Federalism Form and Function in the Detroit Bankruptcy

Melissa B. Jacoby

Introduction .................................................................................................. 56
I. Municipal Bankruptcy: Doctrinal Framework and the Standard Account .... 61
   A. A Bankruptcy Chapter Not Like the Others? ....................................... 61
   B. The Express Federalist Command of Section 904 ................................ 62
      1. The Role of Section 904 .................................................................. 62
      2. The Consent Exception .................................................................. 64
   C. The Prevailing Critiques .................................................................. 66
II. What's Wrong with This Picture? Beyond the Standard Account in Theory and in Reality ........................................................................ 67
   A. Managerial Judging and Beyond ...................................................... 67
   B. Detroit Bankruptcy Background ...................................................... 70
   C. Studying the Detroit Bankruptcy ...................................................... 71
III. The Detroit Blueprint: Overlooked Avenues of Federal Court Involvement .................................................................................. 72
   A. Judicial Selection Process ............................................................... 72
   B. Case Management ........................................................................... 74
   C. Dealmaking ...................................................................................... 81
   D. Team Building .................................................................................. 88
      1. Professional Fee Team ................................................................. 88
      2. Mediation Team ............................................................................ 90
      3. Feasibility Team ............................................................................ 90

† Graham Kenan Professor of Law, University of North Carolina at Chapel Hill. I am grateful to those who commented on prior drafts or discussed relevant issues with me: Donald Bernstein, Susan Block-Lieb, Nathan Bomey, Bernard Burk, John Conley, Frederic Bloom, Andrew Dawson, Adam Feibelman, Anna Gelpem, Nicholas Georgakopoulos, Elizabeth Gibson, Sara Stemberg Greene, Paul Hage, Michelle Harner, Mirya Holman, Rich Hynes, Ted Janger, Richardo Kilpatrick, Heather Lennox, Richard Levin, Marc Levinson, Mia Lipsit, Jonathan Lipson, Stephen Lubben, Bill Marshall, Thomas Moers Mayer, Juliet Moringiello, Gerald Munitz, Gene Nichol, John Pottow, Dana Remus, Hon. Steven Rhodes, Michael Schaedle, Matthew Schneider, David Skeel, Stephen Spencer, Michael Temin, Adrian Walters, Mark Weidemaier, Jay Westbrook, several anonymous reviewers, and participants in law school faculty workshops of earlier versions at University of California-Irvine, University of Colorado, University of Miami, University of North Carolina, University of Texas, and William & Mary. My seminar students at UNC School of Law also made excellent suggestions. Thanks to Robert El-Jaouhari, Graham Ford, Tim Gallina, Dave Hansen, Britton Lewis, Michael Maloney, Dana Messinger, Leigh Edwards Miller, Brett Neve, Tyler O’Hara, Rachel Rogers, Safa Sajadi, and Andy Swanson for library, research, and editorial assistance.
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. Unlike for General Motors and Chrysler just a few years earlier, no government bailout was on the horizon. Sideline by a controversial state financial emergency law, Detroit’s residents and elected officials deemed the bankruptcy illegitimate. 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.

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

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. The city’s elected officials committed to effectuate the plan. With strings attached, the state of Michigan contributed funds to the effort, as did the Ford Foundation, the Kresge Foundation, the W.K. Kellogg Foundation, the Knight Foundation, and others. The city obtained new private financing. Approval of the plan cleared Detroit to shed more than $7 billion in debt and embark on reinvestment initiatives to improve substandard municipal services. 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. 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. 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.

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. 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. Moreover, many provisions that authorize bankruptcy judge oversight do not apply to municipalities. 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. 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.

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. Because Detroit entailed a remarkable level of interactivity between the federal, state, and local governments, it exposes fertile ground for federalism scholars.

15. Id. § 903.
16. Infra Part I.A.
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).
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. 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. 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, deal-making and settlement promotion, team building, and a “court of the people.” The approach was facilitated by hand-selection of the presiding judge by the chief circuit judge. That selection process presents opportunities to coordinate a distinct philosophy—in this case, active and pervasive federal court control.

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. This method, which I have not seen used elsewhere, is more revealing of context and nuance in court-party


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.

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 is 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. 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, and state municipal takeover law. 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. 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, and the city can impair contracts and shed debt if a court confirms a debtor’s plan of adjustment. 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. Unilateral actions that could trigger the appointment of a trustee in other cases generate no such consequence for a municipality. Creditors cannot file an involuntary bankruptcy, reflecting the sovereign state’s role in determining a municipality’s access to a federal bankruptcy regime. And, unlike in Chapter 11, only the municipality is ever authorized to file a plan of adjustment. 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. In addition, prior to 1976, municipalities were expected to come into bankruptcy with a debt restructuring plan already hammered out, bondholder votes counted. That structure not only made Chapter 9 more difficult to use, but left less for a court to do or oversee.

