

THOMAS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 02–1606

TENNESSEE STUDENT ASSISTANCE CORPORATION,
PETITIONER *v.* PAMELA L. HOOD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[May 17, 2004]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins,
dissenting.

We granted certiorari in this case to decide whether Congress has the authority to abrogate state sovereign immunity under the Bankruptcy Clause. 539 U. S. 986 (2003). Instead of answering this question, the Court addresses a more difficult one regarding the extent to which a bankruptcy court’s exercise of its *in rem* jurisdiction could offend the sovereignty of a creditor-State. I recognize that, as the Court concludes today, the *in rem* nature of bankruptcy proceedings might affect the ability of a debtor to obtain, *by motion*, a bankruptcy court determination that affects a creditor-State’s rights, but I would not reach this difficult question here. Even if the Bankruptcy Court could have exercised its *in rem* jurisdiction to make an undue hardship determination by motion, I cannot ignore the fact that the determination in this case was sought pursuant to an adversary proceeding. Under *Federal Maritime Comm’n v. South Carolina Ports Authority*, 535 U. S. 743 (2002), the adversary proceeding here clearly constitutes a suit against the State for sovereign immunity purposes. I would thus reach the easier question presented and conclude that Congress lacks authority to abrogate state sovereign immunity under the Bankruptcy Clause.

I

The Court avoids addressing respondent’s principal argument—which was the basis for the Court of Appeals’ decision and which this Court granted certiorari in order to address—namely, that Congress possesses the power under the Bankruptcy Clause to abrogate a State’s sovereign immunity from suit. Instead, the Court affirms the judgment of the Court of Appeals based on respondent’s alternative argument, *ante*, at 3, that the Bankruptcy Court’s decision was “an appropriate exercise of [its] *in rem* jurisdiction,” Brief for Respondent 35. Although respondent advanced this argument in the proceedings before the Bankruptcy Appellate Panel of the Sixth Circuit, Brief for Appellee in No. 00–8062, p. 8, she declined to do so in the Court of Appeals. Indeed, before that court, respondent relied entirely on Congress’ ability to abrogate state sovereign immunity under the Bankruptcy Clause rather than on any *in rem* theory because, under her reading of *Missouri v. Fiske*, 290 U. S. 18 (1933), “there is no *in rem* exception to a state’s Eleventh Amendment immunity” in bankruptcy. Brief for Appellee in No. 01–5769 (CA6), p. 24. Furthermore, respondent did not raise the *in rem* argument in her brief in opposition before this Court. Under this Court’s Rule 15.2, we may deem this argument waived. *Caterpillar Inc. v. Lewis*, 519 U. S. 61, 75, n. 13 (1996). And, we should do so here both because the argument is irrelevant to this case, and because the *in rem* question is both complex and uncertain, see *Baldwin v. Reese*, 541 U. S. ___ (2004).

A

In *Federal Maritime Comm’n*, the South Carolina Maritime Services, Inc. (SCMS), filed a complaint with the Federal Maritime Commission (FMC), an independent agency, alleging that a state-run port had violated the Shipping Act of 1984, 46 U. S. C. App. §1701 *et seq.* We

THOMAS, J., dissenting

assumed without deciding that the FMC does not exercise “judicial power,” *Federal Maritime Comm’n*, 535 U. S., at 754, and nonetheless held that state sovereign immunity barred the adjudication of the SCMS’ complaint. *Id.*, at 769.

Federal Maritime Comm’n turned on the “overwhelming” similarities between FMC proceedings and civil litigation in federal courts. *Id.*, at 759. For example, FMC’s rules governing pleadings and discovery are very similar to the analogous Federal Rules of Civil Procedure. *Id.*, at 757–758. Moreover, we noted that “the role of the [administrative law judge], the impartial officer designated to hear a case, is similar to that of an Article III judge.” *Id.*, at 758 (footnote and citation omitted). Based on these similarities, we held that, for purposes of state sovereign immunity, the adjudication before the FMC was indistinguishable from an adjudication in an Article III tribunal. See *id.*, at 760–761. Thus, *Federal Maritime Comm’n* recognized that if the Framers would have found it an “impermissible affront to a State’s dignity to be required to answer the complaints of private parties in federal courts,” the Framers would have found it equally impermissible to compel States to do so simply because the adjudication takes place in an Article I rather than an Article III court. *Ibid.*

