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## NOTE: RELIGIOUS LIBERTY AND CHARITABLE DONATION ACT OF 1998: PUTTING THE FEAR OF GOD INTO BANKRUPTCY CREDITORS

On June 19, 1998, President Clinton signed into law the Religious Liberty and Charitable Donation Protection Act of 1998 [1] (the "Religious Liberty Act"). The Religious Liberty Act allows debtors to donate up to 15% of their gross income to charitable organizations and prevents bankruptcy trustees from including that money as part of the bankruptcy estate. [2] Prior to the Religious Liberty Act, [3] the Bankruptcy Code (the "Code") allowed the bankruptcy trustee, in certain situations, to reach back and take money that a debtor had donated to his or her place of worship or charity prior to filing bankruptcy. [4] Although most courts felt sympathetic toward the places of worship or charities, they agreed correctly with the trustees that these charitable donations constituted constructive fraudulent transfers under section 548 of the Code, or under the comparable state provisions pursuant to section 544 of the Code. [5]

Following these court decisions, charitable organizations and religious groups urged Congress to amend the Code to validate such charitable gifts so they would not be deemed fraudulent transfers. [6] As a result, Congress enacted the Religious Liberty Act, [7] which severely curtails a trustee's right to recover transfers of property that previously violated the fraudulent transfer provisions of the Code. [8] These transfers involve donations or tithes [9] to religious or other charitable organizations. [10] This legislation applies to debtors who file under either chapter 7 [11] or 13 [12] of the Code. [13] By limiting the power of the trustee to invalidate charitable donations, this legislation bolsters the constitutional freedoms found in the free exercise provisions of the First Amendment. [14]

The purpose of this Note is to analyze the provisions of the newly passed legislation, including its impact on creditors' rights and the bankruptcy community, specifically commenting on possible areas of abuse and whether the legislation will be effective. Although the Religious Liberty Act affects debtors who file under either chapter 7 or chapter 13 of the Code, this Note will focus on the impact that the Religious Liberty Act has had on sections 544 and 548 of the Code. The Note will not deal with the issue of "disposable income" defined in chapter 13, since various cases and law review articles have addressed this issue and whether or not a debtor should be allowed to contribute to charitable organizations while getting the protection of the Code. [15] Part I explains the fraudulent transfer protections within the Code. Part II analyzes the conflict between freedom of religious exercise and the avoidance powers of the Code before the enactment of the Religious Liberty Act. Part III examines the role that prior case law and the Religious Freedom Restoration Act had on the enactment of the Religious Liberty Act. Part IV critiques the provisions of the Religious Liberty Act that allow debtors to contribute 15% of their gross income to religious organizations and/or charities, discusses possible areas of abuse and provides alternative solutions to the problems. The last section of this Note, Part V, concludes that the Religious Liberty Act is overbroad and that the 15% threshold under the Religious Liberty Act is excessive.

### I. Fraudulent Transfer Protections Within the Bankruptcy Code

The current bankruptcy scheme, rooted in the United States Constitution, [16] provides important individual relief and has strong public policy implications. The important individual relief a debtor receives is referred to as a "fresh start" policy. [17] The social policy implications are most evident in the goal to establish uniform laws to ensure the orderly distribution of a debtor's assets to its creditors. [18] These are often referred to in the

bankruptcy community as the dual goals of bankruptcy. [19] Notably, this protection of the interests of creditors primarily involves guaranteeing that the assets owned by the debtor remain within the bankruptcy estate. [20]

In furtherance of this particular goal, trustees are authorized by sections 544 [21] and 548 of the Code (the "avoidance powers") [22] to "take back" into the bankruptcy estate assets which were previously conveyed by the debtor. [23] Under section 548, a trustee may void certain transfers of property [24] made by the debtor within one year of the filing of a petition in bankruptcy. [25] Similarly, under section 544, a trustee may void certain transfers of property made by the debtor for the allotted period of time applicable under state law. [26]

In bankruptcy, the problem of fraudulent transfers is complicated further by charitable donations to religious organizations, which are protected under the free exercise clause of the First Amendment of the Constitution. [27] The First Amendment states that Congress "shall make no law ... prohibiting the free exercise of religion." [28] The specific conflict arises when trustees use the avoidance powers granted to them under the Code to retrieve amounts that the debtor donated to his/her church. This arguably violates the First Amendment because the debtor is not allowed to express his/her religious beliefs through donations to his/her church. [29] Trustees in bankruptcy often use the reach back provisions [30] of sections 544(b) [31] and 548(a)(2) [32] to force charities to return donations they received, and perhaps spent, in furtherance of charitable and religious purposes. [33] Essentially, it is argued, the bankruptcy powers conflict with the free exercise clause of the First Amendment when the trustee voids charitable donations. [34]

Under section 548, in order to recover such donations, the trustees must establish that the debtor:

> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or
>
> (iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured. [35]

The cases that analyzed section 548 interpreted this provision using a two component inquiry: (1) whether the transferor actually received reasonably equivalent value for the donation; [36] and (2) if such value constituted consideration in exchange for the donation. [37] Although some courts required an actual economic benefit [38] to satisfy the reasonably equivalent requirement, many recent decisions allow indirect economic benefits to qualify. [39] In other words, the benefit received by the petitioner in bankruptcy does not have to be money or like consideration, but can be merely some sort of identifiable benefit, [40] even if spiritual in nature.

