

## Student Loan Discharge

### Arguments to Save Donations from the Closing Jaws of Creditors so They Find Their Way into the Open Arms of Charity

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#### Abstract

This Article examines one of the intersections of federal law, specifically the Bankruptcy Code, and free expression of religion. After a brief overview of the relevant statutes and case law for tithing or donating debtors, this Article proposes two arguments that will be relevant when a person who tithes or donates faces the difficult situation of bankruptcy. The first is a statutory argument. Although a portion of the recent Religious Freedom Restoration Act has been struck as unconstitutional, the remaining portion of this statute, along with other relevant statutes, may allow an argument for discharge of student loans. The second argument is for this matter to be settled by the bankruptcy court. The debtor would argue for the bankruptcy court to use its sound discretion to allow the discharge. The article then resolves the arguments and suggests that change to the Bankruptcy Code may be necessary to provide consistency in this issue.

#### Introduction

[1] Can a court tell a person that her tithe to a church is not an appropriate expense? Can a court call a donation to a synagogue unreasonable or unnecessary? If a debtor has a strong religious belief in tithing, can a court order her to repay her student loans, which might result in her going hungry because she cannot afford food? Would we say this interferes with her free exercise of religion, one of the guarantees of the Bill of Rights? There seems to be a strong social and political current today that would say “yes.” Yet, this may be the situation that some debtors with unpaid student loans face when they argue for discharge of their debts and the financial fresh start of bankruptcy.

[2] In order to discharge a student loan the debtor must establish that repayment will create an undue hardship on the debtor or the debtor’s family (11 U.S.C. § 523(a)(8)). This standard of “undue hardship” is becoming more difficult to prove because Congress and the courts are restricting the discharge of student loans. This Article will discuss whether a debtor’s gift to his or her church or synagogue should be included as a living or other reasonable expense when determining undue hardship.

[3] The development of student loan legislation has been motivated by the desire to educate and concern for creditors. In 1965, the Congress of the United States established a student loan program that would enable students, who could not necessarily afford higher education, to attend college. These loans are guaranteed by the United States government and require repayment by the student or the co-signer on the loan (Higher Education Act). When a new government program is offered to a large number of Americans, however, Congress, acting for the public, wants accountability (see, for example, the National Bankruptcy Review Commission). Concern

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about students abusing the student loan programs sponsored and guaranteed by the government surfaced soon after its establishment. Congress became concerned that students would borrow large amounts of money,<sup>2</sup> and then utilize the bankruptcy laws to discharge these student loans, thereby leaving the federal government to foot the bill (Wiese: 446). Although it has never been proven that high numbers of students have used the bankruptcy laws to their personal advantage,<sup>3</sup> this fear seems to remain at the heart of Congressional attempts to reform the student loan debt discharge of the Bankruptcy Code. To remedy these alleged problems, Congress has now made it extremely difficult to discharge a student loan (Tabb: 729-732). However, the result of the good faith congressional efforts may be people going hungry themselves because of their obligation to repay their student loans.<sup>4</sup>

## **Background on the Discharge of Student Loans**

### *Relevant Bankruptcy Code Provisions.*

[4] The constitutionally authorized Bankruptcy Code (the Code) has two purposes. The first is fairness in the treatment of creditors. The second is a fresh start for “the honest but unfortunate debtor” (Tabb: 3; Treister: 5; Jackson: 4).

[5] The Code provides several forms of relief for the debtor who qualifies. The type of relief dealt with in this Article is liquidation and discharge of debts, contained in Chapter 7 of the Bankruptcy Code, although some debtors seeking to discharge student loans will file for rehabilitation for persons with regular income, Chapter 13 relief (Tabb: 92).

[6] Filing a petition for bankruptcy along with certain financial information, the first step in the process for seeking relief under the Code, converts much of the debtor’s property into the bankruptcy estate. In other words, the debtor files papers, or schedules, with the court stating what the debtor owes, what the debtor’s expenses are, and what property the debtor owns. The property of the debtor then is separated from the debts and becomes the property of the newly established bankruptcy estate (Tabb: 92). In the case of individuals, certain property, such as a residence, household goods, and clothes, may be exempt and is not affected by the bankruptcy (Treister: 137; 143; 345-351). This property cannot “be reached by prepetition unsecured creditors” to pay for prepetition debts (Treister: 137; 345).

[7] The debtor in a Chapter 7 or Chapter 13 bankruptcy, those most common in the context of student loan debt, is protected from creditors in several ways and provided with a fresh start in economic life (Treister: 345). The Code allows for the discharge of *in personam* liability on claims and prevents any further action by the creditor on those discharged claims (11 U.S.C. §

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<sup>2</sup> This portion of their concern has become more and more true with the rising cost of education and the recent poor performance of the economy. See, e.g., Steinberg (describing how the change in the economy is effecting parents repaying student loans). See also Carter: 22 (describing how the economy has forced many law firms to cut down their recruiting).

<sup>3</sup> The latest press release on the subject stated that default on student loans was decreasing. U.S. Department of Education. However, for a shocking account of student abuse, see *Consumer Bankruptcy News* (describing story of student who was arrested for using a fake death certificate to get out of paying student loans while at the same time working for the U.S. Department of Interior).

<sup>4</sup> This statement refers to the debtor in *In re Lynn*, who “testified that at times, she went without food because of her commitment to tithing” (696).

524; § 727; § 1141; § 1328). The debtor is freed from having to pay debts that are discharged (Treister: 360). In a Chapter 7 bankruptcy, the discharge eliminates claims related to the debts except claims that are specifically protected by statute (Treister 360; 11 U.S.C. § 523(a)). In Chapter 13 cases, claims provided for in the confirmed, or approved, plan are discharged (11 U.S.C. § 1328). This discharge from debt is why most individuals file for bankruptcy protection. The debtor is freed from liability on the debts and has a “‘fresh start’ in life, in an economic sense” (Tabb: 692).

