Collective Bargaining Agreements and Chapter 9 Bankruptcy

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I. Introduction

Collective bargaining agreements ("CBAs") or, more accurately, the rejection of collective bargaining agreements featured prominently in the recent wave of automotive and aviation bankruptcies. Collective bargaining agreements that seemed reasonable during the irrational exuberance of the 1990s became increasing untenable under shifting market conditions.

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and unfavorable workforce demographics. The combination of inefficient labor costs, unaffordable legacy benefits, increased market competition, and outright mismanagement pushed more than one company into bankruptcy. Not surprisingly, debtors such as United Airlines¹, Delta Air Lines², Northwest Airlines³, Tower Automotive⁴, Delphi⁵, and Dana Corp.⁶, have used rejection or the threat of rejection to obtain significant concessions from their unions. A debtor’s ability to rid himself of burdensome contractual obligations is one of the fundamental virtues of bankruptcy.⁷

The difficulties created by unmanageable CBAs is not limited to the private sector. Public sector unions have successfully obtained comparatively generous compensation and

¹ See generally In re UAL Corp., 468 F.3d 456 (7th Cir. 2006); In re UAL Corp., 443 F.3d 565 (7th Cir. 2006); In re UAL Corp., 408 F.3d 847 (7th Cir. 2005) (discussing United Airlines’ efforts to reject its collective bargaining agreements).


⁶ Dana’s motion to reject its collective bargaining agreements was filed under seal. See In re Dana Corp., Case No. 06-10354 (BRL) (Bankr. S.D.N.Y.) (Docket No. 4672), available online at http://www.bmccorp.net/master.asp?InfoType=5&ClientId=110.

benefits packages even as the fortunes of American Labor have continued to decline.\(^8\) In particular, municipal pensions may threaten the fiscal survival of many public sector employers.\(^9\) Political concerns can also limit a public employer’s ability to achieve cost savings by curtailing essential services. This dark forecast is further clouded by the significant probability of a near-term recession.

Municipalities throughout the United States will face the very real prospect of bankruptcy.\(^{10}\) The treatment of collective bargaining agreements will play a significant role in this process. Unmanageable obligations imposed by CBAs may be the efficient cause of such filings, as was the case when Bridgeport, Connecticut, attempted to file for bankruptcy in 1995 or when the San José Unified School District filed for bankruptcy in 1983.\(^{11}\) Alternatively, modification of a collective bargaining agreement may be the most effective means to restore the

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\(^{8}\) See generally Keith N. Hylton, Law and the Future of Organized Labor in America, 49 Wayne L. Rev. 685 (2003); Terry M. Moe, Political Control and the Power of the Agent, 22 J.L & Econ. & Org. 1, 5 (2006) (“It is the public sector unions, not the private sector unions, that are now driving the American labor movement.” (internal citations omitted)).


\(^{10}\) The Supreme Court has recently addressed one particularly novel way to stave off municipal collapse. See Kelo v. City of New London, 545 U.S. 469 (2005).

\(^{11}\) In re City of Bridgeport, 129 B.R. 332, 337 (Bankr. D. Conn. 1991) (“Bridgeport claims that it is caught in an economic bind caused, on the one hand, by unaffordable employee union contracts and inadequate state aid and, on the other, by the practical reality that it can neither cut essential services nor raise taxes to pay for them.”); Barry Winograd, San José Revisited: A Proposal for Negotiated Modification of Public Sector Bargaining Agreements Rejected Under Chapter 9 of the Bankruptcy Code, 37 Hastings L.J. 231 (1985) (discussing the San José Unified School District’s bankruptcy filing caused by its inability to obtain cost reductions from its teachers’ union).
financial health of a municipality. In any event, bankruptcy may be a necessary solution for municipal debtors burdened by untenable CBAs or insurmountable fiscal obligations.

Statutory gaps, a lack of significant caselaw, and limited commentary raise serious questions as to how courts should treat collective bargaining agreements in municipal bankruptcies. The affairs of municipal debtors are governed by Chapter 9 of the Bankruptcy Code. Chapter 9 does not incorporate § 1113, which governs the rejection of CBAs in Chapter 11. As a result, § 365 and the Supreme Court’s opinion in NLRB v. Bildisco & Bildisco, which was subsequently abrogated by § 1113, should govern a municipal debtor’s right to assume or reject its CBAs. Bildisco grants debtors significant discretion to reject collective bargaining agreements in bankruptcy—particularly when compared with the requirements imposed by § 1113.

Yet the absence of direct statutory authority, such as § 1113, and concerns unique to the status of a municipal debtor create an invitation for error. The pressure imposed on a bankruptcy

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12 See, e.g., In re County of Orange, 179 B.R. 177 (Bankr. C.D. Calif. 1995) (addressing Orange County’s attempt to reject its collective bargaining agreements in its Chapter 9 filing). County of Orange remains the lone published opinion addressing this issue.


15 11 U.S.C. § 101 et seq. (“Code” or “Bankruptcy Code”). Unless otherwise noted, all statutory references are to the Bankruptcy Code.


judge asked to approve rejection of a firemen’s collective bargaining agreement cannot be underestimated. Judges may be tempted to circumvent Bildisco. First, judges could simply mandate the sort of negotiated settlement required by § 1113. Second, judges could attempt to limit Bildisco’s holding to questions of Federal law. Bildisco involved a question under the National Labor Relations Act, which is inapplicable to the collective bargaining agreements of governmental units. Judges could then seize on general notions of state sovereignty to limit a municipal debtor’s rights under § 365. The latter analysis was invoked by the bankruptcy court when Orange County sought to reject certain CBAs in 1995. Both approaches are incorrect. A bankruptcy court is bound by the Supreme Court’s decision in Bildisco when determining if a Chapter 9 debtor may reject a collective bargaining agreement.

This paper will provide a framework through which collective bargaining agreements may be analyzed—both in and out of Chapter 9. First, this paper will identify the treatment of collective bargaining agreements outside of bankruptcy to provide a basis from which the effect of filing may be considered. Second, this paper will consider how collective bargaining agreements may be affected by a Chapter 11 petition by addressing the impact of Bildisco and the Congressional response reflected in § 1113. The assertion that § 1113 does not apply in

18 See McConnell & Picker, 60 U. Chi. L. Rev. at 467–68.
20 29 U.S.C. § 152(2). (“The term ‘employer’ [under the NLRA] . . . shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . .”).
22 County of Orange, 179 B.R. at 183–84; see also Winograd, 37 Hastings L.J. at 332 (“When a public employer is faced with collectively bargained labor costs in the context of severe budgetary shortfalls, the appropriate course is not unilateral contract modification under a bankruptcy shield, but renegotiation in accordance with state labor law.”).
Chapter 9 is useful only insofar as the effects of § 1113 are properly understood. This analysis suggests that debtors should retain broad discretion to modify CBAs without an explicit Congressional directive to the contrary.

Third, this article will consider the impact of the status of a municipal debtor—if any—on the rights afforded by § 365. Neither Chapter 9 nor the constitutional status of a municipal debtor create any special bar to rejection of collective bargaining agreements. There is no question that a bankruptcy court’s authority to supervise and restrict the activities of a municipal debtor—as opposed to a private debtor—may properly be subject to constitutional limitation. But such limits do not extend so far as to limit a municipal debtor’s ability to exercise a right unique to bankruptcy, such as the assumption or rejection of executory contracts. Bildisco’s determination that statutory regimes governing collective bargaining agreements are displaced by § 365 applies in either Chapter 9 or Chapter 11. A debtor’s ability to reject collective bargaining agreements is therefore a permissible means through which a bankrupt municipality may restructure its finances.

II. Collective Bargaining Outside of Bankruptcy

Collective bargaining holds a unique position in American law. Courts and lawmakers have shifted from a position of abject hostility in the 19th and early 20th Centuries to a broadly permissive view of collective bargaining within the federal regulatory system imposed by the National Labor Relations (Wagner) Act (“NLRA”) in 1935. An important consequence of the NLRA was to remove such bargaining from the direct supervision of the judiciary or

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administrative agencies. Federal courts have since become widely deferential to the rights of both Labor and employer to bring all the weapons of “economic warfare” to bear on such negotiations. The significance of this permissive approach with respect to bankruptcy is addressed Section below III.B., below.

The uniform treatment of private sector bargaining imposed by the NLRA differs significantly from the public sector. The NLRA is inapplicable to public sector employers at the state level or below. Hence, a balkanized field of law has arisen regarding the collective bargaining rights and obligations in the fifty states. The lack of Federal regulation does not imply that regulation of collective bargaining in the public sector unions is a state prerogative. As discussed below, state labor law holds no position of constitutional significance unique to the states. The Federal government is free to extend the NLRA’s reach to state and municipal employees.

A. Collective Bargaining Historically

Until the 1930s, the right of collective bargaining was not widely recognized at law or in practice. Employers often went to extreme lengths to prevent their employees from unionizing, or, where such organization had already occurred, employers would simply refuse to deal with independent unions. State and federal courts also remained hostile to Labor and pro-Labor


legislation throughout this period. The federal injunction was a particularly effective method through which employers could thwart the collective action of Labor.

Nor was this hostility limited to the federal courts. Vegelahn v. Guntner is largely remembered for the dissent of Justice Holmes. But that dissent is of historical import precisely because Justice Holmes rejected contemporary views on the illegality of unionization and collective bargaining. The majority opinion reflected the dominant judicial view of union activity when it stated that:

An employer has a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon, and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the constitution itself.

In short, collective bargaining was historically viewed as an illicit encroachment on the so-called “freedom of contract,” if not a direct path towards communism—at least prior to 1935.

B. Collective Bargaining and Federal Law

The NLRA wrought a fundamental change in the treatment of collective bargaining by recognizing those rights of collective action previously rejected by employers and the courts. On one hand, the NLRA recognized the right of labor to organize independent (as opposed to employer-dominated) unions. The effect of the NLRA in this respect must not be

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29 Forbath, 102 Harv. L. Rev. at 1148–65; see, e.g., In re Debs, 158 U.S. 564 (1895).

30 167 Mass. 92 (1896).

