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The Fresh Start Canon

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THE FRESH START CANON*

Jonathon S. Byington**

Abstract

A primary policy of bankruptcy law is to give consumer debtors a “fresh start” by discharging their debt. A rival policy is that the discharge of debt is a selectively conferred privilege that is not granted in some situations. For example, society is unwilling to pardon debt related to embezzlement or a domestic-support obligation. This “discharge restrictions” policy is manifested in part by the Bankruptcy Code’s exceptions to discharge. The U.S. Supreme Court has repeatedly recognized the tension between the fresh start and discharge restriction policies. It has sought to achieve a fair balance between these policies by applying a “plainly expressed” standard when interpreting exceptions to discharge. Surprisingly, the circuit courts have not followed the Supreme Court. Instead, nearly every circuit court has developed a practice of construing exceptions to discharge narrowly in favor of the debtor and against the creditor. This Article highlights this established practice and seeks to challenge it. In essence, the circuit courts have transformed the fresh start policy into a canon of construction when interpreting exceptions to discharge. This Article makes three contributions. First, it identifies and evaluates the circuit courts’ use of the fresh start policy as a canon of construction. Second, it analyzes Supreme Court jurisprudence and finds an established pattern rejecting the fresh start canon when interpreting exceptions to discharge. Third, it explores the purpose and nature of exceptions to discharge and argues the fresh start canon is an unsuitable tool for interpreting them.

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INTRODUCTION

Bankruptcy law has wildly competing policies. A primary one is the “fresh start.”¹ The fresh start provides relief to a debtor. It gives a debtor “a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.”² The Bankruptcy Code implements the fresh start through several different

1. *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (noting that “[t]he principal purpose of the Bankruptcy Code is to grant a ‘fresh start’ to ‘the honest but unfortunate debtor’” (quoting *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991))).

2. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (stating the fresh start policy is a “public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt” (emphasis omitted)).

sections, but it is primarily accomplished by discharging a debtor's debt.³ Yet, the fresh start has limits.

A rival policy is that discharge of debt is a selectively conferred privilege and therefore has restrictions. The Bankruptcy Code manifests the "discharge restrictions" policy through provisions that deny a debtor a discharge altogether under § 727(a) or except specific, individual debts from discharge under § 523(a).⁴ Some of the exceptions to discharge are based on the debt's importance to society, such as taxes or domestic-support obligations.⁵ Other exceptions to discharge are based on reprehensible conduct by a debtor, such as embezzlement or fraud.⁶

Litigation over exceptions to discharge is one of the main battlegrounds for determining the scope of a debtor's fresh start. The U.S. Supreme Court has recognized the tension between the fresh start and discharge restriction policies. It has sought to achieve "a fair balance between these conflicting interests."⁷ To implement this balance, the Supreme Court has a "'well-known' guide"⁸ and "long-standing principle"⁹ that "exceptions to discharge 'should be confined to those plainly expressed.'"¹⁰

The circuit courts have not followed the Supreme Court's mandate when interpreting exceptions to discharge. Instead, nearly every circuit court has developed a practice of construing exceptions to discharge narrowly in favor of the debtor and against the creditor.¹¹ This Article seeks to highlight this established practice and to challenge it. In essence,

3. See 11 U.S.C. §§ 524, 727, 944, 1141, 1228, 1328 (2012). For example, § 727(b) provides that "a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter."

4. *Id.* §§ 523(a), 727(a).

5. *Id.* § 523(a)(1), (5).

6. *Id.* § 523(a)(2), (4).

7. *Grogan v. Garner*, 498 U.S. 279, 287 (1991).

8. *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) (quoting *Gleason v. Thaw*, 236 U.S. 558, 562 (1915)).

9. *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1760 (2013).

10. *Id.* (quoting *Geiger*, 523 U.S. at 62).

11. *Okla. Dep't of Sec. v. Wilcox*, 691 F.3d 1171, 1174 (10th Cir. 2012) (applying § 523(a)(19)); *Denton v. Hyman (In re Hyman)*, 502 F.3d 61, 66–68 (2d Cir. 2007) (applying § 523(a)(4)); *Bos. Univ. v. Mehta*, 310 F.3d 308, 311 (3d Cir. 2002) (applying § 523(a)(8)); *Owens v. Miller (In re Miller)*, 276 F.3d 424, 429 (8th Cir. 2002) (applying § 523(a)(2)); *McCrary v. Spigel*, 260 F.3d 27, 32 (1st Cir. 2001) (applying 11 U.S.C. § 523(a)(2)); *Meyers v. I.R.S. (In re Meyers)*, 196 F.3d 622, 624 (6th Cir. 1999) (applying § 523(a)(1)); *Cal. Franchise Tax Bd. v. Jackson (In re Jackson)*, 184 F.3d 1046, 1051 (9th Cir. 1999) (applying § 523(a)(1)); *Foley & Lardner v. Biondo (In re Biondo)*, 180 F.3d 126, 130 (4th Cir. 1999) (applying § 523(a)(2)); *In re Crosswhite*, 148 F.3d 879, 881 (7th Cir. 1998) (applying § 523(a)(15)); *Hudson v. Raggio & Raggio, Inc. (In re Hudson)*, 107 F.3d 355, 356 (5th Cir. 1997) (applying § 523(a)(5)); *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 304 (11th Cir. 1994) (applying § 523(a)(2)). The District of Columbia Circuit and Federal Circuit have not addressed the issue.

the circuit courts have transformed the fresh start policy into a canon of construction when interpreting exceptions to discharge. In other areas of the Bankruptcy Code, it may be appropriate for courts to use the fresh start policy as a canon of construction to promote one of the main purposes of bankruptcy law. However, because of the purpose and nature of exceptions to discharge, the fresh start policy should not be “elevated to the level of interpretative trump card” over the policy of the discharge restrictions.¹²

Part I of this Article explores the diverse and sometimes competing rationales of bankruptcy law’s fresh start policy. It then examines how the Supreme Court has balanced the tension between the fresh start and discharge restrictions policies. Part II describes the purpose and use of canons of construction and then analyzes the circuit courts’ use of the fresh start policy as a substantive canon of construction. It argues the Supreme Court has rejected the fresh start canon when interpreting exceptions to discharge. It also considers why the purpose and nature of exceptions to discharge makes the fresh start canon an unsuitable interpretative tool. This Article concludes by recommending courts stop using the fresh start canon to interpret exceptions to discharge.

I. BACKGROUND

This Part highlights the rationales of the fresh start policy and how the Supreme Court has balanced the tension between it and the discharge restrictions policy.

A. *The Mixed Rationales of the Bankruptcy Fresh Start Policy*

The fresh start policy is preeminent in consumer bankruptcy law.¹³ Although there are several provisions directly implementing it,¹⁴ the term “fresh start” appears only once in the actual text of the Bankruptcy

12. *Field v. Mans*, 516 U.S. 59, 67 (1995) (interpreting § 523(a)(2)(A) and rejecting an argument based on a canon of construction that involved a negative implication or “negative pregnant” that an “express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance”).

13. *See Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (explaining that “[t]he principal purpose of the Bankruptcy Code is to grant a ‘fresh start’ to the ‘honest but unfortunate debtor’” (quoting *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991))); ELIZABETH WARREN ET AL., *THE LAW OF DEBTORS AND CREDITORS* 6 (Erwin Chemerinsky et al. eds., 7th ed. 2014) (stating that “[c]omparatively, the United States has always been, and remains, more committed to the fresh start idea for consumers who file bankruptcy than any other country in the world”); Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 529 (1991) (stating that “[t]he soul of debtor financial relief” is the “fresh start”).

14. 11 U.S.C. §§ 362, 522, 524, 525, 727, 944, 1141, 1228, 1322, 1325, 1328 (2012).

Code.¹⁵ It is hidden in a rare and infrequently used section of Chapter 15 that relates to proceedings in which a United States court assists a foreign court that has primary bankruptcy jurisdiction over a foreign debtor.¹⁶ It states:

In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—

. . . .

(5) if appropriate, the provision of an opportunity for a *fresh start* for the individual that such foreign proceeding concerns.¹⁷

Despite its minuscule textual appearance, the significance of the fresh start policy to consumer debtors is not seriously questioned.¹⁸

The Supreme Court began recognizing the fresh start policy by name as early as 1885.¹⁹ The “fresh start” is about providing relief to “the honest debtor from the weight of oppressive indebtedness, and it permits him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.”²⁰

Different aspects of bankruptcy law seek to implement the fresh start. The automatic stay gives debtors their first sigh of relief by providing an immediate reprieve from efforts of creditors to collect debt.²¹ Exemptions allow debtors to retain and use set amounts and types of their property during and after bankruptcy.²² Some debtors readjust their outstanding

15. *Id.* § 1507(b)(5).

16. *See id.* § 1502.

17. *Id.* § 1507(b) (emphasis added).

18. *See Marrama*, 549 U.S. at 367; 1 COLLIER ON BANKRUPTCY § 1.01 (Alan N. Resnick & Henry J. Sommer eds., 16th rev. ed. 2015) (“Bankruptcy serves to mitigate the effects of financial failure. . . . For debtors who are individuals, [the Bankruptcy Code] provides the possibility of a fresh start through the bankruptcy discharge”); WARREN ET AL., *supra* note 13, at 306 (stating that “while there is no serious challenge in this country to the fundamental idea of the discharge of debt, there has been hot debate over its scope”).

19. *Traer v. Clews*, 115 U.S. 528, 541 (1885) (“The policy of the bankrupt act was, after taking from the bankrupt all his property not exempt by law, to discharge him from his debts and liabilities, and enable him to take a fresh start.”).

20. *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554–55 (1915); *see also Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

21. *See* 11 U.S.C. § 362(a) (providing that a petition filed operates as a stay of various enumerated acts).

22. *See id.* § 522.

debt and payment schedules through a judicially confirmed plan of reorganization.²³ Crucially, bankruptcy courts commonly grant debtors a discharge of debt and enjoin creditor efforts to collect discharged debt.²⁴ There is also a prohibition of discrimination against individuals that are or have been debtors in bankruptcy.²⁵ These examples show the variety of ways bankruptcy law provides debtors a fresh start.

Scholars have put forth a mixed variety of theories in support of the fresh start. The theories are not necessarily harmonious.²⁶ A basic theory suggests that the fresh start preserves social order and peace.²⁷ This rationale is closely related to the modern societal view that, taken alone, nonpayment of debt does not justify debtor imprisonment.²⁸ Another

23. *See id.* §§ 1322, 1325.

24. *See id.* §§ 524, 727, 944, 1141, 1228, 1328.

25. *See id.* § 525; *see also* Douglass G. Boshkoff, *Fresh Start, False Start, or Head Start?*, 70 IND. L.J. 549, 549 (1995) (describing bankruptcy law's tripartite protection for individual debtors).

26. *See* Rafael Efrat, *The Fresh-Start Policy in Bankruptcy in Modern Day Israel*, 7 AM. BANKR. INST. L. REV. 555, 558 (1999) (stating that "[t]he fresh-start policy has various fundamental concerns and objectives"); Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 96 (1986) (observing that "the idea of the 'fresh start' has long incorporated and been shaped by a complex multiplicity of policy concerns"); Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1048 (1987) (noting that "a number of different, sometimes mutually inconsistent, policies have developed to justify isolated aspects of the Bankruptcy Code's discharge rules").