Despite this broad definition of what constitutes reasonably equivalent value, these same courts concluded that there is no obligation on the part of the charity to provide a direct benefit or service in exchange for the donation. [41] Essentially, the courts found that any economic benefit received by a donor from a church is independent of, and unrelated to, such donation. As a result of this failure to find an "exchange," trustees usually were able to satisfy the Code's requirements of a "fraudulent transfer" in the case of a charitable donation, thereby allowing the trustees to reach back and place the assets into the bankruptcy estate. [42]

## II. Conflict Between Freedom of Religious Exercise and the Avoidance Powers of the Code Prior to Enactment of the Religious Liberty Act

A primary reason for the enactment of the Religious Liberty Act was to alleviate the conflict between the First Amendment freedom to exercise religious beliefs and the reach back provisions of the Code. Moreover, the

analysis of this constitutional debate was confused further, by conflicting case law and recent legislative attempts to support the religious rights of individuals.

*Christians v. Crystal Evangelical Free Church (In re Young)* [43] is the landmark case that led Congress to enact the Religious Liberty and Charitable Donation Protection Act of 1998. In *Christians,* the Eighth Circuit held that a bankruptcy trustee may not recover church donations even though they are fraudulent conveyances because to do so would violate the Religious Freedom Restoration Act (RFRA), [44] discussed infra, Part III.

In *Christians,* the debtors filed for straight liquidation under chapter 7 of the Code. [45] During the year prior to their filing, the debtors, who were active church−goers, voluntarily contributed $13,450 to their church. [46] The trustee in bankruptcy filed an adversary proceeding against the church, [47] arguing that the contributions were fraudulent conveyances under section 548 (a)(2)(A) of the Code. [48] The bankruptcy judge granted the trustee's motion, holding that the contributions were voidable under section 548 because the debtors did not receive "reasonably equivalent value" in exchange for their contributions. [49] The bankruptcy judge also concluded that "value referred solely to economic value, that is, property in a physical or material sense, and that religious services, theological programs and access to the church's facilities did not meet this economic definition of value." [50] The circuit court discussed the bankruptcy court's analysis stating:

> even assuming the debtors received value, that value had not been received in exchange for their contributions because no exchange took place . . . . As noted by the bankruptcy court, the church made available worship services and religious programs to all members, including the debtors, without in any way linking those services to financial contributions (noting that debtors could not have received property in exchange for their contributions for purposes of § 548(a) and at the same time treated those contributions as charitable deductions under 26 U.S.C. section 170 (c)(4)). [51]

On appeal, the district court affirmed both the bankruptcy court's interpretation of section 548(a)(2)(A) and its decision not to follow the line of cases in which goodwill and church services were deemed the type of benefits that constitute reasonably equivalent value. [52] The church, however, raised a new argument at the district court level stating that applying section 548 would violate the free exercise and establishment clauses of the First Amendment. [53] An examination was needed to determine whether bankruptcy rules should apply even though they might interfere, to some degree, with religious freedoms. [54]

In allowing the reach back, the district court, with due precautions, applied two different free exercise tests. [55] The first of these tests was espoused by Justice Scalia in *Employment Division Department of Human Services of Oregon vs. Smith*. [56] Under the *Smith* test, the court concluded that the church's free exercise claim was invalid because the Code was a neutral law of general applicability which had only an incidental effect on religion. [57] The court alternatively held that under the "compelling interest test" established in *Sherbert v. Verner*, [58] the test used prior to the decision in *Smith*, "[t]he government's policy of allowing debtors to get a fresh start while at the same time treating creditors as fairly as possible qualifies as a compelling [governmental] interest." [59] By rejecting the new constitutional claim raised by the church on appeal, the district court upheld the validity of section 548 of the Code, and the bankruptcy court's analysis of the provision as it applied to religious tithes. [60]

## III. Religious Freedom Restoration Act and Applicable Case Law

While the appeal of the district court's decision in *Christians* was pending in the Eighth Circuit, the judicial landscape surrounding the issue was muddled even further when President Clinton signed into law the Religious Freedom Restoration Act (RFRA). [61] Enacted in direct response to the Supreme Court's decision in *Smith*, [62] RFRA sought to enhance claims brought under the protections of the free exercise clause. In order to show a violation of RFRA, "a party must [first] prove that a government practice substantially burdens his or her religious exercise." [63] Second under RFRA, the government may not burden the exercise of a person's religious beliefs unless it demonstrates that the burdensome law is (1) in furtherance of a compelling governmental interest, and (2) the least restrictive means of furthering that compelling governmental interest.

