vice versa], [date], Sumners Papers, DHS [or Jud. Comm. Papers, Nat'l Archives]." The author reviewed, copied, and retains in his files all documents of the two archival collections that are cited in this article.

[104] 1875-1962. My text about Sumners in this section is partially based on my short "bio" of him in my article about this role in resolving the 1937 court-packing crisis. See *"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*). A history Ph.D. dissertation contains an incomplete political biography of Sumners. RON C. LOVE CONGRESSMAN HATTON W. SUMNERS OF DALLAS, TEXAS: HIS LIFE AND CONGRESSIONAL CAREER, 1875-1937 (Tex. Christian Univ. dissertation 1990). More useful, but all too brief, is the short bio penned by Sumners' longtime assistant and confidante, Elmore Whitehurst. ELMORE WHITEHURST, HATTON W. SUMNERS: HIS LIFE AND PUBLIC SERVICE, available at https://www.sumnersfoundation.org/library/public_service.pdf (hereinafter WHITEHURST, HATTON W. SUMNERS), but it neglects Sumners's bankruptcy legislation, even though Whitehurst later became a bankruptcy judge in Dallas.

Born in Tennessee in 1875, he moved with his family to Garland, Texas in 1893. After high school and odd jobs, he read law in a prominent Dallas lawyer's office, receiving his law license from the Texas Supreme Court in 1899.[105] The next year he won election as Dallas County Attorney, lost the office two years later in a contested election, and regained the position two years later. He prosecuted saloons and gambling activities, earning admiration of the prohibitionist and progressive Democrats in the city. Then he worked as a correspondent for *Farm and Home* magazine and practiced law on behalf of high-profile clients and causes such as cattleman Charles Goodnight in restructuring his indebtedness, the Students Association of what is now Texas A&M University in ousting the college president, and Texas cotton growers in seeking lower freight rates. In 1912, as a Democratic Party candidate, he won the race for an at-large seat in the U.S. House of Representatives; and two years later he won Dallas's Fifth Congressional District, the seat he held until retirement in 1947.

From 1919 onward, Sumners was a member of House's Committee on the Judiciary. While he enacted very little legislation before the New Deal,[106] he built a reputation as a lawyer-congressman and impressed the Supreme Court's justices with his legislative work on judicial and federal legal-system issues. By 1923 he ascended to the position of ranking minority member of the committee and when the Democrats took control of the House served as Judiciary chair from 1931 until his retirement. He gained notice for participating in or managing the trial in the Senate of four impeached federal district judges, and President William Howard Taft called him "the best lawyer in Congress,"[107] and in 1939 he was most highly rated by a LIFE magazine poll for integrity among Congressmen.[108] He presented four oral arguments to the Supreme Court as amicus curiae on behalf of Congress or his committee.[109] A confirmed bachelor, Sumners was devoted to his work and parsimonious.[110] Sumners harbored racial animus and worked to maintain the Jim Crow system. With virtually all other Southern Democrats in Congress, he joined Roosevelt's New Deal team in 1933.[111]

The Supreme Court's invalidation of the First MBA was one of the causes of Roosevelt's effort, and the Second MBA was enacted during the court-packing turmoil. Immediately after FDR's announcement of the court-packing plan in 1937, Sumners reputedly stated, "Boys, here's where I cash in my chips." However, what he actually said was "here's where I cash in," without the two words "my chips," indicating that he had already taken the steps that would provide the result Roosevelt desired—new justices for the Supreme Court—but by other avenues, one bill incentivizing voluntary retirements by guaranteeing lifetime retirement pay for the Justices and

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[105] Tex. Sup. Ct., Attorneys Roster 1900).

[106] One rare exception is discussed in my article *Congressman Hatton W. Sumners's 1928 Amendment to the Electoral Count Act*, available at papers.ssrn.com/sol3/papers.cfm?abstract_id=4086905 (2022). After FDR's election, Sumners's output of bills obtaining enactment increased substantially.

[107] WHITEHURST, HATTON W. SUMNERS, supra n. 104.

[108] Id.

[109] HWS, *In Place of Impeachment—Trial by Judges*, 3 TEX. B.J. 480 (1940); WHITEHURST, HATTON W. SUMNERS, supra n. 104, at 4-5.

[110] He sometimes slept in his office, never paid a taxi fare if someone else was in the cab, and occasionally ate from others' plates in the Congressional cafeteria. Anthony Champagne, *Hatton Sumners and the 1937 Court-Packing Plan*, 26 E. TEX. HIST. J. 46, 47 (1988).

[111] IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 158, 160, 162 (2013)

enabling them, if they wished, to sit as judges in the lower federal courts and a second, innovative bill enacted to ensure that the administration would be a party to any suit in any federal court challenging the constitutionality of a federal law or program. I have argued that Sumners's two bills bookended the court-packing crisis.[112]

Moreover, as the ranking member of the Judiciary Committee, Sumners was actively involved in bankruptcy-law developments over the presidencies of Calvin Coolidge and Herbert Hoover. For example, in 1922 he voted yes when the House Judiciary Committee approved and Congress enacted a bill adding exceptions to the bankruptcy discharge.[113] In late 1925, Senator David I. Walsh of Massachusetts introduced a bill to revise many provisions of the BA'98, and when it stalled, it was Sumners who took the legislative steps to move it to passage.[114] In 1928 Sumners's fellow Texans Congressman Sam Rayburn and Senator Sheppard filed bills to enhance the avoidability of preferential transfers and fraudulent conveyances by bankruptcy trustees.[115] Furthermore, concern about "bankruptcy rings" arose and grew during those presidencies.

In 1925, Sumners investigated one bankruptcy ring in Ohio involving federal district judge George W. English. The Committee's investigator had done a poor job, and the Congressman took upon himself to travel to Indiana and Missouri, teaming up with the journalist who had broken the story of the jurist's corruption in bankruptcy and receivership matters.[116] Based on Sumners's additional findings, the Committee and then the House voted articles of impeachment. Sumners participated in the trial in the Senate, resulting in English's resignation in 1926. That and other public disclosures of bankruptcy rings across the country helped stimulate a growing discontent with the existing bankruptcy regime before the Depression.[117]

Beginning in 1926, Bankruptcy Referee Paul King of Detroit organized and led the National Association of Referees in Bankruptcy, and he also began to convene a small group of reformists that came to include District Judge Thomas D. Thacher, New York attorney Lloyd Garrison, Professor James A. MacLaughlin of Harvard University, and Randolph Montgomery of the New York Credit Men's Association.[118] As new bankruptcy bills began to be filed in 1930, this elite group formalized itself as the National Bankruptcy Conference (the NBC) and dedicated itself to providing expert consultations to Congress on bankruptcy legislation .[119]

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[112] Daniel, "Cash In," supra n. 104, at 414-19.

[113] Act of January 7, 1922, c. 22,

[114] S. 1039; 66 Cong. Rec. 9607-9610; Act of May 27, 1926, c. 406, § 1, 44 Stat. 662; HWS to J.W. Dickson, Apr. 5, 1926, Sumners Papers (taking credit for "[my] motion several days ago . . . for the immediate consideration of the bill to amend the bankruptcy law").

[115] H.R. 11620 (Mar. 1, 1928) by Rayburn; S. 3079 (Feb. 8, 1928) by Sheppard.

[116] Hearing, Subcommittee of the H.R., *Conduct of George W. English, United States District Judge, Eastern District of Illinois*, Mar. 23 to Apr. 1, 1925.

[117] See, e.g., *Hint of "Bankruptcy Ring,"* N.Y. TIMES, Oct 7, 1921, at 28; Detroit Bankruptcy Ring Denied By Court, Women's Wear Daily, New York Vol. 40, No. 84, (Apr 29, 1930): § 3, at 2.

[118] J. Ronald Trost, *National Bankruptcy Conference History 1927-2021* at 3, available at nbconf.org/wp-content/uploads/2021/04/History-NBC-April-2021-JRT-April-15-2021-FINAL-WITH-Authors-Note.pdf (2021).

[119] John D. Honsberger, *The Origins of the National Bankruptcy Conference: A Hinge-point of Change, 1932-1933*, available nbconf.org/wp-content/uploads/2015/10/NBC-History-1.pdf (1985)..

Additionally, in March 1929, right after Hoover's inauguration and only months before the Great Crash, "prompted by the report in the previous month of a grand jury which disclosed serious abuses and malpractices," the three bar associations of New York retained the redoubtable William J. Donovan to intervene in a case in the U.S. District Court in order to seek an investigation of bankruptcy administration in that district.[120] Judge Thacher appointed Donovan to prepare a report, which he filed with the court March 22, 1930, and the House Judiciary Committee also filed the report as a committee print on January 1, 1931, recommending an administratively centralized bankruptcy system to replace what had become a system of repeat players and court favorites serving as trustees and as their lawyers.[121]

Furthermore, as demonstrated in Sumners's remarkably complete papers, Sumners maintained his career-long interest in agriculture from the perspective of the farmers, and he was thoroughly acquainted with debt and land value because while in Congress he engaged in a side business of real estate-investing and secured lending mainly to Dallas-area borrowers. He utilized sophisticated real estate finance devices such as options, and he restructured loans with defaulting borrowers, keeping a Dallas lawyer at the ready. Moreover, he had repeatedly visited South Texas, and he learned of and stayed informed about the agricultural and town-planting developments there.

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.[122] Born in 1890, in Willacooche, Georgia, Wilcox graduated from Mercer University's Law Department in 1910 and entered the Georgia bar,[123] serving as county attorney from 1913 to 1919.[124] Attracting note as "[t]alented, energetic, and well versed in legal lore,"[125] Wilcox practiced in a two-lawyer partnership in Brunswick, Georgia, and joined the Commercial Law League of America.[126] He served as a director of an urban railway and a utility company; both had issued bonds.[127] In 1925 he and his family relocated to West Palm Beach, Florida, where he continued to practice law. Voters there elected him city attorney in 1928 and continued to reelect him even after his taking office in Congress in 1933.[128] He also maintained a law practice during his congressional years as a partner in that city's Winters Foskett & Wilcox law firm.[129]

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[120] Report of Bankruptcy Committees, National Ass'n of Credit Men, 4 J. NAT'L ASS'N REFEREES IN BANKR. 139 (July 1930).

[121] 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*, House Committee Print, 71st Cong., 1st Sess. (1931).

[122] Gillette & Skeel, supra n. 48, at 1167 ("author of and leading advocate for a municipal bankruptcy law").

[123] WILLIAM HARDEN, 2 HISTORY OF SAVANNAH & SOUTH GEORGIA at 739 (1913).

[124] JAMES CLARK FIFIELD, ED., THE AMERICAN BAR: A BIOGRAPHICAL DIRECTORY OF CONTEMPORARY LAWYERS OF THE UNITED STATES AND CANADA 156 (1922).

[125] Id. at 739.

[126] 18 BULL. COMM. L. LEAGUE 50 (1913).

[127] Moody's Manual of Railroads and Corporation Securities - Page 2034 (1921).

[128] J. Mark Wilcox, Biographical Directory of the United States Congress, 1774-Present, bioguideretro.congress.gov/Home/MemberDetails?memIndex=W000455.

[129] 1 MARTINDALE HUBBELL LAW DIR'Y 146 (1937). For example, during his West Palm Beach years he defended the city in an injunctive action by the local gas company, and in a suit removed to federal court.

Founded in 1894, the city of West Palm Beach experienced spectacular growth during the Florida land boom beginning in the early 1920s. The land crash that began mid-decade caused this city significant financial distress. When Wilcox became City Attorney in 1928, he immediately cut his own salary, so dire was the city's predicament. He soon found himself also serving as General Counsel of the League of Florida Municipalities. From those perspectives—at the ground level of his adopted hometown and with an overview of all Florida cities—he focused on municipal finance as more and more of the state's cities and towns became insolvent and defaulted on their municipal bonds in the aftermath of the land crash. Wilcox led his municipality's negotiations with the bondholders, which became the basis of his extensive testimonies in 1933 and 1937 hearings before Sumners's committee.

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 of West Palm Beach is acting on the advice of . . . Wilcox."[130]

In summer that year, Wilcox ran in the Democratic primary election for Congress in the district running the length of Florida's east coast. On a platform to repeal the Eighteenth Amendment,[131] he defeated the dry incumbent, Ruth Bryan Owen, daughter of former presidential candidate and former Secretary of State William Jennings Bryan. One contemporary noted in 1938 that Wilcox "is a lawyer accustomed to leadership in important affairs."[132] Once in 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 the articles in the Senate in 1936.[133] During his three terms, the bumptious Wilcox did play a useful supporting role as a witness in legislative hearings on the topic of municipal bankruptcy but accomplished little else while in Congress.[134] Like the vast majority of the Southern Democrats in Congress, Wilcox opposed Roosevelt's court-packing plan; and when he announced in 1938 that he was leaving the House after three terms to run for the Senate, the President reportedly threw his support to another congressman, the winner Claude Pepper.[135] Sumners remained in office to 1947, when he retired.

Sumners and Wilcox bore similarities. Both were Southern Democrats and white supremacists—Sumners was a career-long foe of anti-lynching bills[136] and Wilcox an opponent of

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[130] Wilcox undoubtedly had noticed the historical precedent of Memphis, Tennessee, that unsuccessfully attempted this strategem as reported in Meriwether v. Garrett, 102 U.S. 472 (1879).

[131] *Repeal Urged by Floridians*, HOUSTON POST, June 6, 1932, at 7.

[132] WILLIAM THOMAS CASH, 3 THE STORY OF FLORIDA 104 (1938).

[133] H.R. 2014, P.L. 75-336 (1937).

[134] Wilcox enacted a minor bill promoting aviation called the Frontier Defense Act, and he introduced an unsuccessful bill to create Everglades National Park.

[135] *Pepper Wins in Florida Primary, Swamping Wilcox, New Deal Critic*, N.Y. TIMES (May 4, 1938).

[136] Daniel, *Cash In*, supra n. 104 at 392.

the Fair Labor Standards Act on racial grounds.[137] As lawyers in Congress, both focused on crafting a solution to municipal insolvency. But the differences were substantial. Sumners, age 58 in 1933, had two-decades' experience in the House of Representatives and wielded substantial power as the Judiciary Committee chair. Fifteen years his junior, Wilcox was a novice representative serving on three minor committees.[138]

When in the second week of his service as a new M.C. in the 73rd Congress, Wilcox filed a municipal bankruptcy bill, his was *not*—contrary to the L&E scholars' version of the story—the first filed but rather the *fifth* such bill. Moreover, *Wilcox* had *not* authored that bill; it had been drafted by the New York lawyer for the holders of West Palm Beach's municipal bonds, with whom Wilcox had been dealing and collaborating in Florida. And the legislative and archival evidence discloses that Sumners had already been working significantly for more than a year on legislation to reform, enlarge, and improve all of the nation's bankruptcy law as a response to the Depression, and *he* had already filed the *first* bill, in the prior Congress, to add a municipal bankruptcy option to the BA'98.

II. The 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 Hoover's Solicitor General, and the Justice Department appointed one of Donovan's assistants, 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 bankruptcy-law revision. Immediately, the Senate Judiciary Committee chair, Daniel O. Hastings of California, filed Senate Bill 3866 and Earl C. Michener of Michigan filed House Bill 9968,[139] companions drafted by Garrison, assisted by the NBC, to amend the entire BA'98 with a system of centralized bankruptcy administration including regional bankruptcy administrators and local examiners, new provisions for compositions, and court supervision of federalized assignments for the benefit of creditors.[140]

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[137] Wilcox's deplorable Jim Crow reasoning was:

> the problem of our Negro labor. . . . [is] 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 (1937).

[138] *Off. Cong. Directory*, 73d Cong., 2d Sess. 223 (1934) (Census, Public Buildings, and Revision of the Laws Committees).

[139] H.R. 9968 by Michener, 72d Cong., 1st Sess. (Mar. 1, 1932). Adolph Berle asserted in a later letter to the President Roosevelt that "the corporate section was pretty much a Wall Street bill drafted by Robert Swaine." Letter, Adolph A. Berle, Jr. to Margaret Lehand, Mar. 30, 1933, FDR Lib'y.

[140] S. 3866 by Hastings (Feb. 29, 1932), followed by his S. 4921, S. 4923, and S. 5551.

The BA'98 had provided composition-with-creditors relief for individual debtors from the beginning[141] and eligibility for private corporations to obtain that form of relief since 1910, but compositions had previously proven infeasible for any type of debtor due to the requirement that complete schedules of assets and liabilities be filed together with the petition.[142] The 1932 companion bills also proposed to add a Section 76, a new chapter for corporate reorganization. It prescribed two-thirds as the supermajority of the claim amounts of votes needed to confirm a plan and with today-recognizable, basic confirmation standards:

> (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].[143]

Those fundamental voting and confirmation standards for corporate reorganizations persisted in Sumners's business reorganization bill filed early the next year, the bill that also included the first-ever proposal for the eligibility of municipalities.

During April through June 1932, a joint subcommittee of the Senate and House Judiciary Committees conducted interminable hearings, but no consensus on the bills emerged as presidential electioneering began that summer. None of the 1932 legislative proposals included an option for municipal bankruptcy, but after FDR's landslide election on November 8, 1932, and with large Democratic majorities elected in both chambers, ideas for expanded bankruptcy relief for all types of debtors proliferated. While Congress passed no bankruptcy bill of any type during 1932, it did enact bills that facilitated the concept of municipal bankruptcy by creating and then expanding the Reconstruction Finance Corporation (the RFC).[144]

Under its powerful chair, Jesse H. Jones of Houston, the RFC began refinancing many types of industrial and business entities and shoring up financial institutions' capital.[145] A staff attorney, Walter C. Sauer, published a relatively contemporaneous account that is reliable historical evidence for the story of municipal bankruptcy's origins that the L&E scholars

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[141] June 25, 1910, c. 412, 80 Stat. 839.

[142] *Need for Municipal Bankruptcy Legislation,* 6 COLLIER ON BANKRUPTCY ¶ 900.LH[1] (2024). But *Collier's* may overstate the situation there.