27. SIMONE WEIL, *On Bankruptcy*, in *SELECTED ESSAYS 1934–1943*, at 145, 149 (Richard Rees trans., 1962); *see also* RICHARD H. BELL, *SIMONE WEIL: THE WAY OF JUSTICE AS COMPASSION* 59 (1998).

A rapid glance at history is enough to show the subversive role consistently played, ever since money existed, by the phenomenon of debt. The cancellation of debts was the principal feature of reforms of both Solon and Lycurgus. And later on the small Greek cities were more than once shattered by movements in favour of another cancellation. The revolt by which the Roman plebeians won the institution of the tribuneship had its origin in a widespread insolvency which was reducing more and more debtors to the condition of slavery; and even if there had been no revolt a partial cancellation of debts had become imperative, because with every plebeian reduced to a slave Rome lost a soldier.

The payment of debts is necessary for social order. The non-payment of debts is quite equally necessary for social order.

WEIL, *supra*, at 149.

28. In early America, debtor prisons were prevalent. After the year 1830, there was a general movement for the relief of debtors and states began prohibiting imprisonment for debt. *See* PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA* 256–57 (1974); JOSEPH D. FAY, *A DISQUISITION ON IMPRISONMENT FOR DEBT: AS THE PRACTICE EXISTS IN THE STATE OF NEW-YORK* 18 (1818); THOMAS HERTTELL, *REMARKS ON THE LAW OF IMPRISONMENT FOR DEBT* 67 (1823); Jay Cohen, *The History of Imprisonment for Debt and Its Relation to the Development of Discharge*

theory advocates that society has a responsibility to treat its members humanely and promote values of human dignity and self-respect.²⁹ In addition, some have argued that the fresh start promotes the physical and mental health of debtors.³⁰

Another theory asserts that the fresh start has rehabilitative purposes, incentivizing individual debtors to remain economically productive, thus contributing to society.³¹ Some believe that it may also decrease a

in Bankruptcy, 3 J. LEGAL HIST. 153, 153–54 (1982); Richard Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 32 (1926); Jason J. Kilborn, *Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy*, 64 OHIO ST. L.J. 855, 872 (2003); Frank T. Carlton, Note, *Abolition of Imprisonment for Debt in the United States*, 17 YALE REV. 339, 339–40 (1908). For a related but different discussion on why the Bankruptcy Clause was inserted in the Constitution, see *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006).

29. See KAREN GROSS, *FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM* 102–03 (1997); F. REGIS NOEL, *A HISTORY OF THE BANKRUPTCY CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 200 (1918) (“The history of these [bankruptcy] laws is evidence of man’s humanity to his fellow man.”); Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 525, 536 (1991) (explaining that the moral approach of the fresh start “stresses that human dignity is of a higher value than the economic benefits or costs associated with achieving a desired economic result” and that “discharge [of debt] is an acknowledgment by Congress that the dignity of the individual person has value”); Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 200 (1990) (stating the fresh start is based on social, religious, and philosophical values); Kilborn, *supra* note 28, at 863 (evaluating a “mercy” theme of bankruptcy law and stating that “discharging the debtor from a crushing debt burden is simply the morally just reaction to the suffering of honest but unfortunate people[;] [m]orality and basic humanity call for the law to show compassion and provide mercy to the pointlessly suffering debtor” (footnotes omitted)); Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56, 95 (1990) (stating “it is humane to free hopelessly indebted individuals from their debts”).

30. See Melissa B. Jacoby, *Does Indebtedness Influence Health? A Preliminary Inquiry*, 30 J.L. MED. & ETHICS 560, 560–61 (2002); see also Deborah Thorne, *Women’s Work, Women’s Worry? Debt Management in Financially Distressed Families*, in *BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS* 136, 142–46 (Katherine Porter ed., 2012) (discussing the physical and mental effects of bankruptcy, including stress, insomnia, and depression).

31. See Kilborn, *supra* note 28, at 877 (“The thrust of the rehabilitation theme . . . has always been not so much compassion for debtors hopelessly overwhelmed by crushing debt, but rather the loss to society due to such debtors’ lack of incentive to work to earn a living or to acquire property.”); John A. E. Pottow, *Private Liability for Reckless Consumer Lending*, 2007 U. ILL. L. REV. 405, 412 (“[S]ociety as a whole also loses when moping bankrupt debtors are distracted from working at their highest and best-use level of productivity because they are instead coping with financial ruin.”); Ellen E. Sward, *Resolving Conflicts Between Bankruptcy Law and the State Police Power*, 1987 WIS. L. REV. 403, 410 (noting that “for the economic system as a whole, discharge might be justified as preserving incentives that a debtor might otherwise lose if his debts essentially mortgaged his future earnings”); Tabb, *supra* note 29, at 94 (stating that “freeing the debtor from past debts encourages the debtor to become (or resume being) a productive member of the commercial society”); William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047, 1100 (“[A] debtor can become so overburdened with debt, and

debtor's reliance upon public welfare programs for support.³² Others point out that the fresh start reassures individuals deciding to assume financial risk, such as engaging in business activities, by providing an alternative to life-long financial failure and debt servitude.³³ In addition, some have said it serves a social-insurance function.³⁴

Although it is a bit of a paradox, a historical purpose of the fresh start was to increase assets available for distribution to creditors by giving debtors a discharge to incentivize them to cooperate.³⁵ Another theory is

can anticipate such a lengthy period of subsistence living while disposable earnings are used mostly for debt retirement, that he or she loses incentive to exploit personal skills productively. Discharge of debt . . . promotes wealth maximization through realization of human skills." (footnote omitted)).

32. See Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the "Fresh Start,"* 45 HASTINGS L.J. 175, 207 (1994) ("Without the discharge, a hopelessly insolvent debtor would lose her incentive to produce, preferring instead . . . administratively costly welfare benefits."); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1402 (1985) (predicting that "[i]f there were no right of discharge, an individual who lost his assets to creditors might rely instead on social welfare programs").

33. See Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 64 (1986) (noting the fresh start encourages engagement of business risks); Robert A. Hillman, *Contract Excuse and Bankruptcy Discharge*, 43 STAN. L. REV. 99, 125 (1990) (stating that the bankruptcy discharge "encourages beneficial, albeit risky, business activity by merchants and manufacturers"); Iain Ramsay, *Models of Consumer Bankruptcy: Implications for Research and Policy*, 20 J. CONSUMER POL'Y 269, 278 (1997) ("Bankruptcy may also be a safety net for financial consequences associated with changes in employment opportunities, family breakup, failure as an entrepreneur, and may be a side-effect of accidents or illness."); Doug R. Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C. L. REV. 723, 726 (1980) (observing that discharge of debt "encourages people to take risks by removing some of failure's permanent sting").

34. See WARREN ET AL., *supra* note 13, at 308 (stating that "the bankruptcy discharge insures a residual class of 'uninsurable' disaster"); Barry Adler et al., *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. LEGAL STUD. 585, 592 (2000) (stating that "[a] bankruptcy discharge provides the borrower with partial wage insurance"); Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129, 160 (2005) (stating that "bankruptcy serves the same social insurance functions as unemployment insurance, Medicare, disability insurance, workers' compensation, and spousal support laws").

35. See *Discussion*, LAW & CONTEMP. PROBS., Autumn 1977, at 123, 148 (1977) ("[D]ischarge was a reward offered by the creditors to the debtors for assembling their property and not concealing anything It was thought to be a benefit to the creditors."); Hillman, *supra* note 33, at 109–10 ("Some evidence suggests that discharge was primarily aimed at facilitating debt collection by inducing debtors to cooperate in the collection process, not at rehabilitating unfortunate merchant debtors."); Howard, *supra* note 26, at 1049 (explaining that the original intent of the discharge was to encourage debtors to cooperate in the distribution of their assets to creditors); Tabb, *supra* note 29, at 90 ("The debtor cooperation theory justifies the discharge as a carrot dangled in front of debtors to induce them to cooperate with the trustee and the creditors in the bankruptcy case in the location, collection, and liquidation of the debtor's assets.").

that society desires not only to protect individuals from their own uncontrolled overconsumption of credit but also to protect others from the resultant externalities.³⁶ Some have argued that the fresh start promotes efficient allocation of risk of loss between the debtor and creditor, but there is a debate on which party is in a better position to protect itself against the risk of nonpayment.³⁷ Another theory is that because the fresh start increases creditor losses, it incentivizes creditors to monitor themselves in granting or withholding credit—a creditor-enforced check on debtors.³⁸ As this brief summary of the variety of rationales shows, there is not a single, unified theory sustaining the fresh start policy. Regardless of its many rationales, the significance of the fresh start policy to bankruptcy law is unequivocal.

B. The Supreme Court Uses a “Plainly Expressed” Standard to Maintain a Fair Balance Between the Policies of the Fresh Start and the Discharge Restrictions

Despite its significance, the fresh start principle is not the sole policy of bankruptcy law. When interpreting exceptions to discharge, the Supreme Court has historically recognized both the fresh start and discharge restrictions policies, often alternating between reliance upon one or the other. This Section summarizes, in chronological order, Supreme Court decisions that interpret exceptions to discharge. The decisions construe various provisions of the Bankruptcy Act of 1867,³⁹

36. Jackson, *supra* note 32, at 1447.

37. See Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 981 (1981) (arguing that “[a] discharge system provides a technique for allocating the risk of financial distress between a debtor and his creditors”); Steven L. Harris, *A Reply to Theodore Eisenberg’s Bankruptcy Law in Perspective*, 30 UCLA L. REV. 327, 362–63 (1982) (suggesting that creditors may be in a better position to bear risk); Hillman, *supra* note 33, at 126 (stating that “debtors are in control of their financial activities and therefore are arguably in a better position to predict and avoid financial collapse or to insure against it”); Howard, *supra* note 26, at 1048 (arguing that “bankruptcy may be designed to achieve economic efficiency in its allocation of the risk of loss, connected with nonpayment, between debtor and creditor”); A. Charlene Sullivan, *Reply: Limiting Access to Bankruptcy Discharge*, 1984 WIS. L. REV. 1069, 1071 (stating that debtors are in a better position to bear risk of loss, as “risk of bankruptcy for an individual could be largely a function of personal characteristics that creditors are not particularly adept at evaluating”).

38. See Jackson, *supra* note 32, at 1426 (“Discharge . . . heightens creditors’ incentives to monitor: by providing for a right of discharge, society enlists creditors in the effort to oversee the individual’s credit decisions even when the individual has not fully mortgaged his future. The availability of the right of discharge induces creditors to restrict the individual’s credit intake and thus to ensure that he does not seriously underestimate his future needs.” (footnote omitted)). *But see* Pottow, *supra* note 31, at 409 (arguing that certain creditors use reckless lending practices).

39. Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878).

the Bankruptcy Act of 1898,⁴⁰ the Bankruptcy Reform Act of 1978,⁴¹ and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.⁴²

Some of the earliest opinions focused on the fresh start policy. In 1877, the Supreme Court construed an exception to discharge in a manner “consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system.”⁴³ In 1884, the Supreme Court observed that “[p]erhaps the liberal construction made in favor of the certificate of discharge in this country is due to the peculiar modes and habits of business prevailing amongst our people.”⁴⁴

Yet the Supreme Court did not adopt a judicial preference solely in favor of the fresh start policy. In 1904, it took a “natural and grammatical reading”⁴⁵ in one case and expressly declined a narrow construction in another:

We are not inclined to place such a narrow construction upon the language of the exception [to discharge]. We do not think the language used was intended to limit the exception in any such way. It was an honest debtor and not a malicious wrongdoer that was to be discharged.⁴⁶

40. Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978).

41. Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C. (2012)).

42. Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.).

43. *Neal v. Clark*, 95 U.S. 704, 709 (1877) (interpreting the term fraud under § 33 of the Bankruptcy Act of 1867); *see also Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934) (construing § 17 of the Bankruptcy Act of 1898 in the same manner and holding that “[t]he scope of the exception was to be limited accordingly”).

44. *Hennequin v. Clews*, 111 U.S. 676, 683 (1884) (stating that “[i]t is, no doubt, true, as said in *Chapman v. Forsyth*, that a construction of the excepting clauses which would make them include debts arising from agencies and the like, would leave but few debts on which the law could operate”).

45. *Crawford v. Burke*, 195 U.S. 176, 189–90 (1904) (construing § 17 of the Bankruptcy Act of 1898).

46. *Tinker v. Colwell*, 193 U.S. 473, 488–89 (1904) (construing the term “malice” in § 17 of the Bankruptcy Act of 1898). *But cf.* S. REP. NO. 95-989, at 79 (1978) (stating “willful” means “deliberate or intentional to the extent that [*Tinker*] held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a ‘reckless disregard’ standard, they are overruled”), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5865; H.R. REP. NO. 95-595, at 365 (1977) (stating “willful” means “deliberate or intentional to the extent that [*Tinker*] held that a looser standard is intended, and to the extent that other cases have relied on *Tinker* to apply a ‘reckless disregard’ standard, they are overruled” (footnote omitted)), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6320–21.

In 1915, the Supreme Court established the foundational principle for interpreting exceptions to discharge. It held: “In view of the well-known purposes of the Bankrupt Law exceptions to the operation of a discharge thereunder should be confined to those plainly expressed”⁴⁷ A year later, the Supreme Court again rejected a request for a narrow construction of an exception to discharge.⁴⁸

In 1920, the Supreme Court noted the purpose of exceptions to discharge “was to limit more narrowly the effect of a discharge by enlarging the class of provable debts that were to be excepted from it” and that it was “designed to restrict the scope of a discharge in bankruptcy.”⁴⁹ In 1964, the Supreme Court elaborated on the rationale of the discharge restrictions policy and how it relates to the fresh start:

Nor is petitioner aided by the now-familiar principle that one main purpose of the Bankruptcy Act is to let the honest debtor begin his financial life anew [The exceptions to discharge section] is not a compassionate section for debtors. Rather, it demonstrates congressional judgment that certain problems—*e.g.*, those of financing government—override the value of giving the debtor a wholly fresh start. Congress clearly intended that personal liability for unpaid tax debts survive bankruptcy. The general humanitarian purpose of the Bankruptcy Act provides no reason to believe that Congress had a different intention with regard to personal liability for the interest on such debts.⁵⁰

In 1978, the Supreme Court was divided on how to interpret an exception to discharge dealing with liability for taxes.⁵¹ Justice William Rehnquist wrote on behalf of four dissenters, stating: “I would hesitate to depart from our longstanding tradition of reading the Bankruptcy Act with an eye to its fundamental purpose—the rehabilitation of bankrupts. This has always led the Court, at least until today, to construe narrowly any exceptions to the general discharge provisions.”⁵² Justice Rehnquist’s

47. *Gleason v. Thaw*, 236 U.S. 558, 558, 562 (1915) (interpreting the term “property” in § 17 of the Bankruptcy Act of 1898, as amended).

48. *See McIntyre v. Kavanaugh*, 242 U.S. 138, 141–42 (1916) (interpreting the term “injury” in § 17 of the Bankruptcy Act of 1898). The Court held: “We are not inclined to place such a narrow construction upon the language of the exception. We do not think the language used was intended to limit the exception in any such way. It was an honest debtor and not a malicious wrongdoer that was to be discharged.” *Id.* at 142 (quoting *Tinker*, 193 U.S. at 488–89).

49. *Schall v. Camors*, 251 U.S. 239, 252–53 (1920).

50. *Bruning v. United States*, 376 U.S. 358, 361 (1964) (footnote omitted) (interpreting an exception to discharge dealing with debts due as a tax to include post-petition interest).

51. *See United States v. Sotelo*, 436 U.S. 268, 285–86 (1978) (Rehnquist, J., dissenting) (interpreting § 17a(1) of the Bankruptcy Act of 1898).

52. *Id.* at 285–86.

dissent characterizing prior decisions as “always” construing exceptions to discharge narrowly seems strained.⁵³ While the majority opinion recognized the importance of the fresh start policy, it focused on the purpose of the discharge restrictions:

And while it is true that a finding of nondischargeability prevents a bankrupt from getting an entirely ‘fresh start,’ this observation provides little assistance in construing a section expressly designed to make some debts nondischargeable. We are not here concerned with the entire Act’s policy, but rather with what Congress intended in § 17a(1) and its subdivision (e).⁵⁴

The majority went on to reject a narrow interpretation of the exception to discharge relating to taxes.⁵⁵

In 1986, the Supreme Court again rejected a narrow interpretation of an exception to discharge.⁵⁶ In 1991, it held that the standard of proof for all discharge exceptions is the ordinary preponderance of the evidence standard.⁵⁷ The Supreme Court rejected the reasoning “that the general ‘fresh start’ policy that undergirds the Bankruptcy Code militated in favor of a broad construction favorable to the debtor.”⁵⁸ It also rejected the argument that the clear and convincing standard was required to effectuate the fresh start policy, reasoning that it was

53. See *Gleason v. Thaw*, 236 U.S. 558, 562 (1915) (stating “exceptions to the operation of a discharge [] should be confined to those plainly expressed”), and *McIntyre*, 242 U.S. at 142 (stating “[w]e are not inclined to place such a narrow construction upon the language of the exception [to discharge]”).

54. *Sotelo*, 436 U.S. at 279–80.

55. *Id.* at 275 (holding that respondent’s liability, although called a “penalty” under I.R.C. § 6672, was a “tax” as that term is used in § 17(a)(1)).

56. See *Kelly v. Robinson*, 479 U.S. 36, 50 (1986) (holding that a criminal restitution order was within the scope of the phrase “to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss” in the Bankruptcy Law Reform Act of 1978). “*Kelly* analyzed the purposes of restitution in construing the qualifying clauses of § 523(a)(7), which explicitly tie the application of that provision to the purpose of the compensation required.” *Pa. Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990) (evaluating and distinguishing the *Kelly* decision to interpret the defined term “debt” in the Bankruptcy Law Reform Act of 1978).

57. *Grogan v. Garner*, 498 U.S. 279, 286, 291 (1991) (rejecting the argument that the clear-and-convincing standard applies).

58. *Id.* at 283; see also *Field v. Mans*, 516 U.S. 59, 69–70 (1995) (rejecting a narrow construction to an exception to discharge and stating that “[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms” (alterations in original) (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989))).

unlikely that Congress, in fashioning the standard of proof that governs the applicability of these provisions, would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud. Requiring the creditor to establish by a preponderance of the evidence that his claim is not dischargeable reflects a fair balance between these conflicting interests.⁵⁹

The Supreme Court continued:

The statutory provisions governing nondischargeability reflect a congressional decision to exclude from the general policy of discharge certain categories of debts Congress evidently concluded that the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start.⁶⁰

In 1998, the Supreme Court rejected a “more encompassing interpretation” by focusing on the words of the statute and held “[a] construction so broad would be incompatible with the ‘well-known’ guide that exceptions to discharge ‘should be confined to those plainly expressed.’”⁶¹ In a different case decided later that same month, the Supreme Court rejected a narrow interpretation of an exception to discharge because “the objective of ensuring full recovery by the creditor would be ill served.”⁶² In 2013, the Supreme Court again reaffirmed that its approach was “consistent with the longstanding principle that ‘exceptions to discharge ‘should be confined to those plainly expressed.’”⁶³ In its most recent decision interpreting an exception to

59. *Grogan*, 498 U.S. at 286–87.

60. *Id.* at 287.

61. *Kawaauhau v. Geiger*, 523 U.S. 57, 61–62 (1998) (quoting *Gleason v. Thaw*, 236 U.S. 558, 562 (1915)) (holding that § 523(a)(6)'s language of “willful and malicious injury by the debtor” does not include a medical malpractice judgment attributable to negligent or reckless conduct because “[t]he word ‘willful’ in (a)(6) modifies the word ‘injury,’ indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury”).

62. *Cohen v. de la Cruz*, 523 U.S. 213, 222–23 (1998) (holding that § 523(a)(2)(A) prevents the discharge of all liability arising from fraud and that an award of treble damages therefore falls within the scope of the exception to discharge).

63. *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1760 (2013) (quoting *Kawaauhau*, 523 U.S. at 62). *Bullock* interpreted the term “defalcation” in § 523(a)(4) to include a culpable state of mind requirement “involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior.” *Id.* at 1757.

discharge, the Supreme Court rejected the debtor's request for a narrow interpretation.⁶⁴

In summary, the Supreme Court has consistently refused to interpret exceptions to discharge narrowly. Instead, since the year 1915, the Supreme Court has sought to balance the competing fresh start and discharge restriction policies by interpreting exceptions to discharge using a "plainly expressed" standard.

II. ANALYSIS OF THE CIRCUIT COURTS' USE OF THE FRESH START POLICY AS A CANON OF CONSTRUCTION

The circuit courts do not use the "plainly expressed" standard when interpreting exceptions to discharge. Instead, they have developed a practice of construing exceptions to discharge narrowly in favor of the debtor and against the creditor. In essence, the circuit courts have transformed the fresh start policy into a canon of construction when interpreting exceptions to discharge. This Part begins by reviewing the role of canons of construction. It then labels the circuit courts' use of the fresh start policy a substantive canon and names it the "fresh start canon." It examines the components of the canon and highlights how it affects the interpretation of exceptions to discharge. It argues that employing the fresh start canon to interpret exceptions to discharge is misguided for two reasons. First, the Supreme Court has rejected use of the fresh start canon in the exceptions to discharge context. Second, the purpose and nature of exceptions to discharge makes the fresh start canon an unsuitable interpretative tool.

A. *The Role of Canons*

Canons are one of many sources courts use to determine the meaning of statutory text. There are several different types of canons.

1. Sources of Guidance Courts Use to Decide the Meaning of Statutory Text

A natural consequence of our adversarial legal system is that the meaning of statutory text is often disputed. As Justice Frank Murphy observed, "words are inexact tools at best."⁶⁵ Courts are commonly called

64. See *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1590 (2016) (rejecting the debtor's argument that "Congress added the phrase 'actual fraud' to § 523(a)(2)(A) not to expand the exception's reach, but to restrict it" and interpreting the phrase "to encompass fraudulent conveyance schemes, even when those schemes do not involve a false representation").

