

# THE BANKRUPTCY HEGEMON: SECTION 524(a) AND ITS EFFECT ON STATE AND FEDERAL COMITY

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## INTRODUCTION

The modern Bankruptcy Code was born in 1978 amid rising calls, from within Congress and without, to overhaul a system that had largely fallen into disrepair.<sup>1</sup> The resulting legislation,<sup>2</sup> with its myriad provisions, makes up Title 11 of the United States Code, bound together via an intricate network of internal references, exceptions, and exemptions. Designed to accommodate a broad range of debtor classes from individuals<sup>3</sup> to large multinational corporations,<sup>4</sup> the modern legislative scheme subjects each class of debtor to a distinct and carefully orchestrated bankruptcy proceeding. But as all roads lead to Rome, so too do all Title 11 proceedings lead to a discharge in bankruptcy—and to § 524(a).<sup>5</sup>

At first blush, § 524(a) of Title 11 is unproblematic; it grants discharged debtors two powerful automatic defenses<sup>6</sup> in the form of a

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\* Head *de novo* Editor, *Cardozo Law Review*. J.D. Candidate (June 2010), Benjamin N. Cardozo School of Law; B.A., *cum laude*, New York University, 2007. It would truly offend moral sensibilities if I did not in the first instance thank my family for their boundless love and support. In particular, I thank my parents, Yuriy and Tatyana, and my maternal grandmother, Lyudmila, for bringing me to this country; verily, I owe them a debt so great as to escape all reasonable description. I would also like to thank the remarkable Scott Danner, who kindly played the Virgil to my Dante as I navigated the writing process. My thanks also go to Professor David G. Carlson, without whose guidance I could not have chosen to write on this topic. Regrettably, I must stop there; had I the space and time to fill these pages with the names of the innumerable friends and colleagues who have assisted me in the preparation of this work, I surely would list them all. As it is, however, I must resign myself to simply saying “Thank you all.”

<sup>1</sup> H.R. REP. NO. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963.

<sup>2</sup> The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1532 (2006)).

<sup>3</sup> *See* 11 U.S.C. §§ 1301-1330 (2006) (“Chapter 13” bankruptcy).

<sup>4</sup> *See* 11 U.S.C. §§ 1101-1174 (2006) (“Chapter 11” bankruptcy).

<sup>5</sup> 11 U.S.C. § 524(a) (2006).

<sup>6</sup> While the Federal Rules of Civil Procedure still list “discharge at bankruptcy” as an affirmative defense, FED. R. CIV. P. 8(c)(1), in theory requiring the debtor to plead his discharge at any subsequent trial, court decisions have recognized that § 524(a) of Title 11 has rendered

statutory injunction<sup>7</sup> and a statutory avoidance<sup>8</sup> provision.<sup>9</sup> In so doing, the section protects debtors against post-discharge suits filed by unscrupulous creditors in an attempt to collect the already discharged debts. However, further consideration reveals a worrisome fact: Section 524(a) seemingly allows federal courts to avoid state judgments unilaterally,<sup>10</sup> thus exacerbating a tension between federal and state courts<sup>11</sup> that has existed for generations.<sup>12</sup> The most troubling scenario is simple enough to articulate:

A debtor, *D*, obtains a discharge order from a bankruptcy court, thereby automatically triggering the protections of § 524(a). One of *D*'s former creditors, *C*, files a post-discharge civil suit in state court, attempting to collect on the pre-discharge debt. *D*, out of an overabundance of caution, pleads his discharge at bankruptcy in the state suit and *C* replies that the debt *was not discharged* during the bankruptcy proceedings.<sup>13</sup> Having weighed the arguments, the state court holds that the discharge order did not cover *D*'s debt to *C* and, thus, § 524(a) protections do not bar *C*'s suit. Accordingly, the state court renders judgment against *D*, who in turn petitions the bankruptcy court for an injunction barring enforcement of the state court's judgment on the ground that it violates either the discharge injunction of § 524(a)(2) or is void under the statutory avoidance provision of § 524(a)(1).

The bankruptcy court is thus presented with a Gordian knot: If it does nothing and permits *C* to enforce the state judgment against *D*, it ignores the language of § 524(a), which "voids any judgment at any time obtained [that is] a determination of the personal liability of the debtor with respect to any debt discharged . . . ."<sup>14</sup> On the other hand, if the bankruptcy court enjoins *C* from enforcing the judgment, it

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such pleadings superfluous. *See, e.g., In re Gurrola*, 328 B.R. 158, 170 (B.A.P. 9th Cir. 2005); *In re Pavelich*, 229 B.R. 777, 781–82 (B.A.P. 9th Cir. 1999).

<sup>7</sup> 11 U.S.C. § 524(a)(1). A debtor in the midst of a stormy bankruptcy proceeding is shielded from creditor actions by the automatic stay injunction. 11 U.S.C. § 362 (2006). Once the discharge order has been issued, however, the automatic stay protection ends, and § 524 rises to take its place. *See* 11 U.S.C. § 362(c).

<sup>8</sup> If a decision is "avoided," then it is rendered void. BLACK'S LAW DICTIONARY 146, 1604 (8th ed. 2004).

<sup>9</sup> 11 U.S.C. § 524(a)(2).

<sup>10</sup> *See id.*

<sup>11</sup> Generally, authority over bankruptcy matters is granted to the district courts. 28 U.S.C. § 1334 (2006). This authority is, in turn, conferred onto bankruptcy courts when district courts "refer" bankruptcy cases to them. 28 U.S.C. § 157 (2006). In contradistinction, while state courts are not allowed to hear core bankruptcy cases, which lie within the exclusive jurisdiction of federal courts, 11 U.S.C. § 1334(a), they may hear related cases, 28 U.S.C. § 1334(b).

<sup>12</sup> *See, e.g., Local Loan Co. v. Hunt*, 292 U.S. 234 (1934); *In re Kaid*, 347 F. Supp. 540 (E.D. Va. 1972).

<sup>13</sup> The argument is not without merit, as the Bankruptcy Code sets out nineteen categories of debt that are not discharged during the bankruptcy proceedings. *See* 11 U.S.C. § 523(a) (2006).

<sup>14</sup> 11 U.S.C. § 524(a)(1).

effectively voids a state decision that is entitled to full faith and credit according to the United States Code.<sup>15</sup>

The dilemma created by the hegemony of § 524(a) is by no means a mere theoretical construct. Cases abound.<sup>16</sup> Take for example Lon McGhan,<sup>17</sup> who pled guilty to one count of “lewd and lascivious acts committed on a child under 14”<sup>18</sup> after sexually molesting his twelve-year-old stepson, Jason Rutz.<sup>19</sup> Shortly after entering his plea, McGhan filed for bankruptcy, listing Rutz as a creditor.<sup>20</sup> At the conclusion of the bankruptcy proceedings, Rutz’s potential civil claim against McGhan was automatically discharged.<sup>21</sup> When he turned eighteen, Rutz filed a civil action against McGhan in California state court, seeking damages “arising out of his sexual molestation at the hands of McGhan.”<sup>22</sup> After the state court sided with Rutz—despite McGhan’s bankruptcy discharge<sup>23</sup>—McGhan returned to the bankruptcy court, arguing that the state decision violated the § 524(a) discharge injunction.<sup>24</sup> The Court of Appeals for the Ninth Circuit ruled in favor of McGhan, deemed the state court’s decision invalid, and vacated the state judgment.<sup>25</sup>

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<sup>15</sup> Unlike the Full Faith and Credit *Clause*, U.S. CONST. art. IV, § 1, the Full Faith and Credit *Statute* dictates that state court decisions will be considered as final judgments in federal courts. See 28 U.S.C. § 1738 (2006) (“Such . . . judicial proceedings or copies thereof . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.”). *But see* 4 COLLIER ON BANKRUPTCY ¶ 524.02 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008) [hereinafter 4 COLLIER ON BANKRUPTCY] (“A bankruptcy court can find that a postpetition state court judgment is void despite the full faith and credit normally given to state court judgments.”).

<sup>16</sup> See, e.g., *In re Bayhi*, 528 F.3d 393 (5th Cir. 2008); *In re Hamilton*, 540 F.3d 367 (6th Cir. 2008); *In re Apex Oil Co., Inc.*, 406 F.3d 538 (8th Cir. 2005); *In re McGhan*, 288 F.3d 1172, 1175 (9th Cir. 2002); *In re Ferren (Ferren II)*, 203 F.3d 559 (8th Cir. 2000); *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000); *In re Reitnauer*, 152 F.3d 341 (5th Cir. 1998); *In re Goetzman*, 91 F.3d 1173 (8th Cir. 1996); *In re James*, 940 F.2d 46 (3d Cir. 1991); *In re Gurrola*, 328 B.R. 158 (B.A.P. 9th Cir. 2005); *In re Candidus*, 327 B.R. 112 (Bankr. E.D.N.Y. 2005); *In re Pavelich*, 229 B.R. 777 (B.A.P. 9th Cir. 1999); *In re Massa*, 217 B.R. 412 (Bankr. W.D.N.Y. 1998); *In re Beardslee*, 209 B.R. 1004 (Bankr. D. Kan. 1997).

<sup>17</sup> *In re McGhan*, 288 F.3d 1172.

<sup>18</sup> Which, according to California Penal Code section 288(a), is a felony. *Id.* at 1175; see also CAL. PENAL CODE § 288(a) (West 2009).

<sup>19</sup> *In re McGhan*, 288 F.3d 1172.

<sup>20</sup> The bankruptcy petition listed Rutz’s claim as a “Potential Civil Action for Personal Injury; Amount Unknown.” *Id.* at 1177 n.2.

<sup>21</sup> As Rutz was still a minor at the time of his stepfather’s bankruptcy proceeding, the task of filing a claim on his debt fell to his mother, who—for reasons unknown—neglected to do so. As a result, the unpaid claim was deemed to be discharged. *Id.* at 1176.

<sup>22</sup> *Id.* at 1177.

<sup>23</sup> *Id.* at 1177 n.5.

<sup>24</sup> *Id.* at 1177. For an in-depth discussion of § 524(a), see *infra* Part II.A.

<sup>25</sup> *In re McGhan*, 288 F.3d at 1182 (“A bankruptcy court may not decline to invoke this power in the face of a clearly invalid state court action infringing upon the bankruptcy court’s exclusive jurisdiction. The bankruptcy court was required to reopen the proceedings to protect its exclusive jurisdiction over the enforcement of its own orders.”).

The Ninth Circuit's decision in *McGhan* has not gone unopposed.<sup>26</sup> The dissenting courts' criticism, however, is but one small part of a greater conflict within the judiciary that centers on the proper roles of federal and state courts with respect to the bankruptcy discharge. In years past, federal courts, left free to develop their own solutions to this problem by the inaction of the Supreme Court, have turned to three approaches: jurisdictional analysis, collateral estoppel, and the *Rooker-Feldman* doctrine. Recently, however, the hegemonic effects of § 524(a) have spawned a fourth possibility, based on a logically flawed interpretation of the *Rooker-Feldman* doctrine. This newest approach falsely purports to strike a compromise between state and federal courts, all the while severely crippling protections for state judgments.<sup>27</sup>

To aid in navigating the labyrinthine system of doctrines and procedures that has developed, Part I of this Note provides a whistle-stop tour of the history behind the discharge injunction described in § 524(a) of Title 11. Part II discusses the current language of § 524(a) and a related provision, § 523(a), which prescribes categories of nondischargeable debts. Part III then examines the three doctrinal approaches that courts have taken in their attempts to resolve an issue central to the Bankruptcy Hegemon problem: the extent of state-court power to adjudicate the scope of the bankruptcy discharge. Part IV focuses on *In re Hamilton* and the Sixth Circuit's recent and troubling argument that state courts can decide post-discharge matters, but only if they do so correctly.<sup>28</sup> Part V then proposes that the tension between federal and state courts must be resolved in favor of the states, based on the federal courts' power to amend the discharge order after the bankruptcy proceedings end. Finally, the conclusion serves as a call to arms for the federal courts to address this dispute directly and clearly instead of lingering in the current doctrinal morass.

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<sup>26</sup> See, e.g., *Ferren II*, 203 F.3d 559 (8th Cir. 2000); *In re Candidus*, 327 B.R. 112 (Bankr. E.D.N.Y. 2005).

<sup>27</sup> See *In re Hamilton*, 540 F.3d 367 (6th Cir. 2008). For a thorough discussion and analysis, see *infra* Part IV.

<sup>28</sup> *In re Hamilton*, 540 F.3d 367.

I. “THE GATH’RING CLOUDS, WITH ASPECT DARK”<sup>29</sup>: TENSION  
BETWEEN STATE AND FEDERAL COURTS GROWS

A. *Discharge as Affirmative Defense*

In 1898, Congress enacted the fourth national system of bankruptcy laws,<sup>30</sup> borrowing from its three predecessors the concept of the discharge at bankruptcy.<sup>31</sup> The 1898 Act’s discharge provisions, aimed at absolving the debtor of all debts that fell outside one of four specific categories,<sup>32</sup> lacked an injunction to bar post-discharge suits,

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<sup>29</sup> JOHN NEWTON, *On the Commencement of Hostilities in America*, in OLNEY HYMNS, IN THREE BOOKS 202 (London, 6th ed. 1797) (1779).

<sup>30</sup> Though the concept of bankruptcy can be traced back to Biblical times, a full account of its history is beyond the scope of this Note. Charles Warren’s excellent book, *BANKRUPTCY IN UNITED STATES HISTORY*, will provide the curious reader with a thorough account of the political and social history of bankruptcy legislation in the United States. CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* (1935).

