1992

Legislation: Congressional Initiatives: The Forgotten Constraint: Bankruptcy Legislation and the Uniformity Clause

Jonathan K Van Patten

Legislation: Congressional Initiatives

JONATHAN K. VAN PATTEN*

THE FORGOTTEN CONSTRAINT: BANKRUPTCY LEGISLATION AND THE UNIFORMITY CLAUSE

Introduction

The Constitution of the United States empowers Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States."[1] This authorization is well-understood as a grant of power but far less so as a limitation on the exercise of such power. The requirement that bankruptcy legislation enacted by Congress be uniform throughout the United States has only rarely occupied the attention of the courts, and it now appears to have disappeared altogether as a factor in the deliberations of Congress.

On November 19, 1991, Senators Heflin and Grassley introduced in the Senate a bipartisan bill that was intended to revise certain portions of the Bankruptcy Code (the Code), to establish a commission to review and make recommendations concerning further amendment of the Code, and to add "a temporary chapter to govern reorganization of small businesses."[2] This bill was the product of lengthy study[3] and represented serious thinking about bankruptcy law and procedure. Nevertheless, there was a provision in the bill that ran squarely against the constitutional provision authorizing Congress to enact uniform bankruptcy legislation. Under the proposed law, the new chapter on small business reorganization would be implemented in eight selected pilot districts only.[4] By its own

* Professor of Law, University of South Dakota School of Law, Vermillion, SD.

[1] U.S. Const. art. I, § 8.

[2] S. 1985, 102d Cong., 1st Sess. at 1 (1991). On March 19, 1992, the bill, with revisions not relevant to this column, was reported out of the Senate Judiciary Committee for action by the entire Senate. 1991 U.S.S.B. 1985 (WESTLAW-BILLTRK).

[3] Senator Heflin described these efforts as follows:

> This bill developed out of a series of hearings conducted this spring and summer. During those hearings, the subcommittee [on Courts and Administrative Practice] heard from nearly 40 witnesses over 5 hearings, and received numerous additional statements and communications from those participating in making suggestions to the subcommittee.

Cong. Rec. S17047 (daily ed. Nov. 19, 1991).

[4] Senate bill 1985 states:

> (e) Application of Chapter 10 of Title 11.—
>
> (1) SELECTION OF DEMONSTRATION DISTRICTS—Not later than 90 days after the date of enactment of this Act, the Director of the Administrative Office of the United States Courts shall—
>
> (A) select 8 judicial districts in which chapter 10 of title 11, United States Code, shall be effective for a period of 3 years; and
>
> (B) identify those districts by notice in the Federal Register.

S. 1985, 102d Cong., 1st Sess. 45 (1991).

terms, it mandates that the implementation of small business bankruptcy reorganizations would not be uniform throughout the United States.

It is fair to say that the drafters of the bill were not troubled by any argument that selective implementation in certain districts would violate the uniformity requirement. Indeed, it is not clear whether they were even aware of such a requirement.[5] This is a good indication that the uniformity provision is not a serious consideration as a constitutional requirement. This is not the first time that Congress has used pilot districts in connection with implementation of new bankruptcy procedures. When the U.S. Trustee system was established in 1979, it was implemented first in selected pilot districts and then later "nationalized" in several steps.[6] Although it is not clear whether the provision for nonuniform supervision of bankruptcy cases would violate the uniformity requirement, there is little doubt that defenders of the proposed nonuniform implementation of Chapter 10 would point to the trustee system pilot program as a justification for the current proposal.

The purpose of this article is to review the history and application of the provision for uniform laws on bankruptcies throughout the United States and to show that, although the Supreme Court has eroded the uniformity principle, there remains a meaningful restraint on the power of Congress to enact nonuniform bankruptcy legislation. If it can be demonstrated that the uniformity language imposes a limitation on Congress's power to enact bankruptcy legislation, then its application to the proposed legislation should influence the current legislative deliberation or, if not, eventual judicial consideration of this issue.

History of the Uniformity Clause

The Constitutional Convention

At the time of the Constitutional Convention, the matter of bankruptcy or insolvency legislation was within the domain of state sovereignty.[7] Because commerce problems and the problems of economic instability engendered by

---

[5] In an interview, Senator Heflin made the following comment relating to the proposed Chapter 10:

> By introducing the concept of Chapter 10 or a 'small business' chapter, we were attempting to respond to testimony that sometimes Chapter 11 procedures were not efficient for effectively reorganizing a small business. Since introducing this proposal, many issues have arisen which will need further clarification in the bill itself, however, by creating some pilot-study districts we would allow an empirical body of evidence to develop regarding whether this concept should be made national in scope. Further, by limiting the time under which these programs would be operating, if evidence shows that this proposal is not working, Congress could simply allow the time limits for extending this proposal to lapse.

ABI Newsletter, Vol. XI, No. 3, at 24 (Mar. 1992).

[6] See Pub. L. No. 95-598, Title II, § 224(a), 92 Stat. 2662 (Nov. 6, 1978); Pub. L. No. 99-554, Title I, §§ 111(a)–111(c), 100 Stat. 3090, 3091 (Oct. 27, 1986). See also infra notes 106–123 and accompanying text.

[7] C. Warren, Bankruptcy in United States History 6–7 (1935). The best modern treatment of the history of the bankruptcy clause is Koffler, The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity, 58 NYU L. Rev. 22, 35–59 (1983). See also Nadelmann, On the Origin of the Bankruptcy Clause, 1 Am. J. of Legal Hist. 215 (1957).

interstate jealousies were a primary impetus for the Convention,[8] it is not surprising that the question of a national system of bankruptcy laws did arise during the debates.[9] What is surprising, however, is how late the issue arose and how little attention was actually devoted to it.

The creation of a strong national legislature was one of the principal intentions of the framers of the Constitution, but a review of the early drafts from the Convention shows that bankruptcy was not included among the first full list of powers to be exercised by Congress.[10] Relatively late in the Convention, in connection with discussion of the full faith and credit clause, Charles Pinckney of South Carolina proposed the following language: "To establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange."[11] This proposal was referred to a committee, and the report back to the Convention recommended that the language "to establish uniform laws on the subject of Bankruptcies" be inserted in the section on legislative powers following the provision for establishing a uniform rule of naturalization.[12] There was no recorded discussion during the Convention concerning the meaning of the word "uniform" in the context of the bankruptcy provision.[13]

The bankruptcy clause, however, is not the only provision that has a uniformity requirement. The first clause of article I, section 8 establishes the power to lay and collect taxes, duties, imposts, and excises and specifies that "all Duties, Imports and Excises shall be uniform throughout the United States."[14] As mentioned earlier, Congress is also authorized "to establish a uniform Rule of Naturalization."[15] These provisions, together with the

---

[8] See, e.g., F. McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 105 (1985); M. Jensen, The New Nation: A History of the United States During the Confederation 1781–1789, 313–326 (1950).

[9] As James Madison observed:

> The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.

The Federalist No. 42, at 271 (J. Madison) (C. Rossiter ed. 1961).

[10] *See* J. Madison, Notes of Debates in the Federal Convention of 1787, 389–390 (1966).

[11] Id. at 546 (Aug. 29, 1787).

[12] Id. at 569 (Sept. 1, 1787). The two provisions were integrated into a single clause in the final version. Id. at 620 (Sept. 12, 1787).

