FRAUDULENT CONVEYANCE LAW: DESTROYING FREE EXERCISE RIGHTS AT A CHURCH NEAR YOU

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INTRODUCTION

The Framers of the Constitution felt that the ability for one to exercise the religion of his/her choice was so important to the fabric of the nation, that they included it in the First Amendment.[1] The Free Exercise clause states that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[2] This clause provides such strong protection that "'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'"[3] With some limitation, this protection allows individuals of different religions to practice their various rituals, beliefs, and values freely.[4] However, one typical link between religions exists: adherents donate to symbolize their devotion to the religion of their choice. Thus, it is fundamental that the Free Exercise clause protects a citizen's right to donate to a religious entity.[5]

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[1] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); Diane Heckman, *One Nation Under God: Freedom Of Religion In Schools And Extracurricular Athletic Events In The Opening Years Of the New Millennium*, 28 WHITTIER L. REV. 537, 542 (2006) (discussing then Judge John G. Roberts, Jr.'s description of Framers' intentions when authoring First Amendment); Shelley Ross Saxer, *Zoning Away First Amendment Rights*, 53 WASH. U. J. URB. & CONTEMP. L. 1, 63 (1998) (stating "Framers and other political leaders viewed freedom of religion as a paramount right").

[2] U.S. CONST. amend. I.

[3] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (quoting Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981)). *See* McCreary County v. ACLU of Ky., 545 U.S. 858, 884 (2005) (O'Connor, J., concurring) (stating First Amendment "protect[s] adherents of all religions"); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 651 (2000) ("[I]t is not the role of the courts to reject a group's expressed values because they disagree with those values . . . .").

[4] *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 894 (1990) (requiring "compelling state interest and by means narrowly tailored to achieve that interest" where government substantially burdens "religiously motivated conduct"); Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) (stating disallowance of tax deductions did not substantially burden Scientologists); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987) (rejecting application of less rigorous standard for free exercise of religion in place of strict scrutiny).

[5] *See generally* James W. Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941, 948 (2005) (listing activities protected by First Amendment that are economic in nature); Kathryn A. Ruff, *Scared to Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 447, 450 (2006) (noting chilling effect on Muslim religious exercise caused by "'blacklisting'" Muslim charities); John K. Turner, *Giving God the Unavoidable Preference, Tithing and the Religious Liberty and Charitable Donation Protection Act of 1998*, 19 AM. BANKR. INST. J. 8, 8 (Nov. 2000) (discussing legislation being applied and potentially exempting some charitable donations from bankruptcy fraudulent transfer avoidance).

However, when a citizen declares bankruptcy, the debtor's right to donate clashes with a creditor's right to collect.[6] In a bankruptcy proceeding, section 548(a) of the Bankruptcy Code allows a trustee to avoid any actual or constructive fraudulent transfer made by the debtor as a fraudulent conveyance.[7] The avoidance requires the recipient of the fraudulent transfer to return the property to the trustee for the property's equitable distribution to the debtor's creditors. The aforementioned rights clash when a debtor donates money to a religious entity, and files a bankruptcy petition within two years of that donation. Although the Free Exercise clause protects that type of donation, the bankruptcy trustee has the power to avoid it as a constructive fraudulent conveyance.[8]

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[6] *See generally* Jool Nie Kang, *Tithing: A Fraudulent Transfer or a Moral Obligation?*, 18 BANKR. DEV. J. 399, 399 (2002) (contrasting debtors' position that tithing is protected by Free Exercise Clause with trustees' view that "debtors are merely evading their financial obligations to creditors"); Thomas M. Walsh, Note, *Religious Liberty and Charitable Donation Act of 1998: Putting the Fear of God into Bankruptcy Creditors*, 7 AM. BANKR. INST. L. REV. 235, 255–56 (1999) (arguing Religious Liberty act "grants the debtor more than a fresh start").

[7] 11 U.S.C. § 548(a)(1) (2006). *See* Johnson v. Neilson (*In re* Slatkin), 525 F.3d 805, 810 (9th Cir. 2008) (observing application of section 548(a)(1)(A) to find actual fraudulent conveyance); *see also* Universal Church v. Geltzer, 463 F.3d 218, 223 (2d Cir. 2006) (noting application of statute to transfer involving charitable donation as constructive fraudulent transfer). To be an actual fraudulent transfer, a debtor must make the transfer with the intent to "hinder, delay, or defraud" a creditor. 11 U.S.C § 548(a)(1)(A) (2006). *See* Addison v. Seaver (*In re* Addison), 540 F.3d 805, 811 (8th Cir. 2008) (stating, under statute, "trustee may avoid a pre-petition transfer of assets" where debtor has requisite "'actual intent'"). *See generally* Eberhard v. Marcu, 530 F.3d 122, 129–30 (2d Cir. 2008) (describing origins of actual fraudulent intent as doctrine dating back to English law enacted in 1570). To be a constructive fraudulent transfer, however, a trustee merely has to demonstrate that the transfer meets the elements listed in section 548(a)(1)(B). *See* Hannover Corp. v. Hayes (*In re* Hannover Corp.), 310 F.3d 796, 802 (5th Cir. 2002) (stating "[t]he Bankruptcy Code looks . . . to the 'reasonable equivalency test' found at § 548(a)(1)(B)(i) . . . to establish a *prima facie* case for avoiding a transfer as constructively fraudulent"); *see also In re* Teligent Inc., 380 B.R. 324, 332 (Bankr. S.D.N.Y. 2008) (asserting section 548(a)(1)(B) is applicable bankruptcy law where evaluating claim of constructive fraudulent transfer); *In re* Northpoint Commc'ns Group, Inc., 361 B.R. 149, 161 (Bankr. N.D. Cal. 2007) (finding elements of section 548(a)(1)(B) must be met to avoid payments as constructive fraudulent conveyances). The elements are,

> [the debtor]
> (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
> (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 U.S.C. 548(a)(1)(B) (2006).

[8] *See* 11 U.S.C. § 548(a)(2) (2006) (permitting trustee to avoid transfer to charitable entity if amount donated is not over 15 percent threshold or is not consistent with debtor's donations in the past); *Universal*

This caused Congress to attempt to strike a balance between the two clashing interests by drafting 11 U.S.C. section 548(a)(2), which states:

> A transfer of a charitable contribution to a qualified *religious* or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which—
>
> (A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or
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> (B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.[9]

Thus, under section 548(a)(2), a debtor may only donate up to fifteen percent of his/her gross income within two years prior to filing his/her bankruptcy petition.[10] If the debtor donates more during that period, a trustee may avoid his/her donation as a fraudulent conveyance unless that donation was consistent with the debtor's past practices.[11]

More notably, the Uniform Fraudulent Transfer Act ("UFTA"), which a majority of states has adopted,[12] allows a creditor to recover any fraudulent transfer to a place of worship regardless of the donation's size.[13]

Church, 463 F.3d at 227–28 (affirming fraudulent conveyance provision does not violate Free Exercise Clause because it "does not target religious practices" and "permit[s] anyone to give up to 15 percent of her income to a charitable cause of her choice without avoidance of those contributions in a subsequent bankruptcy").

[9] 11 U.S.C. § 548(a)(2)(A)–(B) (2006) (emphasis added). *See Universal Church*, 463 F.3d at 225 (reading "safe harbor" statute to "exempt from avoidance charitable contributions where those contributions do not exceed 15 percent of the debtor's adjusted gross income"); *see also* Religious Liberty and Charitable Donation Protection Act, Pub. L. No. 105-183, 112 Stat. 517 (1998) (stating Congress's intent in drafting 548(a)(2) was "to protect certain charitable contributions").

[10] 11 U.S.C. § 548(a)(1) (allowing avoidance of transfers made by the debtor within two year period prior to bankruptcy filing); 11 U.S.C. § 548(a)(2) (stating exception to general rule for avoiding transfers where debtor makes charitable donation within statutory limit of 15 percent of debtor's yearly income). *See generally Universal Church*, 463 F.3d at 225 (finding 15 percent rule applies to charitable contributions in aggregate, not to "each individual contribution").

[11] 11 U.S.C. § 548(a)(2)(A)–(B) (permitting exception to 15 percent statutory limit under limited circumstances where amount is consistent with debtor's previous record of donations). *See In re* Witt, 231 B.R. 92, 99–100 (Bankr. N.D. Okla. 1999) (affirming transfer may also be avoided if it exceeds 15 percent statutory limit or "debtor's charitable giving history"). *See generally In re* Cavanagh, 242 B.R. 707, 712 (Bankr. D. Mont. 2000) (noting deliberate Congressional effort to carve out exception for debtor's past practices in section 548 as distinct from its treatment of previous contributions under other statutory schemes).

[12] The states adopting the UFTA are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *See*

This Comment asserts that section 548(a)(2) violates the Religious Freedom Restoration Act, and that the UFTA violates current Free Exercise clause analysis because neither statute passes strict scrutiny. Specifically, this Comment will discuss the history of Free Exercise clause analysis, the history of fraudulent conveyance law, and finally, the unconstitutionality of current fraudulent conveyance law with regard to the Free Exercise clause.

