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C. Scott Pryor
Campbell University School of Law

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Who Bears the Burden? The Place for Participation of Municipal Residents in Chapter 9

C. SCOTT PRYOR*

ABSTRACT

Confirmation of a municipal Chapter 9 plan of adjustment should take the views of municipal residents into account on the issue of a plan's feasibility. State constitutional and statutory resources must be consulted to determine the baseline of services that must be addressed to evaluate a plan's feasibility. Although courts have not addressed the issue of residents' standing, the question should be answered in the affirmative. The confirmation requirement of feasibility provides the substantive basis for standing, while the relaxed requirements for an Article I tribunal provide the constitutional justification for the standing of residents. The diffuse and nonpecuniary nature of the interests of residents in municipal services warrants the appointment of an official committee on their behalf.

INTRODUCTION

Recent high-profile Chapter 9 bankruptcies like Detroit's and Stockton's have featured contested hearings on confirmation.¹ The confirmation hearings for these cities have been highlighted by battles among groups of creditors, particularly ones between retirees (or their proxy) with their pension claims, and bondholders with their unsecured

* Professor of Law, Regent University School of Law. J.D. 1980, University of Wisconsin Law School. M.A. 1997, Reformed Theological Seminary. I wish to thank Craig Stern, David Wagner, and Tessa Dysart for their valuable insights and suggestions, and the *Campbell Law Review* for sponsoring its symposium on municipal bankruptcy. I also wish to thank William Magee and Kylene Kafer for their research and editorial assistance. The final expression is, of course, mine alone.

1. See Michael Bathon et al., *Stockton's Pension-Protecting Bankruptcy Plan Approved*, BLOOMBERG (Oct. 30, 2014, 5:51 PM), <http://www.bloomberg.com/news/2014-10-30/stockton-california-wins-court-approval-of-bankruptcy.html>; Lisa Lambert, *Detroit Trial Ends, Judge to Rule Nov. 7 on Bankruptcy Plan*, REUTERS (Oct. 27, 2014, 7:39 PM), <http://www.reuters.com/article/2014/10/27/us-usa-detroit-bankruptcy-idUSKBN0IG22Q20141027>.

debt.² The confirmation standards of creditors' best interests, fair and equitable treatment of creditors, and no unfair discrimination among creditors have figured prominently.³

An additional across-the-board criterion exists for confirmation of a Chapter 9 plan: the plan must be feasible.⁴ Unlike the comparable provision in Chapter 11 of the Bankruptcy Code,⁵ Chapter 9 does not define feasibility. This Article demonstrates that feasibility should be considered from two perspectives: revenue feasibility and service feasibility. Revenue feasibility looks to a municipality's projected income—i.e., will there be enough tax and other revenues to make the plan's promised payments? This aspect of feasibility warrants participation by taxpayers in the confirmation process.⁶ Taxpayers are well situated to provide information on a city's managerial slack and on the extent to which projected tax revenue is likely to be collected.⁷ The narrow focus of revenue feasibility also warrants formation of a committee of taxpayers whose expenses will be borne by the debtor city.⁸ The pecuniary stake of taxpayers in the implementation of most Chapter 9 plans affords them standing under Article III of the Constitution.⁹

2. See Steven Church, *Calpers No Better Than Bondholders in Stockton Bankruptcy*, BLOOMBERG (Oct. 2, 2014, 12:01 AM), <http://www.bloomberg.com/news/2014-10-01/calpers-denied-special-protection-in-stockton-bankruptcy.html>.

3. See generally C. Scott Pryor, *Municipal Bankruptcy: When Doing Less is Doing Best*, 88 AM. BANKR. L.J. 85 (2014) [hereinafter Pryor, *Municipal Bankruptcy*] (analyzing potentially irreconcilable requirements of fair and equitable treatment, no unfair discrimination, and best interests for cramdown of a Chapter 9 plan of adjustment).

4. 11 U.S.C. § 943(b)(7) (2012) ("The court shall confirm the plan if . . . the plan is in the best interests of creditors and is feasible.").

5. *Id.* § 1129(a)(11) ("The court shall confirm a plan only if . . . [c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor . . .").

6. See generally C. Scott Pryor, *Who Pays the Price? The Necessity of Taxpayer Participation in Chapter 9*, 24 WIDENER L.J. 81, 98–109 (2015) [hereinafter Pryor, *Who Pays the Price?*] (demonstrating the need for taxpayer standing on the issue of feasibility).

7. *Id.* at 96–97.

8. See *id.* at 109–10 ("A committee of taxpayers, however, whose fees and expenses will be borne by the estate, will be able to rebut a one-sided feasibility analysis presented by a municipality and supporting creditors.").

9. U.S. CONST. art. III, § 2, cl. 1; see also Pryor, *Who Pays the Price?*, *supra* note 6, at 102–04. Pryor explains:

Where a Chapter 9 plan proposes to increase taxes, taxpayers clearly have the requisite imminent concrete injury that can be redressed by the bankruptcy court. Even in cases where the plan does not propose a tax increase, the collective nature of the proceeding combined with the forward-looking standard of feasibility points to recognition of taxpayers as parties in interest.

Service feasibility asks whether the services provided by the city following confirmation of its plan will be adequate for its residents. Adjudication of service feasibility is more challenging than any other criterion for confirmation. The baseline of services that residents are entitled to expect is uncertain, and the extent of services that will be provided following confirmation for years into the future is unclear. While states regularly provide their cities with a variety of powers, they do not provide a comparable list of municipal duties. Nor does the Bankruptcy Code. In addition, the extent of municipal services following confirmation depends on a variety of factors that cannot be known at the time of confirmation. This raises several questions: Will the municipal government have the skill and long-term political will to implement the plan in the face of economic and democratic challenges? Will the needs of municipal residents stay the same? Will municipal revenue remain adequate for those needs?¹⁰

City residents should be heard on service feasibility. Residents are parties in interest on this issue, even though they may not be able to point to an impending pecuniary loss. They are nonetheless among the stakeholders who will bear the burden of a city's insolvency. The standing of municipal residents finds warrant in the notion that the bankruptcy discharge is a public right.¹¹ Moreover, the significance of service feasibility, its inexact baseline, its future uncertainty, and the diffuse nature of city residents make it appropriate to appoint an official committee on their behalf.¹² The limitations within Chapter 9 with respect to interference with municipal governance limit the issue on which a residents' committee has standing to service feasibility alone. Within that limit, however, the debtor municipality should bear the expenses of its committee of residents.

This Article proceeds in three parts. Part I identifies the resources by which to identify the baseline of services that a city must provide. Without such a baseline, feasibility is a moving and uncertain target. Part II addresses a bankruptcy court's jurisdiction to consider the nonpecuniary interests of residents. The interests of municipal residents may not satisfy the Article III case-or-controversy requirement.¹³ Confirmation of a Chapter 9 plan, however, is a public right.¹⁴ As an Article I tribunal, a bankruptcy court may legitimately consider the concerns of a wide range of

Id. at 104 (footnotes omitted).

10. *See infra* notes 34–74 and accompanying text.

11. *See infra* notes 80–127 and accompanying text.