[143] H.R. 9968, 73d Cong., 2d Sess., section 76(b). Michener's bill did not change the confirmation standards for compositions under the BA'98, which were similar: "section 75(d) . . . (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." BA'98, 11 U.S.C. § 30(d) (1925).

[144] 47 Stat. 5 (1932), codified at 15 U.S.C. § 601.

[145] See 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).

overlooked. He reported that the creation of the RFC was a necessary precondition for legislating municipal bankruptcy in 1933 and 1934.[146]

A heightened sense of urgency about bankruptcy reform animated Hoover after losing the election. In his final State of the Union Address on December 6, 1932, Hoover stressed "the need for . . . revision of the bankruptcy acts."[147] Calling the matter "more urgent every day" in a special message one month later, the President connected the concept of reform and enlargement of bankruptcy law with the goal of 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 highlighting the holdout problem.[148]

Both the President-Elect and Sumners concurred in the need for legislative action. Roosevelt said he understood business failure, and it was rumored that the was in touch with Senators about a railroad reorganization bill.[149] Having risen to chair the House Judiciary Committee with the turnover in party control of the House in 1931, Sumners had begun to exert leadership in the second session of the 72nd Congress. The irrigation districts' insolvencies had been bruited in the 1931 session by at least nine bills before the House Committee on Irrigation and Reclamation. It held hearings on April 17, 1930, just six months after Black Friday on Wall Street.[150] That committee's report identified special-purpose agricultural districts in many states in default under their bonds including levee districts in the three counties of Sumners's own congressional district. Again in January 1932, that committee held a hearing on House Bill 4650 by Republican Congressman Royal S. Copeland of New York to authorize the Interior Department to make bond-refinancing loans to "drainage districts, levee districts, levee and drainage districts, irrigation and/or similar districts." Sumners supported the Copeland bill.

When Congress established the RFC in 1932, it initially excluded public-entity debtors as borrowers; but section 36 of Copeland's bill, enacted as the Emergency Farm Mortgage Act, enacted on May 12, 1933, empowered the RFC to extend loans to "drainage districts, levee districts, levee and drainage districts, irrigation districts and similar districts . . . organized under the laws of any State or Territory . . . to reduce and refinance its outstanding indebtedness."[151] But here the RFC found itself stymied by "the problem of the dissenting minority," particularly in

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[146] 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, 7, 8 (1936) (hereinafter Sauer, *An Experiment*). As a RFC staff participant and an eyewitness in the agency's municipal refinancing work, Sauer's report is valuable and reliable.

[147] December 6, 1932: Fourth State of the Union Address, Univ. of Va., Miller Center, https://millercenter.org/the-presidency/presidential-speeches/december-6-1932-fourth-state-union-address.

[148] H.R. Doc. No. 522, Herbert Hoover, A Recommendation that Legislation Revising the Bankruptcy Laws Be Passed at this Session of Congress 1-2 (Jan. 11, 1933).

[149] Telegram from Edward Keating to FDR, Feb. 21, 1933, FDR Papers.

[150] Loans for Relief of Drainage Districts, Comm. on Irrig. & Reclam., 71st Cong., 2d Sess., Apr. 17-May 1, 1930 (printed in Loans for Relief of Drainage Districts, Comm. on Irrig. & Reclam., 72d Cong., 1st Sess. 75-279, Jan. 9, 1932).

[151] 48 Stat. 49,308 (1933). Further statutory authorization for the RFC was enacted. 48 Stat.1110, 1269 (1934) codified at 43 U.S.C. § 403.

situations in which the debtor entity required "scaling of principal" in addition to interest-rate reduction.[152]

A witness in the 1932 hearing, B.F. Williams, the Texas State Reclamation Engineer, presented tables showing numerous taxing districts in Texas experiencing financial defaults, and he paraphrased agricultural landowners' statements about the adverse effects of taxing districts' defaults.[153] Sumners was, furthermore, in regular touch with a political advisor, Roy Miller, the former mayor of Corpus Christi, the largest city adjacent the Valley; the widespread defaults were general knowledge in Texas; and insolvent levee districts were already dealing with protective committees for bondholders elsewhere in the state including Sumners's hometown, Dallas.[154]

2. Three Models of Municipal Bankruptcy

The seminal period in the formulation of the municipal bankruptcy chapter of the BA'98 was January 9th through March 4th, 1933, in the lame-duck session of Congress following Hoover's defeat. In in the dialectics of this 54-day period, members of Congress advanced three models of municipal bankruptcy. None passed before Roosevelt took office, so the competition of the models moved into the next Congress, with Sumners taking control in the first month and then authoring a politically acceptable bill that received the President's signature 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 and Representative Thomas D. McKeown of Oklahoma, with Professor Adolph Berle's assistance,[155] 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 individual debtors' provisions for cases seeking composition with creditors and to add a new chapter for private corporations' business reorganization. The House Judiciary Committee's January 14th hearing on La Guardia's bill revealed a disagreement about the role the Interstate Commerce Commission (the ICC) should play in railroad reorganization cases. Immediately Sumners called an executive session and procured agreement for himself to combine and revise all the bills.

Sumners drafted and on January 21st filed the consolidated bill, House Bill 14359, proposing three new chapters for the BA'98. He retained the prior bills' self-description of the proposed relief as "to effect a composition," and he enlarged the definition of "debt," provided broader relief to the debtor, eased the terms for the court to staying lien enforcement and for satisfying secured claims, ensured opportunity for stockholders to participate in a corporate case, added the unfair-discrimination principle to the confirmation standards, and otherwise eased the requirements for confirmation. His committee approved the bill two days later.

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[152] Sauer, *An Experiment* , supra n. 148 at 7, 8.

[153] Loans for Relief of Drainage Districts, Hearing before the House Irrigation and Reclamation Committee (1932) at 197-206.

[154] *Levee Districts Get Tax Rates Approval*, DMN, Sept. 11, 1931, at 8; *RFC Makes Loan to Kaufman Levee District No. 1*, Kaufman Herald, Nov. 1, 1934, at 3. The Dallas levee districts were intended for commercial land development, and the Kaufman County one was for agriculture.

[155] Thomas D. McKeown to FDR, Mar. 20, 1933; Adolph A. Berle, Jr. to FDR, Mar. 30, 1933, all in FDR Papers.

For individual debtors, its Section 74 provided easier-to-confirm compositions. Section 77 essentially reprised La Guardia's railroad bill enabling including the same ICC provisions. This part of the bill proceeded, and received Hoover's signature on March 3, 1933. The middle part of the bill proposed corporate-reorganization relief. In this section 75, in addition to private corporations, Sumners also specifically included "*drainage, irrigation, levee, sewer, and paving improvement districts* established under the laws of the State of their creation," utilizing but slightly revising the description of the covered political subdivisions from Section 36 of the RFC Act. This is the first ever municipal-bankruptcy bill.

House Bill 14359 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. Reorganization terms would be familiar to today's bankruptcy lawyer: a plan could "modify the rights of creditors," generally or by classes, reducing principal amount and interest rate and extending maturities through exchange of new securities for the outstanding bonds, and otherwise providing "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."

Sumners's initial version of municipal bankruptcy evidenced no trepidation about the juridical nature of a city's or political subdivision's properties and a bankruptcy court's jurisdiction over it; it created bankruptcy estates, and a reorganization plan could "deal with all or any part of the property of the debtor," with state law authorization unnecessary.[156] Under H.R. 14359, the court of bankruptcy would have the option, not requirement, to appoint a trustee but must order the debtor to file 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, accepted, and confirmed, the court could dismiss the case or even direct a trustee "to liquidate the estate." As assiduous a constitutionalist as he was, this was not careless drafting on Sumners's part.

Moreover, Sumners's Corporate-Reorganization Model of municipal bankruptcy was creditor friendly in provisions under which the debtor did not enjoy plan exclusivity; a plan with the support of 25 percent of the amount of each creditor class could be proposed 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. Requirements for confirmation included finding that the plan was "equitable and does not discriminate unfairly" and that offer and acceptance of the plan was in good faith, contained "adequate provision" for secured claims, and required payment in cash of administrative expenses. Confirmation of the plan discharged all debts. Meanwhile, all lawsuits, it mandated, "shall be . . . stayed," and lien enforcements enjoined, too, "until the question of the confirmation of a proposed plan of reorganization has been determined." Such a plan would, upon confirmation, become "binding" on all creditors.[157] Sumners's bill also directed that bankruptcy

[156] "[T]he judge shall confirm the plan if satisfied that . . . the debtor, and every other corporation issuing securities or acquiring property under the plan, is authorized by its charter, and 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." H.R. 14359, Ch. 75, sec. (f)(6).

[157] H.R. 13359, sec. 75(b), (d)-(f).

trustees in corporate reorganization cases be individuals, not corporate or banking entities. H.R. 14359 did not require creditor consent in any form as a precondition for a taxing district to commence its case; the two forthcoming models did. Further creditor-centric features included an option for a preliminary appointment of a trustee and an opportunity for creditors to propose a plan. It was also possible, under Sumners's Section 75, for three creditors to file an involuntary petition against the taxing entity, the same as against any other debtor, but if the petition failed, they could suffer penalties as under the existing BA'98 provision for involuntary cases.

But Sumners balanced the creditors' option with debtor-oriented terms. The plan's ability "to modify or alter the rights of creditors generally, or of any class of them, secured or unsecured," was entirely at the discretion of the proponent, subject to supermajority voting and meeting the confirmation standards. The bill contained no standard or concept of "ability to pay" for the debtor entity to confirm a plan; it was subject to the same confirmation standard of majority voting by the creditors, feasibility of the proposed restructure, and the fair and equitable and non-discriminatory tests, just as all other types of corporate debtors were to be. This was Sumners's municipal reorganization proposal (the Corporate-Reorganization Model). As will be seen, the subsequent legislation that finally gained enactment for municipal bankruptcy regime as part of the BA'98 proceeded on a different, clearly more creditor-friendly basis.

In the bill's accompanying report, Sumners matter-of-factly directed "[a]ttention . . . to the fact that, although excluded from the operation of the present bankruptcy statutes," the covered rural and agricultural districts would "come within the scope of [restructuring relief] under this section," a provision that "is new to existing bankruptcy law."[158] He said nothing about cities or towns. Revised versions of the other two parts of H.R. 14359—improved compositions for individuals and reorganization for railroads—did obtain enactment as parts of House Bill 14359, as amended by the Senate, just before Hoover left office six weeks hence, but the Senate amended the bill to delete municipal bankruptcy and all of Sumners's corporate reorganization chapter. Sumner's inclusion of rural and agricultural taxing districts as eligible debtors in House Bill 14359 constituted the initial model for municipal bankruptcy (the Corporate Reorganization Model).

Sumners's proposal marked the initiation of a dialectical process leading to the 1934 enactment of the First MBA. Significant elements of the Corporate-Reorganization Model persisted in the subsequent models proposed by others for municipal bankruptcy and survived for later enactment in the First MBA—but not until the new Congress convened, and then after a great deal more work by the Chairman over sixteen months' time. As the thesis in such process, Sumners's H.R. 14359 quickly provoked two antitheses: municipal bankruptcy qua composition with creditors and as debt-payment moratorium.

The House passed Sumners's H.B. 14359 on January 30th by a 201-43 vote.[159] Meanwhile on January 28th, Hastings filed S. 5551, copying Sumners's bill in proposing a Chapter 75 on the topic of business reorganization for private corporations, retaining Sumners's local governmental districts as debtors, and making only one, irrelevant drafting change. The Senate seemed leery,

[158] H. Rep. 1897, 73d Cong., 2d Sess., at 16.
[159] House Journal, 72nd Cong., 2d Sess., Jan. 30, 1933, at 202.

however, of both H.R. 14359 and S. 5551. On a date shortly after February 10th, the Senate Judiciary Committee published a committee print titled "Amending the Bankruptcy Act, Criticisms and Suggestions Relating to H.R. 14359 and S. 5551," a collection of "letters and briefs" that had been submitted by nearly a hundred organizations and individuals about the pending bills and addressing the concepts of reorganization relief. Some of the highly detailed and lengthy critiques included detailed edits or redrafting of revised bill language, even for the two earlier House bills now subsumed in Sumners's.[160]

A few sophisticated submissions were labeled "anonymous" but may be deduced to have been authored by Donovan, Garrison, or the NBC. Other submissions came from chambers of commerce, district judges and referees in bankruptcy, landlords, lawyers for clients, and bondholders. The great majority of the documents commented on relief for railroads and business corporations. Bankruptcy-treatise writer Harold Remington's letter fulminated against any but the tiniest tweaks to the BA'98.[161] Several of the letters in the committee print were addressed to Sumners, objecting to his overall approach to his corporate reorganization because it barred corporate entities such as Irving Trust Company from service as trustees.

Only five documents in the 140-page pamphlet focused on inclusion of agricultural and local taxing districts as debtors in Sumners's House Bill 14359 and the topic of municipal bankruptcy. Senator Arthur R. Robinson of Indiana submitted a letter he had received that expressed a fear—a constant theme of opponents during these years—that making relief available would come at a high cost to municipal bond investors; "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 run high in the millions."[162]

The second model for municipal bankruptcy, for relief in the form of composition with creditors, was first publicly propounded in the committee print in four letters to various members of Congress from the mayor of insolvent Coral Gables, Florida, Vincent D. Wyman. In his second letter, Wyman informed Senator George W. Norris of Nebraska 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.[163]

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[160] Senate Judiciary Comm., Amending the Bankruptcy Act, Criticisms and Suggestions Relating to H.R. 14359 and S. 5551, 73d Cong., 2d Sess. (hereinafter CRITICISMS & SUGGESTIONS). The pamphlet is undated, but the latest date of the letters and memos reproduced in it was February 10, 1933.

[161] Harold Remington to Sen. George W. Norris, Jan. 19, 1933; to Sen. Peter Norbeck, Jan. 27, 1933; and to Norris, Feb. 1, 1933, reprinted in CRITICISMS & SUGGESTIONS, supra n. 160, at 48-49, 55-56 & 89-90. He sent the same sort of letter to HWS. Remington to HWS, Jan. 1933, HWS Papers. His treatise was HAROLD REMINGTON, REMINGTON ON BANKRUPTCY (1915).

[162] Arthur R. Robinson to Daniel O. Hastings, Feb. 3, 1933, in CRITICISMS & SUGGESTIONS at 118.

[163] Vincent D. Wyman to Sen. George W. Norris, Feb. 1, 1933, reproduced in SENATE, CRITICISMS AND SUGGESTIONS RELATING TO H. R. 14859, AND S. 5551, AMENDING THE BANKRUPTCY ACT, 72d Cong., 2d Sess. 80 (n.d., 1933) (emphasis added) (hereinafter CRITICISMS & SUGGESTIONS) .

In the records of Congress, the only other reference to that House committee meeting is a 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 21st filing of H.B. 14359.[164] Wyman's letter was, of course, correct that Sumners's bill included only the rural-type districts, not cities and towns, as debtors eligible for relief.[165]

Wyman was allied with a bondholders protective committee by common opposition to the holdouts who were preventing his city from effectuating a restructuring agreement. The committee comprised investment banker Edwin H. Barker, investor Prentiss de V. Ross, and publisher of the *Daily Bond Buyer* Sanders Shanks, Jr., and its counsel was prominent bond lawyer David M. Wood of the Wall Street firm Thompson, Wood & Hoffman (TW&H).[166] These same individuals composed the bondholders protective committee for Wilcox's city, West Palm Beach, and other Florida cities. Those men, acting as an organized group (the Florida Bondholders Group or the FBG), had been creatively active in lobbying about the holdout problem. As later disclosed in testimony to the SEC based on confidential information provided by Wood, the FBG had been, for instance, scheming with Wyman since as early as 1931 "to keep [the city'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 Coral Gable's bills.[167]

Florida lawyer Giles J. Patterson authored an April 1st legal opinion criticizing municipal bankruptcy, and his client, United Mutual Life Insurance, forwarded it to Sumners.[168] It contains a passage directly connecting the restructuring negotiations of the FBG with both Coral Gables and West Palm Beach as forging an alliance that then collaborated to formulate the bill that Wilcox later filed. Patterson noted that after Coral Gables reached its restructuring agreement with the FBG, the Florida Legislature passed a bill to authorize the city to perform it, but the holdouts persisted, and the next step for the FBG was "to have Congress enact an amendment to the bankruptcy act." So by early 1933, Wyman and the FBG had enlarged their focus to Congress.

Wyman's letters in the Senate committee print heralded the advent of intensive efforts by the Florida Bondholders Group together with himself and, soon, Wilcox, collaborating to seek a related but different model of municipal bankruptcy. Dated January 31st, Wyman's first letter addressed Florida's Senator Duncan U. Fletcher, responding to objections to "the bill," which was not "the bill which has already passed the House [H.R. 14359]," but rather S. 5551. Wyman

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[164] H.R. 14359 by Sumners, 72d Cong., 2d. Sess. (Jan. 21, 1933); H. Rep. 1897, 72d Cong., 2d Sess. at 1 (Jan. 23, 1933).

[165] Somewhat cryptically, the next sentence of the bill said, "Any corporation which could become a bankrupt under section 4 of this [BA'98] may file such a petition or answer." But the BA'98 did *not* include municipal entities. 11 U.S.C. § 22 (BA' 98, § 4) Supp. VI (1932). The BA'98 only covered "all bodies having any of the powers and privileges of *private* corporations not possessed by individuals or partnerships," which clearly excluded municipal corporations.

[166] Newspaper solicitation by Coral Gables, Florida, Bondholders Protective Committee, MIAMI HERALD 17 (Jan. 30, 1931).

[167] 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); George H. Dession, *Municipal Debt Adjustment and the Supreme Court*, 46 YALE L.J. 204-06 (1936).

[168] Giles J. Patterson to Harry Wade, United Mutual Life Ins. Co., Apr. 1, 1933, House Judiciary Papers, Nat'l Archives.

stated that he did not object to H.R. 14359 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. The municipalities are entitled to the same antinuisance legislation."

