

**YOU'RE RENDERING WHAT UNTO WHOM?
HOW TITHING IS PUTTING CREDITORS AND DEBTORS AT ODDS
IN MODERN BANKRUPTCY**

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INTRODUCTION

Tithing, the practice of giving a portion of one's income to a church or religious entity, is both an ancient and ubiquitous practice amongst religions. While most well-known to American Christians as the giving of a tenth of income to the church, tithing and other forms of religious giving take a variety of forms amongst Christian denominations and amongst other dominant religions today.¹

The modern bankruptcy system has created circumstances where a debtor's ability to tithe often collides with a creditor's right to payment or a trustee's ability to avoid a fraudulent conveyance. These intersections have created disputes stemming from legislative action, and then leading to legislative action to remedy the perceived problem. From the enactment of title 11 of the United States Code (the "Bankruptcy Code") in 1978, to the passage of the Religious and Freedom Restoration Act of 1993 ("RFRA"), the Religious Liberty and Charitable Donation Act of 1998 ("RLCDA"), and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), statutory rules have guided the development of tithing's place in bankruptcy.²

This paper examines the history of tithing as an authentic religious practice and then explores the controversies that have arisen under each statutory scheme. It examines the cases that best represent the unsettled problems of each period and concludes by examining the unresolved issues the remain today. Bankruptcy, particularly consumer bankruptcy, presents an area of law where tithing has played an outsized role among religious practices, and seems to continue presenting new and unprecedented problems for bankruptcy courts. The combination of individuals in economic straits with a religious obligation to give and trustees and creditors with economic incentives to stymie that giving have led to a colorful collection of cases where, often, we are privy to an individual's finances, domestic difficulties, and other hardships. It is an area of perhaps little consequence for the greater bankruptcy system, but with outcomes of enormous significance for the individual debtor.

I. THE HISTORY OF TITHING AS A SINCERE RELIGIOUS PRACTICE

A. Early Christian and Jewish Traditions

To understand the significance of tithing in the present, it is helpful to understand its long history and development as a sincere religious practice. The word tithe

¹ See *Tithe*, BRITANNICA (Oct. 15, 2024), <https://www.britannica.com/topic/tithe/>.

² See Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified in 11 U.S.C. §§ 101-1329) (1978); Religious Freedom and Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993); Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, 112 Stat. 517 (1998); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

derives from the Old English *teogothian*, literally meaning a "tenth."³ Many discussions of tithing in Christian publications refer to the story of Abram in Genesis, where after prevailing in battle, he gave over one-tenth of what he had to the priest, Melchizedek.⁴ The Old Testament includes several other references that either explicitly reference tithing or that have been interpreted to suggest the importance of the practice.⁵ The particular reference to tithing in Malachi is often cited to suggest not only the requirement but also the benefit of tithing as a practice:

Bring the full tithes into the storehouse, that there may be food in my house; and thereby put me to the test, says the Lord of hosts, if I will not open the windows of heaven for you and pour down for you an overflowing blessing.⁶

The Jewish and Christian traditions of tithing then follow different paths. The Jewish traditions appear to have developed into a complex set of rules through subsequent rabbinical interpretations.⁷ Highly nuanced rules developed for tithing portions of agricultural produce like "grain, wine, and oil" as opposed to other forms of profits, specification for when in the year tithes were due, and rules that only applied geographically in the "Land of Israel."⁸

³ See BRITANNICA, *supra* note 1; Steven Hopkins, *Is God a Preferred Creditor? Tithing as an Avoidable Transfer in Chapter 7 Bankruptcies*, 62 U. CHI. L. REV. 1139, 1139 (1995) ("Tithing is the ancient practice of giving one-tenth of one's annual income to a church. It dates at least to the Book of Genesis, when Abraham paid tithing to Melchizedek.").

⁴ See Hopkins, *supra* note 3; *Genesis* 14:18–20 (Revised Standard Version) ("And Mel-chiz'edek king of Salem brought out bread and wine; he was priest of God Most High. And he blessed him and said, 'Blessed be Abram by God Most High, maker of heaven and earth; and blessed be God Most High, who has delivered your enemies into your hand!' And Abram gave him a tenth of everything."); *Genesis* 14:18–20 (King James) (using the word "tithe" as an alternative interpretation rather than "tenth"); see also Collin Hansen, *The Ancient Rise and Recent Fall of Tithing*, CHRISTIANITY TODAY (Aug. 8, 2008), <https://www.christianitytoday.com/history/2008/august/ancient-rise-and-recent-fall-of-tithing.html> (describing how most discussions about the origin of tithing begin with the story of Abram and Melchizedek).

⁵ See *Deuteronomy* 14:22–23 (King James) ("Thou shalt truly tithe all the increase of thy seed, that the field bringeth forth year by year. And thou shalt eat before the Lord thy God, in the place which he shall choose to place his name there, the tithe of thy corn, of thy wine, and of thine oil, and the firstlings of thy herds and of thy flocks[]; that thou mayest learn to fear the Lord thy God always."); *Leviticus* 27:32 (King James) ("And concerning the tithe of the herd, or of the flock, even of whatsoever passeth under the rod, the tenth shall be holy unto the Lord."); *Proverbs* 3:9 (Revised Standard Version) ("Honor the Lord with your substance and with the first fruits of all your produce[.]").

⁶ *Malachi* 3:10 (Revised Standard Version); see, e.g., *Should You Give While Getting Out of Debt?*, RAMSEY SOLS. (July 18, 2022), <https://www.ramseysolutions.com/budgeting/give-while-in-debt#authorbio> (referencing the passage of Malachi as an encouragement to tithe even when facing financial difficulties).

⁷ See David Golinkin, *Are Jews Required to Give a Maaser [Tithe] of their Income to Tzedakah?*, SCHECHTER INSTS. (Oct. 3, 2010), <https://schechter.edu/are-jews-required-to-give-a-maaser-tithe-of-their-income-to-tzedakah-responsa-in-a-moment-volume-4-issue-no-4-march-2010/> (describing the various Talmudic sources for tithing and rulings on the proper amounts and uses of tithes); *Maaser - Tithing in Torah and Jewish Law*, CHABAD.ORG, https://www.chabad.org/library/article_cdo/aid/4266406/jewish/Maaser-Tithing-in-Torah-and-Jewish-Law.htm (last visited Oct. 6, 2024) (discussing the early practices of Jewish law).

⁸ See CHABAD.ORG, *supra* note 7 (describing early application of tithing law in Jewish tradition).

Alternatively, the Christian New Testament did not set any requirements for tithing, though many passages encouraged generosity.⁹ Despite any explicit command to tithe, leaders in the early church argued that the Old Testament examples of the "tribes of Israel prefigure[d] how Christians should provide for their ministers."¹⁰ This led to the widespread practice of tithing in the Christian church and its eventual obligatory nature by the state in eighth century Europe.¹¹ This continued up to and through the Protestant Reformation; Martin Luther, famously opposed to indulgences, continued to endorse the practice of tithing, and tithing continued as an important doctrine in both Protestant and Roman Catholic traditions.¹²

Eventually, opposition to the *obligatory*, state-mandated tithe swelled in Europe and tithing laws were repealed or died out in France, Italy, Ireland, and Scotland in the eighteenth and nineteenth centuries.¹³ There were outliers—the German Protestant church still collects a church tax unless individuals affirmatively renounce their membership in the church.¹⁴ Contrast this with the Eastern Orthodox church which has never mandated tithing.¹⁵

B. American History of Tithing Since the Founding

Pre-founding, there were competing views about the proper relationship between church and state, and some early colonial communities, like the Puritans, did allow for material support of the church from the state.¹⁶ While the practices of the

⁹ See 2 Corinthians 9:6–7 (Revised Standard Version) ("The point is this: he who sows sparingly will also reap sparingly, and he who sows bountifully will also reap bountifully. Each one must do as he has made up his mind, not reluctantly or under compulsion, for God loves a cheerful giver.").

¹⁰ Hansen, *supra* note 4 (describing the phenomenon of "parallelism" that grew to prominence in the sixth century).

¹¹ See BRITANNICA, *supra* note 1 (relaying how payment of tithes was enforced by secular authorities in the eighth century and made obligatory by Edmund I in the tenth century, carrying with it ecclesiastical and temporal penalties).

¹² See *id.* But see H. Wayne Pipkin, *Impatient Radicals: The Anabaptists*, CHRISTIAN HIST. INST. (1984), <https://christianhistoryinstitute.org/magazine/article/impatient-radicals-the-anabaptists> (identifying strains of the Reformation, particularly in Zurich, where "radicals were attacking the payment of rents, tithes, and interest"); Geoffrey W. Bromiley, *Huldrych Zwingli*, BRITANNICA (Oct. 7, 2024), <https://www.britannica.com/biography/Huldrych-Zwingli> (suggesting that when the Zwinglian project reached Zurich, extremist groups were dissatisfied and advocated for "the abolition of tithes" and "a severance of the state connection").

¹³ See BRITANNICA, *supra* note 1.

¹⁴ See *id.*; Nicolas Bouliane, *What is the church tax (Kirchensteuer)?*, ALL ABOUT BERLIN (Oct. 30, 2023), <https://allaboutberlin.com/glossary/Kirchensteuer> (explaining the current church tax system in Germany and which church members are still obligated by the state to pay a portion of their income tax to their respective religious community).

¹⁵ See BRITANNICA, *supra* note 1; see also *Tithing*, ORTHODOX CHURCH IN AMERICA, <https://www.oca.org/questions/parishlife/tithing> (last visited Oct. 6, 2024) (while still encouraging tithing as an act of generosity and recognizing that individual parishes and dioceses encourage the practice, "the OCA has never issued an official decree in this regard").

¹⁶ See JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 27 (Oxford Univ. Press 4th ed. 2016) (State officials donated public properties "to church groups for meetinghouses, parsonages, day schools, hospitals, and orphanages. Tax collectors collected tithes and special assessments to support the ministers and ministry of the congregational church.").

colonies—and then states—differed, the religion clauses of the First Amendment were, at least in part, motivated to prevent forced payment of religious tithes to the *federal* government.¹⁷ And while any form of obligatory state tithing had lost popular support by 1789, Massachusetts was the last state to properly end state tithing in 1833.¹⁸

While obligatory state tithing was almost unheard of in early America, voluntary tithing was widely practiced. Early church leaders in the colonies endorsed freely given tithes, again making reference to the many biblical passages that praise generosity and giving.¹⁹ John Wesley, father of early Methodism, preached an extreme austerity and generosity: "[h]aving first gained all you can, and secondly saved all you can, then 'give all you can.' . . . Render unto God, not a tenth, not a third, not half, but all that is God's[.]"²⁰ Jonathan Edwards, the noted revivalist preacher, wrote that "[i]t is the [most] absolute and indispensable duty of a people of God, to give bountifully and willingly for the supply of the wants of the needy."²¹ Thus, early Protestant churches seemed to view tithing as a deeply important religious virtue but not something to be made obligatory, rather a practice that should develop from a voluntary and giving spirit.

Moving closer to present day, a number of small but influential religions established themselves in the United States, each with their own giving practices. The Latter Day Saints (LDS) movement, known informally as the Mormon Church, was established in the early nineteenth century.²² The teachings of the LDS required tithing as an "integrated aspect of their religious belief and practice."²³ Adherence to this church doctrine continues to bear out empirically, with Pew finding that in 2011, 79% of Mormons tithed, with tithing defined as donating 10% of earnings to the

¹⁷ See *id.* at 88 (describing the announced concerns of Benjamin Huntington about forced tithes during the debates about religious establishment).

¹⁸ See *id.* at 58.

¹⁹ See Hansen, *supra* note 4.

