

**REWRITE THE BANKRUPTCY LAWS, NOT THE  
SCRIPTURES: PROTECTING A BANKRUPTCY  
DEBTOR'S RIGHT TO TITHE**

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I.	Introduction . . . . .	1224
II.	The Problem . . . . .	1228
	A. The Practical Framework . . . . .	1230
	B. The Legal Framework . . . . .	1233
	1. Are Tithing Contributions Fraudulent Conveyances? . . .	1233
	2. Other Attempts to Protect Tithing Contributions . . . . .	1244
	C. Non-Bankruptcy Limitations on the Avoidance Power . . . . .	1247
	1. Religious Freedom Restoration Act . . . . .	1247
	2. Free Exercise Clause . . . . .	1253
III.	Justifications for Protecting Tithing Contributions from Avoidance . . . . .	1256
	A. Reliance and Efficiency . . . . .	1257
	B. Equitable Arguments . . . . .	1261
	C. Tithing Donations and the "Kickback" Problem . . . . .	1262
	D. Traditional Support for Religious and Charitable Organizations . . . . .	1267
IV.	The Religious Liberty and Charitable Donation Protection Act of 1998 . . . . .	1269
V.	Protecting the Debtor's Post-Petition Right to Tithe . . . . .	1277
	A. Permitting Contributions in Chapter 13 . . . . .	1277
	B. Tithing and Chapter 7 . . . . .	1281
VI.	Conclusion . . . . .	1284

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## I. INTRODUCTION

The Lord said to Moses . . . . A tithe of everything from the land, whether grain from the soil or fruit from the trees, belongs to the Lord; it is holy to the Lord . . . . The entire tithe of the herd and flock—every tenth animal that passes under the shepherd's rod—will be holy to the Lord.<sup>1</sup>

"The bankruptcy laws 'must be rewritten because the Scriptures won't be.'"<sup>2</sup>

Should a bankruptcy debtor be forced to choose between obligations to God and obligations to creditors? Debtors, creditors, and bankruptcy trustees, all aiming to resolve the role of "tithing" contributions made by individual debtors during the period preceding bankruptcy, have asked this question with increasing frequency. In so doing, the bankruptcy system has intervened in a dispute that pits creditors and the mandate of the Bankruptcy Code on the one side against individual debtors seeking to exercise their religious convictions, and the religious and charitable organizations that could suffer severe hardship by being required to disgorge these contributions, on the other.

In response to this ongoing controversy, Congress enacted the Religious Liberty and Charitable Donation Protection Act of 1998 (the Act) in June 1998.<sup>3</sup> Among its primary provisions, the Act would prevent creditors from suing religious and charitable organizations to recover contributions made by insolvent debtors in the time preceding bankruptcy filings. The bill has received widespread support across the political spectrum, from Republican religious conservatives to Democratic civil libertarians.

The reaction of the bankruptcy community to the Act, however, largely has been negative.<sup>4</sup> But this hostility is misplaced. Admittedly,

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1. *Leviticus* 27:1, 30, 32.

2. *Churches Want Donations Protected*, TAMPA TRIB., Sept. 23, 1997, at 4 (quoting Stephen Paul Gould, Senior Pastor, Crystal Evangelical Free Church in New Hope, Minn.).

3. A copy of the Act as introduced is attached as an Appendix. All specific references will be made to that Appendix.

4. For instance, the National Bankruptcy Conference opposed the central portion of the Act which applies to recovery of tithing contributions as fraudulent conveyances. See *Bankruptcy Issues in Review: The Bankruptcy Code's Effect on Religious Freedom and a Review of the Need for Additional Bankruptcy Judgeships: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 105th Cong. 44 (1997) (prepared statement of Donald S. Bernstein on behalf of the National Bankruptcy Conference) [hereinafter Bernstein Testimony]; see also Lisa Fickenscher, *Bankruptcy Reformers Debate Tithes That Bind*, AM. BANKER, Nov. 20, 1997, at 13 (reporting opposition of National Bankruptcy Conference to the Act). The National

forbidding a bankruptcy trustee from recovering tithing contributions as constructively fraudulent conveyances will reduce the estate assets available to pay trustees' fees and to distribute to creditors. Nonetheless, the burdens the Act imposes on bankruptcy trustees are substantially outweighed by the policy goals of protecting debtors' religious freedom and protecting churches from the hardship of disgorged contributions. Moreover, the protections contemplated by the Act are fully justified in light of both traditional bankruptcy policies and this country's historical support for the activities of religious and charitable organizations.

A brief word about methodology: Although in some places this Article makes arguments reasoning from first principles, much of it does not purport to provide a ground-up, deductive, general theory for protection of tithing contributions. I adopt Cass Sunstein's definition: "By a general theory, I mean an approach to law that specifies a simple and (usually) unitary value, that operates at a high level of abstraction, and that decides cases by bringing the general theory to bear."<sup>5</sup> As Sunstein adds, "[a]n approach of this kind operates deductively. Results in particular cases are viewed as a logical consequence of the general theory."<sup>6</sup>

Much of the argument of this Article is analogical and comparative. It takes as established givens many elements of modern bankruptcy and fraudulent conveyance law: for example, the availability of many forms of exempt property for an individual bankrupt debtor.<sup>7</sup> Professor Sunstein describes this process of analogical reasoning:

- (1) Some fact pattern A—the "source" case—has certain characteristics; call them X, Y, and Z. (2) Fact pattern B—the "target" case—has characteristics X, Y, and A, or characteristics

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Bankruptcy Review Commission voted down a similar proposal presented by Commissioner Edith H. Jones, U.S. Court of Appeals for the Fifth Circuit. Most scholarly commentary has largely been negative as well. See Kenneth E. Aaron, *Senator Grassley's Tithing Bill "Inappropriate,"* 31 BANKR. CT. DEC. at A7 (1997); Daniel Keating, *Bankruptcy, Tithing, and the Pocket-Picking Paradigm of Free Exercise*, 96 U. ILL. L. REV. 1041 (1996); Oliver B. Pollak, *"Be Just Before You're Generous": Tithing and Charitable Contributions in Bankruptcy*, 29 CREIGHTON L. REV. 527 (1996); Mary Jo Newborn Wiggins, *A Statute of Disbelief?: Clashing Ethical Imperatives in Fraudulent Transfer Law*, 48 S.C. L. REV. 771 (1997); Robert J. Bein, Comment, *Robbing Peter to Pay Paul: Charitable Donations as Fraudulent Transfers*, 100 DICK. L. REV. 103 (1995); Judge Tice Takes on the Biblical Concept of Tithing, CONSUMER BANKR. NEWS, Mar. 12, 1998, at 7. But see Steven Hopkins, Comment, *Is God a Preferred Creditor? Tithing as an Avoidable Transfer in Chapter 7 Bankruptcies*, 62 U. CHI. L. REV. 1139 (1995).

5. CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 14 (1996).
6. *Id.*
7. See *id.* at 69.

X, Y, Z, and A. (3) A is treated a certain way in law. (4) Some principle, created or discovered in the process of thinking through A, B, and their interrelations, explains why A is treated the way that it is. (5) Because of what it shares in common with A, B should be treated the same way. It is covered by the same principle.<sup>8</sup>

For instance, it will be argued that if one accepts that a debtor may withhold certain exempt property from creditors and retain that property during the bankruptcy process and afterward, then one similarly should permit the debtor to make an arm's-length conveyance of the property to a socially-beneficial organization—a conveyance in which the debtor does not retain the property after bankruptcy.<sup>9</sup> Similarly, if one accepts that it is allowable for a debtor to gamble away assets on the eve of bankruptcy, it should also be permissible for the debtor to donate those assets to worthwhile, charitable causes.<sup>10</sup> “In this sense, analogical reasoning, as a species of casuistry, is a form of ‘bottom-up’ thinking. Unlike many kinds of reasoning, it does not operate from the top down.”<sup>11</sup>

Indeed, the bankruptcy community's attachment to abstract conceptual models of “proper” fraudulent conveyance law has led to tone deafness on this issue. There is a fundamental dissonance between this attachment of the bankruptcy community to its formalistic models, models that protect uncurbed gambling losses but not religious tithing contributions, and the intuitions of the community and its elected representatives, who believe a model that generates such manifestly unreasonable results must be flawed.<sup>12</sup> Moreover, the public's outrage at the seemingly unfair and bizarre operation of a bankruptcy machine run amuck is dismissed by the bankruptcy community as uninformed and sentimental. As Professor Sunstein aptly observes:

And some people who endorse general theories do not like to rely on people's ordinary judgments about particular cases, which are dismissed as “intuitions.” Those who use general theory are often insistently anticasuistical and quite willing to disregard the fact that people are disturbed by particular

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8. *Id.* at 65.

9. *See infra* notes 169-73 and accompanying text.

10. *See infra* notes 163-64 and accompanying text.

11. SUNSTEIN, *supra* note 5, at 68.

12. *See supra* notes 3-4 and accompanying text (comparing opposition of bankruptcy community to protection of tithing contributions versus support of public and elected representatives).

outcomes that seem counterintuitive but that have been compelled by the general theory.<sup>13</sup>

Undoubtedly, a method of analogical and comparative argument would seem less persuasive if we lived under a "perfect" bankruptcy system in which the entire structure of debtor-creditor law reflected the implementation of a single, unifying theory. But there is no indication that such a world is imminent for bankruptcy law, or that we are even close to identifying a cohesive vision of the bankruptcy system.<sup>14</sup> Instead, bankruptcy law embodies trade-offs among many often contradictory, competing constituencies and pressures.<sup>15</sup> It is difficult to draw bright lines. The issue of protecting tithing contributions within the bankruptcy system reflects this trade-off, balancing historical public support for nonprofit organizations and their missions, the First Amendment's protection for religious liberty, and the frequently competitive goals of the bankruptcy system. In resolving such a multifaceted issue, prudence and contextual reasoning may provide a better guide than formalistic, abstract models.<sup>16</sup> Thus, this Article recognizes at the outset that this issue, like the trade-offs inherent in the Bankruptcy Code itself, is a muddle. Where confronted with a muddle, however, it is usually better to "muddle through" than simply to abandon the journey because an abstract theory cannot adequately rationalize the issue. In our world, perfection is unattainable, but internal consistency may be approachable.<sup>17</sup>

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13. SUNSTEIN, *supra* note 5, at 15.

14. See Donald R. Korobkin, *The Role of Normative Theory in Bankruptcy Debates*, 82 IOWA L. REV. 75 (1996) (reviewing various theories of the proper scope of bankruptcy law). Compare Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043 (1992) (advocating abolition of Chapter 11), with Elizabeth Warren, *The Untenable Case for Repeal of Chapter 11*, 102 YALE L.J. 437 (1992) (arguing for expansive role for Chapter 11).

15. See Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47 (1997).

16. See Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1569 (1985):

A prudent judgment or political program is, above all, one that takes into account the complexity of its human and institutional setting, and a prudent person, in this sense, is one who sees complexities, who has an eye for what Bickel called the "unruliness of the human condition," but is nevertheless able to devise successful strategies for the advancement (however gradual or slow) of his own favored principles and ideals.

(footnote omitted). See also Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990).

17. See 1 F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 115 (1973).

More fundamentally, this Article rejects the arguments of those critics who allege that the position advanced here would rupture a fundamental underpinning of the bankruptcy system. Rather, this Article concludes that under certain circumstances, and when proper protections against abuse are in place, reasonable tithing contributions are consistent with the existing structure of fraudulent conveyance and bankruptcy law.

Part I of this Article presents the background to the current debate, including the impact of the Supreme Court's decision in *City of Boerne v. Flores*,<sup>18</sup> which invalidated some applications of the Religious Freedom Restoration Act (RFRA). Part II explains the justifications for protecting such transfers in bankruptcy, and how those goals can be reconciled with the policies of the Bankruptcy Code. Part III provides an overview of the relevant provisions of the Act as they relate to the protection of tithing contributions from attack as fraudulent conveyances. Part IV reviews the Act as it applies to the related area of protecting a debtor's right to make tithing contributions under a Chapter 13 plan, or eligibility for Chapter 7 relief. Part V presents some concluding thoughts.

## II. THE PROBLEM

The problem of bankruptcy trustees suing religious and charitable organizations to recover contributions as fraudulent conveyances appears to be of recent vintage. Despite the novelty of such actions, however, the basis for them is by no means new. Instead, it appears to be an extension of traditional fraudulent conveyance law. Courts, however, have inconsistently applied some aspects of fraudulent conveyance law, thereby treating these donations *less favorably* than comparable non-tithing transfers.

Under section 548 of the Bankruptcy Code, a bankruptcy trustee may avoid any property transfer of the debtor made or incurred on or within one year before the date of the filing of the petition under two circumstances. Subsection (a)(1) permits the avoidance of transfers made with "actual fraudulent intent," or where the debtor "made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud" his creditors. Subsection (a)(2) permits avoidance of "constructively fraudulent transfers," where the debtor "received less than a reasonably equivalent value in exchange for such transfer" and was insolvent at the time of the transfer, or the transfer made him insolvent. Whereas subsection (a)(1) requires a showing that the debtor acted with the actual intent to defraud creditors:

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18. 117 S. Ct. 2157 (1997).

[T]he § 548(a)(2) “constructive fraud” provision does not require that a debtor act with actual intent to defraud the creditors before a transfer can be avoided. It operates to avoid transfers motivated by generosity, rather than fraud, reflecting the policy that an insolvent should be “just to his creditors before he is generous to others.”<sup>19</sup>

Because of the difficulties associated with trying to prove a debtor’s actual intent at the time of the transfer, most cases have been brought under subsection (2), which presents less onerous proof problems.<sup>20</sup>

The avoidance power of 11 U.S.C. § 548 is buttressed by the so-called “strong-arm” power of 11 U.S.C. § 544(b), which permits the trustee to “avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law.” Under this provision, the trustee has the authority to step into the shoes of other creditors and exercise the rights of a creditor under state law, including bringing an action pursuant to state fraudulent conveyance laws. Although trustees usually rely on 11 U.S.C. § 548 for fraudulent conveyance actions, they can reach the same result under 11 U.S.C. § 544 with one additional benefit: State reach-back periods for recovery of fraudulent conveyances are generally longer than the one-year period under 11 U.S.C. § 548. In some states, this period may be as long as six years.<sup>21</sup>

In an “avoidance” of the transfer, the Bankruptcy Code undoes the effect of the transfer, forcing the transferee (for example, a church or charity) to pay the bankruptcy trustee the total amount transferred, unless the property subsequently transfers to a bona fide purchaser for value.<sup>22</sup> These funds are then distributed according to the priority scheme of the Bankruptcy Code. Because the transfer is deemed a fraudulent conveyance, the transferee receives no distribution in the bankruptcy case.<sup>23</sup> Rather, the transferee simply is forced to disgorge the funds,

19. *Weinman v. Word of Life Christian Ctr. (In re Bloch)*, 207 B.R. 944, 947 (D. Colo. 1997) (quoting *Morris v. Midway S. Baptist Church (In re Newman)*, 203 B.R. 468, 473 (D. Kan. 1996)).

20. All of the cases dealing with attacks on tithing contributions have been brought under the constructive fraud prong. *See Keating, supra* note 4, at 1053 (“Nobody has accused any of these debtors of actually intending to defraud anybody.”).

21. *See, e.g., Palatine Nat’l Bank v. Strom (In re Strom)*, 97 B.R. 532 (Bankr. D. Minn. 1989) (statute of limitations under Minnesota law for fraudulent conveyance is six years (citing MINN. STAT. ANN. § 541.05)).

22. *See UNIF. FRAUDULENT CONVEYANCE ACT* § 9, 7A U.L.A. 577 (1985); *see also Douglas G. Baird & Thomas H. Jackson, Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 830 (1985).

23. Thus, this scenario can be contrasted with the recovery of a preference, where the recipient of the preferential payment still retains a right to share in the distribution of

which are used first to pay the expenses of administering the estate, with the remainder distributed to creditors.

### A. The Practical Framework

In recent years, bankruptcy trustees have used 11 U.S.C. §§ 548 and 544 to target religious organizations as the recipients of fraudulent conveyances for contributions made in the period preceding an individual's bankruptcy filing. The frequency of these attacks has increased in recent years.<sup>24</sup> A participant in one such case observed that there has been a "plethora of similar cases in a short time," and that there are "scores" of such cases now in the courts, "with new ones being placed into the judicial pipeline on an almost daily basis."<sup>25</sup>

Some suggest it is open season on churches.<sup>26</sup> The self-restraint and stigma associated with suing churches to recover tithing contributions that historically reined in trustees have disappeared. Today, these restraints must appear anachronistic to bankruptcy trustees, who work to recover funds sufficient to pay their fees and generate recoveries for unsecured creditors. Given that approximately ninety-six percent of individual Chapter 7 debtors make no distribution at all to creditors,<sup>27</sup> the sums held by churches must be an inviting target for bankruptcy trustees.<sup>28</sup> Indeed, trustees may very well have a fiduciary obligation to

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the estate's assets. See 11 U.S.C.A. § 547 (West, WESTLAW through Pub. L. No. 105-216, approved July 29, 1998). In the fraudulent conveyance scenario, by contrast, the transferee who is forced to disgorge the funds has no claim against the estate, and thus it is not entitled to even a pro rata distribution.

24. See Peter Califano, *A Surprising Defendant in Bankruptcy Avoidance Litigation*, COMM. L. BULL. 20, 21 (Mar./Apr. 1997) (describing a "troubling trend in the Bankruptcy Courts"), reprinted in 1 RELIGIOUS LIBERTY NEWS No. 2, Spring 1997, at 1.

25. *Bankruptcy Issues in Review: The Bankruptcy Code's Effect on Religious Freedom and a Review of the Need for Additional Bankruptcy Judgeships: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 105th Cong. 7, 8 (1997) (prepared statement of Stephen Paul Goold, Senior Pastor, Crystal Evangelical Free Church) [hereinafter Goold Testimony].

26. See *Churches Want Donations Protected*, supra note 2 (quoting Steven McFarland, director of the Center for Law and Religious Freedom of the Christian Legal Society, who describes subsequent litigation against churches as "a feeding frenzy").

27. See Michael J. Herbert & Domenic E. Pacitti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed During 1984-1987*, 22 U. RICH. L. REV. 303, 310-11 & n.30 (1988).

28. For instance, if a debtor making \$50,000 per year contributes the biblical tithe of 10% of income in a given year, then that is a pot of \$5000 recoverable by the trustee. If the trustee is able to reach back six years pursuant to 11 U.S.C. § 544 and applicable state law, then the trustee can recover \$30,000. Indeed, even if a debtor contributes the



the estate's creditors to seek those funds. As a result, not only do trustees lack sufficient incentives to restrain themselves, they may actually lack legal standing to forego such actions.<sup>29</sup>

Trustees have an added incentive to litigate such matters. As a repeat player in this litigation game, a Chapter 7 trustee may handle as many as several hundred personal bankruptcy cases over the span of a career. Out of these, many cases might involve debtors who have made tithing contributions to churches that the trustee can pursue as fraudulent conveyances. Because many cases will repeat similar issues, a trustee may see fraudulent conveyance actions as an investment of sorts: A reputation as a trustee who successfully pursues churches belligerently can compel such organizations to settle promptly. Failure to submit to the pressures of settlement can be costly for a church. If the trustee litigates or appeals an adverse judgment, the church faces multiplying legal fees and the public spectacle of such a case. On the other hand, if a trustee is found to be excessively litigious, the consequences may be small: The trustee may suffer only the loss of reimbursement of fees and expenses for the improper actions. The trustee's other fees will be unaffected. Throughout the proceeding, the trustee will be entitled to recover those fees and expenses reasonably contemplated to generate a benefit for the estate.