I. HISTORY OF THE FREE EXERCISE CLAUSE

In recent years, the Supreme Court has altered Free Exercise clause analysis.[14] The first twist occurred in *Sherbert v. Verner*,[15] where the Supreme Court had to decide whether the Free Exercise clause protects conduct in addition to belief.[16] In *Sherbert*, a Seventh-day Adventist's employer discharged her because she would not work on Saturday. Additionally, the employment commission denied her claim for unemployment compensation finding that her religious restriction disqualified her.[17] The Court held that denying the Plaintiff's unemployment compensation was unconstitutional. Because the Seventh-day Adventist's conduct, not belief, was in question, the Court's holding was significant as it established that the Free Exercise clause does protect a citizen's *conduct* regarding the religion of his/her choice.[18]

Uniform Law Commissioners, A Few Facts About The . . . Uniform Fraudulent Transfer Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufta.asp (last visited Mar. 30, 2008). The District of Columbia also adopted the UFTA. *Id. See generally* James Angell McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404 (1933) (discussing how Act will be implemented in various jurisdictions).

[13] A copy of the UFTA is available at http://www.stcl.edu/rosin/ufta84.pdf. *See* Am. Sur. Co. of N.Y. v. Conner, 251 N.Y. 1, 5 (1929) (representing how before enacting of UFTA, creditors must have obtained judgments rendered unsatisfied before bringing actions to equitably avoid transfers as fraudulent); *see also* Pusey & Jones Co. v. Hanssen, 261 U.S. 491, 497 (1923) ("[A creditor] has no right whatsoever in equity until he has exhausted his legal remedy."); Briggs v. Austin, 129 N.Y. 208, 210 (1891) ("[I]t is well settled that a general creditor having no judgment cannot maintain an action to set aside a conveyance by his debtor in fraud of the rights of creditors.") (citation omitted).

[14] *See* Kenneth Marin, Note, Employment Division v. Smith*: The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1433 (1991) ("The *Smith* decision contradicts well-established free exercise precedent . . . ."); *see also* 42 U.S.C. § 2000bb (2006) (restoring compelling interest test "in all cases where free exercise of religion is substantially burdened"). *Compare* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 544–47 (1993) (discussing if object of law is to infringe upon or restrict practices because of religious motivation, law's proponent must justify it by demonstrating narrowly tailored means to further compelling government interest), *with* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990) (stating law must pass strict scrutiny if it facially inhibits religious exercise, but if law of general applicability neutrally inhibits individual's free exercise, mere rational basis applies).

[15] 374 U.S. 398 (1963).

[16] *See id.* at 402–03 (finding claimant was presented with choices unfairly hindering her constitutional liberties).

[17] *Id.* at 399–402 ("The appellee Employment Security Commission . . . found that appellant's restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits [meeting certain requirements] . . . .").

[18] *Id.* at 402–03 (stating regulation of conduct "prompted" by religious principles has "invariably posed some substantial threat to public safety, peace or order"). *See Smith*, 485 U.S. at 670 (observing of *Sherbert*

However, the *Sherbert* Court was rightfully cautious in ensuring that the Free Exercise clause does not protect every type of conduct that promotes religion (i.e., human sacrifice) because it did not want to grant religiously motivated conduct the same level of protection as religious beliefs.[19] The Court practically reasoned that there would be no end to the types of conduct that citizens could engage in if the Free Exercise clause provided the same stringent protection provided to belief as to conduct.[20] Thus, the Court created a balancing test.[21] In order to trigger this test, the government's regulation had to substantially burden an individual's religious beliefs.[22] Once triggered, a court must apply strict scrutiny's two-part test; that is, a court must determine whether the substantial burden placed on an individual's religion is necessary to further a compelling government interest, and whether the means implemented to achieve that interest are the least restrictive.[23] This stringent standard virtually eliminated all laws and proposed bills in both Congress and state legislatures that substantially burdened an individual's religious practice.[24]

Approximately 30 years later, in 1990, the Supreme Court altered its Free Exercise clause analysis. In *Employment Division v. Smith*, the Supreme Court overruled *Sherbert*.[25] In *Smith*, the Court created a bifurcated analysis.[26] The Court held that strict scrutiny applies to laws that purposefully discriminate against

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that where conduct was legal "the Court assumed it was immune from state regulation"); Wisconsin v. Yoder, 406 U.S. 205, 219–220 (1972) (declaring Court has rejected argument that religiously grounded actions are outside protection of First Amendment).

[19] *See Sherbert*, 374 U.S. at 403 ("[T]he Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles . . . ."); Braunfield v. Brown, 366 U.S. 599, 603–04 (1961) (declaring legislature may regulate religiously motivated actions which "are found to be in violation of important social duties or subversive of good order"); *see also* Daniel Keating, *Bankruptcy, Tithing, and the Pocket-Picking Paradigm of Free Exercise*, 1996 U. ILL. L. REV. 1041, 1044–45 (1996) (opining *Sherbert* Court was aware according "blanket protection" to religious conduct would result in "no upper limit on the extent to which third parties might bear the cost of any individual's chosen practice of religion").

[20] *See Sherbert*, 374 U.S. at 403 (1963) (noting religious conduct can be regulated to prevent "substantial threat to public safety, peace or order").

[21] *See* Sherbert v. Verner, 374 U.S. 398, 403–06 (1963) (analyzing case by first determining if Free Exercise rights were burdened and then weighing the burden against compelling state interest in regulation).

[22] *See id*. at 403 (noting decisions where disqualification from government benefits due to religiously motivated conduct burdened free exercise); United States v. Kahane, 396 F. Supp. 687, 698–700 (E.D.N.Y. 1975) (noting use of *Sherbert* balancing test); *see also* Linscott v. Miller Falls Co., 316 F. Supp. 1369, 1372 (D. Mass. 1970) ("[T]he choice presented to the present plaintiff either to pay the exacted union dues or to leave her employment was *prima facie* an infringement of, and a burden on, her right to the free exercise of religion.").

[23] *Sherbert*, 374 U.S. at 403–09 (applying two step analysis to determine constitutionality of burden placed on religious conduct).

[24] *See generally* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 899 (1990) (O'Connor, J. concurring) ("[B]ecause of the close relationship between conduct and religious belief, '[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.'" (quoting Cantwell v. Connecticut, 310 U.S. 296, 304 (1940))).

[25] *See Smith*, 494 U.S. at 885.

[26] *See id.* at 883–85 (requiring no "compelling government interest" test for "generally applicable criminal law").

religion,[27] but rational review applies to laws that incidentally discriminate against religion.[28] The Court then qualified this analysis by creating the hybrid rights test;[29] this test requires courts to apply strict scrutiny to religion-neutral laws that burden a citizen's free exercise rights in addition to another fundamental right.[30]

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[27] *See id.* at 877 (noting state could not "ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display"); Blackhawk v. Pennsylvania, 381 F.3d 202, 212 (3d Cir. 2004) (observing registration fee assessment triggered strict scrutiny when it allowed secular exceptions and not religious); *see also* Rupert v. Director, U.S. Fish & Wildlife Serv., 957 F.2d 32, 34 (1st Cir. 1992) ("Laws that grant 'denominational' preferences are generally subject to 'strict scrutiny[]' . . . .") (citation omitted).

[28] *See Smith*, 494 U.S. at 883–85 ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'") (citation omitted). The Court discussed that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Id.* at 883. *See* Greene v. Solano County Jail, 513 F.3d 982, 988–90 (9th Cir. 2008) (observing inmate could practice his religion but there was compelling government interest in preventing group worship at maximum security prison); George v. Sullivan, 896 F. Supp. 895, 898 (W.D. Wis. 1995) (finding state had compelling interest in restricting prisoner from ordering white supremacist religious items). However, the Court states that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 879 (citation omitted). *See* Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999) (finding vehicle law was "a valid and neutral law of general applicability" and under *Smith* its enforcement did not violate free exercise); Mount Elliot Cemetery Ass'n v. City of Troy, 171 F.3d 398, 403 (6th Cir. 1999) (finding zoning ordinance was of general application and religious group's challenge failed as matter of law).

[29] *See Smith*, 494 U.S. at 881. The Court created the hybrid rights doctrine when it stated that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press[, or the rights of parents to direct their children]." *Id.* The Court went on to discuss several examples of the hybrid rights doctrine. These cases include the following: *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school), *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas), *Cantwell v. Connecticut*, 310 U.S. 296, 304–07 (1939) (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious). The Court also discussed cases decided on Free Speech grounds, which involved freedom of religion including the following: *Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). Commentators have also discussed hybrid claims. *See* Simon J. Santiago, *Zoning and Religion: Will the Religious Freedom Restoration Act of 1993 Shift the Line Toward Religious Liberty?*, 45 AM. U. L. REV. 199, 232 (1995) (stating "[t]he Supreme Court in Smith also suggested that the compelling government interest test may still apply to 'hybrid' situations where another constitutional right is asserted in conjunction with a free exercise claim"); Gary J. Simon, *Reflections on Free Exercise: Revisiting* Rourke v. Department of Correctional Services, 70 ALB. L. REV. 1425, 1430 (2007) (discussing "hybrid" claims as "[a]nother narrow avenue for constitutional attack"); *see also* Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 194 n.26 (2007) (noting circuit splits regarding "the necessary strength of the two independent components of hybrid claims").

