

BLESSED BE THE NAME OF THE CODE: HOW TO PROTECT CHURCHES FROM TITHE AVOIDANCE UNDER THE BANKRUPTCY CODE'S FRAUDULENT TRANSFER LAW

To him that worketh is the reward not reckoned of grace, but of debt.

—Romans 4:4, King James Version

ABSTRACT

The Bankruptcy Code treats debtors' tithes as constructively fraudulent transfers per se and disgorges them from unsuspecting churches drawn into debtors' bankruptcies. Unlike most creditors, churches rely on tithes for their financial wellbeing and thus have unique and important interests at stake when a tithing debtor files bankruptcy. Courts and Congress have tried to prevent the Code's fraudulent transfer law from disgorging tithes, but they have failed to protect the unique church interests most sharply affected in such cases. Their approaches leave church interests dependent upon debtors' conduct and subordinate to creditors' interests. This Comment explains how courts and claimants should use existing federal religious liberty law as a simpler and more direct approach to protecting churches' interests in tithe avoidance cases.

INTRODUCTION

Churches¹ bear a peculiar economic vulnerability. They exist not for private profit, but for public good. They depend on the tithes² they receive

¹ References to "churches" throughout the remainder of this Comment also refer to other religious organizations, such as cathedrals, mosques, parishes, synagogues, or other distinctively religious organizations or associations that might avail themselves of the legal protections for religion discussed herein. Charitable organizations also find themselves vulnerable to the Bankruptcy Code's fraudulent transfer avoidance provisions discussed in Parts I–IV, but only religious charitable organizations possess additional protections discussed in Part V–VI. Most churches and charities discussed in this Comment are those identified by the Internal Revenue Code. See I.R.C. § 107(c)(1)–(2) (2006).

² The word "tithe" literally means one "tenth." 18 OXFORD ENGLISH DICTIONARY 151 (2d ed. 1989). Religiously, it refers to the Mosaic commandment to give one tenth of one's harvest to God or God's church: "All tithes of herd and flock, every tenth one that passes under the shepherd's staff, shall be holy to the lord."

from benevolent contributors, not from commercial contractors. Because their income is irregular and not guaranteed, churches lack the economic assurances and legal protections commercial income bestows. Pledges to tithe are not enforceable promises, and tithes collected in one month might dwindle by half in the next.

American law acknowledges this vulnerability and protects churches. The most well-known of these protections, perhaps, resides in federal tax laws, which encourage taxpayers to tithe by allowing tax deductions for tithes given to qualifying nonprofit churches.³ These tax laws also protect churches by exempting collected tithes from tax liability.⁴ But what if churches could not rely upon the tithes they have already received? What if suddenly, unexpectedly, and through no fault of their own, these organizations had to relinquish already collected tithes to unknown third parties?

Such is the specter haunting churches under modern developments in the Bankruptcy Code's fraudulent transfer law. The Code's fraudulent transfer law protects creditors' interests by avoiding, or undoing, transfers where debtors receive little or no value in return to pay their creditors.⁵ Because tithing debtors give voluntarily and rarely receive anything—much less anything of value—in return, their creditors have found recent and frequent success avoiding tithes as fraudulent transfers. Thus, by simple operation of the Code's fraudulent transfer law, churches are now surprised that, through no

Leviticus 27:32 (New Revised Standard). This Comment uses the term generally to refer to charitable contributions made to churches and religious organizations described above. *See supra* note 1.

³ *See, e.g.*, I.R.C. § 170(c). “[C]ontributions are used by religious and charitable organizations to fund valuable services to society, which serve the common good. This principle is recognized in the Internal Revenue Code’s provisions concerning the deductibility of certain charitable contributions.” H.R. REP. NO. 105-556, at 3 (1998); *see also* *Bob Jones Univ. v. United States*, 461 U.S. 574, 587–88 (1983) (“[I]n enacting both § 170 and § 501(c)(3), Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.”).

⁴ *See* I.R.C. § 503(c). *See also* INTERNAL REVENUE SERVICE, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS: BENEFITS AND RESPONSIBILITIES UNDER THE FEDERAL TAX LAW (2008), <http://www.irs.gov/pub/irs-pdf/p1828.pdf>.

Congress has enacted special tax laws applicable to churches, religious organizations, and ministers in recognition of their unique status in American society and of their rights guaranteed by the First Amendment of the Constitution of the United States. Churches and religious organizations are generally exempt from income tax and receive other favorable treatment under the tax law; however, certain income of a church or religious organization may be subject to tax, such as income from an unrelated business.

Id.

⁵ 11 U.S.C. § 548(a)(1)(B)(i) (2006).

fault of their own, they must relinquish tithes they received in good faith to a tither's creditors, even after spending those monies long ago. Moreover, churches cannot protect their tithes from avoidance by exchanging goods or services in return without jeopardizing their tax exemption. Though fraudulent transfer law plays an important role in bankruptcy and debt collection, it works unintended consequences when it avoids tithes to innocent churches. In such circumstances, these churches and charities may find that what a debtor has given, creditors will take away—all in the blessed name of the Code.

Most parties, legislators, and courts considering the problems tithe avoidance poses have thus far focused only on the interests debtors and creditors have at stake. Unfortunately, they have largely neglected the important interests and unique vulnerability churches have in tithe avoidance cases. Although Congress sought to protect tithes from avoidance with the Religious Liberty and Charitable Donation Protection Act of 1998, the recent opinions *In re Zohdi* and *Universal Church v. Geltzer* render that protection uncertain at best, and nonexistent at worst. A more prudent approach to solving the problem of tithe avoidance minimizes these unintended catastrophes yet respects the legitimate and conflicting interests of debtors, churches, and creditors. Such an approach, however, requires parties, legislators, and courts to consider how tithe avoidance in a given case directly affects churches' rights and interests, and not merely those of debtors and creditors. Although largely ignored until now, existing federal statutory and constitutional laws protecting religious liberty provide parties, legislators, and courts with the framework necessary to take this approach and examine church interests directly in tithe avoidance cases.

Proceeding in six parts, this Comment explains the unresolved problems tithe avoidance law poses for churches and demonstrates how existing federal law can resolve these problems directly by focusing on churches' special religious rights. Part I explains what fraudulent transfer law is, why it was made, and how it avoids certain transfers made by a debtor. Originally designed to prevent debtors from intentionally defrauding their creditors, fraudulent transfer law now avoids good faith transfers, like tithes, as "constructively fraudulent" transfers. Part II explains how courts' early attempts at preventing tithe avoidance failed and ironically exposed churches to newer and more serious problems under the Bankruptcy Code and the Internal Revenue Code. Part III explains how Congress addressed these problems with statutory protections and how two recent judicial opinions now render those protections as uncertain as ever. Part IV explains why Congress's

and courts' approaches to the problem of tithe inadequately protect churches by allowing church interests to depend upon debtors' conduct and to remain subordinate to creditors' interests. Part V explains how churches possess unique statutory and constitutional protections from tithe avoidance and how courts applying these protections nevertheless continue to neglect churches' independent and unique interests in tithe avoidance cases. Part VI demonstrates how existing federal religious liberty law provides a simpler and more direct approach to protecting churches from tithe avoidance by examining whether avoiding tithes in a given case would substantially burden a church's right to the free exercise of religion.

I. FRAUDULENT TRANSFER LAW'S ORIGIN, APPROACH, AIMS, AND REACH

Fraudulent transfer law provides important and powerful tools in modern debt collection and bankruptcy. When debtors file for bankruptcy, they lose control of their assets to a bankruptcy estate administered by a bankruptcy trustee for the benefit of the debtors' creditors.⁶ Conscious of losing this control, debtors nearing bankruptcy often harm their creditors' secured or unsecured claims to their assets by transferring away those assets before filing bankruptcy. By avoiding such transfers, fraudulent transfer law helps creditors and trustees lessen the harm these prepetition transfers cause.

When fraudulent transfer law "avoids" a transfer, it forces the recipient of the transferred assets (the transferee) to return those assets to the party who transferred the assets (the transferor).⁷ After avoiding a transfer, the Bankruptcy Code may give the transferee some type of unsecured claim for the amount of the transfer, but the transferee will not be able to keep the particular assets avoided in the transfer.⁸ Usually the assets from the avoided transfer become part of the bankruptcy estate, which holds them for distribution to the debtor's creditors.⁹ In short, fraudulent transfer avoidance allows the debtor's harmful transfers¹⁰ to be undone for the benefit of interested creditors.

⁶ See *id.* §§ 541, 704. "In general, the . . . [trustee's] duties are to gather all the debtor's property, protect and maintain it, . . . sell the property for the highest possible price, and distribute the proceeds among creditors . . ." ELIZABETH WARREN & JAY L. WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 134 (5th ed. 2006).

⁷ See 11 U.S.C. §§ 544, 548; see also WARREN & WESTBROOK, *supra* note 6, at 552.

⁸ See 11 U.S.C. § 550.

⁹ See *id.*

¹⁰ The development of modern fraudulent transfer law has expanded what transfers are "harmful" to creditors. Originally, it regarded harmful transfers as those a debtor made with fraudulent intent to deceive her

Fraudulent transfer law is both well established in its history and expansive in its coverage. Originally designed to prevent intentionally fraudulent activity, fraudulent transfer law has broadened its reach to regulate transfers that are completely above board and free of any fraudulent intent. As it developed, this law assumed a broader economic function by providing creditors more protections for their economic interests, regardless of whether the debtor had fraudulent intent. This first Part thus provides a short summary of the origins, approach, aims, and reach of fraudulent transfer law and avoidance.

A. Origins of Fraudulent Transfer Avoidance

The origins of fraudulent transfer avoidance date back to 1571, when the Statute of Fraudulent Conveyances¹¹ was passed in England to fine fraudulent conveyors and set aside their conveyances.¹² The statute's drafters aimed to prevent debtors from evading their creditors' collection attempts by transferring away their property in hopes of receiving the transferred property back at a later date.¹³ Through legislatures and common law courts, American state and federal law gradually adopted the statute.¹⁴ By 1918, the National Conference of Commissioners on Uniform Laws drafted the Uniform Fraudulent Conveyance Act to resolve contradictions and obscurities resulting from the haphazard American adoption of fraudulent conveyance law.¹⁵ The Commissioners then replaced the 1918 act with the Uniform Fraudulent Transfer Act (UFTA) in 1984. Adopted in forty-one states, UFTA preserves the basic approach to fraudulent transfers initiated in the older acts.¹⁶

B. The Approach of Modern Fraudulent Transfer Law

Modern fraudulent transfer law applies to transfers that are either actually fraudulent or constructively fraudulent. Actually fraudulent transfers occur when a debtor "made the transfer or incurred . . . [an] obligation . . . with actual intent to hinder, delay, or defraud any creditor."¹⁷ In contrast, constructively

creditors. Today, however, creditors usually rely on "constructive fraudulent transfer law," which ignores the debtor's intent and focuses solely upon the economic harm done to creditors. *See infra* Parts I.B–D.

¹¹ Statute of Fraudulent Conveyances, 1570, 13 Eliz., c. 5 (Eng.).

¹² WARREN & WESTBROOK, *supra* note 6, at 81.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ UNIF. FRAUDULENT TRANSFER ACT § 4(a)(1) (1984).

fraudulent transfers occur where an insolvent debtor transfers her assets for less than “reasonably equivalent value.”¹⁸ The term “constructively fraudulent transfer” thus creates something of a “misnomer,”¹⁹ as it applies to a debtor’s transfer “even though the debtor was entirely innocent of any fraudulent intent.”²⁰ Constructive fraud ignores the debtor’s actual intent because it is concerned with what the debtor received in return for the transfer. This concern has become the primary focus of modern fraudulent transfer law.²¹

C. *The Aims of Modern Fraudulent Transfer Law*

Modern fraudulent transfer law avoids these two types of transfers for two similar but distinct aims. First, by avoiding actually fraudulent transfers, it aims to prevent debtors from evading their creditor’s collection attempts. Second, by avoiding constructively fraudulent transfers, it aims to protect creditors from debtors’ imprudent asset management.²² As debtors near insolvency, they lose incentives they would normally have to maintain or increase the existing value of their assets. If a debtor believes she cannot pay all her creditors and will need bankruptcy protection, she may be tempted to sell her remaining assets at any price, no matter how low, to satisfy her most pressing needs. Those remaining assets, however, collectively compose the estate that the debtor’s creditors will divide and share in bankruptcy. As a debtor exchanges her remaining assets and property for other assets and property of lesser value, she shrinks not only the total value of this estate, but also the share each creditor will receive in lieu of what the debtor owes her. Thus, when a near-insolvent debtor transfers an asset and receives less than its reasonably equivalent value, she injures each of her creditors.²³ Modern fraudulent transfer law’s prohibition on constructively fraudulent transfers thus aims at giving creditors legal remedies²⁴ to relieve this injury.

¹⁸ *Id.* §§ 4(a)(2), 5(a).

¹⁹ WARREN & WESTBROOK, *supra* note 6, at 81.

²⁰ *Id.*

²¹ See *Morris v. Midway S. Baptist Church (In re Newman) (In re Newman II)*, 203 B.R. 468, 473–74 (D. Kan. 1996) (“[T]he purpose of fraudulent transfer law is to preserve the debtor’s estate for the benefit of its creditors, . . . [and its focus] is on whether the net effect of the transaction has depleted the bankruptcy estate.”); see also *Barnes v. Rettew*, 2 F. Cas. 868, 869 (C.C.E.D. Pa. 1871) (No. 1,109) (discussing the development of constructive fraudulent transfer law from the original fraudulent transfer acts of England).

²² WARREN & WESTBROOK, *supra* note 6, at 552.

²³ *Id.*

²⁴ Creditors invoking their rights under state fraudulent transfer laws often have a wide array of remedies at their disposal, including avoidance of all or part of the fraudulent transfer or attachment against the transferee’s property. See UNIF. FRAUDULENT TRANSFER ACT § 7(a)(1)–(3) (1984).

In its early days, fraudulent transfer law set out to discourage fraudulent conduct and prohibit debtors from hiding their assets at their creditors' expense.²⁵ But as the law developed, it became primarily a tool for protecting the economic interests of creditors.²⁶ In this development, the actual fraudulent intent of the debtor became less relevant and fraudulent transfer law applied to transfers made in good faith.²⁷ As fraudulent transfer law shifted focus from preventing fraud to protecting creditors from debtors' economically unwise transactions, its application expanded so much that it would avoid almost all insolvent debtors' transfers if it did not have an exemption for transfers given in exchange for reasonably equivalent value.²⁸

D. The Reach of Modern Fraudulent Transfer Law

Creditors are not the only ones making good use of the remedies modern fraudulent transfer law affords. Trustees in federal bankruptcy cases also use these remedies to protect the bankruptcy estate against both actual and constructively fraudulent transfers. The Bankruptcy Code provides its own fraudulent transfer law in § 548²⁹ and its own avoidance remedies in § 550 for trustees in bankruptcy.³⁰ The Bankruptcy Code's provisions are similar to those in UFTA and, like UFTA, § 548 applies to cases of both actual³¹ and

²⁵ See *Barnes*, 2 F. Cas. at 869 (discussing the development of constructive fraudulent transfer law from the original fraudulent transfer acts of England).

²⁶ *Id.* at 869–71.

²⁷ Compare, e.g., *Polk v. Hill*, 19 F. Cas. 921, 927 (C.C. Tenn. 1811) (No. 11,249) (“The statutes of . . . Elizabeth respecting fraudulent conveyances . . . [are] intended principally as a punishment on the person conveying with a fraudulent intent. It is the intent or mala fides of the person conveying which brings the statute into operation.”) with *Morris v. Midway S. Baptist Church (In re Newman) (In re Newman II)*, 203 B.R. 468, 473–74 (D. Kan. 1996) (“[T]he purpose of fraudulent transfer law is to preserve the debtor’s estate for the benefit of its creditors. . . . [and its focus] is on whether the net effect of the transaction has depleted the bankruptcy estate.”). See generally *Barnes*, 2 F. Cas. at 869–71.

²⁸ See UNIF. FRAUDULENT TRANSFER ACT § 4(a)(2) (1984) (exempting transfers given in exchange for reasonably equivalent value); see also 11 U.S.C. § 548(a)(1)(B)(i)(2006) (same).

²⁹ 11 U.S.C. § 548.

The trustee may avoid any transfer . . . made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily . . . made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made . . . indebted; or . . . received less than a reasonably equivalent value in exchange for such transfer or obligation . . . [and] was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer

Id. § 548(a)(1).

³⁰ See generally *id.* § 550; WARREN & WESTBROOK, *supra* note 6, at 552–72.