[8] Certain kinds of debts, however, are nondischargeable (11 U.S.C. § 523(a)). Section 523(a)(8) provides that educational loans are generally not dischargeable. The Code states:

(a) A discharge under [the relevant code sections] does not discharge an individual debtor from any debt -

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor’s dependents . . .<sup>5</sup>

The exception to the rule of non-dischargeability is if the loan is an “undue hardship” on the debtor (11 U.S.C. § 523(a)(8)). “Undue hardship” is not defined in the Code.

[9] Courts have developed several tests<sup>6</sup> to determine whether the “undue hardship” standard is met. Courts consider different factors in these tests. For instance, the *Brunner* test, the most common test for undue hardship, sets forth a standard that to discharge a student loan under the Bankruptcy Code, section 523(a)(8), the debtor must show

(1) [that she] cannot maintain, based on current income and expenses, a “minimal” standard of living if forced to repay the loans;

(2) that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan, and

(3) [that she] has made good-faith efforts to repay the loans (*In re Brunner*: 756).

Other courts consider the “totality of the circumstances” when determining if the “undue hardship” standard is met. A bankruptcy court in Maine, for instance, held that the “totality of the circumstances” test was proper because some of the other tests were developed before a change in the Code with regard to the time at which a student loan was automatically dischargeable (*In re Kopf*: 741).

[10] Although there are variations in the tests used, each of the tests considers factors such as the debtor’s education, effort at repayment, and capacity for paying back the loan at a future date. Courts also consider factors outside of the ordinary challenges of life (*In re Kopf*: 741; *In re*

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<sup>5</sup> There are changes proposed for this section in the pending reform to make this exception apply to a wider variety of student loans. See, e.g., U.S. Congress 2002.

<sup>6</sup> Courts have developed no less than four tests for determining whether the “undue hardship” standard is met. See Campbell: 3.

*Brunner*: 755). Different courts use different methods to determine what kinds of expenses are counted as reasonable or necessary to prove undue burden (*Frattini*: 552-70).<sup>7</sup>

[11] Court decisions and statutory amendments have made it increasingly difficult for debtors to discharge their student loans. Many of the courts' tests for undue hardship are difficult to meet.<sup>8</sup> The legislation regarding the student loan exception has also been constricted (Tabb: 729-30). For example, in 1998 Congress amended the bankruptcy code and eliminated a provision in the student loan exception that would allow discharge if the loan had been paid on for seven years. The elimination of the seven-year and out option, and the "undue hardship" tests developed by courts have made it very difficult for debtors to have student loans discharged (*In re Kopf*: 734-35).<sup>9</sup>

[12] There are several policy reasons behind the student loan exception. As Tabb points out "[t]he policy behind the eighth exception [to section 523 (a)] . . . is to prevent abuse of the educational loan system" (Tabb: 730). In the late 1970's, there were reports of students who were using the bankruptcy system to get out of repaying their student loans (Wiese: 446). Another policy reason set forth by the courts is that not allowing student loan discharge will safeguard "the financial integrity of governmental entities and nonprofit institutions that participate in educational loan programs" (Collier: ¶523.14). Further justification for the constriction in the student loan discharge is that student loans are "enabling" in that the loans help students attain higher degrees of education, with the expectation that the borrower will be able to obtain a higher salary when she finishes school. Therefore, it is only fair that the loans be repaid before reaping the rewards of higher education (Tabb: 730, using an example of a newly certified eye surgeon).

[13] Courts are divided about how or whether to include tithing or charitable donations as a reasonable or necessary living expense when determining "undue hardship." For example, one judge discussed how other courts have handled tithing or donation:

Several courts have held that a debtor should be able to continue to tithe, even if the result is to reduce payments to unsecured creditors. The cases which have reached this determination have focused primarily on two facts: (i) that the debtor has tithed consistently; and (ii) that either the debtor's church has required tithing or the debtor has a strong commitment to continue tithing (*In re Lynn*: 699, note 9).<sup>10</sup>

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<sup>7</sup> A popular phrase is that "[t]here are as many factors and tests which have been used to determine undue hardship as there are courts to decide the issue" (*Frattini*: 570, quoting *In re Johnson*: 93).

<sup>8</sup> For example, in the *Brunner* test courts will require that a debtor not only be unable to repay loans and maintain a "minimal" standard of living, and have made attempts to repay the loan, but also that there be additional circumstances that will make repayment of the loan unmanageable for a long time. The most common examples of the additional circumstances are sickness, lack of job skills, a number of children or dependents or any of those circumstances combined (*In re Brunner*: 755).

<sup>9</sup> In *In re Kopf*, the debtor was unable to obtain a discharge where she had \$1328 per month in income, and \$1262 in expenses (leaving her \$66 after expenses) (*In re Kopf*: 733). The debtor in *In re Lynn*, a case which came out before the seven-year provision was repealed, was unable to receive a discharge despite her not being employed and having debts in excess of \$40,000 (*In re Lynn*: 694-695). On the other hand, a discharge of a student loan was allowed in *In re Meling*, where the debtor was diagnosed as having bipolar disorder (*In re Meling*: 276).

<sup>10</sup> For a similar decision, see *In re Lee*: 37-39

This court went on to find that in light of the *Smith* decision, discussed below, tithing was not properly included in her expenses to establish undue hardship. The court seemed to be influenced by the fact that the debtor did not stop receiving “services or benefits from her church” if she did not tithe (*In re Lynn*: 700).

[14] Other courts try to avoid discussing the value or consideration that tithing or donating brings to the debtor, and instead base their decisions on other factors, such as whether the debtor meets the prongs of the *Brunner* test (*In re Lawson*: \*13-14). Courts have also considered whether the debtor is living extravagantly (*In re Lebovits*: 269) or whether the expense of tithing is appropriate under the debtor’s circumstances (*In re McLeroy*: 879). Some courts have compared tithing to the “disposable income” calculation in a different section of the Code (*In re Lynn*: 697). Disposable income is defined as “income which is received by the debtor and which is not reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor . . . “ (11 U.S.C. § 1325(b)(2)).<sup>11</sup> The debtor will generally argue that tithing or donation should be included in what is “reasonably necessary” for their “maintenance and support.”<sup>12</sup> When tithing is involved, other legislation may affect a court’s decision.