<sup>31</sup> Past legislation articulated the discharge at bankruptcy as follows:

And be it further enacted, That all and every person and persons, who shall become bankrupt as aforesaid, and who shall, within the time limited by this act, surrender him or herself to the commissioners, and in all things conform as in and by this act is directed . . . shall be discharged from all debts by him or her due or owing, at the time he or she became bankrupt, and all which were or might have been proved under the said commission . . . . And the certificate of such bankrupt’s conforming, and the allowance thereof, according to the directions of this act, shall be, and shall be allowed to be sufficient evidence *prima facie* of the party’s being a bankrupt within the meaning of this act, and of the commission and other proceedings precedent to the obtaining such certificate and a verdict shall thereupon pass for the defendant . . . .

Bankruptcy Act of 1800, ch. 19, § 34, 2 Stat. 19, 30-31 (repealed 1803).

[A]nd such discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are proveable under this act, and *shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever*, and the same shall be conclusive evidence of itself in favor of such bankrupt . . . .

Bankruptcy Act of 1841, ch. 9, § 4, 5 Stat. 440, 444 (repealed 1843) (emphasis added).

And be it further enacted, That a discharge duly granted under this act shall . . . release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy, and *may be pleaded, by a simple averment that on the day of its date such discharge was granted to him, setting the same forth in haec verba, as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands*, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and [the] regularity of such discharge . . . .

Bankruptcy Act of 1867, ch. 176, § 34, 14 Stat. 517, 533 (repealed 1878) (emphasis added).

<sup>32</sup> See Bankruptcy Act of 1898, ch. 541, §§ 14, 17, 30 Stat. 544, 550-51 (repealed 1978) (“SEC. 17 . . . A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice of actual

thereby forcing the debtor to present a certified copy of the discharge order in any subsequent creditor action to prove his status as a discharged bankrupt.<sup>33</sup> Thus, like the previous bankruptcy legislation,<sup>34</sup> the 1898 Act couched its discharge in the language of affirmative defense.<sup>35</sup> This notion of discharge as defense was further strengthened when in 1938, “discharge at bankruptcy” was included in the Federal Rules of Civil Procedure’s list of affirmative defenses,<sup>36</sup> and in subsequent years, in numerous state statutes and procedural rules.<sup>37</sup>

The affirmative nature of the bankruptcy discharge defense had a significant drawback: If a discharged debtor failed to timely respond to a post-discharge lawsuit for whatever reason, he could inadvertently lose the discharge’s protection as the “discharge at bankruptcy,” like all affirmative defenses, was waived if not pleaded in a subsequent suit.<sup>38</sup>

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knowledge of the proceeding in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.”)

<sup>33</sup> *Id.* § 21, 30 Stat. at 552.

<sup>34</sup> Under the three previous bankruptcy systems, the discharge was considered to be an affirmative defense by the courts. *See Dimock v. Revere Copper Co.*, 117 U.S. 559, 566 (1886) (“We are of the opinion that, having in his hands a good defense at the time judgment was rendered against him, namely, the order of discharge, and having failed to present it to a court which had jurisdiction of his case, and of all the defenses which he might have made, including this, the judgment is a valid judgment, and that the defense cannot be set up here in an action on that judgment.”) (interpreting the Bankruptcy Act of 1867); *Steward v. Green*, 11 Paige Ch. 535, 5 N.Y. Ch. Ann. 225 (N.Y. Ch. 1845) (“[I]f Bannister wished to avail himself of a discharge which had been obtained before judgment against him, he should have applied to set up his discharge, as a defence, in the supreme court.”) (interpreting the Bankruptcy Act of 1841); *Mechanics’ Bank v. Hazard*, 9 Johns. 392, 392 (N.Y. Sup. Ct. 1812) (“If the debt in the suit against the principal has been satisfied, that is matter which the bail must plead.”) (interpreting the Bankruptcy Act of 1800).

<sup>35</sup> *See WILLIAM MILLER COLLIER, THE LAW AND PRACTICE IN BANKRUPTCY UNDER THE NATIONAL BANKRUPTCY ACT OF 1898*, at 105 (5th ed. 1905); *see also Nat’l Bank of E. Ark. v. Gen. Mills, Inc.*, 283 F.2d 574, 579 (8th Cir. 1960); *Household Fin. Corp. v. Dunbar*, 262 F.2d 112, 114 (10th Cir. 1958); *Pers. Indus. Loan Corp. v. Forgay*, 240 F.2d 18, 19 (10th Cir. 1957); *Helms v. Holmes*, 129 F.2d 263 (4th Cir. 1942); *In re Havens*, 272 F. 975 (2d Cir. 1921).

<sup>36</sup> FED. R. CIV. P. 8(c)(1) (“In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including . . . discharge in bankruptcy . . . .”); *see also In re Gurrola*, 328 B.R. 158, 166 (B.A.P. 9th Cir. 2005).

<sup>37</sup> *See* ALA. R. CIV. P. 8(c); ARIZ. R. CIV. P. 8(c); ARK. R. CIV. P. 8(c); COLO. R. CIV. P. 8(c); DEL. R. CIV. P. 8(c); FLA. R. CIV. P. 1.110(d); GA. CODE ANN. § 9-11-8 (c) (2008); HAW. R. CIV. P. 8 (c); IDAHO R. CIV. P. 8(c); IND. R. TRIAL P. 8(c); KAN. STAT. ANN. § 60-208(c) (2006); KY. R. CIV. P. 8.03; LA. CODE CIV. PROC. ANN. ART. § 1005 (2008); ME. R. CIV. P. 8(c); MASS. R. CIV. P. 8 (c); MINN. R. CIV. P. 8.03; MISS. R. CIV. P. 8(c); MO. REV. STAT. § 509.090 (2008); MONT. R. CIV. P. 8(c); NEV. R. CIV. P. 8(c); N.J. COURT R. 4:5-4; N.M. DIST. CT. R. CIV. P. 1-008; N.Y. C.P.L.R. § 3018 (2008); N.C. GEN. STAT. § 1A-1, RULE 8 (2008); N.D. R. CIV. P. 8(c); OHIO CIV. R. 8(C); OKLA. STAT. tit. 12, § 2008 (2008); OR. R. CIV. P. 19(b); PA. R. CIV. P. 1030; R.I. R. CIV. P. 8(c); S.D. CODIFIED LAWS § 15-6-8(c) (2008); TENN. R. CIV. P. 8.03; TEX. R. CIV. P. 94; UTAH R. CIV. P. 8(c); VT. R. CIV. P. 8(c); WASH. C.R. 8(c); W.VA. R. CIV. P. 8(c); WIS. STAT. § 802.02 (2007); WYO. R. CIV. P. 8(c); *see also In re Anthony*, 42 F. Supp. 312, 314 (E.D. Ill. 1941) (“Rule 8(c), Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, provides that a discharge in bankruptcy shall be set forth as an affirmative defense. State procedure is generally, if not universally, in accord.”)

<sup>38</sup> *See, e.g., Elliot & Frantz, Inc. v. Ingersoll-Rand Co.*, 457 F.3d 312, 321 (3d Cir. 2006);

Accordingly, to prevent a loss of the discharge's protection, a fair amount of vigilance was required on the part of the bankrupt. Such vigilance, however, required time and resources; for those bankrupts who had neither, the task of safeguarding their discharge order's protection became a Sisyphean exercise. As the number of bankruptcy petitions grew,<sup>39</sup> so too did the audacity of creditors who in ever-increasing numbers attempted to recoup their discharged pre-petition debts. Oftentimes creditors accomplished this feat by improperly serving notice on unsophisticated bankrupts, or by filing suits against those bankrupts who could not afford an attorney because of their financial status. As a consequence of such predatory practices, post-discharge default judgments against newly-bankrupt debtors, particularly from state-level courts, became commonplace.<sup>40</sup>

Such was the case of Edwin B. Havens, who was subjected to an involuntary bankruptcy petition in 1907 that ultimately resulted in a bankruptcy discharge.<sup>41</sup> Once adjudged a bankrupt, Havens found himself on the wrong side of a post-discharge suit filed by one of his creditors in the Supreme Court of New York. After the New York court rendered a default judgment against him,<sup>42</sup> Havens successfully petitioned the District Court for the Eastern District of New York for a permanent injunction to bar the creditor from enforcing the state court judgment.<sup>43</sup> The Court of Appeals for the Second Circuit subsequently reversed the District Court's decision.<sup>44</sup>

According to the Second Circuit panel, "it ha[d] been too often said to need citation" that while bankruptcy courts were the only courts that could *grant* a discharge, any court—state or federal—could determine the *effects* of the discharge once granted.<sup>45</sup> Additionally, the panel held that "no authority exist[ed]" for a federal court to bar the collection of a state judgment rendered against a bankrupt, even in a

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Younen v. Tintic Sch. Dist., 343 F.3d 1296, 1303 (10th Cir. 2003).

<sup>39</sup> 116 CONG. REC. H34818 (daily ed. Oct. 5, 1970) (statement of Rep. Rogers).

<sup>40</sup> Congressman Rogers of Colorado succinctly stated the problem at hand:

Under present law creditors are permitted to bring suit in State courts after a discharge in bankruptcy has been granted and many do so in the hope the debtor will not appear in that action, relying to his detriment upon the discharge. Often the debtor in fact does not appear because of such misplaced reliance, or an inability to retain an attorney due to lack of funds, or because he was not properly served. As a result, a default judgment is taken against him and his wages or property may again be subjected to garnishment or levy. All this results because the discharge is an affirmative defense which, if not pleaded, is waived.

*Id.*

<sup>41</sup> *In re Havens*, 272 F. 975 (2d Cir. 1921).

<sup>42</sup> *Id.* at 975 (reporter's summary of facts).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 976.

<sup>45</sup> *Id.*; see also *Hellman v. Goldstone*, 161 F. 913, 913-14 (3d Cir. 1908) ("The question whether a judgment against one who is thereafter adjudged bankrupt is thereby discharged is properly raised by pleading the discharge in a proceeding to enforce the judgment.").

case where the state court “erred either in fact or law as to the effect of [the bankrupt’s] discharge.”<sup>46</sup>

The *In re Havens* doctrine, which compartmentalized state and federal power, met its demise at the hands of the Supreme Court a decade later when the Court held that it was contrary to the “general rule in equity” that bankruptcy courts could not stop the collection of erroneous post-discharge state judgments.<sup>47</sup> In deciding *Local Loan Co. v. Hunt*,<sup>48</sup> the Supreme Court stated that a bankruptcy court, as a “federal court of equity,” has jurisdiction to “secure or preserve” its previous judgments.<sup>49</sup> As such, a bankruptcy court had the power to interpret a bankruptcy discharge and, if need be, to enjoin a creditor from enforcing a state judgment.<sup>50</sup> A court, however, was not “bound to exercise [this] authority”;<sup>51</sup> rather, the decision to do so was left to the discretion of the court and even then only under “unusual circumstances,”<sup>52</sup> a term that the Supreme Court failed to define—preferring, instead, to use the “unusual circumstances” in *Local Loan* merely as representative exemplars.<sup>53</sup>

The Court, in addition to eliminating the *Havens* doctrine, also held that a “primary purpose[] of the Bankruptcy Act [of 1898]”<sup>54</sup> was to provide the bankrupt with “a new opportunity in life and a clear field for future efforts.”<sup>55</sup> The Court went on, noting that “[l]ocal rules subversive of that result cannot be accepted as controlling the action of

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<sup>46</sup> *In re Havens*, 272 F. at 976 (noting further that “[t]he bankruptcy courts possess no such revisory powers . . .”).

<sup>47</sup> *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934) (noting that *In re Havens* and similar decisions “are clearly not in harmony with the general rule in equity announced by this court”).

<sup>48</sup> In *Local Loan*, William Hunt borrowed \$300 from the Local Loan Company, assigning his wages as security for the loan. *Id.* at 238. Hunt then filed for bankruptcy and shortly thereafter obtained a discharge, after which Local Loan commenced a state suit seeking to recover his post-discharge wages. *Id.* In response, Hunt petitioned the District Court for the Northern District of Illinois for an injunction to permanently bar Local Loan from continuing its state litigation. After the district court granted the injunction, the Court of Appeals for the Seventh Circuit affirmed. Brief for Petitioner at 2, *Local Loan Co. v. Hunt*, 292 U.S. 695 (1934) (No. 783), 1934 WL 32012. Local Loan then appealed the case to the Supreme Court, arguing that the bankruptcy court “was without jurisdiction to entertain a proceeding to enjoin the prosecution of the action in the [state] court.” *Local Loan*, 292 U.S. at 238-39.

<sup>49</sup> *Local Loan*, 292 U.S. at 239.

<sup>50</sup> *Id.* at 241.

<sup>51</sup> *Id.* (emphasis added).

<sup>52</sup> *Id.*

<sup>53</sup> The Court noted that the “legal remedy . . . would be inadequate to meet the requirements of justice,” as the only alternative left open to Hunt would be to pursue a “long and expensive course” of state-level litigation both at the trial and at the appellate level. *Id.* The Court concluded that such a remedy was inadequate because it involved not only a great deal of expense and trouble but also the possibility of “embarrassment . . . and possible loss of employment” for Hunt. *Id.* at 242.

<sup>54</sup> *Id.* at 244.

