THE SUPREME COURT AND THE DISCHARGE OF DEBTS IN CONSUMER BANKRUPTCY CASES

by

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I. Introduction

This article examines the United States Supreme Court's jurisprudence on the scope of the discharge in consumer bankruptcy filings under the Bankruptcy Code of 1978.[1] This jurisprudence is predictable in its focus on statutory text and at the same time remarkable for its almost complete aversion to bankruptcy policy as a source of statutory interpretation.[2] Text and policy are not, of course, mutually exclusive. In snubbing bankruptcy policy, the Court deprives itself and the lower courts of an important tool in the work of interpreting and applying the Code.

The Supreme Court has addressed the scope of the discharge in consumer bankruptcy cases under the Code in eleven cases, all concerning the exceptions to discharge under § 523(a).[3] In nine of these cases, the Court considered the so-called "bad acts" exceptions covering debts arising from culpable misconduct.[4] This article examines the Court's decisions to develop

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[1] 11 U.S.C. §§ 101–1532 (2025) (as amended) (the "Bankruptcy Code" or the "Code"). In addition, all citations to 11 U.S.C. §§ 101 et seq. are to the 2025 version of the statute unless otherwise noted.

[2] *See infra* notes 47–73 and accompanying text.

[3] 11 U.S.C. § 523(a).

[4] The bad acts exceptions to discharge are: § 523(a)(2) (excepting debts for fraud), § 523(a)(4) (excepting debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny"), and § 523(a)(6) (excepting debts "for willful and malicious injury"). *Id.* § 523(a)(2), (4), (6). The nine cases in which the Court has considered these exceptions are: *Bartenwerfer v. Buckley*, 598 U.S. 69 (2023) (holding that debtor could not discharge her vicarious liability for her business partner's fraud); *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 715 (2018) (holding that a statement about the value of a single asset qualified as a "statement respecting the debtor's . . . financial condition" under § 523(a)(2)(B) and therefore could not be nondischargeable unless it was in writing); *Husky Int'l Electronics, Inc. v. Ritz*, 578 U.S. 355, 366 (2016) (holding that "actual fraud" under § 523(a)(2)(A) encompasses schemes in which the debtor is the recipient of an intentionally fraudulent transfer and does not require a fraudulent misrepresentation); *Bullock v. Bankchampaign, N.A.*, 569 U.S. 267 (2013) (holding that the term "defalcation" in §

an understanding of how it has used (and not used) the various sources of statutory interpretation. This will assist both judges and practitioners in addressing the numerous issues concerning the exceptions to discharge on which the lower courts remain divided.[5] The article also explores several non-legal factors, such as the ideology of the justices and the position taken by the Solicitor General, that may bear on the Court's decision-making in this area.[6]

The limits of a bankruptcy jurisprudence without bankruptcy policy are exposed in the Court's most recent exception-to-discharge decision, *Bartenwerfer v. Buckley*.[7] In *Bartenwerfer*, the Court held that the debtor could not discharge a fraud debt that she had no part in creating but for which she was vicariously liable under state law.[8] The Court explained that fraud creditors have an interest in repayment that outweighs the debtor's interest in a fresh start; however, it did not examine what the policy rationale would be or why it should take precedence over the Code's foundational policy of granting a discharge to honest but unfortunate debtors.[9] As a result, it missed

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523(a)(4), which excepts from discharge debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" includes a culpable state of mind requirement); *Archer v. Warner*, 538 U.S. 314 (2003) (holding that a debt based on a settlement agreement pertaining to a claim for fraud, in which the creditor released all claims against the debtor, could be nondischargeable under § 523(a)(2)); *Cohen v. de la Cruz*, 523 U.S. 213 (1998) (holding that § 523(a)(2) precluded the discharge of all liability stemming from the debtor's fraud, including treble damages and attorney fees and costs provided for under applicable state law); *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) (holding that § 523(a)(6) requires intent to cause harm and does not cover debts arising from injuries that are inflicted negligently or recklessly); *Field v. Mans*, 516 U.S. 59 (1995) (holding that the exception to discharge for fraud under § 523(a)(2)(A) requires only justifiable, not reasonable, reliance by the creditor on the debtor's misrepresentation); and *Grogan v. Gardner*, 498 U.S. 279 (1991) (holding that the preponderance of the evidence standard of proof, not the clear and convincing standard, applies to determining exceptions to discharge under § 523(a)(2)). The other two § 523(a) cases are: *Young v. United States*, 535 U.S. 43 (2002) (holding that the three-year lookback period for nondischargeable taxes under § 523(a)(1)(A) was tolled during the pendency of the chapter 7 debtors' previous chapter 13 case); and *Kelly v. Robinson*, 479 U.S. 36 (1986) (holding that a restitution obligation imposed as part of a criminal sentence under applicable state law was nondischargeable under § 523(a)(7)). The Court of course has interpreted earlier versions of various exceptions to discharge under pre–Code law. These decisions are beyond the scope of this article.

[5] *See infra* Part VII.

[6] *See infra* Part VI.

[7] 598 U.S. 69.

[8] *Id.*

[9] *Id.* at 72.

the key insight that, unlike the other § 523(a) exceptions to discharge[10], the bad acts exceptions work together with the § 727(a) objections to discharge[11] to preclude a dishonest debtor from obtaining a complete discharge. While the other exceptions are generally premised on the creditor having an identifiable interest in repayment that outweighs the debtor's interest in a fresh start, the bad acts exceptions are concerned with the character of the debtor.[12]

The Court's decisions addressing the discharge in consumer bankruptcy cases under the Code are striking for the almost complete absence of ideological conflict among the justices. Most of the decisions were unanimous, and in none were the justices closely divided.[13] That said, the Court's decisions were overwhelmingly in favor of the creditor. In eight of the eleven cases, including seven of the nine cases involving the bad acts exceptions, the Court held for the creditor,[14] thereby narrowing the scope of the discharge and fresh start.

The Court has not, however, articulated any pro-creditor principle of interpretation, such as protecting the integrity of the discharge by expansively applying the bad acts exceptions. Nor has it taken an approach that strictly applies the exceptions to discharge to safeguard the debtor's fresh start. Rather, it has refrained from considering bankruptcy policy beyond occasional, very general statements that the purpose of the discharge is to give the debtor a fresh start and that the fresh start is reserved for honest but unfortunate debtors.[15] It consistently has taken a cautious, case-by-case approach that focuses on the statutory text and has relied heavily on statutory

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[10] 11 U.S.C. § 523(a).

[11] *Id.* § 727(a)(2)–(7). For example, § 727(a)(2)(A) denies a discharge to a debtor who has conveyed assets with an intent to defraud creditors within a year before filing for bankruptcy. *Id.* § 727(a)(2)(A).

The terminology—"objection to discharge" and "exception to discharge"—can be confusing. Section 727(a) governs *objections* to discharge. If successful, a complaint objecting to discharge under § 727(a) will prevent the discharge of all claims against the debtor. *Id.* § 727(a), (b). Section 523(a) sets out *exceptions* to discharge. If successful, a complaint seeking to except a debt from discharge will prevent the discharge of only the debt covered by the exception. *Id.* § 523(a); *see also* Husky Int'l Electronics, Inc. v. Ritz, 578 U.S. 355, 364 (2016) ("[W]hile § 727(a)(2) is a blunt remedy for actions that hinder the entire bankruptcy process, § 523(a)(2)(A) is a tailored remedy for behavior connected to specific debts.").

[12] *See infra* Part V.

[13] *See infra* text accompanying notes 123–140.

[14] *See infra* note 48.

[15] *See infra* text accompanying notes 47–60.

context and statutory history, while generally shunning legislative history.[16]

Regarding non-legal factors, the Court is far more likely to reverse the circuit court appealed from when that court held in favor of the debtor than if it held for the creditor.[17] This implies the Court sees itself as a bulwark against pro-debtor bias in the lower courts. Also of note, the Solicitor General, on behalf of the Executive Office of United States Trustees,[18] sided with the creditor in all but one of the eight amicus curiae briefs that it filed in the exception-to-discharge cases, and the Court agreed with the government's position in all except one of these cases.[19] This record suggests that the Court's bankruptcy jurisprudence may be hindered by the absence of a governmental agency that the Court can rely on to advocate a policy perspective, as, for example, the Securities Exchange Commission does in corporate law or the Environmental Protection Agency in environmental law.[20]

Part II of this article is an overview of the principal Bankruptcy Code provisions governing the discharge in consumer bankruptcy cases. Part III considers the extent to which the Supreme Court has developed any overarching theory or guiding principles for interpreting the § 523(a) exceptions to discharge and investigates the sources of statutory interpretation favored by the Court. Part IV summarizes and critiques the *Bartenwerfer* decision. Part V makes the case that the bad acts exceptions to discharge are concerned with the debtor's character and not with the creditor's interest in repayment. Part VI then examines how the Court's decisions may be influenced by non-legal factors. Part VII surveys the exception-to-discharge issues on which lower federal courts remain divided, and Part VIII is a brief conclusion.

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[16] *See infra* text accompanying notes 61–73. Statutory history is to be distinguished from legislative history. "Statutory history" refers to amendments to the text over time, while "legislative history" refers to Congressional reports and other materials that explain statutory text.

[17] *See infra* notes 168–172 and accompanying text.

[18] The Executive Office for United States Trustees is an office within the U.S. Department of Justice with the mission "to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders—debtors, creditors, and the public." U.S. Trustee Program, *Organization, Mission and Functions Manual*, U.S. DEP'T OF JUST., (Feb. 22, 2025), https://www.justice.gov/doj/executive-office-united-states-trustees.

[19] *See supra* note 4 and accompanying text.

[20] *See infra* text accompanying note 179 (citing Ronald J. Mann, BANKRUPTCY AND THE U.S. SUPREME COURT (Cambridge University Press 2017)).

II. Overview of the Main Code Provisions Governing the Discharge in Consumer Cases

A. The Discharge in Chapter 7 and Chapter 13 Cases

The discharge of debts is the salient feature of the consumer bankruptcy system in the United States, a legal system that is used by hundreds of thousands of individuals every year.[21] The discharge is meant to give the debtor a financial fresh start[22]—"a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[23] In economic parlance, the fresh start makes possible the redeployment of human capital to more productive endeavors. By freeing the debtor from the obligation to repay oppressive debt, the discharge positions him to return to full participation in the consumer economy.[24]

The Code provides two primary, alternative forms of bankruptcy relief for individual (consumer) debtors: chapter 7[25] and chapter 13.[26] In chapter 7, the debtor normally receives a discharge of prebankruptcy debts within several months after filing for bankruptcy.[27] In return, the debtor must

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[21] *See* Table F-2. U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending September 30, 2024, https://www.uscourts.gov/sites/default/files/data_tables/bf_f2_0930.2024.pdf [hereinafter Bankruptcy Filings 2024] (reporting 504,112 total filings, including 298,644 under chapter 7 and 195,971 under chapter 13).

[22] Sections 727(b), 1141(d)(1), and 1328(a) provide for the discharge of debts in chapter 7, 11, and 13 cases, respectively. 11 U.S.C. §§ 727(b), 1141(d)(1), 1328(a). The debtor's fresh start is also furthered by other provisions of the Code, such as 11 U.S.C § 522(b) (providing that individual debtors may exempt certain property from the claims of creditors), and § 525 (prohibiting discrimination against individuals because they have filed for bankruptcy relief).

[23] Brown v. Felsen, 442 U.S. 127, 128 (1979) (quoting Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)). Legal scholars have offered several different rationales for the fresh start policy. *See generally* Jonathon S. Byington, *The Fresh Start Canon*, 69 FLA. L. REV. 115, 118–123 (2017) (reviewing the literature).

[24] *See, e.g.*, Vol. B, COLLIER ON BANKRUPTCY APP., Pt. 4-318 (Richard Levin & Henry Sommer eds. 16th ed).

[25] 11 U.S.C. §§ 701–784.

[26] *Id.* §§ 1301–1330. In addition, individuals are eligible for relief under chapter 11, *id.* § 109(d), although an individual debtor would generally file chapter 11 only if he was ineligible for relief under chapter 13 because his debts exceeded the chapter 13 debt limitations, *id.* § 109(e).