12. *See infra* notes 128–32 and accompanying text.

13. *See* U.S. CONST. art. III, § 2, cl. 1; *see also infra* notes 119–27 and accompanying text.

14. *See infra* notes 91–118 and accompanying text.

parties in interest whose Article III standing might be questioned, including municipal residents. Finally, Part III of this Article turns to the form and extent of participation by residents. Residents should be represented by an official committee whose expenses are paid by the municipality. Consistent with the limits on the authority of bankruptcy courts,¹⁵ however, the scope of the committee's input must be limited to feasibility and not extend to interference in the political or governmental powers of the city.

I. THE FEASIBILITY BASELINE

A. *The Limits of Chapter 9*

Chapter 9 explicitly limits the powers of a bankruptcy court in the administration of a municipal bankruptcy. In deference to the Tenth Amendment, § 904 of the Bankruptcy Code¹⁶ provides that the court may not interfere with any political or governmental powers of a city in bankruptcy.¹⁷ Section 903, in turn, locates in the state the power to define the “political or governmental powers” of its municipalities.¹⁸ Thus, a municipal plan cannot be confirmed if it falls short of what a state prescribes for the baseline of services to residents. Conversely, the bankruptcy court cannot substitute its judgment for state law when it comes to the extent of those services. Thus, this Article first examines what services states generally prescribe for their municipal subdivisions, and then identifies heuristics by which the adequacy of those services can be evaluated.

B. *Drilling Down on Municipal Services*

The concept of service-delivery insolvency (or simply “service insolvency”) is of recent vintage in Chapter 9 analysis. It first appeared in Judge Christopher Klein’s opinion on the eligibility for Chapter 9 relief of

15. 11 U.S.C. § 903 (2012) (“This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality . . .”).

16. *Id.* § 904.

17. *Id.* § 904(1); see also Pryor, *Who Pays the Price?*, *supra* note 6, at 83 (“[S]ection 904 of the Bankruptcy Code bars a bankruptcy judge from interfering with the ‘political or governmental powers’ of a municipality.” (quoting 11 U.S.C. § 904(1))). Section 904 also prohibits a court from interfering with “the property or revenues of the debtor,” or “the debtor’s use or enjoyment of any income-producing property.” 11 U.S.C. §§ 904(2)–(3).

18. 11 U.S.C. § 903.

the City of Stockton.¹⁹ Section 109(c)(3) of the Bankruptcy Code makes insolvency a requirement of Chapter 9 relief.²⁰ Even though the Code defines “insolvent” in purely financial terms,²¹ Judge Klein held that “the degree of inability to fund essential government services (service delivery insolvency) also inform[s] the trier of fact’s assessment of the relative degree and likely duration of cash insolvency.”²² He went on to conclude that Stockton was experiencing service insolvency.²³

Service insolvency was also one of the benchmarks on which Judge Steven Rhodes relied when he concluded that Detroit was eligible for Chapter 9 relief.²⁴ Judge Rhodes tied the notion of service insolvency to the second of the alternative tests for municipal insolvency: whether a municipality “is unable to pay its debts as they become due.”²⁵ He concluded that the test is prospective and requires consideration of whether a municipality “has sufficient resources to maintain services for the health, safety, and welfare of the community.”²⁶ Examples of Detroit’s inability to fund such services included the presence of many nonworking streetlights, multiple abandoned and blighted structures, delayed police-response times, lack of maintenance of fire-department vehicles, closed municipal parks, and obsolete information-technology systems.²⁷

While these things are no doubt of enormous significance to a city’s residents, its failure to address such problems is not evidence of a city’s inability to pay debts as they become due. Unperformed municipal services are not debts. For bankruptcy purposes, a debt is a liability on a

19. See *Stockton V*, 493 B.R. 772, 781 (Bankr. E.D. Cal. 2013) (defining “service delivery insolvency” as “a municipality’s inability to pay for all the costs of providing services at the level and quality required for the health, safety, and welfare of the community”). For a fuller analysis of this opinion, see Pryor, *Municipal Bankruptcy*, *supra* note 3, at 96.

20. 11 U.S.C. § 109(c)(3).

21. *Id.* § 101(32)(C) (“The term ‘insolvent’ means . . . with reference to a municipality, financial condition such that the municipality is[] (i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or (ii) unable to pay its debts as they become due.”).

22. *Stockton V*, 493 B.R. at 789.

23. *Id.* at 789–90 (pointing to evidence of a reduction in the number of police officers and an increase in crime).

24. *In re City of Detroit*, 504 B.R. 191, 263 (Bankr. E.D. Mich. 2013) (“The evidence established that there are many, many services in the City which do not function properly as a result of the City’s financial state. . . . [T]he city was in a state of ‘service delivery insolvency’ as of July 18, 2013, and will continue to be for the foreseeable future.”).

25. *Id.* (quoting 11 U.S.C. § 101(32)(C)(ii)).

26. *Id.* at 262 (citing *Stockton V*, 493 B.R. at 789).

27. *Id.* at 213–15.

claim,²⁸ and the failure to deliver municipal services is not a claim.²⁹ In other words, a city's failure to provide services will very rarely give a resident a legal or equitable remedy against the city or its officeholders.³⁰ Nothing short of a claim can function as a measure of insolvency.

"Service insolvency" is a useful metaphor, but it is not a standard that should be used to evaluate a city's eligibility for bankruptcy relief. The definition of "insolvent" in the Bankruptcy Code is purely financial,³¹ and there is no need to add a nonstatutory element to the multiple factors that the Code requires for Chapter 9.³² Notwithstanding the irrelevance of service insolvency at the eligibility stage, it can prove crucial when it

28. 11 U.S.C. § 101(12) ("The term 'debt' means liability on a claim.").

29. *See id.* § 101(5). The statute provides that the term "claim" means:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Id.

30. *See* OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW 842–44 (3d ed. 2009) (describing limited circumstances where a court may issue a writ of mandamus to compel performance of a municipal duty).

31. *See* 11 U.S.C. § 101(32)(C)(ii).

32. *See id.* § 109(c). Section 109(c) provides that an entity may be a debtor under Chapter 9 "if and only if such entity":

(1) is a municipality;

(2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;

(3) is insolvent;

(4) desires to effect a plan to adjust such debts; and

(5) (A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(C) is unable to negotiate with creditors because such negotiation is impracticable; or

(D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

Id.

comes to the time of confirmation of the plan.³³ To keep the notions distinct, what has been labeled as “service insolvency” at the eligibility stage of a Chapter 9 case will be called “service feasibility” when applied at the time of confirmation.

1. *Political Resources for Defining Municipal Duties*

Unless municipalities have duties to residents within their jurisdictions, there are no services to which the concept of service feasibility can attach, even at the confirmation stage of a Chapter 9 plan. While the extent of municipal *powers* has been discussed extensively by the judiciary and the academy,³⁴ there has been virtually no analysis of municipal *duties*.³⁵ If the concept of service feasibility is a chimera, it provides no more than a trope for the desires of civic activists. A concept of service feasibility untethered to state law would effectively empower the court to interfere with the governmental and political powers of a municipality. Moreover, if service feasibility has no legal content, it would follow that it should not be part of the plan-confirmation analysis. Political justification for the imposition of duties on American cities, and thus, service feasibility, must therefore be sought in the texts and practices of the American legal tradition.