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).


40. Id. § 901 (containing the list).
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).
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.
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...
federal court power. 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.” 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. The rest of municipal reform, she says, is up to the states.

2. The Consent Exception

In 1976, Congress added a consent exception to section 904 that continues in the statute today. According to a House Report and an authoritative treatise, the addition was a clarification, not a weakening of the proscription against court interference. There is no indication that the consent exception was meant to effect a big change, or really any change, in the law. 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. The provision expressly gives a municipality the power to ask for the court’s assistance. For example, a
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

---


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”).


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. 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.” Their proposed path involved judges aggressively scrutinizing restructuring plans, usually in ways that would push debtors to pay creditors more. Clayton Gillette has argued that courts should require municipalities to pay “affordable, if unpopular, obligations,” to counter the strategic behavior of local officials. His focal points were, again, eligibility and plan confirmation.

The critics’ proposals accurately reflect untapped leverage for judges from their gatekeeping responsibilities. 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. 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. By the late 1970s, district judges were encouraged to take active control over their dockets and cases through a variety of measures. 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. By some accounts, the courts have moved from dispute resolution to problem solving. 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. The techniques for many federal actions (including but not limited to institutional reform) span detailed case management orders; statements (whether in public

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


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.
Detroit Bankruptcy

Although long identified as a relevant counterpoint, particularly to corporate bankruptcy, 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. In municipal bankruptcy, the federal court’s involvement, rather than the underlying financial problem, is the element more likely to provoke constitutional challenge. 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. 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, corporate bankruptcy scholars tend to characterize bankruptcy as an extension of the private transactional realm, with judges external to that world. 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


more on negotiation and compromise, 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. The city’s financial troubles were decades in the making, intertwined with social and political challenges. 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. 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.

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, planned and funded investment initiatives, and negotiated a regional water authority. The state established fiscal oversight through the Detroit Financial Review Commission.

---


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. The Grand Bargain protected the Detroit Institute of Arts from creditors and permanently put it in a trust. The Grand Bargain also reduced the cuts to pensions for public workers and retirees. 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. 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. 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.”).


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

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. 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. In addition, court-appointed adjuncts engaged in private interactions with city officials and other parties.

These caveats notwithstanding, the available record suggests that the federal court did much more than provide a forum for traditional adjudicative services. 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. In federal courts, judges usually are assigned cases randomly within districts and divisions.

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. Concerns about judge capability have dominated explanations for this provision. 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.

When the clerk of the bankruptcy court received Detroit’s Chapter 9 filing, she asked for a designation from the chief circuit judge. Chief Judge Alice Batchelder filed a notice of her selection. Whereas notices in other Chapter 9 cases have merely identified the judge’s name, the Detroit designation is substantive. In addition to confirming Judge Rhodes’ availability (Judge Rhodes deferred retiring from the bench to take the case), 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.

Judging: Organizational Design in Mass-Multidistrict Litigation, 64 EMORY L.J. 329, 337 (2014) ("[A]llmost 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).
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. 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.” 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. 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.

Always be closing.

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.” Detroit’s dire circumstances made efficient resolution “imperative and one that the Court intends to fulfill with the highest degree of commitment.”

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).


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. Chapter 9 mentions only one, optional deadline: the due date for the filing of a plan of adjustment. Judge Rhodes proposed an ambitious and detailed scheduling order. Pursuant to the terms of the order, the court would extend dates and deadlines only on a motion establishing good cause. Extension requests thus served an information-forcing function. Although delays were inevitable, the case adhered remarkably well to the court’s initial scheduling order.

The court adopted multiple approaches to move the case. One was to prevent parties from belaboring procedural matters. Another was to strongly encourage settlement. Concerned that the city’s progress might languish after the bankruptcy, the court even proposed a continued monitoring role, 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. 7060, 9014(c), but section 105(d) of the Bankruptcy Code authorizes case management.