[27] *See* FED. R. BANKR. P. 4004(c) ("In a Chapter 7 case, when the times to object to discharge and to file a motion to dismiss the case under Rule 1017(e) expire, the court must

surrender all non-exempt property, which is liquidated by a trustee who distributes the proceeds to creditors.[28] In chapter 13, the debtor generally receives a discharge only after completing payments to creditors under a three- to five-year plan.[29] About 60% of individual debtors file under chapter 7 and about 40% under chapter 13.[30]

Not all debtors may obtain a discharge, and not all debts may be discharged in bankruptcy. In chapter 7 cases, § 727(a) bars a debtor who has acted dishonestly in connection with his chapter 7 bankruptcy filing from discharging any of his debts.[31] (For example, a debtor who conceals material assets in his bankruptcy filing will not obtain a discharge.[32]) Section 523(a) provides that certain isolated debts, including debts arising from culpable misconduct (the "bad acts" exceptions in § 523(a)(2), (4) and (6)), are excepted from discharge even if the debtor otherwise qualifies for a general discharge of debts under § 727(b).[33] As is frequently repeated, the discharge is reserved for "the honest but unfortunate debtor."[34]

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promptly grant the discharge . . . ."); FED. R. BANKR. P. 4004(a) and 1017(e) (stating that a complaint objecting to discharge and a motion to dismiss generally must be filed within 60 days after the first date set for the § 341 meeting of creditors).

[28] 11 U.S.C. § 704(a)(1)(a) ("The trustee shall . . . collect and reduce to money the property of the estate . . . ."), § 726(a) ("property of the estate shall be distributed" to creditors in order of priority).

[29] *Id.* § 1328(a) ("[A]s soon as practicable after completion by the debtor of all payments under the plan . . . the court shall grant the debtor a discharge . . . ."). A debtor does not have an unfettered choice between relief under chapter 7 and chapter 13. The "means test" in § 707(b) provides that a debtor whose debts are primarily consumer debts is not entitled to a discharge in chapter 7 if his income is above the median income in his state and he has the means to pay an appreciable amount of his unsecured debt over time. *Id.* § 707(b).

[30] Bankruptcy Filings 2024, *supra* note 21, at 1 (reporting that in the year ending Sept. 30, 2024, there were 298,644 (60.4%) filings under chapter 7 and 195,971 (39.6%) under chapter 13).

[31] 11 U.S.C. § 727(a)(2)–(7).

[32] *Id.* § 727(a)(2).

[33] *Id.* §§ 727(b), 523(a).

[34] A search for "honest but unfortunate debtor" in a database of bankruptcy law decisions will return thousands of results. For just a very few of the case reports, including two from the Court itself, see, e.g., *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 715 (2018) (stating that the fraud exception to discharge "is in keeping with the 'basic policy animating the Code of affording relief only to an 'honest but unfortunate debtor'") (quoting Cohen v. de la Cruz*,* 523 U.S. 213, 217 (1998)); *In re Mitchell*, 633 F.3d 1319, 1326 (11th Cir. 2011) ("To ensure that only honest but unfortunate debtors receive the benefit of discharge, Congress enacted several exceptions to 727(b)'s general rule of discharge."); *In re Bajgar*, 104 F.3d 495 (1st Cir. 1997) ("We are not presented with an 'honest but unfortunate debtor' that the Bankruptcy Code envisions as the deserving recipient of a fresh start.").

Section 1328 governs the discharge in chapter 13 cases.[35] By design, chapter 13 does not preclude relief based on any of the grounds for denial of discharge under Code § 727(a).[36] Likewise, as originally enacted in 1978, § 1328(a) did not include any of the bad acts exceptions to discharge.[37] Congress added the bad acts exceptions with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[38]

As discussed below,[39] the fact the Congress did not limit relief in chapter 13 based on either the grounds for objecting to discharge under § 727(a) or the bad acts exceptions to discharge in § 523(a)(2),(4), and (6) shows that the policy rationale for the bad acts exceptions differs from that for the other § 523(a) exceptions; while the non-bad acts exceptions are generally grounded in the creditor having an interest in repayment that outweighs the debtor's interest in a fresh start, the bad acts exceptions are concerned with the fundamental bankruptcy policy of precluding a full discharge for chapter 7 debtors who have incurred debt through culpable misconduct. If the bad acts exceptions were premised on the creditor's interest in repayment, they would have been excepted from the chapter 13 discharge, too.

B. The Exceptions to Discharge Under § 523

As originally enacted, Code § 523(a) excepted nine types of debts from discharge. In addition to the three bad acts exceptions, they included: certain tax debts; debts that the debtor failed to list in the bankruptcy filing; domestic support obligations; fines, penalties and forfeitures payable to a governmental unit; student loan debts; and debts listed in a previous bankruptcy case in which the debtor did not receive a discharge.[40] Most of these categories of debts, including the bad acts exceptions, were nondischargeable under prior law, the Bankruptcy Act of 1898, as amended.[41]

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[35] 11 U.S.C. § 1328.

[36] *See infra* text accompanying note 106.

[37] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 1328(a), 92 Stat. 2549, 2650 (1978).

[38] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 314, 119 Stat. 23, 88 (2005) (incorporating § 523(a)(2) and (4) in toto and adding § 1328(a)(4), which covers some of the debts for willful and malicious injury that are covered by § 523(a)(6), 11 U.S.C. § 523(a)(6)).

[39] *See infra* Part V.A.

[40] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523(a)(1)–(9), 92 Stat. 2549, 2590–91 (1978).

[41] Chandler Act, Pub. L. No. 75-696, § 17, 52 Stat. 840, 851 (1938) (repealed 1979) (the

Congress has repeatedly added to the list of debts that are nondischargeable since it enacted the Bankruptcy Code in 1978; § 523(a) now lists twenty-one types of debts that are excepted from the discharge.[42]

Also carried over from the previous Bankruptcy Act is § 523(c)(1), which provides that the debts excepted under the three original bad acts exceptions in § 523(a)(2), (4), and (6) are discharged unless the creditor obtains a nondischargeability determination in the bankruptcy proceeding.[43] Thus, the bankruptcy courts have exclusive jurisdiction to determine the nondischargeability of debts under the three original bad acts exceptions, and complaints must be filed within a specific time set by the Code and the Federal Rules of Bankruptcy Procedure.[44] If the creditor does not timely bring an action in the bankruptcy proceeding to declare a debt nondischargeable under § 523(a)(2), (4), or (6), it will be discharged. The dischargeability of a debt under any of the other exceptions may be determined in any court with jurisdiction, and the issue is commonly joined after discharge when the creditor files an action in a non-bankruptcy forum and the debtor invokes the bankruptcy discharge as a defense.[45]

As also discussed below,[46] this special treatment of the bad acts exceptions mirrors the Code's treatment of the objections to discharge under § 727(a), and further evidences that Congress enacted the bad acts exceptions for very different reasons than the other exceptions to discharge in § 523(a).

"Bankruptcy Act"). Under the former Bankruptcy Act, the debtor was denied a discharge if he had obtained money or property by means of a fraudulent statement in writing concerning his financial condition. *Id.* § 14(3), at 850. With the enactment of the Code, this basis for denial of discharge became an exception to discharge. 11 U.S.C. § 523(a)(2)(B).

[42] *Id.* § 523(a). Some of these additions are for debts that arise from misconduct, for example, § 523(a)(11) excepts debts "arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union" and § 523(a)(12) excepts debts "for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency . . . ." However, none of the post-1978 additions to § 523(a) for debts arising from misconduct were added to § 523(c), which continues to provide special treatment only for debts excepted under § 523(a)(2), (4), and (6). *See infra* text accompanying notes 43–45.

[43] 11 U.S.C. § 523(c)(1).

[44] *See* FED. R. BANKR. P. 4007(c) (stating that a complaint under § 523(c) must be filed within 60 days after the first date set for the meeting of creditors under § 341(a)).

[45] *See* 4 COLLIER ON BANKRUPTCY § 523.03, pt. 523-18.1 (Richard Levin & Henry Sommer eds. 16th ed.).

[46] *See infra* Part V.B.

III. The Supreme Court's Adherence to Text and Use of Other Sources of Statutory Interpretation

A. Absence of Bankruptcy Policy and Sparing, Inconsistent Use of Guiding Principles

The Supreme Court's decisions regarding the scope of the discharge in consumer bankruptcy cases under the Code contain scant discussion of bankruptcy policy. Similarly, there are just a few isolated references to guiding principles for interpreting the § 523(a) exceptions to discharge.[47] The Court held in favor of the creditor in eight of the eleven cases, including six of the seven cases addressing the fraud exception in § 523(a)(2).[48] This record

[47] *See supra* note 4 for a list of the eleven cases in which the Court has considered the § 523(a) exceptions to discharge. The lack of discussion of bankruptcy policy in the Court's decisions under the Code contrasts with decisions under the former Bankruptcy Act.

> [D]uring the first 25 years of the reorganization provisions of the previous bankruptcy act (roughly from 1938 to 1963), . . . the Court often seemed to go out of its way to decide core issues of bankruptcy, especially with regard to corporate reorganization. But since 1979, while the Court has decided many more bankruptcy cases than it had previously heard, it has not been eager to reach out and decide issues of policy. There have been more decisions, but their scope has been more limited. Indeed, the Court has said very little about bankruptcy policy overall, and then usually only as a prelude or afterthought to the discrete issues before it. It has ducked central issues in corporate reorganization policy and has been equivocal on the scope and substance of the discharge . . . In summary, although the discharge is a key component of bankruptcy policy, the Court seems to have adopted an ad hoc approach to it . . . the approach thus far lacks a cohesive theme knitting these separate decisions together.

Bruce A. Markell, *Alive at 25? A Short Review of the Supreme Court's Bankruptcy Jurisprudence, 1979–2004*, 78 AM. BANKR. L.J. 373, 375 (2004); *see also* Alan Schwartz, *The New Textualism and the Rule of Law Subtext in the Supreme Court's Bankruptcy Jurisprudence*, 45 N.Y.L.S. L. REV. 149 (2000–2001) ("[T]he cases advance no coherent view of bankruptcy in general, nor do they consistently pursue any bankruptcy policy . . . . Rather, the case results are random from a policy point of view . . . .").

[48] The Court held for the creditor in the following six cases involving the fraud exception (§ 523(a)(2)): *Bartenwerfer v. Buckley*, 598 U.S. 69 (2023); *Husky Int'l Electronics, Inc. v. Ritz*, 578 U.S. 355, 364 (2016); *Archer v. Warner*, 538 U.S. 314 (2003); *Cohen v. de la Cruz*, 523 U.S. 213 (1998); *Field v. Mans*, 516 U.S. 59 (1995); *Grogan v. Gardner*, 498 U.S. 279 (1991). In both of the two cases involving the other bad acts exceptions, *Bullock v. Bankchampaign*, N.A., 569 U.S. 267 (2013) (concerning § 523(a)(4)), and *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) (concerning § 523(a)(6)), the Court held for the debtor. In the two non-bad acts exceptions cases, *Young v. U.S.*, 535 U.S. 43 (2002) (concerning § 523(a)(1)), and *Kelly v. Robinson*, 479 U.S. 36 (1986) (concerning § 523(a)(7)), the Court

suggests that the Court has zealously sought to protect the integrity of the discharge and, perhaps by extension, public confidence in the consumer bankruptcy system. That said, the Court has not articulated any such rationale nor any principle favoring a broad reading of the exceptions to discharge in general or the bad acts exceptions in particular.

Conversely, the Court has not taken an overall approach to the discharge and exceptions that emphasizes the fresh start policy and minimizes constraints on the scope of the discharge.[49] The Court has adverted to the fresh start policy in just two of the eleven exception-to-discharge cases, *Grogan v. Gardner*[50] and *Lamar, Archer & Cofrin v. Appling*.[51] In the other nine case—including two of the three cases[52] in which it held for the debtor—the Court made no reference at all to the fresh start policy. In both *Grogan* and *Lamar, Archer & Cofrin*, the Court hastened to add that the discharge is reserved for the honest but unfortunate debtor,[53] giving equal regard to the countervailing policy against granting a complete discharge to a dishonest debtor.

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held for the creditor.

[49] *See* Byington, *supra* note 23, at 123–128 (demonstrating that the Court has rejected the fresh start policy as a canon for narrowly interpreting the exceptions to discharge). *Cf.* Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co., 547 U.S. 651 (2006) (addressing whether a claim for an employer's unpaid premiums for workers' compensation insurance were "contributions to an employee benefit plan" and thus entitled to priority status under § 507(a)(5), the Court stated "[w]e are guided in reaching our decision by the equal distribution objective underlying the Bankruptcy Code, and the corollary principle that provisions allowing preferences must be tightly construed").