[13] The sole discussion of the provision reported by James Madison is as follows:

> The clause in the Report "To establish uniform laws on the subject of Bankruptcies" being taken up.
>
> Mr. Sherman observed that Bankruptcies were in some cases punishable with death by the laws of England & He did not chuse to grant a power by which that might be done here.
>
> Mr. Govr. Morris said this was an extensive & delicate subject. He would agree to it because he saw no danger of abuse of the power by the Legislature of the U.S.
>
> On the question agree to the clause N.H. ay. Mas. ay. Ct. no. N.J. ay. Pa. ay. Md. ay. Va. ay. N.C. ay. S.C. ay. Geo. ay.

Id. at 571 (Sept. 3, 1787).

[14] U.S. Const. art. I, § 8, cl. 1.

[15] U.S. Const. art. I, § 8, cl. 4. See also The Federalist No. 32, at 199 (A. Hamilton) (C. Rossiter ed. 1961).

article I, section 9 prohibition against preferences for the ports of one state over another in connection with commerce or taxation legislation,[16] indicate an intention to establish national, uniform rules and to avoid the balkanization inherent in the prior state sovereignty regarding economic regulation.

Furthermore, as noted by Professor Koffler,[17] there is good evidence that the framers of the Constitution intended the term "uniformity" to have substantive content. In the debate regarding Congress's power over the militia, the delegates rejected two different formulations that would have authorized Congress to establish "uniform" rules for the militia.[18] Objection was framed, in part, on the potential rigidity that the word "uniform" implied,[19] and the final formulation reflects a partnership between Congress and the respective states rather than an exclusive power in Congress to establish a "uniform" system as was established for naturalization and bankruptcy.[20]

It is reasonable to conclude that the term "uniform" was intended by the framers to act as a limitation on the exercise of certain powers of Congress. In particular, the language limits the power of Congress to enact bankruptcy legislation that is not uniform throughout the United States, presumably meaning that it may not differentiate between various localities. If "uniform . . . throughout the United States" is not viewed as a limitation on Congress's power, one would have to conclude that the language is merely surplusage and that the framers intended for Congress to oversee a geographically diverse system of bankruptcy and insolvency legislation. It is evident that the framers harbored no such intention.

Consistent with this understanding of the uniformity language is Justice Joseph Story's discussion in his *Commentaries on the Constitution*:

> It is obvious, that if the power is exclusively vested in the states, each one will be at liberty to frame such a system of legislation upon the subject of bankruptcy and insolvency, as best suits its own local interests, and pursuits. Under such circumstances no uniformity of system or operations can be expected. . . . [D]iversities of almost infinite variety and object may be introduced into the local system, which may work gross injustice and inequality, and nourish feuds and discontents in neighboring states. What is here stated, is not purely speculative. It has occurred among the American states in the most offensive forms, without any apparent reluctance or compunction on the part of the offending state. There will always be found in every state a large mass of politicians, who will deem it more safe to consult their own temporary interests and popularity, by a narrow system of preferences, than to

[16] U.S. Const. art. I, § 9, cl. 6.

[17] Koffler, supra note 7, at 39–40.

[18] Madison, supra note 10, at 513–514 (Aug. 23, 1787).

[19] The proposed language would have given Congress the power "[t]o establish an uniformity of arms, exercise & organization for the Militia." Id. at 514. This provoked a response from Jonathan Dayton, as recorded in the Notes of Debates in the Federal Convention of 1787:

> Mr. Dayton was against so absolute a uniformity. In some States there ought to be a greater proportion of cavalry than in others. In some places rifles would be most proper, in other muskets &c.

Id. James Madison argued in reply that the militia was a matter of national concern and therefore ought to be provided for in the national constitution. The delegates rejected the proposed uniformity language and then adopted a substitute provision giving Congress the power to regulate the militia but without the uniformity requirement. Id. at 514–515.

[20] U.S. Const. art. I, § 8, cl. 16.

> enlarge the boundaries, so as to give distant creditors a fair share of the fortune of a ruined debtor. There can be no other adequate remedy, than giving a power to the general government, to introduce and perpetuate a uniform system.[21]

Early Efforts to Enact Bankruptcy Legislation

While Story was undoubtedly correct in theory, the politics of bankruptcy law were another matter. For most of the nineteenth century, creditors' rights and debtors' protections, if any, were controlled by state law.[22] Indeed, at the time that Story wrote these words favoring nationalization of bankruptcy laws, there had been no national bankruptcy law for approximately 30 years. According to Charles Warren, the chief reason for this lack of national legislation was the political strength of local interests.[23] A brief review of bankruptcy legislation during the nineteenth century confirms this point.

The first uniform bankruptcy law was passed by Congress in 1800,[24] but it was repealed in 1803.[25] The initial passage had been hotly contested, with the division largely along geographic lines. The opposition, representing Southern agricultural interests, continued the assault on the legislation after passage and won repeal before the law would have terminated on its own terms.[26] Congress struggled many years thereafter with the question of national bankruptcy legislation, but local interests prevailed each time, if only narrowly.[27] After a decisive defeat of a national bankruptcy bill in 1827, Justice Joseph Story wrote:

> The Bankrupt Bill has been lost and under circumstances which will forbid any attempt to revive it for many years. It has had much of the best talent, eloquence, and influence of the Senate to support it; but it has failed from causes not likely to be overcome in future times. It interferes with State pride and prejudice, with the interest of some, with the political expectations of others, with the Antifederalism of others, and above all with that mass of public opinion which in different states of the Union floats in opposite directions, even when apparently impelled by the same common cause. I have always had some confidence that a Bankrupt Law would be passed, but I now begin to believe that the power will, in the National Government, forever remain a dead letter.[28]

It should be noted that implicit in this political struggle is the assumption, shared by proponents and opponents, that bankruptcy legislation cannot be less than national in scope. The uniformity required of bankruptcy legislation was in fact a primary factor contributing to its defeat.

The next passage of national bankruptcy legislation was in 1841,[29] but it too had a short life, for it was repealed in 1843.[30] Again, the opponents who

---

[21] 3 J. Story, Commentaries on the Constitution § 1102 (1833), reprinted in 2 The Founders' Constitution 640 (P. Kurland & R. Lerner eds. 1987).

[22] Koffler, supra note 7, at 44–45, 52–53. See generally Warren, supra note 7.

[23] Warren, supra note 7, at 9.

[24] 2 Stat. 19 (1800).

[25] 2 Stat. 248 (1803).

[26] Warren, supra note 7, at 19–21; Koffler, supra note 7, at 44.

[27] Warren, supra note 7, at 27–45.

[28] I Life and Letters of Joseph Story, quoted in Warren, supra note 7, at 49 (Letter of February 4, 1827).

[29] 5 Stat. 440 (1843).

[30] 5 Stat. 614 (1843).

narrowly lost the fight to prevent a national bankruptcy bill won its early repeal when the political tides changed briefly.[31] The primary mode of debtor relief, in the absence of national legislation, continued to be state-defined exemptions of real and personal property. The existence of generous exemptions in some states in fact fueled local opposition to enactment of uniform bankruptcy legislation by Congress.[32] After the Civil War, Congress enacted another bankruptcy act in 1867,[33] which lasted until 1878.[34] The pressures for repeal this time were caused by the experience of excessive costs and delays as well as by evidence of widespread corruption in the administration of the act.[35] It was not until the enactment of the Bankruptcy Act of 1898 that it could be said that the law of bankruptcy was firmly within the province of Congress, politically as well as constitutionally.