[64]

Although enacted subsequently to the contributions in question, the Eighth Circuit determined that RFRA retroactively applied to the *Christians* case; the court further prefaced that since RFRA was previously applied without issue, it "has at least" been implicitly held constitutional. [65] The court concluded that the reach back provision constituted a substantial burden, [66] because by preventing the debtors from tithing, it "meaningfully curtails...a religious practice of more than minimal significance in a way that is not merely incidental." [67] Next, the court considered whether a compelling government interest [68] justified this burden. [69] Noting that RFRA did not define "compelling governmental interest," [70] and lacking any direct alternative, the court turned to pre−*Smith* case law, [71] post−*Smith* Establishment Clause cases, and other cases analyzing RFRA to gain perspective. [72]

Relying heavily on *In re Tessier,* [73] a Montana bankruptcy case that interpreted the compelling interest requirement to include "only those interests pertaining to survival of the republic or the physical safety of its citizens," [74] the court found that bankruptcy was not a governmental interest comparable to national security or public safety. [75] Conceding that giving debtors a fresh start and protecting the interests of creditors are important, the court nevertheless held that these interests are not comparable to collecting revenue through the tax system or ensuring the fiscal integrity of the social security system. [76] Furthermore, the court determined that no compelling governmental interest warranted the substantial burden imposed on the debtors' free exercise of religion. [77]

The court then turned to whether allowing the trustee to reach back and recapture a tithe substantially burdened the debtors' free exercise of religion to the extent that it was the least restrictive means of furthering a compelling governmental interest. [78] In adopting this standard from the Tenth Circuit, the court held that recapturing a tithe was a substantial burden. [79] The *Christians* court emphasized that even though tithing is not "religiously compelled," permitting the government to recover church tithes donated prior to the filing of a bankruptcy petition, "meaningfully curtails a religious practice of more than minimal significance in a way that is not merely incidental." [80] Accordingly, the trustee was not entitled to recover the $13,450 from the Crystal Evangelical Free Church. [81]

The holding in *Christians* could have protected charities from having to pay back donations to bankruptcy trustees. However, the victory for the church in *Christians* was placed in doubt by the Supreme Court's decision in *City of Boerne v. Flores*. [82]

In *Flores*, the Archbishop of New Mexico applied for a permit to enlarge a church building. [83] Prior to the application, an ordinance was passed whereby pre−approval was necessary before any construction could begin on a building that would affect a historic landmark or building in a historic district. [84] When the Archbishop applied for a building permit to enlarge the church, city authorities relied on the ordinance and the designation of a historic district (which they argued included the church) and denied the application. [85] The Archbishop brought a suit challenging the permit. [86] The Archbishop relied upon the Religious Freedom Restoration Act as a basis for relief and argued that it was constitutional under the enforcement power of section five of the Fourteenth Amendment. The state however, successfully argued that RFRA was unconstitutional. [87] On appeal, the Fifth Circuit reversed, finding RFRA to be constitutional. [88] The Supreme Court granted certiorari and reversed the decision. [89] In concluding that RFRA was unconstitutional, the Supreme Court reasoned that requiring a state to demonstrate a compelling interest and that it adopted the least restrictive means of achieving that interest is excessively burdensome when the state law has only an incidental impact on religion. [90]

Although most church−state scholars read the *Flores* decision to apply only to state laws, and thus not to the Federal Bankruptcy Law, many bankruptcy trustees believed that after *Flores*, *Christians* was no longer the law. [91] Furthermore, even before the *Flores* case, courts favored ways to uphold a bankruptcy trustee's rights to void charitable donations. [92] Consequently, charities lobbied to get the Religious Liberty Act passed. [93]

## IV. Critique of Provisions of the Religious Liberty Act

The Religious Liberty Act provides that debtors may donate up to 15% of their gross income to charitable or religious organizations and prohibits the bankruptcy trustee from including that donation in the bankruptcy estate. [94] As discussed, supra, the enactment of the Religious Liberty Act was a direct result of the Circuit Court's decision in *Christians,* [95] which allowed the bankruptcy trustee to recover the debtors' religious donations as fraudulent transfers. [96] Congress, in enacting the Religious Liberty Act, was trying to protect debtors' free exercise of religion under the First Amendment. [97] Trustees and creditors argued, however, that the fraudulent conveyance rules of the Code, on their face, did not impose restrictions on the religious freedom to tithe because they did not single−out tithers or any charitable or religious organizations. This argument is consistent with the Supreme Court's decision, in *Employment Division Department of Human Services of Oregon vs. Smith,* [98] which held that the "first amendment's free exercise clause does not bar application of a facially neutral law of general application to religiously motivated conduct." [99]