31 Id. at 97.

underestimated. As noted above, the NLRA was enacted at a time when courts were willing to treat unions as little more than illegal conspiracies.33 “[I]t was not until the National Labor Relations Act became effective that the workers’ freedom of association was safeguarded by the imposition of a correlative duty on employers to refrain from interfering with or restraining the workers’ choice.”34

On the other hand, the NLRA imposed affirmative obligations on employers to collectively bargain with those unions.35 The collective bargaining process would be supervised under the auspices of the newly-created National Labor Relations Board (“NLRB”).36 The duty to collectively bargain caused many employers to fear that substantive contractual terms would be reviewed—or imposed—by an activist NLRB.37 Hence, the Supreme Court’s immediate jurisprudence sought to reaffirm the right to organize and to collectively bargain while alleviating anxiety as to the Federal government’s role in this process. To paraphrase Professor Klare, the Court sought to “deradicalize” the more far-reaching implications of the NLRA while not eviscerating the more general rights extended to Labor.38 The Court was careful to emphasize that the NLRA would not be used to impose substantive obligations upon employers within the scope of collective bargaining. Indeed, the Court affirmed the Constitutionality of the

33 See supra nn. 30–31.
37 Klare, 62 Minn. L. Rev. at 288.
38 Id. at 293–310.
NLRA in *NLRB v. Jones & Laughlin Steel Corp.*\(^{39}\) even as it defined a procedural paradigm of private collective bargaining under the NLRA:

The act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer from ‘refusing to make a collective contract and hiring individuals on whatever terms’ the employer ‘may by unilateral action determine.’ . . . The theory of the act is that free opportunity for negotiation with accredited representatives of employees is likely to bring about industrial peace and may bring about the adjustments and agreements which the act in itself does not attempt to compel.\(^{40}\)

In this manner, the Court determined that “the Act [was] disinterested in the substantive justice of the labor contract since it taught that not only would the wage-bargain not ordinarily be subject to substantive scrutiny, but also that the economic combat of the parties had replaced a ‘meeting of the minds’ as the moral basis of labor contractualism.”\(^{41}\)

During World War II, the NLRB departed from the procedural function found in *Jones & Laughlin Steel*. The NLRB took an active role in negotiations and, in certain cases, imposed substantive terms upon the parties. Congress reacted swiftly. In 1947, the Labor Management Relations (Taft-Hartley) Act\(^{42}\), made clear that the duty to collectively bargain was merely procedural and did not include an obligation to come to terms. Specifically, the Taft-Hartley Act amended the NLRA with § 8(d):

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and

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\(^{39}\) 301 U.S. 1 (1937) (Hughes, C.J.).

\(^{40}\) Id. at 45.

\(^{41}\) Klare, 62 Minn. L. Rev. at 302–03.

\(^{42}\) Ch. 120, 61 Stat. 136, amending various provisions of 29 U.S.C.
the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.\(^{43}\)

As if § 8(d) were not sufficiently clear, the legislative history of Taft-Hartley sought to eradicate any inclination to impose substantive obligations upon parties in the collective bargaining process. The Committee Report warned added that “the duty to bargain is not to be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period . . . .”\(^{44}\)

Federal courts and the NLRB have consistently adhered to the procedural vision of collective bargaining. Parties are required only to meet and negotiate. There is no obligation to adopt specific terms, nor is there even an obligation to come to terms. “There is no duty to agree . . . and if the parties deadlock (reach ‘impasse,’ in the jargon of labor law), the employer is free to operate his business as he did before the bargaining began, and therefore he may alter the terms and conditions of the workers’ employment.”\(^{45}\) Moreover, both unions and employers are largely free to use whatever economic leverage may be available to obtain the most favorable contract. Labor may strike.\(^{46}\) Employers may lock out employees.\(^{47}\) At impasse, an employer

\(^{43}\) 29 U.S.C. § 158(d) (emphasis added).


\(^{45}\) Duffy Tool & Stamping, L.L.C. v. NLRB, 233 F.3d 995, 996 (7th Cir. 2000) (Posner, J.). But see NLRB v. A-1 King Size Sandwiches, Inc., 732 F.2d 872, 877–78 (11th Cir. 1984) (holding that employer violated its duty to collectively bargain where it refused to budge from its initial bargaining position for over 18 months).


\(^{47}\) Am Shipbuilding Co. v. NLRB, 380 U.S. 300, 309 (1965) (“The lockout may well dissuade employees from adhering to the position which they initially adopted in the bargaining, but the right to bargain collectively does not entail any ‘right’ to insist on one’s position free from economic disadvantage.”).
may impose unilateral contractual modifications. In sum, the obligation to collectively bargain does not eliminate economic warfare, nor does it eliminate weapons available to the combatants. Collective bargaining under Federal law merely legitimizes the fight by channeling behavior into formalized procedure.

C. Collective Bargaining and State Law

The NLRA has largely preempted state labor law governing private employers. But the NLRA does not apply to states and their sub-units as employers. Each of the fifty states has been free to develop independent approaches regarding the rights and duties of public employers and their employees. While some states have enacted regimes similar to the NLRA, wide variation exists among state laws governing public sector unions. Different jurisdictions also hold widely different views with respect to the “economic weapons” that such parties may use.

In Illinois, for example, public employers may refuse to negotiate with their unions in certain cases. In California, public employees have the statutory right to organize, and

48 Duffy Tool & Stamping, 233 F.3d at 996; accord AFTRA v. NLRB, 395 F.2d 622, 629 (D.C. Cir. 1968) (holding that post-impasse modifications are “legitimate economic weapons from the bargainers’ arsenal”); In re AFL-CIO Local 36 F.W., 326 N.L.R.B. 588, (1998) (Gould, Ch., concurring) (“[T]ough and sometimes distasteful tactics engaged in by employers and unions throughout the collective-bargaining process are frequently not unlawful under the National Labor Relations Act.”); see Brown v. Pro Football, Inc., 518 U.S. 231, 238–39 (1996) (discussing conditions under which employer may unilaterally impose terms post-impasse).

49 First Nat’l Maint. Corp. v. NLRB, 452 U.S. 666, 674 (1981) (“[B]oth employer and union may bargain to impasse over these matters and use the economic weapons at their disposal to attempt to secure their respective aims.”).

50 Klare, 62 Minn. L. Rev. at 302-03.

51 See Wisc. Dep’t of Indus., Labor and Human Relations v. Gould, 475 U.S. 282, 286 (1986) (“It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations.”).

52 29 U.S.C. § 152(2) (The term ‘employer’ [under the NLRA] . . . shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . ”).

53 Peters v. Health and Hosps. Governing Comm’n, 430 N.E.2d 1128, 1130 (Ill. 1981) (“[W]e find no authority in statutory or case law which supports the position that a public body can be ordered to negotiate such an (Continued…)
employers are obliged to collectively bargain with their unions.\textsuperscript{54} Such employees—other than firefighters—may strike even without a statutory right to that effect.\textsuperscript{55} In contrast, the Supreme Court of South Carolina has determined that its “right to work” statute does not apply to public employees in the absence of an express statutory provision to the contrary.\textsuperscript{56} Pennsylvania generally allows public employees to strike if collective bargaining reaches an impasse,\textsuperscript{57} but prohibits strikes by employees such as “guards at prisons or mental hospitals, or employees directly involved with and necessary to the functioning of the courts of this Commonwealth . . . .”\textsuperscript{58} In New York, public employees may unionize,\textsuperscript{59} and public employers are required to bargain collectively with such unions.\textsuperscript{60} But public sector employees are barred from

\footnotesize{agreement. Indeed, under the National Labor Relations Act, a State or local governmental entity has the unequivocal right to refuse to enter into a collective bargaining agreement with its employees.”).}

\textsuperscript{54} Meyers-Milias-Brown Act, Cal. Code Gov’t § 3500 \textit{et seq.}

\textsuperscript{55} \textit{County Sanitation Dist. No. 2 v. L.A. County Employees’ Assoc.,} 699 P.2d 835, 849 (Cal. 1985) (“[T]he common law prohibition against public sector strikes should not be recognized in this state. Consequently, strikes by public sector employees in this state as such are neither illegal nor tortious under California common law.”); Cal. Code Lab. § 1962 (“[Firefighters] shall not have the right to strike, or to recognize a picket line of a labor organization while in the course of the performance of their official duties.”).

\textsuperscript{56} \textit{Branch v. City of Myrtle Beach,} 532 S.E.2d 289, 292 (S.C. 2000) (“In light of the traditional construction of labor relations statutes, we believe that by not having a definition including public employment, the legislature’s intent was not to cover public employees.”).


\textsuperscript{59} N.Y. Civ. Serv. Law § 202.

\textsuperscript{60} N.Y. Civ. Serv. Law § 203.
striking—a fact which did not affect the aggressive posture of the New York City municipal transit workers last year. 

State labor regimes have also taken various approaches with respect to an employer’s ability to impose unilateral modifications to collective bargaining agreements after impasse or termination. Under New York and Connecticut law, a public employer may be obliged to maintain existing terms and conditions pending arbitration. In California, home rule employers may unilaterally modify its CBAs in “emergencies.” Missouri law is silent as to the effect of an expired collective bargaining agreement, but at least one court has determined that a CBA remains in effect until it is replaced. In Washington, employers may unilaterally modify the employment terms of ‘non-uniformed’ employers one year after expiration of a CBA. In Oregon and Pennsylvania, public sector employers may not unilaterally impose terms after an

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63 N.Y. Civ. Serv. Law § 209-a(1)(e) (“It shall be an improper practice for a public employer or its agents deliberately . . . (e) to refuse to continue all terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in [a strike] . . . .”); Conn. Gen. Stat. § 5-278a.

64 Sonoma County Org. of Pub. Employees v. County of Sonoma, 591 P.2d 1 (Cal. 1979) (identifying factors to be used when determining if a municipal employer may unilaterally modify its collective bargaining obligations).


67 Wasco County v. Am. Fed. of State, County and Mun. Employees, Local 2752, 613 P.2d 1067 (Or. App. 1980) (affirming decision of state Employee Relations Board to treat post-impasse unilateral modifications as per se unfair labor practice). But see Medford Firefighters Ass’n, Local No. 1431, IAAF v. City of Medford, 605 P.2d 289, 292 (Or. App. 1979) (holding municipal employer does not commit unfair labor practice by enacting ordinance excluding certain supervisory firefighters from collective bargaining unit after expiration of collective bargaining agreement).
impasse. Massachusetts has adopted the opposite rule. Depending on the jurisdiction, then, state law could severely curtail a municipal employer’s ability to obtain wage or benefit reductions through rejection or modification of a CBA.

Despite this fractured legal environment—or perhaps because of it—public sector unions have thrived while their private sector brethren have suffered. In 1900, public sector employees accounted for less than 2% of total union membership in the United States. In 2000, public sector employees were approximately 40% of union membership. This growth has been due in no small part to the general immunity of public sector employees from market pressures, and the militant tactics adopted by public sector unions since the 1970s. The recent New York transit strike suggests such militancy is not a thing of the past.

