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Federalism Form and Function in the Detroit Bankruptcy

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Federalism Form and Function in the Detroit Bankruptcy

Melissa B. Jacoby[†]

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Introduction

On July 18, 2013, at 4:06 p.m. Eastern Time, the City of Detroit entered bankruptcy without a friend in the world. Its restructuring plan had no creditor support.¹ Unlike for General Motors and Chrysler just a few years earlier, no government bailout was on the horizon.² Sidelined by a controversial state financial emergency law, Detroit's residents and elected officials deemed the bankruptcy illegitimate.³ Unions, retiree groups, and the city's pension funds were fighting in state court to block cuts they feared would come from a city bankruptcy.⁴

On November 7, 2014, the judge presiding over the Detroit bankruptcy declared the turnaround of circumstances nothing short of miraculous.⁵

1. *In re City of Detroit*, 524 B.R. 147, 160, Supp. Op. (Bankr. E.D. Mich. 2014) (“Both before and after [the court’s eligibility determination], nearly every creditor group filed litigation against the City seeking the full protection of its claims.”).

2. Transcript of In Re: Trial—Objections to Chapter 9 Plan at 26, *In re City of Detroit* (Bankr. E.D. Mich. Oct. 1, 2014) (No. 13-53846), ECF No. 7850 (testimony of Dan Gilbert about meeting with high-ranking official in President Obama’s administration); Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 884 (2014) (discussing “extraordinary government intervention” in Chrysler).

3. Robin Erb, *Crowd Expresses Anger Over Detroit’s Bankruptcy at Forum*, DET. FREE PRESS, Sept. 7, 2013 (describing assertions by local lawmakers and residents that bankruptcy was “[p]remature, unfair and destructive”); Matt Helms & Joe Guillen, *Lawsuit Challenges Michigan Emergency Manager Law*, USA TODAY, Mar. 28, 2013 (discussing responses to Michigan Public Act 436).

4. Gen. Ret. Sys. of Detroit v. Orr, No. 13-768-CZ (Ingham Cty. Cir. Ct. July 17, 2013); Flowers v. Snyder, No. 13-729-CZ (Ingham Cty. Cir. Ct. July 3, 2013); Webster v. Snyder, No. 13-734-CZ (Ingham Cty. Cir. Ct. July 3, 2013); Christine Sgarlata Chung, *Zombieland/The Detroit Bankruptcy: Why Debts Associated with Pensions, Benefits, and Municipal Securities Never Die. . . and How They Are Killing Cities Like Detroit*, 41 FORDHAM URB. L.J. 771, 819-820 (2014) (discussing state court litigation).

5. Oral Opinion on the Record at 7, *In re City of Detroit* (Bankr. E. D. Mich. Nov. 7, 2014) (No. 13-53846), ECF 8401 (“The pension settlement borders on the miraculous. No one could have foreseen this result for the pension creditors when the City filed this case.”); Nathan Bomey et al., *Judge OKs Bankruptcy Plan; a ‘Miraculous’ Outcome*, DET. FREE PRESS, Nov. 7, 2014; Nathan Bomey et al., *How Detroit Was Reborn: The Inside Story of the Detroit Bankruptcy Case*, DET. FREE PRESS, Nov. 9, 2014 (“The confirmation was a slam dunk.”). Later writings of the court also illustrate the notable turnaround. *In re City of Detroit*, *supra* note 1, at 228 (calling the \$7 billion reduction in debt “a truly remarkable achievement for the City, unprecedented in the history of municipal bankruptcy”); *In re The*

Organized creditor groups, including bondholders of various kinds, workers, and retirees, had stopped fighting and signed on to the city’s revised plan.⁶ The city’s elected officials committed to effectuate the plan.⁷ With strings attached, the state of Michigan contributed funds to the effort,⁸ as did the Ford Foundation, the Kresge Foundation, the W.K. Kellogg Foundation, the Knight Foundation, and others.⁹ The city obtained new private financing.¹⁰ Approval of the plan cleared Detroit to shed more than \$7 billion in debt and embark on reinvestment initiatives to improve substandard municipal services.¹¹ All of this happened in well under two years—a timeframe thought by many to be impossible.

In retrospective analyses, Detroit’s major newspapers gave much of the credit for this transformation to the federal court overseeing the case.¹² That story line defies the conventional wisdom about municipal bankruptcies in the legal world. Commentators have asserted for decades that the municipal bankruptcy system, as established in Chapter 9 of the Bankruptcy Code, abides by Constitutional commands and federalism principles only if federal court intervention is minimized.¹³ Expressly reflecting this policy, section 904 of the Bankruptcy Code prohibits the court from using a stay, order, or decree to interfere in municipal decision making, expenditures, asset deployment, and the

Reasonableness of Fees at 47-48, *In re City of Detroit* (Bankr. E.D. Mich. Feb. 12, 2015) (No. 13-53846), 2015 WL 603888 (in supplemental fee approval decision, noting “[i]n utter contrast to the community sense when the case was filed, the residents of the City as well as its community and political leaders now justly feel and express a strong and genuine sense of enthusiasm, optimism and confidence about the City’s future”).

6. *In re City of Detroit*, *supra* note 1, at 162 (noting that “[t]he [c]ity has settled with every major creditor group”).

7. Transcript of Trial Re. Objections to Chapter 9 Plan, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. Oct. 6, 2014), ECF No. 7917 (testimony of City Council President Brenda Jones and Mayor Duggan); Gabe Leland, Councilman, Detroit City Council, Comments at Press Conference on Emergence from Bankruptcy (Dec. 10, 2014) (“I’m not the biggest proponent of bankruptcy, but at the end of the day, from a budget perspective we are better off today than we were 18 months ago”); Mike Duggan, Mayor, City of Detroit, Comments at Press Conference (Dec. 10, 2014) (stating that Mayor and Detroit City Council support financial review commission that accompanies emergence from bankruptcy); Matt Helms & Joe Guillen, *Detroit Mayor: Bankruptcy Exit Plan ‘Not Without Risk’*, DET. FREE PRESS, Oct. 6, 2014 (Mayor Duggan: “I support this plan, and I believe it is feasible”).

8. *In re City of Detroit*, *supra* note 1, at 172 (noting a state contribution of \$194.8 million to the Detroit pension systems). The federal government also had chipped in a bit of grant money. Chris Isidore, *Detroit to Get \$300 Million in Federal Help*, CNN MONEY, Sept. 27, 2013.

9. *In re City of Detroit*, *supra* note 1, at 169-70 (listing foundations that made financial contributions).

10. *Id.* at 275-76 (discussing city’s postpetition financing and exit financing).

11. *Id.* at 162.

12. Bomey et al., *supra* note 5; Daniel Howes et al., *Bankruptcy and Beyond: The Inside Story of the Deals that Brought Detroit Back from the Brink in Fifteen Months*, DET. NEWS, Dec. 13, 2014. See also Steven Church, *Detroit Judge’s Tough Tack Said to Speed Bankruptcy*, BLOOMBERG, Nov. 6, 2014 (discussing impact of presiding judge and lead mediator on Detroit’s restructuring on eve of plan confirmation decision); David Ashenfelter, *Meet Gerald Rosen, The Judge Trying to Save Detroit*, DEADLINE DET., Dec. 6, 2013 (discussing Chief Judge Rosen, the lead mediator).

13. *Infra* Part I.A.

like, without municipal consent.¹⁴ A companion provision, section 903, emphasizes this principle through its converse: Chapter 9 does not limit or impair the power of a state to control a municipality or its expenditures.¹⁵ Moreover, many provisions that authorize bankruptcy judge oversight do not apply to municipalities.¹⁶ Judges' role in municipal bankruptcy, we are typically told, is to rule on disputes after evidentiary trials—first on a debtor's eligibility, later on the confirmation of a plan, and occasionally on discrete disputes in between.¹⁷ When critics have complained about lack of oversight, their proposed correctives have operated in largely the same vein: courts should expressly withhold support for eligibility and plan confirmation, they say, unless a municipality promises to change its ways and pay creditors more.¹⁸

Whatever one's view of the outcome in Detroit, the case shows that the restrictions on formal federal court intervention in municipal bankruptcy, born of federalism, enable creative courts to exercise pervasive control under the right circumstances.¹⁹ Because Detroit entailed a remarkable level of interactivity between the federal, state, and local governments, it exposes fertile ground for federalism scholars.²⁰ Notwithstanding the oft-stated policy of judicial

14. 11 U.S.C. § 904 (West 2004).

15. *Id.* § 903.

16. *Infra* Part I.A.

17. John Knox & Marc Levinson, AVOIDING AND USING CHAPTER 9 IN TIMES OF FISCAL STRESS, (Orrick, Herrington & Sutcliffe LLP, 2009); Zack A. Clement & R. Andrew Black, *How City Finances Can Be Restructured: Learning from Both Bankruptcy and Contract Impairment Cases*, 88 AM. BANKR. L.J. 41, 47-48 (2014); David S. Kupetz, *Standards for Confirming a Chapter 9 Plan of Debt Adjustment: Incorporating and Diverging from Chapter 11 Plan Standards*, 32 CAL. BANKR. J. 289, 300 (2012). See generally Clayton P. Gillette, *Fiscal Federalism, Political Will, and Strategic Use of Municipal Bankruptcy*, 79 U. CHI. L. REV. 281, 291, 293 (2012); Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. ON REG. 351, 357 (2010); Lawrence P. King, *Municipal Insolvency: The New Chapter IX of the Bankruptcy Act*, 1976 DUKE L.J. 1157, 1164 (1976); Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 435-36 (1993); Juliet Moringiello, *Goals and Governance in Municipal Bankruptcy*, 71 WASH. & LEE L. REV. 403, 413-414 (2014); Frederick Tung, *After Orange County: Reforming California Municipal Bankruptcy Law*, 53 HASTINGS L.J. 885, 898-99 (2002).

18. *Infra* Part I.C.

19. By studying and focusing on the court, this article is not meant to be a comprehensive account of the institutions that shaped Detroit's bankruptcy. Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2031-2035 (1999) (critiquing institutional reform scholarship for court-centrism and for under-emphasizing strategic role of other actors).

20. For a sampling of such competing theories, see Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1 (2015); Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 113-114 (2014) (calling for a more relational account of federalism); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L. J. 1996 (2014); Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397 (2015); Roderick M. Hills Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005); Neil S. Seigel, *Commandeering and its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1627 (2006); and Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1 (2004).

minimalism, the language of section 904 technically does not restrict court techniques that civil procedure, mass tort, and institutional reform litigation scholars have discussed for decades.²¹ Indeed, the Detroit bankruptcy court sometimes affirmatively used section 904 and its consent exception to exert control in ways that case law and scholarship have not contemplated. Detroit's Chapter 9 produced relatively little new doctrine.²² But it generated procedural precedent—we'll call it the Detroit Blueprint. The blueprint is structured not around discrete substantive issues but around levers of control: active case management,²³ deal-making and settlement promotion,²⁴ team building,²⁵ and a "court of the people."²⁶ The approach was facilitated by hand-selection of the presiding judge by the chief circuit judge.²⁷ That selection process presents opportunities to coordinate a distinct philosophy—in this case, active and pervasive federal court control.²⁸

To enhance this study of the court's involvement in Detroit's bankruptcy, I listened, in near-real time, to digital recordings of hearings, status conferences, and adversary proceedings from the initial bankruptcy filing through the effective date of the restructuring plan.²⁹ This method, which I have not seen used elsewhere, is more revealing of context and nuance in court-party

21. Robert G. Bone, *The Process of Making Process; Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 GEO. L.J. 887, 900 (1999); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1985) (discussing "sea change . . . in the way judges talk about settlement and think about their roles as judges"); Marc Galanter, ". . . A Settlement Judge, not a Trial Judge." *Judicial Mediation in the United States*, 12 J.L. & SOC'Y 1, 6 (1985); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27 (2003); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982); Judith Resnik, *Trial As Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000); Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027 (2013) (arguing that "proactive jurist" has replaced "passive umpire" as dominant paradigm in federal district courts).

22. The resulting doctrine, while limited in scope, was not trivial. The bankruptcy court held that pensions could be impaired in a federal bankruptcy case. *In re City of Detroit*, 504 B.R. 97, 150-54 (Bankr. E.D. Mich. 2013) (holding Michigan Constitution characterizes pension claims as contract rights, and contract rights may be impaired in bankruptcy). The court's plan confirmation ruling sets forth new interpretations of the statutory requirements for nonconsensual plans. *In re City of Detroit*, *supra* note 1, at 253-261 (discussing unfair discrimination and fair and equitable standards). The court also made new law on the dischargeability of civil rights claims and the nondischargeability of Takings Clause claims. *Id.* at 263-64, 267-70.

23. *Infra* Part III.B.

24. *Infra* Part III.C.

25. *Infra* Part III.D.

26. *Infra* Part III.E.

27. 11 U.S.C. § 921(b) (2012) ("The chief judge of the court of appeals for the circuit embracing the district in which the case is commenced shall designate the bankruptcy judge to conduct the case.").

28. *Infra* Part III.A.

29. The study fits within a broader project comparing the work of bankruptcy courts with that of their federal district counterparts. Other components of that project include Melissa B. Jacoby, *Superdelegation and Gatekeeping in Bankruptcy Courts*, 87 TEMPLE L. REV. 875 (2015); Melissa B. Jacoby, *The Detroit Bankruptcy, Pre-Eligibility*, 41 FORDHAM URB. L. J. 849 (2014); Melissa B. Jacoby, *Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?*, 54 BUFF. L. REV. 401 (2006); and Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, 2015 U. ILL. L. REV. 571 (2015).

interactions than published opinions, secondary accounts, or after-the-fact transcript review standing alone.

The article proceeds as follows. Part I reviews the standard account of the minimal role of judges in municipal bankruptcy, and introduces section 904's role as a debtor protection with strong federalist underpinnings. Part I also offers the common critique that, like the standard account, relies on a traditional conception of judicial work. Looking to other litigation contexts, Part II presents a competing narrative of court control that prompts scrutiny of both the conventional wisdom and the common critique of municipal bankruptcy. Part II then introduces the Detroit bankruptcy and describes the research methods. Part III, based on observational and primary source research, presents the Detroit Blueprint. It draws on examples within the bankruptcy to identify the discrete elements of court oversight mentioned earlier.

Part IV reconsiders the federalist assumptions about municipal bankruptcy in light of the Detroit Blueprint.³⁰ First, I discuss Detroit's impact on other municipalities in distress and conclude it cannot be dismissed as *sui generis*. On the other hand, courts' ability to implement the strategy or something like it depends on the intersection of federal court coordination around an oversight philosophy,³¹ and state municipal takeover law.³² For example, a federal judge might perceive the federalist costs of active oversight to be sufficiently modest when a state already has restricted a municipality's self-governance. Even then, however, a bankruptcy court cannot act in isolation in a high profile case; it needs buy-in from the district and circuit courts. Next, I discuss why section 904 does not fulfill its federalist objectives.³³ The first problem is that the section focuses on formal judicial acts, leaving pathways to exercise extensive control while being literally faithful to the statute. The second problem is that the consent exception is not a reliable regulator of court behavior when judges (rather than creditors or the debtor) are raising the exception *sua sponte*. The implications go beyond federalism, and raise bigger questions about the sufficiency of constraints on the federal judiciary.

I. Municipal Bankruptcy: Doctrinal Framework and the Standard Account

A. A Chapter Not Like the Others

Chapter 9 for municipalities is known as distinct from bankruptcy for individuals and business entities. Certain fundamental principles and powers still

30. Other elements of the research in Part III will be addressed in later work. See, e.g., Melissa B. Jacoby & Dana A. Remus, *Judges as Mediators* (unpublished manuscript) (on file with author) (situating Detroit within broader settlement-promotion trends).

31. See *infra* Part IV.A.1.

32. See *infra* Part IV.A.2.

33. See *infra* Part IV.B.

operate—filing a petition immediately shields a city from its creditors,³⁴ and the city can impair contracts and shed debt if a court confirms a debtor’s plan of adjustment.³⁵ Yet, Chapter 9 excludes many Bankruptcy Code provisions that amplify court and creditor oversight in other kinds of cases. For example, in a Chapter 9, which creates no bankruptcy estate, the debtor can sell property without court permission, even outside of the ordinary course of business.³⁶ Unilateral actions that could trigger the appointment of a trustee in other cases generate no such consequence for a municipality.³⁷ Creditors cannot file an involuntary bankruptcy, reflecting the sovereign state’s role in determining a municipality’s access to a federal bankruptcy regime.³⁸ And, unlike in Chapter 11, only the municipality is ever authorized to file a plan of adjustment.³⁹ Neither the court nor creditors can directly force a liquidation of a municipality’s assets in bankruptcy.

Municipal bankruptcy nonetheless has become far more like corporate bankruptcy over time. Originally, statutory provisions applicable to municipal bankruptcy were self-contained; the text did not borrow provisions from other chapters. Since the 1970s, many provisions elsewhere in the Bankruptcy Code have been extended to municipal cases.⁴⁰ In addition, prior to 1976, municipalities were expected to come into bankruptcy with a debt restructuring plan already hammered out, bondholder votes counted.⁴¹ That structure not only made Chapter 9 more difficult to use, but left less for a court to do or oversee. In

34. 11 U.S.C §§ 362(a), 922 (2012); *In re Jefferson Cty., Ala.*, 484 B.R. 427 (Bankr. N.D. Ala. 2012); Jacoby, *The Detroit Bankruptcy, Pre-Eligibility*, *supra* note 29, at 855 (discussing court’s expansion of the automatic stay to other parties working for the debtor and to the state).

35. 11 U.S.C § 944(b) (2012) (providing for discharge of debts unless otherwise provided).

36. *Id.* § 901 (excluding section 363 from Chapter 9). *But see id.* § 549 (imposing some restrictions on post-petition transactional freedom).

37. *Id.* § 901 (excluding section 1104). Although the process is nothing like Chapter 7 liquidation, states can dissolve municipalities, and it is possible a municipality could go through bankruptcy and then be dissolved. Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1387-88 (2012) (“The records gathered for this Article indicate that more municipalities dissolved in the past fifteen years than at any time before that.”); John H. Knox & Chris Hutchison, *Municipal Disincorporation in California*, 32 PUB. L.J. 1, 4 (2009).

38. *The Role of Public Employee Pensions in Contributing to State Insolvency and the Possibility of a State Bankruptcy Chapter: Hearing Before the Subcommittee on Courts, Commercial and Administrative Law* (2011), available at <http://newnbc.wpengine.com/wp-content/uploads/2015/07/NBC-Statement-on-State-Bankruptcy-2-14-2011.pdf> (statement of the National Bankruptcy Conference).

39. 11 U.S.C. § 941 (2012).

40. *Id.* § 901 (2012) (containing the list).

41. King, *supra* note 17, at 1158; Amended Opinion Regarding Confirmation and Status of CalPERS, *In re City of Stockton*, 526 B.R. 35, 50 (Bankr. E.D. Cal. 2015) (summarizing history of Chapter 9 and stating that, prior to 1976, municipal debt adjustment was limited, requiring prepackaged plans); Hon. Thomas B. Bennett, *Consent: Its Scope, Blips, Blemishes, and a Bekins Extrapolation Too Far*, 37 CAMPBELL L. REV. 3, 11 (2015) (1937 Act “was designed to be essentially a prepackaged plan”). Judge Bennett observes that current Chapter 9 goes well beyond the limited municipal bankruptcy statute the Supreme Court upheld in *United States v. Bekins*, 304 U.S. 27 (1938). *Id.* at 13.

1976, Congress rewrote Chapter 9 to allow municipalities to enter bankruptcy even without the requisite majority of votes already in hand.⁴²

Experts primarily have focused on the most explicit channels through which federal courts exert influence in this system: eligibility and plan confirmation. A judge determines a debtor's eligibility on the front end of a case, albeit not necessarily right away.⁴³ That assessment, with fact-intensive elements, is not *pro forma*, particularly because it is coupled with the power to dismiss the case.⁴⁴ On the back end, a judge decides whether to confirm the municipality's plan of adjustment.⁴⁵ The plan confirmation requirements are multi-faceted, and notoriously controversial as applied to a municipality.⁴⁶ It also is well known that parties may ask judges to rule on a municipality's request to assume or reject contracts, or on requests to lift the automatic stay.⁴⁷ These moments of influence are not trivial. But this list is substantially shorter than for other kinds of bankruptcy cases.

B. The Express Federalist Command of Section 904

1. The Role of Section 904

The 1976 revisions to municipal bankruptcy, carried forward in the 1978 Bankruptcy Code, retained a provision affirmatively limiting federal court intervention. Cognizant of the Supreme Court's expression of "a stronger policy of Federalism and States' Rights," reads a House Judiciary Committee Report from 1977, "this bill takes greater care to insure that there is no interference in the political or governmental functions of a municipality that is proceeding under

42. King, *supra* note 17, at 1158.

43. *In re City of Stockton, California*, 475 B.R. 720 (Bankr. E.D. Cal. 2012) (calling eligibility the initial judicial task in every Chapter 9); Jacoby, *Detroit Pre-Eligibility*, *supra* note 29, at 852-53 (reviewing criteria, noting the variable timing of the eligibility determination, and identifying multiple matters the court addressed before beginning the eligibility trial).

44. 11 U.S.C. § 109(c) (2012) (listing eligibility requirements); *In re City of Bridgeport*, 129 B.R. 332, 339 (Bankr. D. Conn. 1991) (finding Bridgeport not insolvent, thus ineligible); *In re Boise City*, 465 B.R. 156, 157 (Bankr. D. Idaho 2011) (same); *In re Harrisburg*, 465 B.R. 744, 745 (Bankr. M.D. Pa. 2011) (finding city ineligible because city council lacked authority to file the petition).

45. 11 U.S.C. § 943(b) (2012) (identifying plan confirmation requirements); *In re Mount Carbon Metro. Dist.*, 242 B.R. 18, 30 (Bankr. D. Colo. 1999); Gillette, *supra* note 17, at 294; Kupetz, *supra* note 17, at 300.

46. Andrew B. Dawson, *Pensioners, Bondholders, and Unfair Discrimination in Municipal Bankruptcy*, 17 U. PA. J. BUS. L. 1 (2014); Richard M. Hynes & Steven D. Walt, *Fair and Unfair Discrimination in Municipal Bankruptcy*, 37 CAMPBELL L. REV. 25 (2015); C. Scott Pryor, *Municipal Bankruptcy: When Doing Less is Doing Best*, 88 AM. BANKR. L. J. 85 (2014).

47. Patrick Darby, *Restructuring Municipal Debt in Chapter 9*, Nat'l Conf. of Bankr. Judges Ann. Mtg. 2013, at 24; *id.* at 25 ("[T]he bankruptcy judge's lack of power to tell the debtor what to do . . . means that the debtor cannot simply lay its difficulties on the desk of the bankruptcy judge to be solved."). Oversight of contract rejection includes requests to reject collective bargaining agreements. *In re City of Vallejo*, 432 B.R. 262 (E.D. Cal. 2010); Ryan Preston Dahl, *Collective Bargaining Agreements and Chapter 9 Bankruptcy*, 81 AM. BANKR. L. J. 295 (2007); Knox & Levinson, *supra* note 17, at 22, 25.

