BANKRUPTCY UNIFORMITY: HOW THE 2017 FEE INCREASE LITIGATION APPLIES TO THE DUAL BANKRUPTCY SYSTEM

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ABSTRACT

The Constitution grants Congress the power to create "uniform" bankruptcy laws. In 2017, Congress amended the existing bankruptcy law governing quarterly fees to increase fees paid by large Chapter 11 debtors. The problem: this law only applied to large debtors in U.S. Trustee Program districts and did not apply to large debtors in Bankruptcy Administrator Program districts in North Carolina and Alabama. Debtors in the Trustee districts sued, claiming that the increase violated the constitutional uniformity requirement imposed on Congress. The litigation from several district courts made its way to four circuit courts, and the Supreme Court recently settled the emergent circuit split in the case of Siegel v. Fitzgerald.

The Court unanimously agreed that the fee increase did, in fact, violate the Constitution. Below the surface of the fee increase issue lurks another constitutional problem: that the existence of the dual bankruptcy system itself is likely non-uniform—an argument that won the day in the Ninth Circuit almost three decades ago. The Supreme Court, in Siegel, chose not to answer the underlying uniformity question directly. Nevertheless, the opinion does help to solidify our understanding of uniformity and how it could bear on the dual system. This article applies the new learning generated by the 2017 fee increase litigation and argues that the only practical solution to cure the constitutional infirmity of the dual system is to require North Carolina and Alabama to adopt the Trustee Program.

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INTRODUCTION

In 2017, Congress amended the federal law governing bankruptcy fees to increase the quarterly fees that Chapter 11 debtors were required to pay in U.S. Trustee districts (hereinafter "Trustee districts"). This change was motivated due to the decreasing funds available to the Trustee Program.[1] However, debtors in only Alabama and North Carolina, where the Bankruptcy Administrator Program ("BA Program") supervises bankruptcy proceedings, did not have to pay this increase until approximately nine months later when Congress amended the law to require the increase in those districts as well.[2] For that nine-month period, Chapter 11 debtors in Trustee districts were subject to much higher fees than debtors in BA Program districts.[3] As a result, lawsuits in several jurisdictions arose, and plaintiffs argued that this increase was unconstitutional because it violated the provision in the Constitution that empowers Congress to only pass bankruptcy laws that are "uniform."[4]

While not the core issue presented to the circuit courts,[5] the dissenting opinions from the Fourth and Fifth Circuits (cases in which the majorities upheld the fee increase)reveal a lurking constitutional issue: whether the dual bankruptcy system itself is unconstitutional.[6] This underlying constitutional question has remained latent since 1994 when the Ninth Circuit struck down the law that temporarily exempted Alabama and North Carolina from joining the Trustee Program.[7] That law was the predecessor for the later exemption that created the now-permanent dual system.[8] As further discussed in Section Five of this note, the Supreme Court, in *Siegel*, chose not to decide the issue of the constitutionality of the dual system itself. [9] This decision may have been made to avoid a political minefield while possibly signaling to

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[1] 28 U.S.C. § 1930(a)(7).
[2] *See In re* Buffets, LLC, 979 F.3d 366, 370 (5th Cir. 2020).
[3] *See id.* at 372.
[4] *See In re* John Q. Hammons Fall 2006, LLC, 15 F.4th 1011, 1018 (10th Cir. 2021).
[5] The only uniformity question presented in the Fourth, Fifth, Second, and Tenth Circuits was whether the 2017 fee increase was constitutionally uniform. *See id.*; *see also* Clinton Nurseries, Inc. v. Harrington, 998 F.3d 56, 63 (2d Cir. 2021); *In re* Cir. City Stores, Inc., 996 F.3d 156, 163 (4th Cir. 2021); *In re* Buffets, LLC, 979 F.3d at 376.
[6] *See In re* Cir. City Stores, Inc., 996 F.3d 156, 160 (4th Cir. 2021) (Quattlebaum, J., dissenting in part); *see also In re* Buffets, LLC, 979 F.3d at 383 (Clement, J., dissenting in part).
[7] *See* St. Angelo v. Victoria Farms, Inc., 38 F.3d 1525, 1531–33 (9th Cir. 1994).
[8] *See generally* Derek F. Meek & Ellen C. Rains, *Applicability of USTP Guidelines to Bankruptcy Administrators*, 33 AM. BANKR. INST. J. 16 (2014).
[9] *See* Siegel v. Fitzgerald, 142 S. Ct. 1770, 1782 (2022).

Congress the need to address the issue itself.[10] This note will apply the new learning, generated from the recent Trustee Program fee increase decisions, to the underlying uniformity issue and deduce a practical solution to avoid this constitutional infirmity.

I. BACKGROUND

A. A Broad View of the Bankruptcy System in the United States

Article I of the Constitution gives Congress the authority to "establish . . . *uniform* Laws on the subject of Bankruptcies throughout the United States."[11] The meaning of "uniform" is a source of ambiguity and debate. While its application is rare, the Supreme Court and Congress have used nonuniformity as the basis for rejecting several laws. For example, Congress rejected a provision of a bankruptcy reorganization bill in the 1990's on the grounds that it would violate constitutional requirements of uniformity.[12] Additionally, the Supreme Court once struck down a bankruptcy law for nonuniformity in the 1982 case of *Railway Labor Executives' Assn. v. Gibbons*.[13]

In 1979, Congress introduced a new bankruptcy program called the "Trustee Program" in eighteen out of ninety-four federal judicial districts "(1) to alleviate the administrative burdens on bankruptcy judges, (2) to remove any appearance of bias arising from judges' administering cases, and (3) to establish bankruptcy-court 'watchdogs.'"[14] Before the advent of the Trustee Program, bankruptcy judges in all judicial districts oversaw and administered their own bankruptcy proceedings.[15] In 1986, Congress made the Trustee Program permanent in all judicial districts, except for the six districts within Alabama and North Carolina, which resisted the change to the Trustee Program.[16]

Political actors in Alabama and North Carolina resisted the Trustee Program because the BA Program is under the control of the judicial branch.

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[10] Jennifer Rubin, *Opinion: It's a Big Deal When the Supreme Court Decides Not to Decide*, WASH. POST (June 16, 2020), https://www.washingtonpost.com/opinions/2020/06/16/its-big-deal-when-supreme-court-decides-not-decide/.

[11] U.S. CONST. art. I, § 8, cl. 4 (emphasis added).

[12] "In 1993, banks and other major financial institutions opposed to debtor-friendly provisions in a new bankruptcy reorganization chapter proposed for small businesses, argued that such a pilot chapter, initially to be implemented in only eight of the ninety-four federal judicial districts, would violate the constitutional requirements of uniformity. In April 1994, the banks and other opponents of Chapter 10 succeeded on the Senate floor in deleting proposed Chapter 10 from S. 540." Dan J. Schulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs*, 74 NEB. L. REV. 91, 92 (1995).

[13] *See* Ry. Lab. Execs.' Ass'n v. Gibbons, 455 U.S. 457, 473 (1982).