It is unclear why Congress carved out an exemption for state and local employers under § 2(2) of the NLRA. Congress may have been concerned with the Constitutionality of the NLRA as applied to state employers under the more limited view of Federal power at work during the 1930s. Supporting this view, the House Report discussing § 2(2) noted that “[the Act] does not

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apply to controversies or practices of purely local significance which do not presently or potentially burden or obstruct the free flow of commerce.”74 This statement suggests that Congress felt its regulation of state employer/employees could have overstepped its authority under the Commerce Clause75.

On the other hand, § 2(2) may have been enacted to mirror the existing labor practices of public sector employers. In 1935, the majority of states and the federal government prohibited their employees from engaging in precisely the type of behavior that the NLRA sought to legalize.76 General antagonism to public sector unions in state law subsisted until the 1960s.77 Federal employees were finally granted the ability to unionize through the 1962 Executive Order of President Kennedy.78 As recently as 2000, South Carolina exempted public employees from state labor law precisely because of the “traditional construction of state labor statutes.”79 In light of this historical reality, § 2(2) looks less like an expression of constitutional limitation and more like a special exception created by legislators for legislators.

Yet inquiry into the Congressional intent guiding the Constitutional necessity of § 2(2) may be largely academic. First, Congress does not make binding determinations with respect to

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75 U.S. Const. art. I, § 8, cl. 3.
76 See NLRB v. Natural Gas Util. Dist. of Hawkins County, 402 U.S. 600, 604 (1971) (“The legislative history does reveal, however, that Congress enacted the [§ 152(2)] exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees did not usually enjoy the right to strike.”). See generally Richard C. Kearney, Labor Relations in the Public Sector 39–43 (Marcel Dekker 1984).
77 Kearney at 39–41.
78 Id. at 43.
79 Branch, 532 S.E.2d at 292.
the Constitutionality of its laws.\textsuperscript{80} Second, the NLRA was passed at a time when the regulatory powers of the Federal government were considerably more limited. The NLRA was enacted in the face of a judiciary antagonistic towards expansive visions of federal regulation and cases such \textit{United States v. Carolene Products Co.}\textsuperscript{81} and \textit{West Coast Hotel v. Parrish}\textsuperscript{82} remained in the uncertain future.

More recent jurisprudence suggests that no Constitutional bar prevents Congress from regulating the labor practices of state employers. Specifically, the Court’s opinion in \textit{Garcia v. San Antonio Metropolitan Transit Authority}\textsuperscript{83} allows that Congress could extend the reach of the NLRA to state employers without overstepping its Constitutional authority. In \textit{Garcia}, the Court determined the Federal minimum wage levels for transit employees preempted state law governing the wages and hours of San Antonio Municipal Transit Authority (“SAMTA”) employees. \textit{Garcia} expressly overruled the Court’s earlier precedent in \textit{National League of Cities v. Usery}\textsuperscript{84}, which had severely limited the exercise of Federal regulatory authority over the


\textsuperscript{81} 304 U.S. 144, 153 n.4 (1938) (announcing the Court’s decision to subject to economic regulation to more relaxed standards of Constitutional review).

\textsuperscript{82} 300 U.S. 379 (1937).

\textsuperscript{83} 469 U.S. 528 (1985), overruling \textit{Nat’l League of Cities v. Usery}, 426 U.S. 833 (1976); \textit{see generally Troy, Appendix A} (discussing background and holding of \textit{Garcia}).

\textsuperscript{84} 426 U.S. 833 (1976). \textit{Usery} had endorsed a strongly deferential approach to the states’ right to define the terms and conditions of employment: “One undoubtedly attribute of state sovereignty is the States’ power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.” \textit{Id.}, at 844. Thus, \textit{Usery} helped terminate a movement towards national labor legislation that had occurred during the mid-1970s. \textit{See} Kearney, at 49–53.
states by distinguishing between “traditional” and “non-traditional” areas of state action. The latter could be subject to federal regulation. The former could not. Garcia found this distinction to be both unworkable and unrealistic in light of the regulatory realities created by the modern state.

The Court then determined that Federal authority to regulate state employers qua employers was not restricted by the Tenth Amendment: “SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.” The Court deflected any claims that Federal legislation had imposed an undue burden on the state and took particular note of the billions of dollars in federal funds benefiting transit authorities such as SAMTA:

Congress . . . has provided substantial countervailing financial assistance . . ., assistance that may leave individual mass-transit systems better off than they would have been had Congress never intervened at all in the area. Congress’ treatment of public mass transit reinforces our conviction that the national political process systematically protects States from the risk of having their functions in that area handicapped by Commerce Clause regulation.

Garcia implies that no Constitutional limits preclude Congress from either eliminating the exemption created by § 2(2) of the NLRA or creating independent statutory regimes governing state employees. State laws determining the collective bargaining rights and obligations of

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86 Garcia, 469 U.S. at 545–47.
87 Id. at 554.
88 Id. at 555. It should be noted that receipt of federal funds is not a condition precedent to federal regulation under Garcia. Id. at 555 n.21.
89 Id. at 566 n.11 (1985) (Powell, J., dissenting) (“[I]t is unlikely that special interest groups will fail to accept the Court’s open invitation to urge Congress to extend [the NLRA] and other statutes to apply to the States and (Continued…)
public employees enjoy no particular Constitutional protection. Congress may therefore exercise its dormant Commerce Clause powers to create a unified field of federal labor regulation.90

III. Collective Bargaining Agreements in Chapter 11

The assumption or rejection of collective bargaining agreements in Chapter 11 is governed by § 1113 of the Bankruptcy Code. Section 1113 was a Congressional response to the Court’s opinion in Bildisco, in order to prevent employers from using bankruptcy as a “judicial hammer” to reduce burdens imposed by collective bargaining agreements.91 Yet § 1113 does not achieve this goal by explicitly enacting an enhanced test for rejection. Indeed, courts and commentators were quick to recognize that § 1113 provided little guidance for the proper treatment of CBAs post-Bildisco.

Rather, the genius of § 1113 is that its ambiguous procedural requirements permit judges to impose substantive obligations upon both debtor and employer as a condition of rejection.

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90 See United States v. Morrison, 529 U.S. 598 (2000) (Souter, J., dissenting) (“[T]he Federal Government, when acting within a delegated power, may override countervailing state interests, whether these be described as governmental or proprietary in character.” (citation and internal quotation marks omitted)); cf. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434 (1946) (“Congress may keep the way open, confine it broadly or closely, or close it entirely”).

Thus, § 1113, properly understood, is a radical displacement of non-bankruptcy law insofar as it requires—or at least permits—bankruptcy judges to engage in precisely the sort of conduct that is generally forbidden outside of bankruptcy.\(^2\) Of course, § 1113 is inapplicable in Chapter 9.\(^3\) But an understanding of how § 1113 actually modifies the Court’s ruling in Bildisco will allow for a more accurate conception of a bankruptcy court’s role when considering the treatment of CBAs in Chapter 9.

A. Bildisco

Under the NLRA, employers can neither terminate nor unilaterally modify collective bargaining agreements without first reaching an impasse.\(^4\) Bildisco determined these statutory prohibitions would not apply in bankruptcy. Specifically, Bildisco held that (1) collective bargaining agreements were executory contracts subject to rejection under § 365\(^5\); and (2) such rejections did not constitute an unfair labor practice under the NLRA\(^6\).

It is worth asking whether the Court was correct in the more fundamental determination that CBAs are, in fact, executory contracts.\(^7\) The unique history of collective bargaining

\(^2\) See Section II.B, supra.


\(^4\) 29 U.S.C. § 158.

\(^5\) 465 U.S. at 525–26. The Court noted that a “somewhat stricter standard” should be used to govern the rejection of CBAs. Id. at 524 (citing In re Brada-Miller Freight Sys, Inc., 702 F.2d 890 (11th Cir. 1983); In re Bildisco, 682 F.2d 72 (3d Cir. 1982); Local Joint Executive Bd. v. Hotel Circle, 613 F.2d 210 (9th Cir. 1980) Shopmen’s Local Union No. 455 v. Kevin Steel Prods., Inc., 519 F.2d 698 (2d Cir. 1975)).

\(^6\) Id. at 533–34.

\(^7\) Interestingly, none of the parties to Bildisco raised this point, which was argued only by the United Mine Workers of America as amicus. See 465 U.S. at 524 n.6.
suggests these agreements hold a special place in the field of contract law. Commentators have consistently recognized that the unique dynamic at work in CBAs sets such agreements apart from a traditional view of contracts. The Court had also used the **sui generis** nature of such agreements to uphold a mandatory arbitration clause in 1960. Nor does a CBA seem to fit neatly into the traditional definition of an executory contract as matter of bankruptcy law—in which non-performance by one party would excuse performance by the other. The paradigmatic example of such a contract is where a debtor simply rejects an unfavorable supply contract. Clearly the “generalized code of conduct” enshrined in a CBA differs markedly in both degree and kind. Moreover, the consequences of rejecting an executory contract are typically the same in or out of bankruptcy—a creditor is left with a claim against the breaching party. Yet Bildisco’s determination that rejection of a CBA could not constitute an unfair labor practice ensured that the effect of rejection would depend entirely on whether an employer was bankrupt.

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98 See Section II.A, supra.


100 United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574, 579 (1960) (“The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.”).


102 Id. at 126–27.

103 11 U.S.C. §§ 365(g), 502(g); Baird at 127.
But theoretical objections do not alter Supreme Court precedent. Bildisco’s determination that bankruptcy effectively preempts federal labor law with respect to the rejection or modification of collective bargaining agreements remains the law. “Since the filing of a petition in bankruptcy under Chapter 11 makes the contract unenforceable, [NLRA] procedures have no application to the employer’s unilateral rejection . . . .”\textsuperscript{104} The Court’s decision rested on a broad interpretation of the proper role of § 365 in Chapter 11. In the Court’s view, a debtor’s rights under § 365 were so essential to its reorganization that conflicting, non-bankruptcy statutes could not be permitted to restrict such rights: “[T]he authority to reject an executory contract is vital to the basic purpose to a Chapter 11 reorganization, because rejection can release the debtor’s estate from burdensome obligations that can impede a successful reorganization.”\textsuperscript{105}

Bildisco’s decision to interpret § 365 in light of the “basic purpose” of Chapter 11 may be questioned. “Nothing in the Bankruptcy Code or its antecedents suggests that the power to reject turns on whether the debtor is liquidating or reorganizing. If it does not, then the debtor’s chances of reorganizing successfully should play no role in deciding the contours of § 365.”\textsuperscript{106} Bildisco implicitly rejected this more limited conception of § 365 through its determination that § 365 should preempt conflicting legal regimes governing collective bargaining agreements where such laws might otherwise impede a debtor’s reorganization.\textsuperscript{107} As a result, Bildisco

\textsuperscript{104} Bildisco, 465 U.S. at 533.