By contrast, most individual churches will not be repeat players in the fraudulent conveyance arena. As a result, they will compare only the costs and benefits for their particular cases. Unlike trustees, churches will not encounter future cases in which they can recoup a reputational investment established in an earlier proceeding. Moreover, a church's moral and spiritual role in the community may dissuade it from engaging in contentious litigation that exposes the church and the debtor to public embarrassment.

The problem is compounded because churches and charities often lack the financial resources to fight fraudulent conveyance actions.

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relatively nominal sum of \$50 per week to the collection plate, this will amount to \$2600 at the end of the year, a sufficiently large amount to justify the trustee's efforts to collect it.

29. Thus, there seems to be some basis to question the assertion of Professor Newborn Wiggins that "[t]here is no reason to believe that trustees will use their discretion unwisely." Wiggins, *supra* note 4, at 791. Moreover, even if the trustee does not bring the action, private creditors may be able to petition the court to allow them to bring the claim, thereby undermining the trustee's self-restraint. See discussion *infra* notes 198-202 (discussing *Cedar Bayou* case). Professor Newborn Wiggins's optimism on this score seems no more well-founded than Professor Carlson's similar misplaced optimism a decade ago that courts would prevent trustees from levying on gifts and tithing contributions. See David Gray Carlson, *Is Fraudulent Conveyance Law Efficient?*, 9 CARDOZO L. REV. 643, 676 n.85 (1987).

Unlike the bankruptcy trustee and his or her lawyers, whose fees are paid by the estate, churches must retain their own legal counsel. Most religious and charitable organizations simply lack these resources.<sup>30</sup> As Professor Richard Flint observes, “[t]hese organizations do not have the financial capability to employ an attorney for advice, nor for litigation. In most of the situations that I am familiar with, the religious organizations have simply turned the alleged transfer over to the trustee without any determination of whether it was or was not a true fraudulent transfer. They simply cannot afford to seek counsel.”<sup>31</sup> Those churches that have financial resources will have to divert resources toward attorneys’ fees and away from their religious and charitable operations.<sup>32</sup> Thus, fraudulent conveyance actions force these organizations to weigh litigation against other ministerial missions. Moreover, absent the Act, churches and charities have doubtful chances of even prevailing in such litigation.<sup>33</sup>

Nor is it cost-effective for churches to defend fraudulent conveyance actions. At a minimum, contesting such actions usually requires the expenditure of several thousand dollars in attorneys’ fees just to fight the case in the bankruptcy court. Even if the church prevails in bankruptcy court, its expenses will mount if the trustee appeals the decision. In light of these practical difficulties, most churches simply give up and turn the tithing contributions over to the estate.

The amount spent on legal fees and litigation expenses often will equal or exceed the amount of the tithing contribution that the trustee seeks to recover. Consider the plight of the Crystal Evangelical Free Church, a church that decided to stand on principle and fight the return of one of its member’s tithing contributions. According to the testimony of Dr. Stephen Paul Goold, Senior Pastor, the church has spent approximately \$280,000 defending an action stemming from avoidance tithing contributions.<sup>34</sup> The massive size of this expenditure is even

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30. See *Bankruptcy Issues in Review: The Bankruptcy Code’s Effect on Religious Freedom and a Review of the Need for Additional Bankruptcy Judgeships: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 105th Cong. 12, 13 (1997) (prepared statement of Richard E. Flint) [hereinafter Flint Testimony] (“Not one parish in our Diocese had an attorney on retainer, nor was there a line item in the budget to cover legal expense.”).

31. *Id.* at 13.

32. See *id.* at 13 (“Every parish in our diocese had extremely tight budgets, such that a minor unexpected expenditure [such as on attorneys’ fees] would create real problems in fulfilling its yearly program.”).

33. See *infra* notes 36-48 and accompanying text.

34. See Goold Testimony, *supra* note 25, at 8. It should be noted that this large expense appears to be atypical, and that it is doubtful that many churches have incurred expenses to such a large degree.

more startling because the amount of the contributions that the bankruptcy trustee sought to recover was only \$13,450.<sup>35</sup> It is little wonder that when sued by bankruptcy trustees, most churches do not contest and instead simply write a check.

These factors skew any balance in the relative positions of churches vis-a-vis trustees. Churches lack sufficient incentive to incur the cost and embarrassment associated with challenging a bankruptcy trustee. By contrast, trustees possess strong financial and legal incentives to prosecute these cases. The imbalance of incentives creates a dynamic driving churches to a swift and lopsided settlement of the case.

### *B. The Legal Framework*

#### 1. ARE TITHING CONTRIBUTIONS FRAUDULENT CONVEYANCES?

This imbalance of power between bankruptcy trustees and churches is exacerbated by the legal plight churches confront. Because churches provide spiritual, not economic, benefits to their members, those benefits are not cognizable under the Bankruptcy Code. As a result, absent the Act, churches have few substantive defenses against avoidance actions.

Fraudulent conveyance law only requires that the debtor receive “reasonably equivalent value in exchange for” the property transferred. Section 548(d)(2)A elaborates, noting that “value” means “property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor.” Thus, by the Code’s own terms, “value” appears to require the receipt of tangible economic benefit, whether property or the satisfaction or securing of a debt.

The Code’s limitation of “value” to tangible economic value is consistent with longstanding principles of fraudulent conveyance law.<sup>36</sup> Thus, spiritual or other intangible values such as love, affection, or respect, generally have not been considered to be of a “value” sufficient to meet the test to protect a transfer from attack as a fraudulent conveyance.<sup>37</sup> Moreover, and more relevant to the tithing situation, gifts

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35. See *Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1410 (8th Cir. 1996), *vacated and remanded*, 117 S. Ct. 2502 (1997).

36. See, e.g., *Weinman v. Word of Life Christian Ctr. (In re Bloch)*, 207 B.R. 944, 948 (D. Colo. 1997) (“Contrary to the Defendant’s assertions, the statute requires that the debtor must have been provided with something of economic, as opposed to religious or spiritual, value.”); *Morris v. Midway S. Baptist Church (In re Newman)*, 203 B.R. 468, 473 (D. Kan. 1996).

37. See *Walker v. Treadwell (In re Treadwell)*, 699 F.2d 1050, 1051 (11th Cir. 1983) (holding “[l]ove and affection” to be inadequate consideration and thus voiding gifts

or conveyances made out of a "moral obligation" also are inadequate.<sup>38</sup> The absence of a specific quid pro quo for contributions made to churches and charities has led one court to lament that this doctrine dooms the "typical" contribution animated by charity and religious obligation.<sup>39</sup>

Understanding why the "value" requirement is restricted to economic value requires an understanding of the purposes of fraudulent conveyance law itself. As an initial matter, the purpose of fraudulent conveyance law is to prevent debtors from dissipating their assets and placing them outside the reach of creditors.<sup>40</sup> For purposes of fraudulent conveyance law, "what constitutes a reasonably equivalent value must be determined from the standpoint of a *debtor's creditors*."<sup>41</sup> Thus, where the debtor

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to daughters as fraudulent transfers). *But see* *Wilson v. Upreach Ministries (In re Missionary Baptist Found.)*, 24 B.R. 973, 979 (Bankr. N.D. Tex. 1982) (justifying contributions made while insolvent as nonavoidable when nonprofit corporation existed solely for the purpose of making such contributions and such contributions "reasonably enhanced" the "morale of the employees and the good will of all of those people with whom [the nonprofit corporation] dealt").

38. *See* *Whitlock v. Hause (In re Hause)*, 13 B.R. 75, 79 (Bankr. D. Mass. 1981) (distinguishing between "moral obligation" and "legal liability"); *see also* *Maddox v. Robertson (In re Prejean)*, 994 F.2d 706, 707 (9th Cir. 1993) (holding that moral obligation was not sufficient consideration for payment of debt, but that payment of time-barred debt was not fraudulent conveyance because debt would be enforceable but for the statute of limitations).

39. *See* *Young*, 82 F.3d at 1415 & n.5; *see also* *Hernandez v. Commissioner*, 490 U.S. 680, 691 (1989) (stating that quid pro quo is inconsistent with charitable contribution); *United States v. American Bar Endowment*, 477 U.S. 105, 118 (1986) ("The sine qua non of a charitable contribution is a transfer of money or property without adequate consideration.").

40. *See* *Treadwell*, 699 F.2d at 1051 ("The object of section 548 is to prevent the debtor from depleting the resources available to creditors through gratuitous transfers of the debtor's property." (citing S. REP. NO. 95-989, at 89 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5875)); THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 148 (1986) ("The essence of fraudulent conveyance law is to prevent manipulative activities by the debtor."); Baird & Jackson, *supra* note 22, at 829 ("A debtor cannot manipulate his affairs in order to shortchange his creditors and pocket the difference."); Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 778 (1984); Jack F. Williams, *The Fallacies of Contemporary Fraudulent Transfer Models as Applied to Intercorporate Guaranties: Fraudulent Transfer Law as a Fuzzy System*, 15 CARDOZO L. REV. 1403, 1421 (1994) [hereinafter Williams, *Fallacies*] ("Courts have held that the purpose of fraudulent transfer law is the preservation of the debtor's estate for the benefit of its unsecured creditors."); Jack F. Williams, *Revisiting the Proper Limits of Fraudulent Transfer Law*, 8 BANKR. DEVS. J. 55, 59 (1991) [hereinafter Williams, *Revisiting*].

41. Williams, *Fallacies*, *supra* note 40, at 1421 (emphasis added); Williams, *Revisiting*, *supra* note 40, at 80. *See also* Jonathan C. Lipson, *First Principles and Fair Consideration: The Developing Clash Between the First Amendment and the Constructive Fraudulent Conveyance Laws*, 52 U. MIAMI L. REV. 247, 254 (1997).

surrenders property such as inventory, but receives equally valuable property in exchange, such as cash, there is no fraudulent conveyance. Creditors do not differentiate between the cash and the inventory.<sup>42</sup>

Although the touchstone of fraudulent conveyance law is that value is measured from the creditors' perspective, in practice the "reasonably equivalent value" test instead is applied from the *debtor's* perspective.<sup>43</sup> Where the debtor receives reasonably equivalent value, the transfer is protected sufficiently, even though the goods received in exchange provide no value to the creditors. Thus, if the debtor spends money on fine dining, expensive vacations, or gambling, the exchanges are not fraudulent conveyances because the debtor receives reasonably equivalent value, even though creditors are significantly worse off after the exchange.<sup>44</sup>

Professor Keating explains that value is measured from the debtor's perspective, not the creditors', because under a standard gauged by creditors, insolvent debtors would be "severely and unreasonably limited in the types of transactions into which they could enter. Insolvent individual debtors could make no consumption purchases and . . . investments . . . ." <sup>45</sup> Baird and Jackson elaborate, noting that if such transferees were not protected from later avoidance of the transaction:

[T]oo many third parties would be deterred from doing business with the debtor. These third parties would know that if the deal turned out to be a bad one for them and a good one for the debtor, they would bear the loss. They also would know that if the deal turned out to be a good one for them and a bad one for the debtor, the creditors might be able to set aside the transfer. Third parties would have nothing to gain and something to lose by dealing with an insolvent (or possibly

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42. See Williams, *Revisiting*, *supra* note 40, at 67.

43. See Keating, *supra* note 4, at 1051-52:

Fraudulent conveyance law cares about whether the debtor received reasonably equivalent value . . . .

. . . [T]he drafters of fraudulent conveyance law have drawn the line at reasonably equivalent value received by (and from the perspective of) the debtor. This means that the insolvent debtor is still free to engage in most transactions, except those that amount to a gift by the debtor. Thus, though it may be small comfort to bankrupt tithers, a Mother's Day gift given while insolvent is just as recoverable by the trustee as a tither's donation to a church.

(footnotes omitted).

44. See *Allard v. Flamingo Hilton (In re Chomakos)*, 69 F.3d 769, 772 (6th Cir. 1995), *cert. denied*, 517 U.S. 1168 (1996); see also Lipson, *supra* note 41, at 255.

45. Keating, *supra* note 4, at 1051.

insolvent) debtor whose creditors could second-guess his decisions.<sup>46</sup>

As these observations indicate, measuring reasonably equivalent value from the debtor's perspective is an *exception* to the general principle of protecting creditors. This exception is rooted in the need to protect the reliance interests of third parties who deal with the debtor. To be sure, Baird and Jackson conclude that it is an exception to which the debtor's creditors would agree, at least for many transfers.<sup>47</sup> Nonetheless, this exception is not part of the underlying fabric of fraudulent conveyance law.

One implication of these observations is that courts should protect tithing contributions when a church or charity makes an actual, reasonable, detrimental reliance on the donation. Where a church or charity already has spent or budgeted the contribution, disgorging it would cause real hardship. Similarly, if an organization has no reasonable notice that the contribution might later be avoidable as a fraudulent conveyance, it should be protected from later attack in a bankruptcy proceeding. The reliance interest of the transferee church is conceptually indistinguishable from the reliance interest of the restaurant, resort, or casino protected under current law. As a result, even absent the Act, recipients of religious or charitable contributions who actually and reasonably rely to their detriment should be protected from later actions that target them as recipients of a constructively fraudulent conveyance. Despite the strength of this analogy, however, courts have not embraced or even considered this argument in the context of tithing contributions.

Aside from reliance issues, however, expanding the concept of "value" to include non-economic value is inconsistent with the purpose of fraudulent conveyance law and the traditional exception for protecting the reliance interests of those who deal with the debtor. Once the concept of "value" expands to include non-economic value, established fraudulent conveyance law provides little principled basis to distinguish among various forms of gratuitous transfers.<sup>48</sup> For instance, if spiritual value constitutes "value" for purposes of fraudulent conveyance law, then how

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46. Baird & Jackson, *supra* note 22, at 839; see also Marie T. Reilly, *The Latent Efficiency of Fraudulent Transfer Law*, 57 LA. L. REV. 1213, 1233 (1997).

47. See Baird & Jackson, *supra* note 22, at 839. As Professor Reilly has noted, Baird and Jackson's analysis is incomplete, however, in that it lacks concrete guidance as to which transfers creditors would support and which they would not. See Reilly, *supra* note 46, at 1215.

48. As just discussed, however, current law may be flawed in failing to protect contributions where there is actual, reasonable, detrimental reliance by the transferee.

can a court distinguish between a gift to the Catholic Church and one to a loving parent or child? If one pays for a brother's operation, one receives that brother's love and gratitude. Similarly, if one buys a sister a big screen television, that person will receive her affection and probably future invitations to watch football games. But these examples constitute paradigmatic examples of fraudulent conveyances, as well they should. If these noneconomic benefits could constitute sufficient value in exchange for a transfer, there would be no fraudulent conveyance law because every gratuitous transfer could be said to be made in exchange for non-economic benefits.

In charitable donations, it is not possible to determine whether the debtor actually received "equivalent value" for his or her contribution. Calculating the amount of spiritual "value" a particular debtor may receive from taking part in religious or charitable services can be difficult.<sup>49</sup> In some specific factual situations, however, courts have found an economic benefit to be present and have protected the transfers at issue. Consider the decision in *In re Moses*:<sup>50</sup> There, the Court admitted that "nothing tangible was given to the Debtors in exchange for the tithes and offerings." Nonetheless, the Court held the transfers could not be voided by the trustee because the "many services provided to the Debtors by the [church]" satisfied the "equivalent value" requirement of 11 U.S.C. § 548.

The *Moses* court elaborated:

For example, the counseling services given, which were approximated at trial as being between 80 and 100 hours of counseling, possessed exchangeable value. Such services are offered at great expense by marriage counselors and others. Moreover, the theological education and training of the persons providing such services at the Defendant church enabled them to offer more than merely friendly advice. The Debtors testified at trial that such services assisted them in getting

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49. See *Staples v. Commissioner*, 821 F.2d 1324, 1326-27 (8th Cir. 1987), *vacated*, 490 U.S. 1103 (1989); Lipson, *supra* note 41, at 269. Of course, it is never strictly possible to determine how much value any party puts on goods or services received in an exchange, except that whatever is given up is valued less than whatever is received in return. See Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law*, 46 CASE W. RES. L. REV. 961, 966-68 (1996). Nonetheless, with a market exchange, the prevailing market price will provide at least a floor to determine whether approximately equivalent value has been exchanged. It is more difficult to make this determination in valuing a wholly gratuitous transfer.

50. *Ellenberg v. Chapel Hill Harvester Church, Inc. (In re Moses)*, 59 B.R. 815 (Bankr. N.D. Ga. 1986).

through an extremely difficult period of their lives prior to bankruptcy.

Furthermore, access to religious services which Debtors attended at least three times a week also possessed exchangeable value. Although pure economic exchange which takes place between religious institutions and those who use their facilities is understandably downplayed so as to preserve the pious nature of such places of worship, such an exchange nevertheless exists. Many religious institutions require their congregation to pay dues to cover expenses of operation. Heating, air conditioning and electrical services, as well as other costs of operation are not provided to churches cost-free. Since the Defendant church did not require that dues be paid, money received from tithes and offerings were the only way to cover the expenses it incurred. The Debtors testified at trial that such utilities were operating during the religious services they attended at the Defendant church.<sup>51</sup>

Thus, although the court refused “to value the amount of spiritual enrichment Debtors gained by engaging in worship,” it did find “that certain facilities and services provided by Defendant, i.e., access to the church which provided heating, air conditioning and electricity, do possess an exchangeable value.”<sup>52</sup> Moreover, not only did these facilities and services constitute an exchangeable value, but the court concluded that under the facts of the case, “[s]uch services were therefore supplied to the Debtors in exchange for tithes and offerings given to the Defendant church.”<sup>53</sup>

The *Moses* court’s reasoning has been rejected uniformly in subsequent cases, and rightfully so.<sup>54</sup> The broad definition of “value” *Moses* gave would essentially gut constructive fraudulent conveyance law. Consider again the person who gives his or her sister that big screen television and receives, “in exchange,” invitations to watch football games. Clearly the sister provides entertainment, heat or air conditioning, and often even food. Without the television, she might not have invited the purchaser to receive those benefits. Defining “value” with the malleability that *Moses* ascribed to the requirement strips it of

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51. *Id.* at 818-19 (citation omitted).

52. *Id.* at 819.

53. *Id.*

54. *See, e.g.,* *Christians v. Crystal Evangelical Free Church (In re Young)*, 148 B.R. 886, 895-96 (Bankr. D. Minn. 1992), *aff’d*, 152 B.R. 939 (D. Minn. 1993), *reversed on other grounds*, 82 F.3d 1407, 1415 n.5 (8th Cir. 1996), *and vacated and remanded*, 117 S. Ct. 2502 (1997).



any force at all. Even the most blatant gift to a relative probably would be protected under *Moses's* expansive standard.