Experts in the bankruptcy community strongly criticized the proposed legislation. [100] During the September 22, 1997 hearing before the Judiciary Subcommittee on Administrative Oversight and the Courts, the National Bankruptcy Conference (the "NBC") argued that the Religious Liberty Act, as proposed, creates "a loophole that would be abused by debtors, and that in any event, the 15% [proposed] amount is excessive." [101] Secondly, at a congressional hearing before the House Judiciary Committee's Commercial and Administrative Law Subcommittee on February 12, 1998, consisting of a "[a] broad coalition of religious leaders and members of Congress testif[ying]…in support of [the proposed] legislation," [102] the NBC was the only group to object to the proposed legislation. The NBC's main criticism classified the churches as "special interest[s]" and stated that "religions and charitable contributions produce no tangible equivalent value to the donor or the donor's creditors." [103]

The NBC's criticisms highlight four significant problems with the Religious Liberty Act. The first problem with the Religious Liberty Act is that the 15% allocation of gross income, which debtors are allowed to contribute to charity, is excessive. [104] As defined by the Religious Liberty Act, the 15% allocation of gross income encompasses a combination of charitable (i.e. Red Cross) and religious (i.e. Latter−Day Saints) donations. [105] Recent surveys of the general population, including the Independent Sector's 1996 Giving and Volunteering Survey, a recent Gallup Poll and the General Social Survey of religious denominations conducted from 1987−1989, lend support to the argument that the 15% allocation under the Religious Liberty Act is excessive. [106]

According to the Independent Sector's 1996 Giving and Volunteering Survey, which reflects the prior year's amount of charitable donations, the *average contributing* household gave 2.2% of its gross income to charity [emphasis added]. [107] This percentage hovered around the same amount for the past decade; in 1993 and 1991, the average contributing household gave 2.1% and 2.2% respectively. [108] Moreover, as indicated in a recent Gallup Poll, *all* households contributed 1.7% of their gross income to charity between 1991 and 1993. [109] Additionally, the households contributing 5% or more of their gross income totaled only 9% in 1991. [110]

Furthermore, the General Social Survey in Appendix A, conducted in 1987−1989, illustrates that the average percentages of gross income given by individuals varied according to their religious denomination. The highest percentage of gross income donated by any religious group belonged to the Latter−Day Saints (Mormons) at just above 7%. [111] This General Social Survey of twenty−three religious denominations, including such groups as Catholics, Jehovah's Witnesses, and Presbyterians, illustrates that more than twelve of the denominations were receiving contributions totaling *only* 2%−3% of its members' gross incomes. [112] For example, Presbyterians contributed 2.5% of income, while Catholics gave just over 1% of their respective gross incomes. [113] Additionally, as noted by the United States Court of Appeals for the Eighth Circuit in the *Christians v. Crystal Evangelical Free Church,* [114] the average percentage of household income donated by individuals to their respective denomination falls in the range of 1.3% to 3.8%. [115] This lends further support to the findings of the General Social Survey. Considering the statistics from these surveys, even if the highest percentages of charitable and religious donations are added together, the percentages fall well short of the 15% that debtors are permitted to contribute under the Religious Liberty Act. As the statistics indicate, the average household across the United States gives far below 10%, which is the amount of a true tithe. [116] Even when factoring in an additional amount that households give to non−religious charitable organizations, the

amount is still less than 10% and far below the 15% which is currently allowed to debtors under the Religious Liberty Act. [117]

This Note purports that the 15% threshold allowing debtors to contribute to charitable or religious organizations is excessive. The Religious Liberty Act should be amended to parallel today's percentage of yearly charitable and religious donations. As indicated by the statistics, supra, a more appropriate threshold amount should hover around 2−3%.

The second problem with the Religious Liberty Act is that it is overbroad. The amended language of section 548(a)(2) of the Code, Section 3 – Treatment of Pre−Petition Qualified Charitable Contributions of the Religious Liberty Act, reads in pertinent part:

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. [118]

The language of the statute is overbroad because it merely states that "the amount of *that* contribution" should not exceed 15% of the debtor's gross income [emphasis added]. [119] By examining the language of the statute, one cannot decipher whether the 15% limit applies only to individual contributions or instead to the debtor's total contribution for the year. [120] Thus debtors could interpret the statute in various ways, thereby creating an ambiguity. Even the testimony of Senator Grassley, proponent for the Bill, who said a debtor may "give away all of his assets in donations of less than 15 percent of his income," could be construed to allow multiple donations as long as they each were less than 15%. [121]

This anomaly was espoused by Donald S. Bernstein, who testified on behalf of the National Bankruptcy Conference [122] before the Subcommittee on Administrative Oversight of the Courts, and criticized this specific language of the Religious Liberty Act. [123] He stated that "the 15 percent threshold appears to apply to single contributions allowing the possibility that multiple contributions, each less than 15 percent of gross income, could be immunized, even though they exceed 15 percent of gross income in the aggregate." [124] Since the statute can be interpreted as either allowing or disallowing multiple contributions, which in the aggregate could exceed 15% of the debtor's gross income, the provision is overbroad. [125] By drafting the provision with overbroad language, an ambiguity results, allowing a debtor to transfer multiple amounts of money to various charitable organizations as long each contributions do not exceed 15%. [126]

To correct the overbroad language in section 548(a)(2) of the Code, legislators should amend the Religious Liberty Act to reflect aggregate contributions for the year. By striking "that contribution does" and replacing it with "aggregate contributions may," section 548(a)(2) of the Code, Section 3 – Treatment of Pre−Petition Qualified Charitable Contributions of the Religious Liberty Act, will now read:

> (A) the amount of aggregate contributions may not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made.