65. *Harrison v. N. Tr. Co.*, 317 U.S. 476, 477, 479 (1943) (interpreting § 807 of the Revenue Act of 1932).

upon to decide what words mean.⁶⁶ The analysis begins with a close reading of the statute's words.⁶⁷ The words are usually given their ordinary, common sense, or reasonable meaning, in the context in which they are being used and applied.⁶⁸ Earlier court opinions on the meaning of statutory text may be binding or persuasive in deciding what words mean.⁶⁹

There are many different theoretical methods courts use to determine meaning.⁷⁰ The methods do not have clear boundaries and they are often intermixed and modified.⁷¹ Depending upon the method of interpretation,

66. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (observing that “[t]hose who apply the rule to particular cases must of necessity expound and interpret that rule” and it is “the province and duty of the judicial department to say what the law is”).

67. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (stating that “[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole”); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (stating that the “starting point in every case involving construction of a statute is the language itself”).

68. *Farrey v. Sanderfoot*, 500 U.S. 291, 296 (1991) (focusing on the text of 11 U.S.C. § 522(f)(1)); *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (“The plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’” (alteration in original) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982))); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 355 (1990).

69. See NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45:15, Westlaw (database updated Nov. 2016) (“Every statute is an independent communication, for which either the intended or the understood meaning may be different, even if the language is similar. For this reason, a decision on a point of statutory construction has little relevance as precedent to construe any other statute, except where the language of one statute was ‘borrowed’ for another, or both statutes concern such closely related subjects that consideration of one naturally brings the other to mind.” (footnote omitted)).

70. See Eskridge & Frickey, *supra* note 68, at 324 (“The three main theories today emphasize (1) the actual or presumed intent of the legislature enacting the statute (‘intentionalism’); (2) the actual or presumed purpose of the statute (‘purposivism’ or ‘modified intentionalism’); and (3) the literal commands of the statutory text (‘textualism’).”); see also Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980) (examining “the three fundamental methods of originalism: interpretation of the text of the Constitution, interpretation of the intentions of its adopters, and inference from the structure and relationships of government institutions”).

71. See RONALD DWORKIN, LAW’S EMPIRE 318–50 (1986) (proposing a coherentist approach to statutory interpretation); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 552 (1983) (proposing statutory construction “only when the statute either plainly addresses a problem or requires someone else (judges or administrators) to supply their own solutions”); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 65 (1988) (proposing a reasonable reader framework); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (combining legislative intent and the purpose of the statute in context of modern times and current views of the legislature); Eskridge & Frickey, *supra* note 68, at 353, 355 (proposing a practical reasoning model of statutory interpretation); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L.

courts use a variety of sources to help guide them in determining the meaning of statutory text.⁷² Courts occasionally look at statutes other than the one being interpreted.⁷³ Sometimes they use dictionaries.⁷⁴ Courts also look to legislative history, such as committee reports and the transcripts of hearings and floor debates.⁷⁵ At times, courts look to a maxim, which is a traditional legal principle that has been frozen into a concise expression, such as *caveat emptor*, meaning “let the buyer beware.”⁷⁶ Finally, courts regularly use canons as a source of authority to draw inferences on the meaning of statutory text.⁷⁷

REV. 621, 623–24 (1990) (arguing the Court has moved toward a more text-based approach to interpretation); Anita S. Krishnakumar, *The Anti-Messiness Principle in Statutory Interpretation*, 87 NOTRE DAME L. REV. 1465, 1466 (2012) (observing the Court prefers a simpler bright-line rule over a complicated multifactor approach); John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1912 (2015) (focusing on intent skepticism and the difficulty of identifying congressional intent); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2393 (2003) (proposing a “contextual interpretation of statutory texts and a principled exercise of judicial review” in an absurdity doctrine context); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 350 (2005) (preferring clear and predictable rules over judgmental standards); Damien M. Schiff, *Purposivism and the “Reasonable Legislator”*: A Review Essay of Justice Stephen Breyer’s Active Liberty, 33 WM. MITCHELL L. REV. 1081, 1104 (2007) (book review) (proposing “Blackstone Variant Textualism” as a new theory of interpretation); Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 270 (proposing linguists’ prototype theory for statutory interpretation).

72. See SINGER & SINGER, *supra* note 69, § 45:13.

73. See, e.g., *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988); *Lorillard v. Pons*, 434 U.S. 575, 579 (1978).

74. See Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 277 (1998); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 486–87 (2013); Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 79 (2010); Lawrence Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50, 50 (1993); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 BUFF. L. REV. 227, 228–29 (1999); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1437 (1994).

75. See generally James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1226 (2010); James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1262 (2009); Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETERICS J. 294, 304 (1982); Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1131–32 (1983); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 442–43 (1988); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1658 (2010); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 410–11 (2004).

76. *Caveat Emptor*, BLACK’S LAW DICTIONARY (10th ed. 2014).

77. The Supreme Court has occasionally treated maxims and canons as synonyms. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (“The wording of § 1 calls for

“[C]anons are not mandatory rules. They are guides that ‘need not be conclusive.’”⁷⁸ They are principles that suggest inferences on the meaning of text. Scholars have mixed views on the utility and propriety of using canons to interpret statutory text.⁷⁹ Canons may be divided into two fundamental groups: textual and substantive.

2. Textual Canons

Textual⁸⁰ canons are predictive guidelines used to determine legislative intent based on word choice, grammatical configuration, or the relationship between parts of the text.⁸¹ A classic example of a textual canon is the Latin phrase *expressio unius est exclusio alterius*, meaning the expression of one thing is the exclusion of another.⁸² Textual canons may be divided into several different subcategories, such as semantic canons, syntactic canons, and contextual canons.⁸³ Textual canons do not

the application of the maxim *eiusdem generis*, the statutory canon that “[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” (alteration in original)); *see also Canon of Construction*, BLACK’S LAW DICTIONARY (stating that canons of construction are principles that guide the interpreter of a text).

78. *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (quoting *Circuit City*, 532 U.S. at 115); *see also Varsity Corp. v. Howe*, 516 U.S. 489, 511 (1996) (stating that canons of construction “are simply ‘rules of thumb’ which will sometimes ‘help courts determine the meaning of legislation’” (quoting *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992))).

79. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 65–66 (1994); Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 672 (1992); Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1202; James C. Thomas, *Statutory Construction When Legislation Is Viewed as a Legal Institution*, 3 HARV. J. ON LEGIS. 191, 210 (1966); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 412 (1989).

80. This type of canon is also called “grammatical,” “language,” or “linguistic.”

81. *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12–14 (2005) (explaining the difference between language canons and substantive canons).

82. *Russello v. United States*, 464 U.S. 16, 23 (1983) (reasoning that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” (quoting *United States v. Wong Kim Bo*, 472 F.2d 729, 722 (5th Cir. 1972))).

83. *See* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69–239 (2012) (categorizing and explaining various canons).

embody or further any specific substantive policy.⁸⁴ Rather, they provide a basis for a court to assign a specific meaning to statutory text.⁸⁵

3. Substantive Canons

Substantive canons are not platitudes, but policy-based principles expressed in a short-form summary. Sometimes they reflect judicially preferred policy positions.⁸⁶ Perhaps the most common substantive canons are directives to interpret different types of statutes “liberally” or “strictly.”⁸⁷ For example, the Supreme Court has established a substantive canon that the coverage of § 1983 of the Civil Rights Act of 1964 “must be broadly construed.”⁸⁸ When interpreting penal statutes, the substantive canon of the rule of lenity states ambiguous statutory text should be construed narrowly in favor of the defendant.⁸⁹

Leading scholars have observed that courts utilize substantive canons in a variety of ways. “[S]ometimes courts will treat a substantive canon as merely a tiebreaker that affects the outcome only if, at the end of the basic interpretive process, the court is left unable to choose between the two competing interpretations”⁹⁰ Other times, courts “treat substantive canons as presumptions that, at the beginning of the interpretive process, set up a presumptive outcome, which can be overcome by persuasive support” from a variety of sources.⁹¹ To overcome the presumption, an opposing party may support a particular meaning by using sources such as statutory text, legislative history, statutory purposes, or policy arguments.⁹² “[C]ourts may [also] treat substantive canons as clear statement rules, which purport to compel a particular interpretive outcome unless there is a clear statement to the contrary.”⁹³

84. WILLIAM N. ESKRIDGE JR. ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 690 (5th ed. 2014).

85. *See* Brudney & Ditslear, *supra* note 81, at 12.

86. *Id.* at 13 (noting how readily canons can be used to defend contradictory results and how they have been used to promote judicial policy preferences at the expense of evident congressional intent).

87. *See* SINGER & SINGER, *supra* note 69, at § 56:1 (stating “[p]ublic policy considerations exert a significant influence in the process of judicial statutory interpretation” and that the rules regarding strict and liberal interpretation are founded on public policy considerations).

88. *See* *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989). *See generally* William Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 *DUKE L.J.* 1215 (2001) (providing examples of statutes that are interpreted liberally to advance their policies).

89. *See* *United States v. Bass*, 404 U.S. 336, 347 (1971) (stating ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity); *see also* Lawrence M. Solan, *Law, Language, and Lenity*, 40 *WM. & MARY L. REV.* 57, 119 (1998).

90. ESKRIDGE ET AL., *supra* note 84, at 693 (emphasis omitted).

91. *Id.* (emphasis omitted).

92. *Id.*

93. *Id.* (emphasis omitted).

B. *The Fresh Start Policy as an Unlabeled Substantive Canon in the Circuit Courts*

As the old adage goes, if it looks like a duck, walks like a duck, and quacks like a duck, it just may be a duck.⁹⁴ In a similar fashion, the circuit courts are using the fresh start policy as a substantive canon of construction without calling it that. Instead, the circuit courts use labels like “traditional[] interpret[ation],”⁹⁵ “duty to construe,”⁹⁶ and “principle.”⁹⁷ Despite this array of names, nearly every circuit court has an established practice of using the fresh start policy as a substantive canon of construction when interpreting the Bankruptcy Code’s exceptions to discharge.⁹⁸

This “fresh start canon” is worded differently throughout the circuits but generally has three components. First, it expressly references the fresh start by name and indicates the fresh start policy is one of the reasons the court is construing statutory text a certain way. Second, it requires exceptions to discharge be narrowly or strictly construed in favor of the debtor. Finally, it requires statutory text be construed against the creditor. Each component will be addressed in turn.

1. The Fresh Start Policy as a Basis for Construing Statutory Text

Circuit courts openly point to and rely upon the fresh start policy as a basis for interpreting statutory text a certain way. For example, in the First Circuit, “[e]xceptions to discharge are narrowly construed *in furtherance of the Bankruptcy Code’s ‘fresh start’ policy.*”⁹⁹ The Fourth Circuit has observed that “[w]hen addressing exceptions to discharge, we traditionally interpret the exceptions narrowly *to protect the purpose of providing debtors a fresh start.*”¹⁰⁰ The Eighth Circuit “construe[s]

94. *United States v. Charnock (In re Charnock)*, 97 B.R. 619, 627 (Bankr. M.D. Fla. 1989) (“[I]f it walks like a duck, quacks like a duck, and looks like a duck, it has got to be a duck.”); *In re Glenn Elec. Sales Corp.*, 89 B.R. 410, 418 (Bankr. D.N.J. 1988) (“Although I am not able to cite the author, there is a saying to the effect that if it walks like a duck and talks like a duck then, in all likelihood, it’s a duck.”).

