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Fraudulent Transfers and Sovereign Immunity

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INTRODUCTION

In *United States v. Miller*, the Internal Revenue Service ("IRS") conceded that it had received a fraudulent transfer[1] from a bankrupt debtor.[2] But the Supreme Court barred the lawsuit because the IRS enjoyed sovereign immunity from creditors with avoidance rights.[3] Because of sovereign immunity, a bankruptcy trustee could not subrogate[4] to an unsecured creditor's Utah right to avoid the transfer, even though Congress waived sovereign immunity for government entities in bankruptcy cases.[5] The premise was that no creditor bringing a private action under Utah law could dun the IRS thanks to its sovereign immunity.[6]

Miller provides the occasion to consider the nature of sovereign immunity. Does it apply only to *in personam* liability of sovereigns? Is there, in general, an *in rem* exception? A review of the caselaw suggests that there is no simple *in rem* exception to sovereign immunity. But in the main, it can be affirmed that sovereign immunity does not apply when a plaintiff can show that the government has trespassed upon a preexisting property right. This is precisely what can be shown under fraudulent transfer law. And for this reason, *Miller* must be considered wrongly decided.

The *Miller* opinion is exquisitely narrow. It does not affect a bankruptcy trustee's ability to recover fraudulent transfers from the IRS under Bankruptcy Code section 548(a)(1), which has a two-year look-back period.[7] Bankruptcy Code section 106(a)(1)[8] waives IRS immunity in such cases.[9] State law has (basically) a four-year look-back.[10] Utah has not waived the United States' sovereign immunity in its

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[1] United States v. Miller, 604 U.S. 518, 525 (2025). At the time of the transfer, Utah followed the Uniform Fraudulent Transfer Act ("UFTA"). *See* Miller v. United States, 71 F.4th 1247, 1251 (10th Cir. 2023). In 2017, it enacted the highly similar Uniform Voidable Transactions Act ("UVTA"). *See* Utah Code Ann. § 25-6-101 (West 2017). In all aspects relevant to this article, the UFTA and the UVTA are identical in language and even section numbers. I will therefore cite to the UVTA instead of the Utah's codification of the UFTA, which was technically applicable in the *Miller* bankruptcy proceeding.

[2] *See In re* All Resort Grp., Inc., 617 B.R. 375, 393–94 (Bankr. D. Utah 2020), *aff'd sub nom.*, Miller v. United States, 71 F.4th 1247 (10th Cir. 2023), *rev'd* 604 U.S. 518 (2025) (awarding summary judgment against the IRS).

[3] *See Miller*, 604 U.S. at 539.

[4] *See* 11 U.S.C. § 544(b)(1) (2024) (enabling the trustee to use state or federal laws to recover assets for the benefit of all creditors in the bankruptcy estate).

[5] *See id.* § 106(a).

[6] *See Miller*, 604 U.S. at 539 ("Section 106(a) of the Bankruptcy Code abrogates sovereign immunity for the federal cause of action created by § 544(b). It does not take the additional step of abrogating sovereign immunity for whatever state-law claim supplies the 'applicable law' for a trustee's § 544(b) claim.").

[7] *See In re* Equip. Acquisition Res., Inc., 742 F.3d 743, 746 (7th Cir. 2014).

[8] 11 U.S.C. § 106(a)(1). According to Bankruptcy Code section 106(a), "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following: (1) Sections . . . 544 [and] . . . 550." *Id.*

[9] Waiver of sovereign immunity "is based on equity[;] in essence, it would be unfair for a governmental unit to participate in the distributions of a bankruptcy case while at the same time shielding itself from liability." Franklin Sav. Corp. v. United States (*In re* Franklin Sav. Corp.), 385 F.3d 1279, 1290 (10th Cir. 2004) (quoting Zayler v. United States, 279 F.Supp.2d 805, 811 (E.D. Tex. 2003)).

[10] *See* UNIF. VOIDABLE TRANSACTIONS ACT § 9 (UNIF. L. COMM'N 2014).

fraudulent transfer law, nor could it do so.[11] So *Miller* affects transfers to the IRS more than two and less than four years prior to the bankruptcy petition.

The opinion is also inconsequential. Although the IRS conceded liability on the merits,[12] it should not have done so. When the corporate debtor paid the IRS, the debtor became subrogated to the IRS's right to collect the tax debt from the shareholders. Thanks to subrogation, the IRS gave value for the payment it received. The Supreme Court accepted without analysis the IRS's mistaken conclusion that it was guilty on the merits.

Building upon this false premise, the Supreme Court's ruling in favor of sovereign immunity is wrong thrice over. First, the Supreme Court failed to see that sovereign immunity is waivable. *Ex hypothesi*, a creditor under Utah law has a *prima facie* cause of action against the IRS for receiving a fraudulent transfer.[13] If sued outside of bankruptcy, the IRS can plead sovereign immunity if it wishes to. If it does not plead, sovereign immunity is waived.[14] Under section 544(b)(1), the creditor's provisionally valid claim passes to the bankruptcy trustee, subject to any as-yet-unpleaded defenses.[15] The trustee now owns the cause of action—before the IRS has the opportunity to plead a defense. When the trustee pursues this action in bankruptcy, the IRS finally has the opportunity to plead defenses. But, in bankruptcy, the IRS may not plead sovereign immunity. Section 106(a)(1) forbids it.[16] In effect, the Supreme Court assumes that the creditor's cause of action never enters the bankruptcy estate because sovereign immunity from the state law cause of action is automatic—in effect, unwaivable.[17]

The Court's second error was overlooking the fact that Congress has waived sovereign immunity in state-law fraudulent transfer litigation. Section 702 of the Administrative Procedure Act waives sovereign immunity when the plaintiff seeks equitable relief against government agencies, but not when the plaintiff seeks "money damages."[18] Fraudulent transfer claims are not, or need not be, claims for damages. A fraudulent transfer claim is a *quasi in rem* claim to property wrongfully withheld by the IRS. Therefore, an unsecured creditor of a bankrupt debtor *could* recover from the IRS under Utah law.

Third, the assumption that the IRS is guilty of receiving fraudulent transfers amounts to the assertion that the IRS has taken property from the creditors (because

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[11] *See In re* Pharmacy Distrib. Servs., 455 B.R. 817, 821 (Bankr. S.D. Fla. 2011) ("Obviously, such a waiver cannot stem from state statute, as only Congress may waive sovereign immunity for the United States to be sued.").

[12] *See In re* All Resort Grp., Inc., 617 B.R. 375, 382 (Bankr. D. Utah 2020).

[13] *See* United States v. Miller, 604 U.S. 518, 538 (2025) ("Utah law would (in theory) permit an All Resort Group creditor to void the 2014 tax payments by suing the two shareholders who orchestrated those payments, neither of whom is protected by sovereign immunity.").

[14] *See infra* text accompanying notes 113–44.

[15] 11 U.S.C. § 544(b)(1).

[16] *Id.* § 106(a)(1).

[17] This is arguably the position Justice Neil Gorsuch adopts in his cryptic dissent. *See Miller*, 604 U.S. at 539–41 (Gorsuch, J., dissenting).

[18] 5 U.S.C. § 702.

fraudulent transfers are *quasi in rem* claims). When the government has wrongfully taken property, Supreme Court precedent invites the victim to sue the government officer in possession. Suing the officer is not suing the sovereign, as the Supreme Court reaffirmed in the landmark case of *Ex parte Young*.[19] In *Young*, a shareholder of a railroad accused Minnesota of "taking" railroad property because the State had set freight rates at a ruinous level (a regulatory taking).[20] The Supreme Court upheld an injunction against the Attorney General of Minnesota from suing the railroad for overcharging.[21] Because the action was against the Attorney General, it was not a suit against the State and so sovereign immunity did not apply.[22] According to *Young* and many other Supreme Court precedents, the Secretary of the Treasury can be sued for the fraudulent transfer, even if the United States cannot.[23] If a Utah creditor can recover from the Secretary, a bankruptcy trustee can subrogate to this claim and compel the Secretary to return the fraudulently transferred property.

Finally, although *Miller* prohibits a bankruptcy trustee from pursuing the IRS for fraudulent transfers under section 544(b)(1),[24] a cause of action can be asserted under section 544(a), which makes no reference to an actual identifiable "trigger" creditor to whom the trustee must subrogate.[25] When the trustee relies on section 544(a), section 106(a)(1) applies.[26] Sovereign immunity is waived. The IRS must cough up fraudulent transfers after all—keeping in mind that the IRS is innocent of having received a fraudulent transfer.

In short, the IRS should have prevailed on the merits, and the Supreme Court erred thrice over on sovereign immunity. The case proves that three wrongs make a right. The IRS was not liable for receiving a fraudulent transfer in the *Miller* case.

Part I reviews the *Miller* opinion, explaining why the case is narrow in scope and, within its domain, inconsequential. The IRS almost certainly has not received a fraudulent transfer because the IRS gives value to the transferor.

Part II shows that fraudulent transfer litigation is, or at least (with proper pleading) could be, *quasi in rem*.

Part III shows that the Supreme Court's holding depends on the unwaivability of sovereign immunity. Sovereign immunity is, however, waivable and so the Supreme Court has erred. Part III also shows that the Administrative Procedure Act waives sovereign immunity from equitable claims to property. That is precisely what a fraudulent transfer claim *is*. On top of that, Part III shows that, even if the United States cannot be made a party to fraudulent transfer litigation, the Secretary of the Treasury can be. The state law creditors therefore can recover from the Secretary and so can the bankruptcy estate—*if* the IRS has indeed received a fraudulent transfer.

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19 *Ex parte* Young, 209 U.S. 123, 159 (1908).
20 *Id.* at 127.
21 *See id.* at 132.
22 *See id.* at 167.
23 *See, e.g.*, *id.* at 151.
24 United States v. Miller, 604 U.S. 518, 519 (2025).
25 *See id.*
26 *See id.*

Part IV shows that many (but not all) actions brought under Bankruptcy Code section 544(b)(1) can be brought under section 544(a). If sovereign immunity interferes with section 544(b)(1), it does not interfere with actions under section 544(a)—as the *Miller* Court expressly conceded.[27] A restriction will exist. Under section 544(a), the bankruptcy trustee is deemed to have given credit on the day of bankruptcy and so is a *future* creditor with respect to the alleged fraudulent transfer.[28] Future creditors have less avoidance power than do "present" creditors. This constitutes a difference between proceeding under section 544(a) (where sovereign immunity does not apply) and section 544(b)(1).

I. THE *MILLER* OPINION

In *Miller*, two shareholders (*SH*) controlled a corporate debtor (*D Corp.*) that was headed for chapters.[29] The *SH* decided to loot the company.[30] In particular, the *SH* each owed a tax debt to the IRS.[31] In 2014, the *SH* caused *D Corp.* to pay $145,000 to the IRS in satisfaction of the *SH*s' tax obligations.[32] Payment was by personal check.[33]

Three years passed.[34] In 2017, *D Corp.* filed for bankruptcy.[35] *D Corp.*'s bankruptcy trustee (*T*) sued the IRS for receipt of a fraudulent transfer.[36] The theory was that *D Corp.* transferred the contents of its deposit account to the IRS and the IRS gave no value back to the estate of *D Corp.*[37] *T*'s claim was that, since *D Corp.* was insolvent at the time, the IRS was in receipt of a constructive fraudulent transfer.[38] According to Uniform Voidable Transactions Act ("UVTA") section 5(a):

> A transfer made . . . by a debtor is voidable as to a creditor whose claim arose before the transfer was made . . . if the debtor made the transfer . . . without receiving a reasonably equivalent value in

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[27] *See id.* at 531.

[28] *See id.* at 519 (identifying Congress's intent to "tie the trustee's rights under subsection (b) to the rights of an actual creditor under 'applicable law'"); 11 U.S.C. § 544(a) (2024).

[29] *Miller*, 604 U.S. at 525.

[30] *See id.*

[31] *See id.*

[32] *See id.*

[33] *See* Joint Appendix at 6–9, United States v. Miller, 604 U.S. 518 (2025) (No. 23-824) [hereinafter Joint Appendix] (exhibiting the personal checks used to pay the IRS as filed in the Adversary Complaint against the United States).

[34] *See Miller*, 604 U.S. at 525.

[35] *See id.*

[36] *See id.*

[37] *See id.*

[38] *See id.*; UNIF. VOIDABLE TRANSACTIONS ACT § 5(a) (UNIF. L. COMM'N 2014). *T* also pleaded theories under section 4(a)—intentional fraud and constructive fraudulent transfers where *D Corp.* was engaged in business with unreasonably small capital. *See Miller*, 604 U.S. at 525; UNIF. VOIDABLE TRANSACTIONS ACT § 4(a).

> exchange for the transfer . . . and the debtor was insolvent at the time or the debtor became insolvent as a result of the transfer . . . .[39]

The remedy *T* requested is pertinent:

> WHEREFORE, the Trustee prays for Judgment against United States as follows:
>
> > A. On the First Claim for Relief, for an order avoiding the Transfers and for an award of Judgment against the United States and in favor of the Trustee in an amount equal to the value of the Transfers as may be proven at trial, but which is believed to be at least $145,138.78 together with pre-judgment interest, costs and fees and as may be allowed by law and such further relief as the Court may deem appropriate.[40]

In this pleading, *T* has skipped over the remedy of an equitable accounting and sought a money judgment straight out. I will refer to this as "the pleading blunder."

If the payments had been less than two years before the bankruptcy, then *T* could have proceeded directly against the IRS, under Bankruptcy Code section 548(a).[41] In such an action, sovereign immunity is waived under section 106(a)(1). But payment was three years before the bankruptcy petition.[42] *T* therefore proceeded under section 544(b)(1).[43] *T*'s theory depended upon the existence of an unsecured "trigger"[44] creditor (C_i)[45] who could avoid the transfers under state law. The C_i was an employment discrimination plaintiff who had settled with *D Corp.* but was not yet paid in full.[46] C_i was a "present" creditor at the time of the alleged fraudulent transfers.[47] Only "present" creditors may claim relief under UVTA section 5(a).[48]

In *Miller*, Justice Ketanji Brown Jackson quoted the IRS as conceding that it had received a fraudulent transfer:

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39 UNIF. VOIDABLE TRANSACTIONS ACT § 5(a).

40 Joint Appendix, *supra* note 33, at 5.

41 11 U.S.C. § 548(a)(1) (2024) (allowing bankruptcy trustees to avoid any transfer of an interest of the debtor in property incurred by the debtor "that was made or incurred on or within 2 years" before the filing).

42 *See Miller*, 604 U.S. at 525.

43 *See id.* at 539–40 (Gorsuch, J., dissenting) (noting *T* may use section 544(b)(1) to set aside the transfers under applicable state law).

44 Zazzali v. United States (*In re* DBSI, Inc.), 869 F.3d 1004, 1006 (9th Cir. 2017) ("This is known as the . . . 'triggering creditor' requirement as it requires the existence of an actual creditor in whose shoes a trustee can stand.").

45 C_g stands for the class of general unsecured creditors of *D Corp.* C_i is an arbitrary unsecured creditor within the class. C_1 is a C_i who actually steps forward and commences fraudulent transfer proceedings.

46 *See In re* All Resort Grp., Inc., 617 B.R. 375, 380 (Bankr. D. Utah 2020).

47 *See id.* at 379–80 (stating C_i had a claim against *D Corp.* before the transfers were made and thus was a present creditor).

48 UNIF. VOIDABLE TRANSACTIONS ACT § 5(a) (UNIF. L. COMM'N 2014).

> The Government did not contest respondent's allegation that [*D Corp.*] was insolvent when it made the 2014 tax payments on behalf of its shareholders. Nor did it dispute that the company received nothing of value in exchange for making those payments. Instead, the Government asserted that [*T*'s] claim failed because he could not satisfy § 544(b)'s actual-creditor requirement. Specifically, the Government argued, [*T*] could not identify any [C_i] capable of prevailing in a fraudulent transfer suit against the Government under Utah law because, outside of bankruptcy, any such suit would be barred by sovereign immunity.[49]

On the merits, however, it is far from clear that the IRS received a fraudulent transfer. First, the payment to the IRS was out of the ordinary course of *D Corp.*'s business. As such, the transfer was authorized only if *D Corp.*'s board of directors approved it.[50] There is no indication this occurred. So the *SH* were embezzling funds and transferring them to the IRS.[51] Arguably, the victim of a theft is not transferring anything.[52] "[A] thief cannot pass good title."[53] Since the *SH* are enriching themselves by embezzlement, they should be deemed the initial transferees of the funds in constructive trust for *D Corp.* The IRS is a good faith transferee of these funds and so it takes free and clear of the constructive trust.[54]

The matter, however, is clouded by the fact that the UVTA (in imitation of the Bankruptcy Code) defines "transfer" as "every mode, direct or indirect, absolute or conditional, *voluntary or involuntary*, of disposing of or parting with an asset . . . and includes payment of money . . . ."[55] Thus, *D Corp.* is plausibly the involuntary transferor of funds to the IRS.

Suppose C_1 had sued the IRS under Utah's version of UVTA section 5(a). C_1 must show that *D Corp.* transferred funds to the IRS "*without receiving a reasonably*

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49 United States v. Miller, 604 U.S. 518, 525–26 (2025).

50 *See, e.g.*, DEL. CODE ANN. tit. 8 § 141(a) (2025); MODEL BUS. CORP. ACT § 8.01(b) (A.B.A. 2002).

51 *See Miller*, 604 U.S. at 525.

52 *See* David Gray Carlson, *Mere Conduit*, 93 AM. BANKR. L.J. 475, 484–91 (2019) [hereinafter Carlson, *Mere Conduit*] (arguing, under state-law, the victim of a theft has not made a conveyance because the victim still owns the property subject to the theft).

53 Bakalar v. Vavra, 619 F.3d 136, 140 (2d Cir. 2010).

54 *See* Harris Tr. & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 250 (2000).

> [I]t has long been settled that when a trustee in breach of his fiduciary duty to the beneficiaries transfers trust property to a third person, the third person takes the property subject to the trust, unless he has purchased the property for value and without notice of the fiduciary's breach of duty.

Id.

55 UNIF. VOIDABLE TRANSACTIONS ACT § 1(16) (UNIF. L. COMM'N 2014) (emphasis added). The idea that a fraudulent transfer might include an involuntary transfer was introduced into bankruptcy law by the Chandler Act, ch. 575 § 1(30), 52 Stat. 840, 842 (repealed 1978). *See* Frank R. Kennedy, *Involuntary Fraudulent Transfers*, 9 CARDOZO L. REV. 531, 547 (1987).

equivalent value in exchange for the transfer."[56] C_1 has no claim to make under this provision. The point that the IRS overlooked is that, upon paying the IRS, *D Corp.* became subrogated to the IRS's tax claim against the *SH*. As a result of subrogation, *D Corp.* stepped into the shoes of the IRS and could collect the tax from the *SH*. If the *SH* were solvent at the time that insolvent *D Corp.* paid the IRS, this subrogation was dollar-for-dollar a reasonably equivalent value. Valuation of subrogation is required. If one or both of the *SH* were insolvent in 2013, the value of the subrogation must be discounted. For ease of exposition, I will assume that subrogation receives no discount.

A few words about subrogation: We begin with the observation that *D Corp.*'s payment of its own debt is not a fraudulent transfer (provided the creditor is not an "insider").[57] Suppose *D Corp.* owes C_1 and C_2. *D Corp.* chooses to pay C_1 and not C_2, which bankruptcy law dubs a *preference*. Preferences within ninety days of bankruptcy are avoidable, but as a matter of state fraudulent transfer law, *D Corp.* is free to prefer C_1 over C_2, provided C_1 is not an insider.[58]

Preference of noninsiders is not a fraudulent transfer. But that is not the situation in *Miller*. *D Corp.* is not preferring one of its own creditors over another. *D Corp.* is preferring *SH*'s creditor over all its *own* creditors (the C_g). In effect, *D Corp.* is enriching the *SH* and impoverishing the C_g. In *Miller*, $145,000 left the *D Corp.*'s estate and did *not* go into the pocket of a C_i.[59] Unless something else comes back in to reimburse *D Corp.*'s estate, we must conclude that *D Corp.*'s checks to the IRS on behalf of the *SH* are transfers for no reasonably equivalent value.

But something does come back in. Under the law of restitution, *D Corp.* presumptively is not *paying* the IRS. Rather, *D Corp.* is *buying* the IRS claim against the *SH*. *D Corp.*'s pre-petition estate therefore includes the right to recover the tax from *SH*.[60] One hundred forty-five thousand dollars may have left *D Corp.*'s pre-petition estate when *D Corp.* issued checks directly to the IRS, but subrogation brings

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[56] UNIF. VOIDABLE TRANSACTIONS ACT § 5(a) (emphasis added).

[57] UVTA section 5(b) makes insider preferences voidable if the insider has cause to believe that *D* was insolvent. *Id.* § 5(b).

[58] *See* Coder v. Arts, 213 U.S. 223, 242 (1909); Sharp Int'l Corp. v. State St. Bank & Tr. Co. (*In re* Sharp Int'l Corp.), 403 F.3d 43, 54 (2d Cir. 2005); Butler v. Wilkinson, 740 P.2d 1244, 1261 (Utah 1987); Emil A. Kleinhaus & Alexander B. Lees, *Debt Repayments as Fraudulent Transfers*, 88 AM. BANKR. L.J. 307, 308 (2014). This can be proved indirectly from the text of the UVTA. The UVTA condemns preferences to insider creditors. Thus, if C_1 is an officer of *D Corp.*, C_1 is an insider and *D Corp.* may not prefer C_1. By negative inference, if C_1 is not an insider, *D Corp.* may prefer C_1.

[59] United States v. Miller, 604 U.S. 518, 525–26 (2025).

[60] Subrogation of tax claims is directly verified by Bankruptcy Code section 507(d): "An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection . . . (a)(8) . . . of this section is not subrogated to the right of the holder of such claim to priority under such subsection." 11 U.S.C. § 507(d) (2024). Although section 507(d) pares back restitutionary principles by disinheriting the subrogee of priority, it indicates that subrogation otherwise works when an entity pays the IRS on behalf of the debtor. *See In re* Hornblower Holdings LLC, No. 24-90061, 2024 Bankr. LEXIS 1335, at *11–12 (Bankr. S.D. Tex. June 6, 2024) (discussing how a subrogee cannot demand priority payment under because section 507(d) says subrogees do not get priority treatment).

$145,000 back in (where the *SH* are solvent).[61] Thus, the IRS gave reasonably equivalent value to *D Corp.*

Subrogation is described by the *Restatement (3d) of Restitution and Unjust Enrichment* section 24:

> (1) If the claimant [*D Corp.*] renders to a third person [the IRS] a performance for which the defendant [*SH*] would have been independently liable to the third person [IRS], the claimant [*D Corp.*] is entitled to restitution from the defendant [*SH*] as necessary to prevent unjust enrichment.
> (2) There is unjust enrichment in such a case to the extent that
> (a) the claimant acts in the performance of the claimant's independent obligation to the third person, or otherwise in the reasonable protection of the claimant's own interests; and
> (b) as between the claimant and the defendant, the performance in question . . . is primarily the obligation of the defendant.[62]

The second paragraph surely does not apply to *D Corp.* It is written to reflect judicial suspicion of officious volunteers intervening into the affairs of a stranger.[63] But *D Corp.* is no stranger. It was involuntarily made to transfer wealth to the IRS and so it was as acting "in the reasonable protection of the claimant's own interests," within the meaning of section 24(2)(a).[64]

Illustration 19 to this section provides:

> Vendor conveys Blackacre to Purchaser with a warranty against undisclosed liens. Attorney representing Purchaser prepares a title report confirming the absence of undisclosed liens. In fact Blackacre is subject to a lien for unpaid tax in the amount of $5000. Attorney pays the tax to discharge the lien. Attorney has a claim against Vendor under this section to recover $5000.[65]

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[61] *See* Carlson, *Mere Conduit*, *supra* note 52, at 537–38.
[62] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 24 (A. L. I. 2011).
[63] *See id.* § 24 cmt. d (explaining section 24 requires a claimant to have acted in the reasonable protection of the interests of a third-party obligee).
[64] *Id.* § 24(2)(a); *see Miller*, 604 U.S. at 525.
[65] *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 24 cmt. f, illus. 19.