[14] *In re* John Q. Hammons Fall 2006, LLC, 15 F.4th 1011, 1016 (10th Cir. 2021).

[15] H.R. REP. NO. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 1977 WL 9628, at *98.

[16] *See* Schulman, *supra* note 12, at 92.

Therefore, the Bankruptcy Administrators are not constrained by any federal guidelines like the U.S. Trustees are.[17] This decentralized structure enables Bankruptcy Administrators to consider the unique conditions that exist in each BA Program district without predetermined federal guidelines to restrict them.[18] The BA program's system also encourages Bankruptcy Administrators to have more cooperative relationships with bankruptcy judges within their district.[19] Arguably, this cooperation results in a more efficient resolution of bankruptcy proceedings, which could account for the slight differences in efficiency that exist between the two programs.[20] For these reasons, Alabama and North Carolina pushed to delay joining the Trustee Program, and Congress initially granted an exemption that would give the two states until 1992 to join.[21] Then, in 1990, Congress extended the deadline for those districts until 2002.[22] Finally, in 2000, Congress enacted 28 U.S.C. § 1930(a)(7) to grant Alabama and North Carolina a permanent exemption from joining the Trustee Program.[23]

As a result, the Judicial Conference currently administers bankruptcy proceedings in the six districts through its BA Program, located in Alabama and North Carolina.[24] The other eighty-eight districts are all supervised by the Trustee Program.[25] This leaves the United States with two different bankruptcy-implementation programs that have two separate funding sources.[26] The general budget of the Judiciary funds the BA Program in Alabama and North Carolina, and debtors' fees fund the Trustee Program in

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[17] *See* Peter C. Alexander, *A Proposal to Abolish the Office of United States Trustee*, 30 U. MICH. J. L. REFORM 1, 9 (1996).
[18] *See id.*
[19] *See id.*
[20] *Compare In re* Butler Indus., Inc., 101 B.R. 194, 197 (Bankr. C.D. Cal. 1989) (deciding that a U.S. Trustee must "show cause" in order to justify hiring their own law firm to perform Trustee Program, work and provide counsel), *with* MANUAL ON THE NATIONAL STANDARDS AND CODE OF ETHICS FOR BANKRUPTCY ADMINISTRATORS 73 (2010), https://www.ebrd.com/downloads/legal/insolvency/manual.pdf (providing unambiguous guidance for BA Program officers regarding the hiring of professionals).
[21] *See In re* John Q. Hammons Fall 2006, LLC, 15 F.4th 1011, 1016–17 (10th Cir. 2021).
[22] *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 317(a), 104 Stat. 5089, 5115 (1990). Without any debate on the matter, the congressional record references the amendment which increases the extension by 10 years and the amendment that gives Bankruptcy Administrators in BA Program districts "standing to raise issues and appear and be heard in the same manner as U.S. Trustees" and gave Bankruptcy courts in BA Program districts "power given to bankruptcy courts to act sua sponte to take any action or make 'any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process" is given to the six affected districts on the date of enactment of this Act." The record on the matter concludes by saying "The section thus makes uniform the authority of courts under 11 U.S.C. 105." *See* 136 Cong. Rec. S17570-02 (1990).
[23] The permanent exemption was put into an unrelated bill in the November 2000 lame-duck session without recorded debate. *See In re* Buffets, LLC, 979 F.3d 366, 383 (5th Cir. 2020); s*ee also* Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 501, 114 Stat. 2410, 2421–22 (2000).
[24] *See In re* John Q. Hammons Fall, 15 F.4th at 1016.
[25] *See id.*
[26] *See In re* Buffets, LLC, 979 F.3d at 371.

every other district.[27] In Trustee districts, when a bankruptcy case is initiated, an independent and impartial Trustee is assigned to manage the case and either liquidate the assets of the debtor which do not qualify for an exemption or facilitate a plan for businesses that seek reorganization.[28] According to the courts, "The Trustee monitors the conduct of bankruptcy parties and private estate trustees, oversees related administrative functions, and acts to ensure compliance with applicable laws and procedures."[29] Similarly, in BA Program districts, Bankruptcy Administrators perform largely the same tasks as Trustees.[30] The BA Program uses licensed attorneys as Bankruptcy Administrators.[31] Those Bankruptcy Administrators serve as officers of the judiciary but are separate as they are technically non-judicial.[32] Like a U.S. Trustee, a Bankruptcy Administrator is completely independent of the bankruptcy courts as well as the district courts.[33] Both Trustees and Bankruptcy Administrators have statutorily granted standing to raise any matter in any proceeding that arises under the Bankruptcy Code.[34] Ultimately, the central mission of both the Bankruptcy Administrator and the Trustee is to make sure creditors are treated fairly in bankruptcy proceedings while affording debtors the chance to have a fresh start.[35]

B. Chapter 11 and Quarterly Fees

In the US Code, there are six "chapters" of bankruptcy in the United States.[36] A debtor will file under a different chapter of bankruptcy depending on their individual circumstances and their goal at the end of their bankruptcy proceedings. For example, Chapter 7—the most common class—is the simplest and fastest form of bankruptcy. Chapter 7 provides liquidation of an individual's property and then distributes it to creditors.[37] Markedly, in Chapter 7, debtors are allowed to keep "exempt property." [38] The purpose of Chapter 7 "is obtaining a discharge which acts as a legally binding document absolving the individual from having to pay back any debts that were not

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[27] *See id*.
[28] *See The United States Trustee Program*, U.S. DEP'T OF JUST., https://www.justice.gov/ust/about-program (last visited Mar. 3, 2022).
[29]*See Trustees and Administrators*, U.S. CTS, https://www.uscourts.gov/services-forms/bankruptcy/trustees-and-administrators (last visited Oct. 22, 2022).
[30] Alexander, *supra* note 17, at 9–10.
[31] *Id.* at 9.
[32] *See id.*
[33] *See id.*
[34] *See id.*
[35]*See id.* at 10.
[36] *See Overview of Bankruptcy Chapters*, U.S. DEP'T OF JUST., https://www.justice.gov/ust/bankruptcy-fact-sheets/overview-bankruptcy-chapters (last visited Jan. 30, 2022).
[37] *See Chapter 7 – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics (last visited Jan. 23, 2022) (hereinafter U.S. CTS,. *Chapter 7 – Bankruptcy Basics*).
[38] "Exempt property" is the property that a debtor can protect from liquidation. *See id*. The Federal Bankruptcy Code allows States to affect their own exemption laws. *See id*. While it varies from state to state, typical possessions that qualify as "exempt property" are a portion of the equity in one's home, motor vehicles up to a certain value, pensions, etc. *See id*.

repaid from the liquidation of assets." [39] In contrast, Chapter 11—which encompasses the class of "large debtors" which were the target of the 2017 fee increase—allows a company to continue doing business while adhering to a debt repayment plan, or "Plan of Reorganization," agreed upon by the bankruptcy court.[40] As a result, Chapter 11 allows a bankrupt business to come back as a healthy business.[41]