²⁰ John Wesley, *Sermon L.—The Use of Money*, in 1 THE WORKS OF THE REVEREND JOHN WESLEY, A.M. 440, 446–48 (New York, J. Emory & B. Waugh 1831); see also *What does the church teach about tithing?*, THE PEOPLE OF THE UNITED METHODIST CHURCH (July 31, 2019), <https://www.umc.org/en/content/ask-the-umc-what-does-the-united-methodist-church-teach-about-tithing> (quoting Wesley's early sermons and describing the Methodist encouragement of tithing and generosity).

²¹ Jonathan Edwards, *Sermon XXIX. The Duty of Charity to the Poor, explained and enforced*, in PRACTICAL SERMONS, NEVER BEFORE PUBLISHED, 343, 346 (Edinburgh, 1788) (1732).

²² See *Timeline: The Early History of the Mormons*, PBS: AMERICAN EXPERIENCE, <https://www.pbs.org/wgbh/americalexperience/features/mormons-timeline/> (last visited Oct. 19, 2024) (describing events of Brigham Young and Joseph Smith in the 1800s leading to the establishment of the publication of the Book of Mormon and first organizational meeting of the LDS in 1830).

²³ *Tithing and Charitable Donations*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://newsroom.churchofjesuschrist.org/article/tithing> (last visited Oct. 19, 2024) (endorsing the remittance of a tenth of one's income to the Church. Donations are a reflection of "God's commandment to tithe and give to the poor." The Church also recognizes "fast offerings" as sign of faith; fasting for two meals each month and donating the money saved help the poor.); see also BRITANNICA, *supra* note 1 (identifying the Latter-day Saints as one of the churches that require tithing).

church.²⁴ Those who were identified as having "highest levels of religious commitment" tithed at a rate of 96%.²⁵

Similarly, the Seventh-day Adventist Church, founded in the 1830s, is a movement that arose from the Second Great Awakening early in American history.²⁶ A development in the Millerite tradition, Adventists advocated a return to biblical truths, and what began as a scattered movement coalesced in the 1860s.²⁷ Members of the Adventist church are required to tithe and the church differentiates between offerings and tithes.²⁸ Tithes are defined as the first 10% of an adherent's income, used to support pastors, maintenance of the church, ministry efforts, and is considered a form of worship; offerings are anything one decides to give beyond the required tithe.²⁹

Thus, throughout American history, tithing has been a part of religious practice amongst the varieties of Christianity. While compulsion by the church was not the norm, and compulsion by the state unheard of, a great number of adherents viewed tithing as an important religious practice, whether as personal conviction in adherence to biblical commands or an outward expression of religious virtues of compassion and generosity.

C. Tithing in Modern America

The religious demographics of America have clearly shifted in recent years—as recently as the 1990s, Americans overwhelmingly identified as Christian to the tune of 90%.³⁰ That percentage has steadily declined and has precipitously dropped in the last few years down to 63%, with those numbers diverting almost entirely to "religiously unaffiliated" while "other religions" have consistently occupied between 5–7% of the population throughout these decades.³¹ Thus, we appear to be a society that is rapidly becoming less religious and less Christian, while of those religiously affiliated, non-Christian religions are occupying an increasing share. Therefore,

²⁴ See *Mormons in America – Certain in Their Beliefs, Uncertain of Their Place in Society*, PEW RSCH. CTR. (Jan. 12, 2012), <https://www.pewresearch.org/religion/2012/01/12/mormons-in-america-beliefs-and-practices/>.

²⁵ *Id.*

²⁶ See *A Historic Look at the Seventh-day Adventist Church*, SEVENTH-DAY ADVENTIST CHURCH, <https://www.adventist.org/who-are-seventh-day-adventists/history-of-seventh-day-adventists/> (last visited Oct. 13, 2024).

²⁷ See *id.*

²⁸ See Maureen Rock, *Tithing*, STEWARDSHIP MINISTRIES, <https://stewardship.adventist.org/tithing> (last visited Oct. 13, 2024).

²⁹ See *What Adventists Believe About Biblical Stewardship*, SEVENTH-DAY ADVENTIST CHURCH, <https://www.adventist.org/stewardship/> (last visited Oct. 13, 2024).

³⁰ See *1. How U.S. Religious Composition has Changed in Recent Decades*, PEW RSCH. CTR. (Sept. 13, 2022), <https://www.pewresearch.org/religion/2022/09/13/how-u-s-religious-composition-has-changed-in-recent-decades/>.

³¹ *Id.*

when discussing tithing and giving practices generally, non-Christian practices will steadily play a larger role in public policy and court decisions.

The Jewish faith occupies the largest share of non-Christian faiths in the U.S. at 1.9% of the population.³² The modern Jewish tithing system, at least among Orthodox adherents, still reflects the Talmudic tradition discussed above.³³ This has led to a structure by which Jewish synagogues are not supported by a tithing system but rather a membership system with payment of dues; that system is not, however, universal, and some synagogues appear to have adopted a voluntary giving regime akin to Christian tithing practice.³⁴ However, practitioners of Judaism are still encouraged to give *ma'aser*, a tenth of their profits, to charity and ensure that if they do spend time in Israel, they purchase food produced in compliance with biblical tithing requirements.³⁵

Muslims make up the next largest group of non-Christian faiths at 0.9%.³⁶ Islam is radically diverse around the world but there is a general agreement on adherence to the "Five Pillars," that is, "five core rituals through which individuals can profess and confirm their adherence to the Islamic faith."³⁷ The pillar known as "zakat" is described as the giving of alms: "[a]ll adult Muslims who are able to do so are required to make an annual donation to assist the poor or less fortunate. The amount is typically 2.5% of a person's total wealth, not just annual income."³⁸ Zakat has been a part of Islamic practice since 624 CE and also has a nuanced history in terms of its obligatory nature and state involvement; as practiced today, it clearly occupies a place of great importance as a religious practice but now springs from personal "conscience and belief" for most adherents.³⁹ Significantly, Muslims today tend to view zakat as a form of philanthropy or charitable giving and often give to domestic or international

³² See *Religious Landscape Study*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/religious-landscape-study/> (last visited Oct. 8, 2024).

³³ See CHABAD.ORG, *supra* note 7.

³⁴ See Michael Paulson, *The 'Pay What You Want' Experiment at Synagogues*, N.Y. TIMES (Feb. 2, 2015), <https://www.nytimes.com/2015/02/02/us/the-pay-what-you-want-experiment-at-synagogues.html> (describing the centuries-old practice of mandatory dues to support synagogue and a recent experiment with eliminating such dues and encouraging a shift to the voluntary pledge of financial support).

³⁵ See CHABAD.ORG, *supra* note 7 ("If you're living in or visiting Israel, make sure the fruits and vegetables you buy are certified as having had maaser taken. When you are doing your taxes, look over your yearly profit and set aside a tenth for the charity of your choice. And if you just received a check for your bar mitzvah, remember to find a charity or community cause to which you will give your tithe.").

³⁶ See PEW RSCH. CTR., *supra* note 32.

³⁷ See *The World's Muslims: Unity and Diversity*, PEW RSCH. CTR. (Aug. 9, 2012), <https://www.pewresearch.org/religion/2012/08/09/the-worlds-muslims-unity-and-diversity-executive-summary/> (describing the Five Pillars as a part of the religious heritage of Islam; they include "Profession of faith," "Praying," "Giving of alms," "Fasting during the holy month of Ramadan," and "Pilgrimage to Mecca").

³⁸ *Id.*; see also Micah A. Hughes et al., *Muslim American Zakat Report 2023*, MUSLIM PHILANTHROPY INITIATIVE AT IND. UNIV. LILLY FAM. SCH. OF PHILANTHROPY (2023), <https://scholarworks.iupui.edu/server/api/core/bitstreams/720d569d-3cfb-432b-9ec0-f5d7924ccf4c/content> (describing the current trends in giving amongst American Muslims).

³⁹ See Khaerud Dawam, Muhammad Yusuf Ibrahim, Aisyah As-Salafiyah & Rusdi Hamka Lubis, *Christian Tithe vis-a-vis Islamic Zakat Concept: A Comparative Study in Socio-Economic Scope*, 13 AL-TASYREE: JURNAL BISNIS, KEUANGAN DAN EKONOMI SYARIAH 124, 128 (2021).

organizations working to alleviate hunger and poverty and provide health services and other forms of humanitarian relief.⁴⁰

While not occupying a major share of American religious adherents, the Church of Scientology is notoriously litigious and has had an outsized influence on religious legal issues.⁴¹ While some of their practices may be unorthodox,⁴² their approach to tithing mirrors typical Christian practice.⁴³ The Church uses a system of voluntary donations as their primary funding source and tithing is not required.⁴⁴ While there is ongoing debate about the legitimacy of the Church and its financial practices and structure, it seems clear that a system of donative exchange for religious services has developed and is a core religious practice for adherents.⁴⁵

Christian practices, however, still dominate the American religious landscape. While a variety of minority religions continue to rise in prominence, Americans still overwhelmingly identify as Christian, and Christian practice was and continues to be a driving force behind religiously motivated legislation.⁴⁶ While Christianity is quite variegated today, there appears to be overwhelming agreement that tithing, or some form of voluntary giving, continues to be an essential religious practice. In the evangelical church (the largest group of American Christians), 58% of religious leaders said tithing was "essential," with another 32% describing tithing as "important but not essential."⁴⁷ One survey suggested that 77% of American Protestants believe

⁴⁰ See Hughes et al., *supra* note 38, at 23.

⁴¹ See Nikos Passas & Manuel Escamilla Castillo, *Scientology and its 'Clear' Business*, 10 BEHAV. SCIS. & L. 103, 108 (1992) (noting Scientology's frequent interaction with both civil and criminal law and the Church's propensity for engaging in litigation); see also Renae Barker, *Scientology, The Test Case Religion*, 40 ALT. L.J. 275, 278 (2015) (describing the Church's litigious nature around the world, the impact the Church has had internationally as a "test case religion," and defining the contours of what counts as a religion in other common law countries like the UK and Australia).

⁴² See generally *Garcia v. Church of Scientology Flag Serv. Org.*, No. 18-13452, 2021 WL 5074465, at *1–3 (11th Cir. Nov. 2, 2021) (evaluating the enforceability of the Church's contracting practices, requiring adherents to sign pre-dispute agreements to arbitrate claims against the Church within the Church's own tribunal system).

⁴³ See *How are Churches of Scientology Supported Financially?*, SCIENTOLOGY, <https://www.scientology.org/faq/church-funding/church-funding.html> (last visited Oct. 22, 2024) (describing the current Church's dependence on both voluntary giving as well as donations and payments for church-related services, not unlike many other modern churches). But see *Church of Scientology of Cal. v. Comm'r*, 823 F.2d 1310, 1313, 1322 (9th Cir. 1987) (describing the financial structure of the early Church of Scientology, including a practice that could have been viewed as tithing but with proceeds inuring to the Church's founder directly. At the time, the Church also charged fixed costs for religious services with few exceptions for those without means.).

⁴⁴ See SCIENTOLOGY, *supra* note 43.

⁴⁵ See *IRS should review Scientology tax-exempt status*, TAMPA BAY TIMES (Nov. 20, 2011), <https://web.archive.org/web/20170908221213/http://www.tampabay.com/opinion/editorials/irs-should-review-scientology-tax-exempt-status/1202497> (alleging the Church uses coercive methods to extract tithes and monetary contributions from its members and exploits workers for profit).

⁴⁶ See PEW RSCH. CTR., *supra* note 32 (breaking down the varieties of Christianity that make up the 70.6% of Americans who identified as Christian).