<sup>55</sup> *Id.*

a federal court.”<sup>56</sup> In so doing, the Court granted bankruptcy tribunals permission to exercise power over state courts when the state laws would deny the bankrupt a fresh start. Thus, *Local Loan* at once allowed a bankruptcy court to exercise authority over state courts, left the decision to exercise such authority to a bankruptcy court’s own discretion, and most troubling of all, transformed that decision into one of public policy.<sup>57</sup>

With the inexorable passage of time, the *Local Loan* decision became a watershed in bankruptcy discharge jurisprudence.<sup>58</sup> Owing mostly to its conclusions about the “purpose and spirit” of the Bankruptcy Act and its elaboration on the equitable power of bankruptcy courts, *Local Loan* became the basis for numerous decisions allowing federal courts to enjoin a creditor from enforcing a state-level judgment against a bankrupt.<sup>59</sup> Nonetheless, the Supreme Court’s decision that bankruptcy courts could protect their discharge orders met with swift opposition from subsequent courts.

In 1942 the Fourth Circuit found itself among the Court’s detractors when it decided *Helms v. Holmes*,<sup>60</sup> a case dealing with a post-discharge state-level default judgment against a bankrupt.<sup>61</sup> In

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<sup>56</sup> *Id.* at 245.

<sup>57</sup> Opinions from the first half of the twentieth century, however, limit the “liberal application” of this “Federal interference.” See, e.g., *Helms v. Holmes*, 129 F.2d 263, 267 (4th Cir. 1942).

<sup>58</sup> Note that *Local Loan* was technically a lien avoidance case, not a discharge case, see *Local Loan*, 292 U.S. at 245; bankruptcy discharges ordinarily can have no effect on liens. However, the *Local Loan* decision’s lasting impact was not its conclusion about liens but its discussion of bankruptcy courts’ authority. See *infra* note 59 and accompanying text.

<sup>59</sup> See, e.g., *Davison-Paxon Co. v. Caldwell*, 115 F.2d 189 (5th Cir. 1940); see also *In re Devereaux*, 76 F.2d 522, 523 (2d Cir. 1935) (recognizing, but not exercising, the power of the federal courts to enjoin the enforcement of state judgments). One such case, *Holmes v. Rowe*, 97 F.2d 537 (9th Cir. 1938), warrants further explication:

In late 1933, S.O. Holmes brought a state action against his tenant, Rowe, for unpaid rent. *Id.* at 538. While the suit was pending, Rowe filed for bankruptcy in the Northern District of California, listing Holmes as a creditor, and obtained a discharge in March of 1936. *Id.* Undaunted, Holmes obtained a default judgment against Rowe on the pending suit in state court and, pursuant to the judgment, began garnishing Rowe’s wages. *Id.* In retaliation, Rowe unsuccessfully attempted to petition the state court for an order restraining Holmes from further executing the judgment. *Id.* When this petition was denied, Rowe moved the court to discharge and cancel the judgment altogether; again meeting with little success. *Id.* Finally, Rowe successfully petitioned the district court that had granted his discharge for an injunction “restraining [Holmes] from levying execution upon judgment against [Rowe].” *Id.* The Ninth Circuit affirmed, noting that after issuing a discharge a federal court had the power to “protect the judgment or decree” and could grant an injunction when a state-level action “may in any way interfere with, or nullify the effect of said judicial determination.” *Id.* at 539. This power, the court noted, was “amply borne out” by *Local Loan*. *Id.* However, the *Rowe* decision did not discuss, or even mention, the Supreme Court’s “unusual circumstances” limitation on this power. Indeed, this decision seems to have left the door open for a broader and more general application of the power discussed in *Local Loan*.

<sup>60</sup> 129 F.2d 263 (4th Cir. 1942).

<sup>61</sup> The debtor, Holmes, obtained a bankruptcy discharge on October 8, 1931. *Id.* at 264. Helms, a creditor to whom Holmes owed roughly \$2,600, filed a state-court suit against the newly

reversing a district court's decision to enjoin creditors from enforcing the state judgment,<sup>62</sup> the Court of Appeals noted that the "discretionary authority" granted to the bankruptcy courts by *Local Loan* was based on the "peculiar facts of the particular case," specifically referencing the "unusual circumstances" language from *Local Loan*.<sup>63</sup> In unexceptional cases such as *Helms*, however, the Fourth Circuit did not "feel that there [would be] sufficient ground for the invocation" of such authority, and thus, the "dictates of orderly administration in bankruptcy proceedings" were to prevail in the stead of bankruptcy courts' "equitable" power.<sup>64</sup>

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bankrupt Holmes more than two years after his discharge. *Id.* at 265. For his part, Holmes never filed an answer to the complaint because he "thought the discharge in bankruptcy operated as an automatic defense to any subsequent action . . ." *Id.* Accordingly, the state court rendered a default judgment in favor of Helms on June 11, 1934, after which Holmes sought a federal injunction to prevent Helms from enforcing the state decision. *Id.* The district court granted the injunction but was overruled by the Court of Appeals for the Fourth Circuit, which noted that the federal courts, along with all state courts, recognized discharge at bankruptcy as an affirmative defense. *Id.* at 266 ("This rule that a failure so to plead operates in law as a waiver of the defense [of discharge] has been uniformly followed by State and Federal Courts alike."). According to the *Helms* court, it was "a matter of Hornbook learning" that a defendant is deemed to have waived an affirmative defense if he did not assert it in his Answer. *Id.* at 265. It followed, therefore, that Holmes' failure to plead his discharge resulted in its waiver. *Id.* at 266 ("[I]t was incumbent upon Holmes to plead [the discharge] if he desired to avail himself of it.").

<sup>62</sup> *Id.* at 268. Interestingly, the *Helms* court regarded the discharge as "neither a payment nor an extinguishment" of the bankrupt's debts. *Id.* at 266. Rather, it was a mere "bar to their enforcement" in a post-discharge suit. *Id.* This view is not without support. The 1938 Chandler Act introduced language into section 14 of the Bankruptcy Act which essentially specified that a bankrupt could, if he so chose, waive his discharge. Chandler Act, Pub. L. No. 75-696, § 14, 52 Stat. 840, 850-51 (1938) (repealed 1978). Case precedent also held that a post-discharge promise by the bankrupt to repay the creditor waived the protection afforded to the debtor by the discharge. See *In re Harris*, 28 F. Supp. 487 (E.D. Ill. 1939); see also 1A COLLIER ON BANKRUPTCY ¶ 17.33 (14th ed. 1978). Generally speaking, then, it seems that the debt owed by the creditor never went away, but rather remained in a state of limbo from which it could be returned if and when the bankrupt reasserted his willingness to reimburse his creditor. It is this inextinguishable quality of debt that prompted the *Helms* court to note that a creditor had full rights to proceed against a bankrupt on a claim for a debt which the creditor knows to have been discharged. See *Helms*, 129 F.2d at 266 ("[A] creditor [is not] guilty of contempt of the bankruptcy court in suing on the old debt in the state court, even though he has notice of the debtor's discharge.").

<sup>63</sup> *Helms*, 129 F.2d at 267.

<sup>64</sup> *Id.* at 267-68. Anomalously, the court cited to *Dimock v. Revere Copper Co.*, 117 U.S. 559 (1886), an outdated Supreme Court decision discussing the nature of the discharge defense under the 1867 Bankruptcy Act.

### B. *The Discharge Becomes Absolute*

Through a series of amendments to the Bankruptcy Act in 1970, Congress added section 14(f) to the bankruptcy laws,<sup>65</sup> thereby granting a statutory equitable remedy to bankrupts and expanding upon the concepts introduced by the Supreme Court in *Local Loan*.<sup>66</sup> The new section dictated that a discharge would not only release the bankrupt from previous court judgments, but that it would also act to protect him from *future* judgments. This feat was accomplished by rendering such future judgments “null and void,” meaning that the grant of a discharge curtailed the power of both state and federal courts and stripped their judgments of any preclusive or precedential effect. Thus, the discharge at bankruptcy lost its status as an affirmative defense<sup>67</sup> and was instead recast as an absolute defense that protected the bankrupt from the moment it was granted.<sup>68</sup>

Standing on its own, however, section 14(f) could do very little to protect a bankrupt from future suits on his discharged debts because prior to 1970, bankruptcy courts lacked the power to definitively “determine which debts were in fact discharged.”<sup>69</sup> Thus, prior to the

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<sup>65</sup> Section 14(f) reads:

f. An order of discharge shall—

(1) declare that any judgment theretofore or thereafter obtained in any other court is null and void as a determination of the personal liability of the bankrupt with respect to any [debts discharged and not excepted from discharge]; and

(2) enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt.

Bankruptcy Act Amendments of 1970, Pub. L. No. 91-467, § 3, 84 Stat. 990, 991.

<sup>66</sup> See 116 CONG. REC. H34818 (daily ed. Oct. 5, 1970) (statement of Rep. Wiggins) (“[When creditors abuse the bankruptcy system] the concept of a discharge in bankruptcy by which the Bankruptcy Act attempts to assure the honest but unfortunate person a *fresh start* and rehabilitation is defeated.” (emphasis added)). According to Congressman Byron Rogers, a proponent of the 1970 alterations, the “purpose of the [amendments] was] to effectuate more fully the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors.” *Id.* Congressman Charles Wiggins, another early supporter, also noted that creditors who abused the bankruptcy system were causing a problem. *Id.* (“Under present practice, debtors are frequently coerced by unscrupulous creditors into paying debts that have been discharged. Typically, the creditor will wait until the bankruptcy proceeding has been closed and then sue in State court on the discharged debt.”). He argued, however, that the amendments made “the process of a discharge in bankruptcy a far more equitable proceeding,” thereby “substantially improv[ing] the quality and fairness of our bankruptcy law . . . .” *Id.*

<sup>67</sup> See *In re Pavelich*, 229 B.R. 777, 781 (B.A.P. 9th Cir. 1999).

<sup>68</sup> See *id.*; *In re Braun*, 141 B.R. 133, 138 (Bankr. N.D. Ohio 1992); cf. H.R. REP. NO. 95-595, at 366 (1977), reprinted in 1978 U.S.S.C.A.N. 5963, 6321 (“In effect, the discharge extinguishes the debt, and creditors may not attempt to avoid that.”).

<sup>69</sup> 116 CONG. REC. H34818 (daily ed. Oct. 5, 1970) (statement of Rep. Wiggins); see, e.g., *In re Havens*, 272 F. 975 (2d Cir. 1921); *Hellman v. Goldstone*, 161 F. 913, 913-14 (3d Cir. 1908) (“The question whether a judgment against one who is thereafter adjudged bankrupt is thereby

1970 amendments, a state court could very well have ruled that a particular debt was *not* discharged and then fearlessly rendered judgment in accordance with its own caprice, undaunted by the possibility of avoidance or injunction. Congress, therefore, sought to eliminate this problem by amending section 38(4) of the Bankruptcy Act<sup>70</sup>—which dealt with the powers granted to bankruptcy courts and their agents<sup>71</sup>—to include the power to “determine the dischargeability of debts, and render judgments thereon.”<sup>72</sup> As a result, bankruptcy courts gained the necessary machinery to set the boundaries on their own authority by “determin[ing] not only the bankrupt’s right to a discharge but also the effect of a discharge when granted.”<sup>73</sup>

Though enacted with the intention to curb unscrupulous creditor actions, on the whole the 1970 amendments merely forced a change of

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discharged is properly raised by pleading the discharge in a proceeding to enforce the judgment.”); *see also* 116 CONG. REC. H34819 (daily ed. Oct. 5, 1970) (statement of Rep. Wiggins) (“It has been the generally accepted rule that the bankruptcy court determines whether a discharge should be granted and the court in which a claim is sought to be enforced determines the effect of the discharge on that particular claim.”).

<sup>70</sup> By 1970, section 38 of the 1898 Bankruptcy Act had been amended several times. As a result, when Congressmen Roger Wiggins proposed the amendments, section 38(4) read as follows: “SEC. 38. JURISDICTION OF REFEREES.—Referees respectively are hereby invested, subject always to a review by the judge, with jurisdiction to . . . (4) grant, deny or revoke discharges . . . .” Chandler Act, Pub. L. No. 75-696, § 38, 52 Stat. 840, 857 (1938) (repealed 1978).

<sup>71</sup> The introductory text to section 38 remained relatively unchanged throughout the lifespan of the 1898 Act. *Compare* § 38, 30 Stat. at 555 (1898), *with* § 38, 52 Stat. 857-58 (1938).

<sup>72</sup> 116 CONG. REC. H34817, 34817; Bankruptcy Act Amendments of 1970, Pub. L. No. 91-467, § 8, 84 Stat. 990, 993.