³¹ Compare UNIF. FRAUDULENT TRANSFER ACT § 4(a)(1) (1984) with 11 U.S.C. § 548(a)(1)(A).

constructive³² fraud. But the Bankruptcy Code gives trustees much more power because it also provides them the same remedies creditors possess under applicable state statutes.³³ In many cases, those state statutes allow trustees to avoid transfers they would not be able to avoid under § 548 because state statutes may avoid transfers made before § 548 would apply to them.³⁴

Importantly, the Bankruptcy Code also contains an “exchange for reasonably equivalent value” exemption from constructively fraudulent transfer avoidance.³⁵ Like UFTA, it will not avoid a transfer when the debtor has received reasonably equivalent value in exchange for the transfer.³⁶ Although the Bankruptcy Code’s modern fraudulent transfer law now applies to most debtors’ good faith transfers, most transferees find shelter in this exemption by giving the debtor goods or services of reasonably equivalent value in exchange for the transfer. Churches once also found shelter in the reasonably equivalent value exemption as well,³⁷ but as the next Part explains, this shelter no longer offers them any protection.

II. COURTS PROTECT TITHES, BUT NOT CHURCHES

Initially, courts would not avoid tithes because they considered church services as benefits having reasonably equivalent value sufficient to exempt tithes given in exchange for these services from constructively fraudulent transfer avoidance.³⁸ The exchange for reasonably equivalent value exemption, however, poses a twofold problem for churches. First, such entities seldom provide any legally cognizable return or consideration for contributions

³² Compare UNIF. FRAUDULENT TRANSFER ACT §§ 4(a)(2), 5(a) with 11 U.S.C. § 548(a)(1)(B).

³³ The Code allows the trustee “to avoid any transfer of an interest of the debtor in property or any obligation incurred . . . that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502” 11 U.S.C. § 544(b). Forty-one states have adopted some version of UFTA. WARREN & WESTBROOK, *supra* note 6, at 81. In these states, the trustee may thus exercise state fraudulent transfer laws for remedies if the debtor has at least one “actual unsecured creditor (creditor with an unsecured claim) who could have brought the avoidance action under state fraudulent conveyance law.” *Id.* at 552. If the debtor has such a creditor, the trustee may then “step[] into that creditor’s shoes” and exercise state fraudulent transfer laws for the sake of all the creditors. *Id.*

³⁴ See, e.g., *Universal Church v. Geltzer*, 463 F.3d 218, 222 n.1 (2006) (noting in dicta that the trustee could avoid transfers beyond the two-year reach back period provided in the Code’s fraudulent transfer law by using New York state laws).

³⁵ See 11 U.S.C. § 548(a)(1)(B)(i).

³⁶ Compare UNIF. FRAUDULENT TRANSFER ACT § 4(a)(2) (exempting transfers given in exchange for reasonably equivalent value) with 11 U.S.C. § 548(a)(1)(B)(i) (same).

³⁷ See *infra* Part II.A.

³⁸ See *infra* Part II.A.

they receive.³⁹ Second, and more importantly, if churches provided goods or services in exchange for the contributions they receive, they would likely suffer a worse fate than transfer avoidance—losing their valuable tax exempt status.⁴⁰ As this twofold problem developed in the courts over the last quarter century, courts narrowed the exchange for reasonably equivalent value exemption with increasing strictness, eventually making all tithes constructively fraudulent per se. This second Part details this development by examining first the early cases that found value in religious services under the Code’s fraudulent transfer law and then the later cases that preclude any such service from being considered as reasonably equivalent value given in exchange for tithes.

A. *The Early Cases: Reading “Value” Broadly*

In the first eight years of case law under the Bankruptcy Code, two courts addressed the problem of applying the reasonably equivalent value exemption to tithes in fraudulent transfer avoidance cases.⁴¹ Both courts relied upon an expansive definition of “value” under the Code that allowed many churches to claim they provided services and activities in exchange for their members’ tithes.⁴²

In the first of these two cases, *In re Moses*, debtors paid their church nearly five thousand dollars in tithes over the course of the year before they filed for bankruptcy.⁴³ The trustee attempted to avoid those tithes as constructively fraudulent transfers under § 548.⁴⁴ The bankruptcy judge, however, held that the tithes were not constructively fraudulent transfers because the debtors received reasonably equivalent value in exchange for them.⁴⁵ Besides “heating, air conditioning, and electricity,” the bankruptcy judge found the debtors received counseling, theological education, theological training, and “access to religious services which Debtors attended at least three times a week.”⁴⁶ Because “such services assisted . . . [the debtors] in getting through

³⁹ See *infra* Part II.B.1.

⁴⁰ See *infra* Part II.B.2.

⁴¹ *Ellenberg v. Harvester Hill Chapel Church, Inc. (In re Moses)*, 59 B.R. 815 (Bankr. N.D. Ga. 1986); *Wilson v. Upreach Ministries (In re Missionary Baptist Found. of Am., Inc.)*, 24 B.R. 973 (Bankr. D. Tex. 1982).

⁴² *In re Moses*, 59 B.R. at 818–19; *In re Missionary Baptist*, 24 B.R. at 974, 975.

⁴³ *In re Moses*, 59 B.R. at 816.

⁴⁴ *Id.* at 817.

⁴⁵ *Id.* at 818–19.

⁴⁶ *Id.*

an extremely difficult period of their lives prior to bankruptcy,” the judge found those services “possess[ed] an exchangeable value” sufficient to protect the tithes from constructive fraudulent transfer avoidance.⁴⁷

In the second of these early cases, *In re Missionary Baptist Foundation of America*,⁴⁸ the debtor was a nonprofit religious organization incorporated as Missionary Baptist Foundation of America that made monthly contributions to another nonprofit organization called Upreach Ministries.⁴⁹ Denying the trustee’s motion to avoid the contributions, the bankruptcy court held that though “[n]o one can argue . . . [the debtor] received a *monetary* equivalent” for its contributions in this case, the contributions were nevertheless given in exchange for reasonably equivalent value.⁵⁰ The contributions allowed Missionary Baptist to satisfy its incorporators’ mandate to distribute a monthly contribution to various charities.⁵¹ This satisfaction, coupled with the enhanced “morale of . . . [Missionary Baptist’s] employees and the good will of all those . . . with whom . . . [Missionary Baptist] dealt,” gave Missionary Baptist reasonably equivalent value in return for its contributions to Upreach.⁵²

These early cases established that tithes and charitable contributions were not constructively fraudulent transfers when debtors received reasonably equivalent value in exchange⁵³ and that such value included nonmonetary value.⁵⁴ Moreover, these cases established that nonmonetary value included such varied benefits as enjoyment of heating, air conditioning, electricity,⁵⁵ access to religious services and theological education,⁵⁶ and furthering corporate objectives, morale, and goodwill.⁵⁷ With this broad interpretation of value governing constructive fraudulent transfer cases, the problem of avoiding

⁴⁷ *Id.* Although the court did not “intend to value the amount of spiritual enrichment Debtors gained by engaging in worship,” it found “that certain facilities and services” the church provided—“i.e., access to the church which provided heating, air conditioning and electricity”—possessed “an exchangeable value” and “were therefore supplied to the Debtors in exchange for tithes and offerings given to the . . . church.” *Id.* at 819.

⁴⁸ *Wilson v. Upreach Ministries (In re Missionary Baptist Found. of Am., Inc.)*, 24 B.R. 973 (Bankr. D. Tex. 1982).

⁴⁹ *Id.* at 974.

⁵⁰ *Id.* at 979 (emphasis added).

⁵¹ *Id.*

⁵² *Id.*

⁵³ See *supra* text accompanying notes 45–47 and 50–52.

⁵⁴ See *supra* note 50 and accompanying text.

⁵⁵ See *supra* note 46 and accompanying text.

⁵⁶ See *supra* note 46 and accompanying text.

⁵⁷ See *supra* notes 51–52 and accompanying text.

tithes under the Code would not demand substantial attention from federal courts for more than a decade after *In re Missionary Baptist*.⁵⁸

B. The Younger Cases: Narrowing “Value” and Demanding “Exchange”

Retreating from the law espoused in the earlier cases of *In re Moses* and *In re Missionary Baptist*, courts in more recent cases began reading the Code’s “reasonably equivalent value in exchange” exemption with increasing strictness. Particularly, they narrowed “reasonably equivalent value” to include only monetary benefits,⁵⁹ and they demanded a stricter showing that debtors received this value in exchange for their tithes.⁶⁰ These developments sounded an ominous knell, alerting many churches that courts would begin avoiding regular tithes as constructively fraudulent transfers. As arguably the most thoroughly-litigated case on tithe avoidance to date, *In re Young*⁶¹ provides the best account of how the modern developments in fraudulent transfer law have exposed churches to altogether new problems in tithe avoidance cases.

The facts and arguments in *In re Young* bear striking similarity to those in *In re Moses*.⁶² In *In re Young*, a church appealed from an order allowing a trustee to avoid debtors’ tithes.⁶³ The church claimed the word “value” in § 548’s “reasonably equivalent value” exemption “include[d] indirect economic benefits.”⁶⁴ The church also argued the debtors received the same value recognized by the court in *In re Moses*—namely church membership, spiritual counseling, and access to church facilities and worship.⁶⁵ The church also argued the debtors received “‘value’ in the form of tax deductions for charitable contributions.”⁶⁶ These valued benefits, the church argued, were

⁵⁸ See *infra* Part II.B.

⁵⁹ See *infra* Part II.B.1.

⁶⁰ See *infra* Part II.B.2.

⁶¹ *Christians v. Crystal Evangelical Free Church (In re Young) (In re Young I)*, 148 B.R. 886, 891 (Bankr. D. Minn. 1992), *aff’d*, 152 B.R. 939 (D. Minn. 1993), *rev’d*, 82 F.3d 1407 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998); see also Oliver B. Pollak, *Be Just Before You’re Generous: Tithings and Charitable Contributions in Bankruptcy*, 29 CREIGHTON L. REV. 527, 561–74 (1996) (discussing the political upheaval surrounding *In re Young*).

⁶² See *supra* notes 43–47 and accompanying text.

⁶³ *Christians v. Crystal Evangelical Free Church (In re Young) (In re Young III)*, 82 F.3d 1407, 1414 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998).

⁶⁴ *Id.*

⁶⁵ Compare *id.* with *Ellenberg v. Harvester Hill Chapel Church, Inc. (In re Moses)*, 59 B.R. 815, 818–19 (Bankr. N.D. Ga. 1986).

⁶⁶ *In re Young III*, 82 F.3d at 1414.

given “in exchange” for the debtors’ contributions because “the debtors made the contributions during the same time period they received the benefits” and “because contributions from the debtors and others helped pay for the church’s operating expenses.”⁶⁷

1. *The Reasonably Equivalent Value of Church Services in Young*

The bankruptcy court in *In re Young* acknowledged that the church provided its members with “religious services, theological programs and access to the premises,”⁶⁸ but doubted such provisions would amount to reasonably equivalent value under the Code.⁶⁹ After considering the precedents established in *In re Moses* and *In re Missionary Baptist*, the bankruptcy court concluded that following those precedents would violate the terms of the Code.⁷⁰ Focusing on the Code’s use of the word “property” in its definition of “value,”⁷¹ the bankruptcy court held that the church’s services and activities could not be considered value because “[t]he debtors did not receive

⁶⁷ *Id.*

⁶⁸ *Christians v. Crystal Evangelical Free Church (In re Young) (In re Young I)*, 148 B.R. 886, 891 (Bankr. D. Minn. 1992) (“The debtors did not receive an ownership interest in the church or anything else by making their contributions.”), *aff’d*, 152 B.R. 939 (D. Minn. 1993), *rev’d*, 82 F.3d 1407 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998). The court found it

hard to imagine, at least in a mortal sense, that religious services and the like, can be possessed, owned or enjoyed to the exclusion of others. Indeed, the church traditionally is a place shared by all and where all are welcome. In fact, at one time the church was the center of the community tantamount to a town hall. That being the case, the debtors could not have received an ownership interest in anything from their contributions.

Id.

⁶⁹ *Id.*

⁷⁰ *Id.* at 896. “Reading between the lines of reasoning,” the bankruptcy judge in *In re Young* found it apparent that the *Moses* court thought what it was doing was “right.” While it is not a pleasant task to require a church to refund contributions, “[my] sole function is to enforce the statute according to its terms.” . . . [W]hile the decision may feel right, there is absolutely no textual support for such a conclusion. While I am not thrilled about making a church return contributions, especially under a statute titled “fraudulent transfers,” I cannot adopt what the church . . . [and] the *Moses* and *Missionary* courts urge as the voice of Congress is loud; property is value, charitable contributions are not.

Id. at 896 (quoting *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (internal footnotes and citations omitted)).

⁷¹ *See* 11 U.S.C. § 548(d)(2)(A) (2006).

legal or equitable rights nor did they obtain any ownership interest from their contributions.”⁷²

The *In re Young* bankruptcy court’s interpretation of value was further narrowed in a more recent case, *In re Newman*.⁷³ The debtors in *In re Newman* testified that they received “great religious value” and “satisfaction of their spiritual commitment” from tithing.⁷⁴ The court in that case, however, held that religious value was not the sort of value that would protect contributions from fraudulent transfer avoidance.⁷⁵ Looking to the relevant definitions⁷⁶ provided in the Code, the *In re Newman* court concluded that § 548 “[c]learly . . . asks whether the debtor was provided something with economic value, as opposed to religious or spiritual value.”⁷⁷ The *In re Newman* court justified its holding by noting that “the purpose of fraudulent transfer law is to preserve the debtor’s estate for the benefit of its creditors,” and it focuses “on whether the net effect of the transaction has depleted the bankruptcy estate.”⁷⁸ It could not consider the benefits of tithing valuable because the debtors received no “*quantifiable economic benefit* as a result of their donations.”⁷⁹ The courts in *In re Young* and *In re Newman* thus narrowed the reasonably

⁷² *In re Young I*, 148 B.R. at 891. The bankruptcy court also considered whether the church’s services and promises to perform those services in the future could be considered “value” under the Code as executory contracts. *Id.* at 891–94. After a thorough and detailed argument, the bankruptcy court eventually held that although executory contracts are indeed “value” under the Code, the church’s promises were not executory contracts because its services were not and could not be consideration. *Id.* at 893 (Although “the debtors made their contributions receiving . . . the privilege to participate in religious worship[, which] . . . may have yielded the feelings of association, comfort, affection, companionship and love, these subjectively emotional benefits cannot be bargained for.”).

⁷³ *Morris v. Midway S. Baptist Church (In re Newman) (In re Newman II)*, 203 B.R. 468 (D. Kan. 1996), *aff’d* 183 B.R. 239 (Bankr. D. Kan. 1995).

⁷⁴ *Id.* at 473.

⁷⁵ *Id.*

⁷⁶ “The term ‘value,’ as used in § 548 . . . means ‘property, or satisfaction or securing of a present or antecedent debt of the debtor . . . [d]ebt’ means ‘liability on a claim,’ and ‘claim’ refers to a right to payment or to an equitable remedy for breach of performance.” *Id.* (quoting 11 U.S.C. §§ 548(d)(2)(A), 101(6), & 101(12), respectively) (internal citations omitted).

⁷⁷ *Id.*

⁷⁸ *Id.* (citing *Harman v. First Am. Bank of Md. (In re Jeffrey Bigelow Design Group, Inc.)*, 956 F.2d 479, 484 (4th Cir. 1992)).

⁷⁹ *Id.* at 472, 474 (emphasis added). The court also found that the debtors received no quantifiable economic benefit from the “considerable support and assistance from the church and its members in the last few years in the form of counselling [sic], car and housing repairs, groceries, and transportation.” *Id.*; *see also* *Weinman v. Word of Life Christian Ctr. (In re Bloch)*, 207 B.R. 944, 947 (D. Colo. 1997) (holding value does not include “church services, spiritual, emotional, psychological, educational services and the basic operation of the [church]” (citing *In re Newman II*, 203 B.R. 476–77)); *Zahra Spiritual Trust v. United States*, 910 F.2d 240, 249 (5th Cir. 1990) (reading Texas state fraudulent transfer law to require “monetary, not spiritual, consideration”).

equivalent value exemption to exchanges that provided the bankruptcy estate with some quantifiable economic benefit.

Perhaps the most striking feature of the bankruptcy court's decision in *In re Young*, however, is that for the first time a federal court suggested that the mere fact that a transferee is a *religious* entity made it constitutionally impermissible to value that entity's activities under fraudulent transfer law.⁸⁰ Applying the reasonably equivalent value exemption to tithes "puts the court in the delicate position of not only differentiating between 'religious' benefits and 'secular' ones but also putting a value on those benefits."⁸¹ Such an inquiry, the *In re Young* bankruptcy court warned, is "fraught with the sort of entanglement that the Constitution forbids."⁸² The difficulty of valuing the satisfaction debtors receive from donating or tithing exists in cases involving religious and secular charitable organizations alike. The *In re Young* court's new conclusion that valuing church property unconstitutionally entangles government in religion, however, made religious institutions uniquely vulnerable to fraudulent transfer avoidance. Their plight resulted not merely from operation of a state or federal statute, but was entrenched in the Constitution of the United States.