State Power to Enact Insolvency Legislation

In the absence of national bankruptcy legislation, the question arose whether the states had retained any power to legislate with regard to debtor insolvency. This question was addressed by the U.S. Supreme Court in *Sturges v. Crowninshield*.[36] This case involved an ordinary suit to collect on promissory notes. What made the case interesting was the defense that a discharge had been granted the defendant under state law.[37] Chief Justice Marshall, speaking for the Court, held that the purported discharge under state law violated the constitutional prohibition of state impairment of contracts.[38] Before reaching this conclusion, however, Marshall discussed whether the states had the power to enact bankruptcy laws or, stated alternatively, whether the power of Congress to enact bankruptcy legislation was exclusive.

In his analysis, Marshall focused on the language of the constitutional provision:

> The peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States. This establishment of uniformity is, perhaps, incompatible with state legislation, on that part of the subject to which the acts of Congress may extend.[39]

In the absence of national legislation, however, the states were free to enact legislation:

> [T]he power granted to Congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. . . . It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states.[40]

---

[31] Warren, supra note 7, at 84–85.

[32] Id. at 100–101.

[33] 14 Stat. 517 (1867); Warren, supra note 7, at 101–109, Koffler, supra note 7, at 52–53.

[34] 20 Stat. 99 (1878); Warren, supra note 7, at 109–127.

[35] Warren, supra note 7, at 127.

[36] 17 US (4 Wheat.) 122 (1819).

[37] Id.

[38] Id. at 208.

[39] Id. at 193–194.

[40] Id. at 195–196.

There is some similarity between this issue and the commerce-clause doctrine that later dominated the Court's attention.[41] What is different between the two is the Court's emphasis on uniformity. The commerce legislation eventually led to a partnership (albeit an unequal one) between Congress and the states,[42] but the uniformity requirement prevented a parallel development in the area of bankruptcy.

Resolution of the Struggle Between Local and National Interests

The principal political battle in connection with the early national bankruptcy acts appears to have been the question of local versus national definition of "exempt property."[43] The first two bankruptcy acts, in 1800 and 1841, attempted to establish a uniform definition of exempt property, and these acts suffered repeal largely at the hands of local interests.[44] The 1867 act took into consideration local interests (favoring generous exemptions for debtors) and incorporated the state exemptions in its provisions.[45] This compromise between national and local interests was also incorporated in the Bankruptcy Act of 1898, and the current bankruptcy system is a system of national bankruptcy laws with state defined laws of property and exempt property.[46]

The question of whether national bankruptcy laws, required to be uniform, could use the diverse definitions and treatment of property by the states was addressed by the Supreme Court in *Hanover National Bank v. Moyses*.[47] In this case, a creditor pursued collection of a debt after a discharge had been granted the debtor under the authority of the Bankruptcy Act of 1898. The creditor conceded that the discharge was good if the Bankruptcy Act was valid but argued that it suffered from several constitutional defects.[48] The creditor asserted that Congress had not passed a law that was uniform throughout the United States because the exemptions under the Bankruptcy Act clearly varied from state to state.[49] The Court rejected this argument, relying in part on a circuit court opinion written by Chief Justice Waite[50] to the effect that the uniformity requirement is satisfied if the creditors in bankruptcy receive just as much as they would receive in the absence of bankruptcy.[51] In

---

[41] See, e.g., Cooley v. Board of Wardens of the Port of Philadelphia, 53 US (12 How.) 299 (1851).

[42] See, e.g., California Fed. Sav. & Loan Ass'n v. Guerra, 479 US 272 (1987); Florida Lime & Avocado Growers, Inc. v. Paul, 373 US 132 (1963).

[43] Koffler, supra note 7, at 43–46, 52–53.

[44] Id. at 43–46.

[45] Id. at 52.

[46] Id. at 53; Warren, supra note 7, at 110–112.

[47] 186 US 181 (1902).

[48] Id. at 182.

[49] The Bankruptcy Act provided in section 6:

> This act shall not affect the allowance to bankrupts of their exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

30 Stat. 544, 548 (1898).

[50] See In re Deckert, 7 F. Cas. 334 (CCED Va. 1874) (No. 3728).

[51] Hanover Nat'l Bank v. Moyses, supra note 47, at 189–190.

acknowledging that bankruptcy laws passed by Congress must be uniform throughout the United States, the *Moyses* Court came upon a formulation that is regarded as authoritative to this day. The uniformity required by the Constitution was said to be "geographical, not personal."[52]

As a general proposition, this in undoubtedly correct. The uniformity referred to in the text is clearly a geographical reference—"throughout the United States." Moreover, the reference to uniform "laws," instead of a single uniform "law," suggests that Congress may distinguish among persons or entities and devise different bankruptcy remedies accordingly. However, the geographical uniformity concept articulated by the *Moyses* Court contains an important ambiguity. There are at least two different interpretations of the meaning "geographical uniformity." The more natural interpretation (in light of the constitutional text and accompanying history) is that geographical uniformity means that Congress must prescribe rules that are uniform throughout the United States. However, the application in *Moyses* also lends support to the proposition that geographical uniformity means simply uniform within any particular state. Under this latter interpretation, there is no constitutional problem as long as the result is the same for all debtors of a particular state. This interpretation has the potential to turn the requirement of uniform bankruptcy laws "throughout the United States" on its head.

The ambiguity of the geographical uniformity concept was reflected in the summation of the *Moyses* Court in the following statement:

> [T]he system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each State whatever would have been available to the creditors if the bankrupt law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different states.[53]

The first sentence restates the uniformity within a state interpretation. If the Court had stopped here, uniformity would not be much of a requirement, constitutional or otherwise. However, the second sentence moves to a middle position. The law may be said to be uniform in that it mandates a single rule to be applied throughout the United States. Differences arises not as a result of Congress's action but on application of the uniform rule within the distinctive legal climate of each state. In this sense of geographical uniformity, it means that Congress may not prescribe one rule for, say, Tennessee and another for Mississippi.[54]

Recognition of "Geographical Uniformity" as an Authoritative Doctrine

Despite this ambiguous formulation, the geographical uniformity concept articulated in *Moyses* has come to be regarded as the authoritative statement of the constitutional requirement.[55] In *Stellwagen v. Clum*,[56] the trustee in bankruptcy sought to recover a fraudulent transfer

---

[52] Id. at 188.

[53] Id. at 190.

[54] See Comment, Bankruptcy Exemptions: Whether Illinois's Use of the Federal "Opt Out" Provision is Constitutional, 1981 S. Ill. U. LJ 65, 72.

[55] See, e.g., Railway Labor Executives Ass'n v. Gibbons, 455 US 457, 469. (1982); Blanchette v. Connecticut Gen. Ins. Corp., 419 US 102, 158 (1974).