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, Kevyn 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 MIDDD, 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 1-4, 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).

dropped the idea once it was clear the State of Michigan would appoint an oversight commission.\footnote{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.").} 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,\footnote{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).} 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.\footnote{Transcript of Hearing Regarding Amended Motion of Creditor Ryan at 13-14, In re City of Detroit (Bankr. E.D. Mich. Oct. 2, 2013) (No. 13-53846), ECF No. 1118.} 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,\footnote{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.").} Judge Rhodes called for an evidentiary hearing to examine the workload of the city’s in-house lawyers.\footnote{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.} Detroit called as its witness the city’s deputy corporation counsel.\footnote{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).} Ryan’s lawyer cross-examined. Just when the hearing seemed to be concluding, Judge Rhodes called a witness of his own.\footnote{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”).} That witness was Michael Muller, one of the city’s in-house lawyers, who had been identified as present in the
courtroom earlier that day.\textsuperscript{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,\textsuperscript{154} the latter’s answer boiled down to “not much.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{157} As if on cue, Detroit filed its tort plan.\textsuperscript{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. . . .\textsuperscript{159}

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

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

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

\textsuperscript{156} Evidentiary Hearing, \textit{supra} note 151, at 63-64. An extension was possible, but the standard for obtaining one was high. \textit{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. \textit{Id.} at 65.

\textsuperscript{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, \textit{Detroit Bankruptcy Judge Gives City 35 Days to Develop Plan to Clear Lawsuits}, \textit{DET. FREE PRESS}, Oct. 8, 2013.


\textsuperscript{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, \textit{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, \textit{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, \textit{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 \textit{Daubert} decision). See also Reporter’s Daily Transcript of Proceedings at 177, \textit{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 18....If 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
insurer’s lawyer by his own admission. Although the city’s lawyer was capable of rebutting the creditor’s arguments, the court did much of that work itself. 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. During the plan confirmation trial, the judge asked detailed substantive questions of a variety of witnesses, including City Council President Brenda Jones, Mayor Mike Duggan, Emergency Manager Kevyn Orr, the Director/Chief Executive Officer of Detroit’s water and sewerage department, the Chief Operating Officer of the Detroit Institute of Arts, 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.”).


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).


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.

Buckfire,\textsuperscript{175} Ernst and Young managing director Guarav Malhotra,\textsuperscript{176} Michael Plummer from ArtVest,\textsuperscript{177} and a water and sewer system consultant.\textsuperscript{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.\textsuperscript{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,”\textsuperscript{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?”\textsuperscript{181} Erickson talked generally about the importance of the museum for families with school age children,\textsuperscript{182} for adults,\textsuperscript{183} and to the city and region as a whole.\textsuperscript{184} The court credited that testimony in its written decision confirming the plan.\textsuperscript{185}
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. 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.*

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. Litigation could be “bitter” and “expensive,” he explained, while settlements could stabilize and strengthen long-term relationships. Judge Rhodes’s proposed order identified Chief Judge Rosen as his choice for lead mediator. 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.”).
the bankruptcy judge arguably delegates more power to the mediator than the bankruptcy judge could have exercised himself. 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. In open court, a lawyer for the city expressed support for the court's order as written. A lawyer for a union also indicated acceptance, although not to the exclusion of other avenues to protect her client's interest. The Detroit Retirement Systems' lawyer suggested the most unease, characterizing the proposal as premature. In response, Judge Rhodes emphasized the facilitative nature of the process; nothing, and no one, would be coerced, he said. 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
major issues, and to appoint other mediators at his discretion.\footnote{197} The order also rendered confidential “all proceedings, discussions, negotiation, and writings incident to mediation.”\footnote{198}

The first mediation session occurred on September 17, 2013.\footnote{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.”\footnote{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.\footnote{201} The numbers of parties in mediation or alternative dispute resolution grew with the addition of hundreds of tort claimants,\footnote{202} counties negotiating a regional water authority,\footnote{203} and parties seeking to enjoin residential water shutoffs.\footnote{204} Mediation continued even long after the court confirmed the city’s plan of adjustment.\footnote{205} When Detroit’s emergency manager was asked at the plan confirmation hearing which issues the court had sent to

\footnote{197. Mediation Order, \textit{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.}

\footnote{198. \textit{Id.} at 1 cl. 4.}


\footnote{200. Ed White, Associated Press, \textit{Judge Acting as Mediator in Detroit Bankruptcy: Deals are Better than ‘Horrendous’ Litigation}, \textit{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, \textit{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, \textit{supra} note 200. Chief Judge Rosen cited the perils of litigation at other junctures. Howes et al., \textit{supra} note 12, at Ch. 4 (Chief Judge Rosen warned Grand Bargain funders that litigation would be devastating to the city).}


\footnote{203. Order of Referral to Mediation, \textit{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).}


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, including some calling for continual attendance until released by the mediator.  209 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.  210

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.
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.’").
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.”).
bankruptcy, for what became the Grand Bargain. Chief Judge Rosen also reached out to the Michigan Governor and members of the state legislature to seek financial contributions for the restructuring. These contributions materialized after legislative sessions in Lansing for which Chief Judge Rosen was on hand. He held meetings in his chambers with Michigan House and Senate majority leaders. 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. 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.