#### *Religious Freedom Restoration Act and the Donation Act*

[15] Two pieces of controversial federal legislation come into play in situations where debtors wish to discharge student loans and tithe (or possibly do not come into play, as stated by the court in *In re McLeroy*: 875). These statutes were introduced in the early and mid 1990’s (Klee: 160-61).

[16] The first is the Religious Freedom Restoration Act (RFRA). Enacted in 1993, RFRA was an attempt by Congress to re-establish the line of reasoning that the Supreme Court had espoused in the cases of *Sherbert v. Verner* and *Wisconsin v. Yoder*. These cases made any general law that burdened the free exercise of religion subject to a compelling interest test that could only be overcome by the least restrictive means. This appeared to be the Supreme Court’s approach to free exercise jurisprudence until *Employment Division v. Smith*. In *Smith*, the Court abandoned the compelling interest test of *Sherbert* and *Yoder*, and only allowed striking down laws that burdened religion that were “designed specifically to hinder religious conduct” or were not “rational” (Duclos: 667-669, 672).

[17] *Smith* caused much negative criticism against the Supreme Court.<sup>13</sup> Consequently, RFRA was Congress’ attempt to restore the *Sherbert* and *Yoder* test by adding provisions that only laws

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<sup>11</sup> The court in *In re Lynn*, which did not discharge the student loan, cited to this statute (*In re Lynn*: 697). This makes an interesting dilemma, as this statute was changed by the Donation Act to include charitable donations.

<sup>12</sup> See, for example, *In re Lynn*: 700 (describing how the debtor held “strong religious beliefs” and was committed to tithing and arguing that tithing should be “an appropriate expense to be considered in the analysis of what constitutes undue hardship”); *In re Reynolds*: 684 (describing the debtor’s claims that his tithe should be included as an item for reasonably necessary maintenance or support).

<sup>13</sup> For example, in a statement by Rep. William E. Dannemeyer of California, the *Smith* decision is referred to as an “embarrassment” that “will undoubtedly go down in legal history as a case study in intellectual rigidity.” (U.S. Congress 1990). Another representative compared the *Smith* decision to Tiananmen Square (U.S. Congress 1990; statement of Stephen J. Solarz). William Dodson, Director, Government Relations, Southern Baptist Convention stated: “The Court’s rejection of [the principle that if a law substantially burdened religion, government would have to justify it] in *Smith* has harmed religious liberty” (U.S. Congress 1998). Colby M. May of the American Center for Law and Justice argued:

of general applicability that (1) furthered a compelling government interest, and (2) were the least restrictive means of furthering that interest, could burden the exercise of religion (RFRA § 3). RFRA, as originally enacted, applied to both state and federal laws (*Boerne*: 516).

[18] A constitutional challenge to RFRA was decided in 1997 in the case of *City of Boerne v. Flores* (507). In *Boerne* the Supreme Court held that Congress had exceeded its limits under section 5 of the Fourteenth Amendment to the Constitution in the state law portion of RFRA by enacting a law with “[s]weeping coverage” which “applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment” (*Boerne*: 532). It should be noted, however, that recent decisions by federal appellate courts have validated the constitutionality of the *federal* portion of RFRA.<sup>14</sup>

[19] As a result of the *Smith* and *Boerne* decisions and the Supreme Court’s remanding of *In re Young*, Congress enacted the Religious Liberty and Charitable Donation Protection Act of 1998 (Donation Act).<sup>15</sup> *Young* was the culmination of a series of decisions in the Eighth Circuit relating to fraudulent transfers. In a bankruptcy case, transfers by an insolvent debtor in exchange for less than reasonably equivalent value can be recovered as a fraudulent transfer (Treister: 189-193). In *Young*, the Chapter 7 trustee attempted to recapture money given by the debtors to their church. The Bankruptcy Court and the District Court held that the money transferred to the church was a fraudulent transfer and allowed the creditors to recapture the money. The Court of Appeals for the Eighth Circuit, however, reversed and held that, because returning the money given to the church burdened the debtor’s free exercise of religion, RFRA applied and provided a defense that prevented recovery by the trustee. The Supreme Court later vacated the decision and remanded the case to be examined in light of the *Boerne* decision (*In re Young* 1998: 857).<sup>16</sup> This decision generated further negative criticism and helped urge Congress to pass the Donation Act (Klee: 160).

[20] The Donation Act amended the Bankruptcy Code in several sections, allowing the debtor to make contributions of up to fifteen percent of her income. The Donation Act changed section 548(a), making a charitable contribution, as defined by the Internal Revenue Code, not qualify as a transfer that can be reclaimed by a creditor (Donation Act § 3(a)). Section 544 relating to the trustee becoming successor or lien creditor in certain situations (§ 3(b)), section 1325(b)(2)(A) relating to post-petition charitable contributions in a Chapter 13 plan (§ 4(a)), and section 707(b) relating to dismissal of bankruptcy cases were also amended to allow for contributions (§ 4(a)). The Donation Act did not change section 523(a)(8) relating to student loans.

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The problem Congress is addressing was created by the Supreme Court when it issued its *Smith* decision in 1990. Instead of adhering to the plain language of the Free Exercise Clause that Congress shall make no law prohibiting the Free Exercise of religion, the Supreme Court in *Smith* instead ruled that government at all levels can indeed make laws prohibiting the Free Exercise of Religion as long as the law has some rational basis and is generally applicable ((U.S. Congress 1998; see also Duclos: 671-72).