[30] *Smith*, 494 U.S. at 881 (highlighting Supreme Court case law applying hybrid rights test); *see*, *e.g.*, San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1032 (9th Cir. 2004) ("'[T]o assert a hybrid-rights claim, a free exercise plaintiff must make out a colorable claim that a companion right has been violated . . . .'" (quoting Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999))). *But see* Church of the

In response, both liberal and conservative groups supported reverting to the *Sherbert* test, which led Congress to overrule the *Smith* holding by enacting the Religious Freedom Restoration Act ("RFRA") in 1993.[31] RFRA states that because laws neutral toward religion "may burden religious exercise as surely as laws intended to interfere with religious exercise,"[32] any law that substantially burdens a citizen's free exercise must further a compelling government interest and must be implemented through the least restrictive means.[33] Thus, Congress reverted Free Exercise clause analysis to the *Sherbert* holding, and re-created *Sherbert's* balancing test.[34]

Under RFRA, the threshold inquiry is whether the law in question substantially burdens religious activity.[35] A substantial burden on one's practice of religion "(1) requires an individual to refrain from doing something required by his or her religious beliefs, or; (2) forces an individual to choose between following the precepts of his or her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of its religion in order to accept benefits, on the

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Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring) (criticizing hybrid rights test as overbroad).

[31] 42 U.S.C. § 2000bb (2006) (stating purpose of statute is "to restore the compelling interest test" and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government"). This section, otherwise known as RFRA, states in section (a)(4) that "in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." *Id.* Further, section (a)(5) states that "the compelling [government] 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." *Id.* In section (b), Congress states that the purpose of the section is "to restore the compelling [government] interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." *Id.* Thus, it is clear that Congress' intention by drafting RFRA was to essentially overrule *Smith*. *See* Cheema v. Thompson, No. 94-16097, 1994 WL 477725, at *2 (9th Cir. Sept. 2, 1994) ("RFRA's intent to overrule *Smith* and reinstate prior federal case law is evident . . . ."); *Religious Land Use in the Federal Courts Under RLUIPA*, 120 HARV. L. REV. 2178, 2180 (2007) (noting RFRA was "purported to overrule *Smith*"). *But see* Rasul v. Myers, 512 F.3d 644, 670 (D.C. Cir. 2008) (observing amendment of RFRA by RLUIPA "merely affirmed that the Congress did not intend RFRA to overrule *Smith* in its entirety").

[32] 42 U.S.C. § 2000bb(a)(2) (2006).

[33] 42 U.S.C. § 2000bb(b)(1) (2006) (restoring compelling interest test); *see*, *e.g.*, Gonzales v. O Centro Espírita Beneficente União Do Vegetal, 546 U.S. 418, 429 (2006) (stating under RFRA government bears burden of demonstrating compelling state interest); Kaemmerling v. Lappin, No. 07-5065, 2008 WL 5396823, at *11 (D.C. Cir. Dec. 30, 2008) (finding compelling government interest and use of least restrictive means).

[34] *See* Crum v. Alabama (*In re* Employment Discrimination Litig.), 198 F.3d 1305, 1320 (11th Cir. 1999) (stating Congress intended to replace *Smith* ruling with creation of RFRA); Muhammad v. Bush, No. 95-1887, 1997 WL 434382, *3 (6th Cir. July 31, 1997) ("In enacting RFRA, Congress sought legislatively to overrule the reasonable relationship standard of *Turner* and to 'restore the compelling interest test . . . .'") (citation omitted); *supra* notes 29–30 and accompanying text.

[35] 42 U.S.C. 2000bb(b) (2006) (stating one of RFRA's purposes is to "guarantee [the compelling government interest test's] application in all cases where free exercise is *substantially burdened*") (emphasis added); *see* Longoria v. Dretke, 507 F.3d 898, 903 (5th Cir. 2007) (discussing threshold burden of substantial burden); Pugh v. Goord, 571 F. Supp. 2d 477, 505 (S.D.N.Y. 2008) (examining whether plaintiff's religious exercise was substantially burdened by lack of separate Shi'ite services).

other hand."[36] Once a court is convinced that a law substantially burdens an individual's free exercise rights, RFRA is triggered.[37] Next, the law must further a compelling government interest.[38] When determining this, the government must demonstrate that the law in question furthers a compelling government interest as applied *to that specific individual*.[39] Finally, the law must further the least restrictive means to further that compelling government interest.[40] If a court believes that Congress can achieve that compelling government interest by less intrusive means, the court will hold that law to be unconstitutional.

Subsequent to Congress passing RFRA, the Supreme Court in *City of Boerne v. Flores*[41] held that RFRA is unconstitutional when applied to state law.[42] In passing

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[36] *In re* Hodge, 200 B.R. 884, 895 (Bankr. D. Idaho 1996) (citations omitted). *See generally* Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 717–18 (1981) ("When the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."); Sherbert v. Verner, 374 U.S. 398, 404 (1963) ("[N]ot only is it apparent that appellant's declared ineligibility for [unemployment] benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable.").

[37] *See In re Hodge*, 200 B.R. at 895 ("The threshold inquiry under RFRA is whether the statute in question substantially burdens a person's religious practices."); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (observing laws only against religious practices "will survive strict scrutiny only in rare cases"). *See generally* Tara Adams Ragone, Note, *In Contempt of Contempt? Religious Motivation as a Reason to Mitigate Contempt Sanctions*, 1993 ANN. SURV. AM. L. 295, 331 (1999) (explaining substantial burden, compelling interest, and least restrictive means tests are fact sensitive, thus judicial results will vary widely).

[38] *See* 42 U.S.C. § 2000bb(b)(1) (2006) (stating Government may only substantially burden exercise of religion "in furtherance of a compelling governmental interest"); *In re Hodge*, 200 B.R. at 896–97 (requiring "[t]he government . . . [to] demonstrate that allowing recovery of Debtors' religious contributions furthers a compelling governmental interest"). *See generally* City of Boerne v. Flores, 521 U.S. 507, 513 (1997) (noting interference with free exercise of religion without compelling interest "'contradicts both constitutional tradition and common sense'" (quoting Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 885 (1990))).

[39] *See* Gonzales v. O Centro Espírita Beneficente União Do Vegetal, 546 U.S. 418, 430–31 (2006) ("RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.") (citation omitted); Kikumura v. Hurley, 242 F.3d 950, 962 (10th Cir. 2001) (noting consideration of applying prison regulation to "individual claimant" rather than merely considering its "general application" under RFRA); *see also* Sample v. Lappin, 479 F. Supp. 2d 120, 124 (D.D.C. 2007) (emphasizing need to "'look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants'" (quoting *Gonzales*, 546 U.S. at 420)).

[40] *See* United States v. Hardman, 297 F.3d 1116, 1145 (10th Cir. 2002) (defining "'least restrictive means'" as "minimal imposition [on religious worship] to accomplish the government's compelling ends"); *see also In re Hodge*, 200 B.R. at 898–99 (discussing if there is less intrusive alternative to individual's right to free exercise, Congress' law must implement that less intrusive means in order for law to be constitutional under RFRA). *See generally* Urantia Found. v. Maaherra, 895 F. Supp 1335, 1336 (D. Ariz. 1995) (stating due to government's failure to meet burden "court must either rule that the law is unconstitutional *in toto*, or grant an exemption from the law because the law, as applied to the aforementioned individual, is unconstitutional").

[41] 521 U.S. 507 (1997).

[42] *Id.* at 533–34 (stating RFRA is unconstitutional implementation of section five of Fourteenth Amendment).

RFRA, Congress relied on section five of the Fourteenth Amendment of the United States Constitution in order to force the states to comply with RFRA's directives.[43] This section provides Congress with the power "to enforce", by appropriate legislation, section one of the Fourteenth Amendment, which states "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[44] However, the power granted to Congress by section five of the Fourteenth Amendment is merely remedial, not substantive.[45] Thus, Congress may only use section five's power to correct a documented wrong, not to alter the meaning of a constitutional right.[46] This requires the law to demonstrate congruence and proportionality; that is, Congress must identify a constitutional problem that

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[43] U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). *See* Brief of Amici Curiae Senators Edward M. Kennedy, et al. in Support of Respondents at 2, City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074), 1997 WL 9077 (arguing RFRA is valid under Fourteenth Amendment); Brief of U.S. Senators Orrin G. Hatch et al. as Amici Curiae in Support of Respondents at 2, City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074), 1997 WL 10291 (arguing RFRA is valid under Fourteenth Amendment).

[44] U.S. CONST. amend. XIV, § 1.

[45] *Boerne*, 521 U.S. at 519–20. The *Boerne* Court stated that,

> Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial," . . . . The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

Id. at 519. The Court goes on to admit that:

> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.

Id. at 519–20.

[46] *See Boerne*, 521 U.S. at 519 (observing Congress "has been given the power 'to enforce,'" but Congress cannot "enforce a constitutional right by changing what the right is"); Nickolai G. Levin, *Constitutional Statutory Synthesis*, 54 ALA. L. REV. 1281, 1321 (2003) (emphasizing holding of *Boerne* resulted from Supreme Court's interpretation: "'Congress' power under section 5 . . . extends only to 'enforc(ing)' the provisions of the Fourteenth Amendment . . . [and] not the power to determine what constitutes a constitutional violation'" (quoting *Boerne*, 521 U.S. at 519)); David E. Marion, *Judicial Faithfulness or Wandering Indulgence? Original Intentions and the History of* Marbury v. Madison, 57 ALA. L. REV. 1041, 1070 (2006) ("Speaking for a slim majority in *City of Boerne v. Flores*, Kennedy reminded Congress that it is the judiciary that has the power both . . . 'to say what the law is' and 'to determine if Congress has exceeded its authority.'" (quoting *Boerne*, 521 U.S. at 536)).

demands a national response, and tailor a statutory scheme to that mischief.[47] The *Boerne* court held that by passing RFRA, Congress interpreted the constitution substantively, not remedially, because they did not make a finding that the states were subjecting their citizens to laws motivated by religious prejudice.[48] Further, the Court held that even if Congress made that necessary finding, subjecting all state laws that "substantially burden" religious exercise to strict scrutiny is not "'adapted to the mischief'" because RFRA would require those laws to pass the "most demanding test known to constitutional law."[49] Thus, the Court held that RFRA is unconstitutional as applied to state law because it lacked congruence and proportionality; this reverted Free Exercise clause analysis regarding all state laws that "substantially burden religion" to the *Smith* analysis.[50]

An issue not decided by *Boerne* was whether RFRA is constitutional when applied to federal law. Due to the *Boerne* Court's lack of direction on the issue, a circuit court split developed.[51] However, in 2006, the Supreme Court resolved the

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[47] *See Boerne*, 521 U.S. at 520 (stating lack of "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" will result in legislation becoming "substantive in operation and effect"); Civil Rights Cases, 109 U.S. 3, 13 (1883) (noting remedial legislation "should be adapted to the mischief and wrong which the [Fourteenth Amendment] was intended to provide against"); *see also* South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) ("[W]hen the Court has found an unconstitutional exercise of [Congressional] powers, in its opinion Congress had attacked evils not comprehended by the Fifteenth Amendment.").