The lead mediator also played a distinctive role in the appellate process, illustrating just how many ways federal court influence can operate. When objects 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.”).


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.


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 Richmond 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." The assigned panel of Sixth Circuit judges agreed to do just that. 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. Eventually, a creditor (successfully) filed a writ of mandamus to compel the district court to hear and decide an appeal. And, by the summer of 2014, the Sixth Circuit threatened to push forward with the eligibility appeal before plan confirmation. 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. Chief Judge Rosen appeared and spoke at press conferences alongside the Governor, members of the state legislature, the emergency manager, Mayor Duggan, and others.

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”).


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.\textsuperscript{227} Indeed, the court rejected the first deal openly endorsed by Chief Judge Rosen,\textsuperscript{228} although he sent the parties right back to mediation.\textsuperscript{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.\textsuperscript{230} Whenever news emerged of settlements, the court encouraged non-settling creditors to follow suit.\textsuperscript{231} Concern about angering or disappointing Chief Judge Rosen prodded parties back into negotiations.\textsuperscript{232} When a lawyer suggested that the court had assigned Chief Judge Rosen to “crack heads,” the


\textsuperscript{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).

\textsuperscript{230} Transcript of Motion of Debtor for Entry of an Order Vacating the Appointment of Official Committee of Unsecured Creditors at 27, \textit{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].”); \textit{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.”).

\textsuperscript{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).

\textsuperscript{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.\textsuperscript{233} At the end of the case, Judge Rhodes called his own best act the recruiting of Chief Judge Rosen.\textsuperscript{234} The mediation put the federal court in a profoundly powerful position, with continuous opportunities to shape municipal reform.

\textbf{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.\textsuperscript{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 \textit{sua sponte} proposed appointing someone to review the fees and expenses of professionals paid by the city.\textsuperscript{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.\textsuperscript{237} Not clearly authorized even in Chapter 11, where courts have the duty to review

\begin{quote}
\textsuperscript{233} Transcript of Hearing Re. Motion by Official Committee of Retirees to Stay Deadlines at 26, \textit{In re} City of Detroit (Bankr. E.D. Mich., Sept. 19, 2013) (No. 13-53846), ECF No. 1037 ("\textsc{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. \textsc{Court}: Well, that’s not exactly the language I used with him. \textsc{Lawyer}: Okay. I’ll accept it. \textsc{Lawyer}: If I misunderstood, please tell me. \textsc{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."). \textit{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?").
\end{quote}

\begin{quote}
\textsuperscript{234} Oral Opinion on the Record at 45, \textit{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."); \textit{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, \textit{Rosen Gives Behind-the-Scenes Look at Bankruptcy Case}, \textsc{Det. News}, Nov. 10, 2014. See also Judge Rhodes \textit{Reflects on the Detroit Case}, \textsc{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).
\end{quote}

\begin{quote}
\textsuperscript{235} The exception was the appointment of a non-testifying consultant to the court. \textit{Infra} Part III.D.3.
\end{quote}

\begin{quote}
\textsuperscript{236} Order Establishing Amended Initial Status Conference Agenda at 4, \textit{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)).
\end{quote}

\begin{quote}
\end{quote}
Detroit Bankruptcy

fees, the "fee examiner" is an especially awkward fit with a municipal case. Judge Rhodes was apparently the first to propose a fee examiner in a Chapter 9.

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. He justified the proposal on public and media scrutiny, and invited collaboration on the details of the appointment. The city did not oppose the proposal, and agreed to pay the fee examiner's own fees and expenses.

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. Fishman did not work alone; at least twenty-nine additional lawyers and paraprofessionals at his law firm were listed as potential contributors. The fee examiner team also included an accountant in Florida and twenty-three of the accountant's employees.


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.").