Wyman had an alternative proposal. On February 4th, 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 to Norris by his second letter dated February 1st in which he criticized the ground of "an invasion of the authority of the State" as the reason Sumners's H.R. 14359 excluded towns and cities but included levee and agricultural districts. There is "no distinction" to be made between rural districts and cities and towns. "[O]f course," Wyman added, under the second model of 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* "ought to compose its debts on the basis of *ability to pay*."[169]

In his letter to Norris, pointing out the defaults on $600 million of Florida cities' bonds, Wyman added, "I have drafted and inclose" a bill for a composition remedy for an insolvent municipality, and that draft bill is set forth verbatim in the committee print (the Wyman Draft). A lawyer, Wyman called it "my bill," but the sub rosa author was Wood. This draft was the first salvo by the FBG in its significant, extended lobbying campaign in Congress. While Wyman called it a "bill," his legislative proposal is actually styled as "Amendments" to Sumners's bill, H.R. 14359. It does embody a competing model of municipal bankruptcy.

In his third letter dated February 3rd addressed to an ally, Senator Hastings, Wyman expounded at length 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 to subject itself to bankruptcy process, he asserted. Moreover,

> this remedy [composition relief for cities and towns] 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.[170]

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

A comparison of the terms of the Wyman Draft against H.R. 14359 shows its clear derivation from the core terms of corporate reorganization in Sumners's bill beginning with the contents of the petition, requiring admission of "insolvent or unable to meet its debts as they mature," and the plan as the operative instrument of restructuring, including modification or

[169] Vincent D. Wyman to Sen. George W. Norris, Feb. 1, 1933, reproduced in CRITICISMS & SUGGESTIONS.
[170] Vincent D. Wyman to Daniel O. Hastings, Feb. 3, 1933, in CRITICISMS & SUGGESTIONS, at 120-21.

alteration of the claims of creditors generally or any class of them, secured or unsecured, adequate means for execution such as transfer or pledging of certain property to trustees and the issuance of new securities for cash or in exchange for the existing debts in satisfaction of claims, schedules, a claims allowance process, reasonable compensation for professional persons, a certain co-exclusivity for proposal of another plan supported by a quarter of the claims, classification of claims and voting by amounts, secured claim treatment, deleting the no-unfair-discrimination principle but otherwise the same confirmation standards, and binding-effect and discharge-of-debt provisions. Added to those were two new rubrics for "reasonable capacity of the taxing district to pay" and "court shall not . . . assume the control of or interfere with the exercise of the political powers" of the debtor. These points constituted the thesis of Florida-based municipal bankruptcy and the gravamen of its legal theory (the Composition Model), as the legislative process unfolded.

A source who ought to have known, Shanks, credits Fletcher with filing the first-ever municipal-bankruptcy bill. For instance, in a letter two years later Shanks asserted:

> In February, 1933, during the closing days of the last "lame duck" session of Congress, Senator *Fletcher* of Florida introduced an amendment to the federal bankruptcy law under which insolvent municipalities might arrange a special composition of their debts with the consent of holders of a majority of such debts. This bill was introduced at the instance of officials of certain Florida municipalities. At about the same time, and in ignorance of the introduction of this bill, representatives of creditors of Florida and other municipalities [the Florida Bondholders Group] visited Washington with the express purpose of investigating the possibility of securing federal legislation of this very nature. . . .[171]

His memory is incorrect, inaccurately conflating the promulgation of Wyman's Draft with a "visit [to] Washington" by the Florida Bondholders Group that occurred a month later. Moreover, although he was a member of that group and a contemporary actor, Shanks's account is not borne out by the Congressional Record. In the dame duck Congress, Fletcher never introduced either an amendment to H.R. 14359 or S. 5551 or any standalone bill. Rather the record indicates for this period that this Senator submitted to the Senate Judiciary Committee something "intended to be proposed by him," but he acknowledged that it was never filed.[172] Only in the opening weeks of the *new* Congress, the 73rd, or New Deal, Congress did Fletcher file his own municipal bankruptcy bill, S. 403, and later an update of it.[173] These texts were based on the Wyman Draft but Fletcher's two

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[171] Sanders Shanks, Jr., DAILY BOND BUYER (1934). See also George H. Dession, *Municipal Debt Adjustment and the Supreme Court*, 46 YALE L. J. 199, 214 (1936) ("Senator Fletcher introduced a bill prompted by the Coral Gables and other similar Florida municipal situations")

[172] Cong. Rec. 3242 (Feb. 3, 1933). The text of his proposals cannot be found in any of the congressional records, but in debate in the Senate on H.R. 14359 as the Senate amended it, Senator Walter F. George observed that "On the desk is an amendment to this bill, though I do not know that it will be pressed, offered by a . . . Senator . . . proposing to discharge municipal corporations from their private and public responsibility through a Federal bankruptcy court," obviously referring to Fletcher's "amendment." CONG. REC. 5126, Feb. 27, 1933. Two weeks later, in the new Congress, Fletcher stated, "I offered an amendment to have included in it municipal corporations and taxing districts, but the committee did not have time to consider the matter and did not report it favorably." Cong. Rec. 245, Mar. 13, 1933.

[173] S. 403 by Fletcher, 73d Cong., 1st Sess., Mar. 14, 1933; S. 1865 by Fletcher, 73d Cong., 1st Sess., June 8, 1933.

bills lacked features Wilcox had added to his first bill. Fletcher's bills died, and the Senator had no responsibility for the creation of municipal bankruptcy.

On February 13th, the full Senate Judiciary Committee met on H.R. 14359 and, based on "a very general sentiment," voted to delete Sumners's proposed Section 75—thus removing the business-reorganization proposal that included Sumners's first municipal debt-restructuring provisions[174]—and to substitute slightly revised versions of Chapter 74 for individual compositions and a Chapter 76 for railroad reorganization, plus a new Chapter 75 based on soon-to-become Senator Joseph T. Robinson's proposed legislation for farmer bankruptcy, also known as the Frazier-Lemke bill. On February 24th, the Senate approved that rollup in an amended bill filed 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's had passed as part of his original H.R. 14359.

Back on the House floor on March 1st, 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 take the bill, with its objections, or take no bill?[175]

After short debate, the House acquiesced by a 207 to 26 vote, and Hoover signed it on March 3, 1933.[176] It was to be the only bankruptcy bill enacted during Hoover's presidency and also during the entire year 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.[177] The next day was FDR's inauguration.

But before the Second Session of the 72nd Congress adjourned, a third model for municipal bankruptcy—the second antithesis to Sumners's Corporate-Reorganization Model—unexpectedly arrived in both houses. The City of Detroit was experiencing significant financial distress, and Illinois could not solve the problem. On February 29th, at the urging of Mayor Frank Murphy, that city's congressman, Clarence J. McLeod, who was a member of the Judiciary Committee, filed H.R. 14789,[178] and Norris, on the verge of losing his chairmanship of the Senate

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[174] Adolph A. Berle to Margaret Lehand, Mar. 30, 1933, FDR Library ("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.")

[175] Id. at 5355. Cong. Rec. 5360 (Mar. 1, 1933).

[176] Act of Mar. 3, 1933, P.L. 420, 47 Stat. 1467. .

[177] Cong. Rec. 5473-5475 (Mar. 3, 1933). See also U.S. Senate, Trial of Harold Louderback, United States District Judge, Feb. 28, Mar. 9-May 24, 1933.

[178] One scholar argues that "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 (Spr. 1999)

Judiciary Committee as Democrats prepared to take control of that chamber as a result of the election, simultaneously filed his S. 5699. These companion bills proposed to add a Chapter IX to the BA'98, providing eligibility to voluntarily file a petition by municipalities of at least 50,000 population and owing at least $1 million, with the sole measure of relief to be the extension of maturities of funded debt—that is, without any interest-rate reduction and without any scaling of principal—pursuant to the filing of a voluntary petition that required no state approval or creditor consent. Initially the bill gave creditors the right to apply for shortening the period of the moratorium with a possibility of at least some interim payments. Agents of Chicago thus presented to Congress the third and final model for municipal bankruptcy (the Moratorium Model).

3. "Some gentlemen here from Florida"

Norris convened a Senate Judiciary Committee hearing on S.B. 5699 the next day, March 3rd. Murphy testified at length. He was a formidable figure, having served as a state judge and U.S. Attorney and soon would become Governor-General of and High Commissioner to the Philippine Islands, and later elected as Governor of Michigan, and still later under appointments by Roosevelt, Attorney General and Associate Justice of the Supreme Court. Murphy had just participated in organizing an association of the nation's larger cities, 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."[179]

Murphy brought his lawyer, Edward A. Zimmerman, who opined that the Bankruptcy Clause provided ample authority for this new bill. He asserted that moratorium was all the relief that Detroit and other large cities would need to overcome their bond defaults by means of a stay of collection activities by the creditors for two years, extensible to ten. When committee members spoke up during this testimony in favor of widening this bill to cover all municipalities, not just the larger ones, Murphy and Chair Norris quickly acceded. That change in fact was made by a formal bill amendment filed the next day.[180]

The hearing was closed-door but at this point Senator Hastings received and granted a request for admittance by "some gentlemen here from Florida who are interested in this bill." The "gentlemen from Florida" were not residents of that state—they lodged in excellent hotels when

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[179] Illustrating that even municipal bankruptcy law had racial intent and effects, Murphy explained 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."

Frank Murphy testifying, hearing, Sen. Jud. Comm. Hearing, Uniform System of Bankruptcy, Mar. 3, 1933, at 4 (hereinafter *Mar. 3, 1933 Sen. Jud. Comm. hearing*).

[180] Insolvent Municipal Corporations, S. Rep. 1360, 72d Cong., 2d Sess., Mar. 3, 1933 (deleting the size-of-population limitation in S. 5699).

they traveled there from their homes in New York and Connecticut.[181] They were the Florida Bondholder Group: Barker, Shanks, and Rose, the members of the protective committees for bondholders of Coral Gables, West Palm Beach, and other insolvent cities of that state. "[A]ll they knew of [S. 5699] was what they had seen in the newspapers, and they gathered from the newspapers that it would not meet their situation," explained Hastings, so they "would like an opportunity to be heard briefly."

When Hastings added, "One of these gentlemen . . . 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." But the "gentlemen from Florida" had no intention to be brief. The bondholders committeemen also had a long memorandum for the committee 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 significant change in their new bill version was one unfavorable to potential debtors: it upped the acceptance percentage required for confirmation of a plan from two-thirds to three-fourths of the amount of the debt in a class.[182]

Barker seized the stage and glibly promoted the unfiled FBG bill for much longer than ten minutes. 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 FBG bill later. Barker retorted: "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." The hearing ended; the battle was joined; Norris was stymied; Hastings and the Florida Bondholder Group 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 breaths. The two competing models for municipal bankruptcy had to be reproduced as new bills, and the battle resumed, in a new Congress with a new President.

B. Enactment of Sumners's Bill in Roosevelt's First Term

1. House Passage, 1933

The First MBA is the synthesis of the competing models. The archival records demonstrate Sumners' primary responsibility for drafting, filing, and shepherding the successful bill through the political and legislative processes 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 legislative process, eleven months later. And when the *Ashton* ruling came down two years later, the President continued broad support for this and other bankruptcy reforms.[183]

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[181] Untitled item, MIAMI 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.").

[182] Mar. 3, 1933 Sen. Jud. Comm. hearing, supra n. 179 at

[183] In his reply to Congressman McKeown, Roosevelt wrote: "I have always been deeply interested in the improvement of the present costly and cumbersome bankruptcy machinery." FDR to Thomas McKeown, Apr. 3, 1933, FDR Papers. "I do not need to tell you," he replied a couple of weeks later to federal judge John C. Knox of Manhattan,

The story illustrates the breadth and adaptability of the Bankruptcy Clause to authorize new forms of relief for the perpetual problem of insolvency of American institutions, entities, and organizations, private and public.

After Roosevelt's March 4th inauguration, among early filings in the 73rd Congress were bills for municipal bankruptcy. Filed first, on March 9th, was House Bill 1670 by McLeod, reprising his Moratorium Model from ten days earlier, proposing judicially granted moratoria for insolvent municipalities but again excluding the smaller and rural taxing districts. 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 payment moratorium on defaulted bonds for two to ten years.

On Saturday, March 11th, the newly sworn-in Representative, Mark Wilcox, filed the second bill of the 73rd Congress proposing a form of municipal bankruptcy, the Composition Model, in his H.R. 3083. It subsumed key features of the Wyman Draft: (i) eligible debtors: "any municipality or any political subdivision of any State" and other elements of the Gateway Factors; (ii) no bankruptcy estate or court administration of debtor assets: "the court, by order or otherwise, [shall not] 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"; (iii) discharge: "confirmation . . . shall discharge the taxing district from its debts"; and (iv) modification of claims: "based upon the "reasonable capacity of the taxing district to pay."[184] H.R. 3083 preserved the two-thirds minimum for plan voting by classes but added a problematic, creditor-control term, undoubtedly at the behest of the FBG, an option for the court to appoint a "comptroller of the revenues" of the debtor for the payment of indebtedness pending final decree. Other bondholder-favorable provisions of H.R. 3083 added to the Wyman Draft were a prohibition upon change or withdrawal of the petition except on consent of those creditors who had agreed to its filing; separate classification of secured bond claims; and the acceptance by a class of bonds of a restructuring proposal to bind those holders and to survive any dismissal of other classes of claims from the case.[185] Creditor consent to the petition was 51 percent.

After he buttonholed Sumners on the House floor March 14th, Wilcox sent him a "Memorandum re Power of Federal and State Governments to Pass Bankruptcy and Insolvency Laws" dated February 11th prepared by an unidentified author together with a Wood legal opinion dated March 1st, likely the same papers the FBG had provided the Senate committee on March 2nd.[186] Sumners decided not to respond.[187] 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

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"I am utterly opposed to returning to the old methods we used to use in the administration of bankrupt estates." FDR to John C. Knox, Apr. 18, 1933, FDR Lib'y.

[184] So contrary to Skeel and Gillette, Wilcox filed, not the first but the fifth bill ever to propose municipal bankruptcy.

[185] Wilcox was not synchronized with Fletcher because the latter's S. 403 was essentially the old Wyman Draft.

[186] Wilcox to HWS, Mar. 15, 1933, Jud. Comm. Papers, Nat'l Archives.

[187] Id.

documents," enclosing editorials of Florida newspaper and the *Daily Bond Buyer* as "an expression from each side," cities and bondholders, about his bill.[188]

Wilcox disclosed his bill's provenance and handling this way:

> 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.[189]

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 he had been quite loaded with work, including the Louderback impeachment from January through March. He, renowned as the "best lawyer" in Congress, had exhibited no doubts about the constitutionality of municipal bankruptcy when he filed the very first model of it as his H.R. 14359 two months earlier in the prior Congress, but the freshman Wilcox's raising of the issue and receipt of Wood's opinion created an opportunity to review that issue.

Sumners had to decide, moreover, how politically to "handle" Wilcox's bill and what to do with McLeod's, their respective bills representing antipodal models of municipal bankruptcy.[190] Sumners had promised another congressman[191] he would refile in the new Congress his prior business-reorganization bill; but McKeown now filed that, at the urging of the President,[192] as H.R. 5009. Although he supported municipal bankruptcy in his advice to the President, McKeown's bill omitted any provision for insolvent rural taxing districts,[193] so there was no easy opportunity for Sumners to resurrect his Business-Reorganization Model of municipal bankruptcy, had he desired to do so. At any rate, the nonstop maneuvering of the lobbyists Wyman, the FBG, Murphy, and

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[188] Wilcox to HWS, Mar. 17, 1933, Jud. Comm. Papers, Nat'l Archives.

[189] Wilcox to HWS, Mar. 17, 1933, Jud. Comm. Papers, Nat'l Archives, enclosing Thompson, Wood and Hoffman, *Proposed Municipal Refinancing Law Constitutional, Eminent Legal Authority Believes*, DAILY BOND BUYER at ____ (Mar. 16, 1933). 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 that some "gentlemen interested in the securities of municipalities" had "helped me draw" the bill. He specifically named Wood. Hearings 1933 at 35, 38-39..

[190] One author characterizes the moratorium bill as stronger and better for the cities than the composition bill. It is true that the FBG strongly disliked McLeod's proposed moratorium, and since bondholders are always keen for timely payments of interest and principal the notion of an up-to-ten-year moratorium probably filled bondholders with dread. But Wilcox's proposal did specifically authorize—by consent—substantial reductions of principal and interest of the debt which in the short and long runs probably provided greater relief and recovery for the cities and districts.

[191] HWS to Robert Ramspeck, M.C., Mar. 15, 1933, Jud. Comm. Papers, Nat'l Archives. [495]

[192] FDR to Thomas McKeown, Apr. 3, 1933, FDR Papers.

[193] "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 be wise to include quasi-public corporations, such as and paving and improvement, sewer and drainage, irrigation, levee, municipal districts, as well as plan for adjustment for other political subdivisions." McKeown to FDR, Mar.20, 1933, FDR Papers. H. R. 5009 by McKeown, 73d Cong., 1st Sess. (Apr. 15, 1933).

Zimmerman—and now the energetic young legislator Wilcox—had changed the circumstances. Cities and towns now occupied center stage.

With his two decades in congressional and national politics, Sumners first gauged "the urgent need of this legislation" as Wilcox asserted, and he anticipated how the nation's interested parties would line up. He put out word that he wished to hear from both the cities and the bondholders' community, and with the Louderback impeachment trial in the Senate about to begin, on March 22nd he gave Wilcox and Wood ten minutes each to make a presentation to his Judiciary Committee. Then he called a committee hearing for March 30th and April 4th.

Privately Sumners reassessed the constitutionality of the concept of municipal bankruptcy. Opinions were flying. The editorial in March 16th's *The Bond Buyer*, which Wilcox had provided, reproduced yet another legal opinion of Wood, dated the 14th,[194] that concluded the Wilcox bill "would constitute a bankruptcy law" and "Congress possesses power to enact such a law."[195] On March 21st Wood sent a new 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.[196]

Sumners heard to the contrary from other bondholders' lawyers. United Mutual Life Insurance, a small insurer that persistently opposed municipal bankruptcy, sent its Florida lawyer Patterson's April 1st letter that disclosed the existence and activity of the Florida Bondholders Group; the lawyer begrudgingly acknowledged constitutionality of compositions but criticized that holdout creditors "can be forced to accept the same terms or lose their entire vested rights . . . th[at] creditor has remitted a part of his rights for which he has received nothing tangible or intangible."[197] On April 13th 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

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[194] *Proposed Municipal Refinancing Law Constitutional, Eminent Legal Authority Believes*, reproducing opinion letter from Thomson, Wood & Hoffman to Editor, The Daily Bond Buyer, Mar. 14, 1933, DAILY BOND BUYER. The day before, Fletcher had filed into the Congressional Record a copy of it that he had received from "the mayor of Coral Gables."