⁴⁷ See *Global Survey of Evangelical Protestant Leaders*, PEW RSCH. CTR. (June 22, 2011), <https://www.pewresearch.org/religion/2011/06/22/global-survey-of-evangelical-protestant-leaders/>

that "tithing is a biblical command that still applies today."⁴⁸ Catholic doctrine does not require tithing, but many dioceses recommend regular and percentage-based contributions to local parishes and charities.⁴⁹

However, religious belief does not always translate to action.⁵⁰ Mormons, as previously mentioned, believe in a mandatory tithe of 10% of their income to the church and 79% of Mormons say they follow this discipline.⁵¹ Such committed practice appears to be the exception rather than the rule. One study suggested that within Evangelicals, only 13% actually donate a tenth of their income; more than half of Evangelicals reportedly give less than 1%.⁵² The average annual tithe for a Catholic is also below 1%, and a recent report on the effects of Covid-19 suggests that Catholic giving rates have decreased and that parishes have become more dependent on larger donations from a smaller pool of givers.⁵³

In conclusion, tithing occupies a unique space in the religious landscape of present-day America. It is a practice deeply rooted in history and tradition and one that an overwhelming majority of religious individuals consider to be essential or important, yet the rate at which individuals engage in giving is woefully low. It is a practice with great variation, both within Christianity and between the major and minor religions in this country, as to both amount and levels of religious compulsion.

⁴⁸ Marissa Postell Sullivan, *Churchgoers Are Still Tithing, More Comfortable Doing So Outside of Church*, LIFEWAY RSCH. (Apr. 25, 2023), <https://research.lifeway.com/2023/04/25/churchgoers-are-still-tithing-more-comfortable-doing-so-outside-of-church/>.

⁴⁹ See Melissa Nevadomski, *True tithing means giving more than 10 percent*, U.S. CATH. (Sept. 8, 2021), <https://uscatholic.org/articles/202109/true-tithing-means-giving-more-than-ten-percent/> ("This seems to indicate that there is no strict obligation for Catholics to tithe. However, many dioceses recommend contributing 5 percent of take-home pay to parishes and an additional 5 percent to other charities."); *What Is the Church's Position of Tithing?*, CATHOLIC ANSWERS, <https://www.catholic.com/qa/what-is-the-churchs-position-on-tithing> (last visited Oct. 23, 2024) ("Although the Church teaches that offering some form of material support to the Church is obligatory for all Catholic adults who are able to do so, it doesn't specify what percent of one's income should be given. Remember, tithing was an Old Testament obligation that was incumbent on the Jews under the Law of Moses. Christians are dispensed from the obligation of tithing ten percent of their incomes, but not from the obligation to help the Church.").

⁵⁰ See Hansen, *supra* note 4 (commenting on the modern criticisms of Christian tithing doctrine and noting that tithing practices as sporadic in the modern church. The article notes that there is a general decline in Christians tithing a full 10%, but with revival of the practice in certain sects like Baptists, Wesleyans, and Pentecostalism.).

⁵¹ See PEW RSCH. CTR., *supra* note 24.

⁵² See Leonardo Blair, *Only 13% of Evangelicals Tithe, Half Give Away Less than 1% of Income Annually: Study*, THE CHRISTIAN POST (Oct. 29, 2021), <https://www.christianpost.com/news/only-13-of-evangelicals-tithe-study.html>.

⁵³ See *Tithing*, OUR LADY OF MERCY, <https://urolm.org/tithing-1#> (last visited Oct. 12, 2024) ("We often think we are very generous yet despite the strong urging throughout sacred scripture to give back 10% the average Catholic today gives less than 1%."); Michelle Boorstein, *Donations to Catholic Parishes Steady, Post-Pandemic, but by Far Fewer Donors*, WASH. POST (Feb. 09, 2023, 1:06 PM), <https://www.washingtonpost.com/religion/2023/02/09/catholic-pandemic-covid-charity-giving/> (reporting on a study by the Center for Church Management at Villanova University business school that investigated the effects of Covid-19 on Catholic giving trends). But see Oliver B. Pollak, *"Be Just before You're Generous": Tithing and Charitable Contributions in Bankruptcy*, 29 CREIGHTON L. REV. 527, 536–37 (1996) (though writing in the 90s, Pollak recognized that tithing statistics can be difficult to parse, and that even at that time the number of "true titheers," those giving a full 10%, was likely as low as 4–5%).

But perhaps most importantly for this investigation, tithing is unique because it involves the transfer of money, often on a regular basis; unlike many religious practices that have been the subject of legal battles (prayer, head coverings, substance use, animal slaughter, etc.), tithing can impair the property rights of a third party in a way that these other practices cannot. This has naturally led to thorny questions in bankruptcy, where a creditor's alleged entitlement to funds is directly adverse to a debtor's religious conviction to tithe.

II. WHERE TITHING AND BANKRUPTCY COLLIDE

Tithing and other forms of religious donations have come under increased scrutiny due to the form of modern bankruptcy proceedings. Though courts occasionally wrestled with the contours of tithing before the Bankruptcy Reform Act of 1978 ("1978 Act"), often for tax exemption purposes, the 1978 Act created forms of bankruptcy where parties repeatedly had and continue to have economic motive to challenge the religious sincerity of a debtor's tithes.⁵⁴ Of course, donors with giver's remorse or issues of fraud can lead a court to evaluate religious donations outside of bankruptcy, but tithing as a source of controversy has really come to the fore in bankruptcy proceedings.⁵⁵

This Section introduces chapter 13 bankruptcy and its unique ability to create these types of controversies. It then traces tithing as a source of controversy in the bankruptcy system over three distinct periods punctuated by federal legislation: the period after the passage of the modern Bankruptcy Code but prior to the passage of the RFRA, the time after RFRA up to the passage of the RLCDA, and the current era which included the passage of the BAPCPA.

A. The Basics of Chapter 13 Bankruptcy

The modern bankruptcy system is a far cry from its predecessors, an often-maligned ineffective patchwork of federal legislative attempts over the course of American history. While bankruptcy as a formal legal concept predated America by several centuries, it was not a well-developed or uniform area of law, unlike other areas of the common law, and Congress' enactments from the founding until the late nineteenth century were short-lived, unpopular, and ineffective.⁵⁶ The Bankruptcy

⁵⁴ See *Haak v. United States*, 451 F. Supp. 1087, 1092 n.5 (W.D. Mich. 1978) (discussing relevance of past practice and doctrine of a particular church in determining whether an alleged "tithe" was a charitable donation for tax purposes and acknowledging the impossibility of disentangling whether an individual tithed out of genuine belief that it was religiously required or other reasons).

⁵⁵ See, e.g., *Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 76 F.4th 962, 962 (9th Cir. 2023) (evaluating First Amendment arguments by the church related to misrepresentation claims brought by a former member of the Church of Latter-Day Saints unhappy with how tithes were being spent).

⁵⁶ See Vincent L. Leibel, Jr., *The Chandler Act—Its Effect Upon the Law of Bankruptcy*, 9 *FORDHAM L. REV.* 380, 380–83 (1940) (describing the Bankruptcy Act of 1800, Congress' first attempt at bankruptcy

Act of 1898 was the first enduring set of bankruptcy laws and lasted for nearly a century.⁵⁷ However, this regime was not without problems and it was routinely amended, significantly by the Chandler Act of 1938 which codified "Chapter XIII" wage-earner plans.⁵⁸ However, there were still aspects of this early system that were unattractive to debtors and it wasn't until the 1978 Act, and the modern chapter 13 proceeding, that we saw the increased participation of debtors in the system, the formal establishment of bankruptcy courts and judges, and a robust statutory regime and accumulation of case law.⁵⁹ Chapter 13 proceedings thus created the necessary conditions for friction between tithing and bankruptcy law to emerge. Prior to the passage of the 1978 Act, it would have taken a highly idiosyncratic set of facts for tithes to become an issue in insolvency proceedings.⁶⁰ Afterwards, issues arose immediately as to whether a particular debtor should be allowed to tithe during a payment plan, whether to consider tithing as a necessary expense, or whether past tithes by the debtor could be attacked as avoidable transactions.⁶¹

By way of brief summary, chapter 13 bankruptcy allows individuals "with regular income to develop a plan to repay all or part of their debts."⁶² This is done by submitting to the bankruptcy court an accounting of the debtor's income and assets as well as all creditors and claims against the debtor.⁶³ The debtor also submits a list of

legislation, which was unpopular and survived only three years until its repeal. The next attempt came in 1841 with an act that lasted less than two years. The Bankruptcy Act of 1867 survived eleven years but was also the subject of criticism for both its inaccessibility and cost.; *see also The Evolution of U.S. Bankruptcy Law: A Time Line*, FED. JUD. CTR., https://www.rib.uscourts.gov/newhome/docs/the_evolution_of_bankruptcy_law.pdf (last visited Oct. 23, 2024).

⁵⁷ *See* FED. JUD. CTR., *supra* note 56.

⁵⁸ *See id.*

⁵⁹ *See id.* (noting the establishment of bankruptcy judges in 1970, the enlargement of jurisdiction and increased tenure in 1978, and the establishment of the much-used chapter 11 and chapter 13 in their modern form in the Bankruptcy Reform Act of 1978); Joe Lee, *Chapter 13 n.e. Chapter XIII*, 53 AM. BANKR. L.J. 303, 305–07 (1979) (discussing the advantages of the new chapter 13 proceeding. Notably, the predecessor chapter XIII gave narrower stay protection and was unclear as to whether the continued use of encumbered property during proceedings was permitted. Chapter 13 also provided for release from a greater range of debts than its predecessor.).

⁶⁰ *See, e.g.,* Gen. Ass'n of Davidian Seventh Day Adventists, Inc. v. Gen. Ass'n of Davidian Seventh Day Adventists, 410 S.W.2d 256, 258–60 (Tex. Civ. App. 1966) (affirming the lower court's decision to permit the trustee to distribute property of a trust to its contributors). In this case, a group of Davidian Seventh Day Adventists had been put into receivership and a trustee was appointed to liquidate and distribute property that had been put into a trust called the "Second Tithe" fund. *See id.* at 257. The trust had been formed for the benefit of the contributors in their old age and a dispute arose whether the trust should remain intact and in the control of the organization or liquidated with proceeds returned to the contributors. *See id.* at 257–58. Ultimately, the issue was determined without any reference to religious law; application of secular Texas law pertaining to charitable trusts was determinative. *See id.* at 260.

⁶¹ *See, e.g., In re Saunders*, 215 B.R. 800, 806 (Bankr. D. Mass. 1997) (concluding a debtor cannot include tithing as part of the "reasonably necessary" expenses when seeking the protection of chapter 13). *But see In re Navarro*, 83 B.R. 348, 356 (Bankr. E.D. Pa. 1988) (suggesting some level of religious or charitable giving, or spending on religious education, could be seen as necessary expenses for chapter 13 debtors).

⁶² *Chapter 13 – Bankruptcy Basics*, U.S. COURTS, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics> (last visited October 16, 2024).

⁶³ *See id.*

monthly living expenses.⁶⁴ The debtor must then submit a plan for court approval that provides for fixed payments over a course of years to the bankruptcy trustee who then disperses those funds to debtor's creditors; many creditors ultimately receive less than the full value of their claims, but if the debtor can complete their planned payments, most claims will be discharged.⁶⁵

Inherent in chapter 13 proceedings, and bankruptcy proceedings generally, is the fact that most unsecured creditors can expect to be paid only "cents on the dollar" for their claims.⁶⁶ While secured creditors are able to either foreclose on secured property or retain their liens through the proceedings, unsecured creditors have a strong economic incentive to fight the debtor's proposed disposition of funds.⁶⁷ A debtor's plan must allocate all of the debtor's "disposable income" to pay the unsecured creditors over the term of the plan and ensure that unsecured creditors will be at least as well off as they would be under a chapter 7 liquidation.⁶⁸ Thus, what portion of a debtor's income is deemed "disposable" will directly affect how much an unsecured creditor is able to collect on their claim.