Even though the bankruptcy court in *In re Young* feared entangling the court in the obligations valuing religious services would entail, it nevertheless valued those services as worthless: "[P]roperty is value, charitable contributions are not."⁸³ Not only did it value religious services as worthless because those services did not benefit the bankruptcy estate and creditors,⁸⁴ but it also went out of its way to hold that not even the debtors could have received value from the religious services.⁸⁵ Citing weak authorities—an administrative ruling and a dead precedent—the bankruptcy court declared that "[a]ny benefit that the debtors may have received . . . was merely incidental."⁸⁶ At most, the

⁸⁰ *Christians v. Crystal Evangelical Free Church (In re Young) (In re Young I)*, 148 B.R. 886, 894 (Bankr. D. Minn. 1992), *aff'd*, 152 B.R. 939 (D. Minn. 1993), *rev'd*, 82 F.3d 1407 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998).

⁸¹ *Id.*

⁸² *Id.* at 894 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1972)) (internal quotation marks omitted).

⁸³ *Id.* at 896.

⁸⁴ The *In re Young* bankruptcy court observed that services neither provided the debtors with economic benefit nor made it possible for creditors to participate in the services and reap any benefits those services may have brought. *Id.* at 893–94.

⁸⁵ *Id.*

⁸⁶ *Id.* at 893–94 n.10 ("Religious observances of any faith are considered under the law of charity to be of spiritual benefit to the general public as well as to the members of the faith, with the private benefit to individual participants being merely incidental to the broader good that is served.") (citing Rev. Rul. 71-580,

bankruptcy court continued, the “debtor received ‘psychic income[,]’ . . . [which] recognizes that in some sense, no one acts unless action is preferable to inaction and takes into consideration the emotional benefits such as public acclaim, reputation for righteousness or internal pleasure derived from economically unwise decisions.”⁸⁷

The bankruptcy court’s decision in *In re Young* thus took earlier decisions to task for failing to apply the Code’s definitions of “value” properly and developed new conclusions about tithe avoidance. After *In re Young*, it was certain that religious services were worthless under the Code and thus could not be given in exchange for tithes to prevent their avoidance as constructive fraudulent transfers. More importantly, however, the court’s decision in *In re Young* created the possibility that valuing any religious good or service in exchange for tithes might unconstitutionally entangle the bankruptcy courts and government in religion. This court’s refusal to value religious services meant that religious services would be treated as if they had no value at all. As far as this court was concerned, church activities, no matter how expensive or how reliant upon debtors’ tithes, were simply valueless under the Bankruptcy Code.

2. Tithes “in Exchange” for Church Services in *Young*

Despite the difficulty of determining whether religious services are themselves “value” under the Code and “valuable” by the courts, churches are even more vulnerable to another facet of fraudulent conveyance law. Even if courts recognize church services as valuable, those services must be given “in exchange” for debtors’ tithes to satisfy the reasonably equivalent value exemption. As courts considered whether tithes could be given in exchange for religious services, however, they exposed a serious dilemma that churches would face when attempting to protect their tithes.

Even if the church services in *In re Young* were valuable under the Code, the bankruptcy court concluded that they were not provided in exchange for

1971–2 C.B. 235, 236)); *see also id.* (“The public benefit from religion remains and predominates regardless of whether church doctrines provide for traditional congregational worship or individual worship . . . or whether donations are voluntary or fixed.”) (citing *Staples v. Comm’r.*, 821 F.2d 1324, 1326 (8th Cir. 1987), *vacated*, 490 U.S. 1103 (1989)).

⁸⁷ *Id.* at 894.

the debtor's tithes.⁸⁸ Rather, they were "purely voluntary" and "driven only by the debtors' feelings of association and goodwill."⁸⁹ Regardless of whether the debtors tithed or not, the bankruptcy court noted that they would have received the same benefits—"[t]he same amount of heat, air conditioning, education and worship."⁹⁰ Moreover, the church neither required the debtors to tithe nor did it bind itself to provide services only to those who tithed: "The sermon is for the spiritual gratification of all in attendance, not just those who contribute money."⁹¹ Because of the very nature of a tithe—a voluntary, communal, moral, and nonreciprocal act—it could not be given in exchange for anything.⁹² A tithe, therefore, is per se a constructively fraudulent transfer.⁹³

The *In re Young* bankruptcy court pressed further, however, and noted that "[t]he Internal Revenue Code further supports the conclusion that the debtors could not have received property in exchange for their contributions."⁹⁴ Under § 170 of the tax code, taxpayers may deduct "contribution[s] . . . to . . . [religious organizations] used exclusively for religious . . . purposes."⁹⁵ The Supreme Court had recently held, however, that § 170 did not allow tithes made "*in exchange* for quid pro quo" services—"even those claimed as 'purely religious in nature'"—to qualify as deductible charitable contributions.⁹⁶ From this holding, the bankruptcy court reasoned that "the debtor cannot receive both a § 170 tax deduction and § 548 property at the same time."⁹⁷ "Unwittingly," the bankruptcy court concluded, "the church's argument calls into question the right of its members to deduct contributions made to the church."⁹⁸ With this conclusion, the *In re Young* court exposed how churches would jeopardize their tax-exempt status by

⁸⁸ *Id.* at 895; see also *Weinman v. Word of Life Christian Ctr. (In re Bloch)*, 207 B.R. 944, 948 (D. Colo. 1997) ("Even if one were to conclude . . . that the [church's] services constituted 'value,' § 548 . . . requires that any value received by the [d]ebtors must have been 'in exchange for' their contributions.").

⁸⁹ *In re Young I*, 148 B.R. at 895.

⁹⁰ *Id.*; see also *In re Bloch*, 207 B.R. at 948 (holding that because the church provided services and benefits to its members "regardless of whether or not they tithed," the debtors' tithes "were purely voluntary," given "from a sense of moral, rather than legal, obligation," and "in no way linked to the availability of" church services).

⁹¹ *In re Young I*, 148 B.R. at 895.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 26 U.S.C. § 170(c)(4) (2006).

⁹⁶ *In re Young I*, 148 B.R. at 895 (quoting *Hernandez v. Comm'r.*, 490 U.S. 680, 691–95 (1989)); see also Daniel Keating, *Bankruptcy, Tithing, and the Pocket-Picking Paradigm of Free Exercise*, 1996 U. ILL. L. REV. 1041, 1051.

⁹⁷ *In re Young I*, 148 B.R. at 895.

⁹⁸ *Id.*

giving their services in exchange for tithes to protect those tithes under the reasonably equivalent value exemption.⁹⁹

Indeed the bankruptcy court's conclusion in *In re Young* exposes churches to an impossible dilemma. They must either leave their tithes vulnerable to avoidance as constructively fraudulent transfers or forfeit their tax-exempt status. If churches provide their services in exchange for tithes to keep the tithes from being avoided as constructively fraudulent transfers, then tithing taxpayers will not be able to deduct their tithes for tax purposes. Not only will churches lose income because tithers will have less incentive to tithe, but churches themselves will also have to pay taxes on the tithes they do collect. Alternatively, if churches do not provide their services in exchange for tithes, those tithes may be avoided as constructively fraudulent transfers long after the church collects and spends the tithes. Tithes, the primary source of income for churches, thus remain squarely within the crosshairs of modern constructive fraudulent transfer law. Such organizations might attempt to save themselves by providing goods or services, but doing so means jumping from the frying pan of fraudulent transfer law into the fire of the tax code.

III. CONGRESS PROTECTS TITHES, BUT NOT CHURCHES

As the previous Part illustrated, the bankruptcy court's decision in *In re Young* exposed a unique dilemma for churches. After the district court affirmed that case,¹⁰⁰ the problems tithe avoidance posed for churches intersected with recent changes in federal law on religious liberty and gained enough momentum to draw the attention of Congress and appellate courts.

A. *The First Amendment, Smith, Congress, and Young*

Just two years before the *In re Young* bankruptcy court's ruling, the Supreme Court decided *Employment Division v. Smith*,¹⁰¹ which severely and surprisingly weakened the constitutional protections churches enjoyed under

⁹⁹ *Id.*; see, e.g., *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378 (1990) (subjecting a religious organization incorporated as a nonprofit corporation recognized under I.R.C. § 501(c)(3) to state tax liability for collecting money in exchange for merchandise and religious lectures).

¹⁰⁰ *Christians v. Crystal Evangelical Free Church (In re Young) (In re Young II)*, 152 B.R. 939 (D. Minn. 1993), *rev'd*, 82 F.3d 1407 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998).

¹⁰¹ *Employment Div. v. Smith*, 494 U.S. 872 (1990).

the Free Exercise Clause of the First Amendment.¹⁰² In *Smith*, the Court abandoned the strict scrutiny standard it used for over a quarter century to review laws claimed to burden the free exercise of religion¹⁰³ and adopted a far less rigorous standard of review.¹⁰⁴ After *Smith*, a claimant's free exercise rights must yield to any "valid and neutral law of general applicability."¹⁰⁵ The less rigorous standard of review set out in *Smith* applied when the district court reviewed *In re Young* and considered whether avoiding the debtor's tithes violate the debtors' free exercise rights.¹⁰⁶ Finding that the Code's constructive fraudulent transfer law was a "neutral law of general applicability," having "only an incidental effect on religion," the district court concluded that avoiding the debtors' tithes did not violate the Free Exercise Clause of the First Amendment and affirmed.¹⁰⁷

As the district court was affirming *In re Young*, however, Congress was considering how to overturn the *Smith* standard.¹⁰⁸ Congress quickly succeeded and passed the Religious Freedom Restoration Act (RFRA),¹⁰⁹ which reinstated the strict scrutiny standard that had protected religious free exercise rights for twenty-five years before *Smith*.¹¹⁰ RFRA revived the *In re Young* debtors' free exercise claims, and the church in that case finally won a battle in its war to recover its avoided tithes.¹¹¹ It recovered these tithes, however, not because the tithes fell under the exchange for reasonably

¹⁰² The Court first applied strict scrutiny review to these cases in *Sherbert v. Verner*, 374 U.S. 398 (1963). JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 143, 149 (2d ed. 2005). The strict scrutiny standard required laws burdening free exercise of religion to be general, to be without religious discrimination, to refrain from affecting religious beliefs, to serve a compelling state interest, and to be tailored narrowly for serving that compelling interest. *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Smith*, 494 U.S. at 879 (holding that free exercise rights must yield to "a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that [a claimant's religion] proscribes (or proscribes)" (internal quotations omitted)); see also WITTE, *supra* note 102, at 149 (comparing the lower-level *Smith* standard to the *Sherbert* strict scrutiny standard).

¹⁰⁵ *Id.*

¹⁰⁶ *In re Young II*, 152 B.R. at 954.

¹⁰⁷ *Id.*

¹⁰⁸ 139 CONG. REC. H1143 (daily ed. Mar. 10, 1993) (statement of Rep. Greene) ("[*Smith*] has allowed the Government to cross the line of separation between church and state . . . [and] limit religious practices that have been practiced in the United States for hundreds of years.").

¹⁰⁹ Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (2006)).

¹¹⁰ A more thorough discussion of *Smith*, RFRA, and free exercise rights implications in tithe avoidance cases follows. See *infra* Part V.

¹¹¹ *Christians v. Crystal Evangelical Free Church (In re Young) (In re Young III)*, 82 F.3d 1407 (8th Cir. 1996) *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998).

equivalent value exemption, but because avoiding them would violate the debtors' free exercise rights under the newly enacted RFRA.¹¹² The church's victory was short-lived, however, as the Supreme Court held RFRA unconstitutional less than one year later¹¹³ and vacated *In re Young*, remanding it back to the Eighth Circuit for consideration in light of its new holding.¹¹⁴ This drew Congress's attention once more.

B. Congressional Response: The Religious Liberty and Charitable Donation Protection Act

Just seven months after the Supreme Court vacated *In re Young*, Iowa Senator Chuck Grassley spearheaded a new bill designed to protect religious and charitable contributions from being avoided by the Bankruptcy Code,¹¹⁵ specifically under the § 548 fraudulent conveyance provisions.¹¹⁶ After receiving strong bipartisan congressional support¹¹⁷ and unanimous consent in the Senate,¹¹⁸ President Bill Clinton signed the bill into law¹¹⁹ as the Religious Liberty and Charitable Donation Protection Act (RLCDPA).¹²⁰

¹¹² *In re Young III*, 82 F.3d at 1419–20.

¹¹³ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹¹⁴ *Christians v. Crystal Evangelical Free Church (In re Young) (In re Young IV)*, 521 U.S. 1114 (1997) *reinstated*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998).

¹¹⁵ See 143 CONG. REC. S10293 (daily ed. Oct. 1, 1997) (statement of Sen. Grassley) (introducing S. 1244, "a bill to amend title 11, United States Code, to protect certain charitable contributions").

¹¹⁶ Religious Liberty and Charitable Contribution Protection Act of 1998, S. 1244, 105th Cong. § 3 (2d Session 1998) (amending 11 U.S.C. § 548(a)).

¹¹⁷ The bill originated in the Senate as Senate Bill 1244 and was sponsored by six Republican senators: Wayne Allard of Colorado, John Ashcroft of Missouri, Rod Grams of Minnesota, Chuck Grassley of Iowa, Orrin Hatch of Utah, and Jeff Sessions of Alabama. See 144 CONG. REC. 59, 2041, 2054, 8645, 8786, 8920, 8940–44, 9278, 10845–50, 10993, 11685, 11378, 11748, 20615 (1998) (debating Senate Bill 1244); 143 CONG. REC. 20975–76, 21077 (1997) (same). In Senate debate, however, Democrats Dick Durbin of Illinois and Paul Sarbanes of Maryland spoke in support of Senate Bill 1244. See 144 CONG. REC. S4771 (daily ed., May 13, 1998). The RLCDPA had strong bipartisan support in the House of Representatives as well. Over twenty-nine percent of the House of Representatives cosponsored a counterpart to Senate Bill 1244, including forty-two Democrats and eighty-five Republicans. 144 CONG. REC. 927, 1225, 1283, 7013, 8894, 8941, 10823, 10844–51, 10885, (1998) (debating H.R. 2604, the house counterpart to Senate Bill 1244); 143 CONG. REC. 21010, 21578, 21919, 22399, 22375, 23347, 23561, 24438, 26216 (1997) (same).

¹¹⁸ According to the *Congressional Record* and the United States Senate website, the Senate passed S. 1244 unanimously. See 144 CONG. REC. S4771–72 (daily ed. May 13, 1998); United States Senate, Summary of Roll Call Vote Number 132 on the Passage of S. 1244 (May 13, 1998), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=105&session=2&vote=00132. Interestingly, however, debate transcripts state that one senator, Democrat Herbert Kohl of Wisconsin, voted against the bill. 144 CONG. REC. S4772 (daily ed. May 13, 1998). The House passed its own bill and the Senate bill with an untallied voice call vote of two-thirds approval. See 144 CONG. REC. H3999, 4005 (daily ed. June 3, 1998).

Among other amendments, RLCDDPA created a “safe harbor” provision in the Code’s fraudulent transfer law. This safe harbor prevents bankruptcy trustees from avoiding contributions a debtor has made to a “qualified religious or charitable entity or organization” that did not exceed fifteen percent of the debtor’s gross annual income for the year in which the debtor made the contribution.¹²¹ The RLCDDPA safe harbor’s reference to “qualified religious or charitable entity or organization[s]” protects organizations permitted to receive tax deductible contributions.¹²² Congress thus designed the RLCDDPA to resolve the dilemma churches faced from the competing requirements¹²³ of the tax code and the fraudulent transfer provisions of the Bankruptcy Code.

¹¹⁹ Statement by President William J. Clinton upon Signing S. 1244, 34 WEEKLY COMP. PRES. DOC. 1178 (June 19, 1998). Upon signing the bill, President Clinton remarked:

As Americans, we value the important role religious and charitable institutions play in the daily life of this Nation. Indeed, we know that fiscal responsibility for these institutions is fundamental to their efforts to meet the spiritual, social and other concerns of our Nation. It is a great loss to all of our citizens for creditors to recoup their losses in bankruptcy cases from donations made in good faith by our citizens to their churches and charitable institutions.

As Americans, we also know that giving, whether to one’s church, temple, mosque, or other house of worship or to any charitable organization, fosters and enriches our sense of community. We need to encourage, not discourage, that sense of community. The Religious Liberty and Charitable Donation Protection Act does just that.

Id.

¹²⁰ Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, 112 Stat. 517 (1998) (codified as amended at 11 U.S.C. §§ 544, 546, 548, 707, 1325 (2006)).

¹²¹ 11 U.S.C. § 548 (a)(2)(A)–(B) (2006). The relevant text of amended § 548 provides:

A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered [a constructively fraudulent transfer under § 548(a)(1)(B)] in any case in which . . . [either] . . . 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 . . . the transfer was consistent with the practices of the debtor in making charitable contributions.

Id.

¹²² “In . . . [§ 548], the term ‘qualified religious or charitable entity or organization’ means . . . an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or . . . an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.” *Id.* § 548(d)(4). Because RLCDDPA applies to any entity described in I.R.C. § 170(1)–(2), it also applies to nonreligious organizations and charities protected for their service to the common good. *See supra* note 3. These nonreligious organizations, however, are less likely to find further protection from title avoidance in the religious rights this Comment discusses. *See supra* note 1.

¹²³ *See supra* Part II.B.2 and text accompanying notes 94–99.