The American political system has historically eschewed providing a foundation for positive rights. Beginning with the United States Constitution, there is little warrant for a federal constitutional baseline for municipal services.³⁶ Contemporary Supreme Court jurisprudence has found no constitutional basis for positive duties of states or their subdivisions to their individual citizens or residents.³⁷ Even high levels of

33. See *infra* notes 119–27 and accompanying text.

34. See REYNOLDS, *supra* note 30, at 167–71 (collecting cases and discussing municipal powers in terms of the famous Dillon’s Rule).

35. Michelle Wilde Anderson is not alone in her conclusion that “it [is] surprising to report that neither Chapter 9 case law nor state law regulations or guidelines define legally adequate [municipal] service levels.” Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1194 (2014).

36. See EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES* 4 (2013) (“While many prominent political figures, including several U.S. presidents, have argued on behalf of positive rights, few (and arguably no) positive-rights claims have ever changed either the U.S. Constitution’s text or the Supreme Court’s interpretation of it.”).

37. See *generally* *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 191 (1989) (articulating the doctrine of positive state action in United States constitutional law and holding that a victim of child abuse did not have a cognizable claim because state and local government agencies were not required to protect the victim from private violence that was not brought about by the conduct of the state’s own personnel). The result would be the same under the common law of most states by virtue of the public-duty doctrine. See,

race-based discrimination in the provision of municipal services do not violate the constitutional right to equal protection of the laws.³⁸ The reticence to constitutionalize municipal duties is not surprising, since the United States Constitution is generally void of entitlements.³⁹ Without explicit entitlements, an alternative resource for constitutional affirmative rights would be their implication from the Constitution's procedural and negative rights. It seems clear, however, that the complex and highly politicized challenges of implying positive rights from negative ones and then policing municipal inaction makes the Constitution an inappropriate resource from which to derive rights to particular municipal services, and is equally unsuited as a baseline for service feasibility.⁴⁰

Federal legislation might seem to be a more fruitful resource for deriving duties of local government.⁴¹ Yet even here, where federal-local relations are intertwined,⁴² few federal statutes set standards for municipal services as such, apart from conditions attached to receipt of federal funds. Federal statutory and regulatory regimes—apart from spending programs—are largely limited to enforcing national commercial or environmental standards or vindicating existing rights.⁴³ Federal spending programs

e.g., *Leone v. City of Chi.*, 619 N.E.2d 119, 121 (Ill. 1993) (“The courts of this State have held as a matter of common law that municipalities are generally not liable for failure to supply police or fire protection” (citing *Huey v. Town of Cicero*, 243 N.E.2d 214, 216 (Ill. 1968))).

38. *See, e.g.*, *City of Mobile v. Bolden*, 446 U.S. 55, 68–70 (1980).

39. *See* Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L.J. 1133, 1148 (2014) (citing Frank I. Michelman, *The Protective Function of the State in the United States and Europe*, in EUROPEAN AND US CONSTITUTIONALISM 156, 161–62 (Georg Nolte ed., 2005) (contrasting the state-action doctrine in the United States with notions of protective duties in Europe)).

40. *See* Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1200 n.17 (2014) (“Scholars and judges seem to understand the general difficulty of policing ubiquitous inaction, the complexity of identifying workable baselines, and the inevitability of resource constraints.”).

41. *See* Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 960 (2007) (“[D]irect relations between the federal government and local governments . . . play a significant role in areas of contemporary policy as disparate as homeland security, law enforcement, disaster response, economic development, social services, immigration, and environmental protection”).

42. *See* Richard C. Schragger, *Democracy and Debt*, 121 YALE L.J. 860, 877 (2012) (“States and cities are not even remotely fiscally autonomous Intergovernmental transfers and direct federal outlays to state and local governments . . . are the norm in our federalism.”).

43. *See* Davidson, *supra* note 41, at 969 (“[F]ederal law—constitutional and statutory—provides baseline standards of fairness and equality that bind local government actors.”).

channeled through local governments have an enormously varied reach.⁴⁴ Federal statutes do not, however, identify across-the-board levels of service entitlements, and they are typically implemented through a kaleidoscope of state and local legal regimes.⁴⁵

State constitutions prove a sturdier basis for municipal duties. As Emily Zackin demonstrates, “[s]tate constitutions contain a plethora of positive-rights provisions that cover a wide range of topics.”⁴⁶ Among the most frequently included is the right to a free public education.⁴⁷ More unexpectedly, many state constitutions contain a variety of labor rights, such as “the right to an eight-hour day, a minimum wage, and protection from blacklisting practices and private armies.”⁴⁸ Other labor-oriented positive state constitutional rights include laborer’s liens, weakening of employer defenses to liability for workplace injuries, and, of course, workers’-compensation systems.⁴⁹ More recently, some state constitutions have been amended to encompass a duty to protect the environment.⁵⁰

State statutes regularly go beyond constitutional mandates to require local governments to implement building codes, sanitation systems, and other matters.⁵¹ After canvassing these resources, Michelle Anderson ultimately concludes that, notwithstanding insolvency, municipal residents, as a class, are generally “entitled to have a 911 emergency system that dispatches police officers and firefighters, along with solid waste pick up, wastewater treatment, and other basics.”⁵² Analyzing these core functions, she derives three principal purposes of municipalities, which, in turn,

44. *Id.* at 971–73 (listing as areas of “cooperative localism” fields including homeland security, criminal justice, immigration, education, employment, housing, economic development, telecommunications, transportation, and environmental protection).

45. See Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 146 (2009) (“Although federal constitutional law nominally serves as the nation’s connecting sinew, its application . . . hinges on state and local legal norms, which are highly variable and create a functionally irregular rights regime.”).

46. ZACKIN, *supra* note 36, at 11.

47. See *id.* at 67–105 (discussing the inclusion of education rights in state constitutions).

48. *Id.* at 108.

49. *Id.* at 110–19.

50. *Id.* at 147 (“During the 1960s and 1970s . . . state constitutions came to include broad rights to environmental health and protection.”).

51. See, e.g., Frank Swindell, Note, *Municipal Liability for Negligent Inspections in Sinning v. Clark—A “Hollow” Victory for the Public Duty Doctrine*, 18 CAMPBELL L. REV. 241, 242 n.4 (1996) (describing a lack of local liability for failure to enforce state-mandated building codes).

52. Anderson, *supra* note 35, at 1195.

warrant services by which they can be implemented.⁵³ Those purposes are: “(1) to provide or facilitate services; (2) to hold land and property in the public interest; and (3) to regulate for public health, safety, and welfare.”⁵⁴ Anderson then identifies sets of specific duties to effect these purposes. Thus, under the broad rubric of services, she finds a mandate to provide those services “most vital to the preservation of life (police, fire, sanitation, public health), liberty (police, courts, prosecutors), property (zoning, planning, taxing), and public enlightenment (schools, libraries).”⁵⁵ Provision of infrastructure and public spaces are duties that pertain to the second purpose of local government—to hold land and property in the public trust.⁵⁶ The third purpose entails regulation by means of the traditional police powers.⁵⁷ Whether residents enjoy additional state-specific rights would involve close examination of the statutes of each state, a task beyond the scope of this Article.