Chapter 9, or of the State in its power to control its municipalities.’⁴⁸ Section 904 prohibits the federal court from “interfering” with the municipality’s political governmental powers, property or revenues, or use of income-producing property during the case, without its consent.⁴⁹ The prohibition is often attributed to the Tenth Amendment, and sometimes to federalism principles more generally.⁵⁰ Adherents to that foundation cite the U.S. Supreme Court decisions that, in turn, invalidated America’s first municipal bankruptcy law and upheld the second.⁵¹ The *Bekins* Court’s ability to uphold the successor law depended on finding it further restricted the federal court’s role.⁵² A companion statutory provision, section 903, says that Chapter 9 does not limit or impair the power of a state to control a municipality or its expenditures.⁵³

Section 904’s very existence indicates that state consent to a municipal bankruptcy does not eliminate federalism concerns.⁵⁴ In other words, a state does not succumb to any and all acts the federal court might wish to take just because it authorized its municipality to file.⁵⁵ To the court presiding over the bankruptcy of Stockton, California, section 904 was the functional equivalent of the “cleanup hitter in baseball” in walling off courts from the affairs of bankrupt municipalities.⁵⁶ The provision, the court explained, overrides other sources of

48. H.R. Rep. No. 95-595, at 262-63 (1977) (citing the later-overruled *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), and Note, *Municipal Bankruptcy, The Tenth Amendment and the New Federalism*, 89 HARV. L. REV. 1871 (1976)); *id.* at 321 (prohibiting creditor-initiated municipal bankruptcy petitions “because to do so may constitute an invasion of State sovereignty contrary to the Tenth Amendment, and would constitute bad policy”).

49. 11 U.S.C. § 904 (2012).

50. See, e.g., *In re Jefferson Cty., Ala.*, 474 B.R. 228, 278 (Bankr. N.D. Ala. 2012); *Ass’n of Retired Empl. v. City of Stockton*, 478 B.R. 8, 17 (Bankr. E.D. Cal. 2012); Moringiello, *supra* note 17, at 410; Tung, *supra* note 17, at 890; see also *In re New York City Off-Track Betting Corp.*, 434 B.R. 131, 149 (Bankr. S.D.N.Y. 2010) (finding capacity to consent limited by section 903, principles of federalism).

51. *Ashton v. Cameron Cty. Water Improvement Dist.*, 298 U.S. 513, 531 (1936); *United States v. Bekins*, 304 U.S. 27, 46, 52 (1938). *But see* Bennett, *supra* note 41, at 6 (*Ashton* does not say what part of 1934 Act “transgressed the demarcations set by the Tenth Amendment”); Thomas Moers Mayer, *State Sovereignty, State Bankruptcy, and a Reconsideration of Chapter 9*, 85 AM. BANKR. L.J. 363, 370 (2011) (noting these decisions barely mention the Tenth Amendment).

52. NATIONAL BANKRUPTCY CONFERENCE, *supra* note 38, at 9-10.

53. 11 U.S.C. § 903 (2012); Juliet Moringiello, *Chapter 9 Plan Confirmation Standards and the Role of State Choices*, 37 CAMPBELL L. REV. 71 (2015).

54. Some writings suggest it is an open question whether the Tenth Amendment requires section 904. See, e.g., David L. Dubrow, *Chapter 9 of the Bankruptcy Code: A Viable Option for Municipalities in Fiscal Crisis?* 24 URB. LAW. 549, 553 (1992); Gillette, *supra* note 17, at 296 (referring to questions “that allegedly underlie the nonintervention principle”); *id.* at 327 (rejecting idea that “the shibboleth of federalism” prevents consideration of his proposals). Judge Rhodes’ plan confirmation decision suggests ambivalence. See *In re City of Detroit*, *supra* note 1, at 250. Under present understandings, scholars say, the Tenth Amendment is not an independent or additional limit on Congressional authority to legislate. Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2087-2088 (2014); Adam Feibelman, *Involuntary Bankruptcy for American States*, 7 DUKE J. CONST. L. & PUB. POL’Y 81, 106 (2012) (discussing shifts in scope and meaning of Tenth Amendment).

55. Bennett, *supra* note 41, at 6.

56. *Ass’n of Retired Empl. v. City of Stockton*, 478 B.R. 8, 13 (Bankr. E.D. Cal. 2012) (section 904 forbids court from enjoining health benefit reductions).

federal court power.⁵⁷ Unless the debtor has consented (discussed next), “a federal court can use no tool in its toolkit—no inherent authority power, no implied equitable power, no Bankruptcy Code § 105 power, no writ, no stay, no order.”⁵⁸ Juliet Moringiello has explained that an active federal judicial role is unnecessary in municipal bankruptcy, where bankruptcy’s role is to impair claims over the objection of holdout creditors.⁵⁹ The rest of municipal reform, she says, is up to the states.⁶⁰

2. The Consent Exception

In 1976, Congress added a consent exception to section 904 that continues in the statute today.⁶¹ According to a House Report and an authoritative treatise, the addition was a clarification, not a weakening of the proscription against court interference.⁶² There is no indication that the consent exception was meant to effect a big change, or really any change, in the law.⁶³ The amendment aimed to ensure that section 904 remained a shield for the state and municipality, rather than a sword for a recalcitrant creditor for its own ends.⁶⁴ The provision expressly gives a municipality the power to ask for the court’s assistance.⁶⁵ For example, a

57. *Id.* at 19.

58. *Id.* at 20; Kupetz, *supra* note 17, at 300. A few decisions have addressed these issues differently. In *Castle Pines*, a creditors’ committee requested that the debtor pay the committee’s professional fees. The court called such a payment the municipality’s “price of admission” for the right to impair contracts; if the municipality did not want to pay, it could dismiss the case. *In re Castle Pines North Metro. Dist.*, 129 B.R. 233, 235 (Bankr. D. Colo. 1991). *Castle Pines* does not seem to have attracted a following. In *Orange County*, an employee association successfully requested that the court enjoin the city from making a unilateral change to a collective bargaining agreement. Based on the opinion, it appears that the parties disputed the applicable standard rather than whether section 904 prevented an injunction without debtor consent. *In re Cty. of Orange*, 179 B.R. 177 (Bankr. C.D. Cal. 1995). In a separate dispute, however, the court declined the creditors’ request to order Orange County to pay compensation to committee professionals on an interim basis because the debtor had not consented. *In re Cty. of Orange*, 179 B.R. 195, 199 (Bankr. C.D. Cal. 1995).

59. *United States v. Bekins*, 304 U.S. 27, 46, 53 (1938) (“we have co-operation to provide a remedy for a serious condition in which the States alone were unable to afford relief”); Moringiello, *supra* note 17, at 409 (“Chapter 9 bankruptcy was designed to complement, rather than replace, state financial intervention plans.”); *id.* at 452 (“No one intended for federal legislation to operate alone to solve the municipal debt problem”); Kevin A. Kordana, *Tax Increases in Municipal Bankruptcies*, 83 VA. L. REV. 1035, 1106 (1997).

60. Moringiello, *supra* note 17.

61. Section 904 thus includes the clause “unless the debtor consents” 11 U.S.C. § 904 (2012).

62. H.R. REP. NO. 94-686, at 18 (1975) (citing *Leco Props. v. Crummer*, 128 F.2d 110 (5th Cir. 1942)); 6 COLLIER ON BANKRUPTCY ¶ 904.02.

63. H.R. REP. NO. 94-686, *supra* note 62, at 18 (noting intention to codify *Leco* and to maintain the holding of *Spellings v. Dewey*, 122 F.2d 652 (8th Cir. 1941), which reversed injunctions the court had imposed on a local election because challengers would not execute the plan of adjustment).

64. COLLIER, *supra* note 62.

65. *Knox & Levinson*, *supra* note 17, at 22.

municipal debtor may ask the court to review and approve a settlement with creditors.⁶⁶

Section 904’s consent clause has produced little case law. In a typical court decision, a creditor asks a court to instruct the debtor to do something that the debtor opposes.⁶⁷ The history and case law focus on debtor or creditor requests for intervention. I have found no analysis of courts making requests for consent under section 904 *sua sponte*.⁶⁸ That context would involve different dynamics, and a larger encroachment on federalist principles to the extent parties do not feel free to resist a judge’s preferences. Whether in constitutional law or private contract enforcement, nominal agreement is not always taken at face value.⁶⁹ Concern about compulsion by government actors is longstanding.⁷⁰ The Supreme Court recently reinforced that federalism protects individuals as well as the states,⁷¹ recognizing a broader range of parties potentially harmed by federal overreach. Moreover, *NFIB v. Sebelius* illustrates the potential for coercion inherent in requests for consent by federal governmental actors.⁷² Whatever one’s view of *NFIB*, it reminds us that withholding consent from a powerful federal actor—including a federal court—can be perceived as costly.⁷³

66. *In re City of Stockton*, 486 B.R. 194, 199 (Bankr. E.D. Cal. 2013) (stating municipality may, but is not required to, seek approval of a settlement); *In re Bamwell Co. Hosp.*, 491 B.R. 408, 417 (Bankr. D.S.C. 2013) (evaluating settlement at debtor’s request).

67. *Stockton*, 478 B.R. at 20; Kupetz, *supra* note 17, at 300. Rejecting a creditor’s request to force the debtor to pay certain commissions, a New York judge noted, “[s]ection 904’s command is clear.” *In re New York City Off-Track Betting Corp.*, 434 B.R. 131, 140 (Bankr. S.D.N.Y. 2010) (noting section 904 protects debtors from a federal court “meddling with their political or governmental powers”).

68. One can find plenty of discussion of consent elsewhere in bankruptcy. *Wellness Int’l Network Ltd. v. Sharif*, 135 S. Ct. 1932 (2015); Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 AM. BANKR. L. J. 663, 679 (2009).

69. Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1289 (2013). *See also* Jacoby & Janger, *supra* note 2, at 943 (discussing economic duress).

70. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984).

71. *Bond v. United States (Bond I)*, 131 S. Ct. 2355, 2363-64 (2011) (without quoting Tenth Amendment, stating, “The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State.”); Mayer, *supra* note 51, at 364.

72. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 256 (2012). In *NFIB*, the Supreme Court invalidated portions of the Affordable Care Act that conditioned existing Medicaid funding on states’ expansion of their programs. Writing for the majority, Chief Justice Roberts explained that if “conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.” *Id.* at 2604 (analogizing inducement to a “gun to the head”).

73. The line between congressional command and federal court action can be blurry; for example, Supreme Court Justices recently raised concerns about how a ruling might, as a practical matter, impose undue pressure on states. Transcript of Oral Argument at 15-18, *King v. Burwell*, 135 S. Ct. 2480 (2015) (questions of Justices Sotomayor and Kennedy). The case was decided in a way that obviated that concern. *King v. Burwell*, 135 S. Ct. 2480 (2015).

C. The Prevailing Critiques

Critiques of municipal bankruptcy tend to focus on disutility and moral hazard: debtors are insufficiently incentivized to reform or maximize creditor payment. To some, a solution lies in greater judicial intervention. Yet, like the conventional wisdom, the resulting proposals have focused on the big evidentiary trials.⁷⁴ In a frequently-cited article from the 1990s, McConnell and Picker suggested that “[b]ankruptcy could be used to force politically unpopular, but sensible, decisions such as elimination of municipal functions, privatization, and changes in tax law.”⁷⁵ Their proposed path involved judges aggressively scrutinizing restructuring plans, usually in ways that would push debtors to pay creditors more.⁷⁶ Clayton Gillette has argued that courts should require municipalities to pay “affordable, if unpopular, obligations,” to counter the strategic behavior of local officials.⁷⁷ His focal points were, again, eligibility and plan confirmation.⁷⁸

The critics’ proposals accurately reflect untapped leverage for judges from their gatekeeping responsibilities.⁷⁹ But there are at least two problems with the model. First, the perceived channels for leverage are way too limited. Second, court leverage is more distributionally indeterminate than the critiques suggest; in other words, court involvement will not necessarily operate as a one-way ratchet to increase creditor returns.

74. Gillette, *supra* note 17, at 291, 295, 326; Clayton P. Gillette & David A. Skeel, Jr., *Governance Reform and the Judicial Role in Municipal Bankruptcy*, 125 YALE L.J. (forthcoming 2016); McConnell & Picker, *supra* note 17, at 427, 470. This view contrasts with discussions about *corporate* bankruptcy in the 1990s, in which scholars complained that judges were more obstacle than facilitator to efficient outcomes. Susan Block-Lieb, *The Logic and Limits of Contract Bankruptcy*, 2001 U. ILL. L. REV. 503 (2001) (reviewing and analyzing literature).

75. McConnell & Picker, *supra* note 17, at 472.

76. *Id.* at 474. They focused particularly on the best interest of creditors test. 11 U.S.C. § 943(b)(7) (2004). *But see* Kordana, *supra* note 59, at 1058-59, 1106 (disagreeing that judges should push for municipal tax increases).

77. Gillette, *supra* note 17, at 291, 295, 326; Gillette & Skeel, *supra* note 74.

78. Gillette, *supra* note 17, at 293-95, 296, 325-27 (noting courts would have few incentives to impose excessive resource adjustments); Clayton P. Gillette, *What States Can Learn from Municipal Insolvency*, in WHEN STATES GO BROKE: THE ORIGINS, CONTEXT, AND SOLUTIONS FOR THE AMERICAN STATES IN FISCAL CRISIS 99, 107 (Peter Conti-Brown & David A. Skeel Jr. Eds., 2012) (“A court “obviously retains substantial discretion to condition that confirmation on the inclusion of tax increases or service reductions.”).

79. McConnell and Picker recognized that their proposals would constitute a “radical revision in the theory of Chapter 9, but also reconsideration of some of the basic common law principles of municipal debt collection.” McConnell & Picker, *supra* note 17, at 775.

II. What's Wrong with This Picture? Beyond the Standard Account in Theory and in Reality

A. Managerial Judging and Beyond

The municipal bankruptcy scholarship often conveys the sense that, because the debtor is a unit of a sovereign state, judges will sit by idly while a case proceeds at whatever pace a debtor sets for it. Federal court and procedure scholars have spoken a different language than municipal bankruptcy scholars about court oversight.⁸⁰ In the second half of the twentieth century, as Judith Resnik has recounted, the federal court system came to evaluate judges by how well they expedited resolution and avoided trials rather than how well they presided over them.⁸¹ By the late 1970s, district judges were encouraged to take active control over their dockets and cases through a variety of measures.⁸² With varying levels of enthusiasm, scholars have documented courts' heavy use of informal and non-adversarial techniques to expedite proceedings, discourage litigation, direct fact-gathering, and encourage settlement.⁸³ By some accounts, the courts have moved from dispute resolution to problem solving.⁸⁴ Altogether, such techniques, often discretionary, afford the federal judiciary significant control in ways harder to track than rulings after trials or injunctive orders on which municipal scholars tend to focus. That context alone complicates the federalist story of municipal bankruptcy.

In other contexts, the presence of state actors has not prevented the application of active judicial oversight and docket-moving norms. Indeed, institutional reform litigation—aimed at curing alleged constitutional violations in prisons, schools, or the like—was a forum for oversight experimentation. When Abram Chayes identified characteristics of “public law litigation” in the 1970s, he observed a more sprawling party structure, a predictive rather than retrospective factual inquiry, and a negotiated rather than imposed remedy.⁸⁵ The techniques for many federal actions (including but not limited to institutional reform) span detailed case management orders,⁸⁶ statements (whether in public

80. *Supra* note 21.

81. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Resnik, *Managerial Judges*, *supra* note 21; Resnik, *Trial as Error*, *supra* note 21.

82. Jacoby, *What Should Judges Do in Chapter 11?*, *supra* note 29, at 575-76 (documenting how federal district judges changed conceptualization of their roles).

83. *Supra* note 21; Molot, *supra* note 21, at 89 (discussing “regularization of judicial management tactics that fall between formal and informal extremes”).

84. Edward H. Levi, *The Business of Courts: A Summary and a Sense of Perspective*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 269, 270-71 (A. Leo Levin & Russell R. Wheeler eds., 1979).

85. Chayes, *supra* note 21, at 1302. For the judge presiding over such cases, Chayes saw an obligation to shape the process to ensure a just and viable outcome. *Id.*

86. *Supra* note 81.

or in chambers) promoting settlement and sometimes offering the terms;⁸⁷ ex parte communication;⁸⁸ recruiting and delegating to teams of helpers who expand the court's reach and interaction with parties;⁸⁹ inquisitorial methods;⁹⁰ public statements through unconventional channels and press conferences;⁹¹ and hearings for non-parties and in locations away from the court's home base.⁹² In other words, judges have taken active and wide-ranging roles in a variety of cases—even in those generating complex and controversial interactions between federal courts and state and local institutions.⁹³

87. RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 75 (2007) (discussing role of Judge Weinstein in Agent Orange, such as providing the dollar figure for settlement on the eve of trial and playing an active role in orchestrating settlement); RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* 25 (1991) (documenting settlement promotion); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 55 U. Chi. L. Rev. 337, 343 (1986) ("From the moment that Judge Weinstein replaced Judge Pratt . . . the goal of settlement was uppermost in his mind.")

88. SOBOL, *supra* note 87, at 32 (discussing judicial practices in *A.H. Robins*).

89. SOBOL, *supra* note 87 (court recruitment of help in *A.H. Robins*); Elwood Hain, *Sealing off the City: School Desegregation in Detroit*, in *LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION* 234-74, 282 (Howard I. Kolodner & James J. Fishman, eds. 1978) (describing Judge DeMascio's use of non-testifying expert advisors in in Detroit school desegregation case *Bradley v. Milliken*); Robert E. Buckholz, Jr. et al., *Special Project, The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 826 (1978) (discussing use of masters, special masters, hearing officers, monitors, various committees, and ombudspersons). To manage the Agent Orange litigation, Judge Jack Weinstein created a "special bureaucracy" that included extra law clerks, paralegals, a magistrate, at least seven special masters, and consultants. PETER SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 342-44 (1986); Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2014, 2019 (1997); Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedures*, 137 U. PA. L. REV. 2131, 2148 (1989).

90. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005) (exploring roots of inquisitorial techniques in American and English jurisprudence); Frederic M. Bloom, *Information Lost and Found*, 100 CAL. L. REV. 635, 667 (2012) (arguing American civil practice is not adversarial "from bottom to top"); Howard Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1985, 2010-2011 (1999) (documenting American courts' use of inquisitorial methods in mass tort cases in response to shortcomings of adversarial system in this context); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 858 (1985) (discussing inquisitorial features of American courts that lack safeguards of German system).

91. Hain, *supra* note 89, at 277 (noting that Judge DeMascio held meetings with school board president, other local officials before releasing high-profile court decision in Detroit school desegregation case); *id.* at 242 (describing Judge Roth press conference explaining plan implementation, deflecting NAACP criticisms).

92. Jack Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 541 (1994) (arguing in both mass tort and institutional reform, "[a] rigid and unresponsive judiciary, blind to the needs of various communities and of society at large, is far more likely to cause an erosion of public confidence in legal institutions than a judiciary perceived as overly interested in resolving the problems before it"); *id.* at 542 (discussing public hearings he held in school desegregation case); *id.* at 543 (stating, in mass tort case, he held hearings all over the country).

93. See, e.g., PHILIP J. COOPER, *HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS* 20-21 (1988) (challenges associated with developing adequate remedy while limiting interference with local government policy and practice); DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977) (case studies raising questions about courts' institutional capacity); Chayes, *supra* note 21, at 1309 ("Can the disinterestedness of the judge be sustained, for example, when he is more visibly part of the political process?"); Theodore Eisenberg & Stephen C.

Although long identified as a relevant counterpoint, particularly to corporate bankruptcy,⁹⁴ institutional reform litigation is distinct from bankruptcy in ways important to this discussion. In prison or school reform cases, an active role for judges is prompted by a constitutional violation.⁹⁵ In municipal bankruptcy, the federal court's involvement, rather than the underlying financial problem, is the element more likely to provoke constitutional challenge.⁹⁶ Such distinctions, however, do not explain or justify the dramatic difference in scholarly analysis. At the very least, in both contexts, judges may perceive the need to fill gaps left by failures of the political process.

In bankruptcy research, scholars have been only modestly and intermittently engaged with trends in federal court oversight methods.⁹⁷ That pattern is odd given the perceived centrality of negotiation, compromise, and litigation avoidance to bankruptcy, making it amenable (or vulnerable) to judicial creativity to cultivate these norms. Rather than connecting such dynamics to the complex litigation universe,⁹⁸ corporate bankruptcy scholars tend to characterize bankruptcy as an extension of the private transactional realm, with judges external to that world.⁹⁹ As Part I conveyed, municipal bankruptcy literature is even further removed from the debates about how federal courts exercise power in the modern judiciary. Given that municipal bankruptcy seems to depend even

Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 468 (1980) (clash between “steely-eyed judge of national prominence” and a “recalcitrant state bureaucracy”).

94. Scholars identifying corporate restructuring as a useful analogy for purposes of understanding institutional reform litigation include Theodore Eisenberg & Stephen C. Yeazell, *supra* note 93, 93 HARV. L. REV. 465 (1980); Charles F. Sabel & William H. Simon, *Destabilizing Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1057, 1061-66 (2004); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L. J. 1355, 1432 n402 (1991); Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention by Prisons*, 138 U. PA. L. REV. 805 (1990).

95. Hon. A. Leon Higginbotham, Jr., *The Priority of Human Rights in Court Reform*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE, PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 87, 107 (A. Leo Levin & Russell R. Wheeler, eds. 1979).

96. See generally *United States v. Bekins*, 304 U.S. 27, 46, 52 (1938); *Ashton v. Cameron Cty. Water Improvement Dist.*, 298 U.S. 513, 531 (1936);

97. Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, *supra* note 29. Exceptions to this claim include John D. Ayer, *The Forms of Action in Bankruptcy Practice: An Exposition and a Critique*, 1985 ANN. SURV. BANKR. L. 306 (William L. Norton ed., 1985); John D. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANKR. L.J. 355 (1986); Jacoby, *Fast, Cheap, and Creditor-Controlled*, *supra* note 29; Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559 (2001); Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 657-58 (2008); and Daniel Bussel, *A Third Way: Examiners as Inquisitors*, 90 AM. BANKR. L.J. (forthcoming 2016). See also sources cited *supra* note 94 (sources focusing on other areas of law analogizing to bankruptcy).

98. Exceptions largely arise from those who study mass tort and other aggregate litigation. S. ELIZABETH GIBSON, FED. JUDICIAL CTR., CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS 106, 152 (2000); Troy McKenzie, *Toward a Bankruptcy Model for Non-Class Aggregate Litigation*, 87 N.Y. U. L. REV. 960 (2012).

99. For an example of the transactional frame, see David A. Skeel, Jr., *Welcome Back, SEC?* 18 AM. BANKR. INST. L. REV. 573, 576 (2010).

more on negotiation and compromise,¹⁰⁰ it is time to examine municipal bankruptcy as we would other complex litigation. Doing so will not only enrich debates about the legacy of managerial judging, but also shed light on whether there really is a stable federalist core to the municipal bankruptcy process.