C. *Judicial Exacerbation: Zohdi and Universal Church*

Although Congress undoubtedly aimed to relieve the worry and headache fraudulent transfer law caused religious debtors and organizations with RLCDDPA,¹²⁴ it might be more accurate to say that Congress merely transplanted that headache to the courts. The language RLCDDPA uses to provide its safe harbor for religious debtors and transferees appears straightforward upon a first glance, but it has caused substantial confusion over what tithes it protects.¹²⁵ Two cases have pressed the courts to resolve this confusion and interpret RLCDDPA's safe harbor provisions. The first case, *In re Zohdi*,¹²⁶ considered whether the safe harbor protected a portion of a contribution exceeding fifteen percent of the debtor's gross annual income.¹²⁷ The second case, *Universal Church v. Geltzer*,¹²⁸ considered whether the fifteen percent threshold applies individually to each contribution given within the safe harbor's applicable timeframe or whether it applies collectively to all transfers within that timeframe.¹²⁹ Unfortunately for churches, these two cases synthesize to undermine significantly the protection that RLCDDPA was originally designed to provide.¹³⁰

¹²⁴ Many scholars and commentators initially viewed RLCDDPA as a panacea for the problems of tithe avoidance. Kenneth N. Klee, *Tithing and Bankruptcy*, 75 AM. BANKR. L.J. 157, 192 (2001) (stating that RLCDDPA restored avoidance immunity to tithes); C. Scott Pryor, *Tension Between the Trustee and the Tithe: Is P.L. 105-183 Absolution?*, AM. BANKR. INST. J., Dec. 1998–Jan. 1999, at 10, 37 (stating RLCDDPA solved the problems of tithing avoidance under the Bankruptcy Code); Todd J. Zywicki, *Rewrite the Bankruptcy Laws, Not the Scriptures: Protecting a Bankruptcy Debtor's Right to Tithe*, 1998 WIS. L. REV. 1223, 1276 (stating RLCDDPA would guarantee debtors' rights to tithes and protect churches' expectations to receive tithes).

¹²⁵ Recent scholarship and commentary underscores RLCDDPA's emerging ambiguities. See John J. Dryer & Gregory Todd Jones, *Judicial Treatment of Charitable Donations in Bankruptcy Before and After the Religious Liberty and Charitable Contribution Protection Act of 1998*, 2 DEPAUL BUS. & COM. L.J. 265, 292–94 (2004) (explaining how loopholes and ambiguities in RLCDDPA leave creditors in the same position as before the RLCDDPA); Klee, *supra* note 124, at 192 (arguing that application of RLCDDPA will vary regionally and result in nonuniform application of bankruptcy laws); Jool Nie Kang, Comment, *Tithing: A Fraudulent Transfer or Moral Obligation?*, 18 BANKR. DEV. J. 399, 409–23 (2002) (arguing for clarifications in RLCDDPA's text to protect creditors and debtors); Lawrence A. Reicher, Comment, *Drafting Glitches in the Religious Liberty and Charitable Donation Protection Act of 1998: Amend § 548(a)(2) of the Bankruptcy Code*, 24 EMORY BANKR. DEV. J. 159, 163–91 (explaining the ambiguities RLCDDPA's language creates, describing this language's treatment in the courts, and suggesting corrective amendments).

¹²⁶ *Murray v. La. State Univ. Found. (In re Zohdi)*, 234 B.R. 371 (Bankr. M.D. La. 1999).

¹²⁷ See *infra* Part III.C.1.

¹²⁸ *Universal Church v. Geltzer*, 463 F.3d 218 (2d Cir. 2006).

¹²⁹ See *infra* Part III.C.2.

¹³⁰ See *infra* Part III.C.3.

1. In re Zohdi

In *In re Zohdi*,¹³¹ a state university foundation received contributions from the debtor and qualified for protection under the RLCDDPA safe harbor as a nonreligious charitable entity.¹³² While insolvent, the debtor donated \$10,000 within a year before filing bankruptcy.¹³³ He received nothing in exchange for his contribution.¹³⁴ The debtor had no previous practice of contributing before he donated to the foundation.¹³⁵ His contribution amounted to almost twenty-three percent of his gross income for that year.¹³⁶ The trustee sought to avoid the debtor's entire contribution as a constructively fraudulent transfer, but the foundation objected. The foundation argued it could "bifurcate" the avoidable amount of the debtor's contribution and avoid only the surplus amount of the contribution that exceeded the RLCDDPA fifteen percent safe harbor.¹³⁷ After bifurcation, the remaining amount within the fifteen percent safe harbor would remain with the foundation.¹³⁸ The trustee responded that the plain meaning of RLCDDPA applied only to transfers that fell entirely within the safe harbor.¹³⁹ According to the trustee's argument, no part of any transfer exceeding this amount, even by one penny, would enjoy the protection of the safe harbor.¹⁴⁰

To resolve the dispute, the *In re Zohdi* court compared the language of the RLCDDPA safe harbor with language used in other parts of the Code.¹⁴¹ RLCDDPA's text applies the safe harbor to a "contribution that does not exceed 15 percent" of the debtor's gross annual income.¹⁴² Had the drafters intended to allow bifurcation of contributions, the court reasoned, they would have written the safe harbor to apply to a contribution "up to fifteen percent" of the debtor's gross annual income.¹⁴³ Observing that Congress used the "up to" language in other areas of the Code where it intended to bifurcate sums, the court concluded that Congress decided not to do so with RLCDDPA's safe harbor because the safe harbor's language did not include "up to" or a similar

¹³¹ *In re Zohdi*, 234 B.R. at 371.

¹³² *Id.* at 373.

¹³³ *Id.*

¹³⁴ *Id.* at 374.

¹³⁵ *Id.*

¹³⁶ *Id.* at 373–74.

¹³⁷ *Id.* at 375.

¹³⁸ *Id.*

¹³⁹ *Id.* at 374.

¹⁴⁰ *Id.* at 382, 384.

¹⁴¹ *Id.* at 375.

¹⁴² *Id.* (quoting 11 U.S.C. § 548(a)(2)(A) (2006)).

¹⁴³ *Id.* at 375–76.

phrase.¹⁴⁴ Because this language was missing, the court reasoned RLCDDPA applied only to those transfers that fit entirely under the fifteen percent threshold.¹⁴⁵ With this interpretation, the court avoided the debtor's single contribution from the foundation entirely, including the portion of that contribution that was within the RLCDDPA's safe harbor fifteen percent threshold.¹⁴⁶

Buried in the final footnote of its opinion, the *In re Zohdi* court noted a peculiar consequence of applying RLCDDPA's plain meaning as it had done.¹⁴⁷ The "ultimate effect of this ruling is arguably to insulate all transfers from avoidance" under the RLCDDPA safe harbor "that are (on a transfer-by-transfer basis) below the 15% amount, regardless of the aggregate amount of charitable contributions during the year before bankruptcy."¹⁴⁸ Under this interpretation, a debtor could transfer substantially all of her assets to a qualified religious or charitable entity and be protected by the RLCDDPA safe harbor, so long as she does so over a number of individual transfers, each of which are below fifteen percent of her gross annual income.¹⁴⁹ While the *In re Zohdi* court did not "like" this consequence, it noted, "[t]hough distasteful sometimes, our job here is to read the statute, apply it as written to the facts, and, in so doing, present Congress with our view of what it has in fact wrought."¹⁵⁰ If Congress intended other consequences, "Congress can say so and fix it."¹⁵¹ Congress, however, said nothing in response to the peculiar consequence of the *In re Zohdi* decision. Eventually other courts also disliked the consequences of the *In re Zohdi* interpretation and were not content to let that interpretation stand, as *Universal Church v. Geltzer* illustrates.¹⁵²

2. *Universal Church v. Geltzer*

In *Universal Church v. Geltzer*, a church challenged a trustee's attempt to avoid the debtor's tithes as constructively fraudulent transfers.¹⁵³ During each

¹⁴⁴ *Id.* at 376–81.

¹⁴⁵ *Id.* at 385–86.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 385 n.44.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Universal Church v. Geltzer*, 463 F.3d 218, 229 (2d Cir. 2006) (holding that the RLCDDPA safe harbor applies collectively to all debtors' contributions even though "the one other court to consider this issue reached the opposite result" (citing *In re Zohdi*, 234 B.R. at 371, 380 n.20)).

¹⁵³ *Id.* at 222.

of the three years before filing for bankruptcy, the debtor tithed substantial portions of her gross annual income to Universal Church in several discrete transfers.¹⁵⁴ The yearly totals of those tithes amounted to nineteen percent of her gross annual income in the first year before her filing, thirty percent in the second year before her filing, and seventy-three percent in the third year before her filing.¹⁵⁵ Though the debtor tithed these large percentages of her income to the church during these three years, only one tithe exceeded fifteen percent of her gross annual income.¹⁵⁶ The trustee sought to avoid that tithe as well as all others, even though the others fell below this threshold.¹⁵⁷ The bankruptcy court concluded that the trustee could avoid only the single tithe that exceeded the fifteen percent gross annual income threshold.¹⁵⁸ The remaining tithes, however, had protection under RLCDDPA's safe harbor.¹⁵⁹

On appeal to the district court, however, the trustee won and successfully avoided all of the debtor's tithes during the three years before the debtor filed for bankruptcy.¹⁶⁰ The church appealed to the Second Circuit, and, relying on *In re Zohdi*, argued that RLCDDPA protected each individual tithe falling under the fifteen percent gross annual income threshold.¹⁶¹ The Second Circuit was not persuaded, however.

Looking to the definitions set forth in the Code¹⁶² and to RLCDDPA's legislative history,¹⁶³ the Second Circuit disagreed with both the church and the *In re Zohdi* court and held that the trustee could avoid all tithes the debtor made three years before filing bankruptcy.¹⁶⁴ Though RLCDDPA's language describes the fifteen percent gross annual income threshold by referring to "a transfer" in the singular,¹⁶⁵ the Second Circuit noted that the Bankruptcy Code contains a rule of construction, "which provides that '[i]n this title . . . the singular includes the plural.'"¹⁶⁶ Applying this rule of construction, the

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Appellant's Brief at 24–28, *Universal Church v. Geltzer*, No. 05-2105-BK(CON) (2d Cir. July 19, 2005), available at 2005 WL 5774129.

¹⁶² *Universal Church*, 463 F.3d at 223.

¹⁶³ *Id.* at 224–25.

¹⁶⁴ *Id.* at 229.

¹⁶⁵ 11 U.S.C. §548(a)(2) (2006).

¹⁶⁶ *Universal Church*, 463 F.3d at 223 (quoting 11 U.S.C. § 102(7)).

Second Circuit read RLCDDPA's safe harbor language to take an aggregate approach and protect churches only when all of the debtor's "transfers" fall under the fifteen percent of gross annual income threshold.¹⁶⁷ The court thus held that the church wrongly relied on *In re Zohdi*¹⁶⁸ and avoided just shy of \$80,000 in tithes already collected and spent as much as three years earlier.¹⁶⁹ In one fell swoop, the church lost not only all the tithes it received from the debtor for a period of three years, but it also lost any legal claim to the amount of those aggregated tithes that fell under the RLCDDPA safe harbor.¹⁷⁰

3. *Dueling Plain Meanings, Slain Churches*

Together, *In re Zohdi* and *Universal Church* present "dueling plain meanings"¹⁷¹ of the RLCDDPA safe harbor. One court determined that any single tithe exceeding the fifteen percent safe harbor must be avoided completely, but any tithing not exceeding the fifteen percent safe harbor may not be avoided.¹⁷² Yet another court determined that when all tithes in a given year exceed the fifteen percent safe harbor, they all must be avoided.¹⁷³ Both purport to derive these somewhat contrary interpretations from the "plain meaning" of the RLCDDPA safe harbor in § 548(a)(2).¹⁷⁴ The result uncovers serious uncertainties about what tithes fall under the safe harbor. As courts duel with these conflicting plain meanings of the Code, churches and other charitable entities may find themselves slain by uncertainties in the meantime.

One serious uncertainty remains over the bifurcation argument originally raised and dismissed in *In re Zohdi*. Recall that the charity in *In re Zohdi*

¹⁶⁷ *Id.* The Second Circuit bolstered its argument with strong legislative history showing that RLCDDPA's drafters intended for the fifteen percent of gross annual income threshold to calculate transfers collectively and not individually. *Id.* at 224–25 (quoting 144 CONG. REC. H3999-00 (daily ed. June 3, 1998) (statements of Reps. Nadler and Gekas)).

¹⁶⁸ *Id.* at 229 ("[T]he Church was not entitled to assume it would prevail on the aggregation issue[, as the foundation in *In re Zohdi* had done, and thus] . . . has no excuse for failing to . . . [argue] that avoidance should be limited to amounts over" the fifteen percent gross annual income threshold.).

¹⁶⁹ *See id.*

¹⁷⁰ *Id.* This result was not, in the eyes of the Second Circuit, "a manifest injustice" requiring reconsideration of the issue. *Id.*

¹⁷¹ *See* WARREN & WESTBROOK, *supra* note 6, at 571 (commenting on *BFP v. Resolution Trust Corp.*, 511 U.S. 311 (1994), "in which both the five members of the majority and the four dissenters claim to be simply reading the plain meaning of the statute that the other side is presumably too obtuse to see").

¹⁷² *See supra* notes 141–46 and accompanying text.

¹⁷³ *See supra* notes 162–70 and accompanying text.

¹⁷⁴ *Compare* Murray v. La. St. Univ. Found. (*In re Zohdi*), 234 B.R. 371, 384 (Bankr. M.D. La. 1999) (declining to consult the safe harbor's legislative history because its language is plain) with *Universal Church*, 463 F.3d at 218 ("[T]he text of § 548(a)(2) is not ambiguous when read alone . . .").

attempted to bifurcate the debtor's contributions, which would have allowed the trustee to avoid any portion of a transfer exceeding the fifteen percent of gross annual income threshold, but not any remaining amount under it.¹⁷⁵ The Second Circuit's aggregate approach in *Universal Church* does not foreclose courts in future cases from bifurcating avoided tithes and creates two alternatives for future courts.¹⁷⁶ Under one alternative, courts in future cases could aggregate debtors' tithes into a single sum and bifurcate that sum into an avoidable portion exceeding the safe harbor's fifteen percent of gross annual income threshold and an unavoidable portion falling below the threshold that the church may keep. If the Second Circuit correctly interpreted Congress's intent to apply the RLCDDPA safe harbor to debtors' aggregate tithes,¹⁷⁷ then this alternative would further that intent by always protecting the portion of aggregate tithes falling below the safe harbor. Under the second alternative, courts in future cases could aggregate and avoid tithes without bifurcating them into avoidable and unavoidable portions. This approach would deny any protection at all for churches whose members give any amount above the safe harbor's fifteen percent of gross annual income threshold. These alternatives render the status of a member's tithes uncertain because the first alternative always protects some tithes, while the second alternative might not protect any at all.

An even more serious ambiguity also remains. If the *Universal Church* court is correct to apply the rule of construction that in the Bankruptcy Code "the use of the singular includes the plural" to the RLCDDPA safe harbor,¹⁷⁸ then this rule applies not only to the number of the debtor's tithes or contributions, but also to the number of churches or charities receiving those tithes or contributions. Recall that the RLCDDPA safe harbor protects transfers "to a qualified religious or charitable entity or organization . . . which . . . do[es] not exceed 15 percent of the [debtor's] gross annual income."¹⁷⁹ If the singular includes the plural in this provision, then courts must construe this provision as applying to all tithes or contributions given to *all* qualified religious or charitable entities or organizations that do not exceed 15 percent of the debtor's gross annual income. This construction

¹⁷⁵ *In re Zohdi*, 234 B.R. at 375.

¹⁷⁶ Because the Second Circuit held that *Universal Church* waived this argument, another case must arise to resolve the issue of whether churches may recover the portion of aggregated tithes under the fifteen percent safe harbor after the trustee has avoided them.

¹⁷⁷ See *supra* note 167.

¹⁷⁸ *Universal Church*, 463 F.3d at 223 (citing 11 U.S.C. § 102(7)(2006)).

¹⁷⁹ 11 U.S.C. § 548(a)(2).

creates odd results, however, best illustrated by a plausible hypothetical example.

Imagine a debtor's gross annual income is \$40,000. In the course of a year, the debtor tithes ten percent of her gross annual income ($\$40,000 \times 10\% = \$4,000$) to her church, which is a qualified religious entity under RLCDPA. The debtor also gives \$100 to each of two nonreligious qualifying charitable entities ten times in the course of the year ($2 \times (10 \times \$100) = \$2,000$). As long as the debtor pays no more than these amounts, all recipients of her tithes and contributions will be protected under RLCDPA because her aggregate contributions to all qualified entities ($\$4,000 + \$2,000 = \$6,000$) will not exceed fifteen percent of her gross annual income ($\$40,000 \times 0.15 = \$6,000$). However, if the debtor gives any *one* of these entities so little as a penny more and a court applies the rule of construction from *Universal Church*, all of the debtor's tithes and contributions to each church or charity would become avoidable. Moreover, if the court also followed *In re Zohdi* and refused to bifurcate these tithes and contributions, RLCDPA would not protect any tithe or contribution given to any church or charity. The Code would disgorge each tithe and contribution given to each church and charity, regardless of whether the church or charity already spent the funds or needs the funds for current costs.