Although the Court ignores *Federal Maritime Comm’n* altogether, its reasoning applies to this case. The similarities between adversary proceedings in bankruptcy and federal civil litigation are striking. Indeed, the Federal Rules of Civil Procedure govern adversary proceedings in substantial part. The proceedings are commenced by the filing of a complaint, Fed. Rule Bkrtcy. Proc. 7003; process is served, Rule 7005; the opposing party is required to file an answer, Rule 7007; and the opposing party can file counterclaims against the movant, Rule 7013. Federal Rule of Civil Procedure 8 applies to the parties’ pleadings.

Fed. Rule Bkrcty. Proc. 7008. Even the form of the parties' pleadings must comply with the federal rules for civil litigation. Rule 7010. "Likewise, discovery in [adversary proceedings] largely mirrors discovery in federal civil litigation." *Federal Maritime Comm'n, supra*, at 758. See Fed. Rules Bkrcty. Proc. 7026–7037 (applying Fed. Rules Civ. Proc. 26–37 to adversary proceedings). And, when a party fails to answer or appear in an adversary proceeding, the Federal Rule governing default judgments applies. Fed. Rule Bkrcty. Proc. 7055 (adopting Fed. Rule Civ. Proc. 55).

In spite of these similarities, the Court concludes that, because the bankruptcy court's jurisdiction is premised on the res, the issuance of process in this case, as opposed to all others, does not subject an unwilling State to a coercive judicial process. *Ante*, at 10. The Court also views the adversary proceeding in this case differently than a typical adversary proceeding because, absent Fed. Rule Bkrcty. Proc. 7001(6), the Court concludes that a debtor could obtain an undue hardship determination by motion consistent with a bankruptcy court's *in rem* jurisdiction and consistent with the Constitution. See *ante*, at 11.

Critically, however, the Court fails to explain why, simply because it asserts that this determination *could have been made* by motion, the adversary proceeding utilized in this case is somehow less offensive to state sovereignty. After all, "[t]he 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." *In re Ayers*, 123 U. S. 443, 505 (1887); *Federal Maritime Comm'n, supra*, at 760; *Alden v. Maine*, 527 U. S. 706, 748 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44, 58 (1996). The fact that an alternative proceeding exists, the use of which might not be offensive to state sovereignty, is irrelevant to whether the particular proceeding actually used subjects a par-

THOMAS, J., dissenting

ticular State to the indignities of coercive process. Indeed, the dissent in *Federal Maritime Comm'n*, much like the Court does today, focused on the fact that the FMC was not required by statute to evaluate complaints through agency adjudication, 535 U. S., at 774–776 (opinion of BREYER, J.), and could have opted to evaluate complaints in some other manner. But this fact had no bearing on our decision in that case, nor should it control here. I simply cannot ignore the fact that respondent filed a complaint in the Bankruptcy Court “pray[ing] that proper process issue and that upon a hearing upon the merits that [the court] issue a judgment for [respondent] and against [petitioner] allowing [respondent’s] debt to be discharged.” Complaint for Hardship Discharge, in No. 99–22606–K, Adversary No. 99–0847 (Bkrtey. Ct. WD Tenn.), p. 1.

More importantly, although the adversary proceeding in this case does not require the State to “defend itself” against petitioner in the ordinary sense, the effect is the same, whether done by adversary proceeding or by motion, and whether the proceeding is *in personam* or *in rem*. In order to preserve its rights, the State is compelled either to subject itself to the Bankruptcy Court’s jurisdiction or to forfeit its rights. And, whatever the nature of the Bankruptcy Court’s jurisdiction, it maintains at least as much control over nonconsenting States as the FMC, which lacks the power to enforce its own orders. *Federal Maritime Comm’n* rejected the view that the FMC’s lack of enforcement power means that parties are not coerced to participate in its proceedings because the effect is the same—a State must submit to the adjudication or compromise its ability to defend itself in later proceedings. 535 U. S., at 761–764. Here, if the State does not oppose the debtor’s claim of undue hardship, the Bankruptcy Court is authorized to enter a default judgment *without making an undue hardship determination*. See Fed. Rules Bkrtey. Proc. 7055, 9014 (adopting Fed. Rule Civ. Proc. 55