[48] *Boerne*, 521 U.S. at 534–35 (noting RFRA "is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion" but rather utilizes "substantial-burden" test); *see* Daniel O. Conkle, *Congressional Alternatives in the Wake of* City of Boerne v. Flores: *The (Limited) Role of Congress in Protecting Religious Freedom From State and Local Infringement*, 20 U. ARK. LITTLE ROCK L. REV. 633, 645 (1998) (stating RFRA could not be justified as remedial absent evidence or congressional findings showing "Congress actually relied on a remedial theory"); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 456 (1994) (arguing "Congress did not even try to *identify* any specific instance of mistreatment that RFRA would remedy" but rather made "interpretive, doctrinal judgment").

[49] *Boerne*, 521 U.S. at 532–34 (quoting *Civil Rights Cases*, 109 U.S. at 13). *See* Crum v. Alabama (*In re* Employment Discrimination Litig.), 198 F.3d 1305, 1320 (11th Cir. 1999) (recognizing, as under *Boerne*, "[w]ith RFRA, Congress overstepped its bounds with regard to both the 'injury' it sought to prevent, and the 'means' it adopted to that end"); Max Kidalov & Richard H. Seamon, *The Missing Pieces of the Debate Over Federal Property Rights Legislation*, 27 HASTINGS CONST. L.Q. 1, 68–69 (1999) (acknowledging *Boerne* Court's observing "the RFRA required the state or local government to satisfy an extremely demanding legal test").

[50] *See Boerne*, 521 U.S. at 536 (holding RFRA "contradicts vital principles necessary to maintain separation of powers and the federal balance"); *see also* Charles v. Verhagen, 220 F. Supp. 2d 937, 942–43 (W.D. Wis. 2002) (acknowledging Court's invalidation of RFRA "at least as it applied to the states"); Brian Richards, Comment, *The Boundaries of Religious Speech in the Government Workplace*, 1 U. PA. J. LAB. & EMP. L. 745, 762 n.101 (1998) (noting Court ruled RFRA unconstitutional and reverted back to *Smith* standard).

[51] *See* Patrick K.A. Elkins, Comment, *The Devil You Know!: Should Prisoners Have the Right to Practice Satanism?*, 41 HOUS. L. REV. 613, 634 n.218 (2004) (highlighting "unclear status" surrounding RFRA's applicability to "federal action"). *Compare* Kikumura v. Hurley, 242 F.3d 950, 958 (10th Cir. 2001) (stating "[t]his court agrees, however, with both the Eighth and Ninth Circuits in their conclusion that [*Boerne*] does not determine the constitutionality of RFRA as applied to the federal government"), *with* La Voz Radio de la Communidad v. FCC, 223 F.3d 313, 319 (6th Cir. 2000) (doubting "RFRA is constitutional as applied to the federal government").

issue in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*.[52] In *Gonzales*, the issue was whether the federal government could prohibit the importation and possession of a controlled substance banned by a federal statute even though the government's prohibition substantially burdened the Respondent's free exercise.[53] The Court held that the government's prohibition violated RFRA because the federal drug statute did not further a compelling government interest in that situation.[54]

The *Gonzales* holding provided two important points regarding RFRA. First, RFRA applies to the federal government and federal statutes.[55] Specifically, the *Gonzales* Court rejected a constitutional attack on RFRA's application to Federal laws, and applied RFRA to the federal drug statute.[56] Second, the Court applied the RFRA strict scrutiny test "to the person".[57] In *Gonzales*, the Court held that although the drug statute may further a compelling government interest in general, the interest did not apply in this particular situation. More specifically, the compelling government interest that the federal drug statute furthered was to decrease importation, distribution, possession, and use of controlled substances because of the listed drugs' negative effects on society and individuals.[58] However,

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[52] 546 U.S. 418, 423 (2006) (acknowledging RFRA applies to federal actions by upholding preliminary injunction against federal Controlled Substances Act based on RFRA); *see* United States v. Manneh, No. 06 CR 248(RJD), 2008 WL 5435885, at *7 (E.D.N.Y. Dec. 21, 2008) (recognizing "Court . . . confirmed RFRA's validity as applied to actions of the *federal* government" in *Gonzales*).

[53] *Gonzales*, 546 U.S. at 423.

[54] *Id.* at 439 (stating "we conclude that the Courts below did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV's sacramental use of *hoasca*"); *see* O Centro Espírita Beneficiente União Do Vegetal v. Ashcroft, 342 F.3d 1170, 1187, (10th Cir. 2003) (concluding "bald assertion of a torrent of religious exemptions does not satisfy the Government's RFRA burden").

[55] *See Gonzales*, 546 U.S. at 439 (noting Congress's intentional extension of RFRA's applicability to laws possibly interfering with religious practice); *see also* Jama v. U.S. Immigration & Naturalization Serv., 343 F. Supp. 2d 338, 368–69 n.17 (D.N.J. 2004) ("Other courts have found that Congress derived its power to enact the portion of RFRA that applies to the federal government from the same source it derived the power to pass statutes that if challenged would be measured by the standard RFRA creates."); *In re* Hodge, 220 B.R. 386, 398–99 (Bankr. D. Idaho 1998) (noting "RFRA, in effect, amends all federal laws to provide enhanced protection for the free exercise of religion" and "amends all actions of the federal government" for same purpose).

[56] *Gonzales*, 546 U.S. at 439 (positing Congress intended courts to apply compelling interest test to governmental interference with religious practices). *See generally* Hankins v. Lyght, 441 F.3d 96, 115 (2d Cir. 2006) (Sotomayor, J., dissenting) ("Read in conjunction with the rest of the statute, the provision simply requires courts to apply RFRA 'to all Federal Law' in any lawsuit to which the government is a party.").

[57] *Gonzales*, 546 U.S. at 439 ("RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' . . . ."); *see* Kikumura v. Hurley, 242 F.3d 950, 962 (10th Cir. 2001) (noting "under RFRA, a court does not consider [a regulation] in its general application, but rather considers whether there is a compelling government reason . . . to apply the . . . regulation to the individual claimant"); *see also* Frank J. Ducoat, *Clarifying the Religious Freedom Restoration Act:* Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, *126 S. Ct. 1211 (2006)*, 8 RUTGERS J. OF L. & RELIG. 6, 9 (2006) ("RFRA's strict scrutiny test is to be applied to the individual claimant and not just society as a whole.") (citation omitted).

[58] Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 425 (2006) (noting CSA's concern with regulating overall existence and use of substances with "potential for abuse"). *See generally* Gonzales v. Oregon, 546 U.S. 243, 250 (2006) (stating CSA was created to combat drug abuse while making

the Court found that the compelling government interest was inapplicable in the *Gonzales* case because there was no real risk of negative societal impact since the Respondent used the substance solely for a religious purpose.[59] Thus, *Gonzales* indicates that RFRA's strict scrutiny requires the government to demonstrate that the statute furthers a compelling government interest with respect to the individual claimant, not just to society at large.[60]

As illustrated by the analysis above, current free exercise analysis is extremely convoluted. To perform free exercise analysis properly, a court must analyze the following: does the issue require the court to determine the validity of a federal or state law? If the court is analyzing a federal law, RFRA strict scrutiny applies. If the court is analyzing a state law, RFRA is inapplicable and *Smith* applies. *Smith* requires one to ask whether the law purposefully discriminates against religion, or is neutrally applicable. If the law purposefully discriminates against religion, strict scrutiny applies; if the law is neutrally applicable, rational basis applies. Further, under *Smith*, if the law burdens a claimant's free exercise rights in addition to another fundamental right, hybrid rights analysis forces a court to apply strict scrutiny.

II. FRAUDULENT CONVEYANCE LAW

The United States Constitution provides Congress with the power to create "uniform Laws on the subject of Bankruptcies throughout the United States."[61] In developing the Bankruptcy Code, Congress created what is now known as the "dual goals of bankruptcy,"[62] which often run in tension with each other.[63] One of these

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unauthorized manufacturing and distribution illegal); Gonzales v. Raich, 545 U.S. 1, 12 (2005) ("The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.")

[59] *Gonzales*, 546 U.S. at 432:

> [T]he Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day. It is true, of course, that Schedule I substances such as DMT are exceptionally dangerous. Nevertheless, there is no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here—the circumscribed, sacramental use of *hoasca* by the UDV.