\textsuperscript{105} Id. at 528.

\textsuperscript{106} Baird at 140.

\textsuperscript{107} See Bildisco, 465 U.S. at 533.
leaves a debtor broad discretion to reject or assume their CBA. Bildisco in fact reminded lower courts that collective bargaining requires that “employer and union reach their own agreements on terms and conditions of employment free from government interference.” A bankruptcy court’s authority with respect to CBAs is thus limited only to its ability to permit or deny rejection of a collective bargaining agreement based on how such a rejection would affect the totality of the reorganization—not the interests of unionized employees in particular.

Bildisco is generally consistent with the NLRA’s permissive approach to collective bargaining under the NLRA even if it displaces the specific provisions of that regime. As noted above, both employers and Labor have wide discretion to utilize weapons of economic warfare when fighting for the best bargain. If a union has the right to put an employer into bankruptcy through a strike, rights created by that bankruptcy are a permissible avenue through which the debtor/employer may preserve its future as a going concern. Bankruptcy—and the rights created by a bankruptcy filing—should remain open to a financially distressed employer confronted with unaffordable collective bargaining agreements and a militant union. The specter of financially healthy employers using bankruptcy solely as a ‘hammer’ to break its unions are

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108 Id. at 525–26 (citing, inter alia, Kevin Steel Prods., 519 F.2d 698).

109 465 U.S. at 526.

110 Id. at 527 (“The Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization.”).

111 See, e.g., First Nat’l Maintenance, 452 U.S. at 675 (“[B]oth employer and union may bargain to impasse over these matters and use the economic weapons at their disposal to attempt to secure their respective aims.”).

112 See In re Horsehead Indus., Inc., 300 B.R. 573, 587 (Bankr. S.D.N.Y. 2003) (“[I]t makes little difference if the Debtors are forced out of business because of a union strike or the continuing obligation to pay union benefits to avoid one.”).
properly addressed through abstention\(^{113}\) or dismissal of the petition\(^{114}\)—not by denying debtors access to rights otherwise available under the Code.

B. Section 1113

Bildisco did not long survive without amendment. Congress quickly enacted § 1113\(^{115}\) which purported to limit a debtor’s rights to reject CBAs. But conflicting legislative history and the muddled text of § 1113 offers little guidance for the precise standard under which collective bargaining agreements may be rejected. In practice, however, courts have used the procedural framework imposed by § 1113 to “do equity” and serve as governors on post-petition collective bargaining.

1. Section 1113 in theory

Section 1113 resulted from competing legislation proposed in the wake of Bildisco. Proposals sought to, inter alia, (1) codify Bildisco; (2) implement a standard for rejection under which a debtor could only reject a CBA only to stave off liquidation; or (3) adopt a middle ground between these extremes.\(^{116}\) There are no committee reports from either the House or the Senate with respect to § 1113.\(^{117}\) There are no statements from its sponsors.\(^{118}\) The legislative record is therefore limited to what the Tenth Circuit has accurately described as “self-serving

\(^{113}\) 11 U.S.C. § 305.

\(^{114}\) 11 U.S.C. § 1112(b).

\(^{115}\) Pub. L. 98-353, Title III, § 541(a) (July 10, 1984). Section 1113 is reproduced in the Appendix


\(^{118}\) Id.
statements by opposing partisans.” The only source of agreement among legislators was that § 1113 enacted a higher standard than Bildisco, though significant disagreement remained as to the precise contours of that standard.

The text of § 1113 reflects the Congressional incongruity. “Courts and scholars alike have commented extensively on how poorly-drafted [§ 1113] is.” First and foremost, Congress failed to enact a precise standard governing the rejection of CBAs. Congress simply shifted such responsibility back to the judiciary:

Section 1113 of the Bankruptcy Code embodies a compromise between the desires of organized labor and those of the business and creditor community. Because it is a compromise, it is loaded with terms of compromise. Interpretation of terms such as ‘necessary,’ ‘fairly and equitably,’ ‘good faith,’ and ‘good cause,’ naturally falls to the courts.

Section 1113 creates a procedural framework through which a court must ultimately make a decision regarding rejection. There are other gaps in § 1113. As noted above, § 1113 is the exclusive provision governing the rejection of CBAs. But section 1113 does not create a

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119 In re Mile Hi Metal Sys., Inc., 899 F.2d 887, 890 (10th Cir. 1990).

120 See Charnov, 40 Syracuse L. Rev. at 969. The limited history has provided at least one court with a foundation for its own construction of § 1113—however questionable such an approach might be. See Wheeling Pittsburgh Steel Corp. v. United Steelworkers of Am., AFL-CIO-CLC, 791 F.2d 1074, 1088 (3d Cir. 1986).


122 Joseph L. Cosetti & Stanley A. Kirshenbaum, Rejecting Collective Bargaining Agreements Under Section 1113 of the Bankruptcy Code—Judicial Precision or Economic Reality?, 26 Duq. L. Rev. 181, 183 (1987). But see Marc S. Kirschner et al., Tossing the Coin Under Section 1113: Heads or Tails, the Union Wins, 23 Seton Hall L. Rev. 1516 (1993) (“Section 1113 provides strict procedural and substantive requirements that a debtor must meet to reject a collective bargaining agreement.”).


claim for damages. A union could then have no claim arising from rejection. Nor does § 1113 determine what concessions—if any—a debtor must make following rejection. And, most relevant to this paper, Congress did not incorporate § 1113 into Chapter 9.

Congress has not remedied the absence of a provision governing the rejection of CBAs in Chapter 9, though Congress has been willing to address other concerns unique to the municipal debtor. Nor has Congress been totally unaware of this hole. In 1991, the Municipal Employee Protection Amendments Act was introduced to require “the debtor which seeks approval of changes to a labor agreement has fully exhausted State law procedures for the bargaining, implementation, and amendment of a collective bargaining agreement . . . .” This bill subsequently died in committee.

2. Section 1113 in practice

It was not long before courts filled the gap created by Congress’s apparent refusal to define a clear standard governing the rejection of collective bargaining agreements. Perhaps unsurprisingly, the caselaw has reflected the Congressional bi-polarity regarding Bildisco.

125 Cf. 11 U.S.C. §§ 365(g), 502(g).


127 See Maxwell Newspapers, 981 F.2d at 91–92 (conditioning rejection under § 1113 on debtor’s obligation to extend previous compromise offer to union) (discussed in Kirshner, 23 Seton Hall L. Rev. at 1532–33); accord Northwest Airlines, 346 B.R. at 332.


130 H.R. 3949, 102d Cong. § 2(c) (1991), reprinted in 4 Reams & Manz.
The Third Circuit, in *Wheeling Pittsburgh Steel Corp. v. United Steelworkers of Am.* AFL-CIO-CLC, determined that a debtor’s obligation to propose “necessary modifications” under § 1113(b)(1)(A) as a condition precedent to rejection refers only to those modifications which were necessary to prevent a debtor’s short-term liquidation.

The ‘necessary’ standard cannot be satisfied by a mere showing that it would be desirable for the trustee to reject a prevailing labor contract so the debtor can lower its costs. Such an indulgent standard would inadequately differentiate between labor contracts, which Congress sought to protect, and other commercial contracts, which the trustee can disavow at will.

Hence, a debtor could not reject a collective bargaining agreement unless and until the debtor had proposed to make only such modifications necessary to stave off liquidation.

*Wheeling-Pittsburgh* was wrongly decided on multiple levels. First, *Wheeling-Pittsburgh* justified its standard through a self-serving view of a legislative history which is at best unclear. Second, the *Wheeling-Pittsburgh* court could only achieve its outcome by conflating the standard for “necessary modification” under § 1113(b)(1) with the standard for interim modifications under § 1113(e): “We reject the hypertechnical argument that ‘necessary’ and ‘essential’ have different meanings because they are in different subsections. The words are synonymous.” It is reasonable to assume that Congress would not have used different words if

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131 791 F.2d 1074 (3d Cir. 1986) ("*Wheeling Pittsburgh*").

132 Id. at 1088.

133 Id.

134 Compare id. at 1082–89 with Section III.B.1.

135 Id. 1089.
it wanted the same standard to govern interim and permanent modifications. One of the few points of consensus in § 1113’s legislative history was that interim modifications to a CBA should be harder to obtain than permanent modifications. Third, Wheeling-Pittsburgh took a myopic view of “necessary” modifications in relation to the debtor’s “reorganization” as defined by § 1113(b)(1)(A). The Third Circuit determined that “necessary” modifications only referred to those modifications which were necessary for the short-term rehabilitation of the debtor—as opposed to the debtor’s long-term financial health. Such a reading prevents a debtor from implementing more substantial—and necessary—changes to its overall cost structure. The Wheeling Pittsburgh approach also runs counter to § 1129(a)(11), which conditions plan approval on the court’s determination that such a plan provides for the long-term survival of the debtor.

In Truck Drivers Local 807 v. Carey Transportation Inc. the Second Circuit endorsed a test for the rejection of CBAs that is more consistent both with the actual language of § 1113 and the goals of Chapter 11 generally. Carey Transportation rejected any equation of “necessary” under § 1113(b)(1)(A) with “essential” under § 1113(e). The court observed that an alternative reading would effectively thwart any negotiation regarding the modifications in question:

136 Cf. Almac’s, 90 F.3d at 6 (“[B]y providing different standards for the approval of ‘rejections’ and ‘interim changes,’ Congress clearly intended not to treat the latter as merely a category of the former.”).


138 791 F.2d at 1088–89; see Cosetti & Kirshenbaum, 26 Duq. L. Rev. at 211.

139 816 F.2d 82 (2d Cir. 1987).