The third problem with the Religious Liberty Act is one of public policy. As stated in Part I, supra, there are two major goals of bankruptcy; to provide the debtor with a fresh start and to ensure an orderly distribution of the debtor's assets to his/her creditors. [127] In order to guarantee a fresh start, a debtor is provided with certain exemptions under the Code. [128] These exemptions are designed to provide the debtor with those necessities that allow the debtor to continue to exist or operate and nothing more. For example, a debtor is provided with a homestead exemption, which is an allocation of funds to provide the debtor with shelter. [129] These exemptions are limited to the basic necessities of life in order to prevent the debtor from giving away the creditors' assets. [130] Contributing to a charitable or religious organization is not a basic necessity of life. By allowing a debtor to contribute 15% of his/her gross income to charitable or religious organizations the Religious Liberty Act grants the debtor more than a fresh start. When a debtor is insolvent, he/she does not have enough money to pay his/her creditors in full and is holding onto property belonging to those creditors.

[131] Furthermore, as stated by Donald S. Bernstein, the Religious Liberty Act "runs contrary to a long−standing bankruptcy policy...that insolvent debtors should not be able to evade their financial commitments by making gifts." [132]

Along with providing the debtor with a "fresh start," the other primary goal of the Code is to establish uniform laws to ensure the orderly distribution of a debtor's assets to his/her creditors. [133] Although charitable and religious organizations are extremely worthy causes that need public support, the Religious Liberty Act is unfair because it favors charitable and religious organizations over all creditors. This argument was explained further in the prepared statement of Stephen H. Case, who testified at a hearing before a House of Representatives Subcommittee on February 12, 1998:

> Congress should not slice up our fraudulent transfer laws with special−interest exceptions, no matter how deserving the special interest groups may be. Don't let insolvent persons give away the creditors' money, say we at the NBC. Here is what we consider the 'worst case' under these bills: Right now many critics contend that the bankruptcy laws inadequately protect creditors. These bills will exacerbate that criticism. Each bill creates an opportunity for persons filing personal bankruptcy to stop off at the local charity and make a donation on their way to file bankruptcy. Suppose (God forbid) it was you. What would you do? You're filing bankruptcy. They are going to take your money and nonexempt property away from you. Where would you rather this property go? To the creditors? Or to the charity? What will the people filing bankruptcy do? The answer is obvious. The money will go to charity. Is this fair to creditors? We say, 'No way.' So will the public (citations omitted). [134]

By fostering favored treatment of charitable and religious organizations, the Religious Liberty Act creates a protection for debtors' donations that did not previously exist under the Code. [135] The Religious Liberty Act essentially creates an exemption for the debtor that does not qualify as a basic necessity of life or as necessary to promote a debtor's fresh start and places charitable and religious organizations over payments of debts. [136] This result clearly goes against the dual goals of bankruptcy and public policy.

Some argue that a positive aspect of the Religious Liberty Act is that it did not amend section 548(a)(1) of the Code. [137] Under section 548(a)(1), a trustee may avoid any transfer incurred within one year of filing the bankruptcy petition and made with an "actual intent to hinder, delay, or defraud." [138] In essence, this means that any transfer of assets on the eve of bankruptcy, intended to hinder, delay, or defraud, can be recaptured by the trustee. [139] In the legislative history supporting the Religious Liberty Act, Senator Grassley interpreted this provision to mean that "if someone who is about to declare bankruptcy gives away all of his assets in donations of less than 15 percent of his income, that would be strong evidence of real fraud and real fraud can't be tolerated." [140] Courts, however, may not look to the legislative history of the Religious Liberty Act regarding section 548(a)(1). Because the interpretation of this section under the Religious Liberty Act remains unresolved, courts may not deem a first time contribution of a debtor or one on the eve of bankruptcy as a fraudulent transfer, especially where the total does not constitute "all of his assets." Therefore, a Court may allow a debtor to stop at his favorite charity or church on the way to filing his bankruptcy petition.

Because of the unresolved interpretation of section 548(a)(1), the Religious Liberty Act failed to establish a bright−line test to determine the true intention of the debtor. [141] This Note purports that in order to resolve this issue, a bright−line test must be added into the Religious Liberty Act. An effective bright−line test would determine the true intention of the debtor if it looked to the debtor's average contributions over a five−year period. This type of bright−line test would benefit the debtor who contributed consistently over a five−year period as compared to the debtor who merely "found religion" and began contributing to a charitable or religious organization one year or less before filing bankruptcy.