[50] 498 U.S. 279. In *Grogan*, the Court rejected the debtor's argument that the fresh start policy underlying the discharge in bankruptcy indicated a clear and convincing standard of proof as opposed to preponderance of the evidence for the fraud exception to discharge in § 523(a)(2). *Id.*

[51] 584 U.S. 709.

[52] *Bullock*, 569 U.S. 267; *Kawaanahau*, 523 U.S. 57.

[53] *Lamar, Archer & Cofrin, LLP*, 584 U.S. at 715; *Grogan*, 498 U.S. at 286–87. In *Grogan*, the Court held that the preponderance of the evidence standard of proof applies to proving fraud under § 523(a)(2), reasoning in part that it was "unlikely that Congress, in fashioning the standard of proof . . . would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud." 498 U.S. at 287. In *Lamar, Archer & Cofrin, LLC*, the Court held that the debtor's oral statement concerning a single asset (a tax refund) qualified as a "statement . . . respecting the debtor's . . . financial condition" under § 523(a)(2)(A), rejecting the debtor's argument that the fresh start policy supported a narrow interpretation of the word "respecting," given its plain meaning. 584 U.S. at 723–24.

In three cases, the Court referred to "the 'well known' guide that exceptions to discharge 'should be confined to those plainly expressed.'"[54] The principle of construing the exceptions narrowly may be well known, but it has not been a touchstone for the Court's decisions in the exceptions to discharge under the Code. In two of the just three cases in which it has even mentioned the guide, *Kawaauhau v Geiger*[55] and *Bullock v. Bankchampaign*,[56] the Court held for the debtor. Except for *Bartenwerfer*, the Court has not discussed the principle in any case in which it held for the creditor.

In *Bullock*, the Court appears to have elaborated on the principle that the exceptions to discharge should be construed narrowly. In doing so, it examined the policy rationale for the exception to discharge in § 523(a)(4) covering debts for defalcation. In holding for the debtor, requiring a culpable state of mind for nondishcargeability, the Court wrote:

> [Our] interpretation is consistent with the long-standing principle that "exceptions to discharge 'should be confined to those plainly expressed.'" [citations omitted] It is also consistent with a set of statutory exceptions that Congress normally confines to circumstances where strong, special policy considerations, such as the presence of fault, argue for preserving the debt, thereby benefiting, for example, a typically more honest creditor. *See, e.g.*, 11 U.S.C. § 523(a)(2)(A), (a)(2)(B), (a)(6), (a)(9) (fault). *See also, e.g.*, § 523(a)(1), (a)(7), (a)(14), (a) (14A) (taxes); § 523(a)(8) (educational loans); § 523(a)(15) (spousal and child support). In the absence of fault, it is difficult to find strong policy reasons favoring a broader exception here, at least in respect to those whom a scienter requirement will most likely help, namely, *nonprofessional* trustees, perhaps administering small family trusts potentially immersed in intrafamily arguments that are difficult to evaluate in terms of comparative fault.[57]

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[54] Bartenwerfer v. Buckley, 598 U.S. 69 (2023); *Bullock*, 569 U.S. 267; *Kawaauhau*, 523 U.S. 57.

[55] 523 U.S. 57 (holding that § 523(a)(6) requires an intent to cause injury, not just an intentional act that results in injury).

[56] 569 U.S. 267 (holding that defalcation under § 523(a)(4) requires a culpable state of mind).

[57] 569 U.S. at 275–276.

In this passage, the Court recognized that the other bad acts exceptions—§ 523(a)(2)(A), (a)(2)(B), and 523(a)(6), as well as § 523(a)(9)—are premised on "fault," i.e., culpable misconduct by the debtor, while other exceptions have different policy bases, for example, the exceptions for taxes, educational loans, spousal and child support, which generally further social policies for repayment of these types of debts. (The Court did not, however, couch the point in terms of the policy making a complete discharge available only to the "honest but unfortunate debtor.") Unable to identify a "strong, special policy consideration" for excepting debts for defalcation not involving a culpable state of mind, the Court concluded that such debts are not covered by the exception.[58] The Court has not repeated or applied this analysis in any of its three subsequent exception-to-discharge cases.[59] As discussed below, the failure of the *Bartenwerfer* Court to examine the policy basis for the fraud exception contributed to its misapplication of the exception to an innocent debtor.[60]

B. Adherence to Text and Use of Other Sources of Statutory Interpretation

Eschewing bankruptcy policy as a source for statutory interpretation,[61] the Court has almost invariably focused on the statutory text.[62] Further, the Court has commonly relied heavily on statutory context

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[58] *Id.*

[59] *See* Bartenwerfer v. Buckley, 598 U.S. 69 (2023); Lamar, Archer & Cofrin, LLP v. Appling, 584 U.S. 709 (2018); Husky Int'l Electronics, Inc. v. Ritz, 578 U.S. 355 (2016).

[60] *See infra* notes 92–95 and accompanying text.

[61] This aversion to bankruptcy policy as a frame for interpreting the Code has characterized the Court's decision-making in the bankruptcy area generally, beyond its decisions concerning the scope of the discharge in consumer bankruptcy cases. *See* Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L. Q. 535, 565 (1993) (examining twenty-four bankruptcy cases decided by the Court between 1986 and 1993, finding that "[n]ot only does the Court fail to rely on bankruptcy policy expressly in any of its opinions, but it also is readily apparent that the Court's textualist approach is not a mask for a 'hidden agenda' in the bankruptcy area. The Court reaches results that are not universally consistent with any theory of bankruptcy law . . . . The bottom line is that the Court cares little for bankruptcy policy . . . . To say that the Court has a bankruptcy jurisprudence would thus be misleading: it has no jurisprudence at all in this area.").

[62] The Court relied primarily on text in eight of the eleven exception-to-discharge cases: *Bartenwerfer*, 598 U.S. 69; *Lamar, Archer & Cofrin, LLP*, 584 U.S. 709; *Husky Int'l Electronics*, 578 U.S. 355; *Bullock v. Bankchampaign*, N.A., 569 U.S. 267 (2013); *Cohen v. de la Cruz*, 523 U.S. 213 (1998); *Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *Field v. Mans*,

and statutory history—changes in the text over time. The Court supported its focus on text with analysis of the statutory context in seven of the eleven cases[63] and with the history of the statute in eight of the cases.[64] It elevated policy over text in one of the eleven exception-to-discharge cases, *Kelly v.* Robinson—relying not on any bankruptcy policy but on the federalism policy of not interfering with states' enforcement of their criminal laws.[65]

The Court did not rely on legislative history as a principal basis for its decision in any of its eleven exception-to-discharge cases. It cited legislative history as a subsidiary basis in just three of the cases: *Grogan v.*

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516 U.S. 59 (1995); *Grogan v. Gardner*, 498 U.S. 279 (1991). *Kelly v. Robinson*, the Court's first decision concerning the § 523(a) exceptions to discharge under the Bankruptcy Code of 1978, is the only one of the eleven cases in which the Court did not adhere to the statutory text. 479 U.S. 36 (1986) (holding that a restitution obligation imposed as part of a criminal sentence was nondischargeable under § 523(a)(7) even though by its terms § 523(a)(7) does not cover debts that are "compensation for actual pecuniary loss"). *Young v. U.S.*, 535 U.S. 43 (2002), and *Archer v. Warner*, 538 U.S. 314 (2003), did not entail interpretation of statutory text. *See generally* MANN, *supra* note 20, at 11 (noting that there is an extensive law review literature on Supreme Court bankruptcy decision-making, most of which starts from the perspective that decisions are predominantly textualist); *see also* Rasmussen, *supra* note 61, at 553 (the Court typically (in nineteen or twenty of the twenty-four cases) used textualism to decide the cases, but departed from textualism when it sought to protect governmental interests.); Markell, *supra* note 47, at 391 (observing that the Court has emphasized plain meaning while also relying on "extra-textual sources, principally legislative history, pre-Code practice and, at least sometimes, policy"); Carlos J. Cuevas, *The Rehnquist Court, Strict Statutory Construction and the Bankruptcy Code*, 42 CLEV. ST. L. REV. 435, 438 (1994) ("the Supreme Court has not followed any recognizable 'ideology' in deciding bankruptcy issues. Rather, the determinative issue in Supreme Court bankruptcy decisions is the method of statutory interpretation that is utilized"); Robert M. Lawless, *Legisprudence Through a Bankruptcy Lens: A Study in the Supreme Court's Bankruptcy Cases*, 47 SYRACUSE L. REV. 1, 107, 114–116 (1996) (examining the Court's opinions in nineteen bankruptcy cases decided between 1991 and 1995, finding that the Court has been inconsistent in its commitment to textualism and that "[a] trend emerges from the Court's manipulations of textualism that favors . . . the most politically powerful groups [such as the government and large institutional creditors] at the expense of the least powerful.").

[63] *See Bartenwerfer*, 598 U.S. 69; *Husky Int'l Electronics*, 578 U.S. 355; *Bullock*, 569 U.S. 267; *Young*, 535 U.S. 43; *Cohen*, 523 U.S. 213; *Field*, 516 U.S. 59; *Grogan*, 498 U.S. 279.

[64] *See Bartenwerfer*, 598 U.S. 69; *Lamar, Archer & Cofrin, LLP*, 584 U.S. 709; *Husky Int'l Electronics*, 578 U.S. 355; *Bullock*, 569 U.S. 267; *Cohen*, 523 U.S. 213; *Grogan*, 498 U.S. 279; *Kelly*, 479 U.S. 36.

[65] *Kelly*, 479 U.S. 36, 47. Even in *Kelly*, the Court paid lip service to the text. *Id.* at 43 ("Of course, the 'starting point in every case involving construction of a statute is the language itself.'" (quoting Blue Chip Stamps v Manor Drug Stores, 421 U.S. 723, 756 (1975))).

Gardner,[66] decided in 1991, *Field v. Mans*, decided in 1995,[67] and *Lamar, Archer & Cofrin v. Appling, LLP*, decided in 2018.[68] Of note, in the latter case, three justices (Thomas, Alito, and Gorsuch) declined to join the part of Justice Sotomayor's otherwise unanimous opinion in which she relied on legislative history.[69] In addition, in *Bartenwerfer*, Justice Barrett's opinion for a unanimous Court discussed legislative history (without objection by any other justice), not as a basis for the holding per se, but rather as a possible reason for rejecting the debtor's argument that Congress would not have excepted an innocent partner's vicarious liability for fraud under § 523(a)(2)(A) but not under § 523(a)(2)(B).[70] In two cases, the Court cited the absence of legislative history explaining the text in question.[71]

In several cases, the Court interpreted statutory provisions according to the common law meaning of terms.[72] It has also relied on dictionary definitions.[73]

IV. The Supreme Court's Decision in *Bartenwerfer v. Buckley*[74]

In *Bartenwerfer*, the Supreme Court held that § 523(a)(2)(A) bars the discharge of a debt for fraud committed by a debtor's business partner where the debtor did not know or have reason to know of the fraud but was

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[66] 498 U.S. 279 at 289.

[67] 516 U.S. 59.

[68] 598 U.S. 69.

[69] 584 U.S. at 712 n.*.

[70] *Bartenwerfer,* 598 U.S. at 79.

[71] *Grogan*, 498 U.S. at 286; *Kelly*, 479 U.S. 36 (in which the Court relied on established pre-Code law in the absence of any legislative history indicating Congress's intent to change it).

[72] *See* Husky Int'l Electronics, Inc. v. Ritz, 578 U.S. 355, 361–362 (2016) (holding that "actual fraud" under § 523(a)(2) encompasses intentionally fraudulent transfers as long recognized by the common law); Field v. Mans, 516 U.S. 59, 69–75 (1995) (reading "actual fraud" under § 523(a)(2) according to its common law meaning); *see also Bartenwerfer,* 598 U.S. at 76 (stating that common law of fraud was the "relevant legal context" for interpreting whether § 523(a)(2) covers innocent debtors who are vicariously liable for another person's fraud).