In our hypothetical, there is no tax lien. *D Corp.* has paid the *SHs*' tax obligations to the IRS before the IRS obtains a lien.[66] *D Corp.* is subrogated nevertheless. The lien is not strictly necessary to the illustration.[67]

In conceding liability, the IRS missed the subrogation point. It should be apparent from the above that, thanks to subrogation, *D Corp.* did receive full value from the IRS. Accordingly, there was no fraudulent transfer. Lawyers for the IRS should not have conceded liability for receipt of a fraudulent transfer.

II. FRAUDULENT TRANSFER AVOIDANCE AS A *QUASI IN REM* PROCEEDING

From here on, we shall assume, as the Supreme Court did, that the IRS has received a fraudulent transfer under Utah law.

Fraudulent transfer law is a *quasi in rem* theory. Consider an insolvent debtor (*D*). Prior to obtaining a money judgment against *D*, a C_i has no property interest in *D*'s estate.[68] *D* is free to convey her assets to a third party (*X*). Such a conveyance is not a wrong against any C_i because the C_g have no property right preceding the transfer.

If, however, *D* intends to frustrate the C_g by transferring assets to *X*, then any C_i can "avoid" the transfer or have the transfer "set aside."[69] This amounts to a judicial declaration that *X*'s property is really *D*'s property, such that a court may grant a C_1 a lien on it. A lien portends that a court officer will sell the asset to raise cash with which C_1's judgment against *D* will be paid.

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[66] Under the Internal Revenue Code, a tax lien arises on all the taxpayer's real and personal property when the IRS assesses a tax. 26 U.S.C. § 6322 (2024).

[67] Forewarned by the above discussion, *SH* in our hypothetical may require *D Corp.* to waive subrogation right against *SH*. *See* Andrew J. Nussbaum, *Insider Preferences and the Problem of Self-Dealing Under the Bankruptcy Code*, 57 U. CHI. L. REV. 603, 616 (1990). This would require approval of the board of directors, in which case we are no longer under the law of theft. This does not, however, adversely affect the fact that the IRS conveyed $145,000 to *D Corp.* via subrogation. The IRS plainly surrenders the tax claim to *D Corp.* and *then D Corp.* releases the claim against *SH*. It is not the IRS who is releasing the claim. The IRS is *selling* the claim. *D Corp.* is the releasor. *D Corp.* cannot release until *D Corp.* actually owns the thing released. Release of a claim against *SH* is itself a transfer of the claim to *SH* and is separately a fraudulent transfer for which the *SH* are liable. *See* David Gray Carlson, *Foreclosure Sales as Fraudulent Transfers*, 13 AM. U. BUS. L. REV. 39, 81 (2024) [hereinafter Carlson, *Foreclosure Sales as Fraudulent Transfers*].

[68] *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 319–20 (1999) ("[A] general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore could not interfere with the debtor's use of that property.").

[69] *See* Emarine v. Haley, 892 P.2d 343, 346 (Colo. App. 1994) ("The primary remedy in an action for fraudulent conveyance is to return the property fraudulently conveyed to its prior status of ownership, thereby bringing it within reach of the judgment creditor of the fraudulent transferor.").

Where D has fraudulently transferred a thing to X, each C_i with avoidance rights[70] obtains a piece of the thing, and X takes the surplus. X thus holds the thing for the C_i.[71]

Proof that C_1 owns a piece of the thing before C_1 commences litigation against X goes as follows. Suppose X receives a fraudulent transfer, but before C_1 can commence a proceeding against X, X conveys all her right, title and interest to Y for no consideration. If X owned the thing outright and C_1 owned none of it, Y would take free and clear of C_1. But the law is clear that Y takes subject to C_1's avoidance right. This was easy to show under the late lamented Uniform Fraudulent Conveyance Act.[72] It is harder to spot in the UVTA. UVTA section 7(a)(1) authorizes "avoidance of the transfer . . . to the extent necessary to satisfy the creditor's claim . . . ."[73] Section 8(b)(1) then describes when C_1 may obtain a money judgment against a transferor.[74] Judgment may be had against the initial transferee and also against, per section 8(b)(1)(ii), "an immediate or mediate transferee of the first transferee, other than: (A) a good-faith transferee that took for value . . . ."[75] So far this is a rule about money judgments, not about recovering the property *in specie* from Y, but we learn that C_1 can recover the thing from Y in section 8(b)(2): "Recovery . . . of . . . the asset transferred or its proceeds . . . is available only against a person described in paragraph (1)(i) or (ii)"—that is to say a transferee of a transferee who is not a good faith purchaser for value.[76]

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[70] The UVTA is organized to distinguish between the rights of "present or future" creditors and "present" creditors. *Compare* UNIF. VOIDABLE TRANSACTIONS ACT § 4 (UNIF. L. COMM'N 2014) (present or future), *with* UNIF. VOIDABLE TRANSACTIONS ACT § 5 (present). Therefore, some but not all the C_g may have avoidance rights if UVTA section 5 is the theory. *See* Alec G. Schwartz, *The Practical Consequences of Metaphysics: Who Owns a Fraudulent-Transfer Claim in Bankruptcy?*, 99 AM. BANKR. L.J. 61, 81 (2025) (discussing the UVTA's broad definition of "claim" and how future creditors get avoidance rights in actual fraud transfers but only present creditors get avoidance rights in constructive fraud); *see also* John E. Sullivan III, *Future Creditors and Fraudulent Transfers: When a Claimant Doesn't have a Claim, When a Transfer isn't a Transfer, When Fraud Doesn't Stay Fraudulent, and Other Important Limits to Fraudulent Transfers Law for the Asset Protection Planner*, 22 DEL. J. CORP. L. 955, 966–67 (1997) (displaying the different types of fraud and creditors under UVTA).

[71] *See* David Gray Carlson, *Fraudulent Transfers: Void and Voidable*, 29 AM. BANKR. INST. L. REV. 1, 31 (2021) [hereinafter Carlson, *Fraudulent Transfers: Void and Voidable*] ("*C* may only obtain 'avoidance of the transfer . . . to the extent necessary to satisfy [*C*'s] claim.' This limitation explains why *X* (not *D*) owns the surplus where *C*'s claim against *X*'s property is less than the value of that property." (citations omitted)).

[72] According to UNIF. FRAUDULENT CONVEYANCE ACT § 9(1) (UNIF. L. COMM'N 1918):

> Where a conveyance . . . is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser . . . .

Id.

[73] UNIF. VOIDABLE TRANSACTIONS ACT § 7(a)(1).

[74] *Id.* § 8(b)(1) ("Except as otherwise provided in this section, the creditor may recover judgment for the value of the asset transferred . . . or the amount necessary to satisfy the creditor's claim, whichever is less.").

[75] *Id.* § 8(b)(1)(ii).

[76] *Id.* § 8(b)(2).

To be emphasized is the fact that, prior to commencement of the action, C_1 already had a piece of the thing. C_1's inchoate fraudulent transfer right against the thing arises when *D* conveys the balance of the thing to *X*.[77]

Accordingly, C_1's action against *X* is *quasi in rem*. What does this mean? The classic definition is from *Freeman v. Alderson*[78]:

> Actions *in rem*, strictly considered, are proceedings against property alone, treated as responsible for the claims asserted by the libellants or plaintiffs. The property itself is in such actions the defendant, and, except in cases arising during war for its hostile character, its forfeiture or sale is sought for the wrong, in the commission of which it has been the instrument, or for debt or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case.
>
> There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims

[77] In *Harder v. Harder*, 168 A. 61, 61 (N.J. Ch. 1933), *D*, in debt to C_1, fraudulently conveyed certificated securities to *X*. *D* died and *X* was one of the executors. *See id.* C_1 demanded payment from *D*'s estate, but *X* denied C_1 had a valid claim. *See id.* C_1 commenced a suit against *D*'s estate. *See id.* Pending trial, C_1 requested a preliminary injunction against *X* to constrain *X* from negotiating the securities. The court granted the preliminary injunction because, even without a money judgment against the estate of *D*, C_1 already owned a piece of those certificated securities:

> Underlying suits to set aside fraudulent conveyances is the rule that a creditor, while permitted to exercise the widest discretion as to the time and manner of disposing of his property, must exercise that discretion with fair regard to the right of his creditors to be paid . . . . Implied is that, upon the creation of the debt, *or at latest upon the making of the fraudulent transfer*, there vests in the creditor some title or right in the property, however vague and inchoate.

Id. (emphasis added).

[78] In *Freeman*, nonresident Alderson owned Texas land. Freeman v. Alderson, 119 U.S. 185, 185 (1886). The Freemans claimed to be tenants in common. *See id.* The Freemans started a partition action by publication without serving process on Alderson. *See id.* at 185–87. In the partition action, the court divided the land in kind, with the Freemans taking by metes and bounds. *See id.* at 186. This was possible because the partition action was *quasi in rem*. *See id.* at 187–88. The court also awarded the Freemans a money judgment for court costs ($61.45). *See id.* at 186. This was part of the equity court's cleanup jurisdiction. The Freemans served an execution on the sheriff who executed on Alderson's remaining land. *See id.* Head was the buyer, but he soon sold the land to one of the Freemans. *See id.* The heirs of Alderson sued Freeman in trespass. *See id.* at 185. Freeman claimed title from the sheriff's deed, but the judgment against Alderson was deemed void. *See id.* It was an action *in personam* for which no service of process occurred. *See id.* at 190. The moral is that, for cleanup *in personam* judgments to be enforceable, service of process on Alderson was necessary. *See id.* Notice by publication was not enough. *See id.* These facts are discussed in the statement of facts located before the opinion of *Freeman*.

> asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the State, and actions for the enforcement of mortgages, and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties.[79]

On this definition, C_1's action against X is *quasi in rem*, it is not *in rem*, as in a forfeiture or admiralty case, because C_1 is not suing the thing. C_1 is suing X, in order to vindicate or (in the case of pre-judgment attachment) to obtain an interest in the thing.

That C_1 owns a piece of X's thing prior to commencing litigation against X underlies the theory of section 544(b)(1) itself. T must locate a trigger creditor to bring fraudulently transferred property into the bankruptcy estate. But T need not (indeed cannot) rely on a trigger C_1 who has already commenced a proceeding against X. Such a C_1 often has a lien on X's thing by virtue of having commenced the action.[80] So C_1 is a secured creditor. T cannot subrogate herself to the rights of a secured creditor. Section 544(b)(1) says that "the trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable . . . by a creditor holding an *unsecured* claim . . . ."[81] Where C_1 already has a lien, T will have to locate a C_i without a lien that can also avoid D's transfer to X. If a C_i can be located, C_1's lien on X's thing makes C_1 a transferee of a transferee under section 550(a)(2).[82] Because C_1 knew of the fraudulent transfer, C_1 is a bad faith transferee. C_1's lien is voidable. Thus, section 544(b)(1) is premised on a C_i having an *in rem* right in X's thing prior to actual commencement of proceedings.[83]

The Supreme Court seems to think that a fraudulent transfer proceeding is *in personam*. In *Granfinanciera, S.A. v. Nordberg*, T sued X, requesting a money judgment per Bankruptcy Code section 550(a)(1).[84] Seeking to gum up the procedural

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[79] *Id.* at 187–88.

[80] *See generally* Metcalf v. Barker, 187 U.S. 165 (1902) (clarifying secured status precludes T from using that creditor as a statutory trigger under section 544(b)(1)).

[81] 11 U.S.C. § 544(b)(1) (2024) (emphasis added).

[82] *Id.* § 550(a)(2). D to X is the first transfer. Creation of the judicial lien in favor of C_1 is the second transfer.

[83] Probably in support of this proposition is *Stadtmauer v. Tulis* (*In re* Nordlicht), 115 F.4th 90 (2d Cir. 2024). In the case, D made fraudulent transfers of real property to X. *See id.* at 99. C_1 obtained an attachment lien under N.Y. C.P.L.R. § 6216 against X's real property. *See id.* at 114. The court upheld the bankruptcy court's ordering the sale free and clear of C_1's attachment lien as in bona fide dispute within the meaning of 11 U.S.C. § 363(f)(4). *See id.*

[84] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 36 (1989). Section 550(a) provides for the return of X's thing to the bankruptcy estate, but it also authorizes a money judgment of the value of X's thing, "if the court so orders." 11 U.S.C. § 550(a).

works, *X* demanded a jury under the Seventh Amendment.[85] Justice Brennan ruled that in 1789, the year of the Judiciary Act creating the federal courts, C_1 would have sought a money judgment against *X*.[86] In short, *X* had committed a tort against C_1, and C_1's remedy was an action at law. Nothing could be further from the truth.[87] In order for C_1 to have a right against *X*'s thing, C_1 needed to have obtained a money judgment against *D*. Fraudulent transfer law belongs to the law of judgments. The post-judgment period is too late for tort theory. The tort has "merged" into the judgment.[88] The law of judgments said that if the transfer was fraudulent, *X*'s property is *D*'s property and therefore accessible by C_1. In fact, the Supreme Court in *Adler v. Fenton*[89] had itself said that *D* does nothing tortious in making a fraudulent transfer and *X* does nothing wrong by receiving one.[90] Rather, fraudulent transfer makes *X* a sort of constructive trustee of the fraudulently transferred property, awaiting *X*'s commencement of an equitable action to force *X* to carry out the trust.[91]

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[85] *See* Dunphy v. Kleinsmith, 78 U.S. (11 Wall.) 610, 615–16 (1870) (ruling *X* is not entitled to a jury because equity courts heard cases without a jury).

[86] *See Granfinanciera*, 492 U.S. at 43 ("In England, long prior to the enactment of our first Judiciary Act, common law actions of trover and money had and received were resorted to for the recovery of preferential payments by bankrupts.").

[87] *See* David Gray Carlson, *Fraudulent Transfers and Juries: Was* Granfinanciera *Rightly Decided?*, 95 AM. BANKR. L.J. 209, 210 (2021) [Carlson, *Fraudulent Transfers and Juries*] ("*C* had no tort cause of action against X for fraudulent transfer . . . .").

[88] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 18 cmt. A (A.L.I. 1982) ("When the plaintiff recovers a valid and final personal judgment, his original claim is extinguished and rights upon the judgment are substituted for it. The plaintiff's original claim is said to be 'merged' in the judgment.").

[89] Adler v. Fenton, 65 U.S. (14 How.) 407 (1861). *C's* claim "was not yet due at the time of bringing the action" according to the syllabus accompanying the opinion. *Id.* at 407.

[90] Per Chancellor Kent:

> The reason of the rule seems to be, that until the creditor has established his title [with a judgment], he has no right to interfere, and it would lead to an unnecessary, and, perhaps, a fruitless and oppressive interruption of the exercise of the debtor's rights. Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds.

Wiggins v. Armstrong, 2 Johns.Ch. 144, 145–46 (N.Y. Ch. 1816).

[91] *See* Doherty v. Holiday, 32 N.E. 315, 317 (Ind. 1892) (referring to *X*'s ownership as legal title in a *constructive trust*); Julien J. Studley, Inc. v. Lefrak, 412 N.Y.S.2d 901, 908 (N.Y. App. Div. 1979) (same). According to the Ohio Supreme Court:

> [T]he creditor ought to receive his debt, and the law gives him a claim to the property, and it charges the fraudulent holder as a trustee, in consequence of . . . his *having in his hands* that which ought to be applied to the satisfaction of the creditor's debt.

Swift v. Holdridge, 10 Ohio 230, 231–32 (1840); *see* Wheeler v. Kirtland, 23 N.J. Eq. 13, 17 (1872) (holding when an insolvent man's money is used to buy property, that property does not become forever held *in trust* for the creditors).

> The rule is elementary that in case an innocent transferee, acting as trustee, of money transferred in fraud of creditors, pays it over before notice of the fraudulent character of the transfer, . . . he is not liable; but in case he pays it over according to the terms of the

There is some thought that the UVTA has made *in personam* actions *possible*,[92] but this was surely impossible in 1798.[93] In any case, C_1 at least has the option of proceeding *quasi in rem*, meaning that *Granfinaciera* merely illustrates a pleading blunder by a trustee. In *Granfinanciera*, the Court noted that *T* "has not requested an accounting or other specifically equitable form of relief . . . ."[94] This leads to the conclusion that when *T* asks for an equitable accounting against *X*, *X* is not entitled to a jury. Thus, in *Resolution Trust Corp. v. Pasquariello*,[95] *T* asked for an equitable accounting and so *X* had no right to a jury.[96] The key is proper pleading by *T*. Thus,

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> transfer, after notice of the fraudulent character of the transfer, he is liable, in an action brought for the benefit of creditors.

Truesdell v. Bourke, 51 N.Y.S. 409, 412 (N.Y. App. Div. 1898); *see* Koellhoffer v. Petersen, 143 N.Y.S. 353, 356 (N.Y. Sup. Ct. 1913) ("[T]here is abundant reason for applying a different rule to one declared a constructive trustee because of his participation in a wrongful act."); Bonesteel v. Bonesteel, 30 Wis. 511, 516 (1872).

92 *See* David Gray Carlson, *Fraudulent Transfers as a Tort*, 2021 MICH. ST. L. REV. 1093, 1106, 1154 (2021) (pointing out the drafters of the UVTA could have intended to render fraudulent transfers into a tort—much like conversion—giving creditors a deliberate choice of *in personam* remedies).

93 *See* Cadle Co. v. Woods & Erickson, LLP, 345 P.3d 1049, 1053 (Nev. 2015).

> Creditors do not possess *legal* claims for damages when they are the victims of fraudulent transfers. Instead, creditors have recourse in *equitable* proceedings in order to recover the property, or payment for its value, by which they are returned to their pre-transfer position. Nevada law does not create a legal cause of action for damages in excess of the value of the property to be recovered.

Id. (citations omitted); *see* Estate of Stonecipher v. Estate of Butts, 591 S.W.2d 806, 808 (Tex. 1979) ("The gist of a cause of action for conspiracy is damage from the commission of wrong which injures another and not the conspiracy itself. The damage in a conspiracy for fraudulent conveyance is the interference with or loss of a property right . . . in the debtor's property." (citations omitted)); Daniel v. Vaccaro, 41 Ark. 316, 329 (1883).

> Neither by common law, nor by statute of Elizabeth against fraudulent conveyances, would an action at law lie on behalf of a mere creditor, having no title to, or specific interest in the debtor's property, by lien or otherwise, to recover damages against a fraudulent grantee of the debtor, resulting from the consequent inability of the creditor to collect his debt . . . . [T]here "never was an action of this kind brought into Westminster Hall."

Daniel, 41 Ark. at 329.

94 Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 49 n.7 (1989).

95 Resol. Tr. Corp. v. Pasquariello (*In re* Pasquariello), 16 F.3d 525, 529, 531 (3d Cir. 1994) (dismissing the appellant's appeal and denying her petition for a writ of mandamus for right to jury trial).

96 *See id.* at 531; *see also* Off. Comm. of Unsecured Creditors v. Schwartzman (*In re* Stansbury Poplar Place, Inc.), 13 F.3d 122, 126 (4th Cir. 1993) (holding that only creditors who have voluntarily filed a proof of claim and who have submitted to the equity jurisdiction of the bankruptcy court lose their right to a jury trial).

in *Granfinaciera*, the Supreme Court imposed a pleading requirement.[97] Incidentally, Justice Brennan subsequently apologized for *Granfinanciera*.[98]

In spite of the fact that fraudulent transfer litigation was classically *quasi in rem*, it was still true that, once the *quasi in rem* action had been commenced, it was entirely possible that *X* could not perform, because *X* had disposed of the thing. Being a constructive trustee of the thing, when *X* disposed of it, the equity courts would presume that *X* did so as a faithful fiduciary for C_1. Thus, any *proceeds* of the thing were deemed held in trust for C_1.[99] But often proceeds could not be traced. In that case, *X* has finally committed a tort—wrongful conversion of property of another. Only then were the equity courts prepared to issue a money judgment against *X*. The tort was not receiving a fraudulent transfer. Rather, the tort was breach of fiduciary duty and of converting C_1's property to her own use. So when C_1 sought to recover

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[97] *See Granfinanciera*, 492 U.S. at 42 (declaring a two-part test in which first, the Court will determine whether the claimed statutory right is analogous to eighteenth-century common law causes of action and the remedy sought; and second, if these two factors indicate a party is entitled to a jury trial under the Seventh Amendment, whether Congress may allow a non-Article III body to serve as factfinder).

[98] In *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 563, 570 (1990), plaintiffs sought back pay from a union and demanded a jury trial. The union moved to strike the jury demand. *See id.* at 563. The Court ruled that the plaintiffs had a Seventh Amendment right to a jury. *See id.* at 561. According to the Seventh Amendment: "Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." *Id.* at 564. "Suits in law" excludes suits "where equitable rights alone [are] recognized, and equitable remedies [are] administered." *Id.* (citation omitted). The test:

> First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature. The second inquiry is the more important in our analysis.

Id. at 565 (citations omitted; *Granfinanciera* cited for "more importance"). The Court decided the plaintiff's claim was more like a breach of contract suit (legal) than a breach of fiduciary duty (equitable). *See id.* at 569–70, 572–73. Had the plaintiffs sought injunctive relief (equitable) and money damages as an incidental, the matter would be equitable. *See id.* at 571 (noting "a monetary award 'incidental to or intertwined with injunctive relief' may be equitable"). However, since money damages were requested straight up, the matter was legal and the plaintiffs had a right to the jury. *See id.* at 573. In a concurring opinion, Justice Brennan urged that the first inquiry (compare today's action with eighteenth-century actions) should be dropped. *See id.* at 574. Only the second one should matter. *See id.* "[T]here remains little purpose to our rattling through the dusty attics of ancient writs." *Id.* at 575. An apology ensued:

> For example, in *Granfinanciera* . . . both Justice White, in dissent, and I, writing for the Court, struggled with the question whether an equity court would have heard the suit that was comparable to the modern statutory action at issue. I quoted Professor Garrard Glenn. Justice White countered that "[o]ther scholars have looked at the same history and come to a different conclusion . . . .
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> . . . .
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> . . . [I]nquiries into the appropriate historical analogs for the rights at issue are not necessarily susceptible of sound resolution under the best of circumstances.

Id. at 576–77 (citations omitted).

[99] *See* UNIF. VOIDABLE TRANSACTIONS ACT § 8(b)(2) (UNIF. L. COMM'N 2014) (protecting good-faith transferees by capping recovery at the value they obtained, not the full property). For a case denying that fraudulent transfer law recognizes the proceeds replace the original *res* held in trust, see Rajala v. Spencer Fane LLP (*In re* Generation Res. Holding Co.), 964 F.3d 958, 968 (10th Cir. 2020).