B. Detroit Bankruptcy Background

Detroit was the biggest municipal bankruptcy in U.S. history when it was filed.¹⁰¹ The city's financial troubles were decades in the making,¹⁰² intertwined with social and political challenges.¹⁰³ The state appointed emergency managers for Detroit as well as other municipalities in Michigan pursuant to the state's financial emergency law, disempowering the elected representatives of a majority of Michigan's African-American residents.¹⁰⁴ The emergency manager and governor, rather than Detroit's elected officials, filed bankruptcy on the city's behalf—a step many Detroit residents perceived as illegitimate. Meanwhile, the emergency manager's initial restructuring plan had no creditor support. The presiding judge was acutely aware of these layers of context.¹⁰⁵

Although the bankruptcy looked intractable at the time of filing, Detroit tackled a lot in the next eighteen months. It not only reduced its debt, but made significant operational and management changes,¹⁰⁶ planned and funded investment initiatives,¹⁰⁷ and negotiated a regional water authority.¹⁰⁸ The state established fiscal oversight through the Detroit Financial Review Commission

100. Reporter's Transcript of Daily Proceedings at 515, *In re City of Stockton* (Bankr. E.D. Cal. March 27, 2014) (No. 12-321118-C-9) ("the Chapter 11 negotiation model applies in Chapter 9 cases on steroids"); *In re City of Stockton, California*, 475 B.R. 720, 724, 731-32 (Bankr. E.D. Cal. 2012) (noting federal policy favoring settlement and compromise in Chapter 9 cases).

101. *In re City of Detroit*, 504 B.R. 97, 178 (Bankr. E.D. Mich. 2013).

102. *Id.* at 112; Heather Lennox, *Panic in Detroit: Chapter 9 Process From Soup to Nuts* 6 (American Bankr. Inst., Working Paper, Apr. 18, 2015).

103. See generally THOMAS J. SUGRUE, ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT (Princeton Classics Ed. 2014); Peter J. Hammer & Michael Schank, *Detroit on the Brink*, THE HILL, Oct. 29, 2014; Letter from Peter Hammer to Judge Steven W. Rhodes (Sept. 1, 2014), <http://www.d-rem.org/wp-content/uploads/2014/09/Hammer-Ltr-2-Rhodes-final-09-01-14.pdf> (expressing concern that "issues of race and regionalism would be marginalized" in Detroit's plan of adjustment). Poverty and racial tension are common among cities facing bankruptcy or other state interventions. Anderson, *Dissolving Cities*, *supra* note 37, at 1407, 1411-1415, 1442; Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1125, 1133-34, 1136-37 (2014).

104. Chris Lewis, *Does Michigan's Financial Emergency Law Disenfranchise Black Citizens?*, THE ATLANTIC, May 9, 2013; Chris Savage, *The Scandal of Michigan's Emergency Managers*, THE NATION, Mar. 5-12, 2012. See generally David Unkovic, *Municipal Distress: Reflections of a Receiver*, 24 WIDENER L.J. 9 (2015) (recognizing undemocratic nature of Harrisburg receivership, but arguing its essentialness to city's recovery).

105. *In re City of Detroit*, *supra* note 1, at 277.

106. *Id.* at 134-35.

107. *Id.* at 7 (noting investment of approximately \$1.7 billion in initiatives over ten years, predicted to result in approximately \$841 million in revenue savings); Lennox, *supra* note 102, at 38.

108. *In re City of Detroit*, *supra* note 1, at 198.

as part of a multiparty deal known as the Grand Bargain.¹⁰⁹ The Grand Bargain protected the Detroit Institute of Arts from creditors and permanently put it in a trust.¹¹⁰ The Grand Bargain also reduced the cuts to pensions for public workers and retirees.¹¹¹ Many of these outcomes had been unimaginable at the outset of the case.

The case's resolution was hardly free of controversy. Certificate of participation holders and bond insurers fought the city's plan until a last-minute settlement. Even though retirees avoided more severe cuts to pensions, their insurance benefits changed radically and their out-of-pocket bills skyrocketed. Claimants with the least representation received among the lowest return in the bankruptcy – debt instruments rather than cash, likely worth no more than ten cents on the dollar of their claims. Some say the bankruptcy has benefitted gentrified, centrally-located, and whiter areas far more than the bulk of the neighborhoods; thousands of low-income residents have lost running water due to the inability to pay their utility bills. Whatever one's assessment of these issues, doing so much in such a short time was, indeed, remarkable.

C. Studying the Detroit Bankruptcy

Part III is based on listening to digital recordings of court hearings in near-real time and monitoring the docket.¹¹² The presiding judge held most status and pretrial conferences in Detroit's bankruptcy on the record in open court, increasing the court activity visible to the public.¹¹³ For citation purposes, I replaced references to audio files with transcripts as they came available. But in nearly all instances, I drew inferences about tone, dynamics, and context

109. *Id. supra* note 1, at 176-99.

110. *Id. supra* note 1, at 169-70.

111. *Id. supra* note 1, at 171. Detroit's emergency manager initially called for big cuts. CITY OF DETROIT, PROPOSAL FOR CREDITORS 109 (June 14, 2013) (“[T]here must be significant cuts in accrued, vested pension amounts for both active and currently retired persons.”).

112. The closest analogy is conversation analysis from sociolinguistics. JOHN M. CONLEY & WILLIAM M. O'BARR, *JUST WORDS: LAW, LANGUAGE, AND POWER* 20 (2d Ed. 2005); John M. Conley & William M. O'Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. REV. 467 (1987). Digital audio recordings are not consistently produced and released by other courts. Courts have not adopted and implemented the technology to the extent hoped. Pilot Project Update: Digital Audio Recordings Online, The Third Branch, June 2008 (quoting Judge Rich Leonard: “It's gone from a novel tool to an anticipated product, with fairly high usage . . . I consider it a great advance in making our federal courts transparent”).

113. Transcript of Hearing Re. Status Conference at 8-9, *In re* City of Detroit (Bankr. E.D. Mich. Aug. 2, 2013) (No. 13-53846) ECF No. 316 (court committing to “facilitate, to the greatest extent possible, public access to the Court's proceedings”); Transcript of Hearing, *In Re* Motion of the Debtor for a Final Order at 10, *In re* City of Detroit (Bankr. E.D. Mich. Dec. 18, 2013) (No. 13-53846), ECF No. 2280 (judge explaining intent not to have off-the-record conversations, but holding sidebar with lawyers for Detroit and Syncora due to undisclosed circumstance); *Judge Information – Judge Steven W. Rhodes, Status Conferences*, UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MICHIGAN, www.mieb.uscourts.gov/judges-info/judge-rhodes (last visited Dec. 25, 2015). *See also* sources cited *infra* note 115 (non-public hearings).

primarily from audio recordings.¹¹⁴ By my count, all but two digital audio recordings of official court hearings were made available.¹¹⁵

Other elements of court oversight posed barriers to observation. A significant amount of activity was sent to confidential mediation overseen by the Chief Judge of the Eastern District of Michigan.¹¹⁶ Behind-the-scenes negotiation is part of all bankruptcies. Action in the courtroom never reveals all. The distinction here is the role of a life-tenured judge in the process, giving rise to nearly unlimited opportunities for federal court influence without the public's watchful eye.¹¹⁷ In addition, court-appointed adjuncts engaged in private interactions with city officials and other parties.¹¹⁸

These caveats notwithstanding, the available record suggests that the federal court did much more than provide a forum for traditional adjudicative services.¹¹⁹ Part III illustrates the subtle and varied ways in which the federal court was a significant institutional actor throughout Detroit's municipal bankruptcy, bearing little resemblance to the federalist model.

III. The Detroit Blueprint: Overlooked Avenues of Federal Court Involvement

A. Judicial Selection Process

An account of the court's role begins with a decision that necessarily transpired before the first hearing—the selection of the bankruptcy judge.¹²⁰ In federal courts, judges usually are assigned cases randomly within districts and divisions.¹²¹ Chapter 9 contains a statutory exception that instructs the chief of

114. For the eligibility and plan confirmation trials—the most likely to fit a traditional adversarial paradigm—I relied more heavily on transcripts.

115. An oral argument relating to the rights of water and sewer bondholders was held in the judge's chambers on July 17, 2014. In response to a UNC Law Library query, the court reported that no recording would be released. A bus tour for the court on August 8, 2014, requested by the debtor and opposed by some creditors, was part of the plan confirmation trial. Order Regarding Site Visit, *In re City of Detroit* (Bankr. E.D. Mich. June 27, 2014) (No. 13-53846), ECF No. 5629. A brief video excerpt was released shortly after the tour, but a full written transcript was not filed on the docket until months later, after the plan of adjustment went into effect. Notice of Filing Record of Site Visit, *In re City of Detroit* (Bankr. E.D. Mich. Dec. 11, 2014) (No. 13-53846), ECF No. 8673. Judge Rhodes also held in-courtroom interviews with finalists for the job of court-appointed feasibility expert on April 18, 2014. Order Regarding the Solicitation of Applications to Serve as the Court's Expert Witness on the Issue of Feasibility at 3, *In re City of Detroit* (Bankr. E.D. Mich. April 2, 2014) (No. 13-53846), ECF No. 3610 (specifying interview date and procedure). A full recording was not released to the public.

116. *Infra* Part III.C.

117. *Id.*

118. *Infra* Part III.D.3.

119. The court performed traditional adversarial tasks, of course. The handling of discrete disputes and evidentiary objections in the first few months of the case is documented in Jacoby, *Detroit Bankruptcy, Pre-Eligibility*, *supra* note 29, at 855-861.

120. By necessity, this section is based on a review of the docket of cases and traditional research rather than on audio recordings of hearings.

121. A prominent exception arises for pre-trial management of multi-district litigation, assigned to a specific judge by the Judicial Panel on Multidistrict Litigation. Jaime Dodge, *Facilitative*

the circuit court of appeals to select the judge.¹²² Concerns about judge capability have dominated explanations for this provision.¹²³ Yet, as we will see, non-random appointment also offers an opportunity for the bankruptcy, district, and circuit courts to discuss a philosophy for, and collaborate on, management of the case.¹²⁴

When the clerk of the bankruptcy court received Detroit's Chapter 9 filing, she asked for a designation from the chief circuit judge.¹²⁵ Chief Judge Alice Batchelder filed a notice of her selection.¹²⁶ Whereas notices in other Chapter 9 cases have merely identified the judge's name,¹²⁷ the Detroit designation is substantive. In addition to confirming Judge Rhodes' availability (Judge Rhodes deferred retiring from the bench to take the case),¹²⁸ Chief Judge Batchelder wrote that the selection followed a review of the judges' "levels of experience and the respective caseloads" in the Eastern District of Michigan, as well as of judges' views.¹²⁹

Judging: Organizational Design in Mass-Multidistrict Litigation, 64 EMORY L.J. 329, 337 (2014) ("[A]most one-third of active district judges have a pending MDL assignment.").

122. 11 U.S.C. § 921(b) (2012) ("The chief judge of the court of appeals for the circuit embracing the district in which the case is commenced shall designate the bankruptcy judge to conduct the case").

123. H.R. REP. NO. 94-686, *supra* note 62, at 2 (stating purpose of maximizing flexibility to account for volume of business); COLLIER, *supra* note 62, ¶ 921.03 (citing S. REP. NO. 94-458, 94th Cong., 1st Sess. 15 (1975), for provision aiming to "insure that a municipal case would be handled by a judge capable of doing so"); King, *supra* note 17, at 1165 ("[T]he Chief Judge of the circuit . . . has the opportunity to review the calendars of the particular judges and to make a selection based on whatever criteria he deems important."); Knox & Levinson, *supra* note 17, at 10 ("[I]t is very likely that a chapter 9 case will be assigned to one of the most qualified and experienced judges within the applicable federal circuit."); David S. Kupetz, *Municipal Debt Adjustment Under the Bankruptcy Code*, 27 URB. LAW. 531, 551-52 (1995). *Cf.* Harry D. Dixon, Jr. & Joanne L. Manthe, *Municipal Adjustments*, 1981 ANN. SURV. BANKR. L. 5 n.40 (1981) (attributing provision to concern about judges "jockeying" for cases).

124. *Infra* text accompanying with notes 220-224.

125. Request for Designation of Bankruptcy Judge, *In re* City of Detroit (Bankr. E.D. Mich. July 19, 2013) (No. 13-53846), ECF No. 0035.

126. Designation of Bankruptcy Judge, *In re* City of Detroit (Bankr. E.D. Mich. July 19, 2013) (No. 13-53846), ECF No. 0052.

127. Designation of Bankruptcy Judge, *In re* Adair Co. Hosp. Dist., No. 13-10939 (Bankr. W.D. Ky. Aug. 1, 2013) (Sixth Circuit, no explanation); Order Designating Bankruptcy Judge Christopher Klein to conduct the City of Stockton Case, *In re* City of Stockton, No. 12-32118 (June 29, 2012); Designation of Presiding Judge, *In re* Jefferson Cty., No. 11-5736 (Bankr. N.D. Ala. Nov. 9, 2011); Assignment of Bankruptcy Judge to Conduct a Case Under 11 U.S.C. § 921(b), *In re* Hardeman Co. Hosp. Dist., No. 13-70103 (Bankr. N.D. Tex. Mar. 27, 2013); Designation of a Bankruptcy Judge to Preside Over a Chapter 9 Case, *In re* Pauls Valley Hosp. Auth., No. 13-10791 (Bankr. W.D. Okla. Mar. 4, 2013); *In re* City of San Bernardino, No. 12-28006 (Bankr. C.D. Cal. Jul. 31, 2012); *In re* Town of Mammoth Lakes, No. 12-32463 (Bankr. E.D. Cal. Jul. 3, 2012); *In re* Suffolk Reg'l Off-Track Betting Corp., No. 12-43503 (Bankr. E.D.N.Y. May 17, 2012); Order Designating Bankruptcy Judge, *In re* City of Harrisburg, No. 11-06938 (Bankr. M.D. Pa. Oct. 12, 2011); *In re* City of Vallejo, No. 08-26813 (Bankr. E.D. Cal. May 23, 2008).

128. Designation, *supra* note 126; David McLaughlin, *Detroit Bankruptcy Judge is Ponzi-Law Scholar*, BLOOMBERG NEWS (July 20, 2013), <http://www.bloomberg.com/news/articles/2013-07-20/detroit-bankruptcy-judge-rhodes-is-ponzi-law-scholar>.

129. Designation, *supra* note 126.

Chief Judge Batchelder appended a letter from the Chief Judge of the Eastern District of Michigan, Gerald Rosen, who will figure prominently into the bankruptcy as the lead mediator.¹³⁰ Noting that he and Chief Judge Batchelder had already spoken about Judge Rhodes taking the case, Chief Judge Rosen's letter explained that Judge Rhodes was a consensus choice, and that he had "outstanding *administrative and case management skills*, which of course will be necessary in handling a case of this magnitude."¹³¹ Chief Judge Rosen also thanked Chief Judge Batchelder for her offer of resource support for the Detroit bankruptcy. Apparently, the chief judges believed Detroit's bankruptcy required considerably more than a traditional umpire of trials.¹³² Their explanations lack any mention of federalism-based constraints.

B. Case Management

*I had a reputation for moving my cases along and I think that the people who were responsible for making the selection understood that reputation and understood its need . . . in this case to be expedited and accelerated.*¹³³

*Always be closing.*¹³⁴

In early August 2013, Judge Rhodes emphasized the court's limited responsibility in municipal bankruptcy, but expressed the intent "to facilitate, to the extent possible, the consensual resolution of disputes" using "procedures of judicial management."¹³⁵ Detroit's dire circumstances made efficient resolution "imperative and one that the Court intends to fulfill with the highest degree of commitment."¹³⁶

130. *Infra* Part III.C.

131. Designation, *supra* note 126 (emphasis added) (reporting the "wholehearted[]" endorsement of a "large cross section" of the district court); Bomey et al., *supra* note 5, at Chapter 4: Rosen's Son Asks "What Would Churchill Do?" ("Rosen told colleagues he believed Rhodes had the temperament and management skills to keep the monster case on track."). These attributes are consistent with Judge Rhodes' prior service as a magistrate judge. Interview by WDET 101.9 FM with Judge Steven Rhodes, U.S. Bankruptcy Judge for the Eastern District of Michigan (Feb. 17, 2015), archives.wdet.org/shows/Detroit-today/episode/judge-rhodes-post-bankruptcy-interview-02-17-15 (reviewing Judge Rhodes's non-bankruptcy experience).

132. A letter from the district's Chief Bankruptcy Judge, however, noted that Judge Rhodes, who presided over the only Chapter 9 previously filed in the district, has expertise on the relationship between bankruptcy and state constitutional law. Designation, *supra* note 126.

133. WDET interview, *supra* note 131(1:40).

134. Hon. Steven Rhodes, Am. Bankr. Inst. Spring Meeting Lunch Talk (Apr. 18, 2015) (citing GLENGARRY GLEN ROSS (New Line Cinema 1992)) [hereinafter "ABI Spring Meeting Lunch Talk"].

135. Transcript of Hearing Re. Status Conference, *supra* note 113, at 7-8 (explaining that a judge plays a "very limited role . . . in a municipal bankruptcy" and the primary role was to resolve disputes, especially eligibility and confirmation); *id.* at 9-10 (The Court has no role in "running the city" or its services. "There is nothing the Court can do about any of these matters. . . . The city's officials are not accountable to this Court for how they run the city.").

136. *Id.*

The court followed through on these intentions—albeit with little help or guidance from the Bankruptcy Code itself.¹³⁷ Chapter 9 mentions only one, optional deadline: the due date for the filing of a plan of adjustment.¹³⁸ Judge Rhodes proposed an ambitious and detailed scheduling order.¹³⁹ Pursuant to the terms of the order, the court would extend dates and deadlines only on a motion establishing good cause.¹⁴⁰ Extension requests thus served an information-forcing function.¹⁴¹ Although delays were inevitable, the case adhered remarkably well to the court’s initial scheduling order.¹⁴²

The court adopted multiple approaches to move the case. One was to prevent parties from belaboring procedural matters.¹⁴³ Another was to strongly encourage settlement.¹⁴⁴ Concerned that the city’s progress might languish after the bankruptcy, the court even proposed a continued monitoring role,¹⁴⁵ but

137. Judge Rhodes sometimes cited FED. R. CIV. P. 1, which calls for a “just, speedy, and inexpensive” process for federal civil litigation. Rule 16 of the Federal Rules of Civil Procedure, which authorizes pretrial conferences and scheduling orders, applies only to adversary proceedings, FED. R. BANKR. P. 7016, 9014(c), but section 105(d) of the Bankruptcy Code authorizes case management.

138. 11 U.S.C. § 941. Setting a time “supplies the necessary incentives to both sides in the negotiations to arrive at a mutually agreeable plan within a reasonable time.” H.R. REP. NO. 94-686, *supra* note 62, at 11. Nonetheless, some judges defer setting even that date. Bill Rochelle & Sherri Toub, *San Bernardino Police Want Deadline for Filing Plan*, BLOOMBERG, Oct. 7, 2014 (reporting no plan filing deadline two years into case).

139. First Order Establishing Dates and Deadlines at 1, *In re City of Detroit* (Bankr. E.D. Mich. Aug. 2, 2013) (No. 13-53846), ECF No. 0280 (proposing March 1, 2014 for plan filing); Transcript of Hearing Re. Status Conference, *supra* note 113.

140. The standard reflects FED. R. CIV. P. 16(b)(4), which, as stated in note 137 does not directly apply to the case as a whole, but also is not expressly prohibited. Later, the standard for deferral requests increased to “extraordinary cause.” Fifth Amended Order Establishing Procedures, Deadlines, and Hearing Dates Relating to the Debtor’s Plan of Adjustment at 4, *In re City of Detroit* (Bankr. E.D. Mich. June 9, 2014) (No. 13-53846), ECF No. 5259.

141. *Cf.* Resnik, *Managerial Judges*, *supra* note 21, at 378 (noting how courts get information earlier through case management).

142. The lead mediator, Chief Judge Rosen, wished the case had wrapped up in just a year. Christine Ferretti & Chad Livengood, *Rhodes: Pension Plans Too Costly for Cities*, DET. NEWS, Feb. 25, 2015 (“I thought it would have had a nice symmetry to it because of the one-year anniversary”); Nathan Bomey, *Keayn Orr Defends Pension Moves in Detroit Bankruptcy*, DET. FREE PRESS, Feb. 25, 2015 (same).

143. For example, creditors and insurers debated the details of the city’s proposed notice to creditors of the deadline to file claims. Perhaps sensing that these debates would postpone finalization and circulation, the court established a process for finalizing the remaining details, noting, “I don’t want this held up. Do you hear me?” Hearing Re. Motion of Debtor at 49, *In re City of Detroit* (Bankr. E.D. Mich. Nov. 14, 2013) (No. 13-53846), ECF No. 1771.

144. Transcript of In Re: Trial Re: Objections to Chapter 9 Plan at 10, *In re City of Detroit* (Bankr. E.D. Mich. Oct. 3, 2014) ECF No. 7894 (regarding dispute between the city and MIDD, court stating, “Well, if I can speak bluntly here. . . [t]his \$26,000,000 claim ought to be settled”); Transcript of In re: Continued Trial Re: Objections to Chapter 9 Plan at 3-4, *In re City of Detroit* (Bankr. E.D. Mich. Oct. 20, 2014) (No. 13-53846), ECF No. 8031 (regarding matter involving UAW and treatment of approximately 330 library employees, court saying, “I don’t want an explanation, I want you to resolve it . . . I want you to resolve it now, go resolve it . . . Go resolve it”). *See also* Transcript of In re: Trial at 172, *In re City of Detroit* (Bankr. E.D. Mich. Sept. 3, 2014), ECF No. 7345 (telling Syncora’s lawyer that “I want a percentage and I want it now” of the amount Syncora would have to be paid for Syncora to agree the plan was confirmable).

145. Transcript on Hearing Re Wayne County’s Motion for . . . Appointment of a Facilitative Mediator at 182, *In re City of Detroit* (Bankr. E.D. Mich. Apr. 17, 2014) (No. 13-53846), ECF

dropped the idea once it was clear the State of Michigan would appoint an oversight commission.¹⁴⁶

Judge Rhodes creatively managed portions of the case that were otherwise difficult to reach, especially in light of section 904's proscriptions. For example, after the city had declined the court's suggestion to establish a tort claimant committee but had not yet made public an alternative plan,¹⁴⁷ Judge Rhodes used a request to lift the automatic stay—a key protection of the debtor from litigation—to achieve a broader oversight objective, illustrating that a court can make a debtor act without entering the kind of orders identified in section 904.

The movant, Deborah Ryan, had asked the bankruptcy court to lift the stay so she could continue her constitutional tort litigation in federal district court.¹⁴⁸ The litigation stemmed from tragic facts: Ryan's son-in-law had killed her daughter and then himself, both Detroit police officers. The city defended against the motion to lift the stay by arguing that the suit would be too distracting for lawyers busy with the restructuring. Surprised by, and perhaps dubious of, the city's assertion that the same lawyers worked on both,¹⁴⁹ Judge Rhodes called for an evidentiary hearing to examine the workload of the city's in-house lawyers.¹⁵⁰ Detroit called as its witness the city's deputy corporation counsel.¹⁵¹ Ryan's lawyer cross-examined. Just when the hearing seemed to be concluding, Judge Rhodes called a witness of his own.¹⁵² That witness was Michael Muller, one of the city's in-house lawyers, who had been identified as present in the

No. 4209 (“[W]e have to think about what the appropriate role is for the Bankruptcy Court to monitor implementation of the plan post-confirmation assuming there is an order of confirmation.”).