[56] 245 US 605 (1918).

under the authority of Ohio law rather than under the authority of the Bankruptcy Act. The Supreme Court rejected the argument that allowance of the trustee's claim would violate uniformity, relying on *Moyses*.[57] In *Wright v. Vinton Branch of Mountain Trust Bank*,[58] the Court upheld a provision of the Frazier-Lemke Act that allowed for a lifting of the stay of proceedings "if in the judgment of the court such emergency ceases to exist in its locality."[59] The Bankruptcy Act's incorporation of local laws or recognition of local conditions was said by the Court to have not affected its character as a uniform rule.[60]

In *Vanston Bondholders Protective Committee v. Green*,[61] Justice Frankfurter specifically responded to the charge that reliance on a particular state law would violate the uniformity requirement:

> [T]his misconceives the purpose and settled understanding of the bankruptcy clause of the Constitution. The Constitutional requirement of uniformity is a requirement of geographical uniformity. *It is wholly satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country, regardless of the State in which the bankruptcy court sits.* See *Hanover National Bank v. Moyses*, 186 U.S. 181, 190. To establish uniform laws of bankruptcy does not mean wiping out the differences among the forty-eight States in their laws governing commercial transactions. The Constitution did not intend that transactions that have different legal consequences because they took place in different States shall come out with the same result because they passed through a bankruptcy court. In the absence of bankruptcy such differences are the familiar result of a federal system having forty-eight diverse codes of local law. These differences inherent in our federal scheme the day before a bankruptcy are not wiped out or transmuted the day after.[62]

Geographical uniformity is satisfied by a uniform law of bankruptcy administration even though specific outcomes may vary from state to state. The differences are the result of state law, not federal law, and it is only the federal law that is required to be uniform.

As indicated earlier, the problem with the "geographical uniformity" concept lies in its potential for misuse. As long as the federal law is uniform throughout the United States, there is no problem. However, if the focus shifts to uniformity within a smaller area of geography—i.e., the state—then "geographical uniformity" might actually permit what was originally the main object of prohibition—i.e., nonuniform bankruptcy legislation

---

[57] The Court's conclusion was grounded on the rule/application distinction noted earlier:

> Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different States. For example, the Bankruptcy Act recognizes and enforces the laws of the States affecting dower, exemptions, the validity of mortgages, priorities of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the act is not alike in all the States. *Hanover National Bank v. Moyses*, 186 U.S. 181, 188, 189, 190.

Id. at 613.

[58] 300 US 440 (1937).

[59] Id. at 463.

[60] Id. at 463, n.7.

[61] 329 US 156 (1946).

[62] Id. at 172–173 (Frankfurter, J., concurring) (emphasis added).

based on regional concerns. While the Supreme Court has managed to avoid this doctrinal misstep (albeit just barely), it is apparent that Congress has slipped, whether knowingly or not, into this trap that essentially does away with the uniformity requirement altogether.

Modern Supreme Court Applications of the Uniformity Requirement

Once the problem of whether Congress could fashion a bankruptcy system that recognized local law in certain respects was resolved, the question of uniformity receded from active consideration for many years. Of course, this was also a consequence of the fact that Congress exercised its bankruptcy legislation powers sparingly after adoption of the Bankruptcy Act of 1898. The issue was revived, however, when Congress enacted the Regional Rail Reorganization Act of 1973 (Rail Act).[63] This legislation was passed in response to a perceived crisis in rail transportation created when eight major railroads in the northeast and midwest filed for reorganization under the Bankruptcy Act. The legislation provided that the district courts having jurisdiction over the reorganizations would determine whether the railroads could successfully reorganize under the existing bankruptcy law and, if not, or if the existing law did not provide a process that would be fair and equitable to the estate of the railroads, then reorganization would proceed under the provisions of the new Rail Act. This permitted the reorganization of the railroads into a single, private, for-profit corporation—a result not obtainable under the existing bankruptcy law.[64] The Rail Act was challenged by two of the affected railroads, principally as a taking, but the uniformity argument was raised as well because the Rail Act, by its express terms, was geographically limited to the northeast and midwest regions of the country.[65]

Unlike the prior cases that considered a single law applicable throughout the United States, this case involved federal law imposed on a regional basis. As such, it appeared to be precisely the type of geographical nonuniformity condemned by the constitutional text and, presumably, the prior cases. Nevertheless, the majority opinion by Justice Brennan ridiculed the uniformity argument, stating that it has "a certain surface appeal but is without merit because it overlooks the flexibility inherent in the constitutional provision."[66] He described the bankruptcy clause as having the capacity "to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day."[67] Brennan thus comes perilously close to saying that the bankruptcy clause is a flexible grant of

[63] 45 USC §§ 701–797m Pub. L. No. 93-236, 87 Stat. 985 (Jan. 2, 1974).

[64] Blanchette v. Connecticut Gen. Ins. Corp., supra note 55, at 102, 109–110 (1974).

[65] Id. at 109 n.2.

[66] Id. at 158.

[67] Id. With statements like this, it is little wonder that students become cynical after brief exposure to constitutional law. Perhaps the uniformity requirement of the bankruptcy clause is another of those "majestic generalities" that "of course calls forth interpretation, the interaction of reader and

power that cannot be hamstrung by inflexible limitations of the text. This would turn the uniformity requirement into a prudential or political limitation rather than a constitutional limitation.

Justice Brennan then summarized what he believed to be the teaching of the prior cases:

> The uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems. "The problem dealt with [under the Bankruptcy Clause] may present significant variations in different parts of the country." *Wright v. Vinton Branch of Mountain Trust Bank.* We therefore agree with the Special Court that the uniformity clause was not intended "to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions."[68]

This paragraph suggests that the complete demise of the uniformity requirement is imminent. The assertion is that Congress may enact bankruptcy legislation that is geographically specific to parts, not the whole, of the United States. The death blow is not delivered, though. Instead, Justice Brennan noted that no railroad reorganization was then pending outside of the defined region and so the Rail Act in fact, if not in law, operated "uniformly upon all bankrupt railroads then operating in the United States and uniformly with respect to all creditors of each of these railroads."[69] This is an astounding approach to constitutional interpretation. After Justice Brennan virtually abrogated the uniformity requirement, it becomes apparent that his undermining of the requirement was gratuitous because the law in fact was uniform in its application to all railroads in reorganization.

Justice Brennan completed the discussion with yet another statement of the uniformity requirement, this one quite different in tone and implication from the prior formulations:

> The uniformity clause requires that the Rail Act apply equally to all creditors and all debtors, and plainly this Act fulfills those requirements. *Vanston Bondholders Protective Committee v. Green.* "No provision of the Act restricts the right of any creditor wheresoever located to obtain relief because of regionalism."[70]

This statement comes the closest to the traditional understanding of the uniformity requirement that federal law may not restrict the rights of debtors or creditors on the basis of regionalism. Yet *Blanchette v. Connecticut General Insurance Corp.* is disturbing because it veers almost haphazardly between opposite poles—from the asserted ability of Congress to ignore the constraint of "nationwide enactments" in order to deal with geographically limited problems, on one hand, to the statement that bankruptcy rights cannot be restricted on account of regionalism,

---

text." Brennan, The Constitution of the United States: Contemporary Ratification, 19 UC Davis L. Rev. 2 (1985). One problem with interpretation, especially when the reader indicates ambivalence about the generally accepted meaning, is that the interpreter may end up with an interpretation antithetical to the "plain meaning" or to what was originally intended by the drafters of the text.

[68] Blanchette v. Connecticut Gen. Ins. Corp., supra note 55, at 159 (citation omitted).

[69] Id. at 160.