<sup>73</sup> 116 CONG. REC. H34817, H34818. Given the short lifespan of the amendments (i.e., 1970-1978), it is hardly surprising that few courts had the time to fully capitalize on the authority granted to them by section 14(f) and section 38(4). Still, federal courts occasionally used their newfound power to protect bankrupts from creditors who, even after the adoption of the amendments, attempted to recover their debts in state court proceedings. One such case, decided only two years after the amendments were passed, was *In re Kaid*, 347 F. Supp. 540 (E.D. Va. 1972), which dealt with Hayward Eugene Kaid, who purchased more than \$500 worth of furniture from Sears, Roebuck and Company and almost immediately signed a security interest in the furniture back over to the store. *Id.* at 542. The following year Kaid filed for voluntary bankruptcy, listing Sears’ security interest in the furniture as one of his debts. *Id.* Sears, in the meantime, had filed a state-court action to recover its property from Kaid just before he received his discharge, after which Sears amended its complaint to allege “fraud and willful conversion” of the property. *Id.* at 543. Despite his attempts to defend himself against this charge, the state court returned a judgment in favor of Sears, and Kaid subsequently petitioned the bankruptcy court to reopen his case and determine whether Sears was in violation of the discharge order. *Id.* at 541-42. In holding against Sears, the district court noted that the general rule “prior to the effective date of the 1970 amendment[s]” allowed the effect of a discharge to be “determined in a state court action.” *Id.* at 542. However, the situation was “drastically altered by [the 1970 amendments]” when “Congress enlarged the jurisdiction of the bankruptcy courts to adjudicate the effect of all discharges . . . .” *Id.* Since the district court therefore had been empowered to determine, during the initial bankruptcy proceeding, whether the debt owed to Sears was properly discharged, the *Kaid* panel held that the state court judgment violated the discharge order’s prohibition on subsequent judgments pertaining to discharge debts and was thus null and void. *Id.* at 543.

tactics among creditors who, in response, turned to alternative methods of coercion.<sup>74</sup> Even operating under their newly-expanded discharge provisions, the bankruptcy courts were unable to effectively curb these practices.<sup>75</sup> Therefore, in 1978, Congress—disenchanted with the amendment process—created the Bankruptcy Code, repealing the obsolescent Bankruptcy Act of 1898<sup>76</sup> and instead establishing a comprehensive system of laws for bankruptcy proceedings.<sup>77</sup>

## II. “DARKNESS OVERSPREADS US HERE”<sup>78</sup>: DISCHARGE UNDER THE MODERN BANKRUPTCY CODE

The Bankruptcy Code, passed in 1978 and signed into law the next year, was looked upon as a way of modernizing the country’s bankruptcy laws.<sup>79</sup> But while the Code signaled, in many ways, a major departure from the language and mechanics of the Bankruptcy Act of 1898, certain of its provisions bear significant similarity to their 1898 forerunners; this is particularly true of §§ 524(a)<sup>80</sup> and 523(a),<sup>81</sup> which are derived from the 1970 Amendments’ sections 14(f) and 17(a), respectively.

### A. Section 524(a)—The Bankruptcy Discharge

The express purpose of 11 U.S.C. § 524(a) is “to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts.”<sup>82</sup> Congress had a like purpose in mind when it created section 14(f) in

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<sup>74</sup> Methods included harassment via the telephone, threats of repossession, see H.R. REP. NO. 95-595, at 365-66 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6321, and other “private, informal means of inducing the debtor to make payment . . .” 4 COLLIER ON BANKRUPTCY, *supra* note 15, ¶ 524.LH.

<sup>75</sup> See, e.g., *In re Thompson*, 416 F. Supp. 991, 996 (S.D. Tex. 1976) (“[A]lthough the methods employed by appellees in this case are inexcusable and in obvious disregard of the purposes of the Bankruptcy Act to give the bankrupt a ‘fresh start,’ the Court is of the opinion that appellees cannot be held in technical contempt of the bankruptcy court’s discharge order [pursuant to 14(f)(2)].”); see also *Aubertin v. Colville Confederated Tribes*, 446 F. Supp. 430 (E.D. Wash. 1978).

<sup>76</sup> H.R. REP. NO. 95-595.

<sup>77</sup> 1 COLLIER ON BANKRUPTCY ¶ 1.01 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008) [hereinafter 1 COLLIER ON BANKRUPTCY].

<sup>78</sup> JOHN NEWTON, *Salvation Drawing Nearer*, in OLNEY HYMNS, IN THREE BOOKS 127 (London, 6th ed. 1797) (1779).

<sup>79</sup> H.R. REP. NO. 95-595 at 3.

<sup>80</sup> 11 U.S.C. § 524(a).

<sup>81</sup> *Id.* § 523(a).

<sup>82</sup> H.R. REP. NO. 95-595 at 365.

1970.<sup>83</sup> It should come as no surprise, therefore, that § 524(a) dutifully treads the same linguistic footpath as the earlier statute:

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged . . . whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived . . . .<sup>84</sup>

Admittedly, the modern legislation does part ways with the antecedent law at times,<sup>85</sup> particularly on the issue of the discharge injunction, which § 524(a)(2) expands well past its 1970 borders.<sup>86</sup> Thus, no longer does the injunction merely prevent creditors from filing post-discharge suits against the bankrupt;<sup>87</sup> on the contrary, § 524(a)(2) prevents creditors from taking *any* action against the bankrupt designed to extract from him the discharged debt.<sup>88</sup> Moreover, the injunction's protection, formerly reserved for the bankrupt's benefit alone, was extended to the bankrupt's friends and, even further, to his employer.<sup>89</sup>

### B. Section 523(a)—Non-Dischargeable Debts

As section 14(f) gave rise to § 524(a), so too did section 17<sup>90</sup> engender § 523(a). Thus, like the now-superseded section 17, § 523(a) enumerates a list of debts that are not automatically discharged during a

<sup>83</sup> Compare H.R. REP. NO. 95-595, at 365, with 116 CONG. REC. H34818 (daily ed. Oct. 5, 1970).

<sup>84</sup> 11 U.S.C. § 524(a).

<sup>85</sup> A point worth mentioning in connection with § 524(a) is the somewhat abstruse language used to define the statutory avoidance provision's scope. Whereas section 14(f) provided that the discharge order voided "any judgment *theretofore or thereafter*" obtained, 84 Stat. at 991, § 524(a)(1) provides that "any judgment *at any time obtained*" is void, 11 U.S.C. § 524(a)(1). The semantic change seems puzzling because it serves no purpose and, in fact, only clouds the issue. The phrase "theretofore or thereafter" quite explicitly sets forth the cases that will be avoided (i.e., all of them). The term "at any time obtained," on the other hand, seems to simply paraphrase the 1970 language and, in so doing, loses some of the precision present in the older discharge provision.

<sup>86</sup> Compare 11 U.S.C. § 524(a)(2), with 84 Stat. at 991. See also 4 COLLIER ON BANKRUPTCY, *supra* note 15, ¶ 524.LH.

<sup>87</sup> See 116 CONG. REC. H34817 (daily ed. Oct. 5, 1970); see also 4 COLLIER ON BANKRUPTCY, *supra* note 15, ¶ 524.LH.

<sup>88</sup> The term "action" includes activities such as "dunning by telephone or letter, . . . harassment, threats of repossession and the like." H.R. REP. NO. 95-595, at 366.

<sup>89</sup> *Id.*; see also 4 COLLIER ON BANKRUPTCY, *supra* note 15, ¶ 524.LH.

<sup>90</sup> See *supra* note 32 and accompanying text.

bankruptcy proceeding.<sup>91</sup> The modern list, expanded from eight debt types under section 17<sup>92</sup> to twenty-seven under § 523(a),<sup>93</sup> can generally be divided into two categories: conditionally excepted debts and automatically excepted debts.<sup>94</sup> Conditionally excepted debts<sup>95</sup> are discharged during the course of the bankruptcy proceeding unless the creditor appears before the bankruptcy court and specifically requests that the debts be excepted from the general discharge.<sup>96</sup> The remaining § 523(a) debts are automatically excepted without required action by the creditor.<sup>97</sup>

Interestingly, while § 523(a) may at first blush seem to curtail the power and scope of the discharge, a somewhat closer examination reveals that it has the opposite effect. True, § 523(a) expands the list of excepted and exempted debts; that much is irrebuttable. However, the modern section also contains language implying that the list articulates, in full, the metes and bounds of debt dischargeability. Under the 1898 Act and its amendments, a discharge order released a bankrupt from all of his *provable* debts, excepting those listed in section 17.<sup>98</sup> The Bankruptcy Code's § 523(a), however, drops the "provable" criteria, thus providing that the order discharges *any* debt that does not fall within the ambit of §§ 523(a)(1)-(19).<sup>99</sup>

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<sup>91</sup> See 11 U.S.C. § 523(a).

<sup>92</sup> See 116 CONG. REC. H34817 (daily ed. Oct 5, 1970) (setting forth two further exceptions, numbers 7 and 8, that are to be added "at the end" of the pre-1970 section 17(a)).

<sup>93</sup> See 11 U.S.C. § 523(a) (listing all excepted debts, including tax penalties and "domestic support obligation[s]").

<sup>94</sup> This categorization is derived from the language of 11 U.S.C. § 523(c)(1), also a descendant of the 1970 Amendments' section 17. Compare 11 U.S.C. § 523(c), with 84 Stat. at 992.

<sup>95</sup> 11 U.S.C. § 523(a)(2), (4), (6). These debts were described best by the Second Circuit in 2005: "[A]ctual fraud, false pretenses or false representations (§ 523(a)(2)) . . . fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny (§ 523(a)(4)), and . . . willful or malicious injury to person or property (§ 523(a)(6)) . . ." *In re Candidus*, 327 B.R. 112, 116 (Bankr. E.D.N.Y. 2005).

<sup>96</sup> 11 U.S.C. § 523(c)(1) ("Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4) or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.").

<sup>97</sup> This binary system of exceptions is a holdover from § 17 of the 1970 Amendment which also provided for automatically excepted and conditionally excepted debts. See 84 Stat. 992 (1970) ("A creditor who contends that his debt is not discharged under clause (2), (4), or (8) of subdivision a of this section must file an application for a determination of dischargeability within the time fixed by the court . . .").

<sup>98</sup> Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, 550 (repealed 1978).

<sup>99</sup> 11 U.S.C. § 523(a).

III. “BITTER, INDEED, THE WATERS ARE”<sup>100</sup>: COURTS’ RESPONSES TO  
THE PROBLEM OF THE BANKRUPTCY HEGEMON

Under the modern bankruptcy regime, the question of whether federal courts can avoid post-discharge state judgments based on § 524(a)—referred to in this Note as the problem of the Bankruptcy Hegemon—has generated three judicial schools of thought, each purporting to definitively resolve the conflict. For the sake of clarity, they will henceforth be referred to as (A) the Jurisdictional Conflict School; (B) the Issue Preclusion School; and (C) the *Rooker-Feldman* School.

A. *The Jurisdictional Conflict School*

The Ninth Circuit has taken the position that for the most part, state courts lack subject matter jurisdiction to determine the dischargeability<sup>101</sup> of a bankrupt’s debts,<sup>102</sup> and as a result, state decisions on such matters are open to collateral attack. In fact, by hanging their hat on 28 U.S.C. § 1334(a)<sup>103</sup> and Congressional “plenary power over bankruptcy,”<sup>104</sup> the Ninth Circuit holds that the United States Code gives federal courts exclusive jurisdiction over bankruptcy proceedings and cases.<sup>105</sup> Though simple to articulate, the reasoning behind this conclusion is considerably more nuanced—and as most courts have determined—incorrect.<sup>106</sup>

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<sup>100</sup> JOHN NEWTON, *The Bitter Waters*, in OLNEY HYMNS, IN THREE BOOKS 14 (London, 6th ed. 1797) (1779).

<sup>101</sup> The term “dischargeability” and “discharge” have different meanings. The Tenth Circuit explains:

The term *discharge* refers to the operation of the Bankruptcy Code provision (§ 727 in a Chapter 7 case) that effects a general discharge of the debtor’s prepetition debts. The term *dischargeability* refers to the operation of the Code provision, § 523, that excepts particular debts from the general discharge provision of the Code.

*In re Beardslee*, 209 B.R. 1004, 1007-08 (B.A.P. 10th Cir. 1997).

<sup>102</sup> See, e.g., *In re Gruntz*, 202 F.3d 1074, 1079, 1081 (9th Cir. 2000); cf. *In re Fernandez-Lopez*, 37 B.R. 664, 669 (B.A.P. 9th Cir. 1984) (noting that Congressional legislation “resulted in . . . the bankruptcy court [being] the exclusive forum for determining whether or not a debt may survive bankruptcy”).

<sup>103</sup> 28 U.S.C. § 1334(a) (“Except as provided in subsection (b) of this section, the district courts shall have *original and exclusive jurisdiction* of all cases under title 11.” (emphasis added)).

<sup>104</sup> *In re Gruntz*, 202 F.3d at 1080, 1080 (“Congress’s plenary power over bankruptcy derives from [Article I, section 8 of the U.S. Constitution].”).

<sup>105</sup> See *id.*

<sup>106</sup> The Second, Sixth, Eighth, and Tenth Circuits, as well as some courts in the Ninth Circuit itself, have all held that state courts have *concurrent* jurisdiction to determine the dischargeability of debts. See, e.g., *In re Hamilton*, 540 F.3d 367 (6th Cir. 2008); *In re Apex Oil Company, Inc.*,

While the case of *In re McGhan*—previously discussed in the Introduction to this Note—was the ultimate articulation of the Ninth Circuit’s position, the foundation of the Jurisdictional Conflict School’s argument can be found in the case of Robert Gruntz, who chose to file for bankruptcy rather than pay child support to his ex-wife.<sup>107</sup> Before he could obtain a discharge, Gruntz’s ex-wife filed a complaint with the Los Angeles District Attorney, who charged Gruntz with “failure to support dependent children.”<sup>108</sup> After his conviction, Gruntz returned to the bankruptcy court, unsuccessfully petitioning the court to avoid the state criminal proceedings as “violative of the automatic stay.”<sup>109</sup> The Ninth Circuit, sitting *en banc*, affirmed the dismissal of Gruntz’s petition. But because it did not rely on jurisdictional grounds,<sup>110</sup> the focus of our attention should fall not on the ultimate conclusion, but on the court’s discussion of 11 U.S.C. § 1334, where it sets out what would eventually become the basis for the Jurisdictional Conflict School’s core argument.<sup>111</sup>

The Ninth Circuit read the language of § 1334(a), which states that federal courts shall have “original and exclusive jurisdiction” over Title 11 cases,<sup>112</sup> to mean that Congress imbued the federal courts with exclusive authority to handle “bankruptcy matters” generally.<sup>113</sup> This grant of power is not absolute, however. Congress can grant exclusive jurisdiction only over what the Court referred to as “core . . . proceedings.”<sup>114</sup> And while according to the *Gruntz* court, a nonexclusive list of core proceeding exemplars can be found in 28 U.S.C. § 157,<sup>115</sup> case law provides a definition that is far more generalized and significantly easier to grasp: Core proceedings, in relation to which bankruptcy courts exercise “plenary” authority, arise from title 11 of the Bankruptcy Code or “only in the context of a

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406 F.3d 538 (8th Cir. 2005); *In re Pavelich*, 229 B.R. 777 (B.A.P. 9th Cir. 1999); *In re Candidus*, 327 B.R. 112 (Bankr. E.D.N.Y. 2005); *In re Beardslee*, 209 B.R. 1004 (Bankr. D. Kansas 1997).