Because the statute requires the debtor to negotiate in good faith over the proposed modifications, an employer who initially proposed truly minimal changes would have no room for good faith negotiating, while one who agreed to any substantive changes would be unable to prove that its initial proposals were minimal.141

Instead, “the necessity requirement places on the debtor the burden of proving that the proposal is made in good faith, and that it contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully.”142 The Second Circuit then adopted a highly discretionary series of factors through which a bankruptcy court might “balance the equities” as required by § 1113(c)(3).143

Under Carey Transportation, § 1113 is not a substantive rule protecting the interests of Labor.144 Rather, § 1113 is a procedural mechanism through which a bankruptcy judge may evaluate the proposed modifications and fairly balance all interests involved. “The purpose of [§ 1113(b)(1)(A)] . . . is to spread the burden of saving the company to every constituency while ensuring that all sacrifice to a similar degree.”145 Thus, a debtor can obtain

141 Carey Transportation, 816 F.2d at 89.

142 Id. at 90.

143 The non-inclusive series of factors adopted by Carey Transportation were: (1) the likelihood and consequences of liquidation if rejection is not permitted; (2) the likely reduction in the value of creditors’ claims if the bargaining agreement remains in force; (3) the likelihood and consequences of a strike if the bargaining agreement is voided; (4) the possibility and likely effect of any employee claims for breach of contract if rejection is approved; (5) the cost-spreading abilities of the various parties, taking into account the number of employees covered by the bargaining agreement and how various employees’ wages and benefits compare to those of others in the industry; and (6) the good or bad faith of the parties in dealing with the debtor’s financial dilemma. Id. at 93.

144 Cf. Wheeling-Pittsburgh, 791 F.2d at 1090–91.

145 Carey Transportation, 816 F.2d at 90 (quoting Century Brass Prods., Inc. v. Int’l Union of United Auto., Aerospace, and Agric. Implement Workers of Am., Local 1604 (In re Century Brass Prods.), 795 F.2d 265, 273 (2d Cir. 1986)).
the contractual modifications necessary to secure its long-term financial health, and the
bankruptcy court can moderate this process.

In practice, this requires the bankruptcy judge to become an active participant in the
negotiations mandated by the Code in order to balance the equities at work. In other words, the
judge must engage in precisely the sort of substantive review typically forbidden outside of
bankruptcy. The bankruptcy court’s actions In re Delta Air Lines146 is instructive. In Delta, the
debtor had already obtained certain wage and benefits concessions from its pilots and its unions
through consensual modification.147 The debtor then sought “non-negotiable” wage concessions
from its stewardesses’ union in order to meet its overall cost-savings goals. When the
stewardesses refused, the debtor sought to reject their CBA under § 1113.148 Judge Hardin
determined that rejection was inappropriate since the requisite wage concessions would have
wrung 21.0% of the projected total cost savings from the stewardesses, though they only
composed 10.5% of total labor costs.149

It is not acceptable to say that [the debtor], by reaching agreement with the pilots
and the machinists, can preempt for the flight attendants the Section 1113 process
of proposal, good faith negotiations, and determinations by the Bankruptcy Court
of all issues relating to necessity, fairness, good faith negotiations, good cause and
balance of equities.150

The thrust of the Judge Hardin’s ruling, then, was to dictate the terms of CBA modifications by
requiring the debtor to achieve pro rata cost savings from all its unions. Indeed, the debtor was


147 Id. at 689–90.

148 Id. at 691.

149 Id. at 698.

150 Id. at 696
subsequently permitted to reject its CBA with its pilots’ union when that union refused to grant the requisite cost savings.\textsuperscript{151}

Under the \textit{Carey Transportation} standard, Section 1113 departs from \textit{Bildisco} by authorizing bankruptcy courts to require and/or implement substantive changes to CBAs through the negotiated process mandated by that section. \textit{Bildisco} provides no authority for a bankruptcy court to engage in the sort of substantive actions of the \textit{Delta Air Lines}. Section 1113, in contrast, both enables and requires the court to condition acceptance or rejection of a collective bargaining agreement upon the imposition of substantive terms, and the court remains the sole arbiter of what constitutes “necessary,” “fair,” equitable,” and the like.\textsuperscript{152}

It may be argued, however, that bankruptcy court behavior would remain the same whether or not § 1113 was ever enacted. That is, one might claim that bankruptcy judges will simply “do equity” with respect to collective bargaining agreements regardless of the court’s statutory authority to do so. Dicta from \textit{Bildisco} might also justify a bankruptcy court’s equitable desire to limit unilateral rejections.\textsuperscript{153} Thus, such judges could effectively require parties to accept substantive modifications to CBAs as a pre-condition of termination under § 365 inasmuch as judges are authorized to do so by the broad language of § 1113.

\textsuperscript{151} \textit{In re Delta Air Lines, Inc.}, — B.R. —, No. 05 B 17923(ASH), 2006 WL 3771049, *19 (Bankr. S.D.N.Y. Dec. 21, 2006) (“It is the essence of a Chapter 11 reorganization that all economic constituencies of a debtor must make their appropriate and proportionate contribution to the debtor’s reorganization in order that all may benefit from the continued viability and future success of the debtor.”). Of course, it is also difficult to imagine the NLRB being permitted to dictate terms in this fashion.

\textsuperscript{152} \textit{Cf.} Cosetti & Kirshenbaum, 26 Duq. L. Rev. at 183.

\textsuperscript{153} See \textit{Bildisco}, 465 U.S. at 524 (“We agree . . . that because of the special nature of a collective-bargaining contract, and the consequent ‘law of the shop’ which it creates, a somewhat stricter standard should govern the decision of the Bankruptcy Court to allow rejection of a collective-bargaining agreement.” (internal citations omitted)).
This position is incorrect. There is a fundamental difference between equitable powers authorized by statute and using general principles of equity to depart from the Code. Indeed, this distinction was recently observed in *United States Trustee v. Lamie*, in which the Court addressed another gap in the Code—created by an apparent drafting error in § 330(a). “There is a basic difference between filling a gap left by Congress’ silence and rewriting rules that Congress has affirmatively and specifically enacted.” The procedural guidelines established by § 1113 grant the bankruptcy court discretionary authority to supervise negotiations between debtor and employer. In the absence of § 1113, a bankruptcy court cannot invoke general principles of equity to craft a “fair” outcome.

*Bildisco* established that rejection of a collective bargaining agreement under § 365 is guided predominantly by whether such rejection could facilitate the reorganization of the debtor. A bankruptcy court has no authority under § 365 to inject itself into negotiations between debtor and union regarding modifications to a CBA. The bankruptcy court must permit rejection if such voluntary negotiations break down and a successful reorganization might

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154 See, e.g., 11 U.S.C. §§ 105, 510(c); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.").


156 Id. at 538 (quoting *Mobil Oil v. Higginbotham*, 436 U.S. 618, 625 (1978)).

157 See notes 146–151 and accompanying text.

158 *Bildisco*, 465 U.S. at 527.

159 Id. at 526.
otherwise be threatened.\textsuperscript{160} To conclude otherwise would, in effect, treat the entirety of § 1113 as surplusage.\textsuperscript{161}

IV. Collective Bargaining Agreements in Chapter 9

Since Chapter 9 does not incorporate § 1113, a municipal debtor’s motion to reject its collective bargaining agreements should be governed by § 365 and the Court’s decision in Bildisco. A debtor should have discretion to reject a CBA without the sort of substantive intervention authorized by § 1113. In addition, Bildisco explicitly determined that labor laws cannot work to limit a debtor’s rights under § 365.\textsuperscript{162} Thus, state law governing modification or rejection should not limit a debtor’s ability to reject an agreement any more than the NLRA could limit such rights.

However, the unique status of a municipal debtor raises two potential objections to this analysis. First, it must be asked whether Congress actually intended for § 365 to displace an area of law specifically reserved for the states by the NLRA, notwithstanding Congress’s failure to enact legislation to the contrary.\textsuperscript{163} Second, it must be asked whether more general principles of state sovereignty otherwise preclude the preemption of state labor law by the Bankruptcy

\textsuperscript{160} See \textit{id}. (“At such a point, action by the Bankruptcy Court is required . . .”).

\textsuperscript{161} It should be noted that § 1114 imposes procedural requirements similar to § 1113 through which a debtor can modify benefits otherwise payable to retirees. See \textit{In re Kaiser Aluminum Corp.}, 456 F.3d 328, 340 (3d Cir. 2006) (discussing similarity of § 1113 and § 1114). Section 1114, like § 1113, is not incorporated into Chapter 9. See 11 U.S.C. § 901. Hence, neither § 1114 nor § 1113 should have any applicability in Chapter. However, a more thorough discussion of the inapplicability of § 1114 in Chapter 9 is beyond the scope of this article.

\textsuperscript{162} Bildisco, 465 U.S. at 533–34.

Code.\textsuperscript{164} \textit{County of Orange} suggests that both objections may be used to provide cover for decisionmakers unwilling to enforce the Court’s holding in \textit{Bildisco}.\textsuperscript{165}

Yet the correct answer to both objections is the same. The legislative history of Chapter 9 provides no indication that Congress intended for a municipal debtor’s rights under § 365 to be limited by state labor law. In addition, the sovereign status of a municipal debtor creates no impediment to rejection of a CBA. Admittedly, a bankruptcy court’s jurisdiction’s over a municipal debtor may be subject to certain Constitutional limitations. But these limits apply only to the most direct intervention by a bankruptcy court into the affairs of a municipal debtor. The intrusion of § 365 into state labor law offends no such principles of state sovereignty. Moreover, any claims to state sovereignty are effectively waived by a State’s determination to allow its municipality to seek Chapter 9 protection.

It must also be noted that Chapter 9 is truly a venue of last resort for municipal debtors. Section 109(c) imposes a series of hurdles which make it extremely difficult for municipal debtors to obtain bankruptcy protection.\textsuperscript{166} Unlike individual or corporate debtors, a municipality must obtain permission from the state to file for bankruptcy.\textsuperscript{167} A municipality

\textsuperscript{164} U.S. Const. amend. X; see also Note, 26 Ga. L. Rev. at 974 (“Unless a state’s right to control municipal labor relations is protected by the United States Constitution, particularly the Tenth Amendment, a municipality may unilaterally impose new terms in accordance with a proper rejection of the collective bargaining agreement under Chapter 9 . . . .”).

\textsuperscript{165} 179 B.R. at 183; see also Winograd, 37 Hastings L.J. at 319 (arguing that unilateral employer action should be limited by state law).