95. *Foley & Lardner v. Biondo (In re Biondo)*, 180 F.3d 126, 130 (4th Cir. 1999).

96. *Owens v. Miller (In re Miller)*, 276 F.3d 424, 429 (8th Cir. 2002).

97. *Fezler v. Davis (In re Davis)*, 194 F.3d 570, 573 (5th Cir. 1999).

98. *See cases cited supra* note 11.

99. *Century 21 Balfour Real Estate v. Menna (In re Menna)*, 16 F.3d 7, 9 (1st Cir. 1994) (emphasis added) (applying § 523(a)(2)), *modified by Field v. Mans*, 516 U.S. 59, 70–71 (1995); *see also Sauer Inc. v. Lawson (In re Lawson)*, 791 F.3d 214, 218 (1st Cir. 2015) (applying § 523(a)(2)); *Richmond v. N.H. Supreme Court Comm. on Prof’l Conduct*, 542 F.3d 913, 917 (1st Cir. 2008) (applying § 523(a)(7)); *Rutanen v. Baylis*, 313 F.3d 9, 17 (1st Cir. 2002) (applying § 523(a)(4)).

100. *In re Biondo*, 180 F.3d at 130 (emphasis added) (applying § 523(a)(2)); *see also Kubota Tractor Corp. v. Strack (In re Strack)*, 524 F.3d 493, 497 (4th Cir. 2008) (applying § 523(a)(4)).

exceptions to discharge narrowly *in order to effect* the fresh start policy of the Bankruptcy Code.”¹⁰¹ In the Ninth Circuit, “exceptions to dischargeability should be strictly construed *in order to preserve* the Bankruptcy Act’s purpose of giving debtors a fresh start.”¹⁰²

These examples contain classic characteristics of a substantive canon. They identify a distinct policy position by expressly naming the fresh start policy. They also promote or express a preference for the identified policy by using phrases such as “in furtherance of,” “to protect the purpose of,” “in order to effect,” and “in order to preserve.” Consequently, the fresh start policy is actively influencing the way circuit courts interpret exceptions to discharge.

2. Construing Statutory Text in Favor of the Debtor

Another component of the fresh start canon is construing statutory text in a way that favors the debtor. In the Second Circuit, “exceptions to discharge are to be narrowly construed and genuine doubts should be resolved in favor of the debtor.”¹⁰³ The Tenth Circuit has held “[e]xceptions to discharge are to be narrowly construed, and because of the fresh start objectives of bankruptcy, doubt is to be resolved in the debtor’s favor.”¹⁰⁴ In the Eleventh Circuit, “courts generally construe the statutory exceptions to discharge in bankruptcy ‘liberally in favor of the debtor,’ and recognize that ‘[t]he reasons for denying a discharge . . . must be real and substantial, not merely technical and conjectural.’”¹⁰⁵

and (a)(6)); *Nunnery v. Rountree (In re Rountree)*, 478 F.3d 215, 219 (4th Cir. 2007) (applying § 523(a)(2)).

101. *In re Miller*, 276 F.3d at 429 (emphasis added) (applying § 523(a)(2)); *see also* *Geiger v. Kawaauhau (In re Geiger)*, 113 F.3d 848, 853 (8th Cir. 1997) (applying § 523(a)(2)), *aff’d*, 523 U.S. 57 (1998); *Jennen v. Hunter (In re Hunter)*, 771 F.2d 1126, 1128 (8th Cir. 1985) (applying § 523(a)(2)).

102. *Cal. Franchise Tax Bd. v. Jackson (In re Jackson)*, 184 F.3d 1046, 1051 (9th Cir. 1999) (emphasis added) (quoting *Industrie Aeronautiche E. Meccaniche Rinaldo Piaggio S.p.A. v. Kasler (In re Kasler)*, 611 F.2d 308, 310 (9th Cir. 1979)) (applying § 523(a)(1)); *see also* *Hawkins v. Franchise Tax Bd.*, 769 F.3d 662, 667 (9th Cir. 2014) (applying § 523(a)(1)); *Ghomeshi v. Sabban (In re Sabban)*, 600 F.3d 1219, 1222 (9th Cir. 2010) (applying § 523(a)(2)); *Gregg v. Rahm (In re Rahm)*, 641 F.2d 755, 756–57 (9th Cir. 1981) (applying § 35(a)(8) of the Bankruptcy Act of 1898).

103. *Denton v. Hyman (In re Hyman)*, 502 F.3d 61, 66 (2d Cir. 2006) (applying § 523(a)(4)).

104. *Okla. Dep’t. of Sec. v. Wilcox*, 691 F.3d 1171, 1174 (10th Cir. 2012) (quoting *Affordable Bail Bonds, Inc. v. Sandoval (In re Sandoval)*, 541 F.3d 997, 1001 (10th Cir. 2008)) (applying § 523(a)(19)); *see* *John Deere Co. v. Gerlach (In re Gerlach)*, 897 F.2d 1048, 1052 (10th Cir. 1990) (applying § 523(a)(2)); *Driggs v. Black (In re Black)*, 787 F.2d 503, 505 (10th Cir. 1986) (applying § 523(a)(2) and (a)(4)), *abrogated by* *Grogan v. Garner*, 498 U.S. 279 (1991); *see also* *Belloco First Fed. Credit Union v. Kaspar (In re Kaspar)*, 125 F.3d 1358, 1361 (10th Cir. 1997) (applying § 523(a)(2)).

105. *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 304 (11th Cir. 1994) (alterations in original) (applying § 523(a)(2)); *see also* *Bullock v. BankChampaign, N.A. (In re Bullock)*,

The way circuit courts interpret the words “fiduciary capacity” in the exception to discharge in § 523(a)(4) provides an example of how the fresh start canon influences what is inferred from statutory text. That section relates to debt for “defalcation while acting in a fiduciary capacity.”¹⁰⁶ Circuit courts have found that “[c]onsistent with the principle that exceptions to discharge are to be narrowly construed, the concept of fiduciary under § 523(a)(4) is narrower than it is under the general common law.”¹⁰⁷ The influence of the fresh start canon has resulted in surprising interpretations on the meaning of fiduciary capacity, such as circuit courts holding that a debtor who was an attorney in an attorney–client relationship was not acting in a fiduciary capacity,¹⁰⁸ a debtor who was a fiduciary under the Employee Retirement Income Security Act was not acting in a fiduciary capacity,¹⁰⁹ and a debtor who

670 F.3d 1160, 1164 (11th Cir. 2012) (applying § 523(a)(4)), *vacated*, 133 S. Ct. 1754 (2013); *Guerra v. Fernandez-Rocha* (*In re Fernandez-Rocha*), 451 F.3d 813, 816 (11th Cir. 2006) (applying § 523(a)(4)); *First Nat’l Bank of Mobile v. Roddenberry*, 701 F.2d 927, 932 (11th Cir. 1983) (applying § 17(a)(2) of the Bankruptcy Act of 1898).

106. 11 U.S.C. § 523(a)(4) (2012); *see also* Jonathon S. Byington, *The Challenges of the New Defalcation Standard*, 88 AM. BANKR. L.J. 3, 10 (2014) (focusing on the challenges of applying the Supreme Court’s interpretation of the term defalcation in *Bullock*, 133 S. Ct. at 1756); Jonathon S. Byington, *Fiduciary Capacity and the Bankruptcy Discharge*, 24 AM. BANKR. INST. L. REV. 1, 3 (2016) (focusing on the meaning of “fiduciary capacity” in § 523(a)(4)).

107. *Tex. Lottery Comm’n v. Tran* (*In re Tran*), 151 F.3d 339, 342 (5th Cir. 1998) (footnote omitted); *see also* *Double Bogey, L.P. v. Enea*, 794 F.3d 1047, 1050 (9th Cir. 2015) (stating that “[w]e have adopted a narrow definition of ‘fiduciary’ for purposes of § 523(a)(4)” (quoting *In re Cantrell*, 329 F.3d 119, 1125 (9th Cir. 2003))); *Commonwealth Land Title Co. v. Blaszak* (*In re Blaszak*), 397 F.3d 386, 391 (6th Cir. 2005) (stating “[t]his Court construes the term ‘fiduciary capacity’ found in the defalcation provision of § 523(a)(4) more narrowly than the term is used in other circumstances”); *In re Frain*, 230 F.3d 1014, 1017 (7th Cir. 2000) (“[T]he existence of a ‘fiduciary relationship’ is a matter of federal law. It bears emphasis that not all fiduciary relationships qualify under the Bankruptcy Code.”); *Miller v. J.D. Abrams, Inc.* (*In re Miller*), 156 F.3d 598, 602 (5th Cir. 1998); *Ragsdale v. Haller*, 780 F.2d 794, 796 (9th Cir. 1986) (finding that “[t]he broad, general definition of fiduciary—a relationship involving confidence, trust and good faith—is inapplicable”).

108. *See* *Fowler Bros. v. Young* (*In re Young*), 91 F.3d 1367, 1372 (10th Cir. 1996) (concluding the attorney debtor and a creditor did not have a fiduciary relationship and stating “[i]n cases where the debtor is an attorney and the creditor is the client, as we have here, the majority of courts that have considered the issue have applied the above principles to require more than an attorney–client relationship alone to establish a fiduciary relationship for purposes of § 523(a)(4)”, *abrogated by* *Field v. Mans*, 516 U.S. 59 (1995)). *But see* *Andy Warhol Found. for Visual Arts, Inc. v. Hayes* (*In re Hayes*), 183 F.3d 162, 170 (2d Cir. 1999) (finding the attorney–client relationship, without more, constitutes a fiduciary relationship under § 523(a)(4)).

109. *See* *Bd. of Trs. v. Bucci* (*In re Bucci*), 493 F.3d 635, 643 (6th Cir. 2007) (finding an ERISA fiduciary did not satisfy the fiduciary relationship required by § 523(a)(4)). *But see* *Blyler v. Hemmeter* (*In re Hemmeter*), 242 F.3d 1186, 1190 (9th Cir. 2001) (finding “ERISA satisfies the traditional requirements for a statutory fiduciary to qualify as a fiduciary under § 523(a)(4)”, *abrogated by* *Bullock*, 133 S. Ct. 1754).

was an obstetrician was not acting in a fiduciary capacity when he negligently performed a procedure that blinded a baby in one eye while the baby was in his mother's womb.¹¹⁰ In § 523(a)(4), Congress did not want to discharge debt owed to beneficiaries of a fiduciary debtor if the debtor committed a defalcation.¹¹¹ The foregoing examples show how circuit courts are using the fresh start canon in a way that results in the fresh start policy trumping the discharge restrictions policy. Ironically, this outcome has developed in the context of courts interpreting the Bankruptcy Code's exceptions to discharge, which is the very code section that Congress designed to implement the discharge restrictions policy.¹¹²

Courts often have several different reasons for assigning a certain meaning to statutory text. A recent case from the Fifth Circuit illustrates that the fresh start canon's pro-debtor preference is often included as one of many explanations for a decision that favors the debtor, even if the interpretation seems strained. *Husky International Electronics, Inc. v. Ritz (In re Ritz)*¹¹³ involved the meaning of the words "actual fraud" in § 523(a)(2)(A).¹¹⁴ That section states a bankruptcy discharge does not discharge debt obtained by "false pretenses, a false representation, or actual fraud."¹¹⁵

The bankruptcy court in *Ritz* made several findings of fact after it held a trial and considered testimony from ten different witnesses.¹¹⁶ It determined that the debtor had financial control of the company¹¹⁷ and

110. See *Lee-Benner v. Gergely (In re Gergely)*, 110 F.3d 1448, 1450–51 (9th Cir. 1997) (finding a fiduciary capacity requires an express trust and that "[n]o such express trust arises out of the doctor–patient relationship").