146. Transcript on Trial Re: Objections to Chapter 9 Plan at 148-50, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. Oct. 2, 2014), ECF No. 7878 (emergency manager testifying why monitor was eliminated from earlier version of plan).

147. Transcript of Hearing Re. Status Conference, *supra* note 113, at 117 (court noting that a flood of motions for relief from stay is the “last thing any of us wants,” and suggesting a tort claimant committee); Transcript of Hearing Regarding Amended Motion of Creditor Ryan at 16, *In re City of Detroit* (Bankr. E.D. Mich. Oct. 2, 2013) (No. 13-53846), ECF No. 1118 (re-raising question of tort claims: “what’s the plan?”).

148. Motion of Creditor Deborah Ryan, An Interested Party, For Relief from This Court’s Order Staying Proceedings, *In re City of Detroit* (Bankr. E.D. Mich. Sept. 10, 2013) (No. 13-53846), ECF No. 0800 (seeking to lift the stay “for cause”).

149. Transcript of Hearing Regarding Amended Motion of Creditor Deborah Ryan at 13-14, *In re City of Detroit* (Bankr. E.D. Mich. Oct. 2, 2013) (No. 13-53846), ECF No. 1118.

150. Order Setting Evidentiary Hearing Regarding Amended Motion of Creditor Deborah Ryan for Relief from this Court’s Order Staying Proceedings, *In re City of Detroit* (Bankr. E.D. Mich. Oct. 2, 2013) (No. 13-53846), ECF No. 1073 (“The Court concludes that the record is not adequate with regard to the potential prejudice to the City if the motion is granted.”).

151. Evidentiary Hearing Regarding Amended Motion of Creditor Deborah Ryan at 62-66, *In re City of Detroit* (Bankr. E.D. Mich. Oct. 8, 2013) (No. 13-53846), ECF No. 1177.

152. A judge calling his or her own witness is rare but authorized under Federal Rule of Evidence 614. FED. R. EV. 614; WEINSTEIN’S FEDERAL EVIDENCE § 614.02[1] (2013) (describing practice as “particularly desirable in bench trials or when the interest of others than the immediate parties may be at stake, such as in class actions, or matters involving public policy”). Discussion of this rule in bankruptcy court opinions is infrequent. *But see* Northeast Alliance Fed. Credit Union v. Garcia, 260 B.R. 622, 628-30 (Bankr. D. Conn. 2011) (court calling debtors’ former lawyer regarding omissions on bankruptcy schedules); *In re Michelson*, 141 B.R. 715, 722 (Bankr. E.D. Cal. 1992) (discussing right of judge to call own witness but not doing so).

courtroom earlier that day.¹⁵³ Muller was responsible for the city’s defense to Ryan’s lawsuit. When Judge Rhodes asked Muller what he was doing with his time,¹⁵⁴ the latter’s answer boiled down to “not much.”¹⁵⁵

Judge Rhodes ruled he would lift the stay to allow Ryan to proceed if Detroit failed to make substantial progress on a comprehensive plan for all tort claims in thirty-five days.¹⁵⁶ Strictly speaking, the court did not order the city to develop a plan. But if the city did nothing, and the stay was lifted, the city would have to contend with not only the Ryan litigation, but hundreds of other plaintiffs wanting similar opportunities.¹⁵⁷ As if on cue, Detroit filed its tort plan.¹⁵⁸

As this example suggests, the court was willing to use inquisitorial techniques (here, calling the court’s own witness) to keep the case moving and under control. Judge Rhodes also selected a court-appointed expert, which is itself an inquisitorial technique, to evaluate the feasibility of Detroit’s ultimate restructuring plan:

The Court will not permit the confirmation of the city’s plan to be another bad deal like all the previous ones the city entered into with which we are now all too familiar. . . .¹⁵⁹

153. Evidentiary Hearing, *supra* note 151, at 47 (court indicating that he would like to call Muller and beginning direct examination).

154. *Id.* at 49 (“So I feel compelled to ask you how are you spending your time these days?”).

155. *Id.* Although the city’s in-house legal department apparently had been preparing a plan, Muller did not so indicate.

156. Evidentiary Hearing, *supra* note 151, at 63-64. An extension was possible, but the standard for obtaining one was high. *Id.* at 64. The court left it to the discretion of the city to develop a process and reminded the city of the possibility of a tort claims committee. *Id.* at 65.

157. Understanding the dynamics, Ryan’s lawyer told the press that the court “basically used our motion as a vehicle to push the city a bit harder to come up with a [tort claimant] plan and liquidate these outstanding claims against the city.” Tresa Baldas, *Detroit Bankruptcy Judge Gives City 35 Days to Develop Plan to Clear Lawsuits*, DET. FREE PRESS, Oct. 8, 2013.

158. Motion of Debtor, Pursuant to Sections 105 and 502 of the Bankruptcy Code, for Entry of an Order Approving Alternative Dispute Resolution Procedures to Promote the Liquidation of Certain Prepetition Claims, *In re City of Detroit* (Bankr. E.D. Mich. Nov. 12, 2013) (No. 13-53846), ECF No. 1665 (setting forth claim exchange procedure, plus arbitration). After filing its tort claimant plan, the city agreed to let Ryan proceed in district court. Stipulation for an Order Resolving Motion of Creditor Deborah Ryan, An Instant Party, For Relief from this Court’s Order Staying Proceedings, *In re City of Detroit* (Bankr. E.D. Mich. Jan. 27, 2014) (No. 13-53846), ECF No. 2568. But the dispute had already served its function for the court.

159. Transcript on Motion of Creditors for Entry of an Order Pursuant to Section 105(a) of the Bankruptcy Code . . . to Establish a Benchmark Valuation at 38, *In re City of Detroit* (Bankr. E.D. Mich. Jan. 22, 2014) (No. 13-53846), ECF No. 2562. At a later hearing, the court explained that creditors were unlikely to provide an adequate adversarial presentation on feasibility, justifying the appointment. Transcript of Hearing Regarding Notice of Presentment of Order at 17, *In re City of Detroit*, (Bankr. E.D. Mich. April 2, 2014) (No. 13-53846), ECF No. 3817; FED. R. EV. 706, Advisory Committee Notes on Proposed Rules (1975) (“[T]he availability of the procedure in itself decreases the need for resorting to it” due to its “sobering effect on other witnesses and parties.”); Erichson, *supra* note 90, at 1987-88 (discussing relative infrequency of court-appointed experts but increasing use in mass tort cases after the Supreme Court’s *Daubert* decision). See also Reporter’s Daily Transcript of Proceedings at 177, *In re City of Stockton*, No. 12-32118-C-9 (Bankr. E.D. Cal. May 13, 2014) (“When I decide . . . whether to confirm the plan, I need to think about what are the alternatives. Otherwise, I’d just mindlessly be rubber-

Now is not the time for defiant swagger or for dismissive pound-the-table, take-it-or-leave-it proposals that are nothing but a one-way ticket to Chapter 18If the plan . . . promises more to creditors than the city can reasonably be expected to pay, it will fail, and history will judge each and every one of us accordingly.¹⁶⁰

The judge conducted the direct examination of his expert himself.¹⁶¹

More generally, Judge Rhodes took an active, affirmative questioning role, gathering and clarifying information as well as conveying his preferences. The August 21, 2013 hearings, early in the case, offer examples that reflect, and perhaps set, the tone and expectations. In the morning, creditors complained about barriers to access to Detroit's financial data room, such as nondisclosure agreements and legal releases.¹⁶² When Detroit responded with a reference to "sensitive financial documents," the judge asked Detroit's lawyers why every piece of paper that is not privileged shouldn't be discoverable in a bankruptcy case.¹⁶³ When the court asked the lawyer for examples of "competitively sensitive" information, and the lawyer identified cash projections, the court challenged that response, and asked why it wouldn't be in the city's best interest to share them with the public. After the lawyer's response, the judge paused the inquiry and instructed the lawyer to confer with his colleagues and client and return with an answer at 3 p.m.¹⁶⁴ At the appointed time, the lawyer reported Detroit would lift the restrictions to an even greater extent than creditors had requested.¹⁶⁵

An afternoon hearing on August 21, 2013 on a time-sensitive issue, scheduled that morning at the court's encouragement,¹⁶⁶ focused on Detroit's rights in casino revenues. Judge Rhodes asked detailed questions throughout the movant's presentation, exhausting the bankruptcy knowledge of the bond

stamping a plan. You might as well hire a potted palm to preside in the courtroom."); Jacoby, *What Should Judges Do in Chapter 11?*, *supra* note 29 at 585 (discussing divergent views on whether courts have a duty to scrutinize plan feasibility and how that duty is fulfilled).

160. Transcript on Motion of Creditors, *supra* note 159, at 39-40. A Chapter 18 is a reference to a second Chapter 9 filing.

161. Transcript of Hearing Regarding Status Conference at 12, *In re City of Detroit* (Bankr. E.D. Mich. Aug. 6, 2014) (No. 13-53846), ECF No. 6585 (asking for objections; none heard); Transcript of Continued Trial at 137-186, *In re City of Detroit*, (Bankr. E.D. Mich. Sept. 15, 2014) (No. 13-53846), ECF No. 7617 (court leading *Daubert* examination of Kopacz); Transcript of *In Re* Continued Trial at 8-84, *In re City of Detroit*, (Bankr. E.D. Mich. Oct. 22, 2014) (No. 13-53846), ECF No. 8082 (court leading direct examination of Kopacz).

162. Transcript of Hearing Regarding Emergency Motion for Clarification at 44-45, *In re City of Detroit* (Bankr. E.D. Mich. Aug. 21, 2013) (No. 13-53846), ECF No. 0685.

163. *Id.* at 52 ("Give me an example of a document that parties can see, but you don't want disseminated, whatever that means.").

164. *Id.* at 53-54 ("This is bankruptcy. What's not relevant? All right. I'm going to—I'm going to just pause this inquiry now because I sense the need for it.").

165. *Id.* at 56-57; Order Granting Motion of Debtor for a Protective Order, *In re City of Detroit*, (Bankr. E.D. Mich. Aug. 29, 2013) (No. 13-53486), ECF No. 0685 ("All interested parties shall have unrestricted access to the data room.").

166. Transcript of Hearing Regarding Emergency Motion, *supra* note 162, at 33-34.

insurer's lawyer by his own admission.¹⁶⁷ Although the city's lawyer was capable of rebutting the creditor's arguments, the court did much of that work itself.¹⁶⁸ Active engagement, and a two-way flow of information, were typical throughout status conferences and hearings.

The court's involvement varied during big evidentiary trials, and sometimes went beyond asking clarifying questions and resolving evidentiary disputes.¹⁶⁹ During the plan confirmation trial, the judge asked detailed substantive questions of a variety of witnesses, including City Council President Brenda Jones,¹⁷⁰ Mayor Mike Duggan,¹⁷¹ Emergency Manager Kevyn Orr,¹⁷² the Director/Chief Executive Officer of Detroit's water and sewerage department,¹⁷³ the Chief Operating Officer of the Detroit Institute of Arts,¹⁷⁴ investment banker Ken

167. *Id.* at 76-93 (back and forth between court and Syncora's lawyer); *id.* at 92-93 ("Your Honor, I have said my piece. I think we—may have exhausted my knowledge of—bankruptcy law as well."); *id.* at 105 ("Just to the extent there was any failing in my presentation today to respond to some of your questions, I wanted you to know that we would be happy to submit additional pleadings . . . [T]here were some questions you posed that if you'd like more, we'd be happy to prepare.").

168. The city prevailed. Excerpt of Hearing Re. Opinion Re. Stay Issue, *In re City of Detroit* (Bankr. E.D. Mich. Aug. 28, 2013) (No. 13-53846), ECF No. 0692; Order Regarding Casino Revenues and Automatic Stay, *In re City of Detroit* (Bankr. E.D. Mich. Aug. 28, 2013) (No. 13-53846), ECF No. 0670. The district court affirmed. Opinion and Order, *In re City of Detroit*, (E.D. Mich. July 11, 2014) (No. 2:13-cv-14305), ECF No. 14.

169. As just one example illustrating the frequent resolution of evidentiary disputes, see Transcript of Re: Evidentiary Trial, *In re City of Detroit*, (Bankr. E.D. Mich. Oct. 24, 2013) (No. 13-53846), ECF No. 1490. The court sometimes raised evidentiary objections *sua sponte*. Transcript of Continued Trial Re: Confirmation of Chapter 9 Plan at 247-51, *In re City of Detroit* (Bankr. E.D. Mich. Sept. 16, 2014) (No. 13-53846), ECF No. 7618 (court and Wagner debating at some length the relevance of Wagner's questions to Kim Nicholl; no input from retiree committee lawyer or city). Later, as the court explains the problem with the answer the witness just gave, Wagner jokes that he will let the court finish the cross-examination. *Id.* at 261. See also Transcript of Trial Re. Objections to Chapter 9 Plan, *supra* note 7, at 57-58 (court raising and sustaining its own objection).

170. Transcript of Trial Re. Objections to Chapter 9 Plan, *supra* note 7, at 58-59 (court asking City Council President whether she is committed to carrying out the plan and whether art should be sold or preserved for the city).

171. Transcript of In re: Continued Trial at 144-149, *In re City of Detroit* (Bankr. E.D. Mich. Oct. 6, 2014) (No. 13-53846), ECF No. 7917.

172. Transcript of In Re: Trial Re: Objections to Chapter 9 Plan, *supra* note 144, at 15-28; Trial Re. Objections to Chapter 9 Plan at 131-136, *In re City of Detroit* (Bankr. E.D. Mich. Oct. 21 2014) (No. 13-53846), ECF No. 8098.

173. Transcript of Trial Re: Objections to Chapter 9 Plan at 127-138, *In re City of Detroit*, (Bankr. E.D. Mich. Sept. 17, 2014) (No. 13-53846), ECF No. 7638. The questions included open-ended queries, such as whether the creation of a regional water authority would be a positive development, *id.* at 130-31, 137, and challenges she foresaw in the next ten years, *id.* at 131. Judge Rhodes also asked, "I'm going to speak perhaps a little more bluntly. . . . Is it fair to say, in your estimation, that certain customers, communities, and others carried a certain amount of distrust or lack of confidence or skepticism about the department's ability to carry out its mission in the most efficient way?" *Id.* at 135.

174. Transcript of Continued Trial Re: Objections to Chapter 9 Plan at 156, *In re City of Detroit* (Bankr. E.D. Mich. Sept. 18, 2014) (No. 13-53846), ECF No. 7634.

Buckfire,¹⁷⁵ Ernst and Young managing director Guarav Malhotra,¹⁷⁶ Michael Plummer from ArtVest,¹⁷⁷ and a water and sewer system consultant.¹⁷⁸

While Judge Rhodes often expected precise answers to his questions, he sometimes afforded witnesses significant latitude. The exchange with the DIA's Chief Operating Officer Annmarie Erickson offers an example.¹⁷⁹ Judge Rhodes asked Erickson, "[w]hat is your opinion on what the value of the museum is to the 60,000 school children you said comes [sic] there,"¹⁸⁰ and then, "[w]hat is the value to the children of participating in the programming that the museum offers apart from just the opportunity to see the art?"¹⁸¹ Erickson talked generally about the importance of the museum for families with school age children,¹⁸² for adults,¹⁸³ and to the city and region as a whole.¹⁸⁴ The court credited that testimony in its written decision confirming the plan.¹⁸⁵

175. Transcript of Trial Re: Objections to Chapter 9 Plan at 54-59, 79-80, *In re City of Detroit* (Bankr. E.D. Mich. Sept. 30, 2014) (No. 13-53846), ECF No. 7821; *id.* at 94 (asking witness to think during recess about advantages and disadvantages of deferring exit financing for six months or a year); *id.* at 115-17, 211-223 (asking, among other things, about cost associated with granting security interest in income tax revenues).

176. Transcript of Trial re: Objections to Chapter 9 Plan at 59, 69, 78-79, 80-85, *In re City of Detroit*, 524 B.R. 147 (Bankr. E.D. Mich. Oct. 21, 2014) (No. 13-53846), ECF No. 8098.

177. Transcript of In re: Continued Trial at 64-66, *In re City of Detroit*, 524 B.R. 147 (Bankr. E.D. Mich. Sept. 18, 2014) (No. 13-53846), ECF No. 7634.

178. Transcript of Trial Re: Objections to Chapter 9 Plan at 32-35, *In re City of Detroit* (Bankr. E.D. Mich. Sept. 30, 2014) (No. 13-53846), ECF No. 7821. The court's questions to three witnesses about public pension practices and discount rates prompted witness re-examination by objecting creditors (who later settled). Transcript of Continued Trial Re: Confirmation of Chapter 9 Plan at 50-57, *In re City of Detroit* (Bankr. E.D. Mich. Sept. 16, 2014) (No. 13-53846), ECF No. 7618 (testimony of Alan Perry in response to court questions); *id.* at 54 (court asking "[i]s the industry doing anything about re-examining its standard practices in—in setting investment return assumptions to deal with this very large as you characterized it, UAAL?"); *id.* at 56 ("Do you have an opinion on whether the 6.75% investment return assumption in this case is prudent?"); *id.* at 57 ("Are you telling me that given Detroit's insolvency your—your view might be that prudence would suggest an even lower rate?"); *id.* at 57-58 (objector re-cross examination); Transcript of Trial Re: Objections to Chapter 9 Plan, *supra* note 7, at 234-37 (testimony of Cynthia Thomas in response to court questions); *id.* at 237 (objector redirect examination); Transcript of In re Continued Trial at 125-134, 136-38, *In re City of Detroit* (Bankr. E.D. Mich. Oct 14, 2014) (No. 13-53846), ECF No. 8004 (testimony of William Fornia in response to court questions); *id.* at 134-135 (objector redirect examination).

179. Transcript of Continued Trial Re: Objections to Chapter 9 Plan at 156-57, *In re City of Detroit* (Bankr. E.D. Mich. Sept. 18, 2014) (No. 13-53846), ECF No. 7634 (starting with disclosure that Erickson had shown Judge Rhodes the museum as part of the city tour, but they had not otherwise talked about the museum).

180. *Id.* at 157. The court specified that his reference to value included non-economic value.

181. *Id.* at 158.

182. *Id.* at 159-160.

183. *Id.* at 161.

184. *Id.* at 161-164.

185. *In re City of Detroit*, *supra* note 1, at 218 ("[The court] also accepts the testimony of Ms. Erickson on the priceless value that the DIA and the art create for the City, the region and the state The evidence unequivocally establishes that the DIA stands at the center of the City as an invaluable beacon of culture, education for both children and adults, personal journey, creative outlet, family experience, worldwide visitor attraction, civic pride and energy, neighborhood and community cohesion, regional cooperation, social service, and economic development. Every great city in the world

These various examples reflect that the presiding judge was not a passive bystander waiting to be invited into the case. From the outset, Judge Rhodes set the pace of the case and aimed to prevent its derailment. He was an active participant, with deep substantive engagement, at the micro and macro levels.¹⁸⁶ The impact of this involvement cannot be measured by standard metrics such as written court decisions.

C. Dealmaking

*I felt it was necessary to appoint the strongest possible mediator that I could. And I felt that Chief Judge Rosen had all of the necessary qualities. Weight of office. Weight of personality. Commitment to the city. Personal and professional contacts. Political contacts. He was the right person.*¹⁸⁷

Settlement promotion, when overseen by a judge, can chip away at the federalist core of municipal bankruptcy. Just a few days after Detroit filed for bankruptcy, Judge Rhodes proposed a mediation process, and raised the matter at the second hearing.¹⁸⁸ Litigation could be “bitter” and “expensive,” he explained, while settlements could stabilize and strengthen long-term relationships.¹⁸⁹ Judge Rhodes’s proposed order identified Chief Judge Rosen as his choice for lead mediator.¹⁹⁰ By appointing a chief district judge as a mediator,

actively pursues these values. They are the values that Detroit must pursue to uplift, inspire and enrich its residents and its visitors.”)

186. The court, rather than the debtor or a moving party, almost always proposed the order in which to address the scheduled items. By comparison, in the *Jefferson County* bankruptcy, the debtor filed detailed agendas for hearings that included the order of agenda items. Jefferson County’s Agenda for Hearing Scheduled for May 9, 2013, *In re Jefferson Cty.* (Bankr. N.D. Ala. May 7, 2013) (No. 11-05736), ECF No. 1766; Jefferson County’s Agenda for Hearing Scheduled for November 15, 2012, *In re Jefferson Cty.* (Bankr. N.D. Ala. Nov. 13, 2012) (No. 11-05736), ECF No. 1420; Jefferson County’s Amended Agenda for Hearing Scheduled for November 15, 2012, *In re Jefferson Cty.* (Bankr. N.D. Ala. Nov. 14, 2012) (No. 11-05736), ECF No. 1423; Jefferson County’s Agenda for Hearing Scheduled for April 16, 2012 at 9:00AM, *In re Jefferson Cty.* (Bankr. N.D. Ala. Apr. 12, 2012) (No. 11-05736), ECF No. 0905; Jefferson County’s Agenda for Hearing Scheduled for November 21, 2011 at 8:00AM, *In re Jefferson Cty.* (Bankr. N.D. Ala. Nov. 17, 2011) (No. 11-05736), ECF No. 0231.

187. Nathan Bomey, *Q&A: Detroit Bankruptcy Judge on Pensions, DIA, Fees*, DET. FREE PRESS, Feb. 20, 2015.

188. Transcript of Hearing Re. Status Conference, *supra* note 113, at 8.

189. *Id.* at 44. That view was expressed throughout the case. *E.g.*, Order Granting the City’s Motion to Vacate the Appointment of the Official Committee of Unsecured Creditors at 11, *In re City of Detroit* (Bankr. E.D. Mich. Feb. 28, 2014) (No. 13-53846), ECF No. 2784 (“As this Court has emphasized, litigation is costly and time-consuming, and most often its results are that the winner takes all and the loser gets nothing.”).

190. Order Establishing Amended Initial Status Conference Agenda at 4, *In re City of Detroit* (Bankr. E.D. Mich., July 23, 2013) (No. 13-53846), ECF No. 0129 (citing 11 U.S.C. § 105 and stating that “it is necessary and appropriate to order the parties to engage in the facilitative mediation of any matters that the Court refers in this case”); Order Regarding Comment Period on Revised Mediation Order, *In re City of Detroit* (Bankr. E.D. Mich., Aug. 2, 2013) (No. 13-53846), ECF No. 0278 (amended proposed order with request for comments). The amended version refers to consultation with the parties before ordering mediation of particular matters. As noted in note 197, that consultation process, if it occurred, is not apparent from the public record.

the bankruptcy judge arguably delegates more power to the mediator than the bankruptcy judge could have exercised himself.¹⁹¹ Had the parties selected one or more mediators from a private panel as local rules generally anticipate, mediation might not have become the relatively unchecked avenue for strong federal control for which Detroit will be remembered.

