Hood: How Not to Decide a Case - And the Ramifications of What Was Decided??

Karen Cordry

Follow this and additional works at: https://via.library.depaul.edu/bclj

Recommended Citation
Hood: How Not to Decide A Case – And the Ramifications of What Was Decided??

Karen Cordry*

I. Introduction

In 1989 and 1992, the Supreme Court decided two cases in which it held that Congress had not acted with sufficient precision to abrogate/waive an existing governmental immunity from avoidance actions. After Congress clarified section 106 in 1994, the Court decided Seminole Tribe of Florida v. Florida, in which it unequivocally stated that no Article I power could provide authority to abrogate state immunity, and agreed that its opinion would likely apply to cases arising under the Bankruptcy Clause. Indeed, the first application of Seminole was in a bankruptcy case where the Court granted certiorari, vacated the decision and remanded for reconsideration in light of Seminole.

Accordingly, there seemed little doubt that bankruptcy proceedings were subject to the Eleventh Amendment and that immunity could not be abrogated by Congress. By 2000, four circuit courts had explicitly held that Seminole applied in bankruptcy cases and that section 106(a) was unconstitutional. That still left many arguments about the extent to which the States could waive their immunity and whether Congress could legislatively prescribe the scope of that waiver or whether that extended “waiver” was really just a disguised abroga-

* The views expressed herein are those of the author and should not be taken as those of the National Association of Attorneys General, the Attorneys General, or their staff.

3. Id. at 72 n.16.
5. Mitchell v. Franchise Tax Bd. (In re Mitchell), 209 F.3d 1111, 1121 (9th Cir. 2000); Sacred Heart Hosp. v. Pennsylvania (In re Sacred Heart Hosp.), 133 F.3d 237, 243 (3d Cir. 1998); Fernandez v. PNL Asset Mgmt. Co. LLC, (In re Fernandez), 130 F.3d 1138, 1139 (5th Cir. 1997); Schlossberg v. Maryland, (In re Creative Goldsmiths of Washington, D.C., Inc.), 119 F.3d 1140, 1145-46 (4th Cir .1997). Other circuits had not ruled on the issue, relying instead on a finding that there had been a waiver of immunity in the particular matter.
Moreover, many provisions that were imposed as a matter of substantive law (and not judicial order), such as the automatic stay and the section 525 bar on governmental discrimination could be enforced by the doctrine described in *Ex parte Young.*

Later, despite the Ninth Circuit's reliance on *Seminole* in *Mitchell,* the bankruptcy court asserted in *In re Bliemeister* that the prior decisions in this area had missed the point and that, as to bankruptcy, the question of whether States had retained their pre-Constitution sovereign immunity was still an open question. This conclusion was primarily based on an analysis of the historical development of bankruptcy as well as language in the Federalist Papers, that dealt with the requirement that bankruptcy laws be "uniform." That decision spurred a flurry of similar arguments around the country. None were upheld on appeal to district courts, and the Seventh Circuit rejected it as well, joining the other four circuits that had previously found Eleventh Amendment immunity in bankruptcy. The Sixth Circuit BAP, though, affirmed one such ruling as did the Sixth Circuit.

Tennessee sought certiorari of the Sixth Circuit's ruling on this historical analysis, noting the conflict of its analysis with that of the other five circuit courts that had explicitly addressed the issue. It was joined by an amicus brief from virtually every other State, requesting that the Court take the issue to decide the fundamental question of whether the Eleventh Amendment applied to bankruptcy. There was no other split in the Circuits – the propositions that the general discharge could apply to States, despite the Eleventh Amendment, but that application of that discharge to the specific facts in a complaint between the debtor and a State was barred by the Eleventh Amendment – were not disputed by any of the Circuits that had considered them. The Court granted certiorari at Tennessee's request, and did not seek supplemental briefs on any other issue.

During the argument, though, none of the discussion touched on the Sixth Circuit's issues or analysis. Instead, the Court immediately launched into a discussion about whether entry of the discharge was an *in rem* proceeding that would not be a "suit against the State." It held that its prior precedent and an analogy to admiralty cases dictated the conclusion that the discharge was such a proceeding and, as such, was not subject to the Eleventh Amendment at all. It held, therefore, that it did not need to address the issue below, and that argument still remains open.

The discussion herein will look briefly at the Sixth Circuit's decision and its analysis since courts will still need to confront that question in the future. It will then turn to the Court's suggestion that describing the discharge as an *in rem* proceeding is sufficient to resolve the issue. A review of prior case law on the many types of *in rem* proceedings and their interaction with the Eleventh Amendment suggests that the Court's decision failed to take into account many relevant precedents that could have greatly undercut its conclusions. The analysis below will also review the decisions cited by the Court and will show that they fail to provide strong support for the Court's conclusions. In an area of such importance to the functioning of the bankruptcy system, one would have expected an ironclad decision, but that does not appear to have been the result. A major part of the problem surely must be placed squarely on the Court's shoulders for its failure to adhere to normal jurisprudential principles that would have precluded a decision on issues that had not been raised, appealed, or fully briefed by both sides. The failure to do so left an opinion that not only is flawed but that provides little guidance to the future—a result that poorly serves all parties.

Those jurisprudential principles include the constitutional bar on federal courts providing advisory opinions, and the corollary that courts should not decide issues that were not presented in a timely fashion. On appeal, the same principle dictates that courts generally do not hear issues that have not been raised below and specifically identified in the appeal. The Supreme Court further refines those principles in the use of its certiorari power, which allows it to decide which issues it will take, and which issues it will defer to a later time. The latter power—to allow issues to "percolate" in the lower courts and achieve full definition—is the most salient characteristic of Supreme Court jurisprudence. Conversely, even if a case is taken by the Court, it may dismiss the writ as improvidently granted if the issues turn out not to be well presented, or it can seek supplemental briefing if wants to review new arguments that have emerged to ensure that the relevant precedents have been identified, examined, and debated. Those procedures are intended to ensure that the Court benefits from finely-honed briefs and focused arguments.

Unfortunately, the decision in *In re Hood* violates virtually all of those principles. The decision that was issued, and the asserted rationales for its result, are likely, if faithfully applied, to have many unexpected ramifications, not only as to sovereign immunity (in and out of

---

bankruptcy) but also as to bankruptcy issues that have no relationship to immunity debates because of the Court's failure to note or take into account its prior precedents. If there had been a fuller briefing and argument, the Court might still have sought to reach the same conclusion but it would have found it far harder to do so, and its opinion would surely have been clearer and distinctly more limited. The lack of preparation resulted in questioning that was not well focused, and attempts to resolve factual issues resulted in questions that were not clearly answered and to some extent, appear to have been answered incorrectly. The cases cited in the opinion provide little support for the sweeping propositions they are offered for and, as a result, the extent of the holding is notably opaque. And, in the end, the Court did not even decide the issue on which it had taken certiorari, leaving that issue still open to bedevil the lower courts.

In any event, the analysis below will first discuss the decision and analysis in the Sixth Circuit's opinion and then will review the lines of precedent that the State could and would have raised had the Court overturned the Sixth Circuit's decision and left these other issues to the next day and the next case. While the review below barely skims the surface – and there are certainly countervailing arguments to be made – it will demonstrate that there is a plausible argument to be made against the conclusions that the Court reached in this decision. Recognizing however, that the Court is both final and infallible, the final portion of the paper will look forward and try to predict how the decision should be interpreted and applied.

II. THE Bliemeister ANALYSIS

The Supreme Court chose not to discuss this issue so this paper will not discuss it at length. In the States' view, the Bliemeister argument, while not historically implausible, is, in the end, fundamentally incompatible with the decisions interpreting the Eleventh Amendment that began with Hans v. Louisiana, proceeded through Atascadero State Hosp. v. Scanlon, and culminated in Seminole. The argument in Bliemeister and its progeny boils down, in the States'
view, to little more than the notion that "uniformity" requires federal law to totally control (and displace) any state law on the subject. The asserted corollary is that, if federal law controls a particular field, then sovereign immunity cannot limit that control and states must be deemed to have waived their immunity pro tanto with the powers granted to the federal government. The argument primarily derives from an opaque cross-reference in the Federalist Papers between essay 81, in which the State were reassured that their immunity from judicial action would be retained, to essay 32, in which Hamilton discussed various issues regarding legislative supremacy and preemption.

The problem for those currently asserting this view is that it's simply not new. It was set forth, in great depth and with considerable persuasive force, in a 55-page dissent by Justice Brennan in Atascadero. While the decision in Bliemeister deals with a subset of the Atascadero argument, its logic is no different than the broader argument there, that essentially links the power to legislate with a corollary power to set aside state immunity. The Seminole majority, though, flatly rejected any such linkage, holding that the Eleventh Amendment barred abrogation no matter how sweeping the federal power that was being exercised. Even assuming that a requirement that a federal law be "uniform" somehow implied that the grant of power in that area was more plenary than the sweeping Commerce Clause powers at issue in Seminole, the opinion is unequivocal in rejecting any equivalence between the power to legislate and the power to abrogate. After Atascadero, the whole argument was hashed out yet again in Pennsylvania v. Union Gas, only seven years before Seminole, so the Court could hardly have been unaware of

14. The Atascadero dissent would have found that to whatever extent federal law preempted state law that it could also overcome state immunity. Bliemeister and its progeny limit themselves to one part of this argument; i.e., the instances where federal law is preemptive because it entails a "uniform" law, but there is nothing in the deductions that they draw from the connection between Federalist Nos. 81 and 32 that would require that their analysis be so limited.

15. Seminole, 517 U.S. at 72.

16. A requirement to pass uniform laws surely suggests a restriction on Congress, not a grant of greater power. Most laws are uniform though, after all, without any special grant of "power" to Congress to write such laws. The Commerce Clause allows Congress to protect Alaskan salmon, but not Florida redfish, even though it sets uniform tax rates and prices stamps equally in both states. Nor does a requirement that a federal law be uniform necessarily bar varying state laws on the same subject. While a federal law can be both uniform and preemptive of state laws on the same subject, it certainly need not be. The debate over whether federal law does or should preempt varying state laws is a perennial staple of legislative debate, particularly in the field of consumer protection. The answer turns on Congressional intent, not an automatic elimination of state laws in any field where Congress establishes a uniform rule (whether it be as floor or ceiling to state efforts).

these points when it decided *Seminole*. And, since the entire argument, including the connection between Federalist Papers 81 and 32 had been before the Court in those cases (and was even mentioned by the dissent in *Seminole*) – it is difficult to see how this is a new argument as *Bliemeister* and *Hood* claimed.

It was perhaps for these reasons that the *Bliemeister* analysis did not find marked favor outside the bankruptcy courts. The analysis was actually dicta, since the decision eventually held that the state had waived its immunity by failing to timely raise the issue. The ruling was upheld solely on that basis by the district court and the Ninth Circuit. A few other bankruptcy courts adopted the analysis, but any such decision that was appealed to a district court was reversed. After the Sixth Circuit BAP’s decision in *In re Hood*, the Seventh Circuit flatly rejected the analysis in *Nelson*, concluding that the Eleventh

18. In *Union Gas*, four Justices asserted that the States waived their immunity as to any Congressional statute upon ratification of the Constitution. *Id.* “[T]o the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary . . . to render them liable. The States . . . are thus not “unconsenting”; they gave their consent all at once, in ratifying the Constitution . . . rather than on a case-by-case basis.” *Id.* As this waiver was inherent in the Constitution, there was no need for application of a “plain statement rule” (the issue in *Atascadero*), a view with which Justice White disagreed. (Welch v. Texas Dep’t of Highways & Public Transp., 483 U.S. 468, 478 (1987) (plurality opinion)), which appears to be why he refused to join the dissent in *Atascadero*. In *Union Gas*, where the majority held the statute was sufficiently clear, Justice White agreed, in a single cryptic sentence, that Congress could abrogate: “I agree with the conclusion . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of [Justice Brennan’s] reasoning.” *Union Gas*, 491 U.S. at 57.

Under this view, States retained immunity only so long as Congress chose to allow them to do so. In practice, the difference between this dormant waiver, and the general waiver espoused by the Brennan group is only with respect to the clear statement rule. See *id.* at 36 (Scalia, J., concurring in part and dissenting in part) (“If Hans means only that federal-question suits . . . against the States cannot be brought in federal court unless Congress clearly says so, it means nothing at all.”); and *id.* at 40 (“Article [III] Article would be transformed from a comprehensive description of the permissible scope of federal judicial authority to a mere default disposition, applicable unless and until Congress prescribes more expansive authority.”).

19. 517 U.S. at 149

20. *Bliemeister*, 251 B.R. at 388 (“Despite repeated acknowledgments of such exceptions to sovereign immunity in the original Constitution, the Supreme Court has not had the opportunity to explore them.”); *Hood*, 319 F.3d at 761-62 (“However, neither Seminole Tribe nor any of the Supreme Court’s other recent sovereign immunity cases address Congress’s Bankruptcy Clause powers as understood in the plan of the Convention.”).

21. *Bliemeister*, 296 F.3d at 858.


23. 262 B.R. 412 (B.A.P. 6th Cir. 2001) (upholding the bankruptcy court’s use of *Bliemeister*).
Amendment did apply and barred a debtor from initiating an injunctive action against the state. With the circuits unanimous on the point, the States, perhaps complacently, assumed that the Sixth Circuit was likely to take the same view.

III. THE HOOD DECISION

A. The General Context

That assumption, of course, turned out to be false when the Sixth Circuit issued its decision in Hood. The problems started with the opening pages where the court recounted the purported history of the student loan exception and its impression of what it believed the state was trying to do to the hapless debtor in the case. It noted that originally all student loan debts had been dischargeable, but in 1976, Congress had begun to limit that right, assertedly at the request of governmental lenders. At least for those loans, students could only discharge them on a showing of undue hardship, or after they had been in repayment for five (later seven, and later an unlimited number of) years. The court stated that this determination had to be made through a “special adversary proceeding” (although it did not specify why the student loan discharge was any more special than any other complaint to determine the dischargeability of a specific debt). It then asserted that Tennessee’s motion to dismiss the adversary proceeding was an attempt to bar the debtor from having the discharge decision made at all, and that Tennessee was trying to “have its cake and eat it, too.” Since courts rarely condone that form of legal gluttony, it was predictable that the opinion would go downhill from there for the State.

The opinion, though, misconstrued Tennessee’s arguments. The State did not contest the entry of the general discharge; it merely argued that an adversary proceeding brought by the debtor to decide the status of a particular debt fell under the Eleventh Amendment. That would not, however, preclude the debtor from asserting the issue in response to a collection effort by the State. This split between the general and specific discharge was well established by this time. Prior to the Sixth Circuit’s opinion, every circuit court opinion that had passed on these issues agreed on three propositions. First, as a general matter, the Eleventh Amendment applied in bankruptcy. Second, based on some variation of an in rem argument, they had rejected the intermittent attempts of some States to raise the applicability of the

24. 301 F.3d at 820.
25. See Hood, 319 F.3d at 759.
Eleventh Amendment to the general discharge or the confirmation process.\textsuperscript{26} (The best the States had ever achieved was the statement in \textit{Walker} that the argument was not "specious."\textsuperscript{27}) Third, this conclusion about the global discharge did not preclude application of the Eleventh Amendment to a debtor-filed complaint to determine whether a particular debt was covered by any exception to the general discharge. While, the generic issue could "bind the world," application of that finding to specific facts (like application of a federal law to specific actions by a state), was subject to the Amendment.\textsuperscript{28}

The practical effect of these principles varied with the way the Code treats the various exceptions. Under section 523(c), debts under sections 523(a)(2), (4), and (6) are discharged unless the creditor affirmatively initiates litigation in bankruptcy court. Accordingly, in the same way that a forced filing of a proof of claim still waives the State's immunity with respect to litigation of that claim,\textsuperscript{29} so too the courts treated the forced requirement to litigate these discharge exceptions in bankruptcy court as a waiver of the State's immunity if it chose to initiate the litigation.\textsuperscript{30} As to the other exceptions, which did not require litigation in bankruptcy court, the State remained free to assert its immunity so as to bar the federal court from litigating the issue if the State objected. That immunity, however, did not eliminate the Supremacy Clause effect of the general discharge (again assuming its validity). Thus, a state court, confronted with a collection action against a debtor, would be required to determine the merits of any bankruptcy discharge defense offered by the debtor.\textsuperscript{31} There is nothing odd or inherently problematic about leaving discharge complaints to the state courts. Indeed, until the mid-1970s, all discharge litigation was normally left to state courts and it was a rare situation where a

\textsuperscript{26} See, e.g., \textit{In re Ellett}, 254 F.3d 1135 (9th Cir. 2001); Bd. of Regents of the Univ. of Texas Sys. v. Walker, 142 F.3d 813 (5th Cir. 1998); Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777 (4th Cir. 1997).
\textsuperscript{27} \textit{Walker}, 142 F.3d at 822.
\textsuperscript{28} See \textit{Walker}, 142 F.3d 813 (distinguishing between the two proceedings).
\textsuperscript{29} See \textit{Gardner v. New Jersey}, 329 U.S. 565, 573-74 (1947) (clarifying that a waiver only applies to litigation of the claim that was presented and the defenses inherently related thereto). Since the claim was the only matter for which federal jurisdiction was invoked, it logically follows that the scope of the claim limits the scope of the waiver. \textit{See infra} note 56.
\textsuperscript{30} \textit{Cf. In re Platter}, 140 F.3d 676, 679 (7th Cir. 1998). If one accepts the supposition that the general discharge can be entered at all, then there would be no logical bar to structuring it so that the discharge exception can benefit to the state only if it chose to enter the federal courts and request that right. Oddly, \textit{Platter} did not involve one of the Section 523(c) exceptions, so it is unclear why the State filed the action in bankruptcy court initially. Having done so, though, it could not insist on only favorable results.
\textsuperscript{31} Testa v. Katt, 330 U.S. 386, 393-94 (1947) (stating Supremacy Clause requires state courts to enforce federal law in their courts, regardless of their opinion of the merits of the law).
bankruptcy court would decide any of those issues. In reaction to concerns that this did not provide adequate protection to debtors, the Bankruptcy Act was amended (and the Code later written) so as to give the bankruptcy courts more power to hear discharge complaints in general, and to require their involvement in the most problematic situations. Apart from section 523(c) exceptions, though, nothing else precluded discharge issues from remaining, in most cases, merely a defense to any potential post-discharge state court litigation. Thus, dismissal of a complaint on immunity grounds would in no way bar the debtor from raising an undue hardship defense in state court.