Tithing, and other forms of charitable giving, has therefore created a tension between the interests of creditors and the religious exercise of the debtor. Every dollar that goes into the collection plate over the course of a debtor's repayment period is, arguably, a dollar that could or ought to go to the debtor's creditors.

B. Period I: The Modern Bankruptcy Code pre-RFRA

The early days under the modern Bankruptcy Code, though a marked improvement over previous bankruptcy regimes, still came with a number of growing pains.⁶⁹ One such issue was the perceived abuses of the chapter 13 process by debtors

⁶⁴ See *id.* (listing such expenses as "food, clothing, shelter, utilities, taxes, transportation, medicine, etc").

⁶⁵ See *id.* ("Unless the court grants an extension, the debtor must file a repayment plan with the petition or within 14 days after the petition is filed. Fed. R. Bankr. P. 3015. A plan must be submitted for court approval and must provide for payments of fixed amounts to the trustee on a regular basis, typically biweekly or monthly. The trustee then distributes the funds to creditors according to the terms of the plan, which may offer creditors less than full payment on their claims.").

⁶⁶ See *Mission Prod. Holdings, Inc., v. Tempnology, LLC*, 139 U.S. 1652, 1658 (2019) (acknowledging the truism that a "debtor's unsecured creditors . . . in a typical bankruptcy may receive only cents on the dollar"); see also, e.g., Grant McLaughlin, *\$40M Burkhalter Bankruptcy Ends with Pennies on the Dollar for Some*, THE DISPATCH (Dec. 29, 2023) <https://cdispatch.com/news/40m-burkhalter-bankruptcy-ends-with-pennies-on-the-dollar-for-some/> (reporting that after a four-year corporate bankruptcy, unsecured creditors "expecting \$800,000 in collective repayments from [the debtor] will now receive less than 2% of the initially proposed allocation").

⁶⁷ See U.S. COURTS, *supra* note 62 ("There are three types of claims: priority, secured, and unsecured. Priority claims are those granted special status by the bankruptcy law, such as most taxes and the costs of bankruptcy proceeding. (3) Secured claims are those for which the creditor has the right take back certain property (i.e., the collateral) if the debtor does not pay the underlying debt. In contrast to secured claims, unsecured claims are generally those for which the creditor has no special rights to collect against particular property owned by the debtor.").

⁶⁸ See *id.*

⁶⁹ See *Butner v. United States*, 440 U.S. 48, 55 (1979) (deciding that state law should govern issues of property rights if and when the Bankruptcy Code is silent on an issue); see also *N. Pipeline Constr. Co. v.*

to the detriment of creditors; that is, debtors who really were not insolvent were taking advantage of the more easily accessible discharge.⁷⁰ In 1984, Congress passed the Bankruptcy Amendments and Federal Judgeship Act ("BAFJA"), in part, to curb such abuses; it added an "ability-to-pay" test to chapter 13 plans which required the judge to make a finding that the debtor will apply all of his disposable income to plan payments for the term of his plan.⁷¹ "Disposable income" was defined then to be "not reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor."⁷² This standard was open to much interpretation by the courts with hardly any guidance from Congress.⁷³ Almost immediately, bankruptcy courts began finding money intended for religious tithes was best characterized as "disposable income."⁷⁴

In re Navarro, an influential case in these early years, came out of the Eastern District of Pennsylvania and dealt with both the constitutional and statutory issues of tithing in a bankruptcy.⁷⁵ The debtors, a husband and wife, both Seventh-day Adventists, filed for chapter 13 bankruptcy.⁷⁶ Their income was \$1,148.00 a month and they proposed in their initial plan to allocate "\$220.00 monthly for tuition for one child at parochial school, [and] \$260.00 paid as a tithe to the debtor's church"⁷⁷ After hearing on the issues, those amounts were reduced to \$100.00 and \$120.00, respectively.⁷⁸ The wife testified that she believed her obligations to tithe and provide a religious education for her child were "central to her personal beliefs and the tenets

Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (holding that the powers Congress gave bankruptcy judges under the 1978 Act violated Article III of the Constitution); Bruce Edward Kosub & Susan K. Thompson, *The Religious Debtor's Conviction to Tithe As the Price of a Chapter 13 Discharge*, 66 TEX. L. REV. 873, 873–74 (1988) (discussing the enactment of the Bankruptcy Amendments and Federal Judgeship Act (BAFJA) in 1984 intended to, in part, "stop what many perceived to be consumer abuse of the Bankruptcy Code"); Pollak, *supra* note 53, at 536 (recognizing that religious controversy is one of many regarding the Bankruptcy Code). The bankruptcy power of Article 8 has given rise to Supreme Court decisions on the propriety of bankruptcy judges, the effect of the Fifth Amendment Takings Clause, and the applicability of the Seventh Amendment's jury trial guarantee. *Id.*

⁷⁰ See Kosub & Thompson, *supra* note 69, at 873–74.

⁷¹ See *id.*

⁷² *Id.* at 874.

⁷³ See *id.* at 875–76 (explaining that Congress was in a rush to pass the BAFJA and left little in terms of legislative history to determine the intent or policy goals underlying the "ability-to-pay" test).

⁷⁴ See *id.* at 874–75 n.16 (collecting cases from federal courts around the country finding tithes disposable income in the later 1980s).

⁷⁵ See *In re Navarro*, 83 B.R. 348, 351 (Bankr. E.D. Pa. 1988).

⁷⁶ See *id.* at 350–51.

⁷⁷ *Id.* at 350 (explaining this was in addition to several other monthly expenses).

Also included in their schedule of monthly expenses are payments of \$220.00 for utilities, \$400.00 for food, \$150.00 for medical expenses, \$100.00 for recreation, \$260.00 for child care, \$220.00 monthly for tuition for one child at parochial school, \$260.00 paid as a tithe to the debtor's church, and \$85.00 for various miscellaneous expenses including clothing and laundry.

Id.

⁷⁸ See *id.*

of her faith."⁷⁹ The Philadelphia Federal Credit Union, set to receive less than 3% of its \$8,000.00 unsecured claim, objected to the plan, arguing that it could not be confirmed because "it does not commit all of the family's disposable income to payments under the plan."⁸⁰

The debtors made two arguments: (1) "their right to make religious contributions and provide religious education for their children [was] constitutionally protected by the free exercise clause of the first amendment," and (2) the payments were permitted under the statute as "reasonable and necessary for the maintenance of the debtors and their family."⁸¹ On the constitutional issue, the court determined that confirmation of the plan was neither compelled nor prevented by the religion clauses of the First Amendment.⁸² The free exercise clause is not offended when an individual voluntarily submits to a proceeding like this one where pressure is put on the debtor to reorganize their financial obligations; the establishment clause is not offended when Congress has decided on a system that may indirectly benefit a religious institution but does not cause the creditor to directly support the religious institution, similar to the tax benefits available to churches and their donors.⁸³ On the statutory issue, the court found that tithes and parochial school contributions *could* be "expenditures reasonably necessary for maintenance and support" and that in this case they were; additionally, the court took into account that these amounts were not excessive, the debtors were proposing to live a rather austere lifestyle during their plan, and credited the debtor-wife's testimony that she would continue to tithe "irrespective of the decision of this court even if it meant the bankruptcy would fail."⁸⁴

The *Navarro* decision was by no means the authoritative word on the issue and indeed several bankruptcy courts held the alternative, that religious tithes were disposable income, no different from a debtor's proposal to make charitable donations of any kind.⁸⁵ Of course, tithing was not the only subject of litigation; the "ability-to-pay" test incorporated competing concerns about the proper line to draw between clearly excessive and unnecessary expenditures at one end and not forcing the debtor into poverty as a requirement of chapter 13 at the other.⁸⁶ Debtors often propose plans

⁷⁹ *Id.* at 351 (stating Ms. Navarro's testimony also indicated "that she would find a way to continue to do so no matter how the court rules in this matter").

⁸⁰ *Id.* at 350–52.

⁸¹ *Id.* at 351.

⁸² *See id.* at 352.

⁸³ *See id.* at 352–54.

⁸⁴ *Id.* at 357.

⁸⁵ *See* Kosub & Thompson, *supra* note 69, at 884; *see also In re Hudson*, 64 B.R. 73, 75 n.1 (Bankr. N.D. Ohio 1986) (discussing a debtor's submitted monthly expenditures. In criticizing the debtor's allocation of funds to "church," the court notes that "[f]urthermore, this Court does not favor, during the course of its Chapter 13 cases, the contribution of funds to non-profit institutions for the main reason that these contributions are not included in the provisions of Section 1325, particularly Section 1325(b)(1) and (2)."); *In re Reynolds*, 83 B.R. 684, 684–85 (Bankr. W.D. Mo. 1988) (debtor claimed he had a "Constitutional right to make a semi-biblical tithe of \$80.00 per month to the Assembly of God." In evaluating whether such a contribution was "reasonably necessary" the court assumes that only "some nominal amount" would be permitted under the statute and would need to be "below 3% of gross income unless very unusual circumstances are present.").

⁸⁶ *See* Kosub & Thompson, *supra* note 69, at 881.

with particular amounts earmarked for things like rent, car payments, clothing, and recreation; in each case, a creditor might prefer the debtor be more thrifty and put more toward plan payments.⁸⁷ What *Navarro* realized, and other commentators echoed, was that determining whether tithing should be allowed as a necessary expenditure was inevitably going to be a highly fact-sensitive inquiry.⁸⁸

Notably, during this period, the Supreme Court decided *Employment Division v. Smith*,⁸⁹ which held that government action alleged to violate the free exercise clause was not subject to strict scrutiny if it was a neutral law of general applicability.⁹⁰ At the time *Smith* was decided, several bankruptcy courts had weighed in on the issue of tithing with wildly different results.⁹¹ Both debtors and bankruptcy judges were confused about how to treat tithes in chapter 13 and what effect *Smith* might have on that debate.⁹² Two cases explored this issue during the twilight zone between *Smith* and the passage of RFRA and did find *Smith* had affected the analysis.⁹³ Though neither dealt with chapter 13, both were dealing with claims that a provision of the Bankruptcy Code violated their free exercise rights.⁹⁴ In both cases, the bankruptcy courts decided that Bankruptcy Code provisions were valid and neutral laws of general applicability and thus there was no free exercise offense with enforcing the Code as written despite interfering with religious practices.⁹⁵

⁸⁷ See *id.* at 885–86.

⁸⁸ See *id.* at 897–903 (arguing that tithing in chapter 13 is never justified when the amount of tithing puts creditors in a worse position than they would be in a chapter 7 liquidation without respect to the tithe, or when tithes "significantly lower[]" the amount creditors will receive). The authors also suggest that the government has a compelling interest in maximizing reimbursement to creditors such that free exercise burdens on the debtor can be overridden. *Id.* at 902. The authors do recognize that tithing in chapter 13 would further the announced policy goals of the bankruptcy system to provide debtors a "fresh-start." *Id.* at 893.

⁸⁹ 494 U.S. 872, 872 (1990).

⁹⁰ See *id.* at 879 (acknowledging "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'").

⁹¹ See Carol Koenig, *To Tithe or Not to Tithe: The Constitutionality of Tithing in a Chapter 13 Bankruptcy Budget*, 32 SANTA CLARA L. REV. 1231, 1243–46 (1992) (noting that some bankruptcy courts were allowing tithes in chapter 13 on statutory grounds while others were denying them; still others were addressing the constitutional issue, while others were determined to avoid it.) The author, writing in 1992, described "the case law regarding tithing under Chapter 13 is uncertain and confusing for both debtors and bankruptcy judges." *Id.* at 1246.

⁹² See *id.* at 1247–49 (arguing that strict scrutiny survived *Smith* for non-criminal statutes, like the Bankruptcy Code, and that restricting tithes in bankruptcy cannot pass muster under the existing compelling interest standard).