\textsuperscript{167} 11 U.S.C. § 109(c)(2) (municipal debtor must be authorized by state law or equivalent to file for bankruptcy); see \textit{In re Westport Transit Dist.}, 165 B.R. 93 (Bankr. D. Conn. 1994) (discussing municipal debtor’s authority to file for bankruptcy under Connecticut law); \textit{In re City of Wellston}, 43 B.R. 348 (Bankr. E.D. Mo. 1984) (discussing municipal debtor’s authority to file for bankruptcy under Missouri law).
must negotiate with its creditors prior to bankruptcy.168 Municipalities are also the only debtors for whom insolvency is a requirement.169 The insolvency requirement, in particular, ensures that the municipal debtor who finally obtains Chapter 9 protection will be in dire financial straights: “[§ 109(c)(3)] postpones the day of reckoning while the city continues to pile on new debt at ever-increasing rates, further burdening the municipal budget and guaranteeing that each creditor will receive less value in bankruptcy.”170

A. The Legislative History of Chapter 9 and Collective Bargaining Agreements

Municipal debtors did not obtain the ability to reject executory contracts until 1976.171 Perhaps because of its relative novelty, it has been argued through legislative history that Congress did not intend for municipal debtors to unilaterally reject their collective bargaining agreements without also being subject to the terms and obligations otherwise imposed by state labor law.172 Under this view, a debtor may be permitted to reject its CBA as a matter of bankruptcy law. But the debtor should remain bound by the substantive obligations of state law, such as an obligation to maintain pre-rejection contractual terms during negotiations, or an

\[\text{References}\]

168 11 U.S.C. § 109(c)(5). Such negotiations will presumably include negotiations with their unions either as a matter of law if obligations are outstanding or in practice if a shortfall is imminent. See, e.g., W. Richard Fossey & John M. Sendor, In re Copper River School District; Collective Bargaining and Chapter 9 Municipal Bankruptcy, 6 Alaska L. Rev. 133, 134–36 (1989) (describing bankruptcy of Copper River School District after failure to obtain wage concessions from its teachers’ union); Winograd, 37 Hastings L.J. at 231 (describing bankruptcy of San José Unified School District after its inability to obtain wage concessions from its teachers’ union).

169 11 U.S.C. § 109(c)(3); see In re City of Bridgeport, 129 B.R. 332 (Bankr. D. Conn. 1991) (discussing § 109(c)(3)).

170 McConnell & Picker, 60 U. Chi. L. Rev. at 457.

171 See infra note 178.

172 Winograd, 37 Hastings L.J. at 278.
obligation to keep negotiating with a union.\footnote{See Section II.C., supra (discussing state labor law with respect to collective bargaining).} This argument is buttressed by Constitutional concerns regarding the scope of a bankruptcy court’s authority over the municipal debtor, now codified at §§ 903 and 904.\footnote{Construction of §§ 903 and 904 is discussed, below.}

Reliance on legislative history is misplaced. The legislative history with respect to a municipal debtor’s ability to reject its CBAs is only conclusive of Congress’s recognition that a municipal debtor could reject its collective bargaining agreements by virtue of its general ability to reject executory contracts. No Congressional consensus has ever emerged as to whether state law either could or should limit a debtor’s ability to reject its CBAs.

1. The 1976 Amendments


\begin{quote}
Chapter IX provides essentially for Federal court supervision of a settlement between the petitioner municipality and a majority of its creditors. A municipal
\end{quote}
unit cannot liquidate its assets to satisfy its creditors totally and finally. Therefore, the primary purpose of a Chapter IX is to allow the municipal unit to continue operating while it adjusts or refines creditor claims with a minimum (and in many cases, no) loss to its creditors.\textsuperscript{177}

Part of this solution was to give municipal debtors increased flexibility with respect to the management of their financial obligations.\textsuperscript{178}

One of the major changes imposed by the 1976 Amendments was to permit municipal debtors to assume or reject executory contracts along the same lines as private debtors under § 82(b)(1).\textsuperscript{179} This power was intended to give municipalities much needed powers to restructure beleaguered finances. In doing so, Congress was well-aware that such a power could (or should) allow a municipal debtor to reject its collective bargaining obligations.\textsuperscript{180} Yet nothing in the 1976 Amendments explicitly limited the effect of § 82(b)(1) with respect to collective bargaining agreements,\textsuperscript{181} though certain unions apparently lobbied Congress for such an exception.\textsuperscript{182}


\textsuperscript{179} See 11 U.S.C. § 82(b)(1); H.R. Rep. No. 94-686, 8, \textit{reprinted in} 1975 U.S.C.C.A.N. at 546 (“The bill grants the court . . . powers which a bankruptcy court has under Chapters X and XI, and under section 77, but which had not previously been granted under Chapter IX. The first is the power to permit the petitioner to reject executory contracts.”).


\textsuperscript{181} Kenneth W. Bond, \textit{Municipal Bankruptcy Under the 1976 Amendments to Chapter IX of the Bankruptcy Act}, 5 Fordham Urb. L. J. 12 (1976) (“New Chapter IX has no special provisions for handling the rejection of executory contracts with municipal labor unions.”).

\textsuperscript{182} \textit{Supplemental Views of Messrs Butler, Kindness, Hutchinson, McClory, Moorhead of California, and Hude, with Mr. Wiggins Concurring in Part and Dissenting in Part}, \textit{reprinted in} 1976 U.S.C.C.A.N. 577, 578 (“We understand that conversations took place between certain members of the Committee staff and representatives of one or more municipal employee unions of the City of New York in an unsuccessful effort to obtain agreement to exclude by amendment collective bargaining agreements from those executory contracts which may be rejected.”).
Different interpretations emerged as to the scope of § 82(b)(1) with respect to collective bargaining agreements.\(^{183}\) On one hand, the House majority agreed that a municipal debtor could be entitled to reject its CBAs under § 82(b)(1) under the same standard under which private debtors might reject such agreements.\(^{184}\) The House Report endorsed private sector cases such as Shopmen’s Local Union No. 455 v. Kevin Steel\(^{185}\) and Brotherhood of Railway Employees v. REA Express, Inc.\(^{186}\) as examples of how a municipal debtor may be able to reject its CBAs.\(^{187}\) But REA Express and Kevin Steel are “two different formulations of a standard for rejecting collective bargaining agreements.”\(^{188}\) Indeed, Bildisco refused to infer legislative intent to create a heightened standard governing the rejection of CBAs precisely because of this confusion: “[T]he [House Report] indicates no preference for either formulation. At most, the House report supports only an inference that Congress approved the use of a somewhat higher standard than the business judgment rule when appraising a request to reject a collective-bargaining agreement.”\(^{189}\)

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183 But see Winograd, 37 Hastings L.J. at 278 (“The 1976 reforms evidence Congressional solicitude for state interests”). Prof. Winograd’s contention that the legislative history to the legislative history of the 1976 Amendments implies that a municipal debtor’s right to terminate a CBA may be limited by state law relies heavily on the opinion of the House majority and floor statements of Rep. Herman Badillo (D. N.Y.). See id. at 279–80. As discussed below, neither source is conclusive with respect to the legislative intent guiding the proper limits of § 82(b). The reliability of Rep. Badillo’s statement as to the legislative intent of § 82(b)(1), in particular, may be questioned. See note 201.


185 519 F.2d 698 (2d Cir. 1975).

186 523 F.2d 164 (2d Cir. 1975).


188 Bildisco, 465 U.S. at 525.

189 Id. Subsequent courts have determined that a higher standard might govern the rejection of other types of executory contracts on the basis of Bildisco. See, e.g., In re Mirant Corp., 318 B.R. 100, 107–08 (N.D. Tex. (Continued…))
The House Report also suggests that state law may impose additional burdens post-rejection:

[I]f a collective bargaining agreement had been rejected, applicable law may provide a process or procedure for the renegotiation and formation of a new collective bargaining agreement. A rejection would also be sufficiently similar to a termination of such a contract so that again, applicable law, if any, would apply to the rights of the other contracting party between rejection and conclusion of the bargaining process.190

This statement suggests that “applicable” state law could still bind a debtor to the substantive terms of a CBA—even after rejection.191 Prof. Lawrence King, for one, adopted this approach as the proper outcome as to the rejection of a CBA under § 82(b)(1).192 Yet the House Report makes no conclusive statements as to the effect of rejection. The Report does not state that a debtor could reject its CBA but ‘should’ or ‘must’ be obliged to maintain existing terms, as would be the case under New York law.193 The Report addresses only how state law could

2004) (citing Bildisco for the proposition that “[w]hen considering [rejection of a power supply contract], the courts should carefully scrutinize the impact of rejection upon the public interest and should, inter alia, ensure that rejection does not cause any disruption in the supply of electricity to other public utilities or to consumers.”). This analysis overlooks the extent to which Bildisco’s concession that a somewhat higher standard should govern rejection of collective bargaining agreements was grounded in the sui generis nature of such contracts. See Bildisco, 465 U.S. at (“[B]ecause of the special nature of a collective-bargaining contract, and the consequent ‘law of the shop’ which it creates, a somewhat stricter standard should govern the decision of the Bankruptcy Court to allow rejection of a collective-bargaining agreement. (internal citation omitted)).

191 See, e.g., N.Y. Civ. Serv. Law § 209-a(1)(e).
192 Lawrence P. King, Municipal Insolvency: Chapter IX, Old and New; Chapter IX Rules, 50 Am. Bankr. L.J. 55, 62 (1976) (“The labor law is an exercise of the governmental power. Additionally, if such law requires that current conditions of employment be maintained during the bargaining process, that requirement would, presumably be enforceable under Chapter IX.”).
193 See In re Sanitary & Improvement Dist., No. 7, 98 B.R. 970, 974 (Bankr. D. Neb. 1989) (“To create a federal statute based upon the theory that federal intervention was necessary to permit adjustment of a municipality’s debts and then to prohibit the municipality from adjusting such debts is not, in the point of view of this Court, a logical or necessary result.”).
determine the procedure by which a new contract might be formed. Nor are collective bargaining agreements really “sufficiently similar” to executory contracts generally.194

The House Report may have also misunderstood the proper scope of a debtor’s power to reject an executory contract. The Report’s citation to both Kevin Steel and REA Express, discussed above, suggests the House had difficulty defining the extent of a debtor’s rights under § 82(b)(1). Moreover, it is hard to believe that the House would consciously authorize debtors to reject collective bargaining agreements and yet allow state law to bind debtors to the pre-rejection terms of such agreements. This outcome would eviscerate the right to reject collective bargaining agreements and was precisely why Bildisco determined that rejection under § 365 could not constitute an unfair labor practice under the NLRA.195

The ambiguity in the House Report motivated certain House members to amend the legislative history of the 1976 Amendments with their “Supplemental Views.”196 In contrast to the indefinite language of the House majority, the Supplemental Views spoke in the most direct terms possible:

The Committee report indicates that even though executory collective bargaining agreements may be rejected, certain collective bargaining agreements may have to be renegotiated pursuant to State law and existing terms and conditions of employment would have to be maintained subsequent to rejection subsequent to rejection because of certain provisions of State law. Nothing could be further from the truth. No evidence was taken or memoranda of law submitted to the

194 See Section II, supra.

195 Bildisco, 465 U.S. at 528; see also Note, Executory Contracts and Municipal Bankruptcy, 85 Yale L.J. 968, 969 (1976).