The Trustee and BA Program districts now both impose quarterly fees on their Chapter 11 debtors.[42] These fees serve to provide funding for the programs.[43] Quarterly fees are relevant because amending quarterly fees split the circuits on the issue of uniformity.[44] Under 28 U.S.C. § 1930(a)(6), Chapter 11 debtors must pay a quarterly fee to the Trustee Program "for each calendar quarter, or portion thereof, between the date a bankruptcy petition is filed and the date the court enters a final decree closing the case, dismisses the case, or converts the case to another chapter in bankruptcy." Bankruptcy courts determine and collect quarterly fees based on the size of quarterly "disbursements" paid to creditors.[45]

Initially, at the inception of the Trustee Program, only debtors in the Trustee districts were required to pay quarterly fees.[46] This scheme sparked litigation because those in Trustee districts were subject to a more expensive bankruptcy program than those who lived in BA Program districts, allegedly in violation of the Uniformity Provision of the Bankruptcy Clause of the Constitution.[47] In 1994, the Ninth Circuit ruled that imposing these fees only on Trustee district debtors did, in fact, violate the Constitution.[48] In response, Congress enacted Section 1930(a)(7), which permitted the Judicial Conference to allow BA Program debtors "to pay fees equal to those imposed" in Trustee districts.[49] A year later, the Judicial Conference imposed fees in BA Program districts "in the amounts specified [for Trustee districts], as those amounts may be amended from time to time."[50] For the next seventeen years, BA Program districts and Trustee districts charged the same amount in quarterly fees.

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[39] *See What Do Each of the Bankruptcy Chapter Numbers Mean?*, IVEY MCCLELLAN, https://www.iveymcclellan.com/bankruptcy-chapter-numbers-mean/ (last visited Oct. 19, 2022).
[40] *See id*.
[41] *See* U.S. CTS., *Chapter 7 – Bankruptcy Basics*, *supra* note 37.
[42] *See In re* Buffets, LLC, 979 F.3d 366, 371 (5th Cir. 2020).
[43] *See id.*
[44] *See* Siegel v. Fitzgerald, 142 S. Ct. 1770, 1782 (2022).
[45] The larger the disbursement, the larger the fees. *See* 28 U.S.C. § 1930(a)(6).
[46] *See* St. Angelo v. Victoria Farms, Inc., 38 F.3d 1525, 1531–33 (9th Cir. 1994).
[47] *See id.* at 1529.
[48] *See id.*
[49] *In re* John Q. Hammons Fall 2006, LLC, 15 F.4th 1011, 1017 (10th Cir. 2021).
[50] *See* JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 45–46 (Sept./Oct. 2001), https://www.uscourts.gov/sites/default/files/2001-09_0.pdf.

That changed in 2017, when Congress amended § 1930(a)(6) to mandate increased quarterly Chapter 11 disbursement fees for large debtors in Trustee districts in order to increase funds for the Trustee Program, which was in financial decline due to fewer bankruptcy filings.[51] This substantially raised fees for Trustee Program debtors, from a maximum of $30,000 to "either $250,000 or one percent of the quarterly disbursement," whichever was less.[52]

BA Program debtors got the worst of the effects—the new amendment only applied to debtors in Trustee districts, so BA Program debtors were not subject to the increase. Section 1930(a)(7) originally provided that the Judicial Conference "may require" debtors in BA Program districts "to pay fees equal to those imposed" in Trustee districts.[53] The Judicial Conference—which funds the BA Program—chose to raise quarterly fees for BA Program debtors on its own in October 2018, but, even then, the increase did not apply prospectively to pending cases.[54] In 2020, Congress amended § 1930(a)(7) to replace "may" with "shall," now requiring the BA Program debtors to pay equal fees to those imposed on Trustee debtors.[55] Still, the lag in legislation resulted in a period of time where the increase was only mandatory for large debtors in Trustee districts. The *Siegel* case surrounded the period before Congress amended the statute to say "shall" instead of "may."[56] Plaintiff debtors claimed that the 2017 amendment was a constitutionally infirm as a non-uniform law, and the Supreme Court agreed in a unanimous decision.[57] To get a full understanding of the result in *Siegel*, an understanding of constitutional uniformity is necessary.

II. THE MEANING OF UNIFORMITY

Article 1, section Eight of the Constitution empowers Congress to "establish . . . *uniform* Laws on the subject of Bankruptcies throughout the United States."[58] Some have argued that the Framers of the constitution intended the Uniformity Provision to be a grant of power to Congress rather

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[51] Quarterly fees would only be increased if "as of September 30 of the most recent full fiscal year," Trustee Program funds fell under $200 million. *See In re* Cir. City Stores, Inc., 996 F.3d 156, 161 (4th Cir. 2021). At first, the increase only applied temporarily during the five fiscal years from 2018 through 2022, but the trigger was later increased to $540 million and extended to at least apply through 2026. *See* Bankruptcy Administration Improvement Act of 2020, Pub. L. No. 116-325, § 3(d)(1), 134 Stat. 5086, 5088 (2021); Commerce, Justice, Science and Related Agencies Appropriations Act of 2021, Pub. L. No. 116-260, § 218, 134 Stat. 1235, 1265 (2021).

[52] *See Chapter 11 Quarterly Fees*, U.S. DEP'T OF JUST., https://www.justice.gov/ust/chapter-11-quarterly-fees (last visited Oct. 22, 2022).

[53] *See In re* John Q. Hammons Fall 2006, LLC, 15 F.4th at 1022.

[54] The increase did apply prospectively to pending cases in Trustee districts. *See In re* Buffets, LLC, 979 F.3d 366, 375 (5th Cir. 2020).

[55] *See In re* John Q. Hammons Fall 2006, LLC, 15 F.4th at 1022.

[56] *See* Siegel v. Fitzgerald, 142 S. Ct. 1770, 1777 (2022).

[57] *Id.* at 1789.

[58] U.S. CONST. art. I, § 8, cl. 4 (emphasis added).

than a constraint.[59] It follows, under that interpretation, that Congress can pass bankruptcy laws that are uniform or not. Although this interpretation is conceivable, the Supreme Court has afforded other interpretations more legitimacy.

The Supreme Court has only ever commented on the issue of uniform bankruptcy laws a handful of times.[60] While the Court has never expressly defined constitutional uniformity, the fact that it carved out an exception to strict geographical uniformity (the "geographically isolated problem" exception discussed further below) tends to suggest that, rather than as a grant of power, the proper interpretation of uniformity is as a constraint on Congress, requiring it to only pass bankruptcy laws that are uniform.[61]

Additionally, the record regarding the original adoption of the Bankruptcy Clause of the Constitution suggests that the Framers intended for the Provision to be a constraint on Congress. The subject of bankruptcy was raised at the Constitutional Convention only a few days before the Bankruptcy Clause was included and then subsequently adopted into the Constitution.[62] There was no significant recorded debate and only one opposing vote.[63] Further, the Supreme Court itself opined that, in drafting the Bankruptcy Clause, the "primary goal was to prevent competing sovereigns' interference with the debtor's discharge," and they "plainly intended to give Congress the power to redress the rampant injustice resulting from States' refusal to respect one another's discharge orders."[64]

The Federalist Papers, which were written by several of the Framers of the Constitution, mention the Bankruptcy Provision and that it is "intimately connected with the regulation of commerce" and suggest that the requirement of uniform law is necessary to "avoid fraudulent conveyances and forum-shopping by debtors."[65] If preventing forum shopping was a motivation for including the uniformity requirement, then the likely goal was to make sure federal law applied equally in every state.