<sup>107</sup> Gruntz had been ordered to make regular child support payments by the state courts. *In re Gruntz*, 202 F.3d at 1077.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> In fact, the court’s ultimate decision was not based on § 524(a). Instead, the *Gruntz* court concluded that the automatic stay, 11 U.S.C. § 362 (2006), did not apply to criminal proceedings in general. *In re Gruntz*, 202 F.3d at 1077.

<sup>111</sup> See, e.g., *In re McGhan*, 288 F.3d 1172, 1175 (9th Cir. 2002) (expanding the reasoning of *In re Gruntz* to cover § 524(a) issues).

<sup>112</sup> 28 U.S.C. § 1334(a).

<sup>113</sup> *In re Gruntz*, 202 F.3d at 1080.

<sup>114</sup> *Id.* (“Not all matters related to bankruptcies fall within the orbit of those subject to federal plenary power.”).

<sup>115</sup> See 28 U.S.C. § 157(b)(2) (2006) (“Core Proceedings include, but are not limited to . . . (I) determinations as to the dischargeability of particular debts; (J) objection to discharges . . .” (emphasis added)).

bankruptcy case.”<sup>116</sup> In contrast, non-core proceedings, which confine bankruptcy courts to “general Article III federal court jurisdiction”<sup>117</sup> held concurrently with state courts,<sup>118</sup> do not involve “a cause of action arising under title 11”<sup>119</sup> and instead involve state-law rights “independent of and antecedent to the . . . petition that conferred jurisdiction upon the Bankruptcy Court.”<sup>120</sup>

The *Gruntz* court also set out an unusual interpretation of § 1334(b),<sup>121</sup> a provision which, as a general matter, has been understood to grant *concurrent* jurisdiction to state courts.<sup>122</sup> Noting that “nothing in [§ 1334(b)] vests the *states* with any jurisdiction over a core bankruptcy proceeding,”<sup>123</sup> the Ninth Circuit held that the true purpose of § 1334(b) is not to establish concurrent jurisdiction for state courts, but to allow “district courts in which the bankruptcy case is filed to adjudicate bankruptcy-related actions in which jurisdiction has been vested in other courts.”<sup>124</sup> To follow this line of reasoning—as a handful of federal courts have done<sup>125</sup>—would therefore mean that §

<sup>116</sup> *In re Gruntz*, 202 F.3d at 1081 (quoting *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987)).

<sup>117</sup> *Id.*

<sup>118</sup> See 28 U.S.C. § 1334(b).

<sup>119</sup> *In re Gruntz*, 202 F.3d at 1081 (citing *In re Windsor Commc’ns Group*, 75 B.R. 713, 721 (E.D. Pa. 1985)).

<sup>120</sup> *Id.* at 1080-81 (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 84 (1982)).

<sup>121</sup> Section 1334(b) reads:

Except as provided [elsewhere in this section], and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have *original but not exclusive jurisdiction* of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(b) (emphasis added).

<sup>122</sup> See, e.g., *In re Hamilton*, 540 F.3d 367 (6th Cir. 2008); *In re Apex Oil Co., Inc.*, 406 F.3d 538 (8th Cir. 2005); *In re Pavelich*, 229 B.R. 777 (B.A.P. 9th Cir. 1999); *In re Candidus*, 327 B.R. 112 (Bankr. E.D.N.Y. 2005); *In re Beardslee*, 209 B.R. 1004 (Bankr. D. Kan. 1997). Interestingly, if 11 U.S.C. § 1334(b) grants concurrent jurisdiction to state courts, then it also creates a tension between itself and 11 U.S.C. § 524(a), which guarantees the federal courts absolute authority over the bankruptcy discharge. This tension has been recognized by several courts, most recently the Sixth Circuit. See, e.g., *In re Hamilton*, 540 F.3d at 373 (“Thus, there exists a tension between [28 U.S.C. § 1334(b)]’s . . . aim to preserve state-court authority, and 11 U.S.C. § 524(a)’s aim to preserve the bankruptcy court’s authority.”).

<sup>123</sup> *In re Gruntz*, 202 F.3d at 1083.

<sup>124</sup> *Id.*

<sup>125</sup> In addition to the Ninth Circuit, the Third and Federal Circuits have each read § 1334(b) to be a broad grant of jurisdiction to federal courts, eschewing any application it might have to state courts. See, e.g., *Quality Tooling, Inc. v. United States*, 47 F.3d 1569, 1573 (Fed. Cir. 1995) (“Congress, wishing to give the district court . . . plenary authority over [bankruptcies] expressly provided that the district court would have concurrent jurisdiction over all claims . . . .”); *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1155 (9th Cir. 1992) (“[11 U.S.C. § 1334] allows a single court to preside over all of the affairs of the estate, which promotes a ‘congressionally-endorsed objective: the efficient and expeditious resolution of all matters connected to the bankruptcy estate.’” (quoting *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988))); *Brock v. Morysville Body Works, Inc.*, 829 F.2d 383, 386 (3d Cir. 1987) (“The jurisdictional grant of [§] 1334(b) . . . permits the district court to expeditiously complete the bankruptcy

1334(b) does not limit the jurisdiction of the bankruptcy court, but instead expands it into areas that before had been the exclusive purview of state courts, thus further eroding the state courts' ability to adjudicate bankruptcy-related cases.

Its contrarian views regarding § 1334(b) notwithstanding, the greatest weakness of the Ninth Circuit's approach is the highly convoluted system of exceptions and counter-exceptions that surrounds § 1334 itself.<sup>126</sup> Those courts that have been able to extricate themselves from this morass of judicial doctrine have turned to 11 U.S.C. § 523(a) in an attempt to resolve this issue. Since § 523(a) debts are not automatically discharged during a bankruptcy proceeding,<sup>127</sup> courts such as the District Court for the Eastern District of New York have held that cases related to such debts await a state-level "judicial determination" regarding the "inchoate" issue of dischargeability.<sup>128</sup> Thus, if a state court decides that the debt has *not* been discharged, the case does not run afoul of § 524(a).<sup>129</sup> By adopting this line of reasoning, most federal courts resolve the tension between § 1334(b) and § 524(a) in favor of state courts.<sup>130</sup>

### B. *The Issue Preclusion School*

Some federal courts resolve the problem of the Bankruptcy Hegemon by appealing to the doctrine of issue preclusion,<sup>131</sup> which bars

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proceedings without the necessity of awaiting the outcome of state or federal trials."); *see also* 1 COLLIER ON BANKRUPTCY, *supra* note 77, ¶ 3.01[4] ("[28 U.S.C. § 1334(b)] evidences the intent of Congress to bring all bankruptcy-related litigation within the purview of the district court, at least as an initial matter, irrespective of congressional statements to the contrary in the context of other specialized litigation.").

<sup>126</sup> *See, e.g., In re Franklin*, 179 B.R. 913, 920 (Bankr. E.D. Cal. 1995) (carving out "an exclusive jurisdiction exception to the general rule of concurrent jurisdiction" and creating a further "concurrent jurisdiction exception to that exclusive jurisdiction exception").

<sup>127</sup> *See supra* notes 96-105 and accompanying text.

<sup>128</sup> *In re Candidus*, 327 B.R. 112, 120 (Bankr. E.D.N.Y. 2005).

<sup>129</sup> Judgments pertaining to § 523(a) debts, thus, are not "determination[s] of the personal liability of the debtor with respect to any debt discharged . . ." 11 U.S.C. § 524(a)(1); *see, e.g., In re Candidus*, 327 B.R. at 120.

<sup>130</sup> *See, e.g., In re Candidus*, 327 B.R. 112; *In re Beardslee*, 209 B.R. 1004 (Bankr. D. Kan. 1997); *see also In re Pavelich*, 229 B.R. 777 (B.A.P. 9th Cir. 1999) (limiting state court jurisdiction to *only* those issues that are raised under § 523).

<sup>131</sup> *See, e.g., In re Goetzman*, 91 F.3d 1173, 1177 (8th Cir. 1996) (affirming a decision reached by lower courts on the basis of issue preclusion); *In re Ferren (Ferren I)*, 227 B.R. 279, 282 (B.A.P. 8th Cir. 1998) (affirming a decision reached by lower courts on the basis of issue preclusion); *In re Palmer*, No. MT-96-2134-HRYR, 1998 WL 739979, at \*2 (B.A.P. 9th Cir. Mar. 9, 1998). At the outset it should be noted that courts agreeing with the Issue Preclusion School's line of reasoning oftentimes use different terms to describe the doctrine. Some courts, and scholars, are still in the habit of using the term "collateral estoppel" where they mean issue preclusion. *See, e.g., In re Palmer*, 1998 WL 739979, at \*2; *see also* Jodi F. Manko, *Collateral Estoppel and the Rooker-Feldman Doctrine: The Problematic Effect These Preclusion and*

the relitigation of legal issues that have already been “actually” decided.<sup>132</sup> Thus, such courts believe that a state decision with respect to the bankruptcy discharge will be binding in all subsequent federal actions if the bankruptcy discharge issue was actually litigated in the state court and necessary for the final judgment, with the court rendering a valid and final decision.<sup>133</sup> In a situation that gives rise to § 524(a) issues, the binding effect arises from the operation of the Full Faith and Credit Statute,<sup>134</sup> which mandates that federal courts abide by and respect state court judgments.<sup>135</sup>

By relying on the mechanism of issue preclusion, some federal courts—most prominently those in the Eighth Circuit—have found that a state decision cannot be avoided by either of the § 524(a) provisions.<sup>136</sup> In the case of *In re Goetzman*, for example, the state court held in a post-discharge judgment that the debtors owed a significant amount of money on their mortgage.<sup>137</sup> The bankruptcy

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*Jurisdictional Principles Have on Bankruptcy Law*, 21 EMORY BANKR. DEV. J. 579 (2005). This is notwithstanding the fact that collateral estoppel has long been subsumed into the larger notion of issue preclusion. Christopher Klein et al., *Principles of Preclusion and Estoppel in Bankruptcy Cases*, 79 AM. BANKR. L. J. 839, 852 (2005).

<sup>132</sup> See RESTATEMENT (SECOND) OF JUDGMENTS, Ch. 1, Introduction (1982) (“The principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually should not be allowed to have another chance to do so. A related but narrower principle—that one who has actually litigated an issue should not be allowed to relitigate it—underlies the rule of issue preclusion.” (emphasis added)).

<sup>133</sup> *Id.* at § 27 (“When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”).

<sup>134</sup> See *In re Singleton*, 230 B.R. 533, 537 (B.A.P. 6th Cir. 1999) (“Preclusion in federal litigation following a judgment in state court depends on the Full Faith and Credit Statute . . .” (quoting *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373 (1985))).

<sup>135</sup> 28 U.S.C. § 1738 (2008).

<sup>136</sup> See, e.g., *In re Goetzman*, 91 F.3d 1173, 1177 n.5 (8th Cir. 1996) (“We have a valid state court judgment that says Agribank gets to foreclose. Anything I say isn’t going to change that at this point . . . The state court has given Agibank the right to foreclose and right or wrong, that is a valid judgment and I . . . have no right to go behind it and change what it’s done.”); see also *Ferren I*, 227 B.R. 279, 281 (B.A.P. 8th Cir. 1998) (“The issue having been litigated and concluded in the state court proceedings, the debtor may not raise the issue in another forum, the bankruptcy court. . . . [T]he state court judgment is entitled to full faith and credit in this court.” (quoting *In re Ferren*, Case No. 91-40707s, AP No. 98-4012, at \*4-5 (Bankr. E.D.Ark. Aug. 27, 1998))).