32. See Local Loan Co. v. Hunt, 292 U.S. 234, 241 (1934) ("What has now been said establishes the authority of the bankruptcy court to entertain the present proceeding, determine the effect of the adjudication and order, and enjoin petitioner from its threatened interference therewith. It does not follow, however, that the court was bound to exercise its authority. And it probably would not and should not have done so except under unusual circumstances such as here exist.") (emphasis added).

33. Brown v. Felsen, 442 U.S. 127, 135-36 (1979) (stating 1970 amendments were meant to prevent specific abuses and to "to give those claims to the bankruptcy court so that it could develop expertise in handling them") (emphasis added).

34. In addition, raising immunity is consistent with regulations of the Department of Education (DOE), which sets procedures for student loan programs, and contracts with State agencies to serve as the administrators of the guarantee process. While the State agencies are the faces that appear in bankruptcy court, the fact is that virtually the entire financial burden of defaulted loans falls on the federal government, not the States, due to the federal reinsurance program. Thus, the States essentially work in bankruptcy court to protect the federal fisc, not their own. See General Accounting Office Report to the Honorable James M. Jeffords, U.S. Senate, Federal Student Loans: Flexible Agreements with Guarantee Agencies Warrant Careful Evaluation (January 2002), available at http://www.gao.gov/new.items/d02254.pdf (noting structure of student loan programs); Student Loan Fund of Idaho, Inc. v. U.S. Dep't of Educ., 272 F.3d 1155, 1157-58 (9th Cir. 2001) (lenders receive guaranty through state agencies, but United States provides reinsurance to states for at least 98% of the value of loans). DOE sets the terms under which State guaranty agencies must agree to guarantee loans, the terms on which they must take back loans from the lenders, and the collection actions they must take if they are to be protected by the reinsurance. Among the requirements are the duty to review "undue hardship" issues in bankruptcy cases and evaluate whether they should be contested or acquiesced in. If they are to be contested, the rules require the States to "oppose" the discharge. Initially the regulations did not specify how the States should "oppose" the debtor and the Tenth Circuit held that could only be read to mean that States must do so in bankruptcy court, rather than by asserting immunity there, and later dealing with the discharge, if necessary, in state court. See generally Innes v. Kansas State Univ. (In re Innes), 184 F.3d 1275, 1282 (10th Cir. 1999).

Thereafter, the Department of Education amended 34 C.F.R. § 682.402(i)(1)(iv) in July 2000 to provide that "(iv) The guaranty agency must use diligence and may assert any defense consistent with its status under applicable law to avoid discharge of the loan. Unless discharge would be more effectively opposed by not taking the following actions, the agency must oppose the debtor's discharge complaint." (emphasis added). 34 C.F.R. § 682.402(i)(1)(iv) (2000). The accompanying commentary made clear that this was meant to allow States to assert immunity, and that the courts had misread the original regulations by refusing to allow the States to assert immunity. 64 Fed. Reg. 58,298 (Oct. 28, 1999). If there is a remaining conflict between the federal policy to support discharges, and the federal policy for student loan debtors to pay what
Moreover, even though they held that the State itself could not be sued on a discharge issue, the bankruptcy courts had little difficulty in finding that suits could be filed under the *Ex parte Young* doctrine against state collection officials, if the debtor alleges that the debt was discharged. If so, then the collection action would violate federal law and the officer could be enjoined. Indeed, some courts concluded that they need not even await active collection from the debtor but could rely on the fact that the State has not unequivocally disavowed any intent to collect the debt.35

Student loans have been distinguished, though, as an instance where *Young* does not apply, because they require an additional litigation after entry of the general discharge. Until the hardship determination was made, the debt was presumptively not discharged, so most courts agreed that there could be no violation in seeking to collect thereon.36 This did not mean debtors were barred from having the issue heard. It merely meant that they could not affirmatively litigate the issue when and where they chose. There may be practical disadvantages with being limited to raising the issue as a defense, but that is not the same as saying that the debtor would be denied a discharge entirely.

Perhaps the simplest way of dealing with the issue would be for the Sixth Circuit to have joined a few courts that suggested that a hardship issue could be raised in a *Young* complaint.37 One could argue that the hardship existed as a Platonic "fact," whether it had been determined yet or not, and that would be enough to allow the issue to be alleged in a suit against the state officer. After all, factual and legal issues must be decided as to the application of other discharge exceptions in which *Young* litigation is brought. For instance, was this tax more than three years old (and how was the time to be calculated)? Did the debtor engage in fraud? The parties would have to litigate those issues before it could be determined whether the debt had, in fact, been automatically discharged and whether, therefore, the collection activity was illegal.38 Including student loan issues might have been a step further, but not a major leap, by any means.

---


The Sixth Circuit, though, explored none of these ramifications. Instead, it apparently began its analysis with two fixed conclusions—that the State was seeking to attack the general discharge, and that, if it were successful in asserting its immunity from having the discharge complaint heard in federal court, that the debtor would lose any right to relief. Neither belief was correct, but they undoubtedly played a role in the course that the court chose to take.

B. The Historical Analysis According to the Sixth Circuit

The Sixth Circuit’s decision is similar to that in Bliemeister, but had a few quirks of its own, so it will be discussed briefly. It began with the assertion that the uniformity aspect of the Bankruptcy Clause was a “power” given to Congress. It then had a lengthy, if debatable, review of what the Constitutional framers assertedly thought of the interaction between state and federal bankruptcy laws. The opinion suggests that the decision in Sturges v. Crowninshield39 changed an established assumption that the Bankruptcy Clause would be inherently preemptive of state laws, even where no federal law existed. This was assertedly because of the “uniformity” requirement and an assumption that “uniform” laws would be expected to displace the right of any other laws to exist.40 However, since by that time, there had been a federal bankruptcy law for only a few of the thirty years since 1789 (June 1801-Dec. 1803), and since States had continued to apply their own bankruptcy laws throughout those decades, the assertion seems problematic. In any event, in Sturges, the Court held that the Bankruptcy Clause only barred state laws when actually exercised.41 Absent a federal law, the only impediment to state laws would be the Impairment of Contracts Clause. In Ogden v. Saunders,42 the Court held that a state bankruptcy law could discharge certain categories of debts (debts owed to residents that came into existence after the bill was passed, or that were not based on contracts).

39. 17 U.S. 122, 196 (1819).
40. This describes the “field preemption” that is part of the so-called Dormant Commerce Clause. See, e.g., Camps Newfound/Owatonna, Inc. v. Harrison, Me., 520 U.S. 564, 571-572 (1997) (“Commerce Clause had not only granted Congress express authority to override . . . conflicting commercial regulations adopted by the States, but . . . also . . . immediately effected a curtailment of state power.”) Thus, if Congress had not legislated, it was because it chose not to have the field regulated, and states could not invade that province with their own regulations. See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245-46 (1959).
41. Sturges, 17 U.S. at 122.
42. 25 U.S. 213 (1827).
Thus, even though bankruptcy laws must ostensibly be "uniform," that constitutional requirement has a far less pervasive preemptive effect than the Commerce Clause, which contains no such explicit obligation. Thus, at least by Sturges, it was clear that bankruptcy (unlike the Naturalization Clause that really must use a national rule and that was exercised immediately and consistently (and that was Hamilton's actual example in Federalist No. 32)), did not require any similar preemption of state law. Nor, of course, did Congress treat bankruptcy legislation as having any urgency. In addition to the 1800 law (repealed in 1803), the second law did not pass until 1841 and was repealed in 1843, and the third was passed in 1867 and repealed in 1878. It was not until 1898 that bankruptcy actually became a constant in the U.S. Code.

The Sixth Circuit conceded that, even assuming States had ceded a broad reach to federal power in the bankruptcy sphere, the question remained of whether that had any bearing on an asserted waiver of judicial sovereign immunity. The Sixth Circuit thought not, drawing on the link between the two Federalist Papers discussed above. It held that the reference to legislative preemption in Federalist No. 32 equated the right to legislate with the scope of the waiver of state immunity, stating "There is no other explanation for his cross-reference in No. 81." It cited no precedent for that conclusion, apparently unaware that the debate about the relationship between Federalist Nos. 81 and 32 had already been underway for almost twenty years at that point. It then looked at the ratification debates, but brushed aside the statements of assurance to the State there, asserting that "Although the debaters' relative silence over sovereign immunity and the bankruptcy provision does not necessarily indicate their acquiescence, it does undermine the notion that those ratifying the constitution objected to federal jurisdiction over the states in such cases."

Thus, the mere absence of discussion was taken to indicate acquiescence in withdrawal of immunity in a particular area. However, since all of the discussions during the Constitutional Convention and the ratification debates about immunity were relatively limited and did not touch on specific federal questions issues, that reasoning would

43. Hood, 319 F.3d at 766 (emphasis added).
44. Had it inquired a little more deeply, it might also have looked at Federalist No. 82. In that paper, Hamilton made explicitly clear that the discussion in Federalist 32 only dealt with legislative issues and that the rules might or might not be different for the judiciary. The statement is made in passing and is hardly definitive either way, but makes clear that Hamilton was well aware of the difference in analysis between legislative and judicial sovereignty issues.
45. Hood, 319 F.3d at 766 (emphasis added).
support abrogation as to any Article I power, which is hardly consistent with Seminole. Moreover, this reasoning seems to reverse the presumption that was enunciated in Hans and reiterated by the Court in Fed. Mar. Comm'n v. South Carolina State Ports Auth., that the States would not have waived their immunity with respect to any proceedings that were "anomalous and unheard-of" at the time of the Constitution. This surely places the burden of proof on the party seeking to establish a waiver, not on the States to disprove one, but the Sixth Circuit took a contrary view. In any event, at this point, having concluded that States had agreed to allow Congress to abrogate their immunity in bankruptcy, the court need have said nothing more – if Congress had the power, it had clearly exercised it by including section 523 in section 106(a).

C. The Back-Up Analysis

The court did not stop there, however, but included an additional paragraph with a number of statements that were factually debatable, or nonsequiturs, or both. The assertions were similar to those used by other courts to find that, despite the general rule that the Eleventh Amendment applied in bankruptcy, that it did not bar entry of the general discharge. But if Congress could abrogate immunity at will, why include them, unless the court doubted its holding? It is unclear if the court was actually trying to provide some final, albeit superficial, alternative holding or if it was simply trying to find ways to diminish the force and equity of the State's arguments. Whichever it was, it seemed that aspects of that last paragraph were used by the Supreme Court when it undertook its analysis.

The Sixth Circuit began by asserting that "This conclusion in no way undermines the dignity of the state as a separate sovereign. This is not an instance in which Congress has enabled private parties to 'haul' states into court against their will. . .but an instance in which Congress has granted states precisely the protection that they sought." Since Congress had allowed a private party to "haul" the State into federal court through an adversary proceeding, the logic is hard to follow. Citing Federal Maritime is even more problematic, since the Court there extended the Eleventh Amendment to administrative proceedings because, on a functional level, they looked and acted like normal litigation and had the practical effect of coercing States to appear be-

46. 134 U.S. at 11.
48. Hood, 319 F.3d at 767-68.
49. Id. (citing 535 U.S. 743).
cause of the binding effect of a default judgment. If a practical "effect" of a non-judicial action can qualify as "hauling" the State in, it is difficult to understand how a true judicial proceeding that advises a State that a default can be entered against it, would not have exactly that same effect.

The court might, however, have been saying that the State was estopped from asserting that it was being coerced to appear because the scheme of hardship discharges via adversary complaints allegedly was created at the request of the States. That argument bears little weight for at least two reasons. First, the court cited no evidence that the student loan provisions were put into the Code in 1976 and thereafter at the request of the States, as opposed to say Congress' own initiative, or the initiative of the DOE. Second, the same argument was made to the Court in Seminole; i.e., that some States had sought passage of the Indian gaming law that was being challenged, but nothing in the decision suggested that the alleged involvement of those States in getting the challenged legislation passed was of any significance, or could result in the loss of the right of States to assert their immunity in response to that law.

Next, the Sixth Circuit stated that "Unlike a traditional lawsuit, in which a state is forced to defend itself against an accusation of wrongdoing, the bankruptcy process is, shortly speaking, an adjudication of interests claimed in a res." That sentence has several non sequiturs - first, lawsuits don't necessarily involve "accusations of wrongdoing," as opposed to asserting competing claims of rights. And, even if one grants that the process of dividing up interests in the estate that was discussed in Gardner is an in rem action, what bearing does that have on the discharge which has nothing to do with dividing up the bankruptcy estate? Discharge exceptions have no relevance until it is determined that a general discharge will be entered and they act only upon property which is not being distributed in the case. Whether or not one chooses to file a claim in the case and seek a distribution from

50. Hood, 319 F.3d at 763-64.
51. To be sure, in neither scenario do the U.S. Marshals arrive to haul an absent defendant into court. The consequence in both scenarios is a default judgment.
52. The entire student loan system is based on federal regulations designed to protect federal money. See supra note 35.
53. The closest that the Court came to discussing this issue was a statement in Seminole. Seminole, 517 U.S. at 58-59 (rejecting the idea that Congress' abrogation of the States' immunity could be made up for if Congress gave the States the right to participate in a process that they might otherwise have been excluded from). See Seminole Tribe of Florida v. Florida, 535 U.S. 734, *26-27 (1995) (discussing this issue during the argument).
54. Gardner, 329 U.S. at 574.
the estate assets has no bearing on whether one may assert that the debt is not discharged.55

_Gardner_ simply did not deal with the discharge issue; indeed, the word never appears in the opinion. It dealt only with the defenses that a debtor could interpose when the State filed a claim to estate assets and concluded that such defenses did not trigger the Eleventh Amendment because "The State is seeking something from the debtor. No judgment is sought against the State."56 Such defenses are part of the adjudication of the interests in the estate, but have no relevance to the entry of the general discharge, much less to a complaint as to a particular debt. And, of course, _denial_ of a general discharge does not limit payment of claims from the estate, so it is apparent that these two actions proceed on wholly separate bases.

The States do not dispute that, if they wish to be paid on their claim from estate assets, they must allow the debtor to defend itself.57 Nor

---

55. Moreover, the vast majority of all bankruptcy cases are "no asset" cases with _no res_ to divide. To make the discharge issue derive from a division of a non-existent _res_ lets the tail wag the dog. It is probably for this reason that the Code (unlike the 1841 and 1867 Acts) does not impose any further restrictions on creditors' actions based on their decision to file a claim. Such a trade-off could be readily justified on a waiver theory – but would likely benefit precious few individual debtors.

56. _Gardner_, 329 U.S. at 574.

57. In _Gardner_, the Court concluded that the State's concern was that the debtor was trying to relitigate defenses that had already been resolved in state court. _Id._ at 578-84. Those defenses might well be invalid and would be dismissed on their merits, but the Eleventh Amendment did not bar them from being _raised_. The scope of the matters that may be raised in response to a suit by a government is well-settled in non-bankruptcy cases, but still controversial within bankruptcy. The standard analysis allows only true defenses – _i.e._, mandatory counterclaims that do not exceed in amount or differ in kind from the government's suit – to be heard. This holding, as stated in _Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe_, 498 U.S. 505, 509-10 (1991) is based on the fact that the filing of a federal action is _not_ itself a waiver of immunity. _see also_ U.S. v. _Murdock Mach. and Eng'ring Co. of Utah_, 81 F.3d 922, 931 (10th Cir. 1996). Rather, it is an invocation of federal jurisdiction that inherently includes the right of defense, but nothing more. _See U.S. v. Shaw_, 309 U.S. 495, 502-03 (1940) and _U.S. v. Fidelity & Guaranty Co._, 309 U.S. 506, 511-12 (1940) (both holding that the filing of a claim by the government did not allow affirmative judgments on counterclaims, absent an independent jurisdictional basis); _U.S. v. Dalm_, 494 U.S. 596 (1990); _U.S. v. Neary (In re Armstrong)_, 206 F.3d 465, 473 (5th Cir. 2000); _In re Dept' of Energy Stripper Well Exemption Litig._, 956 F.2d 282, 285 (Temp. Emer. Ct. App. 1992). The Seventh Circuit in _In re Friendship Med. Ctr., Ltd._, 710 F.2d 1297, 1301 (1983) and the Sixth Circuit in _Ohio v. Madeline Marie Nursing Homes_, 694 F.2d 443, 449 (1982) both applied the same constitutional principles in dealing with immunity issues under the Bankruptcy Act. _See also In re Patterson-MacDonald Shipbuilding Co., v. Australia_, 293 F. 192, 193 (9th Cir. 1923) (under Constitutional standards, filing of bankruptcy claim did not allow for entry of affirmative judgment on counterclaim against foreign government). In cases under the Code, though, despite the invalidation of Section 106(a), a number of courts no longer apply the standard analysis and conclude that _Gardner_ stated a broad waiver as to counterclaims – even though there were no counterclaims in that case! _See, e.g._, _Arecibo Comty. Health Care, Inc. v. Puerto Rico_, 270 F.3d 17 (1st Cir. 2001).
do they quarrel with the holding in *New York v. Irving Trust*,\(^58\) that, if they seek to be paid from the common fund, they must follow established procedures for asserting the claim. Both points, though, are essentially trivial and neither provides any support for determining whether sovereign immunity affects the ability of the general discharge to bar collection of the debt from *non-estate* assets, or the power of a federal court to hear a discharge complaint against a state for a specific debt.