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[59] Randolph J. Haines, *The Uniformity Power: Why Bankruptcy is Different*, 77 AM. BANK. L.J. 129, 170 (explaining that Chief Justice Marshall regarded the constitutional provision empowering congress to pass uniform laws to be not a limitation, but the grant of more extensive power).
[60] Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188 (1902). *See* Ry. Lab. Execs. Ass'n v. Gibbons, 455 U.S. 457, 473 (1982). *See generally* Blanchette v. Conn. Gen. Ins. Corp., 419 U.S. 102 (1974); Sturges v. Crowninshield, 17 U.S. 122 (1819).
[61] *See* Schulman, *supra* note 12, at 98.
[62] William Huston Brown, *Political and Ethical Consideration of Exemption Limitations: the "Opt-out" as Child of the First and Parent of the Second*, 71 AM. BANKR. L.J. 149, 153 (1997).
[63] *See id.*
[64] *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 357 (2006).
[65] *See* Schulman, *supra* note 12, at 99 (quoting THE FEDERALIST NO. 42, at 266 (James Madison) (Lodge ed., 1888)).

While most agree that Congress is *only* authorized to pass uniform bankruptcy laws, the meaning of "uniform" is a source of disagreement amongst courts and legal scholars. The Supreme Court made it unequivocally clear that the uniformity requirement forbids Congress from enacting any bankruptcy law affecting a single debtor.[66] It is similarly uncontroversial that debtors are subject to different bankruptcy laws and procedures depending on the state in which they live—bankruptcy law absolutely varies from state to state.[67]

Yet, this optical "patchwork" of a bankruptcy law scheme does not offend constitutionally prescribed uniformity for three reasons.[68] First, Congress is not required to pass bankruptcy laws at all.[69] Second, where federal law is silent, states are free to pass bankruptcy laws that fill the gaps and suit the individual needs of their debtors.[70] Third, the Supreme Court decided that the Uniformity Provision allows for bankruptcy law to have different effects from state to state due to variations in state law.[71] For example, Congress enacted and can amend the U.S. Bankruptcy Code, which expressly allows all states to enact and enforce their own exemption laws instead of applying federal exemption laws.[72] This does not offend uniformity because the law coming from Congress applies uniformly to all states. Though its effect allows state law to cause large differences among the states, the law applies equally to every state.[73] The controversial issue is whether Congress can pass laws that are geographically non-uniform and only apply to debtors in certain geographical regions of the country but not to others.

A. The "Geographically Isolated Problem" Exception

The Supreme Court has wrestled with geographical uniformity and decided that Congress is prohibited from passing bankruptcy laws that treat debtors in a certain class differently solely based on where they live.[74] Therefore, Congress cannot make arbitrary distinctions based on residence,

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[66] *See generally* Ry. Lab. Execs.' Ass'n v. Gibbons, 455 U.S. 457 (1982). In *Gibbons*, the Supreme Court struck down Rock Island Railroad Transition and Employee Assistance Act (RITA). That law applied to only one large debtor and the Supreme Court said it violated constitutional uniformity as it did not apply uniformly across one class of debtors. *Id.* The only instance where a law can properly be applied to one debtor is where a named individual may constitute a "legitimate class of one." *See also* Nixon v. Adm'r of Gen. Serv., 433 U.S. 425, 428 (1977).

[67] *See* Daniel A. Austin, *Bankruptcy and the Myth of "Uniform Laws,*" 42 SETON HALL L. REV. 1081, 1164 (2012).

[68] *See id. See also* Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188 (1902).

[69] *See* Austin, *supra* note 67, at 1083.

[70] *See* Sturges v. Crowninshield, 17 U.S. 122, 192–93 (1819).

[71] *See* Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 172 (1946); s*ee also* Butner v. United States, 440 U.S. 48, 54–55 (1979).

[72] *See generally* 11 U.S.C. §§ 522 (f)(3)(A)–(B).

[73] *See* Hanover Nat'l Bank, 186 U.S. at 188.

[74] *See* Schulman, *supra* note 12, at 97; s*ee also* Blanchette v. Conn. Gen. Ins. Corp., 419 U.S. 102 (1974)

and federal law must apply evenly to all debtors within the same class.[75] But, what about where the distinction is not arbitrary? Is Congress forced into nationwide enactments to solve bankruptcy problems that may only exist in one region of the country? The Supreme Court considered this question in *Blanchette v. Connecticut General Insurance Corp.*[76]

In that case, the Court considered whether the Regional Rail Reorganization Act violated the Uniformity Provision when the Act operated only within a single defined geographic region.[77] The Court held that it did not violate uniformity because the railroad proceedings which were the focus of the legislation were only taking place in one region. There were no parties involved in the proceeding outside of that region, so the entire category of debtors was confined to that region.[78] Thus, the law did not treat the same class of debtors differently and the geographic distinction was not arbitrary because the law was created to address the problem of one class of debtors who happened to be in one geographical region.[79] In other words, geographical location was not the basis for the distinction, rather, status within a particular class of debtors was. This "geographically isolated problem exception" articulated in *Blanchette* allows Congress to pass laws that only apply to certain regions of the country, so long as the class of debtors to which the law applies only exists within those regions.[80] These geographically isolated laws give Congress the ability to provide targeted solutions while not offending uniformity because they apply evenly to all debtors within a specific class, regardless of residence.

B. State Bankruptcy Exemption Laws can Legally Vary

The geographically isolated problem exception does not account for significant differences in bankruptcy law between the states today and has had little application since *Blanchette*. Now, *state* bankruptcy exemption laws are a major reason why bankruptcy law looks very different from state to state.[81] As one might expect, such variability between states in the face of the constitutional mandate of "uniformity" has raised constitutional questions. The Bankruptcy Act of 1898 provides that all states can determine their own exemption laws.[82] The issue of its legality reached the Supreme Court in 1902 in *Hanover National Bank v. Moyses*.[83] There, the Court, faced

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[75] *See* Blanchette, 419 U.S. at 160.
[76] *See generally id.*
[77] *Id.* at 158.
[78] *See id.*
[79] *See In re* John Q. Hammons Fall 2006, LLC, 15 F.4th 1011, 1023–23 (10th Cir. 2021).
[80] *See* Stephen J. Lubben, *Promesa and the Bankruptcy Clause: A Reminder About Uniformity*, 12 BROOK. J. CORP. FIN. & COM. L. 53, 58 (2017).
[81] *See* Richard E. Mendales, *Rethinking Exemptions in Bankruptcy*, 40 B.C. L. REV. 851, 861 (1999).
[82] The opt-out provisions of § 522 leave most debtors with exemptions that vary incredibly from state to state, ranging, for example, from almost non-existent exemptions in Rhode Island to virtually unlimited homestead exemptions in Texas and Florida. *See id.*
[83] Hanover Nat'l Bank v. Moyses, 186 U.S. 181(1902).