in both adversary proceedings and in contested matters governed by motion). The Court apparently concludes otherwise, but, tellingly, its only support for that questionable proposition is a statement made at oral argument. See *ante*, at 11.

As I explain in Part I-B, *infra*, I do not contest the assertion that in bankruptcy, like admiralty, there might be a limited *in rem* exception to state sovereign immunity from suit. Nor do I necessarily reject the argument that this proceeding could have been resolved by motion without offending the dignity of the State. However, because this case did not proceed by motion, I cannot resolve the merits based solely upon what might have, but did not, occur. I would therefore hold that the adversary proceeding in this case constituted a suit against the State for sovereign immunity purposes.

B

The difficulty and complexity of the question of the scope of the Bankruptcy Court's *in rem* jurisdiction as it relates to a State's interests is a further reason that the Court should not address the question here without complete briefing and full consideration by the Court of Appeals.

Relying on this Court's recent recognition of a limited *in rem* exception to state sovereign immunity in certain admiralty actions, see *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), the Court recognizes that "States . . . may still be bound by some judicial actions without their consent," *ante*, at 4. The Court then acknowledges the undisputed fact that bankruptcy discharge proceedings are *in rem* proceedings. *Ante*, at 5. These facts, however, standing alone, do not compel the conclusion that the *in rem* exception should extend to this case.

Deep Sea Research, supra, does not make clear the extent of the *in rem* exception in admiralty, much less its

THOMAS, J., dissenting

potential application in bankruptcy. The Court's recognition of an *in rem* exception to state sovereign immunity in admiralty actions was informed, in part, by Justice Story's understanding of the difference between admiralty actions and regular civil litigation. Justice Story doubted whether the Eleventh Amendment extended to admiralty and maritime suits at all because, in admiralty, "the jurisdiction of the [federal] court is founded upon the possession of the thing; and if the State should interpose a claim for the property, it does not act merely in the character of a defendant, but as an actor." 2 Commentaries on the Constitution of the United States §1689, p. 491 (5th ed. 1891). Justice Story supported this view by contrasting suits in law or equity with suits in admiralty, which received a separate grant of jurisdiction under Article III. *Id.*, at 491–492. The Court, however, has since adopted a more narrow understanding of the *in rem* maritime exception. See *Ex parte New York*, 256 U. S. 490, 497 (1921) ("Nor is the admiralty and maritime jurisdiction exempt from the operation of the rule [that a State may not be sued without its consent]"). Thus, our holding in *Deep Sea Research*, was limited to actions where the res is not within the State's possession. 523 U. S., at 507–508.

Whatever the scope of the *in rem* exception in admiralty, the Court's cases reveal no clear principle to govern which, if any, bankruptcy suits are exempt from the Eleventh Amendment's bar. In *Fiske*, 290 U. S., at 28, the Court stated in no uncertain terms 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." The Court contends that *Fiske* supports its argument because there the Court "noted the State might still be bound by the federal court's adjudication even if an injunction could not issue." *Ante*, at 7, n. 5. But the Court in *Fiske* also suggested that the State might not be bound by the federal court's adjudication—a more weighty propo-

sition given the circumstances of the case. *Fiske*, in part, involved the validity of a federal court decree entered in 1927, which determined that Sophie Franz had only a life interest in certain shares of stock previously held by her deceased husband. When Franz died in 1930, Franz's executor did not inventory the shares because the federal court decree declared Franz to have only a life interest in them. The dispute arose because the State sought to inventory those shares as assets of Franz's estate so that it could collect inheritance taxes on those shares. Although *Fiske* did not decide whether the 1927 federal decree was binding on the State, 290 U. S., at 29, the mere suggestion that the State might not be bound by the decree because it was not a party to an *in rem* proceeding in which it had no interest, see *ibid.*, at least leaves in doubt the extent of any *in rem* exception in bankruptcy.