<sup>137</sup> Before finding themselves in such an unfortunate situation, the Goetzmans had filed for bankruptcy, and because their discharge order invoked § 524(a)’s statutory injunction and avoidance provisions, they thought that they had succeeded in discharging a portion of their mortgage. *In re Goetzman*, 91 F.3d at 1175 (noting that the discharge order avoided subsequent judgments and barred creditors from suing the debtors on the discharged debts). A year later, however, the bank moved to foreclose on the supposedly discharged mortgage, causing the Goetzmans to appeal to the Minnesota state court, where the bankruptcy discharge was deemed irrelevant and, after concluding that the Goetzmans owed more than \$740,000 on the mortgage, the court allowed the bank to foreclose. *Id.* After the Minnesota Court of Appeals affirmed and the Supreme Court of Minnesota declined to review the decision, the Goetzmans petitioned the bankruptcy court for a declaratory judgment as to the amount of the mortgage that had been

court ruled that the doctrine of issue preclusion prevented it from reconsidering the amount of the Goetzmanns' mortgage.<sup>138</sup> The Eighth Circuit Court of Appeals agreed, holding that appropriate relief for the Goetzmanns "was available in the appellate courts of Minnesota,"<sup>139</sup> and having failed to secure such relief, the Goetzmanns could not now seek the federal courts' aid in an attempt to circumvent the state's ruling.<sup>140</sup>

The Eighth Circuit's opinions notwithstanding, most courts stand in diametric opposition to the Issue Preclusion School's approach.<sup>141</sup> Consider, for example, the Ninth Circuit's adamant insistence that bankruptcy courts' authority transcends that of the U.S. Code, and by extension that of the Full Faith and Credit Statute,<sup>142</sup> because Article I of the Constitution granted the federal government power to create a uniform system of bankruptcy laws.<sup>143</sup>

The validity requirement attendant to the doctrine of issue preclusion is also troublesome since a determination of validity requires that the deciding court had subject matter jurisdiction to hear the case.<sup>144</sup> As discussed earlier, federal courts are split on the issue of whether state courts have subject matter jurisdiction over bankruptcy proceedings. Those who follow the logic of *Gruntz* and the Jurisdictional Conflict School hold that there is no concurrent jurisdiction for state courts, and therefore, no state judgment regarding the bankruptcy discharge can ever be valid.<sup>145</sup> On the other hand, courts granting concurrent jurisdiction to state tribunals are far more likely to be receptive to an issue preclusion argument.

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discharged. *Id.* (noting that the issue up for determination in federal court was "the amount of the real estate lien represented by the unsecured portion of the lien and subsequently discharged in the underlying Goetzman bankruptcy discharge").

<sup>138</sup> *Id.* Specifically, the bankruptcy court held that it could not "go behind" a valid state judgment to change the outcome:

If the state trial court erred in the extent it addressed the issue the Goetzmanns are now pressing, relief was available in the appellate courts of Minnesota. None being forthcoming, the Goetzmanns cannot now bring an action in federal court which would effectively reverse the state court decision or void its ruling.

*Id.*

<sup>139</sup> *Id.* at 1178.

<sup>140</sup> *Id.* Interestingly, the opinion can be read in such a way as to hold open the possibility that even an *incorrectly decided* state judgment is beyond reproach.

<sup>141</sup> RESTATEMENT (SECOND) OF JUDGMENTS, that great aggregator of jurisprudence, says: "For a statute significantly modifying the rules of res judicata in certain matters relating to bankruptcy, see §524(a) of the Bankruptcy Code . . ." RESTATEMENT (SECOND) OF JUDGMENTS § 27, reporter's note cmt.o (1982).

<sup>142</sup> *See, e.g., In re Gurrola*, 328 B.R. 158, 169 (B.A.P. 9th Cir. 2005); *In re Pavelich*, 229 B.R. 777, 782 (B.A.P. 9th Cir. 1999) ("[Section] 524(a) is a statutory exception to the Full Faith and Credit Statute."); *In re Fernandez-Lopez*, 37 B.R. 664, 669 (B.A.P. 9th Cir. 1984).

<sup>143</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>144</sup> After all, without proper jurisdiction there can be no valid final judgment. *See In re Pavelich*, 229 B.R. at 782 (noting that stripping state courts of subject matter jurisdiction results in federal courts not having to accord state decisions full faith and credit).

<sup>145</sup> *See supra* notes 101-130 and accompanying text.

### C. *The Rooker-Feldman School*

As arguably the most popular approach to the Bankruptcy Hegemon problem, it should come as little surprise that a majority of the courts have at one time or another peered through the prism of the *Rooker-Feldman* doctrine in an attempt to determine the proper balance between federal and state court power under § 524(a).<sup>146</sup> But in spite of its popularity, or perhaps as a consequence of it, the various jurisdictions have failed to uniformly apply the doctrine—and at present there is no want for arguments regarding its “correct” application.

In the abstract, the *Rooker-Feldman* doctrine stands for the proposition that all federal courts—with the exception of the Supreme Court—lack the authority to review, alter, or in any other way collaterally attack a state court decision.<sup>147</sup> The doctrine derives from a pair of Supreme Court cases decided sixty years apart. In 1923, in *Rooker v. Fidelity Trust Co.*,<sup>148</sup> the Court ruled that the jurisdiction of lower federal courts is “strictly original” and that therefore they could not sit in appellate review over state decisions.<sup>149</sup> The *Rooker* court further held that the Supreme Court was the *only* federal court allowed to exercise appellate jurisdiction over state court decisions.<sup>150</sup> This notion was further strengthened when, in 1983, the Court decided *District of Columbia Court of Appeals v. Feldman*<sup>151</sup> by holding that a federal district court was “without authority to review final determinations of the District of Columbia Court of Appeals in judicial proceedings.”<sup>152</sup> Citing to the *Rooker* decision, the *Feldman* court likewise underscored the Supreme Court’s unique appellate powers by noting that “[appellate review] can be obtained only in this Court.”<sup>153</sup>

Thus, starting in 1983, bankruptcy courts that had already been operating according to the Bankruptcy Code regime for several years had to reconcile this new pro-state jurisprudential doctrine with

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<sup>146</sup> See, e.g., *In re Bayhi*, 528 F.3d 393 (5th Cir. 2008); *In re Hamilton*, 540 F.3d 367 (8th Cir. 2008); *Ferren II*, 203 F.3d 559 (8th Cir. 2000); *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000); *In re Reitnauer*, 152 F.3d 341 (5th Cir. 1998); *In re Goetzman*, 91 F.3d 1173 (8th Cir. 1996); *In re James*, 940 F.2d 46 (3d Cir. 1991); *In re Singleton*, 230 B.R. 533 (B.A.P. 6th Cir. 1999); *In re Pavelich*, 229 B.R. 777; *In re Candidus*, 327 B.R. 112 (Bankr. E.D.N.Y. 2005); *In re Massa*, 217 B.R. 412 (Bankr. W.D.N.Y. 1998); *In re Beardslee*, 209 B.R. 1004 (Bankr. D. Kan. 1997).

<sup>147</sup> See, e.g., *Gruntz*, 202 F.3d at 1078; *Goetzman*, 91 F.3d at 1177.

<sup>148</sup> 263 U.S. 413 (1923).

<sup>149</sup> *Id.* at 416. In doing so, the Court affirmed a district court decision refusing to review a state judgment due to “lack of jurisdiction.” *Id.* at 415.

<sup>150</sup> *Id.* at 416 (“Under the legislation of Congress, no court of the United States other than [the Supreme Court] could entertain a proceeding to reverse or modify the judgment [of a state court] for errors . . . .”).

<sup>151</sup> 460 U.S. 462 (1983).

<sup>152</sup> *Id.* at 476.

<sup>153</sup> *Id.* (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923)).

§ 524(a)'s provisions, which allowed federal courts to invalidate state actions against a debtor who had obtained an otherwise valid discharge. In attempting to do so, federal courts reached a variety of differing conclusions. The Eighth and Ninth Circuits, the two jurisdictions generally most opposed to each other in bankruptcy jurisprudence, unsurprisingly represent the opposite ends of this debate. The Eighth Circuit gives great deference to state courts while the Ninth Circuit grants almost no such deference.

The Eighth Circuit holds that the *Rooker-Feldman* doctrine precludes bankruptcy courts from reversing or avoiding a state decision. Nowhere is this more apparent than in the case of *In re Ferren*,<sup>154</sup> which dealt with a debtor who filed for bankruptcy and listed several judicial lien holders as “unsecured creditors.”<sup>155</sup> The subsequent bankruptcy discharge order provided that the lien holders would each receive “pro rata payments from [Ferren’s] earnings.”<sup>156</sup> The bank later foreclosed on Ferren’s property,<sup>157</sup> selling it back to him in a foreclosure sale.<sup>158</sup> The remaining lien holders then moved the Arkansas Chancery Court for “distribution of the sale proceeds in satisfaction of their liens.”<sup>159</sup> The state ruled against Ferren despite his bankruptcy discharge and distributed the proceeds to the various lien holders.<sup>160</sup> Instead of appealing in state court, Ferren petitioned the bankruptcy court to enforce his discharge.<sup>161</sup> The bankruptcy court, citing issue preclusion considerations, dismissed the petition.

The Bankruptcy Appellate Panel held that Ferren’s claim could succeed only if the federal court found that the state order “was in error,” a conclusion that necessitated appellate review of the state decision itself.<sup>162</sup> Because the *Rooker-Feldman* doctrine precluded such review, the *Ferren* panel surmised that the federal judiciary lacked authority to consider and, if need be, overrule the state court’s decision.<sup>163</sup> Instead, Ferren’s “proper avenue for appeal,” the court

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<sup>154</sup> *Ferren II*, 203 F.3d 559, 560 (8th Cir. 2000). However, since the Court of Appeals opinion is exceptionally short, the majority of the discussion will focus on the Bankruptcy Appellate Panel’s decision. *Ferren I*, 227 B.R. 279, 283 (B.A.P. 8th Cir. 1998).

<sup>155</sup> *Ferren I*, 227 B.R. at 281.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 283.

<sup>163</sup> *Id.* at 282 (noting the “well settled principle” that the court could “affirm the judgment below on any basis supported by the record, whether or not raised therein” (citing *In re McGowan*, 226 B.R. 13, 18 (B.A.P. 8th Cir. 1998))). The *Ferren I* court opined that, though the *Rooker-Feldman* and Issue Preclusion doctrines were similar, the differences between the two were “worth recalling.” *Id.* at 282 n.7. Thus, the court first noted that “Rooker-Feldman is broader than claim and issue preclusion because it does not depend on a final judgment on the

said, lay with the state appellate courts.<sup>164</sup> The Eighth Circuit affirmed the decision and noted that a federal decision that would *effectively void* a state court's judgment—as distinct from a decision which *explicitly voids* a state court judgment—was also barred by the *Rooker-Feldman* doctrine.<sup>165</sup>

Interestingly, the determination as to whether a specific debt has been discharged<sup>166</sup> is an inquiry that qualifies as a core bankruptcy proceeding under 28 U.S.C. § 157.<sup>167</sup> This begs the question: How can federal courts be barred from undertaking a core proceeding—which falls within the exclusive jurisdiction of the bankruptcy courts—as a result of a state court's actions that intruded upon their jurisdiction in the first place? The answer lies in the very circular nature of the question itself. In order to conclude that the state court engaged in an inquiry outside of its jurisdiction, the federal court must first consider and review the state's decision. That is, in order to find that the state intruded upon the federal courts' exclusive jurisdiction, the federal court must first—impermissibly—exercise appellate jurisdiction over the state court's decision. Thus, it seems as though the distinction between core and non-core bankruptcy proceedings<sup>168</sup> is irrelevant with regard to the issue of § 524(a) discharges, at least in the Eighth Circuit. If that is indeed the case, however, it imposes a tremendous burden on state courts in that they are now required to understand the intricacies of bankruptcy law, something that was rarely within their purview before.

But the *Ferren* decision stands for far more than the simple proposition that federal courts cannot review state bankruptcy judgments. The *Ferren* panel suggested that the *Rooker-Feldman* doctrine would bar the decision even if the federal court never *explicitly* stated that it was reversing a state court's judgment.<sup>169</sup> Likewise, the Court of Appeals saw no difference between a judgment that explicitly

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merits.” *Id.* (quoting *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 n.1 (8th Cir.1995)). Additionally, the *Ferren I* court explained that “under *res judicata*, if the state would allow for reconsideration of a previously decided claim or if the federal plaintiff did not have an adequate chance to address the claim during the state action, [the courts] will consider the federal claim. *Rooker-Feldman* does not contain analogous limitations.” *Id.* (quoting *Garry v. Geils*, 82 F.3d 1362 (7th Cir.1996)).

<sup>164</sup> *Id.* at 283 (“Having determined that *Ferren*'s efforts to overturn the ruling of the Chancery Court in these federal forums were misplaced, we note, in closing, that his proper avenue for appeal, and that which he chose to disregard, was with the state courts of Arkansas.”).

<sup>165</sup> *Ferren II*, 203 F.3d 559 (“[I]n order to grant *Ferren* the relief he seeks, the bankruptcy court would have to *effectively void* the Arkansas Chancery Court's decision.” (emphasis added)).

<sup>166</sup> *Ferren I*, 227 B.R. at 281.

<sup>167</sup> 28 U.S.C. § 157(b)(2) (2008) (“Core proceedings include, but are not limited to . . . determinations as to the dischargeability of particular debts . . . .”); see *In re McGhan*, 288 F.3d 1172, 1179 n.9 (9th Cir. 2002).

<sup>168</sup> See *supra* notes 116-120 and accompanying text.

<sup>169</sup> *Ferren I*, 227 B.R. at 283 (“Thus the bankruptcy court could not review *Ferren*'s claims and grant the relief he requested without *effectively* reversing the decision of the state court.” (emphasis added)).

avoided a state decision and a judgment that accomplished the same feat with no specific language to that effect.<sup>170</sup> As a result, Eighth Circuit courts are now in a rather uncomfortable position, for they must take care not to tread on state court decisions either by their words or by their actions. *In fine*, then, an Eighth Circuit bankrupt who is sued in state court can never ascend to the federal level and is in effect bound by the actions of his creditor, despite any privilege to a “fresh start” to which he may be entitled.