with a challenge to Section 6 of the Bankruptcy Act of 1898,[84] upheld the law even though it results in states having differing schemes of exemptions.[85] That court reasoned that "uniformity is geographical, and not personal."[86] In simpler words, the *Hanover* court reconciled the law allowing state-by-state bankruptcy exemptions with the uniformity requirement by explaining that the federal law uniformly allowed states to continue using their current exemption scheme. A critical idea was that the law did not cherry-pick which states could keep their exemption scheme and which states could not (note this is the exact situation presented by the formulation of the dual bankruptcy system discussed below).[87] It is worth mentioning that the Supreme Court's seemingly under-reasoned and "inadequate" write-off of the uniformity issue in *Hanover* has been criticized by many that have addressed the question since.[88]

Based on the few decisions coming from the Supreme Court on the matter, the definition of uniformity seems to boil down to this: a federal law passes constitutional muster only if it applies evenly to all debtors who belong to the same class. Indeed, the Supreme Court's recent decision in *Siegel* reveals no departure from this principle.[89] For years the issue of uniformity remained latent. Even though the Supreme Court created an eclectic construction of uniformity before *Siegel*, the 2017 Trustee fee increase[90] brought this issue back to the surface, and interested parties were bullish for Supreme Court clarity. Although it answered the specific question of the 2017 fee increase, *Siegel* arguably leaves us with just as many questions unanswered.

III. THE 2017 TRUSTEE FEE INCREASE AND *SIEGEL*

In 2017, to confront the issue of declining revenue in Trustee districts, Congress amended a federal law to increase quarterly disbursement fees for large debtors[91] in Trustee districts were required to pay.[92] Until they amended the law again in 2020 to mandate the increase for large debtors in BA Program districts, the law as written required large debtors in Trustee districts to pay a significantly higher fee, and only permitted BA Program

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[84] Section 6 reads: "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition." *See* Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22, 26 n. 9 (1983).
[85] *See id.* at 26.
[86] Hanover Nat'l Bank, 186 U.S. at 188.
[87] *See id.*
[88] *See* WILLIAM MILLER COLLIER ET AL., COLLIER ON BANKRUPTCY 141 (7th ed. 1909); *see also* Brown, *supra* note 62, at 172.
[89] *See* Siegel v. Fitzgerald, 142 S. Ct. 1770, 1782 (2022).
[90] *See* 28 U.S.C. § 1930(a)(6).
[91] *See id.* (large debtors are those whose disbursements total at least $1,000,000).
[92] *See In re* Cir. City Stores, Inc., 996 F.3d 156, 161 (4th Cir. 2021).

districts to increase their fee.[93] As discussed above, the Supreme Court prohibits bankruptcy laws that treat debtors of the same class differently. Therefore, as a result of the 2017 amendment, which increased some debtors' fees by thousands of dollars, several large debtors in Trustee districts brought suit claiming that the increase was an unconstitutional, non-uniform law.[94]

On the question of whether the amendment was constitutionally uniform, a distinct circuit split emerged.[95] The Fourth and Fifth Circuits found that a geographically isolated problem existed and, therefore, there was no uniformity problem.[96] The Second and Tenth Circuit found the amendment to be non-uniform and unconstitutional.[97] The Eleventh Circuit was the last circuit court to weigh in and decided there was no uniformity problem, holding that "the decisions to use two different statutory provisions to establish quarterly fees for every district in the country comes well within the flexible range of permissible bankruptcy legislation."[98] The Eleventh Circuit court did not rely on the geographically isolated problem exception to validate the 2017 fee increase.[99] Rather, it refused to read the Bankruptcy Clause narrowly and decided that the law was in line with the purpose and flexibility of the Bankruptcy Clause.[100]

Seemingly most in line with prior precedent from the Supreme Court, the Second and Tenth Circuits found an issue with the fact that the law applied to all large debtors in the country, except those in two states.[101] The Second Circuit recognized that the fee increase applied to a class that exists in both Trustee districts and BA Program districts, therefore presenting "the exact problem avoided in *Blanchette*: Two debtors, identical in all respects save the geographic locations in which they filed for bankruptcy, [were] charged dramatically different fees."[102] Further, both Circuit Courts held that the geographically isolated problem exception did not apply.[103] The Courts were unwilling to rely on the need for funding in Trustee districts to validate the fee increase because, in doing so, the application of the geographically isolated problem "would yield the following inexplicable rule: Congress must enact uniform laws on the subject of bankruptcy ... except when

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[93] *See In re* Buffets, L.L.C., 979 F.3d 366, 378 (5th Cir. 2020).
[94] *See In re* John Q. Hammons Fall 2006, LLC, 15 F.4th 1011, 1018 (10th Cir. 2021).
[95] *See* Shane G. Ramsey, *U.S. Supreme Court Seems Poised to Address Constitutionality of 2018 U.S. Trustee Fee Increase*, JD SUPRA BLOG (Oct. 12, 2021), https://www.jdsupra.com/legalnews/u-s-supreme-court-seems-poised-to-9883633/.
[96] *See In re* Buffets, L.L.C., 979 F.3d at 378; *In re* Cir. City Stores, Inc., 996 F.3d at 166 .
[97] *In re* John Q. Hammons Fall 2006, LLC, 15 F.4th at 1024; *see also* Clinton Nurseries, Inc. v. Harrington, 998 F.3d 56, 67 (2d Cir. 2021).
[98] United States Tr. Region 21 v. Bast Amron LLP (In re Mosaic Mgmt. Grp., Inc.), 22 F.4th 1291, 1310 (11th Cir. 2022).
[99] *See id.* at 1320, 1327.
[100] *See id.*
[101] *See In re* John Q. Hammons Fall 2006, LLC, 15 F.4th at 1024; Clinton Nurseries, 998 F.3d at 67.
[102] Clinton Nurseries, 998 F.3d at 69.
[103] *See id* at 65.

Congress elects to treat debtors non-uniformly."[104] Concluding that "such reasoning would render the uniformity requirement of the Bankruptcy Clause of the Constitution effectively meaningless."[105]

The Fourth and Fifth Circuits disagreed. Puzzlingly, the Fourth and Fifth Circuits did not address the Supreme Court's warning against treating the same class of debtors differently from *Blanchette*. Instead, the Fourth and Fifth Circuits focused on a different assertion from *Blanchette* to equate the 2017 fee increase law to the geographically isolated railroad law in *Blanchett*e.[106] The Fifth Circuit's majority opinion in *Buffets* decided that the geographically isolated problem exception applied because the 2017 amendment's purpose was to ensure proper funding of the U.S. Trustee System—a system that only exists in an isolated geographic region (every state other than Alabama and North Carolina).[107] That court reasoned that "[j]ust as it did in addressing the failure of railroads in the industrial heartland, Congress confronted the problem of an underfunded Trustee Program where it found it: in the Trustee districts."[108] The Fifth Circuit also noted the "flexibility inherent in the constitutional provision," explaining that "the Supreme Court has never held that a statute violated the Bankruptcy Clause because of arbitrary geographic distinctions."[109] It allowed Congress to set up a special court and laws for bankrupt railroads in the Northeast and Midwest, as those were the only parts of the country with the problem."[110] The Fourth Circuit, in *In re Circuit City Stores, Inc.*, agreed.[111]