[195] Id.

[196] 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. U.S.*[196] 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 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. And Wyman creatively argued to Sumners on March 24th 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 FBG was promoting. Wyman to HWS, Apr. __, 1933, Nat'l Archives.

[197] Giles Patterson to Harry Wade, Un. Mut. Life Ins. Co., at 2 (Apr. 1, 1933).

Bankruptcy Clause because it did not mandate distribution of the debtor's property to the creditors.[198]

Still other knowledgeable voices contacted Sumners. On April 13th, Los Angeles law firm O'Melveny, Tuller & Myers pointed to 200 California taxing districts stranded in the middle of refinancings, with take-out funds committed but blocked by holdouts and thus needing the assistance of municipal bankruptcy. The firm requested a clarification in H.R. 3083 to specifically name "unincorporated and special assessment" districts as eligible debtors.[199] 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 [lacking their own officers,] the petition . . . shall be filed by the municipality, county, or political subdivision whose officials [had acted to] issue[] the bonds."[200]

The President understood such financial distress. On March 31st he wrote the Attorney General that "hundreds of chartered municipalities and counties will default on their bonds this year and next." He asked Cummings to examine municipal relief "from the broad constitutional principle,"[201] 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 primarily on his own counsel in Dallas, the law firm of Thompson & Knight, one of whose partners had advised him on politics and assisted him in difficult matters throughout his career.[202] On March 18 and 20, 1933, the firm's Alex F. Weisberg, sent the Congressman negative reviews of McLeod's H.R. 1670; and Sumners asked that he evaluate the Wilcox bill.[203] Weisberg prepared a detailed legal analysis of both bills and illustrated it with his own experience in representing bondholders in municipal debt restructurings in Texas. He expressed a strong preference for Wilcox's bill over McLeod's.

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~~

[198] Clay, Dillon & Vandewater to George B. Gibbons & Company (1st opin.), April 4, 1933, at 2-3, 6 (citing Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902) & Nelson v. Carland, 1 How. 265, 277 (1843)); Clay, Dillon & Vandewater to Sumners, May 15 & 25, 1933, all in HWS Papers.

[199] O'Melveny, Tuller & Myers to HWS, Apr. 13, 1933, at 1. [344, 416]

[200] H.H. Cotton to HWS, Apr. 14, 1933.

[201] FDR to Homer Cummings, Mar. 31, 1933, FDY Lib'y.

[202] For instance, when in 1922 the head of the Dallas chapter tried to strongarm Sumners into joining the Ku Klux Klan by positioning a rival candidate for his seat, Sumners dispatched that firm's partner Will Harris to "handle it."

[203] Alex F. Weisberg to HWS, Mar. 18 & 20, 1933, and HWS to Weisberg, Mar. 28, 1933 (I find the statements made by some of the proponents of the [Wilcox] Bill not are not in line with the information contained in your letter and I am especially appreciative."), and telegram from Weisberg to HWS, Mar. 31, 1933, Jud. Comm. Papers, Nat'l Archives. [428, 429]

~~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. 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.[204]

With a pen, Sumners struck the typed word "constitutionality" in his question about the Contract Clause and inserted "inclusion of" to replace "or including" in the reference to the Bankruptcy Clause, indicating that the question for him was a precise issue of yes, Congress may legislate bankruptcy eligibility for political subdivisions of states.

In this situation, he indicated in the 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 key. The Bankruptcy Clause was amply powerful to undergird bankruptcy relief to a "municipality [that became] insolvent" or a "Bankrupt municipality." Undoubtedly Sumners knew the essence of the legal term "insolvent" as "The condition of a person who is unable to pay [it]s debts" in *Black's Law Dictionary*,[205] and that subsisted within the definition of "bankrupt" in the BA'98: the "inability to pay [it]s debts."[206] Of course, he was aware of the arguments of opponents that "bankruptcy" and "discharge" must require a liquidation, or at least court administration, of a debtor's assets; numerous interested parties had so asserted in hearings and in the Committee Print of the prior Congress. That he never even remarked that argument here shows that he rejected that argument completely.

Sumners never even mentioned the Tenth Amendment in his file memo; by ignoring it, he dismissed it too. We may infer from his concise words that he understood the specific grant to the Congress of power to enact "uniform laws of . . . bankruptcy" meant that a "uniform"—national—debt-restructuring legal process was not reserved to the states. After all, just a few months before, in January, he had filed his H.R. 14359 with inclusion of certain municipalities in business-reorganization relief. He discussed none of the models of municipal bankruptcy, so his constitutional analysis pertained to all of them. Obviously, if the Corporate-Reorganization Model as he had conceived and drafted it to include agricultural and local political subdivisions and in

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[204] HWS, memo to file, n.d., Jud. Comm. Papers, 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 shown. A clean, retyped version is also in the archive. [51-52, 171] 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. judgment, therefore, 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 national legislation enacted under the express power conferred upon Congress to enact uniform bankruptcy laws."

[205] BLACK'S LAW DICTIONARY, *insolvent*, at 983 (3d ed. 1933).

[206] See 11 U.S.C. § 21(5) (Supp. VI, 1925).

H.R. 14359 was constitutional, then so were the lesser forms of relief, composition with creditors as subsequently propounded by the FBG and filed by Wilcox and extension by the Detroit group.

The separate question for Sumners was political feasibility. In March and April in response to his call for input from interested parties, Sumners received a large volume of letters and telegrams from all over the country. There was no clear consensus. Many expressed fear that a bankruptcy option for taxing districts would eliminate or reduce such debtors' access to credit. Individual bondholders uniformly registered alarm about the concept, one writing from a West Palm Beach hotel that the concept "will set back this country one hundred years in progress."[207] A businessman wrote that "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."[208]

A Charleston holder who identified himself as a crippled carpenter "67 years old and incapacitated and have three women in the fifties to support," with his fifty-years savings of $30,000 invested in large cities' bonds, objected. Still another individual holder foretold that the legislation "will cause suffering and hardship to hundreds of thousands of small investors, people entirely dependent upon such obligations for existence."[209] Numerous insurance companies with large municipal bond holdings opposed both the general concept and the specific bills, but especially the moratorium bill. Predicting deleterious effects, United Mutual Insurance reported a vulture investor currently making "attempts to frighten owners" into selling—"18 flat" for a $25,000 Florida school bond—based on the prospect Wilcox's bill would be enacted.[210]

Important interest groups opposed both bills on prudential grounds. "It is difficult to perceive how it [the Wilcox bill] would fail to encourage defaults in many cities which thus far have met their obligations and can continue to do so," opined a U.S. Chamber of Commerce committee,[211] and on behalf of the Bankruptcy Committee of the American Bar Association (the ABA), prominent lawyer Jacob M. Lashley registered "the certainty that such legislation would depress the municipal bond market and seriously injure solvent cities."[212] As Presiding Judge of Jackson County, Missouri, the 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."[213]

On the other hand, Carl H. Chatters of the National Municipal Finance Officers Association registered the approval of his group of 200 city officials, and at least 19 Florida mayors

[207] Robert W. Evans to HWS, Mar. 24, 1933.
[208] Chas. F. Cole, Pres., Va. Mach. & Well Co. to HWS (May 7, 1934).
[209] James J. Guttsamy to Judiciary Committee, June 5, 1933, Nat' Archives. [52]
[210] Harry Wade, United Mut. Life Ins. Co. to HWS, Mar. 30, 1933, enclosing William Morris & Co. to United Mut. Life Ins. Co., Mar. 23, 1933, Nat'l Archives.
[211] H.S. Harriman, President, U.S. Chamber of Commerce to HWS, May 8, 1933, JUD. COMM. PAPERS, NAT'L ARCHIVES.
[212] Telegram from Jacob M. Lashley to HWS, May 8, 1933, at 1, JUD. COMM. PAPERS, NAT'L ARCHIVES.
[213] Harry S. Truman to HWS, May 9, 1933, at 1, JUD. COMM. PAPERS, NAT'L ARCHIVES. [323-24]

and the state's League of Cities sent letters and telegrams of support for the Wilcox bill.[214] Citing a similar example of vulture investing but making the reverse argument to that posed by United Mutual, a California lawyer involved in a bond restructuring voiced support, relating that

> 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.[215]

As practical men of the business world, investment bankers typically favored "the Wilcox bill."

Some correspondents to Sumners focused their opposition on the McLeod bill. One bond house called it "vicious and far-reaching,"[216] and another "the most harmful legislation which could be enacted."[217] Pacific Mutual Life preferred the Wilcox bill because the other would "destroy the credit standing of political subdivisions."[218] Woodmen of the World Insurance protested that the McLeod bill "will vitally impair the assets of insurance companies" and imperil "interests of insured[s]."[219] 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."[220] 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."[221] The American Bankers Association also objected on this ground,[222] and even a few investment banking firms agreed.[223] Asserting that "bankruptcy" required liquidation of assets, Remington "hope[d] this freak bill will be defeated," calling municipal bankruptcy "a monstrosity" in "these latter days of helter skelter bankruptcy amendatory bills."[224]

With a sense of the divergent political winds, Sumners took charge and moved forward with the most politically feasible proposal, the Composition Model; and he successfully legislated it into the BA'98. Anticipating the testimonies to be heard, Sumners conducted his hearing on March

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[214] See, e.g., Carl H. Chatters, Nat'l Municipal Finance Officers Ass'n, to HWS, Mar. 23, 1933; various Florida cities' representatives to HWS, various dates; and E.P. Owen, Florida League of Municipalities, to HWS, Mar. 25, 1933, all in Jud. Comm. Papers, Nat'l Archives [341, 432]

[215] W. C. Felchner to HWS, Apr. 13, 1933, at 1, Jud. Comm. Papers, Nat'l Archives [353-54]

[216] Letter from A.C. Mittendorf, Prudden & Co. to HWS, Mar. 27, 1933.

[217] Letter from W. Wallace Payne, Central Trust Co. to HWS, Mar. 20, 1933.

[218] Telegram from George I. Cochran, Pac. Mut. Ins. Co. to HWS, Mar. 28, 1933.

[219] Telegram from John T. Yates, Woodmen of the World to HWS, Mar. 30, 1933.

[220] A.G. Collins to HWS, Apr. 6, 1933. See also William D. Thompson to House Judiciary Committee, Mar. 1933 ("I hope you gentlemen will tell the Mayor of the city of Detroit to get back home and cut his expenses . . . and make a little effort to collect his taxes.").

[221] Telegram from First Nat'l Trust & Sav. Bank to HWS, Apr. 3, 1933.

[222] Telegram Francis H. Sisson, American Bankers Ass'n, to HWS, Mar. 30, 1933, JUD. COMM. PAPERS, NAT'L ARCHIVES. [657]

[223] Telegram from Cray McFawn & Co. to HWS, Mar. 25, 2023; letter from Howard H. Fitch, Stern Bros. & Co. to HWS, Mar. 18, 1933.

[224] Harold Remington to HWS, Apr. 4, 1933, JUD. COMM. PAPERS, NAT'L ARCHIVES. [387-88]

30th and April 4th.[225] The topic was to be, as he informed a startled Wilcox, who apparently assumed the hearing was to focus solely on his H.R. 3083, "the general proposition" and "nobody's bill."[226] The Chairman permitted Wilcox both to testify and to manage the witnesses for his bill. The young representative chose to testify first, making the key 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.[227] In all, the Floridian testified five times during the two days; his supporting witnesses included Wood, Shanks, Chatters, and Paul V. Betters of the U.S. Conference of Mayors.

The hearing did cover the Moratorium Model as expressed in McLeod's pending H.R. 5009. 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 Chicago and the large cities only require "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 other taxing districts were inserted into the record.[228] It became apparent that the Detroit team had recently attempted to compromise by incorporating Wilcox's bill into an amended bill by McLeod, H.R. 5009, and seeking support for it among the cities.

But the Florida Bondholder Group 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, also fundamentally objectionable to the FBG. Only one Florida city endorsed McLeod's bill.[229] 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, Zimmerman would not concede; but the Moratorium Model, and its up-to-ten-year stay of collection, died at that point in the hearing. The original Corporate-Reorganization Model did surface during the hearing when McKeown stopped Wood in the middle of his testimony to ask why not resurrect Sumners's old H.R. 14353's provisions for municipal bankruptcy as a part of a chapter on corporate reorganization. Wood demurred; and Sumners indicated that he was not interested in revisiting that model.

On April 20th, Cummings submitted to Sumners the Justice Department's legal opinion on the constitutionality of H.R. 3083 requested by the President three weeks earlier. The opinion quoted the Supreme Court's 1902 decision *Hanover National Bank v. Moyses*[230] that the Bankruptcy

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[225] See, e.g., Elmore Whitehurst, Clerk of the Judiciary, to Paul Benners, League of American Municipalities, Mar. 26, 1933, Jud. Comm. Papers, Nat'l Archives [405]

[226] Hearing, Judiciary Comm., H.R., 73r d Conf., 1st Sess., on H.R. 1670, H.R. 3083, H.R. 4311, H.R. 5267 & H.R. 5009 (Mar. 30, Apr. 4, May 4, 9 & 10, 1933) at 33. See also Sumners's handwritten witness list for the hearing, n.d. [Mar. 30, 1933], Nat'l Archives, Legisl. Branch.

[227] Id. at 23.

[228] Id. 107.

[229] W.A. Johnson, City of Tampa, to HWS, Apr. 27, 1933.

[230] 186 U.S. 181 (1902).

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."[231] But the opinion said no more about the role of property and court administration of it as a required element of a law under the clause. Rather, it fixated upon municipal corporations as the only debtor entities a state could authorize to file a bankruptcy petition. The reason or distinction, Cummings asserted, was that municipalities, unlike other taxing districts and political subdivisions, were subject to a proprietary/governmental distinction as found in the states' tort law.[232] Unsurprisingly, Cummings's attempted justification of bankruptcy for cities but not for the other political subdivisions was ignored by both sides in the national conversation.[233]

At that point, Sumners wrote a second memo to file, characterizing the hearing's testimonies of "many important investment banks" preferring the Wilcox bill as "the least of evils," and similarly insurance companies preferring "the principle laid down in the Wilcox bill to th[at] . . . in the McLeod bill." His notes during the hearings included both the "details" of language that drew objections and the "alternatives suggested."[234] But it was Wilcox who moved first with another bill filing during the recess of the hearing until May 4th. The Floridian submitted an elaborated, doubly long, bill, H.R. 5267, on April 26th.

Comparison of Wilcox's two bills indicates significant drafting input by the Florida Bondholder Group, with new terms clearly intended to augment or foster bondholders' control over the municipal debtor. In addition to unilateral plan filing by debtor—"without such approval by creditors"—the new bill provided an option for co-exclusivity,[235] if 20 percent of the holders would accept a creditors-generated plan.[236] Additionally, Wilcox continue from the Wyman Draft the proposal for creditors to take control of the purse strings and the collection of taxes via a temporarily or permanently appointed "comptroller of the revenues" of the debtor. Taking cues from federal equity receivership practice, the bill enabled the bankruptcy court's acquisition of control of at least a portion of the debtor's property and revenue by "exclusive jurisdiction . . . of the property and revenues . . . not necessary for essential governmental purposes . . . [equivalent to] appoint[ing] a receiver in equity." Among the means of execution were now alternatives of "sale of any property," "increase or decrease of existing rates of taxation," 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 under retained jurisdiction.

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[231] Homer S. Cummings to Hatton W. Sumners, Apr. 20, 1933, in 72d Cong., 1st Sess., House of Rep., Judiciary Committee, Hearing To Amend the Bankruptcy Act: Municipal and Private Corporations, Mar. 30, Apr. 4, May 4, 9, 10, 1933 (hereinafter, the 1933 Hearing), at 174, 175, citing Hanover National Bank v. Moyses, 186 U.S. 181 (1902) & In re Klein, rprt'd in Nelson v. Carland, 42 U.S. 265, 281 (1843).

[232] 1933 Hearing, supra n. 231 at 178-80.

[233] In the Senate Judiciary subcommittee hearing in January 1934, Woods carefully refuted it.

[234] HWS, *Memorandum on the Wilcox Bill*, n.d. [c. after the April hearing dates], Nat'l Archives, Legisl. Branch.

[235] I am using a 21st century bankruptcy-practice term to denominate the feature of municipal composition proposals in 1933 whereby a debtor and a percentage of its creditors would share the exclusive right to propose a plan of adjustment. See Novica Petrovski, *The Bankruptcy Code, Section 1121: Exclusivity Reloaded*, 11 AM. BANKR. INST. L. REV. 451, 522-23 (2003) ("In a complex bankruptcy case, the bankruptcy court may decide that it would be in the interest of the bankruptcy proceeding to allow some, but not all of the parties in interest to file a plan during the debtor's exclusivity period.").

[236] (This is a term Sumners had included in his original H.R. 14359.

But H.R. 5267 did enlarge filing eligibility to include the public schools and agricultural and local taxing districts that Sumners obviously cared about, and it lowered the consent-to-file percentage to one-third of bondholders. The second Wilcox bill provided restructuring power for debtors dealing with secured claims, specifically, to bifurcate undersecured claims and to cram down the secured claims. In addition to sale of property subject to liens, or sale free and clear with liens to attach to proceeds, cash out, substitution of obligations, or what today is called the indubitable equivalent but there stated as "such method as will in the opinion of the judge, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection," Wilcox's new bill also provided that "the judge may require objecting [secured] creditors to accept, in lieu of any cash payment under this subdivision, such securities, of any kind, in payment of their interests, claims, or liens as shall, in the opinion of the judge upon the consummation of the plan, represent the fair and equitable shares of such creditors in the property and revenues of the taxing district, available for the payment of its debts."