(citations omitted). *See generally* Thomas C. Berg, *The Permissible Scope Of Legal Limitations On The Freedom Of Religion Or Belief In The United States*, 19 EMORY INT'L L. REV. 1277, 1298 (2005) (noting although perhaps "imperfect" in religious freedom context, compelling interest standard still means "the government bears a significant burden of proof when it substantially restricts religious conduct").

[60] *See Gonzales*, 546 U.S. at 430–31 (observing RFRA's contemplation of "an inquiry more focused than . . . [a] categorical approach"); Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 353 (2d Cir. 2007) ("[The government] must show a compelling interest in imposing the burden on religious exercise in the particular case at hand, not a compelling interest in general."); *see also* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (analyzing State's compelling interest against specific "claimed Amish exemption").

[61] U.S. CONST. art. I, § 8, cl. 4.

[62] *See generally* Kristin L. Davidson, Comment, *Bankruptcy Protection for Community Associations as Debtors*, 20 EMORY BANKR. DEV. J. 583, 616 (2004) (arguing for dual goals' application to community

goals is to grant debtors relief by providing a "fresh start."[64] This goal is fostered by exempting some of the debtor's assets from a creditor's reach and by permitting the debtor to discharge certain debt.[65] The other goal is to ensure an equitable and orderly distribution of a debtor's assets to its creditors.[66] This goal is fostered by providing the trustee (who steps into the shoes of each creditor) with certain avoiding powers; this allows the trustee to recoup, for the bankruptcy estate, assets that were previously conveyed by the debtor.[67]

Under section 548 of the Bankruptcy Code,[68] a trustee may avoid fraudulent conveyances transferred by the debtor within two years of the debtor's bankruptcy petition filing.[69] If, however, the transfer occurred more than two years ago, a

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associations); Barbara J. Houser, *Chapter 11 as a Mass Tort Solution*, 31 LOY. L.A. L. REV. 451, 460–61 (1998) (discussing "future" claims' impact on attempts to achieve dual goals); Walsh, *supra* note 6, at 238–39 (discussing "dual goals of bankruptcy" in fraudulent transfer context).

[63] *See* Michael J. Donovan, Note, *Criminal Restitution and Bankruptcy Code Discharge—Another Case for Defining the Scope of Federal Bankruptcy Law*, 65 NOTRE DAME L. REV. 107, 127 (1989) (stating "the two goals do not always coexist peacefully. The social and economic policy determinations represented in 'fresh start' policy are distinct from those underlying the debt-collection function"); *In re* Grosso, 51 B.R. 266, 269–70 (Bankr. D.N.M. 1984) (noting dual goals of bankruptcy can conflict).

[64] *See, e.g.*, Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (asserting purpose of bankruptcy law is to give debtor "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt"); Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915) (stating bankruptcy act's purpose to "permit [the debtor] to start afresh free from the obligations and responsibilities consequent upon business misfortunes"); Walsh, *supra* note 6, at 238 (discussing one goal of bankruptcy is providing debtor with fresh start).

[65] *See* 11 U.S.C. § 727 (2006) (instructing court to grant discharge to debtor filing for chapter 7 with some exceptions); *In re* Lawrence, 205 B.R. 115, 117 (Bankr. E.D. Tenn. 1997) ("[T]he effect of exempting property in bankruptcy is to sequester the property from creditors in the most complete and permanent way by removing it from the estate while destroying the very debtor-creditor relationship that would otherwise permit creditors to threaten property with execution, seizure, or attachment."); Richard M. Hynes, *Why (Consumer) Bankruptcy?*, 56 ALA. L. REV. 121, 124 (2004) (arguing for expanding bankruptcy's fresh start policies so as to, for example, "protect a consumer's wages from garnishment and her assets from attachment").

[66] *See* Mary-Alice Brady, Note, *Balancing the Rights of Debtors and Creditors: § 522(f)(1) of the Bankruptcy Code*, 39 B.C. L. REV. 1215, 1220 (1998) (highlighting fact Bankruptcy Code "contains various provisions to discourage creditors from racing to collect their debts owed" in order to "ensure an orderly distribution of these assets"); Victoria Henges, Comment, *Canons of Construction Take Aim: Ascertaining the Proper Burden of Proof for Fraud Under Section 523(a)(2)(A)*, 59 UMKC L. REV. 321, 329 (1991) (stating one of dual purposes of Bankruptcy Code is providing "equal and efficient distribution of assets among creditors") (citation omitted); Walsh, *supra* note 6, at 238 (acknowledging bankruptcy "goal to establish uniform laws to ensure the orderly distribution of a debtor's assets to its creditors").

[67] *See* 11 U.S.C. § 544 (2006) (allowing trustee to avoid unperfected liens); 11 U.S.C. § 547 (2006) (permitting trustee to avoid preferences); 11 U.S.C. § 548 (2006) (providing trustee with power to avoid fraudulent conveyances); Walsh, *supra* note 6, at 238–39 (describing reason for avoiding powers is to allow for equitable distribution of debtor's assets).

[68] 11 U.S.C. § 548.

[69] 11 U.S.C. § 548(a)(1) (2006):

> The trustee may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
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> (A) 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

trustee is not out of luck. Bankruptcy Code section 544(b) allows a trustee to "step in the shoes" of any of the debtor's unsecured creditors.[70] This provides the trustee to utilize the rights and powers of any unsecured creditor under applicable state law. Because most states have adopted the UFTA, the state law reach-back period is almost uniformly four years. Thus, if the fraudulent conveyance occurred between two and four years before the debtor filed the petition, a trustee may use section 544(b) to avoid that transaction.[71]

Pursuant to section 548 and the UFTA, a transfer is fraudulent in two situations. The first is considered an actual fraudulent transfer; that is, when a debtor makes "such a transfer . . . with actual intent to hinder, delay, or defraud any entity."[72]

> after the date that such transfer was made or such obligation was incurred, indebted; or
> (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
> (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

See Michael R. Cedillos, Note, *Categorizing Categories: Property of the Estate and Fraudulent Transfers in Bankruptcy*, 106 MICH. L. REV. 1405, 1408 (2008) (explaining section 548 enables "trustee to avoid any transfer of an 'interest of the debtor in property . . . incurred by the debtor' . . . within two years of filing for bankruptcy protection"); 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 (2006) (discussing section 548 avoidance power).

[70] *See* 11 U.S.C. § 544(b) (2006) (stating "the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim"); Bryan D. Hull, *A Void in Avoidance Powers? The Bankruptcy Trustee's Inability to Assert Damages Claims on Behalf of Creditors Against Third Parties*, 46 U. MIAMI L. REV. 263, 264 (1991) (observing "trustee may even 'step into the shoes' of a creditor and avoid the debtor's transfers of property or property interests that could have been avoided by the creditor outside of bankruptcy"); Douglas J. Whaley, *The Dangerous Doctrine of* Moore v. Bay, 82 TEX. L. REV. 73, 74, 86 (2003) (noting section 544(b) followed doctrine of *Moore v. Bay*, "wherein the trustee steps into the shoes of such protected creditors").

[71] *See* Paul L. Hammann & John C. Murray, *Creditor's Rights Risk: A Title Insurer's Perspective*, 38 J. MARSHALL L. REV. 223, 237 (2004) ("Section 544(b)(1) incorporates state law into the bankruptcy process and enables the trustee . . . to exercise the rights of creditors under state fraudulent transfer laws to void any transfer of an interest of the debtor in property that is avoidable under applicable state law.") (citations omitted); Kenneth C. Kettering, *Securitization and Its Discontents: The Dynamics of Financial Product Development*, 29 CARDOZO L. REV. 1553, 1621–22 n.228 (2008) (mentioning "limitation period" under UFTA is four years, while "limitation period" under section 548 of Bankruptcy Code is now two years after statute was amended in 2005). *Compare* UNIF. FRAUDULENT TRANSFER ACT § 9, 7A U.L.A. 194–95 (1984) (indicating four-year reach-back period), *with* 11 U.S.C. § 548 (indicating two-year reach-back period).

[72] 11 U.S.C. § 548(a)(1)(A) (2006). *See In re* Canyon Sys. Corp., 343 B.R. 615, 634–35 (Bankr. S.D. Ohio 2006) (noting to succeed on section 548(a)(1)(A) claim, trustee must prove debtor intended to "'hinder, delay, or defraud'" creditor); Thomas Yerbich, *Bankruptcy Briefs: Denial of Discharge: 727(a)(2)*, 24

Because Congress realized it is extremely difficult to prove the intent of a debtor, it created the second type: a constructive fraudulent transfer.[73] In order for a transfer to be constructively fraudulent, a debtor must receive less than reasonably equivalent value in exchange for such transfer; and have been either insolvent on the date of the transfer or became insolvent as a result of the transfer, was undercapitalized, incurred debts that he knew he would not pay back, or made the transfer to or for the benefit of an insider.[74] If a trustee or creditor demonstrates these requirements, it will be able to avoid any transfer even though the debtor made the transfer without an actual fraudulent intent.

Although the rule seems clear, throw religion in the mix, and the law muddies. Several religions either require or encourage their adherents to donate money to their respective establishments.[75] Because these donations inherently have less than reasonably equivalent value (because the debtor is receiving no tangible compensation),[76] the trustee could avoid those transfers and force the church to hand over the donations, if for example the debtor was insolvent at the time of the transfer.[77] Since avoiding these transfers prevents a debtor from expressing his/her

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ALASKA B. RAG 9, 9 (2000) (noting section 548(a)(1)(A) allows trustee to recover property if debtor transferred property with intent to defraud creditor).