⁹³ See *In re Young*, 152 B.R. 939, 952 (D. Minn. 1993) ("The Supreme Court's decision in *Smith* 'dramatically altered the manner in which we must evaluate free exercise complaints.'"); *In re Lee*, 162 B.R. 31, 42 (Bankr. N.D. Ga. 1993).

⁹⁴ See *In re Young*, 152 B.R. at 944; *In re Lee*, 162 B.R. at 37.

⁹⁵ See *In re Young*, 152 B.R. at 953 ("The Court concludes that section 548 is a neutral statute of general applicability. There is no evidence in the statutory text or otherwise that section 548 was designed to regulate religious beliefs or conduct. Thus, section 548 is presumed to be a neutral law of general applicability."); *In re Lee*, 162 B.R. at 42 ("The Supreme Court's opinion in *Smith*, therefore, appears to have modified the constitutional First Amendment analysis applicable in the instant case. As a result, a constitutional challenge to a determination that tithing is an unreasonable expense, subjecting a debtor to dismissal under § 707(b), is not sustainable. The free exercise clause does not require the Bankruptcy Code to yield to the debtors' desire to tithe. The Supreme Court's analysis in *Smith* provides that a court need not make an exception for a religious

C. Period 2: Fraudulent Conveyances and the passage of the RLCDA

Tithing issues expanded in the lead up to the passage of the RLCDA in 1998. The issue of whether tithing ought to be permitted as a "reasonably necessary" expense still presented occasionally, and courts continued to divide on the issue.⁹⁶ However, even between courts of differing opinions about whether tithing must, must not, or could be permitted, there emerged a recognition that debtors ultimately had implicit control over the matter. For instance, in *In re Andrade*, the court decided that tithing was permitted but not required; yet, in dicta, the court noted that courts will often approve some measure of discretionary spending and the debtor is free to forego recreation to tithe.⁹⁷ In *In re Saunders*, the court found that it could not confirm a plan with tithing over the objection of creditors out of entanglement concerns, but recognized that debtors could structure their plan in a way that included tithing if creditors agreed to it; the court suggested that if a debtor created a five-year plan with tithing and could show creditors they would be better off than a three-year plan without tithing, they would likely get creditor support, thus leveraging the plan's minimum requirements in negotiating support from creditors.⁹⁸ While the legal question of tithing was still open to debate, it practically had matured to a place where debtors and their counsel could anticipate arguments and ideally negotiate a result acceptable to both debtor and creditors.

Fraudulent conveyances became a controversial issue when in 1992, for the first time, a bankruptcy trustee was able to avoid a donation made by debtor-congregants to their church.⁹⁹ In any bankruptcy, the trustee, or certain other empowered parties,

practice when the applicable statute is a valid and neutral law of general applicability. As the *Young* court concluded with respect to § 548, § 707(b) is also a neutral law of general applicability. Nothing suggests that § 707(b) was designed to regulate religious beliefs or conduct.").

⁹⁶ Compare *In re Saunders*, 215 B.R. 800, 806 (Bankr. D. Mass. 1997) (deciding that under the RFRA, allowing tithing in a chapter 13 plan would be unconstitutional because it would require the bankruptcy court to excessively entangle itself in religion), with *In re Andrade*, 213 B.R. 765, 770 (Bankr. E.D. Cal. 1997) (holding tithing is permitted in limited circumstances in chapter 13). The court conducts a broad survey of various bankruptcy courts, recognizing that the case law is uneven, with some courts finding the First Amendment requires permitting tithes, some courts finding that the Code never permits tithings, and others recognizing that it is only permitted in narrow circumstances. *Id.* at 769–70.

⁹⁷ See *In re Andrade*, 213 B.R. at 771 ("When a court does approve some discretionary spending as a reasonably necessary expense, debtors are free to spend that amount of income on recreation, vacation, charity, or anything else they choose. The courts should thus confirm tithing as a necessary expense, but only by virtue of the debtors' willingness to pay for it with their discretionary funds—not by virtue of its charitable or religious nature.").

⁹⁸ See *In re Saunders*, 215 B.R. at 807 n.16 ("While not applicable on the facts of this case, there remains a light at the end of the tunnel for many debtors who wish to combine Chapter 13 and tithing or other charitable giving. 'If a tithing debtor in Chapter 13 were willing to propose a five-year repayment plan with tithing that gave unsecured creditors to same present-value return as a three-year plan *without* tithing, then unsecured creditors should not be able to complain about the tithing. Because Chapter 13 debtors are not required to propose plans longer than three years, the unsecured creditors' baseline entitlement should be measured as what they would receive in a three-year, no-tithing plan.'" (citation omitted).

⁹⁹ See Peter Califano, *A Surprising Defendant in Bankruptcy Avoidance Litigation*, 12 COM. L. BULL. 20, 20 (1997).

are able to bring avoidance actions to unwind certain transactions made by the debtor prior to entering bankruptcy and bring that property back into the estate.¹⁰⁰ Certain transfers can be attacked as "fraudulent conveyances."¹⁰¹ Actual fraud is susceptible to avoidance under the statute, but notably so is constructive fraud; while actual fraud can be difficult to prove (needing actual intent to "hinder, delay, or defraud"), constructive fraud requires only that the transfer took place when the debtor was insolvent and that the debtor "received less than a reasonable equivalent value in exchange for such transfer."¹⁰² This "reasonable equivalent value" was the only matter at issue in *In re Young*.¹⁰³

In *In re Young*, the Youngs, husband and wife, filed a chapter 7 bankruptcy.¹⁰⁴ Notably, in a chapter 7 bankruptcy, colloquially a liquidation bankruptcy, a trustee is appointed and is responsible for administering the estate.¹⁰⁵ Chapter 7 trustees are primarily compensated based on how much money they can bring into the estate to be dispersed to creditors, thus they have an economic incentive to chase down any avoidable transactions, such as fraudulent conveyances.¹⁰⁶ Here, the trustee brought an action to avoid the \$13,450.00 that the Youngs had given to their church in the year prior to filing.¹⁰⁷ Because the debtors were found to be insolvent during that time, the only issue on appeal to the district court was whether the Youngs had received "reasonably equivalent value" for their donations.¹⁰⁸

Whether a particular debtor received reasonably equivalent value is fact-specific and a determination that the bankruptcy judge makes given the circumstances of the case.¹⁰⁹ Often, courts are looking for direct economic benefit but will consider indirect benefits as well; however, the *Young* court determined that such benefits must

¹⁰⁰ See generally 57. Avoidance Powers -- Strong-Arm Clause, *Fraudulent Conveyances*, DEPT. OF JUSTICE, <https://www.justice.gov/jm/civil-resource-manual-57-avoidance-powers-strong-arm-clause-fraudulent-conveyances> (last visited Oct. 12, 2024) (discussing the statutory grounds for the avoidance powers).

¹⁰¹ See 11 U.S.C. § 548 (2018) (providing statutory grounds to avoid transfers made that satisfy the elements of either actual or constructive fraud).

¹⁰² *Id.* § 548(a)(1)(A)–(B)(i).

¹⁰³ 152 B.R. 939, 945 (D. Minn. 1993) ("The parties stipulated that the first three elements were satisfied; the only issue is whether the debtors received 'reasonably equivalent value in exchange for' the contributions.").

¹⁰⁴ *Id.* at 943.

¹⁰⁵ See *Chapter 7 – Bankruptcy Basics*, U.S. COURTS, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics> (last visited Oct. 15, 2024).

¹⁰⁶ See 11 U.S.C. § 326(a) ("In a case under chapter 7 or 11, other than a case under subchapter V of chapter 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25 percent on the first \$5,000 or less, 10 percent on any amount in excess of \$5,000 but not in excess of \$50,000, 5 percent on any amount in excess of \$50,000 but not in excess of \$1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of \$1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.").

¹⁰⁷ See *In re Young*, 148 B.R. 886, 888 (Bankr. D. Minn. 1992); *In re Young*, 152 B.R. at 943 ("[D]ebtors contributed a total of \$13,450 to defendant Crystal Evangelical Free Church. Debtors were insolvent at the time the contributions were made.").

¹⁰⁸ See *In re Young*, 152 B.R. at 945.

¹⁰⁹ See *id.* ("[A] determination of whether the debtor received reasonably equivalent value depends on the facts and circumstances of each case."); *In re Joshua Slocum, Ltd.*, 103 B.R. 610, 618 (Bankr. E.D. Pa.).

be "fairly concrete" and that the value received must be "property" of some form.¹¹⁰ Parting from prior bankruptcy cases that had found religious services and involvement to have "value" as required by the statute,¹¹¹ the bankruptcy court had found that the Youngs had not received any value for their donations and thus the transactions were susceptible to avoidance as fraudulent conveyances.¹¹² The district court affirmed the bankruptcy court's holding for the trustee.¹¹³

In doing so, the district court necessarily wrestled with constitutional objections to the avoidance made by the recipient church.¹¹⁴ The court, applying *Smith*, found that provisions of the Bankruptcy Code were neutral laws of general applicability with only an "incidental effect" on religion, thus rejecting their free exercise claim.¹¹⁵ Alternatively, they held that even if *Smith* did not apply to this case, application of the Bankruptcy Code served a compelling government interest in creating an orderly and fair statutory regime for giving debtors a fresh start as well as treating creditors fairly in the process.¹¹⁶

The district court holding in *In re Young* was eventually reversed in the Eighth Circuit in 1996,¹¹⁷ then vacated by the Supreme Court in a denial of certiorari,¹¹⁸ only to be reinstated a second time in 1998.¹¹⁹ While ultimately a win for tithing debtors, in the years following the 1992 decision, several bankruptcy courts engaged in the same interpretation of the Bankruptcy Code and trustees were successfully avoiding religious tithes on the same arguments from *In re Young*.¹²⁰ This practice was not without its critics as well as its supporters; some scholarship at the time argued that the RFRA ought to apply to these cases and tithes protected from avoidance¹²¹ or that the fraudulent conveyance scheme was never intended to be applied to tithes¹²² while

¹¹⁰ See *In re Young*, 152 B.R. at 945–46.

¹¹¹ See *In re Moses*, 59 B.R. 815, 818 (Bankr. N.D. Ga. 1986); *In re Missionary Baptist Found. of Am.*, 24 B.R. 973, 979 (Bankr. N.D. Tex. 1982).

¹¹² *In re Young*, 152 B.R. at 947–48.

¹¹³ *Id.* at 948.

¹¹⁴ See *id.* at 951–53.

¹¹⁵ See *id.* at 954.

¹¹⁶ See *id.*

¹¹⁷ *United States v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1407 (8th Cir. 1996).

¹¹⁸ *Christians v. Crystal Evangelical Free Church*, 521 U.S. 1114, 1114 (1997).

¹¹⁹ *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854, 856 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998).

¹²⁰ See Califano, *supra* note 99, at 21 (suggesting a trend in 1997 of bankruptcy courts' willingness to avoid tithes. "From a strict reading of the Code's fraudulent conveyance statutes, religiously motivated contributions made to any religious organization are clearly at risk."); Todd J. Zywicki, *Rewrite the Bankruptcy Laws, Not the Scriptures: Protecting a Bankruptcy Debtor's Right to Tithe*, 1998 WIS. L. REV. 1223, 1230 (1998) (noting the increased frequency of trustee attacks on church donations); see also *In re Newman*, 183 B.R. 239, 242–43 (Bankr. D. Kan. 1995) (avoiding tithes debtors had made a year prior to their chapter 7 filing); *In re Hodge*, 200 B.R. 884, 907–08 (Bankr. D. Idaho 1996) (holding that debtor's payments were avoidable).

¹²¹ See Hopkins, *supra* note 3, at 1140 ("RFRA's compelling interest and least restrictive means requirements provide clear grounds for disallowing creditor avoidance of sincere tithing payments.").