[70] Id. (citation omitted).

on the other.[71] Any future use of *Blanchette* must therefore recognize the doctrinal instability of the opinion. In actuality, it may be justifiably cited in support of opposite conclusions.

If the Court came close to declaring a "liquidation" of the uniformity requirement in *Blanchette*, it confirmed the "reorganized" uniformity requirement in *Railway Labor Executives Association v. Gibbons*.[72] *Gibbons* is the only Supreme Court case in which the uniformity argument has been used to strike down bankruptcy legislation.[73] This case also involved the troubled railroad industry, but it concerned only one railroad. In 1975, the Chicago, Rock Island & Pacific Railroad Co. (Rock Island) petitioned for reorganization under the Bankruptcy Act. The railroad continued to operate for approximately four and a half years thereafter until it ceased operation as a result of a labor strike. The reorganization court then directed the trustee of the railroad to prepare a plan of liquidation. Before the effective date of the final abandonment of the system, Congress enacted the Rock Island Railroad Transition and Employee Assistance Act (RITA), which required the Rock Island trustee to provide up to $75 million to those Rock Island employees who were not hired by other carriers.[74] The money was to be paid from the estate's assets, and the benefits were designated as priority administrative expenses. This was obviously a different result than would have occurred under the reorganization provisions of the Bankruptcy Act (which continued to be applicable to this case because it was filed prior to the Bankruptcy Reform Act of 1978).

The trustee filed a complaint in the reorganization court seeking to enjoin enforcement of RITA on the ground that it was unconstitutional. The district court held that the employee protection provisions constituted an uncompensated taking under the Fifth Amendment.[75] In response to this ruling, Congress reenacted the employee protection provisions with the proviso that the trustee and other creditors could commence an action for damages against the United States under the Tucker Act.[76] The reorganization court thereafter denied a motion to vacate its injunction on the ground that passage of the Bankruptcy Reform Act of 1978 had rendered the injunction moot, and the court issued a new order enjoining implementation of RITA, as amended.[77]

The Supreme Court affirmed the new order of the reorganization court because it found the employee protection provisions to constitute bankruptcy legislation repugnant to the uniformity clause.[78] Although the Court noted the close relation between the exercise of power under the Commerce Clause (which has no uniformity requirement) and the exercise of power under the Bankruptcy Clause, it concluded that the legislation could only be characterized as an exercise of the bankruptcy power.[79] In addressing the issue of uniformity, the Court noted its prior decisions allowing for distinctions

---

[71] It is noteworthy that only one member of the Court, Justice Douglas, registered any disagreement with Brennan's majority opinion. Id. at 180–185.

[72] Supra note 55, at 457.

[73] Id. at 469.

[74] Id. at 460–461.

[75] Id. at 463.

[76] Id. at 464. The Tucker Act provides the jurisdictional basis for claims against the United States "founded upon," inter alia, the Constitution or an act of Congress. 28 USC §§ 1346(a)(2), 1491(a).

[77] Railway Labor Executives Ass'n v. Gibbons, supra note 55, at 464.

[78] Id. at 465.

[79] The Court noted the factual distinctions from commerce legislation and the

among classes of debtors and recognizing state laws that do not treat commercial transactions uniformly.[80] Relying on *Blanchette*, the Court stated:

> The uniformity requirement, moreover, permits Congress to treat "railroad bankruptcies as a distinctive and special problem" and "does not deny Congress power to take into account differences that exists between different parts of the country, and to fashion legislation to resolve geographically isolated problems."[81]

This language reinforces the notion that Congress may enact geographically limited bankruptcy legislation, as long as it is intended to address "geographically isolated problems." It is not a great leap in logic to argue that the problems faced by the Rock Island employees were geographically isolated and therefore deserving of special attention by Congress.[82] The Court, however, took this line of argument no further, reverting instead to the observation that in *Blanchette* there were no pending railroad reorganizations outside the region defined by the Rail Act and thus the law "in fact" operated uniformly on all railroads then in bankruptcy proceedings.[83]

Therefore, although suggesting that Congress could, consistent with the uniformity requirement, legislate nonuniform bankruptcy legislation for geographically isolated problems, the Court held that uniformity was violated in this case because the law applied to one regional bankrupt railroad:

> The conclusion is thus inevitable that RITA is not a response either to the particular problems of major railroad bankruptcies or to any geographically isolated problem: it is a response to the problems caused by the bankruptcy of one railroad. The employee protection provisions of RITA cover neither a defined class of debtors nor a particular type of problem, but a particular problem of one bankrupt railroad.[84]

The Court specifically noted that other railroads were in bankruptcy at the time that RITA was enacted. The New York, Susquehanna & Western Railroad was in the process of liquidating under the Bankruptcy Act of 1898.[85]

---

factual similarities to bankruptcy legislation:

> In sum, RITA imposes upon a bankrupt railroad the duty to pay large sums of money to its displaced employees and then establishes a mechanism through which these "obligations" are to be satisfied. The Act provides that the claims of these employees are to be accorded priority over the claims of Rock Island's commercial creditors, bondholders, and shareholders. It follows that the subject matter of RITA is the relationship between a bankrupt railroad and its creditors [citation omitted]. The Act goes as far as to alter the relationship among the claimants to the Rock Island estate's remaining assets. In enacting RITA, Congress did nothing less than to prescribe the manner in which the property of the Rock Island estate is to be distributed among its creditors.

Id. at 467.

[80] Id. at 469.

[81] Id.

[82] This argument was made to the Court:

> As the private appellees acknowledge (Br. 51), a statute directed at railroads in a particular geographical region does not violate the uniformity requirement when there is a geographically isolated problem. *Regional Rail Reorganization Act Cases* [*Blanchette*], 419 U.S. 102, 159 (1974). Here, the Rock Island Act was passed to deal with the specific problems caused by the collapse of the Rock Island [railroad].

Federal Appellees' Reply Brief, 6–7 (No. 80-1239). See also Appellants' Reply Brief, 16–17 (No. 80-1239).

[83] Railway Labor Executives Ass'n v. Gibbons, supra note 55, at 469–470.

[84] Id. at 470.

[85] In re New York, S & W R. Co., 504 F. Supp. 851 (D. NJ 1980), aff'd, 673 F2d 1301 (3d Cir. 1981).

The Auto-Train Corporation was liquidating in a bankruptcy case under the Bankruptcy Reform Act of 1978.[86] The Milwaukee Railroad was reorganizing under the provisions of a special law similar to RITA.[87] It is particularly significant that none of these other railroads was a debtor in the northern district of Illinois where Rock Island was liquidating. This fact undermines the argument that geographic uniformity means only that all similarly situated debtors and creditors within any particular jurisdiction are treated uniformly. The disparate treatment condemned here by the Court is among similarly situated railroads who are in different jurisdictions.