111. 11 U.S.C. § 523(a)(4).

112. See *Bruning v. United States*, 376 U.S. 358, 361 (1964) (stating that the Bankruptcy Code section containing the exceptions to discharge "demonstrates congressional judgment that certain problems—e.g., those of financing government—override the value of giving the debtor a wholly fresh start").

113. 787 F.3d 312 (5th Cir. 2015), *rev'd*, 136 S. Ct. 1581 (2016).

114. *Id.* at 316.

115. 11 U.S.C. § 523(a)(2)(A).

116. *Husky Int'l Elecs., Inc. v. Ritz (In re Ritz)*, 459 B.R. 623, 629–30 (Bankr. S.D. Tex. 2011), *aff'd*, 513 B.R. 510 (2014), *aff'd*, 787 F.3d 312, *rev'd*, 136 S. Ct. 1581. The bankruptcy court identified whether a given witness's testimony was given little or significant weight. Notably, the bankruptcy court found that the debtor was not a credible witness and observed that "his frequent inability to recall certain information was not coincidental" and "[h]is ability to recollect was selective." *Id.* at 629. It found the debtor's explanation for certain fund transfers "disingenuous, if not downright misleading" and that the debtor "frequently gave non-responsive answers to questions which were unambiguous." *Id.*

117. *Id.* at 627 (finding the debtor was the owner of at least thirty percent of the common stock of Chrysalis Manufacturing Corp., that he was its director, and that he exercised financial control of the corporation).

that the company owed a creditor \$163,999.¹¹⁸ The debtor caused the company to transfer over one million dollars to various entities in which the debtor held an ownership interest and the company did not receive reasonably equivalent value for the transfers.¹¹⁹ The bankruptcy court also found that the company was not paying its debts as they became due and that its debts exceeded its assets.¹²⁰ The bankruptcy court found that as a result of the debtor's fund transfers from the company's account, the creditor suffered damages totaling \$163,999.¹²¹ It even concluded "the [d]ebtor is not an upstanding businessman who can be trusted."¹²² However, "[n]o exhibits were introduced and no testimony was adduced indicating that the [d]ebtor made any oral or written representations to the [creditor]."¹²³

The issue came down to whether a representation was required for "actual fraud" under § 523(a)(2)(A)'s language of "false pretenses, a false representation, or actual fraud."¹²⁴ The bankruptcy court analyzed the requirements of actual fraud under Texas law and concluded that a representation was a necessary element for establishing actual fraud.¹²⁵ It then found that the tests for fraud under Texas law and the requirements of § 523(a)(2)(A) "are virtually the same" and held the creditor did not prove actual fraud.¹²⁶ The district court affirmed on appeal.¹²⁷

On appeal to the Fifth Circuit, the creditor argued that a false representation was unnecessary to trigger "actual fraud" under § 523(a)(2)(A).¹²⁸ The creditor pointed to the Seventh Circuit case

118. *Id.*

119. *Id.* at 628.

120. *Id.* at 627–28.

121. *Id.* at 628. This finding is significant because § 523(a)(2)(A) states a discharge does not discharge "any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent *obtained by . . . actual fraud.*" 11 U.S.C. § 523(a)(2)(A) (2012) (emphasis added).

122. *In re Ritz*, 459 B.R. at 636.

123. *Id.* at 628.

124. *Id.* at 633; 11 U.S.C. § 523(a)(2)(A).

125. *See In re Ritz*, 459 B.R. at 633.

126. *Id.*

127. *Husky Int'l Elecs., Inc. v. Ritz (In re Ritz)*, 513 B.R. 510, 539 (S.D. Tex. 2014), ("[T]he Court agrees with Judge Bohm [of the bankruptcy court] that since there is no representation involved in this Adversary Proceeding, [the creditor] fails to prevail under § 523(a)(2)(A) to overturn the discharge of [the company's] debt to [the creditor]."), *aff'd*, 787 F.3d 312, *rev'd*, 136 S. Ct. 1581. Interestingly, the district court quoted the fresh start canon that "the basic principle of bankruptcy that exceptions to discharge must be strictly construed against a creditor and liberally construed in favor of a debtor so that the debtor may be afforded a fresh start." *Id.* at 518 (quoting *FNFS, Ltd. v. Harwood (In re Harwood)*, 637 F.3d 615, 619 (5th Cir. 2011)).

128. *Husky Int'l Elecs., Inc. v. Ritz (In re Ritz)*, 787 F.3d 312, 316 (5th Cir. 2015), *rev'd*, 136 S. Ct. 1581 (2016).

McClellan v. Cantrell,¹²⁹ which held actual fraud does not require a representation.¹³⁰ The *McClellan* court focused on the wording of § 523(a)(2)(A) and reasoned that “by distinguishing between ‘a false representation’ and ‘actual fraud,’ the statute makes clear that actual fraud is broader than misrepresentation.”¹³¹ The *McClellan* court explained:

No learned inquiry into the history of fraud is necessary to establish that it is not limited to misrepresentations “Fraud is a generic term, which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another No definite and invariable rule can be laid down as a general proposition defining fraud, and it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.”¹³²

The *Ritz* court rejected the reasoning of *McClellan* and instead drew pro-debtor inferences by holding “a representation is a necessary prerequisite for a showing of ‘actual fraud’ under Section 523(a)(2)(A).”¹³³ Although it based its reasoning on several grounds,¹³⁴ the final justification given by the *Ritz* court was the fresh start canon, that “[e]xceptions to discharge should be construed in favor of debtors in accordance with the principle that provisions dealing with this subject are remedial in nature and are designed to give a fresh start to debtors unhampered by pre-existing financial burdens.”¹³⁵ Even though the fresh start canon was certainly not the exclusive reason the *Ritz* court interpreted the exception to discharge in favor of the debtor, it was a significant enough reason to be prominently included as the final justification for the decision. On appeal, the Supreme Court reversed the Fifth Circuit’s decision in *Ritz* and gave the statutory text a broader reading, interpreting the term actual fraud “to encompass fraudulent

129. 217 F.3d 890 (7th Cir. 2000).

130. *Id.* at 894 (concluding that a fraudulent misrepresentation “is not the only form that fraud can take or the only form that makes a debt nondischargeable”).

131. *Id.* at 893.

132. *Id.* (quoting *Stapleton v. Holt*, 250 P.2d 451, 453–54 (Okla. 1952)).

133. *See In re Ritz*, 787 F.3d at 321.

134. Some of the other grounds included the *Ritz* court’s interpretation of *Field v. Mans*, 516 U.S. 59, 70 (1995) and its own Fifth Circuit precedent in *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1293 (5th Cir. 1995). *In re Ritz*, 787 F.3d at 317, 319.

135. *In re Ritz*, 787 F.3d at 321 (alteration in original) (quoting *Fezler v. Davis (In re Davis)*, 194 F.3d 570, 573 (5th Cir. 1999)).

conveyance schemes, even when those schemes do not involve a false representation.”¹³⁶

3. Construing Statutory Text Against the Creditor

The closely related third and final component of the fresh start canon is construing statutory text against the creditor. If construing text in favor of the debtor is one side of a coin, construing text against the creditor is simply the other side of the same coin. In the Third Circuit, “statutory exceptions to discharge are generally construed ‘narrowly against the creditor and in favor of the debtor.’”¹³⁷ In the Fifth Circuit, “exceptions to discharge must be strictly construed against a creditor and liberally construed in favor of a debtor so that the debtor may be afforded a fresh start.”¹³⁸ The Seventh Circuit construes exceptions to discharge “strictly against the objecting creditor and liberally in favor of the debtor in order to give the debtor a better chance at a fresh start.”¹³⁹

The Third Circuit’s interpretation of what an educational “loan” means in § 523(a)(8) provides an example of construing words against the creditor. *Boston University v. Mehta (In re Mehta)*¹⁴⁰ involved a student debtor who registered and took classes from a university without paying.¹⁴¹ The debtor owed charges for delinquent tuition and attendant costs.¹⁴² After the debtor filed bankruptcy, the creditor university argued that the debtor’s “tuition debt arose from an extension of credit for

136. See *Husky Int’l Elecs., Inc. v. Ritz (In re Ritz)* 136 S. Ct. 1581, 1590 (2016).

137. *Bos. Univ. v. Mehta (In re Mehta)*, 310 F.3d 308, 311 (3d Cir. 2002) (quoting *In re Pelkowski*, 990 F.2d 737, 744 (3d Cir. 1993)) (applying § 523(a)(8)).

138. *Hudson v. Raggio & Raggio, Inc. (In re Hudson)*, 107 F.3d 355, 356 (5th Cir. 1997) (applying § 523(a)(5)); see also *FNFS, Ltd. v. Harwood (In re Harwood)*, 637 F.3d 615, 619 (5th Cir. 2011) (applying § 523(a)(4)); *Deodati v. M.M. Winkler & Assocs. (In re M.M. Winkler & Assocs.)*, 239 F.3d 746, 751 (5th Cir. 2001) (applying § 523(a)(2)); *Hickman v. Texas (In re Hickman)*, 260 F.3d 400, 404 (5th Cir. 2001) (applying § 523(a)(7)); *LSP Inv. P’ship v. Bennett (In re Bennett)*, 989 F.2d 779, 784–85 (5th Cir. 1993) (applying § 523(a)(4)); *Citizens Bank & Tr. Co. v. Case (In re Case)*, 937 F.2d 1014, 1024 (5th Cir. 1991) (holding that “[a]ny exception to the general discharge of a debtor’s debts is strictly governed by the Code and construed narrowly in favor of the debtor and against the creditor requesting the determination”) (applying § 523(a)(3)), *superseded by statute*, FED. R. APP. P. 3(c), *as recognized in McDow v. United Refuse LLC (In re United Refuse LLC)*, 171 F. App’x 426 (4th Cir. 2006); *Boyle v. Abilene Lumber, Inc. (In re Boyle)*, 819 F.2d 583, 588 (5th Cir. 1987) (applying § 523(a)(4)), *superseded in part by statute*, TEX. PROP. CODE ANN. § 162.031 (West 2016), *as recognized in Ratliff Ready-Mix v. Pledger (In re Pledger)*, 592 F. App’x 296 (5th Cir. 2015); *Murphy & Robinson Inv. Co. v. Cross (In re Cross)*, 666 F.2d 873, 879–80 (5th Cir. 1982) (applying § 17(a)(4) of the Bankruptcy Act of 1898).

139. *In re Crosswhite*, 148 F.3d 879, 881 (7th Cir. 1998) (applying § 523(a)(15)); see also *Kolodziej v. Reines (In re Reines)*, 142 F.3d 970, 972–73 (1998) (applying § 523(a)(5)).

140. 310 F.3d 308 (3d Cir. 2002).