[73] *See* Jonathan C. Lipson, *First Principals and Fair Consideration: The Developing Clash Between the First Amendment and the Constructive Fraudulent Conveyance Laws*, 52 U. MIAMI L. REV. 247, 251 (1997) (stating due to difficulty of proving fraudulent intent "courts developed, and modern statutes incorporated, certain presumptions based on badges of frauds, acts, or states of affairs that, regardless of intent, rendered a transaction presumptively fraudulent"); Barry L. Zaretsky, *Fraudulent Transfer Law as the Arbiter of Unreasonable Risk*, 46 S.C. L. REV. 1165, 1166 (1995) (discussing development of "'constructive fraud' provisions"); *cf. In re* Andersen, 166 B.R. 516, 528–29 (Bankr. D. Conn. 1994) (discussing allowance of circumstantial evidence to establish fraudulent intent because "it is completely unrealistic to expect an admission").

[74] *See* 11 U.S.C. § 548(a)(1)(B) (2006); *In re* Gustafson, 381 B.R. 259, 262 (Bankr. W.D. Ark. 2008) (explaining for creditor to succeed on constructive fraud claim creditor must prove transfer was made for "less than equivalent value" in addition to proving one of four situations described in section 548(a)(1)(B)); *In re* First Fin. Assocs., Inc., 371 B.R. 877, 896–97 (Bankr. N.D. Ind. 2007) (holding constructive fraudulent transfer existed because debtor "received less than a reasonably equivalent value in exchange for the transfer" and "was insolvent when the transfer was made or was rendered insolvent by the transfer").

[75] *See* Christians v. Crystal Evangelical Free Church (*In re* Young), 82 F.3d 1407, 1417 (8th Cir. 1996) (discussing how certain religions rely on and encourage donations); Kang, *supra* note 6, at 399 ("Although many churches do not require their members to tithe, some members feel compelled to do so . . . ."); Note, *Tithing in Chapter 13—A Divine Creditor Exception to Section 1325?*, 110 HARV. L. REV. 1125, 1125 (1997) (discussing numerous religious faiths which encourage members to donate to charity or to their religious institutions).

[76] *See In re* Jackson, 249 B.R. 373, 375 (Bankr. D.N.J. 2000) (noting church conceded debtor did not receive "'reasonably equivalent value'" for his $20,000 donation made to church); *In re* Newman, 183 B.R. 239, 246 (Bankr. D. Kan. 1995) (concluding receipt of "religious comfort and support does not constitute value under the Bankruptcy Code"); *see also* Natalie A. Hurley, Note, *Religious Entanglement by the Bankruptcy System—Avoidable Transfers and RFRA*, 27 U. MEM. L. REV. 177, 192–94 (1996) (stating *Newman* court found tithing could not be exchanged "because if the debtors ceased to tithe or reduced tithings, the church would render the same services").

[77] *See In re* Rivera, 214 B.R. 101, 107–08 (Bankr. S.D.N.Y. 1997) (reasoning creditor can still recover fraudulently transferred property from church, even if debtor's transfer was "religiously motivated"); *In re Newman*, 183 B.R. at 248 (holding "[t]he payments to the church [were] fraudulent transfers recoverable under § 548(a)(2)").

religious beliefs, many questioned whether these actions violated the Free Exercise clause.[78] Eventually, in 1998, President Clinton signed the Religious Liberty and Charitable Contribution Protection Act,[79] which amended section 548 to include the now section 548(a)(2).[80]

Section 548(a)(2) limits the trustee's power to avoid a constructive fraudulent transfer made to a religious (or charitable) organization. It does so by allowing a debtor to donate fifteen percent of his/her annual gross income within the two years preceding his/her petition to the religious organization of his/her choice.[81] Further, a debtor may donate more than fifteen percent if his/her donation is consistent with his/her past practices.[82] More notably, under the UFTA, a creditor may avoid a constructive fraudulent transfer to a place of worship, regardless of how much the transfer was worth in comparison with the debtor's gross annual income.[83]

This Comment proposes that although the enactment of section 548(a)(2) and the UFTA were valiant attempts by Congress and state legislatures to strike a balance between the interests of trustees and/or creditors in avoiding fraudulent transfers and a debtor's free exercise rights, section 548(a)(2) and the UFTA violate present free exercise analysis, and thus are unconstitutional.

III. CURRENT FRAUDULENT CONVEYANCE LAWS: COURTS SHOULD APPLY STRICT SCRUTINY

When avoiding a fraudulent conveyance, a bankruptcy trustee has two options: he could use Bankruptcy Code section 548, or Bankruptcy Code section 544(b). Section 548 is the Code's fraudulent conveyance statute. Section 544(b) permits the trustee to avoid a fraudulent transfer if any of the debtor's creditors could have avoided the transfer under relevant state law. In contrast, outside of bankruptcy, a creditor may avoid a fraudulent conveyance by only utilizing state law in states with jurisdiction over the debtor.

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[78] *See, e.g.*, *In re Young*, 82 F.3d at 1407 (providing example of court questioning whether free exercise of religion is substantially burdened by recovery of charitable donations and violates RFRA). *See generally* Walsh, *supra* note 6 (discussing effect of law allowing debtors to contribute 15% of gross income to charities without interference from bankruptcy trustees).

[79] Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, 112 Stat. 517 (codified as amended in scattered sections of 11 U.S.C.) (amending Bankruptcy Code to allow limited charitable donations by debtors).

[80] Religious Liberty and Charitable Donation Protection Act of 1998, sec. 3, § 7, Pub. L. No. 105-183, 112 Stat. 517, 517–18 (codified as amended at 11 U.S.C. § 548(a)(2)) (amending Bankruptcy Code to allow limited charitable donations by debtors); *see* 11 U.S.C. § 548(a)(2) (2006).

[81] 11 U.S.C. § 548(a)(2)(A) (2006) (excluding such charitable donations from reasonably equivalent value standard).

[82] 11 U.S.C. § 548(a)(2)(B) (2006).

[83] *See* UNIF. FRAUDULENT TRANSFER ACT §§ 4–5, 7, 7A U.L.A. 58–149, 155–78 (1984) (outlining process by which trustees can avoid fraudulent transfers by debtors); *In re* Mussa, 215 B.R. 158, 168 (Bankr. N.D. Ill. 1997) (listing UFTA factors to determine fraudulent transfers including whether debtor received reasonably equivalent value); *cf.* Zahra Spiritual Trust v. United States, 910 F.2d 240, 248 (5th Cir. 1990) (stating "spiritual fulfillment" does not qualify as reasonably equivalent value under Texas law).

A. Section 548

As stated before, the Supreme Court implied that RFRA's application to federal law is constitutional.[84] Thus, if a trustee decides to use section 548 when seeking to avoid a transfer from a place of worship, RFRA will apply because the Bankruptcy Code is a federal law.

Although RFRA applies in bankruptcy, a debtor first must demonstrate that the trustee's avoidance pursuant to section 548 "substantially burdens" his/her religious activity to trigger it.[85] Under section 548(a)(2), so long as the transfer was more than fifteen percent of the debtor's income and was not consistent with the debtor's past practices, the church is required to return the money to the trustee.[86] Although the avoidance requires the donee to disgorge the donation, this statute also chills prospective debtors from donating to a religious establishment because they know that the trustee will avoid that donation. Thus, because section 548(a)(2) chills a debtor's free exercise rights, it substantially burdens a prospective debtor's free exercise rights, which triggers RFRA.

Next, the trustee must demonstrate that Congress, by enacting section 548(a)(2), sought to further a compelling government interest,[87] and implemented the least restrictive means to achieve that end.[88] Courts are split regarding whether section

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[84] *See supra* notes 49–57 and accompanying text. *See generally* United States v. Vasquez-Ramos, 531 F.3d 987, 992 (9th Cir. 2008) (discussing Supreme Court's application in *Gonzales* of RFRA to federal law); Hankins v. N.Y. Annual Conference of the United Methodist Church, 516 F. Supp. 2d 225, 231 (E.D.N.Y. 2007) (discussing *Gonzales* decision and Supreme Court's application of RFRA to federal law).

[85] *See* 42 U.S.C. § 2000bb(b) (2009) (indicating RFRA only applies to cases where religious exercise "is substantially burdened"); Thiry v. Carlson, 78 F.3d 1491, 1494 (10th Cir. 1996) (noting threshold requirement that government action is substantial burden to sincerely held religious belief); *In re* Newman, 183 B.R. 239, 251 (Bankr. D. Kan. 1995) ("The threshold inquiry under RFRA is whether the statute in question substantially burdens a person's religious practice.").

[86] *See supra* notes 80–81 and accompanying text; *see also* Universal Church v. Geltzer, 463 F.3d 218, 225 (2d Cir. 2006) (noting charitable transfers of less than 15 percent of debtor's adjusted gross income are exempt from avoidance); *In re* Zohdi, 234 B.R. 371, 373 (Bankr. M.D. La. 1999) (ruling charitable transfers which exceed 15 percent of debtor's gross income and are avoidable under section 548 are avoidable in their entirety and "not merely that portion of the transfer exceeding 15 percent").

[87] *See* 42 U.S.C. § 2000bb(b) (2009) (codifying rule that courts should use compelling government interest test once it is established that law in question substantially burdens religion); Weir v. Nix, 114 F.3d 817, 820 (8th Cir. 1997) ("Only after the plaintiff first [shows a substantial burden] must the government prove that its policy is the least restrictive means to further a compelling governmental interest."); *see also In re Newman*, 183 B.R. at 251–52 (discussing various compelling government interests that past courts have found including maintaining uniform social security tax system, maintaining uniformity in military, balancing dual purposes of bankruptcy, and administering bankruptcy system, but not right to actual discharge).