Judge Rhodes presented mediation to the parties as a proposal. His order required, however, that party comments be delivered to the court in sealed envelopes and not filed on the public docket.¹⁹² In open court, a lawyer for the city expressed support for the court's order as written.¹⁹³ A lawyer for a union also indicated acceptance, although not to the exclusion of other avenues to protect her client's interest.¹⁹⁴ The Detroit Retirement Systems' lawyer suggested the most unease, characterizing the proposal as premature.¹⁹⁵ In response, Judge Rhodes emphasized the facilitative nature of the process; nothing, and no one, would be coerced, he said.¹⁹⁶ After the comment period, Judge Rhodes named Chief Judge Rosen the lead mediator and authorized him to "enter any order necessary for the facilitation of mediation proceedings" on

191. A bankruptcy court, comprising merit-selected non-Article III judges, is a unit of the district court. Also, the district court is generally the first court to hear an appeal from a bankruptcy court order (although one presumes such appeals would not go to a judge assigned as mediator). Church, *supra* note 12 (business school professor stating that Chief Judge Rosen was "a second judge who can do things the first judge can't").

192. Order Regarding Comment Period, *supra* note 190, at 1 ("Interested parties may submit comments regarding the attached Proposed Revised Mediation Order as well as comments regarding a proposed Mediator directly to Judge Rhodes in care of the Bankruptcy Clerk's office by August 9, 2013. Comments should be sealed in an envelope and labeled 'CONFIDENTIAL MEDIATION ORDER COMMENTS.' Comments should not be filed through CM/ECF."); Transcript of Hearing Regarding Status Conference, *supra* note 188, at 45-46 ("I want to solicit the comments of others regarding the concept of mediation and the particulars of the order. It's probably not, however, appropriate to seek your comments in this forum regarding the proposed mediator, and so I am going to ask you if you have any comments, either—on either side of the question about the proposed mediator, I'm going to give you a seven-day opportunity to submit to my chambers sealed and confidentially any such comments.").

193. Transcript of Hearing Regarding Status Conference, *supra* note 188, at 45 ("Obviously you articulated better than I could possibly why we support mediation. We want resolution. We don't want protracted litigation. We want to move swiftly. Time is our enemy, as I said With respect to the order, which is your second question, we have no desire to change any of the language presented in the order as you've stated it.").

194. *Id.* at 46-47 (also expressing preference for a "full-service mediator that can help us with process issues as well as substance issues").

195. *Id.* at 51-52. The lawyer asked that parties have the chance to engage in negotiations to narrow the issues and gather more information before being sent to mediation. "We want to caution against expediency merely for the sake of expediency. We all have a sense of urgency. How could we not? But there is proceeding with all due dispatch, and then there's proceeding in haste and endangering parties' due process rights." *Id.*

196. *Id.* at 53-54 ("[P]lease understand what I'm referring to here and what I envision here is entirely facilitative mediation. There's nothing that this mediator will have the authority to do in terms of compelling any particular outcome The ultimate deliverable is a plan, assuming we get past eligibility And in that regard, there may be other disputes that should be better referred to a mediation panel than to the mediator who is working on debt adjustment, and I think we want to keep that option open also.").

major issues, and to appoint other mediators at his discretion.¹⁹⁷ The order also rendered confidential “all proceedings, discussions, negotiation, and writings incident to mediation.”¹⁹⁸

The first mediation session occurred on September 17, 2013.¹⁹⁹ Speaking in his courtroom before the confidential portion began, Chief Judge Rosen reiterated the virtues of settlement: “years of litigation, disputing issues in the courts, is horrendous.”²⁰⁰ By about two months into the bankruptcy, dozens of creditor groups or representatives, including the State of Michigan and Michigan’s Attorney General, had been sent to mediation on almost everything of significance in the case.²⁰¹ The numbers of parties in mediation or alternative dispute resolution grew with the addition of hundreds of tort claimants,²⁰² counties negotiating a regional water authority,²⁰³ and parties seeking to enjoin residential water shutoffs.²⁰⁴ Mediation continued even long after the court confirmed the city’s plan of adjustment.²⁰⁵ When Detroit’s emergency manager was asked at the plan confirmation hearing which issues the court had sent to

197. Mediation Order, *In re City of Detroit* (Bankr. E.D. Mich., Aug. 13, 2013) (No. 13-53846), ECF No. 0322. The order refers to consultation with the parties before matters are sent to mediation, but, for nearly all mediation orders that followed, I have found no evidence that such consultation occurred.

198. *Id.* at 1 cl. 4.

199. First Order Referring Matters to Facilitative Mediation, *In re City of Detroit* (Bankr. E.D. Mich. Aug. 16, 2013) (No. 13-53846), ECF No. 0333; *see also* Order to Certain Parties to Appear for Mediation of Certain Disputes Before Special Mediator U.S. Bankruptcy Judge Elizabeth Perris, *In re City of Detroit* (Bankr. E.D. Mich. Aug. 23, 2013) (No. 13-53846), ECF No. 0593.

200. Ed White, Associated Press, *Judge Acting as Mediator in Detroit Bankruptcy: Deals are Better than ‘Horrendous’ Litigation*, STAR TRIBUNE, Sept. 17, 2013; Robert Snell, *Mediator Tells City Creditors: ‘Open Your Minds’; Team of Judges Will Try to Settle Disputes Over Debt Restructuring*, DET. NEWS, Sept. 18, 2013, at A1. He also shared that he and the other mediators he had appointed had taken a bus tour of the “good, the bad, and the ugly” of the city. White, *supra* note 200. Chief Judge Rosen cited the perils of litigation at other junctures. Howes et al., *supra* note 12, at Ch. 4 (Chief Judge Rosen warned Grand Bargain funders that litigation would be devastating to the city).

201. First Order Referring Matters to Facilitative Mediation, *supra* note 199; Second Order Referring Matters to Facilitative Mediation, *In re City of Detroit* (Bankr. E.D. Mich. Aug. 22, 2013) (No. 13-53846), ECF No. 0562; Order to Certain Parties, *supra* note 199; Third Order Referring Matters to Facilitative Mediation, *In re City of Detroit* (Bankr. E.D. Mich. Oct. 7, 2013) (No. 13-53846), ECF No. 1101 (listing twenty unions whose disputes would be referred to Chief Judge Rosen).

202. Order, Pursuant to Sections 105 and 502 of the Bankruptcy Code, Approving Alternative Dispute Resolution Procedures to Promote the Liquidation of Certain Prepetition Claims, *In re City of Detroit* (Bankr. E.D. Mich. Dec. 24, 2013) (No. 13-53846), ECF No. 2302; Alternative Dispute Resolution Notice, *In re City of Detroit* (Bankr. E.D. Mich. June 30, 2014) (No. 13-53846), ECF No. 5681 (directing recipient’s tort claim to be submitted to ADR and dividing costs).

203. Order of Referral to Mediation, *In re City of Detroit* (Bankr. E.D. Mich. Apr. 17, 2014) (No. 13-53846), ECF No. 4156 (entering an order broader than Wayne County requested).

204. Mediation Order, *Lyda v. City of Detroit* (Bankr. E.D. Mich. Sept. 2, 2014) (No. 14-04732), ECF No. 34 (referring matter to Chief Bankruptcy Judge Shefferly, not officially part of Chief Judge Rosen’s mediation team).

205. After ruling that plan confirmation required a review of all professional fees, even if already paid, Judge Rhodes sent that process to Chief Judge Rosen. Oral Opinion on the Record at 27, *supra* note 5. Judge Rhodes also sent to mediation post-bankruptcy matters relating to the establishment of a regional water authority. Mediation Order, *In re City of Detroit* (Bankr. E.D. Mich. Nov. 26, 2014) (No. 14-53846), ECF No. 8468; Mediation Confidentiality Order, *In re City of Detroit* (Bankr. E.D. Mich. Feb. 6, 2015) (No. 14-53846), ECF No. 9176 (lease negotiations relating to water authority).

mediation, he replied, “[a]ll of them.”²⁰⁶ Again, there is no sign that consent was specifically elicited for each matter. The mediation process may also have re-incorporated the presiding judge. For example, the press reported that a district judge mediator asked Judge Rhodes to meet with union representatives to explain bankruptcy law and their rights.²⁰⁷

Chief Judge Rosen regularly entered orders on the bankruptcy court docket even though he was not the presiding judge assigned to the case. Some memorialized agreements between parties or sent tort claimants into a separate arbitration process.²⁰⁸ Most directed parties to attend mediation sessions,²⁰⁹ including some calling for continual attendance until released by the mediator.²¹⁰ In a deposition, Detroit’s emergency manager reported that Chief Judge Rosen told him that he would hold an interest-rate-swap counterparty in contempt if it did not accept a particular settlement.²¹¹

Wearing his Detroit mediator hat (while also presiding over cases on his own docket), Chief Judge Rosen was in direct communication with individuals outside of the official sessions. Several news stories reported that Chief Judge Rosen called the Emergency Manager over a weekend to urge him to cancel a planned pension freeze that was rattling the parties.²¹² Judge Rosen later quipped at a press conference that he and Detroit’s emergency manager probably talk to each other more than to their wives.²¹³ In addition, Chief Judge Rosen actively solicited donations from private foundations, not originally parties to the

206. Transcript of *In re* Trial: Objections to Chapter 9 Plan, *supra* note 2, at 169.

207. Howes et al., *supra* note 12, at Ch. 4 (“Could she invite Judge Rhodes to meet privately with union leaders to provide a primer on Chapter 9 and his powers, answering questions and concerns? The city agreed, mindful that continued delay benefited no one. On April 16, Rhodes walked into the judges conference room on the seventh floor. For two hours, Roberts confirmed, he described Chapter 9, quashing any notion that he could excise individual labor contracts from a restructuring plan he might otherwise confirm. It helped.”).

208. *E.g.*, Order Regarding Provision of Actuarial Data, *In re* City of Detroit (Bankr. E.D. Mich. Apr. 11, 2014) (No. 13-53846), ECF No. 3959 (setting forth terms by which Retiree Committee’s actuary will provide data to Detroit Retirement Systems).

209. Jacoby & Remus, *supra* note 30, contains a comprehensive list.

210. Order for Continuing Mediation, *In re* City of Detroit (Bankr. E.D. Mich. Sept. 11, 2014) (No. 13-53846), ECF No. 7419 (ordering mediation for 11 parties “continuing day-to-day thereafter as deemed necessary, until released by the mediators”).

211. Deposition of Emergency Manager Kevyn Orr at 41, Dec. 31, 2013 (“We again asked if it was possible to get to 155 [million], the mediators told us, ‘No, 165 is the number. That’s the best number you’re going to get today and I’m going to hold them in contempt if they don’t agree to it.’”), available at <https://www.detroitmi.gov/Portals/0/docs/EM/Reports/OrrDeposition123113.pdf>.

212. Matt Helms, *Orr Issues Stay on Freezing Pensions for Detroit Workers as Mediation Continues*, DET. FREE PRESS, Jan. 6, 2014 (quoting spokesperson for Emergency Manager Kevyn Orr as saying “Judge Rosen asked Kevyn [Orr]—I think they had a long conversation over the weekend—and Rosen asked if he would consider staying it”); Christine Ferretti, *Pension Officials Frustrated with Lack of Communication from Detroit EM over Freeze*, DET. NEWS, Jan. 8, 2014 (“Chief U.S. District Court Judge Gerald Rosen, who is mediating Detroit bankruptcy talks, urged Orr over the weekend to halt the benefit freeze to allow for a possible debt-cutting deal with pensioners, Orr spokesman . . . has said.”).

213. Jonathan Oosting, *Snyder Hails “Historic Day for Michigan’s Future,” Urges Detroit’s Retirees to Approve Bankruptcy Plans*, MICH. LIVE (June 3, 2014, 10:02 AM), http://www.mlive.com/lansing-news/index.ssf/2014/06/snyder_hails_historic_day_for.html.

bankruptcy, for what became the Grand Bargain.²¹⁴ Chief Judge Rosen also reached out to the Michigan Governor and members of the state legislature to seek financial contributions for the restructuring.²¹⁵ These contributions materialized after legislative sessions in Lansing for which Chief Judge Rosen was on hand.²¹⁶ He held meetings in his chambers with Michigan House and Senate majority leaders.²¹⁷ Local reporters spotted Chief Judge Rosen heading into a closed-door Detroit City Council meeting, apparently to advocate for a continued role for the emergency manager.²¹⁸ Chief Judge Rosen hosted Michigan Governor Snyder and other politicians in his chambers to listen while Judge Rhodes announced his decision confirming Detroit's plan.²¹⁹

The lead mediator also played a distinctive role in the appellate process, illustrating just how many ways federal court influence can operate. When objectors sought expedited review directly from the Sixth Circuit of the order finding Detroit eligible for bankruptcy, Judge Rhodes asked the Circuit to confer with Chief Judge Rosen on the timing of the appeal: "the Court remains

214. Bomey et al., *supra* note 5, at Ch. 11: After Tough Persuasion, Lansing Commits to Grand Bargain; John Gallagher & Mark Stryker, *Foundation Leaders, Detroit Bankruptcy Mediator Meet Behind Closed Doors*, DET. FREE PRESS, Nov. 6, 2013; Howes et al., *supra* note 12, at Ch. 4 (foundation leader recalling Chief Judge Rosen telling her, "I need a lot of money fast"); Mark Stryker & John Gallagher, *DIA Joins Deal in Works with Mediators that Would Protect Art, Pensions in Detroit Bankruptcy*, DET. FREE PRESS, Dec. 11, 2013 ("DIA leaders said they had pledged at a Tuesday meeting with mediators, including U.S. Chief Judge Gerald Rosen . . . to help refine the proposal that Rosen has been pushing behind closed doors since November Rosen has been lobbying leaders of at least 10 foundations.").

215. Howes, Livengood & Shepardson, *supra* note 12, at *Introduction* ("I think we'll get \$350 [million] and I think you should match it," Chief Judge Rosen said to Governor Snyder); Steven Church & Chris Christoff, *Michigan Republicans in Talks with Detroit Mediator*, BLOOMBERG NEWS (Jan. 16, 2014, 4:01 PM), www.bloomberg.com/news/articles/2014-01-15/michigan-republicans-in-talks-with-detroit-mediator.

216. Church, *supra* note 12 ("Rosen also met with Michigan lawmakers about the deal. The agreement required the Legislature's approval because the state was required to contribute \$195 million."); Kathleen Gray, *Michigan Senate OKs Historic \$195M Detroit Aid Package; Snyder's Signature Next*, DET. FREE PRESS (June 4, 2014) ("U.S. District Judge Gerald Rosen, the chief federal negotiator on the bankruptcy case, met with senators Tuesday morning and stayed to witness the bills passage."), <http://archive.freep.com/article/20140603/NEWS06/306030043/Detroit-bankruptcy-pensions-artwork>; Press Conference (June 9, 2014) ("Big Three" Automaker contribution, transcript on file with author) (Rosen: "I was up there as I think some of you know last week when the legislation was passed and it was just remarkable . . .").

217. Howes et al., *supra* note 12, at Ch. 7.

218. Joe Guillen, *Duggan, Council Meet on Orr's Fate as Emergency Manager*, DET. FREE PRESS (Sept. 23, 2014) ("Rosen . . . seen walking into the Detroit City Council Chambers, where a closed council session started at 2pm. Rosen oversees private mediation talks in the city's bankruptcy case. He helped fashion the so-called 'grand bargain.' His involvement in this afternoon's private meeting makes clear the interconnection between the city's ongoing bankruptcy case and the talks to oust Orr."), <http://www.freep.com/story/news/local/detroit-bankruptcy/2014/09/23/duggan-council-meeting/16113167/>; Darren A. Nichols, *City Leaders Meet to Discuss Orr's Future in Detroit*, DET. NEWS (Sept. 25, 2014) (referring to Chief Judge Rosen's presence), <http://www.freep.com/story/news/local/detroit-bankruptcy/2014/09/23/duggan-council-meeting/16113167/>.

219. Bomey et al., *supra* note 5 ("Cheers and applause broke out down the hallway in Rosen's stately chambers, where he and a large reception of dignitaries, including Gov. Snyder, Sen. Majority Leader Richardville and others watched the ruling on closed circuit TV.").

convinced that the interests of the City, its residents and its creditors are better served by adjusting the pace of the legal process, including the appeals, to meet the needs of the mediation process.²²⁰ The assigned panel of Sixth Circuit judges agreed to do just that.²²¹ The district judge who received appeals also stayed them *sua sponte* pending the Sixth Circuit's review of Detroit's eligibility on direct appeal, which, as just noted, was largely suspended.²²² Eventually, a creditor (successfully) filed a writ of mandamus to compel the district court to hear and decide an appeal.²²³ And, by the summer of 2014, the Sixth Circuit threatened to push forward with the eligibility appeal before plan confirmation.²²⁴ But overall, the strategy prevailed.

Although parties were barred from discussing negotiations by the mediation order (and stern admonitions about that order), the lead mediator communicated with the media and public through several channels. Written statements from the "Detroit Bankruptcy Mediators" were issued by the district court's press officer on the state of negotiations, significant contributions to the Grand Bargain, or settlements.²²⁵ Chief Judge Rosen appeared and spoke at press conferences alongside the Governor, members of the state legislature, the emergency manager, Mayor Duggan, and others.²²⁶

220. *In re City of Detroit*, 504 B.R. 191, 200 (Bankr. E.D. Mich. 2013) ("The Court recommends that similarly, the Court of Appeals . . . consult with Chief Judge Rosen on whether expediting these appeals will facilitate or impede the mediation, and be guided accordingly.").

221. Letter from Deborah S. Hunt, Clerk to Counsel Re: City of Detroit Michigan, Petition for Permission to Appeal, City of Detroit, 13-116, 13-118, 14-101/102/103/104/105 (6th Cir. Feb. 7, 2014) ("I advise you that [the panel] will consult with the Honorable Gerald Rosen in his capacity as Judicial Mediator for the underlying bankruptcy.").

222. *In re Syncora Guarantee Inc.*, 757 F.3d 511, 514-15 (6th Cir. 2014) (discussing how district court allowed appeal to languish from November 2013, when it was fully briefed, until April 2014, when the district court formally suspended the appeal pending the eligibility determination).

223. *Id.* at 516 ("[T]he prospect that a panel of this court may declare the city to be ineligible for the protections of Chapter 9 of the Bankruptcy Code is no reason to stay other appeals that present independent questions of law . . . judicial resources are not so scarce as to justify the risks that arise from the stay . . . We must intervene to protect our appellate jurisdiction and to ensure that the district court does not deprive Syncora of its statutory right to judicial review."); *id.* at 517 ("The question presented in Syncora's appeal . . . is precisely the type of issue that should be reviewed before the bankruptcy court confirms the plan of adjustment."). A concurring opinion emphasized that "governing case law" necessitated the mandamus order. *Id.* at 517-18. The district court affirmed the bankruptcy court's judgment in favor of the city; the parties argued the matter before the Sixth Circuit, but settled, and the Sixth Circuit did not rule.

224. Letter from Hon. Julia Smith Gibbons, *In re City of Detroit*, No. 14-1208 et al. (6th Cir. July 29, 2014) (expressing reservation about postponing oral argument, suggesting court might have to decide the matter without oral argument or argument via telephone, but canvassing appellants to submit position on what to do with appeal by July 31, 2014, even though "panel does not consider further delay in rendering a decision an option at this time").

225. Jacoby & Remus, *supra* note 30, contains a list of press releases.

226. *Id.*, *supra* note 30, contains description and analysis. At the June 3, 2014 press conference, after the state legislature had approved the Grand Bargain funding, Chief Judge Rosen recognized it was unusual for judges to meet with the media, but said he was making an exception because the matter was so important. Press Conference, *supra* note 213, at approximately 10:00 into video.

Judge Rhodes was not a rubber stamp for settlements reached in mediation.²²⁷ Indeed, the court rejected the first deal openly endorsed by Chief Judge Rosen,²²⁸ although he sent the parties right back to mediation.²²⁹ Overall, though, the court's support for the court-supervised deal-making could hardly have been stronger. In granting the city's request to dissolve the creditor's committee, an atypical and controversial step in any bankruptcy, the court listed the committee's insufficient enthusiasm for mediation as one of two reasons for doing so.²³⁰ Whenever news emerged of settlements, the court encouraged non-settling creditors to follow suit.²³¹ Concern about angering or disappointing Chief Judge Rosen prodded parties back into negotiations.²³² When a lawyer suggested that the court had assigned Chief Judge Rosen to "crack heads," the

227. Transcript of Motion of Creditors at 4, *In re City of Detroit* (Bankr. E.D. Mich. Jan. 22, 2014) (No. 13-53846), ECF No. 2562 ("Well, in case you haven't noticed, I don't do facts accomplis.").

228. On December 24, Chief Judge Rosen announced that the parties had agreed on a new interest rate swap termination price. Chief Judge Rosen called the parties into a courtroom, where a court reporter transcribed the settlement. Transcript of Settlement Between Debtor and Swap Counter Parties at 9, *In re City of Detroit* (Bankr. E.D. Mich. Dec. 24, 2013) (No. 13-53846). Reporters were understandably unclear about the procedure, referring to a "settlement hearing." Joe Guillen, *City of Detroit, Banks Reach New Settlement in 2005 Financial Deal*, DET. FREE PRESS, Dec. 24, 2013. Chief Judge Rosen filed a memorandum on the bankruptcy court docket encouraging Judge Rhodes to approve the agreement and overrule all objections. Mediators' Recommendation for Approval of Settlement Between the Debtor and Swap Counterparties, *In re City of Detroit* (Bankr. E.D. Mich. Dec. 30, 2013) (No. 13-53846), ECF No. 2343-1. Judge Rhodes rejected the settlement as being too expensive for the city, outside the range of reasonableness. Transcript of Bench Opinion, *In re City of Detroit* (Bankr. E.D. Mich. Jan. 16, 2014) (No. 13-53846), ECF No. 2521; Order Denying Debtor's Assumption Motion, *In re City of Detroit* (Bankr. E.D. Mich. Jan. 17, 2014) (No. 13-53846), ECF No. 2511. The court approved a reformulated swaps settlement in April. Transcript of Bench Opinion Regarding Motion to Approve Compromise, *In re City of Detroit* (Bankr. E.D. Mich. Apr. 11, 2014) (No. 13-53846), ECF No. 4057.

229. Transcript of Bench Opinion (Jan. 16) at 28, *supra* note 228 ("The Court agrees that the settlement of the swaps claims is better for everyone than litigation and hopes that everyone still agrees with that. If the city feels the need to pursue immediate litigation, so be it, but even so, litigation and negotiation can and should be pursued at the same time. In any event, the Court strongly encourages the parties to continue to negotiate."). Bomey, Gallagher & Stryker, *supra* note 5 ("Afterward, away from the news media, Rhodes addressed creditors privately, asking them what they were willing to settle for. 'He goes around to each person and goes, 'What's your number, what's your number, what's your number?'' said one person familiar with the matter. 'Then he says, 'Guys, don't ever do that to me again with Rosen.'"); Transcript of Bench Opinion (Jan. 16) at 28, *supra* note 228 (court clearing the courtroom of non-attorneys).