X's thing, the end result might well be a judgment *in personam* after all. This was part of an equity court's cleanup jurisdiction.[100] As the Supreme Court put in *Buzard v. Houston* put it:

> In England, indeed, the court of chancery, in cases of fraud, has sometimes maintained bills in equity to recover the same damages which might be recovered in an action for money had and received. But the reason for this . . . was that such cases were within the ancient and original jurisdiction in chancery, before any court of law had acquired jurisdiction of them, and that the assumption of jurisdiction by the courts of law, by gradually extending their powers, did not displace the earlier jurisdiction of the court of chancery. Upon any other grounds, such bills [in equity seeking money judgments] could not be maintained.[101]

To summarize, when *D Corp.* fraudulently transferred to the IRS in *Miller*, the IRS held the payment in trust for the C_g of *D Corp.* The IRS has taken property from the C_g without fair compensation, in violation of the Fifth Amendment.[102]

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[100] *See* Whitlock v. Hause, 694 F.2d 861, 863 (1st Cir. 1982) ("Once the inadequacy of legal remedies was established, however, courts of equity had jurisdiction to provide complete relief between the parties. This 'clean-up' jurisdiction permitted courts of equity to award money damages where such an award was incidental to the equitable relief that supplied jurisdiction initially."); *see also* Miller v. Kaiser, 433 P.2d 772, 775 (Colo. 1967) ("[A]s long as the subject property remains in the possession of the fraudulent transferee in toto and is not depreciated by any action of the fraudulent transferee, a personal judgment against such transferee will not be sustained."); Murtha v. Curley, 90 N.Y. 372, 378 (1882) (finding a money judgment could be issued in equity where *X* sold the fraudulently received property and had converted the proceeds); Marine Midland Bank v. Murkoff, 508 N.Y.S.2d 17, 24–25 (N.Y. App. Div. 1986), *appeal dismissed*, 507 N.E.2d 322 (1987) (holding a money judgment may only be granted where the grantee disposed of the wrongfully conveyed property or depreciated it); Wasey v. Holbrook, 125 N.Y.S. 1087, 1089 (N.Y. App. Div. 1910), *aff'd mem.*, 99 N.E. 1119 (1912).

> If, however, the suit be in equity the court will adapt its relief to the exigencies of the case, but it will order a sum of money to be paid to the plaintiff or give him a personal judgment therefor only when that species of relief is necessary to prevent a failure of justice or where for any reason it is impracticable to grant the specific relief prayed for.

Wasey, 125 N.Y.S. at 1089.

[101] Buzard v. Houston, 119 U.S. 347, 352 (1886).

[102] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *see* Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 498 (2006) (proposing sovereign immunity is always waived when the state or federal government takes property without just compensation).

III. SOVEREIGN IMMUNITY

A. In General

I will confess in advance that it is hard for me to generate a passion for sovereign immunity.[103] The doctrine assumes that litigation is commenced when a court "commands" a defendant to appear before it. Since the King *was* the court ("King's Bench"),[104] it was absurd for the King to command himself to appear.[105] But it seems no absurdity to me. Command of self is command indeed!

Another idea, even less sympathetic, assumes that the King is not the court. But how dare the court command the King to appear! The King commands. The King is not to be commanded. It is an insult—*lèse majeseté*—for a court to command the King to appear.[106] As a person who is insulted daily by fortune's buffets and rewards, it is hard for me to feel empathy for the sovereign insulted by commencement of civil litigation.[107] History everywhere belies the dictum that "the king can do no wrong."[108] Besides, sovereign immunity is very often waived. Nevertheless, conservative jurisprudence makes a big to-do over sovereign immunity,[109] finding it within the Constitution[110] (to the extent not repealed by the Fourteenth Amendment, which is no

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[103] *See* David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 168 (1984) ("Sovereign immunity [is] an unattractive doctrine that does not belong in an enlightened constitution.").

[104] "'The name King's Bench reflects the fact that 'the king used formerly to sit . . . in person,' . . . and was 'supposed always to be present in it . . . .'" James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex parte Young, 72 STAN. L. REV. 1269, 1294 n.127 (2020) (citations omitted).

[105] *See* United States v. Lee, 106 U.S. 196, 206 (1882) (expressing skepticism of this account).

> But the broader reason is, that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on the government in war and peace, and the money in his treasury.

Briggs v. Light-Boat Upper Cedar Point, 93 Mass. 157, 162–63 (1865).

[106] *See* Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 453 (2004) ("The issuance of process, nonetheless, is normally an indignity to the sovereignty of a State because its purpose is to establish personal jurisdiction over the State."); *see also In re* Ayers, 123 U.S. 443, 505 (1887) ("The very object and purpose of the 11th Amendment [is] to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.").

[107] *See* Berger, *supra* note 102, at 546 ("[A] state that avoids suits against it seems far less 'dignified' than one that meets its challengers directly; legitimate government, one would hope, would be accountable government."); *see also* Henry Paul Monaghan, Comment, *The Sovereign Immunity "Exception"*, 110 HARV. L. REV. 102, 132 (1996) ("The idea that a state, an utterly abstract entity, has feelings about being sued by a private party when 'its' highest officials are regularly so sued [per *Ex parte Young*] surely strains credulity.").

[108] 3 WILLIAM BLACKSTONE, COMMENTARIES *254.

[109] *See* David J. Bederman, *Admiralty and the Eleventh Amendment*, 72 NOTRE DAME L. REV. 935, 937 (1997) ("[T]he Eleventh Amendment has become the bulwark principle of federalism for the Rehnquist Court.").

[110] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) ("'[W]e have understood the Eleventh

respecter of sovereigns).[111] The best argument I have seen for sovereign immunity is the possibility that the government faces breakdown if there is too much litigation against it. But given massive waivers of immunity, the threat of anarchy seems unlikely.[112] To the contrary, when government embraces anarchy, judicial review becomes our last hope.

B. Sovereign Immunity is Jurisdictional

Sovereign immunity is thought to be a principle of court jurisdiction, as Justice Jackson emphasizes in *Miller*:

> Before discussing § 106(a) itself, it is helpful to recall how waivers of sovereign immunity operate in general. As our precedents explain, "[s]overeign immunity is jurisdictional in nature" and deprives courts of the power to hear suits against the United States absent Congress's express consent. In providing that consent, waivers of sovereign immunity function simply as "prerequisite[s] for jurisdiction"—they do not create any new substantive rights or alter any pre-existing ones.[113]

The idea is that the sovereign enacts general applicable law. These laws may apply to the sovereign. If the sovereign has broken the law, there is nothing its citizens can do about it because the courts cannot take jurisdiction over the sovereign. On this view, sovereign immunity is a classic "defense" of no jurisdiction.[114]

"Jurisdictional" is an ambiguous term. The federal courts are, of course, limited by subject matter as to cases they can hear. If a defendant fails to plead lack of subject matter jurisdiction and proceeds to lose at trial, the defendant may at any time raise the absence of subject matter jurisdiction, and the federal court must dismiss the case.

Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'" (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991))).

111 *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (finding Congress may, "for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts").

112 *See* Alden v. Maine, 527 U.S. 706, 750 (1999) (stating sovereign immunity thwarts litigation that threatens "the financial integrity of the States"); *see also* Joseph D. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1086 (1946) (arguing sovereign immunity does not need to result in "a flood of burdensome litigation"); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2 (1963) (noting the doctrine of sovereign immunity has not had "much impact on the judicial control of administrative illegality").

113 United States v. Miller, 604 U.S. 518, 527 (2025) (citations omitted).

114 *See id.* at 528 ("It is undisputed that, outside of bankruptcy proceedings, the United States could invoke the *defense* of sovereign immunity to bar any lawsuit seeking to invalidate a federal tax payment under a State's fraudulent-transfer law." (emphasis added)).

Indeed, courts are expected to act *sua sponte* when they discover they have no subject matter jurisdiction over the case before them.[115]

"Jurisdictional" may also mean jurisdiction over the defendant or over the property of the defendant. This may be waived, where the defendant appears to make a substantive move in the litigation. Once the defendant voluntarily appears to contest the merits, the defendant admits to jurisdiction over her person. She has waived the lack of jurisdiction over her person.

Sovereign immunity is of the second sort. If a plaintiff sues the sovereign, the sovereign must raise the defense of sovereign immunity or the defense is lost. Sovereign immunity comprehends the idea that *commencing* an action offends the dignity of the sovereign. The sovereign shows she is not offended by dipping into the finger paints of the merits. Being unoffended, the sovereign has waived her defense. The sovereign must plead the defense at the beginning of the proceeding or else the defense is waived.

In *Clark v. Barnard*, a stakeholder of money paid the cash into a federal court and made a railroad and Rhode Island parties to the action.[116] Rhode Island objected to the proceeding on sovereign immunity grounds, was rebuffed, but then proceeded to litigate the merits.[117] It lost again.[118] On appeal, Justice Stanley Matthews ruled that Rhode Island waived its sovereign immunity by subsequently litigating the merits:

> The immunity from suit belonging to a State . . . is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction . . . .[119]

Also, in *Gunter v. Atlantic Coast Line Railroad Co.*, a railroad sued South Carolina for breach of contract because South Carolina, contrary to promise, enacted a tax on the railroad.[120] South Carolina failed to plead sovereign immunity, litigated on the merits, and lost.[121] Twenty-five years later, South Carolina tried to enact another tax

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[115] *See* Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 607 n.6 (1978) (stating that the Supreme Court has an obligation to consider the subject-matter jurisdiction question *sua sponte* even when it is not raised in the lower courts).

[116] Clark v. Barnard, 108 U.S. 436, 445 (1883).

[117] *See id.* at 445.

[118] *See id.* at 446.

[119] *Id.* at 447. Happily for Rhode Island, it ultimately prevailed on the merits and obtained the money. *See id.* at 461.

[120] Gunter v. Atl. Coast Line R.R. Co., 200 U.S. 273, 280 (1906).

[121] *See* Humphrey v. Pegues, 83 U.S. (16 Wall.) 244, 249 (1872) (articulating the role of sovereign immunity in South Carolina's failed appeal).

on the railroad.[122] The railroad sued again.[123] South Carolina pleaded sovereign immunity and was rebuffed.[124] According to Justice Edward Douglass White:

> Although a State may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.[125]

Saving for later a caveat,[126] these cases show that sovereign immunity is "jurisdictional" (in the *in personam* sense). If not pleaded, it is waived. If someone sues the sovereign, and the sovereign fails to plead immunity, the lawsuit may continue.

This immediately suggests that *Miller* was wrongly decided. Suppose the IRS has received a fraudulent transfer under Utah law. C_i is a trigger creditor. C_i has a valid cause of action for avoidance under Utah law (by stipulation). The IRS can defend, if it is sued in the Utah courts and if it chooses to plead sovereign immunity. If it does not plead, it has waived the defense. C_i, however, has not commenced litigation when *D Corp.* files for bankruptcy.[127] The IRS has had no occasion to plead sovereign immunity. The cause of action enters the bankruptcy estate, encumbered by any defense state law or the Constitution conjures up. *T* is subrogated to C_1's cause of action. *T* therefore brings an adversary proceeding within the bankruptcy proceeding. The IRS must now plead its defenses. According to Bankruptcy Code section 106(a)(1), Congress has waived IRS immunity.[128] Section 106(a)(1) applies after all. Therefore, the IRS violates section 106(a)(1) when it pleads sovereign immunity in the adversary proceeding.[129]

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[122] *See Gunter*, 200 U.S. at 279.

[123] *See id.* at 281.

[124] *See id.* at 284.

[125] *Id.*; *see* Porto Rico v. Ramos, 232 U.S. 627, 632 (1914) ("[T]he immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step."); Richardson v. Fajardo Sugar Co., 241 U.S. 44, 47 (1916) ("Whatever might have been the merit of [a sovereign immunity defense], we hold . . . that having solemnly appeared and taken . . . other steps . . . [Puerto Rico] could not thereafter deny the court's jurisdiction."); Aholelei v. Dep't. of Pub. Safety, 488 F.3d 1144, 1147 (9th Cir. 2007) ("'Eleventh Amendment immunity is an affirmative defense that must be raised "early in the proceedings" to provide "fair warning" to the plaintiff.'"); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1611 n.246 (2002) ("[S]ome circuit courts will infer a waiver when the state has proceeded too far into a case before asserting its immunity . . . . No circuit, however, treats the waiver of sovereign immunity like the waiver of objections to personal jurisdiction." (citations omitted)).

[126] *See infra* text accompanying notes 133–38.

[127] If the trigger creditor has commenced litigation, it often has a lien on the property *in custodia legis* and is thus a secured creditor. *T* is not subrogated to secured creditors. *See supra* text accompanying notes 80–83.

[128] 11 U.S.C. § 106(a)(1) (2024).

[129] *See In re* Hatchett, 588 B.R. 472, 480–81 (Bankr. E.D. Mich. 2018) ("The fact that the IRS could assert

This seems to be the argument that Justice Neil Gorsuch was reaching for in his dissent:

> Thus, under "applicable law," the relevant transfers are "voidable," and the bankruptcy trustee can use §544(b)(1) to set them aside. That remains true even though the trustee must sue the United States to void the relevant transfers, because § 106(a)(1) bars the government from raising a sovereign-immunity defense in the trustee's action . . . . Can the federal government defeat the claim by raising the affirmative defense of sovereign immunity? With respect to a private creditor pursuing relief in state court, the answer is yes. With respect to a trustee pursuing relief in a federal bankruptcy proceeding, the answer—thanks to § 106(a)(1)—is no.[130]

The unstated premise is that the *prima facie* cause of action by a C_i for fraudulent transfer enters the bankruptcy estate with the defense as yet unpleaded. When *T* sues the IRS in bankruptcy, the IRS may not plead the defense because section 106(a)(1) forbids it.[131] This in turn depends on sovereign immunity being "jurisdictional" in the service-of-process sense, not in the subject-matter sense.

The mistake the Supreme Court has made is failing to see that, when *T* brings a section 544(b)(1) action against a third party, the action *is part of the bankruptcy proceeding*. Instead, the Supreme Court assumes that we are to imagine C_1 is suing *X* *outside* of bankruptcy, where section 106(a) does not apply and sovereign immunity has not been waived. In this counterfactual vision, the IRS has sovereign immunity without ever having to plead it. Because C_1 could be hypothetically defeated, *T* is *actually* defeated.[132] Nothing in section 544(b)(1) requires such a hypothetical test.

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the *defense* of sovereign immunity *outside* of bankruptcy against an unsecured creditor has no bearing on the availability of that defense against a trustee *inside* bankruptcy."). Judge R. Kiball Mosier in the *Miller* case also saw that the *prima facie* case of a C_i entered the estate before defenses were pleaded and that, now in bankruptcy, section 106(a)(1) applied to prevent the IRS from pleading sovereign immunity: "But the waiver of sovereign immunity did remove the ability of a governmental unit to interpose immunity as a defense to the underlying state law cause of action when a bankruptcy trustee asserts that cause of action standing in the actual creditor's shoes." *In re* All Resort Grp., Inc., 617 B.R. 375, 389 (Bankr. D. Utah 2020), *aff'd sub nom.*, Miller v. United States, 71 F.4th 1247 (10th Cir. 2023), *rev'd* 604 U.S. 518 (2025).

130 *Miller*, 604 U.S. at 540–41 (Gorsuch, J., dissenting).

131 11 U.S.C. § 106(a)(1).

132 Justice Jackson accuses *T* of using section 106(a)(1) to create a "new" cause of action against the IRS, whereas section 106(a)(5) says, "'[n]othing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.'" *Miller*, 604 U.S. at 528 (quoting 11 U.S.C. § 106(a)(5)) (majority opinion). This is so only if sovereign immunity is not a defense and "defendant is not a sovereign" part of C_1's *prima facie* case. If sovereign immunity *is* a defense, a C_i's *prima facie* case enters the bankruptcy estate with the defense unpleaded. Once inside bankruptcy, the IRS *cannot* plead sovereign immunity thanks to section 106(a)(1). Justice Jackson's contradiction is apparent in these two sentences:

> Under respondent's view, § 106(a) does not simply give courts jurisdiction to hear § 544(b) claims against the Government; it also alters the substantive requirements of the

The trustee brings the section 544(b)(1) action in bankruptcy court. Any defense must be asserted *actually* in bankruptcy, not *hypothetically* outside of bankruptcy court.[133]

A caveat was advertised a few pages back. A Supreme Court case subsequent to the ones I have cited suggests that sovereign immunity is subject-matter jurisdiction which can never be waived. In *Ford Motor Co. v. Department of Treasury*, a taxpayer could have sued Indiana in state court for a refund of a tax claimed to be an unconstitutional burden on interstate commerce.[134] It chose to sue Indiana in federal court.[135] Under the Eleventh Amendment, waiver of sovereign immunity in state court does not translate into waiver of sovereign immunity in federal court.[136] Indiana chose to litigate in federal court on the merits without ever pleading sovereign immunity. It lost, appealed and lost again, never mentioning sovereign immunity. Indiana first uttered the words "sovereign immunity" on further appeal to the Supreme Court. The Supreme Court allowed the argument.[137] Obviously, Indiana had its cake and ate it too. Having lost on the merits it was able to cancel its defeat after the bout was over.[138] In his study of sovereign immunity waivers, Professor Jonathan Siegal concludes (rather tentatively) that *Ford Motor Co.* has been overruled by subsequent Supreme Court developments.[139] We shall let him have the last word and assume that sovereign immunity must be pleaded or it is waived.

C. Modern Sovereign Immunity and Bankruptcy

So far we have only asserted that the dissent (as supplemented) was right and the majority was wrong. The Supreme Court is wrong for another reason. If C_1 sues the

> claim itself. It is undisputed that, outside of bankruptcy proceedings, the United States could invoke the defense of sovereign immunity to bar any lawsuit seeking to invalidate a federal tax payment under a State's fraudulent-transfer law.

Id. If sovereign immunity is a defense that must be pled or lost, then C_1 does have a claim under Utah law. T is innocent of the charge.

[133] *See* Zazzali v. United States (*In re* DBSI, Inc.), 869 F.3d 1004, 1015 (9th Cir. 2017) ("Section 544(b)(1) does not authorize a trustee to bring an avoidance action in state court, rather the statute permits a trustee to pursue *federal* cause of action in bankruptcy court.").

[134] Ford Motor Co. v. Dep't of Treasury of Ind., 323 U.S. 459, 460–61 (1945).

[135] *See id.* at 462.

[136] *See* Smith v. Reeves, 178 U.S. 436, 441 (1900).

[137] Said Justice Stanley Reed: "It is conceded by the respondents that if it is within the power of the administrative and executive officers of Indiana to waive the state's immunity, they [would] have done so in this proceeding." *Ford Motor*, 323 U.S. at 467. The Indiana Constitution provided: "'Provision may be made, by general law, for bringing suit against the State . . . but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed.'" *Id.* at 468. Justice Reed held that failure to plead sovereign immunity was *ultra vires*, so pleading it to the Supreme Court for the first time was allowed. *See* Montgomery v. Maryland, 266 F.3d 334, 339 (4th Cir. 2001) ("'[T]he Attorney General of Maryland lacks the authority to waive Eleventh Amendment immunity on behalf of the state and its officials.'" (quoting Booth v. Maryland, 112 F.3d 139, 145 n.2 (4th Cir. 1997))), *vacated*, 535 U.S. 1075 (2002).

[138] *Ford Motor* was followed in *Edelman v. Jordan*, 415 U.S. 651, 662–63 (1974), where the Supreme Court allowed the defense of sovereign immunity, even though it was never mentioned in the lower courts.

[139] *See* Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167, 1212–18 (2003).

IRS under Utah law, it does so (or could do so) in a *quasi in rem* proceeding, where sovereign immunity does not apply. To see this, we explore the baffling jurisprudence the Supreme Court has generated on sovereign immunity. In the discussion, I assume that there is one unified doctrine of sovereign immunity, applicable to the states and to the federal government. A precedent pertaining to a state government is thus usually applicable to litigation against the federal government.[140]

As of 1989, sovereign immunity was held in scant regard.[141] States and the federal government had it, but Congress could get rid of it, both for the federal government and for the states. Thus, in *Pennsylvania v. Union Gas Co.*, Congress could make states liable for environmental cleanup because environmental cleanup was authorized under the Commerce Clause.[142] States had no right to resist federal regulation and its enforcement through money judgments against the states.[143] Ominously, only five Justices agreed that Congress could abrogate state sovereign immunity or regulate the states.[144]

The tables soon turned. In 1999, the composition of the Court changed and therefore so did the Constitution. In *Seminole Tribe of Florida v. Florida*, a majority said that Congress could not, under the Indian Commerce Clause, compel Florida to

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[140] *E.g.*, Fla. Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 686 n.21 (1982) (citing cases that treated state and federal immunity claims similarly); United States v. Lee, 106 U.S. 196, 206–07 (1882) (stating the principle of sovereign immunity is "as applicable to each of the States as it is to the United States, except in those cases where by the Constitution a State of the Union may be sued in this court"); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 517–18 (1978) (discussing the relationship between state and federal immunity doctrines).

[141] *See* Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex parte Young *Relief*, 76 AM. BANKR. L.J. 461, 462 (2002) ("[S]tates' sovereign immunity in federal court seemed to be on the verge of virtual extinction . . . .").

[142] *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 19 (1989) (plurality opinion) ("Congress has the authority to override States' immunity when legislating pursuant to the Commerce Clause.").

[143] *See id.* at 13–15 (discussing the cases that led the Court to holding that Congress may permit suits against the States for money damages).

[144] The two issues were whether Congress intended to abrogate Pennsylvania's state sovereign immunity and whether Congress could do so constitutionally. Here is how the votes were allocated:

	Yes	**No**
Congress intended to abrogate?	Brennan Blackmun Marshall Stevens Scalia	Kennedy O'Connor Rehnquist White
Congress could abrogate?	Brennan Blackmun Marshall Stevens White	Kennedy O'Connor Rehnquist Scalia

Letitia A. Sears, Pennsylvania v. Union Gas*: Congressional Abrogation of State Sovereign Immunity Under the Commerce Clause, or, Living with* Hans, 58 FORDHAM L. REV. 513, 525–26 (1989).

stand suit in federal court for violation of a federal statute.[145] In *Alden v. Maine*, a majority ruled that Maine could not be made liable to its employees in Maine state court for violating over-time pay legislation enacted by Congress under its Commerce Clause power.[146] Suddenly sovereign immunity of states was a thing.[147]

Bankruptcy law got caught up between the fell swoop of mighty opposites as kind of an afterthought. After two visits to the Supreme Court, bankruptcy law found itself endowed with two properties. Bankruptcy was revealed to be an *in rem* proceeding to which sovereign immunity did not apply.[148] Second, even though, post-*Seminole*, Congress could not waive sovereign immunity for states under the Commerce Clause, bankruptcy was different. Congress could and did waive state sovereign immunity in bankruptcy proceedings.

D. Hood *and* In Rem *Proceedings*

In *Tennessee Student Assistance Corp. v. Hood*, the Court rested on the premise that sovereign immunity did not apply in *in rem* proceedings.[149] In *Hood*, a debtor (*D*) owed a student loan to a private lender.[150] The loan was guaranteed by an Agency of the State of Tennessee.[151] Student loans are nondischargeable unless, in an adversary proceeding against the lender, *D* proved that repayment was an undue hardship.[152]

D filed for bankruptcy. The lender filed a proof of claim. Tennessee paid the lender and was subrogated to the lender's position.

D commenced an adversary proceeding against Tennessee claiming undue hardship.[153] Tennessee huffed that the lawsuit was an affront to the dignity owed to sovereigns.[154] Tennessee lost its motion to dismiss and on appeal to the Supreme Court, Tennessee claimed that Congress had no constitutional authority to abrogate state sovereign immunity in bankruptcy cases, which Bankruptcy Code section 106(a) purports to do.[155]

The Supreme Court, for the moment, ducked the issue of whether Congress, under its bankruptcy powers, could waive state sovereign immunity. In *Central*

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[145] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996).

[146] Alden v. Maine, 527 U.S. 706, 712 (1999).

[147] Professor Lieb describes the public acrimony between members of the Supreme Court over sovereign immunity in Richard Lieb, *State Sovereign Immunity: Bankruptcy is Special*, 14 AM. BANKR. INST. L. REV. 201, 215 (2006).