[73] *See, e.g.*, Lamar, Archer & Cofrin, LLP, 584 U.S. 709, 716 (2018) (using several dictionaries in interpreting the term, "respecting," in § 523(a)(2)(B)); Bullock v. Bankchampaign, N.A., 569 U.S. 267, 271–272 (2013) (relying on multiple dictionaries regarding the meaning of "defalcation" in § 523(a)(4)); Kawaauhau v. Geiger, 523 U.S. 57, 61 n.3 (1998) (citing Black's Law Dictionary regarding the meaning of "willful" in § 523(a)(6)).

[74] 598 U.S. 69 (2023).

vicariously liable for the debt under state agency or partnership law.[75] The Court's decision implicitly rejects the premise that the bad acts exceptions are rooted in the character of the debtor and proceeds on the assumption that the fraud exception rests on Congress's determination that fraud creditors have an interest in repayment that trumps the debtor's interest in a complete fresh start. At the outset of its opinion, the Court explained that

> [t]he Bankruptcy Code strikes a balance between the interests of insolvent debtors and their creditors. It generally allows debtors to discharge all prebankruptcy liabilities, but it makes exceptions when, in Congress's judgment, the creditor's interest in recovering a particular debt outweighs the debtor's interest in a fresh start. One such exception bars debtors from discharging any debt for money "obtained by . . . fraud."[76]

In the same vein, in concluding, the Court wrote that

> innocent people are sometimes held liable for fraud they did not personally commit, and, if they declare bankruptcy, § 523(a)(2)(A) bars discharge of that debt. So it is for Bartenwerfer, and we are sensitive to the hardship she faces. But Congress has "evidently concluded that the creditors' interest in recovering full payment of debts" obtained by fraud outweigh[s] the debtors' interest in a complete fresh start.[77]

In reaching its decision, the Court in *Bartenwerfer* relied primarily on Congress's use of the passive voice in § 523(a)(2)(A), which excepts from discharge debts "for money . . . obtained by" fraud.[78] The debtor argued that the statute is naturally read to mean that it covers only fraud committed *by the debtor*, illustrating the point with this example: "the sentence 'Jane's clerkship was obtained through hard work'" would ordinarily be understood "to mean that 'Jane's hard work led to her clerkship.'" The Court rejected the argument, reasoning that

> [p]assive voice pulls the actor off the stage. At least on its face, Bartenwerfer's sentence conveys only that *someone's* hard work led to Jane's clerkship—whether that be Jane herself, the professor who wrote a last-minute letter of recommendation, or the counselor who collated the application materials. . . . It is true, of course, that context can confine a passive-voice

[75] *Id.* at 72.
[76] Bartenwerfer v. Buckley, 598 U.S. 69, 72 (2023).
[77] *Id.* at 83 (quoting Grogan v. Garner, 498 U.S. 279, 287 (1991)).
[78] 11 U.S.C. § 523(a)(2).

> sentence to a likely set of actors. . . . But in the fraud-discharge exception, context does not single out the wrongdoer as the relevant actor. Quite the opposite: The relevant legal context—the common law of fraud—has long maintained that fraud liability is *not* limited to the wrongdoer.[79]

The debtor further argued that § 523(a)(2)(A)'s immediate statutory context, § 523(a)(2)(B) and (C), indicates that Congress intended for § 523(a)(2)(A) to apply only where the debtor is the wrongdoer. Both subparagraphs (B) and (C), by their terms, require fraud *by the debtor*.[80] The Court, however, drew the opposite inference, concluding that the requirement of fraud by the debtor for nondischargeability under § 523(a)(2)(B) and (C) but not under (A) reflected Congress's intent not to require conduct by the debtor for nondischargeability under § 523(A). "[I]f there is an inference to be drawn here," the Court wrote, "it is . . . that (A) excludes debtor culpability from consideration given that (B) and (C) expressly hinge on it."[81]

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[79] *Bartenwerfer*, 598 U.S. at 75–76.

[80] 11 U.S.C. § 523(a)(2)(B), (C).

[81] *Bartenwerfer*, 598 U.S. at 78. The Court rejected the debtor's argument that "it would have made no sense for Congress to set up such a dichotomy, particularly between (A) and (B). These two provisions are linked: (A) carves out fraudulent 'statement[s] respecting the debtor's or an insider's financial condition,' while (B) governs such statements that are reduced to writing." *Id.* The Court also "offered a possible answer for why (B) contains a more debtor-friendly discharge rule than (A): Congress may have 'wanted to moderate the burden on individuals who submitted false financial statements, not because lies about financial condition are less blameworthy than others, but because the relative equities might be affected by practices of consumer finance companies, which sometimes have encouraged such falsity by their borrowers for the very purpose of insulating their own claims from discharge.' . . . . This concern may also have informed Congress's decision to limit (B)'s prohibition on discharge to fraudulent conduct by the debtor herself." *Id.* at 79.

There is a further argument for the debtor based on statutory context. Section 523(a)(2)(C) is an elaboration of § 523(a)(2)(A). Subsection (C) provides that "for purposes of § 523(a)(2)(A)," certain consumer debts incurred *by the debtor* in the months before filing for bankruptcy are presumptively nondischargeable. 11 U.S.C. § 523(a)(2)(C) (emphasis added). The opinion in *Bartenwerfer* did not consider this point, but here again, there is not an obvious rationale for requiring conduct by the debtor for purposes of (C) but not (A). Rather, it is reasonable to believe that Congress assumed that (A) requires conduct by the debtor when it included the elaboration in (C). This is especially so given that Congress used the active voice when it first enacted § 523(a)(2) in 1978 and substituted the passive voice for the active voice in § 523(a)(2)(A) in 1984 at the same time that it added subparagraph (C). *See infra* notes 86–91 and accompanying text.

In addition, § 523(a)(2)'s next most closely related provisions, § 523(a)(4) and (a)(6), the other bad acts exceptions, also require culpable misconduct by the debtor. Bullock v. Bankchampaign, N.A., 569 U.S. 267 (2013) (holding that the term "defalcation" in

The Court also relied on some of the relevant statutory history of § 523(a)(2)(A) and on its 1885 decision in *Strang v. Bradner*.[82] In *Strang*, the Court held that the debtor could not discharge a debt for fraud committed by the innocent debtor's business partner although the then-fraud exception to discharge by its terms required that the debtor be the wrongdoer; it provided that "no debt created by fraud or embezzlement *of the bankrupt* . . . shall be discharged under this act."[83] Given that the current statute is more amenable to the broader interpretation and that Congress enacted it with presumed knowledge of the *Strang* decision, the Court reasoned, the current formulation of § 523(a)(2)(A) reflects Congress's intent to adopt the broader exception.[84] The Court cited Congress's deletion of "of the bankrupt" in the Bankruptcy Act in concluding that Congress carried this approach forward in the current (1984) version of § 523(a)(2) by using the passive voice.[85]

As the Court in *Bartenwerfer* acknowledged, "context can confine a passive-voice sentence to a likely set of actors."[86] In its discussion of the statutory history of the current version of § 523(a)(2), the Court appears to have overlooked a key development in the statutory history that provides such context. The *Bartenwerfer* Court compared the version of the fraud exception addressed in *Strang* with the Code version *as amended in 1984*. However, as originally adopted in the 1978 Code, § 523(a)(2) used the active voice,[87] so that only debts for fraud committed *by the debtor* were nondischargeable according to the text of the statute. Thus, Congress seemingly abrogated *Strang* when it enacted the original 1978 version of § 523(a)(2), having previously deleted "of the bankrupt" from the fraud exception when it originally enacted the Bankruptcy Act, thirteen years after *Strang*.[88]

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§ 523(a)(4), which excepts from discharge debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" includes a culpable state of mind requirement); Kawaauhau v. Geiger, 523 U.S. 57 (1998) (holding that "willful or malicious injury" in § 523(a)(6) requires that the debtor intended to injure the creditor).

[82] 114 U.S. 555 (1885).

[83] *Id.* at 561 (emphasis added).

[84] *Bartenwerfer*, 598 U.S. at 79–81.

[85] *Id.* at 80–81.

[86] *Id.* at 75 (citing E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 128–129 (1977)).

[87] As enacted in 1978, § 523(a)(2) read: "A discharge . . . does not discharge an individual debtor from any debt for obtaining money, property, services, or an extension, renewal, or refinance of credit by [fraud] . . ." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523(a)(2), 92 Stat. 2549, 2590 (1978).

[88] Act of July 1, 1898, § 17, 30 Stat. 550 (1898).

Congress substituted the passive voice in § 523(a)(2) in 1984 at the same time that it added subparagraph (C).[89] As noted above,[90] § 523(a)(2)(C), which establishes presumptions of fraud for purposes of § 523(a)(2)(A), expressly requires misconduct by the debtor. The Senate Report on the 1984 amendments refers to the change as a simple "stylistic change" and makes no mention of the (then) nearly one hundred year old decision in *Strang*.[91] Thus, it seems more than plausible that Congress assumed that § 523(a)(2)(A) would continue to require misconduct by the debtor when it added the presumptions in subparagraph (C) to be specifically applicable in subparagraph (A).

The Court's oversight is significant.[92] As discussed below,[93] in its design of the 1978 Code, Congress included the bad acts exceptions in § 523(a) to limit the discharge available to dishonest debtors, not to protect some special interest of bad-acts creditors in repayment. If the Court had taken the full statutory history into account, it may not have been so quick to adopt the "plain meaning" of the passive voice in § 523(a)(2). And if it viewed bankruptcy policy as a valuable source of statutory interpretation, it may have recognized that the *Bartenwerfer* case, involving an innocent but vicariously liable debtor, is precisely the case in which a policy understanding of the relationship between § 727(a) and the bad acts exceptions in § 523(a) is needed. The Court stated that the rationale for the fraud exception is that Congress gave precedence to the fraud creditor's interest in repayment over the debtor's interest in a fresh start,[94] but did not venture further to explain its assumption or to consider what that interest would be.[95]

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[89] Bankruptcy Amendments and Federal Judgeship Act, Pub. L. 98-353, §§ 454(a)(1), 307(3), 98 Stat. 333, 375–76, 353 (1984). (The 1984 amendment also added "to the extent," an apparent limitation on the reach of § 523(a)(2)(A). *Id.* at 375–76.).

[90] *See supra* text accompanying note 80.

[91] S. Rep. 98-65, p. 80 (1983).

[92] Indeed, the Court itself stated that "Congress's post-*Strang* legislation—is the linchpin" of its analysis of the statutory history of § 523(a)(2). Bartenwerfer v. Buckley, 598 U.S. 69, 80 (2023).

[93] *See infra* notes 99–114 and accompanying text.

[94] *Bartenwerfer*, 598 U.S. at 72.

[95] In two of its earlier exception-to-discharge cases, the Court expressed this same, unexamined assumption that the bad acts exceptions to discharge are like the other exceptions to discharge in being based on a Congressional judgment that the creditors' interest in repayment outweighs the debtors' interest in a complete fresh start. (The *Bartenwerfer* Court did not, however, cite either of these cases for the proposition.) In *Grogan v. Gardner*, the Court wrote:

> The statutory provisions governing nondischargeability reflect a congressional decision to exclude from the general policy of discharge

Interestingly, the Court, in its previous decision in *Cohen v. de la Cruz*, read the statute to require fraud *by the debtor*, stating that "[t]he most straightforward reading of § 523(a)(2)(A) is that it prevents discharge of 'any debt' respecting 'money, property, services, or . . . credit' that the debtor has fraudulently obtained . . ."[96] The Court did not address this dicta in *Bartenwerfer*.

In a short concurring opinion, Justice Sotomayor emphasized that the case involved a debtor who had an agency relationship with the person who perpetrated the fraud and not "a situation involving fraud by a person bearing no agency or partnership relationship to the debtor."[97] The debtor was married to the fraudster, but her vicarious liability for his fraud under state law arose from the fact that they were business partners.[98]

> 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.

498 U.S. 279, 287 (1991). In *Cohen v. de la Cruz*, the Court quoted from this passage in *Grogan* as further support for its conclusion that § 523(a)(2) covers the entire debt arising from the debtor's fraud, including treble damages and attorney fees. 523 U.S. 213, 222 (1998). The Court in *Cohen* appears to also have expressed the (correct) view that the bad acts exceptions are grounded in the policy of limiting the discharge available to debtors who have acted dishonestly, stating that "[t]he Bankruptcy Code has long prohibited debtors from discharging liabilities incurred on account of their fraud, embodying a basic policy animating the Code of affording relief only to an 'honest but unfortunate debtor.' [citations omitted] Section 523(a)(2) continues the tradition . . ." More cogently, as discussed above, *supra* notes 57–59 and accompanying text, the Court in *Bullock v. BankChampaign* differentiated the "fault" based exceptions to discharge from other exceptions grounded in the creditors' interest in repayment. 569 U.S. 267, 275–276 (2013).