Committee for discussion on that point. No discussion of this matter took place in the Subcommittee or the full Committee.\textsuperscript{197}

Under the view of these representatives, state law could not be used as a means of limiting a debtor's ability to terminate a CBA.\textsuperscript{198}

Though the Conference Committee Report\textsuperscript{199} to the 1976 Amendments makes no reference to either the Supplemental or the House Majority view, the Senate seems to have adopted the view of the House minority. Senator Quentin Burdick (D. N.D.), a Senate manager for the 1976 Amendments addressed the issue point-blank in floor debate with Senator Roman Hruska (R. Neb.), a fellow manager of the 1976 Amendments:

\textit{In any case where the labor laws conflict with the powers of the petitioner under this Act, it is the intent of the legislation that the Federal, State, and local labor laws should be overridden. . . . I want to make it clear that [the bankruptcy court] will not be obligated to follow state or local law in that regard.}\textsuperscript{200}

Conversely, floor debate on the same day saw Rep. Herman Badillo (D. N.Y.), a House manager of the 1976 Amendments, take a decidedly different view on the application of state law with respect to § 82(b)(1). In Rep. Badillo’s view, a municipal debtor’s collective bargaining obligations imposed by state law would subsist even after rejection.\textsuperscript{201} The reliability of his statements as indicia of legislative consensus may be questioned. The bulk of Rep. Badillo’s

197 Id. at 577–78.

198 See id. at 578.


200 122 Cong. Rec. 8217 (Mar. 25, 1976) (remarks of Sen. Burdick). This statement occurred in a debate between Sen. Burdick and Sen. Hruska which was largely devoted to the collective bargaining issue. The relevant portion of the debate is produced in the Appendix.


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statement was comprised of a memorandum analyzing the 1976 Amendments prepared by the law firm of Fried, Frank, Harris, Shriver & Jacobson ("Fried Frank"). Fried Frank prepared this memorandum on behalf of the American Federation of State, County and Municipal Employees.

In the final analysis, the legislative history of the 1976 Amendments cannot justify the creation an implicit limitation on a debtor’s ability to reject a CBA via state law. On one hand, the House majority seems to have taken the view that state law might govern the effect of rejection, but the House Report has no obligatory language to that effect, nor did the Report even define a clear standard governing rejection. This ambiguity is also contrasted by the clear views of dissenting House members, and the leading proponents of the 1976 Amendments in the Senate. Against this jumbled history must be weighed Congress’s failure to enact specific limitations on a debtor’s rights under § 82(b)(1) though it knew municipal debtors could use such rights to reject CBAs.

2. Legislative History post-1976

The 1976 Amendments provided the basis for Chapter 9 as it currently exists under the Code, and the Bankruptcy Reform Act of 1978 incorporated § 82(b)(1). Though the House Report to the Bankruptcy Reform Act did not address the issue of rejection and collective

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202 Id.
203 Id.
204 See note 176 and accompanying text.
205 H.R. Rep. No. 95-595, 395 (1977), reprinted in 13 Resnick & Wypyski, supra note 176 ("The applicability of section 365 incorporates the general power of a bankruptcy court to authorize the assumption or rejection of executory contracts or unexpired leases found in other chapters of the title. This section is comparable to section 82(b)(1) of current law.").
bargaining, the Senate provided the following gloss in its section-by-section analysis of Chapter 9:

Within the definition of executory contracts are collective bargaining agreements between the city and its employees. Such contracts may be rejected despite contrary State laws. Courts should readily allow the rejection of such contracts where they are burdensome, the rejection will aid the municipality’s reorganization and in consideration of the equities of each case. On the last point, ‘[e]quities in favor of the city in chapter 9 will be far more compelling than the equities in favor of the employer in chapter 11. Onerous employment obligations may prevent a city from balancing its budget for some time. . . .’ Rejection of the contracts may require the municipalities to renegotiate such contracts by state collective bargaining laws. It is intended that the power to reject collective bargaining agreements will pre-empt state termination provisions, but not state collective bargaining laws. Thus, a city would not be required to maintain existing employment terms during the renegotiation period.206

It seems the Senate—at least—had adhered to its previous view that a debtor’s ability to reject its CBAs could not be limited by the operation of state labor laws. State law might provide the procedural mechanisms by which such contracts might be re-negotiated, but state law could not require a municipality to “maintain existing terms.”

B. The Constitutional Status of the Chapter 9 Debtor

A Chapter 9 bankruptcy may impose unique Constitutional restrictions on a debtor’s rights in bankruptcy, or a bankruptcy court’s authority to oversee the affairs of a municipal debtor. These constitutional concerns are currently reflected by §§ 903 and 904, but these sections embody a legal tradition which pre-dates the Bankruptcy Code.207 The Court’s recent

206 S. Rep. No. 95-989, 112 (1978), reprinted in 16 Resnick, supra note 176 (emphasis added) (alteration in original) (quoting Note, 85 Yale L.J. at 965). Prof. Winograd notes that the Senate Report “mischaracterizes” the cited article. Winograd, 37 Hastings L.J. at 281 (“Rather than a preemption analysis, the commentator proposed using [a] ‘new entity’ theory to justify construction of state laws so that a duty to bargain would continue, but post-rejection maintenance of terms would not be required.’). This criticism is valid but irrelevant. A debtor would not be obliged to maintain pre-rejection contractual obligations on a post-rejection basis under either the commentator’s approach or its characterization by the Senate Report. See Note, 85 Yale L.J. at 973 (“State law would then present no bar to a city’s unilateral alteration of employment terms after rejection.”).

207 McConnell & Picker, 60 U. Chi. L. Rev. at 435, 446.
jurisprudence suggests that constitutional guarantees of state sovereignty are not violated by a municipal debtor’s independent exercise of bankruptcy-specific rights.208

As early as 1884, the Supreme Court had determined that federal courts could not make fiscal determinations on behalf of municipal debtors in City of East St. Louis v. United States ex rel. Zebley.209 In Zebley, the debtor/municipality had been ordered to impose certain taxes and to use the proceeds of those taxes to pay its creditor.210 The Court held that the district court lacked jurisdiction to issue such an order—federal courts could not become the de facto mayors of state municipalities: “[T]he question, what expenditures are proper and necessary for the municipal administration, is not judicial; it is confided by law to the discretion of the municipal authorities. No court has the right to control that discretion, much less to usurp and supersede it.”211

In 1934, Congress enacted its first statute governing municipal bankruptcies in response to the fiscal crises and municipal defaults created by Great Depression.212 The 1934 Act was held unconstitutional on grounds similar to Zebley in Ashton v. Cameron County Water Improvement District No. 1.213 In Ashton, the bankrupt municipality had sought to adjust its pre-

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209 110 U.S. 321 (1884)

210 Id. at 322–23; cf. 11 U.S.C. § 904(1).

211 110 U.S. at 324 (quoted in McConnell & Picker, 110 U. Chi. L. Rev. at 434).


213 298 U.S. 513 (1936).
bankruptcy debts through a reorganization plan authorized by the 1934 Act.\textsuperscript{214} The Court, in a 5-4 opinion written by Justice McReynolds, determined that the Act improperly interfered with the affairs of a sovereign state entity. Specifically, the Act afforded rights to the state entities that would be unavailable outside of bankruptcy:

The especial purpose of all bankruptcy legislation is to interfere with the relations between the parties concerned—to change, modify, or impair the obligation of their contracts. The statute before us expresses this design in plain terms. It undertakes to extend the supposed power of the federal government incident to bankruptcy over any embarrassed district which may apply to the court.\textsuperscript{215}

In the majority’s view, this represented an unconstitutional intrusion into the affairs of a state creature: “[i]f obligations of States or their political subdivisions may be subjected to the interference here attempted, they are no longer free to manage their own affairs; the will of Congress prevails over them.”\textsuperscript{216} Justice Cardozo, writing in dissent, argued that any concerns for state sovereignty were outweighed by both the compelling public interest in permitting municipalities to obtain bankruptcy protection\textsuperscript{217} and the federal government’s Constitutional mandate to create uniform bankruptcy laws.\textsuperscript{218} Justice Cardozo also delivered a strong reminder of the unique place of bankruptcy in the federal system: “To read into the bankruptcy clause an exception or proviso to the effect that there shall be no disturbance of the federal framework by

\begin{itemize}
  \item \textsuperscript{214} Id. at 523–24.
  \item \textsuperscript{215} Id. at 530.
  \item \textsuperscript{216} Id. at 530 (quoted in McConnell & Picker, 60 U. Chi. L. Rev. at 451).
  \item \textsuperscript{217} Ashton, 298 U.S. at 533 (Cardozo, J., dissenting).
  \item \textsuperscript{218} Id. at 534.
\end{itemize}
any bankruptcy proceeding is to do no more than has been done already with reference to the power of taxation by decisions known of all men.”219

By comparison, Justice McReynolds’ logic is “exceptionally weak.”220 The Ashton majority provided no justification for its choice to set aside the Federal government’s constitutional authority to create “uniform Laws on the subject of Bankruptcies throughout the United States”221 in favor of vague notions of state sovereignty. There is no question that a bankruptcy court—as in Zebley—goes too far when it makes policy determinations on behalf of the bankrupt: setting the levels of taxation, determining expenditures, and so forth.222 No such constitutional limits are implicated where a bankruptcy court permits a debtor to exercise its discretion through rights inherent to its bankruptcy petition.223 The difference may be one of degree—but such degrees cannot be overlooked.224

Congress responded to Ashton by enacting a second municipal bankruptcy act in 1937225 (“1937 Act”). The Court was asked to address the constitutionality of the 1937 Act less than a year later in United States v. Bekins.226 Bekins involved a proposed plan of reorganization

219 Id. at 538.


221 U.S. Const. art. I § 8, cl. 4.


223 See id. (“The debtor is vested with its property and is subject to state law concerning its distribution. This Court may not approve or disapprove of its disposition, except in contemplation of plan confirmation.”).

224 Cf. Int’l News Serv. v. Assoc. Press, 248 U.S. 215, 247–48 (1918) (Holmes, J., dissenting) (“It is a question of how strong an infusion . . . is necessary to turn a flavor into a poison.”).