[148] *See id.* at 205 ("[I]f a proceeding does not require the exercise of *in personam* jurisdiction over a State, the proceeding does not constitute a 'suit' against the State . . . . Because discharge proceedings are *in rem*, the Court thus held that States do not have immunity from them.").

[149] Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 451 (2004).

[150] *Id.* at 444.

[151] *See id.*

[152] *See* 11 U.S.C. § 523(a)(8) (2024).

[153] *See Hood*, 541 U.S. at 444.

[154] *See id.* at 445.

[155] *See id.*

Virginia Community College v. Katz, it would answer this question in the affirmative.[156] For the moment, the Court ruled instead that Tennessee had no sovereign immunity in the first place.[157]

1. Admiralty and *in rem*

According to Justice Rehnquist, states may be subject to some judicial actions without their consent.[158] Justice Rehnquist gave as an example *in rem* admiralty actions "when the State is not in possession of the property."[159]

Admiralty is both a choice of law[160] and a principle of federal court jurisdiction. Section 9 of the Judiciary Act of 1789, reflecting Article III of the Constitution, grants to federal courts jurisdiction over disputes governed by admiralty law, as inherited from the law of nations.[161] But section 9 "saves to suitors" the right to bring an admiralty action in state courts.[162] Federal courts, however, have the exclusive right to *in rem* admiralty actions.[163] According to admiralty law, vessel, cargo and freight are entities that are subjected to liabilities.[164] If a vessel collides with another vessel, or if a seaman's wages are not paid, the injured party may sue the vessel itself. For this reason, admiralty cases have names like *The Siren*.[165] Suppose the Siren negligently collides with the Harper. The owners of the Harper have sustained damages. Instantly upon the collision, these owners have a maritime lien on the Siren. These owners can foreclose the lien by commencing a proceeding by "libeling" the vessel. This constitutes putting a writ into the hands of a federal marshal who "arrests" the vessel, establishing *in custodia legis* over the Siren.[166]

It is, however, too simple to assume sovereign immunity does not apply in adjudication *in rem*. There seems to be the idea that navy ships are immune from libel.[167] In *The Siren*, sailors captured a vessel attempting to run a blockade the United States government established around the Confederate States in the Civil War.[168] Under admiralty law, these sailors were entitled to a prize financed by the sale of the

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[156] Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 379 (2006).

[157] *See Hood*, 541 U.S. at 445.

[158] *See id.* at 446.

[159] *Id.*

[160] *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 45–47 (2d ed. 1975) (explaining that, although the Constitution grants federal courts admiralty jurisdiction, it does not supply substantive rules, leaving courts to choose and apply the general maritime law).

[161] Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

[162] *See id.* at 77.

[163] *See, e.g.*, The Hine v. Trevor, 71 U.S. (4 Wall.) 555, 571–72 (1866); The Moses Taylor, 71 U.S. (4 Wall.) 411, 431 (1866).

[164] *See* The Siren, 74 U.S. (7 Wall.) 152, 155 (1869).

[165] *See generally id.* (applying the doctrine of sovereign immunity to admiralty law).

[166] *See* Fed. R. Civ. P. C(3)(a)(i).

[167] *See* Bederman, *supra* note 109, at 970–75.

[168] *See The Siren*, 74 U.S. at 152. These facts are listed in the statement of facts accompanying the opinion of the case.

captured vessel.[169] While under government possession, the Siren collided with the Harper.[170] The Siren ended up in Boston where the federal government libeled her to raise prize money.[171] The collision victim claimed a superior maritime lien on the Siren.[172] The federal government claimed sovereign immunity.[173] The Supreme Court ruled that, since the government commenced the action, it could not use sovereign immunity to get rid of parties with superior claims.[174] Having commenced the action, there was no insult, and the federal government had to accept intervention by those with superior claims.

In dictum, however, Justice Stephen Field worried that naval vessels might be arrested at the behest of aggrieved plaintiffs, thereby compromising the Nation's military situation.[175] Thus, where the government was in possession of the maritime property, it had immunity against the arrest of its property. So it is not exactly the case that sovereign immunity has no purchase in *in rem* actions.[176] On the other hand, where the government has bailed federal personal property to the master of a private vessel and a salvor saves the cargo, the salvor can libel the federal cargo for a salvage award because the government was not in possession of the cargo. No insult to the sovereign can be implied.[177] Possession means "actual personal dominion."[178]

In *Hood*, Justice Rehnquist cited the admiralty rules as evidence that sovereign immunity does not apply to protect sovereigns from at least *some in rem* proceedings.[179] "Although both bankruptcy and admiralty are specialized areas of the law, we see no reason why the exercise of federal courts' *in rem* bankruptcy jurisdiction is more threatening to state sovereignty than the exercise of their *in rem* admiralty jurisdiction."[180]

2. Bankruptcy and *in rem*

As it is in admiralty, so it is in bankruptcy. According to Justice Rehnquist: "The discharge of a debt by a bankruptcy court is similarly an *in rem* proceeding."[181] That is, sovereigns are subject to discharge whether they consent or not.

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169 *See id.*
170 *See id.* at 153.
171 *See id.*
172 *See id.*
173 *See id.*
174 *See id.* at 154.
175 *See id.* at 156.
176 *See Ex parte* State of New York, No. 1, 256 U.S. 490, 497 (1921) ("Nor is the admiralty and maritime jurisdiction exempt from the operation of [state sovereign immunity]."). For the view that the navy exception is tied to judicial abstention and not to sovereign immunity, see Bederman, *supra* note 109, at 977–85.
177 *See* The Davis, 77 U.S. (10 Wall.) 15, 20–22 (1869).
178 Aqua Log, Inc. v. Georgia, 594 F.3d 1330, 1336 (11th Cir. 2010).
179 Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 451 (2004) (holding *in rem* jurisdiction does not infringe state sovereignty).
180 *Id.*
181 *Id.* at 447.

Properly, the *quasi in rem* label fits bankruptcy better, as a historical matter. In England and in America's first bankruptcy act (1800), bankruptcies were commenced by creditors against debtor merchants.[182] As such bankruptcy proceedings were directed at the person of *D* but involved rendering assets of *D in custodia legis*.[183] In the United States, the Bankruptcy Act of 1800 had to be commenced by creditors against *D* (though *D*, desiring a discharge, could recruit friendly creditors to file the bankruptcy petition).[184] The voluntary petition (and expanding eligibility beyond merchants) arrived in the Bankruptcy Act of 1840 (in spite of grumbling that both innovations were unconstitutional).[185] The voluntary petition seems to confess that friendly creditors could always be recruited. Why not empower the debtor to anticipate the desire of the creditors and to commence the bankruptcy proceeding on their behalf? So conceived, in a voluntary petition, *D* sues her own self as a creditor fiduciary. Bankruptcy, then, can be seen is a *quasi in rem* proceeding against *D* personally.

In *Hood*, discharge of debt was conceived as *in rem*.[186] A discharge speaks to a debtor's *in personam* liability to Tennessee. How could an action pertaining to discharge be an action *in rem* against Tennessee?

Justice Rehnquist's answer was borrowed from the Fourth Circuit's decision in *Virginia v. Collins*.[187] According to the *Collins* court:

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[182] *See* Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 500–01, 533 (1996) ("Creditors could initiate proceedings only against a merchant that committed acts of bankruptcy that in essence signaled the merchants insolvency.").

[183] *See id.* at 501, 533–34 (stating debtors transferred their property to commissioners appointed by the Lord Chancellor to handle the proceedings).

[184] *See* CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 20, 34 (Leonard W. Levy ed., Da Capo Press, 1972).

[185] *See id.* at 63–65 (finding opposition to the bankruptcy bill because it did not apply to corporations and did not treat debtors and creditors uniformly).

[186] *Hood*, 541 U.S. at 447. Professor Brubaker proclaims the reasoning in *Hood* to be "exceedingly feeble." Ralph Brubaker, *Explaining* Katz*'s New Bankruptcy Exception to State Sovereign Immunity: The Bankruptcy Power as a Federal Forum Power*, 15 AM. BANKR. INST. L. REV. 95, 97 (2007) [hereinafter Brubaker, *Explaining* Katz]. His point is that bankruptcy may be *in rem*, but discharge litigation is strictly *in personam*. *See id.* at 101; *see also* Ralph Brubaker, *From Fictionalism to Functionalism in State Sovereign Immunity: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief After* Hood, 13 AM. BANKR. INST. L. REV. 59, 63 (2005) ("[T]he reasoning of *Hood* is so feeble and ungrounded . . . that the Court is still at a loss . . . about for the appropriate means to determine the 'limits . . . implicit in the constitutional principle of state sovereign immunity' in the bankruptcy context."); Susan E. Hauser, *Necessary Fictions: Bankruptcy Jurisdiction After* Hood *and* Katz, 82 TUL. L. REV. 1181, 1221–23 (2008) (arguing *Hood*'s characterization of discharge is inaccurate). Professor Brubaker nevertheless supports the idea that bankruptcy discharges are binding on sovereigns. He argues that *Ex parte Young*, 209 U.S. 123 (1908), justifies application of the discharge injunction against the states. *See* Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex parte Young *Relief*, 76 AM. BANKR. L.J. 461, 466–67 (2002). *But see* Karen Cordry, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief: A Response*, 77 AM. BANKR. L.J. 23, 25–27 (2003) (critiquing Brubaker's interpretation of *Ex parte Young*).

[187] *See Hood*, 541 U.S. at 447–48 (citing Virginia v. Collins (*In re* Collins), 173 F.3d 924, 929 (4th Cir. 1999)).

> A federal court's jurisdiction over the dischargeability of debt . . . derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over debtors and their estates . . . . While the bankruptcy system gives creditors an opportunity to share in the estate, the debtor receives an overriding benefit. In return for submitting to the bankruptcy process, the debtor is discharged of his legally dischargeable debts.[188]

The idea is that bankruptcy constitutes a bargain with the debtor. If the debtor coughs up his pre-petition assets to *T*, the debtor gets a discharge. Discharge requires a court order.[189] The discharge order is not entered in a suit against the state.[190] "The order does not depend on bankruptcy court jurisdiction over the state . . . it is based on the court[']s jurisdiction over the debtor and his estate."[191] Thus, in *Collins*, Virginia was not insulted when its *in personam* claim against the debtor was discharged.

Student loan discharges are different, however. Student loans are not dischargeable, "unless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents . . . ."[192] Under Bankruptcy Rule 7001(f), matters pertaining to discharge must be adjudicated in an adversary proceeding.[193] An adversary proceeding requires a complaint, answer, etc., as described in the Federal Rules of Civil Procedure.[194] The debtor in *Hood* therefore served a complaint on the State of Tennessee, and Tennessee viewed this adversary proceeding as an affront to its sovereign dignity.[195] Justice Rehnquist conceded: "The issuance of process . . . is normally an indignity to the sovereignty of a State because its purpose is to establish personal jurisdiction over the State."[196] But here the *res* was already *in custodia legis*. No insult was directed toward Tennessee in commencing this action. The discharge complaint served on Tennessee was not an attempt to achieve personal jurisdiction and therefore was no affront. There was no *in personam* jurisdiction over the State. "A debtor does not seek monetary damages or any 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."[197]

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188 *In re* Collins, 173 F.3d at 929–30 (citations omitted).

189 *See* 11 U.S.C. § 524(a) (2024) (implementing the court's discharge order by nullifying any judgment imposing personal liability and prohibiting all collection efforts on the discharged debt).

190 *See In re* Collins, 173 F.3d at 926–27 (finding that the Eleventh Amendment's immunity "extends to suits against a state by its own citizens").

191 *Id.* at 930.

192 11 U.S.C. § 523(a)(8).

193 FED. R. BANKR. P. 7001(f).

194 *See id.* at Rules 2004, 7003, 7004.

195 *See* Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 445, 451–52 (2004).

196 *Id.* at 453.

197 *Id.* at 450.

Justice Rehnquist also pointed out that Bankruptcy Code section 523(a)(8) does not require an adversary proceeding.[198] The Federal Rules of Bankruptcy Procedure impose this requirement.[199] Absent Rule 7001(f),[200] a motion directed against Tennessee would do. Motions against the sovereign are not an insult because *D*'s estate is already *in custodia legis*, which occurred without sovereign insult. Just because the Rules upscale the procedure in a way that resembles lawsuits in a court does not change the fact that the state is already implicated in an *in rem* bankruptcy proceeding.

Thus, commencement of a bankruptcy is not an insult to the sovereign, and the sovereign must live with the incidental procedures and effects of the bankruptcy. In spite of this reasoning, Justice Clarence Thomas, in his dissent favoring sovereign immunity for Tennessee, was able to exhibit the following quote from Chief Justice Charles Evans Hughes in the challenging case of *Missouri v. Fiske*:

> 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 non-consenting State . . . . [T]he court has no authority to issue process against the State to compel it to subject itself to the court's judgment, whatever the nature of the suit.[201]

This passage, Justice Thomas thought, undermined Justice Rehnquist's ruling in *Hood*.[202]

In *Fiske*, a decedent owned stock in a corporation.[203] In 1898, he left the stock to his wife (*W*) for life, remainder to their children.[204] This implied that dividend income belonged to *W* absolutely, but ownership of the underlying certificates belonged to *W* only for her life. In 1909, *W* delivered the certificates to a trustee (*T*).[205] The corporation had issued stock dividends.[206] The issue that wrent *W*'s maternal bond with her children was whether stock dividends were income from the life estate (belonging to *W* absolutely) or corpus of the trust (in which *W* had only a life estate).[207]

In 1924, the children sued *T* for an equitable accounting and for a declaration that the children had a remainder interest in the stock dividend, as well as in the original

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198 *See id.* at 453.

199 *See id.*

200 *See* FED. R. BANKR. P. 7001(f) (declaring an adversary proceeding to include "a proceeding to determine whether a debt is dischargeable").

201 Missouri v. Fiske, 290 U.S. 18, 28 (1933).

202 *See Hood*, 541 U.S. at 461 (Thomas, J., dissenting) (arguing *Hood*'s ruling only works if the Court accepts an *in rem* exception to sovereign immunity, but *Fiske* said there is no such exception).

203 *See Fiske*, 290 U.S. at 21–22.

204 *See id.* at 22.

205 *See id.*

206 *See id.*

207 *See id.* at 22–23.

shares.[208] The equitable accounting was a *quasi in rem* proceeding. That is, it had the effect of putting the certificates *in custodia legis*.[209] In 1927, the district court declared that stock dividends were not income.[210] The children of *W* did indeed have a remainder interest in the stock dividends.[211] The federal court continued to have jurisdiction over the shares in order that the certificates might be distributed to the children of *W* at *W*'s anticipated death.[212] This distribution would be accomplished by an order compelling *T* to deliver the relevant stock certificates to the children.

In 1930, *W* died.[213] Figuring that *W*'s life estate had ended and that the children absolutely owned the shares (including the stock dividends), the executor excluded the shares from his inventory of the probate estate.[214] The State of Missouri then obtained an order from the probate court that the executor add to his inventory the stock dividend.[215] Under Missouri law, once *W* died, Missouri had a tax lien on the entire decedent estate.[216] Missouri anticipated obtaining from the probate court a ruling that Missouri has a tax lien on the stock dividends.[217] Such a ruling would constitute a collateral attack on the federal district court's earlier judgment that the remaindermen owned the stock dividend.

In supplement of its scheme to overthrow the federal ruling, Missouri moved to intervene in the federal equitable accounting.[218] Permission to intervene was granted.[219] Missouri asked that the shares not be distributed, thereby preserving the opportunity of the probate court to overrule the federal court decree in a collateral attack.[220] Before the court could rule, the children brought a second ancillary bill against Missouri, Missouri's Attorney General, and various subsidiary lawyers for Missouri to prohibit Missouri *et al.* from resorting to the collateral attack in state probate court.[221]

The district court ruled that an injunction against Missouri to prevent the collateral attack violated sovereign immunity.[222] The court of appeals, however,

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[208] *See id.* at 22; Buder v. Franz, 27 F.2d 101, 105 (8th Cir. 1928).
[209] *See Fiske*, 290 U.S. at 22 ("[T]he federal court had first acquired jurisdiction over the subject matter in an action *quasi in rem* . . . .").
[210] *See id.* at 22–23.
[211] *See id.* at 23.
[212] *See id.*
[213] *See id.*
[214] *See id.*
[215] *See id.*
[216] *See id.* at 24.
[217] *See id.* at 23–24.
[218] *See id.* at 23.
[219] *See id.*
[220] The lower courts and the Supreme Court did not view Missouri's motion to be an intervention into the district court proceeding. *See id.* at 25. Such an intervention would have constituted a waiver of sovereign immunity. *See* Clark v. Barnard, 108 U.S. 436, 447–48 (1883).
[221] *See Fiske*, 290 U.S. at 24.
[222] *See id.* at 21 (noting district court dismissed injunction bill on Eleventh Amendment sovereign immunity grounds).

reversed, ruling that the injunction should issue in the interest of "the protection of the jurisdiction and decrees of the trial court."[223]

The Supreme Court reversed again, ruling that the Eleventh Amendment applied to prevent the action for an injunction.[224] The district court had "no authority to issue process against the State to compel it to subject itself to the court's judgment . . . ."[225] This occasioned Chief Justice Hughes's remark that "[t]he 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 non-consenting State."[226] On the other hand:

> We express no opinion upon the question whether the decree of the District Court, entered during the lifetime of [*W*], the life tenant, in this suit to which she, her trustees and the remaindermen were parties, can be regarded as binding upon the State of Missouri with respect to its subsequent claim for inheritance taxes against the shares in controversy as a part of the life tenant's estate. That question is not before us. Whatever may be found to be the effect of this decree in that relation, the result is the same so far as [the Eleventh Amendment] is concerned. If [Missouri], by reason of the fact that it was not a party to the litigation, is not bound by the decree, it is manifestly free to litigate its claim to the taxes in the proceeding it has instituted in its own court. But if the decree of the federal court can be considered as determining the ownership of the shares so as to bind the State in later tax proceedings upon the death of the life tenant and there is a federal right to have that effect given to the decree, that federal right can be specially set up and claimed in the proceeding in the state court, and, if the right is finally denied, the decision may be the subject of review by this Court . . . . The contention that the question of ownership of the shares has been finally determined by the federal court affords no ground for the conclusion that the federal court may entertain a suit against the State, without it consent, to prevent the State from seeking to litigate that question in the state court.[227]

The meaning of *Fiske*, then, is that federal courts cannot simply erase the Eleventh Amendment because a state was planning to test the limits of *res judicata* in subsequent state litigation.

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[223] Fiske v. Missouri, 62 F.2d 150, 157 (8th Cir. 1932).
[224] *See Fiske*, 290 U.S. at 28–29.
[225] *Id.* at 28.
[226] *Id.*
[227] *Id.* at 29 (citations omitted). The final chapter in this saga is *In re* Franz' Estate, 127 S.W.2d 401 (Mo. 1939). Missouri seems to have dropped the idea of challenging the ruling of the district court.

Does *Fiske* contradict *Hood*? Justice Rehnquist thought not,[228] though he seemed nervous that *Fiske* barred an injunction against Missouri and the Bankruptcy Code provides an automatic stay that is effective against Tennessee.[229] The enforcement of the automatic stay against Tennessee (should Tennessee attempt a post-discharge collection) "is not before us," he feebly observed.[230] If anything, *Fiske* supported *Hood* because the *Fiske* Court "noted the State might still be bound by the federal court's adjudication even if an injunction could not issue."[231] A better answer is that, in *Fiske*, Missouri was never enmeshed in an *in rem* proceeding; the remaindermen were commencing litigation against Missouri in a genuinely insulting way. In *Hood*, Tennessee was already implicated in an *in rem* proceeding, and further administration of the bankruptcy estate was no insult to Tennessee.

C. Katz

The second chapter in our bankruptcy narrative is *Central Virginia Community College v. Katz*.[232] In the case, *D* paid an antecedent debt to Virginia within ninety days of bankruptcy.[233] In the bankruptcy, *T* brought an adversary proceeding against Virginia for voidable preference.[234] The Court found no offense to Virginia's sovereign immunity.[235]

With the outer bounds of the *in rem* theory unclear, the *Katz* majority chose not to uphold jurisdiction over Virginia on the *in rem* theory.[236] Generalizing, Justice John Paul Stephens wrote: "Bankruptcy jurisdiction, as understood today and at the time of . . . framing [the Constitution], is principally *in rem* jurisdiction . . . . As such, its exercise does not in the usual case, interfere with state sovereignty even when States' interests are affected."[237] But "it is not necessary to decide whether actions to recover preferential transfers pursuant to § 550(a) are themselves properly characterized as *in*

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[228] *See* Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 448–49 n.4 (stating *Missouri v. Fiske* was "not to the contrary").
[229] *See id.*
[230] *Id.*
[231] *Id.*
[232] *See generally* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006) (holding sovereign immunity did not bar a trustee's action to avoid preference transactions to state agencies).
[233] *See id.* at 360.
[234] *See id.*
[235] *See id.* at 371.
[236] *See id.* In *Hood*, Justice Rehnquist remarked in passing: "The case before us is thus unlike an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference." *Hood*, 541 U.S. at 454. Justice Rehnquist seemed keen to avoid ruling that a bankruptcy trustee could sue a sovereign *in personam* without the consent of the sovereign. Thus he remarked: "Even if we were to hold that Congress lacked the ability to abrogate state sovereign immunity under the Bankruptcy Clause, as [Tennessee] urges us to do, the Bankruptcy Court would still have authority to make the undue hardship determination sought by Hood." *Id.*
[237] *Katz*, 546 U.S. at 369–70.

rem."[238] Instead, it upheld the adversary proceeding on a new theory.[239] Generally, Congress cannot make states amenable to suit in federal court.[240] This was the limitation discovered in the *Seminole* case.[241] But, it turns out, there is a bankruptcy exception to this principle. In bankruptcy legislation, Congress does have this power,[242] which it exercised in section 106(a): "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following: (1) Sections . . . 547 [and] 550 . . . ."[243] *Katz* thus "smites . . . the state sovereign immunity vampire that had stalked the bankruptcy system since *Seminole*."[244] This holding has proved controversial, but it is not our concern.[245]

The *Katz* majority chose not to rely on the *in rem* theory.[246] But it could have done so. *Katz* was a voidable preference case. Prior to bankruptcy, no C_i had an interest in *D* property.[247] *D* paid funds to Virginia.[248] The payment was no fraudulent transfer.[249] No C_i could claim the funds now in Virginia hands. Nevertheless, Virginia did not receive payment free and clear. Rather, it held the payment in a ninety-day trust for a future bankruptcy trustee (*T*) of *D* (should a bankruptcy petition be filed).[250] The minute *D* filed for bankruptcy, a bankruptcy estate was created. That estate included "[a]ny interest in property that the trustee recovers under section . . . 550 . . . ."[251] Section 550(a) in turn provides that "to the extent that a transfer is avoided under section . . . 547 . . . , the trustee may recover . . . the property transferred . . . ."[252] Therefore, the "particular dollars"[253] held by Virginia became property of the

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238 *Id.* at 372.

239 Though the *Katz* Court does say that it relied "in part on our reasoning in *Hood* . . . ." *Id.* at 359.

240 *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996) (emphasizing the finding that Congress generally will not allow private individuals to sue a state government in federal court).

241 *See id.*

242 For criticism, see Thomas E. Plank, *State Sovereignty in Bankruptcy After* Katz, 15 AM. BANKR. INST. L. REV. 59, 60 (2007).

243 11 U.S.C. § 106(a) (2024).