Professor Douglas Laycock has advanced a more plausible justification for a finding of economic benefit. He argues that focusing on a direct exchange value between the debtor and the church is an unduly narrow reading of the term "in exchange for." Such contributions by the congregation *collectively* are necessary for the church to exist and to provide any ministry or services. The individual members' contributions, therefore, are part of this collective contribution for which all those who donate receive church services in exchange for their contributions.<sup>55</sup>

This approach also points out a flaw in the reasoning of those courts that have refused to protect tithing contributions from later avoidance. These courts appear to apply an unreasonably narrow "exchange" requirement to tithing contributions that they do not apply to many other similar transactions. Thus, some courts have concluded that tithing contributions are not made "in exchange for" church services because they are "purely voluntary and in no way linked to the availability of [church] services. [Church] services are made available to its members regardless of whether those members have made contributions to the church, or the extent of any such contributions."<sup>56</sup>

Courts, however, seem to require such a tight fit only when it comes to tithing contributions and generally do not mandate such a closely-tailored showing when the transfer is made in exchange for some articulated benefit. Thus, for instance, both the Bankruptcy Code<sup>57</sup> and state law<sup>58</sup> recognize that satisfaction of an "antecedent debt" satisfies the exchange requirement, and case law recognizes that this satisfaction may constitute value even if collection on the debt is barred by the statute of limitations.<sup>59</sup> The analogy to the tithing situation is striking: In the antecedent debt situation, the debtor has *already received* the benefit of the extension of credit. When the debtor repays the loan, especially where its collection is time-barred, an exchange takes place in only the

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55. See *Bankruptcy Issues in Review: The Bankruptcy Code's Effect on Religious Freedom and a Review of the Need for Additional Bankruptcy Judgeships: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 105th Cong. 23 (1997) (testimony of Douglas Laycock).

56. *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge)*, 200 B.R. 884, 893 (Bankr. D. Idaho 1996), *rev'd*, 220 B.R. 386 (D. Idaho 1998).

57. 11 U.S.C. § 548(d)(2)(A) (1994).

58. UNIF. FRAUDULENT CONVEYANCE ACT § 3(a), 7A U.L.A. 448 (1985); UNIF. FRAUDULENT TRANSFER ACT § 3(a), 7A U.L.A. 650 (1985).

59. See *Maddox v. Robertson (In re Prejean)*, 994 F.2d 706, 707 (9th Cir. 1993).

loosest sense of the word. The debtor has gotten the benefit of the loan regardless of whether he or she ever pays it back.

If repayment of an antecedent debt satisfies the "exchange" requirement, this suggests that the requirement of a quid pro quo is at best a loose one. Thus, Professor Laycock must be correct in finding that making tithing contributions in exchange for an undivided interest in the collective benefits provided by a church should satisfy the "exchange" requirement.<sup>60</sup> Indeed, if repayment of an antecedent debt satisfies the exchange requirement, the debtor should be able to contribute to the collective benefit *after* it is actually received. The observation of some courts that the benefits of the church are available to all regardless of whether they actually make tithing contributions is a non sequitur, in the same sense as a debtor who receives the benefits of a loan regardless of whether he ever actually pays it back. When a debtor satisfies an antecedent debt and satisfies the exchange requirement, he or she should also satisfy the exchange requirement by contributing as part of a collective group in exchange for collective benefits. To decide otherwise would appear to impose an unduly narrow exchange requirement on observant debtors and religious organizations, a requirement not applied in analogous situations.

Yet both this argument as well as the *Moses* analysis can make us uncomfortable. The problem is that both arguments turn on treating spiritual transactions as market exchanges. There is simply no evidence that the much-ballyhooed services touted by the court in *Moses* had any tangible effect on the debtor's decision to contribute money to the church. Indeed, Mr. Moses had earned the position of deacon at the church, suggesting that he had been a loyal and active church member for many years before he filed bankruptcy.<sup>61</sup> As a result, the court's conclusion that the benefits were received "in exchange for" the contributions is questionable. It is more plausible that the debtor made the contributions primarily out of a spirit of religious obligation and charity, and that the availability of the church's "heating, air conditioning, and electricity" only were incidental benefits derived from membership. Similarly, Laycock's argument, while more persuasive than the reasoning in *Moses*,

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60. But there is a caveat. By its own terms, Professor Laycock's argument apparently would apply to protect contributions made only for services which actually benefit the debtor. It is unclear whether it would protect benefits provided for third parties (such as a homeless shelter or soup kitchen).

61. The case does not state how long Mr. Moses had been a member of the church, nor how long he had been tithing to the church. Professor Jack Williams has communicated with Mr. Moses, who told Professor Williams that he had been a tithing member of his church for many years. See Correspondence Between Author and Jack Williams (Apr. 1998).

also seems to exalt the secular components of the transaction over its charitable roots.

Similarly arbitrary “exchanges” of value potentially could be identified to shoehorn other tithing contributions into the requirements of the Bankruptcy Code. For instance, contributions to the Church of Scientology might be protected because they are made in exchange for “an identifiable benefit, namely, auditing and training sessions.”<sup>62</sup> Similarly, “in some synagogues, attendance at worship services for Jewish High Holy Days is predicated upon the purchase of a ticket or a reserved seat.”<sup>63</sup> A finding of an “exchange” for value might also be made for Mormons who must tithe in order to be eligible to receive a “temple recommend,” the right to attend services and pray at the Central Church in Salt Lake City, Utah.<sup>64</sup> “As a final example, Roman Catholics can make a fixed payment in the form of a Mass stipend to a priest, who in turn conducts a Mass for the intention of the donor.”<sup>65</sup> Thus, while the run-of-the-mill charitable donation animated by goodwill and spiritual obligation is not protected, other contributions ironically would be protected “when religious contributions are directly linked to certain benefits.”<sup>66</sup>

The reasoning in cases that identify a cognizable “benefit” to be present is not wholly persuasive. Most fundamentally, forcing debtors and churches to justify the receipt of an economic benefit in exchange for the contribution turns the nature of the contribution on its head: It converts a selfless, charitable act into a selfish market exchange. In so doing, such reasoning ignores that a spirit of religious or charitable obligation, not economic benefit, often motivates these contributions. As Kenneth Whitehead, a member of the national Board of Directors of the Catholic League for Religious and Civil Rights observes:

[V]oluntary donations, whether religious or charitable, are not normally made as purchases are made, that is, with the expectation of receiving some specific or tangible good or service of equivalent value in return. Donations are made, precisely, in order to “give away” the money for a purpose deemed to be a good or a benefit by the donor—and specifically

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62. *Christians v. Crystal Evangelical Free Church (In re Young)*, 89 F.3d 494, 495 (8th Cir. 1996) (Beam, J., specially concurring in the denial of the petition for rehearing en banc) (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 691 (1989)).

63. *Id.* (citing *Hernandez*, 490 U.S. at 709 (O'Connor, J., dissenting)).

64. *See id.* (citing *Hernandez*, 490 U.S. at 709 and *In re Bien*, 95 B.R. 281 (Bankr. D. Conn. 1989)).

65. *Id.* (citing *Hernandez*, 490 U.S. at 709).

66. *Id.*

*without* the expectation of receiving anything in return; but rather with the expectation that the donation will be put to good religious or charitable use by the recipient.<sup>67</sup>

Charitable motives provide the bulk of the impetus underlying tithing contributions, thus the “economic” element of the benefit received in exchange is likely to be far less than the amount transferred, suggesting the absence of equivalency between the amount transferred and the tangible economic benefit received.<sup>68</sup>

The debtor in *Moses* clearly received some economic benefits as a result of his donations. But there is no evidence that the donations were made primarily for the purpose of securing those tangible benefits. Rather, Mr. Moses made his contributions out of a sense of charity and obligation, and the quantifiable benefits he received in exchange were incidental to the furtherance of his charitable intent. Thus, it would be inaccurate to suggest that the economic benefits in *Moses* were received “in exchange for” the contributions. The mere happenstance that one religion provides some incidental benefit after an exchange, while some other religion does not, creates an arbitrary distinction among cases that furthers no bankruptcy or social policies. Given that the debtor’s primary impetus for making the contribution may be unrelated to the tangible benefits received, focusing on the trivial distinction of whether the debtor received anything in exchange for the contribution is to have the “tail wag the dog.” As Kenneth Whitehead concludes:

It would thus be a fundamental mistake for the law anywhere to consider charitable-type donations in the same category as payments made expressly in order to receive in return some specific or tangible good or service in return. Buying and

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67. *Bankruptcy Issues in Review: The Bankruptcy Code's Effect on Religious Freedom and a Review of the Need for Additional Bankruptcy Judgeships: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary, 105th Cong. 45 (1997)* (prepared statement of Kenneth D. Whitehead, Board Member, Catholic League for Religious and Civil Rights) [hereinafter Whitehead Testimony] (emphasis added). See also Lipson, *supra* note 41, at 264.

68. Indeed, it is only because the donor contributes far more than he directly receives in exchange for the contribution that such donations are tax deductible under the Internal Revenue Code. See 26 U.S.C.A. § 170 (West, WESTLAW through Pub. L. No. 105-216, approved July 29, 1998). If the donor is receiving something of equivalent economic value, then no such deduction is permissible, but the Commissioner generally allows deductions for payments made even in explicit exchange for religious benefits that lack market value. See Rev. Rul. 70-47, 1970-1 C.B. 49; see also Powell v. United States, 945 F.2d 374 (11th Cir. 1991).

selling, on the one hand, and donating on the other, belong in two distinct categories.<sup>69</sup>

As noted above, where the debtor receives some tangible property that is of "reasonably equivalent value in exchange for" a transfer, the transaction is not a fraudulent conveyance because creditors have recourse against the property that the debtor has received "in exchange." This rule is broadened further to protect the reliance interests of creditors who deal with debtors for consumer goods and the like. What conceivable policy goal could be advanced by concluding that receiving a preferred seat at synagogue or the right to worship in the Central Church in Salt Lake City is protected under the fraudulent conveyance laws, but a contribution to a baptist church that provides only spiritual benefits is not?<sup>70</sup> In both situations, the tangible and spiritual benefits received have value to the debtor. However, they also have no value whatsoever to creditors. The right to a preferred seat in church, or access to the church's air conditioning, cannot be auctioned to third parties in ways that place assets at the disposal of creditors. Nor is a church materially prejudiced by extending this right to a member, because these benefits are in fact extended to member and non-member alike. The heat, air conditioning, and electricity were going to be on either way. As a result, there is no reliance interest to be protected.

No coherent bankruptcy policy is advanced by distinguishing protected from non-protected transfers according to the formalistic inquiry focused on whether the debtor receives some tangible economic benefit of the type described in *Moses*. Whether the debtor makes such contributions purely out of charity or to gain access to the church's air conditioning and heating is irrelevant to the bankruptcy question of whether those assets are available to satisfy creditor claims.

The Bankruptcy Code's traditional focus on the receipt of economic benefit is well-founded, but judicial attempts to shoehorn tithing contributions into this calculus have largely been unpersuasive. Even under the current requirement that economic benefit be exchanged, tithing contributions should be protected because one person's contribution, in combination with other similar contributions, make available the collective benefit of the church that would otherwise be unavailable. The contributions also should be protected under current law where the

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69. Whitehead Testimony, *supra* note 67, at 45.

70. See *In re Bien*, 95 B.R. 281, 282-83 (Bankr. D. Conn. 1989) (tithing contribution to Mormon Church as part of Chapter 13 plan was "reasonably necessary" expense because it was "nondiscretionary" and was "a condition precedent to full participation in the debtor's religion").

transferee can demonstrate actual, reasonable, detrimental reliance on the transfer. To date, however, courts have not accepted these arguments.

## 2. OTHER ATTEMPTS TO PROTECT TITHING CONTRIBUTIONS

Other attempts designed to reconcile tithing contributions with fraudulent conveyance law appear unavailing. The most notable and powerful attempt to ground protection in the fraudulent conveyance law has been advanced by Professor Jack Williams, but upon closer scrutiny, his argument does not seem to justify special protection for these contributions.<sup>71</sup>

Williams begins by observing, as noted above, that courts typically measure “value” from the debtor’s perspective, rather than from the creditors’ perspective. Thus, for instance, services provided to the debtor that in no way benefit the creditors remain protected from avoidance as fraudulent conveyances.<sup>72</sup> Professor Williams concludes that the import of this observation is that the purpose of fraudulent conveyance law “is to prevent the *unjust* diminution of a debtor’s estate at the expense of its creditors. Thus, *some*, even a significant, diminution to the estate available to one’s creditors is legally acceptable.”<sup>73</sup>

What constitutes an “unjust” diminution of the debtor’s estate? Williams argues that an “unjust” diminution of the debtor’s estate is one that “arises from a transaction or event outside the ordinary course of affairs of a debtor—an unexpected harm . . . . In other words, when a debtor is insolvent, fraudulent transfer law enjoins: First, debtor do no *unexpected* harm!”<sup>74</sup>

Where the diminution of the estate as a result of the transfer is reasonably predictable by creditors, the transfer should not be a fraudulent conveyance. This suggests that where the debtor makes tithing contributions that are reasonably foreseeable by creditors, no fraudulent conveyance should be deemed to take place. Only a wholly unexpected contribution should be avoidable as a fraudulent conveyance.

Applying this model, Professor Williams argues that the question of whether a religious contribution constitutes a fraudulent conveyance:

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71. See Williams, *Fallacies*, *supra* note 40, at 1424-25.

72. See *id.* at 1423-24.

73. *Id.* at 1424 (emphasis added).

74. *Id.* (emphasis added). This seems to be the model Professor Newborn Wiggins describes as a “reasonableness” standard. See Wiggins, *supra* note 4, at 789 (“Substantively, this method would protect those who in good faith contribute regular amounts to a church over a long period of time.”).

[S]hould turn on a debtor's course of affairs regarding past charitable contributions. If a debtor has regularly engaged in previous charitable contributions, then his or her creditors should expect that such contributions continue. However, if the amount or frequency of contributions increases unreasonably, then the creditors of an insolvent debtor have a legitimate claim.<sup>75</sup>

While ingenious, Professor Williams's model is both overinclusive and underinclusive in explaining the decisions by courts concerning whether to uphold transfers made by insolvents for less-than-reasonably equivalent value.<sup>76</sup>

Professor Williams's model is underinclusive because it fails to explain cases in which courts have in fact permitted an unexpected diminution of the debtor's estate. For instance, courts have protected from avoidance transfers made to casinos in the period preceding bankruptcy<sup>77</sup> and bills for phone calls to a psychic line.<sup>78</sup> In neither case did the court inquire whether these transfers were consistent with a prior pattern.

As already noted, the rationale for protecting expenditures on services and consumption activities is to protect the reliance interest of those with whom the debtor transacts.<sup>79</sup> The casino would not allow parties to gamble without evidence of solvency; the psychic telephone advisors would not extend its services without evidence of solvency.

Thus, determining value from the debtor's perspective is actually an *exception* to the central purpose of fraudulent conveyance law, which is

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75. Williams *Fallacies*, *supra* note 40, at 1424-25.

76. Professor Newborn Wiggins argues that an additional problem with this approach is that it would require fact-intensive scrutiny in every case to determine the "reasonableness" of the contributions as judged by their regularity and consistency. *See* Wiggins, *supra* note 4, at 790. While there are always benefits in having a bright-line rule for courts to apply, it is not evident why establishing a standard of reasonableness in this context is any more problematic or difficult than doing so in any other context, such as reasonable care in torts or reasonable searches in the criminal law. Indeed, courts already have to establish whether the value received in exchange for a given transfer of property is "reasonable." Thus, this criticism is not unique to this proposal, nor does it raise particularly difficult concerns. Indeed, Professor Williams specifically recognizes that his proposal will turn on highly fact-dependent inquiries. *See* Williams, *Fallacies*, *supra* note 40, at 1425. Thus, Professor Newborn Wiggins's criticism is misdirected.

77. *See* Allard v. Flamingo Hilton (*In re* Chomakos), 69 F.3d 769 (6th Cir. 1995).

78. *See* Samson v. U.S. W. Communications, Inc. (*In re* Grigonis), 208 B.R. 950, 958 (Bankr. D. Mont. 1997).

79. *See supra* notes 45-47 and accompanying text.

to preserve the debtor's assets for the creditors. Professor Williams, however, characterizes this exception as a component part of the fraudulent conveyance law. In short, whether or not the diminution is "just" or "expected" is irrelevant. What is important, as a descriptive matter, is the reliance interest of third parties with whom the debtor deals.

Professor Williams's model is also overinclusive because it would protect from avoidance many transfers that courts have found to be fraudulent conveyances. For instance, I am aware of no cases in which courts have held that purely gratuitous gifts to relatives are protected from avoidance.<sup>80</sup> Indeed, such gifts are the paradigmatic examples of fraudulent conveyances. It seems to be utterly beside the point whether the gifts were isolated or part of a pattern of such contributions, or expected versus unexpected by creditors. As Professors Baird and Jackson observe, under section 4 of the Uniform Fraudulent Conveyance Act, "an insolvent debtor who gives 1000 dollars to his mother makes a fraudulent conveyance, even if he has made a similar gift each year in the past and is not motivated in the slightest by a desire to thwart creditors."<sup>81</sup> Such gifts are invalid regardless of the debtor's intent and any prior pattern of giving.<sup>82</sup> A debtor's past tithing practices similarly has been deemed irrelevant in the tithing context.

Professor Williams's model has additional problems. For instance, if the purpose of adopting his model is to protect a debtor's religious liberty, his approach potentially would have contrary implications. For instance, his model would require potential creditors to inquire into the religious affiliations and contribution habits of *all* potential borrowers to establish the debtor's prior pattern of giving, not just those who actually file bankruptcy.

[A]s private creditors adjust for the increased risk, they might become more intrusive when gathering information about a potential debtor prior to lending. Creditors can be expected to ask loan applicants if they have a pattern or practice of religious giving. This raises another potent issue: if the creditor denies the loan based upon information in response to these questions, does the creditor commit unlawful discrimination based on religion?<sup>83</sup>

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80. If, however, the principle of reasonable reliance discussed above goes far enough, then it could extend to cover these cases.

81. Baird & Jackson, *supra* note 22, at 831-32.

82. *See id.* at 832 (characterizing such gifts as "inherently objectionable").

83. Wiggins *supra* note 4, at 788; *see also* Christians v. Crystal Evangelical Free Church (*In re Young*), 82 F.3d 1407, 1423 (8th Cir. 1996), *vacated and remanded*, 117 S. Ct. 2502 (1997) (Bogue, J., dissenting) ("Given today's holding, are cautious potential



In light of these problems, it is questionable whether Professor Williams provides a workable model for protecting tithing contributions from avoidance in a manner that is consistent with the purposes of fraudulent conveyance laws and debtors' religious freedom.

### *C. Non-Bankruptcy Limitations on the Avoidance Power*

Several courts and commentators have argued that even if tithing contributions are actually fraudulent conveyances, they are protected from avoidance by the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause of the First Amendment. These issues have been discussed extensively elsewhere,<sup>84</sup> but their resolution remains unsettled. As a result, they provide an uncertain foundation for the protection of tithing contributions.