141. *Id.* at 310.

142. *Id.*

educational services, and that it [was] therefore tantamount to an educational ‘loan’ that [was] excluded from discharge.”¹⁴³

The *Mehta* court explored the creditor university’s regulations and policies, including a guide given to all students upon registration that bound students registered for classes to the school’s regulations and policies.¹⁴⁴ The regulations and policies obligated students to pay all tuition, fees, and charges and included various remedies the university could exercise to collect delinquencies.¹⁴⁵ Part of the *Mehta* court’s reasoning focused on the bankruptcy court opinion in *Seton Hall v. Van Ess (In re Van Ess)*,¹⁴⁶ in which the bankruptcy court held that a student’s delinquent tuition was dischargeable “because the exceptions to discharge contained in § 523(a) ‘should be narrowly construed against the creditor in order to carry out the rehabilitative policy of the Bankruptcy Code.’”¹⁴⁷ Speaking of *Van Ess*, the *Mehta* court noted that “the contrary construction urged by the university there would have been inconsistent with that liberal, rehabilitative policy” and that a debtor’s “nonpayment of his tuition bill did not result in an extension of credit.”¹⁴⁸ The *Mehta* court concluded that delinquent tuition, without more, was not excepted from discharge and that it would “not now create a loan agreement where none otherwise exists.”¹⁴⁹ In finding the tuition debt

143. *Id.* at 312. The relevant part of § 523(a)(8) stated that a discharge:

[D]oes not discharge an individual debtor from any debt . . . for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor’s dependents.

Id. at 310–11 (quoting 11 U.S.C. § 523(a)(8) (1994)).

144. *Id.* at 312.

145. *Id.* One of the creditor’s policies stated:

Boston University’s policy requires the withholding of all credit, educational services, issuance of transcripts, and certification of academic records from any person whose financial obligations to the University (including delinquent student accounts, deferred balances, and liability for damages) are due and/or unpaid. . . . By registering for any class in the University, each student accepts and agrees to be bound by the foregoing University policy as applied to any preexisting or future obligation to the University.

Id. at 312 n.5.

146. 186 B.R. 375 (Bankr. D.N.J. 1994).

147. *Mehta*, 310 F.3d at 315 (quoting *In re Van Ess*, 186 B.R. at 377–78).

148. *Id.* at 315 (quoting *In re Van Ess*, 186 B.R. at 378).

149. *Id.* at 316.

was not a loan, the *Mehta* court quoted the fresh start canon twice.¹⁵⁰

Overall, the circuit courts have applied the fresh start canon to statutory text in at least ten of the nineteen subsections of § 523(a) of the Bankruptcy Code.¹⁵¹ The practice of using the fresh start canon to interpret exceptions to discharge is widespread and unquestioned throughout the circuit courts. But because canons are supposed to merely provide guidance and are not mandatory rules, this practice should be open to review.¹⁵²

C. The Fresh Start Canon Should Not Be Used to Interpret Exceptions to Discharge

Using the fresh start canon to interpret exceptions to discharge is misguided for two reasons. First, the Supreme Court has rejected use of the fresh start canon in the exceptions to discharge context. Second, the purpose and nature of exceptions to discharge makes the fresh start canon an unsuitable interpretative tool.

1. The Supreme Court Has Rejected Use of The Fresh Start Canon to Interpret Exceptions to Discharge

In stark contrast to the circuit courts, the Supreme Court does not use the fresh start canon. It has repeatedly declined explicit invitations in briefs to construe exceptions to discharge narrowly.¹⁵³ Instead, it has a “‘well-known’ guide”¹⁵⁴ and “‘long-standing principle”¹⁵⁵ that “‘exceptions to discharge ‘should be confined to those plainly

150. *Id.* at 311, 316.

151. *See supra* Section II.B (identifying cases interpreting the language of § 523(a)(1), (2), (3), (4), (5), (6), (7), (8), (15) and (19)).

152. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (“[T]hese canons do not determine how to read this statute. For one thing, canons are not mandatory rules. They are guides that ‘need not be conclusive.’ They are designed to help judges determine the Legislature’s intent as embodied in particular statutory language.” (citation omitted) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001))).

153. *E.g.*, Brief of Amicus Curiae G. Eric Brunstad, Jr. in Support of Petitioner at 12, *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013) (No. 11-1518) (“The Court Should Construe the Exceptions to the Discharge Narrowly to Effectuate the Bankruptcy Code’s Fresh Start Policy.”); Brief for Petitioner at 29, *Cohen v. De La Cruz*, 523 U.S. 213 (1998) (No. 96-1923) (stating that “[g]iven the centrality of the fresh start policy to the purposes of the bankruptcy law as applied to individuals, it follows that the nondischargeability provisions must be construed narrowly” (citation omitted)); Brief of the National Association of Consumer Bankruptcy Attorneys as Amicus Curiae in Support of Respondents at 8, 523 U.S. 57 (1998) (No. 97-115) (containing an entire subsection of argument entitled “Exceptions To Discharge Should Be Narrowly Construed”).

154. *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) (quoting *Gleason v. Thaw*, 236 U.S. 558, 562 (1915)).

155. *Bullock*, 133 S. Ct. at 1760.

expressed.”¹⁵⁶ The historical development of this approach and the Supreme Court’s repeated rejection of narrow interpretations of exceptions to discharge were explained earlier in Section I.B.

At first glance, one might mistake the two standards as being roughly equivalent because the Supreme Court’s standard uses the word “confine” and the circuit courts’ fresh start canon uses the word “narrow.” That is not the case. There is a meaningful difference between confining exceptions to discharge to those plainly expressed and construing them narrowly. The verb “confined” indicates the placement of a limit, boundary, or enclosure. The object being confined is not “those plainly expressed,” meaning the words of the exceptions to discharge in § 523(a). Rather, the object being confined is anything other than the plainly expressed words of § 523(a). The scope or extent of the confinement is “to” the plainly expressed words. This suggests the confining construction does not apply to the plainly expressed words of § 523(a)—it applies to anything other than the plainly expressed words. In contrast, the object of the circuit courts’ narrow construction is the actual words of § 523(a). The focus of the Supreme Court’s standard ensures an interpretation that is bounded “to” the plainly expressed words of § 523(a). The circuit courts’ focus in using the fresh start canon is on making narrow inferences from the actual words of § 523(a). The distinction is subtle but significant.

The Supreme Court has expressly recognized the difference between confining exceptions to discharge to those plainly expressed and construing them narrowly. In 2010, the Supreme Court decided a case involving exemptions under § 522(l) of the Bankruptcy Code. One party argued that “procedures that burden the debtor’s exemption entitlements, like those that impair a debtor’s discharge generally, are to be construed narrowly.”¹⁵⁷ The Supreme Court rejected this argument stating it “miss[ed] the mark” and emphasized “the importance of limiting exceptions to discharge ‘to those plainly expressed.’”¹⁵⁸ In addition, the outcome of a case completely changes depending on which standard is applied. Subsection II.B.2 explored the *Ritz* case, where the Fifth Circuit applied the fresh start canon to construe statutory language in favor of the debtor.¹⁵⁹ In doing so, the Fifth Circuit in *Ritz* drew pro-debtor inferences by interpreting “actual fraud” to require a representation. When the Supreme Court applied the plainly expressed standard to the same

156. *Id.* (quoting *Kawaauhau*, 523 U.S. at 62).

157. *Schwab v. Reilly*, 560 U.S. 770, 790 n.17 (2010) (quoting Brief for Respondent at 33, *Schwab*, 560 U.S. 770 (No. 08-538)).

158. *Id.* (quoting *Kawaauhau*, 523 U.S. at 62).

159. *See supra* Subsection II.B.2. (discussing *Husky Int’l Elecs., Inc. v. Ritz (In re Ritz)*, 787 F.3d 312 (5th Cir. 2015), *rev’d*, 136 S. Ct. 1581 (2016)).

statutory language, the outcome changed. The Supreme Court interpreted the term actual fraud “to encompass fraudulent conveyance schemes, even when those schemes do not involve a false representation.”¹⁶⁰

Admittedly, the “plainly expressed” standard is limited in its utility to provide helpful guidance to courts seeking to interpret exceptions to discharge. Like its related “plain meaning” cousin, the “notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification.”¹⁶¹ Consequently, it is appropriate and in many cases necessary for a court, in applying the plainly expressed standard, to use a variety of sources such as precedent, other parts of the Bankruptcy Code, dictionaries, legislative history, maxims, and yes, even textual and substantive canons, in order to determine the meaning of statutory text.¹⁶² But one of these sources of guidance should not be utilized in certain contexts. The Supreme Court has determined that it is not appropriate for courts to use the fresh start canon to interpret exceptions to discharge.

2. The Purpose and Nature of Exceptions to Discharge Makes the Fresh Start Canon an Unsuitable Interpretative Tool

Exceptions to discharge serve a unique role in bankruptcy law, especially in relation to the fresh start policy. The fresh start policy is primarily accomplished through the discharge of debt. But using the fresh start policy to delineate the limits of the discharge is circular and compromises a rival public policy that is a critical component of bankruptcy law. Indeed, the competing policy of the discharge restrictions could be viewed as a condition imposed by society upon the grant of a discharge. To understand the exceptions to discharge, one must understand the nature of the discharge itself.

The “Bankruptcy Clause” of the Constitution authorizes Congress to establish “uniform Laws on the subject of Bankruptcies throughout the United States.”¹⁶³ Congress has intermittently used this authority to enact, repeal, and amend various bankruptcy acts since the year 1800.¹⁶⁴

160. See *Husky Int’l Elecs., Inc. v. Ritz* (*In re Ritz*) 136 S. Ct. 1581, 1590 (2016).

161. *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J. dissenting); see also *United States v. Ron Pair Enters.*, 489 U.S. 235, 242, 249 (1989) (involving both the majority and dissenting opinions relying upon conflicting plain meanings of statutory text).

162. In other words, this Article is not contending that the “plainly expressed” standard is the fix-all solution for courts struggling to apply exceptions to discharge. For example, in *Bullock* the Supreme Court applied the “plainly expressed” standard in conjunction with several other considerations, including the textual canon *noscitur a sociis*. *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1760 (2013).

163. U.S. CONST. art. I, § 8, cl. 4.

164. Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (amended in 1801 and 1802, then repealed in 1803); Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843); Bankruptcy Act of 1867,

Discharge of debt is a selectively conferred privilege, not a fundamental or constitutional right.¹⁶⁵ The Supreme Court has characterized the discharge as “a legislatively created benefit, not a constitutional one, and . . . it was a benefit withheld, save for three short periods, during the first 110 years of the Nation’s life.”¹⁶⁶ Thus, “[t]here is no constitutional right to obtain a discharge of one’s debts in bankruptcy.”¹⁶⁷ In corresponding fashion, the Supreme Court rejected arguments that the clear and convincing burden of proof was required to effectuate the fresh start, and only requires creditors to prove exceptions to discharge by “the ordinary preponderance of the evidence standard.”¹⁶⁸

Instead of a constitutional right, “bankruptcy legislation is in the area of economics and social welfare.”¹⁶⁹ As such, Congress has shaped the contours of the discharge to include at least two types of restrictions. First, a discharge may be denied globally rendering all of a debtor’s debt nondischargeable.¹⁷⁰ Second, an identified, single indebtedness may be excepted from discharge either because the nature of the debt itself is important to society or the debt relates to a debtor’s wrongful conduct.¹⁷¹ Examples of important types of debt are those relating to taxes,¹⁷²

ch. 176, 14 Stat. 517 (repealed 1878); Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed in 1978 after significant amendments); Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C. (2012)); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.).