244 Brubaker, *Explaining* Katz, *supra* note 186.

245 *See id.* (noting the rationale applied by the *Katz* Court was unconvincing); Hauser, *supra* note 186, at 1221 (discussing the difference between a discharge of debts and other matters within bankruptcy proceedings); Lieb, *supra* note 147, at 210 (highlighting the *Katz* Court needed to add an additional theory to pre-existing frameworks); Joseph Pace, *Bankruptcy as Constitutional Property: Using Statutory Entitlement Theory to Abrogate State Sovereign Immunity*, 119 YALE L.J. 1568, 1568 (2010) (noting *Katz* leaves much unsettled and questions its durability); Plank, *supra* note 242 (similar argument); Martin H. Redish & David M. Greenfield, *Bankruptcy, Sovereign Immunity and the Dilemma of Principled Decision Making: The Curious Case of* Central Virginia Community College v. Katz, 15 AM. BANKR. INST. L. REV. 13, 47–52 (2007) (arguing *Katz* implicitly overrules *Seminole*).

246 *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 378–79 (2006).

247 *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 319–20 (1999) ("[A] general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore could not interfere with the debtor's use of that property.").

248 *See Katz*, 546 U.S. at 360.

249 *See supra* text accompanying notes 57–60.

250 *See Katz*, 546 U.S. at 360 n.1.

251 11 U.S.C. § 541(a)(3) (2024).

252 *Id.* § 550(a).

253 The phrase comes from *United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992). By this phrase,

bankruptcy estate.[254] Accordingly, *D* did not convey to Virginia absolute title to the particular dollars. *T* had a *contingent future interest*—a springing executory interest—in the Virginia dollars. The minute the bankruptcy petition was filed, the contingent future interest became a vested present interest in *T*.[255] At this moment, under the logic of *Hood*, the *in rem* action had been commenced and Virginia (*sans* insult) was implicated in the case. Thereafter, when *T* commenced his adversary proceeding against Virginia for those dollars (in an equitable accounting), *T* was just following through on the pre-existing *in rem* jurisdiction over Virginia. So conceived, the adversary proceeding does not offend the sovereign dignity of Virginia.

But didn't *T* serve a complaint on Virginia, thus offending her sovereign majesty? No, on the logic of *Hood*. Recall that in *Hood*, Tennessee had argued that the adversary proceeding over which it waxed indignant resembled an insulting assertion of personal jurisdiction because it involved a complaint and an answer governed by the Federal Rules of Civil Procedure.[256] Justice Rehnquist pointed out that the Bankruptcy Code nowhere required an adversary proceeding.[257] This was imposed by the Federal Rules of Bankruptcy Procedure.[258] But for Rule 7001(6), the debtor in *Hood* could have proceeded by motion.[259] Since the bankruptcy was *in rem* and Tennessee was already implicated in *in rem* jurisdiction by virtue of being a creditor, the adversary proceeding was no affront to the dignity of Tennessee.[260]

The same point could be made in *Katz*. That which *D* voidably conveyed to Virginia would eventually become part of the bankruptcy estate. True, Rule 7001 requires that *T* file an adversary proceeding against Virginia.[261] But nothing in section 547(b) or section 550(a) requires an adversary proceeding.[262] But for Rule 7001, the trustee could proceed by a turnover motion under section 542(a).[263] Thus, the action against Virginia was fully within the *in rem* jurisdiction of the bankruptcy court over the bankruptcy estate.

What about the probability that in between payment to Virginia and the bankruptcy, Virginia had commingled the money received and could no longer trace it? Does that not mean *T* is seeking a money judgment against Virginia? If so, we are

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Justice Scalia meant that *T* invoked the bankruptcy court's *in rem* jurisdiction over property of the bankruptcy estate. *See id.*

254 Vexingly, there is an argument that the preference receivable becomes property of the estate only when *T* recovers, not when the bankruptcy proceeding commences. I address this nuisance in David Gray Carlson, *Bankruptcy's Organizing Principle*, 26 FLA. STATE UNIV. L. REV. 549, 576–79 (1999).

255 A vigorous proof of this *in rem* right in voidably conveyed dollars is presented in David Gray Carlson, *Voidable Preferences and Proceeds: A Reconceptualization*, 71 AM. BANKR. L.J. 517, 523–24 (1997).

256 Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 450–52 (2004).

257 *See id.* at 453.

258 *See id.*

259 *See id.*

260 *See id.* at 448.

261 FED. R. BANKR. P. 7001.

262 11 U.S.C. §§ 547(b), 550(a) (2024).

263 *See* FED. R. BANKR. P. 7001(a); 11 U.S.C. § 542(a).

not on the *terra firma* of *in rem* but in the aery atmosphere of *in personam*.[264] By my way of thinking, the law presumes that Virginia has done the right thing. Since it received the transfer in trust for a future *T*, we may presume that Virginia retained the "particular dollars" in identifiable shape. Thus, *T* is entitled to get the same dollars back. Section 550(a) establishes that return of the particular dollars is presumptively the remedy to which *T* is entitled.[265] On this presumption the adversary proceeding may be commenced and so it is *in rem* in the first instance. Sovereign immunity is all about *commencement*. Once commenced on an *in rem* basis, Virginia is bidden to go find the exact dollars, if it can. Once jurisdiction has started, the bankruptcy court has cleanup jurisdiction. It can issue a money judgment per section 550(a) ("if the court so orders") without offense because the sovereign was already enmeshed in an *in rem* matter consistent with sovereign immunity principles.[266]

In his *Katz* dissent, Justice Thomas suggested that the *in rem* theory did not sustain jurisdiction over Virginia.[267] He thought *United States v. Nordic Village, Inc.* precluded such a theory.[268] Such a conclusion, however, is not logically required. To see why, let's drop back and take a closer look at some bankruptcy cases in which sovereign immunity has been implicated.

Prior to the modern controversy, all was quiet on the bankruptcy front. In *Van Huffel v. Harkelrode*, a bankruptcy referee sold land free and clear of an Ohio tax lien and two mortgages.[269] The referee erroneously ruled that the mortgages were senior to the tax lien, so the mortgage lenders took all of the proceeds.[270] The State did not appeal.[271] Later, the buyer sought to quiet title to the land, seeking a declaration that the tax lien had been foreclosed.[272] Ohio claimed its tax lien still existed because the purported elimination of the tax lien violated its sovereign immunity.[273] The Supreme Court disagreed.[274] "Realization upon the lien created by the state law must yield to the requirements of bankruptcy administration."[275]

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[264] *See* Lieb, *supra* note 147, at 209–10.

[265] 11 U.S.C. § 550(a).

[266] *Id.* Says Justice Stevens in *Katz*, equity courts "historically have had the power to issue ancillary orders enforcing their *in rem* adjudications." Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 370 (2006). Consider what Virginia sounds like if I am wrong. Says Virginia, "If we did our fiduciary duty and kept the particular dollars for *T*, we admit we can be sued. But since we violated our fiduciary duty, we can skulk off scot free in the name of sovereign immunity." This sort of argument violates the spirit of many Supreme Court holdings suggesting that sovereign immunity is to be set aside when the sovereign is a thief. *See infra* text accompanying notes 445–577.

[267] *Katz*, 546 U.S. at 393 (Thomas, J., dissenting).

[268] *See id.* at 392–93 (citing United States v. Nordic Vill., Inc., 503 U.S. 30 (1992)).

[269] Van Huffel v. Harkelrode, 284 U.S. 225, 226 (1931).

[270] *See id.* at 227.

[271] *See id.*

[272] *See id.* at 226.

[273] *See id.* at 227.

[274] *See id.* at 228.

[275] *Id.*; *see* Christian v. Atl. & N.C. R.R. Co., 133 U.S. 233, 244 (1890) (finding sovereign can be foreclosed upon when it has a junior lien on property *in custodia legis*).

To be sure, Ohio was unjustly treated. Its tax lien was indeed senior.[276] But Ohio was implicated in the bankruptcy maelstrom. It was part of the *in rem* proceeding and was subject to bankruptcy court jurisdiction.[277] The legal error committed by the bankruptcy referee was regrettable. But Ohio should have appealed, as any other private lien creditor would be expected to do. Ohio was subject to *res judicata*, just as any private citizen would be.[278] Ohio did not have the sovereign immunity defense because the bankruptcy was commenced without insult to Ohio.

In *New York v. Irving Trust Co.*, a bankruptcy referee imposed a bar date on New York discharging its claim if a proof of claim was not filed by the time of the bar date.[279] New York missed the deadline and made a half-hearted claim that its sovereign immunity was compromised.[280] The Supreme Court disagreed.[281] "The consequent necessity for bar orders is apparent. Otherwise, estates could not be promptly closed."[282] In both these cases, sovereign immunity gave way to administrative convenience in a bankruptcy case.[283]

Much later, under the modern Bankruptcy Code, the IRS in *United States v. Whiting Pools, Inc.* levied on some pool chemicals pursuant to a tax lien.[284] In the subsequent chapter 11 case, *D* sought and obtained a turnover order against the IRS.[285] The IRS unsuccessfully claimed that *D*'s prepetition right of possession was beyond the bankruptcy estate, but the Supreme Court, in an important ruling about the scope of the bankruptcy estate, held that the chemicals were in the bankruptcy estate and the IRS had to cough them up.[286] The thought of sovereign immunity never arose.[287] This was in the era in which no one much cared about sovereign immunity.

Next in the sequence is *Hoffman v. Connecticut Department of Income Maintenance*, where two cases were consolidated.[288] First, *D Corp.* claimed

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[276] *See Van Huffel*, 284 U.S. at 227.

[277] *See id.* at 227–28.

[278] *See* Peck v. Jenness, 48 U.S. (7 How.) 612, 624–25 (1849).

> It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the case, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court . . . .

Id.

[279] New York v. Irving Tr. Co., 288 U.S. 329, 330 (1933).

[280] *See id.* at 330–31.

[281] *See id.* at 331.

[282] *Id.*

[283] *See, e.g.*, Gardner v. New Jersey, 329 U.S. 565, 583 (1947) (holding no breach of sovereign immunity where New Jersey filed proof of claim and *T* challenged the claim).

[284] United States v. Whiting Pools, Inc., 462 U.S. 198, 200 (1983).

[285] *See id.* at 200–01.

[286] *See id.* at 209. The classic article on the metaphysics of *Whiting Pools* is Thomas E. Plank, *The Outer Boundaries of the Bankruptcy Estate*, 47 EMORY L.J. 1193, 1196 (1998).

[287] At the time, Bankruptcy Code section 106(a) did not waive sovereign immunity against turnover orders. *See generally Whiting Pools*, 462 U.S. 198 (proceeding without a sovereign immunity argument raised by either party).

[288] Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96, 98–99 (1989).

approximately $64,000 from Connecticut for Medicaid services rendered.[289] Connecticut had a counterclaim of about $121,000 for overpayments that *D Corp.* had received.[290] *T* wanted Connecticut to pay up for $57,000, the amount Connecticut owed after the setoff was accounted for.[291] Second, an individual (*D*) had paid state taxes.[292] *D* filed for bankruptcy in chapter 7 and *T* claimed the tax payment was a voidable preference.[293]

In the "setoff" case, *T* filed an adversary proceeding against Connecticut under section 542(b).[294] The Supreme Court assumed that the Eleventh Amendment applied to protect Connecticut from *T*'s adversary proceeding; the only issue as they saw it was whether Congress, under Bankruptcy Code section 106(a) as it then existed, successfully waived Connecticut's sovereign immunity.[295] No one on the Supreme Court thought so, but two Justices thought that Congress had no power to waive a state's sovereign immunity, a view eventually falsified in *Katz*.[296]

It can be argued that, under slightly different facts, the suit against Connecticut was ancillary to the *in rem* bankruptcy proceeding, in which case Connecticut had no defense of sovereign immunity. In *Hoffman*, Connecticut did not file a proof of claim for its unjust enrichment claim over overpayment.[297] Let us assume *T*, as is her right,[298] had timely done so on behalf of Connecticut. Presumably, filing for Connecticut is not a suit against Connecticut and so is not a violation of the Eleventh Amendment. Connecticut now has an "allowed claim."[299] It is also a secured creditor in the bankruptcy. According to Bankruptcy Code section 506(a)(1): "An allowed claim of a creditor . . . that is subject to setoff under section 553 . . . is a secured claim to the extent of . . . the amount subject to setoff . . . ."[300] Under these alternative facts, the case arguably resembles *Van Huffel*. In *Van Huffel*, Ohio had a lien on collateral that was property of the estate.[301] The bankruptcy court could rule that Ohio's tax lien could be foreclosed, consistent with sovereign immunity. Thus, the Bankruptcy Code can "administer" collateral in which Ohio has an interest.

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289 *See id.* at 99.
290 *See id.*
291 *See id.*
292 *See id.*
293 *See id.*
294 *See id.* According to this provision, "an entity that owes a debt that is property of the estate . . . shall pay such debt to . . . the trustee, except to the extent that such debt may be offset under section 553 . . . against a claim against the debtor." 11 U.S.C. § 542(b) (2024).
295 *See Hoffman*, 492 U.S. at 101.
296 *See id.* at 105 (O'Connor, J., and Scalia, J., concurring); *see also* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) (allowing a trustee to recover preferential transfers from state agencies and rejecting the assumption from *Hoffman*).
297 *See Hoffman*, 492 U.S. at 99.
298 *See* 11 U.S.C. § 501(c) ("If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.").
299 *See id.* § 502(b).
300 *Id.* § 506(a)(1).
301 Van Huffel v. Harkelrode, 284 U.S. 225, 226 (1931).

In *Hoffman*, Connecticut's obligation to pay was Connecticut's collateral.[302] Connecticut was both the "account debtor"[303] and the secured creditor claiming a security interest in its own obligation to pay. Against this estate property, Connecticut (an oversecured creditor) could charge post-petition interest on its secured claim.[304] The bankruptcy court would need to assess the amount of the surplus claim against Connecticut because this would comprise the limit of Connecticut's post-petition interest claim. This is a necessary adjunct to administering Connecticut's collateral, thereby bringing the case under *Van Huffel*.

Such a conclusion must be justified in light of *United States v. Shaw*, where the United States made a claim against a probate estate (an *in rem* proceeding).[305] The executor cross-claimed for an even larger amount against the United States, which was therefore in a similar situation as Connecticut in *Hoffman*.[306] The Supreme Court allowed the executor a *defense* of setoff, thereby canceling the United States' claim in probate.[307] But it ruled that sovereign immunity prevented entry of a money judgment against the United States for the balance.[308] This holding makes little sense. The executor has a claim under the Tucker Act, which can be brought in the Federal Court of Claims.[309] There, in light of the probate court's ruling on the defense of setoff, the United States would be collaterally estopped to deny liability.[310] Little is achieved in *Shaw*, except to reserve for the Court of Claims the technical privilege of declaring the federal government liable.

Shaw is distinguishable by the fact that, in *Hoffman*, the Bankruptcy Code makes the surplus claim against Connecticut property of the estate. Since the bankruptcy was commenced without offense to Connecticut, the bankruptcy court had jurisdiction to determine the amount of collateral Connecticut had for its oversecured claim in bankruptcy.[311] Section 506(a)(1) "propertizes" the surplus claim against Connecticut, whereas no such provision exists in probate cases.

As for the voidable preference action in *Hoffman*, this should have been deemed an *in rem* action, and thus Connecticut had no sovereign immunity. Earlier, in the context of *Katz*, also a voidable preference case, we followed the money in slow

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302 Hoffman v. Conn. Dep't Income Maint., 492 U.S. 96, 99 (1989).

303 U.C.C. § 9-102(a)(3) ("'Account debtor' means a person obligated on . . . [a] general intangible.").

304 *See* 11 U.S.C. § 506(b).

305 United States v. Shaw, 309 U.S. 495, 502 (1940).

306 *Hoffman*, 492 U.S. at 99.

307 *See Shaw*, 309 U.S. at 502.

308 *See id.*

309 28 U.S.C. § 1491(a)(1) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States . . . .").

310 "'Collateral estoppel . . . serves as a bar to relitigation of an issue which has already been determined by a valid judgment.' For collateral estoppel to bar re-litigation, the identity of the parties in both the previous and the current litigations must be the same." United Auto. Ins. Co. v. Millenium Radiology, LLC, 337 So. 3d 834, 837 (Fla. Dist. Ct. App. 2022) (citations omitted).

311 *See Hoffman*, 492 U.S. at 102–03; *Shaw*, 309 U.S. at 500–01 (holding that the filing a probate claim did not waive the government's immunity from a counterclaim beyond setoff).

motion and found that *T*'s claim to the voidably paid funds were *in rem* in nature.[312] On this reasoning, Connecticut's sovereign immunity was not offended by the avoidance action in *Hoffman*,[313] provided *T* did not straight out ask for a money judgment.

United States v. Nordic Village is a variation on the *Hoffman* tale.[314] In *Nordic*, *D Corp.* filed for chapter 11 relief.[315] *SH* grossly abused his fiduciary duty as the debtor-in-possession by causing *D Corp.* to buy a cashier's check with bankruptcy estate funds.[316] This check was negotiated by *SH* to the IRS to satisfy *SH*'s tax obligation.[317] A trustee (*T*) appointed in the chapter 11 proceeding sought to avoid the transfer to the IRS pursuant to Bankruptcy Code section 549:

> [T]he trustee may avoid a transfer of property of the estate—
> (1) that occurs after the commencement of the case; and
> (2)
> (A) that is authorized only under section 303(f) or 542(c) of this title; or
> (B) that is not authorized under this title or by the court.[318]

Section 549 is a difficult moment in the Bankruptcy Code.[319] Usually, it does not apply to theft cases. If *X* steals a gold brick from the bankruptcy estate and sells it to

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312 *See supra* text accompanying notes 245–54.

313 Schoenthal v. Irving Tr. Co., 287 U.S. 92, 94–96 (1932), could be read to mean equitable accountings are never appropriate because *T*'s right to damages was adequate, and equity courts did not intervene when the legal remedy was adequate. In *Schoenthal*, *T* made a voidable preference payment to *X*. *Id.* at 93. In those days, a bankruptcy referee had no summary jurisdiction to recover preferences. *T* had to leave bankruptcy court and seek a remedy in a nonbankruptcy court. *See id.* at 93–94. *T* sued *X* in a federal district court for an equitable accounting. *See id.* at 93. *X* demanded a jury. *See id.* at 93–94. The Supreme Court ruled that *X* had the right to a jury because, although *T* had the right to an equitable accounting, *T*'s legal remedy in damages was adequate, and equity courts would take no jurisdiction where the legal remedy was adequate. *See id.* at 96. In those days, the case was governed by a statute since repealed: "[S]uits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate, and complete remedy may be had at law." Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82 (codified at 28 U.S.C. § 384 (1926)) (repealed Judicial Code and Judiciary, ch. 626, § 39, Pub. L. No. 80-773, 62 Stat. 869 (1948)). Section 384 emboldened the *Schoenthal* Court to look past the plea for an equitable accounting in order to determine whether the equitable remedy was "needed"—whether a money judgment would serve just as well. Now that the statute in question is gone, only a Seventh Amendment minimum remains. *Schoenthal* is a statutory case, interpreting a repealed statute, not a Sixth Amendment jury case. Today, *T* may bring an *in rem* proceeding to avoid a preference. 11 U.S.C. § 550(a) (2024).

314 United States v. Nordic Vill., Inc., 503 U.S. 30, 32–33 (1992) (comparing the limits of section 106(a)'s waiver of sovereign immunity to those recognized in *Hoffman*).

315 *See id.* at 31.

316 *See id.*

317 *See id.*

318 11 U.S.C. § 549(a) (2024); *see Nordic*, 503 U.S. at 31–32.

319 On its many problems and contradictions, see generally David Gray Carlson, *Bankruptcy's Acephalous Moment: Postpetition Transfers Under the Bankruptcy Code*, 21 EMORY BANKR. DEV. J. 113 (2004).

Y, *X* has "transferred" no part of *T*'s interest in the brick. *T* can take it back from *Y* by turnover under section 542(a).[320] But *Nordic* is different. The stolen property was a negotiable instrument.[321] *SH*, the thief, did in fact have power under state property law to extinguish the debtor-in-possession's ownership of the cashier's check—by conveying it to a holder in due course. It is not exactly clear that the UCC applies to property of the estate. The better view is that the cashier's check entered the bankruptcy estate with the state-law defect that a property right in it could be terminated if it ends up in the hands of a holder in due course. If so, *Nordic* was no avoidance case. *T* could proceed under section 542(a) because either the IRS was a knowledgeable holder and no transfer (hence no *voidable* transfer) took place, or (as is extremely likely), the IRS was a holder in due course and so was not in possession of estate property.

Be that as it may. *T* took the case to lie in avoidance under section 549(a) and, in so doing, *T* invoked Bankruptcy Code section 550(a)[322]:

> [T]o the extent that a transfer is avoided under section . . . 549 . . . the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
>
> (2) any immediate or mediate transferee of such initial transferee.[323]

This language obviously tries to repeat the premises of an equitable accounting. Recovering the thing is primary. As an afterthought, and only if the court allows it, can money damages be awarded for the value of the property.

Properly, *T* seeks an equitable remedy when proceeding under section 550(a).[324] Since the thrust of section 550(a) is *in rem*, the IRS cannot (under *Hood*'s reasoning) claim sovereign immunity from a section 549(a) avoidance action.

In *Nordic*, *T* committed the *Granfinanciera* pleading blunder.[325] He asked for money damages straight up. This allowed the Supreme Court to say in its opening words: "This case presents a narrow question: Does § 106(c) of the Bankruptcy Code waive the sovereign immunity of the United States from an action seeking monetary

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320 "[A]n entity . . . in possession, custody, or control, during the case, of property that the transfer may use, sell, or lease under section 363 of this title . . . shall deliver to the trustee, *and account for, such property or the value of such property* . . . ." 11 U.S.C. § 542(a) (*emphasis added*).

321 *See Nordic*, 503 U.S. at 31.

322 *See id.*

323 11 U.S.C. § 550(a).

324 *See Nordic*, 503 U.S. at 31.

325 *See supra* text accompanying note 94.

recovery in bankruptcy?"[326] Had *T* asked for an equitable accounting, the question of sovereign immunity should never have arisen.[327] At the time, section 106(c) provided: "[N]otwithstanding any assertion of sovereign immunity—(1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and (2) a determination by the court of an issue arising under such a provision binds governmental units."[328]

As in *Hoffman*, the majority in *Nordic* relied on the rule that waiver of sovereign immunity must be clearly expressed.[329] The majority thought that section 106(c) did not clearly express an intent to waive the United States's sovereign immunity and so the IRS could not be sued in an adversary proceeding.[330] But we have seen that *T* did not need to bring an adversary proceeding at all, because section 549 was not necessary to the case. *T* could have proceeded under section 542(a).

Since the IRS was in custody of the cashier's check, the IRS had the duty (unless it was a holder in due course) to fork it over.[331] More than that, it had to "account" for the check.[332] This language from section 542(a) invokes an equitable accounting, suggesting that the trustee's *motion* for a turnover (no adversary proceeding being required) is ancillary to the *in rem* jurisdiction of the bankruptcy court. Under equity jurisprudence, the bankruptcy court, as a court of equity, had cleanup jurisdiction to issue a money judgment against the IRS. Thus, *T* made a pleading blunder, seeking a money judgment when an *in rem* remedy was fully available.

Justice Scalia alludes equitable accountings in *Nordic*.[333] But he noted that no one raised the issue in the courts below:

> Equally unpersuasive is [the] respondent's related argument that a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity. As an initial matter, the premise for that argument is missing here, since respondent did not invoke, and the Bankruptcy Court did not purport to exercise, *in rem* jurisdiction. Respondent sought to recover a sum of money, not "particular dollars," so there was no *res* to which the court's *in rem* jurisdiction could have attached. 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.[334]

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[326] *Nordic*, 503 U.S. at 31.

[327] Justice Scalia does remark, "[W]e have never applied an *in rem* exception to the sovereign immunity bar against monetary recovery, and have suggested that no such exception exists . . . ." *Id.* at 38 (citing United States v. Shaw, 309 U.S. 495, 502–03 (1940)).