Wilcox's bill also contained a few improvements from the perspective of the insolvent municipal debtor. First, it added that a plan could contain an operational-restructuring provision for "assumption or rejection of executory contracts [and] unexpired leases . . . unless the same shall have been previously rejected," and outside a plan, court approval of an executory contract rejection required only the "authorized written approval" of the debtor. H.R. 5267 thus gave unilateral contract rejection power to the debtor apart from its utilization in a plan that bondholders approved. Second, the bill authorized plan filings by creditors constituting a quarter of the creditors in a class to be impaired but now permitted unilateral plan filing—"without such approval by creditors"—by only the debtor.

On three days in early May, Sumners completed the committee hearing. The third and fourth days added nothing new, and the last day focused on McKeown's corporate reorganization bill that was separately moving toward enactment in the next year. 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 . . . as an unlawful interference with the rights of the States to administer their own affairs," and arguing a lack of necessity based on a purported trend of reported cases showing federal courts always lenient to cities when adjudicating mandamus petitions.[237] Neither dissuaded the Chairman.

While Representative Warren J. Duffy of Ohio interfaced between Zimmerman and Wilcox seeking compromises, Sumners exercised control and prepared his own bill. With June only a few days away, Betters telegraphed the Chair with his organization's "unqualified support" for a bill to be authored by the Sumners,[238] and several interested parties that had straddled the fence, such as Prudential Insurance Company, now climbed on board with Sumners.[239] Soon the *Dallas*

[237] Clay, Dillon & Vandewater to George B. Gibbons & Company (2d opin.), May 15, 1933, at 1-2. See also David M. Wood to Sumners, Mar. 21, 1933, Jud. Comm. Papers, Nat'l Archives.

[238] Paul V. Betters, U.S. Conf. of Mayors, May 29, 1933, Jud. Comm. Papers, Nat'l Archives [700-02]

[239] Alfred Murrell, Prudential Ins. Co., to Sen. A.H. Vandenburg, June 8, 1933, Jud. Comm. Papers, Nat'l Archives [598, 739] See also *List Endorsing Wilcox Bill*, n.d., Nat'l Archives, Legisl. Branch (2-1/2 page single spaced list of firms, groups, and individuals). [740-02]

Morning News reported, "Mr. Roosevelt favors legislation of this character."[240] In fact, on May 31st, Sumners met alone with the President, and on June 1st 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, briefly jumped in and interrupted Sumners's progress.

Acheson sent Sumners a mimeographed bill containing the Treasury's requested revisions. Sumners had to himself mark up a copy of House Bill 5267 in order to see what changes Treasury wished. They were stylistic. Acheson added an elaborate preamble detailing the economic "emergency" and substituted "public debtor" for "municipal debtor."[241] As a New Deal team player, Sumners filed Acheson's rewrite as H.R. 5885, but his committee split at 8-8 on it, and he moved to reconsider and announced that he would take and amalgamate into his own bill those provisions and address all the objections he had heard in the hearings. Seven days later, Sumners's new H.R. 5950 forth the essential elements of municipal bankruptcy restructuring that survive today: the Gateway Factors,[242] no concept of property of the estate, and full discharge of debts. He reverted to "taxing district" as the defined term for eligible entities, and he kept two additional types of such districts, "sanitary" and "port" districts, suggested by Acheson. Responsive to the vocalized fears of abusive filings, he added an opportunity for five percent of the bondholders to contest the debtor's grounds for relief and move for dismissal. In response to grumblings about the role and bona fides of protective committees of bondholders, he elaborated the disclosure filings required of them (presaging the SEC's later hearings on this topic).

Highly significantly, Sumners added a special provision for a bankruptcy court's preconfirmation stay of creditors' mandamus, litigation, and debt-collection efforts as against related, or at least relevant, and potentially numerous, nondebtor third parties: "any officer or inhabitant" of the debtor. His enlarged stay protected them, requiring only a simple, routine court order, against attempts to collect bonds or other claims:

> in addition to the [existing BA'98] provisions . . . for the staying of pending suits against the 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 . . . .

This was the first, and remains today the only, statutory provision for an injunctive order to protect nondebtor third parties during the pendency of a bankruptcy case of any artificial entity.[243] This legislative innovation signifies that Sumners believed the Bankruptcy Clause to be very broad in scope.

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[240] *Roosevelt to Ask for Mortgage Holiday for Home Owners*, DMN, June 3, 1933, at _____.

[241] Memorandum for Honorable Hatton Sumners, June 2, 1933, Jud. Comm. Papers, Nat'l Archives [753-55]

[242] See text accompanying n. 27 *supra*.

[243] This provision survives in Code section 922 today and is automatic. In Chapter 12 and 13, a co-debtor stay automatically protects individual co-borrowers and co-signers.

Sumners helped municipal debtors in other ways in his new bill. To expedite relief, the Congressman creatively added that when the debtor and 30 percent of its creditors have accepted the plan, the court could enter an interlocutory decree putting the plan temporarily into effect. He revised several of Wilcox's and the FBG's latest pro-creditor terms in H.R. 5265 such as reducing the 75 percent supermajority of all claims required for confirmation back down to two-thirds and deleting Wilcox's lengthy creditor-empowering provisions for appointment of "comptrollers of the property and revenues" of the debtor." Also he removed the provision for post-confirmation enforcement orders to assist creditors in the event of debtor default on a confirmed plan. He added to the confirmation factors a "best interests of creditors" test that benefitted debtors.

Furthermore, Sumners crafted an inventive two-clause provision to facilitate case filings.[244] 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 . . . .[245]

Sumners thus ingeniously nodded to the Tenth Amendment while permitting municipal entities to file bankruptcy petitions before, or in the absence of, a State's specific authorization for such.[246] The debtor in the test case that would go up to the Supreme Court, *Ashton*, would take advantage of this provision.

On the same date, June 7th, the 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, designated in the bill as "taxing districts", 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.[247]

That was his easy answer to the constitutionality question.

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[244] HWS, undated file draft of provision that became enacted as 11 U.S.C. section ____, Nat'l Archives.

[245] H.R. 5885, sec. 80(l).

[246] The debtor in the case that went to the Supreme Court, *Ashton*, benefitted from Sumners's creative provision, filing in the district court before Texas enacted its enabling statute.

[247] Amend the Bankruptcy Act—Municipal Indebtedness, H. Rep. No. 207, 73d Cong., 1st Sess. (June 7, 1933), Jud. Comm. Papers, Nat'l Archives.

The report elaborated the point in terms disclosing an assiduous concern for the insolvent political subdivision's obligations 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.

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 plan confirmation. 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." This passage prefigured the oral argument be would make to the Supreme Court in 1938 on the constitutionality of the Second MBA in the *Bekins* case.[248]

All the Republicans joined by three Democrats of the Committee filed a minority report, complaining that the bill exceeded the ambit of the Bankruptcy Clause as they understood it because it did not require liquidation of a debtor's property and regurgitating the dire forecasts of municipal doom littering the legislative pathway. House Bill 5950 then easily passed the House on June 10th and went to the Senate,[249]—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.[250]

[248] See text accompanying nn. 368-72 infra.

[249] In the Senate, Fletcher filed Sumners's bill a day later as S. 1865, but this bill went nowhere. [need a redline to prove up]

[250] HWS to Alex F. Weisberg, June 6, 1933, Jud. Comm. Papers, Nat'l Archives [799]

While the House victory was gratifying, Sumners's apprehension was understandable.

In midsummer Zimmerman wrote Sumners a gracious thank you for causing the House passage of the "Insolvent Public Debtors legislation (lately known as 'The Sumners Bill, H. R. 5950')."[251] In August, the organization of lawyers that generally represented "stand-pat conservatism,"[252] the ABA, featured the opposing viewpoints at its annual meeting. Barker ably covered all the issues raised during the House hearing and spoke about all the bondholder-friendly features of municipal bankruptcy such as the ability-to-pay test for confirmation.[253] However, afterward he reported to Sumners that the speech did not go over well with the ABA attendees.[254] They preferred the stolid argument presented by St. Paul lawyer Asa G. Briggs that the bill was unconstitutional or unjustified under the Bankruptcy Clause because it did not condition a discharge upon turnover of the debtor's property and that a composition is a private agreement, not a form of bankruptcy. The ABA approvingly published the speech by Briggs, who mailed it to Sumners.[255]

Public discussions of municipal insolvency continued. For instance, the pages of the journal of the referees' association included in the October issue McLeod's essay advocating Sumners's H.R. 5950[256] and an endorsement in the January edition by another supporter, E. Fleetwood Dunstan of Bankers Trust Co., who denied the continuing objection "that it would encourage defaults in many cities."[257] In December, Barker wrote two letters to the President, touting his expertise by virtue of his committee work on bond defaults in 126 municipalities in 23 states aggregating a sixth of all such bonds and half of those in default; but his further offer to meet with Roosevelt was not accepted.

The President was, however, concerned because when Betters wired him on behalf of the National Conference of Mayors on December 5th 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 18th that he "[h]opes that thru [sic] the PWA and the RFC the credit will ease up, but if the situation remains unchanged, other efforts will he made."[258]

Just as 1933 expired, an advisory committee of the New York's statewide Conference of Mayors wrote Roosevelt to disapprove of the "pending federal legislation," Sumners's bill, as "abhorrent to the citizens of New York State municipalities"[259] because it would dry up municipal

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[251] Edward A. Zimmerman to HWS, July 5, 1933, Jud. Comm. Papers, Nat'l Archives

[252] 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.

[253] His speech was published in *Bond Buyer*. Edwin H. Barker, Federal Legislation Needed to Adjust Debts of Insolvent Municipalities, BOND BUYER at 2 (Sept. 2, 1933) (text of Barker's ABA speech).

[254] Edwin Barker to HWS, Sept. 6, 1933, Jud. Comm. Papers, Nat'l Archives [684]

[255] Asa G. Briggs, "Shall Bankruptcy Jurisdiction Be Extended to Include Municipalities and Other Taxable Subdivisions?," reprint from ABA JOURNAL (Nov. 1933), Jud. Comm. Papers, Nat'l Archives (with the envelope used mailing it to HWS).

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

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

[258] File memo, OF 260, Municipalities file, n.d. [c. Dec. 1933], FDR Library.

[259] Advisory Committee, Conf. of Mayors of the State of N.Y. to FDR, Dec. 29, 1933, FDR Papers.

credit. In the New Year, Sumners would encounter not only the prudential and constitutional objections that persisted in the Senate but also continuing efforts by Wilcox to control the legislation and to advance the concept and details of municipal bankruptcy as desired by the Florida Bondholder Group, as well as to grandstand for himself in the process. Specific problems for Sumners were the opposition of the smaller life insurance companies, the last-minute intervention of a tiny trade group, National Drainage, Levee and Irrigation Association (the Irrigation Association), and an onset of new models and ideas about municipal bankruptcy resulting from the President's consultations with people he trusted. The enactment of municipal bankruptcy in the late spring required the personal involvement of Roosevelt.

2. Senate Passage and Presidential Signing, 1934

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 objections on February 8th,[260] and a month later he 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."[261] Indeed that "powerful lobby," the Florida Bondholders Group, remained assiduously involved and continually urged Sumners to press his bill through the Senate. Opposition had also strengthened, and whether influenced by such comments and opinions of Mason and other consultants, or independently, Roosevelt involved himself in the project of municipal bankruptcy and its passage in May.

Sumners knew the necessity for his bill had increased. For instance, in January a Texas lawyer informed him that Burkburnett, an oil boomtown in a neighboring Texas congressional district, had defaulted and its creditors were organizing a committee.[262] On January 19th, Wilcox wrote Sumners that the Senate Judiciary subcommittee would be holding a hearing on the 23rd and rather presumptuously stated, "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 sub-committee with the importance of this legislation and of the necessity for reporting the Bill out at the earliest possible date."[263] Barker followed up with Sumners the next day, suggesting that he, Barker, testify in the Senate hearing—under friendly questioning by Sumners.[264]

The hearing commenced on January 24th before an unfriendly Senate subcommittee chaired by Senator Frederick Van Nuys of Indiana. Wilcox testified first, at length, followed by Sumners, Wood, and others. Senator Patrick McCarran of Nevada put Wilcox on his heels when Wilcox mentioned "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.

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[260] J. Rupert Mason, San Francisco to M. McIntire, February 8, 1934, FDR Lib'y.
[261] J. Rupert Mason, San Francisco to M. McIntire, Mar. 16, 1934, FDR Lib'y.
[262] Jordan Morrow to HWS, Jan. 29, 1934, Jud. Comm. Papers, Nat'l Archives [697]
[263] J. Wilcox to HWS, Jan. 19, 1934, Jud. Comm. Papers, Nat'l Archives [691]
[264] Edwin H. Barker to HWS, Jan. 20, 1934, Jud. Comm. Papers, Nat'l Archives [304].

. . . McCarran: Very well; I thought perhaps you did.[265]

In addition to forcing Wilcox to make an ill-advised concession that the Composition Model was not really "bankruptcy," McCarran's tough questioning made several more points:

> Senator 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?
>
> Representative 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.
>
> . . . McCarran. In the delay?

Now awake, Wilcox replied with the details of restructuring to be available for both the unpayable debt and for debtor operations:

> 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. . . .

McCarran asked a loaded question:

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

[265] Hearing, Subcomm., Judiciary Comm., Senate, 73d Cong., 2d Sess., S. 1868 and H.R. 5950, Jan. 24 & 30, 1934, at 18.

Wilcox weakly replied, "each case to 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.[266]

Sumners interjected here to make the most fundamental point: "Under this bill the small minority could not prevent . . . a settlement of two-thirds or three-fourths of the creditors with a debtor."[267] Wood then testified, making Wilcox's point more articulately, and he dressed the proposal in patriotic terms: "It is nothing more nor less than the application of the principles of democracy to public indebtedness."[268]

The Senate subcommittee members disfavored H.R. 5950, acknowledging that bondholders had lobbied them. Sensing the hearing was not going well, Sumners chose to testify again, in his folksiest manner, trying to focus the Senators on the holdout problem. He invoked his experience in private law practice representing wholesalers who assembled when a customer became financially distressed and reached 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."

> 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.[269]

McCarran retorted: "There is nothing to prevent that now." Sumners answered: "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."[270] The chair thanked him for his "very understandable language."

A surprise at the end of the second day was the appearance of a member of the NBC—not on behalf of that august advisory group, which never took a position on municipal bankruptcy, but rather as a lobbyist hired by the American Bankers Association to oppose Summers's H.R. 5950. He was James A. McLaughlin, Harvard University law professor, and he exuded a deep

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[266] Id. at 18-19.

[267] Id. at 24.

[268] Id. at 45. But query: is voting of creditors absolutely necessary? In two additional models of municipal bankruptcy advanced in the spring of 1934 and the spring of 1936, one advisor to FDR proposed negative notice in lieu of voting, see text accompanying nn. 282-84 infra, and even more radically, in 1935 Representative John E. Miller in his H.R. 6982 proposed that a municipal debtor could confirm a plan with no voting but only the determination of the court that the other standards had been met. See text accompanying nn. 319-26 infra.

[269] Id. at 58-59.

[270] Sumners also made a point L&E scholars are revisiting today: where "a municipal[ity] . . . owes more money than it can pay," the taxpayer has the privilege of continuing to live there or move somewhere else. For every fellow who moves over the bridge to another town, the chance of collecting the money is that much less. That is just horse sense." Id. at 59.

understanding of insolvency and bankruptcy 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. But when Summers asked, McLaughlin acknowledged that no constitutional problem infected the concept of municipal bankruptcy, and he revealed his real preference: each state's government should create an agency to serve as gatekeeper or manager of the insolvent political subdivision before filing a petition.[271]

Unsurprisingly, many observers were pessimistic about H.R. 5950 as a result of the Senate hearing,[272] and opposition even seemed to be building. On February 10th, a manufacturers' association wrote the President opposing municipal bankruptcy.[273] United Mutual Life of Indianapolis submitted a memo to FDR that included the constitutional objection based on property.[274] Roosevelt spoke publicly in early February in ambiguous terms. Some misconstrued his remark as characterizing the bill as complete repudiation of debt in bankruptcy, and Barker wrote Roosevelt to correct:

> my familiarity with the Sumners Bill convinces me that its provisions make possible an orderly process of readjustment of debts of municipalities, whereby the credit can be so strengthened as to warrant a material reduction in interest charges. The reduction accomplished is an actually earned one and when consented to by holders of a large majority in amount of holders of the debts affected, can in no sense be construed as a repudiation.[275]

And FDR continued to reach out to people in whom he had confidence, and those consultations yielded several more models for municipal bankruptcy in the month of March.

The President contacted the well known Mayor of Pawtucket, Thomas McCoy, who responded on March 11th with a creative out-of-court alternative: in lieu of bankruptcy, that the RFC loan the insolvent municipality the amount of 25 percent of its fixed debt charges, repayable with interest over twenty years. The debtor would report its finances quarterly to the federal government that would hold approval rights on the budget and any 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).[276] But Jesse Jones and the RFC were opposed to direct lending to municipalities.

Despite the Senate Judiciary Committee's approval in early March, Roosevelt believed that some modifications to H.R. 5069 would be necessary to obtain full Senate approval, specifically a change to increase 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

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[271] Id. Cf. the City of Detroit case in which Michigan government provided an emergency manager before its filing in bankruptcy court.

[272] Ralph West Robey, *Report that Sumner Municipal Bankruptcy Bill is Again to Come Before Congress Raises Hopes of Constructive Action in this Field*, WASH. POST 18 (Jan. 31, 1934) (a bill is "stalled in the Senate").

[273] Otto H. Berndt, Merchants & Mfrs. Assn. to FDR, Feb. 10, 1934.

[274] Harry V. Wade to FDR, Feb. 14, 1934, FDR Lib'y.

[275] Edwin H. Barker to Louis McH. Howe, Feb. 20, 1934.