Such is the specter haunting churches and charities today. They cannot escape fraudulent transfer law by offering services in exchange for contributions without jeopardizing their tax-exempt status and making those contributions nondeductible. They have no sure way of knowing whether a given contribution might be avoided as a fraudulent transfer from insolvent or near-insolvent titheholders. Even when they know a tithe might be subject to fraudulent transfer avoidance, they cannot know whether RLCDPA protects any portion of that tithe because of the uncertainties following *In re Zohdi* and *Universal Church*.

IV. WHY COURTS AND CONGRESS HAVE FAILED TO PROTECT CHURCHES

The uncertainties following *In re Zohdi* and *Universal Church* stem from those courts' fundamental differences over the relative importance of church and creditor interests, the policies relevant to tithe avoidance cases, and the courts' role in managing these interests according to the policies Congress enacts. The courts in both cases conceded that RLCDPA's plain meaning might allow a debtor to transfer all of her assets to a church or charity in the

year before filing bankruptcy, so long as the assets were transferred piecemeal in sums under the safe harbor.¹⁸⁰ The *Universal Church* court thought such an interpretation, while plausible, resulted in “absurd” consequences because it would “defeat the entire purpose of allowing trustees to protect and enhance the estate by avoiding transfers made in a specific period of time before the bankruptcy petition is filed.”¹⁸¹ Trustees protect and enhance the estate to preserve the creditors’ portion of the debtor’s assets as the debtor approaches bankruptcy. Stressing the ultimate importance of creditors’ interests, the *Universal Church* court would not allow the RLCDDPA safe harbor exception to swallow the fraudulent transfer avoidance rule.¹⁸²

The *In re Zohdi* court also identified this “absurd” result, but it deferred to the will of Congress and viewed the RLCDDPA safe harbor as a necessary inconvenience applying the Code’s fraudulent transfer laws.¹⁸³ Furthermore, the court acknowledged that, in the eyes of Congress, the interests of churches and charities were just as important as the competing interests of creditors.¹⁸⁴ Though it disliked how Congress balanced those interests in the text of RLCDDPA, the *In re Zohdi* court concluded it was bound to respect the lines drawn by Congress and to refrain from subordinating the interests of churches to those of creditors.¹⁸⁵

Indeed both sets of interests—the interests of creditors and the interests of churches and charities—are very important in disputes over avoidable

¹⁸⁰ Compare *Universal Church v. Geltzer*, 463 F.3d 218, 224 (2d Cir. 2006) (“[I]f § 548(a)(2) requires consideration of each transfer separately, a debtor could contribute all of her income and assets to charity shortly before declaring bankruptcy, provided that she did so in several separate gifts, none of which was larger than 15 percent of her income.”) with *In re Zohdi*, 234 B.R. at 384 n.44 (noting in dicta that the RLCDDPA safe harbor protects transfers “that are (on a transfer-by-transfer basis) below the 15% amount, regardless of the aggregate amount of charitable contributions during the year before bankruptcy”).

¹⁸¹ *Universal Church*, 463 F.3d at 224.

¹⁸² *Id.*

¹⁸³ *In re Zohdi*, 234 B.R. at 384. The *In re Zohdi* court stated:

So, we readily admit that the discernable significance of the 15% amount is only that Congress decided to “draw the line” where it did. Because of the presumed authority to draw such a line (and many others in other places), we are bound to abide by that line The transferor of a charitable donation does not receive “reasonably equivalent value” for the contribution; the transferee has given no consideration. Congress, in an effort to protect religious organizations and charities, is merely legislating that they are excepted from this requirement. The 15 percent limitation is no more absurd than attribution of reasonably equivalent value to a “contribution”; it is also no more or less arbitrary.

Id.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

transfers. Without being able to avoid some of the debtor's prepetition transfers, creditors would rarely recover any portion of their valid and legitimate claims to the debtor's assets because the debtor would have transferred those assets fraudulently or spent them wastefully.¹⁸⁶ The Code's fraudulent transfer avoidance law thus allows creditors to rely upon some portion of the debtor's promise to pay, as creditors will have the power to recover some payments they should have received in the first place.

Creditors, however, are not the only parties that must rely upon debtors' promises; churches must as well. By avoiding prepetition tithes and contributions and giving churches a claim on the bankruptcy estate, the Code treats churches like creditors. Like creditors, churches holding these claims will most likely receive far less in bankruptcy than the debtor gave or promised to give. Unlike creditors, however, churches cannot protect themselves by giving reasonably equivalent value in exchange for debtors' contributions without losing their valuable tax-exempt status. The Code thus fails to recognize how churches are uniquely vulnerable to tithe avoidance.

Courts fail to recognize this vulnerability as well. In tithe avoidance cases, courts approach the problem of tithe avoidance from the limited perspectives of either debtors or creditors, rather than of the churches involved. Some courts allow church interests to depend upon a debtor's conduct, asking whether the debtor received services "in exchange" for her tithes.¹⁸⁷ Other courts allow church and charity interests to depend upon creditors' interests, asking whether the bankruptcy estate received reasonably equivalent value in return for the debtor's tithes.¹⁸⁸ In every case, however, all courts approach the problem indirectly by using the interests of either the debtor or creditors as crude proxies for the actual interests of churches involved. Although Congress sought to remedy the problem of tithe avoidance by enacting RLCDDPA, the courts applying that statute in *In re Zohdi* and *Universal Church* use the same indirect approach as courts in early cases.¹⁸⁹ As the next Part explains, this

¹⁸⁶ See *supra* text accompanying notes 22–23.

¹⁸⁷ See *supra* Part II.B.2.

¹⁸⁸ See *supra* Parts II.A, II.B.1.

¹⁸⁹ Scholars and commentators have followed suit, also neglecting churches' independent interests in tithe avoidance cases and focusing instead on debtors' and creditors' interests. See Dryer & Jones, *supra* note 125, at 281–94 (explaining how judicial interpretations of RLCDDPA have left creditors' interests intact); Klee, *supra* note 124, at 192 (arguing that although RLCDDPA protects tithing debtors, it undermines integrity in the bankruptcy system); Gloria Jean Lidell, Pearson Lidell, Jr. & Stephen K. Laceywell, *Charitable Contributions in Bankruptcy: An Empirical Analysis*, 39 AM. BUS. L.J. 99, 100–28 (2001) (examining how bankruptcy affects tithing and donating debtors); Jonathan C. Lipson, *When Churches Fail: The Diocesan Debtor*

crude approach and the uncertainties it creates persist even when churches seek to protect tithes with special religious rights.

V. UNRECOGNIZED CHURCH PROTECTIONS IN RELIGIOUS RIGHTS

Among the churches and charities vulnerable to fraudulent transfer avoidance, churches occupy hallowed ground. By virtue of their religious character, churches benefit from special rights provided in the First Amendment¹⁹⁰ and various federal statutes¹⁹¹ that other entities do not possess. These special rights give churches two alternative protections from fraudulent transfer avoidance. Under one alternative, churches can claim that avoiding tithes under the Bankruptcy Code unconstitutionally entangles government in religion and thus violates the Establishment Clause.¹⁹² This alternative sets a high hurdle, however, as all churches seeking protection from tithe avoidance under the Establishment Clause have been unsuccessful.¹⁹³ Under the second alternative, churches may claim that avoiding tithes violates their right to free exercise of religion guaranteed either by the Free Exercise

Dilemmas, 79 S. CAL. L. REV. 363, 378–424 (2006) (discussing church interests as debtors in bankruptcy cases and religious rights of tithers); Steven Walt, *Collective Inaction and Investment: The Political Economy of Delay in Bankruptcy Reform*, 49 EMORY L.J. 1211, 1248–60 (examining how RLCDDPA affects debtors' incentives to tithe and how changing these incentives affect creditors in bankruptcy); Kang, *supra* note 125, at 409–23 (arguing for clarifications in RLCDDPA's text to protect creditors and debtors); Anne McLaughlin, Note, *Tithing in a Chapter 13 Plan: The Requirement of Reasonableness Under the Religious Liberty and Charitable Donation Protection Act*, 47 B.C. L. REV. 375, 384–93, 409 (2006) (explaining how RLCDDPA accommodates debtors' religious interests while protecting creditors); Reicher, *supra* note 125, at 171–77 (discussing congressional debates over tying the RLCDDPA safe harbor threshold to the debtors' income and tithing).

¹⁹⁰ The first two clauses of the First Amendment are commonly called the "Religion Clauses." They read, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. CONST. amend I.

¹⁹¹ See, e.g., Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2006); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc; Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183 (codified as amendments to 11 U.S.C. §§ 544, 546, 548, 707, 1325 (2006)); and WITTE, *supra* note 102, at 174–78. See generally Symposium, *Religious Liberty at the Dawn of a New Millennium*, 75 IND. L.J. 1 (2000) (providing thorough scholarship and commentary on some of these and other federal and state statutory religious rights).

¹⁹² The Establishment Clause is the first of the two Religion Clauses, and it provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend I.

¹⁹³ See, e.g., *Universal Church v. Geltzer*, 463 F.3d 218 (2d Cir. 2006); *Hartvig v. Tri-City Baptist Temple of Milwaukie, Inc. (In re Gomes)*, 219 B.R. 286 (Bankr. D. Or. 1998); *Geltzer v. Crossroads Tabernacle (In re Rivera)*, 214 B.R. 101 (Bankr. S.D.N.Y. 1997).

Clause¹⁹⁴ or the Religious Freedom Restoration Act (RFRA).¹⁹⁵ Churches following this second alternative have found modest and indirect protection from tithe avoidance.¹⁹⁶ This protection remains modest and indirect because these cases—like the cases considering the exchange for reasonably equivalent value exemption¹⁹⁷ and the RLCDDPA safe harbor¹⁹⁸—also allow church interests to depend upon debtors’ conduct and creditors’ interests.¹⁹⁹ Examining the cases reviewing tithe avoidance under the Free Exercise Clause and RFRA, this Part explains how the modest and indirect protection churches have received in these cases lay bedrock for a more robust and direct protection detailed in the next Part.

¹⁹⁴ The Free Exercise Clause is the second of the two Religion Clauses of the First Amendment; it provides that “Congress shall make no law . . . prohibiting the free exercise [of religion].” U.S. CONST. amend I.

¹⁹⁵ 42 U.S.C. § 2000bb.

¹⁹⁶ Of the eight courts reviewing tithe avoidance under the Free Exercise Clause, none held that the Free Exercise Clause prevented tithe avoidance. *Universal Church v. Geltzer*, 463 F.3d 218, 227–28 (2d Cir. 2006); *Weinman v. Word of Life Christian Ctr. (In re Bloch)*, 207 B.R. 944, 949–50 (D. Colo. 1997); *Morris v. S. Midway Baptist Church (In re Newman) (In re Newman II)*, 203 B.R. 468, 475 (D. Kan. 1996); *Christians v. Crystal Evangelical Free Church (In re Young) (In re Young II)*, 152 B.R. 939, 953 (D. Minn. 1993), *rev’d*, 82 F.3d 1407 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998); *In re Gomes*, 219 B.R. at 293–94; *In re Rivera*, 214 B.R. at 106; *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge) (In re Hodge I)*, 200 B.R. 884, 903–04 (Bankr. D. Idaho 1996), *rev’d*, 220 B.R. 386 (D. Idaho 1998); *Morris v. S. Midway Baptist Church (In re Newman) (In re Newman I)*, 183 B.R. 239, 249–50 (Bankr. D. Kan. 1995), *aff’d*, 203 B.R. 468 (D. Kan. 1996).

Of the eight courts reviewing tithe avoidance under RFRA, two held RFRA prevented tithe avoidance. *Compare Christians v. Crystal Evangelical Free Church (In re Young) (In re Young III)* 82 F.3d 1407, 1417–20 (8th Cir. 1996) (holding that RFRA prevented tithe avoidance), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854, 863 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998); *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge) (In re Hodge II)*, 220 B.R. 386, 390–401 (D. Idaho 1998) (same) *with In re Bloch*, 207 B.R. at 950–51 (holding that RFRA did not prevent tithe avoidance); *In re Newman II*, 203 B.R. at 477–78 (same); *In re Gomes*, 219 B.R. at 294–95 (same); *In re Rivera*, 214 B.R. at 102 n.1 (same); *In re Hodge I*, 200 B.R. at 902 (same).

¹⁹⁷ *See supra* Part II.A–B.

¹⁹⁸ *See supra* Part II.C.

¹⁹⁹ Most courts in tithe avoidance cases consider the debtor’s free exercise rights under the Free Exercise Clause or RFRA, as opposed to the churches. In most cases, churches raise debtors’ Free Exercise Clause and RFRA’s rights under third-party standing rules. *See, e.g., In re Young III*, 82 F.3d at 1416; *In re Hodge II*, 220 B.R. at 391 n.3; *In re Newman II*, 203 B.R. at 474 n.3; *In re Young II*, 152 B.R. at 951; *In re Hodge I*, 200 B.R. at 894; *In re Newman I*, 183 B.R. at 248–49. In other cases, courts consider only debtors’ rights without regard to churches’ Free Exercise Clause or RFRA rights. *See Universal Church*, 463 F.3d at 227–28; *In re Bloch*, 207 B.R. at 949–50; *In re Rivera*, 214 B.R. at 106. Only one case features a church directly claiming its own Free Exercise Clause and RFRA rights. *In re Gomes*, 219 B.R. at 293–97.

A. *Tithe Avoidance Under the Free Exercise Clause*

The Supreme Court's current regime for adjudicating Free Exercise Clause cases²⁰⁰ began when the Court severely and surprisingly weakened the strength of free exercise rights in its *Employment Division v. Smith* decision.²⁰¹ *Smith* marked an abrupt departure from the Court's earlier and well-established strict scrutiny approach to Free Exercise Clause cases and adopted a far less rigorous standard of review.²⁰² For almost twenty-five years before *Smith*, the Supreme Court required statutes not only to be nondiscriminatory with respect to religion, but also to be tailored to achieve a compelling state interest "with the least possible intrusion on free exercise rights."²⁰³ In *Smith*, however, the Supreme Court declared that any claim of protection under the Free Exercise Clause would not affect the claimant's subjection to "valid and neutral law of general applicability."²⁰⁴ *Smith's* lower scrutiny standard has drastically diminished the ability of claimants to seek any sort of equitable exemption from laws that burden their free exercise of religion.

When applied in tithe avoidance cases, the *Smith* standard often varies according to the court that applies it. Some courts apply it with a rigorous

²⁰⁰ Legal historian and professor John Witte, Jr. has called the Supreme Court's history of interpreting the Free Exercise Clause "rife with casuistry and contradiction[,] . . . often bristling with long historical and jurisprudential debates and disquisitions that go far beyond the constitutional issues at hand." WITTE, *supra* note 102, at 143–44. Between its first consideration of the Free Exercise Clause in *Reynolds v. United States*, 219 U.S. 145 (1878), and its institution of its current approach in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court has understood the Free Exercise Clause to mean very different things. WITTE, *supra* note 102, at 143–44. In its first case addressing the right, the Court understood the Free Exercise Clause to provide a low standard and held that a claimant had no free exercise right against otherwise valid law prescribing action rather than belief. *See Reynolds*, 98 U.S. 145. Eighty-five years later, the Court understood the Free Exercise Clause to require a high strict scrutiny standard in *Sherbert v. Verner*, 374 U.S. 398 (1963). *See* WITTE, *supra* note 102, at 149. This heightened standard remained in place for twenty-four years. *See Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987) (holding a claimant's mere religious belief is sufficient to exempt that claimant from otherwise valid conditions required before receiving government benefits). In *Smith*, however, the Court understood the Free Exercise Clause to provide a lower standard more akin to the low standard recognized in *Reynolds*. *Smith*, 494 U.S. at 879–90 (citing *Reynolds* and recognizing that free exercise does not exempt individuals from neutral laws of general applicability).

²⁰¹ *See Smith*, 494 U.S. 872.

²⁰² *See* WITTE, *supra* note 102, at 149. From 1963 until 1989, the "Supreme Court used . . . [a] strict scrutiny test of free exercise in ten cases . . . six times finding for the religious claimant, four times for the government." *Id.*; *see also id.* at 285–303.

²⁰³ *Id.* at 149.