In any event, the court concluded, "If [a State] prefers not to [participate], it may decline, and the debtor will still need to convince the bankruptcy court that repayment will constitute an "undue hardship."\(^59\) That statement reflects little familiarity with actual bankruptcy processes. Despite the requirement that discharge actions must be brought by adversary proceeding, two circuit courts upheld confirmed Chapter 13 plans that discharged student loan debts without an adversary proceeding and without any showing that the requested discharge satisfied the Code, based on application of *res judicata*.\(^60\) Since then, a number of courts have taken a harder line on plan provisions, that should have been brought as adversary proceedings, concluding that they violate due process and constitute "discharge by declaration."\(^61\)

That line of cases, though, would only bar the debtor from obtaining default relief by way of a *contested matter* where the Rules require an adversary. None suggested that a default in an *adversary* proceeding against a properly served creditor would be equally ineffective. To the contrary, it almost surely would not be. An adversary complaint is served under Rule 7004, which explicitly states that "failure to [appear and answer] will result in a judgment by default against the defendant for the relief demanded in the complaint." (emphasis

\(^58\) 288 U.S. 329, 333 (1933).
\(^60\) See *In re Andersen*, 179 F.3d 1253, 1254, 1259 (10th Cir. 1999) (stating that plan paid 10% of student loan debt and stating further that payments would be undue hardship; finding no evidence of hardship but in absence of timely objection, provision was *res judicata*); *In re Pardee*, 193 F.3d 1083, 1087 (9th Cir. 1999) (finding provision improperly discharged interest on student loan but was valid if not timely objected to). These cases and many like them rely on the principles enunciated in *Stoll v. Gottlieb*, 305 U.S. 165 (1938), which applied *res judicata* principles to confirmation orders, even where they may violate the provisions of the Code, in the absence of a timely objection.

Nothing in current cases preclude entry of default judgments on hardship issues – and, indeed, they probably happen every day. Thus, the notion that a debtor will have to affirmatively prove his or her hardship if the lending agencies fail to appear seems unlikely. Nevertheless, as we will see below, this optimistic notion resurfaced in the Supreme Court’s decision as well. Whether one can argue that this, in fact, represents a reversal of Stoll awaits to be seen.

III. OF FIRST YEAR CIVIL PROCEDURE AND OTHER MATTERS

As set out above, the Sixth Circuit barely mentioned any concepts relating to in rem jurisdiction and certainly did not rest its opinion on those issues. Nevertheless, when the argument began in the Supreme Court, Tennessee’s counsel was not even able to complete his first sentence before Justice O’Connor wanted to know why this case wasn’t akin to the in rem jurisdiction in admiralty cases in California v. Deep Sea Research. The most accurate answer probably would have been – “because, as your Honor herself made clear at page 506-08 in Deep Sea, the opinion was only applicable to a limited subset of admiralty proceedings and you explicitly stated that the situation was different for the equivalent sort of action in proceedings in law and equity. So, if you told us Deep Sea isn’t relevant, why are you bringing it up now?” Not a tactful – or wise – answer, to be sure, but accurate.

counsel did try to draw the distinction (in a more tactful way), but Justice O’Connor could not be dissuaded and the Court settled in for an extended discussion on in rem issues. Unfortunately, since, those issues had not been decided, appealed, or fully briefed, the State’s counsel was far from being in the best position to discuss them. The rest of this section deals with what the State might have been able to present if the Court had requested briefing and argument on the issue: “Does the Eleventh Amendment apply to in rem proceedings in matters arising in law or equity?” An alternative (and more evocative, or provocative, phrasing) might have been “Does the fact that Congress designates a proceeding in law or equity as being in rem, when that proceeding is otherwise substantively identical to an in personam proceeding, allow a private party to sue in federal court and obtain an

62. See, e.g., In re Bernal, 207 F.3d 595 (4th Cir. 2000); In re Grant, 305 B.R. 484 (Bankr. W.D. Ark. 2004) (finding no undue hardship for debtor to pay remaining debts when when non-appearing party defaulted); In re Haag, 274 B.R. 833 (Bankr. W.D. Mo. 2002) (dismissing the state on sovereign immunity grounds and entering default judgment against Sallie Mae on undue hardship issue).


64: Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 124 S. Ct. 1905, 1913-14 (2004) (“Our precedent has drawn a distinction between in rem and in personam jurisdiction, even
order that binds an unconsenting State, despite the Eleventh Amendment?" Had those questions been briefed and argued, it is fair to assume that the opinion that issued would have been a far more complex, nuanced, and difficult one than the one being reviewed now.

A. A Word Means Just What I Say

The first difficulty in that one must remember that the terms "in rem jurisdiction" and "adjudication of interests in a res" are neither synonymous nor well defined. We assume we recall what the definitions are from our first year Civil Procedure but as it turns out, a great evolution in jurisdiction and due process law took place in the 1970s and thereafter and many of the concepts and fictions that had been used in the past were changed drastically. Yet, there is little recognition of that in current opinions on these topics, or a sense that one must be mindful that those changes may cast doubts on the validity of language quoted in old cases, particularly when cited without a factual context.

The cases may also use bankruptcy terms that had very different meanings under the Bankruptcy Acts of 1800, 1841 or 1867, or even 1898 then they do now, but the distinctions may not always be apparent. Assuming that one knows what they mean because they look like the same words we use now, can unwittingly lead one far astray. The National Bankruptcy Review Commission suggested that new terms should be devised for "rejecting" and "assuming" a contract, since the existing terms suggested far more radical effects on the terms of a contract than the relatively modest provisions of section 365 actually provide. The same is true with a vengeance in the case of the word "discharge."

when the underlying proceedings are, for the most part, identical."). The statement is correct to the extent that it notes there is nothing inherently different about the proceedings that may proceed in rem, versus in personam. See infra text accompanying notes 91-92. To the extent that it impliedly suggests that the distinction involves an inherent right to ignore the Eleventh Amendment in in rem proceedings, the discussion below will suggest that is not consistent with Supreme Court decisions in numerous areas of the law and would work a sea change in the understanding of sovereign immunity if it were.

65. LEWIS CARROLL, ALICE IN WONDERLAND 163 (D. Gray ed., 1971) (quoting Humpty Dumpty speaking to Alice: "When I use a word . . . it means just what I choose it to mean—neither more nor less").
1. Discharge v. Discharge

In current parlance, it only has one meaning, i.e., a permanent injunction against the attempt to collect a debt as a personal liability. In the history of “bankruptcy” laws in the United States, though, the word had two very different meanings. The first meaning, and by far the more prevalent well into the 1800s, was a release from being held in prison on a writ of capias ad satisfaciendum, i.e., an order that one be held until a debt was satisfied. These discharges were either granted under laws providing a sort of amnesty from time to time, or on the swearing of a “pauper’s oath” by the person being held, as to his inability to satisfy the debt at that time. Because this imprisonment was based on a particular court’s writ to aid in collecting a particular debt, the release only applied to that court’s writs. Thus, one might still be imprisoned by a different court for different debts, and there was no permanent exoneration from any of the debts. Moreover, after the Constitution was ratified, one might be subject to writs issued by the state courts for debts brought under state law, and to writs issued by the federal courts for debts found owing by those courts. In a reversal of the normal rules in *Erie R. Co. v. Tompkins* and its progeny, the federal courts and federal law quickly decided that debtors held on a writ from a *federal* court would be granted the same rights of release as a debtor held on a writ from a *state* court.

---

66. Moreover, the word may even be used more generically as a synonym for “release” as in liens being “discharged” when assets are sold free and clear and the liens are transferred to the proceeds. See Van Huffel v. Harkelrode, 284 U.S. 225, 228 (1931). While not absolutely guaranteeing that payments will be received in full (if the liens exceed the value of the property), the sale and transfer process does not leave the creditor any worse off than it was before. The Supreme Court referred to Van Huffel’s use of the term “discharge” in *Hood*, though, to support its holding that debts could be “discharged” and creditors barred from making further efforts to collect on them from future assets that the debtor might acquire—a process that does make distinct changes in the creditor’s rights. *Hood*, 124 S. Ct. at 1912.

67. “Bankruptcy,” itself was an evolving term. In English and American law, well into the 1800s, “bankruptcy” laws, with a discharge of debts were thought to apply only to involuntary proceedings against merchants; everyone else was subject only to “insolvency” laws in which a “discharge” from prison was the only relief offered. See *Sturges*, 17 U.S. at 194-95; Hanover National Bank v. Moyses, 186 U.S. 181, 185-88 (1902). While the Court concluded in *Hanover* that the “subject of bankruptcies,” was broad enough to allow the range of proceedings we now use, it is far from clear that States would have anticipated that development, the use of the term in its modern sense, or the application of such proceedings to their debt at the time the Constitution was ratified. See *Cordry*, *Seminole Seven*, supra note 12, at 399-405, 439-440; see also infra text accompanying notes 72-76.

68. See infra text accompanying notes 82-85.

69. 304 U.S. 64 (1938) (holding that in a diversity case, state substantive law applies); cf. Hanna v. Plumer, 380 U.S. 460, 465-69 (1965) (holding that in a diversity case, federal procedural provisions apply so as to provide federal uniformity).

70. *Cordry*, *Seminole Seven*, supra note 12, at 405-06. This may have been due to the absence of federal prisons (see U.S. v. Knight, 39 U.S. 301, 304 (1840)) so that federal prisoners were
Federal law did not attempt to dictate generally how and when states would hold debtors on state writs and, to the contrary, allowed federal writs to be controlled by state law rules on that issue.

Another important factor was that this "discharge," even though phrased in very broad terms, was understood not to apply to debts of the Crown, prior to the Revolution, nor, it appears, to the debts of the State or the United States, thereafter. This was based on the principle that general laws did not affect the government and could not take away its rights, unless it was specifically mentioned therein. Thus, even very general discharge language would not mean that a debtor could be released if he were being held due to debts owed to the federal government. To the contrary, there were separate statutes specifically providing for how debtors could be discharged from prison for such debts. In United States v. Hewes, the court discusses the fact that even federal courts were not given the power to release debtors owing money to the federal government. Instead, a separate tribunal process was created to allow government officials to exercise discretion in determining whether to release a debtor.

These insolvency "discharges" from imprisonment were to be contrasted with a discharge of debt that could be obtained under a bankruptcy law. Even under such laws, though, the same principle applied throughout the 1800s. It was generally accepted that the same "clear statement" rule meant that none of the first three Bankruptcy Acts allowed discharge of governmental debts. In any event, as noted above, such discharges were initially extremely limited. While the lodged in state jails and might be thought entitled in fairness to be discharged therefrom under the same conditions, particularly when federal cases were all based on diversity jurisdiction and suits likely brought by an out-of-state creditor.

71. See U.S. v. Herron, 87 U.S. 251 (1869) (extending historical discussion of practices under English law and first three American Bankruptcy Acts); Dollar Sav. Bank v. U.S., 86 U.S. 227, 239 (1873) ("most general words that can be devised . . . affect [the government] not in the least, if they may tend to restrain or diminish any of [its] rights and interests"); Knight, 39 U.S. at 315-16; U.S. v. Hewes, 26 F. Cas. 297, 298-300 (E.D. Penn. 1840). The modern "clear statement" rule used by the Court in cases such as Atascadero is plainly a direct lineal descendent of this principle. Atascadero, 473 U.S. at 242-43.

72. Hewes, 26 F. Cas. at 301.

73. See also U.S. v. Wilson, 21 U.S. 253, 254 (1823) ((holding a person could not assert state insolvency laws to obtain discharge from prison for federal debt); People v. Rossiter, 4 Cow. 143 (N.Y. Sup. Ct. 1825) (finding, by the same reasoning, insolvency discharge under state law did not apply to debt owed to the state).

74. Herron, 87 U.S. at 261-63; U.S. v. Rob Roy, 27 F.Cas. 873 (C.C.D. La. 1870). An explicit provision to that effect was contained in the 1800 Act, but the Court in Herron did not find that such language was necessary to bar application of the discharge to federal debts. The same principles were generally assumed to apply to state debts as well. See Connecticut v. Shelton, 47 Conn. 400 (Conn. 1879); Johnson v. Auditor, 78 Ky. 282 (Ky. 1879); Commonwealth v. Hutchinson, 10 Pa. 466 (Pa. 1849).
laws gradually began to broaden debtor eligibility, it not until the 1898 Act that the principle of allowing non-business persons to voluntarily seek permanent relief from the debt, as opposed to merely temporary release from prison, was firmly accepted. Since, by this time, the concept of imprisonment as a general tool of debt collection had largely been dropped, the new usage of the term “discharge” tended to crowd out the old. But, when reading pre-1898 cases, it is important to remember that the discharge being talked about is often only a discharge from prison, not the discharge from the debt. And, in reading those pre-1898 laws, the unwritten limits on using those laws for government debts must also be recalled. It was only when the 1898 law took care to except and give priority to only certain government debts that the Court concluded that this meant that the law now intended to make sovereigns subject thereto.75

2. “Jurisdiction”

The other great area of confusion is with respect to the term “jurisdiction” and all of its many variations. In Kontrick v. Ryan,76 the Court noted that “Jurisdiction . . . is a word of many, too many, meanings.”77 The same confusion about “jurisdiction,” that arose in that case is I submit, rampant in cases discussing bankruptcy court jurisdiction and the effect of the different type of jurisdiction on state sovereign immunity. As noted above, courts often describe bankruptcy jurisdiction as being in rem, or as involving the adjudication of interests in a res, and stop, as if those two statements are synonymous, or answer the question. In reality, though, one must review at least three major issues: a) what are the various sorts of in rem, quasi in rem, and in personam jurisdiction that may be used to decide “interests” in a res and what limitations are imposed by each form of jurisdiction; b) what are the types of “res” that may be adjudicated in such proceedings, and c) how does the effect of the Eleventh Amendment vary based on the type of jurisdiction and type of res that are involved. As will emerge, answers to those questions have evolved over time – and recent Supreme Court decisions may have made old answers obsolete.

The discussion below will suggest that there is no general in rem exception to Eleventh Amendment immunity so that, if the Court in Hood would try to find a basis for upholding the general discharge, it might have to find that bankruptcy is “different,” in a constitutional sense, from any other form of in rem or quasi in rem jurisdiction in a

77. Id. at 454 (citing Steel Co. v. Citizens for Better Env’t, 523 U.S. 83, 90 (1998)).
“law or equity” context, or else must rethink much of the last thirty or forty years of litigation about in rem jurisdiction. If the former, then the Court would have been better served by taking up the Sixth Circuit’s opinion to see if it could provide an escape mechanism. If the latter, then all parties that would be affected thereby – including the United States – would want to know and participate in such a dramatic change and explore its ramifications. The Delphic opinion that emerged in Hood, however, does not serve any party well in trying to predict the future.

B. In rem, Quasi In Rem, and In Personam

In any event, taking Kontrick’s words to heart, it seemed useful to return to the basics of civil procedure first, in light of the loose way in which jurisdictional terms are often used in these discussions. My own recollection was that the three types of jurisdiction broke down as follows. On the in rem side, true in rem jurisdiction applied when one was divvying up rights (whether of ownership or not) that related to a given asset and dealt only with that asset, while quasi in rem jurisdiction used the court’s control over an asset within its jurisdiction to force an absent defendant to litigate on the plaintiff’s home turf, over issues that need not relate to the asset at all. Until the Supreme Court began to endorse the use of “long arm” statutes to extend the reach of personal jurisdiction, quasi in rem jurisdiction was critically important to provide a basis for local suits against absent defendants.

Both types of in rem actions, though, as I understood it, would only allow determination of rights relating to and/or limited by the value of the assets. No affirmative recoveries could be made under either jurisdictional basis and the defendant could lose nothing beyond the asset that was being dealt with if he didn’t show up. Conversely, if that

78. As will be seen below, the Court in Hood did analogize the bankruptcy discharge to an admiralty proceeding to determine ownership of a sunken vessel. As will be further discussed below, though, the rules in admiralty diverge considerably from in cases in “law and equity” (those referred to in the Eleventh Amendment). Moreover, the rules for in rem status decisions differ from the rules for in rem title determinations, so on both counts, the comparison is inappposite.

79. Compare Pennoyer v. Neff, 95 U.S. 714 (1878) (holding court could not personally serve person outside its territorial boundaries; absent such service, no basis for in personam action to proceed; case allowed only if debtor had property within state that could be attached), with Int’l Shoe Co. v. Washington, 326 U.S. 310, 317-19 (1945) (holding if company had “minimum contacts” with state to satisfy due process, and service made on corporate agent within state, action could proceed, domicile of defendant no longer dispositive). Because the property at issue might often be the source of the harm, quasi in rem jurisdiction based on attachment of the asset could easily overlap with an in personam suit brought under a long arm statute authorizing suit for harm arising out of the asset and its use within the State.
asset did not satisfy the alleged debt, the plaintiff could continue to look for other assets and bring a new action against them. Similarly, if there were competing claims against a single pool of money, the party that lost out on priority grounds would not be barred from continuing the same search for new assets to collect from. A corollary was that parties need not join the contest over a particular asset in order to retain the right to collect a debt, but could simply look for other assets upon which to execute. On the other hand, if one wanted to have a final resolution of all matters pending between the parties, and to obtain an order that would allow execution against all existing and future assets of the losing party, one had to rely on in personam jurisdiction, and obtain personal service over a party. The resulting judgment could be monetary, injunctive or both – and it certainly could "adjudicate interests" in a particular asset if that were the relevant dispute.

C. The Historical Development of Jurisdiction

1. The Pre-1900s Law

To the extent that the courts tried to distinguish these different forms of jurisdiction, they did so based on concerns about the territorial limits of a court's powers. Those limits, in turn, derived from the very real necessity of determining how a government could enforce the judgments of a court. As Justice Holmes said "the foundation of jurisdiction is physical power."80 The court may call on the executive to control property within its territorial bounds, and the physical presence of persons within those bounds provided the initial basis for jurisdiction over them. Indeed, physical presence was necessary for issuance of the two basic writs that were used in litigation – the writ of capias ad respondum, and the writ of capias ad satisfaciendum.81 The first is a writ by which the person of an alleged debtor was seized and brought to court to respond to a claim by the plaintiff creditor. If the debtor could not immediately satisfy the debt, or show that it was not owed, or post a bond, he could be imprisoned under the second writ in the "jail yard" until he had satisfied the debt.82

81. See generally Cordry, Seminole Seven, supra note 12, at 396-99.
82. It should be noted that, in practice, the imprisonment was not always what one would expect. While, to be sure, there were true debtors' prisons in which unfortunates were held in ruinous conditions, it is also true that, particularly in the United States, where the labor of every man was needed, the definition of the "jail yard" was often greatly enlarged. In one case, for instance, the law had initially provided that the town limits were the "jail yard" during the day, but the debtor must return to a cell at night. See, e.g., Knight, 39 U.S. 301. The latter provision was later dropped, and the jail yard expanded to take in the entire county for 24 hours a day!
Those writs were used primarily because the vast majority of collection techniques used in modern-day litigation did not exist. A sheriff could not force his way into a house to seize assets held therein by a debtor who refused to come out. Writs of execution did not apply to stocks, negotiable instruments, accounts payable, or the like. Creditors could only execute on the crops growing on a piece of land, but not the land itself – and all such collection efforts were suspended while the debtor was in jail. Moreover, a creditor had to elect between a seizure of assets or holding the debtor in prison, and seizure could bar later imprisonment, no matter how little was obtained through the seizure. Thus, unless the creditor was quite sure of the location of the debtor’s assets and that they were of a nature that readily could be seized, taking the debtor’s person and holding him until he voluntarily tendered payment was the safest way to proceed.  