Finally, the amendments to the Code preclude the trustee from utilizing powers granted under section 544, and increase the probability of multiple lawsuits from creditors. [142] Prior to the Religious Liberty Act amendments to section 544(b) of the Code, the trustee possessed the rights of actual unsecured creditors to void transfers under applicable state law. [143] The amended language of section 544(b) now prohibits the trustee from using

the state law reach back avoidance power [144] in any transfer of a charitable contribution as defined by section 548(d)(3). [145] This creates a window of opportunity for each creditor to bring a lawsuit against the recipients of the donation, thereby opening the floodgates to multiple lawsuits. [146] As stated by Donald S. Bernstein, "[i]t leaves charities vulnerable [to] multiple fraudulent transfer suits under state law and encourages a race to the courthouse that is avoided under current law. Moreover, it would create a federal rule directly contrary to state laws enacted to protect creditors, whose claims are created under state law." [147] As a result of the amendments to section 544(b), the Religious Liberty Act's goal to protect a debtor's right to free exercise of religion is frustrated because charitable and religious organizations may be subjected to unnecessary litigation.

## V. Conclusion

The Religious Liberty Act began as an attempt to strike a balance between the protection of religious freedom and the policies behind our bankruptcy laws. The result, however, is legislation that fails to achieve this goal. The language of the Religious Liberty Act is overbroad, creating the possibility of multiple contributions as long as each contribution does not exceed 15% of the debtor's gross income. Even if the total aggregate sum of all the contributions were limited to 15%, it would be excessive as evidenced by statistics indicating that contributions from individuals to charitable and religious organizations are at a much lower amount. Furthermore, the Religious Liberty Act does not lend itself to judicial economy because it has eliminated the trustee's ability to recapture fraudulent transfers under the section 544(b) of the Code. Lastly, because the Religious Liberty Act creates a fictitious exemption and favors charitable and religious organizations to creditors, it fails to meet the dual goals of bankruptcy, and more importantly, fails as legislation.

In order for the Religious Liberty Act to be effective legislation, the recommendations set forth in this Note should be implemented. The 15% allocation must be reduced to parallel more realistic patterns of giving. Furthermore, the language of section 548(a)(2) must be amended to reflect a debtor's aggregate contributions. Under section 548(a)(1), a bright−line test must be designed to determine the true intentions of the debtor. If these recommendations are implemented, the Religious Liberty Act may have a chance to be effective bankruptcy legislation.

*Thomas M. Walsh*

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**FOOTNOTES:**

[1] *See* Statement by President William J. Clinton upon signing S.1244, 1998 WL 477102 (Leg. Hist.) Bankruptcy − Religious Liberty and Charitable Donation Protection Act of 1998, 1998 U.S.C.C.A.N. 230 (explaining purpose of the Religious Liberty Act of 1998). President Clinton stated "it is a great loss to all of our citizens for creditors to recoup their losses in bankruptcy cases from donations made in good faith by our citizens to their churches and charitable institutions." Id; *see also* Oliver Thomas, *Legislative Opportunities*, Christian Century, Jan. 20, 1999, at *3−4, *available in* 1999 WL 10269058 (stating that Religious Liberty and Charitable Donations Protection Act will protect churches from having to give up donations that were given by parishioners who have since gone bankrupt).Back To Text

[2] *See* Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105−183, 112 Stat. 517 (amending § 548 to include debtor's right to contribute 15% of his/her gross income to charitable and religious organizations).Back To Text

[3] *See* H.R. 2604, 105th Cong. (1997); S.1244, 105th Cong. (1997). On October 1, 1997 Senator Grassley and on October 2, 1997 Congressman Ronald Packard introduced the "Religious Liberty and Charitable Donation Protection Act of 1997" to their prospective congressional forums. The legislation "would amend sections 548 and 544 [and 1325] to protect contributions made to religious, charitable or other nonprofit groups from avoidance as fraudulent conveyances. The bills create a safe harbor which protects such transfers up to an aggregate amount of 15 percent of the gross annual income of the debtor for the year in which the transfer is made." American Bankruptcy Institute Breaking News, *Broad Support for Tithing Bill Seen at House Hearing*, (visited Mar. 20, 1998) <http://www.abiworld.org/headlines/98feb12.html>. Although the bill was

introduced in late 1997, it was not passed until June 19, 1998 and now is titled the Religious Liberty and Charitable Donation Protection Act of 1998. *See also* A. Michele Dickerson, Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status, 67 Fordham L. Rev. 69, 113 (1998) (noting expansion of debtor's right to make charitable contributions under Religious Liberty Act).Back To Text