Those courts found that the two debtors were not "identical in all respects" because they existed in states run by two different bankruptcy systems.[112] Therefore, both circuits found that the fee increase fell into the geographically isolated problem exception because the only districts where there was a need for funding were the Trustee districts.[113]

Those Courts reasoned that Congress did not draw an arbitrary distinction based on the residence of the debtor, rather, the increase applied to geographic areas that use the Trustee Program system.[114] But, what if the law establishing the existence of the dual bankruptcy system itself is a

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[104] *See id* at 69.
[105] *Id.*
[106] *See In re* Buffets, L.L.C., 979 F.3d 366, 378 (5th Cir. 2020).
[107] Although the increase was supposedly created to pay for the funding shortfall, it also allocated 2% of all amounts collected to the general treasury fund. Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 115-72, § 1004, 131 Stat. 1224, 1232.
[108] *In re* Buffets, L.L.C., 979 F.3d at 378.
[109] *Id.* (quoting Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 159 (1974)).
[110] *See id.*
[111] *See In re* Cir. City Stores, Inc., 996 F.3d 156, 166 (4th Cir. 2021).
[112] *See In re* Buffets, L.L.C., 979 F.3d at 378.
[113] *See id.*
[114] *See id.*

violation of uniformity?[115] If that is the case, the Fourth and Fifth Circuit's logic is flawed because the only reason Congress would target certain jurisdictions with the fee increase is that those districts operate under a different bankruptcy system, resulting in different needs for funding. Put differently, the Fourth and Fifth Circuit's reasoning "relies on a flawed tautology: Congress can justify treating bankrupts differently because it has chosen to treat them differently (higher fees because of different programs)."[116] Relying on the scheme created by an unconstitutional statute to defend the constitutionality of another statute presents an obvious problem.

The Supreme Court in *Siegel* disagreed with the Fourth and Fifth Circuit's reliance on the geographically isolated problem stating that the 2017 fee increase implicated no geographically isolated problem of the type presented in *Blanchette*, rather, the "problem" of the budgetary shortfall in just the Trustee Program districts "…existed only because Congress itself arbitrarily separated the districts into two different systems with different cost funding mechanisms…"[117] This statement shows that the Supreme Court is willing to allude to the uniformity issue of the dual system, but not actually address the legality of the dual system. Before seeking to apply the new law generated by the fee increase litigation to the underlying uniformity question, it is necessary to understand the history revolving around the dual system's uniformity concerns.

IV. THE DUAL BANKRUPTCY SYSTEM

To understand the dual system and its possible uniformity problems, it is helpful to understand how the dual system originated. It would be logical to assume that Alabama and North Carolina must have possessed some trait that would compel Congress to grant them permanent exemption from a Bankruptcy scheme that Congress requires every other state to implement. Congress creates this type of location-justified legislation routinely, for instance, when Congress passes a law that only applies to Florida to address land transfers to the Seminole Indian Tribe.[118] That legislation is clearly a geographically targeted law to solve a problem that only exists in that region. That type of legislation is constitutional because, in contrast to the Bankruptcy Provision, the Constitution does not constrain Congress with a uniformity requirement in exercising the majority of its enumerated powers.[119] In contrast, for bankruptcy legislation, Congress is constrained by

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[115] This note refers to the U.S. bankruptcy system, comprised of both the Trustee Program and the Bankruptcy Administrator Program as the "dual bankruptcy system" or "dual system."
[116] *See In re* Buffets, L.L.C., 979 F.3d at 383 (Clement, J. dissenting in part).
[117] *See* Siegel v. Fitzgerald, 142 S.Ct. 1770, 1782 (2022).
[118] *See generally* 25 U.S.C. §1772 (2006).
[119] The constitution grants Congress the power to only enact uniform laws on the subject of bankruptcies, provides that all "Duties, Imposts and Excises shall be uniform throughout the

uniformity. Yet, even if possessing a pointed reason for the permanent exemption could cure the dual system's uniformity issue, the reality is that Congress had no identifiable reason for granting the permanent exemption to Alabama and North Carolina.

Upon examining the creation of the permanent exemption, political influence emerges as the only probable reason the dual system exists.[120] The UST Program was originally intended to be a uniform, nationwide program, but "well[-]connected and motivated trustees and judges" convinced representatives in both states to resist the Trustee system.[121] In fact, the permanent exemption only came about when a North Carolina senator tucked it into an unrelated bill during the November 2000 lame-duck session.[122] There is no record of floor debate on the matter.

Ultimately, there is nothing about Alabama or North Carolina that makes the BA Program's system a better fit (which eliminates the argument that the permanent exemption could fit into the "geographically isolated problem" exception). Implementing the Trustee Program in Alabama and North Carolina would not have posed a serious threat to the administration of bankruptcy in those states, which is evidenced by its implementation in every other state.

A. Prior Challenges against the Dual System

The primary reason for the partial dissents in the Fourth and Fifth Circuits was the underlying dual system uniformity problem.[123] The only circuit court that has addressed the underlying uniformity problem head-on has found the dual system itself to be unconstitutionally non-uniform.[124] In 1994 the Ninth Circuit held that the law authorizing the dual system was unconstitutional in *St. Angelo v. Victoria Farms*.[125] That case came to the Ninth Circuit on appeal by a regional U.S. Trustee, St. Angelo, who claimed that his owed fee was miscalculated.[126] Victoria Farms asserted that the court should not even reach the issue of the fee payment because section 317(a)—the amendment to the Judicial Improvements act of 1990 which granted

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United States," and mandates that naturalization laws be uniform. *See* U.S. CONST. art. I, § 8. There is no uniformity requirement for any of congress's other enumerated powers. *See generally* U.S. CONST. art. I.

[120] *See In re* Buffets, L.L.C., 979 F.3d at 383 (Clements, J., dissenting in part); *see also* Alexander, *supra* note 17, at 9.

[121] *See In re* Buffets, L.L.C., 979 F.3d at 383 (Clements, J., dissenting in part)*; see also* U.S. GEN. ACCT. OFF., GAO/GGD-92-133, BANKRUPTCY ADMINISTRATION: JUSTIFICATION LACKING FOR CONTINUING TWO PARALLEL PROGRAMS 14 (1993).

[122] *See In re* Buffets, L.L.C., 979 F.3d at 383 (Clements, J., dissenting in part).

[123] Dissenting judges argued that relying on the dual system to justify the disparity in the application of the 2017 fee increase was improper because the creation of the dual system itself was illegal. *See id.*; *see also In re* Cir. City Stores, Inc., 996 F.3d 156, 173 (4th Cir. 2021).

[124] *See* St. Angelo v. Victoria Farms, Inc., 38 F.3d 1525, 1531–33 (9th Cir. 1994).