The result was that debt collection was generally treated as being in the nature of a contempt proceeding, whereby it was not up to the creditor to find the assets; rather it was up to the debtor to choose whether to turn over assets that the creditor might not be able to seize (or find), or to stay in jail. While the law has now changed to the point that contempt for failure to pay a money judgment is no longer allowed in private civil litigation, it does still exist, at least for governmental entities in the form of the “writ of body attachment.” In those cases, the government is still allowed in a contempt setting to seize the person and hold him until he carries out the acts he is obligated to do under a judgment, even including the payment of money.

In any event, in the 1700s and before, jurisdictional issues were relatively simple – people and the land tended to stay put, and jurisdiction over either was based on their physical presence in the territory of the court, so that they could be seized (literally or constructively) and brought before the court. In dealing with property issues, the courts used a fiction and a presumption to assist in dealing with the problem of absentee owners. Because it was initially thought that a court could not send a summons or service outside its territorial limits,84 other means had to be used to allow the court to adjudicate the ownership and rights in that property in a form that would have binding effects that others could rely on. The courts accordingly created the fiction in dealing with property interests of treating suits as if they were brought directly against the property itself, rather than against the disputing

---

Thus, in at least some locales, this provision was more in the nature of a bar on relocation than it was a serious limit on the debtor’s movements or ability to earn a living to repay his debt.

83. See generally Cordry, Seminole Seven, supra note 12, at 395-96.
84. Pennoyer, 95 U.S. at 720.
owners or those asserting a right to be paid from the property. The fiction allowed the court to declare that the action could be brought "against the world," i.e., the determinations made therein could not be made subject to attack by another party whether it participated in or was personally served with notice of the proceeding. The due process issues arising from that fiction were resolved by the presumption that any owner would, even if absent, arrange for a caretaker so that he would know if any actions were taken against his land or ship or livestock and could steps to defend those interests.

2. Modern Jurisdictional Precepts

Over the last hundred years or so, however, these fictions, presumptions, and distinctions have become increasingly eroded. The Restatement (Second) of Judgments notes "The distinction between "in rem" and "quasi in rem" jurisdiction, on the one hand, and "in personam" jurisdiction, on the other hand, is in many respects elusive."85 The Restatement set out the traditional divisions thus: a "true" in rem proceeding is one brought "against all the world," in which "the court undertakes to determine all claims that anyone has to the thing in question." In a quasi in rem proceeding, either "the court undertakes to determine the claims of specifically identified persons to the thing in question" or, in a process now known as "attachment or garnishment" jurisdiction, "a thing owned by a specific person is seized as a basis for exercising jurisdiction to decide a claim against the owner. The claim does not concern interests in the thing; it concerns some other transaction." Thus, the quasi in rem jurisdiction noted in my civil procedure class was only one such form, while the other looks exactly like in rem jurisdiction, except that it purports to have a more modest effect as to who is bound thereby.

The distinction between the two, the Restatement continues, was based on the notion that an in rem action could bind everyone, whether notice was received or not (or even whether sent), while the quasi in rem action required at least some attempt to serve affected parties. There were four types of actions generally thought to fall within true in rem jurisdiction, the Restatement notes, at comment b – admiralty libels, forfeiture to the government, proceedings to settle an estate, and accountings and discharge by an administrator. All of these, the comment states are matters meant to resolve potential claims so an asset can be transferred free and clear at its highest value. Interestingly, though, the comments adds, the admiralty libel is based

85. Restatement (Second) of Judgments, ch. 2, topic 2, § 6, cmt. a (1982).
on a completely different set of substantive laws and analyses than the other three, and according to the Reporter's Note, "it seems most unfortunate to subsume admiralty libels in rem along with other types of in rem proceedings under a single category," noting that admiralty libels could not discharge mortgage liens and other interests that cannot be terminated without notice. However, the Court's growing concern with due process notice issues in these types of cases has largely eliminated any real difference between in rem and quasi in rem jurisdiction and comment b suggests that it is questionable whether this distinction "is useful for any purpose," if, despite the type of proceeding, the same degree of notice and service must be attempted.

The Supreme Court noted these issues in Mullane v. Cent. Hanover Bank & Trust Co., where it stated that "American courts have sometimes classed certain actions as in rem because personal service of process was not required, and at other times have held personal service of process not required because the action was in rem." Moreover, the Court noted that an action by a fiduciary to account for its actions and obtain a discharge by the beneficiaries has features both of an action in rem (whether quasi or not) and in personam. Regardless of how the action was to be characterized, however, the Court held, it could not take place without notice to beneficiaries (by mail to known claimants and publication for unknown claimants) and an opportunity to be heard. One could not enter an order binding the world, unless one made every effort to advise all the known portions of the world of the issues so that they could litigate the issue with the party seeking to benefit from the order. Numerous other decisions followed with simi-

86. An admiralty "libel" is a procedure to name a boat as allegedly "liable" for damages in a wide variety of circumstances. It is not the same thing as an admiralty proceeding to determine ownership of a sunken vessel, and is distinguishable from the allocation of an estate in a non-admiralty proceeding. In U.S. v. Shaw, in limiting the counter claims that could be brought against the federal government in a probate case where it had filed a claim, the Court noted that "Emphasis is placed upon the fact that these probate proceedings are in rem or quasi in rem as were the libels in admiralty in The Thekla... The Thekla turns upon a relationship characteristic of claims of collision in admiralty but entirely absent in claims and cross-claims in settlement of estates. The subject matter of a suit for damages in collision is not the vessel libelled but the collision. Libels and cross-libels for collision are one litigation and give rise to one liability." 309 U.S. 495, 502-03 (1940) (emphasis added). (This is akin to the holding in Gardner that the raising of a defense does not implicate the Eleventh Amendment.) A "libel" can also be used to seek payment of wages, or for injuries suffered by a crew man, or monies owed to a supplier with the boat being the source of payment. Since ships are both highly mobile and a valuable asset, it is not surprising that a separate body of law grew up to ensure that the asset could be held within the court's jurisdiction to answer just claims arising from its business operations.

88. Id. at 312.
lar holdings. Thus, the distinction between *in rem* and *quasi in rem* based on the efforts needed to notify the affected parties has largely disappeared.

As a result, and as the Court noted in both *Mullane*, and *Tilt v. Kersey*, the question of whether an action is truly *in rem* boils down to whether the government *intends* to make it so; i.e., to bind all parties regardless of their actual knowledge or participation. On the other hand, if the government is willing to allow for the possibility that it is determining the relative rights between parties A through C, but that the winner may still be subject to a challenge from party D, then the proceeding would be *quasi in rem* (or perhaps *in personam*, depending on the form of service on the defendants).

Since, after *Mullane*, the Court had largely removed any distinction between the service requirements for *in rem* and *quasi in rem* jurisdiction, and, in light of the general benefits of finality, it is clear that the tendency would be to make as many matters as possible fall under true *in rem* jurisdiction. Doing so, though, had to take into account the original basis on which courts were allowed to issue such far reaching decisions, namely the fiction that the action was really "against" the property. As such, the thought was that one could decide rights of the property without doing something "against" anyone specific (although the proceeding was said to be "against the world"). The notice aspects of that fiction were changed in *Mullane*. In *Shaffer v. Heitner*, the Court eliminated the other aspect of the fiction; i.e., that the action was not "against" those persons whose interests in the asset were being determined.

Until then, a seizure of assets had been thought to be enough to allow the creditor to litigate *any* cause of action against the debtor, so long as the judgment was limited to the value of the assets that were seized. There need be no other relationship between the defendant and the jurisdiction and the assets need have no relationship to the cause of action. In *Shaffer*, though, the Court held that, even in the *quasi in rem* situation, a court must apply the "minimum contacts" analysis in *International Shoe* to the relationship between the property, the owner, and the forum.

89. See, e.g., Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 796-779 (1983) and cases cited therein (dealing with a wide variety of actions involving land (such as condemnation, tax sale, etc.) where the Court required actual service on known creditors and publication, not merely some action directly against the property such as posting an eviction notice).
91. 207 U.S. 43, 55-56 (1907).
In particular, the Court noted, "The overwhelming majority of commentators have also rejected Pennoyer's premise that a proceeding 'against' property is not a proceeding against the owners of that property. . . . [W]e have held that property cannot be subjected to a court's judgment unless reasonable and appropriate efforts have been made to give the property owners actual notice of the action. . . . This conclusion recognizes . . . that an adverse judgment in rem directly affected the property owner by divesting him of his rights in the property."\(^{94}\) Thus, the court held, to exercise jurisdiction in rem, "the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.'"\(^{95}\)

While to be sure the existence of the property itself would provide some forms of such contacts – and disputes over ownership, for instance, would normally be proper in the locale of the property, suits having no relationship to the property at all would require greater proof of contacts that would make it appropriate to assert jurisdiction over the person before it would be proper to go forward. The Court concluded by saying that "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant."\(^{96}\) In short, the fundamental underpinning for the notion that a suit involving interests in property is not "against" the claimants thereto has disappeared.

At the same time that in rem actions were acquiring greater due process trappings, the fairly rigid requirements for personal service within the forum state to achieve in personam jurisdiction were being eased. The greatly expanded long-arm statute provisions that were upheld in International Shoe, made it much easier to bring an in personam action against one who engaged in activities that caused damages in the state. The net result of these two lines of cases is that in cases involving property, the distinction between quasi in rem jurisdiction and "long-arm" personal jurisdiction (both of which now require minimum contacts) has virtually disappeared. The only difference that still remains is the notion that the judgment in in rem actions will still be limited to issues regarding the property itself or its value. Affirmative relief against the other side still requires in personam jurisdiction by way of personal service. In sum, with the blurring of the

---

94. *Shaffer*, 433 U.S. at 205 (emphasis added).
95. *Id.* at 207 (emphasis added).
96. *Id.* (emphasis added).
lines between *in rem* (broadly speaking) and *in personam* actions, it is far from easy to tell which is which. Contrary to the automatic equation of the “adjudication of interests in a res” with *in rem* actions, it is clear that such interests can be adjudicated in any of the three forms of jurisdiction. The distinction between *in personam* and *in rem* actions appears to be more quantitative than qualitative, and determined by statutory intent, not by anything intrinsically different in the nature of the proceedings.

D. Types of Adjudications of “Interests” in Property

Next, one must examine whether there is more than one type of “interest” in a res that may be adjudicated, and whether immunity issues have different effects with respect to the different types of “interests.” In analyzing the latter issue, it will become apparent that it is not that the immunity changes, but rather that, upon making a nuanced analysis, different types of litigation will have different practical effects on the government’s interest. If an action nominally involves the government but has no adverse effect on its rights, then the courts will normally not find that there is an Eleventh Amendment bar. However, where the result, no matter how the proceeding is characterized, will result in binding determinations that will require the government to act or preclude it from acting, the immunity bar normally will be found to exist. Reviewing the cases and the Restatement indicates that there are three basic types of adjudications – asset allocation, title determinations, and status determinations. The first two will be examined in turn below and the immunity implications discussed, and then the concept of an *in rem* “status determination” will be reviewed. While it has resemblances to the other two, determining rights in a “status,” as opposed to property, has its own nuances.

1. Paying Debts from a Single Asset

The first type of action is the prioritization of competing claims that are asserted against a single asset. A party facing such claims could simply passively let the particular asset go to the first one that seeks to execute thereon. But if a party wished to ensure that the asset went to the entity that had the highest right thereto and to receive some protections for its own interests, or if the different claimants are proceed-

---

97. See, e.g., Nevada v. U.S., 463 U.S. 110, 143-44 (1983) (holding while “quiet title” action generally is *in personam*, comprehensive attempt to adjudicate title to all water rights in a river had binding effects on all and was *in rem*).
ing simultaneously, there are ways to collectively adjudicate the rights of those competing parties.

a. Interpleader

The asset's owner could initiate a federal interpleader action under 28 U.S.C. 1335 by depositing the asset into the court, naming the contestants thereto, and leaving it to the court to sort out the result.\footnote{Like the bankruptcy process, the federal statute allows for nationwide service of process, although it does require diversity between at least two claimants as a jurisdictional limit. The interpleader plaintiff is also entitled to place its own claim into the balance, as well.} At the end of that process, the losing contestants are barred from contesting the ownership right of the winner as to that asset or from asserting rights against the party initiating the interpleader with respect to any rights derived from that asset. In \textit{State Farm Fire & Cas. Co. v. Tashire,}\footnote{386 U.S. 523 (1967).} the Court noted that, in some cases, the entitlement to the fund itself, is the only issue.\footnote{Id. at 534.} In such cases, where the rights to the fund are the “outer limits of the controversy,” the court may enter an order under 28 U.S.C. 2361 barring any party from further litigation with respect to the fund (the “classic” form of interpleader).

On the other hand, the Court noted, a fund may be simply one asset that multiple parties may seek to collect from in the context of a larger dispute between them and the defendant. In \textit{Tashire,} for instance, the fund was $20,000 in insurance on a bus driver who had been involved in an accident that killed 2 people and injured 36. The amount of that policy was vastly less than what was needed to deal with all of the claims, yet the insurance company (later joined by the bus company) sought to force all of the litigation over liability in the accident into a single forum in the guise of litigating rights to that single policy. The Court held this was improper, for much the same reasons that later impelled the decision in \textit{Shaffer.} An interpleader action could limit claimants from any effort to sue the insurer for payments except under the interpleader action, but could not impose any further limits on the broader litigation.\footnote{Id. at 535.} It could not, in any event, bar further actions against the primary tortfeasor as to other assets.

So, are interpleader actions in personam or in rem? In \textit{Metropolitan Property and Cas. Ins. Co. v. Shan Trac, Inc.},\footnote{324 F.3d 20 (1st Cir. 2003).} the court stated that they were in personam and could not bind those who have not been given notice and directed to make their claim.\footnote{Id. at 25.} But that begs the
question, since even in rem and quasi in rem proceedings now require notice, especially since the fiction that the action is “against” the asset has been dropped. Other courts describe interpleader as an in rem or quasi in rem action.\textsuperscript{105} Or, in yet another formulation, the Fourth Circuit stated in \textit{Humble Oil & Refining Co. v. Copeland}\textsuperscript{106} that “Interpleader is based upon in personam jurisdiction which extends only to the funds deposited in court,” (which actually sound a good deal like quasi in rem jurisdiction).\textsuperscript{107} In short, this form of adjudication of interests in a res plainly is not necessarily an in rem action, although it clearly can be one, depending on the relief sought and the parties named.\textsuperscript{108}

b. Admiralty Libels (including the “Limitation” Proceeding)

Interestingly, while the Court made clear in \textit{Tashire} that an interpleader action was not in the nature of a “bill of peace” allowing a defendant to force all parties and all litigation into a single proceeding, there is an \textit{admiralty} proceeding that has that effect, namely, a “limitation” proceeding. This is a unique form of suit in admiralty that allows a determination that, as to the owner of a vessel (who presumably will not be aboard when it causes the damage) the damages in a given accident will be “limited” to the value of the vessel, if the owner can show that the damages were not due to his negligence. If granted, the various plaintiffs must divide their claims against that limited fund. If not granted, on the other hand, the parties may recover damages both in personam against the owner and in rem against the boat.\textsuperscript{109} No such proceeding exists outside of admiralty. Bankruptcy, for instance, does not entail an initial judicial decision on the available assets based on the culpability or lack thereof of the debtor; rather, it simply places all of the debtor’s (statutorily non-exempt) assets in the hands of the trustee for its creditors and proceeds from there. In any case, the “limitations” defense is part of a larger action involving the “libel” of a vessel and the determination of global liability for an acci-

\textsuperscript{106} 398 F.2d 364 (4th Cir. 1968).
\textsuperscript{107} Id. at 368 (citing Knoll v. Socony Mobil Oil Co., 369 F.2d 425, 429 (10th Cir. 1966)).
\textsuperscript{108} See New York Life Ins. Co. v. Dunlevey, 241 U.S. 518 (1916) (holding absent personal service, interpleader action could not purport to decide all of defendant’s rights, as opposed to merely issue of whether asset could be seized to pay debt allegedly owed by defendant); Gaines v. Sunray Oil Co., 539 F.2d 1136, 1141-42 (8th Cir. 1976) (holding court can allow party to refuse to submit claim in interpleader where amount being placed in issue had nothing to do with the claim, and was much less than claim asserted; cannot be used “as a weapon to defeat recovery from funds other than the one before the court”).
dent, which, as the Court noted in Shaw, was not analogous to pro-
ceedings in law and equity to divide an estate.\textsuperscript{110}

c. Allocation of an Insolvent Estate (Non-ownership Interests)

In Tashire, the Court noted that interpleader did not provide a sce-
nario for dealing with mass torts or other situations where a party
might wish to force all of the claims against it into a single forum to
the greatest extent possible for allocation of a limited fund. That func-
tion has largely been left to the Bankruptcy Code.\textsuperscript{111} Under the Code,
a party turns over all of its non-exempt assets for claimants to divide
amongst themselves. That division in and of itself does not determine
any rights of a filing (or non-filing claimant) in assets that are not part
of the estate. To this extent, the bankruptcy process is substantially
identical to an interpleader action. Thus, to the extent that there is a
bar on further lawsuits, it comes from some other basis than the mere
division of those assets or the assertion of claims. As a corollary, state
proceedings that are in the nature of receiverships, assignments for
the benefit of creditors, and the like may proceed despite the exis-
tence of a federal bankruptcy law, so long as they do not force credi-
tors to accept discharge of their debts in return for some payment of
their claims.\textsuperscript{112} This, of course, follows from the Impairment of Con-
tacts Clause as discussed previously, but also makes clear that there
are numerous forms of proceedings that can result in a distribution of
assets among interested claimants.