[276] Thomas McCoy to FDR, Mar. 11, 1934, FDR Lib'y.

got[ten] out of the picture," FDR on March 9th 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, "after which you [Bruere] can take it up with the insurance company people [and then] get Sumners and Senators Robinson and Ashurst to work it up and put it through."[277] A week later, Bruere advised that "a redraft of the measure has been made by Major [Fred. N.] Oliver, and submitted this morning to the Senator [Ashworth] and Judge [Sumners]."[278]

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 percent creditor approval needed for filing a petition to 51 percent and the minimum for confirmation from two-thirds to 75 percent of the amount of all claims, while retaining the two-thirds rule for each class (the Bruere Modification). Sumners and Ashurst signaled that they could support Bruere Modification if "those who are in opposition" would actually climb on board; Bruere and Oliver were indeed working for that with the insurance companies.[279] At the same time, Bruere reminded FDR that the opposition remained alive by forwarding yet another letter from Northwestern Mutual asserting the constitutional objection regarding a municipal debtor's properties.[280] Satisfied with the Bruere Modification, FDR immediately met with Sumners and Ashurst about it. On April 12th, Sumners wrote Bruere, "You have done excellent service in helping to get the difficulties ironed out, and to quiet the apprehensions of opponents."[281]

Then on March 26th, a former president of the Association of the Bar of the City of New York, C.C. Burlingham, submitted yet another model to the White House, a radical broadening of municipal bankruptcy that he said "would not cost the government anything."[282] The lawyer began with 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," and he argued for an enlargement of H.R. 5950 to include "*all* debtors, viz. municipalities, states, private corporations, including banks, insurance companies, railroads, building and loan associations, industrial corporations, etc."[283] The author 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

[277] H.M. Kanee (on behalf of FDR) to Marvin McIntyre, Mar. 9, 1934, FDR Papers (requesting reach-out to Bruere).
[278] Henry Bruere to FDR, Mar. 16, 1934, FDR Lib'y. Oliver was Maj. Fred. N. Oliver, a bank association leader.
[279] Id.
[280] Northwestern Mutual Life Ins. Co. to Fred. N. Oliver, Mar. 13, 1934, FDR Papers.
[281] HWS to Henry Bruere, Apr. 12, 1934, FDR Lib'y.
[282] Based on the dates of surrounding documents in the archival folder, the President received this memo in April.
[283] Memorandum to the President, n.d. and no author, at _____, FDR Papers.

> creditors. . . . The procedure of assuming consent unless written objection has been made has been expressly approved by the U.S. Supreme Court . . . .[284]

Unknown is whether Sumners and Ashurst saw this proposal, and it of course did not proceed; but the submission further demonstrates innovative exploration of the power of the Bankruptcy Clause to help the debtors restructure more easily, here by using the device of negative notice (the Negative Notice Model).

The observation of Professor McLaughlin in January's Senate subcommittee hearing that municipal bankruptcy seemed obsessively focused on bondholders and ignored other creditors received some validation when on May 1, 1934, Chicago's Local No. 2, American Federation of Teachers, submitted to Roosevelt the legal memorandum of its attorney, John Potts Barnes, analyzing "possible unfavorable effects [of H.R. 5950] upon the status of the members" of the union "in relations to the various . . . school districts" and the unpaid salaries and continuation of contracts with teachers. 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 a breach-of-contract claim for their damages.[285] The lawyer observed correctly that executory-contract rejection power available to municipal debtors under this bill could powerfully restructure the relations between a school district or other public debtor and its teachers or employees.

Sumners's achievement in municipal bankruptcy was to overcome the constitutional objection about debtor retention of its property while forging politically acceptable terms and satisfying all the political objections. Sumners continued to seek to persuade municipal bond firms on Wall Street, representatives of important monied interests, and other financial officials throughout the first five months of 1934. One experienced Wall Street banker who Sumners worked with behind the scenes during those months was Josiah Hewitt,[286] and Wood, the Wall Street lawyer, liaised between Sumners and involved Senators.[287] For example, to sell the Bruere Modification to B.A. McKinney, the President of the Federal Reserve Bank of Dallas, Sumners, who had always sought to lower the requirements for debtor success in restructuring, on March 28th slightly dissembled 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."[288]

Then as Senate passage drew near, another obstacle materialized: Harold L. Ickes, a trusted Roosevelt advisor heading the Public Works Administration, telephoned Sumners and in a letter of May 12, 1934, enclosed yet another draft of a bill, only the first page of which survives in the archive, and stating that "I hope very much indeed that you will see fit to introduce [it]. . . and that

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[284] Id. at 3 (citing Gilfillan vs. Union Canal Co., 109 U.S. 401).

[285] Grover C. Ramsey to Marvin McIntire, May 1, 1934, enclosing Opinion of Attorney John Potts Barnes; Opinion at 2, 3.

[286] Josiah M. Hewitt to HWS, June 1, 1934, and HWS to Hewitt, June 6, 1934, Nat'l Archives.

[287] David. M. Wood to HWS, Apr. 19, 1934, Legisl. Branch, Nat'l Archives.

[288] HWS to B.A. McKinney, President of Dallas Federal Reserve Bank, Mar. 28, 1933, HWS Papers. Also on May 7, 1934, E.P. Greenwood, President of Great Southern Life Insurance, wrote 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." E.P. Greenwood to Sumners, May 7, 1934, Jud. Comm. Papers, Nat'l Archives.

it may be enacted into law at this session of the Congress."[289] The bill purported to exempt debts to the federal government from the discharge under a municipal readjustment plan. Sumners rebuffed Ickes's intervention:

> if that which is known as the municipal bankruptcy act were 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.[290]

Nothing came of Ickes's proposal.

By telegram, May 2, 1934, Sumners inquired of Barker: "Are you and associates [i.e., the FBG] satisfied with the Senate amendment to the Municipal Bankruptcy Bill" and advising that he would just acquiesce and oppose a conference with the Senate "if Senate amendments are workable."[291] But a conference was necessary, and on May 11th,[292] it resulted in a final legislative compromise—the last before enactment—because the Irrigation Association had, at the eleventh hour, roused itself. It reported that the 51 percent creditor-consent threshold for filing a petition was not feasible for its members because the individual holders of such districts' bonds were too difficult to locate. Congressman John E. Miller of Arkansas, a Judiciary Committee member Sumners highly trusted,[293] carried the water for the association. In conference committee, according to his handwritten notes, Sumners forged a compromise: for the "drainage, irrigation, levee and reclamation [districts,] go 30[% minimum creditor consent for petition filing] and 66 2/3[% for confirmation;] all other [debtors] 51[%] and 75[%]."[294] As so amended, the bill easily passed both houses,[295] and on May 24, 1934,[296] in the New Deal's second year, President Roosevelt signed the First MBA.[297]

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[289] Harold L. Ickes to HWS, May 12, 1933, Jud. Comm. Papers, Nat'l Archives [198-99]

[290] HWS to Harold L. Ickes, May 12, 1933, Jud. Comm. Papers, Nat'l Archives [197]. Ickes replied that he would send his agency's counsel E.M. Foley "to appear before your committee and explain my views." Ickes to HWS, May 17, 1934, Jud. Comm. Papers, Nat'l Archives [196]

[291] Hatton W. Sumners to Edwin H. Barker, May 2, 1934, Jud. Comm. Papers, Nat'l Archives.

[292] Notes to file by HWS, May 11, 1934.

[293] HWS to J. Hugh Wharton, June 16, 1934 (Miller "has been most valuable in connection with the Municipal Bankruptcy Act"), Nat'l Archives.

[294] HWS, "Conference H.R. 5950" (his handwritten notes of conference committee meeting attended by Sens. Neely, McCarran, & Austin, and Reps. Sumners, Montague, McKeown, & Perkins; "also Rep. Wilcox"), May 11, 1934 Jud. Comm. Papers, Nat'l Archives.

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[296] Municipal Bankruptcy Act of May 24, 1934, ch. 345, 48 Stat. 798 (§§ 78, 79 and 80 of the Bankruptcy Act of 1898; 11 U.S.C. §§ 301, 302, 303).

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3. Test Case and Legislative Amendments, 1935-1936

The First MBA was effective upon its signing, May 24th. Within two months, the first political subdivision in the Valley filed a Chapter IX petition. Historian Alicia Dewey[298] found in archived case files a veritable parade of insolvent irrigation districts and municipalities in the Valley invoking the new Chapter IX in the South Texas federal court:

> At least five [irrigation] districts from Cameron County became insolvent . . ., six from Hidalgo County, and two from Willacy County. Additionally, eight of the Hidalgo County Road Districts . . . became unable to pay their debts and 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 . . . .[299]

Altogether, Dewey found 38 municipal bankruptcy filings in the Valley beginning in 1934 and on through the decade.[300] My research found additional Chapter IX filings in the Valley between 1934 and 1946 by the Cities of Corpus Christi[301] and Benavides,[302] plus elsewhere in Texas the Cities of Belton,[303] Eastland,[304] Ennis[305], and Cisco, and the Kaufman County Levee Improvement District No. 4.[306] However, considered nationally, there was no massive rush to bankruptcy court by insolvent taxing districts, contrary to the dire predictions of opponents.

Without any state approval, on July 17, 1934, the first of those Valley irrigation districts, the Cameron County Water Improvement District No. One ("CCWID") filed in Judge Kennerly's court the petition that became the test case for the First MBA, Case No. 520 on the bankruptcy docket. Filed also was the plan and the RFC's prepetition commitment for a loan to pay off the district's six-percent bonds at 49.8 cents on the dollar. The district recited its creation in 1914 as a "municipality and political subdivision"[307] covering 43,000 acres. By 1919 it had issued 5 percent bonds, with a filing-date balance due of $802,000, to finance its civil improvements, but the "general financial depression" had so reduced the price for its farmers' fruits and vegetables

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[299] 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 (Ph.D. dissertation, SMU, Dept. of History, Aug. 1, 2007).

[300] *Id.* at ch. 3, 135, n.10.

[301] L Rev art by RFC guy

[302] 28 J. FINANCE 1339–1351 (Dec. 1973)

[303] Supreme Forest Woodmen Circle v City of Belton, 100 F.2d 655 (5th Cir. 1938).

[304] *City of Eastland Seeks Bankruptcy*, DALLAS MORNING NEWS 7 (Oct. 22, 1938).

[305] Women's Catholic Order of Foresters v City of Ennis 116 F.2d 270 (5th Cir. 1940).

[306] Kaufman County Levee Imp. Dist. No. 4 v. Mitchell, 116 F.2d 959 (5th Cir. 1941).

[307] need the Texas session law creating the district

that the growers could not recover their costs and pay their taxes to the district.[308] 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."[309] 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 percent of the bondholders. 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 papers; the collaboration of the lawyers for the key parties later became clear.

On August 22nd, 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 and approved the filing as in good faith, setting a next hearing for October 1st in that city. Chapter IX permitted creditors holding five percent of the claims to oppose the petition, and on that second hearing date, that judge's brother, Palmer Hutcheson, a partner of the firm Baker, Botts, Andrews & Wharton, Houstonian C.L. Ashton, and other counsel representing seven other bondholders, 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." It noted also that the Texas Legislature had not authorized the debtor to access the First MBA, and it challenged the RFC loan as ultra vires.

Judge Kennerly handled the case thenceforth and, considering the willingness he had demonstrated to assist consenting parties in multiple improvised mandamus cases in his court to implement bond restructurings over the dissent of holdouts, the judge surprisingly proved unreceptive to CCWID's petition. Although there was no requirement in Chapter IX or the national bankruptcy rules[310] for a debtor to aver and prove such, Judge 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."[311] He rejected the Act's assertion of national emergency.[312] His December 1st decision dismissing the petition appeared in the

[308] First Amended Petition, in Transcript of C.L. Ashton et al., Petitioners, vs. Cameron County Water Improvement District No. One, No. 859, U.S. Supreme Court (hereinafter *Ashton Transcript*) at 5.

[309] Id. at 59.

[310] Pertinent *General Orders in Bankruptcy*, setting forth 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 Sup. Ct., General Orders In Bankruptcy, Nov. 28, 1898, and amended May 31, 1932.

[311] Id. at 120.

[312] In re Cameron County Water Improvement Dist. No. 1, 9 F.Supp. 103, 106-07 (S.D. Tex. 1934).

Federal Supplement,[313] and soon decisions from district courts in California and Florida appeared, but all of those sustained the constitutionality of the First MBA.[314]

Throughout the legislative period, opponents had predicted that the First MBA would be vigorously appealed by creditors,[315] but it was a debtor, CCWID, that fulfilled the prophesy by filing notice of appeal six months later, on May 31, 1935. The Justice Department was not a party to the constitutionality 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 three years into the future.[316] The debtor's appeal found a receptive audience at the Fifth Circuit. After briefing and oral arguments on November 4, 1935, with a seasoned Washington lawyer, Vincent M. Miles, joining Lewis in representing the district, and Palmer Hutcheson the appellees, the Fifth Circuit reversed and held the new act within the ambit of the Bankruptcy Clause and otherwise valid. The decision was published.[317]

In the fourteen months between Judge Kennerly's decision and its reversal by the Fifth Circuit, several legislative developments occurred. First, the Texas Legislature enacted a statute on April 27, 1935, that specifically authorized the State's political subdivisions to file Chapter IX cases in federal courts.[318] The Court of Appeals took this state statute into account in its decision and the Supreme Court did mention it six months later. Second, in Congress two bills resulted in amendments to the First MBA, effective prior to the Supreme Court's reversal, albeit only by six weeks. While they did not play a visible role in the Supreme Court's decision, the two acts are germane to understanding the nature of municipal bankruptcy, then and now.

This untold story begins March 13, 1935 when Senate Majority Leader Joseph T. Robinson of Arkansas filed S. 2471, and twelve days later Congressman John E. Miller of the same state filed its companion, H.R. 6982, the bill that succeeded. Passage took more than a year but was never really contested. It illustrates that the constitutionality of municipal bankruptcy relief, broad in scope, available under the Bankruptcy Clause was never an issue for the House or the Senate in the thirties. Scott, as head of the Irrigation Association, procured the bill filings, and he and Miller were the main witnesses at Sumners's Judiciary Committee hearing on April 2-3, 1935. Scott who had involved himself in the Senate proceedings just before passage of the First MBA a year earlier, testified to "754 applications [by drainage and irrigation districts] filed with the R.F.C. 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."[319]

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[313] In re Cameron County Water Improvement Dist. No. 1, 9 F. Supp. 103 (1934)

[314] In re East Contra Costa Irrigation Dist., 10 F.Supp. 175 (N.D. Cal. 1934); In re Imperial Irrigation Dist., 10 Fed. Supp. 832 (S.D. Cal. 1935); In re City of Dunedin (S. D. Fla., 1935), CCH BANKRUPTCY LAW SERVICE, Decisions Volume paragraph 3512 at 1540.

[315] Edwin H. Barker, *Federal Legislation Needed to Adjust Debts of Insolvent Municipalities*, BOND BUYER 2 (Sept. ___, 1933) (text of ABA speech); Geo Bangs pamphlet, Jud. Comm. Papers, Nat'l Archives.

[316] See Daniel, Cash In, supra n. 104, at 406-07, 416.

[317] Report of hearing

[318] Act of April 27, 1935, TEX. GEN. LAWS, ch. 107.

[319]

But very few rural districts had received the necessary relief in Chapter IX to effectuate the RFC's commitments. The reason, per Scott, was once again the problem he had voiced the year earlier that resulted in the creation of the special, lower percentage approval and creditor-voting rules in order for such rural districts to file a case and confirm a plan—30 percent approval to file a petition, rather than 51 percent, and 66-2/3 rather than 75 percent of all claims voting to confirm a plan. Even that 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 . . . .[320]

He therefore "c[a]me to the Judiciary Committee today hoping that the Committee will liberalize the requirements of drainage, levee, irrigation and reclamation districts desiring to go into bankruptcy for the sole purpose of getting the benefit of the loans already approved by the R.F.C."[321]

After pointing out that the First MBA would expire in a year, Scott moved to his real point: "We feel that drainage, levee, irrigation, and reclamation districts should be permitted to file petition for bankruptcy proceedings *the same as individuals*."[322] Moreover, under questioning by Sumners, Scott acknowledged that he really "want[ed] the matter [plan confirmation] determined *without* the consent of 66-2/3," that is, "on the Judgment of the court, *without any percent*."[323] 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."

In short, so long as a taxing district of any kind covered by the First MBA held a RFC loan commitment, it could file a case and proceed to plan confirmation without any balloting or creditor consents; the court would rule on the adequacy of the RFC's funding, and the other confirmation standards in the First MBA remained unchanged and applicable (the No-Creditor-Consent-Needed Model).

An unpublished hearing conducted by Sumners discloses the full consideration given by the House Judiciary Committee to the No-Creditor-Consent-Needed Model. Sumners asked Scott about the deletion of voting on a plan: "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

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[320] Hearing at 4
[321] Id. at 5-6.
[322] Id. at 12-13 (emphasis added).
[323] Id. at 13 (emphasis added).

jurisdiction by the court or the determination by the court? Scott: "That is correct." Representative Lloyd got specific: "Do you think it is constitutional?" "Yes, sir," was Scott's answer. 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." Michener jumped in: "You change here the entire theory of our new bankruptcy law [the First MBA]. Sumners made a deal. "If the Committee would agree to relax with reference to jurisdictional requirements, then could you get along with requiring the consent of, say, the majority of the bondholders? Scott said yes: "I would state it this way, Congressman: Eliminate the 30 and require the majority. The main thing is to give us the power."