#### 1. RELIGIOUS FREEDOM RESTORATION ACT

Courts have been divided over the issue of whether RFRA protects tithing contributions from avoidance as fraudulent conveyances. Before reviewing the case law and the arguments, however, it is useful to digress by discussing the continuing viability of RFRA in the wake of the Supreme Court's decision in *City of Boerne v. Flores*.<sup>85</sup>

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creditors (including government or government-sponsored creditors) now expected to question applicants in depth regarding the highly personal activity of religious giving? And what if said application is denied on the grounds that the applicant's religious giving makes extending credit an unwarranted risk?"). The conclusion that Williams' model might require potential creditors to inquire into the religious affiliations and contribution habits of all potential borrowers is speculative and may be exaggerated. As things are now, lenders would probably be interested in knowing a lot of things that they do not ask about, for example, the debtor's gambling habits, drug habits, number of uninsured elderly relatives, etc. Instead, the debtor's income, expenses, and net worth serve as a proxy for all of these kinds of questions. Indeed, it may be that active religious participants may be a better credit risk than those who are not, thus a pattern of tithing may actually be a *favorable* credit characteristic in some circumstances, as it may indicate a greater proclivity against bankruptcy and excessive risk-taking than in the general population. See F.H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 201, 205 (1998) (concluding that members of hierarchical, socially-conservative religions have lower bankruptcy filing rates than the general population); see also John R. Sutherland, *The Ethics of Bankruptcy: A Biblical Perspective*, 7 J. BUS. ETHICS 917 (1988).

84. See Michael M. Duclos, *A Debtor's Right to Tithe in Bankruptcy Under the Religious Freedom Restoration Act*, 11 BANKR. DEV. J. 665 (1995); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 223 (1994).

85. 117 S. Ct. 2157 (1997).

Many bankruptcy courts<sup>86</sup> and commentators<sup>87</sup> have ignored the subtleties of the Court's decision in *Boerne* and have blithely declared RFRA invalid. Such statements about the death of RFRA, however, have been exaggerated<sup>88</sup> and rest on a misunderstanding of the holding in *Boerne*. The only issue raised and addressed by the Supreme Court in *Boerne* was the application of RFRA to a city ordinance. The *Boerne* Court's holding was equally narrow: The enforcement power of Section 5 of the Fourteenth Amendment did not grant Congress authority to apply RFRA to state and local governments.<sup>89</sup> Although the case contains some dicta suggesting a broader reach for the opinion,<sup>90</sup> *Boerne* is largely silent as to whether RFRA remains valid as applied to *federal* laws—such as construction of the Bankruptcy Code—as opposed to state or local laws.<sup>91</sup> Thus it is erroneous to conclude that *Boerne* simply declared RFRA unconstitutional.<sup>92</sup>

Standard canons of interpretation support a narrow reading of *Boerne*. It is a well-established principle of constitutional law that legislative acts bear a “presumption of constitutionality” that courts should

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86. See, e.g., *Geltzer v. Crossroads Tabernacle (In re Rivera)*, 214 B.R. 101, 106 (Bankr. S.D.N.Y. 1997); *In re Gates Community Chapel of Rochester, Inc.*, 212 B.R. 220, 226 (Bankr. W.D.N.Y. 1997).

87. See, e.g., Bruce W. Megard, Jr., *Tithing and Fraudulent Transfers in Bankruptcy: Confirming a Trustee's Power to Avoid the Tithe After City of Boerne v. Flores*, 71 AM. BANKR. L.J. 413 (1997) (claiming that “the Supreme Court has invalidated RFRA as unconstitutional”); Lawrence E. Singer, *Realigning Catholic Health Care: Bridging Legal and Church Control in a Consolidating Market*, 72 TUL. L. REV. 159, 205 (1997); Steven J. McCardell, *Religious Contributions and Bankruptcy After RFRA's Demise*, NORTON BANKR. L. ADVISER, Nov. 1997, at 7.

88. See Letter from Mark Twain to a London Correspondent of the New York Journal (June 1, 1897), in JOHN BARTLETT, FAMILIAR QUOTATIONS 528 (Justin Kaplan ed., 1992) (“The report of my death was an exaggeration.”).

89. See Jonathan Mallamud, *Religion, Federalism and Congressional Power: A Comment on City of Boerne v. Flores*, 26 CAP. U. L. REV. 45, 60 (1997) (“Because *Flores* involved state action, its holding extends only to Congress' power under Section 5 of the Fourteenth Amendment.”).

90. See *Boerne*, 117 S. Ct. at 2172 (suggesting that RFRA violated separation of powers).

91. See Lipson, *supra* note 41, at 248, 276; Mallamud, *supra* note 89, at 55 (“Congress undeniably makes federal law, and *Flores* said little about the issue of whether Congress, in enacting RFRA, simply amended all federal law in conflict with RFRA or sought to impose Congress' view of the proper application of the First Amendment on the courts.”). *But see* Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997) (concluding that *Boerne* invalidated RFRA as it applies to both state and federal law).

92. See Mallamud, *supra* note 89, at 60 (“As far as RFRA affects federal law, its validity remains subject to discussion and debate, and eventually, decision by the Supreme Court.”).

overturn only for good cause.<sup>93</sup> As Chief Justice John Marshall opined, the Court should declare a legislative act unconstitutional only if the “opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other” and that it should not do so in any “doubtful case.”<sup>94</sup> This presumption is strongest when courts review the acts of the coequal branches of the federal government, especially where there is evidence of congressional deliberation and judgment on the constitutional question.<sup>95</sup> Moreover, where a statute is declared unconstitutional, it should be found so on the narrowest reasonable grounds, relieving a court of the need to pronounce constitutional judgments unnecessarily.<sup>96</sup> Principles of statutory construction also require courts to sever the constitutionally infirm portions of a statute, retaining the validity of the remainder of the statute unless it is evident that Congress would not have enacted the statute without the offensive portion.<sup>97</sup> In the case of RFRA, it is obvious that Congress intended its continued application to federal laws, even if declared invalid to state legislation.<sup>98</sup> Applying these standard canons of interpretation further supports the conclusion that *Boerne* should be read to apply only to the limited situation present there. As one court has concluded, “[w]hile the trend seems to be to limit *Boerne* to its holding, it remains a fairly open question.”<sup>99</sup>

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93. See McConnell, *supra* note 91, at 185-87. As I read Professor McConnell's article, he seems to assume that *Boerne* invalidated RFRA as it applies to federal law as well as state laws and concludes that the Supreme Court erred in failing to apply the presumption of constitutionality. If this is an accurate reading of McConnell's conclusion, it is my opinion that he has assumed away the key question about *Boerne*'s reach.

94. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 625 (1819).

95. See Board of Educ. v. Mergens, 496 U.S. 226, 251 (1990); Rostker v. Goldberg, 453 U.S. 57, 64 (1981)

96. See Christians v. Crystal Evangelical Free Church (*In re Young*), 141 F.3d 854 (8th Cir. 1998) [hereinafter *Young II*]; EEOC v. Catholic Univ., 83 F.3d 455, 469 (D.C. Cir. 1996) (“[The] principle of the law of federal courts [is] that constitutional issues affecting legislation will not be determined . . . in broader terms than are required by the precise facts to which the ruling is to be applied.” (quoting Hastings v. Judicial Conference, 770 F.2d 1093, 1100 (D.C. Cir. 1985))); Magic Valley Evangelical Free Church, Inc. v. Fitzgerald (*In re Hodge*), 220 B.R. 386 (D. Idaho 1998) [hereinafter *Hodge II*] (“This Court does not believe that the Supreme Court would depart from the firmly-entrenched principle of judicial restraint that constitutional questions are to be decided on the narrowest grounds possible.”).

97. See Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987); INS v. Chadha, 462 U.S. 919, 931-32 (1983).

98. See *Young II*, *supra* note 96, at 859; Appendix § 6 (noting that the Act does not limit the applicability of RFRA).

99. Gunning v. Runyon, 3 F. Supp. 2d 1423 (S.D. Fla. 1998) (citing cases). As the Court notes in *Gunning*, few courts have addressed the question directly. See, e.g.,

Under Article I, Section 8, Clause 4 of the Constitution, Congress is empowered to establish “uniform Laws on the subject of Bankruptcies throughout the United States.”<sup>100</sup> By implication, this gives Congress the authority to *limit* the reach of the bankruptcy power generally, and 11 U.S.C. §§ 544 and 548(a)(2) specifically, to exempt tithing contributions from avoidance as fraudulent conveyances. The Necessary and Proper Clause also provides Congress with authority to limit the reach of the bankruptcy power.<sup>101</sup> As applied to federal legislation, therefore, RFRA appears to be simply a “rule of construction regarding the manner in which other acts of Congress are to be applied”<sup>102</sup> or a “blanket amendment” covering all relevant federal laws,<sup>103</sup> including the Bankruptcy Code.<sup>104</sup> Congress certainly has the power to limit the reach of laws that it enacts.<sup>105</sup> Congress can also create new statutory

*Young II*, *supra* note 96, at 856 (holding RFRA constitutional as applied to federal law); *Alamo v. Clay*, 137 F.3d 1366 (D.C. Cir. 1998) (assuming without deciding that RFRA is constitutional as applied to federal law); *United States v. Grant*, 117 F.3d 788, 792 n.6 (5th Cir. 1997) (noting that *Boerne* “arguably casts some doubt on the continued viability of [RFRA]” but declining to address the issue).

100. U.S. CONST. art. I, § 8, cl. 4. See *Young II*, *supra* note 96, at 858 (“In applying RFRA to the federal government, Congress relied on its enumerated powers in Article I of the Constitution.”)

101. See U.S. CONST. art. I, § 8, cl. 18.

102. William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 294 n.12 (1996) (emphasis omitted).

103. See *Hodge II*, *supra* note 96, at 868:

RFRA, in effect, amends all federal laws to provide enhanced protection for the free exercise of religion . . . . Congress could have achieved the same result by individually amending each federal statute, and no one would seriously question whether Congress had the authority to amend legislation which it had the authority to adopt in the first instance. The Court is aware of no reason that prohibits Congress from achieving on a wholesale basis what it is clearly empowered to do on a statute-by-statute basis.

*But see Young II*, *supra* note 96, at 866 (Bogue, J., dissenting) (acknowledging that although Congress *may* amend any bankruptcy legislation that it has passed to prohibit recovery of tithing contributions, it may not “attempt to make a substantive change in free exercise rights, and then impose its interpretation of what the right ought to be onto the courts via ‘grafts’ onto every federal law”).

104. See *Young II*, *supra* note 96, at 861 (“RFRA . . . has effectively amended the Bankruptcy Code, and has engrafted the additional clause to § 548(a)(2)(A) that a recovery 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.”).

105. See *INS v. Chadha*, 462 U.S. 919, 941 (1983) (“Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction.” (quoting *Buckley v. Valeo*, 424 U.S. 1, 132 (1976)) (citations omitted); *Young II*, *supra* note 96,

rights that expand upon the Supreme Court's constitutional interpretation.<sup>106</sup> Thus, *Boerne* should be irrelevant to the question of RFRA's continuing viability as applied to the Bankruptcy Code.<sup>107</sup> As applied to federal legislation, the validity of RFRA remains uncertain.<sup>108</sup>

In response to the invalidation of RFRA's application to state laws, some states have considered their own versions of RFRA.<sup>109</sup> Any state versions of RFRA would be applicable to limit the use of 11 U.S.C. § 544's strong-arm power as it merely incorporates state fraudulent conveyance law. It is equally obvious, however, that these state laws would provide no defense to an action under 11 U.S.C. § 548.

Assuming *arguendo* that RFRA remains valid as applied to the reach of the Bankruptcy Code, what effect does it have on the reach of 11 U.S.C. §§ 544 and 548? Under RFRA, the government may not "substantially burden a person's exercise of religion" unless it is in furtherance of a "compelling governmental interest" and is the "least restrictive means" of furthering that interest.<sup>110</sup> Courts are divided on

at 860; *EEOC v. Catholic Univ.*, 83 F.3d 455, 470 (D.C. Cir. 1996); Mallamud, *supra* note 89, at 60 ("With regard to federal law, Congress clearly has plenary authority.").

106. See *Young II*, *supra* note 96, at 860 ("Congress has often provided statutory protection of individual liberties that exceed the Supreme Court's interpretation of constitutional protection."); *Hodge II*, *supra* note 96, at 397 ("It has long been the law of the land that Congress may permissibly create new statutory rights giving greater protection to constitutionally-protected interests than the Constitution itself does. Congress has frequently responded to constitutional decisions of the Supreme Court by doing just that. Examples abound.").

107. RFRA may still be found to be unconstitutional as applied to federal legislation on some other grounds. For instance, some have argued that it violates the separation of powers. See Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 470 (1994). But see *Young II*, *supra* note 96, at 859-61 (rejecting argument that RFRA violates separation of powers); *Hodge II*, *supra* note 96, at 397 (same). Others have argued that RFRA violates the Establishment Clause of the First Amendment. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997) (Stevens, J., concurring). But see *Young II*, *supra* at 861-63 (holding that RFRA does not violate Establishment Clause); *Hodge II*, *supra* at 401 (same); *Mockaitis v. Harclerod*, 104 F.3d 1522, 1530 (9th Cir. 1997) (same); *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996), *vacated*, 117 S. Ct. 2502 (1997) (same); *EEOC*, 83 F.3d at 470 (same); *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996), *rev'd*, 117 S. Ct. 2157 (1997) (same). *Boerne* itself does not resolve the fundamental issue raised by the case.

108. See *In re Saunders*, 215 B.R. 800, 803 (Bankr. D. Mass. 1997) ("The constitutional issues involved in the application of RFRA to the Bankruptcy Code remain open after *Flores*.").

109. Michigan and New York acted swiftly in response to *Boerne* by introducing state versions of RFRA. See Lipson, *supra* note 41, at 276 n.185.

110. 42 U.S.C.A. § 2000bb-1(a),(b) (West 1998).

the issue of how RFRA affects the right to recover tithing contributions under 11 U.S.C. §§ 544 and 548 of the Bankruptcy Code.

The only federal appellate court to address the question was the Eighth Circuit, which found that although the tithing contributions made in *In re Young* were fraudulent conveyances, RFRA protected them from avoidance by the trustee.<sup>111</sup> The court held first that the trustee's action to recover the transfers would substantially burden the Youngs' exercise of religion. Although Crystal Evangelical Church did not require tithing, the debtors considered "tithing to be an important expression of their sincerely held religious beliefs."<sup>112</sup> "Permitting the government to recover these contributions would effectively prevent the debtors from tithing, at least for the year immediately preceding the filing of the bankruptcy petitions."<sup>113</sup> Because this result "meaningfully curtails, albeit retroactively, a religious practice of more than minimal significance in a way that is not merely incidental," it constituted a "substantial burden" on the Youngs' religious exercise. Further concluding that there was no compelling governmental interest sufficient to offset this burden, the court concluded that the trustee's action to avoid the transfers ran afoul of RFRA.<sup>114</sup>

In their definitive history of RFRA, Oliver S. Thomas and Douglas Laycock argue that the bankruptcy trustee's power to avoid tithing contributions as fraudulent conveyances presents a prototypical example of a situation in which a "compelling interest" is absent. Thus, one specific purpose of RFRA was to prevent bankruptcy trustees from asserting as compelling just such a power.<sup>115</sup>

Several bankruptcy courts, however, have reached conclusions contrary to *In re Young*. In *In re Tessier*,<sup>116</sup> the court observed that RFRA would protect the tithing contributions, but held RFRA unconstitutional. In *In re Newman*,<sup>117</sup> the court held that RFRA did not protect tithing contributions because 11 U.S.C. § 548(a) advanced compelling governmental interests and was the least restrictive means of

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111. See *Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1416 (8th Cir. 1996), *vacated and remanded*, 117 S. Ct. 2502 (1997).

112. *Id.* at 1418.

113. *Id.*

114. See *id.* at 1420. The Court noted that the constitutionality of RFRA was not raised by the parties, and it need not consider the issue. See *id.* at 1416, 1420.

115. See Laycock & Thomas, *supra* note 84, at 223. It should be noted that at the time Professor Laycock made that observation, he was representing amici in the *Crystal Evangelical* case who were supporting the church, and he subsequently has represented the church as counsel.

116. 190 B.R. 396 (Bankr. D. Mont. 1995).

117. *Morris v. Midway S. Baptist Church (In re Newman)*, 203 B.R. 468 (D. Kan. 1996).

furthering those compelling state interests.<sup>118</sup> In *In re Bloch*,<sup>119</sup> the court explicitly rejected *Young* and followed *Newman* in holding that the RFRA did not prohibit the application of 11 U.S.C. § 548 to religious contributions. Indeed, one Judge on the *Young* panel dissented from the majority opinion because of disagreement over whether § 548(a) substantially burdened religious expression under RFRA.<sup>120</sup>

In short, even if RFRA is constitutional as applied to tithing contributions, it is unsettled whether the statute would actually be read to limit the reach of section 548 of the Bankruptcy Code. The more accurate reading of RFRA protects these transfers. Nonetheless, while the Eighth Circuit has concluded that it does in fact have that effect, several courts have found otherwise. Thus, RFRA remains an uncertain foundation on which to rest hopes of protecting contributions from attack as fraudulent conveyances.

## 2. FREE EXERCISE CLAUSE

Some also have argued that avoiding tithing contributions made to religious institutions runs afoul of the Free Exercise Clause of the First Amendment. Under *Church of Lukumi the Babalu Aye, Inc. v. City of Hialeah*,<sup>121</sup> if a regulation applies to religious conduct, and does not apply to similar secular conduct, the statute must be justified by a compelling government interest and must be narrowly tailored to advance that interest.<sup>122</sup> If, on the other hand, the prohibition of a religious practice is not the object of a law but merely the incidental effect of a valid, generally applicable, and neutral provision, no violation of Free Exercise Clause has occurred.<sup>123</sup>

As the Court concluded in *Bloch*, the requirement that “reasonably equivalent value” be economic does not fall uniquely hard on religious

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118. *See id.* at 477-78.

119. *Weinman v. Word of Life Christian Center (In re Bloch)*, 207 B.R. 944 (D. Colo. 1997) (application of § 548(a) and state fraudulent conveyance law through § 544 did not violate RFRA because no substantial burden on debtors and government was able to show compelling interest).

120. *See Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1422 (8th Cir. 1996) (Bogue, J., dissenting), *vacated and remanded*, 117 S. Ct. 2502 (1997).

121. 508 U.S. 520 (1993).

122. *See id.* at 535-38, 543-45.

123. *See Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 877-90 (1990). Some commentators have suggested that *Smith* in fact overruled *Hialeah*, *see, e.g.*, Larry Alexander, *Are Smith and Hialeah Reconcilable?*, 13 CONST. COMMENTARY 285 (1996), but I will assume for current purposes that the two are in fact reconcilable.

entities. Instead, it also excludes gifts, and "all types of unquantifiable benefits, not only those considered religious."<sup>124</sup> Thus, sections 548 and 544 of the Bankruptcy Code appear to be valid and neutral laws of general applicability and would be reviewed under *Smith's* lenient standard.<sup>125</sup> Under *Smith*, the distinction between economic and non-economic value furthers "a significant, legitimate governmental interest of protecting general creditors against unjust diminution of an insolvent debtor's estate, while at the same time recognizing that prior to bankruptcy the estate remains the debtor's property."<sup>126</sup> Thus, absent RFRA, bankruptcy courts have consistently held that 11 U.S.C. § 548 is consistent with the limits of the Free Exercise Clause.