Standing in stark contrast to the Eighth Circuit’s approach, in 2000 the Ninth Circuit articulated its own position on the proper place of the *Rooker-Feldman* doctrine in bankruptcy jurisprudence. While the case of *In re Gruntz* concerned itself with an alleged violation of the automatic stay provision—and was ultimately decided based on the notion that the automatic stay does not affect criminal actions—the doctrinal explanations of the Circuit Court about the *Rooker-Feldman* doctrine are nonetheless instructive.<sup>171</sup> Since the Ninth Circuit had already held that states lacked the jurisdictional authority to decide bankruptcy cases,<sup>172</sup> it deemed state decisions in such cases void and thereby open to “collateral attack.”<sup>173</sup> Since there was no valid judgment to protect, the court concluded that the “unremarkable”<sup>174</sup> *Rooker-Feldman* doctrine ultimately does not apply to state determinations of bankruptcy-related cases.<sup>175</sup>

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<sup>170</sup> *Ferren II*, 203 F.2d at 559 (“[I]n order to grant Ferren the relief he seeks, the bankruptcy court would have to *effectively void* the Arkansas Chancery Court’s decision.” (emphasis added)).

<sup>171</sup> See *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000).

<sup>172</sup> See *supra* notes 166-170 and accompanying text.

<sup>173</sup> *Gruntz*, 202 F.3d at 1079 (“[T]he rule has long stood that ‘[a] state court judgment entered in a case that falls within the federal courts’ exclusive jurisdiction is subject to collateral attack in the federal courts.’” (quoting *In re Gonzales*, 830 F.2d 1033 (9th Cir. 1987))).

<sup>174</sup> See *id.* at 1078.

<sup>175</sup> See *id.* at 1079, 1083. The court also concluded, in a somewhat alarmist fashion, that: The rule urged by the County would undermine the principle of a unified federal bankruptcy system, as declared in the Constitution and realized through the Bankruptcy Code. If state courts were empowered to issue binding judgments modifying the federal injunction created by the automatic stay, creditors would be free to rush into friendly courthouses around the nation to garner favorable relief. The bankruptcy court would then be stripped of its ability to distribute the debtor’s assets equitably, or to allow the debtor to reorganize financial affairs. . . . *It is but slight hyperbole to say that chaos would reign in such a system.*

*Id.* at 1083 (emphasis added). This fear seems somewhat misplaced. After all, in cases where the state court erroneously interprets the discharge order, debtors are protected by the appellate process. And where the state process fails, the Supreme Court of the United States may choose to step in and impose a uniform approach on the state courts by virtue of bankruptcy’s constitutional roots. Ultimately, however, the Ninth Circuit’s conclusion that “chaos would reign” seems more like an appeal to Congress than an argument in favor of limiting *Rooker-Feldman* protection. Indeed, a solution to this problem would be most effective if it came from the federal legislature, again, acting through its constitutional grant of power.

But what of the circular argument, discussed previously with regard to the *Ferren* decision?<sup>176</sup> Here the same logic is inapplicable, for unlike the Eighth Circuit, the Ninth Circuit does not grant states jurisdiction—concurrent or otherwise—under 11 U.S.C. § 1334. Thus, because federal courts in the Ninth Circuit need not engage in *any* form of review of the state decision in order to determine that the state court impermissibly encroached upon the exclusive federal jurisdiction, state court decisions that deal with matters related to bankruptcy are considered void *ab initio*, thereby obviating any need for appeal to the *Rooker-Feldman* doctrine.

#### IV. “THE EVIL[] THAT BESET[S] OUR PATH”<sup>177</sup>: THE NINTH AND SIXTH CIRCUITS’ POISON OLIVE BRANCH

In recent years, several federal courts, in considering the Bankruptcy Hegemon problem, have crafted decisions that purport to create a workable middle ground between granting state courts absolute deference and granting them none at all. However, these decisions are nothing more than the latest in a long series of attempts on the part of the federal courts to usurp state power in the bankruptcy context.

##### A. *In re Pavelich*<sup>178</sup>: *The Ninth Circuit’s Attempt*

Issued just one year before *Gruntz* articulated the Ninth Circuit’s position in favor of granting federal courts the power to collaterally attack state judgments, *In re Pavelich* dealt with a couple who had been forced into bankruptcy.<sup>179</sup> After the proceedings ended, their attorneys filed a state suit to collect on fees for services rendered.<sup>180</sup> Despite their discharge, the Paveliches lost on the state level and subsequently moved the bankruptcy court to reopen their case.<sup>181</sup> The Paveliches contended that their attorneys had violated the discharge injunction from § 524(a)(2), and as such, the state judgment should be avoided.<sup>182</sup> The

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<sup>176</sup> See *supra* notes 167-168 and accompanying text.

<sup>177</sup> JOHN NEWTON, *Vanity of Life*, in OLNEY HYMNS, IN THREE BOOKS 55 (London, 6th ed. 1797) (1779).

<sup>178</sup> See *In re Pavelich*, 229 B.R. 777 (B.A.P. 9th Cir. 1999).

<sup>179</sup> *Id.* at 779.

<sup>180</sup> *Id.* at 780.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* (“Contending that McCormick Barstow was violating the discharge injunctions by attempting to collect a discharged debt, the Paveliches filed a motion to reopen their bankruptcy cases so that they could pursue relief by way of contempt and sanctions.”).

motion was denied, and the Paveliches then appealed to the Bankruptcy Appellate Panel, which attempted to split the doctrinal baby.<sup>183</sup>

In considering the question of whether to void a state judgment or not, the *Pavelich* court considered two types of state decisions: first, decisions dealing with the dischargeability of a particular debt, and second, decisions dealing with the discharge order as a whole.<sup>184</sup> Based on its interpretation of 11 U.S.C. § 1334(b),<sup>185</sup> the court held that the states had the power to decide whether a particular debt was dischargeable pursuant to the language of § 523(a).<sup>186</sup> Such decisions, the court continued, should be afforded protection under the *Rooker-Feldman* doctrine.<sup>187</sup> The panel then moved on, taking up the question of whether a state court's decision dealing with the discharge *as a whole* could ever be safe from § 524(a)'s statutory avoidance provision.

The *Pavelich* court began its inquiry by holding that state courts had the power to construe the discharge itself, noting as evidence that “discharge in bankruptcy is a recognized defense under state law.”<sup>188</sup> However, the court then quickly placed an “unusual limitation” on this power.<sup>189</sup> The state court, according to *Pavelich*, only had power to construe the discharge *correctly*.<sup>190</sup> And if by some chance the state court should misconstrue the discharge order, then “its judgment may be void to the extent it *offends* the discharge . . . .”<sup>191</sup> All this begged the question: Who was to decide whether the state court had construed the discharge order correctly or not? The answer, according to the *Pavelich* decision, is the federal bankruptcy courts.<sup>192</sup> At bottom, then, the *Pavelich* court seems to have held that a state court had the power to determine the dischargeability of debts<sup>193</sup> and to construe the discharge order so long as the state court construed the discharge in a way that the federal court deemed was “correct.”<sup>194</sup>

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<sup>183</sup> *Id.*

<sup>184</sup> *See id.* at 784.

<sup>185</sup> It bears mentioning that the *In re Pavelich* court read § 1334(b) as a grant of subject matter jurisdiction to the state court, a decision standing in stark contrast to the *Gruntz* court's reading, which denied state courts *any* jurisdictional authority over bankruptcy matters. *See supra* Part III.A.

<sup>186</sup> *See In re Pavelich*, 229 B.R. at 784 (“A state court's erroneous determination that specific debts, e.g., child support subject to 11 U.S.C. § 523(a)(5) . . . are excepted from discharge would be viewed as mere legal error on a matter over which it has subject matters jurisdiction.”).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 783. Indeed, this is highly analogous to the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 8.

<sup>189</sup> *In re Pavelich*, 229 B.R. at 783.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* (emphasis added).

<sup>192</sup> *Id.* at 782 (noting that the bankruptcy court's ability to enforce the § 524(a)(2) injunction “necessarily places [the court] in the position of scrutinizing a state court judgment”).

<sup>193</sup> *Id.* at 784 (“[O]n matters of nondischargeability of particular debts, the state courts have jurisdiction both to decide whether they are excepted from discharge and to get it wrong.”).

<sup>194</sup> *Id.* (“[T]he state court has jurisdiction to construe the bankruptcy discharge correctly, but not incorrectly.”).

A year later, the Court of Appeals for the Ninth Circuit decided *In re Gruntz*, setting the stage for the ascension of the Jurisdictional Conflict School and casting this doctrinal anomaly into the shadows. It wasn't until 2008 that the concept was rediscovered and adopted by the Sixth Circuit when it decided the case of *In re Hamilton*.<sup>195</sup>

### B. *In re Hamilton: The Sixth Circuit Follows Suit*

In *Hamilton*, the bankruptcy court issued the debtor a § 524(a) discharge order that covered, among other things, a debt to his ex-wife, whom he had listed among his creditors.<sup>196</sup> Undaunted, his ex-wife filed a state-level complaint seeking to recover the purportedly discharged debt.<sup>197</sup> Hamilton's failure to plead his discharge during the trial resulted in an unfavorable judgment against him,<sup>198</sup> a ruling that the state appellate court affirmed.<sup>199</sup> The court held that because of Hamilton's silence, he had lost his right to the discharge's protection.<sup>200</sup> Hamilton then attempted to move the federal bankruptcy court to enforce the discharge order against his ex-wife but found the court unwilling to oblige due to the *Rooker-Feldman* doctrine.<sup>201</sup> A subsequent 2006 appeal to the district court was more successful, with the court reversing the bankruptcy tribunal and holding that the state court was barred from contradicting the discharge order.<sup>202</sup>

In its own decision, the Sixth Circuit relied in large part on the reasoning of the *Pavelich* court, noting that "persuasive precedent" suggested that a state court's incorrect application of a discharge order is tantamount to a modification of the discharge<sup>203</sup>—a feat which, according to the Sixth Circuit, state courts lack the authority to accomplish.<sup>204</sup> As a result, the *Hamilton* panel ordered the bankruptcy court to review a post-discharge state judgment and to determine

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<sup>195</sup> 540 F.3d 367 (6th Cir. 2008).

<sup>196</sup> *Id.* at 370.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* ("In response to the Debtor's argument that his bankruptcy discharge barred Herr's indemnification claim, the Kentucky Court of Appeals held that discharge in bankruptcy was an affirmative defense that the Debtor had failed to raise. The Kentucky Court of Appeals went on to say that the Debtor's 'failure to affirmatively plead discharge in bankruptcy as a defense amounts to a waiver of the defense.'").

<sup>201</sup> *Id.* at 370-71.

<sup>202</sup> *Id.* at 371.

<sup>203</sup> *Id.* at 373-74.

<sup>204</sup> *Id.* at 375 ("[S]tate courts are allowed to construe the discharge in bankruptcy, *but what they are not allowed to do is construe the discharge incorrectly*, because an incorrect application of the discharge order would be equivalent to a modification of the discharge order." (emphasis added)).

whether it was “a modification of the discharge order and [was] void ab initio.”<sup>205</sup>

Despite the conviction with which the Sixth Circuit decided the *Hamilton* case, its conclusion has garnered very little attention from other circuits,<sup>206</sup> which is not too surprising given that the approach creates what one New York bankruptcy court called “an anomaly.”<sup>207</sup> The main problem with the *Hamilton* decision comes from the very notion that rests at its core: that a state court can construe the discharge as a whole, but only if its interpretation is in line with that of the federal court<sup>208</sup> that is placed in the position of “scrutinizing” all state decisions.<sup>209</sup> But in this very scrutiny lies the trouble.<sup>210</sup> The federal court is, in effect, passing its own judgment on the issue and then comparing its judgment with that of the state forum.<sup>211</sup> If the state decision is identical to that of the federal court, the state decision is deemed to be “correct.” Thus, when the federal court “upholds” a state court decision it is simply issuing its own judgment via a state court proxy. Two possibilities present themselves: Either the state decision is different from the federal decision, in which case the state’s judgment is void, or the state decision is the same as the federal decision, in which case the state’s judgment is not really that of the state but, in truth, is a federal judgment in state garb. Implicit in this approach, then, is the notion that all state court decisions are *void*—regardless of their holdings—since with either possibility the state judgment is disregarded in favor of the federal decision.

To be fair, the notion that a modification of the bankruptcy discharge is outside the authority of the state court is a valid one. Section 524(a)(1) specifically works to void any state judgments that apply to “debts discharged.”<sup>212</sup> As a result, if a state court rules that a

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<sup>205</sup> *Id.* at 376.

<sup>206</sup> One of the only decisions citing *In re Hamilton* for its proposition that state courts are without authority to construe a discharge correctly comes from the Seventh Circuit. *In re Slayton*, No. 06-B-2826, 2009 Bankr. LEXIS 2148, at \*18 n.8 (Bankr. E.D. Ill. Aug. 7, 2009).

<sup>207</sup> *In re Candidus*, 327 B.R. 112, 121 (Bankr. E.D.N.Y. 2005).

<sup>208</sup> See *In re Hamilton*, 540 F.3d at 373 (citing *In re Pavelich*, 229 B.R. 777, 783–84 (B.A.P. 9th Cir. 1999)).

<sup>209</sup> See *In re Pavelich*, 229 B.R. 777, 782 (B.A.P. 9th Cir. 1999).

<sup>210</sup> In his recent article, Christopher Frost correctly points out that the *In re Hamilton* decision’s reasoning renders all state decisions reviewable. Christopher W. Frost, *The Rooker-Feldman Doctrine, the Discharge Injunction, and the Automatic Stay*: *In re Hamilton*, BANKR. L. LETTER, Dec. 2008, at 1. It is this Note’s contention, however, that Mr. Frost’s conclusion does not go far enough. According to the *In re Hamilton* line of reasoning, federal courts need not review *any* state court decisions because all state court decisions are void ab initio.