[4] *See* Weinman v. World of Life Christian Center (In re Bloch), 207 B.R. 944, 946 (D. Colo. 1997) (deciding debtors contributed over $11,000 as fraudulent conveyance, and allowing trustee to reach back and claim money for bankruptcy estate); Morris v. Midway Southern Baptist Church (In re Newman), 203 B.R. 468, 478 (D. Kan. 1996) (deeming tithes fraudulent transfers recoverable under Code); Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge), 200 B.R. 884, 907 (D. Idaho 1996) (holding that trustee could recover $5,204 because debtors did not receive reasonably equivalent value); Christians v. Crystal Evangelical Free Church (In re Young), 148 B.R. 886, 891−92 (Bankr. D. Minn. 1992), aff'd, 152 B.R. 939 (D. Minn. 1993), rev'd, 82 F.3d 1407 (8th Cir. 1996), rev'd, 141 F.3d 854 (8th Cir. 1998) (allowing trustee to reach back and recover $13,450 because debtors did not receive reasonably equivalent value under § 548 of Code).Back To Text

[5] *See* supra note 4 and accompanying text (noting that trustee can reach back and retrieve donated money).Back To Text

[6] *See Religious Liberty and Charitable Donation Protections Act of 1997; and Religious Fairness in Bankruptcy Act of 1997, 2604, 2611: Hearing Before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary House of Representatives* [hereinafter *Hearing Statement of Steven T. McFarland*], 105th Cong. at 14−20 (1998) (statement of Steven T. McFarland, director of Christian Legal Society's Center for Law and Religious Freedom). The Christian Legal Society's Center (the "Center") is a thirty−six year old organization consisting of 4,000 Christian attorneys and law students nationwide. The Center "has particular expertise on the issue of bankruptcy trustees seeking to recover tithes and offerings to churches." Id. *See also* Young, 82 F.3d at 1412 n.3 (listing ten amicus briefs that were filed on behalf of special interest groups, which included: the Christian Legal Society, the National Association of Evangelicals, Americans United for Separation of Church and State, Concerned Women for America, the Baptist Joint Committee on Public Affairs, the Southern Baptist Convention, the General Conference of Seventh−Day Adventists, the Evangelical Lutheran Church in America, the Church of Jesus Christ of Latter−Day Saints and United States Senator Orrin G. Hatch); *It is Better [for Debtors] to Give Than [for Creditors] to Receive: Clinton Signs "Tithing" Bill into Law*, Am. Bankr. Inst. J., July−Aug. 1998, at 6 (stating Religious Liberty Act provides immediate relief to debtors who make religious or charitable contributions before or during bankruptcy).Back To Text

[7] *See* Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105−183, 112 Stat. 517; Richard E. Coulson, Consumer Abuse of Bankruptcy: An Evolving Philosophy of Debtor Qualification for Bankruptcy Discharge, 62 Alb. L. Rev. 467, 542 (1998) (stating Religious Liberty Act allows charitable contributions to be given priority to unpaid, unsecured creditors); *see also* Thomas, supra note 1, at *3−4 (stating that Religious Liberty Act protects donations given by debtors in bankruptcy).Back To Text

[8] The Code recognizes two types of fraudulent transfers. The first requires the debtor to have "actual intent to hinder, delay, or defraud" under § 548(a)(1) of the Code. The second type occurs when a debtor tithes part of his or her income, described under § 548(a)(2)(A) of the Code. The debtor in this situation has made a ‘constructively' fraudulent transfer if the debtor received "less than a reasonably equivalent value" and was "insolvent on the date that such transfer was made." 11 U.S.C. § 548 (1994). The Code defines "value," in part, in § 548(d)(2)(A) as "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative." This definition is a departure from the former Bankruptcy Act, which included a good faith component. *See* 5 Collier on bankruptcy ¶ 548.05[1][b], at 31−32 (Lawrence P. King et al. eds., 15th ed. rev. 1996).

Secondly, the Bankruptcy Code defines "insolvent" as a "financial condition such that the sum of such entity's debts is greater than all of such entity's property." 11 U.S.C. § 101(32)(A). This does not include property transferred with actual fraudulent intent or exempt property. *See* 5 Collier, ¶ 548.05[1][b], at 30.Back To Text

[9] *See* Merriam's webster collegiate dictionary 1238 (10th ed. 1993) (defining tithing as "to pay or give a tenth part of especially for the support of the church; a tenth part of something paid as a voluntary contribution or as a tax especially for the support of a religious establishment"); *see also* R.T. Kendall, Tithing − A call to Serious, Biblical Giving 44 (1982) (discussing origination of word "tithe" which appears in Genesis 14:20 of the Bible stating "[h]e [Abraham] gave him [Melchizedek] tithes of all (a tenth of everything)"). The story begins with Abraham's nephew, Lot, foolishly putting up his tent near Sodom, which was in the crossfire of a war between its king and kings of other lands. Abraham had to rescue his nephew, who lost all of his possessions and his freedom. Abraham was extremely successful in his efforts to rescue his nephew and save all the women and other people. Genesis 14:16. The results that followed are the mysterious and sublime events of the Holy Writ. Thereafter, Melchizedek, King of Salem, gave bread and wine to Abraham and blessed him. "It is at this point that [origination of the word] tithing came into the picture." Genesis 14:20.Back To Text

[10] *See* H.R. 2604, 105th Cong. (1997); S.1244, 105th Cong. (1997). In the newly drafted legislation, amendments were made to the language of § 548(d)(4) defining charities. It stated:

> In this section the term ‘qualified religious or charitable entity or organization' means−(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or
>
> (B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.