However, the bankruptcy courts' reliance on *Smith* may be misplaced. Before *Smith*, free exercise cases generally were governed by *Sherbert v. Verner*,<sup>127</sup> a case examining a Sabbatarian's claim of exemption from a Saturday work requirement under state unemployment compensation law. In *Sherbert*, the Court held that state interference with the free exercise of religious belief is appropriate only if it satisfies the rigorous strict scrutiny test applicable to laws infringing on so-called fundamental rights.<sup>128</sup> *Smith* substantially narrowed the class of cases to which *Sherbert* applies, but it did not overrule *Sherbert* completely.<sup>129</sup> The *Smith* Court noted that *Sherbert* had been developed in the context of unemployment compensation, "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."<sup>130</sup> Unemployment compensation programs require individualized assessment of each applicant's eligibility. In *Sherbert*, for instance, an employee was ineligible for unemployment compensation if he had quit work or refused available work "without good cause."<sup>131</sup> Moreover, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."<sup>132</sup>

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124. *Bloch*, 207 B.R. at 950.

125. *See id.* at 949-50; *Morris v. Midway S. Baptist Church (In re Newman)*, 203 B.R. 468, 475 (D. Kan. 1996); *Fitzgerald v. Magic Valley Evangelical Free Church (In re Hodge)*, 200 B.R. 884, 902-05 (Bankr. D. Idaho 1996); *see also* Lipson, *supra* note 41, at 282.

126. *Bloch*, 207 B.R. at 950.

127. 374 U.S. 398 (1963).

128. *See id.* at 403.

129. *See* Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 884 (1990).

130. *Id.*

131. *Id.*

132. *Id.*



Thus, *Smith* seemed to preserve the continued viability of *Sherbert's* strict scrutiny test for any case in which a statutory scheme rests on individualized assessments of merit or where there is a system of individual exceptions. At the same time, however, *Smith* appeared to treat *Sherbert* as a dead letter, either overruled sub silentio or at most limited only to the established context of unemployment compensation. As the Court observed, “[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.”<sup>133</sup> As Price and Rahdert have noted, “[t]he obvious premise of this statement is that *Sherbert* is being treated, beyond its own limited context, as a generally moribund precedent.”<sup>134</sup>

Assuming that *Sherbert* remains viable beyond the unemployment context, does it apply in the tithing context? Several commentators have argued that it does, at least in the context of protecting a debtor's right to tithe as part of a Chapter 13 plan. Section 1325 of the Bankruptcy Code requires a court to calculate the debtor's disposable income and the debtor's repayment plan according to the amount of income “reasonably . . . necessary for the maintenance and support” of the debtor.<sup>135</sup> The mandate that a court establish a plan tailored to the needs of each debtor is analogous to the individualized inquiry for “good cause” under the unemployment compensation scheme in *Sherbert*.<sup>136</sup> Moreover, 11 U.S.C. § 1325 contains multiple exemptions from the debtor's disposal income, including such “necessary expenses” as food, clothing, shelter, transportation, medical expenses, and children's schooling. Given this proliferation of exemptions from a debtor's income available to satisfy creditors, and the ease with which an exemption for religious tithing contributions could be added to this list, such contributions should fall outside the *Smith* parameters.<sup>137</sup>

The case for protecting tithing contributions from recovery as fraudulent conveyances is weaker.<sup>138</sup> As noted, the bankruptcy courts that have addressed this issue gave little if no attention to the argument that the Bankruptcy Code establishes a system of individualized

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133. *Id.*

134. Donald R. Price & Mark C. Rahdert, *Distributing the First Fruits: Statutory and Constitutional Implications of Tithing in Bankruptcy*, 26 U.C. DAVIS L. REV. 853, 895 n.177 (1993).

135. 11 U.S.C. § 1325(b)(2)(A) (1994).

136. See Carol Koenig, *To Tithe or Not to Tithe: The Constitutionality of Tithing in a Chapter 13 Bankruptcy Budget*, 32 SANTA CLARA L. REV. 1231, 1249 (1992); Price & Rahdert, *supra* note 134, at 901.

137. See Price & Rahdert, *supra* note 134, at 902.

138. See Hopkins, *supra* note 4, at 1150-51.

assessments that would require 11 U.S.C. § 548 to surmount the hurdle of strict scrutiny. Arguably, these courts have erred by examining 11 U.S.C. § 548 in isolation, rather than as part of the overall context of the bankruptcy system, because a broader view would require the application of strict scrutiny.<sup>139</sup> Nonetheless, even those who would protect tithing contributions from avoidance under 11 U.S.C. § 548 have been reluctant to stretch the First Amendment this far.<sup>140</sup>

### III. JUSTIFICATIONS FOR PROTECTING TITHING CONTRIBUTIONS FROM AVOIDANCE

Under traditional principles of fraudulent conveyance law, the case for protecting tithing contributions from fraudulent conveyance attack is tenuous. Although there are several arguments that justify protecting these contributions under established principles of fraudulent conveyance law, courts have been reluctant to recognize them. Assuming RFRA remains valid, it may protect transfers made to churches, but even this is not obvious. The Free Exercise Clause provides even less protection. As a result, churches and charities will continue to be sued by bankruptcy trustees. Charities, of course, cannot even appeal to RFRA or the First Amendment at all. Churches and charities, for their parts, will continue simply to settle these suits because of the futility and expense of fighting them.

Simply because current law appears to mandate this result does not make it right. It does indicate, however, that it was appropriate for Congress to consider a statutory exception explicitly protecting churches and charities from being forced to disgorge such contributions a year or more after they are made. Judicial attempts to protect charitable contributions were unsuccessful. To the extent that judges protected contributions in specific cases, the facts underlying those rulings were arbitrary and have ignored the charitable impulse of the gifts themselves. As a result, the matter was properly one for congressional, not judicial, consideration.

The need for such legislation is pressing. As one commentator observed:

Allowing creditors to avoid tithing payments as fraudulent conveyances forces members of these religions to choose between their religious belief in tithing and the protection of the bankruptcy courts.

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139. *See id.* at 1149-51.

140. *See id.* at 1151.

The price of bankruptcy code protection for these debtors is very high. They must stiff God in order to satisfy their other creditors. This is a tough choice to make, even in the face of serious financial difficulty . . . . If tithing is avoidable as a fraudulent conveyance, tithe-paying debtors who file for bankruptcy protection are required to “rob God” and invoke a curse on their own heads in order to obtain the protection of the Bankruptcy Code. This is quite a price.<sup>141</sup>

This Part of the Article articulates the policy reasons for protection of religious and charitable contributions from avoidance as fraudulent conveyances. Part IV will provide an overview of the Act, which is designed to effectuate the policy arguments advanced here.

Although not falling within the traditional emphasis on receipt of an economic benefit to distinguish fraudulent from non-fraudulent conveyances, the protection of arm's-length transfers to bona fide religious and charitable organizations is consistent with the underlying policies animating traditional fraudulent conveyance law doctrine. There are four justifications for protecting such transfers. First, reliance by the recipients is justified on the same grounds as for sellers of consumption goods or services, and economic efficiency argues in favor of protecting these transfers. Second, equity suggests that these transfers should be treated at least as favorably as those market transactions that have been protected. Third, protecting such transfers is more defensible under established fraudulent conveyance policies than under many other bankruptcy policies, such as those which allow a debtor to exempt certain property from the estate. Fourth, an exception for such transfers is consistent with this country's historical support for religious and charitable organizations.

#### *A. Reliance and Efficiency*

Current principles of fraudulent conveyance law suggest that tithing contributions should be protected from avoidance where the transferee actually, reasonably, and detrimentally relies on the contribution.<sup>142</sup> But the reliance interest also provides a compelling case for a more general protection of religious and charitable organizations that receive contributions, even when there is no showing of actual reliance. These organizations are often of marginal economic viability and use most of

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141. *Id.* at 1152-53.

142. *See supra* notes 45-47 and accompanying text.

their resources on the current provision of services.<sup>143</sup> Many live a hand-to-mouth existence; forcing such organizations to disgorge funds contributed a year or even more before the debtor filed bankruptcy can work real hardship.<sup>144</sup> As a result, these organizations would be forced to bear the risk that any contribution they receive may be disgorged at any time, at least for the next year and perhaps even longer under some state laws. Few non-profit organizations are organized and operate in a manner that can absorb and diversify such risk.<sup>145</sup> Unlike issuers of credit, charitable organizations do not, and cannot, perform credit checks to verify the credit-worthiness of the debtor before receiving a contribution.<sup>146</sup>

Commercial enterprises, in contrast to non-profit organizations, are better equipped to predict and diversify against bankruptcy risks.<sup>147</sup> This dichotomy is even more striking because the risk that the non-profit organization must bear is larger than that borne by the typical commercial party. Most commercial parties will not be exposed to fraudulent conveyance attacks, and if they are, any consideration provided for the transfer usually will satisfy the economic value requirement of 11 U.S.C.

143. See Hopkins, *supra* note 4, at 1155.

144. See Flint Testimony, *supra* note 30, at 13 ("These organizations cannot operate at a deficit . . . . Returning money which they have received from a debtor means that some program or salary will need to be cut. The religious or charitable work of these institutions will suffer."); Whitehead Testimony, *supra* note 67, at 46:

Religious and charitable organizations literally exist and do their work on the basis of donations made to them; often their means are slender, especially by comparison with for-profit enterprises. For the law to impose, even indirectly, a requirement that recipients of contributions must somehow be aware of or monitor the solvency of contributors, would be a grave imposition on them, indeed a grave injustice for them.

145. See Comments of Judge Edith H. Jones, Transcript of Meeting of the National Bankruptcy Review Commission (Aug. 12, 1997), at 181:

[N]one of these organizations are business organizations. They are not set up to absorb risk. They do not have ready access to lawyers to defend them. Most of them operate on a shoestring with absolutely no profit, and to make them at risk for having to disgorge contributions is a very, very serious imposition.

146. See Whitehead Testimony, *supra* note 67, at 46:

But in the nature of the case religious and charitable organizations do not normally inquire into the financial status or solvency of contributors; nor should they be obliged to; nor would it even be practicable in most cases for them to do so. Much less could they easily delay utilizing or spending of contributions they receive until it is certain that their donors will not be subject to bankruptcy proceedings.

147. In fact, because the Act eliminates much of the confusion currently surrounding the issue, this increased certainty will enable creditors to predict their risk more effectively.

§ 548. In practice, businesses will be susceptible at worst to a preference action, not a fraudulent conveyance attack. Non-insider parties will only have to bear the risk of returning a payment during a ninety-day window, not the risk of the one year or longer reach-back period of the fraudulent conveyance laws.<sup>148</sup> Businesses will also usually have several possible defenses to shield the allegedly preferential payments.<sup>149</sup> Finally, if a preference must be disgorged, the creditor will retain a claim against the estate and may still recover a portion of its claim. The recipient of a fraudulent conveyance, by contrast, is not a creditor and thus receives no distribution in the bankruptcy case.<sup>150</sup>

Finally, where a creditor receives a preferential payment, that creditor often has some notice of the debtor's precarious financial situation. Frequently, the creditor will have used extraordinary methods to try squeezing payment out of a financially-troubled debtor. As a result, the creditor should not be completely surprised if the payment is later held to be a preference. By contrast, a charity would have no reason to have any suspicions or other constructive knowledge about a contribution's later susceptibility to attack because of the long reach-back period for fraudulent conveyance actions and the nature of these donations.<sup>151</sup>

Charitable organizations will be unable to rest easy until a full year elapses, at which time the payments in question finally will be insulated from attack under 11 U.S.C. § 548.<sup>152</sup> Faced with the prospect of a requirement to disgorge contributions a year or more down the road, a non-profit organization is confronted with a Hobson's choice. On the one hand, the organization can curtail current services and wait to verify that the contributions will not have to be disgorged in a year or later. On the other hand, the contributions may be used in current services, and the organization will run the risk that sometime in the future those contributions will be prone to disgorgement.<sup>153</sup> Moreover, the hardship resulting from being disgorged will be especially painful: The funds

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148. See 11 U.S.C.S. § 547(b)(4)(A) (Law. Co-op., LEXIS through Pub. L. No. 105-235, approved Aug. 14, 1998).

149. See 11 U.S.C.S. § 547(c).

150. Because fraudulent conveyance transferees are not creditors, Professor Newborn Wiggins is incorrect in stating that "[c]harities can at least be assured that the same rules which apply to other creditors (including other churches with a tradition of tithing) will apply to them." Wiggins, *supra* note 4, at 784-85.

151. See Hopkins, *supra* note 4, at 1154.

152. Of course, the organization is not completely home-free because the trustee can still seek to avoid the transfers under 11 U.S.C. § 544.

153. As noted earlier, many charitable organizations do not have ready access to lawyers, and any legal fees and expenses spent on defense also will come at the expense of current services. See *supra* notes 24-35 and accompanying text.

disgorged must be surrendered in one lump-sum payment, whereas most charitable contributions are made in installments. Few non-profit organizations operate in a manner in which they can maintain a war chest of savings upon which they can rely to make a large lump-sum payment to repay a fraudulent conveyance.

Efficiency analysis supports this reasoning. As in all constructive fraud situations, the relevant question is which party should be forced to bear the risk of a transfer: the creditors or the transferee? Note further that both parties are *innocent*; the debtor is the only "guilty" party. Professor Reilly states:

A transfer ought to be avoidable where the transferee's cost of bearing loss is lower than the creditors' cost of bearing it. A transferee's cost of bearing loss is lower than the creditors' only in the *relatively unusual case* where the transferee, at the time of the transfer, had inexpensive access to information that revealed: (1) loss to the debtor was likely to occur; and (2) creditors' cost to shift loss to equity claimants was unusually high.<sup>154</sup>

An arm's-length nonprofit transferee will rarely possess information causing it to question the appropriateness of the debtor's contribution. As between innocent creditors and an innocent church or charity, the creditors will almost always be in a superior position to monitor the debtor's behavior and to bear any loss that results. Many nonprofits lack the expertise to investigate the source of their donations and to assume the risk of having to surrender bad donations.<sup>155</sup>

Arguably, the provisions of the Act are inconsistent with an overriding purpose of the Bankruptcy Code: to provide a centralized forum for the orderly collection and distribution of estate assets.<sup>156</sup>

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154. Reilly, *supra* note 46, at 1246 (emphasis added).

155. Of course, this conclusion would not stand if the contribution was not actually an arm's-length transfer to a bona fide nonprofit organization. Thus, for instance, if the transferee was a sham organization controlled by the debtor, then the transferee clearly would be the lower-cost party to monitor the debtor. Or if the transferee was a family member, then the transferee would likely have inexpensive access to information that revealed the debtor's scheme (even if not part of any kickback arrangement).

156. See JACKSON, *supra* note 40, at 7-19. It is likely that this is the primary concern which influenced the decision of the National Bankruptcy Review Commission to reject a similar proposal presented to the Commission for consideration. See Transcript of Meeting of the National Bankruptcy Review Commission (Aug. 12, 1997), at 191-93 [hereinafter Commission Transcript]. Professor Jackson identifies the provision of a "fresh start" to debtors as a second goal of bankruptcy law. See *id.* at 4. This "fresh start" goal is not implicated here.

Under this analysis, bankruptcy law should modify state-created rights, such as fraudulent conveyance law rights, only when the provision furthers an important bankruptcy policy.<sup>157</sup>

Even if this policy reflects the primary goal underlying the bankruptcy laws, it is not the exclusive policy. Provisions that favor some entities over others are sprinkled liberally throughout the Bankruptcy Code.<sup>158</sup> Where, as here, there are strong policy reasons supporting disparate treatment and little offsetting prejudice to bankruptcy policies, such disparate treatment is appropriate. Similarly, although the Internal Revenue Code is designed primarily to raise revenue, that goal may yield to other policies, such as support for non-profit organizations through tax-preferred treatment. In this situation, the bankruptcy policies stand in square conflict with the right of free exercise and the federal policies encouraging and protecting charitable and religious organizations. Moreover, as noted earlier, this exception is consistent with the spirit of traditional bankruptcy law's policies and exceptions. Thus, it is appropriate to try to balance and accommodate these competing concerns.<sup>159</sup>

### *B. Equitable Arguments*

Equity also demands that religious and charitable contributions be protected from avoidance as fraudulent conveyances. Assuming that an exception can be crafted that prevents abuse, it is appropriate to protect such transfers.

The intellectual poverty of the Bankruptcy Code's current approach to this issue is illustrated by the fact that, as long as there is no actual intent to defraud, "debtors can, within one year of filing, spend money on extravagant personal consumption, investments in exempt property, investments pursuant to fraudulent business schemes, and gambling, without having the transactions avoided."<sup>160</sup> Or, as the Christian Legal Society's main brief in *In re Young* observed, "[h]ere, the trustee would

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157. See *Butner v. United States*, 440 U.S. 48, 54-55 (1979). Of course, the existence of an independent cause of action for fraudulent conveyances under 11 U.S.C. § 548 violates this principle, as all states have extant fraudulent conveyance laws. See JACKSON, *supra* note 40, at 148.

158. See, e.g., 11 U.S.C. § 507 (1994) (providing, in part, preferred priority treatment for employee wages, employee benefit plans, owners and operators of grain storage facilities, fishermen, alimony and child support).

159. See *infra* notes 179-85 (discussing traditional preferred treatment for nonprofits in American law and society).

160. Hopkins, *supra* note 4, at 1154-55 & nn.81-83 (citing cases).

reach for the offering plate, but leave the Youngs' new stereo blaring."<sup>161</sup> The decision in *In re Grigonis* highlights the unfairness of this approach: There, a debtor's expenditures on psychic consultations during the year preceding bankruptcy were not fraudulent conveyances.<sup>162</sup> As Daniel Keating commented: "So we are left to explain why fraudulent conveyance law says it is okay to gamble your money away but not to give it to your church."<sup>163</sup> The answer is: "You can't." The distinction may be well-grounded in current fraudulent conveyance law, but that does not make it right. Since debtors are largely insulated from attack for spending their money on recreational activities, it is only equitable to shield debtors who spend their money on charitable activities.

Moreover, if the purpose of measuring value from the debtor's perspective is to enable the debtor to enter into consumption and investment purchases,<sup>164</sup> then it is difficult to see what goal is served by interpreting the value requirement to protect a debtor who spends money at a casino and not one who donates to the American Heart Association. Creditors suffer equally in both cases. The debtor has unarguably received some benefit in both cases. And arguably, the public is actually better off by protecting the American Heart Association. Thus, there is little to commend the distinction other than the legal formalism of requiring that the value given in exchange be "economic" rather than charitable.

### C. Tithing Donations and the "Kickback" Problem

The classic fraudulent conveyance scenario is as follows:<sup>165</sup> The creditors are swarming around the debtor's house, looking for assets available to satisfy their claims. With the "wolves" knocking at the door, the debtor sells a flock of sheep to his cousin for one dollar with the intent of placing the flock beyond the reach of his creditors. Absent

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161. Keating, *supra* note 4, at 1053 (quoting Brief for Christian Legal Society at 16, *In re Young*, 82 F.3d 1407 (8th Cir. 1993) (No. 93-2267)).

162. See *Samson v. U.S. W. Communications, Inc. (In re Grigonis)*, 208 B.R. 950, 958 (Bankr. D. Mont. 1997).

163. Keating, *supra* note 4, at 1051; see also *Allard v. Flamingo Hilton (In re Chomakos)*, 69 F.3d 769, 772 (6th Cir. 1995), *cert. denied*, 517 U.S. 1168 (1996) (denying attempt by bankruptcy trustee to recover as a fraudulent conveyance almost \$8000 gambled away at a Las Vegas Casino in the year preceding bankruptcy).