In neither of the two cases in which the Court held that a bad acts exception requires a culpable state of mind did the Court discuss the "honest but unfortunate debtor" policy (or any other policy) as a reason for its conclusion. *See Bullock*, 567 U.S. 267 (interpreting § 523(a)(4)), and Kawaauhau v. Geiger, 523 U.S. 57 (1998) (interpreting § 523(a)(6)).

[96] 523 U.S. 213, 218 (1998); *see also* David Koha, *When Fraud Results in a Nondischargeable Debt: The Scope of 11 U.S.C.A. § 523(a)(2) After Husky International Electronics v. Ritz,* 2017 ANN. SURV. OF BANKR. L. 383, 419 (2017) ("the best reading of the plain language of § 523(a)(2)(A) is that the debtor must have obtained money, property, services or credit by fraud. Although the section does not explicitly say 'obtained by the debtor,' it provides that [the] Code's discharge provisions do not 'discharge an individual debtor from any debt . . . for money, property, services or credit, to the extent obtained by .. . actual fraud.' The most natural reading of this language is that the debtor is the person who must have 'obtained' the money, property, services or credit.").

[97] *Bartenwerfer,* 598 U.S. at 83–84.

[98] *Id.* at 72–73.

V. Relationship Between the Objections to Discharge in § 727(a) and the Bad Acts Exceptions to Discharge in § 523(a)

Keeping in mind the fundamental tenet of statutory interpretation that a statute must be read as a whole, this section makes the case that the bad acts exceptions to discharge in § 523(a)[99] work together with the objections to discharge in § 727(a)[100] to limit the discharge available to "dishonest" debtors. The objections to discharge and the bad acts exceptions are concerned with the character of the debtor, while the other, non-bad acts exceptions to discharge generally seek to protect the creditor's special interest in repayment. Unlike the bad acts exceptions, the other exceptions to discharge generally are premised on Congress's determination that the creditor's interest in repayment outweighs the debtor's interest in a complete fresh start. For example, the exception for domestic support obligations[101] prioritizes family support obligations over the debtor's fresh start. Contrary to the Court's view in *Bartenwerfer*, Congress did not except fraud debts from the discharge because of some special interest of the fraud creditor in repayment that outweighs the debtor's interest in a fresh start.

As discussed above, as originally enacted, Code § 523(a) had nine exceptions to discharge, including the three bad acts exceptions.[102] Each of the original non-bad acts exceptions has a clear policy rationale, generally the creditor having an interest in repayment that outweighs the bankruptcy fresh start policy.[103]

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[99] 11 U.S.C. § 523(a)(2), (4), (6).

[100] *Id.* § 727(a).

[101] *Id.* § 523(a)(5).

[102] *See supra* note 41 and accompanying text.

[103] Section 523(a)(1) protects the public first by preventing the discharge of tax debts. *Earned Income From Sources Outside the United States: Hearings Before the Committee on Ways and Means*, 95th Cong., 279–280 (1978); *Changes in Bankruptcy Tax Law: Hearing Before the Committee on Ways and Means*, 95th Cong. 107 (1978) (Statement of Vern Countryman). Section 523(a)(3), 11 U.S.C. § 523(a)(3), self-evidently seeks to ensure that the debtor fully discloses all claims so that they are not discharged without the creditor's knowledge and opportunity to participate in the bankruptcy proceeding. Section 523(a)(5), *id.* § 523(a)(5), prioritizes family support obligations over the debtor's fresh start. David N. Ravin & Kenneth A. Rosen, *The Dischargeability in Bankruptcy of Alimony, Maintenance and Support Obligations*, 60 AM. BANKR. L.J. 1, 1 (1986). Section 523(a)(7), 11 U.S.C. § 523(a)(7), gives precedence to the state interest in enforcing criminal laws by preventing the debtor from escaping debts for criminal liability. Cillo v. The Florida Bar (*In re* Cillo), 165 B.R. 46 (M.D. Fla. 1994) (citing *In re* Abramson, 210 F. 878 (2d Cir. 1914)). Section 523(a)(8) both protects the government fisc and recognizes that education is an asset with

The rationale for the bad acts exceptions to discharge in § 523(a)(2), (4), and (6) is, of course, not expressly addressed in the Bankruptcy Code. However, the differences and commonalities between the exceptions to discharge that Congress originally provided for in chapters 7 and 13 and the special provision giving bankruptcy courts exclusive jurisdiction over the bad acts exceptions, as well as the statutory and legislative history of the consumer discharge provisions, support the conclusion that the bad acts exceptions are an extension of the § 727(a) objections to discharge. The Congressional purpose was to limit the scope of the discharge available to debtors who have incurred debts through culpable misconduct, not to protect some special interest of fraud creditors in repayment.

A. The Architecture of the Code: The Chapter 7 Versus Chapter 13 Choice and Exclusive Bankruptcy Court Jurisdiction Over the Bad Acts Exceptions to Discharge

1. The Differences Between the Exceptions to Discharge in Chapters 7 and 13

The differences between the exceptions to discharge that Congress provided in chapter 7 and chapter 13 when it enacted the Bankruptcy Code of 1978 provide clear insight into the legislative purpose underlying the bad acts exceptions. The three bad acts exceptions were applicable in chapter 7 cases and not in chapter 13 cases.[104] This plainly suggests that the purpose of the bad acts exceptions was to limit the scope of the discharge in chapter 7 cases and not to advance some other policy favoring repayment of the creditor's claim over the debtor's fresh start. Otherwise, Congress would have made the bad acts exceptions applicable in both chapters. Other than the bad acts exceptions in § 523(a), the exceptions to discharge were very largely the same in both chapter 7 and chapter 13 cases,[105] confirming that these other

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value that the debtor continues to realize beyond the filing of bankruptcy. Kevin M. Lewis, Congressional Research Service, Bankruptcy and Student Loans (Feb. 22, 2018), at 5–6. Finally, § 523(a)(9), 11 U.S.C. § 523(a)(9), simply ensures that dischargeability determinations are binding in any future bankruptcy filing.

[104] *Compare* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523(a), 92 Stat. 2549, 2590 (1978) (the exceptions to discharge applicable in chapter 7 cases, which included the three bad acts exceptions) *with id.* § 1328(a), 92 Stat. 2549, 2650 (the exceptions to discharge in chapter 13 cases, which did not include any of the bad acts exceptions).

[105] *See supra* note 94. The only non-bad acts exceptions to discharge that were not replicated in chapter 13 were as follows: (1) the additional non-priority tax claims covered

exceptions, unlike the bad acts exceptions, are rooted in the creditor's interest in repayment.

Indeed, in explaining the drafting decision not to make the bad acts exceptions applicable in chapter 13 cases, the Commission on the Bankruptcy Laws of the United States, appointed by Congress to study and recommend a comprehensive revision of the federal bankruptcy laws leading up to the 1978 Code, stated that

> neither the interests of the creditors nor the principles of sound bankruptcy administration require a denial of confirmation [of a chapter 13 plan] due to conduct on the part of the debtor which would bar a discharge. If the debtor wants to pay his debts pursuant to a plan, and if the creditors are willing to go along, he should be allowed to do so. The fact that a discharge would not be available in a liquidation case should furnish a greater incentive for the debtor to perform under the plan.[106]

While the Commission was addressing the grounds for denial of discharge in § 727(a), not the exceptions to discharge in § 523(a)(2), (4), and (6), the rationale applies with equal force to the bad acts exceptions made applicable in chapter 7 cases but not in chapter 13 cases.

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by § 523(a)(1), which very largely concern unpaid taxes where the debtor acted dishonestly, *see* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523(a)(1), 92 Stat. 2549, 2590 (1978); (2) unscheduled claims, *id.,* which are essentially inapposite in chapter 13 cases because chapter 13 pend for a much longer period of time than a chapter 7 case and it is unlikely that an unscheduled creditor in a chapter 13 case would inexcusably learn of the bankruptcy filing only after it would be too late to file a proof of claim (Federal Rule of Bankruptcy Procedure 3002(c)(6) allows the court to extend the time for filing a proof of claim where notice to the creditor of the bankruptcy filing was insufficient to give the creditor a reasonable time to file a proof of claim. FED. R. BANKR. P. 3002(c)(6)); and (3) government claims for fines, penalties or forfeitures, *id.*, which was mostly covered by § 1328(a)(3), which excepts debts "for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 1328(a)(3), 92 Stat. 2549, 2650.

[106] See REPORTS, COMMUNICATION FROM THE EXECUTIVE DIRECTOR, COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES TRANSMITTING A REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES (September 6, 1973), BANKR78-LH 4, 1973 WL 172789 (A.&P.L.H.), Arnold & Porter LLP Legislative History: P.L. 95-598.

2. Section 523(c)(1)

Section 523(c)(1) singles out the bad acts exceptions for exclusive bankruptcy court jurisdiction.[107] Like the objections to discharge in § 727(a), and unlike the other exceptions to discharge in § 523(a), the bad acts exceptions must be litigated in an adversary proceeding filed in the bankruptcy case and decided by the bankruptcy court.[108] The other exceptions can be determined in a non-bankruptcy forum; bankruptcy court jurisdiction is concurrent, not exclusive, with respect to all of the exceptions other than § 523(a)(2), (4), and (6). This special treatment of the bad acts exceptions supports the inference that Congress intended them to supplement § 727(a) in limiting the discharge that may be obtained by dishonest debtors.

The legislative history behind § 523(c) indicates that Congress was concerned about abuses of the bad acts exceptions by creditors. For example, Congress heard reports that some creditors knowingly obtained false financial statements from their debtors so that they could use the statements against the debtors in the event they later filed for bankruptcy.[109] This legislative history carries no suggestion that victims of fraud or misconduct have an interest in repayment of their claims that outweighs the debtor's

[107] 11 U.S.C. § 523(c)(1). Section 523(c)(1) provides that "the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section." This language is the same as originally enacted. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523(c), 92 Stat. 2549, 2591 (1978).

[108] The Federal Rules of Bankruptcy Procedure likewise treat the exceptions to discharge under § 523(a)(2), (4), and (6) like objections to discharge under § 727(a). The Rules set the same deadline for filing a complaint objecting to the discharge under § 727(a) and for filing a complaint seeking to except a debt from discharge under § 523(a), (2), (4), and (6)—within 60 days after the first date set for the meeting of creditors under 11 U.S.C. § 341. *See* FED. R. BANKR. P. 4004(a), 4007(c).

[109] *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, PART I, H.D. 93-137, 10 (1973) (discussing the congressional intent for amending the Bankruptcy Act in 1970 to require exclusive bankruptcy court jurisdiction with respect to the bad acts exceptions due to the potential for abuse by creditors); Vern C. Countryman, *The New Dischargeability Law*, 45 AM. BANKR. L.J. (1971) (discussing problems plaguing discharge before the 1970 amendments adding the provision for exclusive bankruptcy court jurisdiction over the bad acts exceptions, the legislative history surrounding the amendments, and the resulting provision).

Section 523(d) contains an additional protection for debtors in cases where a creditor unsuccessfully objects to dischargeability under § 523(a)(2): the debtor may recover attorney fees from the creditor. 11 U.S.C. § 523(d).

interest in a fresh start. Rather, the fact that Congress gave debtors special protections against documented abuses by creditors improperly alleging misconduct by the debtor conflicts with the idea that these creditors have greater needs or vulnerabilities than creditors generally.

3. Statutory and Legislative History

In enacting the current Bankruptcy Code, Congress eliminated the ground for denial of discharge in toto where the debtor had incurred a debt before bankruptcy by using a false financial statement, instead making it an exception to discharge. The prior Bankruptcy Act barred the discharge of any debts where the debtor had incurred a single debt using a false financial statement,[110] while the exceptions to discharge included a broader exception for debts incurred through fraud.[111] The elimination of a fraud-based ground for denial of the discharge in toto because the matter would be adequately covered by the fraud exception to discharge quite clearly indicates a complementary relationship between the bad acts exceptions and the grounds for objecting to the discharge. They work in tandem to prevent a "dishonest" debtor from obtaining a complete discharge.