¹²² See Zywicki, *supra* note 120, at 1262–64 (arguing that the kick-back problem, where a debtor transfers assets prior to bankruptcy with the intent to recover them later through use of a willing participant in the fraud as a participant, is part of the reason constructive fraud actions are available). Such dangers do not exist with church donations, where an arm's-length transfer of money to a religious entity poses almost no threat of

other scholarship suggested that the government had narrowly tailored the fraudulent conveyance scheme to serve the compelling interests in a uniform bankruptcy system.¹²³

Todd Zywicki suggested that church donations appeared to be targeted in this period in part because the historical stigma attached to suing churches had disappeared by this time.¹²⁴ Trustees viewed these donations as "inviting target[s]" given their motives to generate enough estate funds to pay themselves and creditors.¹²⁵ Furthermore, they may have even been bound by a fiduciary duty to creditors to go after such funds knowing that courts would be willing to avoid the transactions.¹²⁶ This period of "open season on churches" in bankruptcy garnered strong opposition and with RFRA unable to serve as a protector of tithes, new legislation would be needed.¹²⁷

D. Period 3: The Unresolved Issues post-RLCDA

With RFRA's application in flux, religious groups persuaded Congress to pass the RLCDA in 1998.¹²⁸ The Act amended portions of the Bankruptcy Code relating to both the chapter 13 tithing and fraudulent conveyance issues.¹²⁹ Section 1325(b) of the Bankruptcy Code was amended to include a new category of expenditures considered "reasonably necessary" when deciding what would count as disposable

fraudulent kick-back. *Id.* at 1264. Thus, such transactions "fall[] outside the traditional concerns underlying fraudulent conveyance law." *Id.*

¹²³ See Bruce W. Megard, Jr., *Tithing and Fraudulent Transfers in Bankruptcy: Confirming a Trustee's Power to Avoid the Tithes After City of Boerne v. Flores*, 71 AM. BANKR. L.J. 413, 414 (1997) ("[T]his avoiding power retained vitality even under RFRA and that, when the essential elements of a fraudulent transfer are established, its recovery does not impermissibly infringe upon the debtor's religion: the fraudulent transfer statutes do not impose a substantial burden on the debtor's right to practice religion; the government has a compelling interest in avoiding such transfers; and, the fraudulent transfer statutes are narrowly tailored to achieve the compelling governmental interest.").

¹²⁴ See Zywicki, *supra* note 120, at 1230.

¹²⁵ *Id.*

¹²⁶ See *id.* at 1230–31.

¹²⁷ *Id.* at 1230, 1248 (noting that RFRA was not an effective tool as many bankruptcy courts and commentators were ignoring the Supreme Court's *Boerne* decision and continuing to hold RFRA invalid in these cases).

¹²⁸ See *id.* at 1269; John J. Dyer & Gregory Todd Jones, *Judicial Treatment of Charitable Donations in Bankruptcy Before and After the Religious Liberty and Charitable Contribution Protection Act of 1998*, 2 DEPAUL BUS. & COM. L.J. 265, 267 (2004) ("Concerned religious and charitable groups persuaded members of Congress that the *Flores* decision had a negative effect upon a debtor's right to donate money to charitable organizations. Congress quickly responded by passing the Donation Act. The Donation Act amended several provisions of the Bankruptcy Code (including 11 U.S.C. §§ 544, 548, 707, and 1325) in an effort to head off the perceived negative effect that the *Flores* decision would have on a bankrupt debtor's ability to make charitable donations."); see also The Religious Liberty and Charitable Donation Act of 1998, Pub. L. No. 105-183, 112 Stat. 517 (1998).

¹²⁹ See §§ 3–4, 112 Stat. at 517–18. Also notable was a change to section 707 of the Bankruptcy Code, which governs dismissal of a case for abuse of the bankruptcy system. 11 U.S.C. section 707(b)(1) (2018) was amended such that eligible charitable donations could not be considered when determining whether to dismiss or convert a case.

income in a chapter 13 plan; eligible "charitable contribution" up to 15% of the debtor's gross yearly income.¹³⁰ In similar fashion, section 548 of the Bankruptcy Code was amended to make charitable contributions up to 15% of the debtor's gross annual income (and contributions in excess of 15%, if consistent with a debtor's past practice) immune from attack as a constructive fraudulent conveyance.¹³¹ The RLCDA thus addressed the "disturbing trend in bankruptcy" of interfering with religious debtors and their ability to engage in sincere religious tithing practices.¹³²

Immediately, the statutory safe harbors began protecting tithes that had been under attack for years in the bankruptcy system.¹³³ However, the RLCDA was not a total victory for religious donors; some courts continued to apply reasonableness standards to tithes that otherwise met the statutory safe harbor in section 1325, and there were still open questions when dealing with charitable contributions that exceeded 15% or how to treat multiple charitable contributions that exceeded the safe harbor in total.¹³⁴ Though religious debtors hoping to tithe are undoubtedly better off with the passage of the RLCDA, issues still remain.¹³⁵

However, a sea change occurred in 2005 with the passage of the BAPCPA. The primary purpose of the BAPCPA was to make it more difficult to qualify for chapter 7 bankruptcy as an individual debtor.¹³⁶ There was concern from creditors that debtors were now abusing the chapter 7 process and receiving discharges from their debts

¹³⁰ 11 U.S.C. § 1325(b)(2)(A)(ii) (defining disposable income not to include "charitable contributions (that meet the definition of 'charitable contribution' under section 548(d)(3)) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made . . .").

¹³¹ See *id.* § 548(a)(2) ("A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which— (A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or (B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions."); see also *id.* § 544 (expanding the protections of section 548 to any claims brought under state law as well).

¹³² Zywicki, *supra* note 120, at 1284.

¹³³ See Dyer & Jones, *supra* note 128, at 281–83.

¹³⁴ See *id.* at 290–93.

¹³⁵ See Gloria Jean Liddell, Pearson Liddell Jr. & Stephen K. Lacewell, *Charitable Contributions in Bankruptcy: An Empirical Analysis*, 39 AM. BUS. L.J. 99, 102 (2001) ("We note that [the] Charitable Contribution Act may have given churches reason to celebrate, but the war is far from over."); *In re Wade*, 612 B.R. 70, 75 (Bankr. E.D.N.C. 2019) (finding that a debtor's chapter 13 plan included tithes that exceeded the statutory limit and were not made in good faith, evidenced by a lack of giving prior to bankruptcy); *Universal Church v. Geltzer*, 463 F.3d 218, 221 (2d Cir. 2006) (holding that it is proper to aggregate total donations for determining the applicability of the section 1325 safe harbor, but found the district court had erred by not allowing defendant Church to put on a defense by showing consistency of past practice of giving); *Wadsworth v. Word of Life Christian Ctr. (In re McGough)*, 737 F.3d 1268, 1277 (10th Cir. 2013) (holding that if a donation exceeds the 15% cap in the statute, the entire amount is subject to avoidance as a fraudulent conveyance).

¹³⁶ See Arthur Markley & Ernest Liu, *The Effect of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Credit Card Delinquency Rates*, PRINCETON GRISWOLD CTR. FOR ECON. POL'Y STUD. 2 (2020), https://gceps.princeton.edu/wp-content/uploads/2020/10/20jun-JIW_Liu_Markley_Arthur.pdf ("[BAPCPA] overhauled personal bankruptcy procedure in the United States by making it more difficult for individuals to access the generous debt forgiveness provisions of Chapter 7 bankruptcy, instead pushing bankruptcy filers towards Chapter 13.").

when they in fact had the means to pay them, if not in full, at least to a greater degree.¹³⁷ The intent of the BAPCPA was to shunt more filers of means into chapter 13 plans.¹³⁸ While not motivated to help or harm religious debtors particularly, the BAPCPA led to a dramatic drop to the number of consumer bankruptcy filings generally.¹³⁹ While filings did spike again briefly in the wake of the 2008 recession, filings of all kinds have steadily decreased since 2010.¹⁴⁰ Thus, the opportunities for tithing to clash with bankruptcy laws has decreased and the safe harbors provided by the RLCDA dispose of many otherwise controversial issues. However, there are two particular issues still lingering that the remainder of this paper surveys.

1. Student debt dischargeability

Most students know that bankruptcy is no panacea for the crushing liability of student debt.¹⁴¹ Prior to 1976, student loans were treated just like any other unsecured loan; since then, statutory changes have made them all but nondischargeable except in the most extreme circumstances.¹⁴² Congress worried that easy access to a bankruptcy discharge for student loans would lead to the downfall of educational lending.¹⁴³ Specifically, 11 U.S.C. section 523(a)(8) made student loans and other educational obligations exempt from discharge absent a showing of undue hardship on the debtor.¹⁴⁴ In assessing what constitutes "undue hardship," multiple tests emerged but the majority of courts now apply the *Brunner* test.¹⁴⁵ *Brunner* held that to satisfy the undue hardship standard of the statute, debtors needed to satisfy a three-part test:

¹³⁷ See *id.* at 12.

¹³⁸ See *id.* at 3.

¹³⁹ See *id.* at 4 (showing a drop in chapter 7 filings from 1.5 million in 2005 to under 500,000 in 2006, with a small drop in the number of chapter 13 filings as well).

¹⁴⁰ See *Bankruptcy Statistics Data Visualizations*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/analysis-reports/bankruptcy-filings-statistics/bankruptcy-statistics-data> (last visited Oct. 14, 2024).

¹⁴¹ See Steven W. Sather, *Dischargeability of Student Loans in Bankruptcy*, AM. BANKR. INST. (2014), <https://www.abi.org/feed-item/dischargeability-of-student-loans-in-bankruptcy>.

¹⁴² See *id.*

¹⁴³ See Matthew S. Farina, *Schoolbooks and Shackles: The Undue Hardship Standard and Treatment of Student Debt at Bankruptcy*, 62 B.C. L. REV. 1621, 1632 (2021) (Congress acted "to protect the student loan program from financial ruin and to prevent opportunistic student debtors from taking advantage of bankruptcy proceedings.").

¹⁴⁴ See 11 U.S.C. § 523(a)(8) (2018) (stipulating that no discharge is available "unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual . . .").

¹⁴⁵ See Farina, *supra* note 143, at 1621 ("Thus, courts developed a variety of tests for undue hardship, most notably the *Johnson*, *Bryant*, *Brunner*, and *Totality* tests. The *Brunner* test, which the majority of bankruptcy courts apply, imposes an extremely demanding burden on debtors to show undue hardship.").

1) that the debtor cannot, based on current income and expenses, maintain a 'minimal' standard of living for himself or herself and his or her dependents if forced to repay the loans, 2) that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan, and 3) that the debtor has made good faith efforts to repay the loans.¹⁴⁶

While the standard has been criticized for being overly harsh and for requiring the court to dig into the debtor's past (perhaps contravening the "fresh start" policy of bankruptcy), "the *Brunner* test is unquestionably popular and is the current law in the majority of circuits."¹⁴⁷

In order to satisfy the first prong of *Brunner*, the debtor must show an inability to pay the loan while maintaining a minimal standard of living.¹⁴⁸ This requires a tabulation and showing similar in kind to the requirements of section 1325.¹⁴⁹ A debtor will often submit their projected expenses and seek to persuade the court that having to pay the student loans would not be feasible; such a determination is often fraught, with the court having to evaluate the fuzzy lines between "poverty" and mere financial "difficulty" for the debtor.¹⁵⁰ It is important to note that debtors are often given wiggle room in their plans, with allocations made for many things like "internet," "cable television," or other things arguable not necessary but included in a basic standard of living.¹⁵¹ Thus, when attempting to show an "undue burden," it behooves the debtor to compile as many necessary expenditures as possible to show that there are not enough funds to repay the loan. Thus, tithes can become the subject of scrutiny when their consideration as an expense may be the proverbial straw that breaks the back of the student loan.