2. Determination of Ownership Interests

The proceedings above dealt with a distribution of assets in which
the State merely asserted a right to be paid therefrom. A different set
of principles apply when the question is the sale of property in which
the State asserts a title interest, or an attempt to determine the valid-
ity of that assertion of title.\textsuperscript{113} In such cases, as Shaffer made clear, it
is impossible to adjudicate rights in the asset without determining the

\textsuperscript{110} Shaw, 309 U.S. at 502-03.

\textsuperscript{111} There is at least, potentially, the notion of a “defendant class action” where a plaintiff
might seek to force all of the suits against it into a single forum, and perhaps to limit the assets to
be used for such claims. There are formidable obstacles to such a proceeding outside of bank-


\textsuperscript{113} Lien interests are somewhere between the two but, in normal practice, undisputed liens
are paid first from the proceeds of a transaction. If the lien creditor receives full payment in the
sale, its rights have not been adversely affected. The only potential problems are in the rela-
tively few cases where the sale cannot satisfy the lien, and the holder might have preferred the
property in lieu of the payment. But, since such sales would provide nothing for the property
holder, in most cases, the parties will likely reach accord on whether to sell the property or
rights of the persons asserting such claims. It is one thing to say that a debtor may pay debts from its bank account without affecting the State’s interest; it is another entirely to say that it could sell an asset in which the State claims to hold title without having such an adverse impact. These issues can arise in a variety of proceedings, such as a quiet title action, an action in “ejectment,” or a determination of how to allocate water rights in a given river basin. The proceeding might be brought directly against one or more other parties, in a typical \textit{in personam} action. On the other hand, a party may seek to obtain an \textit{in rem} determination that binds the world, by explicitly so stating in its pleadings. Title issues certainly present a strong argument for a process that is truly dispositive so that property transfers can go forward without dispute. The decision in \textit{BFP v. Resolution Trust Corp.},\textsuperscript{114} for instance, noted the untoward consequences on state law property rights if bankruptcy avoidance actions were overly intrusive and resulted in overturning settled expectations of property rights.\textsuperscript{115}

In addition to state law actions, federal law also includes a provision for clearing title. In any action where \textit{in personam} jurisdiction could be asserted, a party may use 28 U.S.C. § 1655 to bring an \textit{in rem} action to clear title to property from competing liens or claims. If personal service is made, the action will then bind parties to the disposition of the asset, but if not (but publication notice is given), the party has a year to come in and have the judgment set aside.\textsuperscript{116}

E. Eleventh Amendment Implications of Asset Adjudications

1. Interpleader

As noted above, interpleader may be brought against a limited number of claimants, but it can certainly be envisioned as a process to name all applicants against a particular asset. Can a State be forced into such an action in a federal trial court? It would appear not. Where an action is brought \textit{in personam}, the answer is easy, but even where all relevant parties are named and an attempt is made to bind the world, the Court has not allowed the action to proceed if the State’s interests are to be resolved.

For instance, the Court had to deal with the probate of the estate of Howard Hughes after his death. Both Texas and California asserted that he was domiciled in their jurisdiction so that they were entitled to

\footnotesize{merely abandon it to the lien holder, in which case, again, there has been no action “against” the lien holder.}
\textsuperscript{114} 511 U.S. 531 (1994).
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} GP Credit Co. v. Orlando Residence, Ltd., 349 F.3d 976, 979 (7th Cir. 2003).
impose estate taxes. Neither state could be forced to sue in the other's court, and there was certainly the possibility that both states would, on the facts presented in their court, find in their own favor. The result — with a marginal rate of 77% for federal estate taxes and a combined 34% for the two states — was a tax rate of 101%, making it possible that the claims of all three sovereigns could not be fully satisfied (much less leaving anything for heirs)! The federal taxes would have to be paid in any event, but the executor wanted to avoid paying death taxes to both states. A direct suit against the States would have been barred, he concluded, so he filed an interpleader action against the two state officials. In Cory v. White, the Court concluded that the action was, in reality one against the States and, as such, was barred by the Eleventh Amendment.

Moreover, the action could not be asserted against the state officials, pursuant to the Ex parte Young doctrine, since they had done nothing illegal by pursuing their litigation of the domicile issue. And, the Court concluded, nothing in its decision in Edelman v. Jordan eliminated the touchstone requirement that the state officer must be alleged to have violated federal law before he could be named. The net result was that there was no forum in the lower federal courts in which the issue could be heard and the Court concluded that it was, instead, a matter that would fall within the Court's original jurisdiction to hear the case between the two states directly.

118. Id.
120. This follows from the fact that the Young doctrine does not simply allow the arbitrary substitution of a State officer for the State. Rather, it is based on the notion that if one commits an act that is harmful to the interests of another, one can escape personal liability only by showing that a lawful directive of the government authorizes the act. If the directive is unlawful (because in violation of the Constitution or federal law), it cannot protect the officer and he is liable for his own personal acts. That is, if I hold a person and refuse to let them leave, this is false imprisonment, unless I am a sheriff acting under a lawful state statute. If the law is invalid, though, I am liable on the false imprisonment charge. Thus, there must always be a violation of federal law by the state official before the doctrine applies. See Karen Cordry, Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory Ex parte Young Relief: A Response, 77 AMER. BANKR. L.J. 23 (2003).
121. California v. Texas, 457 U.S. 164 (1982). See also Ky. for Benefit of United Pac. Ins. Co. v. Laurel County, 805 F.2d 628, 636 (6th Cir. 1980) (holding interpleader statute does not override federal immunity); In re Republic of Philippines, 309 F.3d 1143, 1153 (9th Cir. 2002) (holding interpleader action meant to resolve all issues in a res, but, where foreign governmental entities had rights in the res, they were necessary and indispensable parties and could not be forced into the proceeding); Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166, 1169 (10th Cir. 1992) (holding bank may not use interpleader against objecting Indian tribe).
HooD: How Not to Decide a Case

2. Title Interests
   a. "Law and Equity" Cases

Unlike the mere payment of claims from an asset pool, an action that purports to sell an asset in which the State claims a property interest or that seeks to adjudicate the actual title to a piece of property, is plainly subject to the Eleventh Amendment. The debtor seeks to actually determine, and perhaps eliminate, a right of the state by a transfer, with no certainty that the States' interests will be fully recognized and protected. The law seems to be clear, both in and out of bankruptcy, that an action to directly affect a State's ownership interest is barred by the Eleventh Amendment. All nine justices in Idaho v. Couer d'Alene Tribe of Idaho,122 for instance, agreed that a true quiet title action was barred by the Eleventh Amendment.123

There are a number of cases that hold that one can distinguish between a title action and an action brought against a state court official alleging that he was wrongly in possession of the property (because the state's claim was invalid and provided no justification for his presence).124 Even so, the decisions made clear that the finding with respect to the official could not, in fact, bind the State or determine its title to the particular property. And, since Couer d'Alene, the Fifth Circuit has concluded that the distinction no longer can be maintained. It dismissed an ejectment action brought by an Indian tribe against a State official, finding that the suit was, in essence, one against the State and, as such, was barred by the Eleventh Amendment.125

123. Id. at 281-82 (Kennedy, J., joined by Rehnquist, J.) ("It is common ground between the parties, at this stage of the litigation, that the Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State's consent."); id. at 291 (O'Connor, J., concurring, joined by Scalia, J., & Thomas, J.); id. at 307 (Souter, J., dissenting, joined by Stevens, J., Ginsburg, J., & Breyer, J.). The only dispute was over whether the Tribe's effort to bar the State from continuing involvement and regulatory control over submerged lands was the "functional equivalent" of a quiet title action. See also Deep Sea Research, 523 U.S. at 506 ("[T]he Eleventh Amendment bars federal jurisdiction over general title disputes relating to state property interests"); Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 697 (1982); U.S. v. Brosnan, 363 U.S. 237 (1960) ("well established that the United States was an indispensable party to any suit affecting property in which it had an interest, and that such a suit was therefore a suit against the United States which could not be maintained without its consent"); Chandler v. Dix, 194 U.S. 590, 591 (1904) ("state's title... is the only one assailed. The state, therefore, is a necessary party... and, as this suit cannot be maintained against a state, the bill, so far as it seeks to have tax sales declared void, must be dismissed"); Christian v. Atl. & N.C. R. Co., 133 U.S. 233, 243-44 (1890) (distinguishing between an action to force the sale of stock owned by the state, versus the sale of property on which state held lien).
124. See Treasure Salvors. 458 U.S. at 685-89; Couer d'Alene, 521 U.S at 290-91.
125. Ysleta Del Sun Pueblo v. Leary, 199 F.3d 281 (5th Cir. 2000).
Further proof that governmental immunity applies to *in rem* actions regarding title and other property interests can be derived from several provisions where the federal government explicitly *waived* its immunity, so as to allow various proceedings to proceed when it is a party thereto. In the context of water rights for instance, the federal government has agreed to waive its immunity where there will be a *global in rem* adjudication of the rights in a particular basis, but not where there are only piecemeal decisions. In these global proceedings, the state is the party adjudicating the rights, and presumably has no immunity concerns with respect to participating in its own proceedings. If there is more than one state involved with respect to a single river, the actions will typically end up in the Supreme Court as original actions between the States.

Similarly, there are provisions *waiving* the United States’ immunity with respect to issues respecting tax liens and liens in general. Thus, it is clear that *in rem* title actions are generally subject to immunity considerations unless they are waived in the case of the United States, or could be lawfully abrogated in the case of States. The issue of whether the property is in the “possession” of the government, which arises in admiralty cases, does not appear to be discussed in law and equity cases.

Section 363(h) allows the sale of property held by both the debtor and another party under certain limited circumstances. There is little, if any, case law dealing with whether this could be used to sell an interest of the State over the State’s objection. It is worth noting that such a sale (unlike a sale free and clear of a mere lien interest which may be brought by contested motion under Rule 6004(c)) must be brought by an adversary action, underscoring the nature of this as a dispute between specific parties. Moreover, this is true even though questions as to whether certain property belongs to the debtor go to the core powers of the court and the scope of its jurisdiction.

---


127. *Brosnan*, 363 U.S. at 243-44 (holding 26 U.S.C. § 7424 was enacted in order to deal with immunity issues arising from such liens).

128. *Id.* at 244-45 (holding 28 U.S.C. § 2410 allows private party to name United States in suit to foreclose mortgage or lien or to quiet title). See also *Hussain v. Boston Old Colony Ins. Co.*, 311 F.3d 623, 629 (5th Cir. 2002) (holding § 2410 waives federal immunity on lien issues, but does not apply to attempts to quiet title where government is asserting ownership interest, and not merely lien or mortgage).

b. Admiralty Determinations

The most that one can say about the Court's views on the Eleventh Amendment in admiralty is that it is in a state of evolution. Courts might have held that admiralty was not referred to in the Eleventh Amendment (despite its preeminent position in the law of the day when the Amendment was enacted) and concluded that it was a field apart, never intended to be covered thereby. Some cases in the early part of the Nineteenth Century arguably took that view — but also arguably did not. However, following *Hans*, the Court decided two companion cases in the 1920s and made broad statements to the effect that admiralty cases were as much subject to the Eleventh Amendment as were cases in law and equity. Both cases involved libels of a ship, not ownership determinations.

Since then, however, in *Treasure Salvors*, and, even more clearly in *Deep Sea Research*, the Court's conclusions on admiralty cases have become a good deal more ambivalent. *Treasure Salvors* was deeply split, and had no majority opinion. The case turned in large part on the fact that the issue had merely been whether the federal court could order assets to be physically turned over to it, compounded by the fact that the State did not even have a "colorable claim" of ownership by the time the case reached the Supreme Court. In the course of the decision, while reiterating that the Eleventh Amendment barred determination of title disputes involving the State, the plurality nevertheless added that "we need not decide the extent to which a federal district court exercising admiralty in rem jurisdiction over property before the court may adjudicate the rights of claimants to that property as against sovereigns that did not appear and voluntarily assert any claim that they had to the res."132

In *Deep Sea Research*, the Court addressed the ownership issue, concluding that the Eleventh Amendment would not apply to ownership issues if the vessel was not in the State's actual possession, because it had so held with respect to the United States in cases going back as far as 1869. In addition to that unanimous holding, though, four judges added concurrences that muddled matters considerably. Justice Stevens suggested that some old cases that had not been been

---

130. See generally Welch, 483 U.S. 468.
131. *In re New York* (I), 256 U.S. 490 (1921) (treating actions as *in personam* against the State when claimant sought payment for damages allegedly caused by ship leased to State); *In re New York* (II), 256 U.S. 503 (1921) (holding property used by governmental entity for governmental purposes is never available for seizure by private claimants who seek payment for death caused by alleged negligence of ship owned by State).
cited in *Treasure Salvors* convinced him that it was likely that admiralty *in rem* ownership actions were never meant to be covered by the Eleventh Amendment. Justices Kennedy, Ginsberg, and Breyer suggested that some of the holdings in prior cases were open for reconsideration, noting that they might not draw a distinction between whether assets were in the possession of the State or not in the admiralty context. It is less than clear, though, which way they meant to go if they no longer drew the distinction. They joined the opinion, so presumably they agreed that non-possessory admiralty ownership disputes involving States may be decided by federal courts but, if they meant to imply that they would hold that a federal court could may decide ownership rights in a vessel while in the actual possession and control of the State, that would be a marked departure from the very precedents they relied upon in granting relief against the State here. And, by continuing to leave the *New York* cases intact, they left in place the holdings that *in personam* and *quasi in rem* actions (i.e. non-ownership issues) may not be brought in admiralty. In short, it is very unclear where their "reconsideration" might come out.

In light of the Court's agreement in *Deep Sea Research* that the Eleventh Amendment *does* apply to similar title issues outside of admiralty, it is not clear why they thought admiralty was different, other than the historical fact that it had been treated differently for other governmental entities. Conversely, the Court made extremely clear that it was *not* deciding any issue outside of admiralty. To the contrary, every single time that it described the proceeding it referred to it as an admiralty *in rem* proceeding, not merely an *in rem* proceeding in general. Thus, except perhaps from the extremely cryptic concurring noted above, there is no suggestion that the opinion was meant to apply outside of admiralty or was expressing a new view of *in rem* actions generally. The net result seems to be that the Court might be thinking of asserting a broad exemption of admiralty from the Eleventh Amendment, at least where the cases don't look too much like typical *in personam* actions. This could be because admiralty wasn't listed in the text of the Eleventh Amendment or because the historical evidence might be read to support the view that litigation of government ownership interests (absent actual possession of the vessel) had been accepted at the time of the Constitution. Thus, this would fall within the *Hans* analysis. Or, of course, it was possible that the Court was coming up with a whole new treatment of *in rem* issues, generally, despite the very carefully hedged language that it used throughout the opinion.
In trying to decide which possibility is correct, it is worthy of note that, despite the admiralty cases dealing with in rem adjudication of federal interests dating back to 1869, the Court had flatly rejected the notion that it had created a general in rem exception in bankruptcy or elsewhere, at least as to issues involving monetary liability and the United States. In U.S. v. Nordic Village, Inc., the Court stated:

Equally unpersuasive is respondent's related argument that a bankruptcy court's in rem jurisdiction overrides sovereign immunity. [First, there was no actual res, where the debtor was seeking fungible dollars from the U.S. Treasury, not asserting rights in some specific fund of assets.] In any event, we have never applied an in rem exception to the sovereign-immunity bar against monetary recovery, and have suggested that no such exception exists, see United States v. Shaw, 309 U.S. 495, (1940). Nor does United States v. Whiting Pools, Inc., 462 U.S. 198 (1983), establish such an exception, or otherwise permit the relief requested here. That case upheld a Bankruptcy Court order that the IRS turn over tangible property of the debtor it had seized before the debtor filed for bankruptcy protection. A suit for payment of funds from the Treasury is quite different from a suit for the return of tangible property in which the debtor retained ownership. The Court's opinion in Whiting Pools contains no discussion of § 106(c), and nothing . . . suggests that . . . monetary recovery from the United States would be proper.

If there was any equation between admiralty in rem jurisdiction and other in rem actions in law and equity, so as to make immunity inapplicable in both, then the United States would have had no such rights since 1869 – which plainly is not case in light of Nordic Village. To the contrary, that opinion certainly suggested that the nature of a proceeding as being in rem was irrelevant for immunity determinations outside of admiralty. That position was further supported by the Court's unequivocal statement in Missouri v. Fiske that:

The fact that a suit in a federal court is in rem, or quasi in rem, furnishes no ground for the issue of process against a nonconsenting state. If the state chooses to come into the court as plaintiff, or to intervene, seeking the enforcement of liens or claims, the state may be permitted to do so, and in that event its rights will receive the same consideration as those of other parties in interest. But, when the state does not come in and withholds its consent, the court has no authority to issue process against the state to compel it to subject

134. Id. at 38-39 (emphasis added). Whether the United States agreed that sovereign immunity did not bar a turnover order, or had missed the potential issue, or had concluded that section 106(c) did waive the United State's immunity from injunctive relief, cannot be determined from Whiting Pools, but the government's position in Nordic Village suggests that the last answer is correct. That waiver, though, could not bind the States.
135. 290 U.S. 18 (1933).
itself to the court’s judgment, whatever the nature of the suit.\textsuperscript{136} (Emphasis added).

A series of cases that suggest a way to deal with non-admiralty title issues were those by Circuit Courts before \textit{Deep Sea Research}. They assumed that the Eleventh Amendment applied to the sunken ship cases but solved the effect of the Eleventh Amendment by holding that they could decide the rights of all of the other parties \textit{inter se}, but would not decide any issues \textit{vis-a-vis} the State. After the winning private claimant was known, the State could either choose to negotiate with that person, or it could bring its own affirmative action in state court to assert its claimed rights in the vessel.\textsuperscript{137} While such cases are no longer valid in the admiralty context, they might provide useful insights outside of admiralty.