<sup>14</sup> For an example of a case upholding the federal portion of RFRA, see *Henderson v. Kennedy*.

<sup>15</sup> See, e.g., the record of Congressman Souder of Indiana discussing the *Smith* decision and the *In re Young* remand (144 *Congressional Record*: H3999-02, H4004).

<sup>16</sup> The procedural history of the *In re Young* case is explained on this page of the case. For discussion of the *Boerne* case, see the discussion above. The Court of Appeals, on remand, reinstated their previous decision and held that the portion of RFRA relating to federal statutes was valid (*In re Young* 1998: 859-63).

[21] These two statutes, RFRA and the Donation Act, reflect the recent trend towards respecting religion (Klee: 160). This respect for religion reaches the Bankruptcy Code. The Donation Act directly amends sections in the Code. In addition, it is argued that RFRA virtually changes the Code (along with all other federal statutes) (*In re Young* 1998: 861).<sup>17</sup> Against this background, then, the debtor may have arguments where he or she wants to tithe or donate *and* receive a discharge of their student loan.

### **Arguments for Discharge**

[22] Thus far we have seen that there was concern about students using the bankruptcy system to get out of paying their student loans, and that Congress has been making it more difficult to have student loans discharged under the Bankruptcy Code. At the same time, Congress has been promulgating legislation that encourages respect for people's religious beliefs and practices. In many of these cases, student loans are the major part of the debtor's outstanding debts. A tithing debtor, therefore, is faced with a difficult situation.

[23] The debtors in cases like *McLeroy* and *Lebovits*<sup>18</sup> face the uphill challenge of persuading the court that their donation or tithe should be included as a reasonable expense when calculating undue hardship. Many courts analyze undue hardship using the *Brunner* test (see, for example, *In re McLeroy*: 878). Some courts will count the money the debtor used to tithe to demonstrate that paying creditors would not be an undue hardship, as though that money was discretionary for the debtor to spend as they pleased (*In re McLeroy*: 878). Some courts, however, will count this money as a reasonable or necessary living expense in the undue hardship calculus (*In re Lebovits*: 273). This Article will now set forth and analyze two arguments that may be used by the debtor to have moneys included as a reasonable or necessary living expense to meet the high burden of undue hardship.

### *Statutory Challenge*

[24] One argument that a debtor could make is that not allowing the debtor to tithe when considering whether to discharge their student loan violates federal law. Again, the situation would be that the bankruptcy court does not discharge student loans when the court knows that the debtor intends to donate their money. There are arguments to be made under RFRA and the Donation Act.

### *RFRA Argument*

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<sup>17</sup> The court in *In re Young* argued that RFRA "effectively amended the Bankruptcy Code" (861).

<sup>18</sup> In *In re McLeroy*, the debtor signed notes for student loans for their children (874-75). The debtor and his family subsequently acquired other debt due to the debtor's medical condition, and filed for bankruptcy seeking to discharge the student loans (875). The Bankruptcy Court denied the creditors challenge to discharge, and would not allow, because of the Donation Act, the amount of \$490 per month that the family tithed to be considered for repayment to creditors in the determination of undue hardship (875-77). The District Court, however, vacated the Bankruptcy Court's decision and held that the Donation Act did not affect the student loan provision of the Bankruptcy Code (880).

In *In re Lebovits*, the debtor was a social worker who had attended private school in New York, accumulating \$54,000 in debt under a guaranteed student loan program (267-68). In this case the court held that because the Congress had just passed the Donation Act the debtor could donate up to fifteen percent of their income as a living expense, no questions asked (273). No appeal of this case is reported.

[25] The first statutory argument for counting money donated to a church or synagogue as a reasonable or necessary living expense is: A court that imposes the requirement that the student loan creditor be paid,<sup>19</sup> rather than allowing student loan discharge, violates RFRA. RFRA, if applicable and used as a claim or defense by the debtor, would require a court (no doubt aided by creditors) to show the constitutionality of forcing a debtor to make the choice<sup>20</sup> between tithing and giving the money up to creditors to be (1) furthering a compelling government interest and (2) be the least restrictive way to further that interest (RFRA § 2000bb-1). Or, as one court put it,

RFRA . . . has effectively amended the Bankruptcy Code, and has engrafted the additional clause . . . [that a statute] that places a substantial burden on a debtor's exercise of religion will not be allowed unless it is the least restrictive means to satisfy a compelling governmental interest (*In re Young 1998*: 861).

[26] RFRA allows “a person whose religious exercise has been burdened . . . [to] assert . . . violation [of RFRA] as a claim or defense in a judicial proceeding . . . “ (RFRA § (a), (b)). For example, in a recent case, a group of Christians attempted to use RFRA to challenge a National Park Service regulation, claiming that the “regulation imposed a ‘substantial burden’ on their exercise of religion” (*Henderson*). RFRA has provided a defense to conviction of a crime where a Native American was in possession of prohibited eagle feathers (*United States v. Hardman*). In another case, RFRA provided a defense to recovery of a fraudulent conveyance made to a church (*In re Young 1998*).

#### *Donation Act Argument*

[27] Another argument would be that requiring the payment of creditors before allowing the discharge of a student loan violates the Donation Act. A debtor could argue that charitable contributions up to 15% of the debtor's income “could not be included in tallying the Debtor's income” for purposes of the Code (*In re Lebovits*: 273).

[28] As mentioned above, the Donation Act amended several sections of the Bankruptcy Code. The section relevant to this Article, section 523(a)(8), however, is not among those sections. At least one court, nevertheless, has decided that the passage of the Donation Protection Act means that a consumer can donate up to 15% of his income to a church or synagogue (*In re Lebovits*: 273).

#### *RFRA Argument Analysis*

[29] A RFRA claim or defense has several requirements. Assume for this analysis that the federal portion of the RFRA is constitutional. To proceed under a RFRA defense, a party must claim that another statute has burdened his free exercise of religion (*Boerne*: 511; *Henderson*: 1074). The statute then requires that, if the party's free exercise of religion is burdened, the government show that the statute “is in furtherance of a compelling government interest; and . . . is the least restrictive means of furthering that compelling government interest” (RFRA § bb - bb-3).