Meanwhile the Senate Judiciary Committee reported Robinson's S. 2471 with an amendment adding as debtors "mutual nonprofit companies and incorporated water users' associations"—*private*, not governmental, entities, and the Senate quickly approved referral of amended S. 2471 to the House on May 3, 1935. In the new year, the House Judiciary Committee amended the bill deleting both the addition of two types of private debtors but reducing the required approval majority to 51 percent for the irrigation and rural districts; and it authorized unilateral filing decisions by such districts.[324] Miller's and Scott's proposal to eliminate any creditor voting for plan acceptance had been too large a step in the political environment. But both houses' acceptance of the idea of fully voluntary petitions by at least certain types of municipal districts was a significant step of debtor empowerment in the evolution of the law.[325] Combined with the absence of any requirement for municipal taxing districts to surrender or make available their assets to a federal bankruptcy court for administration, the inclusion of the one part of the No-Creditor-Consent-Necessary Model marks the fullest measure of exercising the power of Congress under the Bankruptcy Clause for the relief to an insolvent municipal debtor. On February 25, 1936, the Senate Judiciary Committee approved. On April 7, 1936, the House agreed with a final tweak by the Senate and passed the Miller bill and it became law April 11.[326]

The second of the two additional enactments before *Ashton* came down is H.R. 10490 filed by Wilcox on January 22, 1936. The year prior the Governor of the Federal Reserve Bank of Dallas had predicted to Sumners that "measures of that kind are so often extended and become more or less permanent."[327] But the impetus for extension in early 1936 was a real need; a number of cases filed under Chapter IX were in midstream. With the First MBA's two-year expiry fast approaching, Wilcox's bill proposed to extend its effectiveness to January 1, 1945. The House committee shortened that to 1940. After Wilcox advised the House that the ABA had changed its position on municipal bankruptcy and now supported its extension, both houses passed the bill easily and the President's signed on April 10th.[328] However, the new enactment was not in the record on appeal, and the *Ashton* Court either ignored it or was ignorant of it. Yet this second bill is significant because by extending the expiration date, Congress, in essence, re-enacted Chapter IX and

[324] H.R. Rep. No. 1499, 74t h Cong., 1st Sess., July 10, 1935.

[325] After *Ashton* invalidated the First MBA, this provision for unilateral decision by a debtor to file a petition did not return to municipal bankruptcy law until the 1976 amendments and today is found in Code section 9____(___)(___).

[326] 1936 Cong. Rec. 5070 (Apr. 7, 1936). P.L. 74-515; 49 Stat. 1203; 74 H.R. 6982

[327] B.A. McKinney (Pres., Dallas Fed. Res. Bank) to HWS, Mar. 24, 1934, Legisl. Branch, Nat'l Archives.

[328] H.R. 10490, 75th Cong., 2d Sess. (Jan. 22, 1936); H. Rep. 2023, EXTEND MUNICIPAL BANKRUPTCY ACT, id. (Feb. 19, 1936); 1936 Cong Rec. 2528 (Feb. 20, 1936); 49 Stat. 1198 (Apr. 10, 1936).

reaffirmed its decision to make available restructuring relief for municipal debtors by a statutory remedy under the Bankruptcy Clause—and did so only moments before the High Court ruled.

C. The 1936 Ashton Unconstitutionality Holding

In New Orleans the Court of Appeals entered its reversal of Kennerly's order of dismissal in the CCWCID case on March 3, 1936, holding that Chapter IX preserved the essential sovereignty of the state and that no advance consent by the State of Texas was necessary.[329] In seeking certiorari, the seven dissident bondholders argued that both the First MBA and the Texas Legislature's statute authorizing districts to file such cases were unconstitutional. The Court granted cert on April 13, 1936, and set argument for only two weeks later. For the brief, a seasoned Washington lawyer, Vincent M. Miles, joined Lewis, the debtor's South Texas counsel; and David Wood switched sides and presented oral argument for CCWID.

On May 25, 1936, Justice Stanley McReynolds authored the reversal decision, joined by the others of the "Four Horsemen"[330] and the swing justice, Oran Roberts. The majority discounted the severity of the financial crisis of CCWID and held that the independence and sovereignty of the State of Texas within the structure of the federal union—without mentioning the Tenth Amendment—was trammeled by Chapter IX's provisions to adjust bonds that had been issued on the guarantee of a state's political units that to use their taxes to repay. The Court held the First MBA unconstitutional.[331]

The High Court's recitation of the issue on appeal signaled the 5-4 result: the First MBA was intended "to authorize a federal court to require 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,"[332] reflecting the majority's embrace of the traditional conception of "bankruptcy" as requiring such a turnover of a debtor's property to a bankruptcy estate or into the custody of the bankruptcy court. Of course, the act did *not* authorize repudiation[333] of debts, but rather required their acknowledgment and simply effectuated a compromise to which the creditor-group's supermajority consented.

The Court found that CCWCID was a "political division[] of the State, with power to sue and be sued, issue bonds, levy and collect taxes." I conceded that the act was within the scope of the Bankruptcy Clause: "The enactment is adequately related to the general 'subject of bankruptcies'."[334] So Sumners had been correct that municipal bankruptcy was permissible at least solely as a matter of the Bankruptcy Clause. The Court declined to consider the petitioners' Fifth

[329] Cameron County Water Improvement Dist. No. 1 v. Ashton, 81 F.2d 905, 908 (5th Cir. 1936).
[330]
[331] *Id.* at 543.
[332] Ashton, 298 U.S. 527 (1936).
[333] Black's Law Dictionary
[334] Id. at 527.

Amendment claim, and acknowledged that the State of Texas had in 1935 authorized its political subdivisions to "proceed" under the federal act.[335]

But primarily the *Ashton* Court bought the dissident 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 turned on the majority's overarching 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."[336] To emphasize how seriously it regarded the sovereignty issue, it quoted *Texas v. White*.[337]

Commentators have consistently and gravely criticized *Ashton*. 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 for the management of their own affairs. . . . [T] he *Ashton* decision seems unnecessary and misguided. (at 452)

More recently, the distinguished constitutional scholar Mark Tushnet has analyzed *Ashton*:

> The opinion's logic is difficult to discern. [In the decision's reliance on the limited reach of the federal power to tax, 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.[338]

The eminent and knowledgeable bankruptcy scholar Kenneth Klee has expressed bewilderment.[339]

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[335] Id. at 527 ("we assume for this discussion that the enactment is adequately related to the general 'subject of bankruptcies.'").

[336] Id. at 531.

[337] Id. at 528, citing Texas v. White, 74 US 700 (1869) ("an indestructible union composed of indestructible states").

[338] MARK V. TUSHNET, THE HUGHES COURT: FROM PROGRESSIVISM TO PLURALISM, 1930-1941, vol. XI, The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States 247 (2021).

[339] KENNETH KLEE, BANKRUPTCY AND THE SUPREME COURT (2008).

But the vote was only 5-4, and Justice Benjamin Cardozo wrote a vigorous dissent that spotlit the real financial distress being suffered by the District—for instance, 89 percent of the taxpayers were in default, and the value of agricultural land was only $75 an acre as compared to $100 in bonded debt per acre—and other agricultural districts. He also observed that 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. The Constitution prohibits the states from passing any law that will impair the obligation of existing contracts. . . .[340]

Cardozo asserted that the Bankruptcy Clause permitted Congress to authorize local governmental units, "with the consent of their respective states," to file voluntary cases.[341] His dissent suggested how, only slightly, the formula of the first statute could be rejiggered.

III. The Second Municipal Bankruptcy Act

A. Enactment of Sumners's Bill During the 1937 Court-Packing Crisis

By May 24, 1936, when the Supreme Court issued *Ashton*, approximately sixty Chapter IX cases were pending,[342] and the decision obviously presented problems about their disposition. Sumners was, of course, displeased.[343] Wilcox too remained committed to municipal bankruptcy. His city of West Palm Beach had agreed to a bond restructuring deal, but *Ashton* caused four percent of the creditors to back out. Wilcox was, moreover, apparently considering a run for the Senate seat being vacated by Fletcher; a political success in reenacting municipal bankruptcy would facilitate a campaign in Florida with its still-numerous insolvent towns and cities.

The starting point was, of course, the drafters' comprehension of *Ashton*. They concluded the Court's characterization of eligible debtors under the First MBA as "municipalities and *other political subdivisions*," indicating to the legislators that the designation of entities that constituted parts of a state itself must have been the element of the statute that caused the Supreme Court to hold the first Act unconstitutional. Around Christmas of 1936, probably at Sumners's request, John D. McCall, a well experienced Dallas bond lawyer who had been involved in municipal "bankruptcy cases ranging from West Texas all the way to Florida" and had filed an amicus brief in *Ashton*,[344] travelled to Washington and, according to Wilcox, participated in drafting two new bills that Wilcox filed as House Bills 2505 and 2506 on January 11, 1937. Both bills represented a

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[340] *Id*. at 534.

[341] *Id*. at 532-33.

[342] 1937 Hearings, Mar. 1, 1937, at 44

[343] "He had been angered in particular by its decision declaring the Municipal Bankruptcy Act unconstitutional. That act had come from his committee and 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 (1988).

[344] Rodolfo Segura, Jr., *Defaults, Bankruptcies and Depression: How a Century Old Firm Came to Be*, McCall Parkhurst & Horton—Our 100+ Year History, available at mphlegal.com/100-years/defaults-bankruptcies-and-depression/ (viewed May 8, 2025).

fall back for the insolvent municipalities and a gain for their creditors, but the latter was intended to eliminate any wording that did not sound like pure composition; for instance, this bill deleted the nondebtor stay provision and the discharge.

In H.R. 2505 Wilcox and McCall edited the text of the First MBA in three ways. First and most obviously, they substituted the term "composition" for "readjustment" everywhere; thus "plan of readjustment" became "plan of composition." This sort of wordsmithing that did not change substance but operated to subtly emphasize the limited nature of a composition proceeding. Other changes were the jurisdictional references and requiring only a special $100 filing fee, deleting the otherwise applicable filing fees of the BA'98. They enlarged the definition of "security" to include "judgments, claims and demands" as well as "other evidences of indebtedness" and "certificates of beneficial interests in property" was a rare broadening of the terms of municipal bankruptcy while emphasizing that "bonds" that were the heart of the problem. Another wordsmithing addition inserted the adjective "Uniform" before the references in the bill to the BA'98.

The bill did make a few debtor-favorable changes such as lowering again the filing-threshold percentage from 51 percent to 30 percent and the percentage for class acceptance of the plan from 75 percent to two-thirds and deleting the option for 5 percent of the holders to controvert the petition in the first 90 days. Other edits such as defining the venue of such cases simply harmonized with the business and railroad chapters. Additional requirements for not only disclosure but also specifying the power of the court to approve or modify the fees of attorneys and agents for the creditor groups was consistent with the disfavor of protective committees that followed William O. Douglas's SEC investigation, in which Wilcox had a minor role. But removing "a county or parish," shortening the case time line, and removing the power to reject executory contracts represented real retreats from Sumners's concept. And Sumners's ingenious clause regarding state governments' acquiescence in or approval for their taxing districts and municipalities to file ("including the power to require the approval by any governmental agency") was deleted, making clear that the states had control over entrance into Chapter IX.

As Judiciary Committee chair, Sumners facilitated the reenactment effort by appointing a Bankruptcy Subcommittee to which he sagely appointed Henry Chandler of Tennessee— although relatively new to the Judiciary Committee, an experienced lawyer with substantial knowledge of bankruptcy law. Chandler already had the confidence and support of the President for his H.R. 6439 that in the Second Session obtained enactment as a thorough rewriting of Section 77B, the corporate business reorganization chapter of the BA'98 based on the studies conducted by the Securities and Exchange Commission and special committees in both the Senate and the House.[345] Sumners named as subcommittee members only Congressmen who had been elected subsequent to the 72nd Congress in which the First MBA had been adopted: Earl C. 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. The Chairman himself was extremely busy that month with other matters, beginning with

[345] FDR to HWS, May 24, 1937, Jud. Comm. Papers, Nat'l Archives.

his instrumental role in resolving the court-packing crisis ignited by the President's February 5th proposal for a new statute to authorize up to six additional justices for the Supreme Court,[346] as well as conducting the Senate trial from March 10th to April 17th of the House's impeachment of Judge Halstad Ritter[347]—charges that Wilcox had instigated back in 1933. Chandler proved to be the most significant participant, and Wilcox again the most voluble, in the hearing. With the Bankruptcy Subcommittee's work completed, Sumners took control and moved reenactment of municipal bankruptcy forward.

Contrary to the assertion of the L&E scholars, the subcommittee hearing included extended, not cursory, discussions of the constitutional issues of municipal bankruptcy in the light, necessarily, of *Ashton*. Initially 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 droned on at great length about the First MBA as "a means of giving effect to composition settlements on the part of . . . not only municipalities—cities and towns—but . . . also special tax districts and levee, drainage. irrigation, and other special tax districts, and . . . counties, [that is,] any governmental units . . . below the grade of State."[348] He reviewed the "outstanding 'horrible example' of his own city that had laid on massive bond debt during the land boom in anticipation that this small town would quickly grow to 150,000, and he explained how the collapse of land values made it impossible to pay the debt. Before the First MBA, two percent of the bondholders had held out against a restructuring deal; after enactment, the city was on the verge of consensually adjusting its debt when *Ashton* came down and suddenly 3 or 4 percent backed out. The same problem existed, Wilcox testified, in in cities and small agricultural districts in 43 of the 48 states.

Under Chandler's management, over the hearing's three days, subcommittee members and sometimes the witnesses posed questions that explored the constitutional dimension of municipal bankruptcy. The subcommittee was well prepared, and Chandler particularly demonstrated a mastery of the case law and principles of bankruptcy. Wilcox "made a good speech," as Chandler put it, but when Chandler and the others asked him probing questions about constitutionality and jurisdiction, he frequently sidestepped, obfuscated, or proved unable to debate the issues.[349] Wilcox's only constitutional argument was that the only relief provided was a composition with creditors, and no one disagreed. At one point he even denied that the "real purpose of the bill" was to "impair or change contracts," which the subcommittee members found unbelievable.[350] No one challenged the ability of Congress to adopt a bankruptcy statute to do so, and no one argued for conditioning the discharge of debt upon bringing municipal property into the bankruptcy court or for deleting Sumners's nondebtor stay provision.

Subcommittee member Frank Towey, "speaking as a lawyer," replied to Wilcox that the bonds' text provided "at a certain time you shall pay a certain number of dollars," and Michener

[346] Daniel, Cash In, supra n. 104.
[347] Proceedings of the United States Senate in the Trial of Impeachment of Halsted L. Ritter, United States District Judge, Mar. 10 to Apr. 17, 1936.
[348] Report at 18.
[349] For example,
[350] Id. At 25

added "fundamentally, bankruptcy is for the purpose of *changing* contractual relations . . . . and taking away from the [creditor] parties the other rights which they have."[351] He added that formerly "you could . . . impair a contract . . . under the old theory of bankruptcy . . . when a man was insolvent [but a] new philosophy . . . has grown up, so that we are considering bankruptcy a little differently" today. In short, the alteration of creditors' contractual rights is "purely fundamental bankruptcy law."[352] Chandler completed the schooling of Wilcox on this point by reading to him the sentence of *Ashton* exactly to that effect.[353]

Michener recalled McLeod's H.R. 14789 seeking the Moratorium Model of municipal bankruptcy, and recalled that at that time—in the final days of the Lame Duck Congress of 1933—"[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. Wilcox remembered that Michener "could not vote for the bill he [McLeod] brought down" because it was "a voluntary bankruptcy bill." But in contrast, Wilcox's H.R. 2505 "is simply . . . to give effect to an agreement between the taxing districts and the vast majority of [their] creditors."[354] And, he added, Detroit had successfully compromised with its creditors as soon as the First MBA became effective—"a shining example of the value of the statute."[355]

Wilcox turned to the portion of *Ashton* that found that political subdivisions in municipal bankruptcy "are no longer free to manage their own affairs," and he contested that.[356] Towey took him on, asserting that any municipal bankruptcy case *is* "an attempt to allocate the taxing power," with Wilcox denying that vehemently. Towey then asked about the role and determination of insolvency in the scheme of municipal bankruptcy, particularly of large cities such as Detroit. Wilcox evaded by reciting that the Detroit bondholders—represented by Wood—had made and concluded a restructuring deal. Towey had one more question germane to constitutionality and bankruptcy law generally and that was: "Is there any limitation on the number of times" a municipal debtor could file? Wilcox sidestepped by mentioning the Miller Amendment of 1936 that covered "the smaller districts."

At that point, Chandler refocused the hearing on the differences between Wilcox's 1937 bill and the First MBA. Wilcox responded that the "essential difference" was omission of counties from eligibility. Only one county had filed under the first act, but Wilcox excluded counties because structurally that unit "undoubtedly is a part of the sovereign government of a State."[357] And amendments to the old text "made it perfectly obvious that this is a composition bill and in no sense of the word anything other."[358] Chandler summarized that Wilcox was seeking to cover

[351] Id. at 25 & 27 (emphasis added). The L&E scholars contend that "Congress simply assumed, rather than analyzed, the constitutional scope of federal judicial intervention into municipal affairs," but the discussion of constitutional issues during the three day hearing in 1937 were again robust and extensive.
[352] Id. at 27.
[353] Id. at 28.
[354] Id.
[355] Id. at 29-30.
[356] Id. at 28.
[357] Id. at 31.
[358] Id. at 32.

"quasi-public corporations, rather than political subdivisions," and Wilcox agreed.[359] A lengthy discussion of the juristic nature and categories of taxing districts in relation to State government and the Bankruptcy Clause followed.

After lunch the first day, Wilcox yielded the floor to W.R. Satterfield, in-house counsel with the RFC's division handling rural districts' restructuring loans and probably the most knowledgeable person about the actual operation of the First MBA. He explained how municipal bankruptcy was the necessary means by which the RFC could effectuate refunding loans to insolvent agricultural districts on standardized terms of interest only for three years with amortization then over the next 27 at 4 percent for a principal amount, based on "the ability of the lands to pay." "Satterfield testified to "a clear distinction between H.R. 2505 and the [First MBA] although the machinery or procedure for carrying it out is practically the same." That distinction was that the old law applied only to "political subdivisions" and the new bill to "a local taxing district." Admittedly determining "just what a political subdivision is" was difficult.[360]

Satterfield agreed with Wilcox that politically the key was to make clear that the new law is "purely a composition statute" and "[c]ompositions come within the subject of bankruptcies." So Satterfield had come to the hearing with his own draft of a new definition of municipal debtors for Wilcox's bill, setting out a laundry list of the various types of taxing districts so "that anyone could see at a glance [H.R. 2505] applied only to local improvement districts and not to political subdivisions unless their indebtedness was incurred . . . through the exercise of their proprietary or business powers."[361]

The subcommittee reconvened the hearing on March 10, and two days earlier Wilcox filed another new bill, H.R. 4503 that included Satterfield's lengthy list of the various types of taxing and agricultural districts approved to be debtors. Three new bondholder-centric changes made by Wilcox indicate the continuing hand of the Florida Bondholder Group: raising the threshold for creditor consent for the debtor to file a case from 30 percent back to 51 percent; inserting a requirement of publication notice in newspapers with circulation among bond dealers and holders; and limiting the Sumners-initiated stay of collection activity that included nondebtor third parties by an exception "where rights have become vested under peremptory writs."