230. Transcript of Motion of Debtor for Entry of an Order Vacating the Appointment of Official Committee of Unsecured Creditors at 27, *In re City of Detroit* (Bankr. E.D. Mich. Feb. 19, 2014) (No. 13-53846), ECF No. 2717 (expressing that the committee's statement that it would not participate in the mediation exhibited an "extraordinary lack of understanding"); *id.* at 31 ("I already have a mediator that's a consensus builder. Give me something else that I can say to the city will add value to this case [sic]."); *In re City of Detroit*, 519 B.R. 673, 680 (Bankr. E.D. Mich. 2014) ("The Committee's stated disavowal of the mediation process is extraordinary in its manifest disrespect for the importance of mediation in this chapter 9 case.").

231. Transcript of Bench Opinion (Apr. 11), *supra* note 228, at 26 (telling parties not to wait until the eve of confirmation and commending parties that already settled).

232. Transcript of Trial Re. Objections to Chapter 9 Plan, *supra* note 7, at 242 (in response to information that a matter had not settled, court says "Does Judge Rosen know that? . . . One does not want to surprise Judge Rosen especially with that kind of news.").

presiding judge did not reject the characterization.²³³ At the end of the case, Judge Rhodes called his own best act the recruiting of Chief Judge Rosen.²³⁴ The mediation put the federal court in a profoundly powerful position, with continuous opportunities to shape municipal reform.

D. Team Building

With the mediation as just one illustration, Judge Rhodes recruited help in several categories to oversee and evaluate the Detroit bankruptcy, increasing the reach of the federal court and its ongoing interaction with state and local officials and other parties. In two out of three instances, the court gave parties the opportunity to be heard before making the initial appointments.²³⁵ Some appointees put their own teams in place, without a mechanism for party input, and some of those team members interacted with public officials and parties.

1. Professional Fee Team

Early in Detroit's bankruptcy, the court *sua sponte* proposed appointing someone to review the fees and expenses of professionals paid by the city.²³⁶ Prior to the Detroit bankruptcy, it was thought that a court had no fee oversight rights or duties in a municipal bankruptcy other than at plan confirmation.²³⁷ Not clearly authorized even in Chapter 11, where courts have the duty to review

233. Transcript of Hearing Re. Motion by Official Committee of Retirees to Stay Deadlines at 26, *In re City of Detroit* (Bankr. E.D. Mich., Sept. 19, 2013) (No. 13-53846), ECF No. 1037 (“LAWYER: Your honor has already dealt with, in effect, the possibility of delay by asking Judge Rosen to crack heads and move people, which is what he is doing. COURT: Well, that’s not exactly the language I used with him. Okay. I’ll accept it. LAWYER: If I misunderstood, please tell me. COURT: No. I did tell him that his – I’ll share this with you. I did tell him that his deliverable is a confirmable plan”). *Id.* at 44 (court asking city lawyer, “[h]ow do you deal with Mr. Montgomery’s argument that there’s nothing about the relief he requests here today that would have any impact on the negotiations for a plan and Judge Rosen is going to crack heads at my request?”).

234. Oral Opinion on the Record at 45, *supra* note 5 (“I have said publicly and repeat now that the smartest thing I did in this case was to ask Judge Rosen to be the mediator.”); *id.* at 44 (“These words of thanks cannot begin to express the depth of gratitude that I, and all of the parties and attorneys, feel about what Chief Judge Rosen and his mediation team put into this case—the work, the time, the creativity, the commitment, the nights, the weekends, and the holidays.”). See also Jim Lynch, *Rosen Gives Behind-the-Scenes Look at Bankruptcy Case*, DET. NEWS, Nov. 10, 2014. See also *Judge Rhodes Reflects on the Detroit Case*, AM. BANKR. INST. (video interview by Lois Lupica), <http://www.abi.org/podcasts/judge-rhodes-reflects-on-detroit-case-video-cast-005> (3:30-6:00) (appointing Chief Judge Rosen was “the smartest thing” he did in the case).

235. The exception was the appointment of a non-testifying consultant to the court. *Infra* Part III.D.3.

236. Order Establishing Amended Initial Status Conference Agenda at 4, *In re City of Detroit* (Bankr. E.D. Mich., July 23, 2013) (No. 13-53846), ECF No. 0129 (listing authority for a fee examiner as 11 U.S.C. §§ 105(a), 943(b)(3) and 1129(a)(3), applicable to chapter 9 via § 901(a)).

237. *In re Colorado Centre Metro*, Dist., 139 B.R. 534, 535 (1992) (interpreting 11 U.S.C. § 943(b)(3)). In his plan confirmation decision, Judge Rhodes interpreted the statute to authorize reviewing fees and expenses already paid. *In re City of Detroit*, *supra* note 1, at 204-11; Order Regarding Process to Determine the Reasonableness of Fees Under 11 U.S.C. § 943(b)(3), *In re City of Detroit* (Bankr. E.D. Mich., Jan. 5, 2015) (No. 13-53846), ECF No. 8999.

fees,²³⁸ the “fee examiner” is an especially awkward fit with a municipal case.²³⁹ Judge Rhodes was apparently the first to propose a fee examiner in a Chapter 9.²⁴⁰

Due to section 904 and the nature of the contemplated duties, the judge needed the debtor’s consent. In open court and after filing a proposed order, Judge Rhodes expressed hope that the city would not object.²⁴¹ He justified the proposal on public and media scrutiny, and invited collaboration on the details of the appointment.²⁴² The city did not oppose the proposal, and agreed to pay the fee examiner’s own fees and expenses.²⁴³

Judge Rhodes appointed Chicago lawyer Robert Fishman (apparently the court’s own selection), who then obtained access to detailed records for legal and financial professionals representing the City and the retiree committee.²⁴⁴ Fishman did not work alone; at least twenty-nine additional lawyers and paraprofessionals at his law firm were listed as potential contributors.²⁴⁵ The fee examiner team also included an accountant in Florida and twenty-three of the accountant’s employees.²⁴⁶

238. Fee examiners resemble special masters, who are not permitted in bankruptcy cases. FED. R. BANKR. P. 9031; *In re Continental Airlines et al.*, 150 B.R. 334, 342 (D. Del. 1993) (characterizing Chapter 11 fee reviewer as “more in the nature of a special master” and reversing bankruptcy court’s decision to restrict access to report). Courts nonetheless appoint fee examiners in Chapter 11 cases. Order Appointing Fee Examiner and Establishing Related Procedures for Compensation and Reimbursement of Expenses for Professionals and Consideration of Fee Applications, *In re Nortel Networks, Inc.*, No. 09-10138(KG) (Bankr. D. Del. July 10, 2013); *In re Collins & Aikman Corp.*, 368 B.R. 623, 625-626 (Bankr. E.D. Mich. 2007) (Judge Rhodes appointing fee examiner later in case over objections).

239. 11 U.S.C. § 901 (2012) (excluding the incorporation of 11 U.S.C. § 330).

240. Steven Church, *Detroit Fee Examiner Gets Paid to Second Guess Bills*, BLOOMBERG NEWS, Oct. 21, 2013 (“Keach and the other bankruptcy lawyers . . . can’t remember such a system being used in . . . Chapter 9, which . . . doesn’t require cities to submit their fees to the judge for approval.”).

241. Transcript of Hearing Re. Status Conference, *supra* note 113, at 57.

242. *Id.*

243. *Id.* at 58.

244. Order Appointing Fee Examiner, *In re City of Detroit* (Bankr. E.D. Mich., Aug. 19, 2013) (No. 13-53846), ECF No. 0383; Fee Review Order, *In re City of Detroit* (Bankr. E.D. Mich., Sept. 11, 2013) (No. 13-53846), ECF No. 0810. The scope expanded to cover the retiree committee’s investment banker, for which the city would pay. Hearing Re. Application to Employ Lazard Freres & Co., LLC at 4-9, *In re City of Detroit*, (Bankr. E.D. Mich. Dec. 16, 2013) (No. 13-53846), ECF No. 2229 (“So what will you and the others . . . do for \$175,000 a month?” “[A]re we paying for your learning curve?”); *id.* at 10 (stating that fee examiner had no questions and saw no unique problems). Judge Rhodes later decided that the Detroit Retirement Systems’ fees should be reviewed. Opinion and Order Determining that the Fees and Expenses of Retirement Systems’ Professionals are Subject to 11 U.S.C § 943(b)(3) at 2, *In re City of Detroit* (Bankr. E.D. Mich., Nov. 26, 2014) (No. 13-53846), ECF No. 8470.

245. Order Appointing Fee Examiner, *supra* note 244, at 6.

246. *Id.* at 11.

2. Mediation Team

The master mediation order discussed earlier gave Chief Judge Rosen the authority to appoint help.²⁴⁷ Shortly after being appointed, Chief Judge Rosen announced five other mediators, mostly federal judges, including one who mediated in the California municipal bankruptcies.²⁴⁸ Chief Judge Rosen added another judge, retained a professor who eventually served as a mediator,²⁴⁹ and had also been working with Richard Ravitch before Judge Rhodes selected him as a consultant.²⁵⁰ Arbitrators of tort claims also were formally under Chief Judge Rosen's umbrella.²⁵¹ These appointments further increased the federal court's off-the-record interaction with state and local officials, creditors, and other parties and stakeholders.

3. Feasibility Team

Judge Rhodes committed to an independent inquiry into the feasibility of Detroit's restructuring plan—a condition of confirmation.²⁵² To this end, Judge Rhodes issued an order to show cause, *sua sponte*, for why he shouldn't name a court-appointed expert to evaluate the feasibility of Detroit's restructuring plan.²⁵³ No party opposed this idea outright, but some suggested adjustments.²⁵⁴

247. Mediation Order, *supra* note 197, clause 3.

248. Detroit Chapter 9 Mediation Team Announced, *In re* City of Detroit (Bankr. E.D. Mich. Aug. 20, 2013) (No. 13-53846), ECF No. 0542.

249. Transcript at 10, Settlement Between Debtor and Swap Counter Parties, *In re* City of Detroit (E.D. Mich. Dec. 24, 2013) (No. 13-53846) (mentioning “our consultant, Professor Torielli”); Press Conference, Nov. 7, 2014 (Chief Judge Rosen explaining that Professor Torielli had become a mediator).

250. Press Conference, Nov. 7, 2014 (approximately 15:25) (joking that Judge Rhodes “stole” Ravitch from the mediation team, but before then, Ravitch's wisdom and advice were invaluable).

251. *Id.* (between 14:00-15:25) (thanking Judge David Lawson for overseeing tort claimant process).

252. See *supra* notes 160-161, and accompanying text; 11 U.S.C. § 943(b)(7) (2012).

253. Order to Show Cause Why Expert Witnesses Should Not Be Appointed, *In re* City of Detroit (Bankr. E.D. Mich. Mar. 24, 2014) (No. 13-53846), ECF No. 3170. Judge Rhodes has used Rule 706 before. Collins & Aikman, 368 B.R. 623, 625 (Bankr. E.D. Mich. 2007) (fee examiner appointment). For other bankruptcy court decisions discussing or ordering court-appointed experts, see *D&M Steel v. Neilson (In re Peck/Jones Constr. Corp.)*, No. BAP CC-09-1414KiTaPa, 2010 WL 6245626 (9th Cir. BAP Aug. 26, 2010) (appointing expert to determine whether a pre-bankruptcy transfer could be construed as being in the ordinary course of business, insulating it from voidable preference attack); *In re Peck/Jones Constr. Corp.*, No. BAP CC-09-1414KiTaPa, 2010 WL 6245626 at *7 (B.A.P. 9th Cir. Aug. 26, 2010) (affirming authority of court to use Rule 706, but expressing concerns about court disallowing party experts and replacing with court-appointed expert); *In re Gainey Corp.*, 400 B.R. 576, 577 (Bankr. W.D. Mich., Dec. 10, 2008) (appointing expert to advise on whether to approve a debtor's contested request to use cash collateral); *In re Loehwing*, 320 B.R. 281, 284 (Bankr. D.N.J. 2005) (describing appointment of expert to conduct survey on sheriffs' foreclosure sale commissions); *In re Roman Catholic Archbishop of Portland*, 339 B.R. 215, 223 (Bankr. D. Or. 2006) (discussing possibility of appointing expert to develop form questionnaire and matrix for claims' settlement value and jury trial value); *In re McMullen*, No. 00-1051-WCH, 2009 WL 1490581 at *20 (Bankr. D. Mass. May 27, 2009) (entering order to show cause why accountant should not be appointed).

254. Reporting that it had planned to file its own Rule 706 request, Transcript of Hearing Regarding Notice of Presentment of Order at 14-15, *In re* City of Detroit (Bankr. E.D. Mich.

Judge Rhodes accepted some of the narrower recommendations but retained the basic structure and scope.²⁵⁵

The court filed a solicitation for candidates in early April 2014.²⁵⁶ With party participation, Judge Rhodes interviewed five candidates in the courtroom.²⁵⁷ He selected Martha Kopacz.²⁵⁸ Kopacz's duties involved private contact with the presiding judge, city officials, and other parties. With advance notice, Judge Rhodes reviewed her expert report before it was circulated to the parties.²⁵⁹ And during the plan confirmation trial, Judge Rhodes asked Kopacz to describe their contact.²⁶⁰ They discussed the confirmation trial, she said, but not her testimony, he had sent her a list of questions and had invited feedback on the questions, but she did not provide it.²⁶¹

Kopacz also testified to participating in over two hundred meetings with city officials and other parties.²⁶² The parties included: the Detroit mayor, the Detroit emergency manager, Detroit City Council members, most department heads, representatives of the DIA, foundations funding the Grand Bargain, lawyers for the pension systems, and others.²⁶³ Mayor Duggan's plan confirmation testimony likewise painted a picture of extensive interaction, in which Kopacz or her staff

sat in on every single meeting with every department head. She was invited to all cabinet meetings. She had open access to all of our departments and all of their –

April 2, 2014) (No. 13-53846), ECF No. 3817, Detroit suggested the use of a panel of experts and recommended a particular person to lead the panel, Debtors' [sic] Concurrence with the Court's Appointment of Experts Pursuant to Fed. R. Evid. 706 at 4, 5-6, *In re City of Detroit* (Bankr. E.D. Mich. March 30, 2014) (No. 13-53846), ECF No. 3328. Other parties asked that the expert also consider whether the plan was in the best interests of creditors. Transcript of Hearing, *supra* note 254, at 17, 19, 22.

255. Order Regarding the Solicitation of Applications to Serve as the Court's Expert Witness on the Issue of Feasibility, *In re City of Detroit* (Bankr. E.D. Mich. April 2, 2014) (No. 13-53846), ECF No. 3610. Multiple experts could be appointed, however, if no single expert had all of the required qualifications. *Id.* at 2.

256. *Id.*

257. Notice Regarding Interviews of Expert Witness Applicants, *In re City of Detroit* (Bankr. E.D. Mich. April 14, 2014) (No. 13-53846), ECF No. 4068.

258. Order Appointing Expert Witness, *In re City of Detroit* (Bankr. E.D. Mich. Apr. 22, 2014) (No. 13-53846), ECF No. 4215. As described by Kopacz at the plan confirmation trial, her job was to "render an opinion on the feasibility of the plan of adjustment for the City of Detroit and to render an opinion on the reasonableness of the assumptions that underlie the revenues, expenses, and the plan payments." Transcript of Continued Trial at 138, *In re City of Detroit* (Bankr. E.D. Mich. Sept. 15, 2014) (No. 13-53846), ECF No. 7617.

259. Order Regarding Report of Court's Expert, *In re City of Detroit* (Bankr. E.D. Mich. July 16, 2014) (No. 13-53846), ECF No. 6090; Transcript of Hearing Regarding Motion for Costs Relating to Clawback of Debtor's Document Production at 43, *In re City of Detroit* (Bankr. E.D. Mich. July 14, 2014) (No. 13-53846), ECF No. 6054. Syncora's lawyer expressed surprise, and asked whether the discussion between the court and expert would be discoverable. The court said yes. *Id.*

260. Kopacz kept a log of her communications with the court. Transcript of Continued Trial, *supra* note 258, at 139-140.

261. *Id.* at 139 (They discussed logistics, such as whether her attorney would be present.).

262. *Id.* at 159.

263. *Id.* at 159-61.

our numbers. And I relied in reaching my conclusion both on my own assessment of this but also on the report that she wrote, which was really my only independent verification from a financial expert of what I experienced in those interviews.²⁶⁴

Kopacz employed at least a half a dozen professionals or paraprofessionals at her firm to work on this project,²⁶⁵ and at least three lawyers.²⁶⁶ The assistance of these other people supplied more channels for information flow to and from the court's team.²⁶⁷

Richard Ravitch, a lawyer associated with New York City's financial crisis in the 1970s, had applied and interviewed for the court's feasibility expert position.²⁶⁸ Judge Rhodes instead appointed Ravitch to a position that had not been advertised: a non-testifying consultant.²⁶⁹ The court did not seek consent from the parties before making this appointment. No parties objected publicly when the appointment was announced. Ravitch's charge was to focus on "issues of municipal finance and viability."²⁷⁰ The court order provided that "[a]ll interested parties and their professionals shall fully and promptly cooperate with the Court's consultant and shall promptly comply with any requests for information made by the consultant."²⁷¹

By design, the information would flow only in one direction; Ravitch would be insulated from requests to testify, or providing other information.²⁷² This procedure afforded parties no opportunity to rebut Ravitch's specific analyses or contributions. The absence of procedural protections rendered the appointment vulnerable to challenge, at least as measured by the law in other circuits.²⁷³

264. Transcript of Trial Re. Objections to Chapter 9 Plan, *supra* note 7, at 101-102.

265. Phoenix Mgmt. Serv., LLC invoice, *In re City of Detroit* (Bankr. E.D. Mich. June 30, 2014) (No. 13-53846), ECF No. 5662; Letter from Martha E.M. Kopacz to Judge Rhodes, re: invoice for April 22, 2014-April 30, 2014, *In re City of Detroit* (Bankr. E.D. Mich. June 12, 2014) (No. 13-53846), ECF No. 5293; Invoice, Phoenix Mgmt. Serv., LLC, invoice for Oct. 2014, *In re City of Detroit* (Bankr. E.D. Mich. Jan. 9, 2015) (No. 13-53846), ECF No. 9018 (five); Transcript of Continued Trial at 155-58, *In re City of Detroit* (Bankr. E.D. Mich. Sept. 15, 2014) (No. 13-53846), ECF No. 7617 (reporting professionals who worked on court-appointed Detroit assignment as Brian Gleason, Bob Childree, Al Mink, Mike Gaul, Kevin Barr, Jack Murdoch).

266. Letter from Stephen D. Lerner to Judge Rhodes, *In re City of Detroit* (Bankr. E.D. Mich. June 24, 2014) (No. 13-53846), ECF No. 5606; Order Approving Compensation and Reimbursement of Expenses of Attorneys to the Court's Expert Witness, *In re City of Detroit* (Bankr. E.D. Mich. July 9, 2014) (No. 13-53846), ECF No. 5869.

267. Transcript of Continued Trial at 160, *In re City of Detroit* (Bankr. E.D. Mich. Sept. 15, 2014) (No. 13-53846), ECF No. 7617 (testifying on high frequency of meetings between members of Kopacz's team and parties to the case and their professionals).

268. Notice Regarding Interviews, *supra* note 257.

269. Order Appointing Non-Testifying Consultant, *In re City of Detroit* (Bankr. E.D. Mich. Apr. 22, 2014) (No. 13-53846), ECF No. 4216.

270. *Id.* at 1.

271. *Id.* at 1.

272. *Id.* at 1 ("Unless the Court orders otherwise, the consultant shall not be subject to any discovery proceedings and shall not be called as a witness at any hearing in this case.").

273. *FTC v. Enforma Natural Prod., Inc.*, 362 F.3d 1204, 1215, 1219 (9th Cir. 2004) (record unclear on basis on which advisor was appointed, vacating injunction, identifying safeguards to ensure court "is proceeding openly and fairly" and instructing court to "clarify the role of any expert it

Ravitch served without compensation.²⁷⁴ The arrangement therefore generated no public documents on how this federal court appointee spent his time.²⁷⁵ In a speech in June 2014, Ravitch offered the following insight:

Well I'm somewhat constrained in being too specific. My role in Detroit is simply to advise the bankruptcy judge about the feasibility of the plan that ultimately gets finalized in the next few weeks. Suffice it to say that there are a lot of very very good people who are trying very hard to adjust the limited resources equitably amongst the various creditors, whether they're money creditors or retirees If the bankruptcy plan does not go through I think it would be a tragedy. Whether it's this one or a modified one is something I can't comment on.²⁷⁶

Testimony during the plan confirmation trial in the fall of 2014 suggests that Ravitch was in close contact with Kopacz, the court's feasibility expert. She reported that, after delegating some pension review to staff, "I reinserted myself into the pension discussions when I met and got to know Dick Ravitch because Dick has some interesting views."²⁷⁷ Indeed, a lawyer for the city sought to bolster Kopacz's credibility as an expert on pensions by pointing out that she had conferred with "Mr. Ravitch, who needs no introduction because of his enormous expertise."²⁷⁸ As noted earlier, Kopacz, in turn, had extensive interactions with the city.

Detroit Mayor Mike Duggan testified during the plan confirmation trial that Ravitch also gave policy advice directly to city officials while serving as the court's non-testifying consultant:

appoints"); *Techsearch L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1377-78 (Fed. Cir. 2002) (stating goal of appointment was "so that the court can better understand scientific and technical evidence in order to properly discharge its gatekeeper role of determining the admissibility"); *id.* at 1377-79 n.6 (finding appellate court must review whether "district court has established safeguards to prevent the technical advisor from introducing new evidence and to assure that the technical advisor does not influence the district court's review of the factual disputes"); *Ass'n of Mexican-Am. Educators v. California*, 231 F.3d 572, 590-91 (9th Cir. 2000) (upholding district court's authority to appoint technical advisor, for outside technical expertise would be helpful, noting split in court is over procedures); *Conservation Law Found. v. Evans*, 203 F. Supp. 2d 27, 30, 32 (D.D.C. 2002) (holding advisor "shall *not* give any advice to the Court on the ultimate issue" and court committing to "summarize the amount and nature of its reliance on the technical advisor"); *Reilly v. United States*, 682 F. Supp. 150, 150 (D. R.I. 1998) (appointing economist to provide neutral technical advice to help determine loss of earning capacity of an infant).

274. Order Appointing Non-Testifying Consultant, *supra* note 269, at 1 ("The consultant has agreed to serve without expense to the City. . . . The Court expresses its thanks and appreciation to Mr. Ravitch for his willingness to serve the Court in this capacity without compensation.").

275. When Ravitch attended a status conference telephonically, he was silent other than to indicate his presence at the judge's request. Transcript of Hearing Regarding Status Conference Regarding Plan Confirmation Process at 7, *In re City of Detroit* (Bankr. E.D. Mich. Aug. 6, 2014) (No. 13-53846), ECF No. 6585.

276. *Richard Ravitch*, JEWISH COMMUNITY CTR. OF S.F. (Aug. 18, 2014, 10:29 AM), <http://podcasts.jccsf.org/2014/08/richard-ravitch/> (podcast interview by David Crane with Jewish Community Center of San Francisco).

277. Transcript of Continued Trial at 161-62, *In re City of Detroit* (Bankr. E.D. Mich. Sept. 15, 2014) (No. 13-53846), ECF No. 7617.