[328] 11 U.S.C. § 106(c) (1988).

[329] *Nordic*, 503 U.S. at 33.

[330] *See id.* at 34–37.

[331] *See id.* at 31.

[332] *See* 11 U.S.C. § 542(a).

[333] *See Nordic*, 503 U.S. at 39.

[334] *Id.* at 38 (internal citations omitted).

This alludes to the voidable preference side of *Hoffman*.

In *Nordic*, Justice Scalia distinguished *Whiting Pools*.[335] Where a sovereign possesses property of the bankruptcy estate, *Whiting Pools* says that sovereign immunity does not apply.[336] But where *T* "sought to recover a sum of money, not 'particular dollars,'"[337] the IRS could assert sovereign immunity against money judgments for having received debtor-in-possession property in violation of Bankruptcy Code section 549(a). This implies that where *T* pleads correctly and asks for an equitable accounting, the IRS has no sovereign immunity defense. The IRS is then accused of being in possession of the bankruptcy estate and so *Whiting Pools* applies; sovereign immunity is defeated.

Following *Hoffman* and *Nordic*, Congress had its fill. It promptly amended Bankruptcy Code section 106 to remove all doubt that waiver of sovereign immunity was intended in bankruptcy cases.[338] Included in the amendment is the statement that federal bankruptcy courts "may issue against a governmental unit . . . an order or judgment awarding a money recovery . . . ."[339]

This concludes the argument that Justice Thomas erred in his *Katz* dissent when he claimed that *Nordic* precluded an *in rem* solution to the voidable preference action against Virginia.[340] Because Virginia held payments in trust for *T*, an *in rem* theory sufficed to justify the adversary proceeding under section 550(a), understood as authorizing an equitable accounting as the means of recovering specific property from the sovereign.[341]

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335 *Id.* at 38–39.

336 United States v. Whiting Pools, Inc., 462 U.S. 198, 209 (1983); *see Nordic*, 503 U.S. at 38–39.

337 *Nordic*, 503 U.S. at 38.

338 United States v. Miller, 604 U.S. 518, 535 (2025) ("When Congress adopted § 106(a)'s current language in 1994, it did so with the narrow aim of overturning [*Nordic* and *Hoffman*.]").

339 11 U.S.C. § 106(a)(3) (2024).

340 Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 392–93 (2006) (Thomas, J., dissenting).

341 For a different view, see Brubaker, *Explaining Katz*, *supra* note 186, at 109 ("An *in rem* bankruptcy exception to states' sovereign immunity, therefore, could not justify the preference actions for *in personam* money judgments against [Virginia] in *Katz*.").

IV. SOVEREIGN IMMUNITY AND EQUITABLE ACCOUNTINGS

We have concluded our tour of sovereign immunity in the context of bankruptcy proceedings. We now examine sovereign immunity under Utah fraudulent transfer law—the theater in which the *Miller* case played out.

A. Waiver

The UVTA by its terms provides no waiver of sovereign immunity.[342] The UVTA mentions government units.[343] This occurs in the UVTA definition of "person."[344] "'Person' means an individual, estate . . . business or nonprofit entity, public corporation, *government or governmental subdivision, agency, or instrumentality*, or other legal . . . entity."[345] The definition, however, fails to achieve waiver of sovereign immunity. A "person" can be a debtor or a creditor. The word "person" is never used to describe the liability of a fraudulent transferee. For example, suppose insolvent *D Corp.* transfers property to the State of Utah for no reasonably equivalent value. The relevant liability-creating provision is section 5(a):

> A transfer made . . . by a debtor is voidable as to a creditor whose claim arose before the transfer was made . . . if the debtor made the transfer . . . without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer . . . .[346]

The word "person" never appears here, or in any of the liability-creating provisions in the UVTA.[347] So the UVTA does not waive the IRS's sovereign immunity. Nor could it. Perhaps Congress can waive sovereign immunity in case a tax payment is challenged as a fraudulent transfer. The State of Utah can waive its own sovereign immunity for having received a fraudulent transfer. But Utah cannot waive federal immunity to fraudulent transfer attacks.[348]

Surprisingly, Congress *has* waived federal sovereign immunity from Utah fraudulent transfer actions. According to Administrative Procedure Act section 702:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action

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[342] *See In re* Equip. Acquisition Res., Inc., 742 F.3d 743, 747 (7th Cir. 2014).

[343] *See id.* at 749 (noting section 106(a)(1) abrogates sovereign immunity for "any governmental unit" which "encompasses not just the federal government, but also state and local governments").

[344] *See* UNIF. VOIDABLE TRANSACTIONS ACT § 1(11) (UNIF. L. COMM'N 2014).

[345] *Id.* (emphasis added).

[346] *Id.* § 5(a).

[347] *See generally* UNIF. VOIDABLE TRANSACTIONS ACT (lacking a definition of the word "person").

[348] *See In re* Pharmacy Distrib. Servs., 455 B.R. 817, 821 (Bankr. S.D. Fla. 2011).

> in a court of the United States seeking relief *other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.[349]

This describes C_1 versus the IRS perfectly. C_1 has suffered a legal wrong because an agency (the Department of the Treasury) expropriated C_1's property. C_1 is entitled to judicial review. C_1 may file an action in the District Court of Utah because the relief it seeks is not money damages. C_1 seeks to force the Treasury Department to disgorge C_1's pre-existing property so that C_1 can use it to pay a judgment against *D Corp.* When the Secretary of the Treasury received a fraudulent transfer from *SH*, it received the funds in trust for C_1. It is wrong for the Secretary to refuse to honor the trust.[350] The result of the equitable accounting is that the Secretary of the Treasury can be forced by court order to deliver up the trust property for C_1 to satisfy its judgment against *D Corp.*

Section 702 authorizes "relief other than money damages."[351] The turnover order that results from the equitable accounting is not an award of money damages in disguise, as the Supreme Court recognized in *Bowen v. Massachusetts*.[352] *Bowen* involved a Medicaid funding dispute.[353] Under Medicaid, states design their own program, choosing from eighteen different categories of medical assistance.[354] The federal government advances funds quarterly.[355] If the federal government has overcompensated the state, the federal government withholds that amount from the next quarterly payment owing to the state.[356]

Massachusetts reimbursed providers of educational therapy for mentally challenged individuals.[357] The Secretary of Health and Human Services filed an action with the Departmental Grant Appeals Board to disallow Massachusetts federal

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349 *Id.* (emphasis added).

350 *See* Husky Int'l Elecs., Inc. v. Ritz, 578 U.S. 355, 365 (2016) (a third party who refuses to disgorge is so "wrong" that he forfeits his bankruptcy discharge).

351 5 U.S.C. § 702 (2024).

352 Bowen v. Massachusetts, 487 U.S. 879, 893 (1988) (recognizing that the relief sought by Massachusetts was not the same as money damages).

353 *Id.* at 882.

354 *See id.* at 883.

355 *See id.* at 883–84.

356 *See id.* at 884.

357 *See id.* at 886–87.

reimbursement for such services.[358] Massachusetts responded with a suit in federal district court, requesting the court to "set aside" the order of the Board.[359] The Secretary on appeal claimed the district court had no jurisdiction to set aside the Board's order because Massachusetts was seeking money damages within the meaning of section 702.[360] The Secretary also claimed that, even if the district court had jurisdiction, it could not award an equitable remedy because Massachusetts had an adequate remedy at law for money damages, which had to be filed in the United States Court of Claims.[361]

Justice Stevens ruled that the district court had jurisdiction to set aside the Board's disallowance order.[362]

> There are two reasons why the plain language of this amendment does not foreclose judicial review of the actions brought by the State challenging the Secretary's disallowance decisions. First, insofar as the complaints sought declaratory and injunctive relief, they were certainly not actions for money damages. Second, and more importantly, even the monetary aspects of the relief that the State sought are not "money damages" as that term is used in the law.
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> . . . .
>
> Our cases have long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief . . . .The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as "money damages."[363]

Justice Stevens quoted approvingly from *Maryland Department of Human Resources v. Department of Health and Human Services*:

> The term "money damages," . . . normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." Thus, while in many instances an award of money is an award of damages, "[o]ccasionally a money award is also a specie remedy." Courts frequently describe equitable

[358] *See id.* at 887.
[359] *See id.*
[360] *See id.* at 891.
[361] *See id.* at 879.
[362] *See id.* at 912.
[363] *Id.* at 893.

> actions for monetary relief under a contract in exactly those terms . . . .[364]
>
> . . . .
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> . . . [Legislative history] suggests that Congress intended to authorize equitable suits for specific monetary relief . . . .[365]

These comments describe fraudulent transfer litigation perfectly. The IRS received money in trust for C_1. C_1's remedy is a turnover order requiring "specific dollars" to be made available to satisfy C_1's money judgment against *D Corp.* It is "wrong" for the IRS to ignore its fiduciary duty to C_1. Under Administrative Procedure Act section 702, the *quasi in rem* action may thus be commenced against the IRS in federal court.[366] Once commenced, the IRS is subject to an equity court's "cleanup" jurisdiction.[367] It can be made to respond to an *in personam* money judgment if it can no longer identify the "specific dollars" it received from *D Corp.*

A case illustrating what "money judgment" means is *Department of the Army v. Blue Fox, Inc.*[368] In this case, the Army contracted with *A* to build a telephone system.[369] *A* subcontracted with *B* to perform services in connection therewith.[370] The Army did not require *A* to supply a performance bond, which would require an insurance company to pay *B* if *A* did not.[371] Allegedly, the Army knew *B* was unpaid at the time it paid *A*.[372] In the absence of a performance bond, *B* sued the Army directly (though privity of contract was lacking), claiming that it had an "equitable lien" on the Army's obligation to pay *A* on completion of satisfactory performance.[373] The theory was that the Army had an equitable duty to hold back payment to *A* and retain those funds for the benefit of *B*.[374]

In *Blue Fox*, Justice Rehnquist came close to claiming that "equitable lien" is just another name for recovering money judgments:

> Liens . . . are merely a means to the end of satisfying a claim for the recovery of money. Indeed, equitable liens by their nature constitute substitute or compensatory relief rather than specific relief. An equitable lien does not "give the plaintiff the very thing to which he

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[364] *Id.* at 894–95 (quoting Md. Dep't of Hum. Res. v. Dep't of Health & Hum. Servs., 763 F.2d 1441, 1446 (D.C. Cir. 1985) (internal citations omitted)).

[365] *Id.* at 899–900 (quoting *Md. Dep't of Hum. Res.*, 763 F.2d at 1447).

[366] 5 U.S.C. § 702 (2024).

[367] *See* Whitlock v. Hause, 694 F.2d 861, 863 (1st Cir. 1982) (arguing based on the claim that "clean-up" jurisdiction allowed courts of equity to award money damages when those damages were incidental to the equitable relief).

[368] Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 262 (1999).

[369] *See id.* at 257.

[370] *See id.*

[371] *See id.* at 257–58.

[372] *See id.* at 258.

[373] *See id.*

[374] *Id.*

> was entitled," instead, it merely grants a plaintiff "a security interest in the property, which [the plaintiff] can then use to satisfy a money claim," usually a claim for unjust enrichment . . . .[375]

Equitable liens do indeed exist and they can be distinguished from the legal remedy of money judgment.[376] If C_1 has an unsecured claim against *D*, her remedy is money judgment. Prior to judgment, C_1 has no property interest in *D*'s assets. As a result of judgment, C_1 can get a judicial lien on some asset. The trouble with judicial liens is that they can be superseded by the judicial lien of some more diligent creditor C_2, or by some buyer to whom *D* sells the asset prior to the arrival of the judicial lien.

If C_1 has an equitable lien, she has it in property controlled by a third person prior to any judicial lien stemming from a money judgment. When C_1 has an equitable lien, C_2 cannot subsequently get a senior judicial lien because C_1 already has liened the collateral.

Justice Rehnquist is better understood as ruling that, *under the circumstances*, *B* had no equitable lien on government property and therefore was reduced to seeking a money judgment against the Army, as to which the Army enjoyed sovereign immunity.[377] In the case there was no privity of contract between *B* and the Army.[378] The Army possessed no pre-existing property of *B*.[379] *B* was seeking a judgment *in personam* and was not seeking to retrieve identifiable property that the Army was wrongfully withholding.[380]

Since *Blue Fox*, the Supreme Court has confirmed that equitable liens are different from seeking a money judgment for damages. In *Sereboff v. Mid Atlantic Medical Services*, *B*, the Beneficiary of an ERISA health insurance plan, had agreed that, if she recovered in tort against a third party, she would reimburse an insurance company for medical expenses outlaid.[381] *B* was injured in an accident and retained a personal injury attorney to recover.[382] The insurance company laid out medical expenses and wrote to the attorney, asserting a lien on the anticipated proceeds that would come into the attorney's possession.[383] *B* settled.[384] *B*'s attorney deducted his

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375 *Id.* at 262–63 (internal citations omitted).

376 *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 56 cmt. a (A.L.I. 2011) (an equitable lien "in specific property [is] an alternative (or a supplement) to a money judgment against the defendant *in personam*" (emphasis added)).

377 *See Blue Fox*, 525 U.S. at 263.

378 *See id.* at 256–57 (noting *B* was a subcontractor and had no direct contractual relationship with the Army).

379 *See id.* at 258 n.2 (observing by the time of the suit, the Army had already paid all contract funds to *A* and the replacement contractor and held no funds belonging to *B*).

380 *See id.* at 263; RESTATEMENT (FIRST) OF RESTITUTION § 110 (A.L.I. 1937) ("A person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other merely because of the failure of performance by the third person.").

381 Sereboff v. Mid Atl. Med. Servs. Inc., 547 U.S. 356, 359 (2006).

382 *See id.* at 360.

383 *See id.*

384 *See id.*

fee and forwarded the surplus to *B*, who kept the funds in a segregated account.[385] The Court found that the insurance fund had an equitable lien on the segregated account.[386] If it were seeking money damages, the insurance company would have no ERISA cause of action against *B*, under the Supreme Court's (controversial) reading of ERISA.[387] ERISA allows only equity claims, not claims for damages.[388]

B. Suing the Secretary of the Treasury Instead of the IRS

If a private creditor were to sue the IRS for receipt of a fraudulent transfer, the Administrative Procedure Act constitutes a waiver by the IRS of any sovereign immunity,[389] but more can be said. Even if this waiver did not exist, C_1 can recover under Utah law by suing the Secretary of the Treasury.

Courts have long allowed plaintiffs to avoid sovereign immunity by suing a government officer who has custody of a plaintiff's property.[390] The most celebrated instance of this is *United States v. Lee*, which concerns the Arlington Cemetery.[391] In 1863, Congress passed a tax on property in Confederate states in order to finance the

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385 *See id.*

386 *See id.* at 368–69.

387 *See id.* at 361–63.

388 Employee Retirement Income Security Act of 1974 (ERISA) § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2024). For energetic criticism of the Supreme Court's interpretation of section 502(a)(3), see John Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317, 1362–65 (2003).

389 Does the Tucker Act of 1877 waive sovereign immunity and authorize a money judgment against the United States Treasury? According to 28 U.S.C. § 1346(a)(1): "The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected . . . ." 28 U.S.C. § 1346(a)(1). One court has ruled that section 1346(a)(1) applies only for the benefit of taxpayers who have been assessed. *See* Marlow v. United States, No. 93-2295, 1993 U.S. Dist. LEXIS 15226, at *16 (W.D. Tenn. Sept. 30, 1993). Since *D Corp.* and the C_g are not the taxpayers (the *SH* are), the Tucker Act cannot serve to waive sovereign immunity against state fraudulent transfer actions. *See Marlow*, 1993 U.S. Dist. LEXIS 15226, at *16–18.

390 *E.g.*, Meigs v. McClung's Lessee, 13 U.S. (9 Cranch) 11, 14 (1815) (in a case where Army officers sued for trespass, the Court held "if it was private property the United States could not deprive the individual of it without making him compensation therefor"); United States v. Peters, 9 U.S. (5 Cranch) 115, 139–40 (1809).

> The state cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant. In this case, the suit was not instituted against the state or its treasurer, but against the executrixes of [the treasurer], for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion; but it certainly can never be alleged, that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.

Peters, 9 U.S. at 139–40.

391 United States v. Lee, 106 U.S. 196, 198 (1882).

Civil War.[392] If the tax was not paid, a Federal Land Commission could sell the fee simple of the land.[393] The United States had a tax lien on the home of Mary Anna Randolph Custis Lee, wife of Robert E. Lee.[394] Mary held a life estate in the premises.[395] The remainder was in her son George.[396] Mary had fled the premises upon the approach of the Union Army. In 1863, federal officers commenced a tax foreclosure.[397] Mrs. Lee, in hiding, got wind of the proceedings and sent an agent to pay the tax.[398] The officials at the Land Commission refused to accept tender of the payment.[399] A sale was held, and the United States took title by bidding in the tax debt.[400] The United States took possession of the premises, where it established the Arlington Cemetery.[401] Years later, after Mary Lee died, her son George sued the federal officials (Kaufman and Strong) who administered the cemetery and a military base adjacent thereto.[402] A jury decided that since a tax payment was tendered and refused, the tax was considered paid, and so the tax sale was illegal; George was the rightful possessor.[403]

The United States was not a party to this lawsuit but nevertheless commandeered the appeal to the Supreme Court,[404] claiming that suit against Kaufman and Strong was a suit against United States, which was protected by sovereign immunity.[405]

The Supreme Court showed no patience for sovereign immunity:

> When [a plaintiff], in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any [sovereign] person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right.[406]

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[392] *See id.* at 199.
[393] *See id.*
[394] *See id.* at 197–98.
[395] *See id.* at 198.
[396] *See id.*
[397] *See id.* at 204.
[398] *See id.*
[399] *See id.*
[400] *See id.* at 199.
[401] *See id.* at 198.
[402] *See id.* at 197–98.
[403] *See id.* at 199.
[404] *See id.* at 197.

> As the United States was not a party to the suit below, and, while defending the action by its proper law officers, expressly declined to submit itself as a defendant to the jurisdiction of the court, there may exist some doubt whether it has a right to prosecute the writ of error in its own name; but as the judgment against Kaufman and Strong is here on their writ of error . . . , the point is immaterial . . . .

Id.
[405] *See id.* at 198.
[406] *Id.* at 208–09.

It may be noted that Kaufman and Strong were found guilty of the Virginia law of trespass.[407] Analogously, the Secretary of the Treasury in *Miller* is *ex hypothesi* guilty of receiving a fraudulent transfer law according to Utah law,[408] which binds him to hold fraudulently transferred funds for the benefit of *D Corp.*'s creditors. *Lee* stands for the proposition that the Secretary of the Treasury can be sued personally to enforce the constructive trust with which the Secretary is charged.

In support of the thesis that the Secretary is liable for fraudulent transfers is *Osborn v. Bank of the United States*.[409] In *Osborn*, Ohio had passed an unconstitutional tax on the Bank of the United States.[410] The Bank refused to pay the tax.[411] The auditor (Osborn) sent agents "who proceeded by violence to enter the office [of the Bank], and forcibly took therefrom 100,000 dollars in specie and bank notes . . . ."[412] The Bank had the wit not to sue Ohio.[413] Instead the Bank sued the auditor and the Treasurer who still had possession of the stolen securities.[414] The state officers were not allowed to plead sovereign immunity.[415] Equitable restitution was ordered and the Bank got back the securities that had been unlawfully taken.[416] In so deciding, Chief Justice John Marshall relied heavily on the point that Ohio was not actually made a party to the action.[417] Therefore, it was not an action against the sovereign.[418] It was an action against individuals who happened to be state officers.[419] In order to comply with *Osborn*, the government officer must be sued as an individual.[420]

In short, Chief Justice Marshall invited a way to avoid sovereign immunity when property has been taken.[421] Don't sue the state! Sue the officer in charge! Thus, under the tutelage of *Osborn* and a great many other Supreme Court precedents, where *D Corp.* has made a fraudulent transfer to the IRS, C_1 is invited to sue the Secretary of the Treasury. He has the responsibility for lawfully dealing the trust funds that the IRS has received from *D Corp.* for the benefit of C_1.

Now it is undoubtedly the case that the Secretary has not segregated the proceeds of *D Corp.*'s check. Doesn't this mean that C_1 is reduced to obtaining a money judgment, and from money judgments the sovereign is immune? There are two

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[407] *See id.* at 225.
[408] *See supra* text accompanying note 13.
[409] *See generally* Osborn v. Bank of U.S., 22 U.S. (9 Wheat.) 738 (1824) (affirming the state auditor was liable for improperly seizing funds).
[410] *See id.* at 739–40.
[411] *See id.* at 743.
[412] *Id.* at 836.
[413] *See id.* at 842 (noting Ohio was not a party defendant).
[414] *See id.* at 739–43.
[415] *See id.* at 746.
[416] *See id.* at 870–71.
[417] *See id.* at 798, 802.
[418] *See id.* at 803.
[419] *See id.* at 798.
[420] *See* Block, *supra* note 112, at 1079.
[421] *See Osborn*, 22 U.S. at 766–67.

answers to this challenge. First, we are suing the Secretary, not the federal government. The Secretary has no sovereign immunity. The Secretary has violated his trust and therefore the Secretary must pay.[422] Second, the initial right against the Secretary is *quasi in rem*. C_1 is entitled to assume that, in an equitable accounting, the Secretary is performing his duty as a fiduciary. This duty includes maintaining the trust fund without commingling.[423] Accordingly, the Secretary will locate the fraudulently transferred funds. If he cannot or will not, as part of the equity court's "cleanup jurisdiction," the court can issue a money judgment against the Secretary.[424] Sovereign immunity, if it applies, speaks to the *commencement* of the proceeding. *Hood* teaches that, once the equitable proceeding is commenced, the sovereign must live with the ordinary consequences of the proceeding, including the money judgments that equity courts can issue as part of their cleanup jurisdiction.[425]

Carried to an extreme, *Osborn* threatens to render sovereign immunity "into a mere pleading rule."[426] Chief Justice Marshall did not quite abolish sovereign immunity through artful pleading. The issue was whether the Ohio auditor and Treasurer "are to be considered as having a real interest, or as being only nominal parties."[427] Contrarily, the Supreme Court has on occasion proclaimed that the suit against officers is actually a suit against the sovereign. Over a vigorous dissent, the

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[422] This is a surprising feature of *Osborn*. It culminates the tort liability of the Secretary of the Treasury; C_1 can obtain a garnishment of the Secretary's bank account. In *Edelman v. Jordan*, 415 U.S. 651, 665 (1974), Justice Rehnquist predicted, "[t]he funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois, and thus the award resembles far more closely the monetary award against the State itself . . . ." This is a fiction overlaying a fiction. Illinois was in fact immune from judgment, suing the officer instead of the state is a fiction. *See* Block, *supra* note 112, at 1079. That the state naturally would not let its officers pay is the second fiction. Sovereign immunity *means* the state does not have to pay!

[423] *See* RESTATEMENT (THIRD) OF TRUSTS § 84 (A.L.I. 2007) ("The trustee has a duty to see that trust property is designated or identifiable as property of the trust, and also a duty to keep the trust property separate from the trustee's own property and, so far as practical, separate from other property not subject to the trust.").

[424] *See, e.g.*, Johnson v. Gardner, 179 F.2d 114, 117 (9th Cir. 1950) (money judgments as part of equitable accounting were a province of equity, not tort); Cadle Co. v. Woods & Erickson, LLP, 345 P.3d 1049, 1053 (Nev. 2015).

> Creditors do not possess *legal* claims for damages when they are the victims of fraudulent transfers. Instead, creditors have recourse in *equitable* proceedings in order to recover the property, or payment for its value, by which they are returned to their pre-transfer position. Nevada law does not create a legal cause of action for damages in excess of the value of the property to be recovered.