[125] *Id.*

[126] *Id.* at 1528.

South Carolina and Alabama an extension delaying their adoption of the Trustee Program—was non-uniform.[127] The court agreed with Victoria Farms and struck down § 317(a) of the Judicial Improvements Act of 1990 because it was the basis for the existence of "a different statutory scheme governing the relationship between debtors and creditors in Alabama and North Carolina.[128] It is § 317(a) that guarantees that creditors and debtors in the forty-eight other states are governed by a dissimilar, more costly bankruptcy system than members of the same groups in Alabama and North Carolina."[129]

That court was ruling on the amendment that preceded the permanent exemption granted to the BA Program states, which formally created the dual system.[130] Ultimately, through invalidating 317(a), the *St. Angelo* court was the first and only circuit court to declare the unconstitutionality of the dual system in a majority opinion.[131]

Despite its bold invalidation of the dual system, the practical impact of the *St. Angelo* decision is minimal, at most.[132] This is for several reasons. The Trustee system is a massive administrative program that forty-eight states implement, therefore, practically, if one system was to be abolished because of non-uniformity, it would probably have to be the BA Program because it exists in only two states.[133] Therefore, the burden to transition would only fall on two states instead of forty-eight. The decision of the *St. Angelo* court could only have an impact on the states within the Ninth Circuit. So, in *St. Angelo*, the Ninth Circuit was effectively powerless to abolish the BA Program given that the BA Program states are in the Eleventh and Fourth Circuits.[134] Consequently, it would have to be one of those circuit courts and/or the Supreme Court that invalidate the BA Program for there to be any practical effect.

Notwithstanding that abolishing the BA Program would affect fewer states, some have argued that the Trustee system should be abolished because it failed to meet its congressional mandate at all, in that it is overly burdensome and ineffective.[135] The Trustee system has been criticized as an "inflexible bureaucracy, preferring form over substance."[136] One court held that the Trustee System "acts as a regulatory body and violates federal law

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[127] *See id.* at 1533
[128] *Id.*
[129] *Id.*
[130] *See id*; 28 U.S.C. § 1930(a)(7).
[131] *See* Alexander, *supra* note 17, at 18.
[132] *See id.* at 36 n. 237.
[133] *See id.*
[134] *See id* at 19.
[135] *See id*. at 21.
[136] *See id*. at 21 (quoting NATIONAL ACADEMY OF PUB. ADMIN., ALTERNATIVE STRUCTURE FOR THE UNITED STATES TRUSTEE PROGRAM 8 (1995)).

by failing to comply with various provisions of the Administrative Procedure Act."[137]

B. The Dual System Issue in Siegel

Regardless of the Trustee system's arguable pitfalls, the constitutional questions of its structure remain. The Petitioner in *Siegel* presented to the Supreme Court the issue of the dual system as a secondary argument.[138] For context, the *Siegel* case arose out of the Fourth Circuit.[139] At the circuit court level, neither party addressed the constitutionality of the dual system itself.[140] Nor was the original law creating the dual system addressed in the bankruptcy court decision or in any of the other bankruptcy court rulings deciding a uniformity challenge to the 2017 fee increase.[141]

It is unclear why those parties did not bring up the issue, which won the day previously in the Ninth Circuit.[142] It may be that invalidating the dual system (and requiring BA Program states to transition to the Trustee program) would have been little solace to the Plaintiff debtors in a Trustee district who bore the higher fee from the 2017 increase. But, in retrospect, the plaintiff debtors in the Fourth and Fifth Circuits may have excluded this argument to their detriment. The Fourth and Fifth Circuits basically relied on the underfunding in only Trustee districts to justify their decision to consider the fee increase valid under the "geographically isolated problem" exception."[143] Had the courts decided whether the dual system itself was constitutionally uniform as a threshold matter, it is certainly possible, and arguably likely, that they would have held that this system was not uniform just as the Ninth Circuit did.[144] The dual system is patently not *geographically* uniform, and therefore, the permanent exemption would need to fall into the geographically isolated problem exception (or some new exception) in order for the existence of the dual system to pass constitutional muster.[145] As the Ninth Circuit opined, there is no "problem" in Alabama or North Carolina that Congress sought to address by granting them the permanent exemption.[146] Therefore, if the question of the dual system had been presented, and those courts found it to be infirm, then they would not

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[137] *See id*. at 4.
[138] *See* Brief for the Petitioner, at *33, *In re* Cir. City Stores, Inc., 996 F.3d 156 (S. Ct. 2022) (No.21-441), 2022 WL 89272.
[139] *See* Siegel v. Fitzgerald, 142 S.Ct. 1770 (2022).
[140] Both briefs focus on the 2017 fee increase and do not bring up the underlying uniformity issue. *See generally* Brief for the Respondent, *In re* Cir. City Stores, Inc., 996 F.3d 156 (S. Ct. 2022) (No.21-441), 2022 WL 89272; s*ee also* Brief for the Petitioner, *In re* Cir. City Stores, Inc., 996 F.3d 156 (S. Ct. 2022) (No.21-441), 2022 WL 89272.
[141] *See In re* Cir. City Stores, 996 F.3d 156, 165 n.9 (4th Cir. 2021).
[142] *See* St. Angelo v. Victoria Farms, Inc., 38 F.3d 1525 at 1531–32 (9th Cir. 1994).
[143] *See In re* Cir. City Stores, 996 F.3d at 165; *see also In re* Buffets, L.L.C., 979 F.3d 366, 378 (5th Cir. 2020).
[144] *See generally* St. Angelo, 38 F.3d at 1535.
[145] *See* Blanchette v. Conn. Gen. Ins. Corp., 419 U.S. 102, 106 (1974).
[146] *See* St. Angelo, 38 F.3d at 1532.

have been able to use the assumedly valid dual system as the basis for validating the law targeting the Trustee districts only.

In any event, the Fourth Circuit did not address the constitutionality of the dual system and the primary issue on appeal to the Supreme Court was the issue of the fee increase (the question of the dual system was presented by the petitioner as an issue the Court could address but they argued that it was "unnecessary" for the Court to issue a ruling).[147] While the constitutionality of the dual system was not the main issue before the court, it was certainly entwined. Because there is nothing about the Trustee Program that makes it any more constitutionally valid than the BA Program,[148] the Supreme Court could have invalidated the BA Program, the Trustee System, or both. A decision to invalidate the Trustee Program would clearly have a much larger and more disruptive practical impact, and as such the Court would likely be inclined to avoid such political questions. However, the Court could have invalidated the dual system by abolishing the BA Program. A major ramification of that decision would be requiring the six BA Program districts to convert to the Trustee system. This, inherently, would not have a national effect, and the parameters for moving forward would be clear. Rather than to avoid the practical consequences of invalidating the dual system, the Supreme Court likely chose not to address the issue of the dual system to avoid political fallout— especially considering the actual impact of invalidating the dual system would have a practical significance that pales in comparison to many of the Court's major decisions. The closest the Court came to addressing the legality of the dual system was when it referred to the Trustee and BA Program states as "arbitrarily separated" by Congress.[149] It is possible that the court was signaling to the lower court for remand purposes or Congress (or both) that the existence of the dual system is unconstitutional, without having to make a sweeping decision itself.