Some might recoil from having such a meager list of positive rights function as the baseline of feasibility in a municipal Chapter 9 case. For some, the nature of modern urban life calls for more than the provision of such a minimal range of municipal services. For example, municipal services such as museums and entertainment venues do not fit neatly into Anderson’s list of municipal duties. Nevertheless, in addition to this brief canvass of state law, public-choice theory also supports a relatively narrow understanding of municipal duties, at least under the circumstance of municipal insolvency.⁵⁸

Charles Tiebout provided one of the first accounts of the appropriate scope of the obligations of municipal government from an economic perspective. In short, Tiebout argued, municipal government exists to provide local public goods.⁵⁹ What constitutes public goods is thus at the center of the baseline of municipal duties and the service aspect of feasibility in Chapter 9. Tiebout succinctly defined a public good as “one which should be produced, but for which there is no feasible method of

53. *Id.* at 1158.

54. *Id.*

55. *Id.* at 1159 (quoting ROBERT L. LINEBERRY, EQUALITY AND URBAN POLICY 10 (1977)).

56. *Id.*

57. *Id.*

58. *See id.* at 1195 (“Without resting on either extra-legal natural rights or affirmative, positive rights articulated in constitutional text, Americans do seem to have legally defensible, affirmative rights to basic local services in the context of insolvency law.”).

59. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417 (1956) (“The consumer is, in a sense, surrounded by a government whose objective it is to ascertain his wants for public goods and tax him accordingly.”).

charging the consumers.”⁶⁰ In other words, public goods are goods (including services) for which there is demand but which will not be supplied due to market failure. The potential for market failure in the context of municipal services comes primarily in the form of “free riders” who would receive the benefits of services without payment.⁶¹ The failure of the market to deliver goods for which providers cannot be assured of payment (or the power to exclude those who do not pay) justifies their provision by government supported by the power to tax. Roads are an example of public goods. Without a guarded toll gate at the end of every driveway, there is no way to charge users for the good of a municipal street. Public-choice theory thus provides a justification for taxing all residents for creating and maintaining roads. Defining public goods in terms of market failure might produce a feasibility baseline that is even smaller in scope than what can be derived from state law. It is unlikely to be significantly larger.⁶² Thus, an assertion that feasibility includes a panoply of services in addition to the legal minimum bears a heavy burden of proof.

Drawing on the bricolage of resources described above, bankruptcy courts can identify the baseline necessary to find a plan feasible from the perspective of municipal services. Feasibility requires judicial evaluation of projected postconfirmation municipal expenditures for matters addressed in the state’s constitution and legislation. For aspects of other commonly provided municipal services, the court should take care to find their warrant in the state’s legal tradition of public health, safety, and welfare—the historical implementation of the police powers. If the court can find no

60. *Id.*

61. See Clayton P. Gillette, *Equality and Variety in the Delivery of Municipal Services*, 100 HARV. L. REV. 946, 957 (1987) (reviewing CHARLES M. HAAR & DANIEL W. FESSLER, *THE WRONG SIDE OF THE TRACKS* (1986)) (explaining that a “‘free rider’ problem” exists when “those who make capital contributions towards these services cannot efficiently exclude noncontributors from receiving substantial benefits”). In addition to the free-rider problem, Gillette provides two reasons for market failure: cases where early users would pay a disproportionate share of the initial cost of an improvement that provides a good whose subsequent marginal cost is low (e.g., public water works), and cases where the cost of enforcement of exclusion of free riders is disproportionately high. *Id.*

62. *Id.* at 960. Gillette explains:

Street paving, street lighting, sewage treatment, garbage collection, as well as monopolies ranging from local transportation to electric utilities, do not fall within the domain of local government solely from tradition. Rather, these became “traditional” local government functions because, left to the private market, they were susceptible to undersupply (for social goods) and oversupply (for social bads).

Id.

warrant other than an accretion of services procured by effective rent seekers, no legal duty to continue their provision exists. In other words, if there is no legal justification for a particular municipal service, the city should not continue to provide the service if it has sought bankruptcy protection. Once the baseline of municipal services has been identified, additional resources must be consulted for standards by which to measure their adequacy.

2. *How Much Risk Must Be Borne?*

Evaluating the extent of the financial commitment for municipal duties is even more problematic than identifying them. Standing alone, the duty to provide a particular municipal service does little to determine its adequacy, especially when a city is insolvent. A duty to provide a particular service does not entail its fiscal extent. In other words, how many dollars should a municipality's plan project for satisfying residents' entitlements for a plan to be feasible?⁶³ Payment of less than the full amount of creditors' claims justifies a concomitant sharing by municipal residents in the risk of insolvency. Like claims of creditors to payment, municipal residents are exposed to a risk of reduction in services. Yet it is possible that reductions in municipal services *before* bankruptcy have already exposed residents to more than their share of the risk of insolvency. In any event, by what standard can a court measure such an obligation to share in the risk of insolvency?

Michelle Anderson offers a set of heuristics to identify "locally appropriate priorities and values."⁶⁴ Although Anderson may understand these heuristics to provide a source for the baseline of municipal duties, they function better as a tool by which to measure the adequacy of the provision of municipal services. While a state's legal tradition answers the question of *what* duties are owed, other resources tell us *how much*. There is no rule of law by which to measure the precise allocation of limited municipal resources among the legal duties that remain to a city in Chapter 9. Heuristics⁶⁵ are the only means by which to assess proposed spending

63. See *In re Mount Carbon Metro. Dist.*, 242 B.R. 18, 34 (Bankr. D. Colo. 1999) ("[T]here is no purpose in confirming a Chapter 9 plan if the municipality will be unable to provide future governmental services. . . . [D]etermination of the feasibility of the plan covers both repayment of pre-petition debt and future services.").

64. Anderson, *supra* note 35, at 1195–96 ("[H]ow can courts or receivers monetize what current residents need and what assets they are entitled to hold for their long-term fiscal health? . . . Instead of attempting to answer this question comprehensively, I offer a set of heuristics for judges, receivers, and citizens to use . . .").

65. A heuristic has been described as a conceptual tool characterized by "non-algorithmic, efficient, error-based, purpose-oriented, problem-solving tasks." Jordi Cat, *The*

on municipal services.⁶⁶ Even though their application may not result in a specific dollar amount, heuristics can frame the analysis and provide standards other than the court's conscience by which to analyze service feasibility.⁶⁷

The resources identified by Professor Anderson begin with a basic efficiency concern: service provision cannot be reduced to the point that tax revenue decreases.⁶⁸ For example, if less expenditures for law enforcement would entail more crime, and if more crime would cause more residents to flee, it follows that the tax revenues would decrease, causing a decrease in payments to creditors. Service feasibility blocks implementation of such a downward spiral. Expenditures to the extent necessary to enforce building codes and state-law warranties of habitability, as well as other matters related to public health and safety, such as streetlights, are certainly warranted.⁶⁹ Provision for funding the legally identified baseline must be sufficient to ensure that the baseline is achieved. Public expenditures to eliminate urban blight and bring the conditions of older neighborhoods to the standard of contemporary land-use laws may also be considered to evaluate the funding of municipal services.⁷⁰ Similarly, comparison to the collective bargaining agreements of comparable cities and regional and statewide average expenditures by category of service will be useful for the

Unity of Science, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., Winter 2014 ed.), <http://plato.stanford.edu/archives/win2014/entries/scientific-unity/>.