[30] The debtor's argument under RFRA would be that not allowing the discharge of the student loan “would effectively prevent the debtor[ ] from tithing.” If the court did not count the money

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<sup>19</sup> This would require that tithing either not occur or other sacrifices be made.

<sup>20</sup> For instance, as one debtor suggested, she could not eat in order to tithe (*In re Lynn*).



to tithe or donate as a reasonable expense, it would violate the RFRA. The debtor's free exercise of tithing, if faithfully and consistently practiced, would be burdened (*In re Young* 1996: 1419). If not allowing the discharge is found to be substantially burdening the debtor's free exercise of religion, the government must prove that there is a compelling government interest and not discharging the student loan is the least restrictive means to further that interest (RFRA § 2000bb – 2000bb-1(a), (b)).

[31] Some courts are reluctant to accept this kind of challenge from a debtor. For example, the District Court in *McLeroy* made short shrift of RFRA. In two paragraphs the court eliminated the debtor's argument in relation to tithing and section 523(a)(8). The court stated that (1) the RFRA had no bearing on the case; (2) RFRA was probably unconstitutional, based on *Boerne*; and (3) even if part of RFRA was alive as demonstrated in *Young*, a fraudulent transfer case, the present case had nothing to do with fraudulent transfers and therefore *Young* was not relevant (*In re McLeroy*: 882-883). In *In re Faulkner*, a case relating to the dismissal section of the Code, the debtor fared little better. The court simply stated that RFRA "would not allow a debtor who pledges to tithe to receive a chapter 7 discharge when another similarly situated debtor who does not tithe would not receive such a discharge" (*In re Faulkner*: 648).

[32] In addition, courts have argued that RFRA violates the Establishment Clause of the United States Constitution (*In re Saunders*: 804-6; *Warner*: 1287, note 11).<sup>21</sup> To determine whether a statute violates the Establishment Clause, courts will follow the so-called *Lemon* test, although this test is being questioned by members of the Supreme Court (*Lemon*; *In re Saunders*: 804). This test consists of three prongs: (1) there must be a secular legislative purpose to the statute; (2) the statute must not be meant to advance or inhibit religion; and (3) the statute must not cause "excessive government entanglement with religion" (*Lemon*: 612-13).

[33] The Bankruptcy Court for the District in Massachusetts in *In re Saunders* argued, for example, that RFRA violates all three of the prongs in the *Lemon* test. First, the court argued, the purpose of the statute was, as stated in the statute, "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application . . . where free exercise is substantially burdened . . ." (*In re Saunders*: 804-806; RFRA). The other purpose of the statute, as stated in the statute was to give people a claim or a defense where their religion was substantially burdened. Second, the *Saunders* court argued that if RFRA is used to allow a debtor to tithe instead of paying creditors, it promotes religion over irreligion. Finally, the *Saunders* court argued that if RFRA is allowed to permit tithing, it "imposes a necessity for continuing surveillance leading to an impermissible degree of [government] entanglement" with religion because the court would have to examine the seriousness of the debtor in her or his commitment to tithing (*In re Saunders*: 805-6; internal footnote omitted).

[34] The RFRA defense, nevertheless, has had some success with relation to tithing and bankruptcy. Most notably, the Eighth Circuit held that the portion of RFRA that related to federal statutes was fully intact. The court found that RFRA did not violate the Establishment Clause of the First Amendment to the Constitution and reinstated its earlier decision to not allow the trustee to void the debtor's tithe to their church (*In re Young* 1998: 858-859, 863). In its earlier decision, the Eighth Circuit held that "allowing debtors a fresh start and protecting the

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<sup>21</sup> The author will save for another day the issue of whether factoring in tithing in the discharge of student loans violates the Establishment Clause. The issue has not come up in the cases discussing student loan discharge cited by this Article.

interests of creditors are not compelling governmental interests under the RFRA” and allowed the church to keep the tithe (*In re Young* 1996: 1420).

[35] In addition to the court in *Young* in the Eighth Circuit, other courts have held that the RFRA is consistent with the Establishment Clause of the Constitution. For example, the court in *In re Hodge* argues that although RFRA would fail the *Lemon* test if applied literally, the test must be used “with the judicial gloss which has been placed upon it by subsequent decisions of the Supreme Court.” The court argued that it might be permissible under the first prong of the *Lemon* test for statutes “to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions” (*In re Hodge*: 400; *Zorach*: 335). The *Hodge* court argued that RFRA did not violate the second prong of the *Lemon* test because government itself did not promote a religion – instead it allowed religious people to advance their religion themselves. The *Hodge* court further argued that RFRA would pass the third prong of the *Lemon* test because it is an exemption statute that would not cause the government to be excessively entangled with religion (*In re Hodge*: 400). The Ninth Circuit in *Mockaitis v. Harcleroad*, a case that pre-dates the constitutional challenge posed to RFRA by *Boerne*, argued that as the federal government’s experience has involved religion in things such as tax deductions for religious entities and creation of chaplaincies in Congress and the armed services, RFRA does not create an excessive entanglement of government with religion (*Mockaitis*: 1529-1530). Although this case was written before *Boerne*, it provides arguments that support the constitutionality of RFRA’s federal portion.

[36] An important point for a debtor to bring out in his or her RFRA argument would be the Congressional intent behind the enactment of RFRA (Mikva: 4-9). It seems clear that Congress intended to correct what it felt was a problem of neutral laws impeding people’s exercise of religion (Duclos: 673). The debtor’s argument would then be that section 523(a)(8), although it is a neutral law of general applicability, burdens their free exercise of religion, and, as the *Young* court held, there is no compelling government interest (*In re Young* 1996: 1420).