Justices Marshall and Brennan concurred in the judgment, but expressed reservations with the Court's uniformity analysis. They characterized *Blanchette* as "squarely reject[ing] the argument that the geographic nonuniformity of the Rail Act violated the Bankruptcy Clause." Instead the uniformity required is said to be uniformity regarding an "evil:"

> The constraint of uniformity, however, requires Congress to legislate uniformly with respect to an identified "evil." In the Regional Rail Reorganization Act, Congress imposed certain requirements on all railroads in reorganization; all were deemed to present the same "evil." If Congress has legislated pursuant to its bankruptcy power, furthering federal bankruptcy policies, and if the specificity of the legislation is defensible in terms of those policies, then, but only then, has Congress satisfied the uniformity requirement. Where, as here, the law subjects one named debtor to special treatment, I would require especially clear findings to justify the narrowness of the law.[88]

The extent to which the analysis has become unhinged from the text is obvious here. The text empowers Congress to enact "uniform laws on the subject of Bankruptcies throughout the United States." The *Moyses* Court, perhaps for brevity's sake, later turned that into "geographical uniformity." The uniformity required by Justices Marshall and Brennan is not geographic at all but concerns the nature of the problem or evil to be remedied; if the evil is dealt with on a uniform basis, there is no constitutional defect. This interpretation, however, serves neither the text nor the underlying policy of the requirement. This new version of uniformity is essentially idiosyncratic because it is not rooted in the text or underlying policy. This is the sort of thing that can be expected with a "living Constitution."[89]

---

[86] In re Auto-Train Corp., 11 Bankr. 418 (Bankr. DDC 1981).

[87] Id. at 470, n.11.

[88] Id. at 476 (Marshall, J., concurring).

[89] See, e.g., Rummel v. Estelle, 445 US 263, 307 (Powell, J., dissenting). A "living Constitution" will require contemporary interpretation so as not to freeze its meaning for all time. As expressed by Justice Brennan:

> Our amended Constitution is the lodestar for our aspirations. Like every text worth reading, it's not crystalline. The phrasing is broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure. This ambiguity of course calls forth interpretation, the interaction of reader and text.

Address by Justice William J. Brennan, Jr., The Constitution of the United States: Contemporary Ratification, Georgetown University (Oct. 12, 1985), reprinted in 19 UC Davis L. Rev. 2, 7 (1985). See also Van Patten, The Partisan Battle Over the Constitution: Meese's Jurisprudence of Original Intention and Brennan's Theory of Contemporary Ratification, 70 Marq. L. Rev. 389, 409–422 (1987).

In any event, the holding in *Gibbons* confirms that the uniformity requirement imposes some limitation on Congress's power to enact legislation. In light of the ambiguity in the doctrinal concept of "geographical uniformity," it is difficult to state precisely the extent of the limitation. At a minimum, the attempt to deal with a problem on a less than national scope must be tied to a specific geographical problem. In addition, the Court appears to require bankruptcy legislation to deal uniformly with all debtors and creditors that are similarly situated, no matter where they are located. This latter proposition is consistent with the results in *Blanchette* and *Gibbons*. As such, it is apparent that there is a constitutional difficulty with the proposed partial implementation of Chapter 10. There is no readily discernible basis on which the pilot districts could be said to be geographically unique. Moreover, proposed Chapter 10 does not treat all similarly situated debtors and creditors alike. Before concluding that the partial implementation is unconstitutional, however, it is necessary to examine the case law developments subsequent to *Blanchette* and *Gibbons* that arguably support the current proposal.

The Uniformity Clause in the Lower Courts

One of the important accomplishments of the Bankruptcy Reform Act of 1978 was the further nationalization of bankruptcy law through the expansion of bankruptcy court jurisdiction. The Bankruptcy Reform Act eliminated the referee system and established bankruptcy courts with jurisdiction over all "civil proceedings arising under title 11 or arising in or related to cases under title 11."[90] The adjudication of many matters in bankruptcy court that had previously been heard in state courts contributed to a more uniform interpretation and implementation of the bankruptcy laws.[91] Although the Supreme Court later held that the grant of jurisdiction was too broad to be exercised by non-article III judges,[92] the establishment of specialized bankruptcy courts with broad jurisdictional powers was accomplished in fact if not in law.[93] In two respects, however, the Bankruptcy Reform Act is arguably violative of the uniformity requirement.

The Power of the States to Veto or "Opt Out" of the Federal Exemptions

Section 522(b)(1) allows states to opt out of the exemptions set forth in Section 522(d). At first glance, the exemption issue appeared to be the same

[90] 29 USC § 1471(b) (1976 ed. Supp. III).

[91] The commencement of publication of West's Bankruptcy Reporter at this time no doubt also contributed to the uniformity of interpretation and implementation of the Bankruptcy Reform Act in the newly created bankruptcy courts.

[92] See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 US 50 (1982). Non-article III judges are judges authorized by Congress who lack the article III protection of life tenure, subject only to removal by impeachment, and the guarantee against salary diminution. Id. at 59–60.

[93] See L. King, Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984, 38 Vand. L. Rev. 675 (1985). Professor King expressed reservations about the constitutionality of the provisions designed to meet the Supreme Court's pronouncements in *Northern Pipe Line*. Id. at 710–711. The constitutional defect was not the breadth of the jurisdictional grant itself but the limitations inherent in non-article III courts. Professor King noted that the problem would have been easily curable through conversion of the bankruptcy courts to article III courts. Id. at 676.

question addressed in *Moyses* of whether Congress could recognize state-defined exemptions in the Bankruptcy Code. However, the provision in the Bankruptcy Reform Act went one step further. The federally defined exemptions could be elected by a debtor in a bankruptcy case initiated under title 11 only if the state permitted such election.[94] In other words, the bankruptcy law itself now had a second decision maker involved in the process. The law was challenged by debtors who wished to use the federal exemptions but who resided in states that had not authorized the election of the federal exemptions.[95] It is fair to say that the legal commentary was generally supportive of these challenges.[96]

The most authoritative decision on the issue is the Seventh Circuit's decision in *In re Sullivan*.[97] In this case, the court rejected the uniformity challenge to the opt-out provision, relying principally on the *Moyses* decision. In responding to the argument that uniformity could not be satisfied by an opt-out provision that allowed exemption levels to differ among the states, the court noted that *Moyses* authorized a less than "true" uniformity, namely "geographical uniformity."[98] The potential ambiguity in the term "geographical uniformity" was touched on but not developed by the court.[99] Although it is not entirely clear which meaning of "geographical uniformity" the court had in mind, it appears likely that the court assumed that uniformity among debtors within a particular state satisfied the *Moyses* formulation. Again, it is interesting to note how the geographical uniformity formulation glosses over the issue and obscures the troubling question of how the statute can be squared with the textual requirement of uniformity throughout the United States. Geographical uniformity, if understood as uniformity within a particular state, turns the text on its head.

The *Sullivan* court did acknowledge the weakness of the *Moyses* Court's reliance on arguably distinguishable precedents[100] but concluded that it was

---

[94] 11 USC § 522(b)(1).

[95] See, e.g., Rhodes v. Stewart, 705 F2d 159 (6th Cir. 1983); In re Sullivan, 680 F2d 1131 (7th Cir. 1982); In re Locarno, 23 Bankr. 622 (D. Md. 1982); In re Parrish, 19 Bankr. 331 (Bankr. D. Colo. 1982); In re Balgemann, 16 Bankr. 780 (Bankr. ND Ill. 1982); In re Lausch, 16 Bankr. 162 (MD Fla. 1981); In re Curry, 5 Bankr. 282 (Bankr. ND Ohio 1980); In re Ambrose, 4 Bankr. 395 (Bankr. ND Ohio 1980).