[88] *See* 42 U.S.C § 2000bb-1(b)(2) (2009) (requiring government to show burden is "the least restrictive means of furthering [a] compelling government interest"); *Weir*, 114 F.3d at 820 (discussing how "the government [must] prove that its policy is the least restrictive means to further a compelling governmental interest"); United States v. Crystal Evangelical Free Church (*In re* Young), 82 F.3d 1407, 1419 (8th Cir. 1996) (discussing how means must be "the least restrictive means of furthering that compelling governmental interest"). 42 U.S.C. section 2000bb(b)(1) states that the purpose of RFRA is "to restore the compelling government interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972)". 42 U.S.C. § 2000bb(b)(1) (2009); *see* United States v. Meyers, 95 F.3d 1475, 1481–82 (10th Cir. 1996) (discussing "Congress passed the RFRA reestablishing the compelling interest test

548(a)(2) furthers a compelling government interest. For example, in *In re Newman*,[89] the court held that the Bankruptcy Code's fraudulent conveyance law advances a compelling government interest because it furthers the balance between an effective administration of the Bankruptcy Code and the importance of a trustee's fraudulent conveyance avoidance powers.[90] By contrast, the courts in *In re Young*,[91] *In re Tessier*,[92] and *Fitzgerald v. Magic Valley Evangelical Free Church*,[93] held that the Bankruptcy Code's fraudulent conveyance law does not further a compelling government interest. These courts reasoned that the Code's fraudulent conveyance law does not "endanger the ability of the bankruptcy laws to provide financially distressed debtors with effective relief and a new chance to succeed economically. Bankruptcy debtors in general . . . will receive their chapter 7 discharge and fresh start unhindered by whether bankruptcy trustees prevail in recovering religious tithes."[94] Because courts are split regarding whether section 548(a)(2) furthers a compelling government interest, clearly reasonable minds can differ.

Although section 548(a)(2) *may* pass the compelling government interest test, it fails the least restrictive means test, and thus must be declared unconstitutional.

By its definition, section 548(a)(2) protects debtors and churches from a trustee's avoidance powers. However, if a debtor donates more than fifteen percent of his/her gross income to a place of worship, a trustee can avoid the transfer, assuming that donation was not consistent with the debtor's past practices, regardless of the debtor's intent. Thus, if a debtor wants to donate 16% of his/her annual income to his/her church, even if the debtor did not intend to defraud his/her creditors, the trustee can avoid that transfer as a constructive fraudulent conveyance.

However, the development of constructive fraudulent transfers demonstrates that Congress did not implement the least restrictive means when it created section

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of" *Sherbert* and *Yoder*); Werner v. McCotter, 49 F.3d 1476, 1479 (10th Cir. 1995) (noting compelling interest test from *Sherbert* and *Yoder* was reestablished in RFRA). In those cases, the Court required the government to demonstrate that the law in question furthered a compelling government interest and implemented the least restrictive means possible. *See Yoder*, 205 U.S. at 213, 215 (noting compelling state interest and acknowledging need for its accomplishment by least restrictive means); *Sherbert*, 374 U.S. at 406–07 (requiring state to show compelling interest advanced by least restrictive means); *see also* United States v. Lee, 455 U.S. 252, 257 (1982) (applying compelling interest test from *Sherbert* and *Yoder*).

[89] 183 B.R. 239 (Bankr. D. Kan. 1995).

[90] *Id*. at 251–52 ("The compelling nature of the interest is reflected in the fact that recovery of fraudulent transfers has been a basic tenet of bankruptcy law for 400 years.").

[91] 141 F.3d 854 (8th Cir. 1998).

[92] 190 B.R. 396, 405 (Bankr. D. Mont. 1995).

[93] *In re* Hodge, 200 B.R. 884, 898 (Bankr. D. Idaho 1996).

[94] *Id.* at 898 (reasoning fraudulent conveyance law does not advance compelling interest because trustees will receive chapter 7 discharge whether or not they receive recovery for religious tithes), *rev'd*, 220 B.R. 386 (D. Idaho 1998); *see In re Young*, 141 F.3d at 854; *In re Tessier*, 190 B.R. at 405 ("[C]ompelling interests include only those interests pertaining to survival of the republic or the physical safety of its citizens.").

548(a)(2). Congress created constructive fraudulent transfers because actual fraud is extremely hard to prove.[95] As one commentator points out:

> Fraudulent conveyance laws were initially developed to deter intentional acts that hindered, delayed, or defrauded creditors. Intent, however, was notoriously difficult to prove. As a result, Courts developed, and modern statutes incorporated, certain presumptions based on badges of frauds, acts, or states of affairs that, regardless of intent, rendered a transaction presumptively fraudulent.[96]

Thus, constructive fraudulent transfers are inherently a backup to the actual fraud provision. Therefore, section 548(a)(2) would implement the least restrictive means only if a trustee could avoid a transfer made to a place of worship with actual fraudulent intent. Absent the intent requirement, section 548(a)(2) is unconstitutional because it is not narrowly tailored. Adopting this approach would force Congress to respond by either drafting a statute that implements the least restrictive means, which most likely means that a court will only allow a trustee to avoid a debtor's transfers to religious organizations if the debtor made the transfers with actual fraudulent intent.

B. The UFTA—State Law

Many states have adopted the UFTA,[97] which provides creditors with state law protections from fraudulent conveyances outside of bankruptcy. Because the UFTA is a state law, RFRA is inapplicable due to *Boerne*;[98] thus, the *Smith* holding

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[95] *See* Lipson, *supra* note 73, at 251 (observing original intent element of fraudulent conveyance law was "difficult to prove"); Zaretsky, *supra* note 73, at 1166 (discussing original form of fraudulent transfer law and its difficult intent element).

[96] Lipson, *supra* note 73, at 251. *See* Max Sugarman Funeral Home, Inc. v. A.D.B. Investors, 926 F.2d 1248, 1254–55 (1st Cir. 1991) (explaining although single indication of fraud cannot be treated as conclusive, "the confluence of several can constitute conclusive evidence of an actual intent to defraud"); *see also* Acequia v. Clinton (*In re* Acequia, Inc.), 34 F.3d 800, 806 (9th Cir. 1994) (using "several badges of fraud" to infer "actual fraudulent intent").

[97] *See supra* note 12 and accompanying text; *see also* Drenis v. Haligiannis, 452 F. Supp. 2d 418, 426 (S.D.N.Y. 2006) ("In 1996, Delaware became one of forty-two jurisdictions to adopt the Uniform Fraudulent Transfers Act . . . ."). *See generally In re* Goldberg, 277 B.R. 251, 295–96 (Bankr. M.D. La. 2002) (discussing UFTA).

[98] *See supra* note 47 and accompanying text; *see also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003) (acknowledging Congress cannot "'attempt to substantively redefine the States' legal obligations'") (citation omitted). *See generally* Vill. of Bensenville v. FAA, 457 F.3d 52, 60 n.1 (D.C. Cir. 2006) (noting Congress responded to *Boerne* by passing Religious Land Use and Institutionalized Persons Act (RLUIPA), which "applies the compelling interest standard to action by the states, but only as to the limited categories of regulations affecting land use or institutionalized persons").

applies.[99] As noted in section one, under current Free Exercise clause analysis, state laws that purposefully single out and discriminate against religious activity receive strict scrutiny, while laws that are neutral, but have an incidental effect on religion receive rational basis.[100] There is no indication that state legislatures intended the UFTA to target religion. Further, the UFTA is facially religion-neutral because it does not have a parallel section like section 548(a)(2). Thus, rational basis would normally apply to determine the UFTA's constitutionality.[101]

However, the Supreme Court applies strict scrutiny to religion-neutral laws in certain situations. One situation is when a claimant has a hybrid claim.[102] As Justice Scalia points out in *Smith*,

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.[103]

Accordingly, a hybrid claim has two requirements. First, a law must not purposefully inhibit an individual's right to free exercise of religion, but must merely incidentally inhibit it (because if it was purposefully inhibited, the law would be characterized as one that singles out and discriminates against religion, which, under *Smith*, would be analyzed under strict scrutiny).[104] Second, the law

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[99] *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (stating provisions created by RFRA were "beyond Congressional authority," and therefore adhering to judicial precedent); Richards, *supra* note 50, at 762 n.101 (observing Court in *Boerne* found RFRA unconstitutional and reinstituted *Smith* standard).

[100] *See supra* Part I; *see also* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 883–85 (1990) (replacing use of *Sherbert* test for "generally applicable" laws); WTC Families for a Proper Burial, Inc. v. City of New York, 567 F. Supp. 2d 529, 541 n.4 (S.D.N.Y. 2008) ("[R]egulations and policies of general applicability that have only an incidental effect on religion need not be held to a standard higher than rational basis scrutiny.").

[101] *See Smith*, 494 U.S. at 886 n.3 (concluding "religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest"); *see also* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 273 (3d Cir. 2007) (concluding although city's redevelopment plan barred religious organization's presence in downtown area, regulation is neutral and thus subject to rational basis scrutiny).

[102] *See Smith*, 494 U.S. at 881 (stating First Amendment exempts application of neutral law to religiously motivated conduct where both Free Exercise Clause and "other constitutional protections" are involved). *But see* Kissinger v. Bd. of Trustees of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993) (noting previous decision "did not hold that the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights" and this result would be "illogical").