Our more recent decision in *United States v. Nordic Village, Inc.*, 503 U. S. 30 (1992), casts some doubt upon the Court's characterization of any *in rem* exception in bankruptcy. *Nordic Village* explicitly recognized that "we 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. Although *Nordic Village* involved the sovereign immunity of the Federal Government, it also supports the argument that no *in rem* exception exists for other types of relief against a State. *Nordic Village* interpreted 11 U. S. C. §106(c) to waive claims for declaratory and injunctive, though not monetary, relief against the Government. 503 U. S., at 34–37. We noted that this interpretation did not render §106(c) irrelevant because a waiver of immunity with respect to claims for declaratory and injunctive relief would "perform a significant function" by "permit[ing] a bankruptcy court to determine the amount and dischargeability of an estate's liability to the Government . . . whether or not the Government filed a proof of claim." *Id.*,

THOMAS, J., dissenting

at 36. Our interpretation of §106(c) to waive liability only for declaratory and injunctive relief strongly suggests that such a waiver is necessary—*i.e.*, that without the waiver, despite the bankruptcy court’s *in rem* jurisdiction, the bankruptcy court could not order declaratory or injunctive relief against a State without the State’s consent. Cf. *Raygor v. Regents of Univ. of Minn.*, 534 U. S. 533, 554, n. 11 (2002).

To be sure, the Court has previously held that a State can be bound by a bankruptcy court adjudication that affects a State’s interest. See *New York v. Irving Trust Co.*, 288 U. S. 329 (1933); *Van Huffel v. Harkelrode*, 284 U. S. 225 (1931). But, in neither of those cases did the Court attempt to undertake a sovereign immunity analysis. *Irving Trust*, for instance, rested on Congress’ “power to establish uniform laws on the subject of bankruptcies,” 288 U. S., at 331, and the need for “orderly and expeditious proceedings,” *id.*, at 333. And in *Van Huffel*, the Court appeared to rest its decision more on “the requirements of bankruptcy administration,” 284 U. S., at 228, than the effect of the *in rem* nature of the proceedings on state sovereign immunity.* Perhaps recognizing that these precedents cannot support the weight of its reasoning, the Court attempts to limit its holding by explicitly declining to find an *in rem* exception to every exercise of a bankruptcy court’s *in rem* jurisdiction that might offend state sovereignty, *ante*, at 9, n. 6. But, I can find no principle in the Court’s opinion to distinguish this case from any other. For this reason, I would not undertake this

* *Gardner v. New Jersey*, 329 U. S. 565 (1947), also does not aid the Court’s argument. Although *Gardner* held that the reorganization court could entertain objections to the State’s asserted claim, the Court also held that the State waived its immunity by filing a proof of claim, thus obviating any need to consider the sovereign immunity question in the context of the *in rem* proceedings. *Id.*, at 573–574.

complicated inquiry.

II

Congress has made its intent to abrogate state sovereign immunity under the Bankruptcy Clause clear. See 11 U. S. C. §106(a). The only question, then, is whether the Bankruptcy Clause grants Congress the power to do so. This Court has repeatedly stated that “Congress may not . . . base its abrogation of the States’ Eleventh Amendment immunity upon the powers enumerated in Article I.” *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U. S. 356, 364 (2001). See also, e.g., *Kimel v. Florida Bd. of Regents*, 528 U. S. 62, 80 (2000) (“Congress’ powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals”); *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627, 636 (1999) (“*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers”).

Despite the clarity of these statements, the Court of Appeals held that the Bankruptcy Clause operates differently than Congress’ other Article I powers because of its “uniformity requirement”, 319 F. 3d 755, 764 (CA6 2003). Our discussions of Congress’ inability to abrogate state sovereign immunity through the use of its Article I powers reveal no such limitation. I would therefore reverse the judgment of the Court of Appeals.

For the foregoing reasons, I respectfully dissent.