66. Resources for Anderson's heuristics include efficiency and economic perspectives; recognition of a warranty of habitability for neighborhoods; land use and subdivision laws; building codes; environmental regulation; collective bargaining agreements; regional and statewide average service levels; best practices in neighborhood stabilization; and educational adequacy debates. See Anderson, *supra* note 35, at 1196–1205.

67. See *id.* at 1195–96 (“This inquiry presents an opportunity to put social contract theory into action—a chance to explore and define the terms on which society expects government to provide services and protection in exchange for individuals’ obedience to the state.”).

68. *Id.* at 1196 (“Up to a certain point, services are in both creditors’ and residents’ interests, because they can protect (or even increase) the property values used as the basis for property tax assessments . . .”).

69. *Id.* at 1197–98.

70. *Id.* at 1200. As Anderson explains,

For instance, if a city requires one streetlight per fifty feet of sidewalk in a new subdivision of single-family homes, that figure can provide a starting point for a [bankruptcy court] to define the street lighting budget in an existing neighborhood funded in the city’s bankruptcy plan. In other words, how much money does the city need to get that number of streetlights operational again?

Id.

spending side of feasibility.⁷¹ Use of such heuristics is necessary to avoid substituting the court's predilections for those of the political process.

Especially with the evaluation of the extent of funding for a city's duties, the bankruptcy court risks running afoul of the limits on its powers. Section 903⁷² of the Bankruptcy Code reserves the power of state government to control a municipality's governmental powers. To the extent a state has not mandated a particular level of funding for municipal services—as most have not—a city's plan is free to project funding for services as it chooses, but the extent of that funding remains relevant to the plan's feasibility. Excessive funding, even for baseline services, is not in the best interests of creditors. Inadequate funding is not feasible. Confirmation of a plan at either extreme is not warranted.

Section 904 of the Bankruptcy Code⁷³ also presents an impediment to treating funding of municipal services as an element of feasibility. The bankruptcy court cannot order a decrease or increase in spending on services within the legally required services. The court can, however, refuse to confirm a plan which over- or under-funds those services.⁷⁴ Constitutional and congressional limits on a bankruptcy court's powers conflict with the same court's duty to evaluate a plan's feasibility. While the court must be careful not to intrude into matters left to the states, it cannot shirk its duty to evaluate a plan's feasibility.

C. *The Limits of the Confirmation Process*

A principal foundation of a plan of adjustment is its projections of the future. Distributions to creditors are generally fixed at the time of confirmation, but the sources of payment—whether from tax revenues or transfers from other levels of government—are only projections. So, too, are the levels of future municipal services and their costs. The unfolding of the infinite variety of eventual contingencies makes problematic even the best projection of future municipal expenditures.

Notwithstanding the vagaries in the fortunes of a postconfirmation city, it remains the most important governmental locus in the lives of its

71. *Id.* at 1202–03. For additional heuristics, see *id.* at 1204–05.

72. 11 U.S.C. § 903 (2012).

73. *Id.* § 904.

74. See, e.g., *Fano v. Newport Heights Irrigation Dist.*, 114 F.2d 563, 565 (9th Cir. 1940) (reversing confirmation of a Chapter 9 plan where the debtor failed to utilize substantial unencumbered assets for the benefit of the creditors); see also Pryor, *Municipal Bankruptcy*, *supra* note 3, at 125 (arguing that courts should hold out credible threats of dismissal to force creditor constituencies to compromise).

residents.⁷⁵ The inability to project with certainty the adequacy of funding for baseline services should limit the bankruptcy court's evaluation of their feasibility to the near term only. Built-in increases, however, should be eschewed, because changes in funding should be addressed through the postconfirmation political process. Indeed, a confirmation order binding future city governments to spending increases would cross the line set by § 904 of the Bankruptcy Code. The court may no more interfere with the governmental powers postconfirmation than during the pendency of the case.⁷⁶ Plans that automatically implement increases in spending for municipal services should not be confirmed. The postconfirmation political process—not an order confirming a Chapter 9 plan—provides the appropriate means by which to increase spending.

II. FEASIBILITY JURISDICTION

Municipal residents have legitimate expectations of their city.⁷⁷ Municipal residents are stakeholders when it comes to provision of municipal services, even if those services are no more than the implementation of state-mandated entitlements. Yet, because municipal residents are not creditors, they have no right to vote on a plan. Taxpayers also are not municipal creditors, but they arguably have standing nonetheless.⁷⁸ Taxpayers have a sufficiently concrete interest to object to a plan's feasibility,⁷⁹ but what of residents who may not pay any direct taxes to their municipality? While they benefit directly and indirectly from municipal services, is that adequate for standing to be heard on a plan's feasibility?

A. *Jurisdiction*

A bankruptcy court must have jurisdiction over a Chapter 9 plan if it is to enter a final order confirming it. Article III, Section Two, of the Constitution provides for the exercise of the "Judicial Power" of the United States over "all Cases" arising under the laws of the United States.⁸⁰ In turn, Section One limits those who may exercise such power to the

75. See Davidson, *supra* note 41, at 968 ("Local governments are intimately involved in questions that implicate such central concerns as where and how people live, public safety, work conditions, and education.").

76. 11 U.S.C. § 904.

77. See *supra* notes 34–62 and accompanying text.

78. See Pryor, *Who Pays the Price?*, *supra* note 6, at 99–104.

79. *Id.*

80. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . .").

Supreme Court and such inferior courts that Congress establishes, so long as their judges have lifetime tenure and salaries that cannot be reduced.⁸¹ Bankruptcy judges do not have such protections,⁸² and thus, may not exercise the judicial power of the United States when it comes to adjudication of private rights.⁸³

On the other hand, non-Article III tribunals regularly adjudicate various matters with full constitutional warrant; “[t]he first Congress itself entrusted disputes regarding veterans’ benefits, customs duties, and matters before courts-martial to determination by those who were themselves not judges at all.”⁸⁴ Less than a century later, the Supreme Court validated congressional authorization of adjudication of a “public right” by a non-Article III judge.⁸⁵ For some—occasionally, including the Supreme Court—such matters are exceptions to the tenure and salary requirements of Article III.⁸⁶ For the more textually minded, they instead represent the over-the-boundary markers of the judicial power.⁸⁷ In other words, those

81. *Id.* art. III, § 1. The provision provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Id.

82. See 28 U.S.C. § 152(a)(1) (2012) (“Each bankruptcy judge shall be appointed for a term of fourteen years . . .”).

83. See *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011). The court wrote:

Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article. . . . The Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor’s proof of claim.

Id.

84. Craig A. Stern, *What’s a Constitution Among Friends?—Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1045 (1998).