278. *Id.* at 202.

the Court was good enough to bring in Mr. Dick Ravitch, who I spent a great deal of time with, and who educated me on just how far we have to go to rebuild the finance system.²⁷⁹

Mayor Duggan's testimony also indicated that Ravitch had set up a meeting in New York for Duggan Ravitch's recommendation for the position of Detroit's finance director.²⁸⁰ Mayor Duggan testified to "extensive conversations" with Ravitch about the need to keep the city's financing at the lowest possible amount.²⁸¹ The interaction between Mayor Duggan and Ravitch was later reported in the local news: "[Ravitch] has had great influence on me already," Duggan said, speaking of the advice he received during the bankruptcy.²⁸²

Ravitch influenced the presiding judge's evaluation of the case as well:

His commitment, knowledge, wisdom, expertise, and spirit of public service were remarkable and helped me to more fully understand this case. I hope a way is found for him to contribute to fiscal health and revitalization of this City. He would be a valuable resource in any capacity.²⁸³

This wish was granted: Ravitch was named as a consultant to the Detroit Financial Review Commission.²⁸⁴

E. Court of the People

*. . . when a judge feels and sees injustice, I believe that a judge has a responsibility to do what he or she can about it I felt that by calling out the water department and asking to speak personally with the decision makers and highlighting this problem in open court with the full attention of the media on the issue I was doing what I could even if I didn't have jurisdiction to deal with it.*²⁸⁵

279. Transcript of Trial Re. Objections to Chapter 9 Plan, *supra* note 7, at 76-77.

280. *Id.* at 77 (Mayor Duggan testifying that he had asked Ravitch, "if you could hire anybody in America to come in here to redo the finances, who would it be" and Ravitch responding, "There's no question. The former finance director of the City of New York, Carol O'Cleireacain, would be the top choice"); *id.* ("Mr. Ravitch was kind enough to set up lunch for me, and I flew out to New York . . .").

281. *Id.* at 144-45.

282. Matt Helms, *He Rescued New York. Up Next: Detroit*, DET. FREE PRESS, Nov. 17, 2014. The story also mentions Ravitch's recommendation for Detroit's finance director.

283. Oral Opinion on the Record at 46, *supra* note 5.

284. Press Release, Gov. Rick Snyder Taps Public, Private Fiscal Experts for Detroit Financial Review Commission (Nov. 10, 2014), http://www.michigan.gov/snyder/0,4668,7-277-57577_57657-340967--,00.html. Kopacz also was selected as a consultant to this Commission.

285. WDET Interview, *supra* note 131.

*It was as much a political case as a legal case. . . The residents of the city had a great stake in [the] outcome of the case, a personal stake, each and every one of them.*²⁸⁶

Early on, Judge Rhodes emphasized his responsibility to “recognize and appreciate the enormous public interest in this case.”²⁸⁷ His public court procedures were inclusive, allowing participation by individual retirees as well as residents, the latter of whom lack creditor status.²⁸⁸ The court held a hearing for individual objectors to Detroit’s bankruptcy eligibility,²⁸⁹ did the same for plan confirmation,²⁹⁰ and invited some individuals to present evidence at the plan confirmation trial itself.²⁹¹ Early in the case, Judge Rhodes invited courtroom audience questions after speaking about the role of a judge in Chapter 9.²⁹² When bond insurers argued that retirees should be barred from filing proofs of claim because pension funds would do so, the court defended retirees’ rights to directly participate.²⁹³ When creditors raised objections to other municipal activities,

286. Ferretti & Livengood, *supra* note 142 (quoting Judge Rhodes).

287. Transcript of Hearing on Status Conference, *supra* note 113, at 8-9.

288. *Compare In re Addison Comm. Hosp. Auth.*, 175 B.R. 646 (Bankr. E.D. Mich. 1994) (Judge Rhodes declined residents’ request to speak on Chapter 9 plan of adjustment because they were not creditors).

289. Transcript of Hearing Re. Objections to Eligibility Before the Honorable Steven W. Rhodes at 2, *In re City of Detroit* (Bankr. E.D. Mich. Sept. 19, 2013) (No. 13-53846), ECF No. 1034; Jacoby, *The Detroit Bankruptcy, Pre-Eligibility*, *supra* note 29, at 864-65 (recounting hearing testimony and Judge Rhodes’ admonition to Michigan’s Governor and Detroit’s emergency manager to listen to a recording). Other municipal bankruptcies have included resident testimony, although on a more ad hoc basis. *E.g.*, Cate Long, Jefferson County’s Bankruptcy Confirmation Hearing, REUTERS MUNILAND (November 21, 2013) <http://blogs.reuters.com/muniland/2013/11/21/jefferson-countys-bankruptcy-confirmation-hearing> (audience members speaking at hearing on Nov. 20, 2013).

290. Notice of Hearing to Individuals Who Filed Plan Objections, *In re City of Detroit* (Bankr. E.D. Mich. June 10, 2014) (No. 13-53846), ECF No. 5264; *In re City of Detroit*, *supra* note 1, at 165 (“At the hearing, 46 of these 79 objectors appeared before the Court.”). Of the 1159 objections submitted by unrepresented individuals, 836 were timely filed. *Id.* at 165.

291. *In re City of Detroit*, 524 B.R. 147, 166 (“Parties filed 36 such motions. Upon its review of each motion, the Court allowed seven parties to testify.”); Order Regarding Motions to Participate in the Confirmation Hearing, *In re City of Detroit* (Bankr. E.D. Mich. Aug. 20, 2014) (No. 13-53846), ECF No. 6896 (referring back to solicitation of interest in presenting evidence, document 6584). Three selected objectors did not appear. 524 B.R. 147, 166. Most of those selected were workers or retirees; two were residents. Transcript of In Re: Trial Re: Objections to Chapter 9 Plan, *supra* note 144 (individual objector examining emergency manager on Oct. 3); Trial Re. Objections to Chapter 9 Plan, *In re City of Detroit* (Bankr. E.D. Mich. Oct. 15, 2014) (No. 13-53846), ECF No. 8033 (main day for individual objectors to present sworn testimony or ask questions of witnesses during plan confirmation trial).

292. Transcript of Hearing Re. Status Conference, *supra* note 113, at 7-10; Brent Snavely, *Judge Steven Rhodes Explains His Limited Role in Detroit Case*, DET. FREE PRESS, Aug. 2, 2013, <http://archive.freep.com/article/20130802/NEWS01/308020140/Judge-Steven-Rhodes-Detroit-bankruptcy>.

293. Hearing Re. Motion of the Objectors for Leave to Conduct Limited Discovery at 29, *In re City of Detroit* (Bankr. E.D. Mich. Nov. 14, 2013) (No. 13-53846), ECF No. 1771.

Judge Rhodes expressed concern that the residents would have to wait even one additional day for basic service restoration.²⁹⁴

As these measures increased the information flow, they perhaps inadvertently presented the court with opportunities to weigh in on local policy and personnel matters. For example, after hearing a complaint about residential water shutoffs, the judge requested the presence of a water department representative that afternoon.²⁹⁵ Judge Rhodes asked the representative detailed questions about policies, made suggestions about those policies,²⁹⁶ and asked the representative to return the next week with more answers and updates.²⁹⁷ The return trip to court left little doubt that the court had influenced the city's handling of the matter, at least in the short term.²⁹⁸ Detroit imposed a brief moratorium on residential water shutoffs and increased efforts to educate the public about financial assistance programs.²⁹⁹ Apparently encouraged by this

294. Hearing Re. City of Detroit's Motion for Entry of an Order Authorizing the Debtor to Enter into and Perform Under Certain Transaction Documents With The Public Lighting Authority at 21, 35, *In re* City of Detroit (Bankr. E.D. Mich. Nov. 27, 2013) (No. 13-53846), ECF No. 1877 (quoting judge saying "I wonder if you'll ever be satisfied" and "hundreds of thousands of people victims of crime while we wait?"). See also Transcript of Evidentiary Hearing Regarding Motion of the Debtor for a Final Order at 110, *In re* City of Detroit (Bankr. E.D. Mich. Jan. 13, 2014) (No. 13-53846), ECF No. 2512 (in closing arguments on swap termination agreement and financing, court asking city lawyer, "Is it your position that the people of the City of Detroit have to wait for safe lighting for a plan of adjustment?"); *id.* at 112 ("So the citizens of Detroit have to wait for safe lighting when the city manager – or the city emergency manager decides that it's necessary or appropriate to get court permission because that then would have to wait for plan confirmation? . . . What about the safety of the citizens? . . . So in deciding between necessary and appropriate process in Bankruptcy Court and citizen safety, he's got to choose one or the other?").

295. Transcript of Hearing Re. Objections to Chapter 9 Plan at 54, *In re* City of Detroit (Bankr. E.D. Mich. July 15, 2014) (No. 13-53846), ECF No. 6141 ("I'm going to ask you, if it's at all possible, to have someone here at this afternoon's session who can advise the Court and the public about the specifics of the program."). Judge Rhodes noted at the outset that he hesitated to raise the issue because he was "reasonably sure that it's probably not within my jurisdiction, but I'm going to anyway." *Id.* at 53.

296. *Id.* at 55 ("What can you tell me about the water department's program for water shutoffs for customers who haven't paid their bills?"); *id.* at 58 ("Does the department itself have a program to defer payment of delinquencies or amortize them over a period of time?"); *id.* at 59 (soliciting information on the average delinquency among people who seek a payment plan); *id.* at 61 (asking if there is any flexibility in the 36-month amortization period); *id.* at 63 (asking about outreach efforts and staffing).

297. *Id.* at 65 ("Well, I'll just comment for whatever it's worth to you that it seems to me that there's much more you can do than just that, and I encourage you to work with community leaders to come up with a whole list of initiatives that can be effective at solving this problem. In fact, I have to say to you I'm feeling the need to ask you to come back . . ."); *id.* at 66 ("Are you willing to do that, sir?").

298. Transcript of Hearing Regarding Motion for Temporary Allowance of Claim at 17-24, *In re* City of Detroit (Bankr. E.D. Mich. July 21, 2014) (No. 13-53846), ECF No. 6244 (Lattimer reporting what city had done to respond to judge's concerns); Alisa Priddle & Matt Helms, *Judge Rhodes: Water Shutoffs are Hurting Detroit's Reputation Internationally*, DET. FREE PRESS, July 15, 2014, <http://archive.freep.com/article/20140715/NEWS01/307150125/bankruptcy-water-officials>.

299. Zenobia Jeffries, *Detroit Water Department Places 15-Day Moratorium on Shutoffs*, NEW AM. MEDIA, July 23, 2014 ("The announcement came following Federal Judge Steven Rhodes' order for the department and Emergency Manager Kevyn Orr to come up with a solution to what he called an embarrassment to the city and the bankruptcy proceeding."), <http://newamericamedia.org/2014/07/detroit-water-department-places-15-day-moratorium-on-shutoffs.php>.

course of events, resident advocates requested an injunction of residential water shutoffs.³⁰⁰ Judge Rhodes allowed the parties to file papers and make oral arguments before denying the request for reasons that included, but were not limited, to section 904,³⁰¹ presumably hoping that the city and the plaintiffs would forge a compromise in the meantime.

There are other examples. When it became clear that the emergency manager's appointment would expire before the bankruptcy ended, and the city's continued retention of the law firm Jones Day seemed less than certain, the court said,

Well, I just want to say for the record that it would be a really bad idea for the city, the mayor, to terminate Jones Day's services at such a critical phase in this process . . . I hope the mayor hears me. Feel free to communicate my view of this to him.³⁰²

Mayor Duggan quickly made clear that they would continue to use Jones Day. Also, at the express request of Wayne County, the court ordered mediation on the creation of a regional water authority.³⁰³ Going beyond what was strictly necessary, the court said its decision to send the matter to mediation reflected a sense,

unrebutted in the record here, that the creation of a regional water authority is not only in the best interest of the city but also in the best interest of all of the customers in the city's Water Department. . . . I also have a sense that this bankruptcy offers a unique opportunity for the creation of that regional authority and that if we do not take advantage of this unique opportunity, the opportunity will, in all likelihood, be lost forever . . .³⁰⁴

Such a statement does not bind the city to reach a deal, of course. The interest of some parties in a regional water authority long preceded the

300. Lyda v. City of Detroit (Bankr. E.D. Mich. July 21, 2014) (No. 14-04732) (requesting an order enjoining residential water shutoffs).

301. Minute Entry: Case Dismissed, Lyda v. City of Detroit (Bankr. E.D. Mich. Sept. 29, 2014) (No. 14-04732); Transcript of Hearing Regarding Motion for Temporary Restraining Order at 5-24, Lyda v. City of Detroit, (Bankr. E.D. Mich. Sept. 29, 2014) (No. 14-04732), ECF No. 84; Lyda v. City of Detroit, 14-04732, 2014 WL 6474081 (Bankr. E.D. Mich. Nov. 19, 2014) (denying motion for rehearing and supplementing initial bench decision); Order Affirming Bankruptcy Court Orders, Lyda v. City of Detroit (E.D. Mich. Sept. 16, 2015) (15-CV-10038) (upholding bankruptcy court decision regarding adversary proceeding regarding residential water shutoffs).

302. Hearing Transcript at 270-271, *In re* City of Detroit (Bankr. E.D. Mich. May 28, 2014) (No. 13-53846), ECF No. 5183; Joe Guillen & Mark Stryker, *Bankruptcy Judge Scolds Duggan, Calls Any Plan to Fire Law Firm a 'Bad Idea,'* DET. FREE PRESS, May 29, 2014, <http://archive.freep.com/article/20140528/NEWS01/305280182/bankruptcy%20hearing%20Judge%20St even%20Rhodes>.

303. Transcript of Hearing, *supra* note 145, at 18-19.

304. *Id.*

bankruptcy.³⁰⁵ But awareness of the court's support for such an authority, as the parties continued to negotiate a variety of issues, was hardly irrelevant.

Judge Rhodes also reminded professionals to keep the details of the case accessible to stakeholders. With respect to notices being written for individual claimants, Judge Rhodes noted, "I can't emphasize enough the importance of plain language in this document. . . . I wish you had an eighth grade English teacher on staff to edit this for you."³⁰⁶ He encouraged lawyers to be proactive in ensuring accurate press reporting.³⁰⁷ In closing arguments on a motion to approve a settlement, Judge Rhodes interjected to clarify a lawyer's assertions, noting that he wanted to make sure the public understood the issue.³⁰⁸ That point was representative of efforts to break through financial and legal jargon.³⁰⁹

The court's approach to oversight also reflected a view that state and city actors do not get preferential treatment, even in municipal bankruptcy. When the Governor of Michigan raised new objections in a last-minute filing, the court reacted with the same frustration that would have been directed toward any party.³¹⁰ The judge questioned the assumption that the Governor should get special flexibility in scheduling court testimony.³¹¹ When the state had delayed getting approval of a transaction through its own processes, the court expressed disappointment that the state's lack of action risked wasting time and money in the bankruptcy court.³¹² These matters are reminders that the federal court may

305. John Wisely & Matt Helms, *Proposed Regional Water Authority Could Be \$50M Boost for Detroit*, DET. FREE PRESS, March 10, 2013 (in story preceding bankruptcy filing, reporting on confidential plan for regional authority, and long-brewing interest in such a regional system).

306. Hearing Re. Motion of the Debtor at 29, *In re City of Detroit* (Bankr. E.D. Mich. Nov. 14, 2013) (No. 13-53846), ECF No. 1771.

307. Hearing re Notice of Presentment of Order at 74-75, *In re City of Detroit* (Bankr. E.D. Mich. April 2, 2014) (No. 13-53846), ECF No. 3817.

308. Evidentiary Hearing Regarding Motion of the Debtor for a Final Order at 10, *In re City of Detroit* (Bankr. E.D. Mich. Jan. 13, 2014) (No. 13-53846), ECF No. 2512 (in response to swap counterparty assertion that termination payment was part and parcel with the fixing of interest rates).

309. Transcript of Hearing Re: Eligibility Trial at 193, *In re City of Detroit* (Bankr. E.D. Mich. Oct. 23, 2013) (No. 13-53846), ECF No. 1411 (during testimony at eligibility trial, asking witness to explain the phrase "liquidity was tight" in order that "the record is clear and everyone understands"); *id.* at 229-231 (seeking clarification of expressions "P-O-C," "cash burn," and "unpool").

310. Transcript of Hearing, In Re: Notice of Proposed Fee Review Order at 62-63, *In re City of Detroit* (Bankr. E.D. Mich. Sept. 10, 2013) (No. 13-53846), ECF No. 948 (Judge to lawyer for Governor Snyder: "You filed a brief yesterday for a hearing today and you want the parties to respond and me to rule on this? . . . [You filed the brief] at 20 minutes till 5:00."); *id.* at 66 ("But you—you made the conscious decision to get a ruling on—on—on relevance and then if you lose that to assert the privilege."); *id.* at 68 ("Is it really in the best interest of the city and the people of the State of Michigan for the Governor to be asserting a deliberative process privilege in this case, Ma'am?").

311. Transcript of Hearing Re. Eligibility Trial, at 51, *In re City of Detroit* (Bankr. E.D. Mich. Oct 23, 2013) (No. 13-53846), ECF No. 1411 (court to Governor's lawyer: "it's not for a witness who appears in any court to condition his appearance on a specific time limit").

312. Transcript of Hearing In Re Motion of the Debtor for a Final Order at 8, *In re City of Detroit* (Bankr. E.D. Mich. Dec. 18, 2013) (No. 13-53846), ECF No. 2280 (expressing displeasure to Michigan's lawyer that Emergency Loan Board did not approve Detroit's proposed loan before commencement of hearing, the Court asked "[s]omeone actually made the decision to potentially risk wasting the Court's time and all of the attorney fees in this case?").

be in an ongoing relationship with state and local officials during a municipal bankruptcy.

F. Summary

The preceding sections have presented a federal court’s active engagement with and involvement in a city’s restructuring and reform, even as the presiding judge references the federalist structure of municipal bankruptcy.³¹³ For those steeped in high profile mass tort or institutional reform cases, Detroit may resonate.³¹⁴ But the story clashes with the municipal bankruptcy literature.³¹⁵

The judicial appointment materials indicate that Judge Rhodes was chosen in part for his case management and administrative skills. By necessity, that selection was preceded by discussion among judges from the circuit, district, and bankruptcy courts.³¹⁶ Judge Rhodes could therefore handle the case with something of a blessing from the courts, including from the chief judge of the district court who would be a participant in overseeing the case.³¹⁷ Upon establishing an optimistic and detailed timeline, Judge Rhodes managed the case on micro and macro levels, creatively using inquisitorial techniques to accomplish indirectly what could not be done directly.³¹⁸ Information flowed between the court and parties in the full range of hearings and status conferences, educating the judge about important facts and conveying to the parties the judge’s beliefs and preferences.

313. *Lyda v. City of Detroit*, 14-04732, 2014 WL 6474081 at *2, *4 (Bankr. E.D. Mich. Nov. 19, 2014) (“The [section 904] limitation means that the Court cannot interfere with the choices a municipality makes as to what services and benefits it will provide,” although section 904 does not protect city from plaintiffs’ constitutional claims); Supplemental Opinion, *supra* note 1, at 153 (recommending future steps for city “while remaining cautious due to the limits on the Court’s authority”); *id.* at 165 (“under the Tenth Amendment, however, it is for the City, not this Court, to supervise the execution of that recovery”); *In re City of Detroit*, *supra* note 1, at 164 (responding to Kopacz’s concern about the case being too swift by stating that his managerial approach was “entirely consistent with the limitations of federalism that the Tenth Amendment of the United States Constitution imposes and that §§ 903 and 904 manifest”); Transcript of Hearing Re. Status Conference, *supra* note 113, at 9-10 (“[T]he Court has no role to play in managing or running the city or any of the services it provides. Any compliments, complaints, suggestions, or requests regarding city services should continue to be directed to the city. There is nothing the Court can do about any of those matters The city’s officials are not accountable to this Court for how they run the city. . . . It is not the Court’s role to dictate to the city what its plan should state or even to suggest anything about it. That is entirely for the city to decide after, of course, discussing and attempting to negotiate the plan with its creditors.”); Opinion and Order Regarding the Reasonableness of Fees Under 11 U.S.C. § 943(b)(3) at 4, *In re City of Detroit* (Bankr. E.D. Mich. Feb. 12, 2015) (No. 13-53846), ECF No. 9256.

314. Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 347 (1986) (about Agent Orange, stating, “the judge and special masters displayed a degree of skill, sophistication, imagination, and artistry in fashioning the settlement that almost all the participants viewed as highly unusual”).

315. *Supra* Part I.

316. *Supra* Part III.A.

317. *Supra* Part III.C.

318. *Supra* Part III.B.

Issues at the core of the debt restructuring and the city's reform underwent a confidential mediation process heavily supervised by Chief Judge Rosen and other federal judges. In crafting and pushing for the central settlement in the case, Chief Judge Rosen met and worked with politicians, raised funds from foundations, and became an outspoken public advocate for the resulting restructuring plan.³¹⁹ In the meantime, the typical appellate pipeline for bankruptcy court orders was all but suspended, in anticipation that settlement would moot the appeals.³²⁰

By enlisting teams of people to assist with the court's work, the federal bankruptcy court further increased involvement with state and local affairs. The mediation and feasibility teams forged lines of private communication with the city and other parties on behalf of the court. The resulting discourse generated close collaboration between the city and the court's helpers.³²¹

Back at the courthouse, Judge Rhodes created an inclusive process that gave more public credibility to a case that was highly controversial at its inception. The court's receptivity to stakeholder input and awareness of the broader public discourse led, perhaps inevitably, to the expression of substantive opinions on policy (e.g., regional water authority, residential water shutoffs) and personnel (the retention of restructuring professionals).³²²

IV. Implications for the Federalist Core of Municipal Bankruptcy

Part III illustrated the informal and unconsidered channels through which a federal court can influence a municipality and its restructuring. Although the exact set of circumstances is unlikely to repeat, it is a mistake to consider the Detroit Blueprint *sui generis*. In this part, I identify two variables particularly affecting its viability. Then, I turn to the regulatory shortcomings of section 904 revealed by the Detroit Blueprint.

A. The Detroit Blueprint's Shadow

Some readers may be tempted to categorize Detroit as an exceptional case, with little broader application.³²³ But municipal bankruptcy cases remain

319. *Supra* Part III.C.

320. *Supra* notes 220-224, and accompanying text.

321. *Supra* Part III.D.

322. *Supra* Part III.E.