[103] *Smith*, 494 U.S. at 881. *See* Wooley v. Maynard, 430 U.S. 705, 715, 717 (1977) (invalidating compelled display of license plate slogan that offended individual religious beliefs); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (invalidating compulsory flag salute statute challenged by religious objectors).

[104] *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988) ("It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment."); *see also* Wisconsin v. Yoder, 406 U.S.

must implicate another of the individual's constitutional fundamental rights (other than his/her free exercise rights).[105]

As stated before, the UFTA does not purposefully inhibit a debtor's religious practices. However, the UFTA does incidentally inhibit the debtor's religious practices because creditors may avoid donations, a traditional religious activity, to a religious organization for up to four years.[106] Further, a creditor's avoidance of a debtor's donation to a religious entity as a fraudulent transfer implicates the debtor's constitutional fundamental right of freedom of speech because knowledge of a possible avoidance will have a "chilling effect" on a debtor since the debtor may not donate to a religious entity to which he/she otherwise would have donated.

Although a debtor's actual speech is not in question, donating to a charitable entity is symbolic speech.[107] Thus, avoiding a debtor's donation to a religious organization violates his/her first amendment right of free speech, which in turn, transforms the debtor's free exercise assertion into a hybrid claim. This would force a court to apply strict scrutiny, not mere rational review, if a debtor were to challenge the UFTA as unconstitutionally infringing on his/her free exercise rights. A court then would apply the exact same analysis *supra*, forcing it to conclude that the UFTA *may* further a compelling government interest, but certainly does not implement the least restrictive means to further that interest.

C. Section 544(b)

Under section 544(b)(1), "the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under

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205, 220 (1972) (explaining although law does not discriminate against religion on its face, it may be unconstitutional in its application if it "unduly burdens the free exercise of religion") (citation omitted); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (clarifying law is unconstitutional if it indirectly interferes with free exercise of religion) (citation omitted).

[105] *See Smith*, 494 U.S. at 881 (acknowledging past decisions have invalidated neutral laws when they violated Free Exercise Clause "in conjunction with other constitutional protections"); *see also Yoder*, 406 U.S. at 233 (determining because plaintiffs asserted their interests of parenthood along with their free exercise rights, State would have to do more than just show law had "'reasonable relation'" to State goal to be upheld); Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 87 (Cal. 2004) (noting past decisions have involved violation of Free Exercise Clause as well as another constitutional protection when party asserts hybrid rights to invalidate law).

[106] *See* UNIF. FRAUDULENT TRANSFER ACT § 9, 7A U.L.A. 194 (1984) (indicating cause of action regarding fraudulent transfer can be made "within 4 years after the transfer was made or the obligation was incurred"); *see also* Smith v. Am. Founders Fin., Corp., 365 B.R. 647, 675 (S.D. Tex. 2007) (stressing party must bring fraudulent transfer claims within four years of transfer under Texas UFTA); *In re* Sia, 349 B.R. 640, 652 (Bankr. D. Haw. 2006) ("The Hawaii statute of limitations on fraudulent transfer claims is four years.") (citation omitted).

[107] *Cf.* Buckley v. Valeo, 424 U.S. 1, 20–21 (1976) (finding political campaign donations are form of symbolic expression by contributor in support of candidate); Spence v. Washington, 418 U.S. 405, 409–410 (1974) (determining appellant's action of hanging American flag in his window with peace symbol attached constituted communication because of nature of action and context surrounding activity); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (holding prohibiting "silent, passive" speech, such as wearing black armband to support political view, "is no less offensive to the Constitution's guarantees").

applicable law by a creditor holding an unsecured claim."[108] In effect, this section enables a trustee to "step into the shoes" of any of the debtor's unsecured creditors, which allows the trustee to use any unsecured creditor's applicable state law.[109] Trustees typically use this section to benefit from a state law's longer statute of limitations, such as the UFTA.[110] But if a trustee decides to use any creditor's state law when seeking to avoid a fraudulent conveyance, does section 544(b) entitle the trustee to side-step RFRA and avoid its definite strict scrutiny requirements?

For two reasons, the answer most likely is no. First, although section 544(b) allows the trustee to apply a state law, it is itself a federal law and thus falls under RFRA's guise. Second, as 544(b)(2) states "[a]ny claim by any person to recover a transferred contribution [under 548(a)(2)] under Federal or State law in a Federal or State court shall be preempted by the commencement of the case."[111] This clause mandates that if a creditor is seeking to recover a religious contribution in a manner inconsistent with section 548(a)(2), the bankruptcy filing will prevent that litigation from proceeding. Thus, when a trustee seeks to avoid a charitable contribution made by the debtor, once a bankruptcy petition is filed, the trustee may only use the directives consistent with section 548(a)(2), not the unlimited recovery provisions of the creditor's applicable state law. Because a trustee must apply section 548(a)(2), a federal law, RFRA applies; this forces a court to apply strict scrutiny to determine if section 548(a)(2) is constitutional.[112]

A deeper analysis of this type of situation reveals that this result is best for several reasons. First, in a bankruptcy proceeding, the trustee is a federally appointed representative appearing in Federal Court.[113] Second, RFRA's

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[108] 11 U.S.C. 544(b)(1) (2006).

[109] *See* Schilling v. Heavrin (*In re* Triple S Rests., Inc.), 422 F.3d 405, 410 (6th Cir. 2005) (stating "[p]ursuant to section . . . 544(b), a trustee may avoid a transfer if the transferor was insolvent at the time and if the transfer is voidable under applicable state law"); *see also* Havee v. Belk, 775 F.2d 1209, 1218 (4th Cir. 1985) (finding federal law provides trustee with its "strong arm" power, however, it is state law which governs his "exercise of such power and its extent"); Angeles Real Estate Co. v. Kerxton, 737 F.2d 416, 418 (4th Cir. 1984) ("[I]f under applicable state law a judgment lien creditor would prevail over an adverse claimant, the trustee in bankruptcy will prevail; if not, he will not.") (citation omitted).

[110] *See* Sender v. Simon, 84 F.3d 1299, 1304 (10th Cir. 1996) ("The trustee's powers under [section 544(b)] are predicated on the non-bankruptcy law, usually state law, applicable to the transaction sought to be avoided."); *In re* Int'l Loan Network, Inc., 160 B.R. 1, 18 (Bankr. D.D.C. 1993) ("Before the trustee can rely upon section 544(b), he must first show that there is an actual creditor holding an allowable unsecured claim pursuant to section 502 who, under Maryland law, could avoid the transfers in question."); Neil M. Garfinkel, *No Way Out: Section 546(e) Is No Escape for the Public Shareholder of a Failed LBO*, 1991 COLUM. BUS. L. REV. 51, 54 (1991) (observing section 544(b) allows trustees to use applicable state law, with less stringent statute of limitations).

[111] 11 U.S.C. § 544(b)(2) (2006).

[112] *See supra* Part I.

[113] *In re* Si Yeon Park, Ltd., 198 B.R. 956, 962 (Bankr. C.D. Cal. 1996) (discussing federally appointed bankruptcy trustees). *See generally* R. Spencer Clift, III, *Should the Federal Rules of Bankruptcy Procedure be Amended to Expressly Authorize United States District and Bankruptcy Courts to Appoint a Special Master in an Appropriate and Rare Bankruptcy Case or Proceeding?*, 31 U. MEM. L. REV. 353, 383 (2001) (providing detailed examination on role of bankruptcy trustee and stating "[i]n order to further improve the efficiency of the bankruptcy court, the bankruptcy trustee evolved into an intricate player in the bankruptcy system while the bankruptcy judge performed the role as an adjudicator") (citation omitted).

requirements are stricter than state law's requirements (because applying strict scrutiny is definite under federal law and merely possible in state law since a claimant must prove a hybrid claim).[114] Thus, if a court were to allow a trustee to apply state law when avoiding 548(a)(2) transactions, in effect, RFRA would never be applied with regard to fraudulent conveyances. This is because a trustee would always use section 544(b) in conjunction with an unsecured creditor's state law since it provides a parallel path to section 548 during the first two years, and, under UFTA, an extra two year reach back period.

Therefore, in bankruptcy court, whether the trustee uses section 544(b) or section 548(a)(2) a court will perform the same analysis, RFRA strict scrutiny, and come to the same result, that the bankruptcy fraudulent conveyance law is unconstitutional.

CONCLUSION

A description of section 548(a)(2) and the UFTA can be summarized in one word: unconstitutional. In bankruptcy, section 548(a)(2) allows a trustee to avoid transfers made to a religious institution in excess of fifteen percent of the debtor's gross annual income. Because this section does not require a debtor to make these types of transfers with actual fraudulent intent, Congress failed to meet RFRA's strict scrutiny requirements because the section does not implement the least restrictive means. In state court, the analysis is different, but the results conform. The UFTA implicates two of a debtor's fundamental rights when a creditor seeks to avoid a debtor's donation to a religion organization: free exercise and free speech. Thus, pursuant to dicta in *Smith* the debtor's right is a hybrid claim; this forces a court to apply strict scrutiny, which, like RFRA, invalidates the UFTA.

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[114] *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 881 (1990) ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved . . . the Free Exercise Clause in conjunction with other constitutional protections . . . ."); Wooley v. Maynard, 430 U.S. 705, 714 (1977) (invalidating state law, which required motorist to display slogan which was offensive to appellant's religious beliefs, on grounds that it violated Free Exercise Clause and First Amendment freedom of speech which "includes both the right to speak freely and the right to refrain from speaking at all"); *supra* Part I.