242. Id.

243. Id. at 58.


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
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 --
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.\textsuperscript{264}

Kopacz employed at least a half a dozen professionals or paraprofessionals at her firm to work on this project,\textsuperscript{265} and at least three lawyers.\textsuperscript{266} The assistance of these other people supplied more channels for information flow to and from the court’s team.\textsuperscript{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.\textsuperscript{268} Judge Rhodes instead appointed Ravitch to a position that had not been advertised: a non-testifying consultant.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{271}

By design, the information would flow only in one direction; Ravitch would be insulated from requests to testify, or providing other information.\textsuperscript{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.\textsuperscript{273}

\begin{itemize}
\item \textsuperscript{264} Transcript of Trial Re. Objections to Chapter 9 Plan, supra note 7, at 101-102.
\item \textsuperscript{267} Transcript of Continued Trial at 160, \textit{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’ team and parties to the case and their professionals).
\item \textsuperscript{268} Notice Regarding Interviews, supra note 257.
\item \textsuperscript{270} Id. at 1.
\item \textsuperscript{271} Id. at 1.
\item \textsuperscript{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.”).
\item \textsuperscript{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. The arrangement therefore generated no public documents on how this federal court appointee spent his time. 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.

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.” 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.” 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).
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.\textsuperscript{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.\textsuperscript{280} Mayor Duggan testified to “extensive conversations” with Ravitch about the need to keep the city’s financing at the lowest possible amount.\textsuperscript{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.\textsuperscript{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.\textsuperscript{283}

This wish was granted: Ravitch was named as a consultant to the Detroit Financial Review Commission.\textsuperscript{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.\textsuperscript{285}

\begin{flushright}
\footnotesize
\textsuperscript{279.} Transcript of Trial Re. Objections to Chapter 9 Plan, supra note 7, at 76-77.
\textsuperscript{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 . . . .”).
\textsuperscript{281.} Id. at 144-45.
\textsuperscript{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.
\textsuperscript{283.} Oral Opinion on the Record at 46, supra note 5.
\textsuperscript{285.} WDET Interview, supra note 131.
\end{flushright}
Detroit Bankruptcy

*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,

---

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).
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?”).


course of events, resident advocates requested an injunction of residential water shutoffs. 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, 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.  

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. 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 . . . .

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

304. Id.
bankruptcy. 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.” He encouraged lawyers to be proactive in ensuring accurate press reporting. 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. That point was representative of efforts to break through financial and legal jargon.

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. The judge questioned the assumption that the Governor should get special flexibility in scheduling court testimony. 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. 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).


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 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. For those steeped in high profile mass tort or institutional reform cases, Detroit may resonate. But the story clashes with the municipal bankruptcy literature.

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. 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. 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. 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. In the meantime, the typical appellate pipeline for bankruptcy court orders was all but suspended, in anticipation that settlement would moot the appeals.

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.

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).

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. But municipal bankruptcy cases remain
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. 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.

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, on the radio, on a video podcast, in newspaper interviews, at a college graduation, at sponsored events at which he was honored, and at professional conferences. He has been retained to advise the Commonwealth of Puerto Rico regarding its financial distress. The lead mediator, Chief Judge Rosen, has continued to be vocal about the case.

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.

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.

Professionals and parties are speaking about the Detroit Blueprint at educational programs and in interviews. 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. 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. Today’s municipal bankruptcies can be, like Detroit, “free fall,” and in flux. The possibility that a case could last many years is real, especially because the substantive law forming the backdrop of negotiations remains underdeveloped. 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.

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


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.


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).


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).
Detroit Bankruptcy

Blueprint depends on support from the judge’s district court and circuit court. The special judicial selection rule produces an opportunity for discussion and coordination. 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. 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. In deferring appeals, the Sixth Circuit panel and the district judge receiving appeals accommodated the plan. Apparently by design, the appellate process did not operate as a corrective to the court’s oversight choices.

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. 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.


2. State Law

To state the obvious, the restructuring of government debt is political, at least in part. 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. 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, 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. 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.

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
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.\textsuperscript{352} Section 904 calls for judicial constraint by proscribing formal judicial acts associated with traditional adjudication: “stay, order, or decree.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{355}

The origin of the consent exception to section 904 was as debtor protection.\textsuperscript{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.\textsuperscript{357} In any kind of case, a litigant weights the benefits of asserting rights against the risks of disappointing the judge and the anticipated impact, whether or not accurate.\textsuperscript{358} Chapter 9’s critics are correct that a federal court’s traditional gatekeeping role gives it considerable leverage.\textsuperscript{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,\textsuperscript{360} and a mediation order.\textsuperscript{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

\textsuperscript{352} Supra Part II.A.
\textsuperscript{354} Sources cited supra Part I.B.1, 2.
\textsuperscript{356} Supra note 64.
\textsuperscript{357} Supra notes 69-73.
\textsuperscript{358} Jacoby & Remus, supra note 30 (discussing limited constraints on judiciary).
\textsuperscript{359} Supra Part I.C.
\textsuperscript{360} Supra Part III.D.1.
\textsuperscript{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.

106
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
and municipality. 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).