Cadle, 345 P.3d at 1053 (citations omitted); *see* Getty Refin. & Mktg. Co. v. Park Oil, Inc., 385 A.2d 147, 150 (Del. Ch. 1978) ("[O]nce equity obtains jurisdiction, it may go on to decide the whole controversy."); Estate of Stonecipher v. Estate of Butts, 591 S.W.2d 806, 808 (Tex. 1979); Hutto v. Finney, 437 U.S. 678, 691–92 (1978) (holding an "ancillary" monetary award against a sovereign for attorneys' fees not a violation of the Eleventh Amendment).

[425] Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 448 (2004).

[426] John F. Duffy, *Sovereign Immunity, the Officer Suit Fiction and Entitlement Benefit*, 56 U. CHI. L. REV. 295, 296 (1989).

[427] Osborn v. Bank of U.S., 22 U.S. (9 Wheat.) 738, 858 (1824).

Supreme Court refused to do this in *United States v. Lee*.[428] But counter-examples exist.

The earliest counter-example comes from Chief Justice John Marshall, the author of the *Osborn* opinion. In *Governor of Georgia v. Madrazo*, a pirate (Moore) seized a Spanish vessel and a "cargo" of enslaved persons belonging to Madrazo.[429] The pirate sold the enslaved persons to Bowen who brought them across the border between Georgia and Spanish Florida.[430] These enslaved persons were seized by a federal customs officer and delivered to an agent of the Governor of Georgia, pursuant to a Georgia statute enacted in coordination with the Act of Congress of March 1807 (prohibiting importation of enslaved persons).[431] Consistent with this legislation, the Governor (William Rabun) sold some of the enslaved persons.[432] The proceeds received ($38,000) were paid into and commingled with the State Treasury.[433]

Madrazo then filed a libel (maritime talk for a "complaint") with the Federal District Court of Georgia, seeking possession of the enslaved persons and of the proceeds of those preciously sold.[434] The libel was dismissed by the district court but reinstated by the court of appeals.[435] At the request of the appeals court, the Governor (by this time, John Clarke) agreed to hold the enslaved persons as agent of the court.[436] The enslaved persons were thus *in custodia legis*.

So far, it would appear that, since maritime property (cargo) was *in custodia legis*, on remand, the district court could determine who was the best owner of the property. But, on further appeal to the Supreme Court, Chief Justice Marshall held that the federal marshal in the pre-appeal procedure had never properly arrested the enslaved persons.[437] This apparently required service of process on the enslaved persons themselves, which never occurred.[438] Accordingly, Madrazo was not proceeding *in rem* against cargo.[439] He was proceeding *in personam* against the Governor.[440]

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428 United States v. Lee, 106 U.S. 196, 220 (1882) (holding federal officers could be sued personally for unlawfully seizing private property, despite claims of sovereign immunity, because they acted beyond their lawful authority).

429 Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110, 110 (1828) (enslaved parties at issue).

430 *See id.* at 111.

431 *See id.*

432 *See id.*

433 *See id.* at 119.

434 *See id.* at 120.

435 *See id.* at 120–21.

436 *See id.* at 121.

437 *See id.*

438 *See id.*

439 *See id.*

440 *See Ex parte* Madrazzo, 32 U.S. (7 Peters) 627, 632 (1833) ("[N]ot a case where the property is in custody of a court of admiralty . . . ."); *see also* Bederman, *supra* note 109, at 986 ("The Fifth Circuit Court of Appeals affirmed the holding of the district court. It upheld the mistaken notion that 'the eleventh amendment applies to admiralty in rem actions,' without any discussion, aside from citing *Petition of Walsh* and *The Queen City*." (footnote omitted)).

The fact remained that the Governor still held Madrazo's personal property. Why did not *Osborn* apply? Because, in *Osborn* the Ohio Auditor claimed lawful possession of the "particular dollars" under an Ohio statute *that was unconstitutional*.[441] The auditor could not claim authority under state law.[442] In *Madrazo*, the Governor pleaded authority to possess the enslaved persons under a Georgia statute that was (at the time) perfectly constitutional.[443] Therefore the suit, nominally against the person of the Governor,[444] was really a suit against the State.[445] The Governor therefore could plead the defense of sovereign immunity, because suing the Governor was suing the State.[446]

The rule from *Osborn* is that suits against government officers are not suits against the sovereign.[447] The rule from *Madrazo* is that suits against officers *are* suits against the sovereign.[448] The distinction seems to be this: When the Government possesses property illegally, the officer may be sued personally. But where the officer's possession of property is legal, the plaintiff is really suing the state, which is not allowed.[449] My claim is that a suit for fraudulent transfer is on the *Osborn* side of the line.

It is not "an easy matter to reconcile all the decisions of the court in this class of cases."[450] Let us look at some cases on the *Madrazo* side of the line. In *Christian v. Atlantic & North Carolina Railroad Co.*, North Carolina bought shares of a

441 Osborn v. Bank of U.S., 22 U.S. (9 Wheat.) 738, 870 (1824) ("[A] State law imposing a tax on the Bank of the United States, was unconstitutional and void . . . .").

442 *See id.*

443 *Madrazo*, 26 U.S. at 123 ("It is not alleged, nor is it the fact, that this money has been brought into the treasury, or these Africans into the possession of the executive, by any violation of an Act of Congress. The possession has been acquired, by means which it was lawful to employ.").

444 Chief Justice Marshall strongly emphasizes that the pleadings named the Governor, not the name of the person who happened to be the Governor. *See id.* at 123–24. Presumably the case would have come out the same way if the name "John Clarke" (instead of "the Governor") had appeared in the pleadings.

445 *See id.* at 121 ("The process which issued from the Court of Admiralty not having been executed, the *res* was never in possession of that Court. The libel of Madrazo therefore, was not a proceeding against the thing, but a proceeding against the person for the thing.").

446 Chief Justice Marshall was cagey about whether the source of the sovereign immunity was the Eleventh Amendment. *See id.* at 124. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Suits in admiralty were considered different from suits in law or suits in equity. There is a lively dispute whether, in admiralty cases, states have sovereign immunity at all. Rather than answer this question, Chief Justice Marshall pointed out that suits by foreigners against a state had to be brought in the Supreme Court under its original jurisdiction. Madrazo commenced his suit in the district court, which had no jurisdiction. Therefore, even if the suit was in admiralty and therefore the Eleventh Amendment did not apply, the district court was without jurisdiction to sue the State directly. *See Madrazo*, 26 U.S. at 124. Justice Johnson, in dissent, thought that when the Supreme Court has original jurisdiction, it did not have *exclusive* jurisdiction; therefore, the district court had jurisdiction after all. *See id.* at 129 (Johnson, J., dissenting).

447 *See Osborn*, 22 U.S. at 798.

448 *Madrazo*, 26 U.S. at 123–24.

449 *See* Sloan Shipyards Corp. v. U.S. Shipping Bd. Emergency Fleet Corp., 258 U.S. 549, 566–67 (1922) ("But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him.").

450 Cunningham v. Macon & Brunswick R.R. Co., 109 U.S. 446, 451 (1883).

railroad.[451] To pay for them, North Carolina issued bonds in 1855, payable in 1886, with interest coupons payable twice yearly.[452] A statute indicated that North Carolina pledged the railroad shares to the bondholders.[453] Corporate dividends from the shares were allocated to pay semi-annual interest payments.[454] A Virginia citizen (*C*) held ten bonds but had received no interest payments since 1868.[455] *C* commenced a class action on behalf of all bondholders to foreclose on the stock.[456] The action was directed at the railroad, the President, directors of the railroad and the Treasurer of North Carolina.[457] *C* sought what today we would call a "charging order"[458] against the railroad according to which, if the railroad chose to issue dividends, the dividends otherwise payable to North Carolina as shareholder would be paid to a receiver to be appointed for the benefit of the bondholders.[459]

Said Justice Joseph P. Bradley:

> How the dividends due to the State can be seized and appropriated to the payment of the bonds, or how the stock held and owned by the State can be sold and transferred, through the medium of a suit in equity, without making the State a party to the suit, it is difficult to comprehend. The general rule certainly is, that all persons whose interests are directly to be affected by a suit in chancery must be made parties.[460]

Justice Bradley then re-interpreted North Carolina's 1855 enabling statute: It did not intend to create a pledge in the Article 9 sense of the word.

> ["Pledge"] . . . [was] us[ed] . . . in a popular and not in a technical sense. That section declares, first, that as security for the redemption of said certificates of debt the public faith of the State is hereby pledged to the holders thereof. This is no more than a solemn promise on the part of the State, to redeem the certificates . . . . There was no actual pledge. It was no more of a pledge than is made by a farmer when he pledges his growing crop . . . for the payment of a debt, without any delivery thereof. He does not use the word in its technical, but in its popular sense.[461]

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451 Christian v. Atl. & N.C. R.R. Co., 133 U.S. 233, 238 (1890).
452 *See id.* at 236.
453 *See id.*
454 *See id.*
455 *See id.* at 237.
456 *See id.*
457 *See id.*
458 *See* Baybank v. Catamount Constr., Inc., 693 A.2d 1163, 1167 (N.H. 1997).
459 *See Christian*, 133 U.S. at 241.
460 *Id.* (citation omitted).
461 *Id.* at 242.

Thus *C* was portrayed as having no property right against North Carolina's shares.[462] The Treasurer therefore had no duty to surrender the shares to *C*.[463] It would be different, said Justice Bradley, if *C* actually had a lien on non-state property and the State had a non-possessory junior lien (*e.g.*, a tax lien) in the same property.[464] In such a case:

> [T]he foreclosure and sale of the property will not be prevented by the interest which the State has in it . . . . Such cases do not affect the present, in which the object is to take and appropriate the State's property for the purpose of satisfying its obligations.[465]

C was therefore portrayed as having an *in personam* right against the State. Accordingly, the case is unlike *Osborn* or *Lee*, where the government trespassed on a pre-existing right.[466] The case turned on the fact that the North Carolina legislature in 1855 didn't mean a "technical" pledge.[467] *C* was not seeking to recover property but was simply trying to enforce North Carolina's obligation to pay interest on unsecured bonds.[468]

In contrast, when the Secretary of the Treasury in *Miller* takes payment from *D Corp.* for a tax debt of the *SH*, the Secretary holds that payment in trust for the C_g. A C_1 therefore has a "lien" on this payment and so *Christian* does not govern. It falls within the lien foreclosure exception Justice Bradley carved out.[469]

Harder to explain is *Cunningham v. Macon & Brunswick Railroad Co.*, where a railroad borrowed $1.95 million in exchange for a mortgage on its real estate.[470] Georgia guaranteed payment.[471] Later, the railroad issued a junior mortgage to holders of $600,000 in junior bonds.[472] Once again, Georgia guaranteed payment to the junior holders.[473] As to both mortgages, the Governor was the trustee in a "deed of trust," authorized to foreclose and sell in case of railroad default.[474]

The railroad defaulted.[475] Georgia paid the senior bondholders $1.95 million (by issuing state bonds to refinance the railroad bonds).[476] By paying the seniors, Georgia

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462 *See id.*
463 *See id.*
464 *See id.* at 243.
465 *Id.* at 243–44 (citation omitted).
466 *See* Osborn v. Bank of U.S., 22 U.S. 738, 858 (1824); United States v. Lee, 106 U.S. 196, 209–10 (1882).
467 *See Christian*, 133 U.S. at 242 (explaining "pledge" referred to an informal promise instead of an actionable promise).
468 *See id.* at 238.
469 *See id.* at 243–44.
470 Cunningham v. Macon & Brunswick R.R. Co., 109 U.S. 446, 447 (1883).
471 *See id.*
472 *See id.* at 448.
473 *See id.*
474 *See id.* at 449.
475 *See id.* at 447–48.
476 *See id.* at 448.

became subrogated to the mortgage.[477] As trustee of the deed of trust, the Governor held a foreclosure sale, where Georgia was the buyer (for $1 million).[478] The junior bondholders were simply ignored (even though Georgia guaranteed payment).[479]

C was a holder of junior bonds.[480] He was careful to sue the Governor only.[481] His claim is none too clearly described. Allegedly, the Governor-as-seller sold to Georgia, with the Governor serving as agent of the buyer.[482] *C* claimed the Governor-as-buyer had no authority to bid in the name of Georgia, and so the sale was void.[483] Furthermore, *C*'s "bill insists that by the taking up and payment of the . . . [senior] bonds their lien on the property is extinguished, and that of the second series is now become paramount, and this suit is brought to foreclose that mortgage lien."[484] The claim is deeply contradictory. It basically denies that Georgia was subrogated to the senior mortgage. Instead, the mortgage had disappeared through payment of the seniors, leaving the junior bonds with the senior mortgage. But if that is so, the railroad owned the real estate subject to the junior $600,000 mortgage. Georgia's title would be void.

The Court held that the suit against the Governor was really a suit against Georgia and therefore dismissible on sovereign immunity grounds.[485] The best way to understand the case is that Georgia was indeed subrogated to the senior $1.95 million mortgage. The Governor validly sold to Georgia for $1 million. In this foreclosure the junior mortgage was foreclosed. The foreclosure left the senior bonds with an unpaid shortfall of $950,000. Georgia lived up to its guaranty of the senior bonds. It issued state bonds worth $1.95 million in exchange for railroad bonds with face value of $1.95 million. As to the junior bonds, Georgia simply reneged on its promise. *C* was therefore suing Georgia *in personam* on the junior guaranty. Although *C* sued the Governor, not Georgia, Justice Samuel Freeman Miller pierced through the ruse of suing the Governor and concluded *C* was really suing the State.

In the modern *Miller* case, C_1 has an *existing* lien on property that the Secretary of the Treasury received from *D Corp.* In *Cunningham*, *C* had a lien junior to Georgia's lien, but that lien was destroyed by foreclosure; *C* was suing Georgia *in personam* on its guaranty, which was not allowed. Therefore, *Cunningham* cannot serve as authority to recast C_1's lawsuit as really a suit against the sovereign.

A pair of related cases make an interesting comparison. In *Poindexter v. Greenhow*, Virginia had issued coupons that could be used to pay Virginia taxes.[486]

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[477] *See id.*
[478] *See id.*
[479] *See id.*
[480] *See id.* at 447.
[481] *See id.*
[482] *See id.* at 448.
[483] *See id.* ("[T]he governor was not authorized to bid for the property, and the State had no constitutional power to make the purchase.").
[484] *Id.*
[485] *Id.* at 457 ("No money decree can be rendered against the State, nor against its officers, nor any decree against the treasurer . . . .").
[486] *See* Poindexter v. Greenhow, 114 U.S. 270, 273 (1885).

This seemed to be a scheme for Virginia to refinance pre-Civil-War debt.[487] Later Virginia passed a law commanding Virginia tax collectors to accept "gold, silver, United States treasury notes, national bank currency, and nothing else . . . ."[488] A taxpayer tendered coupons to a state tax collector (Greenhow), who refused to take them.[489] When no other payment was forthcoming, the tax collector levied the taxpayer's desk.[490] The taxpayer sued the tax collector personally in detinue for return of the desk.[491] The tax collector prevailed in state court on sovereign immunity grounds.[492] On a writ of error, the Supreme Court reversed.[493] The renunciation of the coupons was a violation of the Contracts Clause in the Constitution.[494] The tax collector could not assert such a statute to justify seizure of the desk.[495] The desk had to be returned.[496]

The story continues in *In re Ayers*. Virginia thereafter passed another statute requiring tax collectors to produce lists of taxpayers who had used coupons to pay taxes.[497] Virginia attorneys were then instructed to sue the taxpayers on this tax debt.[498] The taxpayers could only defend by proving that the coupons previously submitted by them were not counterfeit.[499] Ostensibly, the coupons were valid but a difficult standard of proof was imposed upon the taxpayer.[500]

C, a London entrepreneur, bought coupons at a 70% discount, hoping to resell them to Virginia taxpayers for a profit.[501] Traveling to Virginia, *C* sought an injunction to prevent Virginia's Attorney General from bringing such lawsuits against taxpayers.[502] *C*'s strategy was to improve the market for coupons now being held by *C*.[503] The federal district court issued the injunction.[504] The Attorney General defied the injunction and continued to sue taxpayers.[505] The federal court ordered the

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487 *See id.* at 271–72 (citing syllabus accompanying opinion of case).
488 *Id.* at 275.
489 *See id.* at 273.
490 *See id.* at 273–74.
491 *See id.* at 274.
492 *See id.*
493 *See id.* at 306.
494 *See id.* at 279–81.
495 *See id.* at 282–83.
496 *See id.* at 306.
497 *See In re* Ayers, 123 U.S. 443, 447 (1887).
498 *See id.*
499 *See id.* at 447–48.
500 *See id.* at 448 (explaining taxpayers had "the burden of proving the same being placed upon the tax-payer and the coupon being taken to be *prima facie* spurious and counterfeit").
501 *See id.* at 447 (noting that *C* "bought a large quantity of said coupons in the open money market of the city of London . . . amounting to more than one hundred thousand dollars nominally, at a cost of more than thirty thousand dollars").
502 *See id.* at 450.
503 *See id.* at 447.
504 *See id.* at 454–55.
505 *See id.* at 445.

Attorney General to prison for contempt of court.[506] The Attorney General responded by filing a writ of habeas corpus against the federal marshal.[507]

The Supreme Court granted the writ.[508] According to Justice Stanley Matthews, suing the Attorney General was the same as suing Virginia.[509] Since Virginia had sovereign immunity against equity actions under the Eleventh Amendment, so did the Attorney General.[510] The contempt order was therefore void.[511]

Why could the taxpayer sue the tax collector, but *C* could not get an injunction against the Attorney General? In *Poindexter*, the tax collector had taken the desk.[512] The color of authority was an unconstitutional statute. In *In re Ayers*, the Attorney General was acting under the authority of a constitutional Virginia statute.[513] Despicable Virginia may have been opening up old tax cases on the premise that the coupons were presumptively counterfeit, but such an imposition of the burden of proof was perfectly constitutional.

What to make of these cases and those like it? The Supreme Court, having introduced the fiction that suing an individual was not suing the sovereign, reserved the right to reject the fiction when private litigants sought to insinuate the federal courts in "politics."[514] Thus, in all several of the cases discussed, a sovereign reneged on its debts. That's politics! Or Virginia revived old tax cases to put taxpayers to the proof that the coupons tendered were not counterfeit. Politics! Therefore, suing the Governor or the Treasurer was a fiction. The sovereign was being sued! But where the sovereign violated a pre-existing property right, the property owner's suit against the officer in custody is not suing the sovereign.[515]

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[506] *See id.* at 445–46.

[507] *See id.* at 445.

[508] *See id.*

[509] *See id.* at 488 ("[W]here the action was not in the name of the State, but was brought by the Governor in its behalf . . . 'the State . . . may be considered as a party in this.'").

[510] *See id.* at 507.

[511] *See id.* at 507–08.

[512] Poindexter v. Greenhow, 114 U.S. 270, 273 (1885).

[513] *In re* Ayers, 123 U.S at 447.

[514] According to Justice Anthony Kennedy:

> Not only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf.

Alden v. Maine, 527 U.S. 706, 749 (1999). This attitude of keeping courts out of politics is on display in *Hans v. Louisiana*, 134 U.S. 1, 1–3 (1890), where Louisiana reneged on its promise to repay and a Louisiana citizen sued in federal court for damages. The Supreme Court held that the Eleventh Amendment applied to bar the suit, even though by its terms, the Amendment prevents a citizen of *another* state to sue a state in federal court. *See id.* at 10–11; *see also* Hagood v. Southern, 117 U.S. 52, 53 (1886) (holding suing state officers to compel South Carolina to perform its obligation to pay was really a suit against South Carolina).

[515] "The result, then, of former decisions is: That a suit against officers of the United States to recover property not legally in their possession, is not a suit against the United States . . . ." *In re* Ayers, 123 U.S. at 515.

In *Larson v. Domestic & Foreign Commerce Corp.*, the Court showed how arbitrary the line-drawing is between suing government officers who withhold property from its rightful owners (*Osborn*) and suits against officers which are deemed to be really suits against the sovereign (*Madrazo*).[516] The case involved a pile of federally owned coal located at a military base in 1947.[517] The War Assets Administration ("WAA") was statutorily authorized to sell this coal "F.O.B. CARS, Camp Maxey. . . ."[518] Accordingly, the WAA solicited bids.[519] The plaintiff's bid was accepted.[520] The contract required the plaintiff to deposit $17,500 with the First National Bank in Dallas with instructions that the bank was to pay the Government upon presentment of invoices.[521] The plaintiff did not deposit funds, but it arranged for the bank to write the WAA a standby letter of credit whereby the bank would pay upon presentment of an invoice.[522] There can be no doubt that the letter of credit complied with the contract. The plaintiff took the position that, at the moment the letter of credit was sent, the plaintiff became the owner of the coal.[523] The WAA took the position that arranging for the letter of credit without funding it by depositing cash did not fulfill the contract.[524] The WAA therefore canceled the contract and resold the pile to another buyer.[525] The plaintiff could have sued in the Court of

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[516] Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 690–91 (1949).

[517] *See* Domestic & Foreign Com. Corp. v. Littlejohn, 165 F.2d 235, 236 (D.C. Cir. 1947), *rev'd sub. nom.*, Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682 (1949).

[518] *See Littlejohn*, 165 F.2d at 236.

[519] *See id.*

[520] *See id.*

[521] *See id.*

[522] *See id.*

[523] *See* Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 692 (1949) (discussing the plaintiff's complaint, which alleged that the contract "with the United States was an immediate contract of sale under which title to the coal had passed"). The modern cite for this is UCC § 2-401(3)(b), which provides: "(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods, . . . (b) if the goods are at the time of contracting already identified and no documents of title are to be delivered, title passes at the time and place of contracting." U.C.C. § 2-401(3)(b). Since the contract was F.O.B. CARS, army base, section 2-319(1) provides:

> (1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place . . . is a delivery term under which
> (a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods . . . and bear the expense and risk of putting them into the possession of the carrier . . .
> (c) when under . . . (a) . . . the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board . . . .

U.C.C. § 2-319(1). This language suggests that title passes to the plaintiff only when a carrier took possession and loaded the cars, which never happened. The plaintiff's claim would then not be a property claim but a claim for damages.

[524] *See Larson*, 337 U.S. at 382; *see also* U.C.C. § 2-511(2) ("Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.").

[525] *See Littlejohn*, 165 F.2d at 236.

Claims for breach-of-contract damages (under the Tucker Act,[526] which waives sovereign immunity). But the plaintiff wanted the coal as such and wanted the federal district court (not the court of claims) to take jurisdiction.[527] The plaintiff was careful not to make the United States a named defendant.[528] The defendant was the Administrator of the WAA.[529]

The district court dismissed the complaint on grounds of sovereign immunity,[530] taking the position that the suit was *really* a suit against the government on the *Madrazo* side of the line. The court of appeals reversed,[531] placing the case on the *Osborn* side of the line. The Supreme Court reversed again over dissents.[532] It placed the case on the *Madrazo* side.

Said Chief Justice Vinson, the case would be easy if the claim was that the government officer had committed a tort.[533] That would be on the *Osborn* side of the line.[534]

> If the War Assets Administrator had completed a sale of his personal home, he presumably could be enjoined from later conveying it to a third person. On a similar theory, where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. . . . [I]n such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power.[535]

This was one kind of case where one could sue the officer. Another was where the officer purported to act under a statute that was unconstitutional.[536]

The *Larson* case did not fall within either of the *Osborn* categories. The *Madrazo* line was crossed because the Administrator was selling sovereign property.