Courts have gone both ways on this issue in recent years. In *In re McLaney*, chapter 7 debtors argued that their student loans should be discharged because out of their \$2,253.19 monthly income, the bankruptcy court had allowed \$2,110.00 in monthly expenses.¹⁵² Of that amount, \$220.00 was earmarked as a monthly "religious tithe."¹⁵³ The bankruptcy court held for the debtors, deciding that the RLCDA should

¹⁴⁶ *In re Brunner*, 46 B.R. 752, 756 (S.D.N.Y. 1985).

¹⁴⁷ Farina, *supra* note 143, at 1643.

¹⁴⁸ *See id.* at 1641.

¹⁴⁹ *See In re McLaney*, 375 B.R. 666, 680 (M.D. Ala. 2007).

¹⁵⁰ *Id.* at 674 ("A court making this determination: 'must apply its common sense knowledge gained from ordinary observations in daily life and general experience to determine whether [a debtor's] expenses are reasonable and necessary. If [the debtor] expends funds for items not necessary for the maintenance of a minimal standard of living or if [the debtor] expends too much for an item that is needed to maintain that minimal standard, then it is unlikely that, given [the debtor's] present circumstance, the first prong of the *Brunner* test is satisfied where such overpayment would permit [the debtor] to cover the expense of her student loan debt without sacrificing a minimal standard of living.'").

¹⁵¹ *Id.* at 671, 674.

¹⁵² *Id.* at 670–72 (notably, the debtors both had chronic medical conditions, a 15-year-old dependent child, and demonstrated a committed history of tithing to their church).

¹⁵³ *Id.* at 672.

apply to the analysis under section 523(a)(8) despite the Act making no change to the section.¹⁵⁴ It believed that the changes made to other portions of the Bankruptcy Code suggested that a similar reading was appropriate in other places not explicitly changed.¹⁵⁵ The district court disagreed, acknowledging that courts have taken divergent views on the applicability of the RLCDA to section 523(a)(8), deciding ultimately that the RLCDA does not apply to section 523(a)(8) but that the tithing here was nevertheless reasonable and thus affirmed the bankruptcy court on other grounds.¹⁵⁶

Similarly, in *In re McCafferty*, the Bankruptcy Court for the Eastern District of Washington found that tithes and charitable giving were reasonable expenses in applying the first prong of the *Brunner* test.¹⁵⁷ And again in *In re Lopes*, the Colorado Bankruptcy Court was quite forceful in its allowance of tithing as a reasonable expense when conducting a *Brunner* inquiry, suggesting that "[a]s to Debtor's tithing expense, again, it is not this Court's role to 'impose [its] own values on a debtor's life choices.'"¹⁵⁸ However, in *In re Lozada*, the Bankruptcy Court for the Southern District of New York found differently.¹⁵⁹ There, the debtor was sixty-seven and had a student loan balance of over \$300,000.00.¹⁶⁰ The debtor had consistently tithed and refused to reduce his tithing amount going forward.¹⁶¹ Despite the fact that the debtor and his wife were both retired, and their monthly income came from Social Security benefits and a pension, the court found that their allocated expenses for "rent, food, transportation, entertainment, and charitable donations [were] excessive under the circumstances."¹⁶²

2. Religious school tuition

A second issue that has arisen in this area is determining whether the RLCDA safe harbors should apply to religious school tuition payments. Private school tuition

¹⁵⁴ See *id.* at 679.

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* at 682–83 (important to the court's decision were clear omissions and underestimations of other costs, like food, that suggested the debtors were adopting austerity measures to make the tithing possible).

¹⁵⁷ See *In re McCafferty*, No. 14-04545-FPC7, 2015 WL 6445185, at *19 (Bankr. E.D. Wash. Oct. 23, 2015) (holding, ultimately, that a discharge was not warranted because of prong three; the debtor had not made good faith efforts to pay the debt prior to filing for bankruptcy).

¹⁵⁸ *In re Lopes*, No. 15-13272 KHT, 2018 WL 11421925, at *41 (Bankr. D. Colo. June 28, 2018) (here, as in *McLaney*, debtor was quite sympathetic, being an older individual with a grandchild as a dependent and testifying that she only buys clothes for herself and her grandson at the thrift store).

¹⁵⁹ See *In re Lozada*, 594 B.R. 212, 229 (Bankr. S.D.N.Y. 2018) (holding the debtor had "failed to carry his burden with respect to each prong of the *Brunner* test" and denying the request for a discharge).

¹⁶⁰ See *id.* at 217 ("As of July 24, 2018, the outstanding balance of the ECMC Loan, including principal, interest, fees, and costs, was approximately \$337,980.04. In addition, the ECMC Loan accrues interest at a rate of 8.25% per annum, or \$71.63 per diem.").

¹⁶¹ See *id.* at 218.

¹⁶² *Id.* at 225 (highlighting that debtor here had several expenses that were under scrutiny; he had recently moved to an apartment with significantly higher rent and claimed higher expenses for donations and food to account for his desire to give money gratuitously to his children and to dine out from time to time).

expenses are an often-litigated issue in consumer bankruptcies that can arise in different postures.¹⁶³ Religious schools aside, debtors will occasionally have a private school preference for their children and argue that such an expenditure ought to be counted among those that are necessary.¹⁶⁴ Indeed, money spent on a private school, especially in the face of a failing local public school, seems a more defensible expenditure than most other recreational expenses debtors claim.

An early case dealing with parochial school tuition was *In re Grawey*, where debtor was seeking a discharge of her student loans.¹⁶⁵ Debtor was a single mother to four children and had little success in collecting child support payments from her former spouse.¹⁶⁶ She was able to live rent-free through the charity of a friend, had all second-hand furniture, drove an old used car, and forewent health and dental insurance all to be able to make the monthly payments necessary to send her two youngest children to a parochial high school.¹⁶⁷ She filed a chapter 7 bankruptcy when her student loan servicers secured a judgment against her and began garnishing her tax refunds.¹⁶⁸ The loan servicers argued that she should not be permitted to spend the \$277.00 a month for parochial school, but should be bound to put that money toward her student debt.¹⁶⁹ The court, noting debtor's long history of sending her children to parochial school, her willingness to "cut her expenses to the bone," and the sacrifices she has made to afford the tuition, held that the tuition was a reasonable and necessary expense.¹⁷⁰

In *In re Knight*, the bankruptcy court evaluated a constructive fraudulent conveyance action seeking to claw back funds the debtor had paid for college tuition on behalf of her adult son.¹⁷¹ The court found that the debtor had no legal duty to pay for her son's education and did not herself receive any reasonably equivalent value and thus the transaction was avoidable.¹⁷² While religion was not implicated in the case, the court opined that the result of this case might be bad policy; that clawing back tuition payments made on behalf of a debtor's child may not be what Congress

¹⁶³ See *In re Golematz*, No. 11-52238, 2012 WL 3583154, at *3 (Bankr. E.D. Mich. Aug. 17, 2012) (deciding whether school tuition was a necessary expense in determining whether to dismiss a chapter 7 case under section 707(B)(1)); see also *Watson v. Boyajian (In re Watson)*, 403 F.3d 1, 2 (1st Cir. 2005) (deciding whether parochial school tuition should be considered a reasonably necessary cost when confirming a chapter 13 payment plan); *In re Grawey*, No. 00-83643, 2001 WL 34076376, at *3 (Bankr. C.D. Ill. Oct. 11, 2001) (deciding whether parochial school expenses should be considered in applying the *Brunner* test to determine dischargeability of a student loan); *In re Knight*, No. 15-21646, 2017 WL 4410455, at *4 (Bankr. D. Conn. Sep. 29, 2017) (trustee attempting to recover college tuition payments made by the debtor parent on behalf of a child as a constructive fraudulent conveyance).

¹⁶⁴ See cases cited *supra* note 163.

¹⁶⁵ *In re Grawey*, 2001 WL 34076376, at *1.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at *2.

¹⁶⁹ See *id.* at *3.

¹⁷⁰ *Id.* at *2-3.

¹⁷¹ See *In re Knight*, No. 15-21646, 2017 WL 4410455, at *3-5 (Bankr. D. Conn. Sept. 29, 2017).

¹⁷² See *id.* at *5, 7.

had in mind when providing the trustee with avoidance powers.¹⁷³ Nevertheless, that is the statutory result, and if Congress wishes to change the outcome, just as they did with charitable and religious donations with the RLCDA, they are the ones to make the change.¹⁷⁴

In *In re Watson*, the debtors wished to include Catholic school tuition as an expense in their chapter 13 plan.¹⁷⁵ Debtors were "devout Catholics, the[ir] children ha[d] always attended parochial school, and the tuition [was] less than fifteen percent (15%) of their gross annual income."¹⁷⁶ Debtors and the trustee disputed whether the tuition fell within the RLCDA safe harbor.¹⁷⁷ Notably, debtors did not argue that their children had any particular need to attend a private school, rather their desire was purely religious; nor had debtors taken any steps to reduce spending in other areas to compensate for the tuition, indicia in other cases that private school tuition expenses were proposed in good faith.¹⁷⁸ The court held that tuition was clearly outside the scope of the charitable donation exception of section 1325(b)(2)(A) and denied confirmation of the plan.¹⁷⁹

In many cases, though, bankruptcy courts are willing to confirm a plan that includes religious school tuition, though it depends on the circumstances.¹⁸⁰ But that determination often turns on the sincerity and actions of the debtor, rather than strict adherence to any statutory text.¹⁸¹ Bankruptcy courts are often very close to the case and make findings related to past practices, willingness to cut expenses in other areas, or special circumstances militating the need for private school.¹⁸² Though courts are unwilling to see religious school tuition as a *per se* charitable donation, they are often

¹⁷³ See *id.* at *4.

¹⁷⁴ See *id.*; see also *Chorchos v. Catholic Univ. of Am.*, No. 3:16-CV-1964, 2018 WL 3421318, at *3 (D. Conn. July 13, 2018) (finding that college tuition paid to a Catholic university was not protected by the RLCDA, debtors had not received any "value" as dictated by the statute, and thus the transfer was avoidable).

¹⁷⁵ See *In re Watson*, 299 B.R. 56, 57 (Bankr. D.R.I. 2003).

¹⁷⁶ *Id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *id.* at 58.

¹⁷⁹ See *id.* at 59–60. Notably, the holding was upheld by the BAP and the First Circuit. See *Watson v. Boyajian (In re Watson)*, 403 F.3d 1, 3, 8 (1st Cir. 2005). In affirming the bankruptcy court ruling, the First Circuit did not address the debtor's argument that RFRA should apply, and that denying confirmation was a burden on religion. *Id.* at 6–7. However, because that argument was not raised in the lower court, the Circuit found debtor had waived the argument. *Id.*

¹⁸⁰ See *In re Urquhart*, No. 09-71058, 2009 WL 3785573, at *6 (Bankr. C.D. Ill. Nov. 12, 2009) (overruling trustee's objection that parochial school tuition was not necessary both because the local schools were failing and the family had a strong religious conviction); *In re Cleary*, 357 B.R. 369, 374 (Bankr. D.S.C. 2006) (finding parochial school tuition a necessary expense, citing the family's long history of attending parochial school and the sacrifices the family made to allocate the funds in their budget).

¹⁸¹ See *In re Urquhart*, 2009 WL 3785573, at *5 (finding it is "especially relevant and persuasive that the Debtors, knowing their budgetary constraints, have made it a conscious practice to otherwise live well beneath their means in order to budget for the parochial school tuition expenses"); *Cleary* 357 B.R. at 373 (explaining "Congress has set forth the public policy that private school tuition can be a reasonable and necessary expense").