164. See *supra* notes 45-47 and accompanying text.

165. Although I suspect that in the modern economy sheep rarely provide the basis for a fraudulent conveyance scenario, I have retained them out of respect to the famous *Twyne's Case*, 76 Eng. Rep. 809 (K.B. 1601). *Twyne's Case* is discussed in more detail in Bein, *supra* note 4, at 108-09.



fraudulent conveyance law, creditors would be unable to claim the sheep, now owned by the cousin, to collect on the debt. Of course, the "sale" to the cousin is a pure sham—after the dust has cleared, the cousin will return the sheep to the debtor. Through this "kickback" arrangement, the debtor retains his property in the end, and the creditors are left empty-handed.<sup>166</sup>

In this classic situation, the transferee cousin is a knowing participant in the fraud. Thus, it is appropriate to allow the creditors to pursue the sheep from the transferee's hands, avoiding the transfer and levying on the sheep for the benefit of the creditors. As noted above, a primary purpose of fraudulent conveyance law is to deter debtors from conspiring with others to defraud creditors by hiding the estate's assets. For similar reasons, it is not a constructively fraudulent conveyance when the debtor receives "reasonably equivalent value" in exchange for the transfer because creditors are no worse off. Although creditors can no longer reach the assets transferred, they can now levy against the assets received in exchange for those transferred.

However, it will often be difficult to prove the debtor's state of mind to establish that he had the fraudulent intent necessary to commit actual fraud. Moreover, the debtor can further circumvent the rule by manipulating the time or nature of the transfer to conceal fraudulent intent. As a result, courts early on developed the idea of certain "badges of fraud," which amounted to objective evidence that created a rebuttable presumption of actual fraudulent intent by the debtor.<sup>167</sup>

One "badge of fraud" occurred when a debtor transferred property but received little or nothing in return. Over time, this principle expanded to treat any transfer made when the debtor was insolvent as a fraudulent conveyance, regardless of the debtor's subjective intent. The principles underlying this rule ostensibly mirror those that prevent actual fraudulent transfers and presume the debtor is acting to defraud creditors when such facts are present.<sup>168</sup> Again, however, the underlying concern was that the debtor not only would stiff creditors, but that in the end the debtor would end up with the property.

This fear of a kickback arrangement is minimal in the context of an arm's-length transfer of property to a bona fide religious or charitable

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166. See Baird & Jackson, *supra* note 22, at 829. In 1571, Parliament passed the Statute of 13 Elizabeth, which made illegal and void such arrangements. See *id.*

167. See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 541 (1994); *Twyne's Case*, 76 Eng. Rep. at 810-11 (announcing six badges of fraud). The concept of "badges of fraud" is retained in section 4 of the Uniform Fraudulent Transfer Act. See Reilly, *supra* note 46, at 1217-18.

168. See Baird & Jackson, *supra* note 22, at 830; Bein, *supra* note 4, at 108-09 (summarizing early history of fraudulent conveyance law).

organization. The debtor's contributions go to the recipient, who then uses them in the provision of current services. There is no implicit promise by the recipient to return the property to the debtor at the end of the day. If there is such a promise, either implicit or explicit, then actual fraud exists, and the trustee can recover the contributions under 11 U.S.C. § 548(a)(1). Thus, this situation falls outside the traditional concerns underlying fraudulent conveyance law.

The case for protecting such transfers is made more compelling because the exemption process for debtors makes it possible for a debtor to use bankruptcy as exactly the same sort of kickback mechanism generally prohibited under fraudulent conveyance law. Section 522 of the Bankruptcy Code provides the debtor with a list of property that is exempt from the claims of creditors.<sup>169</sup> To the extent that the debtor's property fits within any of these exemptions, the debtor is able to retain that property during and after bankruptcy. In effect, therefore, the Bankruptcy Code stands in for the cousin in the hypothetical situation described above: It allows the debtor to take that property out of the reach of creditors and then reclaim it later.

Moreover, it is not fraudulent for a debtor to convert nonexempt assets into exempt assets on the eve of bankruptcy solely with the motive of placing such assets beyond the reach of creditors.<sup>170</sup> Thus, for instance, a debtor may liquidate stock holdings and bank accounts—assets that otherwise would be available to satisfy creditors' claims—and use those proceeds to buy a large house, an action protected by a federal or state homestead exemption.<sup>171</sup> In short, when it comes to exemption

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169. A debtor has the option of choosing the federal slate of exemptions or of instead opting for similar, and often more generous, state law exemptions.

170. See *Abbott Bank-Hemingford v. Armstrong (In re Armstrong)*, 931 F.2d 1233, 1238 (8th Cir. 1991). *But see Levine v. Weissing (In re Levine)*, 134 F.3d 1046, 1050 (11th Cir. 1998) (holding that under applicable Florida law, it did constitute a fraudulent conveyance to convert nonexempt assets to an exempt annuity on the eve of filing bankruptcy). Under limited circumstances, debtors who engage in excessive bankruptcy planning may not be able to obtain a discharge. Absent de facto fraud or appalling overreaching, however, courts are unlikely to deny a debtor's discharge. See DAVID G. EPSTEIN ET AL., *BANKRUPTCY* § 8-32, at 649-50 (1993). In the colloquial expression of bankruptcy practice, "Pigs get fat; hogs get slaughtered." Thus, a great deal of eating at the exemption-planning trough will be permitted before discharge is denied. For instance, pouring money into an unlimited homestead exemption will almost never limit a debtor's discharge, although abuse of other unlimited exemptions may raise problems. See *id.* at 650 ("In the case of a homestead, the outer limit is the sky or almost as high . . ."). For exemptions which are already capped in amount, debtors can usually avail themselves with impunity. See *id.*

171. Perhaps the most notorious example is that of former Major League Baseball Commissioner Bowie Kuhn, whose law firm, Meyerson & Kuhn, filed for protection under Chapter 11, after which Kuhn sold his \$1.2 million dollar house in New Jersey and

law, debtors routinely flaunt the policies of fraudulent conveyance law; they not only take assets out of creditor's reach, but at the end of the day they retain the property. The kickback thus is alive and well, and the Bankruptcy Code provides the conduit.

Compared to the exemption scenario, the case for protecting charitable contributions from fraudulent conveyance attack is compelling. As Laycock and Thomas observe:

Our point is comparative: if the interest in protecting creditors is not important enough to nullify debtors' nonfraudulent secular transactions or to override their secular interests in retaining exempt assets and income for future consumption, then it cannot be important enough to nullify their religious act of contributing to their church.<sup>172</sup>

When the debtor makes an arm's-length transfer to such an organization, the debtor does not receive any sort of kickback: The debtor does *not* get the property back in the end. There is no distinction based on fraudulent conveyance law that would protect a debtor's exemptions but not arm's-length transfers to bona fide recipients. Stated more bluntly, should O.J. Simpson be entitled to purchase a million-dollar house in Florida protected by that state's generous exemptions laws when the Crystal Evangelical Church is forced to disgorge the Youngs' \$13,000 contribution?<sup>173</sup>

Nor would such an exception be uniquely prone to abuse. If the recipient is under the donor's control, thus raising the concern that the debtor is using the organizations as a method to conceal assets from creditors, then such transfers should not be protected. Policing such fraudulent recipients should not be difficult. Indeed, the IRS has been engaged in such monitoring activities for many years to prevent taxpayers from funneling assets into bogus tax-exempt organizations. Thus, such concerns are easily remedied on a case-by-case basis, just as they are under the tax code.

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relocated to Florida just ahead of his creditors. See Lawrence Ponoroff, *Exemption Limitations: A Tale of Two Solutions*, 71 AM. BANKR. L.J. 221, 235 n.68 (1996). Former Texas Governor John Connally was able to use Texas's exemption laws to file bankruptcy in 1987 while retaining his 200-acre ranch. See *id.* at 235 n.69.

172. Laycock & Thomas, *supra* note 84, at 223.

173. Indeed, prior to his adverse civil judgment, O.J. Simpson was reported to be house hunting in Florida for exactly this reason. See David Barstow, *In Florida, Simpson May Find a Financial Haven*, ST. PETERSBURG TIMES, Oct. 19, 1995, at 1A.

*In re Zarling*<sup>174</sup> presents such a case and demonstrates the way in which bankruptcy courts can police such fraudulent activity. In that case, the debtor conveyed his interest in a farm to the "Universal Life Church Charter 22406." At the time, the value of the property and improvements was approximately \$389,000. Zarling received no consideration in exchange for the farm from the recipient, Universal Life Church Charter 22406. After the conveyance, the debtor and his family continued to reside on the farm, operate the farm, retain the benefits of all income generated from the farm, and pay the real estate taxes. The debtor exercised complete control over the church, and the entire slate of the original officers and trustees consisted of the debtor and his family. They were also the church's only members.<sup>175</sup>

The debtor later filed bankruptcy, and the trustee argued that the farm was property of the debtor's bankruptcy estate despite the earlier conveyance of title. The court held that the church was a sham, avoided the transfer of the farm to the church, and held the farm to be property of the Zarlings' bankruptcy estate. As the court noted:

The debtor's attempts to portray himself as an unsophisticated individual acting out of sincere religious convictions are unconvincing. To the contrary, the court concludes that the debtor is a very clever individual who embarked upon a carefully contrived scheme for his personal benefit and with the primary motive of circumventing payment of his existing and anticipated tax obligations.<sup>176</sup>

Thus, the possibility that debtors may create fraudulent charities as recipients of such transfers, while real, is exaggerated. Such issues are not new and are not unique to bankruptcy law. Consequently, they do not provide an adequate basis for rejecting protection of contributions to religious and charitable organizations in bankruptcy.<sup>177</sup>

Protecting arm's-length transfers to bona fide religious and charitable organizations is thus defensible in light of traditional bankruptcy and fraudulent conveyance law policies. If the Bankruptcy Code permits a debtor to retain assets through the exemption process, it also should allow the debtor to make arm's-length contributions to appropriate organizations.

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174. Stein v. Zarling (*In re Zarling*), 70 B.R. 402 (Bankr. E.D. Wis. 1987).

175. See *id.* at 403-05.

176. *Id.* at 405.

177. The Act also contains several specific provisions designed to mitigate the danger of abuse and fraud. See *infra* notes 195-97.

*D. Traditional Support for Religious and Charitable Organizations*

Protecting charitable contributions from attack also is consistent with the federal policy that encourages charitable donations and non-profit organizations. Historically, these organizations have received long-standing preference. Shielding them from the Bankruptcy Code's reach furthers traditional support for their missions and enhances the incentives to contribute to them. The law evinces this support for non-profit activities in many places. For instance, religious and charitable organizations receive preferential tax treatment, as do those who contribute to them. Similarly, until relatively recently, the "charitable immunity" doctrine protected charities from liability for the torts of their employees and agents.<sup>178</sup>

Some maintain that the religious mandate to tithe to one's church is offset by an equally powerful religious obligation to pay one's creditors.<sup>179</sup> In part, offsetting the obligation to pay one's creditors underlies Professor Daniel Keating's argument that tithing contributions should not be protected in bankruptcy: "While one can readily point to the Bible as authority for the proposition that failing to tithe is a sin, one can just as readily find in the Bible ample authority for the proposition that failing to repay one's creditors is a sin."<sup>180</sup>

Keating admits, however, that the Bible does not "say directly which obligation—tithing or repaying creditors—should supersede the other."<sup>181</sup> Yet because there is room for disagreement about how to balance these offsetting obligations,<sup>182</sup> it would be improper to conclude that tithing should be prohibited in bankruptcy or that churches should be required to return tithing contributions.<sup>183</sup> If individuals and churches uniformly valued the obligation to repay creditors over tithing obligations, there rarely would be an occasion for the issue to arise in court. Such disagreement reveals how this situation justifies reliance on the Free Exercise Clause and the policies it embodies: Debtors and their churches should be permitted to weigh these competing obligations without state

178. See Bein, *supra* note 4, at 137. This traditional immunity has now been abolished in most states. See *id.* at 137-38.

179. See Keating, *supra* note 4, at 1052 (arguing that tithing contributions should not be considered to be a "necessary expense" for a Chapter 13 debtor); Wiggins, *supra* note 4, at 788.

180. Keating, *supra* note 4, at 1054.

181. *Id.* at 1055.

182. See *id.* (admitting that "there is no 'standard' Christian doctrine" on the issue).

183. Professor Newborn Wiggins appears to draw the same conclusion as Professor Keating. See Wiggins, *supra* note 4, at 788.

interference. Tithing runs across many religions. For example, Buddhism and Islam, like many Judeo-Christian denominations, require tithing.<sup>184</sup> The wide application of tithing thus presents a potent argument for permitting debtors and their spiritual guides to balance the competing religious obligations of tithing over repaying creditors.

Forcing churches to relinquish tithing contributions made by insolvent debtors tramples the beliefs of individuals who weigh the obligation to tithe more heavily than competing requirements. By contrast, providing debtors with the option to tithe would return the decision to where it properly belongs: with the debtor and his or her religious institution. If the debtor favors the obligation to repay debts over a tithing obligation, the debtor can voluntarily decide to allocate those assets to the repayment of debts. Similarly, if the church weighs the repayment obligation over the tithing obligation, the church can voluntarily surrender the debtor's contributions to his or her creditors. Permitting the option to tithe preserves the goals of the Free Exercise Clause by providing the debtor with some sphere of freedom to balance religious obligations conscientiously, whereas a flat prohibition denies that choice.

Arguably, protecting tithing contributions is inappropriate because it would "force" creditors to subsidize the debtor's charitable donation patterns, or that it would require nonconsenting third-parties to bear the cost of the debtor's exercise of his or her religious freedom. This argument, however, is unpersuasive. Third parties often "subsidize" such indirect costs. Charitable and religious organizations receive tax-exempt status, and their donors are given a tax deduction for contributions. As a result, tax rates must be set higher than they would be without these tax exemptions. Practically, this means that others must pay increased taxes to replace the funds contributed to tax-exempt institutions: In effect, taxpayers subsidize these organizations through tax-exempt status. Similarly, employers accommodate an employee's exercise of religion, because an employee cannot be required to work on a day of religious observation. Finally, every taxpayer is "forced" to pay for military chaplains.

Moreover, until the debtor files bankruptcy, all of the property remains the debtor's property. The debtor may hold the property in trust

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184. See Price & Rahdert, *supra* note 134, at 886 n.142 (discussing tithing requirements of Islam and Buddhism); Note, *Tithing in Chapter 13—A Divine Creditor Exception to Section 1325?*, 110 HARV. L. REV. 1125 (1997) (discussing tithing traditions of various religions). Both Professor Keating and Professor Newborn Wiggins limit their discussion on this particular point to Biblical authority and make no mention of the sacred texts of other religions.

for creditors during the period of insolvency, but even this is not clear.<sup>185</sup> As we have seen, this means the debtor can spend it at a casino, take a trip to Hawaii, or sample Zagat's best, even though creditors have not consented to the transfer and derive no benefit from such expenditures. Apparently the only thing the debtor is forbidden from doing is giving to a soup kitchen or temple. If the property truly is the debtor's property, it is fatuous to suggest, even figuratively, that the debtor spends the creditors' money by making such contributions.<sup>186</sup>

#### IV. THE RELIGIOUS LIBERTY AND CHARITABLE DONATION PROTECTION ACT OF 1998

The Religious Liberty and Charitable Donation Protection Act (the Act) was enacted in response to the problems identified. Among its provisions, the Act is designed to protect tithing contributions from later recovery under 11 U.S.C. §§ 544 and 548. Through the Act, Congress carves out exceptions to 11 U.S.C. §§ 544 and 548 to exclude from avoidance reasonable gratuitous transfers made to bona fide religious and charitable contributions. The Act generally bars a bankruptcy trustee from suing a church or charity that receives a contribution from an insolvent debtor, as long as the transfer is not intentionally fraudulent and does not exceed fifteen percent of the debtor's income.<sup>187</sup>

The Act is drafted in a manner that protects the free exercise rights of debtors without running afoul of the Establishment Clause. The Act also recognizes the fundamental similarities between religious and charitable contributions and treats them comparably. But the Act only protects arm's-length transfers made to religious and charitable entities. Thus, it limits the problem of self-dealing while still advancing the traditional social policies that support such organizations. Finally, the Act is justified on the basis of federal bankruptcy policy: Indeed, it is far more normatively justifiable than many current bankruptcy doctrines, such as the "economic value" rule and the availability of broad exemptions to debtors.

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185. Compare Carlson, *supra* note 29, at 672 (stating that an insolvent debtor holds property in trust for creditors), with Williams, *Revisiting*, *supra* note 40, at 66 ("[A] debtor does not hold its estate in trust for its general creditors.").

186. Thus, there is no basis for Lipson's statement that, "[e]ssentially, the insolvent debtor is not spending her own money, but her creditors' money." Lipson, *supra* note 41, at 303.

187. The Act also includes provisions designed to protect the right of debtors to tithe as part of a Chapter 13 plan or to make provision for such payments during the pendency of a Chapter 7 case without having the case dismissed for substantial abuse. Those provisions are discussed briefly in Part IV.

As an initial matter, the Act requires that any “charitable contribution” must be made to a “qualified religious or charitable entity or organization.”<sup>188</sup> The Act defines these terms by reference to the definitions provided by section 170(c) of the Internal Revenue Code of 1986, known more familiarly as a section 501(c)(3) organization.<sup>189</sup> As a result, the Act offers bankruptcy courts a body of statutory and case law to which they can refer when applying its provisions. Bankruptcy courts thus will be able to ensure that the contributions are made to bona fide religious and charitable organizations.<sup>190</sup>

The Act creates a “safe harbor” that protects all such transfers up to an aggregate amount of fifteen percent of the gross annual income of the debtor for the year in which the transfer is made.<sup>191</sup> Transfers that exceed the fifteen percent safe harbor still would be protected from avoidance if the transfer is reasonable in amount and consistent with the debtor’s established contribution practices. What constitutes a reasonable donation and the debtor’s established practice will have to be considered on the facts of each case.

In considering the wisdom of this fifteen percent safe harbor, two issues are relevant: first, whether there should be any safe harbor at all and second, the amount at which the safe harbor should be set.

The existence of some safe harbor amount is justified. The alternative would be a fact-intensive inquiry in each case geared to determine the depth of the debtor’s spiritual commitment and the level of consistency with his or her prior donation patterns. The safe harbor amount would prevent bankruptcy trustees and courts from entangling unnecessarily in the debtor’s private religious affairs.<sup>192</sup> The bankruptcy policy of avoiding the administrative costs associated with a fact-intensive inquiry in every case also justifies the safe harbor.

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188. See *infra* Appendix § 2.

189. Although the Act refers to organizations defined in section 170(c)(2) of the Internal Revenue Code, the Act is intended to protect unincorporated churches and charities as well. See Letter from Professor Douglas Laycock to Hon. Ron Packard (May 6, 1998).

190. As discussed above, the court in *Zarling* applied just such an analysis to determine whether certain property was property of the debtor’s bankruptcy estate. National Bankruptcy Review Commissioner Shepard has observed that eligibility for section 501(c)(3) status is “well policed” by the Internal Revenue Service. See Commission Transcript, *supra* note 156, at 183.

191. See *infra* Appendix § 3(a)(7)(A), (B).

192. This responds to Professor Newborn Wiggins’ concern that protecting such contributions will lead to undue interference with the debtor’s private religious affairs. The safe harbor obviates the need for intensive scrutiny of every borrower’s contribution habits. See discussion *supra* note 83 and accompanying text.