Moreover, the legislative history of the Code explicitly explains this relationship. In 1970, Congress established the Commission on the Bankruptcy Laws of the United States to consider changes in the bankruptcy laws. The Commission recommended, and in the Bankruptcy Code of 1978, Congress adopted

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[110] The Bankruptcy Act provided that "[t]he court shall grant the discharge unless satisfied that the bankrupt has . . . obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition." § 14(c)(3), 52 Stat. 575, 850 (1938). Congress amended this provision in 1960 to add requirements that the debtor intend to deceive the creditor and that the creditor rely on the false financial statement. Act of July 12, 1960, Pub. L. 86-621, 74 Stat. 409.

[111] Bankruptcy Act, § 17(2), 52 Stat. 575, 851 (1938), provided that "[a] discharge in bankruptcy shall release a bankrupt from all of his provable debts, . . . except such as . . . are liabilities for obtaining money or property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another . . . ." In the Bankruptcy Code, this exception to discharge was split in two. The false pretenses and false representations portion of the provision was combined with the false financial statement provision from § 14(c)(3), *supra* note 100, under § 523(a)(2); and the willful and malicious injury part was codified as § 523(a)(6). The Bankruptcy Act provision excepting debts for "fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity," § 17(4), *supra* note 101, was carried over as § 523(a)(4).

> a departure from the provision of the [former Bankruptcy Act] barring discharge of an individual engaged in business who obtains for such business money or property on credit by way of a false financial statement. The Commission is of the opinion that such fraud is more adequately dealt with by excepting the debt created by fraud from the effect of the discharge. This gives sufficient protection to the defrauded creditor and eliminates the possibility under the present law that the creditor may coerce an unlawful preference as a condition to his not opposing the discharge.[112]

Further, the Commission proposed eliminating the fraud exception to discharge for consumer debtors (while retaining it for non-consumer debtors). Representatives of the National Conference of Bankruptcy Judges (NCBJ), which recommended its own draft bankruptcy bill to Congress, opposed the Commission's proposal, stating that "[w]e cannot believe that the Commission would be inclined to grant a dishonest debtor, consumer or otherwise, a discharge from those debts incurred through his wrongdoing."[113] That the Commission recommended elimination of the exception for consumer debtors and the judges opposed the recommendation on the grounds that it failed to penalize a dishonest debtor clearly indicate that it is the character of the debtor, not the nature of the debt, that underlies the exception. Ultimately, of course, Congress agreed with the NCBJ in retaining the fraud exception to discharge.[114]

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[112] REPORTS, COMMUNICATION FROM THE EXECUTIVE DIRECTOR, COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES TRANSMITTING A REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES (September 6, 1973), BANKR78-LH 4, 1973 WL 172789 (A.&P.L.H.), Arnold & Porter LLP Legislative History: P.L. 95-598. On the other hand, the Report just quoted also refers to "protection of the defrauded creditor," perhaps suggesting that the fraud exception to discharge serves that purpose in addition to limiting the scope of the discharge available to debtors who have acted dishonestly. *But cf.* Statement of Hon. Joe Lee, Bankruptcy Judge, Bankruptcy Court for the Eastern District of Kentucky, BANKR78-LH 8, 1976 WL 191320 (A.&P.L.H.) (indicating that the sole justification for the fraud exception is the debtor's dishonesty).

[113] Statement of Alvin O. Wiese, Jr., Chairman of the Subcommittee on Bankruptcy of the Law Forum of the National Consumer Finance Association, and Robert B. Norris and Vernon L. Evans, General Counsel and Associate General Counsel, National Consumer Finance Association, BANKR78-LH 8, 1976 WL 191320 (A.&P.L.H.).

[114] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523(a)(2), 92 Stat. 2549, 2590 (1978).

4. An Alternative Explanation for Excepting a Debtor's Vicarious Liability for Fraud from Discharge

Over twenty-five years before the Supreme Court decided *Bartenwerfer*, Professor Ponoroff made the case for excepting a debtor's vicarious liability for fraud from discharge under Code § 523(a)(2)(A).[115] The crux of his argument was that the Bankruptcy Code generally preserves state law entitlements, and in the absence of a clear expression of intent to do so, Congress did not abrogate the state law rules that hold innocent principals liable for fraud committed by a dishonest agent.[116] Professor Ponoroff rejects the view that the exceptions to discharge in § 523(a) fall into two distinct categories, those that concern debts arising from the debtor's culpable misconduct and those reflecting other public policy determinations. In his account, shared by the Supreme Court in *Bartenwerfer*, all the exceptions to discharge are grounded in the character of the debt, and the bad acts exceptions are concerned only secondarily with punishing the debtor for misconduct.[117]

As Professor Ponoroff acknowledges, his thesis is undermined by the difficulty of distinguishing an innocent partner's vicarious liability for fraud from all other non-consensual debts arising from the debtor's negligent conduct, which are unquestionably dischargeable in bankruptcy.[118] He states that an innocent partner's liability is sufficiently different from dischargeable debts, which generally arise from voluntary transactions in which the creditor necessarily knows of and accepts the risk that the debt might later be discharged in bankruptcy, whereas fraudulently incurred debts are not consensual in the same way.[119] However, he does not explain how the innocent principal's failure to adequately supervise the culpable agent's conduct is distinguishable from other debts arising from the debtor's negligence, which, of course, the creditor has not consented to. If the point is to disincentivize conduct that is unreasonable, although not intentional or reckless, debts for both negligence and innocent vicarious liability for fraud would be excepted from discharge, or neither would be.

Finally, Professor Ponoroff states that he would not apply § 523(a)(2)(A) to a debt arising from fraud and for which an innocent spouse

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[115] Lawrence Ponoroff, *Vicarious Thrills: The Case for Application of Agency Rules in Bankruptcy Dischargeability Litigation*, 70 TUL. L. REV. 2515 (1996).

[116] *Id.* at 2527 & n.40.

[117] *Id.* at 2540–41.

[118] *Id.* at 2545–46.

[119] *Id.*

would be liable under the law in a state that still provides for vicarious liability for fraudulent conduct in the contracting of joint debts. In this scenario, he writes, the bankruptcy fresh start policy is more compelling than the state law entitlement, so that the state law entitlement would be displaced in bankruptcy.[120] He does not address how the language of § 523(a)(2)(A) could be read to reach this result, that is, how the text distinguishes between the two cases. This is what Justice Sotomayor may have been concerned about in her concurring opinion in *Bartenwerfer*. She prefaced her point by noting that "petitioner and her husband had an agency relationship and obtained the debt at issue after they formed a partnership. Because petitioner does not dispute that she and her husband acted as partners, the debt is not dischargeable under the statute."[121] To return to the text of § 523(a)(2)(A), the problem with the Ponoroff limit on excepting vicarious liability for fraud from discharge is that there is no basis in the statute for distinguishing between the two cases. If the debtor is vicariously liable under applicable state law for fraud committed by someone else, it would be nondischargeable under the Court's reading of § 523(a)(2)(A) in *Bartenwerfer*.[122]

VI. The Influence of Non-Legal Factors

Having considered the sources of statutory interpretation favored and disfavored by the Supreme Court in its decisions addressing the exceptions to discharge under the Code, this Part examines several non-legal factors that may or may not influence the Court's decisions—the ideology of the justices, the position taken by the United States Solicitor General, whether the circuit court below held for the debtor or the creditor, and the position taken by the majority of circuits in the cases in which the Court resolved a circuit split.

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[120] *Id.* at 2558–59; *see also* Angela Littwin, Adrienne Adams & Angie Kennedy, *Bartenwerfer v. Buckley and Coerced Debt*, 99 AM. BANKR. L.J. 1 (2025) (raising concern that "coerced debt"—debt incurred in the debtor's name by an abusive spouse or partner's fraud—could be found nondischargeable under the reading of § 523(a)(2)(A) in *Bartenwerfer* but concluding that the Court's opinion indicates limits that should preclude such an application of the fraud exception to discharge).

[121] Bartenwerfer v. Buckley, 598 U.S. 69, 83–84 (2023) (Sotomayor, J., concurring).

[122] *See also* Littwin et. al, *supra* note 120, at 8 ("a victim of coerced debt must be found liable for the fraud under state law for its discharge to become an issue" under *Bartenwerfer*).

A. Ideology of the Justices

The political ideology of the individual justices has played almost no discernible part in the Supreme Court's decisions in the exception-to-discharge cases arising under the Bankruptcy Code. (Broadly speaking, ideologically, conservatives tend to favor creditors' interests, and liberals are more likely to favor debtors' interests.[123]) The Court was not closely divided in any of the eleven § 523(a) cases. It decided seven of the cases unanimously,[124] one by a 7-1 margin,[125] and the other three cases by a 7-2 margin.[126] In one of the 7-2 decisions, the dissenters agreed with the majority regarding the legal ruling and dissented only to argue that the bankruptcy court had, in effect, applied that rule and therefore a new trial was unnecessary.[127]

The Court held for the creditor in four of the seven unanimous decisions[128] and for the debtor in three.[129] It held for the creditor in all four of the non-unanimous decisions.[130] That said, in two of the three 7-2

[123] For example, in the U.S. Senate, all Republican senators voted in favor of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), while most Democratic senators voted against it. https://www.govtrack.us/congress/votes/109-2005/s44. BAPCPA's provisions very largely favored creditors over debtors. *See also* REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION (1977), available at https://books.google.com/books?id=ZCb0NwBrJckC&printsec=frontcover&source=gbs_ViewAPI#v=onepage&q&f=false. Four members of the Commission dissented from recommendations by the five member majority, "disagreeing most strongly with the . . . proposals that do not go far enough to penalize debtor abuse; grant excessively generous exemptions; discourage Chapter 13 repayment plans and encourage Chapter 7 liquidations; impose unnecessary restrictions on lenders . . .; do not meaningfully restrict abusive refilings or misuse of the automatic stay to prevent evictions." *Id.* Chapter 5: Individual Commissioner Views, Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners 3–4.

[124] *Bartenwerfer*, 598 U.S. 69; Lamar, Archer & Cofrin, LLP v. Appling, 584 U.S. 709 (2018); Bullock v. Bankchampaign, N.A., 569 U.S. 267 (2013); Young v. U.S., 535 U.S. 43 (2002); Cohen v. de la Cruz, 523 U.S. 213 (1998); Kawaauhau v. Geiger, 523 U.S. 57 (1998); Grogan v. Gardner, 498 U.S. 279 (1991).

[125] Husky Int'l Electronics, Inc. v. Ritz, 578 U.S. 355 (2016).

[126] Archer v. Warner, 538 U.S. 314 (2003); Field v. Mans, 516 U.S. 59 (1995); Kelly v. Robinson, 479 U.S. 36 (1986).

[127] *Field*, 516 U.S. at 79–84.

[128] *Bartenwerfer*, 598 U.S. 69; *Young*, 535 U.S. 43; *Cohen*, 523 U.S. 213; *Grogan*, 498 U.S. 279.

[129] *Lamar, Archer & Cofrin, LLP*, 584 U.S. 709; *Bullock*, 569 U.S. 267; *Kawaauhau*, 523 U.S. 57.

[130] *Husky Int'l Electronics*, 578 U.S. 355; *Archer*, 538 U.S. 314; *Field*, 516 U.S. 59;

decisions, the two dissenters were from either ideological wing of the Court, and the justices in the majority came from across the ideological spectrum.[131] In the 7-1 case, it was a staunchly conservative justice who sided with the debtor in dissent.[132] In only one of the eleven cases, two more liberal justices dissented (while the seven justices in the majority were from across the ideological spectrum).[133]

The one clear ideological conflict in the § 523(a) decisions did not concern the Court's holding, but rather apparently concerned the use of legislative history as additional support for the Court's holding. In *Lamar, Archer & Cofrin, LLP v. Appling*, Justices Thomas, Alito, and Gorsuch declined to join the part of Justice Sotomayor's opinion for the Court in which she drew on legislative history to further support the Court's holding.[134]

Kelly, 479 U.S. 36.

[131] *Archer*, 538 U.S. 314 (in this case, Justices Thomas and Stevens dissented; Justices Breyer, Rehnquist, O'Connor, Scalia, Kennedy, Souter, and Ginsburg voted with the majority); *Field*, 516 U.S. 59 (in this case, Justices Breyer and Scalia dissented; Justices Souter, Rehnquist, Stevens, O'Connor, Kennedy, Thomas, and Ginsburg voted in the majority).