²⁰⁴ *See Smith*, 494 U.S. at 879 (holding that free exercise rights must yield to a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that [a claimant's religion] proscribes (or proscribes)" (internal citations omitted)).

multistep logic,²⁰⁵ while other courts apply the *Smith* standard summarily with little more than conclusory statements.²⁰⁶ Courts applying the more rigorous variant of *Smith* divide “‘neutrality’ and ‘general applicability’ . . . [into] separate but related requirements.”²⁰⁷ The neutrality requirement focuses “on the object of the challenged statute.”²⁰⁸ At minimum, neutrality requires that a law neither “discriminate on its face”²⁰⁹ nor “refer[] to a religious practice without a secular meaning discernable from the [law’s] language or text.”²¹⁰

But neutrality can require more. “The Free Exercise Clause is also concerned with ‘subtle departures from neutrality and covert suppression of particular religious beliefs.’”²¹¹ Thus, neutrality requires the court to test whether “the effect of the law in its real application” provides “strong evidence” that it has its intended effect.²¹² Even if a law has an “adverse impact” on religious conduct, however, a court may not find that the law unconstitutionally targets religion.²¹³ When the adverse impact is only an “incidental effect” on religious conduct and pursues a “legitimate concern of government” without “calculation to target such conduct,” the law will satisfy the neutrality requirement of *Smith*.²¹⁴

All courts applying the rigorous variant of *Smith* have found the Code’s fraudulent transfer provisions neutral under the *Smith* standard. Those courts conclude the provisions are facially neutral and do not target religious conduct because their text “make[s] no reference to religions or to religious

²⁰⁵ See, e.g., *Universal Church v. Geltzer*, 463 F.3d 218, 227–28 (2d Cir. 2006); *Weinman v. Word of Life Christian Ctr. (In re Bloch)*, 207 B.R. 944, 949–50 (D. Colo. 1997); *Morris v. S. Midway Baptist Church (In re Newman) (In re Newman II)*, 203 B.R. 468, 475 (D. Kan. 1996); *Christians v. Crystal Evangelical Free Church (In re Young) (In re Young II)*, 152 B.R. 939, 953 (D. Minn. 1993), *rev’d*, 82 F.3d 1407 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998); *Hartvig v. Tri-City Baptist Temple of Milwaukie, Inc. (In re Gomes)*, 219 B.R. 286, 293–94 (Bankr. D. Or. 1998); *Geltzer v. Crossroads Tabernacle (In re Rivera)*, 214 B.R. 101, 106 (Bankr. S.D.N.Y. 1997); *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge) (In re Hodge I)*, 200 B.R. 884, 903–04 (Bankr. D. Idaho 1996), *rev’d*, 220 B.R. 386 (D. Idaho 1998).

²⁰⁶ See, e.g., *Morris v. S. Midway Baptist Church (In re Newman) (In re Newman I)*, 183 B.R. 239, 250 (Bankr. D. Kan. 1995), *aff’d*, 203 B.R. 468 (D. Kan. 1996).

²⁰⁷ *In re Hodge I*, 200 B.R. at 903–04 (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993)).

²⁰⁸ *Id.* at 903.

²⁰⁹ *Id.* (citing *City of Hialeah*, 508 U.S. at 531).

²¹⁰ *Id.* (citing *City of Hialeah*, 508 U.S. at 534).

²¹¹ *Id.* (quoting *City of Hialeah*, 508 U.S. at 531).

²¹² *Id.* (citing *City of Hialeah*, 508 U.S. at 531).

²¹³ *Id.*

²¹⁴ *Id.* at 903–04.

practice.”²¹⁵ Specifically, the Code’s criteria for allowing a bankruptcy trustee to recover certain transfers, including the exchange for reasonably equivalent value exemption,²¹⁶ neither relate to “religious belief or practices” nor do they depend on “whether there exists a religious motivation for the transfers.”²¹⁷ Furthermore, the fraudulent transfer provisions pursue the legitimate government purpose of “promot[ing] the equal treatment of similarly situated creditors of the debtor . . . and . . . enlarg[ing] the pool of funds available for those creditors by recovering gratuitous transfers made by insolvent debtors.”²¹⁸ Because the Code’s fraudulent transfer provisions have not been found to target religious conduct, any effect they have on religious practice, even if they completely destroy the religious practice of tithing altogether, is incidental and not direct.²¹⁹ Thus, all courts considering the issue have found the fraudulent transfer provisions neutral on their face and in their intended effect.

All courts applying the rigorous variant of the *Smith* standard find that the fraudulent transfer provisions of the Code are generally applicable as well. The Code does not permit “avoidance in a selective manner by imposing burdens only upon *conduct* motivated by religious belief.”²²⁰ Its provisions apply not only to religious organizations, “but more generally to all charitable organizations, and more generally still, to any entity, based solely upon a finding that the entity has received a transfer of property in return for which the insolvent transferor did not receive reasonably equivalent value.”²²¹ These courts thus find the Code’s fraudulent transfer provisions fall “squarely within” the rule announced in *Smith*.²²² Indeed, whether applying a rigorous or conclusory analysis, no court has found that the Free Exercise Clause protects tithes from avoidance since the *Smith* decision.²²³

²¹⁵ *Id.* at 903 (citing *City of Hialeah*, 508 U.S. at 531).

²¹⁶ *Morris v. Midway S. Baptist Church (In re Newman) (In re Newman II)*, 203 B.R. 468 (D. Kan. 1996).

²¹⁷ *In re Hodge I*, 200 B.R. at 903–04 (citing *City of Hialeah*, 508 U.S. at 531).

²¹⁸ *Id.* (citing *Christians v. Crystal Evangelical Free Church (In re Young) (In re Young II)*, 152 B.R. 939, 953 (D. Minn. 1993) (finding that § 548 is a neutral law of general applicability); *In re Faulkner*, 165 B.R. 644, 648 (Bankr. W.D. Mo. 1994) (finding § 707(b) of the Bankruptcy Code is a neutral law of general applicability)).

²¹⁹ *Morris v. S. Midway Baptist Church (In re Newman) (In re Newman I)*, 183 B.R. 239, 250 (Bankr. D. Kan. 1995) (holding that § 548 has an incidental effect on religion because religious motivation of a debtor is merely incidental to the operation of the statute), *aff’d*, 203 B.R. 468 (D. Kan. 1996).

²²⁰ *In re Hodge I*, 200 B.R. at 904.

²²¹ *Id.*

²²² *Id.* at 903.

²²³ *See supra* notes 205 and 206.

Though an analysis of title avoidance under *Smith* makes it clear that the fraudulent transfer provisions are neutral and generally applicable, it speaks little to the problem tithing avoidance poses for churches. Because *Smith* halts a court's inquiry into the effect of a law once it determines the law to be neutral, generally applicable, and not targeting religion, it does not permit churches to demonstrate how two neutral and generally applicable laws—the Bankruptcy Code's fraudulent transfer provisions and the Internal Revenue Code's tax exemption provisions—combine to place churches in the dilemma exposed in *In re Young*.²²⁴ Nor does it allow churches to challenge title avoidance in cases where churches would have to close their doors or cease providing religious services because these effects would be merely incidental to the operation of the fraudulent transfer statutes. Perhaps under the Court's strict scrutiny approach before *Smith* churches would have more protections under the Free Exercise Clause, but *Smith* has lowered that standard. Congress, however, has reinstated the strict scrutiny approach to cases challenging federal law, as the next subpart explains.

B. Tithing Avoidance under RFRA

Recall that as the district court reviewed *In re Young*, Congress debated how to overturn the *Smith* standard.²²⁵ Congress quickly succeeded in overturning the *Smith* standard by passing the Religious Freedom Restoration Act ("RFRA"),²²⁶ which provides:

In general . . . Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . if it [the Government] demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest.²²⁷

As its text illustrates, RFRA aims at the heart of the *Smith* standard. It applies "even if" the rule it challenges is "a rule of general applicability." Furthermore, it requires more from the government than the *Smith* standard. *Smith* permitted government to burden religion as an incidental effect when

²²⁴ See *supra* Part II.B.2 and text accompanying notes 94–99.

²²⁵ See *supra* Part III.A and note 108 and accompanying text.

²²⁶ Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (2006)).

²²⁷ 42 U.S.C. § 2000bb-1(a)–(b).

pursuing a “legitimate concern of government.”²²⁸ RFRA, however, demands that government employ “the least restrictive means” to further “a compelling governmental interest” when it substantially burdens an exercise of religion.²²⁹

By enacting RFRA, Congress expressed its finding that *Smith* “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.”²³⁰ Observing that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests,”²³¹ Congress set out “to restore the compelling interest test” declared in the Supreme Court’s previous cases²³² and “to guarantee its application in all cases where free exercise of religion is substantially burdened.”²³³ By enacting RFRA Congress thus subjected its own legislative powers to the strict scrutiny review courts applied in Free Exercise Clauses cases for the quarter century before *Smith*. Though struck down as applied to the states,²³⁴ RFRA still applies to federal laws²³⁵ including the Bankruptcy Code’s fraudulent transfer provisions.²³⁶

²²⁸ *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge) (In re Hodge I)*, 200 B.R. 884, 903–04 (Bankr. D. Idaho 1996) (interpreting *Smith* and citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993)), *rev’d*, 220 B.R. 386 (D. Idaho 1998).

²²⁹ 42 U.S.C. § 2000bb-1(a)–(b).

²³⁰ *Id.* § 2000bb(a)(4).

²³¹ *Id.* § 2000bb(a)(5).

²³² *Id.* § 2000bb(b)(1) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

²³³ *Id.*

²³⁴ *See City of Boerne v. Flores*, 521 U.S. 507, 532–36 (1997) (holding that RFRA exceeded Congress’s powers to enact remedial and preventative legislation applicable to the states under § 5 of the Fourteenth Amendment).

²³⁵ *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 432–34 (2006) (applying RFRA and requiring religious usage exemption to the federal Comprehensive Drug Abuse Prevention and Control Act of 1970, § 202(c), 21 U.S.C. § 812(c) (2006)).

²³⁶ *Christians v. Crystal Evangelical Free Church (In re Young) (In re Young III)*, 82 F.3d 1407, 1420 (8th Cir. 1996) (holding that “the substantial burden on the debtors’ free exercise of religion is not furthered by a compelling governmental interest” and “RFRA provides a defense against . . . avoid[ing] the debtors’ contributions to the church under 11 U.S.C. § 548(a)(2)(A)”), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998); *see also Morris v. S. Midway Baptist Church (In re Newman) (In re Newman I)*, 183 B.R. 239, 249–50 (Bankr. D. Kan. 1995) (assuming RFRA is constitutional when applied to Bankruptcy Code fraudulent transfer provisions), *aff’d*, 203 B.R. 468 (D. Kan. 1996).

Not all courts initially accepted that RFRA was constitutional as applied to the Bankruptcy Code’s fraudulent transfer provisions, however. *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge) (In re Hodge I)*, 200 B.R. 884, 899–902 (Bankr. D. Idaho 1996) (holding RFRA unconstitutionally violates separation of powers when applied to judicial determinations under the Bankruptcy Code’s fraudulent transfer provisions), *rev’d*, 220 B.R. 386 (D. Idaho 1998). *But see Weinman v. Word of Life Christian Ctr. (In*

When a claimant challenges a statute under RFRA, the court applying RFRA must engage in a three-step analysis.²³⁷ In the first step, the court must determine whether the challenged statute has substantially burdened a person's exercise of religion.²³⁸ If any such person's rights have not been substantially burdened by the challenged statute, then RFRA is inapplicable and the remaining two steps are unnecessary.²³⁹ If the statute does impose a substantial burden, however, the court must complete the remaining two steps.²⁴⁰ In the second step, the court must determine whether the challenged statute pursues a compelling government interest.²⁴¹ If the court finds no compelling government interest pursued by the challenged statute, then the statute must yield to the claimant's free exercise rights.²⁴² If, however, the court finds the challenged statute does pursue a compelling government

re Bloch), 207 B.R. 944, 950–51 (D. Colo. 1997) (assuming RFRA is constitutional when applied to bankruptcy code fraudulent transfer provisions); *Morris v. S. Midway Baptist Church (In re Newman) (In re Newman II)*, 203 B.R. 468, 475 (D. Kan. 1996) (same).

After the Supreme Court struck down RFRA as applied against the states in *City of Boerne v. Flores*, 521 U.S. 507, 532–36 (1997), another court assumed RFRA unconstitutional in a titling avoidance case. *Geltzer v. Crossroads Tabernacle (In re Rivera)*, 214 B.R. 101, 102 n.2 (Bankr. S.D.N.Y. 1997). After issuing its decision in *Flores* the Supreme Court also granted certiorari to *In re Young III* and remanded it back to the Eighth Circuit for consideration in light of *Flores*. *Christians v. Crystal Evangelical Free Church (In re Young) (In re Young IV)*, 521 U.S. 1114 (1997). In the meantime, courts applied RFRA to titling avoidance cases under the Bankruptcy Code. *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge) (In re Hodge II)*, 220 B.R. 386, 394–99 (D. Idaho 1998) (applying RFRA to titling avoidance and holding RFRA as a constitutionally valid exercise of Congress's enumerated bankruptcy powers does not violate the separation of powers doctrine); *Hartvig v. Tri-City Baptist Temple of Milwaukie, Inc. (In re Gomes)*, 219 B.R. 286, 294–95 (Bankr. D. Or. 1998) (applying RFRA to titling avoidance case but not deciding whether RFRA is constitutional).

On remand from the Supreme Court, the Eighth Circuit determined *Flores* only declared RFRA unconstitutional as applied to state laws and reinstated its opinion in *In re Young III*. *Christians v. Crystal Evangelical Free Church (In re Young) (In re Young V)*, 141 F.3d 854 (8th Cir. 1998). The Supreme Court then denied review of the Eighth Circuit's reinstatement. *Christians v. Crystal Evangelical Free Church (In re Young) (In re Young VI)*, 525 U.S. 811 (1998). RFRA thus remains constitutional as applied to the Bankruptcy Code's fraudulent transfer provisions.

²³⁷ *E.g.*, *In re Young III*, 82 F.3d at 1418–20.

²³⁸ *Id.* at 1418–19. A “person” in this analysis includes natural persons as well as corporate persons, such as religious entities and churches. *See, e.g.*, *In re Gomes*, 219 B.R. at 294–95 (considering church's claim that titling avoidance impermissibly and substantially burdens its free exercise of religion under RFRA).

²³⁹ *See, e.g.*, *In re Gomes*, 219 B.R. at 294–95 (ending RFRA analysis after finding titling avoidance does not substantially burden churches' or debtors' free exercise of religion).

²⁴⁰ *See, e.g.*, *In re Hodge II*, 220 B.R. at 390–91 (continuing RFRA analysis after finding titling avoidance burdened debtors' free exercise of religion).

²⁴¹ *See, e.g., id.*

²⁴² *See, e.g., id.* at 391–93 (finding that although government has a compelling interest in maintaining a bankruptcy system and preventing actual fraud in that system, it does not have a compelling interest in avoiding constructively fraudulent transfers).

interest, then it must proceed to the third and final step.²⁴³ In the third step, the court must consider whether the challenged statute furthers the compelling government interest in the least restrictive means available.²⁴⁴

Courts applying the three-step analysis to tithe avoidance in bankruptcy have come to different conclusions at each RFRA step. A brief census of how these courts have applied RFRA's three steps demonstrates the confusion and difficulty tithe avoidance creates under the Bankruptcy Code's fraudulent transfer provisions.

1. Substantial Burden on Free Exercise of Religion in Tithe Avoidance Cases

Courts are divided as to whether the Bankruptcy Code's fraudulent transfer provisions impose a substantial burden on a person's free exercise of religion. Whatever their ultimate conclusions, however, most courts consider only the burdens that tithe avoidance impose on debtors' free exercise rights, as opposed to the burdens imposed on churches' free exercise rights.²⁴⁵

a. Courts Finding a Substantial Burden

Courts finding that tithe avoidance imposes a substantial burden on free exercise rights all focus exclusively on the rights of the debtor.²⁴⁶ Those courts have found that to impose a substantial burden, "[i]t is sufficient that the governmental action in question meaningfully curtails, albeit retroactively, a religious practice of more than minimal significance in a way that is not merely incidental."²⁴⁷ Because "[p]ermitting the government to . . . [avoid] contributions would effectively prevent the debtors from tithing," those courts

²⁴³ See, e.g., *Weinman v. Word of Life Christian Ctr. (In re Bloch)*, 207 B.R. 944, 951 (D. Colo. 1997) (finding compelling government interests in providing debtors a fresh start, providing equitable protections for creditors, and not entangling government in religion).

²⁴⁴ See, e.g., *id.* (finding the Bankruptcy Code's fraudulent transfer provisions balance debtors' desire to tithe with the need to protect creditors).

²⁴⁵ See *supra* notes 196 and 199.

²⁴⁶ See *supra* notes 196 and 199. The only court considering whether tithe avoidance imposes a substantial burden to churches' free exercise rights found that it does not. *Hartvig v. Tri-City Baptist Temple of Milwaukie, Inc. (In re Gomes)*, 219 B.R. 286, 294–95 (Bankr. D. Or. 1998).