These same policy goals support the establishment of a safe harbor of approximately fifteen percent of a debtor's gross income. The safe harbor amount should be one sufficient to protect most contributions from any unnecessary entanglement with debtor beliefs and to minimize administrative costs. It seems reasonable to conclude that a figure based on fifteen percent of the debtor's gross income appropriately includes the total contributions made by most Americans to charities and churches in any given year, thereby minimizing entanglement in the debtor's affairs.<sup>193</sup> At the same time, that amount is not so large as to prejudice substantially the creditors' ability to collect on their claims.

Contributions that exceed the fifteen percent safe harbor would be permitted, but only upon a showing that the donated amount comports with an established practice of contributions.<sup>194</sup> Limiting the safe harbor to fifteen percent of gross income is designed primarily to prevent abuse of the provision. Thus, for amounts exceeding fifteen percent, a court will be entitled to review the contributions to ensure that they are not being used solely to put the assets beyond the reach of creditors. If the contributions can be shown to be consistent with an established pre-bankruptcy giving pattern, the transfer is protected.

As a result, a debtor's ability to "load up" contributions of up to fifteen percent of his or her income in order to put assets beyond creditors' reach is limited.<sup>195</sup> But debtors already have the ability to "load up" significantly larger amounts through exemption schemes. Put more strongly, while a debtor could "load up" exemptions by plowing all of his or her assets into a multi-million dollar house in Florida protected by that state's unlimited homestead exemption, the debtor would be unable to contribute more than fifteen percent of the assets to a religious or charitable institution, and only then if it was an arm's-length transfer to a bona fide organization with no actual fraudulent intent.

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193. Members of many Judeo-Christian religions traditionally tithe 10% of their incomes to the church. See *Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1410 (8th Cir. 1996). In practice, however, most people tithe in significantly lesser amounts. See *id.* at 1417 (noting table in Appellant's brief "listing [the] average percentage of household income donated to charity by denomination as 1.3 to 3.8%, much less than 10%"); see also Pollak, *supra* note 4, at 536-37 (reporting statistics that indicate only four to five percent of Americans tithe 10% of their income). Others, however, tithe much more. Mormons, for instance, are required to tithe 20% of their income.

194. See *infra* Appendix § 3(a)(7)(B). Thus, 15% is a safe-harbor, not a cap. See Letter from Steven T. McFarland to Hon. Ron Packard (May 13, 1998).

195. This was Commissioner Hartley's concern when the issue was raised before the National Bankruptcy Review Commission. See Commission Transcript, *supra* note 156, at 182.

Admittedly, some debtors may "find religion" on the eve of bankruptcy and make some contributions exclusively to prevent assets from falling into the hands of creditors. But this threat will most likely be a minor one.<sup>196</sup> Few debtors are likely to engage in opportunistic giving simply to stiff creditors: Selfish motives are more effectively executed by converting assets into exempt property. As a result, the universe of debtors who can make opportunistic charitable contributions are: (1) those who exhaust their exemptions, yet still have assets they want to exclude from creditors; or (2) those who are willing to forego some exemptions. Few debtors will fall into the first category because those with sufficient assets to exhaust all exemptions while still retaining sufficient assets to contribute to charities are unlikely candidates for bankruptcy. The second category should not be punished for choosing to contribute their property to more selfless causes rather than plowing it into self-serving exemptions. Indeed, if those in the second category were craftier, they could convert their assets into exempt property, liquidate that property, and contribute the proceeds to a church or charity after bankruptcy. No social policy is furthered by rewarding the most savvy bankruptcy planners while penalizing those acting from charitable impulses. Finally, the most egregious bankruptcy planning can be regulated by preventing contributions made with actual intent to defraud.

"Bankruptcy planning" usually is condemned because by planning, the debtor manipulates the Bankruptcy Code to retain for his or her own benefit assets that otherwise would be available to satisfy creditors, as in the kickback scheme described above, or where the debtor converts non-exempt assets into exempt assets on the eve of bankruptcy. Where a debtor has made good faith transfers to a legitimate religious or charitable organization, by contrast, the debtor does not line his or her own pocket. As a result, concerns about encouraging improper bankruptcy planning hold less force in this situation than in those in which the debtor exploits bankruptcy loopholes for his own benefit.

The requirement that the donee be a legitimate section 501(c)(3) organization also distinguishes these contributions from other gratuitous transfers, such as transfers to family members. Public policy goals that favor non-profit do not apply to transfers to family members. Moreover, restricting donees to a class of statutorily-defined legitimate organizations

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196. Thus, it is possible that there may be some small increase in the cost of credit for borrowers. Any increase in the cost of credit which results from the Act, however, must be weighed against the reduced litigation costs for all parties by the establishment of a bright-line rule which will cover most cases without litigation. However, to the extent that there may be some small residual increase in the cost of credit, it is the position of this Article that the increase is justified by offsetting social values.

limits the ability of the debtor to manipulate the exception for fraudulent ends.

Transfers to family members and friends always have been inherently suspicious transfers.<sup>197</sup> Presumably, this suspicion is rooted in part in the concern that transfers to family members are more likely to be made pursuant to a fraudulent kickback scheme. Such transfers are distinguishable from the typical charitable transfers that are arm's-length transactions, where the transferee in turn uses the property in its current operations or transfers the property to others by providing social services. Thus, the Act's protections and its exclusion of gratuitous transfers to family members is well-grounded in traditional bankruptcy policies.

Moreover, this fear of encouraging improper behavior is not limited to bankruptcy situations. For instance, taxpayers may contribute to non-profit organizations primarily to reduce their tax liabilities, rather than for genuine charitable motives. This "tax planning" puts assets beyond the reach of the Treasury, causing the rest of us to pay higher taxes. Of course, that is the purpose of granting the deductions in the first place. Thus, "abuse" of these tax provisions only arises when the taxpayer uses the non-profit organization as a sham to gain the benefits of tax-exempt status, while still retaining control over the assets after the contribution is made. Merely electing to use the deduction, however, is not generally viewed as an abuse of the tax code. Similarly, merely electing the protection of the Act should not be viewed as inherently improper.

Although some classify this type of "tax planning" as an "abuse" of the charitable tax deduction, the device generally is accepted as a necessary price for encouraging the activities of non-profits overall. If these entities meet the tax code's definition of a religious or charitable organization, it is inevitable that some abuse will occur. However, fears of abuse should not deter recognition of a charitable or religious exemption. In short, we have decided that the benefits of encouraging these organizations and relieving them of some burdens justifies the threat that the deduction sometimes will be used for improper purposes. That is simply the price of a policy that is socially beneficial overall. The same principle applies to arm's-length contributions made to non-profits in the shadow of the bankruptcy code.

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197. Thus, transfers to "insiders," such as family members, have traditionally been one of the "badges of fraud" evidencing a fraudulent conveyance. See UNIF. FRAUDULENT TRANSFER ACT § 4(b)(1), 7A U.L.A. 653 (1985); Baird & Jackson, *supra* note 22, at 832; Williams, *Revisiting, supra* note 40, at 60 ("[F]raudulent transfer laws were initially passed to prevent collusive transfers between individual debtors and their families and friends.").

The Act also preempts the right of individual creditors to bring actions against the debtor.<sup>198</sup> As an initial matter, the Bankruptcy Code gives the trustee the right to bring such actions on behalf of the estate, but if the trustee chooses not to, individual creditors may petition the court for the right to raise a claim.<sup>199</sup> If the trustee were prohibited this preemptive right, courts would have little alternative but to permit individual creditors to bring multiple actions. Failure to preempt such private actions by creditors could lead to a wasteful and duplicative "race to the courthouse" by individual creditors exercising their individual state-law rights.<sup>200</sup> *Gregory-Edwards, Inc. v. Cedar Bayou Baptist Church*<sup>201</sup> illustrates this problem.

In *Cedar Bayou*, the debtors, Leland and Joyce Collins, filed for bankruptcy protection in October, 1992. One of their creditors, Gregory-Edwards, Inc., held a judgment against Leland Collins arising from a business dispute. Gregory-Edwards filed a \$150,682 claim in the Collins' bankruptcy case. In December 1992, a trustee was appointed to administer the Collins estate. For the forty-three year period leading up to and including the filing of bankruptcy, Leland Collins had contributed approximately ten percent of his income to the Cedar Bayou Baptist Church (the Church). The Collins never had sufficient assets to pay Gregory-Edwards's claim.

Finally in 1995, Gregory-Edwards purchased from the bankruptcy trustee, for nominal consideration, the right to sue the Church under state law to recover the contributions made by Leland Collins during the period when he was insolvent as a result of the Gregory-Edwards judgment. Soon thereafter, Gregory-Edwards sued the Church. The trial court held against the Church in the amount of \$23,428 plus interest from dates beginning as early as July 1, 1989.<sup>202</sup> The court derived this figure

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198. See *infra* Appendix § 3(b).

199. See *Nebraska State Bank v. Jones*, 846 F.2d 477, 478 (8th Cir. 1988); *In re Xonics Photo-Chemical, Inc.*, 841 F.2d 198, 202 (7th Cir. 1988); *American Nat'l Bank v. Mortgageamerica Corp. (In re Mortgageamerica Corp.)*, 714 F.2d 1266, 1275 (5th Cir. 1983). But see *Glenny v. Langdon*, 98 U.S. 20, 22, 27-31 (1878) (suggesting that the right belongs exclusively to the trustee); *Palatine Nat'l Bank v. Strom (In re Strom)*, 97 B.R. 532, 539 (Bankr. D. Minn. 1989) (stating that individual creditors lack standing to bring fraudulent conveyance actions). Later cases suggest that the trustee holds the right initially, but that it may be transferred to other parties.

200. See Bernstein Testimony, *supra* note 4, at 42.

201. *Gregory-Edwards Inc. v. Cedar Bayou Baptist Church*, No. 14-97-01429-CV (Tex. Fourteenth Ct. App.). The following discussion draws from the briefs submitted in the *Cedar Bayou* case.

202. The interest rate was set at 10%. As a result of the high rate of interest the judgment has now almost doubled in value over the initial principal amount.

from the amount of Leland Collins's contributions made for the four years preceding bankruptcy.

The particulars of this case, however, are not as important as the larger implications. As noted, the cause of action against the Church initially belonged to the bankruptcy trustee acting on behalf of the estate, but he sold this claim to Gregory-Edwards, thereby enabling the private creditor to bring the action. Neither the automatic stay nor the discharge provisions of the Bankruptcy Code protected the Church because it was not the debtor. As a result, it was insufficient simply to bar the trustee from bringing the action against the transferee church on behalf of the estate. Rather, it also was necessary to prevent the trustee from assigning the claim to anyone else who might have standing to bring the claim under state law, and to bar all other parties from bringing the claim. Failure to do so would permit the very "race to the courthouse" and duplication of litigation that the Bankruptcy Code seeks to prevent.

The Act also is an improvement over both RFRA and previous case law shielding charitable contributions because it extends protection to both religious and secular charities alike. RFRA and the case law both are anchored in concepts of religious liberty, thus, they have not afforded similar protection to secular charities. Nonetheless, the case for protecting non-religious charities is compelling as a matter of bankruptcy policy and overall social policy.<sup>203</sup> The reliance argument is strong for organizations such as Meals on Wheels or homeless shelters. Soup kitchens and their counterparts are often local charities that are truly shoestring operations. Thus, while religious liberty concerns are absent in this context, other compelling reasons exist for bringing them under the protective umbrella.

Litigious attacks by bankruptcy trustees against secular charities are significantly less common than attacks against religious organizations.<sup>204</sup> This difference, however, probably does not result from variant treatment between the two types of organizations under the Bankruptcy Code or by bankruptcy trustees, but instead from the perception that trustees usually will find it not economically worthwhile to attack non-religious organizations.<sup>205</sup> In all likelihood, the amounts given to a debtor's

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203. See Wiggins, *supra* note 4, at 787 (noting that "as an economic matter" religious and other charities should be treated similarly).

204. There are some cases, however, where secular charities have been sued in fraudulent conveyance actions. See, e.g., *In re 375 Park Ave. Assoc., Inc.* 182 B.R. 690, 692-93 (Bankr. S.D.N.Y. 1995) (indicating that debtor's pledge to the U.S. Holocaust Memorial Museum was challenged as fraudulent conveyance).

205. See Fickenscher, *supra* note 4, at 13 ("The concern is that if they can do it to the small storefront church, they can do it to the larger churches . . . . And if they can do it to the churches they can do it to any charity, like the Sierra Club, for instance.")

church often will exceed the amounts given by a debtor to a non-religious charity. In part, this may be because debtors are more likely to treat religious tithing as a stronger obligation than charitable contributions, which are more discretionary in nature. This difference may be even more pronounced when a debtor suffers financial difficulty, such as in the period preceding bankruptcy: The debtor will be inclined to curtail charitable giving during that interval, even while maintaining religious tithing.

Churches might also be a more profitable source of funds for a trustee because a debtor usually will make all religiously-motivated contributions to one recipient, but will spread charitable donations around, making smaller donations to several different charities. Thus, any one charity may not have received a large enough transfer to justify an action by the trustee. Finally, because of the religious freedom principles at stake, churches probably will have a stronger inclination to fight such actions than will the typical secular charity. As a result of these factors, religious organizations may be more lucrative sources of fraudulent conveyance recoveries than secular charities, and religious organizations are more likely to fight the actions. This explains the prevalence of religious organizations as defendants in the reported cases.

Protecting both religious and secular charitable donees also eliminates Establishment Clause concerns that might otherwise arise.<sup>206</sup> The Internal Revenue Code, of course, has for many years protected religious and charitable organizations, and there is no question such protection is consistent with the Establishment Clause. Qualified recipients are defined by reference to the well-tested definitions provided by the Internal Revenue Code. Moreover, the Act's fifteen percent safe harbor provision evinces an intent to treat all qualified donors and recipients equally.<sup>207</sup> As a result, the Act is insulated from attacks charging that it violates the Establishment Clause.

With respect to protection of tithing contributions, therefore, the Act has been crafted in a manner guaranteed to protect the bankruptcy debtor's religious freedom and the expectations of religious and charitable organizations, while remaining consistent with bankruptcy policies and the Establishment Clause.

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(quoting Peter Califano)).

206. See Wiggins, *supra* note 4, at 787.

207. For instance, if the Act had created a safe harbor of 10%, this might be construed as an attempt to elevate Judeo-Christian tithing habits over those of other religions or charitable donors. See *supra* note 1 and accompanying text.

## V. PROTECTING THE DEBTOR'S POST-PETITION RIGHT TO TITHE

In addition to protecting those tithing contributions a debtor makes during the period preceding bankruptcy, the Act also protects debtors who seek to tithe as part of a Chapter 13 plan and those who tithe during the pendency of a Chapter 7 case.

A. *Permitting Contributions in Chapter 13*

A problem conceptually similar to the tithing one arises when debtors try to make religious or charitable contributions as part of an individual plan of reorganization. The Act amends the Bankruptcy Code to permit debtors to donate charitable contributions as part of a Chapter 13 plan.<sup>208</sup> Many of the basic policy tensions here are identical to those discussed above in connection with the problems caused by the fraudulent conveyance laws. Rather than repeating those arguments, this Section discusses how they apply in the context of individual reorganization cases.

Under 11 U.S.C. § 1325(b), an individual debtor's plan of reorganization can be confirmed only if the debtor either pays the creditors in full under subsection (1)(A),<sup>209</sup> or "the plan provides that all of the debtor's projected disposable income" over the life of the plan "will be applied to make payments under the plan" under subsection (1)(B).<sup>210</sup> Rarely will a debtor's plan provide for the payment of all claims in full under subsection (1)(A). As a result, in most cases the debtor will have to make provision for the payment of all "projected disposable income" over the life of the plan. "Disposable income" is defined in § 1325(b)(2) as "income which is received by the debtor and which is not reasonably necessary to be expended—(A) for the maintenance or support of the debtor or a dependent of the debtor."<sup>211</sup>

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208. See *infra* Appendix § 4(a). Inexplicably, the Act does not make a similar modification to Chapter 12 and for individual Chapter 11 cases. Although the problem usually arises in Chapter 13 cases, this is only because almost all individual debtors seek reorganization under Chapter 13. But the issue is relevant to Chapter 12 as well, see *In re Stottlemire*, 146 B.R. 234, 236-37 (Bankr. W.D. Mo. 1992), and for individuals filing Chapter 11. Moreover, this oversight is quite problematic, as it undoubtedly will spawn unnecessary and wasteful litigation by Chapter 12 debtors seeking similar protection. Additionally, given the centrality of this issue in many cases, it could very well cause debtors to opt for Chapter 13 when they might otherwise be better suited for Chapter 12. Most perversely, the doctrine of *expressio unius est exclusio alterius* likely will result in Chapter 12 debtors being deprived of the Act's protections.

209. 11 U.S.C. § 1325(b)(1)(A) (1994); see also 11 U.S.C. § 1225(b)(1)(A) (1994) (same).

210. 11 U.S.C. § 1325(b)(1)(B); see also 11 U.S.C. § 1225(b)(1)(B) (same).

211. 11 U.S.C. § 1325(b)(2); see also 11 U.S.C. § 1225(b)(2) (same).

In individual reorganization cases, difficulties arise when a debtor seeks to schedule charitable or religious contributions as part of his or her reorganization plan. Because such contributions do not seem to meet the strict definition of expenditures “reasonably necessary” for the “maintenance or support of the debtor,” courts have been reluctant to permit them as part of a Chapter 13 plan. Since a Chapter 13 plan usually runs for three to five years, forbidding debtors from making religious and charitable contributions during that period can impose a real hardship, forcing debtors to choose between the dictates of their conscience and the dictates of the Bankruptcy Code.

In these cases, as with the fraudulent conveyance cases, the case law reveals both widespread confusion about the requirements of the Bankruptcy Code and inconsistent, ad hoc resolution of the competing goals implicated. A majority of courts have held that tithing contributions are part of a debtor’s disposable income, not a necessary living expense. As a result, tithing as part of a Chapter 13 plan has been flatly prohibited.<sup>212</sup>

Other courts have viewed debtors’ tithing expenditures as protected by RFRA or the Free Exercise Clause of the First Amendment and have approved the allocation of as much as ten percent of a debtor’s income to tithing contributions.<sup>213</sup> Still other courts have opted for a middle ground, reviewing proposed tithing expenditures on a case-by-case basis and permitting tithing to occur, but only if done in nominal amounts.<sup>214</sup>

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212. See, e.g., *In re Saunders*, 214 B.R. 524 (Bankr. D. Mass. 1997); *In re Tessier*, 190 B.R. 396 (Bankr. D. Mont. 1995), *appeal dismissed*, 127 F.3d 1106 (9th Cir. 1997); *In re Cavanaugh*, 175 B.R. 369, 374-75 (Bankr. D. Idaho 1994) (stating that a debtor has “no right to more discretionary income [than] other debtors merely because [he or she] wish[es] to use some of it to make charitable donations”); *In re Sturgeon*, 51 B.R. 82, 84 (Bankr. S.D. Ind. 1985). See also *In re Reynolds*, 83 B.R. 684, 685 (Bankr. W.D. Mo. 1988) (prohibiting tithing contributions “reflects the majority view of decided cases”); Price & Rahdert, *supra* note 134, at 879 (concluding that “a majority of those courts facing the issue of tithing under Chapter 13 has ultimately concluded that tithing is not a reasonably necessary expense”).