¹⁸² See *In re Cleary*, 357 B.R. at 374.

receptive to arguments about the necessity of such expenditure given the right circumstances.¹⁸³

Though such a controversy has yet to occur, the religious school tuition issue may cause future issues for Jewish debtors in particular or other adherents who have both a strong religious imperative to tithe and to provide religious education to their children.¹⁸⁴ While most religions would not consider paying tuition to any school a "tithe," there appears to be some "play in the joints" when considering financial difficulties and taking into account the voluntary nature of tithing for most people.¹⁸⁵ It is not uncommon for religious tithing practice and legal principles to inform and guide the development of each other; this is certainly the case with tax exemptions and what qualifies as an appropriate destination for tithe money.¹⁸⁶ Thus, notions of tithing obligations may inform a religious conviction to pay religious school tuition and present novel questions of RLCDA and RFRA applicability to such expenditures in consumer bankruptcies.

CONCLUSION

Tithing is one of the oldest religious practices and sincerely held by a great number of Americans of various religions.¹⁸⁷ Modern bankruptcy laws have a unique way of grinding up against this practice when dealing with the disposition of a debtor's funds intended for religious purposes.¹⁸⁸ Statutory enactments have, over the years, proven to be a boon to debtors who wish to tithe before and during a bankruptcy proceeding but their effectiveness has at times been wanting. For now, it appears that

¹⁸³ See *In re Urquhart*, 2009 WL 3785573, at *5 (determining that "any of [the] facts alone may not have been sufficient to warrant a finding that the expense was reasonably necessary but that, taken as a whole, the facts led to the conclusion that the monthly tuition payments were reasonably necessary").

¹⁸⁴ See Itamar Eichner, *How Much Does it Cost to Study at a Jewish School in the United States?*, YNET NEWS (July 16, 2023, 2:58 PM), <https://www.ynetnews.com/article/bjfwxs119h> (relaying the average tuition for Jewish schools in the United States is between \$18,000.00 and \$25,000.00); Rav Baruch Fried, *Ma'aser for Tuition*, BAIS HAVAAD L'INYONEI MISHPAT, <https://baishavaad.org/maaser-for-tuition/> (last visited Oct. 8, 2024) (discussing where money set aside for *ma'aser* can be used for religious school tuition. The general consensus has been no except in circumstances where financial difficulties leave no option); Ed Condon, *Is Tithing Just a Tax?*, CATHOLIC ANSWERS FOCUS (April 12, 2021), <https://www.catholic.com/audio/caf/is-tithing-just-a-tax> (discussing the question "What are the church's teachings on tithing, and does Catholic education tuition count towards tithing?" Ultimately, the speakers discuss that it doesn't fall into a classical understanding of tithing but recognize that people may not have the financial ability to give more and the importance of supporting Catholic schools); see also CHABAD.ORG, *supra* note 7; Wesley, *supra* note 20.

¹⁸⁵ See Condon, *supra* note 184.

¹⁸⁶ See generally Adam S. Chodorow, *Maaser Kesafim and the Development of Tax Law*, 8 FLA. TAX REV. 155, 155–56 (2007) (analyzing *maaser kesafim*, a tithing practice in many Orthodox Jewish communities, which functions similarly to an income tax, prompting complex questions about the interrelationship between religious and federal tax jurisprudence).

¹⁸⁷ See BRITANNICA, *supra* note 1.

¹⁸⁸ See Theresa J. Pulley Radwan, *Sword or Shield: Use of Tithing to Establish Nondischargeability of Debt Following Enactment of the Religious Liberties and Charitable Donation Protection Act*, 19 AM. BANKR. INST. L. REV. 471, 471 (2011) ("The balance between generosity to churches and charitable organizations and payment to creditors plagues many aspects of bankruptcy law.").

pre-petition tithes are well-protected from attack as fraudulent conveyances and a debtor is likely able to tithe during their chapter 13 plan so long as they stay within the safe harbor.¹⁸⁹

I want to note here three areas that still have unresolved questions: (1) the RLCDA's application to the first prong of the *Brunner* test, (2) the policy concerns in allowing the claw back of religious tuition, and (3) the ongoing application of RFRA to claims where the RLCDA does not apply.

First, the cases suggest that courts are not yet settled on how exactly the RLCDA's language in section 548 and section 1325 should affect other sections of the Bankruptcy Code with similar inquiries.¹⁹⁰ Notably, tithes, as they exist in the context of fraudulent conveyances and chapter 13 confirmation, are quite different in implication than in other areas of the Bankruptcy Code. The RLCDA specifically targeted areas where the categorization of a tithe was outcome determinative whether the money would go to a religious institution or to the estate/creditors. When considering tithes in the context of *Brunner* and the discharge of a student loan, the debtor's ability to tithe is not necessarily at issue; rather, whether the tithe can be counted amongst the debtor's necessary expenses will determine only whether the student loan will be discharged or not.¹⁹¹ Arguably, this is less of a religious burden than the circumstances the RLCDA addressed, and thus courts are justified in not applying any sort of safe harbor in such circumstances and instead evaluating such claims on a case-by-case basis.

Secondly, the religious tuition cases highlight a particular policy concern and a potentially problematic undercurrent in the system. Just as the *In re Knight* court suggested, if Congress wishes to, it could create a safe harbor, similar to the RLCDA, for religious tuition or tuition generally if it feels trustees have become too temerarious in their attempts to claw back such funds.¹⁹² However, the text of the RLCDA exception is tied directly to certain tax-exempt qualifying entities.¹⁹³ Thus, the category of charities is one that can grow to accommodate certain religious practice; indeed, in the tax world, some have advocated tax-deductible status for parochial school tuition, especially amongst religionists that rely heavily on religious schooling as an integral part of their faith.¹⁹⁴ This type of transaction is also particularly susceptible to the kick-back issue noted by Zywicki; the line between "tuition" and "donation" is often blurred in the context of churches and small private

¹⁸⁹ See *id.* at 478–80; see also 11 U.S.C. § 548(a)(2) (2018).

¹⁹⁰ See, e.g., *In re McLaney*, 375 B.R. 666, 678–80 (M.D. Ala. 2007); *In re McCafferty*, No. 14-04545-FPC7, 2015 WL 6445185, at *5–6 (Bankr. E.D. Wash. Oct. 23, 2015); *In re Lozada*, 594 B.R. 212, 223–24 (Bankr. S.D.N.Y. 2018).

¹⁹¹ See, e.g., *In re McLaney*, 375 B.R. at 682–83; *In re McCafferty*, 2015 WL 6445185, at *6–7; *In re Lozada*, 594 B.R. at 224–25; *In re Lopes*, No. 15-13272 KHT, 2018 WL 11421925, at *15 (Bankr. D. Colo. June 28, 2018).

¹⁹² See *In re Knight*, No. 15-21646, 2017 WL 4410455, at *4 (Bankr. D. Conn. Sept. 29, 2017).

¹⁹³ See 11 U.S.C. § 548(d)(4).

¹⁹⁴ See Meir Katz, *The Economics of Section 170: A Case for the Charitable Deduction of Parochial School Tuition*, 12 RUTGERS J.L. & RELIGION 224, 225 (2011).

schools that may have "suggested donations" or may be willing to continue taking a debtor's child as a student on a reduced cost basis or for free, in some circumstances, when a parent cannot in good faith make tuition payments.¹⁹⁵ Thus, it seems proper that bankruptcy courts should continue to play a role, supervising tuition cases and making determinations about the good faith nature and necessity of such payments when the issue arises.

Thirdly, RFRA has had little impact on recent litigation in this area. The cases either conspicuously avoid the issue or cryptically refer to it without addressing the arguments head on.¹⁹⁶ While most of the time the RLCDA is applicable on its face, litigants ought to be raising RFRA claims as well in the alternative or they risk waiving it.¹⁹⁷ This is particularly significant because the RLCDA contains a savings clause, section 6, which reads, "[n]othing in the amendments made by this Act is intended to limit the applicability of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2002bb et seq.)."¹⁹⁸ There are clearly cases that present in this area where otherwise meritorious RFRA arguments were waived or ignored on the assumption that the plain text of the Bankruptcy Code, given the RLCDA amendments, would prevail.¹⁹⁹

To conclude, issues of tithing in bankruptcy present a unique environment where a debtor's religious beliefs come up against fair and equitable treatment of creditors and religious institutions. While these issues are weighty to the parties involved, it seems unlikely that there will ever be uniformity across the bankruptcy courts, perhaps for the better. Considering that consumer bankruptcies often involve small dollar amounts and creditors can realistically expect to only be paid a fraction of what they are owed, the economic incentive to appeal these cases is mostly absent. Add to this the falling number of consumer bankruptcies since the passage of the BAPCPA and the decreasing levels of tithing in America, the opportunities for this issue to come before the appellate courts are significantly decreased.²⁰⁰

Additionally, the facts of these cases showcase how determinative the sincerity and past actions of the debtor can be; a willingness to take austerity measures in one's life, a track record of religious participation, or good-faith efforts to pay creditors often dictate outcomes, not whether a dollar amount falls on one side of the statutory line or the other.²⁰¹ Thus, the engagement of the factfinder is likely more important to reaching equitable results than a more developed regulatory scheme. Lastly,

¹⁹⁵ See Zywicki, *supra* note 120, at 1263–64.

¹⁹⁶ See *In re Nichols*, No. TDC-14-0625, 2014 WL 4094340, at *5 (D. Md. Aug. 15, 2014) (denying an interlocutory appeal on the issue of RFRA applicability to a fraudulent conveyances action against a church to recover donations); see also *Wadsworth v. Word of Life Christian Ctr. (In re McGough)*, 737 F.3d 1268, 1277 n.8 (10th Cir. 2013) (noting the court would not address the RFRA argument raised by amicus that avoiding a tithe in whole that exceeded the 15% cap would substantially burden religion).

¹⁹⁷ See *Watson v. Boyajian (In re Watson)*, 403 F.3d 1, 3 n.1 (1st Cir. 2005).

¹⁹⁸ Religious Liberty and Charitable Donation Act of 1998, Pub L. No. 105-183, 112 Stat. 517–18 (1998).

¹⁹⁹ See *In re Watson*, 403 F.3d at 6–7.

²⁰⁰ See Markley & Liu, *supra* note 136.

²⁰¹ See, e.g., *In re Wade*, 612 B.R. 70, 73–76 (Bankr. E.D.N.C. 2019).

debtors and their counsel are often far more nimble than Congress and will react to court holdings and simply change negotiation tactics or pleadings to get the proper result. While cases may suggest a particular outcome, the ability to negotiate a slightly better chapter 13 plan for a creditor²⁰² or going directly to a particular charitable entity with a proposal²⁰³ may fare better than an adversary proceeding in court. Thus, these issues are not likely to be the subject of high court opinions and perhaps statutory change is not needed to deal with the remaining wrinkles in the current system. Regardless, it is surely a place where parties encounter difficult questions and where religious conviction, equitable outcomes, and the fair treatment of all parties enter into the calculus, and courts continue to make decisions that greatly impact not just the disposition of an estate, but also a debtor's ability to adhere to religious convictions in the process.

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²⁰² See *In re Saunders*, 215 B.R. 800, 806 n.16 (discussing a debtor's ability to bargain with creditors in the creation of their plan).

²⁰³ See Eric Wallerstein, *FTX Seeks to Recoup Sam Bankman-Fried's Charitable Donations*, WALL ST. J. (Jan. 7, 2023), https://www.wsj.com/articles/ftx-seeks-to-recoup-sam-bankman-frieds-charitable-donations-11673049354?mod=Searchresults_pos1&page=1 (discussing the trustee's efforts to solicit voluntary returns of funds given to charities on the grounds that money reclaimed from the charities was money that should have gone to individual creditors who had been defrauded).