²⁴⁷ *Christians v. Crystal Evangelical Free Church (In re Young) (In re Young III)*, 82 F.3d 1407, 1418–19 (1996). The Eighth Circuit "assumed that the contributions and the church services were reasonably equivalent" and thus avoided "the constitutionally suspect . . . task of attempting to value the church services." *Id.* at 1415 n.4; see also *Magic Valley Evangelical Free Church v. Fitzgerald (In re Hodge) (In re Hodge II)*, 220 B.R. 386, 390–91 (D. Idaho 1998).

conclude that such an impediment substantially burdens debtors' rights to free exercise under RFRA.²⁴⁸ Those courts also find it irrelevant that "debtors can continue to tithe or that there are other ways in which . . . debtors can express their religious beliefs that are not affected by the governmental action."²⁴⁹

Two courts have found it significant that the fraudulent transfer provisions require a difficult choice for debtors: "[F]inancially strapped debtors should not be subjected to the substantial pressure of choosing between either debt relief on the one hand, or generating a law suit against their church for a money judgment on the other."²⁵⁰ These courts have concluded that this "hard reality . . . has a chilling effect sufficient to constitute a substantial burden on the [debtor's] free exercise of their religion."²⁵¹ No court, however, has recognized that the fraudulent transfer provisions require churches to make the difficult choice of protecting their tithes by forfeiting their tax exemption. Moreover, no court has recognized how this difficulty makes church income so uncertain that it may substantially burden churches' abilities to provide religious services to debtors or other members.²⁵²

b. Courts Finding No Substantial Burden

Courts finding no substantial burden have also focused on the rights of the debtor, for the most part.²⁵³ These courts share the conclusion that the Code's fraudulent transfer provisions do "nothing to prevent the debtors' fulfillment of their personally held religious obligation[s] to tithe and . . . [do] not place a 'substantial burden' on the debtors' practice of their religion."²⁵⁴ Though tithing may be a "central tenet of the debtors [sic] religion . . . that the debtors regularly" practice, the fraudulent transfer provisions do not prevent "the debtors or any other church member from tithing."²⁵⁵ One court further suggested that "the fact that similar [fraudulent transfer avoidance] statutes

²⁴⁸ *In re Young III*, 82 F.3d at 1418; *see also In re Hodge II*, 220 B.R. at 390–91.

²⁴⁹ *In re Young III*, 82 F.3d at 1418; *see also In re Hodge II*, 220 B.R. at 390–91.

²⁵⁰ *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge) (In re Hodge I)*, 200 B.R. 884, 896 (Bankr. D. Idaho 1996). "The Court concludes that Debtors here were substantially burdened in being put to that choice, and so the [substantial burden] first prong of RFRA is satisfied." *Id.*; *see also In re Hodge II*, 220 B.R. at 390–91.

²⁵¹ *In re Hodge II*, 220 B.R. at 391; *see also Hodge I*, 200 B.R. at 897.

²⁵² Although the church raised this argument in *In re Gomes*, the court in that case did not consider the uncertainties tithe avoidance causes to be substantial burdens. *See infra* notes 262–70 and accompanying text.

²⁵³ *See supra* note 199.

²⁵⁴ *Morris v. S. Midway Baptist Church (In re Newman) (In re Newman I)*, 183 B.R. 239, 251 (Bankr. D. Kan. 1995).

²⁵⁵ *Id.*

have existed for over 400 years and generated virtually no reported cases suggests that any impact is de minimus [sic].”²⁵⁶ That court, however, failed to note that the Bankruptcy Code’s fraudulent transfer law challenged in that case had been in effect for less than two decades and had only been interpreted to avoid tithes as constructively fraudulent transfers since *In re Young* was decided just two years earlier.²⁵⁷

Other courts have held that the limited applicability of the fraudulent transfer provisions minimizes any burden they may impose on debtors’ rights.²⁵⁸ Those courts found it significant that the provisions do not impose any “constraint of conduct or belief” or “significant curtailment of the debtors’ ability to express adherence to their faith.”²⁵⁹ Moreover, because the provisions contain the exchange for reasonably equivalent value exemption, they are sufficiently narrow to leave debtors “a reasonable opportunity both before and after bankruptcy to carry on the practice of tithing.”²⁶⁰ Although these courts observed the reasonably equivalent value exemption may limit the burden tithing avoidance will have on debtors, these courts failed to observe that the reasonably equivalent value exemption does not limit the burden tithing avoidance has on churches.²⁶¹

The only court that has examined a church’s free exercise rights, as opposed to a debtor’s, is the bankruptcy court in *In re Gomes*, which also

²⁵⁶ *Id.*

²⁵⁷ See *supra* Parts II.B. The *In re Newman* bankruptcy court appealed to the four hundred year vintage of fraudulent transfer laws, but constructive fraudulent transfer law itself is a more modern development. See *supra* Part I. The *In re Newman* bankruptcy court also failed to consider that perhaps only a few cases involved tithing avoidance challenges because debtors may have few incentives to challenge tithing avoidance in cases when they are more interested in using their precious few resources for retaining whatever assets they can for themselves, piecing together their chapter 13 plan, or securing their chapter 7 discharge. Furthermore, many churches may lack the funds necessary to challenge tithing avoidance actions. The church in *In re Young*, for example spent more than twenty-three times the amount of tithes at stake in its fight to keep those tithes. H.R. REP. NO. 105-556, at 4 (1998). Other churches may lack the funds necessary to protect their own interests in numerous tithing cases when recovering the tithing in each case might cost more than the tithing itself. The lack of cases challenging tithing avoidance may thus demonstrate that the burden tithing avoidance poses churches is insurmountable rather than unsubstantial. *Id.*

²⁵⁸ *Morris v. S. Midway Baptist Church (In re Newman) (In re Newman II)*, 203 B.R. 468, 477 (D. Kan. 1996); see also *Weinman v. Word of Life Christian Ctr. (In re Bloch)*, 207 B.R. 944, 951 (D. Colo. 1997); *Hartvig v. Tri-City Baptist Temple of Milwaukie, Inc. (In re Gomes)*, 219 B.R. 286, 294–95 (Bankr. D. Or. 1998).

²⁵⁹ *In re Newman II*, 203 B.R. at 477; see also *In re Bloch*, 207 B.R. at 951; *In re Gomes*, 219 B.R. at 294–95.

²⁶⁰ *In re Newman II*, 203 B.R. at 477; see also *In re Bloch*, 207 B.R. at 951.

²⁶¹ See *supra* Part III.

found tithe avoidance imposed no substantial burden.²⁶² Although the court admitted that it is “important to the [c]hurch to achieve as consistent a level of financial support for its services as possible,” and that “avoid[ing] the [t]ransfers came as an unpleasant and unexpected surprise to the [c]hurch, which did not budget for [it],” this burden was not substantial.²⁶³ Because a church’s central function is often to provide “relief of the poor” and “insolvent debtors generally would qualify among the poor,” a church “reasonably could not expect to collect tithes from its insolvent debtor members.”²⁶⁴ Thus, the court concluded churches do “not provide services in the expectation that all of its members will contribute to the funding of such services” and cannot claim a burden on their rights when those unreasonably expected funds are disgorged.²⁶⁵ Whatever burden tithe avoidance posed on a church, the court opined, that burden was just an ordinary risk of operating on tithed income in a “very mobile society.”²⁶⁶

Oddly, although the *In re Gomes* court recognized how tithe avoidance burdens a church’s free exercise rights directly, it failed to recognize how substantial a burden avoidance imposes. The surprise of tithe avoidance can wreck a nonprofit organization’s budget, as the court acknowledged.²⁶⁷ The *In re Gomes* court also acknowledged that many of the individuals to whom the church provides services do not tithe.²⁶⁸ Further, the *In re Gomes* court acknowledged that churches operate in a very mobile society and cannot expect contributions from all of those they serve.²⁶⁹ Yet that court concluded tithe avoidance poses no substantial burden even though these facts all demonstrate how fortunate a church is to receive the tithes it does in fact

²⁶² *In re Gomes*, 219 B.R. at 286.

²⁶³ *Id.* at 295.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* The *In re Gomes* court stated:

[I]n a very mobile society, tithes and offerings inherently are subject to fluctuations due not just to the financial reverses of Church members, but also to the moves and deaths of members. Being subject on occasion to the recovery by a bankruptcy trustee of a limited portion of an insolvent debtor’s tithed funds does not constitute the type of substantial burden on religion that would justify heightened scrutiny under RFRA or the Constitution.

Id.

²⁶⁷ See *supra* note 263 and accompanying text. When enacting RLCDDPA, Congress recognized that the day-to-day budget of churches limit their ability to prepare and plan for returning funds after tithe avoidance. H.R. REP. NO. 105-556, at 4 (1998).

²⁶⁸ See *supra* note 264 and accompanying text.

²⁶⁹ See *supra* note 255 and accompanying text.

collect and how disgorging those already collected tithes makes its already uncertain income all the less certain.

2. *Government's Compelling Interest in Tithe Avoidance Cases*

Courts also disagree about whether the federal government's interests in tithe avoidance cases are compelling enough to justify any substantial burdens they impose on free exercise rights. The difference in their conclusions is often a function of what government interests the courts take under consideration and how broadly or narrowly the courts consider those interests.

a. *Courts Finding a Compelling Interest*

Courts finding a compelling interest in tithe avoidance cases under RFRA tend to describe that interest in very expansive terms.²⁷⁰ Generally, those courts conclude the fraudulent transfer provisions “and the Bankruptcy Code as a whole, serve a compelling governmental interest.”²⁷¹ Those courts look to the policies of allowing “debtors to get a fresh start while at the same time treating creditors as fairly as possible”²⁷² and of maintaining integrity in the “administration of the bankruptcy system” as compelling interests.²⁷³ One court went so far to hold that any free exercise exception at all in tithe avoidance cases would defeat the efficacy of the bankruptcy system itself: “The effectiveness of the bankruptcy system could be frustrated if creditors’ remedies were made subject to various exceptions based on the religious beliefs of debtors.”²⁷⁴ Another court found the history of fraudulent transfer law dispositive, asserting that the “compelling nature of the [government’s] interest is reflected in the fact that recovery of fraudulent transfers has been a basic tenet of bankruptcy law for 400 years.”²⁷⁵ That court again failed to recognize that the Bankruptcy Code’s fraudulent transfer laws had been in

²⁷⁰ Weinman v. Word of Life Christian Ctr. (*In re Bloch*), 207 B.R. 944, 251 (D. Colo. 1997); Morris v. S. Midway Baptist Church (*In re Newman*) (*In re Newman II*), 203 B.R. 468, 477–78 (D. Kan. 1996); Christians v. Crystal Evangelical Free Church (*In re Young*) (*In re Young II*), 152 B.R. 939, 954 (D. Minn. 1993), *rev'd*, 82 F.3d 1407 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998); Morris v. S. Midway Baptist Church (*In re Newman*) (*In re Newman I*), 183 B.R. 239, 252 (Bankr. D. Kan. 1995), *aff'd*, 203 B.R. 468 (D. Kan. 1996).

²⁷¹ *In re Newman I*, 183 B.R. at 252; *see also In re Bloch*, 207 B.R. at 251; *In re Young II*, 152 B.R. at 954.

²⁷² *In re Young II*, 152 B.R. at 954; *see also In re Newman I*, 183 B.R. at 251–52; *In re Bloch*, 207 B.R. at 951.

²⁷³ *In re Newman I*, 183 B.R. at 251–52 (quoting *In re Navarro*, 83 B.R. 348, 353 (Bankr. E.D. Pa. 1988)).

²⁷⁴ *In re Newman II*, 203 B.R. at 477–78.

²⁷⁵ *In re Newman I*, 183 B.R. at 251–52.

effect for less than two decades and that those laws only began avoiding tithes as late as *In re Young* was decided.²⁷⁶ Congress's interest in avoiding tithes must therefore be a more recent tenet of its bankruptcy law.

b. Courts Finding No Compelling Interest

Three courts found no compelling interest in tithing avoidance cases under RFRA.²⁷⁷ One of those courts considered the government's interest in the bankruptcy system as a whole. It noted that the Supreme Court characterized compelling government interests after its decision in *Smith* as "interests of the highest order"²⁷⁸ and found examples of compelling government interests included maintaining national security and safety,²⁷⁹ maintaining safety and security in prisons and schools,²⁸⁰ providing public education,²⁸¹ enforcing participation in the social security system,²⁸² and maintaining the tax system.²⁸³ The court reasoned government interests in providing debtors with a fresh start and protecting creditors in bankruptcy are neither "comparable to national security or public safety" nor "comparable to the collection of revenue through the tax system or the fiscal integrity of the social security system" and are thus not compelling.²⁸⁴

A second court finding no compelling interest considered the government interest in avoiding constructively fraudulent transfers, rather than in the bankruptcy system as a whole.²⁸⁵ It concluded that whatever compelling interests the government may have in the bankruptcy system, "allowing

²⁷⁶ See *supra* note 257 and accompanying text.

²⁷⁷ *Christians v. Crystal Evangelical Free Church (In re Young) (In re Young III)*, 82 F.3d 1407, 1419–20 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998); *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge) (In re Hodge II)*, 220 B.R. 386, 391–92 (D. Idaho 1998); *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge) (In re Hodge I)*, 200 B.R. 884, 896–98. (Bankr. D. Idaho 1996), *rev'd*, 220 B.R. 386 (D. Idaho 1998).

²⁷⁸ *In re Young III*, 82 F.3d at 1419 (8th Cir. 1996) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)).

²⁷⁹ *Id.* (citing *Gillette v. United States*, 401 U.S. 437 (1971); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)).

²⁸⁰ *Id.* (citing *Hamilton v. Schriro*, 74 F.3d 1545, 1554 (8th Cir. 1996); *Cheema v. Thompson*, 67 F.3d 883, 885 (9th Cir. 1995)).

²⁸¹ *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 690 (7th Cir. 1994)).

²⁸² *Id.* (citing *Droz v. Comm'r.*, 48 F.3d 1120, 1122–23 (9th Cir. 1994)).

²⁸³ *Id.* (citing *United States v. Lee*, 455 U.S. 252, 258–59 (1982)).

²⁸⁴ *Id.* at 1420.

²⁸⁵ *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge) (In re Hodge I)*, 200 B.R. 884, 896–98 (Bankr. D. Idaho 1996), *rev'd*, 220 B.R. 386 (D. Idaho 1998).

recovery of religious contributions will not . . . endanger the ability of the bankruptcy laws to provide financially distressed debtors with effective relief and a new chance to succeed economically.”²⁸⁶ It stressed that bankruptcy policies will be furthered even if tithes are not avoided.²⁸⁷

A third court found that though the government interest in maintaining the bankruptcy system is “of the highest order” and must “be regarded as compelling,” the interests served by the avoidance statutes themselves are not.²⁸⁸ Although the avoidance statutes protect creditors’ interests, the court observed that the Bankruptcy Code “subordinates the interests of creditors to the interests of debtors and other public policy interests in numerous circumstances.”²⁸⁹ The court thus concluded that “maximizing the recovery of creditors cannot be considered an interest of the highest order.”²⁹⁰ Moreover, the court also reasoned that “there is no compelling interest in maintaining the current balance between debtors and creditors.”²⁹¹ Though “some sort of balance is vital . . . Congress frequently tinkers with [it by] . . . amending the Bankruptcy Code.”²⁹² By creating “what amounts to a free-exercise exception to bankruptcy laws,” RFRA is nothing more than “another example of this tinkering.”²⁹³ Lastly, the court recognized government may have a compelling interest in preventing actual fraud,²⁹⁴ but this interest was not compelling for constructive fraud avoidance done only to maximize creditors’ recovery in bankruptcy.²⁹⁵

²⁸⁶ *Id.*

²⁸⁷ *Id.* Debtors will receive a “fresh start unhindered by whether bankruptcy trustees prevail in recovering religious tithes” and “denying recovery . . . of transfers . . . when no actual fraud is shown . . . will have little discernable effect on the integrity of the bankruptcy system, or on the amounts received by most creditors through that system.” *Id.*

²⁸⁸ *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge) (In re Hodge II)*, 220 B.R. 386, 391–92 (D. Idaho 1998).

²⁸⁹ *Id.* (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (holding an interest served by a statute is not compelling where the statutory framework itself allows that interest to be subordinated)).

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* Importantly in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Supreme Court found the governmental interest in preventing actual fraud in unemployment compensation was not compelling enough to justify substantially burdening the free exercise of religion. RFRA explicitly mentions *Sherbert* by name as an example of the sort of free exercise rights it restored after *Smith*. See 42 U.S.C. § 2002bb(b)(1) (2006). By incorporating the *Sherbert* holding into its protections, RFRA arguably requires even the Bankruptcy Code’s actual fraud statutes not to impose a substantial burden on the free exercise of religion.

²⁹⁵ *Id.* at 391–93.