[96] See, e.g., Wells, Federal Bankruptcy Exemptions: How Far Out Is Opting-Out? 37 Baylor L. Rev. 811 (1985); Koffler, supra note 7; Mordy, Dunn & Johnson, Constitutionality of "Opt-Out" Statutes Providing for Exemptions to Bankrupts, 48 Mo. L. Rev. 627 (1983); Haines, Section 522's Opt-Out Clause: Debtors Bankruptcy Exemptions in a Sorry State, 1983 Ariz. St. LJ 1; Bosomworth, Federal Exemptions and the Opt-Out Provisions of Section 522: A Constitutional Challenge, 58 Ind. LJ 143 (1982–1983); Comment, Bankruptcy Exemptions: Whether Illinois's Use of the Federal "Opt-Out" Provision Is Constitutional, 1981 So. Ill. LJ 65; Duncan, Though the Trap Door Darkly: Nebraska Exemption Policy and the Bankruptcy Reform Act of 1978, 60 Neb. L. Rev. 219 (1981); Hertz, Bankruptcy Code Exemptions: Notes on the Effect of State Law, 54 Am. Bankr. LJ 339 (1980); Vukovich, Debtors' Exemption Rights Under the Bankruptcy Reform Act, 58 NC L. Rev. 769 (1980).

[97] 680 F2d 1131 (7th Cir. 1982).

[98] Id. at 1133.

[99] Id. at 1134.

[100] The court expressly acknowledged the force of the debtors' historical and legal analysis. Id. The debtors were represented on appeal by Professor Vern Countryman of the Harvard Law School. Professor Countryman, a leading bankruptcy scholar, was

without authority to overturn a Supreme Court precedent.[101] The court also concluded that the Supreme Court had not signaled any retreat from the geographical uniformity rule because of its continued citation of *Moyses* in both *Blanchette* and *Gibbons*.[102] Indeed, the *Gibbons* Court specifically cited *Moyses* for the proposition that "Congress can give effect to the allowance of exemptions prescribed by state law without violating the uniformity requirement."[103]

The *Sullivan* court did not address whether the case was distinguishable from *Moyses* in that the national law now expressly had two decision makers involved in the process. The response might well be that it makes no difference if the states are given the choice of opting out because Congress has already the recognized power to incorporate state-defined exemptions in the bankruptcy laws. Does it make a difference that a state is now given express authority to, in effect, veto the federal exemption scheme? The argument ultimately sounds more like a supremacy argument or a nondelegation argument rather than a uniformity argument. As such, it becomes far less relevant to the Chapter 10 issue.[104]

Without resolving here whether *Sullivan* or the other cases rejecting the uniformity argument were correctly decided, it is evident that nothing in these decisions gives direct support for a geographically distinct implementation of Chapter 10. Whatever may be said about the different results that may occur depending on where the bankruptcy is filed, Section 522 is a single rule that applies to all states throughout the United States.[105] It does not establish one rule for Illinois and another for Indiana. At most, these cases might lend tacit support to the proposition that uniformity means treating all similarly situated debtors and creditors within any particular state alike. This interpretation, however, is hard to reconcile with the reasoning and result in *Gibbons* as well as with the constitutional text.

The U.S. Trustee System

The best support for a geographically distinct bankruptcy law may be found in the creation and implementation of the U.S. Trustee system. As part of the Bankruptcy Reform Act, Congress established a five-year pilot program of U.S. Trustees to supervise the administration of bankruptcy cases.[106] The law established ten pilot programs covering eighteen judicial districts.[107] The districts chosen were geographically representative of various sections of the

---

instrumental in the effort to revise the Bankruptcy Act of 1898. See Kennedy, The Background of the Bankruptcy Reform Act of 1978, Ann. Survey of Bankruptcy Law 1, 4–5 (1979).

[101] Id.

[102] Id. at 1135.

[103] Railway Executives Ass'n v. Gibbons, supra note 55, at 469.

[104] Because the choice of pilot districts is to be made by the Director of the Administrative Office of the U.S. Courts, there is a potential nondelegation argument, but it appears to be a weak one. See generally Mistretta v. United States, 488 US 361, 373 (1989). See also United States v. Myers, 687 F. Supp. 1403, 1409 (ND Cal. 1988).

[105] This was the essential reasoning in the bankruptcy court cases that rejected the uniformity argument. See, e.g., In re Parrish, 19 Bankr. 331, 334 (Bankr. D. Colo. 1982); In re Lausch, 16 Bankr. 162, 164 (MD Fla. 1981); In re Curry, 5 Bankr. 282, 286 (Bankr. ND Ohio 1980); In re Ambrose, 4 Bankr. 395, 398 (Bankr. ND Ohio 1980).

[106] Pub. L. No. 95-598, Title II, § 224(a), 92 Stat. 2662 (Nov. 6, 1978).

[107] Id.

country. At the end of the seven-year period, Congress would decide whether to fully implement the U.S. Trustee system or to terminate the program altogether.

This Trustee pilot program is clearly the example that has influenced the proposal to implement Chapter 10 in selected pilot districts. There were no challenges to the initial establishment of the Trustee system on a nonuniform basis. Only when Congress decided in 1986 to implement the program on a nationwide basis did legal challenges to the legislation arise. The motivating factor underlying these challenges was the accompanying statutory requirement that Chapter 11 debtors would thereafter fund the operation of the trustee system through the payment of quarterly fees.[108] The problem was exacerbated because the transition was accomplished in three different stages and therefore different administrative burdens were created for Chapter 11 debtors, depending on the district in which the case was being administered. The pilot districts continued to operate as they had previously.[109] Approximately one-half of the remaining districts came under the program on May 1, 1987.[110] The remaining districts came under the program either when a district was certified by the attorney general (who was charged with implementation of the system) or by May 1, 1989, whichever occurred first.[111]

The following example illustrates the piecemeal transition to a nationwide trustee system. The trustee program was in place in the district of South Dakota as a pilot program from the inception—October 1, 1979. The judicial districts established for Iowa came under the program as of May 1, 1987. For the district of Nebraska, the trustee program became effective as of November of 1988. Moreover, from the standpoint of payment of quarterly administrative fees, cases in Iowa and Nebraska were for the most part exempted at the time the program became effective, while pending cases in South Dakota were not.[112]

The leading case that challenged this method of transition to a nationwide system is the Eighth Circuit's decision in *In re Prines*.[113] In this case, the debtors filed a Chapter 11 case on August 14, 1986, prior to the imposition of quarterly fees that became effective during the last quarter of 1986. A plan of reorganization was submitted by the debtors in December of 1986 and was confirmed by the bankruptcy court in June of 1987. The debtors were thus assessed for payment of fees for three quarterly periods after the effective date of the 1986 Act.[114] The debtors' challenge to payment of the fees was successful in the bankruptcy court, but

[108] See 28 USC § 1930(a)(6).

[109] Pub. L. No. 95-958, Title II, § 224(a), 92 Stat. 2662 (Nov. 6, 1978), as amended, Pub. L. No. 99-554, § 302(a), 100 Stat. 3119 (Oct. 27, 1986).

[110] Pub. L. No. 99-554, § 302(d)(1)(B), 100 Stat. 3020 (Oct. 27, 1986).

[111] Pub. L. No. 99-554, § 302(d)(2)(B), 100 Stat. 3021 (Oct. 27, 1986).

[112] Pub. L. No. 99-554, § 302(e)(1), 100 Stat. 3023 (Oct. 27, 1986).