213. See, e.g., *Tessier*, 190 B.R. at 405-07 (stating that religious tithing protected by RFRA, but holding RFRA unconstitutional); *In re Green*, 73 B.R. 893 (Bankr. W.D. Mich. 1987), *aff’d*, 103 B.R. 852 (W.D. Mich. 1988) (holding that tithing protected by Free Exercise Clause of the Constitution). But see *Cavanaugh*, 175 B.R. at 374 (arguing that the analysis of *Green* “has been seriously undermined” by the Supreme Court’s decision in *Smith* and that the “Bankruptcy Code need not yield to a debtor’s desire to tithe”); Note, *supra* note 184, at 1126 (arguing that permitting religious tithing violates Establishment Clause of the Constitution).

214. See, e.g., *In re Stottlemyre*, 146 B.R. 234, 237 (Bankr. W.D. Mo. 1992) (following *Reynolds* and permitting tithing where it amounted to less than three percent of debtor’s gross annual income); *Reynolds*, 83 B.R. at 685 (stating that Chapter 13 debtor required to reduce church tithe to three percent as a condition for plan confirmation). Of



Still other courts have protected the right to contribute to religious charities, but to not secular charities.<sup>215</sup>

Bankruptcy courts have tried to work out a balance between a debtor's free exercise of religion and the requirements of the Bankruptcy Code. Despite heroic efforts to reach an accommodation, however, the overall result has been erratic and unpredictable. The case law reflects no coherent rationale, whether bankruptcy or otherwise. In light of the chaos and confusion that has developed, the time is ripe for Congress to act by clarifying the relationship between the needs of the Bankruptcy Code and other competing policy goals.

The Act reaches this accommodation by defining "reasonably necessary" expenses to include charitable contributions to a qualified religious or charitable entity or organization in an amount not to exceed fifteen percent of the debtor's gross income for the year in which the contributions are made.<sup>216</sup> This is a reasonable compromise between the debtor's individual conscience and the interests of his or her creditors.

Many of the policy arguments advanced in support of exempting these contributions from the fraudulent conveyance laws also support their protection as part of a Chapter 13 plan. Admittedly, transferees have no reliance interest in these prospective contributions, unlike the fraudulent conveyance situation in which they are compelled to disgorge funds that already have been spent or budgeted. Nonetheless, protecting an individual's opportunity to tithe is consistent with the general policy of encouraging charitable contributions and permitting individuals to balance their free exercise rights against other values. Debtors should not be forced to make an all-or-nothing choice between their social or religious obligations and bankruptcy relief, particularly when both can be reasonably and harmoniously accommodated.

The ad hoc attempts by bankruptcy judges to balance these competing policy goals is illustrated by the opinion in *Reynolds*. The *Reynolds* court first acknowledged that the "majority view of decided cases" finds that tithing contributions are "not a necessary living expense but should be

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course, cases resting on RFRA are only as good as RFRA itself is, a question open to doubt. See *supra* notes 85-108 and accompanying text (discussing the continuing validity of RFRA).

215. See, e.g., *In re Bien*, 95 B.R. 281, 282-83 (Bankr. D. Conn. 1989).

216. As currently drafted, the Act makes no accommodation for debtors who seek in good-faith to exceed the 15% cap and can show a prior pattern which supports a commitment to contributing a larger amount. It is not explained why post-petition tithing is not subject to the same rules as recoveries of fraudulent conveyances, which protect greater amounts if consistent with a prior pattern of giving. By applying equally to both religious and non-religious recipients, the Act answers the concern of some who have claimed that permitting such tithing runs afoul of the Establishment Clause. See, e.g., Note, *supra* note 184, at 1134-42.

considered a part of the debtor's disposable income, at least some portion of which should be assigned to the repayment of debt."<sup>217</sup> The court further believed "that result . . . more clearly expresses the realities of the situation."<sup>218</sup> At the same time, the court in *Reynolds* observed that there is an offsetting need to recognize the right of debtors to abide by the mandates of their religious beliefs.<sup>219</sup>

In attempting to accommodate these competing goals, the court disavowed any "hard and fast rule as to what amount or percentage of charitable contribution it will construe as 'reasonably necessary,'" and stated that the determination should be made on a case-by-case basis. Despite this statement, the court went on to conclude that "[c]ertainly some nominal amount will be permissible, but that amount will need to be below 3% of gross income unless very unusual circumstances are present."<sup>220</sup> At least two other cases have followed this "three-percent rule" of *Reynolds*.<sup>221</sup>

Although *Reynolds* attempts to accommodate competing policy goals, several problems arise in its analysis. First, the Supreme Court recently stated, at least twice, that it is inappropriate for a court to draw an arbitrary line, such as the three-percent rule, when that line finds no support in the Bankruptcy Code.<sup>222</sup> Second, the three-percent rule is truly arbitrary: It furthers no bankruptcy policy goal, and it is not consistent with traditional visions of the mandate of religious free exercise. There is no principled basis for permitting a debtor the free exercise of religion—but only in a "nominal amount," not to exceed three percent of gross income "unless very unusual circumstances are present." Finally, the Court provides no guidance about what would constitute "very unusual circumstances" sufficient to override the three-percent rule. Not surprisingly, no subsequent courts applying the *Reynolds* approach found the presence of "unusual circumstances" sufficient to permit contributions which exceed three percent of gross income. Thus, while *Reynolds* offers some clarity and shows a modest attempt to balance the competing values implicated, its solution is inconsistent with the nature

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217. *Reynolds*, 83 B.R. at 685.

218. *Id.*

219. *See id.*

220. *Id.*

221. *See In re Faulkner*, 165 B.R. 644, 647 (Bankr. W.D. Mo. 1994) (applying the three percent rule of *Reynolds* in reviewing tithing plans under Chapter 7 for "substantial abuse"); *In re Stottlemire*, 146 B.R. 234, 237 (Bankr. W.D. Mo. 1992). At least one commentator has recommended the *Reynolds* approach as a "practical and reasonable" compromise of these competing goals. *See Pollak, supra* note 4, at 547.

222. *See Associates Commercial Corp. v. Rash*, 117 S. Ct. 1879, 1886 (1997); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 540 (1994).

of the judicial process and represents an improper, ad hoc resolution of important constitutional principles.

The case for permitting a debtor to tithe as part of a Chapter 13 plan is compelling when one considers that debtors generally are entitled to some "recreational spending" and an "entertainment allowance" as "reasonably necessary expenses" that qualify as part of their Chapter 13 budget.<sup>223</sup> As the Court in *Cavanaugh* observed, "Because the courts allow discretionary spending for some items which are not absolute necessities of life such as modest dinners out, newspapers and other recreational items, the debtors should not be denied the right to make [charitable] donations purely because of the discretionary nature of these items."<sup>224</sup> Again, the point is comparative: If debtors are permitted to budget for entertainment or even frivolous expenses, they should be permitted to budget for conscientious and charitable contributions.

In cases involving a debtor's right to tithe as part of an individual plan of reorganization, the transferee will not suffer the same hardship as in the fraudulent conveyance scheme that requires the transferee to disgorge funds already received. Overall, compelling reasons rooted in the Free Exercise Clause, and public policy encouraging non-profit organizations, remain, and the Act is an appropriate vehicle for moderating these concerns. Bankruptcy courts have attempted to reconcile them, but their efforts have been inconsistent and have not fully vindicated the religious freedom issues at stake. The Act reaches a suitable balance between the requirements of free exercise and the policies of the Bankruptcy Code.

### *B. Tithing and Chapter 7*

The Act also amends section 707(b) of the Bankruptcy Code to provide that a debtor's charitable contributions during the pendency of a Chapter 7 reorganization plan shall not constitute "substantial abuse."<sup>225</sup>

Under 11 U.S.C. § 707(b), a court may dismiss a case in which an individual's debts are primarily consumer debts "if it finds that the granting of relief would be a substantial abuse" of the provisions of Chapter 7. Problems similar to those appearing in individual reorganization cases have arisen under 11 U.S.C. § 707(b) when a creditor seeks dismissal of a debtor's case for "substantial abuse" because

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223. See *In re Cavanaugh*, 175 B.R. 369, 374-75 (Bankr. D. Idaho 1994) (collecting cases).

224. *Id.* at 374.

225. See *infra* Appendix § 4(b).

the debtor proposed to make contributions to a religion or charity.<sup>226</sup> The purpose of this provision is to provide the court and creditors with a mechanism to force debtors to repay some percentage of their debts where doing so would not be an undue burden.<sup>227</sup> Thus, although this provision should not be used to deny Chapter 7 relief to those with “unaffordable debt burdens,” it would “represent a substantial abuse” to permit a debtor to use Chapter 7 “if a debtor can meet his or her debts without difficulty as they come due.”<sup>228</sup> If a debtor can make payments to creditors, some courts have dismissed the Chapter 7 case, usually requiring him or her to refile under Chapter 13.<sup>229</sup>

Pursuant to 11 U.S.C. § 707(b), creditors have sought dismissal of a debtor’s Chapter 7 case when the debtor identifies funds that are to be allocated to payment of tithing obligations. The issues arising under 11 U.S.C. § 707(b) are similar to those in Chapter 13 cases. The policy arguments under the two sections are also similar and need not be restated here. As a result, case law applying 11 U.S.C. § 707(b) borrows heavily from the Chapter 13 case law and reflects similar judicial confusion.<sup>230</sup>

The court’s decision in *In re Hudson*<sup>231</sup> represents one extreme example. In *Hudson*, the debtors proposed to contribute twenty-five dollars per month to their church. The Court dismissed the debtors’ Chapter 7 case, relying in part on the fact that donations to charitable

226. This statutory provision also appears to be consistent with the Free Exercise Clause, as a valid and neutral law of general applicability. See *Faulkner*, 165 B.R. at 648.

227. See S. REP. No. 98-65, at 43 (1983); *Faulkner*, 165 B.R. at 648; *In re Grant*, 51 B.R. 385, 392 (Bankr. N.D. Ohio 1985).

228. S. REP. No. 98-65, at 43 (1983).

229. See *In re Walton*, 866 F.2d 981, 985 (8th Cir. 1989) (holding that the primary factor in determining whether substantial abuse exists is the debtors’ ability to pay their debts when due, determined by their ability to fund a Chapter 13 plan).

230. See generally *Faulkner*, 165 B.R. at 647 (reviewing tithing plan for Chapter 7 substantial abuse by borrowing analysis from *Reynolds* and following the “three percent rule” of *Reynolds*); *In re Lee*, 162 B.R. 31 (Bankr. N.D. Ga. 1993) (dismissing Chapter 7 case as inequitable and finding substantial abuse where debtor did not begin tithing to a church until after filing petition for bankruptcy and the church did not require tithing for full membership); *In re Gyurci*, 95 B.R. 639 (Bankr. D. Minn. 1989) (dismissing Chapter 7 case for reasons unrelated to tithing of \$100 per month); *In re Gaukler*, 63 B.R. 224, 225-26 (Bankr. D.N.D. 1986) (holding that it was not “substantial abuse” for debtors to tithe 10% of their income annually to their church, to save 10% for personal expenses associated with celebrating annual holy days and festivals, and to save an additional 10% every third and sixth year out of seven to donate to the church); *In re Hudson*, 56 B.R. 415 (Bankr. N.D. Ohio 1985), *modified in part*, 64 B.R. 73 (Bankr. N.D. Ohio 1986) (dismissing case for “substantial abuse” in part because of proposed monthly church donation of \$25).

231. *In re Hudson*, 64 B.R. 73 (Bankr. N.D. Ohio 1986).

organizations are per se excluded from the debtor's reasonable and necessary expenses:

[T]his court does not favor, during the course of its Chapter 13 cases, the contribution of funds to non-profit institutions for the main reason that these contributions are not included in the provisions of Section 1325, particularly Section 1325(b)(1) and (2). There is no reason why this prohibition should not be applied when considering a debtor's income and expenses for Section 707(b) purposes.<sup>232</sup>

The decision in *In re Faulkner* illustrates an intermediate position. In *Faulkner*, the debtors claimed they contributed ten percent of their monthly income (or approximately \$300 per month) to their church. The bankruptcy court invoked the *Reynolds* "three-percent rule," holding that "since the Chapter 7 substantial abuse determination is based primarily on whether a debtor could make substantial payments under Chapter 13, the same analysis would apply in [a] Chapter 7 case."<sup>233</sup> Finding no "very unusual circumstances" to justify overriding the three percent cap, the court reduced the debtors' ten percent contribution to three percent, meaning that an additional \$216.87 per month could be dedicated to pre-petition debt.<sup>234</sup> Once that additional amount was added in, the court found that the debtors would be able to pay approximately 73.88% of their unsecured debt over the term of a thirty-six month Chapter 13 plan. As a result, the Chapter 7 case was dismissed for "substantial abuse."<sup>235</sup>

In *In re Gaukler*, on the other hand, the court held that religious contributions of almost \$700 per month did not constitute substantial abuse for dismissal of the debtor's petition. There, the debtors' church required them to: (1) donate ten percent of their income; (2) save an additional ten percent for their personal use in paying the expenses of celebrating annual holy days and festivals; and (3) donate an additional ten percent for the support of widows, orphans, and other needy persons every third and sixth year out of seven in all during which they were required to donate.<sup>236</sup> To the court, the willingness of the debtors to "sacrifice the financial well-being of themselves and their children in order to make [religious] contributions they obviously cannot afford . . . smacks of irresponsibility."<sup>237</sup> Nonetheless, the court concluded,

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232. *Id.* at 75 n.1.

233. *Faulkner*, 165 B.R. at 647.

234. *See id.*

235. *See id.*

236. *See Gaukler*, 63 B.R. at 225.

237. *Id.* at 226.

"This is ultimately . . . a matter between the Debtors and God. This Court will not presume to know by what avenue one ought to seek salvation and recognizes that in the eternal scheme of things material accomplishments count for naught."<sup>238</sup> As a result, the Court refused to dismiss the Chapter 7 case for "substantial abuse."

As these cases illustrate, there is little consistency or logic in the approach taken by courts in balancing the needs of the Bankruptcy Code against those of the Free Exercise Clause. In deciding whether to dismiss a case pursuant to 11 U.S.C. § 707(b), the court may not take into consideration whether a debtor has made, or continues to make, "reasonable charitable contributions" to any qualified religious or charitable entity or organization.<sup>239</sup> This provision adequately balances the goals of the Bankruptcy Code by ensuring that debtors who can make repayment to creditors through a Chapter 13 plan are required to do so, while not forcing the debtor to choose between his or her conscience and relief under Chapter 7.

## VI. CONCLUSION

The Act halts a disturbing trend in bankruptcy law, a trend that interferes with the religious and charitable impulses of bankruptcy debtors and the churches and charitable organizations that rely on their contributions. By allowing recovery of tithing contributions, the Bankruptcy Code trampled upon important policy goals, such as encouraging the contributions and missions of non-profit recipients. Although these bankruptcy policies are important, they also should be balanced against other vital social values. The Bankruptcy Code is rife with provisions that balance bankruptcy policies with other social policies. Moreover, accommodation for religious and charitable organizations appears elsewhere in federal law and American society. Therefore, the Act and its accommodations are not revolutionary; they simply reflect the latest installment in an ongoing story.<sup>240</sup>

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238. *Id.*

239. *See In re Norris*, 225 B.R. 329, 331 n.5 (Bankr. E.D. Va. 1998) (noting that under the Act the court was prohibited from considering a debtor's charitable donations of \$50 per month in determining whether dismissal was warranted under § 707(b)). It is unclear why in this section alone the Act substitutes a test of "reasonable . . . contributions" in place of the 15% safe harbor used elsewhere throughout the Act. *See infra* Appendix § 4(b). This language should have been amended to provide the same 15% safe harbor used elsewhere in the Act. Again, the result will be to create confusions and unnecessary litigation regarding the scope of this protection.

240. I make no representations, of course, that it is "the greatest story ever told." *See THE GREATEST STORY EVER TOLD* (Metro-Goldwyn-Mayer 1965).

**APPENDIX****Text of the Religious Liberty and Charitable Donation Protection  
Act of 1998  
Enacted June 19, 1998**

An Act to amend title 11, United States Code, to protect certain charitable contributions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

**SECTION 1. SHORT TITLE.**

This Act may be cited as the 'Religious Liberty and Charitable Donation Protection Act of 1998'.

**SEC. 2. DEFINITIONS.**

Section 548(d) of title 11, United States Code, is amended by adding at the end the following:

'(3) In this section, the term 'charitable contribution' means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution—

'(A) is made by a natural person; and

'(B) consists of—

'(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

'(ii) cash.

'(4) In this section, the term 'qualified religious or charitable entity or organization' means—

'(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

'(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.'

**SEC. 3. TREATMENT OF PRE-PETITION QUALIFIED CHARITABLE CONTRIBUTIONS.**

(a) **IN GENERAL.**—Section 548(a) of title 11, United States Code, is amended.—

(1) by inserting '(1)' after '(a)';

(2) by striking '(1) made' and inserting '(A) made';

(3) by striking '(2)(A)' and inserting '(B)(i)';

(4) by striking '(B)(i)' and inserting '(ii)(I)';

(5) by striking '(ii) was' and inserting '(II) was';

(6) by striking '(iii)' and inserting '(III)'; and

(7) by adding at the end the following:

'(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which—

'(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

'(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.'

(b) TRUSTEE AS LIEN CREDITOR AND AS SUCCESSOR TO CERTAIN CREDITORS AND PURCHASERS.—Section 544(b) of title 11, United States Code, is amended—

(1) by striking '(b) The trustee' and inserting '(b)(1) Except as provided in paragraph (2), the trustee'; and

(2) by adding at the end the following:

'(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.'

(c) CONFORMING AMENDMENTS.—Section 546 of title 11, United States Code, is amended.—

(1) in subsection (e).—

(A) by striking '548(a)(2)' and inserting '548(a)(1)(B)'; and

(B) by striking '548(a)(1)' and inserting '548(a)(1)(A)';



- (2) in subsection (f).—
  - (A) by striking '548(a)(2)' and inserting '548(a)(1)(B)'; and
  - (B) by striking '548(a)(1)' and inserting '548(a)(1)(A)'; and
- (3) in subsection (g).—
  - (A) by striking 'section 548(a)(1)' each place it appears and inserting 'section 548(a)(1)(A)'; and
  - (B) by striking '548(a)(2)' and inserting '548(a)(1)(B)'.

#### SEC. 4. TREATMENT OF POST-PETITION CHARITABLE CONTRIBUTIONS.

(a) CONFIRMATION OF PLAN.—Section 1325(b)(2)(A) of title 11, United States Code, is amended by inserting before the semicolon the following: ', including charitable contributions (that meet the definition of 'charitable contribution' under section 548(d)(3)) to a qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)) in an amount not to exceed 15 percent of the gross income of the debtor for the year in which the contributions are made'.

(b) DISMISSAL.—Section 707(b) of title 11, United States Code, is amended by adding at the end the following: 'In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of 'charitable contribution' under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).'.

#### SEC. 5. APPLICABILITY.

This Act and the amendments made by this Act shall apply to any case brought under an applicable provision of title 11, United States Code, that is pending or commenced on or after the date of enactment of this Act.

#### SEC. 6. RULE OF CONSTRUCTION.

Nothing in the amendments made by this Act is intended to limit the applicability of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2002bb et seq.).