After the third and final day of the subcommittee hearing, Sumners took control of the legislation, taking Chandler's recommendations and preparing and filing House Bill 5969 under his own name[362] two days after the rendition of *West Coast Hotel v. Parrish*, the 5-4 decision that signaled the juristic turning of the Court such that it thenceforth always sustained all other challenged New Deal laws. The change for which Wilcox had expressed hope and that Sumners had worked to achieve by retirement of superannuated justices and appointment of new blood to the Court came to be known as the "switch in time that saved nine," although the switching justice

[359] Id. at 33.
[360] Id. at 46.
[361] Id. at 49.
[362] Cong. Rec. 2858 (Mar. 29, 1937).

Owen Roberts had voted in that case well prior to the announcement of the court-packing plan.[363] Sumners guided his H.R. 5969 to adoption as the Second MBA on August 16, 1937,[364] just at the end of the packing crisis.[365]

B. The 1938 *Bekins* Holding of Constitutionality

Klee has remarked: "A comparison of [the First and Second MBAs] leads one to wonder what statutory differences were constitutionally significant. Perhaps there were none."[366] Skeel characterized the Second MBA as "differ[ing] only in minor details from its ill-fated predecessor."[367] When the test case for the Second MBA came up to the Supreme Court, again an irrigation district case, from California this time, the High Court upheld the law as constitutional.

That litigation began in the federal court for the Southern District of California when a California irrigation district in circumstances analogous to CCWCID file a Chapter IX case, and the district judge notified the Justice Department on October 11th that party had raised a constitutionality issue about the Second MBA. This was required under Sumners's Attorney General Standing Act that was one of the two ways he instrumentally participated in resolving the court-packing crisis. Under that act, the government intervened in a judicial case for the first time for the purpose of participating in proceedings about constitutionality. When that court, citing *Ashton*, held the statute unconstitutional, the Justice Department appealed directly to the Supreme Court. At the urging of his committee, Sumners requested and received the Chief Justice's leave to make the lead-off oral argument on April 7, 1938.

Key to the enactment of the second Chapter X had been the chairmanship of the Judiciary Committee by Congressman Sumners, and emblematic of the forthcoming judicial victory was the message in Sumners's argument—presented on behalf of the House at the exact time that day the House was feting Sumners on his twenty-fifth anniversary as a M.C.[368] Sumners went directly to the ground of reversal in *Ashton* by noting that the debtor and all municipalities could always be haled into federal court for nonpayment of their debts 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

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[363] The issuance of *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), is generally regarded as the turning point in the Court's receptivity to the New Deal legislation enacted at President Roosevelt's urging, a switch that resulted in the President dropping his "court-packing plan" to increase by six the number of justices. *Bekins* followed a year later. One scholar puts the "Switch" into a perspective that includes a dismissal of the significance of *Ashton*:

> the Court's 1935-1936 decisions . . . did not wreak as much devastation upon the New Deal as is often supposed. The Court invalidated only 11 of 2,669 statutes signed by Roosevelt during his first term, albeit all of the statutes that the Court nullified were high-profile laws. . . . and [the reversal of] the Municipal Bankruptcy Act has little practical significance.

WILLIAM G. ROSS, THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES, 1930-1941 (2007) at 59.

[364] Act of Aug. 16, 1937, ch. 754, 50 Stat. 751, then codified at 11 U.S.C. § 401 *et seq*.

[365] Daniel, Cash In, supra n. 104.

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

[367] David A. Skeel, Jr., *States of Bankruptcy*, 79 U. Chi. L. Rev. 677, 788 (2012).

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

officers. . . . That was the procedure, and that will continue to be the only procedure under existing law if this Act is unconstitutional."[369]

So *Ashton*'s exalting of structural state sovereignty in face of the history of debt-collection and mandamus practice with respect to political subdivisions was preposterous. In contrast, under Chapter IX the municipality

> 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 [87 percent] had agreed [to compromise]. 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[?"][370]

He continued on the theme of sovereignty, but turned *Ashton*'s rationale upside down: "there is," he argued, "no higher act of sovereignty than for the sovereign voluntarily to submit itself to the judgment of a court."[371] 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," rather "this Act clearly is in line with the nature and philosophy of sovereignty of the State, and . . . to declare this Act unconstitutional . . . would impinge upon the sovereignty of the State."[372]

Satisfied with his statement, Sumners sat down before his time expired.[373] Solicitor General Robert H. Jackson argued next in support of constitutionality, followed by the lawyers for the actual parties argued, the California irrigation district and its dissident bondholders. On April 25, 1938, by 6 to 2 vote,[374] the Court rendered its decision reversing and holding Chapter IX constitutional.[375] Indeed, the Supreme Court's decision of affirmance quoted at length from the favorable report on the new act by Sumners's Judiciary Committee.[376] An immediate transcript was prepared, and Jackson gave his to Sumners.[377]

Two reasons account for this outcome. First, the second iteration of Chapter IX afforded 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 Chapter IX was expressly intended and designed to operate as a facility for the negotiation of relatively consensual plans of readjustment with creditors. Second, by the time a new challenge to the constitutionality of the second Chapter IX reached the Supreme Court, the court-packing crisis was over; Justice van

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[369] Transcript of Proceedings, *Bekins*, Nos. 757 & 772, Sup. Ct., Apr. 7, 1938, Sumners Papers, DHS, at 4, 5.
[370] Id. at 5.
[371] Id.
[372] Id.
[373] Id. at 6.
[374] Justice Cardozo was ill and soon to die.
[375] U.S. v. Bekins, 304 U.S. 27 (1938).
[376] Id.
[377] One original transcript of the oral argument is in the Sumners Papers. The court reporter addressed this copy to "Mr. Jackson."

Devanter had resigned, opening a slot for FDR to appoint Hugo Black, so that by 6-2[378] vote the Court validated the new Chapter IX on April 25, 1938, eighteen days after argument, in the case *Bekins v. Lindsay-Strathmore Irrigation District*.[379]

Sumners's immediate correspondence with two figures discloses his sense of vindication. First, in reply to an inquiry from Edgar B. Tolman, the Secretary for the Advisory Committee on Rules of Civil Procedure and Editor of the *American Bar Journal*, Sumners sent a copy of the transcript of the oral argument and specified the two most significant aspects of the new act that had persuaded the Court:

> the Committee on the Judiciary . . . *protected the sovereignty* of the states by requiring the consent of the state for the municipality to resort to the Bankruptcy Court and *limited the judgment of the court* so that it could not interfere with the state's control of the municipality.[380]

And when Wood wrote to 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,[381] the Congressman replied by sending him also the transcript[382] remarking that it "will probably amuse you . . . but it goes rather directly to the point." The Congressman added:

> For the life of me, I could not see how we were impinging upon the sovereignty of 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 an 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 [the state] and denied the court in its judgment the right to interfere with the state's governmental control of its creature. [383]

The Second MBA retained its designation in the BA'98 as Chapter IX.

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[378] Terminally ill, Justice Cardoza did not participate; he died July 9, 1938.
[379] 304 U.S. 27 (1938).
[380] Edgar B. Tolman to HWS, April 27, 1938, and HWS to Tolman, Apr. 29, 1938, Sumners Papers (emphasis added).
[381] David M. Wood to HWS, Apr. 28, 1938, Sumners Papers, DHS.
[382] Sumners received another one of the transcript from Jackson. It is in the Sumners Papers.
[383] HWS to David M. Wood, May 2, 1938, Sumners Papers, DHS.

C. Pre-Bankruptcy Code Precedents and Legislative Extensions

The Second MBA provided a two-year effective period, and Sumners authored the extensions of it each successive biennium until 1946 when by his bill Congress made Chapter IX permanent. Only a relative handful of taxing districts ever had to file,[384] in the Valley and across the nation, both because some debtors were able to resolve their own debts and problems[385] and because others had their problems resolved through much more drastic means such as tough receiverships.[386] The Supreme Court considered the Second MBA in several cases after *Bekins*.[387]

Congress amended Chapter IX only a few times, the last in 1976. By then, legislation had been proposed and was beginning to work its way through Congress to fundamentally reform and revise the BA'98 and the jurisdiction of bankruptcy courts, efforts that culminated in the signing of the Bankruptcy Reform Act by President Jimmy Carter on November 6, 1978; and the Bankruptcy Code took effect on October 1, 1979. But with the City of New York teetering on the brink of insolvency, Congress in 1976 grabbed the revised provisions for municipal bankruptcy in the then working draft of the Code and enacted it. From its 1979 effective date onward, the Code made only a few changes in the area of municipal debt adjustment, and essentially the old Chapter IX as amended became the new Chapter 9.[388] And today the fundamental terms for municipal bankruptcy relief that Sumners drafted in House Bills 5450 in 1933 and 5969 in 1937 substantially live on in today's Chapter 9 of the current Bankruptcy Code and continue to provide relief for insolvent political subdivisions for the states that currently have authorized access.

IV. Why the Historical Method Matters Here

Because archivally researched and grounded upon previously unknown sources, all pursuant to the historical method, my article presents the first reliable history of this important event in the development of bankruptcy law, the genesis of municipal bankruptcy. The article answers the question laid out in Part B of Section 1 of this article: legal history is superior to L&E as methodology for investigating and understanding that genesis and demonstrates that Sumners has primary responsibility for fashioning and enacting the solution to Texas irrigation districts' and other political subdivisions' insolvency in the thirties. A summary of the story and then particular conclusions and observations follow.

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[384] "fewer 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 (2025).

[385] During this period, Cincinnati for instance, overcame its overhang of debt and "an almost complete breakdown of government, which, if continued, could only have resulted in eventual municipal bankruptcy" through innovative measures and civic leadership. Murray Seasongood, *The Triumph of Good Government in Cincinnati*, 199 ANN. AM. ACAD. POL. & SOC, SCIENCE 83, 87-88 (1938).

[386] Kenneth A. Scherzer, The Politics of Default: Financial Restructure and Reform in Depression Era Fall River, Massachusetts, 26 URBAN STUDIES 164, 166 (1989).

[387] One case is unique, upholding a state statute in idiosyncratic circumstances of a New Jersey city's restructuring. Faitoute Iron & Steel Co. v. Asbury Park, 316 U.S. 502 (1942). The other decisions never indicated any doubt about it constitutionality and upheld its efficacy and preemptiveness. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); Kelley v. Everglades Drainage Dist., 319 U.S. 415 (1943).

[388] Since adoption, Chapter 9 has been amended three times.

The archival evidence tells a straightforward story. Under the authority of the Bankruptcy Clause, Congress from 1933 to 1937 enacted successive statutes providing an effective debt-resolution and restructuring remedy for the insolvency of South Texas irrigation districts and other political subdivisions around the nation that found themselves unable to pay their publicly held bonds during the Great Depression. It was an immediate success in that objective, and its bones—its fundamental elements—live on in the fleshed-out version we know today as Chapter 9. It provides effective relief to insolvent municipalities either by the power of judicial discharge of debt by means of orders entered in filed cases in bankruptcy courts and even more commonly by providing the platform upon which towns and districts can and do negotiate out-of-court debt restructuring deals. Chapter IX worked in the past, and Chapter 9 works today.

The story of the First and Second MBAs demonstrate the underappreciated capaciousness of the Bankruptcy Clause, authorizing Congress to innovate and create new and different remedies for the financial conditions of financial distress as such present themselves in new and different ways that change over time. For instance, Chapter IX provided the discharge without surrender of assets and the nondebtor stay for numerous individuals bearing a relationship to the debtor, its officers and its residents. Success in enacting municipal bankruptcy required both that Congress buy in on its constitutionality and also that a political consensus develop in both houses of Congress around the need. Sumners made his contribution to Congress's understanding of the constitutionality, and he steered the political and legislative course for the most broadly acceptable model of municipal bankruptcy. Nothing was assured; the story demonstrates all of the historical factors of "change over time, context, causality, contingency, and complexity"[389]; and Sumners was the key actor.

Beyond that factually correct story, my history of municipal bankruptcy's origin presents three significant conclusions or themes. First, municipal bankruptcy's history illuminates the remarkably capacious scope of the Bankruptcy Clause. It is far broader than bankruptcy-law commentators of the mid-thirties had previously thought, authorizing and accommodating the innovation of a novel means of dealing with and resolving financial distress and restructuring a debtor entity. In the period 1933-1938, and afterward, the legislative process furnished a virtual bankruptcy laboratory of what was and is possible under that clause.

From 1933 to 1938, Congressmen Sumners, Wilcox, McLeod, and others drafted and filed bills whose essences I have characterized as the Business-Reorganization Model, the Composition Model, and the Moratorium Model, and after enactment of H.B. 5950, Congressman Miller filed H.R. 6982, the bill constituting the Creditor-Voting-Unnecessary Model. Furthermore, the involvement of the President elicited yet more models. Those include the McCoy Model, the Bruere Model, and the Negative Notice Model as additional proposals that did not find expression in bills are were unknown to the public and most legislators but fit within the overall dialectic of the process of creating municipal bankruptcy. Of all those, the Creditor-Voting-Unnecessary Model would have embodied the farthest extension of Congress's power under the Bankruptcy

[389] See FEA, WHY STUDY HISTORY?, supra n. 78.

Clause. To remind future legislators and bankruptcy scholars of that creativity is one way my full history of the Municipal Bankruptcy Acts' genesis may prove useful in the future.

A very recent illustration of the utility of this history today is shown by reading the Supreme Court's 2024 mass-tort bankruptcy decision, *Purdue Pharma*. The 5-4 majority wrote: "we hold only 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."[390] The majority sought to support that ruling by making a claim about the legal history of bankruptcy discharge. That is not surprising. Today's Court considers itself expert in legal history, and as shown by cases such as *Dobbs*[391] and *Bruen*,[392] its decision-making in recent years has supposedly made a "turn to history" in a number of subject matters.[393] But the *Purdue Pharma* majority's bid to support its ruling 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*."[394]

The parties and the amici curiae indeed failed to address that legal-history contention in the briefs, but—as we have seen in the pages of my article—there is *one entire chapter* of the statutory bankruptcy law that was adopted and effective for a substantial time during the 178 year period Gorsuch posited—a restructuring chapter, no less—that unequivocally provided for a debtor in a bankruptcy case in a court of bankruptcy to receive a full *bankruptcy discharge* of claims *without* surrendering *any of its assets*. And that chapter remains in effect today. For the half century from 1934 to 1978, Chapter IX plainly afforded the judicial relief of adjustment of debts for municipal debtors that included discharge of all claims, without surrender of properties.[395]

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[390] Purdue Pharma, Majority, at 2088.

[391] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

[392] New York State Rifle & Pistol Assn, Inc. v. Bruen, 597 US 1 (2022).

[393] See, e.g., Reva Siegel, *The "Levels of Generality" Game: History and Tradition in the Roberts Court*, 47 HARV. J.L. & PUB. POL'Y (forthcoming 2024; presently available at papers.ssrn.com/sol3/papers.cfm?abstract_id=4808688) and *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) (hereafter, Keenan, *Equity*).

[394] Purdue Pharma, Majority at 2086 (emphasis added).

[395] There is a difference in that the municipal debtor was then and is now a unit of State government in contrast to the normal debtor in possession in today's Chapter 11, a private, artificial person engaged in capitalistic enterprise. But Justice Gorsuch did not limit his historical claim to business reorganization. So the majority's proclamation about "[e]very bankruptcy law" is just incorrect.

At least tangentially, municipal bankruptcy is relevant to another point being presently debated in the aftermath of *Purdue Pharma*, and that is whether a bankruptcy court can enter a postpetition order to extend the automatic stay or grant a preliminary injunction in order to protect nondebtor third parties during the interim phase of Chapter 11 cases.[396] In that chapter today, the automatic stay of Code § 362(a) by its terms only protects the debtor and its estate; but if Congress proves willing to amend the Code to enable plan settlements in mass tort Chapter 11s, there is a historical precedent for the national bankruptcy law to specifically authorize a bankruptcy court to enter an order granting a stay to protect nondebtors, even very numerous third parties, during the interim of a restructuring case: again, that statutory precedent is Chapter IX, and its very broad postpetition stay that protects not only the debtor but also two groups of third parties with a relationship to the debtor: (i) all officers and (ii) all inhabitants of a municipal debtor, against debt-collection efforts that may be directed against them by the holders of claims against the debtor.

The second significance of my archivally researched history is to demonstrate that Hatton Sumners earned primary credit for the formulation and adoption of the politically feasible Composition Model of municipal bankruptcy. The L&E authors' designation of Mark Wilcox for that designation is insupportable. 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 was under the thumb of the Florida Bondholders Group. Like today's L&E proponents, the FBG desired, and maneuvered through Wilcox for, maximum creditor control, particularly of municipal purse strings and the taxing power itself. In the dialectical process of this legislation, Sumners acted independently but in coordination with the Administration, and it was his 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.

Third, the researching and writing of my article confirms that the project of finding and then interpreting the genesis of municipal bankruptcy is one for legal history, not for law and economics. The historical method requires deep research not only into the conventional, secondary sources found in libraries and online databases of law journals but also into the primary, original sources of the matter that are found in archives. The historical method then informs the examination of the facts and evidence disclosed by such sources, after they are found in those archives. Application of the historical method undermines, indeed refutes, the under-researched and ill-supported conclusions or normative arguments of the L&E scholars about the creation of municipal bankruptcy law in the 1930s.

[396] See, e.g., Adam Levitan, *Preliminary Injunctions After Harrington v. Purdue Pharma*, CREDIT SLIPS, www.creditslips.org/creditslips/2024/07/ (Aug. 9, 2024) ("*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 express provision of the Bankruptcy Code. There isn't.*") (emphasis added). I disagree.