According to their Martin-Quinn (M-Q) scores, Justices Thomas, Rehnquist, O'Connor, Scalia, and Kennedy fall on the more conservative end of the ideological spectrum, while Justices Stevens, Breyer, Souter, and Ginsburg fall on the more liberal side. Developed by Professors Andrew D. Martin of Washington University in St. Louis and Kevin M. Quinn of Emory University, the M-Q scores are a respected and commonly used method for rating the ideological leanings of U.S. Supreme Court justices. *See* Rok Spruk & Mitja Kovac, *Replicating and extending Martin-Quinn scores*, 60 INT'L REV. OF L. & ECON. (2019). The ratings are dynamic in that they change with each decision issued by the Court on which a justice served. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POLITICAL ANALYSIS *134 (2002)*. The discussion in this part of the article uses the most recent M-Q rating for each justice. See http://mqscores.wustl.edu/measures.php (for most recent scores, click on the link titled "2021 MQ Scores Data" under "2022 Legacy Data Files" and then open the justices.csv file) [hereinafter "M-Q Scores"]. For a good graphic representation of the M-Q scores for all U.S. Supreme Court justices over time from 1935, see http://mqscores.wustl.edu/measures.php.

[132] *Husky Int'l Electronics*, 578 U.S. 355 (Thomas, J., dissenting). Justice Thomas's M-Q score makes him one of the two most conservative justices who have served on the Court since 1935. *See* M-Q Scores, *supra* note 131.

[133] *Kelly*, 479 U.S. 36 (in this case, Justices Marshall and Stevens dissented; Justices Powell, Rehnquist, Brennan, White, Blackmun, O'Connor, and Scalia voted with the majority). Both dissenting justices have M-Q scores that fall on the more liberal end of the spectrum. Among the justices voting in the majority, Justices Powell, Rehnquist, White, O'Connor, and Scalia are rated as more conservative, while Justices Brennan and Blackmun are rated as more liberal. *See* M-Q Scores, *supra* note 131.

[134] *Lamar, Archer & Cofrin, LLP*, 584 U.S. 709. In rejecting the creditor's argument that

Although Justices Thomas, Alito, and Gorsuch did not explain why they did not join the one part of the Court's opinion, it seems that they objected in principle to the use of legislative history.

The almost complete absence of ideological conflict in the exception-to-discharge cases is consistent with the Court's decisions in bankruptcy matters generally.[135] Some of the cases do appear to be straightforward, notwithstanding a circuit split.[136] In the more difficult cases, perhaps the justices are inclined to reach consensus for institutional reasons. Certainly, the credibility of the Court depends to an extent on it being perceived as non-political. The stakes in the exception-to-discharge cases may be seen as comparatively small, especially where the debtor may be less than sympathetic, as in most of the cases involving the bad acts exception to discharge.[137] Professor Mann has suggested that the absence of ideology in the Court's decision-making in bankruptcy cases (including exception-to-

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"respecting the debtor's financial condition" in § 523(a)(2)(B) should be read narrowly because the discharge is only for honest debtors, Justice Sotomayor invoked legislative history to explain why Congress adopted heightened requirements for proving fraud with respect to statements regarding a debtor's financial condition. *Id.* at 712. Justices Alito, Thomas, and Gorsuch have M-Q scores on the more conservative end of the spectrum, while the six justices who joined in the full opinion included four justices with more liberal M-Q scores (Sotomayor, Ginsburg, Breyer, and Kagan) and two with more conservative M-Q scores (Justices Roberts and Justice Kennedy). *See* M-Q Scores, *supra* note 131.

[135] *See* MANN, *supra* note 20, at 33; Cuevas, *supra* note 62, at 438 ("the Supreme Court has not followed any recognizable 'ideology' in deciding bankruptcy issues. Rather, the determinative issue in Supreme Court bankruptcy decisions is the method of statutory interpretation that is utilized."); *see also* Lawless, *supra* note 62, at 112–113 (examining the Court's commitment to textualism in nineteen cases decided between 1991 and 1995, observing that "[s]everal justices vote almost exclusively with the majority side in bankruptcy cases . . . Because the Court has not consistently applied textualism, these voting records mean the justices consistently have signed on to both textual and nontextual opinions . . . This record suggests that the justices are subverting interpretive theory for the sake of a greater good, be it a preferred substantive result, judicial comity and efficiency, vote trading, or other reasons").

[136] *E.g.*, *Lamar, Archer & Cofrin, LLP*, 584 U.S. 709 (holding that a representation regarding the value of a single asset can be a "statement regarding the debtor's financial condition" under § 523(a)(2)); Grogan v. Gardner, 498 U.S. 279 (1991) (holding that, in the absence of explicit specification by Congress, the same, preponderance of the evidence standard of proof applies to the fraud exception to discharge under § 523(a)(2) as to the other exceptions to discharge).

[137] *See* MANN, *supra* note 20, at 37 (observing that the bankruptcy cases decided by the Court almost never draw wide public attention, with the implication being that for that reason ideology plays a minimal role except where perhaps the justices are posing for other cases that are salient).

discharge cases) is at least in part attributable to the fact that bankruptcy issues are rarely of significant public interest.[138]

Bartenwerfer stands as a lucid example of the Court elevating consensus over ideology in the face of fundamental systemic values that favor preserving the scope of the discharge in consumer bankruptcy cases. *Bartenwerfer* is the only case in which the Court applied one of the bad acts exceptions to bar the discharge of a debt for misconduct that the debtor did not participate in but for which she was vicariously liable under state law. As discussed above,[139] in a short concurring opinion, Justice Sotomayor, with whom Justice Jackson joined, emphasized that the case involved a debtor who had a business agency relationship with the person who perpetrated the fraud, not "a situation involving fraud by a person bearing no agency or partnership relationship to the debtor."[140] Instead of using this potential misapplication of the decision in *Bartenwerfer* as grounds for limiting the scope of the ruling, it should have been another argument against reading the statute to cover an innocent debtor's vicarious liability. There is no basis in the text of § 523(a)(2)(A) for distinguishing between an innocent debtor who is vicariously liable under state law for the fraud of an agent or partner and an innocent debtor who is vicariously liable under state law for fraud committed by anyone else.

B. Solicitor General Amicus Curiae

Evaluated on its win-loss record, the government has been exceptionally persuasive before the Court in the exception-to-discharge cases. The Court appears very likely to rule in favor of the position taken by the Solicitor General. The United States appeared in nine of the eleven exception-to-discharge cases—as amicus curiae in eight cases[141] and as a

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[138] *Id.*

[139] *See supra* text accompanying notes 97, 121.

[140] Bartenwerfer v. Buckley, 598 U.S. 69, 84 (2023).

[141] *Id.*; *Lamar, Archer & Cofrin, LLP*, 584 U.S. 709; Husky Int'l Electronics, Inc. v. Ritz, 578 U.S. 355 (2016); Bullock v. Bankchampaign, N.A., 569 U.S. 267 (2013); Archer v. Warner, 538 U.S. 314 (2003); Cohen v. de la Cruz, 523 U.S. 213 (1998); Field v. Mans, 516 U.S. 59 (1995); Grogan v. Gardner, 498 U.S. 279 (1991). The government did not submit an amicus brief in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), or *Kelly v. Robinson*, 479 U.S. 36 (1986).

Thus, the government appeared as amicus in 80% (8 of 10) of the exception-to-discharge cases in which it was not a party. This rate is somewhat higher than the 60% (35 of 60) of all bankruptcy cases in which the government appeared as amicus (and was not a party) between 1978 and 2015. *See* MANN, *supra* note 20, at 195.

party in one.[142] The Court agreed with the government's position in all except one of the nine cases.[143]

The government's position in the § 523(a) cases may help explain the Court's record of holding in favor of creditors in the exception-to-discharge cases. The government sided with the creditor in all but one of the eight amicus curiae briefs that it filed.[144] The Court agreed with the government's position in all except one of these seven cases.[145]

Notably, the government did not take a position in *Kawaauhau v. Geiger*, where the Court, siding with the debtor and a broader scope of the discharge, unanimously held that the exception for debts "for willful and malicious injury" required culpable misconduct, not mere negligence.[146]

The Court held for the government (the Internal Revenue Service) in the one case in which the government was a party.[147]

Going beyond the government's win-loss record, however, there is little evidence in the Court's § 523(a) opinions that the government's position was of any more than minor import. The Court referred, but not at length, to the government's brief in just three of the seven cases in which the United States appeared as amicus curiae.[148] It did not cite or refer even in passing to the government's brief in the other five cases.[149] The Court sided with the

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[142] Young v. U.S., 535 U.S. 43 (2002).

[143] The one case in which the Court did not side with the government was *Bullock*, 569 U.S. 267. In *Field v. Mans*, both the government and the Court disagreed with the debtor's argument for a reasonable reliance standard for proving fraud under § 523(a)(2)(A), but the Court did not accept the government's contention that the statute requires only actual reliance. It held that the statute requires justifiable reliance. 516 U.S. 59.

[144] *See* cases *supra* note 141.

[145] This success rate of nearly 90% compares favorably to the government's success rate of about 60% in all bankruptcy cases in which the Court adopted the government's more restrictive application of the Code. *Id.* at 195. The Court rejected the government's position and held (unanimously) for the debtor only in *Bullock v. Bankchampaign, N.A.,* 569 U.S. 267. *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, is the one case in which the government supported the debtor's position (and the Court held for the debtor).

[146] *Kawaauhau*, 523 U.S. 57. The United States also did not file an amicus brief in *Kelly v. Robinson*, where nearly three-quarters of state attorneys general did file briefs in support of the state creditor's position (and the Court ruled in favor of Connecticut, holding that a state criminal restitution obligation was nondischargeable under § 523(a)(7)). 479 U.S. 36.

[147] Young v. U.S., 535 U.S. 43 (2002).

[148] *Lamar, Archer & Cofrin, LLP*, 584 U.S. 709; Bullock v. Bankchampaign, N.A., 569 U.S. 267 (2013) (Court rejected government's position); Field v. Mans, 516 U.S. 59 (1995) (government sided with the creditor, the Court ruled in favor of the creditor but adopted a more stringent standard for reliance (actual and justifiable) than the government argued for (only actual)).

[149] *See* Bartenwerfer v. Buckley, 598 U.S. 69 (2023); Husky Int'l Electronics, Inc. v.

government in two of the three cases in which it discussed the government's arguments. In one of these cases, the government supported the creditor[150], and in the other, it supported the debtor.[151] In one case in which it mentioned the government's position in its opinion, the Court disagreed with that position (and held for the debtor).[152]

Whether the Solicitor General served a Democratic or a Republican president does not appear to impact the Solicitor General's position in the exception-to-discharge cases. Regardless of the president's party, the Solicitor General almost invariably supports the creditor objecting to the dischargeability of a debt and seeking to narrow the scope of the discharge.[153]

C. Circuit Court Split

There is no apparent relationship between the Court's holding and the majority position among the circuit courts in the nine § 523(a) cases in which the Court granted certiorari to resolve a circuit split. In five of the nine cases, the Court agreed with the minority circuit position.[154] In the other four cases, it sided with the majority position.[155] Most of the circuit splits were narrow—

Ritz, 578 U.S. 355 (2016); Archer v. Warner, 538 U.S. 314 (2003); Cohen v. de la Cruz, 523 U.S. 213 (1998); Grogan v. Gardner, 498 U.S. 279 (1991).

[150] *Field*, 516 U.S. 59.

[151] *Lamar, Archer & Cofrin, LLP*, 584 U.S. 709.

[152] *Bullock*, 569 U.S. 267.

[153] The Solicitor General served a Republican president in four of the ten cases in which the government appeared as amicus: *Lamar, Archer & Cofrin, LLP*, 584 U.S. 709 (Trump); *Archer*, 538 U.S. 314 (George W. Bush); *Grogan*, 498 U.S. 279 (George H. W. Bush); Kelly v. Robinson, 479 U.S. 36 (1986) (Reagan). He served a Democratic president in six: *Bartenwerfer*, 598 U.S. 69 (Biden); *Husky Int'l Electronics*, 578 U.S. 355 (Obama); Bullock v. Bankchampaign, N.A., 569 U.S. 267 (2013) (Obama); *Cohen*, 523 U.S. 213; (Clinton); *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) (Clinton); *Field*, 516 U.S. 59 (Clinton). The only Solicitor General to submit a brief on behalf of the debtor served a Republican president, *Lamar, Archer & Cofrin, LLP*, 584 U.S. 709 (Trump). In all six of the cases in which the Solicitor General was appointed by a Democratic president, the Solicitor General sided with the creditor. In the two cases in which the government did not file an amicus brief, it was represented by a Republican-appointed Solicitor General in one, *Kelly*, 479 U.S. 36 (Reagan), and a Democratic-appointed Solicitor General in the other, *Kawaanahu*, 523 U.S. 57 (Clinton).