323. Kevyn Orr, Detroit's former emergency manager, has said, "I caution everyone as taking Detroit as a template or a precedent for anywhere else." November 7, 2014 Press Conference, approximately 4:20PM, WDET DetNext report. *See also* Transcript of In re Trial: Objections to Chapter 9 Plan at 163-64, *In re City of Detroit* (Bankr. E.D. Mich. Oct. 1, 2014) (No. 13-53846), ECF No. 7850 (Orr recalling awareness of and concern about lengthy timelines in other contemporaneous Chapter 9 cases). Judge Rhodes has said, "I think it is also true that many cities around the country will not be able to put together what we did in Detroit, which was the grand bargain which resulted in over \$800 million from the state and from private sources coming into our pension plans." Tavis Smiley Show Interview with Judge Rhodes, PBS, March 24, 2015 (transcript on file with author). Chief Judge Rosen, by contrast,

relatively few and far between, and history teaches us that the truly one-off case may not exist. Judicial creativity in challenging situations lays tracks for the future.³²⁴ As already noted, while the tools and techniques comprising the Detroit Blueprint may be unexpected to municipal bankruptcy scholars, most have been used in other complex litigation settings, in which similar elements were portable.³²⁵

Detroit's protagonists are out and about, amplifying the lessons of the case. Since leaving the bench, the presiding judge has spoken about the case on television,³²⁶ on the radio,³²⁷ on a video podcast,³²⁸ in newspaper interviews,³²⁹ at a college graduation,³³⁰ at sponsored events at which he was honored,³³¹ and at professional conferences.³³² He has been retained to advise the Commonwealth of Puerto Rico regarding its financial distress.³³³ The lead mediator, Chief Judge Rosen, has continued to be vocal about the case.³³⁴

has expressed hope that “we’ve set a template for how things can be accomplished in a political environment and in a non-political way.” Press Conference June 3, 2014.

324. Railroad equity receiverships are an early example. Stephen J. Lubben, *Railroad Receiverships and Modern Bankruptcy Theory*, 89 CORNELL L. REV. 1420 (2004). More recently, cases like Lehman Brothers, General Motors, and Chrysler were influential for Chapter 11 practices even though they were considered exceptional. Jacoby & Janger, *supra* note 2.

325. Cf. David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015 (2014) (discussing transmission of norms across institutional reform cases).

326. Tavis Smiley Show, *supra* note 323.

327. Interview by WDET 101.9 FM, *supra* note 131.

328. Judge Rhodes Reflects on the Detroit Case, *supra* note 234.

329. Nathan Bomey, *Q&A: Detroit bankruptcy judge on pensions, DIA, Fees*, DET. FREE PRESS, Feb. 20, 2015 (excerpts of video interview), <http://www.freep.com/story/news/local/detroit-bankruptcy/2015/02/20/judge-steven-rhodes-detroit-bankruptcy-chapter/23707897>; Jack Casey, *Rhodes: Bankruptcy Critical for All of Puerto Rico*, BOND BUYER, Nov. 16, 2015, <http://www.bondbuyer.com/news/washington-budget-finance/rhodes-bankruptcy-critical-for-all-of-puerto-rico-1089610-1.html>; James David Dickson, *Steven Rhodes: Engineer of Detroit's Bankruptcy*, DET. NEWS, Nov. 5, 2015, <http://www.detroitnews.com/story/news/michigan/michiganians-of-year/2015/11/05/michiganians-year-bankruptcy-court-judge-steven-rhodes/75262870>.

330. Judge Rhodes to Graduates: Lessons Learned from the Detroit Bankruptcy Case, WDET NEXT CHAPTER DET., Jan. 24, 2015 (Walsh College speech), <http://www.nextchapterdetroit.com/012415-detroit-bankruptcy-judge-rhodes-speech>.

331. Holly Fournier, *Rhodes on Bankruptcy: We Love to Give a Second Chance*, DET. NEWS, April 22, 2015 (Bank of Ann Arbor breakfast, in Judge Rhodes' honor, at Barton Hills Country Club), <http://www.detroitnews.com/story/news/local/detroit-city/2015/04/22/rhodes-bankruptcy-love-give-second-chance/26177585>; Christine Ferretti & Chad Livengood, *Rhodes: Pension Plans Too Costly for Cities*, DET. NEWS, Feb. 25, 2015 (Crain's Detroit Business “Newsmakers of the Year” Lunch, Motor City Casino), <http://www.detroitnews.com/story/news/local/wayne-county/2015/02/25/ort-rhodes-reflect-end-detroit-bankruptcy/23995495>.

332. The ABI Spring Meeting Lunch Talk, *supra* note 134, is one example.

333. Megan Davies, *Puerto Rico Signals Chapter 9 Push with Ex-Detroit Judge on Board*, REUTERS, July 3, 2015. The Bankruptcy Code currently does not give Puerto Rico the ability to authorize its municipalities to use Chapter 9, but pending legislation would change that. H.R. 870 114th Cong. (2015); S. 1774 114th Cong. (2015).

334. Lynch, *supra* note 234 (reporting on speech at Christ Church in Grosse Pointe Farms, Michigan as part of the Rector Forum lecture series); Caitlin Devitt, *It's Never Too Soon to Restructure, Say Detroit Bankruptcy Vets*, BOND BUYER, May 7, 2015 (reporting on panel discussion in which Chief Judge Rosen participated at the Union League Club of Chicago), <http://www.bondbuyer.com/news/regionalnews/its-never-too-soon-to-restructure-say-detroit->

Professionals and parties are speaking about the Detroit Blueprint at educational programs and in interviews.³³⁵ More generally, repeat players abound in municipal distress contexts. Detroit's emergency manager became Atlantic City's consultant before he returned to his former law firm.³³⁶ Many of the professionals involved in Detroit are now working on Puerto Rico. If and when another big city or school district files Chapter 9, it is not hard to predict who will be involved.

The Detroit Blueprint is associated with speed. That attribute may look particularly attractive because, as reviewed earlier, gone are the days when a municipality could not file without a confirmable plan already in hand, votes counted.³³⁷ Today's municipal bankruptcies can be, like Detroit, "free fall," and in flux.³³⁸ The possibility that a case could last many years is real, especially because the substantive law forming the backdrop of negotiations remains underdeveloped.³³⁹ In a variety of contexts, parties cite, and courts perceive, the need for a trip through bankruptcy to be brief even though speed has costs.³⁴⁰

Two variables made Detroit's bankruptcy unusually amenable to strong federal court oversight. Those variables, although dynamic, help predict the traction of the Detroit Blueprint in other contexts.

1. Court Cooperation

Federal courts can create the conditions in which strong oversight is more, or less, likely. A presiding judge's ability to implement elements of the Detroit

bankruptcy-vets-1072977-1.html; David Shepardson, *Gerald Rosen, Architect of The Grand Bargain*, DET. NEWS, Nov. 5, 2015; Detroit Grand Bargain Panel, The Ford School, Univ. of Mich., Oct. 21, 2015 (transcript on file with the author).

335. For example, in an interview, Detroit's former emergency manager defended the Detroit mediation against strong-arming critiques of financial creditors. Andrew Scurria, *Jones Day's Orr Champions Muni Settlement Model*, LAW 360, Apr. 29, 2015 ("Speaking generally, Orr said that capital markets creditors were mistaken to think that closed-door mediations, often overseen by current or former judges, can strong-arm bondholders into forfeiting valid repayment rights."), <http://www.law360.com/articles/649327/jones-day-s-orr-champions-muni-settlement-model>.

336. Hilary Russ, *Orr to Leave Atlantic City Emergency Management Team*, REUTERS, Apr. 27, 2015, <http://www.reuters.com/article/usa-atlantic-city-orr-idUSL1N0XOIQ020150427>.

337. *Supra* Part I.A.

338. *In re Genco Shipping & Trading Ltd.*, 509 B.R. 455, 461 (Bankr. S.D.N.Y. 2014) (contrasting free fall cases, with no recorded creditor support, and cases that are prearranged or prepackaged).

339. For example, how to account for residential interests and measuring the adequacy of municipal services remain unclear. Anna Gelpert, *Bankruptcy, Backwards: The Problem of Quasi-Sovereign Debt*, 121 YALE L.J. 888, 907, 909 (2012); C. Scott Pryor, *Who Bears the Cost? The Necessity of Taxpayer Participation in Chapter 9*, 24 WIDENER L.J. 81 (2015); Christine Sgarlata Chung, *Municipal Bankruptcy, Essential Municipal Services, and Taxpayers' Voice*, 24 WIDENER L.J. 43 (2015).

340. Jacoby & Janger, *supra* note 5 (discussing the difficulties of sorting between cases in which the need for speed is legitimate and cases in which the argument is used strategically). Indeed, the Detroit court's expert opined that the case's swift pace reduced the feasibility of the city's plan. Transcript of In Re: Continued Trial at 24-26, *In re City of Detroit* (E.D. Mich. Oct. 22, 2014) (No. 13-53846), ECF No. 8082 (calling speed two-edge sword, win-lose situation where parties keep coming back to city for higher payout).

Blueprint depends on support from the judge's district court and circuit court. The special judicial selection rule produces an opportunity for discussion and coordination³⁴¹ The Detroit Blueprint reflects shared philosophy and cooperation up the chain of appellate review and command. Judge Rhodes agreed to delay his retirement for the case on the condition that Chief Judge Rosen would be the mediator.³⁴² Chief Judge Rosen's letter supporting the assignment of the case to Judge Rhodes, and his agreement to be the mediator, reinforce the notion that they (and possibly the former Chief Judge of the Sixth Circuit) already established a shared philosophy, and possibly a more detailed strategy.³⁴³ In deferring appeals, the Sixth Circuit panel and the district judge receiving appeals accommodated the plan.³⁴⁴ Apparently by design, the appellate process did not operate as a corrective to the court's oversight choices.³⁴⁵

A presiding judge wishing to exercise strong oversight may not always find reviewing and supervising courts so congenial. Without their buy-in, such a blueprint would be difficult, particularly in a high-profile case. Moreover, a chief circuit judge can shape the process considerably through the option to select a judge from another district.³⁴⁶ Appointing a judge from outside the district changes the dynamics of coordination. For example, the appointment of a local federal district judge as mediator seems less likely with an out-of-town bankruptcy judge at the helm.

341. The selection rule is not immune from calls for reform. In the 1990s, a nine-member federal commission, divided on many other issues, unanimously proposed that Congress revert to the ordinary random selection rule and norm for Chapter 9. NATIONAL BANKRUPTCY REVIEW COMMISSION, *BANKRUPTCY: THE NEXT TWENTY YEARS 997* (1997). The group's final report explained: "Concern over the ability and sophistication of bankruptcy judges to handle a Chapter 9 case is no longer well-founded. As a result, this provision of the statute should be eliminated. Chapter 9 cases should be assigned according to the local rules and practices governing the assignment of other bankruptcy cases." *Id.*

342. Lynch, *supra* note 234.

343. District and bankruptcy judges have coordinated and collaborated in other cases using a different arrangement. For example, a district and bankruptcy judge jointly presided over the A.H. Robins Chapter 11, *In re A.H. Robins Co.*, 59 B.R. 99, 105 exhibit A (Bankr. E.D. Va. 1986) (reprinting district court's Administrative Order #1), but there was little question that the district judge was in control of the case, GIBSON, *supra* note 98, at 190.

344. *Supra* notes 221, 224.

345. On the difficulty of using the appellate process as a corrective for exercises of procedural discretion, see Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631 (1994); and Jacoby & Remus, *supra* note 30.

346. Report Together with Separate and Supplemental Views to Accompany H.R. 10624, H.R. Rep. No. 94-686, at 2 (1975) (expressing intent to give chief circuit judge flexibility to appoint judge sitting in a different district). For example, the chief judge of the First Circuit appointed a judge from the District of Massachusetts to preside over the Central Falls, Rhode Island bankruptcy. *City of Central Falls v. Central Falls Teachers Union*, 468 B.R. 36 (Bankr. D.R.I. 2012).

2. State Law

To state the obvious, the restructuring of government debt is political, at least in part.³⁴⁷ If state law gives control of a municipality to an unelected emergency manager—who also happens to be a bankruptcy lawyer—it stands to reason that the Detroit Blueprint becomes more viable.³⁴⁸ An unelected emergency manager is more likely than elected local officials to be amenable to significant operational and financial changes, and less likely to resist collaboration with a federal court and its team. The limited duration of the Detroit emergency manager’s appointment matched the judge’s proposed expedited timeline, further encouraging cooperation.

State law affects the viability of the Detroit Blueprint in the other direction as well: a federal judge might be more comfortable exercising oversight if a municipality already has experienced a “contraction of democracy,” as Judge Rhodes has phrased it,³⁴⁹ when the federalist cost of active court oversight is arguably more modest. Although Michigan’s emergency management law is quite controversial, it is not far-fetched to imagine other states importing some of the law’s features. New Jersey Governor Christie’s tapping of Orr for Atlantic City prompted assumptions that Michigan and Detroit were models to some extent.³⁵⁰ Active federal court oversight also might affect states’ willingness to allow distressed municipalities access to the bankruptcy system in the first place. Also, the variable returns to financial creditors in Detroit is prompting lobbying for state legislation to enhance the rights of bondholders to reduce the risks associated with federal court discretion, although the enforceability of such laws is far from certain.³⁵¹

B. Section 904 as Regulatory Failure

The Detroit Blueprint treats section 904 and its consent exception as a tool of judicial oversight. While literally consistent with the text, such an

347. Caitlin Devitt, *One Year Later: Lessons from Detroit’s Bankruptcy*, BOND BUYER, July 18, 2014 (“In Detroit’s bankruptcy, politics has driven everything from the fast-paced schedule to anti-bondholder rhetoric from city and state officials.”), <http://www.bondbuyer.com/news/regionalnews/one-year-later-lessons-from-detroits-bankruptcy-1064487-1.html>. See generally Gelpert, *supra* note 339 (discussing difficulty of imposing bankruptcy framework on states); Adam J. Levitin, *Fiscal Federalism and the Limits of Bankruptcy*, in *WHEN STATES GO BROKE*, *supra* note 78.

348. Melissa B. Jacoby, *What Are the Costs of Detroit’s Rise from Bankruptcy*, CONVERSATION (Nov. 20, 2014, 5:45 am), <http://theconversation.com/what-are-the-costs-of-detroits-rise-from-bankruptcy-34171>.

349. ABI Spring Meeting Lunch Talk, *supra* note 134; *In re City of Detroit*, *supra* note 1, at 213 (“It is now time to restore democracy to the people of the City of Detroit.”); Casey, *supra* note 329.

350. Russ, *supra* note 336.

351. Moringiello, *supra* note 53at 100.

interpretation illustrates how the constraints of section 904 on federal courts are not nearly as robust as often claimed.

Bankruptcy Code section 904 does not map onto how modern judges manage cases.³⁵² Section 904 calls for judicial constraint by proscribing formal judicial acts associated with traditional adjudication: “stay, order, or decree.”³⁵³ I have uncovered no evidence that Congress adopted this language with a wink or nod to courts that they should exercise control through other means. As reviewed earlier, the message consistently has been that courts’ roles are confined to ruling on a municipality’s eligibility for bankruptcy, the legality of its plan of adjustment, and occasionally on other disputes.³⁵⁴ Whatever benefits might flow from a more experimental system, the history of section 904 does not suggest that Congress intended to create such a laboratory, particularly one that does not contain a mechanism for systematic evaluation.³⁵⁵

The origin of the consent exception to section 904 was as debtor protection.³⁵⁶ The Detroit court instead used the exception as an oversight tool. That approach puts a premium on a municipality exercising free choice. As previously reviewed, sometimes the presentation of options by a federal government actor is, or perceived as, no real choice at all.³⁵⁷ In any kind of case, a litigant weighs the benefits of asserting rights against the risks of disappointing the judge and the anticipated impact, whether or not accurate.³⁵⁸ Chapter 9’s critics are correct that a federal court’s traditional gatekeeping role gives it considerable leverage.³⁵⁹ What they overlook is the proliferation of means and ends through and for which that leverage might be used, to which municipalities (and, indeed, other parties) may be reluctant to object.

For example, perhaps foundational to his case management strategy, Judge Rhodes offered draft language and rationales for a fee examiner order,³⁶⁰ and a mediation order.³⁶¹ Those proposals came early, when the bankruptcy petition’s ink was barely dry, before establishment of a rhythm or rapport. Once a court makes such proposals, could professionals rise in court and resist on behalf of clients, while the news media recorded every move? Could the lawyers have anticipated the scope of activity undertaken as “mediation?” What opportunities existed to resist expansion of the scope, had the city or others wanted to do so? Would it have been consequence-free for the emergency manager to reject Chief

352. *Supra* Part II.A.

353. 11 U.S.C. § 904 (2012).

354. Sources cited *supra* Part I.B.1, 2.

355. Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011).

356. *Supra* note 64.

357. *Supra* notes 69-73.

358. Jacoby & Remus, *supra* note 30 (discussing limited constraints on judiciary).

359. *Supra* Part I.C.

360. *Supra* Part III.D.1.

361. *Supra* Part III.C.

Judge Rosen's weekend urgings to cancel a planned pension freeze and ask him not to call again?³⁶² The role of consent is further complicated by shifts in municipal authority. Detroit's City Council probably never had a say on the mediation order. Upon the re-emergence of its authority, could it complain if the lead mediator tried to go where he arguably did not belong?³⁶³

To be sure, the city asserted section 904 rights in formal litigation settings in response to alleged *creditor* overreach.³⁶⁴ But the response understandably differed when the court made the request. Recall that Judge Rhodes asked the city, in the middle of a hearing, to bring in a water department representative, posed a series of questions, and asked him to return the following week.³⁶⁵ It is unimaginable that, in the middle of the bankruptcy, the city would simply refuse to produce that representative.³⁶⁶ When that representative arrived, presumably with little time to prepare, we would not expect to hear, "not your business, Your Honor," in response to the judge's questions.

The tussle over managing tort claims also illustrates how a court can leverage other powers to obtain consent. Concerned that tort claims could derail the schedule, the court suggested a tort claimant committee, which the city did not embrace.³⁶⁷ Before it publicly proposed an alternative, the court indirectly forced the city's hand.³⁶⁸ Thus, a court can piggyback off the legal rights of a creditor to coax the debtor to do something bigger or different. The story is a reminder that even prohibiting *sua sponte* requests for consent under section 904 would not eliminate the federalist cost of creative court management.

Some readers less interested in federalism as an independent value might wonder whether this alleged regulatory failure is a problem only a law professor could love. Didn't the court's intervention work out well for Detroit and the state of Michigan? For example, the Grand Bargain, the centerpiece of Chief Judge Rosen's efforts, brought hundreds of millions of dollars into the restructuring.³⁶⁹ If federal court intervention creates value, they might ask, what is the harm? Don't the ends justify the means?

362. See *supra* note 212.

363. See *supra* note 218 (discussing presence of Chief Judge Rosen at closed-door City Council meeting).

364. The city raised a section 904 defense when third parties filed an adversary proceeding seeking a moratorium on water shutoffs, documented *supra* notes 300-301. The city also fought creditors' efforts to control the process of valuing the art collection in the DIA. Debtor's Objection to Motion of Creditors at 6, *In re City of Detroit* (Bankr. E.D. Mich. Apr. 28, 2014) (No. 13-53846), ECF No. 4290 ("The Moving Creditors' request that the Court compel the City to cooperate in their due diligence efforts is in direct conflict with section 904 . . .").

365. *Supra* notes 295-298.

366. *Cf. G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 657 (7th Cir. 1989) (en banc) (Posner, J., dissenting) (noting limited effect of majority opinion because "it is the rare attorney who will invite a district judge's displeasure by defying a request to produce the client for a pretrial conference").

367. *Supra* note 147.

368. *Supra* notes 156-158.

369. *Supra* Part II.B.

Concluding that the ends justify the means is too simplistic. To start, federal court intervention in Detroit went considerably beyond the Grand Bargain. The cost-benefit analysis of the interventions discussed in Part III eludes easy calculation.³⁷⁰ Although speed associated with the court’s managerial approach reduced some costs, the court’s feasibility expert worried that the swift pace made settlements more expensive, and nearly too expensive, for the city.³⁷¹ Further, empirical research casts doubt that fee examiners—another of the court’s interventions—are associated with lower costs, at least in corporate restructuring.³⁷² In any event, section 904 does not, and logistically cannot, proscribe only federal interventions that would be viewed as negative after the fact.³⁷³ It is hard to predict whether discretionary judicial interventions will maximize welfare.³⁷⁴

As for the Grand Bargain, it was not universally accepted that this deal generated sufficient value in exchange for shielding the art. The distribution of that value among competing creditors was also very much at issue.³⁷⁵ Financial creditors objected the most before settling their grievances, but other creditors, with less robust representation in the process, also were excluded from the fruits of that deal. Indeed, their exclusion and overall low returns were partly a result of the court’s disbandment of the creditors’ committee that would have been duty-bound to advocate for their interests.

Many individual creditors were residents of Detroit and thus arguably entitled to the protections of federalism directly as well.³⁷⁶ Other costs of court control, via the consent exception or otherwise, are distinct from federalism. For example, creditors may perceive the court as too closely aligned with the state

370. Evaluating the judicial “decisionmaking” in managerial contexts is known to be difficult. Andrew J. Wistrich, *Defining Good Judging*, in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING* 258 (David Klein & Gregory Mitchell, eds. 2010).

371. *Supra* note 340.

372. Stephen J. Lubben, *What We “Know” About Chapter 11 Costs Is Wrong*, 17 *FORDHAM J. CORP. & FIN. L.* 141, 146, 182 (2012).

373. Whether courts or market actors are better arbiters of what should happen to a financially distressed entity is an age-old debate. Jacoby & Janger, *supra* note 2.

374. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 *CARDOZO L. REV.* 1961, 1988 (2007) (asserting that judges may be overconfident in ability to predict settlement effects, leading them to take bolder-than-optimal steps; arguing for more detailed federal rules); *id.* at 1994 (describing difficulty of judges measuring impact of their discretionary measures); Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge’s Mind*, 86 *B.U. L. REV.* 1227, 1230 (2006) (finding bankruptcy judges vulnerable to anchoring and framing effects).

375. Before they settled, bond insurers and certificate of participation holders argued that the mediators rather than the funders excluded them from the Grand Bargain proceeds. Matthew Dolan & Emily Glazer, *Mediator Walks Fine Line Between City, Creditors*, *WALL ST. J.* Feb. 14, 2014; Puerto Rico Chapter 9 Uniformity Act of 2015: Hearing on H.R. 870 Before the Subcomm. On Regulatory Reform, Commercial and Antitrust Law of the H. Judiciary Comm., 114th Cong. 88 (2015) (testimony of Thomas Moers Mayer) (calling Chapter 9 the “Wild West” based on variation in recoveries).

376. *Supra* note 71.

and municipality.³⁷⁷ In that respect, a court's use of the consent exception might spur allegations of bias in favor of the municipal debtor. The identity of creditors asserting disadvantage could vary from case to case. Even if one likes the substantive result this time, what about the next? The Detroit Blueprint, taken as a whole, suggests the absence of meaningful checks on the court.

Conclusion

The Detroit Blueprint reflects a set of judicial tools that the municipal bankruptcy world has overlooked but have long occupied federal court and procedure scholars. Functionally analyzing the court's handling of the case reveals the weakness of the key statutory provision commonly associated with judicial minimalism and meant to enforce the federalist structure of municipal bankruptcy, section 904 of the Bankruptcy Code. Whether or not this assessment provokes statutory reform, we must reframe the discussion of what courts do and analyze the municipal bankruptcy system accordingly. In the meantime, and independent of doctrine it created, the Detroit bankruptcy will generate ripples across a variety of government distress contexts. Even if the Detroit Blueprint is never replicated in full, we have neither seen nor heard the last of it.

377. Indeed, those dynamics generated the *Leco Properties* case and, in turn, the consent exception. *Supra* notes 62-63. See also Dolan & Glazer, *supra* note 375 (discussing creditors' mediation-related complaints); Jacoby & Remus, *supra* note 30 (same).