165. *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (noting that “a debtor has no constitutional or ‘fundamental’ right to a discharge in bankruptcy” (quoting *United States v. Kras*, 409 U.S. 434, 445–46 (1973))); *Napolitano v. McNamara (In re McNamara)*, 310 B.R. 664, 668 (Bankr. D. Conn. 2004) (“Bankruptcy is a privilege, not a right.”).

166. *Kras*, 409 U.S. at 447.

167. *Id.* at 446 (also stating that “[b]ankruptcy is hardly akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment, that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated”).

168. *Grogan*, 498 U.S. at 286, 291 (1991) (“We are unpersuaded by the argument that the clear-and-convincing standard is required to effectuate the ‘fresh start’ policy of the Bankruptcy Code.”).

169. *Kras*, 409 U.S. at 446.

170. 11 U.S.C. § 727(a) (2012).

171. *Id.* § 523(a); *see also* *Cohen v. de la Cruz*, 523 U.S. 213, 222 (1998) (stating that “[t]he various exceptions to discharge in § 523(a) reflect a conclusion on the part of Congress ‘that the creditors’ interest in recovering full payment of debts in these categories outweigh[s] the debtors’ interest in a complete fresh start’” (second alteration in original) (quoting *Grogan*, 498 U.S. at 287)); *Bruning v. United States*, 376 U.S. 358, 361 (1964). An example of a debt that is important to society is the public policy favoring the enforcement of familial obligations as contained in § 523(a)(5). *See* *Shaver v. Shaver*, 736 F.2d 1314, 1315–16 (9th Cir. 1984).

172. 11 U.S.C. § 523(a)(1).

domestic-support obligations,¹⁷³ government fines,¹⁷⁴ educational loans,¹⁷⁵ and orders of restitution in criminal cases.¹⁷⁶

In addition, there is no discharge of debt arising from certain types of reprehensible conduct by a debtor. This is the statutory implementation of the fresh start policy's "honest" but unfortunate debtor.¹⁷⁷ For example, there is no discharge for debts obtained by false pretenses or actual fraud,¹⁷⁸ defalcation while acting in a fiduciary capacity,¹⁷⁹ embezzlement,¹⁸⁰ willful and malicious injury by the debtor to another,¹⁸¹ or death or injury caused by the debtor's operation of a vehicle while the debtor was intoxicated.¹⁸²

The Supreme Court has recognized that the code section containing the exceptions to discharge "is not a compassionate section for debtors. Rather, it demonstrates congressional judgment that certain problems—*e.g.*, those of financing government—override the value of giving the debtor a wholly fresh start."¹⁸³ In a later case, after discussing the importance of the fresh start policy, the Supreme Court described the interplay between the fresh start and exceptions to discharge:

[I]n the same breath that we have invoked this "fresh start" policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the "honest but unfortunate debtor."

The statutory provisions governing nondischargeability reflect a congressional decision to exclude from the general policy of discharge certain categories of debts—such as child support, alimony, and certain unpaid educational loans and taxes, as well as liabilities for fraud. Congress evidently concluded that the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start.¹⁸⁴

173. *Id.* § 523(a)(5).

174. *Id.* § 523(a)(7).

175. *Id.* § 523(a)(8).

176. *Id.* § 523(a)(13).

177. *See* *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (stating the fresh start policy is a "public as well as private interest, in that it gives to *the honest* but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt" (emphasis added)).

178. 11 U.S.C. § 523(a)(2).

179. *Id.* § 523(a)(4).

180. *Id.*

181. *Id.* § 523(a)(6).

182. *Id.* § 523(a)(9).

183. *Bruning v. United States*, 376 U.S. 358, 361 (1964) (applying § 17 of the Bankruptcy Act of 1898, the predecessor to the current § 523).

184. *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991) (citation omitted).

The circuit courts utilize the fresh start canon on the basis that it is necessary to achieve the general beneficial purpose of the Bankruptcy Code. Yet, the discharge restrictions policy underlying the exceptions to discharge is just as much a part of the purpose of the Bankruptcy Code as the fresh start policy. Congress defined the scope of the discharge by outlining exceptions to discharge. Courts should not use the benefits of the discharge as a basis for narrowly interpreting the exceptions to discharge, because the exceptions confine the discharge itself. In other words, overreliance upon the fresh start policy evolves into a self-expanding discharge that squeezes out all but the most rare and egregious cases involving the exceptions to discharge. The discharge restrictions policy should not be overshadowed by the fresh start policy. The Supreme Court has recognized this distinction, observing that “while it is true that a finding of nondischargeability prevents a bankrupt from getting an entirely ‘fresh start,’ this observation provides little assistance in construing a section expressly designed to make some debts nondischargeable.”¹⁸⁵

However, under the same logic, courts interpreting exceptions to discharge should not give lopsided treatment in favor of the discharge restrictions policy by utilizing a broad construction. There is a narrow circuit court line of authority applying a “broad” construction of the exception to discharge in § 523(a)(5) for domestic-support obligations on a public-policy basis.¹⁸⁶ Many of these courts point to the 1904 Supreme Court decision *Wetmore v. Markoe*,¹⁸⁷ which was issued before the Bankruptcy Code contained a statutory provision excepting domestic-

185. See *United States v. Sotelo*, 436 U.S. 268, 279–80 (1978).

186. See *Falk & Siemer, LLP v. Maddigan (In re Maddigan)*, 312 F.3d 589, 596 (2d Cir. 2002) (“[W]hen due regard is given for the other policy priorities with which Congress was concerned in drafting the Bankruptcy Code, there is ample justification for construing certain statutory terms broadly . . . [A]mong the concepts to be given broad interpretation is the meaning of ‘in the nature of support.’” (quoting *Peters v. Hennenhoefter (In re Peters)*, 133 B.R. 291, 295 (S.D.N.Y. 1991))); *Beaupied v. Chang (In re Chang)*, 163 F.3d 1138, 1141 (9th Cir. 1998) (making a broad interpretation stating that even though § 523(a)(5) “applies on its face only to debts owed ‘to’ a child or former spouse . . . [w]e hold in the instant case that the identity of the payee is less important than the nature of the debt”); *In re Crosswhite*, 148 F.3d 879, 882 (7th Cir. 1998) (stating “a § 523(a)(5) exception from discharge is construed more liberally than other § 523 exceptions”); *Holliday v. Kline (In re Kline)*, 65 F.3d 749, 750–51 (8th Cir. 1995) (stating that “[a]lthough statutory exceptions to discharge normally are subject to narrow construction, exceptions from discharge for spousal and child support deserve a more liberal construction” (citation omitted)); *Jones v. Jones (In re Jones)*, 9 F.3d 878, 881 (10th Cir. 1993) (holding that “the term ‘support’ as used in § 523(a)(5) is entitled to a broad application”); *Peters v. Hennenhoefter (In re Peters)*, 964 F.2d 166, 167 (2d Cir. 1992), *aff’g*, 133 B.R. 291, 295 (S.D.N.Y. 1991) (“The ‘nature of support’ is a broadly construed term in bankruptcy law.”).

187. 196 U.S. 68 (1904).

support obligations from discharge.¹⁸⁸ *Wetmore* emphasized the importance of domestic-support obligations to society and held:

Unless positively required by direct enactment the courts should not presume a design upon the part of Congress in relieving the unfortunate debtor to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to maintain and educate his children.¹⁸⁹

Despite the importance of the public policies manifested by the discharge restrictions, courts should not construe any of the exceptions to discharge broadly. Congress has balanced the tension between the fresh start and the discharge restriction policies by carefully crafting through compromise the statutory text of the exceptions to discharge, and “it is not for courts to alter the balance struck by the statute.”¹⁹⁰

The Uniform Commercial Code (UCC) provides a classic example of when it is appropriate for courts to utilize a broad or narrow construction of statutory language. Section 1-103 of the UCC is entitled “Construction of UCC to Promote its Purposes and Policies.”¹⁹¹ It states that the UCC must be “liberally construed and applied to promote its underlying purposes and policies . . . (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.”¹⁹² This section is an express legislative direction to construe statutory provisions in accordance with the stated substantive public policies. The Official Comment explains:

The proper construction of the Uniform Commercial Code requires, of course, that its interpretation and application be limited to its reason.

. . .

The Uniform Commercial Code should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the

188. See Bankruptcy Act of 1898, ch. 541, § 17, 30 Stat. 544 (1898) (repealed 1978).

189. *Wetmore*, 196 U.S. at 77.

190. *Law v. Siegel*, 134 S. Ct. 1188, 1197–98 (2014) (interpreting exemption limits contained in § 522 of the Bankruptcy Code).

191. U.C.C. § 1-103 (AM. LAW INST. & UNIF. LAW COMM’N 2012).

192. *Id.* § 1-103(a).

Uniform Commercial Code as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.¹⁹³

Unlike the UCC, the exceptions to discharge in the Bankruptcy Code should not be construed narrowly or broadly, precisely because there are competing purposes and policies involved. Section 102 of the Bankruptcy Code is entitled “Rules of Construction.”¹⁹⁴ In contrast to section 1-103 of the UCC, § 102 of the Bankruptcy Code does not contain substantive public policies nor does it contain a legislative direction to construe statutory provisions in accordance with substantive public policies.¹⁹⁵ Instead, it contains grammatical interpretative guidance on the level of a textual canon. For example, § 102(3) states: “‘includes’ and ‘including’ are not limiting” and § 102(5) states: “‘or’ is not exclusive.”¹⁹⁶ The text of the Bankruptcy Code does not contain a legislative direction to construe statutory provisions in favor of any identified substantive public policy. Accordingly, courts should not favor a broad or narrow construction of the exceptions to discharge.

CONCLUSION

Circuit courts throughout the Nation are using bankruptcy law’s fresh start policy as a substantive canon of construction to interpret exceptions to discharge. They should immediately stop this practice. Likewise, bankruptcy courts should not follow their respective circuit court’s version of the fresh start canon. Regardless of whether the fresh start canon is used as a presumption, a tiebreaker among competing interpretations, or as a reason compelling a particular interpretive outcome, courts should not apply it when interpreting the exceptions to discharge. The purpose and nature of exceptions to discharge makes the fresh start canon an unsuitable interpretative tool. In addition, the Supreme Court has rejected the use of the fresh start canon to interpret exceptions to discharge. Courts should not construe exceptions to discharge narrowly or broadly. Instead, as the Supreme Court requires, “exceptions to discharge ‘should be confined to those plainly expressed.’”¹⁹⁷ When courts seek to give meaning to what is plainly

193. *Id.* § 1-103 cmt. 1.

194. 11 U.S.C. § 102 (2012).

195. Section 105 of the Bankruptcy Code is probably the most similar provision to section 1-103 of the UCC. Section 105(a) states that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” § 105(a).

196. *Id.* § 102.

197. *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1760 (2013) (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998)).

expressed in the exceptions to discharge, they should not utilize the fresh start canon.