[154] *Lamar, Archer & Cofrin, LLP*, 584 U.S. 709; *Bullock*, 569 U.S. 267; *Archer*, 538 U.S. 314; *Kawaauhau*, 523 U.S. 57; *Grogan*, 498 U.S. 279.

[155] *Bartenwerfer*, 598 U.S. 69; *Husky Int'l Electronics*, 578 U.S. 355; *Cohen*, 523 U.S. 213; *Field*, 516 U.S. 59.

in five of the cases, it was 2-1[156], and in one case, it was 3-2.[157] In two cases, the circuit courts were split 3-1[158], and in one case, they were divided 5-2.[159]

Interestingly, in all three cases in which it held in favor of the debtor, the Court went against the majority in the circuit court split (2-1,[160] 3-1,[161] and 2-1[162]) in favor of the creditor; and in two cases the Court held for the creditor in the face of a circuit court split (5-2[163] and 2-1[164]) that favored the debtor.

Further, the Court does not appear to be more likely to either affirm or reverse the decision in the circuit court below in the exception-to-discharge cases under the Code. In five of the cases, the Court affirmed the circuit court[165] and in six of the cases it reversed.[166]

D. Decision of the Circuit Court Appealed From

However, the Supreme Court was much more likely to reverse the circuit court's decision in the § 523(a) cases if it was in favor of the debtor and, conversely, much more likely to affirm if it was in favor of the creditor. The Court affirmed the circuit court appealed from in five cases[167] and reversed in six.[168] Of the six decisions that it reversed, five had been in favor

[156] *Lamar, Archer & Cofrin, LLP*, 584 U.S. 709; *Int'l Electronics, Inc*., 578 U.S. 355; *Archer*, 538 U.S. 314; *Cohen*, 523 U.S. 213; *Kawaauhau*, 523 U.S. 57.

[157] *Field*, 516 U.S. 59.

[158] *Bartenwerfer*, 598 U.S. 69; *Bullock*, 569 U.S. 267.

[159] *Grogan*, 498 U.S. 279.

[160] *Kawaauhau*, 523 U.S. 57.

[161] *Bullock*, 569 U.S. 267.

[162] Lamar, Archer & Cofrin, LLP v. Appling, 584 U.S. 709 (2018).

[163] *Grogan*, 498 U.S. 279.

[164] Archer v. Warner, 538 U.S. 314 (2003).

[165] Bartenwerfer v. Buckley, 598 U.S. 69 (2023); *Lamar, Archer & Cofrin, LLP*, 584 U.S. 709; Young v. U.S., 535 U.S. 43 (2002); Cohen v. de la Cruz, 523 U.S. 213 (1998); *Kawaauhau*, 523 U.S. 57.

[166] Husky Int'l Electronics, Inc. v. Ritz, 578 U.S. 355 (2016); *Bullock*, 569 U.S. 267; *Archer*, 538 U.S. 314; Field v. Mans, 516 U.S. 59 (1995); *Grogan*, 498 U.S. 279; Kelly v. Robinson, 479 U.S. 36 (1986).

[167] *Bartenwerfer*, 598 U.S. 69; *Lamar, Archer & Cofrin, LLP*, 584 U.S. 709; *Young*, 535 U.S. 43; *Cohen*, 523 U.S. 213; *Kawaauhau*, 523 U.S. 57.

[168] *Husky Int'l Electronics*, 578 U.S. 355; *Bullock*, 569 U.S. 267; *Archer*, 538 U.S. 314; *Field*, 516 U.S. 59; *Grogan*, 498 U.S. 279; *Kelly*, 479 U.S. 36.

of the debtor[169] and just one in favor of the creditor;[170] and of the five decisions it affirmed, four had held for the creditor[171] and just one had held in favor of the debtor.[172] This record suggests that the Court may perceive a pro-debtor bias among the lower courts against which it stands as a bulwark.

In sum, while the ideology of the justices does not appear to play a role in the Court's exception-to-discharge decisions, it seems that the Court has its eye out for issues on which the circuits are divided and the circuit court appealed from held in favor of the debtor. There is reason to conclude that the Solicitor General is exceptionally persuasive in these matters, likely in part because there is no government agency that is situated to inform the Court with an institutional and policy perspective on the bankruptcy laws.

VII. Exception to Discharge Issues on Which the Lower Courts Remain Divided

There remain more than a few issues concerning the exceptions to discharge on which the lower courts are divided:

whether a late-filed tax return constitutes a return for purposes of § 523(a)(1)(B);[173]

whether forbearance to collect a debt constitutes "an extension, renewal or refinancing of credit" under § 523(a)(2);[174]

whether the § 523(a) exceptions to discharge apply to corporate debtors under Subchapter V of chapter 11;[175]

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[169] *Husky Int'l Electronics*, 578 U.S. 355; *Archer*, 538 U.S. 314; *Field*, 516 U.S. 59; *Grogan*, 498 U.S. 279; *Kelly*, 479 U.S. 36.

[170] *Bullock*, 569 U.S. 267.

[171] *Bartenwerfer*, 598 U.S. 69; *Lamar, Archer & Cofrin, LLP*, 584 U.S. 709; *Young*, 535 U.S. 43; *Cohen*, 523 U.S. 213.

[172] *Kawaauhau*, 523 U.S. 57.

[173] *Compare, e.g.*, Smith v. IRS (*In re* Smith), 828 F.3d 1094 (9th Cir. 2016) (holding that a late-filed tax return can constitute a return for purposes of § 523(a)(1)(B)), *with* Fahey v. Massachusetts Dep't of Revenue (*In re* Fahey), 779 F.3d 1 (1st Cir. 2015) (holding that a late-filed return does not qualify as a return).

[174] *See In re* Hay Phat, 623 B.R. 371 (Bankr. E.D Pa. 2021) (collecting cases on either side).

[175] *See* Avion Funding, LLC v. GFS Indus., LLC (*In re* GFS Indus., LLC), 2024 WL 1644229 (5th Cir. 2024) (holding that the § 523(a) exceptions to discharge apply in subchapter V cases); Cantwell-Cleary Co. v. Cleary Packaging, LLC (*In re* Cleary Packaging, LLC), 36 F.4th 509 (4th Cir. 2022) (same). *But see* Catt v. Rtech Fabrications, LLC (*In re* Rtech Fabrications, LLC), 635 B.R. 559 (Bankr. D. Idaho 2021) (holding that the exceptions do not apply); Lafferty v. Off-Spec. Sols, LLC (*In re* Off-Spec Sols, LLC), 651 B.R. 862 (9th Cir. BAP 2023) (same).

whether the debtor must receive a direct benefit from fraudulent conduct that gives rise to an otherwise nondischargeable debt under § 523(a)(2);[176]

whether the debtor himself must have violated securities laws for purposes of nondischargeability under § 523(a)(19); and[177]

whether § 523(a)(6) requires tortious conduct.[178]

This article's examination of the Supreme Court's jurisprudence concerning the discharge in consumer bankruptcy cases will assist courts and litigants in addressing these unresolved questions.

VIII. Conclusion

In the course of eleven opinions addressing the scope of the discharge in consumer bankruptcy cases under the Bankruptcy Code, including nine cases in which it interpreted one of the bad acts exceptions to discharge, the Supreme Court has firmly established an approach that shuns bankruptcy policy; relies heavily on statutory text, context, and history; and only occasionally (and not recently) relies on legislative history. The Court's approach does not appear to be ideologically driven, but the decisions very

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[176] *Compare* Nunnery v. Rountree (*In re* Rountree), 478 F.3d 215 (4th Cir. 2007) (holding that the debtor must receive some direct or indirect benefit from the fraud), *and* HSSM #& Ltd. P'ship v. Bilzerian (*In re* Bilzerian), 100 F.3d 886 (11th Cir. 1996) (same), *and* BancBoston Mortg. Corp. v. Ledford (*In re* Ledford), 970 F.2d 1556 (6th Cir. 1992) (same), *and* Luce v. First Equip. Leasing Corp. (*In re* Luce), 960 F. 2d 1277 (5th Cir. 1992) (same), *with* Muegler v. Bening, 413 F.3d 980 (9th Cir. 2005) (holding that debtor need not receive any benefit from the fraud), *and In re* M.M. Winkler & Assocs., 239 F.3d 746 (5th Cir. 2001) (same).

[177] *Compare In re* Sherman, 658 F.3d 1009 (9th Cir. 2011) (holding that debtor must have violated the securities laws), *and* Oklahoma Dept. of Sec., *ex rel.* Faught v. Wilcos, 691 F.3d 1171 (10th Cir. 2012) (same), *with* Lunsford v. Process Tech. Servs. (*In re* Lunsford), 848 F.3d 963 (11th Cir. 2017) (holding that the debtor need not have himself violated the securities laws).

[178] *Compare, e.g.,* Brown v. Chamouille, 2024 WL 2127040 (9th Cir. 2024) (§ 523(a)(6) requires tortious conduct), *and* Lockerby v. Sierra, 535 F.3d 1038 (9th Cir. 2000) (same), *with* Williams v. Int'l Bhd. of Elec. Workers Local 520, 337 F.3d 504, 510–11 (5th Cir. 2003) ("Accepting that Section 523(a)(6) excepts contractual debts from discharge when those debts result from an intentional or substantially certain injury," but holding that the debtor's conduct did not meet these requirements), *and* Sanders v. Vaughn (*In re* Sanders), 210 F.3d 390 (10th Cir. 2000) (unpublished opinion) (same). *See generally* Scott F. Norberg, *Contract Claims and the "Willful and Malicious Injury" Exception to the Discharge in Bankruptcy*, 88 AM. BANKR. L.J. 175, 187–88, 215–35 (2014) (discussing the circuit split).

largely favor creditors, with the Court choosing to hear most cases on appeal by the creditor from the courts of appeals below. The government has almost invariably weighed in on the side of the creditor in the exception-to-discharge cases; the absence of an advocate for a bankruptcy system perspective seemingly inhibits the Court's jurisprudence.[179]

The limits of an approach that disregards bankruptcy policy are made apparent in *Bartenwerfer v. Buckley*. The *Bartenwerfer* case, involving an innocent debtor who was vicariously liable for her culpable partner's fraud under state law, is the paradigm scenario in which a policy understanding of the bad acts exceptions in § 523(a) is essential. By neglecting policy as a source of statutory interpretation, the Court overlooked important statutory history and wrongly held that the fraud exception did not require misconduct *by the debtor*.[180] While use of the passive voice in the current § 523(a)(2)(A)[181] creates ambiguity concerning Congress's intent, the debtor's case was doomed by the Court's failure to examine the policy rationale for excepting fraud debts from the discharge. There is no apparent basis for differentiating a claim arising from an innocent debtor's vicarious liability for a partner's fraud from a garden-variety claim for negligence, which is plainly dischargeable in bankruptcy.[182]

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[179] Professor Mann has written that "the absence of a major administrative presence in the Executive Branch has hindered the development of a broad and coherent bankruptcy system. Specifically, the administrative vacuum has left the Supreme Court adrift, underinformed about the importance of a robust bankruptcy system to a modern capitalist economy." MANN, *supra* note 20, at 193. Mann further writes that "[t]he Solicitor General's role in bankruptcy cases has been almost diametrically opposed to the role we would have expected from [a hypothetical] United States Bankruptcy Administration: We don't have a Court left to its own devices in the bankruptcy realm, we have a Court consistently advised by the executive to downplay the significance of the bankruptcy system." *Id.*; *see also* Markell, *supra* note 49, at 385 ("perhaps caused by a lack of a neutral agency dedicated to a consistent interpretation of the Code, the Court's decisions in one part of the Code seem insufficiently attentive to the possible effects in other parts of the Code").

[180] 598 U.S. 69.

[181] 11 U.S.C. § 523(a)(2)(A) (2015).

[182] *See* 11 U.S.C. § 523(a) (providing that certain debts are nondischargeable, claims for negligence are not among them).