3. Allocation of Bankruptcy Assets

In most bankruptcy cases, the State is not contesting ownership of the debtor’s assets; at most, it is merely asserting a right to be paid therefrom. Does that process implicate the Eleventh Amendment? Plainly, the answer is no. In and of itself, an allocation among various claimants has only the most tenuous relationship to any determination of interests adverse to those of the State.\textsuperscript{138} As stated in \textit{Gardner}, it is highly unlikely that the initial trigger for the application of the Eleventh Amendment exists. When parties are invited to come forward and request to be paid, nothing is being done “against” them; no adverse determination is made as to their interests if they choose to abstain from seeking funds from that asset. Outside of bankruptcy, a debtor is not thought to have taken action “against” the State if it pays some debts, while owing money to the State, even if it doesn’t first give notice to the State and invite it to contest those payments.\textsuperscript{139}

\begin{itemize}
  \item \textsuperscript{136} \textit{Id.} at 28.
  \item \textsuperscript{137} See Zych v. Unidentified Wrecked and Abandoned Vessel, Believed to be the Lady Elgin, 960 F.2d 665 (7th Cir. 1992) and cases cited therein.
  \item \textsuperscript{138} Clearly if the State files a claim, the court might not rule against it on the merits, but that is inherent in any attempt by a State to affirmatively enforce a right. The Eleventh Amendment is a jurisdictional limitation, not a guarantee that the State will never lose a case.
  \item \textsuperscript{139} A creditor might be able to sue a recipient that aided a fraudulent transfer, but in most situations where a debtor pays one creditor, that would be the exception. A party who merely has an unsecured claim against a defendant has no right to demand that particular assets be set aside for that claim or to object if another party is paid first. \textit{See generally} Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999). Even with a judgment, one merely has potential rights to collect from any given asset. Until those rights are exercised, the defendant is free to use his assets. Thus, as the Court asserted in \textit{Gardner}, it is difficult to state a case in which one can claim that the bankruptcy payment process is one that is \textit{against} the state. Absent such adversity, the initial condition for assertion of immunity never occurs.
\end{itemize}
The other reason why nothing is being done "to" the creditor is because in a traditional *in rem* action, as discussed above, the parties whose claims are not satisfied, are left with the ability to look for other assets. The proceeding might bind the world in the sense that one could not overturn an allocation of assets of which one had notice and did not contest, but non-participants would not have any determinations made as to their rights, and claimants who were only partially paid could seek to collect from other sources. Under the same analysis, a mere *in rem* allocation of the bankruptcy estate would impose no inherent limits on the State's right to continue efforts to collect its debt. One need go no further to see that there is no reason to find a violation of the Eleventh Amendment in the allocation process as such.

By the same token, even a sale under section 363 of an asset with respect to which the state merely asserts a lien interest does not implicate the Eleventh Amendment if the debtor relies on section 363(f)(3) to justify the sale.\(^{140}\) While, to be sure, a lien is a property interest of sorts, it functions primarily as a way to ensure payment of a claim. If the debtor takes steps that results in the conversion of a lien on an asset of uncertain value into a right to be paid in full from a stack of negotiable currency, the State would surely have no reason to say that something was being done "against" its interests.\(^{141}\) Indeed, transactions of this nature take place every day outside of bankruptcy, as properties are sold, and amounts deducted for tax payments, without anyone ever concluding that this would trigger the Eleventh Amendment. The Supreme Court, in fact, drew exactly this distinction in *Christian* in distinguishing between an action to force the sale of stock owned by the state, versus the sale of a property on which the state merely held a lien.\(^{142}\) While the former was barred by the Eleventh Amendment, the latter, in a foreclosure proceeding, for instance,

---

140. This assumes the better reading of that section, namely, that the section requires that the sale must provide enough to satisfy the face value of all of the liens. See *In re WDH Howell*, 298 B.R. 527 (D. N.J. 2003) and *In re Terrace Chalet Apartments, Ltd.*, 159 B.R. 821 (N.D. Ill. 1993) and cases cited therein. The section would merely express a tautology if it were interpreted to apply to the value of the liens as computed under section 506(a) (since the value of the liens is limited by the value of the property, the property could always be sold for the value of the liens under that analysis). Of course, a sale under section 362(f)(1) or (2) would also not implicate sovereign immunity – if the State agrees to the sale, or its nonbankruptcy law allows for the sale to take place, regardless of the price received, there would be no reason why the same process in bankruptcy would trigger any immunity issues.

141. The primary function of section 363, after all, is to authorize the debtor to take actions that it could unquestionably have done if it were not in bankruptcy, but that it is precluded from carrying out once the petition is filed. Selling things outside of the ordinary course of business is primarily a matter between the debtor and the bankruptcy court, not the debtor and the State.

142. *Christian*, 133 U.S. at 243-44.
would not be precluded. The analysis is no different here. The discussion in *Gardner* about the court’s right to deal with liens, appears to arise in the context of determining the allocation of assets in the estate. Since the State asserted a secured status for its claim, review of that assertion was simply part of the overall review of the claim that needed to be made.

F. Determination of Status

So, if the claims allocation process does not impinge on the State’s rights, despite (and, indeed, because of) its *in rem* nature, where is the basis for the Code’s “discharge,” i.e., the injunction barring creditors from asserting personal liability against a debtor for debts dealt with in the bankruptcy proceeding? Can that discharge arise from the *in rem* nature of the claim allocation process? Plainly not, because no matter how much effort is put into allocating a specific *res*, the proceeding, by its very nature ends, when the assets are allocated. Something else must be relied upon to justify the discharge. It could, of course, be sought on an *in personam* basis against known creditors but the concern is that it would leave loose ends and would, as to the States in any event, plainly be subject to the Eleventh Amendment. So is there some other form of *in rem* proceeding that does not adjudicate property interests, some other form of *res*? The answer is yes, although it is a point that has rarely been even alluded to by name, much less clearly analyzed in the bankruptcy context.

This is the notion that one can have an “*in rem*” determination of a right to an intangible “status.” The Restatement of Judgments describes such status actions as involving the relationship between a person and society, such as citizenship, or between particular persons, such as marriage or the parent-child relationship. In the ordinary course, while the grant of the status may entitle a person to certain benefits and rights *vis-a-vis* other persons, the status determination is usually sought for reasons apart from merely gaining the right to those benefits. Marriage is not just about the right to file joint tax returns, for instance. Moreover, the parties that provide the benefits are not necessarily the ones conferring the status, and have normally no obligation to continue the benefits even if the status does not change. While marriage under state law allows for those federal tax benefits, the federal government is not obligated to continue providing them and could change its tax structure at will, despite the adverse impact on parties with a certain status.

In most cases, too, there are only a limited number of parties that may participate in the determination or challenge it. Since a status determination in most circumstances has no effect on the interests of other parties, there is no reason why they should be brought into the process or given legal rights with respect thereto. According to the Restatement, though, if there are parties whose rights will be directly affected, and they are not given the ability to challenge the determination, they will not be bound if they are prejudiced thereby. Indeed, the discussion notes, despite the characterization of the process as being in rem (and, hence, theoretically dispositive against the world) the degree of claims preclusion varies widely, depending on the conflicting interests of different parties that may be affected thereby.\textsuperscript{144}

More to the point, it is not at all clear that status determinations are exempt from the Eleventh Amendment. To be sure, it is possible for one governmental entity to determine a status issue without running afoul of the immunity interests of another entity, even if the status determination may affect the actions of the other entity. In \textit{Gao v. Jenifer},\textsuperscript{145} the court dealt with a situation where state law determined whether a minor alien was a “dependent” person. That status in turn entitled a minor to be treated as a “special immigrant juvenile” under federal immigration law, with consequent benefits for him. The Sixth Circuit rejected the federal government’s argument that the state action violated its sovereign immunity. The right to determine dependent status was one normally exercised by states and the federal law made no effort to preempt that right, even for a juvenile constructively in INS custody. Nothing the state did barred the federal government from acting, in a constitutional sense, on immigration matters. The federal law chose what effect to give to those having the status of “dependent” minor under state law, and the federal government could change that effect if it were dissatisfied. Thus, the court held, while the status determination had an incidental effect on federal interests, it did not violate the United States’ immunity – not because status determinations were not subject to the Eleventh Amendment but because, in this case, the determination, in and of itself, did not adversely affect the United States’ interests.

\textsuperscript{144} For instance, marriage normally has no legal impact on others, nor will an annulment. But, where a divorce decree provides for alimony until a party remarries, the former husband may have the right to question whether the annulment removes the “marriage” that ended his alimony obligations. The annulment then might bind the rest of the world, but not him. The Restatement adds in the Reporter’s Note, comment (f) that “The older authorities are in hopelessly conflict as to whether non-parties are concluded by a status determination.” \textit{Id.}

\textsuperscript{145} 185 F.3d 548 (6th Cir.1999).
The Restatement makes no mention of a bankruptcy "status," but there are some old cases that use the term in bankruptcy. *Shawham v. Wherritt* \(^{146}\) dealt with the Bankruptcy Act of 1841, which, in some cases, required proof the debtor had committed an "act of bankruptcy" to warrant commencing the case. The Court held that, where the public had been notified that the debtor allegedly made fraudulent transfers, the adjudication of the debtor as a "bankrupt" was an *in rem* determination that bound all interested parties. The effect of this determination, though, was merely to set the case in motion and did not, as such, limit or destroy creditors' property rights. Its only effect was to require creditors to respect the bankruptcy case and not proceed with separate activities to collect from assets under the control of the court. Similar litigation was required to commence certain cases under the 1867 Act, and, again, the Court having determined that notice had been given, and that the debtor satisfied requirements to be a "bankrupt," held that the determination of the debtor's "status" was binding on all creditors.\(^{147}\) A corporation was also adjudicated a "bankrupt" in an *in rem* proceeding under the 1867 Act, but that judgment did not affect the creditors' property rights because corporations did not receive any discharge.\(^{148}\) Note, too, that none of these cases involved State creditors (and, recall, that State debts would not be discharged in these proceedings in any event). Thus, none of the decisions had occasion to rule on the issue of whether a "status" determination could bind an unconsenting state.

In each of these cases, the effect was, essentially, the same as now occurs when the filing of a petition automatically triggers a bankruptcy filing and a stay of other proceedings. Under those prior Bankruptcy Acts, though, the petition did not necessarily have that effect and a preliminary litigation had to take place to set the bankruptcy process in motion. However, while the result of the determination that the filing party could assert the "status" of bankrupt, would bind the world if proper notice were given, the *facts* underlying the decision on the bankrupt status would not be *res judicata* as to anyone who did not participate directly in that status hearing. In *Gratiot County State Bank v. Johnson*,\(^{149}\) for instance, the Court noted that an involuntary bankruptcy could be commenced upon evidence pointing to allegedly fraudulent transfers.\(^{150}\) The alleged *recipients* of the transfers, though,

---

146. 48 U.S. 627, 643 (1849).
149. 249 U.S. 246 (1919).
150. *Id.* at 249-50.
were not bound by that determination and were free to prove that the transfers had *not* been fraudulent. Thus, this “status” decision was more a matter of practical convenience to be sure that all parties knew when the case had started and the court had asserted its exclusive jurisdiction that it was any attempt to resolve the creditors’ rights. And, it is also likely that, just as the automatic stay “binds” the world and voids actions in violation thereof but can be annulled to protect the innocent, a party that innocently ran afoul of that status decision could have asked the court to modify its order to protect his interests.

These cases, in any event, only dealt with the commencement of the case. In *Hanover*, though, the Court was called on to decide the constitutionality of the 1898 Bankruptcy Act.\(^{151}\) Most of the decision dealt with other issues, but the final contention of the creditor was that the Act deprived him of due process by virtue of both the lack of notice of the *commencement* of the case, and the adjudication of the *discharge*. The Court noted that this Act, unlike prior ones, allowed the case to begin merely by the debtor showing that he had debts, had filed his schedules, and had agreed to turn over his assets. Since commencement of the case involved no disputed facts, the lack of prior notice of the filing was not material, since the creditor was given notice of its rights to contest the discharge. The Court held that creditors were bound to the allocation of the estate by virtue of being given notice of the initial filing of the bankruptcy petition and, thereafter, Congress had the right to decree that a discharge would be entered unless objections were filed thereto. The decision on such objections, the Court then held was a determination *in rem* that the debtor held the *status* of “discharged bankrupt,” which could be granted even if personal service was made on each creditor (although notice was needed). This description of the discharge as an *in rem* determination of a status was reiterated in passing in *Local Loan Co. v. Hunt*.\(^ {152}\) Neither case involved a state creditor or discussed whether the status could override Eleventh Amendment immunity.

Other than those two cases, the notion of an *in rem* status as the basis for upholding the discharge has almost never been alluded to as such since then. It does undoubtedly underlie decisions that uphold the discharge but the courts almost never distinguish between the *in rem* allocation of the estate (which is irrelevant) and the *in rem* determination of the “status” of the debtor not just as a “bankrupt,” but as

\(^{151}\) *Hanover*, 186 U.S. at 192.

\(^{152}\) 292 U.S. 234, 241 (1934).
a “discharged bankrupt,” which has a considerably different effect on the rights of the creditors.

G. Is an In Rem Status Determination Subject to the Eleventh Amendment?

The next obvious question is whether a status determination, in general, or in the bankruptcy context, in particular, can truly bind all parties, particularly those protected by the Eleventh Amendment. To begin with, the notion of a status determination fits somewhat poorly with the rights granted by a bankruptcy discharge. Other status decisions, as noted above, are typically directed at personal relationships or relationships directly with the state (such as citizenship). It is presumably precisely because of their general lack of impact on others, and the special importance of certainty to the petitioners, that the proceedings are treated as binding the world at large—unless those other persons have a special interest.

If one compares the bankruptcy status determination with the kind of determination dealt with by the Sixth Circuit in Gao, there are notable differences. While the determination that Gao was “dependent” had independent consequences from the INS proceeding and federal immunity, obtaining the status of “discharged bankrupt” has no purpose other than to eliminate the property rights of other parties. Nor is this a determination of a matter primarily of concern to the governmental entity granting the status (such as citizenship or dependency) and that has an effect on others only to the extent they choose to take that status into account. (States might only choose to hire United States citizens, but no one would argue that their independent decision to do so would mean that a federal judgment on an applicant’s citizenship somehow impacted on their immunity, since they are free to change their criteria). But, bankruptcy status is designed precisely to determine the rights of other parties and its entry automatically imposes obligations on them that they may not change or eliminate.

In short, the granting of this “status” looks a very great deal as if it were the result of a typical law suit between opposing parties seeking rights guaranteed by a federal statute. If the Code merely provided that a debtor could allocate its assets and then request an injunction naming specific creditors in an in personam action to bar any further collection activities, this would surely look like an action subject to the Eleventh Amendment. Is there something specific about delineating this process as a a “status” issue that truly differentiates the situation? Could one have a “status” of “non-exempt” worker under the Fair Labor Standards Act? Would that status determination include an
analysis of one's job duties, pay grades, and other factors relative to whether one is entitled to overtime? If so designated, could the federal government allow the process of determining that "status" to be determined in federal court at the instigation of the state employee? If not, what is it about the bankruptcy "status" in particular, or in rem decisions generally, that would make them exempt from the Eleventh Amendment?

To recapitulate: in rem jurisdiction arises when the government chooses to create a proceeding in which it wants all interests to be decided at the same time. The proceeding will still not be binding on the world unless there has been adequate notice to all known, affected parties and publication notice to others. These due process duties are required because, as stated in Shaffer, in rem actions are, still, in reality adjudications of the interests of the parties that own the property interests being determined. There is no such thing as a disinterested determination of property rights apart from and in isolation from the rights of the parties asserting those rights. While the extent of the rights being determined may be somewhat more limited than if the plaintiff can obtain personal service over the defendant, the litigation is no less a decision on personal rights. The failure to provide direct notice to known parties means that, even in bankruptcy, the discharge is not effective as to them.

To be sure, the degree of concern for the interests of other parties is tied to the scope of the interests being resolved in the in rem action. Where only rights in a particular asset are being dealt with, this obviously has a lesser impact than if the litigation purports to decide all of the rights between the parties. Similarly, proceedings that merely allow a claim for payment to be asserted against a given asset are less problematic for immunity purposes than proceedings that determine ownership. The first, as discussed above, reasonably can be analyzed as not affecting the government's interests at all, and hence, not something that would trigger immunity concerns. The latter plainly does affect the government's interests — and, as such, is treated as being

153. In essence, one might conclude that this is a corollary of the rejection of Justice Douglas' eloquent plea in Sierra Club v. Morton that trees should be given standing to protest their own despoliation. 405 U.S. 727, 741-42 (1972).

subject to the government’s immunity. If one weighs the discharge “status” determination on that scale, it clearly seems more like the “title” determination than the asset allocation determination. Just as a decision on ownership unavoidably impinges on the government’s rights, so too does the grant of discharge with its concomitant injunction against any collection actions against any non-estate assets now or in the future. Indeed, it provides nothing to the debtor apart from that limitation on the rights of others. Thus, by any standard form of analysis used outside of bankruptcy, there is a strong argument that even the general discharge is subject to the Eleventh Amendment, much less a specific discharge complaint. Put another way, if the federal government can simply choose to design a litigation process that can be invoked by private litigants to decide the rights of unconsenting states, how is this any different from any other form of abrogation?

If there were particular kinds of actions that had always been handled throughout history by in rem actions (and no other), and historical practice showed that such actions were filed against the Crown and the colonial governments, one might plausibly argue that such actions were within the contemplation and agreement of the States in ratifying the Constitution as part of the “plan of the convention.” But, if as seems clear, virtually any kind of proceeding can be deemed by the government to be in rem, how does that suggest that there was any kind of clearly agreed to process that the States had agreed to be bound by? It is clear, to the contrary, as shown above, that many types of in rem actions may not be brought against the State. Moreover, if the federal government cannot authorize a private party to sue the State as the sole defendant, why can it do so by adding “the world” as additional defendants? To be sure, if one is trying to bind the world, one can argue persuasively that it would be useful to be able to bind the States as well – but how does that necessity argument comport with the unequivocal words of the Eleventh Amendment? Where does the Amendment state that it applies to all cases in “law and equity,” except those where the federal government thinks it’s really important that a decision should bind the States?