226 304 U.S. 27 (1938).
through which a municipality sought to refinance its pre-petition debts through revenues from
the debtor’s tax authority.227 Certain creditors claimed the Act violated the Fifth and Tenth
Amendments.228

Though the 1937 Act was largely identical to its predecessor,229 Chief Justice Hughes
made it quite clear that rights made available to a municipality in bankruptcy did not offend state
soverignty where those rights were exercised with respect to the debtor’s reorganization:

    The statute is carefully drawn so as not to impinge upon the sovereignty of the
    State. The State retains control of its fiscal affairs. The bankruptcy power is
    exercised in relation to a matter normally within its province and only in a case
    where the action of the taxing agency in carrying out a plan of composition
    approved by the bankruptcy court is authorized by state law.230

Though the majority made no mention of Ashton, the case was clearly overruled in substance if
not in form.231

    When viewed through the spectrum created by Zebley, Ashton, and Bekins, we must
conclude that a bankruptcy court improperly intrudes upon state sovereignty only where it
directly involves itself in the day-to-day operations of the municipality.232 A bankruptcy court
cannot tell a debtor which debts to pay or which streets to sweep. Indeed, a court could not tell a

227 Id. at 45–46.
228 Id. at 46.
229 McConnell & Picker, 60 U. Chi. L. Rev. at 452; Winograd, 37 Hastings L.J. at 272.
230 304 U.S. at 51.
231 See McConnell & Picker, 60 U. Chi. L. Rev. at 452 (“In his argument before the Court, Solicitor General Robert
Jackson all but admitted that the sections of the statute applicable to political subdivisions of the State would be
unconstitutional under Ashton, but quoted a member of Congress to the effect that ‘it was not only the right, but
the duty of Congress to present the question once more to this Court, since the decision, if allowed to stand,
threatened grave impairment to the powers of the States.’” (citation omitted)).
232 See 6 Collier on Bankruptcy ¶ 904.01[2]
debtor which CBA to reject or what type of modifications to seek. But a debtor can exercise all those rights independently.

These Constitutional limitations are presently reflected by the general reservation of power codified at § 903 and the specific provisions at work in § 904. For instance, a bankruptcy court that attempted to make budgetary determinations on behalf of the municipal debtor would clearly violate the constitutional limitations articulated by § 904(2). Indeed, §§ 903 and 904 also ensure that a municipal debtor can maintain profligate spending habits in bankruptcy. A Chapter 11 debtor-in-possession, in comparison, could be divested of such rights through a bankruptcy court’s power to appoint a trustee.

State sovereignty is not implicated where state labor law is displaced by § 365. State labor law holds no special position of Constitutional significance following the Court’s opinion in Garcia. Congress may eliminate the exemption for state employers carved out by § 2(2) of the NLRA or create independent legislation governing the CBAs of state employers.


234 In re Addison Comty. Hosp., 175 B.R. 656, 649 (Bankr. E.D. Mich. 1994) (“The foundation of § 904 is the doctrine that neither Congress nor the courts can change the existing system of government in this country. . . . [C]hapter 9 was created to give courts only enough jurisdiction to provide meaningful assistance to municipalities that require it, not to address the policy matters that such municipalities control.” (internal citations omitted)).

235 See County of Orange, 179 B.R. 195, 200 (Bankr. C.D. Calif. 1995) (holding that § 904(2) bars a court to order debtor to make interim payments to professionals); accord In re Castle Pines North Metro. Dist., 129 B.R. 233, 233 (Bankr. D. Colo. 1991) (noting that it is “fairly obvious” that § 904(2) would be violated if the Court ordered the District to make interim payments to counsel for the Creditors’ Committee since “it would be interfering with the revenues of the District, at least insofar as it could or would affect its cash flow”). But see In re E. Shoshone Hosp. Dist., 226 B.R. 430 (Bankr. D. Idaho 1998).

236 McConnell & Picker, 110 U. Chi. L. Rev. at 462.

237 Id. (citing 11 U.S.C. § 1104(a)).

238 See Section II.B., supra. But see Winograd, at 317–18 (arguing that Garcia should not eliminate discretionary efforts “to reconcile federal bankruptcy law with state negotiating requirements”).
Any attempt to limit a debtor’s rights under § 365 through recourse to state sovereignty must also be viewed through the filing requirements unique to Chapter 9. As noted above, a State must consent to the bankruptcy of its municipality as a condition precedent to the filing. Such a requirement should eliminate any Constitutional objection to a municipal debtor’s rights created by the Bankruptcy Code. This principle was recognized by Bekins:

The bankruptcy power is competent to give relief to debtors in such a plight and, if there is any obstacle to its exercise in the case of the districts organized under state law it lies in the right of the State to oppose federal interference. The State steps in to remove that obstacle. The State acts in aid, and not in derogation, of its sovereign powers. It invites the intervention of the bankruptcy power to save its agency which the State itself is powerless to rescue. Through its cooperation with the national government the needed relief is given. We see no ground for the conclusion that the Federal Constitution, in the interest of state sovereignty, has reduced both sovereigns to helplessness in such a case.

The Court’s recent opinion in Central Virginia Community College v. Katz further suggests that any lingering tension between principles of state sovereignty and federal authority to enact “uniform Laws on the subject of Bankruptcies” should be resolved in favor of the Bankruptcy Code. Katz determined that the Eleventh Amendment did not permit a state to claim sovereign immunity against suits initiated by a bankruptcy trustee. In the Court’s view, ratification of Article I, § 8 effectively waived state sovereignty with respect to the rights and


240 See, e.g., supra note 89 (discussing efforts of Rep. Clay to enact federal legislation governing firefighters).


242 Bekins, 304 U.S. at 54; accord In re Columbia Falls, Special Improvement Dist. No. 25, 143 B.R. 750, 760 (Bankr. D. Mont. 1992) (“Far from interfering with the ability of the state of Montana to control its municipalities, it is concluded Montana has affirmed that its municipalities may avail themselves of the benefits of the federal bankruptcy process, including the modification and termination of these sorts of debts, and such does not interfere with the power of the State of Montana to control a municipality or in the exercise of the political or governmental powers of such municipality.”).

privileges created by federal bankruptcy law. “In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the in rem jurisdiction of the bankruptcy courts.”

It is difficult to see how the Bankruptcy Clause limits an affirmative defense of sovereign immunity, yet concerns for sovereignty could preclude a municipality (authorized by the state to file for bankruptcy) from exercising rights created under that same Clause. By permitting a municipality to file for bankruptcy, state law must yield to the rights created by virtue of the bankruptcy.

V. Conclusion

As noted at the outset, the absence of a well-defined body of law regarding collective bargaining agreements in municipal bankruptcy leaves serious questions as to how such agreements will be treated. This article has attempted to answer some of those questions. Outside of bankruptcy, federal law grants parties significant latitude to bring tools of economic warfare to bear on the collective bargaining process. In contrast, state law may impose significant restrictions on a public sector employer’s ability to modify or reject such agreements. However, state labor law holds no position of special constitutional status. Congress remains free to subject the field of state labor law to a federal regime such as the NLRA when and if it chooses to do so.

244 126 S. Ct. at 1005.

245 6 Collier on Bankruptcy ¶ 903.02[4] (“If a state has specifically authorized a municipality to file under chapter 9, that authorization should be construed as an expression of state policy that the benefits of chapter 9, and the application of the substantive provisions of chapter 9, are more important than any restriction on State law that might arise by reason of application of chapter 9.”).

246 Ashton, 298 U.S. at 535 (Cardozo, J., dissenting) (“The history [of bankruptcy] is one of an expanding concept. It is, however, an expanding concept that has had to fight its way.”).
Inside of bankruptcy, the landscape is changed. Collective bargaining agreements are executory contracts and subject to assumption or rejection. Congress enacted § 1113 of the Bankruptcy Code in order to mollify Labor-specific hardships that might have arisen from the Court’s opinion in Bildisco. This provision has authorized bankruptcy judges to play an active role in the negotiated process that now characterizes the treatment of collective bargaining agreements in bankruptcy. But Congress has not incorporated § 1113 into Chapter 9. Hence, a municipal debtor’s decision to reject collective bargaining agreements is governed by § 365 and the standard promulgated by Bildisco. Constitutional concerns or vague overtures to legislative purpose do not create any role for state law within the rights available to a Chapter 9 debtor under the Bankruptcy Code.

Of course, this analysis does not consider the massive political or social pressure that will inevitably bear down on a judge asked to terminate the contractual rights of policemen, teachers, firefighters, or nurses. A judge may be tempted to depart from the letter of the law and “do equity” under a doctrine of a necessity. In this manner, a debtor’s rights under § 365 could be curtailed either by denying rejection entirely or by forcing compliance with state law in the event of rejection. As this article has shown, this sort of equitable impulse lacks a sound legal basis.

More importantly, the equities inherent to Chapter 9 are unlikely to favor union representatives and their beneficiaries. Generous wage, benefit, and pension packages obtained


248 See, e.g. N.Y. Civ. Serv. Law § 209-a(1)(e) (requiring employer to maintain existing contractual terms in event a CBA is terminated).

249 Cf. In re Kmart Corp., 359 F.3d 866, 871 (7th Cir. 2004) (“A doctrine of necessity is just a fancy name for a power to depart from the Code.”).
by municipal unions may be the efficient cause of a bankruptcy. Alternatively, collective bargaining modifications may be the most economical means through which a municipality might regain financial health. Regardless, it cannot be forgotten that the Chapter 9 debtor is comprised of more than municipal unions and their officers. Municipal corporations do not exist to serve their employees. Municipal corporations exist to serve their citizens. The true stakeholders in Chapter 9 are the citizens who live, work, or depend on essential services from the municipality at issue. Any decision governing rejection of the collective bargaining agreements of a municipal debtor should be guided by this fact.
Appendix


(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall--

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that--

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time
for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.
Mr. Hruska: The conference report and statement of managers are silent on the rejection of a collective bargaining agreement by a municipality. Could you explain the intent of the legislation in that regard?

Mr. Burdick: Yes. The Senate report in its version of the bills makes this clear on page 15. The house report has similar language on pages 8–9. The bill provides in section 82(b)(1) that the court shall have the power to permit the rejection of executory contracts by the petitioner. It is contemplated that all continuing obligations of the petitioner including collective bargaining agreements will be considered executory contracts.

Mr. Hruska: But does not the House report imply that local laws, such as those governing the negotiation and renegotiation of collective bargaining laws, might apply in such a case.

Mr. Burdick: I am familiar with the language to which you refer. To use an example, it is my understanding that some States have laws which require the negotiation or renegotiation in good faith of all collective bargaining agreements . . . . It is the intent of this legislation that any such laws should not be allowed to frustrate the purposes of the bankruptcy proceedings.”

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Mr. Burdick: In any case where the labor laws conflict with the powers of the petitioner under this Act, it is the intent of the legislation that the Federal, State, and local labor laws should be overridden . . . I want to make it clear that [the bankruptcy court] will not be obligated to follow state or local law in that regard.

*   *   *   *