85. See *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284–85 (1855) (holding that the longstanding recognition of the “public right” of the executive to seize property to collect sums from an absconding tax collector was an example of collecting revenue, not an adjudication of a private right to property between two parties).

86. See, e.g., *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 853–54 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 582–86 (1985).

87. See Stern, *supra* note 84, at 1052 (“Article III purports to describe and vest only ‘the judicial Power.’ Conducting courts-martial and deciding matters of public rights are matters of executive, not judicial, power. Consequently, Article III and its Section 1 security have nothing to do with them.” (quoting U.S. CONST. art. III, § 1) (emphasis added)).

who adjudicate in courts-martial, administrative agencies, and with respect to matters arising as public rights are simply not exercising the judicial power of the United States encompassed in Section Two of Article III; thus, the requirements of Section One do not apply to them.

Yet, the jurisdiction of the bankruptcy courts is not like courts-martial, which have historically been associated with the executive power.⁸⁸ Neither is bankruptcy set apart from the jurisdiction of the United States, like territorial courts.⁸⁹ Moreover, bankruptcy courts are not agencies in which the executive makes judicially reviewable decisions in the course of administering a federal program.⁹⁰ Thus, a bankruptcy court can enter a final order confirming a Chapter 9 plan only if the Chapter 9 plan is a public right.

Over the course of its evaluation of bankruptcy judges' jurisdictional limits, a majority of the Supreme Court has been careful not to answer whether any part of bankruptcy adjudication is a public right. For instance, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,⁹¹ the Court held that a bankruptcy judge did not have the power to enter a judgment in an action for damages for breach of contract brought by a Chapter 11 debtor.⁹² According to the plurality opinion, a state-law contract action was clearly a private right.⁹³ Thus, no person without

88. See *Dynes v. Hoover*, 61 U.S. 65, 79 (1857) (explaining that the Constitution vests Congress with the power to establish the military, along with its customary usages, including courts-martial); Stern, *supra* note 84, at 1055 (“[C]ourts-martial do not exercise the judicial power. Instead, they exercise the executive power, the power of a military command to discipline its troops.”).

89. See *Am. Ins. Co. v. Canter*, 26 U.S. 511, 545–46 (1828) (holding that territorial courts established by Congress pursuant to the Constitution could exercise admiralty jurisdiction because they had nothing to do with Article III); Stern, *supra* note 84, at 1067–68 (“The courts that Congress establishes for such polities under its control are not truly United States courts. They, like state courts, are courts of their respective polities.”).

90. See *Crowell v. Benson*, 285 U.S. 22, 49–50 (1932) (holding that a federal agency could award compensation against a private employer under a federal act because it functioned as a fact-finder subject to federal court review); see also Stern, *supra* note 84, at 1073 (“As long as ‘judges’ with Section 1 security perform all ‘judging,’ Article III leaves Congress free to constitute courts with subalterns as it sees fit, possibly even filling courts with agents of the executive.”).

91. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

92. *Id.* at 84 (“[T]he cases before us, which center upon appellant Northern’s claim for damages for breach of contract and misrepresentation, involve a right created by state law . . .”).

93. *Id.* at 71–72 (plurality opinion) (“Appellant Northern’s right to recover contract damages to augment its estate is ‘one of private right, that is, of the liability of one individual to another under the law as defined.’” (quoting *Crowell*, 285 U.S. at 51)).

Article III tenure could enter a final judgment.⁹⁴ The Court took pains not to decide whether something as fundamental to the bankruptcy power⁹⁵ as the discharge was a public right.⁹⁶

Seven years after *Northern Pipeline*, the Supreme Court again addressed the public- versus private-right bankruptcy distinction in *Granfinanciera, S.A. v. Nordberg*.⁹⁷ In *Granfinanciera*, the Court held that even in an action created by the Bankruptcy Code, a defendant was entitled to a jury trial, at least when Congress had “simply reclassified a pre-existing, common-law cause of action that was not integrally related to the reformation of debtor-creditor relations.”⁹⁸ The Seventh Amendment right to a trial by jury,⁹⁹ according to the Court, was congruent with the Article III requirement that only someone with lifetime tenure may enter a judgment in a matter of a private right.¹⁰⁰ The majority opinion simply repeated the proposition from *Northern Pipeline* that “the restructuring of debtor-creditor relations” may be a public right.¹⁰¹

Over twenty years passed before the Court’s next foray into the thicket of bankruptcy-court jurisdiction. In *Stern v. Marshall*,¹⁰² the majority held that the bankruptcy court did not have jurisdiction over a debtor’s state-law counterclaim for tortious interference with the expectation of a gift, even though the claim arose in response to a creditor’s claim for defamation.¹⁰³ The fact that the defendant filed a proof of claim in the debtor’s bankruptcy did not entail a different result.¹⁰⁴ The majority

94. *Id.* at 87.

95. U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have Power to . . . establish . . . uniform Laws on the subject of Bankruptcies . . .”).

96. *N. Pipeline*, 458 U.S. at 71 (“[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights The former may well be a ‘public right,’ but the latter obviously is not.”).

97. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

98. *Id.* at 60.

99. U.S. CONST. amend. VII.

100. *Granfinanciera*, 492 U.S. at 53 (“[T]he question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal.”).

101. *Id.* at 56.

102. *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

103. *Id.* at 2620 (“The Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor’s proof of claim.”).

104. *Id.* at 2616. The Court wrote:

went on to address the public- versus private-right question at length, without reaching a conclusion with respect to bankruptcy law.¹⁰⁵ It seems likely that all members of the Court would agree that Congress could assign to a non-Article III tribunal virtually any claim against the federal government, the quintessential example of a public right.¹⁰⁶ But confirmation of a Chapter 9 plan of adjustment does not involve a matter between an entity and the federal government. May confirmation nonetheless be a public right?

There can be no doubt that the four dissenters in *Stern* would classify confirmation of a plan as a public right. If, as they concluded, a counterclaim by a debtor against a creditor should be a public right,¹⁰⁷ surely something as central to the process of reorganization as plan confirmation would be a public right.¹⁰⁸ Excluding Justice Scalia, the four members in the *Stern* majority would probably agree. While the majority expressly declined to decide whether any part of the bankruptcy system might be a public right,¹⁰⁹ it described a two-step analysis by which to make the determination. Adjudication by a judge with Article III tenure is required if two conditions are not met: (1) “[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power

Pierce’s claim for defamation in no way affects the nature of Vickie’s counterclaim for tortious interference as one at common law that simply attempts to augment the bankruptcy estate—the very type of claim that we held in *Northern Pipeline* and *Granfinanciera* must be decided by an Article III court.

Id.

105. *Id.* at 2611–15.

106. *Id.* at 2612 (defining public rights as including matters “arising ‘between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments’” (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932))); *id.* at 2620 (Scalia, J., concurring) (“[A] matter of public rights . . . must at a minimum arise between the government and others.” (quoting *Granfinanciera*, 492 U.S. at 65 (Scalia, J., concurring in part and concurring in judgment) (internal quotation marks omitted))); *id.* at 2626 (Breyer, J., dissenting) (asserting that a public right requires application of five factors of “substance rather than doctrinaire reliance on formal categories” (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 578, 587 (1985))).