> There was, it is true, an allegation that the Administrator was acting "illegally," and that the refusal to deliver was "unauthorized." But

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[526] *See* 28 U.S.C. § 1491(a)(1) (2024).
[527] *See Larson*, 337 U.S. at 688–89.
[528] *See id.* at 692.
[529] *See id.* at 686.
[530] *See id.* at 689.
[531] *See id.* at 685.
[532] *See id.* at 705.
[533] *See id.* at 687.
[534] *See id.* at 688–89.
[535] *Id.* at 689–90.
[536] *See id.* at 690.

> these allegations were not based and did not purport to be based upon any lack of delegated power. Nor could they be, since the Administrator was empowered by the sovereign to administer a general sales program encompassing the negotiations of contracts, the shipment of goods and the receipt of payment. A normal concomitant of such powers, as a matter of general agency law, is the power to refuse delivery when, in the agent's view, delivery is not called for under a contract and the power to sell goods which the agent believes are still his principal's to sell.[537]
>
> . . . .
>
> . . .We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign.[538]

Thus, even if the Administrator was holding property whose title had passed to the plaintiff, the Administrator was just doing his duty under a constitutional statute. This *is* the *Madrazo* case *tout court*.[539]

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[537] *Id.* at 691–92 (footnote omitted).

[538] *Id.* at 695 (footnote omitted).

[539] Justice Vinson, however, was embarrassed by *Goltra v. Weeks*, 271 U.S. 536 (1926). In that case, the government had leased barges. *See id.* at 539. The administrators grumbled that provisions of the lease were violated and perhaps the administrators would repossess. *See id.* at 541. The Court authorized an injunctive action against the individual officer for his allegedly mistaken contractual interpretation. *See id.* at 550. This directly contradicts the result reached in *Larson*. *Goltra* was dismissed as based on a mistake. The *Goltra* Court had overlooked *Goldberg v. Daniels*, 231 U.S. 218 (1913). There, the Secretary of the Navy held an auction of a naval vessel. *See id.* at 221. A plaintiff won with a bid that enclosed a certified check for the purchase price. *See id.* The case was tried on the merits. *See id.* The meaning of the contract was that the auction constituted a mere offer which the government could (but need not) accept affirmatively. *See id.* Since the Secretary did not accept, there was no contract and no ownership of the property to be sold. *See id.* So far, this would seem to support the plaintiff in the *Larson* case, since the lower court in *Goldberg* did allow the Secretary of the Navy to be sued as an individual. On appeal to the Supreme Court, the plaintiff argued that the interpretation of the auction was incorrect, that a sale had been completed, and that the plaintiff owned the property. *See id.* But the Court would not listen to an argument on the merits. Justice Oliver Wendell Holmes disposed of the appeal in three sentences:

> We see no sufficient reason for throwing doubt upon this premise for the decision, but there is another that comes earlier in point of logic. The United States is the owner in possession of the vessel. It cannot be interfered with behind its back and, as it cannot be made a party, this suit must fail.

Id. at 221–22 (citations omitted). It would appear that Justice Holmes was appealing to the "navy" exception in *The Siren*, 74 U.S. (7 Wall.) 152 (1869), alluded to earlier: the sovereign is immune if a private claimant seeks to libel a naval vessel. *See supra* text accompanying notes 176–80. (Incidentally, Justice Holmes relied

Larson, however, can be distinguished from C_1's fraudulent transfer claim against the Secretary of the Treasury in *Miller*. In *Larson*, Congress said to the Administrator: "Go out and make contracts and interpret what they mean."[540] In *Miller*, no statute authorizes the Secretary of the Treasury to confiscate C_1's property and apply it to some stranger's tax debt.[541] Therefore, *Larson* may be on the *Madrazo* side of the line, but *Miller* aligns with *Osborn*.

One last matter should be addressed. Since the Secretary of the Treasury will not have kept the trust funds segregated, *T* may commence the action on the assumption that the Secretary had performed his fiduciary duty. A money judgment follows as part of the cleanup jurisdiction attendant to equitable accountings.[542] Complicating (but not contradicting) this conclusion is the holding in *Edelman v. Jordan*.[543] In this case, Illinois awarded welfare benefits from the time of administrative approval, not from the time of application, as required by the Social Security Act.[544] Illinois also violated the Social Security Act by taking too long to decide eligibility.[545] This triggered an *Ex parte Young*[546] remedy against the Illinois Director of the Department of Public Aid (Edelman), compelling him, in the future, to backdate payments to the time of the application.[547] This injunction was for the benefit of the class of future welfare recipients going forward.[548] The propriety of this remedy was conceded by all.[549] But the plaintiff (representing the class of recipients who had applied and been approved) wished a money judgment against Edelman for class entitlements that should have been available if Illinois had complied with the Social Security Act.[550] Superficially, this looks like cleanup jurisdiction. The equitable proceeding against Edelman had been commenced.[551] Now the district court could issue a money judgment against Edelman, in order to wrap up the controversy. The Supreme Court disagreed, on Eleventh Amendment grounds.[552] Suing the officer for a money

on sovereign immunity even though the government never raised the point below. Sovereign immunity was treated as unwaivable).

Said Justice Vinson of this decision, *Goldberg* was right and *Goltra* was overruled: "In so holding the [*Goldberg*] Court said, in effect, that the question of title was immaterial to the court's jurisdiction. Wrongful the Secretary's conduct might be, but a suit to relieve the wrong by obtaining the vessel would interfere with the sovereign behind its back and hence must fail." *Larson*, 337 U.S. at 700–01 (footnote omitted).

540 *Larson*, 337 U.S. at 691–92, 701–03.

541 *See generally* United States v. Miller, 604 U.S. 518 (2025) (making no reference to any statute authorizing Secretary of the Treasury to confiscate property in satisfaction of a third-party's debt).

542 *See supra* note 425 and accompanying text.

543 Edelman v. Jordan, 415 U.S. 651, 678 (1974) (holding Eleventh Amendment barred a district court order effectuating retroactive payments of benefits found to have been wrongfully withheld).

544 *See id.* at 655–56.

545 *See id.*

546 *Ex parte* Young, 209 U.S. 123, 159 (1908); *see supra* note 186.

547 *See Edelman*, 415 U.S. at 663–64.

548 *See id.* at 664.

549 *See id.*

550 *See id.* at 656.

551 *See id.* at 658.

552 *See id.* at 663. "While the Amendment by its terms does not bar suits against a State by its own citizens,

judgment was really suing the State, even though suing the officer for an injunction going forward was *not* suing the State.[553] The single lawsuit commenced by the plaintiff had two natures. Thus, Justice Rehnquist in his opinion promulgated the new rule that, in an *Ex parte Young* equity action, an injunction could issue *prospectively* but no relief could be had *retrospectively* for compensatory damages.[554]

Edelman, however, can be distinguished from C_1 pursuing the Secretary of the Treasury for holding fraudulently received property from *D Corp.* In the *Miller* context, the Secretary *prospectively* is being ordered to cough up property owned by C_1. Where the Secretary cannot do so through inattention to his fiduciary duty, a money judgment must issue. The money judgment is part of the prospective relief. In *Edelman*, the director did not possess any property of the plaintiff. The plaintiff was seeking to establish a judicial lien on state property as damages or compensation for past slowness on the part of the Administrator.[555] The money judgment sought was purely retroactive.

Some dictum may seem at first to problematize this distinction. In *Edelman*, Justice Rehnquist complains that the Seventh Circuit Court of Appeals had permitted the money judgment

> because it was in the form of "equitable restitution" instead of damages . . . . But we must judge the award actually made in this case, and not one which might have been differently tailored in a different case, and we must judge it in the context of the important constitutional principle embodied in the Eleventh Amendment.[556]

So far so good. The lower court styled the action "equitable restitution" but really issued a money judgment.[557] Restitution refers to giving back to the plaintiff that which the plaintiff once possessed.[558] In *Edelman*, the plaintiff had given nothing to Illinois and so it was not properly a "restitution" case.[559] (In contrast, *Miller*, if not a

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this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as citizens of another State." *Id.* at 662–63 (citations omitted).

[553] *See id.*

[554] *See id.* at 664–68.

[555] *See id.* at 653, 665–56.

[556] *Id.* at 665–66.

[557] *See id.* at 665.

[558] *See* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 3 cmt. d (A.L.I. 2011).

> The law of restitution and unjust enrichment requires the surrender of benefits wrongfully obtained, but it does not tell us whether the defendant's conduct is wrongful in a particular case. As a practical matter, therefore, the contours of the claim in restitution to recover benefits wrongfully obtained will be determined by principles of law outside the scope of this Restatement.

Id.

[559] *See Edelman*, 415 U.S. at 668.

restitution case in the "restore me in possession" sense, is a case in which C_1 seeks access to property held in trust for her by the Secretary of the Treasury).

More troubling is Justice Rehnquist's analogy of the *Edelman* remedy to the remedy sought in *Ford Motor Co. v. Department of Treasury*.[560] In *Ford Motor*, Indiana collected an unconstitutional tax.[561] Here, Ford Motor had something and was compelled to hand funds over to the Treasurer of Indiana against its will[562]—exactly what happened in *Osborn*. This *does* sound like restitution!

Anticipating that taxpayers might protest the propriety of the assessment, Indiana had a procedure for obtaining refunds.[563] The taxpayer could bring a suit in state court to obtain the refund.[564] Ford Motor did not wish to take that route. It sued in *federal* court claiming that its property had been illegally taken by Indiana, thereby triggering an *Osborn*-style right to sue the Treasurer personally for a remedy.[565]

Said Justice Rehnquist:

> Were we to uphold this portion of the District Court's decree, we would be obligated to overrule the Court's holding in [*Ford Motor*] . . . . The term "equitable restitution" would seem even more applicable to the relief sought in that case, since the taxpayer had at one time had the money, and paid it over to the State pursuant to an allegedly unconstitutional tax exaction. Yet this Court had no hesitation in holding that the taxpayer's action was a suit against the State, and barred by the Eleventh Amendment. We reach a similar conclusion with respect to the retroactive portion of the relief awarded by the District Court in this case.[566]

Tax is a peculiar area of law. The Tax Injunction Act forbids an injunction against taxing authorities to prevent collecting illegal taxes.[567] The taxpayer is expected to pay, surrender all its property right, and sue for a refund *in personam*, pursuant to a waiver of sovereign immunity. Therefore, Indiana did not steal from Ford Motor. Ford Motor genuinely alienated the funds (even though Indiana obtained them by duress). Ford Motor had no *Osborn* remedy against the Treasurer.[568] In effect, *Ford Motor* resembles *Christian* and *Cunningham*, where the plaintiff was conceived as having

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560 *See Edelman*, 415 U.S. at 665–66 ("[T]he award resembles far more closely [a] monetary award against the State itself . . . ." (citing Ford Motor Co. v. Dep't of Treasury of Ind., 323 U.S. 459, 464 (1945))).

561 *See Ford Motor*, 323 U.S. at 460–61 (explaining the allegation that Indiana collected a tax which violated the Commerce Clause and the Fourteenth Amendment).

562 *See id.* at 460.

563 *See id.* at 463.

564 *See id.*

565 *See id.* (explaining why the petitioner filed suit in federal district court).

566 Edelman v. Jordan, 415 U.S. 651, 668–69 (1974).

567 **Error! Main Document Only.**28 U.S.C. § 1341 (2024) ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.").

568 *See Ford Motor*, 323 U.S. at 464.

no pre-existing property right with which government officials were wrongfully interfering.[569] *Ford Motor* does *not* stand for the proposition that, when the sovereign wrongfully takes funds, the remedy is always for money damages, which is barred by sovereign immunity.

To summarize, the Supreme Court authorizes suit against individual government officers when the officer has wrongfully taken property of another. Therefore, under Utah law, C_1 can recover from the Secretary of the Treasury because the IRS has received a fraudulent transfer voidable under Utah law. Suing the Secretary of the Treasury is not suing the State.

V. AN ALTERNATIVE THEORY FOR SUING THE IRS

Keeping in mind that, on the merits, the IRS almost certainly did not receive a fraudulent transfer, there is an alternate way *T* in *Miller* could pursue fraudulent transfers made to the IRS more than two and less than four years before bankruptcy—a theory that bypasses the IRS's supposed sovereign immunity from suit under Utah law.

According to Bankruptcy Code section 544(a):

> The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—
>
> (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;
>
> (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists . . . .[570]

This is the famous strong-arm power that establishes *T* as a judgment creditor as of the time of the bankruptcy petition. Section 544(a)'s principal use is to "avoid" security interests that are unperfected.[571]

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569 *Id.* at 463–64; *see supra* text accompanying notes 462–66.

570 11 U.S.C. § 544(a)(1)–(2).

571 *See* IPC (USA), Inc. v. Ellis (*In re* Pettit Oil Co.), 917 F.3d 1130, 1133 (9th Cir. 2019). The theory uses UCC section 9-317(a)(2) to establish that the unperfected secured party is "subordinated" to *T*'s judicial lien. *See id.* at 1133–34. On the difference between avoidance and subordination, see David Gray Carlson, *The Trustee's Strong Arm Power Under the Bankruptcy Code*, 43 S. CAR. L. REV. 841, 856–63 (1992).

T could use section 544(a) to establish that *T*'s hypothetical judicial lien is senior to the rights of a third party to property fraudulently transferred by *D Corp.*[572] If section 544(a) is the theory and the IRS is the defendant, section 106(a)(1) applies to deprive the IRS of sovereign immunity.[573] In section 544(b)(1), according to *Miller*, the IRS has sovereign immunity because no flesh-and-blood trigger creditor could beat the sovereign immunity defense of hypothetically pleaded by the IRS.[574] If *T* proceeds under section 544(a), however, *T* does not need a trigger creditor.[575] *T* is strictly a "hypothetical fellow"[576] who sues the IRS directly, and the IRS is thereby deprived of sovereign immunity by section 106(a)(1).[577]

Justice Jackson alludes to section 544(a) in *Miller*.[578] *T* had claimed in his argument that, if the IRS prevailed, section 106(a)(1)'s waiver of sovereign immunity in section 544 cases becomes totally meaningless—an interpretive *faux pas*.[579] Justice Jackson conceded this may be so for section 544(b)(1) cases, but waiver of sovereign immunity for section 544 cases would still apply when *T* asserts a section 544(a) theory.[580]

> [S]ubsection (a), unlike subsection (b), does not contain an actual-creditor requirement. A trustee can therefore use subsection (a) to set aside certain transfers—specifically, transfers of certain liens—without identifying an actual creditor capable of invalidating those transfers under state law. And federal tax law separately provides that tax liens . . . may be invalidated under particular circumstances. See 26 U.S.C. § 6323. As a result, a trustee can avoid transfers of certain tax liens under § 544(a) without identifying an actual creditor and without needing to identify a waiver of immunity to sustain a claim under the Internal Revenue Code. By giving courts jurisdiction to

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572 *See* Lewis v. Takacs (*In re* Stone Pine Inv. Banking, LLC), Nos. 21-1423, 21-1431, 21-1439, 2023 WL 8758947, at *11–12 (10th Cir. Dec. 19, 2023) (tolling the UVTA statute of limitations because a hypothetical creditor could not have discovered the fraud in a publicized transfer); DeGiacomo v. Sacred Heart Univ., Inc. (*In re* Palladino), 942 F.3d 55, 58 n.2 (1st Cir. 2019); Olds v. Bedizel (*In re* Bedizel), 805 F.Appx. 841, 844 (11th Cir. 2020); *In re* Archdiocese of Milwaukee, 483 B.R. 855, 860 (Bankr. E.D. Wis. 2012) ("Although more commonly used to attack unperfected security interests or defective mortgages or deeds, the strong arm power of § 544(a) can be used to prosecute fraudulent transfers, assuming state law would permit that.").

573 11 U.S.C. § 106(a).

574 *See* United States v. Miller, 604 U.S. 518, 523–25 (2025).

575 *Id.* at 536.

576 Frank R. Kennedy, *The Trustee in Bankruptcy Under the Uniform Commercial Code: Some Problems Suggested by Articles 2 and 9*, 14 RUTGERS L. REV. 518, 524 (1960).

577 Justice Jackson thus errs when she opines: "The 'actual creditor' requirement serves as an important check on the trustee's § 544(b) powers. Absent the actual-creditor requirement, a trustee could use § 544(b) to unwind transactions that would never actually be at the risk of invalidation outside of bankruptcy proceedings." *Miller*, 604 U.S. at 524. Since *T* dispenses with the actual creditor when proceeding under section 544(a), the actual creditor serves as no check at all on *T*.

578 *Id.* at 536.

579 *See id.* at 527.

580 *See id.* at 536–37.

> hear those types of claims against the Government, then, § 106(a) serves a clear purpose "with respect to" § 544.[581]

Justice Jackson appeared to be oblivious that section 544(a) renders section 544(b)(1) largely superfluous to IRS liability for tax payments more than two years before bankruptcy.

A word should be said about temporality of claims in the UVTA. According to section 544(a)(1), we are to pretend that *T* "extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien . . . ."[582] In *Miller*, *D Corp.* fraudulently transferred to the IRS in 2014 (supposedly) and *T* hypothetically extended credit in 2017.[583] That makes *T* a "future" creditor. Future creditors have no avoidance right under UVTA section 5(a),[584] which expresses the "easiest" theory by which a C_1 could avoid the transfer. Under section 5(a), if C_1 was a "present" creditor on the day of the fraudulent transfer, C_1 need prove only that *D Corp.* was insolvent that day, and the IRS gave back no reasonably equivalent value (which we assume *ex hypothesi* is the case).[585] This theory is not available when *T* proceeds under section 544(a) since the fraudulent transfer was in 2014 and *T* became a "let's pretend" creditor in 2017.[586]

Instead *T* must proceed as a *future* creditor under UVTA section 4(a), which provides:

> A transfer made . . . by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

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[581] *Id.* at 536. Justice Jackson accurately describes the effect of section 544(a) on an unperfected tax lien. A tax lien arises when a tax is assessed, 26 U.S.C. § 6322 (2024), but until the IRS files notice of a lien, *id.* § 6323(f) (describing where the IRS must file), the lien "shall not be valid as against any . . . judgment lien creditor . . . ." *Id.* § 6323(a).

[582] 11 U.S.C. § 544(a)(1). This strange predicate was designed to defeat *Constance v. Harvey*, 215 F.2d 571 (2d Cir. 1954) (per curiam), *cert. denied*, 348 U.S. 913 (1955), which wreaked havoc on chattel mortgages prior to the adoption of the UCC. Under *Constance*, unsecured creditors whose claims arose in the gap between creation and recordation of a chattel mortgage could later obtain judicial liens that were senior to the subsequently perfected chattel mortgage. *Id.* at 573–74. If later a debtor filed for bankruptcy, *Constance* permitted *T*, as part of the strong-arm power, to imagine that the lien was associated with "gap" credit (even if no gap creditor actually existed). *Id.* at 574–75. This allowed *T* to invalidate perfected chattel mortgages whenever an unperfected gap existed, no matter how long it had been since the lender perfected. *See* Carlson, *supra* note 571, at 851–55.

[583] *See Miller*, 604 U.S. at 525.

[584] Blame for the distinction between present and future creditors may be laid at the doorstep of Chancellor Kent. *See* Reade v. Livingston, 3 Johns. Ch. 481, 481 (N.Y. Ch. 1818); John C. McCoid II, *Constructively Fraudulent Conveyances: Transfers for Inadequate Consideration*, 62 TEX. L. REV. 639, 644–47 (1983).

[585] UNIF. VOIDABLE TRANSACTIONS ACT § 5(a) (UNIF. L. COMM'N 2014).

[586] *See Miller*, 604 U.S. at 525.

> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
> (2) without receiving a reasonably equivalent value in exchange for the transfer . . . , and the debtor:
>> (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>> (ii) intended to incur, or believed or reasonably should have believed that [he or she] would incur, debts beyond [his or her] ability to pay as they became due.[587]

T may have difficulty with the claim that *D Corp.* intended to defraud future creditors. In *Miller*, there is no evidence that *D Corp.*'s board of directors authorized payment by *D Corp.* of the *SH* tax debt. Rather, it is probable that agents of *D Corp.* conspired with the *SH* to embezzle *D Corp.* funds. In that case, it is hard to say that *D Corp.* intended to defraud future creditors such as *T*. *D Corp.* was simply the victim of the theft and therefore had no intent at all. *T* will then have to prove that in 2014, *D* was engaged in a business for which *D Corp.*'s remaining assets were unreasonably small, or that *D Corp.* intended to incur a debt that *D Corp.* could not pay. These are the proxies for insolvency that appear in section 4(a)(2).[588] A constructive fraudulent transfer with insolvency proxies would be *T*'s only chance to recover from the IRS for the 2014 fraudulent transfers.

This differs from *T*'s burden if section 544(b)(1) applied. To activate UVTA section 5(a), a trigger C_i would have to be a "present creditor" in 2014.[589] In *Miller*, such a creditor existed.[590] In other cases, if *D Corp.* had long term corporate debt at the time of the fraudulent transfer that was still outstanding at the time of bankruptcy, *T* could use a bondholder as the trigger to sustain the section 5(a) theory. If no longstanding debt existed in at the time of the fraudulent transfer, it is possible that no C_i from 2013 was still a C_i in 2017. *T*, under section 544(b)(1), would then have to rely on a future creditor as the trigger, throwing *T* back into section 4(a). Thus, *T* has more chances to win under section 544(b)(1) than under section 544(a), where *T* is necessarily a "future" creditor.

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587 UNIF. VOIDABLE TRANSACTIONS ACT § 4(a).
588 *Id.* § 4(a)(2).
589 *See id.* § 5(a).
590 *Miller*, 604 U.S. at 525–26.

CONCLUSION

In *United States v. Miller*, a failing corporation (*D Corp.*) used its funds to pay the tax debt of its *SH*.[591] The Supreme Court assumed that the IRS had received a fraudulent transfer because *D Corp.* sent assets to the IRS and received nothing in return.[592] This was wrong. *D Corp.* was subrogated to the IRS's right to collect the tax debt from the *SH*. This cause of action is a reasonably equivalent value had and received by *D Corp.* The IRS did not receive a fraudulent transfer.

The Court then ruled that, under Utah law, a creditor of *D Corp.* could not sue the IRS for receiving a fraudulent transfer.[593] Such a suit, the Court said, violates the sovereign immunity of the IRS.[594] Because this was so, the bankruptcy trustee (*T*) could not, via Bankruptcy Code section 544(b), subrogate to a creditor's avoidance rights and sue the IRS within a federal bankruptcy proceeding.[595] Wrong again! A Utah creditor had (*ex hypothesi*) a *prima facie* case of fraudulent transfer against the IRS. If the creditor actually brought this case, the IRS would have to plead sovereign immunity as an affirmative defense or lose it. By section 544(b)(1), *T* expropriates the *prima facie* cause of action with defenses not yet pled. When *T* actually brings the case in bankruptcy, the IRS, contemplating its defenses, will find that sovereign immunity has been waived by Bankruptcy Code section 106(a)(1).

The Supreme Court also overlooked the fact that section 702 of the Administrative Procedure Act waives sovereign immunity in all cases where a plaintiff seeks equitable relief. That is precisely what a Utah creditor seeks in fraudulent transfer litigation.

Finally, a fraudulent transferee holds what it receives in trust for the creditors of *D Corp.* Under Supreme Court precedent, where a government official has taken property, the property owner may sue the official in charge of the stolen property for its return. These actions do not constitute suits against the sovereign and so sovereign immunity does not apply. If a creditor of *D Corp.* sues the Secretary of the Treasury for fraudulent transfer instead of the United States, the creditor fully recovers and therefore so does the bankruptcy trustee.

The only thing commendable about the *Miller* case is the result. The IRS is not liable for receiving a fraudulent transfer. The IRS should have won on the merits. Properly, it had no defense of sovereign immunity.

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[591] *Id.* at 525.
[592] *See id.*
[593] *See id.* at 539.
[594] *See id.*
[595] *See id.*