<sup>211</sup> See *In re Hamilton*, 540 F.3d at 376 (“We therefore remand the case to the district court so that court may remand to the bankruptcy court to determine whether the debt was discharged. If the debt was discharged, then the state-court judgment was a modification of the discharge order and is void ab initio. If the debt was not discharge pursuant to the bankruptcy court’s discharge order, then the state-court judgment was not a modification of the discharge . . .”).

<sup>212</sup> 11 U.S.C. § 524(a)(1) (2006).

debt discharged by the bankruptcy court's order is not really discharged, then the state court's decision should be void. However, the problem with the approach taken by the Ninth and Sixth Circuits is not its reliance on this principle. It is that the approach elevates the federal courts to the status of final arbiters, calling upon them to act as overbearing patriarchs, incessantly peering over the shoulders of the state courts.

In practice, this role requires federal courts to review—impermissibly so, according to the *Rooker-Feldman* doctrine—each state court decision concerning the dischargeability of debts. And here then, in all its tragic beauty, is the core of the Bankruptcy Hegemon problem: The federal judiciary, according to § 524(a), *should* have the power to defend its orders against state court opinions that purport to resurrect debts that have been discharged during a bankruptcy proceeding. But at the same time, the determination of whether such an error has occurred *cannot* be left to the federal courts themselves, for if such a decision were subject to federal caprice, state decisions would be stripped of all but the mere pretense of validity.

V. “A SHELTER FROM THE RAIN OR WIND”<sup>213</sup>: THE PROBLEM OF THE MOVING TARGET AND A NEW CONCEPTUALIZATION

Throughout this Note, the notion that the Bankruptcy Hegemon problem should be resolved by granting federal courts unilateral authority to review state judgments has been looked upon as unacceptable. Further support for such a position comes from considering the dilemma in light of the the bankruptcy courts' power to amend the discharge order after bankruptcy proceedings have come to an end. Focusing on that issue, which this Note calls the Problem of the Moving Target, demonstrates that granting federal courts the power to collaterally attack state decisions imposes an unreasonably high burden on any state court that renders post-discharge bankruptcy judgments. That is, by allowing the bankruptcy courts to change their orders after the close of proceedings, the states are put in an awkward position where their judgments can be avoided after the fact, based on an amended discharge order issued by the bankruptcy court. Such a scenario requires further exploration.<sup>214</sup>

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<sup>213</sup> JOHN NEWTON, *For a Garden-Seat or Summer-House*, in OLNEY HYMNS, IN THREE BOOKS 231 (London, 6th ed. 1797) (1779).

<sup>214</sup> Throughout the remainder of this section, the argument and analysis proceed subject to an assumption that the Bankruptcy Hegemon problem has been resolved in favor of exclusive federal court authority.

To begin with, it bears repeating that under 28 U.S.C. § 1334(b), state courts have the requisite subject matter jurisdiction to consider whether or not a debt has been discharged.<sup>215</sup> This authority, in a jurisdiction that has resolved the Bankruptcy Hegemon problem in favor of federal courts, only extends as far as 11 U.S.C. § 524(a) will allow. After all, as discussed above, a state court cannot hold the bankrupt responsible for a debt that has been validly discharged by the bankruptcy proceeding.<sup>216</sup> If the state does render such a judgment, then its decision will be deemed void *ab initio*, and the bankruptcy court will be free to disregard it pursuant to the language of § 524(a).<sup>217</sup> Up to this point the system functions rather unremarkably. However, suppose that, after a state court renders a judgment that does not run afoul of § 524(a), the bankrupt successfully moves the bankruptcy court to reopen his case and modify the discharge so as to include the previously undischarged debt. This, in effect, creates a moving target for the state courts. The *Espinosa* line of cases suggests such a possibility.<sup>218</sup>

In the *Espinosa* cases, after a bankruptcy court issued an order that did not discharge Espinosa's student loan debts, the creditor on its own authority began to intercept tax refunds mailed to Espinosa in the hopes of recouping the loan. Espinosa then successfully petitioned the bankruptcy court to reopen his case. The court ruled that the loan had in fact been discharged, barring the creditor from any further action concerning the loan pursuant to the § 524(a) protections. The district court subsequently reversed, prompting Espinosa to appeal to the Ninth Circuit.<sup>219</sup>

The Ninth Circuit agreed with the district court that because the debt was not listed in the text of the discharge order, the creditor was not in violation of § 524(a).<sup>220</sup> However, the court noted that there were ways to amend the discharge order to *include* the student loans,

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<sup>215</sup> “[D]istrict courts shall have original *but not exclusive* jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.” 28 U.S.C. § 1334(b) (2000) (emphasis added). The *Gruntz* opinion notwithstanding, most courts agree that this language grants state courts concurrent jurisdiction to consider whether a debt was discharged. *See, e.g., In re Hamilton*, 540 F.3d 367, 373 (6th Cir. 2008); *In re Apex Oil Co., Inc.*, 406 F.3d 538, 542 (8th Cir. 2005); *In re Pavelich*, 229 B.R. 777, 784 (9th Cir. B.A.P. 1999); *In re Candidus*, 327 B.R. 112, 119 (Bankr. E.D.N.Y. 2005); *In re Beardslee*, 209 B.R. 1004, 1009 (Bankr. D. Kan. 1997).

<sup>216</sup> *See supra* note 84 and accompanying text.

<sup>217</sup> 11 U.S.C. § 524(a)(1).

<sup>218</sup> *Espinosa v. United Student Aid Funds, Inc. (Espinosa II)*, 553 F.3d 1193 (9th Cir. 2008), *cert. granted* 129 S. Ct. 2791 (2009); *Espinosa v. United Student Aid Funds, Inc. (Espinosa I)*, 530 F.3d 895 (9th Cir. 2008).

<sup>219</sup> *See Espinosa I*, 530 F.3d at 896.

<sup>220</sup> *Id.* at 898 (“The obvious problem, of course, is that the discharge injunction simply does not run against Funds because the bankruptcy court’s discharge order did not cover its debt. Funds was thus free to collect its debt, and the bankruptcy court seems to have misread its own order when it held otherwise.”).

specifically indicating Rule 60(a) of the Federal Rules of Civil Procedure.<sup>221</sup> Subsequently, the case was remanded back to the bankruptcy court so that it could “consider whether its discharge order in this case was entered as a result of a clerical error and, if so, whether to correct it . . . .”<sup>222</sup> After several months, the bankruptcy court responded:

[The paragraph that exempted student loan obligations from the general discharge] was inserted because of a clerical mistake, because *it was the clear intent of the Court*, as reflected in the Chapter 13 Plan, as approved by the Court, that all student loan-related obligations were to be discharged if the debtor successfully performed and completed the Plan.<sup>223</sup>

The use of the term “clear intent of the Court” is troubling given that state courts, whose judgments are valid only if they deal with nondischarged debts,<sup>224</sup> are already called upon to carefully consider the discharge order’s language to determine whether the debt at issue in their case was, in fact, discharged. While this by itself is a tenuous position, the *Espinosa* cases seem to suggest—by invoking the “intent” of the bankruptcy court—that state courts now have the added burden of divining the intent of the particular bankruptcy tribunal if they wish to fully understand which debts were and were not discharged. If they fail to do so, then they run the risk that, just like in the *Espinosa* cases, a future federal court will amend the discharge order based on the nebulous intent of a long-since disbanded bankruptcy panel. Such a sorry state of affairs is an almost insurmountable obstacle for those state courts that attempt to keep their judgments from conflicting with § 524(a).

In all fairness, the *Espinosa* cases explicitly note that this was a “clerical error” and that as such, the bankruptcy court had the full authority to amend its discharge order.<sup>225</sup> However, all that one must do is look at the reasoning behind the bankruptcy court’s decision to see that such a conclusion can be reached with surprisingly little evidence. It is based, once again, on the fact that the order contradicts the “clear intent” of the bankruptcy court.<sup>226</sup> In fact, the error that the court

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<sup>221</sup> *Id.* at 899. The full text of Rule 60(a) reads:

The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court’s leave.

FED. R. CIV. P. 60(a).

<sup>222</sup> *Espinosa I*, 530 F.3d at 899.

<sup>223</sup> *Espinosa II*, 553 F.3d at 1197 (emphasis added).

<sup>224</sup> 11 U.S.C. § 524(a) (2006).

<sup>225</sup> See *Espinosa I*, 530 F.3d at 899; *Espinosa II*, 553 F.3d at 1196.

<sup>226</sup> See *Espinosa II*, 553 F.3d at 1197.

considers is the insertion of a paragraph, as opposed to the omission of one—which is the archetypical example of a clerical error.<sup>227</sup>

Certainly, it is possible that an argument based on “clerical error” may be hard to make under ordinary circumstances, and for all the lip service it receives, the intent of the bankruptcy tribunal may be apparent from the discharge order and the discharge plan. However, even if all such arguments were immaterial and of little value, a further problem would still persist: Bankruptcy courts are not infallible. That much is clear from the *Espinosa* decisions, where the Ninth Circuit noted that the bankruptcy panel “seems to have misread its own order.”<sup>228</sup> Forgetting for a moment that this is the same bankruptcy court that the Ninth Circuit trusted to determine whether a clerical error had been made, the fact that bankruptcy courts are capable of misconstruing their own discharge orders at times should act as the final nail in the coffin of any approach that resolves the Bankruptcy Hegemon problem in favor of the federal courts. That is, granting bankruptcy courts power to collaterally attack state court judgments on the theory that state courts can misinterpret discharge orders, introduces the very real possibility that such power will be inadvertently misused due to the federal courts’ own interpretational errors.

Thus, considering the dilemma with the Problem of the Moving Target in mind, it becomes apparent that the possibility of a bankruptcy court’s misreading its own discharge order, and thereby changing it in some way, makes the work of the state court exponentially harder. A state court must now not only decipher what the discharge order really means and divine the intent of the bankruptcy court, but it must also outright *gamble* on whether or not the bankruptcy court will remember what its own intentions were when it granted the discharge order in the first instance. To say, therefore, that creditors face an uncertain outcome in state courts under such conditions would be an understatement; indeed, such a scenario subjects creditors to a process that is nothing more than a glorified guessing game.

The very real danger of placing such a high burden on state courts is that creditors could very well flee to the federal system in order to take advantage of the relative decisional stability that they could find there. In the abstract, the migration of creditors from state to federal courts might not seem like too great a catastrophe, but such an exodus would effectively deprive states of the concurrent jurisdiction over post-discharge suits that § 1334(b) grants to them. Thus, as this Note’s analysis regarding the Problem of the Moving Target shows, the federal courts should be prohibited from collaterally attacking state bankruptcy decisions, instead leaving that duty to the appropriate state appellate

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<sup>227</sup> *Id.*

<sup>228</sup> *Espinosa I*, 530 F.3d at 899.

panel. The *Rooker-Feldman* doctrine is the most elegant method for implementing such a solution, but this Note's analysis in no way specifies a methodology that *must* be used. Instead, it provides an argument for, and a glimpse of, the intended result, leaving open to debate the question of which methods courts should use to reach such a result.

#### CONCLUSION

The doctrinal landscape surrounding the discharge at bankruptcy is filled with serpentine lines of reasoning, and the three main schools of judicial thought are a testament to the federal courts' struggle to find a common theory to apply to the Bankruptcy Hegemon problem. The Ninth Circuit is leading the charge against state decisions by appealing first to a lack of subject matter jurisdiction in state courts and then curtailing the effects of the *Rooker-Feldman* doctrine.<sup>229</sup> The Eighth Circuit, on the other hand, takes the opposite approach, granting broad authority to state courts in terms of subject matter jurisdiction, the issue preclusion doctrine, and the *Rooker-Feldman* doctrine.<sup>230</sup> The Sixth Circuit, meanwhile, has quietly shifted from a relatively pro-state stance to a position exemplified by its recent holding in *Hamilton*, where it adopted the approach pioneered by the Ninth Circuit's Bankruptcy Appellate Panel in the *Pavelich* decision.<sup>231</sup> And the Second Circuit courts are somewhere in the middle, rejecting the *Pavelich/Hamilton* approach and granting state courts concurrent jurisdiction pursuant to § 1334(b).<sup>232</sup>

Given this decisional morass, it is unsettling that the Supreme Court has yet to deliver a decision that would directly settle the question at hand. With so many circuits turning to so many different doctrines, the time for such a decision is nigh. In a situation where the federal and state courts are in direct conflict with each other, the courts, regardless of jurisdictional allegiance, can ill afford to wait until "the arbiters of weal and woe, the healers and destroyers, Time and Chance . . . bring the catastrophe or the cure."<sup>233</sup> And while it is impossible to predict what the Supreme Court will decide in the end, it should at least

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<sup>229</sup> See *In re McGhan*, 288 F.3d 1172 (9th Cir. 2002); *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000).

<sup>230</sup> See *Ferren II*, 203 F.3d 559 (8th Cir. 2000); *In re Goetzman*, 91 F.3d 1173 (8th Cir. 1996).

<sup>231</sup> See *In re Hamilton*, 540 F.3d 367 (8th Cir. 2008).

<sup>232</sup> See *In re Candidus*, 327 B.R. 112 (Bankr. E.D.N.Y. 2005).

<sup>233</sup> 5 JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS: COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, at 129 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1875).

consider the Problem of the Moving Target as part of its analysis, and at the same time, stay far away from the *Pavelich/Hamilton* approach.