[113] 867 F2d 478 (8th Cir. 1989). The author of this article served as co-counsel for the debtors on appeal to the district court and to the Eighth Circuit. The other cases that raised the quarterly fees issue are In re Eisenbarth, 77 Bankr. 228 (Bankr. DND 1987) and In re Jehle, 72 Bankr. 487 (Bankr. DRI 1987). Neither of these cases addressed the uniformity argument.

[114] In re Pines, supra note 113, at 480–481.

this decision was reversed by the district court.[115]

On appeal to the Eighth Circuit, the debtors' argument included a variation of the uniformity argument. The uniformity argument was not made as such because it had not been raised in the earlier proceedings. Instead, the uniformity issue was addressed through an equal protection argument. Normally, equal protection arguments are very weak unless the proponent can show either a suspect classification or a fundamental right, in which case the court will apply a higher level of scrutiny than the traditional rational basis test.[116] Moreover, the Supreme Court had already established that bankruptcy legislation was subject to the rational basis test. In *United States v. Kras*,[117] the Court held that a $50 filing fee required of debtors filing a voluntary petition in bankruptcy did not violate equal protection. The equal protection challenge in *Kras* failed to show that this uniform requirement burdened the exercise of any fundamental right.

In attempting to distinguish *Kras*, the debtors in *Prines* argued that a higher standard should be employed when the bankruptcy statute itself is not uniform, citing the uniformity language in the bankruptcy clause. *Kras* involved a uniform law, whereas the imposition of quarterly fees in *Prines* was clearly not uniform. The Eighth Circuit rejected the argument but gave little indication in its opinion about the uniformity language of the bankruptcy clause:

> Assuming unequal treatment, however, we find this statutory scheme is rationally related to the legitimate governmental interest of establishing a nationwide self-supporting trustee system. The debtors argue some measure of heightened scrutiny is required because of the Constitution's provision for *uniform* bankruptcy laws, see U.S. Const. art. I, § 8, but the Supreme Court has held directly to the contrary, finding the appropriate standard for measuring the propriety of classifications in bankruptcy legislation to be that of rational justification. *United States v. Kras*.[118]

The court did not address the contention that *Kras* is applicable only when the bankruptcy legislation is uniform. The conclusion that *Kras* "held directly to the contrary" regarding the higher standard is not accurate, because the *Kras* Court did not consider the matter of the appropriate standard when the bankruptcy legislation is not uniform.

One cannot know for certain whether the result in *Prines* would have been different had the uniformity argument been made directly. The reasoning and result of *Gibbons* give little comfort to a geographically specific bankruptcy law. There is nothing in the legislative history or in the selection process that would indicate that Congress considered these particular districts to have any greater need for administrative supervision than the districts not selected. There appears to be no geographically isolated "evil" that the trustee pilot program was intended to remedy. Thus, although the use of selected pilot districts was successfully implemented prior to nationwide application, the precedential value of this experience is questionable.[119]

---

[115] 82 Bankr. 110 (DSD 1987).

[116] See, e.g., Frontiero v. Richardson, 411 US 677 (1973); Plyer v. Doe, 457 US 202 (1982).

[117] 409 US 434 (1973).

[118] 867 F2d at 485 (emphasis in original).

[119] It should be noted that it is not entirely accurate to speak of the U.S. Trustee system as operating nationwide. The

Perhaps the best defense against the result in *Prines* in light of the uniformity argument is to make a distinction between substance and procedure. For example, consider the operation of the local bankruptcy rules committee in each judicial district. These committees recommend local practice rules that, when approved by the judges of the district court, govern practice and procedure in all bankruptcy cases.[120] The natural consequence is that bankruptcy procedures vary from district to district.[121] Similarly, it might be argued that the administrative supervision of bankruptcy cases does not affect the substantive rights of the parties and therefore does not violate the uniformity requirement, geographical or otherwise. This distinction, of course, does not support the piecemeal implementation of Chapter 10 because substantive rights are clearly affected. Small business reorganizations that would otherwise be governed by Chapter 11 are not subject in Chapter 10 to the absolute priority rule, the Section 1111(b) election, or even the requirement of creditor consent.[122] This in unequal treatment of similarly situated debtors and creditors and does not meet the test of *Blanchette* or *Gibbons*.[123]

Senator Grassley noted in his remarks that Chapter 10 was "based upon a current experiment that has been going on under a bankruptcy judge in North Carolina."[124] The North Carolina experiment, however, is procedural only and does not attempt to change the substantive rights and obligations of the parties. The principal change is to put the small business reorganization on a "fast track" for confirmation or dismissal within 120 days of the filing of a Chapter 11 petition.[125] Thus, while the North Carolina experiment provides an example of what can be done through innovative procedural rules, it cannot serve as a precedent for experimental programs that alter the substantive rules for some but not all.

Conclusion

In proposing an experimental pilot program to test the operation of a new bankruptcy chapter in specific districts, the drafters of Senate bill 1985 have proceeded with laudable intentions. As stated by Senator Heflin:

> "Such an approach balances the concerns of substantially rewriting the Bankruptcy Code without enough experience and information, with the need for congressional action to address the problems faced by small businesses when they are forced to face a bankruptcy. I believe that this is a thoughtful, balanced and measured method of addressing problems found in the Bankruptcy Code."[126]

As thoughtful, balanced, and measured as this approach undoubtedly is, it runs

---

judicial districts for the states of Alabama and North Carolina do not come within the system before the year 2003 unless they have the consent of a majority of bankruptcy judges in the district. Pub. L. No. 99-554, § 302(d)(3), 100 Stat. 3021 (Oct. 27, 1986). As of this date, both states are not within the U.S. Trustee system.

[120] Bankr. R. 9029.

[121] See Bankruptcy—Local Court Rules Service (1989).

[122] S. 1985, 102d Cong., 1st Sess. at 34 (§ 1026—Confirmation of Plan).

[123] See Railway Labor Executives Ass'n v. Gibbons, supra note 55, at 457, 471; Blanchette v. Connecticut Gen. Ins. Corp., supra note 55, at 102, 160.

[124] Cong. Rec. S17057 (Nov. 19, 1991).

[125] Telephone conversation with law clerk to Judge A. Thomas Small, March 19, 1992.

[126] Cong. Rec. S17047 (Nov. 19, 1991).

afoul of the uniformity requirement clearly expressed in the constitutional text. Even under the eroded uniformity doctrine developed by the Supreme Court, the proposed selective implementation does not pass the tests of *Blanchette* and *Gibbons*. It cannot be said that the provision of small business reorganizations in some but not all districts "appl[ies] equally to all creditors and all debtors."[127]

If Congress is wary at this point of a substantial rewriting of the Bankruptcy Code because of Congress's lack of experience and information, it should either refer this issue to the proposed National Bankruptcy Review Commission or implement Chapter 10 on a nationwide basis and provide for a sunset limitation subject to further review and deliberation as was done for Chapter 12. The constitutional constraint of uniformity, though apparently forgotten by Congress, should not be abandoned for the sake of expediency. Observance of the uniformity clause should serve as an important discipline for Congress as it continues to monitor and adjust the operation of the bankruptcy laws.

---

[127] Railway Labor Executives Ass'n v. Gibbons, supra note 55, at 457, 471; Blanchette v. Connecticut Gen. Ins. Corps., supra note 55, at 102, 160.