107. *Id.* at 2626 (Breyer, J., dissenting) (“A grant of authority to a bankruptcy court to adjudicate compulsory counterclaims does not violate any constitutional separation-of-powers principle related to Article III.”).

108. *See id.* at 2626–29 (Breyer, J., dissenting) (listing and applying the five-factor test to determine propriety of congressional assignment of a matter to a non-Article III tribunal).

109. *Id.* at 2614 n.7 (eschewing to decide whether “the restructuring of debtor-creditor relations” is a public right because “neither party ask[ed] us to reconsider the public rights framework for bankruptcy”).

to enact”;¹¹⁰ and (2) “if that right neither belongs to nor exists against the Federal Government.”¹¹¹ Reframing the first requirement in the positive, we see that confirmation of a plan is certainly intertwined with Chapter 9, which Congress enacted pursuant to its constitutional bankruptcy power.¹¹² In other words, plan confirmation “stems from the bankruptcy itself.”¹¹³ The relief offered by Chapter 9—the discharge—was not available at common law¹¹⁴ and exists only “by the grace of the other branches.”¹¹⁵ Confirmation discharges a municipality’s preconfirmation debts and substitutes the promises of the plan in their place.¹¹⁶ As the plurality acknowledged in *Northern Pipeline*, the discharge is “at the core of the federal bankruptcy power.”¹¹⁷ Thus, despite their continuing reticence, four members of the majority in *Stern* would likely join the four dissenters and hold that a non-Article III tribunal may enter a final order confirming a plan.¹¹⁸ Bankruptcy court jurisdiction over confirmation of a Chapter 9 plan ensures that its order confirming the plan is final.

110. *Id.* at 2614 (quoting *Granfinanciera*, 492 U.S. at 54–55) (alteration in original).

111. *Id.*

112. See U.S. CONST. art. I, § 8, cl. 4; see also 28 U.S.C. § 152(a)(1) (2012); *United States v. Bekins*, 304 U.S. 27, 51 (1938) (upholding the constitutionality of Chapter IX of the Bankruptcy Act).

113. *Deitz v. Ford (In re Deitz)*, 469 B.R. 11, 17 (B.A.P. 9th Cir. 2012) (quoting *Stern*, 131 S. Ct. at 2618).

114. See Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 10 (1995) (describing legislative introduction of the discharge into the creditor remedy of bankruptcy in the Statute of Anne in 1705).

115. *Stern*, 131 S. Ct. at 2614.

116. 11 U.S.C. § 944(b) (“Except as provided in subsection (c) of this section, the debtor is discharged from all debts as of the time when . . . the plan is confirmed . . .”); see also *Sanders v. Muhs (In re Muhs)*, Chap. 7 Case No. 09-10564, Adv. No. 10-1008, 2011 Bankr. LEXIS 3032, at *3 (Bankr. S.D. Tex. Aug. 2, 2011) (“The Bankruptcy Code is a public scheme for restructuring debtor-creditor relations, necessarily including . . . the ultimate discharge that gives the debtor a “fresh start” . . .” (quoting *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 364 (2006))).

117. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality opinion).

118. Justice Scalia, whose understanding of public rights is the narrowest of any member of the Court, admits that a non-Article III tribunal might be permitted to adjudicate allowance of claims against the bankruptcy estate. *Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring) (“Perhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate.”). Given the historical centrality of the discharge to bankruptcy, even Justice Scalia might agree that confirmation is a public right. In any event, it seems likely that a majority would. See also S. Todd Brown, *Constitutional Gaps in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 179, 214 (2012). Brown writes:

In sum, *Marshall* may be read to continue the Court’s effort to distinguish between rights that are (a) created by the legislative scheme to restructure debtor-

B. Standing

The Article III limits on standing—an allegation of an injury fairly traceable to a defendant’s conduct that the court may redress¹¹⁹—do not apply when a non-Article III tribunal adjudicates a public right. Enacting uniform laws concerning bankruptcy is among the enumerated powers of Congress,¹²⁰ and the discharge is at the center of that power.¹²¹ The constitutional warrant for a bankruptcy judge’s order confirming a plan with its concomitant discharge thus comes from congressional action pursuant to Article I of the Constitution; we find in Article II the duty of the President to “take [c]are that the Laws be faithfully executed.”¹²² Congress’s Article I powers and the President’s Article II powers operate together as the constitutional fulcrum for the jurisdiction of the bankruptcy judge that exists today.¹²³ Even without the ability to exercise the judicial power of the United States, bankruptcy judges can implement the joint Article I and Article II powers of Congress and the Executive.

By requiring that the plan be feasible, Congress has given all those within the broad “zone of interests” of a confirmed plan—whom the Bankruptcy Code characterizes as parties in interest—a stake in the process of confirmation.¹²⁴ Although as a general rule, neither the Executive¹²⁵ nor

creditor relations; (b) necessarily incorporated as part of the substantive design of that scheme; and (c) private matters, regardless of whether they are relabeled under the Code. For example, a debtor’s right to . . . a discharge . . . appear[s] to fall in the first category because [it is a] creation[] of bankruptcy law that [is] central to the restructuring scheme.

Id. (citing *In re Turner*, 462 B.R. 214, 221 (Bankr. S.D. Tex. 2011)).

119. See Pryor, *Who Pays the Price?*, *supra* note 6, at 99–104.

120. U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have Power to . . . establish . . . uniform Laws on the subject of Bankruptcies . . .”).

121. THE FEDERALIST NO. 42, at 192 (James Madison) (Jim Manis ed., 2014). Madison wrote:

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

Id.

122. U.S. CONST. art. II, § 3.

123. See *Stern*, 131 S. Ct. at 2612 (describing “the public rights exception” in terms of cases “arising ‘between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments’” (quoting *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932))).

124. See S. Todd Brown, *Non-Pecuniary Interests and the Injudicious Limits of Appellate Standing in Bankruptcy*, 59 BAYLOR L. REV. 569, 583 (2007). Brown later writes on a different test:

Congress can delegate the duty to enforce the laws to private parties,¹²⁶ an across-the-board nondelegation rule should not be applied when the law in question does not impinge on private liberty.¹²⁷ An objection by municipal residents to the feasibility of a plan does not implicate the life, liberty, or property of any person. Therefore, a broad notion of standing is appropriate on the issue of feasibility. It is the duty of the Executive to provide an adjudicatory mechanism by which Congress's bankruptcy power may be implemented, and hence to provide all parties in interest, including municipal residents, an opportunity to be heard. Bankruptcy courts are such an adjudicatory mechanism.

The breadth, and even the uncertainty of "party in interest" is precisely appropriate for the work of a non-Article III tribunal. With respect to matters of public right, it is for Congress to decide the scope of the public that has a right to be heard and for the Executive to provide the opportunity. Bankruptcy judges should therefore afford that right to a broad range of persons. An expansive understanding of non-Article III standing is warranted. When service feasibility is the issue, that expansive understanding certainly includes municipal residents.