It certainly seems clear, in any event, that, as a historical matter, bankruptcy and insolvency laws at the time of the Convention and for 111 years thereafter were not areas in which governmental rights and obligations were treated as akin to those of private entities, and certainly not ones where another government could necessarily dictate

those rights. The federal government did not dictate state insolvency laws; rather, it allowed states to decide those issues as to federal judgments except for those owed to the United States. And, until the 1898 Act, government debts were not dischargeable and generally received priority so what adverse effect could the proceeding have had on the government? Bankruptcy was simply a creditors' remedy to be asserted against a very limited number of debtors. The States in 1787 could not have imagined the degree to which it would have burgeoned nor the notion that in all of the 1.6 million cases filed in 2004, private parties could obtain orders barring states from collecting their debts. To the contrary, this is exactly the type of proceeding, "anomalous and unheard of" at the time of the Convention, that *Hans* said must be viewed as being subject to the Eleventh Amendment.

If bankruptcy proceedings weren't contemplated, can one argue that a "status" decision actually isn't "against" the State, because it is only determining rights in the status res? But how can a federal court have jurisdiction to decide anything if there is not first a "case or controversy" between opposing parties? If an action is not "against" somebody, and doesn't determine concrete rights, it has no business being in federal court! The reality is that *Shaffer* made clear that such arguments are fictions that cannot be used to eliminate the rights of the parties being affected by those determinations. Property and status, like trees, don't have standing and don't litigate about themselves separately from the interests of the entities fighting over the benefits and detriments of those decisions. The bottom line is that a discharge decision granting an individual an injunction from a federal court to bar a State from pursing a lawful debt looks disturbingly like any other suit in law and equity subject to the Eleventh Amendment.

In this regard, it is clear that a discharge order (particularly in the context of an order confirming a plan) is not some mere mechanical implementation of a statutory right created by Congress and effective without judicial intervention. While the automatic stay does fit that mold, the discharge plainly does not. The courts have never hesitated to find that a discharge order that is entered with adequate notice can bind parties to language that does not conform to the Code. The *Antonelli* case is a primary example of this – the Fourth Circuit assumed, for purpose of the decision, that the State was correct in its contention that the confirmation order provided relief that exceeded that actually allowed by section 1146(c). Yet, the court had no hesitation in holding
the State was bound by the confirmation order because it had not appeared to contest it.156

Of course, had the State appeared, the court also made plain that the appearance would have been a waiver of its immunity. Thus, the court conceded, there was no question that the State was placed on the horns of a dilemma – appear and waive one’s immunity (and be bound by the decision) or fail to appear and be bound by the decision by default. Yet, the court opined, that did not coerce the State to appear, or turn the confirmation/discharge process into a suit against the State.157 Measured against the standards that the Supreme Court enunciated in *Federal Maritime*, though, which held that such a Hobson’s choice did unlawfully coerce the State to appear in federal court, the entry of the general discharge would appear to be such a coercive action even if no summons was issued to the State.158 Even more clearly, therefore, it would appear that an adversary complaint to determine the discharge status of a specific debt would so qualify as a coercive proceeding that would trigger the Eleventh Amendment.

If one does not like that conclusion, this would seem to leave only two possibilities. First, one can come up with an analysis that concludes that bankruptcy in rem determinations are somehow different than any other type of in rem decisions in law and equity on some (as yet unspecified) basis, but leaves the Eleventh Amendment applicable to bankruptcy decisions not based on in rem jurisdiction (whatever those might be). Or, the Court could have opted for the escape route chosen by the Sixth Circuit, namely to deny that the Amendment applies at all. The latter analysis at least had the virtue of providing a simple and clear result – namely, that none of these constitutional issues need be addressed because Congress can simply do whatever it wants.

So, this would have been the analysis that the States could have presented to the Court in *Hood* if it had asked for the topic to be briefed. Since the Court did not do so, it was left to its own research and we can now see how many of these issues the Court spotted on its own, and how it used the broad variety of precedent it could have cited. Moreover, how clearly did the Court understand the procedural actions taking place in the case, including the distinctions between the general discharge and a specific discharge complaint, and the results that would occur in each case if the State chose not to appear? To what extent did the Court understand why the drafters of the Code

156. *Antonelli*, 123 F.3d at 782.
157. *Id.* at 787.
and the Rules required that some actions proceed by motion and some by adversary proceeding? Did it provide adequate guidance for the future for parties dealing with the vast range of proceedings in a bankruptcy case that might involve the States? Those questions will be taken up next, along with some attempts to predict where the Court will go from here.

IV. *Hood* - The Argument and the Decision

A. The Argument

As noted above, the first question in the argument was whether the case was controlled by the holding in *Deep Sea Research* about admiralty title *in rem* proceedings. Justice Ginsberg then linked that both the process of allocating the debtor's estate as an *in rem* proceeding and the debtor's *in rem* discharge status. Thus, in less than a minute she had conflated all three different types of *in rem* proceeding, with no clear indication that there was any difference between the three, or that the consequences for sovereign immunity purposes varied greatly between the different types, much less between actions in admiralty versus in law and equity.

At other points in the argument, both the Court and counsel for the debtor appeared to confuse the effect of the entry of the general discharge with the litigation of the specifics of the particular debt owed to Ms. Hood. The Court seemed to be less than aware that, while the grounds for denying a discharge in general could affect all creditors, resolution of the disputed facts of the debtor's post-discharge earning capacity and lifestyle would have no bearing on any other creditor. Debtor's counsel contributed to the confusion by stating that the bankruptcy court "would have a heightened responsibility to determine whether there was a basis for an undue hardship discharge because the decision is . . . affecting everyone,"159 although a decision on the discharge of a particular debt has no effect on other creditors.

Because the Court seemed to view the student loan hardship issue as being bound up in the determinations that would go into the general discharge determination, the Justices repeatedly suggested that perhaps Congress could have just discharged all student loans, so why should the States complain if they were given the right to contest some of them? That argument might have been well directed if the issue had dealt with a section 523(a)(2), (4), or (6) exception where Congress used that sort of process, but it clearly set up a different requirement for student loans. Under the Code, the grant of the gen-

159. Trans. of U.S. at 34, *Hood* (No. 02-1606).
eral discharge status is merely a first step in student loan cases; there-after, the debtor is still obligated to initiate another litigation with the State to determine his individual rights. To view that as part of a global in rem determination, underscores that the term in rem has no inherent meaning except that "the United States wants this proceeding to bind the States as well as everyone else."

In any event, the Court seemed far more interested in speculating about what Congress and the Rules drafters might have written, rather than passing on what they had done. Amidst a whirl of ever-more complex hypotheticals about other Codes and other Rules, the State's counsel eventually conceded that the general discharge could bind the States, a position he had not taken at the beginning of the argument. Nevertheless, he valiantly tried to point out to the Court that conceding the point for the argument was irrelevant, since in this context, it would be no different than saying that substantive application of a law to the State would not allow it to be applied to particular facts in a judicial proceeding, but in vain.

The Court spent considerable time with both the State and debtor's counsel trying to understand exactly what would happen in an "adversary proceeding," particularly if the State just didn't show up. This was clearly an area in which notice to the parties of the Court's interests would have been of assistance, since the Court was unsure of the facts, and the answers were not overly clear. On Tennessee's side, this was undoubtedly a result of the fact that the State Solicitor was not a bankruptcy lawyer as such, and had less reason to be fully cognizant of these fine points of bankruptcy procedure, when none of them were part of what had been appealed. But, even the debtor's counsel's answers were less than models of clarity or accuracy. The correct answer to what happens if the State doesn't show up in an adversary or a contested matter is that it will, almost certainly, be defaulted and it would be highly unlikely that the court would ask for more from the debtor than whatever was alleged in its complaint. Debtor's counsel, on the other hand, first agreed there would be a default, but then turned around and agreed with Justice Ginsberg that the bankruptcy judge would have to "find" that there was undue hardship. He then added that the court would not merely "find" the issue based on a failure to appear, stating that "The difference is . . . that all of the property of a debtor and claims against that property - they're - they're all under the bankruptcy court's jurisdiction. So a bankruptcy
court has a *special obligation* to – to protect the interests of all creditors and the estate."\(^{160}\)

The result of all of this was that the Justices had little patience with the distinctions that the Rules draw between motions and adversary proceedings. The Court appeared to assume that decisions on which procedures would be required were somewhat arbitrary and did not see them as reflecting the very distinctions between proceedings affecting the interests of creditors as a whole for which adversaries are not generally used, and those affecting the interests of a *specific* creditor (or the debtor, in the case of the attacks on its discharge) which are protected by the use of adversary proceeding requirements.

It was not until virtually the end of debtor's counsel's time that anyone on the Court sought to sort out the distinction between the estate *res* and the right to a discharge status and that any reference was made to *Hanover*. Debtor's counsel made clear that he was not arguing that matters such as preference actions would be related to the *in rem* aspects of the case, whether based on arguments about the estate or a debtor's "status." And, finally, during rebuttal, in response to questions from Justice Ginsberg, the State's counsel noted that the State's position would *not* deprive the debtor of a forum to have its issues heard – a point that did not appear to have fully registered with the Court, in view of some of the language in its opinion.

**B. The Decision**

1. The Majority Decision

The Court's bottom line conclusion was that the "discharge of a student loan does not implicate the State's Eleventh Amendment immunity," so that it need not reach the issue on which it had granted certiorari of the Sixth Circuit's opinion.

The Court began by stating that States may "be bound by some judicial actions without their consent," citing *Deep Sea Research* – an *in rem* admiralty action. The Court then stated that the "discharge of a debt by a bankruptcy court is similarly an *in rem* proceeding." For that proposition, it cited *Gardner*, which was not a discharge case.\(^{161}\)

It also cited three other cases – *Straton v. New*,\(^{162}\) which held that once a bankruptcy case was filed, the bankruptcy court had exclusive jurisdiction over the property in the estate and a party could not enforce a lien in state court while the case was pending (i.e., a matter

---

160. Id. at 33-34 (emphasis added).
162. 238 U.S. 318 (1931).
now dealt with by the automatic stay); Hanover, which had the language referring to the discharge as an in rem status determination;\(^{163}\) and New Lamp Chimney Co. v. Ansonia Brass & Copper Co.,\(^{164}\) in which a corporation was given the status of "bankrupt" at the onset of the case, but did not involve the discharge of debts). Thus, of the four cases, only one dealt with the discharge or linked the in rem status issue to that issue, and only one (Gardner) involved a State entity, but did not deal with a discharge issue. On the other hand, none involved the sort of title determination that was at issue in Deep Sea Research, so none of them were similar to Deep Sea Research on the critical issue.

The Court then cited various recent lower court decisions holding that the right to grant a discharge was based on a court's jurisdiction over the debtor and his estate, not over creditors. It then stated that it had previously held that States, whether or not they participated in the case, were bound to the discharge. It cited Gardner for that proposition although Gardner has nothing to do with discharges and the opinion does not even contain the word "discharge." It also cited New York v. Irving Trust Co.,\(^{165}\) which only held that the State must abide by court procedures to collect from the estate and also does not include the word "discharge" either. The third citation was to Van Huffel v. Harkelrode,\(^{166}\) which held that bankruptcy courts may sell assets free and clear of state liens.

The issue in Van Huffel, though, was the interpretation of the 1898 Act which did not specifically provide for that power. The Court agreed that the power should be found to exist because it had been included in prior Acts and was inherent in the general process of marshaling the estate. Immunity was never raised as an issue, and the Court did not rule thereon. Indeed, the only reason the case had arisen was because the bankruptcy court had erroneously paid mortgages first without satisfying the tax lien as it should have done. Following the proper procedure, of course, would have resulted in no harm to the state. Van Huffel cited a great many cases allowing such sales, and many appear to explicitly rely on that payment right to justify allowing the sales to proceed.\(^{167}\) And, even if some mortgage liens could not always be paid in full, first priority tax liens almost certainly

\(^{163}\) Hanover, 186 U.S. 181.
\(^{164}\) 91 U.S. 656 (1876).
\(^{165}\) 288 U.S. 329 (1933).
\(^{166}\) 284 U.S. 225 (1931).
\(^{167}\) See, e.g., In re Nat'l Grain Corp., 9 F.2d 802 (2nd Cir. 1926) (finding court may sell free and clear if price allows liens to be satisfied from proceeds).
would be paid. And, finally, as noted, above, "discharging" the lien by transferring it to the proceeds received does not, in any realistic sense, result in any loss of any right the State actually had. A lien cannot guarantee satisfaction of the debt, it only represents a right to have that asset devoted to payment of the debt according to state law priorities— which is exactly what happens in the "free and clear" sale. Thus, while this cases comes closest to supporting the court's point, it still falls far short of proving that the Court had ever previously decided the actual issue at stake now.

The Court then stated that "when the bankruptcy court's jurisdiction over the res is unquestioned... our cases indicate that the exercise of its in rem jurisdiction to discharge a debt does not infringe state sovereignty." It cited only Irving Trust and Van Huffel for that principle, although, as set forth above they do not deal with that proposition at all. It then stated that Missouri v. Fiske, which explicitly held that immunity did apply to in rem proceedings is "not to the contrary!" It did not cite Fiske's actual lanaguage, but asserted that Fiske is actually consistent with its view that the courts can use in rem proceedings to discharge debts of States despite their lack of consent to any proceeding in the bankruptcy court. It noted that the question of enforcing the discharge injunction was not now before it and that Fiske had not decided the enforceability of the underlying federal court determination against the state.

That raises a striking question—is the Court suggesting that even though the discharge may be entered and bind the State, it cannot be directly enforced against the State? That would seem to be a hollow victory indeed for the debtor. Or, perhaps the Court is suggesting that it may still only be susceptible to actual enforcement through an Ex parte Young action against State officials? It is impossible to tell what the Court means here.

On the other hand, by citing Fiske, the Court apparently meant to suggest that the proceedings in that case were like those that result in the bankruptcy discharge, that is where the determinations being contested were being made in the same procedure in which the injunction was sought. The actual facts in Fiske, though, are considerably more complicated. They boil down to the fact that the judgment in question had been entered years previously and the present issue was a separate suit being brought to enjoin the State from holding probate hearings in which the results of the prior decision might have res judicata effects. The Court in Fiske noted that it was not deciding whether that

---

168. 290 U.S. 18 (1933).
prior \textit{in rem} decision \textit{could} bind the State substantively but that, in any event, it could not be the basis for a new injunction that would prohibit the State court from reviewing the issues itself. While it may be fair to say that the holding in \textit{Fiske} is not entirely dispositive of the discharge issue, it is difficult at best to read the case as in any way consistent with the views about \textit{in rem} jurisdiction begin espoused in \textit{Hood}.

The Court then suggested that adhering to the plain import of \textit{Fiske}'s language would require a finding that \textit{Irving Trust} had been overruled \textit{sub silentio}. But that ignores the language in \textit{Fiske}, which, after stating that \textit{in rem} jurisdiction could not justify jurisdiction over a State's \textit{objection}, added that "If the state chooses to come into the court as plaintiff, or to intervene, seeking the enforcement of liens or claims, the state may be permitted to do so, and in that event its rights will receive the same consideration as those of other parties in interest."\textsuperscript{169} Since that is \textit{exactly} what took place in \textit{Irving Trust}, there is no reason to think that the two opinions are contradictory or that the Court in \textit{Fiske} did not mean exactly what it said.

After noting that the State had conceded that the general discharge could be entered against it, the Court then noted that student loans used to be discharged but that in 1976, Congress provided a benefit to States by making it more difficult to "discharge student loans guaranteed by States." (This suggests that the Court also believed the claim of the Sixth Circuit that States were the primary beneficiary of this change, as opposed to the federal government.) The Court then stated that the major difference between student loans and other debts is that State creditors that choose not to submit to the court's jurisdiction may still receive some benefit, because of the affirmative obligation of the debtor to prove hardship. This, of course, assumes that debtors will not be able to readily default State creditors on this issue if they do not appear.

The Court then stated that "a debtor does not seek monetary damages or affirmative relief from a State by seeking to discharge a debt; nor does he subject an unwilling State to a coercive judicial process. He seeks only a discharge of his debts." That suggests that any action that merely seeks to restrain the State from acting is qualitatively different from an order that requires the State to act of pay money – although \textit{Dugan} equates the two forms of relief.\textsuperscript{170} And, while the debtor does not want money from the state, it certainly affirmatively

\textsuperscript{169} \textit{Fiske}, 290 F.2d at 28.
\textsuperscript{170} \textit{Dugan}, 372 U.S. at 620.
wants the entry of an injunction against the State. Moreover, it is difficult so see how the Court can say that this is not a coercive judicial process, since the State plainly is being haled into court under current law.

The Court then stated it had endorsed "individualized determinations" of States' interest, citing again to Van Huffel and the "discharge" of the liens there, although, nothing in that opinion actually deal with any "determination" of the State's interest, as opposed to a mere failure by the trustee to properly observe payment priorities (and a failure of the State to timely object to that failure). It then cited Gardner yet again even though the only "determination" there was on the merits of the claim that had been voluntarily filed by the State. It then returned to Deep Sea Research and once again equated bankruptcy and admiralty because they both dealt with *in rem* jurisdiction. It apparently failed to notice the difference in the type of *in rem* proceeding in the two cases as well as the fact that in Deep Sea Research it had explicitly noted the very distinctions between admiralty and law and equity cases that it now dispensed with.

The Court then muddied the waters somewhat more with its footnote 5, where it denied that it was necessarily saying that "a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity." Rather, it was only saying that the exercise of such jurisdiction to discharge student loan debts "is not an affront to the sovereignty of the State. Nor do we hold that every exercise of a bankruptcy court's *in rem* jurisdiction will not offend the sovereignty of the State." The Court resisted the temptation to indicate which actions would be an affront to State sovereignty since those issues "were not before it."

Finally, the Court turned to consideration of the procedure used. It noted that creditors are not necessarily entitled to personal service before a bankruptcy court may discharge a debt, but in so stating, it failed to distinguish between the general discharge for which that is true, from the determination on specific debts where the Rules do require personal service. (This may be another instance where the Court is discussing alternative procedures that the Rules drafters might have used.) It then suggested that student loans were unusual in requiring an adversary proceeding, although, any ruling on the dischargeability of a specific debt requires just such a proceeding. The Court then said the adversary proceeding had "some" similarities to a traditional civil trial (in fact, it's essentially identical to such a trial) but rejected the argument that the case was governed by *Federal Maritime* because "we have long held that the bankruptcy court's exercise of *in rem* jurisdiction is not such an affront." In other words, the
Court did not address the issue on the merits, it merely made a circular reference to its prior assertion that the issues had already long since been resolved (despite the lack of any precedent that actually supported that assertion). It then stated flatly that "Our precedent has drawn a distinction between in rem and in personam jurisdiction, even when the underlying proceedings are for the most part, identical," but cited nothing at all for that sweeping proposition.