#### *Analysis of Donation Act Argument*

[37] The debtor who attempts to use a defense under the Donation Act faces a statutory interpretation obstacle.<sup>22</sup> Portions of the Code changed by the Donation Act include power given to parties other than the debtor.<sup>23</sup> The Donation Act also changes several sections of the Code but does not change section 523(a)(8) (*In re McLeroy*: 880-882). This would suggest that the Donation Act would have no effect on student loan discharge. Therefore, a debtor who tithes or donates could not argue that a court order to, in effect, pay creditors rather than tithe would violate the Donation Act.

[38] This statutory interpretation argument of *expressio unius est exclusio alterius*<sup>24</sup> is supported by scholarship (Singer: § 47.23).<sup>25</sup> The portion of Sutherland’s treatise that is espoused by the *In*

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<sup>22</sup> There are other obstacles that parties face when applying the Donation Act, as pointed out by Professor Klee in his recent article (162-69). In addition to the question about whether section 523(a)(8) is affected by the statute, there is a question of whether the 15% limitation is aggregate or per charity, and others.

<sup>23</sup> For example, § 707(b), includes powers of the bankruptcy court itself or the United States trustee, but not the debtor (11 U.S.C. § 707(b)).

<sup>24</sup> “Expression of one thing is the exclusion of another” (*Black’s Law Dictionary*).

<sup>25</sup> The section on *expressio unius est exclusio alterius* is cited by the *In re McLeroy* court (881).

*re McLeroy* court is that “[w]here a statute . . . names the parties granted [the] right to invoke its provisions, . . . such parties only may act” (881)<sup>26</sup> This quote refers to the Donation Act granting rights to the bankruptcy trustee and not to the debtor (*In re McLeroy*: 881).

[39] Any argument utilizing statutory canons such as *expressio unius*, however, is subject to criticism. For example, canons unjustifiably presume legislative intent and do not accurately reflect the legislative process (Mikva: 23-27). In addition, this statutory interpretation does not explain how one court came to the conclusion that the Donation Act automatically grants the debtor the right to contribute up to 15% of their income to charities without having to count this amount in their bankruptcy petition (*In re Lebovits*: 273). Although the court did not offer much in the way of explanation, the court stated

Congress has recently enacted the [Donation Act] to amend the Bankruptcy Code to protect certain charitable contributions. The amendment provides, among other things, that an individual consumer debtor may donate up to fifteen (15%) percent of his income to his church or synagogue. Thus, the Debtor’s charitable contribution is well within permissible limits set by Congress (*In re Lebovits*: 273).

Indeed, the lower court in *McLeroy* made the same presumption for the debtor (*In re McLeroy*: 876). The lower court said that the debtor was *entitled* to make charitable contributions and “[t]here is absolutely nothing [that the court] can do about it” (*In re McLeroy*: 876).

[40] Is it possible that these two bankruptcy courts just completely misinterpreted the meaning and application of the Donation Act?<sup>27</sup> Or are these two courts attempting to reconcile Congressional intent of the Donation Act with the somewhat ambiguous language of the discharge statute?<sup>28</sup> The legislative history indicates that the Donation Act was, in part, promulgated to protect “those who make contributions . . . [and] fall into financial problems and end up before a bankruptcy court” (144 Congressional Record: Rep. Cannon). In addition, religious groups gained “clout” during the 1990’s and exerted political pressure that may have made its way to bankruptcy courts (Klee: 160).

[41] The courts in *Lebovits* and *McLeroy* (bankruptcy court), moreover, may have been trying to fulfill what they felt to be the Congressional intent behind the Donation Act, that is, to protect these tithing debtors and allow them to make their donations rather than paying creditors. Or, perhaps they are trying to give substance to the “undue hardship” standard that is a requisite to discharge of student loans (11 U.S.C. § 523(a)(8)).

[42] The two courts’ arguments seem, however, to be limited. For instance, the weight of logic and authority seems to be on the side of the District Court in *McLeroy* (*In re McLeroy*: 879-83; *In re Ritchie*). The District Court’s arguments are based on established statutory construction principles, whereas the courts in *In re Lebovitz* and *In re McLeroy* (bankruptcy court) do little more than say that the Donation Act exists and therefore the debtor should not have to pay their

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<sup>26</sup> The court was quoting from the U.S. Supreme Court case *Hartford Underwriters Insurance Company v. Union Planters Bank*.

<sup>27</sup> The court argued that the lower court misinterpreted the plain language of the Donation Act (*In re McLeroy*: 879-81).

<sup>28</sup> As stated in *Sutherland on Statutory Construction*, “all rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered . . .” (Singer: § 45.05).

creditors.<sup>29</sup> In addition, another bankruptcy court suggests that the only reason that the *Lebovits* court “allowed” the debtor to tithe was the *de minimus* amount of their tithing (*In re Ritchie*: 920, note 12).

[43] Perhaps a sounder approach for a debtor would be an argument based on both RFRA and the Donation Act.<sup>30</sup> With this approach, a debtor would have to argue that the federal portion of RFRA amended section 523(a)(8) to state that the exception to the discharge of a student loan could not burden the debtor’s free exercise of religion unless it was for a compelling government interest and was the least restrictive means. In other words, the debtor could argue that RFRA amends section 523(a)(8) to say that a loan is not discharged “unless excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor’s dependents”; but if excepting the student loan from discharge “places a substantial burden on a debtor’s exercise of religion [it] will not be allowed unless it is the least restrictive means to satisfy a compelling governmental interest” (*In re Young* 1998: 861).

[44] The debtor could then give definition to her argument with the reasoning from the *Lebovits* court by stating that Congress intended, through the Donation Act, to allow a debtor to tithe or donate up to fifteen percent of their income, no questions asked (*In re Lebovits*: 273). If this donation is under fifteen percent of their income, then it should be included as a reasonable living expense in calculating undue hardship.