3. *Least Restrictive Means in Pursuing Compelling Interests in Tithing Avoidance Cases*

Courts are also divided as to whether the Bankruptcy Code's fraudulent transfer provisions provide the least restrictive means in furthering any compelling interests the federal government may have in avoiding tithes. Most tithing avoidance cases under RFRA, however, end on either of the first two steps in the RFRA analysis.²⁹⁶ Because this third step in the RFRA analysis is only necessary when the first two steps have been satisfied,²⁹⁷ only a few cases have considered whether the Bankruptcy Code's fraudulent transfer provisions are the least restrictive means of pursuing a compelling government interest.²⁹⁸

a. *Courts Finding a Least Restrictive Means*

The three courts finding a least restrictive means in the Code's fraudulent transfer provisions focus exclusively on how those provisions restrict debtors' rights in furthering the compelling interest of striking a balancing between parties in bankruptcy.²⁹⁹ They stress that the provisions "balance the need to protect unsecured creditors with the debtor's potentially conflicting interest in disposing of property as he sees fit."³⁰⁰ Because the challenged constructive fraud provisions are limited by criteria that "only allow . . . for recovery of those transfers of the debtor's property which occurred within one year of the bankruptcy filing, occurred while the debtor was insolvent, and that were not given in exchange for reasonably equivalent value,"³⁰¹ they balance "the potentially conflicting interests of debtor and creditor in what is the only practical manner available."³⁰² One of these courts, the *In re Newman* bankruptcy court, also noted that "Congress clearly could exempt tithing from the reach of" the Code's fraudulent transfer provisions with explicit and direct exemptions, "as it has certain transactions from [preference avoidance] § 547."³⁰³ Although the existence of such direct exemptions itself

²⁹⁶ See *supra* Parts V.B.1–2.

²⁹⁷ See *supra* notes 242–45 and accompanying text.

²⁹⁸ *Weinman v. Word of Life Christian Ctr. (In re Bloch)*, 207 B.R. 944, 951 (D. Colo. 1997); *Morris v. S. Midway Baptist Church (In re Newman) (In re Newman II)*, 203 B.R. 468, 475 (D. Kan. 1996); *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge) (In re Hodge I)*, 200 B.R. 884, 898 (Bankr. D. Idaho 1996), *rev'd*, 220 B.R. 386 (D. Idaho 1998); *Morris v. S. Midway Baptist Church (In re Newman) (In re Newman I)*, 183 B.R. 239, 252 (Bankr. D. Kan. 1995), *aff'd*, 203 B.R. 468 (D. Kan. 1996).

²⁹⁹ *In re Bloch*, 207 B.R. at 951; *In re Newman II*, 203 B.R. at 475; *In re Newman I*, 183 B.R. at 252.

³⁰⁰ *In re Newman II*, 203 B.R. at 475 n.4; see also *In re Bloch*, 207 B.R. at 951.

³⁰¹ *In re Newman I*, 183 B.R. at 252.

³⁰² *In re Newman II*, 203 B.R. at 478.

³⁰³ *In re Newman I*, 183 B.R. at 252 n.14 (citing 11 U.S.C. § 547(c)(8) (2006)).

demonstrates a less restrictive means exists for furthering the same compelling interests of the Bankruptcy Code, that court nevertheless found the avoidance statutes were the least restrictive means without providing any such exemptions.³⁰⁴

b. Courts Not Finding a Least Restrictive Means

The only court in a title avoidance case under RFRA finding that the Code's fraudulent transfer provisions were not the least restrictive means was the bankruptcy court in *In re Hodge*.³⁰⁵ Although this court focused on the same example of § 547 exemptions that the bankruptcy court in *In re Newman* noted,³⁰⁶ it understood these exemptions to provide evidence that Congress could "easily" provide an exception "when transfers can be shown to have occurred in connection with the practice of sincerely held religious beliefs, and without fraudulent intent."³⁰⁷ Because Congress did not, however, the bankruptcy court in *In re Hodge* determined that the fraudulent transfer provisions in the Code did not provide the least restrictive means for pursuing any purported government interest that violates debtors' free exercise rights to tithe.³⁰⁸

As these cases demonstrate, the free exercise rights in the Free Exercise Clause and RFRA have so far provided only sporadic protection for churches from tithe avoidance. Of the nine courts considering these rights in tithe avoidance cases, only two prevented avoidance.³⁰⁹ Both cases preventing tithe avoidance did so only to protect debtors' free exercise rights to tithe.³¹⁰ The only case to consider how tithe avoidance burdens a church's free exercise rights, *In re Gomes*, held that avoiding tithes imposes no substantial burden on churches because tithes themselves are uncertain sources of income even when

³⁰⁴ *Id.*

³⁰⁵ *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge) (In re Hodge I)*, 200 B.R. 884, 898 (Bankr. D. Idaho 1996), *rev'd*, 220 B.R. 386 (D. Idaho 1998).

³⁰⁶ *See supra* notes 303–04 and accompanying text.

³⁰⁷ *In re Hodge I*, 200 B.R. at 898.

³⁰⁸ *Id.* "Congress allows avoidance of most payments to creditors made by debtors on the eve of bankruptcy as a means of ensuring the equitable distribution of the debtors' assets among all deserving claimants." *Id.* at 898. Though "the reach of the preference statute is broad, Congress has also provided a long list of exceptions to preference avoidance [codified at 11 U.S.C. § 547(c)] when justified by other appropriate considerations," like "transfers made on account of contemporaneous exchanges for new value, in the ordinary course of business, or for child support." *Id.* (citing 11 U.S.C. § 547(c)(1), (2), (7)).

³⁰⁹ *See supra* note 196 and accompanying text.

³¹⁰ *See supra* Part V.B.1.a.

not avoided.³¹¹ This holding added insult to injury, subjecting the tithes a church is fortunate enough to receive to the greater uncertainty of future avoidance.³¹² These cases thus demonstrate that any protections churches have from their own free exercise rights against tithe avoidance remain unrecognized.

VI. RECOGNIZING CHURCH PROTECTIONS IN RELIGIOUS RIGHTS

Courts have not recognized how churches' religious rights protect them from tithe avoidance for two reasons. First, courts disagree about how to apply RFRA's compelling state interest requirement in tithe avoidance cases.³¹³ Second, the approaches courts take in these cases prevent them from evaluating whether and to what extent tithe avoidance burdens the churches before them. By interpreting the Bankruptcy Code's fraudulent transfer provisions, RLCDDPA, and RFRA collectively, however, courts and parties may begin to recognize how these statutes directly protect churches' interest in tithe avoidance cases. This Part explains first how to interpret these laws collectively; second, how such an interpretation clarifies RFRA's application to tithe avoidance cases; and third, how this collective interpretation correctly directs the courts' and parties' attention to the burden tithe avoidance poses to the church involved.

A. *Interpreting the Code, RLCDDPA, and RFRA Collectively*

The key to interpreting the Code's fraudulent transfer provisions with RLCDDPA and RFRA lies in RLCDDPA § 6, which enacted a rule of construction governing court interpretations of RLCDDPA.³¹⁴ The RLCDDPA rule of construction provides that “[n]othing in the amendments made by . . . [RLCDDPA] is intended to limit the applicability of the Religious Freedom Restoration Act of 1993.”³¹⁵ With this rule of construction, Congress protects claimants possessing free exercise rights under RFRA from

³¹¹ See *supra* notes 262–64 and accompanying text.

³¹² See *supra* notes 262–64 and accompanying text.

³¹³ See *supra* Part V.B.2.

³¹⁴ Religious Liberty and Charitable Donation Protection Act of 1998 § 6, Pub. L. No. 105-183, 112 Stat. 517 (1998).

³¹⁵ *Id.*

interpretations of the Code's fraudulent transfer provisions and RLCDDPA that would violate RFRA.³¹⁶

RLCDDPA's rule of construction allows courts in tithe avoidance cases to interpret the Code's fraudulent transfer provisions, RLCDDPA, and RFRA collectively. When a church faces tithe avoidance under the Code's fraudulent transfer provisions, it should move the court to have the tithe protected under the RLCDDPA safe harbor. If, however, the RLCDDPA safe harbor would not protect a certain tithe from avoidance,³¹⁷ the church should demonstrate that RLCDDPA's rule of construction requires the court not to interpret RLCDDPA in any way that would substantially burden its religious free exercise rights guaranteed by RFRA. The court must then engage in the three-step RFRA analysis, determining whether avoiding the particular tithe at issue would burden the church's free exercise of religion, whether avoiding the tithe pursues a compelling government interest, and whether avoiding the tithe is the least restrictive means of pursuing any compelling interest the government may have. Although courts have disagreed about each step of this analysis in tithe avoidance cases, RLCDDPA's rule of construction itself simplifies the RFRA analysis in these cases.

³¹⁶ *Id.*; see also 144 CONG. REC. S4770-71 (daily ed. May 13, 1998) (statement of Sen. Hatch) (noting that RFRA itself protects religious claimants from tithe avoidance when it burdens their religious free exercise rights, that RFRA will continue to operate in tithe avoidance cases, and that RLCDDPA should clear remaining confusion of applying RFRA in tithe avoidance cases).

³¹⁷ The RLCDDPA rule of construction thus helps relieve courts from the confusion confronted in *In re Zohdi* and *Universal Church*, when the tithes at issue had no protection under the RLCDDPA safe harbor because those courts interpreted the safe harbor to protect tithes only in their entirety (*In re Zohdi*) and only when debtors' aggregate tithes fall under the fifteen percent gross annual income threshold (*Universal Church*). See *supra* Part III. In cases such as these, clarifying RLCDDPA's ambiguities may be unnecessary, as RFRA may require that churches keep their tithes regardless of whether the RLCDDPA safe harbor protects only an entire tithe and only the debtors' aggregate tithes.

The *Universal Church* court based its holding upon a different rule of construction found in § 102(7) of Bankruptcy Code, which provides that references in the Bankruptcy Code using the singular include the plural. See *supra* notes 165-66 and accompanying text. Section 102(7)'s rule of construction applies to the Bankruptcy Code generally. 11 U.S.C. § 102(7) (2006). RLCDDPA's rule of construction only applies to the sections that RLCDDPA amends. See Religious Liberty and Charitable Donation Protection Act of 1998 § 2-4, Pub. L. No. 105-183, 112 Stat. 517 (1998) (amending 11 U.S.C. §§ 544, 546, 548, 707, & 1325). Under usual canons of statutory interpretation, a general statute does not impliedly repeal a more specific statute without clear intention. See *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). RLCDDPA's rule of construction therefore should have governed in *Universal Church* and directed the court to consider whether avoiding tithes in that case substantially burdened the churches' rights to free exercise of religion under RFRA.

B. Clarifying RFRA Analysis in Tithe Avoidance Cases

RLCDPA's rule of construction clarifies the RFRA analysis in tithe avoidance cases by settling what compelling interest government has in such cases. The mere existence of RLCDPA demonstrates that whatever Congress's compelling government interest in avoiding transfers is, Congress does not wish to extend that interest to certain constructively fraudulent transfers—namely those received by the religious and charitable organizations RLCDPA protects. Furthermore, by incorporating RFRA into its rule of construction, RLCDPA indicates Congress's explicit interest in preventing the Code's fraudulent transfer statutes from substantially burdening religious free exercise rights. RLCDPA applies only in constructive fraudulent transfer cases,³¹⁸ and thus, at least in such cases, courts need not consider whether avoiding constructively fraudulent transfers is a compelling government interest. By enacting RLCDPA, Congress has declared it is not.

RLCDPA's rule of construction also clarifies the RFRA analysis in tithe avoidance cases by demonstrating that the exchange for reasonably equivalent value exemption and the RLCDPA safe harbor are not the least restrictive means for pursuing Congress's interest in avoiding constructively fraudulent transfers. When Congress enacted RLCDPA, it provided a more restrictive means of furthering Congress's interests in avoiding constructively fraudulent transfers than the exchange for reasonably equivalent value exemption that governed tithe avoidance cases before RLCDPA. This demonstrates that the exchange for reasonably equivalent value exemption, as much as it may balance competing interests of creditors and debtors, is not the least restrictive means of avoiding constructively fraudulent transfers.³¹⁹ Moreover, RLCDPA is not the least restrictive means either. Because RLCDPA explicitly leaves RFRA unaffected in its rule of construction, RLCDPA directs courts to consider an even less restrictive means when RLCDPA's operation substantially burdens a church's free exercise rights.³²⁰

³¹⁸ See 11 U.S.C. § 548(a)(2) (2006) (applying RLCDPA's safe harbor only to constructively fraudulent transfers avoided under 11 U.S.C. § 548(1)(B)(b)(i)).

³¹⁹ *Contra* *Morris v. S. Midway Baptist Church (In re Newman) (In re Newman I)*, 183 B.R. 239, 252 (Bankr. D. Kan. 1995), *aff'd*, 203 B.R. 468 (D. Kan. 1996) (holding the exchange for reasonably equivalent value exemption made the Code's fraudulent transfer provisions the least restrictive means for pursuing fraudulent transfer avoidance).

³²⁰ The bankruptcy court in *In re Newman* suggested that Congress could have exempted tithes explicitly from the Code's fraudulent transfer provisions. See *supra* notes 303–04 and accompanying text. Although it acknowledged that such an explicit exemption would have been less restrictive of free exercise rights when avoiding fraudulent transfers than the reasonably equivalent value exemption, that court held the reasonably

When churches demonstrate that their free exercise rights are substantially burdened by tithe avoidance, the least restrictive means of avoiding constructively fraudulent transfers would be to avoid only the amount of tithes not protected by the RLCDDPA safe harbor that are unnecessary for the church to continue exercising its religious rights under RFRA. This of course makes the first step of the RFRA analysis in these cases—which asks whether avoidance imposes a substantial burden on the church’s free exercise rights—all the more important. The next subpart explains why this important question deserves such emphasis.

C. Focusing on How Tithe Avoidance Burdens Churches

As explained above, courts analyzing the substantial burden requirement in tithing avoidance cases consider such questions as whether tithing is itself a religious practice of the debtor and whether avoiding tithes substantially burdens that practice.³²¹ The only court to decide whether avoiding tithes substantially burdened the churches’ free exercise rights concluded that churches’ free exercise rights were not burdened when their tithes were unexpectedly disgorged because such a fate is just the risk it takes when relying upon already uncertain tithes as a main source of income.³²²

These courts have neglected that particular burden tithing avoidance imposes on churches when the bankruptcy and tax laws operate in tandem to make tithes vulnerable to later disgorgement and therefore unreliable. None of the cases actually considers how much a church relied upon a particular debtor’s tithes. Nor does any case actually consider whether a church would have to forgo or deny its members religious exercises, services, or practices for a period of time or indefinitely because of the financial consequences of paying back the tithes it received and relied upon in good faith. These are the questions most central to tithe avoidance cases. They turn on the facts and equities of each case. Because courts and litigants have focused mostly on the debtors’ and creditors’ interests and competing policy concerns, we know very little about how burdensome any tithe avoidance is in any particular case.³²³

equivalent value exemption was the least restrictive means furthering a compelling government interest. *See supra* notes 303–04 and accompanying text. That court, however, failed to consider that Congress did explicitly exempt those tithes from avoidance that either fall within the RLCDDPA safe harbor or enabled a church to continue exercising its religious rights. *See supra* notes 305–08 and accompanying text.

³²¹ *See supra* Part V.B.1.

³²² *See supra* notes 262–64 and accompanying text.

³²³ Scholars and commentators have so far provided very little empirical data about how tithing avoidance affects churches, as opposed to debtors. *See supra* note 189.

Emphasizing RFRA's substantial burden inquiry would alleviate this confusion in tithe avoidance cases. Forcing churches to demonstrate the substantial burden tithe avoidance imposes on them in each case would most accurately separate substantial burdens from those that are insubstantial. It would distinguish cases where tithe avoidance would actually force a church into financial trouble from cases where tithe avoidance would only cause a church mild inconvenience at the expense of a creditor that may get next to nothing in bankruptcy. It would also give churches the security of knowing that they can rely on tithes they receive to pay for expenses necessary for their operation and existence.

By recognizing how RLCDDPA's rule of construction incorporates RFRA into the Code's fraudulent transfer provisions, courts can interpret these collectively and engage in a more direct analysis of whether tithe avoidance in a given case substantially burdens a church's free exercise of religion and would therefore be prohibited. Such an approach will answer the confusing questions about what compelling interests government has in constructively fraudulent transfer avoidance and what means of pursuing that interest are the least restrictive of free exercise rights. Most importantly, however, such an approach will demand a more direct showing of burden from churches seeking RFRA protection and will minimize any chance that this protection would unjustly prejudice creditors' interests when churches face no substantial burden from tithe avoidance.

CONCLUSION

Churches' free exercise rights are not dependent upon those of tithing debtors; they are tubs on their own bottoms. Qualified religious entities provide religious services, the free exercise of which are protected under the First Amendment and federal statutes. Courts, practitioners, creditors, debtors, and churches should keep this squarely in mind when confronting the problem of avoiding tithes as fraudulent transfers. Courts should respect Congress's approach to the problem of tithe avoidance enacted under RLCDDPA and RFRA and focus on the rights of the church bringing its claim. Practitioners should be mindful of this approach and particularly of RLCDDPA's rule of construction. Creditors should leverage their comparative advantage over churches and charitable organizations to assess how to manage the risks a tithing debtor poses for them. Debtors should alert their churches or religious organizations when they are filing or about to file bankruptcy so those

organizations can take precautions to prepare for an avoidance action. Finally, and most importantly, churches should take steps to mitigate their current risks under existing fraudulent transfer law, and they should litigate their own interests when challenging fraudulent transfer law under RFRA.

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