[T]his is not to say that the pecuniary interest test should be discarded in its entirety. It may be much easier to understand the dynamic when a provision is clearly designed to protect a specific, narrow pecuniary interest and the pecuniary interest test can play an important role in discerning what interests fall within the zone of interests of that provision. But it should be just that—one test designed to assist with the consideration of standing The problem lies with holding to the erroneous view that this narrow standard is relevant to any interests represented or issues that arise in a case or proceeding.

Id. at 619.

125. See Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 J. CONST. L. 781, 821 (2009) ("[The Constitution] prohibits the government from delegating certain discretionary functions to nongovernmental actors.").

126. *Id.* ("Various constitutional rules—ranging from the Article I nondelegation doctrine to the due process and establishment clause contexts—prohibit the government . . . from delegating broad discretionary power to private parties.") (footnotes omitted).

127. *Id.* at 791 ("Under the Article II nondelegation principle, standing doctrine serves . . . to safeguard individual liberty against arbitrary exercises of private prosecutorial discretion. The constitutional protection therefore applies only in cases that implicate private liberty . . .").

III. RESIDENTS' REPRESENTATION

A. *Residents' Committees*

The interests of municipal residents are exceptionally diverse. Issues concerning the range of legally required services multiplied by the needs of tens or hundreds of thousands of citizens, residents, and entities that have a physical and economic presence in a city make individualized representation impractical. Recognition of a committee of residents is warranted by the incorporation of § 1102 of the Bankruptcy Code into Chapter 9.¹²⁸ Only rarely will the value of the objections of a single resident on the basis of service feasibility match the cost of effective representation.¹²⁹ Collective action is thus a necessary requirement for effective evaluation of service insolvency, but it is not sufficient.

The very rationale proffered by public-choice theory for identifying municipal duties¹³⁰ provides the warrant for municipal subsidy of the expenses of a residents' committee. In other words, the expenses of a residents' committee are a public good. Free riders cannot be excluded from the benefits of a committee's efforts, and, without adequate funding, no adequate representation of municipal residents will take place. The requirement of feasibility for confirmation of a plan reinforces the conclusion that these expenses are a public good. Just as confirmation of a plan is a public right warranting participation by noncreditor residents,¹³¹ so, too, are public means to vindicate that right. Existing constituencies with the financial wherewithal to protect their interests—creditors—exist with respect to the other requirements for confirmation.¹³² The public interest of service feasibility, by contrast, requires public support.

Detroit's Chapter 9 proceedings have seen an example of such support with the appointment of a feasibility expert.¹³³ While the court has the power to appoint an expert witness,¹³⁴ appointment of a residents' committee with the powers both to select an expert and to advocate its view

128. 11 U.S.C. § 901(a) (incorporating § 1102 by reference).

129. See Pryor, *Who Pays the Price?*, *supra* note 6, at 107 (describing a similar economic disincentive for taxpayers).

130. See *supra* notes 59–62 and accompanying text.

131. See *supra* notes 85–127 and accompanying text.

132. See Pryor, *Who Pays the Price?*, *supra* note 6, at 114 (“Without the right to vote, an attack on a plan’s feasibility is the only recourse [residents] have.”).

133. *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. Apr. 22, 2014) (order appointing expert witness).

134. See FED. R. EVID. 706(a).

of service feasibility is more consistent with an adversarial approach to adjudication.

B. Keeping the “Political,” Political . . . But Not Too Political

All aspects of service feasibility are deeply political. Identification of the baseline of legally required municipal services, as well as the extent of their funding, are at the center of the political existence of municipalities.¹³⁵ Yet, for both constitutional and statutory reasons, the powers of the bankruptcy court are constrained when it comes to “political or governmental” powers of a municipality.¹³⁶ The court can maintain the balance between these limitations and the requirement of feasibility by restricting the scope of the committee’s powers. Limiting the standing of a residents’ committee to the issue of service feasibility “would reduce the risk of turning the Chapter 9 case into a political free-for-all.”¹³⁷

Even though the virtues of political liberalism should be respected, the “democratic deficit” in municipal elections¹³⁸ further warrants appointment of a residents’ committee. A committee that reflects the interests of voting and non-voting residents as they pertain to service feasibility is justified because Congress has made feasibility a requirement of confirmation and because “the personal interests of municipal office holders may not coincide with larger groups within the municipality.”¹³⁹ A committee of residents chosen for the narrow purpose of evaluating service feasibility further ensures the legitimacy of the final result. A vigorous assessment of a plan’s feasibility led by residents will reduce subsequent criticism of a plan and increase the likelihood that the plan’s implementation will be preserved by the subsequent democratic process.¹⁴⁰

135. See *supra* notes 34–74 and accompanying text.

136. See *supra* notes 16–18 and accompanying text; see also Pryor, *Who Pays the Price?*, *supra* note 6, at 83.

137. See Pryor, *Who Pays the Price?*, *supra* note 6, at 106 (making the same point with respect to taxpayers).

138. See *id.* at 94. Of local elections, Pryor writes:

Municipal elections enjoy less legitimacy than elections at other levels of state and federal governments. Low voter turnout and the opacity of the issues of municipal governance . . . cause most municipal elections to turn on the ability of relatively small groups to organize a high-percentage turnout of like-minded voters.

Id. (footnotes omitted).

139. *Id.*

140. See *supra* notes 9–15 and accompanying text.

CONCLUSION

Every Chapter 9 plan must be feasible to be confirmed. Feasibility includes provision of mandated municipal services. As the recipients or beneficiaries of such services, municipal residents have standing to object to a municipal plan of adjustment on the ground that it is not feasible. First, while the substance of municipal duties are created by state law, the uncertainty of their boundaries entails a role for residents in identifying them. Second, a plan's provisions for funding those services are not susceptible to rule-based evaluation. Thus, municipal residents are entitled to weigh in on the adequacy of services proposed for the postconfirmation city as much as the plan's proponents.

It remains the case that §§ 903 and 904 of the Bankruptcy Code limit the powers of the bankruptcy court when it comes to a municipality's exercise of its governmental powers. Such limits on federal power do not, however, eliminate the requirement that a municipality's plan be feasible. Evaluating the services that the municipality plans to provide merely implements state-law identification of municipal duties; it is not an interference with the municipality's political or governmental powers.

The nonpecuniary nature of the interests of residents, even as indirect beneficiaries of municipal services, is not an impediment to their standing to contest a plan's feasibility. The constitutional limits on judicial standing are immaterial when it comes to plan confirmation. Confirmation of a Chapter 9 plan—with the concomitant discharge of indebtedness—is a public right. Thus, the constitutional bankruptcy power granted to the legislative branch increases the range of interests of those who may appear before a non-Article III tribunal. In other words, Congress, not the Constitution, has the power to determine the scope of bankruptcy-related parties in interest.

In addition, the diffuse interests of municipal residents will make appointment of a residents' committee, whose expenses will be borne by the city, appropriate in many large municipal bankruptcies. To the extent that federal courts conclude that municipal residents are not parties in interest, or that they are not entitled to an official committee, Congress should amend the Bankruptcy Code to make such conclusions clear. The requirement that a Chapter 9 plan be feasible is appropriate. Congress should ensure that the issue of feasibility receives the thorough vetting it deserves.