#### *Discretionary Challenge*

[45] Another way that a debtor may be able to discharge the student loan is by arguing for the bankruptcy court to use its discretion. The portion of the Bankruptcy Code relating to the discharge of student loans is unique (11 U.S.C. § 523(a)(8)). It is surrounded by mandatory exceptions to discharge: for instance, the Code requires that tax debts be exempt from discharge (§ 523(a)(1)); the Code automatically exempts from discharge “money, property, services” or credit if obtained through fraud (§ 523(a)(2)); and the Code does not generally allow discharge for child support or maintenance or support of a former spouse (§ 523(a)(5)).

[46] The student loan exception to discharge, however, contains language that “gives considerable discretion to the bankruptcy judge to tailor the fresh start policy of the Code to the vagaries of specific fact situations, and to find in effect that in the totality of the circumstances there was no abuse of the system” (Tabb: 731). Often, the outcome of the case will depend on which court and which judge hears it.<sup>31</sup> With this in mind, the argument that the debtor would make would be that the debtor was tithing and will continue to tithe; it is not an abuse of the bankruptcy system; it is in the discretion of the bankruptcy court to allow the debtor to continue to tithe and not count the tithe in determining undue hardship; and therefore in the totality of the circumstances the debtor’s student loans should be discharged.

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<sup>29</sup> Compare *In re McLeroy* (879-83, analyzing the Donation Act) with *In re Lebovitz* (273, mentioning the Donation Act in the process of allowing a debtor to tithe and discharge student loan) and *In re McLeroy* (875-77; District Court discussing Bankruptcy Court hearing).

<sup>30</sup> This approach would have to combine the reasoning from the *In re Young* court (1998) and the *In re Lebovits* court (273).

<sup>31</sup> Compare the two cases that have been discussed in this portion of the article: *In re Lebovits* and *In re McLeroy*.

[47] The overall structure of section 523(a) may provide a tithing debtor the opportunity to have his student loans discharged. As indicated above, section 523(a)(8) is one of the only provisions in the exceptions to discharge section that gives a court discretion. The court must determine if the discharge not being allowed “will impose an undue hardship on the debtor and the debtor’s dependents” (11 U.S.C. § 523(a)(8)).

[48] As noted above, courts have developed different tests to determine whether a debtor qualifies for discharge under the “undue hardship” standard. Because undue hardship is not defined in the Code, courts have developed tests, described above, that often make it difficult for debtors to discharge student loans.

### **Resolution and Recommendation**

[49] The debtor could make a defense based on RFRA, and argue that adding the money into the undue hardship calculus that he wants to donate to his church or synagogue is an undue burden on his free exercise of religion. If the federal portion of RFRA proves to be constitutional the government would have to establish that an order not allowing the discharge of the student loan is the least restrictive means to carry out a compelling government interest. Although some courts have found the Bankruptcy Code itself to be a compelling interest, this may prove difficult for the creditors or the court for reasons set forth in the *Young* case (*In re Young* 1996: 1419-1420). The court may find that the interests of the creditors are not compelling government interests, and therefore find that this impermissibly burdens the debtors’ free exercise of religion. Even if a court finds that the Bankruptcy Code, or the discharge exception for student loans, is a compelling government interest, the court’s decision may also be challenged on the ground that it is not the least restrictive means to further this end.

[50] RFRA’s weakness, however, is its shaky constitutional footing. As discussed above, commentators have expressed their doubts that RFRA is constitutional. An argument under RFRA must be approached with caution.

[51] The Donation Act may also provide the debtor with the chance to count his donating in the calculus of the undue hardship. As indicated above, however, there are serious logical flaws in this argument, the most blatant one being *expressio unius* - the Donation Act changed many parts of the Code, but not the student loan exception.

[52] A court may use its discretion in the bankruptcy to allow the discharge (11 U.S.C. § 523(a)(8)). If the debtor argues that, based on congressional intent of RFRA and the Donation Act, she should be allowed to donate to charity, the debtor may stand a chance at discharge relief of the student loan. This may appeal to the court’s reason when looking at undue hardship because of the other places in the Code where a certain amount of donation is allowed. Unfortunately, there is often a question of equity when the availability of discharge is dependent on where the court is, and which bankruptcy judge hears the bankruptcy case.

[53] Thus, the tithing debtor is faced with a legal, along with a moral, dilemma when considering student loan discharge. On the one hand, Congress is clearly expressing support for free exercise of religion through legislation such as the RFRA and the Donation Act. This clear expression of congressional intent would seem to be in favor of allowing a debtor to tithe or donate rather than forcing him to sacrifice his donation (or in extreme cases forego eating) for the sake of creditors.

[54] On the other hand, Congress seems to be constricting the allowance of student loan discharge. This constriction makes it more and more difficult for debtors to discharge their student loan despite how long they have been paying and their financial condition.

[55] One way to solve this dilemma would be for Congress to amend the Code to add language similar to the Donation Act into the student loan exception and allow the debtor to contribute a percentage of her income. This would clarify the situation for courts and debtors. After all, why would Congress want to allow churches or other charitable institutions to keep *fraudulent transfers*, as in the *Young* case, but not allow debtors to continue tithing rather than paying student loans when it clearly burdens the debtor. This would at least bring consistency to the Code.

[56] Perhaps this dilemma, however, presents an opportunity to give further definition to the term “undue hardship” when courts are deciding whether to allow discharge of a student loan. Realizing that (1) Congress intends not to burden free exercise of religion, *a la* RFRA, and (2) the Donation Act provides a lodestar that a debtor may donate up to fifteen percent of their income in calculating undue hardship. In this way, the debtor may be able to have her donations escape the closing jaws of her creditors into the open arms of charity.

## **Bibliography**

Black, Henry Campbell

1968      *Black's Law Dictionary*. West Publishing Co.

Campbell, Andrew M.