Even without addressing the dual system directly, the narrower decision by the Supreme Court, addressing the 2017 fee increase, creates a precedent on general issues of uniformity and reinforces the teeth of the Uniformity Provision. First, the Court's invalidation of the fee increase not only signals Congress to be more careful in enacting only uniform bankruptcy laws but also could renew congressional attention to the underlying dual system issue for the first time since *St. Angelo*. Additionally, it sends a message that the Supreme Court cares to interpret uniformity strictly to possible litigants who are harmed in the future as a result of the existence of the dual system itself.

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[147] S*ee generally* Brief for the Respondent, *In re* Cir. City Stores, Inc., 2022 WL 89272 (S. Ct. 2022) (No.21-441). *See also* Brief for the Petitioner, *In re* Cir. City Stores, Inc., 2022 WL 89272, at *33 n. 9 (S. Ct. 2022) (No.21-441).
[148] *See In re* Buffets, L.L.C., 979 F.3d at 383 (Clement, J., dissenting in part).
[149] *See* Siegel v. Fitzgerald, 142 S.Ct. at 1784 (2022).

For instance, debtors who are harmed by the inefficiency of the Trustee system or by other non-uniform laws passed in the future.

V. PROPOSED SOLUTION: THE DUAL SYSTEM SHOULD BE ABOLISHED.

An obvious solution to the issue of uniformity presented by the 2017 fee increase would be for Congress to be abundantly careful in their drafting of bankruptcy statutes to avoid enacting laws that expressly treat the debtors in BA Program districts differently than those in Trustee districts. But rather than putting lipstick on a pig, the constitutional infirmity of the dual system itself should be remedied so that uniformity issues, such as the one caused by the fee increase, will never arise again. Because the Supreme Court decided to only answer the narrow fee increase question, the burden likely falls to Congress to rectify the issue.

Congress has a duty to uphold the Constitution and should pass legislation that mandates that the BA Program districts transition to the Trustee program, as this would have the least disruptive effect. As discussed above there is nothing inherent to North Carolina or Alabama that makes the Trustee system unsuitable for those states. In fact, other than some differences in flexibility and funding, both programs operate in largely similar ways. Balanced against the obligation to uphold the Constitution,[150] simple preference for the BA Program must lose out. As James Madison observed in *Federalist* number 42:

> 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 [i.e., Congress's exclusive power to enact bankruptcy laws] seems not likely to be drawn into question.[151]

Even in the best-case scenario, where there are no more non-uniform laws, the existence of the dual system promotes forum shopping[152] and tends

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[150] For members of Congress, the Constitution states that they "shall be bound by Oath or Affirmation to support this constitution." *See* U.S. CONST. art. VI, § 3.

[151] *See* Schulman, *supra* note 12, at 99 (quoting The Federalist No. 42, at 266 (Lodge ed., 1888)).

[152] "In its current form, 28 U.S.C. § 1408 allows a debtor to file bankruptcy in any bankruptcy court in which
the debtor's (1) principal place of business; (2) principal assets; (3) domicile (i.e., its state of incorporation); or (4) residence has been located during the 180-day period preceding the bankruptcy
filing, or in any district in which a bankruptcy case concerning the debtor's affiliate, general partner, or
partnership is pending" KEVIN M LEWIS, CONG, RSCH. SERV., LSB10063, SHOULD FEDERAL LAW RESTRICT WHERE A COMPANY MAY FILE BANKRUPTCY? 1 (2018). Though not indicative of forum shopping, it may be a correlation that, for three years in a row, the state

to advantage certain debtors based solely on where they live. The statutes, court rules, procedures, and principles that work together to safeguard against and discourage forum shopping in normal civil litigation do not typically apply in bankruptcy proceedings. For that reason, forum shopping is prevalent in Bankruptcy.[153] Rampant forum shopping can undermine the perception and integrity of the bankruptcy system.

Further, the dual system disadvantages unsecured creditors in the forty-eight states which operate under the Trustee Program compared to similarly situated unsecured creditors in Alabama and North Carolina. The dual system caused Chapter 11 debtors in Trustee districts to pay materially more in quarterly fees than similarly situated debtors in districts that employ Bankruptcy Administrators. "Those fee differences, in turn, trickle down and reduce the amounts unsecured creditors receive."[154] Those unsecured creditors do not have the ability to forum shop and are disadvantaged through no fault of their own.

Additionally, the funding scheme created by the dual system reveals uniformity and fairness issues. The BA Program and Trustee Program are engaged in a form of cost-sharing funding, whereby debtors' fees are pooled to fund each general program.[155] It is intuitive that some states will contribute to that pot more than others depending on the number of filings and the number of large debtors. It is seemingly unfair that, in the Trustee system, the higher contributing states must carry the load of dozens of other under-performing states, and North Carolina and Alabama must rely on, or help to provide for, only each other. Notably, Alabama holds the highest proportion of personal bankruptcy filings and has for several years.[156] So while states like Texas, New York, and Delaware, which have the most large-debtors that make up much of the Program's funding,[157] carry the burden to up-keep a program made up of forty-eight states, Alabama and North Carolina just fund themselves.[158]

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of Alabama has had the highest per capita Chapter 7 and 13 filing rates in the nation. *See* Kaitlin Miller, *States with the Highest Bankruptcy Rates*, CHI. TRIB., (Feb. 13, 2020, 3:00pm) https://www.chicagotribune.com/business/careers-finance/sns-us-states-with-the-highest-bankruptcy-rates-20200219-v5dz4qpt5resnebzsdxxchlhjq-photogallery.html.

[153] *See* Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 218 CONN. L. REV. 159, 162–63 (2013).

[154] *See In re* Cir. City Stores, Inc., 996 F.3d 156, 169 (4th Cir. 2021) (Quattlebaum, J., dissenting in part).

[155] *See* 28 U.S.C. § 1930(a)(6).

[156] *See States with the highest bankruptcy rates*, CHI. TRIB. (Feb. 13, 2020, 3:00 PM), https://www.chicagotribune.com/business/careers-finance/sns-us-states-with-the-highest-bankruptcy-rates-20200219-v5dz4qpt5resnebzsdxxchlhjq-photogallery.html.

[157] *See* Statista Rsch. Dep't, *Number of Chapter 11 bankruptcy filings in the United States in 2021, by state*, STATISTA (Oct. 19, 2022), https://www.statista.com/statistics/1118037/bankruptcy-filings-us-chapter-11-state/.

[158] *See In re* Cir. City Stores, 996 F.3d at 169 (Quattlebaum, J., dissenting in part).

If Congress can pass non-uniform bankruptcy laws and then rely on those laws to justify new non-uniform laws, then uniformity is dead. For all these reasons, coupled with the fact that the existence of the dual system is a violation of the plain language of the Constitution and Supreme Court precedent, to cure this long-standing constitutional infirmity which created and will continue to cause costly litigation, and arbitrarily disadvantage many Americans, the dual system should be abolished.