The problem with the Court's "we've always done it this way" analysis is that, at best, it might show that since 1898 Congress had asserted that it could discharge state debt without affecting state immunity. However, according to *Hans*, the analysis must be made with respect to what States knew and agreed to in 1787, not 1898, and, as shown above, and in the State's brief, there is no basis to find such acquiescence at the earlier date. The Court took exactly this position in *Federal Maritime*, where it noted that evidence that administrative agency proceedings had not been brought against states until 1918, and that there was no evidence of such actions at the time of the Constitution. Moreover, it also overlooks the fact that many of the conceptual underpinnings that supported such an assertion in 1898 (such as that this wasn't really an action against the State) have been overruled since then. In short, even if the Court had been able to find any cases that actually supported its assertions on the discharge and the States, they could be attacked from both the beginning and end of the historical scale.

Finally, the Court set aside the fact that the State was, in fact, summoned to appear by the complaint. That result, the Court held, was merely a consequence of the Rules, so it could apparently be disregarded, since debtor's counsel had assured the Court that "the Bankruptcy Court cannot discharge her debt without making an undue hardship determination." And, since the Court had concluded that the debtor was entitled to have her discharge litigated in federal court, it could not let "elementary mechanics of captions and pleadings" or the decisions of the Rules drafters stand in the way. It did add though that "The case before us is thus unlike an adversary proceed-

172. Couer d'Alene, 521 U.S. at 270. The language is from *Coeur d'Alene*, but there it was used to support the holding that the State's immunity could not be ignored despite the fact that the suit was filed nominally against the State officers, instead of being used to ignore the fact that a federal complaint had been filed directly against the State as such. Here, it is turned on its head to hold that an actual suit directly against the State does not trigger immunity because it's really - what? Not an action against the State because it's an in rem determination? But what of Shaffer's flat statement that all in rem actions are still actions against specific persons and entities?
ing by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference.”

The Court then held that it needn't decide whether the exercise of personal jurisdiction over a State would be valid under the Eleventh Amendment (i.e., it wouldn't address the Sixth Circuit's rationale) because it had written the decision to avoid a constitutional question. That assertion is curious, since the Court plainly was deciding a point of constitutional law, just not the one that had been appealed. Nothing in the opinion turned on interpreting the Code and its language – to the contrary, the Court seemed ready to disregard entirely the Code and the Rules if they impeded the ability of a bankruptcy court to decide the discharge complaint. Thus, States are still left to confront this issue in future cases and the ambiguous wording of the decision is likely to encourage further efforts in that regard. The final point in the opinion is yet another curious statement – "If the Bankruptcy Court on remand exceeds its in rem jurisdiction, TSAC, of course, would be free to challenge the court’s authority.” Unless one thinks that the court might, in the midst of reviewing the debtor's finances suddenly decide to order the State to pay her a bonus, or some other unlikely event, it is difficult to imagine what the Court might have meant by that statement. Or could this be another cryptic reference to the notion that perhaps the bankruptcy court can't enforce the discharge decision? Again, the Court doesn't explain.

2. The Dissent

Justices Thomas and Scalia dissented, noting initially that regardless of what the analysis might be if Congress had established a discharge by motion process, the fact was that it had used an adversary proceeding. They noted that the "alternative argument" that the Court had chosen to rely on was not presented to the court below or in the debtor's brief to the Supreme Court and should not have been considered. They then noted that the adversary proceeding was essentially identical to traditional federal court litigation, and that factor had been enough to convince the Court in Federal Maritime to apply the Eleventh Amendment even to a non-court procedure, much less to a normal federal suit. While they accepted the notion that a proceeding by motion might or might not offend state sovereignty, they insisted that the Court had no business ignoring the process that had been established. Moreover, they noted, the effect of a failure to appear, just as in Federal Maritime, would be that the State would forfeit its rights, which would plainly coerce it to appear. The dissent then went
on to explain that, while they would consider the possibility that there was a bankruptcy *in rem* jurisdiction exception, they viewed the question as a difficult one and not one that was answered in any way by *Deep Sea Research*. They also viewed the Court's decisions in *Fiske* and *Nordic Village* as warranting considerably more attention and weight than the Court had accorded them to that point, and noted that *Van Huffel* and *Irving Trust* could not readily bear the weight that the Court placed thereon, in that neither dealt with immunity issues. They ended their opinion with an unequivocal rejection of the Sixth Circuit's position, so there are, at least, two expressed votes for that position (three if one counts Justice O'Connor's stated view in *Hoffman*).

C. The Aftermath

So what is one to make of the opinion? To begin with, its logic basically boils down to two syllogisms. The first is: "There is an *in rem* proceeding in admiralty; there is an *in rem* proceeding in bankruptcy; therefore the two proceedings are the same." That analysis, though, does not take into account that there are three different types of *in rem* proceedings and that the admiralty proceeding in *Deep Sea Research* dealt with ownership decisions, while bankruptcy normally deals with asset allocation and status decisions. Since, as was shown above, the nature, rationale, and treatment of the three types of actions differs widely both within admiralty or law and equity, much less between them, the Court's facile equation of the two matters either is wrong, or means that the Court is *sub silentio* wiping out numerous decisions that make those distinctions.

The second syllogism is even simpler: "We have issued decisions about this in the past and it hasn't been held unconstitutional, therefore, it can't be unconstitutional now." That is, to be sure, a function of *stare decisis*, but before one rules on the basis of *stare decisis*, the prior cases must be carefully reviewed to be sure that they really are factually and legally analagous. As set out above, though, the cases cited by the Court really don't match up with the propositions for which they are asserted, much less create an impregnable barrier of well-settled precedent. While some of the "words" match up, the analogy breaks down when they are looked at in context and examined as to whether the actions being allowed to proceed are being *imposed* on the State or have any adverse effect on its interests. Both of those factors have to be present before the Eleventh Amendment will kick

in to begin with. On the other hand, the Court’s casting aside of the most closely applicable decisions, *Fiske* and *Nordic Village*, while barely acknowledging their holdings, suggests that the Court is skittish about looking too closely at unhelpful precedent.

The Court’s opinion really seems to be based in the end on its sense we’ve been doing this for so long, how could there possibly be a question about it? The problem is that, immunity litigation is not a good candidate for saying “we’ve always done it that way” and moving on. The whole field has been in ferment for the last forty years or so, with determined attacks and reconsiderations of the scope of State immunity from the courts and Congress. (This is in contrast to the extended period from after the Civil War until well into the middle of the Twentieth Century when immunity was well recognized, accepted, and extended beyond the literal words of the Eleventh Amendment.). Moreover, immunity is a voluntary choice of the States to assert or waive. In an era when bankruptcies were relatively few and far between and provided fewer benefits to debtors, it may not have seemed a point worth pushing. At a time of 1.6 million bankruptcies, a highly mobile population, strained state budgets, and ever-increasing federal mandates, it is not surprising that States may seek for ways to reduce the burden on them from demands by private debtors. If so, and if this was not an area where it had waived its rights in 1787, it is not clear that they can be made subject to a sort of laches argument for not protesting sooner. Is there a way for the Court to get to where it wants to be? Perhaps. But, as Justice Thomas suggested, and as extensively explored above, the States believe the fight should have been (and perhaps in the future will be) far harder than it turned out to be this time.

Before one goes to the bankruptcy specifics, it is worth noting that the Court’s extremely broad statements about *in rem* jurisdiction may have ramifications far beyond this case. As noted above, there are many forms of *in rem* actions outside of bankruptcy and there has been little question that the Eleventh Amendment applies therein to a greater or lesser degree. By suggesting, for instance, that the immunity exception for the title-determining form of *in rem* action may not be limited to admiralty, this opens up a veritable Pandora’s box of new litigation. There is very little in the Court’s discussion of *in rem* proceedings that is drawn from anything unique to bankruptcy – or to the Eleventh Amendment, for that matter. Thus, not only could its words be used against the States, but the United States may equally find the words coming back to haunt it. It has *waived* its immunity with respect to some, but by no means all, such proceedings and it
would not be surprising to find plaintiffs using these words against the United States in the future. But, enough of generalities, what are the bankruptcy specifics?

V. *Hood - Implications*

A. *Discharges*

Obviously the decision means that the State cannot contest the entry of the general discharge or hardship discharges for student loans. But there are many uncertainties after that. Did the language distinguishing the "enforcement" of the discharge injunction from its entry, or the reference to the bankruptcy court "overstepping" its bounds, mean that the Court thought that the State could not be directly named in a contempt proceeding if it did not abide by a decision on the hardship issue? Currently, State officials are named in (the relatively few) discharge contempt proceedings that are filed. Is that what the Court intends to continue?

By the same token, did the Court assume that discharge complaints for other exceptions would now be brought against the State as opposed to its officials? Since the general discharge already made those debts discharged or not, how does the two-party dispute between the State and the debtor with respect to a penalty debt, for instance, fit into the model of an *in rem* status determination? The hardship issue at least bore some resemblance to the overall discharge decision since it dealt with the sort of issues of income and liabilities that underlie the general discharge (although, of course, the decision did not actually affect any other creditors). But, can one really seek to litigate over the status of "discharged bankrupt without penalty debts" or "discharged bankrupt who doesn't owe taxes?" Doesn't that make the notion that this is tied up with a status issue meaningless? Indeed, an interesting exercise would be to ask what would be the result if Congress passed a law that established a "student loan only" form of discharge? Could it use the bankruptcy law to create an *in rem* status of "bankrupt student loan debtor" which would be established by filing a petition, and instituting a suit against the government to prove that the student loans were an undue hardship to pay? While one might question whether this would fall under the "subject of bankruptcies," would there be any immunity bar under the Court's analysis? If not, how would this two-party only form of bankruptcy relate to the notion that the filing is "against the world?"

In any event, in practical effect, it doesn't make much difference, whether it is the State or its officer who is named, but cautious debtors
might be advised to name both until the issues are sorted out. One
down-side of this for other creditors may be the likelihood that States
may file more claims. Until now, concerns about opening oneself up
to a discharge complaint under an application of section 106(b), has
militated against such filings. Now, there may be no reason to hold
back, which may impinge on other creditors' recoveries.

B. Automatic Stay

Despite much wringing of hands, this has never been a serious prob-
lem. Unlike the discharge injunction, which requires judicial interven-
tion and allows for a contested procedure, the stay is a statutory
 provision that is triggered by the act of the debtor passing a piece of
 paper to the court clerk. The stay was, in fact, changed from an in-
junction to a statute precisely to avoid issues as to whether immunity
barred application of the injunction. Like every statutory provi-
sion, it may be enforced against state officials under Ex parte Young.
The primary effect of the existence of immunity is to allow the State to
argue that a section 105 injunction cannot be entered against the State
if the court determines that the State's actions do not violate the auto-
matic stay. If there is no violation of the law, then the court may not
create a new set of restrictions that it then enjoins state officials from
violating.

C. Avoidance Actions; Monetary Suits

The States certainly intend to continue to argue that Hoffman and
Nordic Village are still good law. Both cases plainly started with the
premise that the governmental entities would be immune from the
avoidance actions unless either waiver or abrogation were found ap-
plicable. Nothing in that premise has changed and the Court appears
to recognize that fact. Finding that a two-party action would be in rem
merely because it would bring more assets into the estate would ex-
pand the concept beyond all reasonable definitional limits. Moreover,
if that were the basis on which a matter could be deemed to be in rem,
then it would be equally applicable to actions to collect on con-
tract or tort claims against non-debtor parties. Such an expansion
would play havoc with the concepts underlying the decision in North-

174. Cf. Murdock Mach., 81 F.3d at 932 (holding that sovereign immunity barred stays im-
posed under Bankruptcy Act Rules from binding United States).
175. Query, though, as to whether the argument would be different with respect to postpeti-
tion transfers where one could assert that the money came out of the actual estate.
Moreover, it would run directly contrary to the Congressional intent in section 106(a). That section does not list section 541 as one of the sections as to which abrogation was attempted, precisely so as not to allow debtors to begin to sue states on “related to” matters solely by the expedient of filing bankruptcy.

D. Section 505 Actions

The States still intend to assert that, in the absence of a filed claim, section 505 can not be justified on an *in rem* analysis, for the same reasons as with respect to avoidance actions, and that the attempted abrogation in section 106(a) is invalid.

E. Section 363 Orders

As discussed above, to the extent that the sale does not impinge on the States’ rights, they will have no quarrel with the proceedings. If their only interest is a lien, and it is satisfied from the sales proceeds, they would also have no reason to object. The States will be analyzing these issues very carefully and likely will not be in any hurry to “push the envelope” on these issues until the effect of *Hood* is better understood. The Court’s decision explicitly dealt only with the discharge question, but in light of its heavy reliance on *Van Huffel* and its broad assertions as to what that case meant, this is not a high percentage argument for the States at least unless and until they are able to open up the dialogue to the broader principles and precedents discussed above, On the other hand if there is an attempt to sell an asset in which the State claims an actual property interest, this is likely to create more of a problem for them, in light of the historically greater protections provided to ownership interests. On the other hand, in light of the rather stringent standards imposed by section 363(h) for allowing such a sale to proceed, it seems likely that in most cases, the State might be amenable to allowing the sale to proceed.

F. Lien Avoidance Actions

The Tenth Circuit BAP held in *In re Mayes (Mayes v. Cherokee Nation)* that an avoidance action to remove a lien held by a tribe on


177. *See* 140 CONG. REC. H 10764, 10766 (House Judiciary Committee, Bankruptcy Reform Act of 1994—Section-By-Section Description, 103d Cong., 2d Sess., Oct. 4, 1994).

178. 294 B.R. 145 (B.A.P. 10th Cir. 2003).
the ground that it impaired the debtor’s exemption was barred by the tribes’s immunity. Such an action, of course, would have a considerably different effect than a mere sale free and clear of the lien, with the lien attaching to the proceeds. The BAP concluded that the action was an attempt to dispossess the state of its property right represented by the lien and rejected the argument that this was the sort of global action which might qualify as an *in rem* proceeding not subject to sovereign immunity. Rather, the court concluded this looked much more like an action *in personam* between the debtor and the creditor to which immunity still applied, and noted that the debtor’s view would have an asserted *in rem* exception swallow up the entire case. The same arguments and analysis will undoubtedly be revived now – and the same concern. If anything at all that affects property of the estate is deemed thereby to be part of an *in rem* exception, then one might as well deem bankruptcy to be exempt from the Eleventh Amendment and move on. As a substantive matter, the avoidance may bind the State in the same way that the automatic stay does; as a procedural matter, that would suggest that an action might lie against a state official who refused to remove the lien, or could perhaps be brought under some state court quiet title action.

G. Procedure

There have been many recent cases dealing with the issues of “discharge by declaration” and other problems arising from the presence of plan language that arguably conflicts with Code proceedings. The courts are split between the relative merits of *res judicata* and due process. The opinion provides conflicting signals in this respect. To the extent that it brushes aside the decision to impose adversary action procedures and protections as largely meaningless, it suggests the Court might side with the *res judicata* side. On the other hand, the Court explicitly required that the bankruptcy court must actually decide the hardship issue and, apparently, not merely take a default judgment. This would certainly tend to support the due process side. As to student loans, the States expect the courts to take the Supreme Court at its word and deny any effect to hardship determinations that occur without actual findings and conclusions by the judge. This would presumably overturn *Andersen*, although it is less clear whether the result would differ with respect to the interest discharge that the debtor granted herself in *Pardee*. 
One last question must surely be what would have been the result if the Court came out the other way and said the Eleventh Amendment would bar discharge of debts of unconsenting States? First, of course, this would not have been unprecedented; it would have returned the law to its state from 1787 until 1898. Second, it probably would not make a huge difference. While there is no good data on the subject, it seems likely that taxes, student loans, and domestic support payments are, by far, the largest categories of state debts, and all of those debts already are excepted in whole, or in great part, already. When one adds other exceptions such as fraud, willful and malicious injury penalties, and the like, it does not leave a lot to be discharged. Third, there is probably nothing that would stop Congress from adding provisions whereby filing or being paid on a claim barred further collection on the debt (unless it were otherwise excepted).

Finally, if Congress actually was concerned about discharging student loans (although all efforts for the last 25 years have been in the direction of limiting the discharge, not expanding it) there are many ways to address the problem. Two points should be kept in mind—first, States are involved essentially as the agents of Department of Education ("DOE") and, second, regulations already require that guarantee agencies assess hardship issues before they move to collect the debt. DOE could, for instance, amend their contracts with States to require that they process the issues in bankruptcy court. (Recall, the Tenth Circuit thought this was what DOE had done, but it was mistaken.) Or, DOE could use rule-making to clarify the multitude of issues about what is "undue hardship" so that it would be possible for far more of these cases to be administratively resolved by the State agency and DOE could monitor them to ensure proper performance, without leaving any private right of action under the Code. (Indeed, why require an entire bankruptcy filing if this is the primary issue?) Or moreover, DOE could take the hardship assessment in-house, decide the issues, and inform the States when they were relieved from the need to continue trying to collect from those debtors in order to retain their federal reinsurance benefits. A different approach would be stricter limits on what would be lent to those going into occupations unlikely to generate enough income to repay the loans. As of now, states have little leeway to deny loans to anyone not already in default, even if the likelihood of repayment seems small. Any or all of these options would probably do as well or better than the current situation where the law is not remotely uniform on these questions.
The bigger issue is more likely to be with respect to corporate confirmation issues and the discharge they receive. The options of tying a discharge to claims filing probably exists wholly apart from any attempt at abrogation. There are few corporations as to which the State would not have some claim—and, if it had no claim, the lack of a discharge would hardly threaten the corporation. The real effect is more likely with respect to the attempts to use bankruptcy as a means to avoid state regulation of restructuring, but it is far from clear that bankruptcy affords such relief in any event. For now, this remains merely interesting speculation—but exploration might calm some fears about the “end of bankruptcy” if the Court ever takes a good look at these issues.

179. Cf. Pac. Gas and Elec. Co. v. California, 350 F.3d 932 (9th Cir. 2003) (limiting preemptive effect of Section 1123(a)(5) only to matters covered by Section 1142(a)).