1998      “Bankruptcy Discharge of Student Loan on Ground of Undue Hardship Under § 523(a)(8)(B) of Bankruptcy Code of 1978 (11 U.S.C.S. § 523(a)(8)(B) Discharge of Student Loans.” *American Law Reports - Federal* 144: 1.

Carter, Terry

2001      “Taking Up the Slack.” *American Bar Association Journal* 87: 22.

Collier

2001      *Collier on Bankruptcy*. Fifteenth Edition. Edited by L. King. Newark: Matthew Bender.

*Consumer Bankruptcy News*

2002      “Debtor fakes death to avoid student loan repayment.” *Consumer Bankruptcy News* (February 5).

Duclos, Michael M.

1994-95    “A Debtor’s Right to Tithe in Bankruptcy Under the Religious Freedom Restoration Act.” *Bankruptcy Developments Journal* 665.

Frattini, Jennifer L.

2001      “The Dischargeability of Student Loans: An Undue Burden?” *Bankruptcy Developments Journal* 537.

Jackson, Thomas H.

1986 *Logic and Limits of Bankruptcy Law*. Cambridge: Harvard University Press.

Klee, Kenneth N.

2001 "Tithing and Bankruptcy." *American Bankruptcy Law Journal* 75: 157.

Mikva, Abner J. & Eric Lane

1997 *An Introduction to Statutory Interpretation and the Legislative Process*. New York: Aspen Law & Business.

National Bankruptcy Review Commission

1998 "Survey: Consumer Bankruptcy Developments and the Report of the National Bankruptcy Review Commission." *Business Lawyer*.

Singer, Norman J.

2000 *Sutherland on Statutory Construction*. Sixth Edition. 2A § 47.23 Eagan, MN: Thomson-West.

Steinberg, Jacques

2002 "Hard-Pressed Parents Fall Behind on Tuition." *New York Times* (February 3).

Tabb, Charles Jordan

1997 *The Law of Bankruptcy*. New York: Foundation.

Treister, George M., et al.

1996 *Fundamentals of Bankruptcy Law*. Philadelphia: American Law Institute.

U.S. Congress

1990 "Religious Freedom Restoration Act of 1990: Hearing before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary." 101st Congress.

1998 "Religious Liberty Protection Act of 1998: Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary." 105th Congress.

2002 Conference Report on H.R. 333, Bankruptcy Abuse Prevention and Consumer Protection Act of 2002, dated July 25, 2002. *Congressional Record* 148: H5757.

U.S. Department of Education

2001 "Accountability for Results Works: College Loan Default Rates Continue to Decline." Available at <http://www.ed.gov/PressReleases>.

Wiese, Kurt

1984 "Discharging Student Loans in Bankruptcy: The Bankruptcy Court Tests Of 'Undue Hardship.'" *Arizona Law Review* 26: 445.

Wiggins, Mary Jo

1997 "A Statute of Disbelief?: Clashing Ethical Imperatives in Fraudulent Transfer Law." *South Carolina Law Review* 48: 771.

## Statutes

Bankruptcy Code, 11 U.S.C. § 100 - 1330 (2000).

Higher Education Act of 1965, Pub.L. No. 89-392, Nov. 8, 1965, Title IV, 79 Stat. 1219 (codified at 20 U.S.C. §§ 1087- 1087-4).

Religious Freedom Restoration Act (RFRA) § 3, 42 U.S.C. § 2000bb-1: 1988 & Supp. 1993.

Religious Liberty and Charitable Donation Protection Act (Donation Act). Pub. L. No. 105-183: 1998. (Codified, *inter alia*, in various sections of the Bankruptcy Code.)

## Cases

City of Boerne v. Flores, 521 U.S. 507 (1997).

Employment Div. v. Smith, 494 U.S. 872 (1990).

Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1 (2000).

Henderson v. Kennedy, 265 F.3d 1072 (D.C. Cir. 2001)

*In re Brunner*, 46 B.R. 752 (S.D. N.Y. 1985).

*In re Faulkner*, 165 B.R. 644 (Bankr. W.D. Mo. 1994).

*In re Hodge*, 220 B.R. 386 (D. Idaho 1998).

*In re Kopf*, 245 B.R. 731 (D. Me. 2000).

*In re Johnson*, 121 B.R. 91 (Bankr. N.D. Okla. 1990).

*In re Lawson*, 2000 Bankr. LEXIS 1885 (M.D. Fla. 2000).

*In re Lebovits*, 223 B.R. 265 (E.D. N.Y. 1998).

*In re Lee*, 162 B.R. 31 (Bankr. N.D. Ga. 1993).

*In re Lynn*, 168 B.R. 693 (Bankr. D. Ariz. 1994).

*In re McLeroy*, 250 B.R. 872 (N.D. Texas 2000).

*In re Meling*, 263 B.R. 275 (Bankr. N.D. Iowa 2001).

*In re Reynolds*, 83 B.R. 684 (Bankr. W.D. Mo. 1988).

*In re Ritchie*, 254 B.R. 913 (Bankr. D. Idaho 2000).

*In re Saunders*, 215 B.R. 800 (Bankr. D. Mass. 1997).

*In re Witt*, 231 B.R. 92 (N.D. Okla. 1999).

*In re Young*, 82 F.3d 1407 (8th Cir. 1996), *vacated by*, 521 U.S. 1114 (1997).

*In re Young*, 521 U.S. 1114 (1997).

*In re Young*, 141 F.3d 854 (8th Cir. 1998).

Lemon v. Kurtzman, 403 U.S. 602 (1971).

Mockaitis v. Harclerod, 104 F.3d 1522 (9th Cir. 1997).

Sherbert v. Verner, 374 U.S. 398 (1963).



United States v. Hardman, 297 F.3d 1116 (10th Cir. 2002)

Warner v. City of Boca Raton, 64 F.Supp. 2d 1272 (S.D. Fla. 1999).

Wisconsin v. Yoder, 406 U.S. 205 (1972).

Zorach v. Clauson, 343 U.S. 306 (1952).