Id. Section 170(c) of the Internal Revenue Code defines "charitable contribution" as follows:

> (c) Charitable contribution defined. − For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of−
>
> (1) A State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.
>
> (2) A corporation, trust, or community chest, fund, or foundation−
>
> (A) created or organized in the United States, any State, the District of Columbia, or any possession of the United States;
>
> (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals. . . .

26 U.S.C.S. § 170(c) (1986).Back To Text

[11] Debtors who file under chapter 7, the liquidation chapter, submit all of their non−exempt assets to a bankruptcy trustee and are relieved of liability and given a fresh start within a few months of filing.Back To Text

[12] Chapter 13 debtors maintain their non−exempt assets in return for allocating their disposable income over a 3−5 year time frame in which to repay creditors.Back To Text

[13] *See* Hearing Statement of Steven T. McFarland, supra note 6, at 19−20 (discussing how in addition to chapter 7 debtors being protected by Religious Liberty Act, "post−petition charitable contributions under Chapter 13 plan should [and will] be protected as well").Back To Text

[14] *See* id. at 18 (stating how currently, under plain meaning of sections 544 and 548(a) of Code, "churches, synagogues and religious ministries, as well as secular charitable organizations, are almost defenseless when bankruptcy trustees demand refund from their offering plates"); *see also* David B. Young & Jeff Bohm, *Preferences and Fraudulent Transfers: A Lender's Perspective*, 767 PLI/COMM 585, 707 (1998) (arguing that avoidance of tithes constitutes infringement of debtor's religious freedom guaranteed by First Amendment).Back To Text

[15] *See e.g.*, In re Dick, 222 B.R. 189, 190 (Bankr. D. Mass. 1998) (holding that religious contributions were not reasonably necessary during chapter 13 plan and were treated as money which should be devoted to disposable income); In re Bien, 95 B.R. 281, 282 (Bankr. D. Conn. 1989) (holding that it is reasonably necessary for debtor to tithe to religious organization); Oliver B. Pollack, *"Be Just Before You're Generous": Tithing and Charitable Contributions in* Bankruptcy, 29 Creighton L. Rev. 527, 553 (1996) (outlining three ways that courts have dealt with debtors who want to continue to tithe while filing under chapter 13); James Rodenberg, *Reasonably Necessary Expenses or Life of Riley?: The Disposable Income Test and a* Chapter 13 Debtor's Lifestyle, 56 Mo. L. Rev. 617, 681 (1991) (proposing standard that would maximize dividend to unsecured creditors by tightening belt of debtor and establishing balance test to determine what is reasonably necessary).Back To Text

[16] *See* U.S. Const. art. I, § 8, cl. 4. Article I § 8 of the Constitution states: "[t]he Congress shall have Power To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States." Id.Back To Text

[17] *See* Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an* Interpretive Theory, 21 U. Rich. L. Rev. 49, 50 (1986) (stating purpose of bankruptcy law is to provide "fresh start" for overburdened debtors); *see also* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (attesting purpose of bankruptcy law is to have "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre−existing debt"); Williams v. United States Fidelity & Guaranty Co., 236 U.S. 549, 554−55 (1915) (contending purpose of bankruptcy law is to provide debtor with fresh start); In re Sullivan, 195 B.R. 649, 654 (Bankr. W.D. Tex. 1996) (asserting that "fresh start" is "essence of bankruptcy law" and one of its primary purposes).Back To Text

[18] *See* Mary Alice−Brady, Balancing the Rights of Debtors and Creditors: § 522(F)(1) of the Bankruptcy Code, 39 B.C. L. Rev. 1215, 1220 (1998) (acknowledging goal of Code is to provide for orderly distribution of assets). Congress enacted the Code to provide "the debtor with a fresh start, ensuring a fair system of administration that keeps debtors from becoming public charges, facilitating the vitality of the economy to protect public and private interests, ensuring easy administration and uniformity of the bankruptcy system, and protecting the interests of creditors." Susan D. Franck, Comment, Christians v. Crystal Evangelical Free Church: Interpreting RFRA in the Battle Among God, the Government, and the Bankruptcy Code, 81 Minn. L. Rev. 981, 994 (1997); *see also* Thomas H. Jackson, Bankruptcy, Non−Bankruptcy Entitlements, and the Creditors' Bargain, 91 Yale L.J. 857, 866−67 (1982) (describing how equality of distribution best resolves common pool problem that insolvent debtor's assets present to creditors).Back To Text

[19] *See* H.R. Rep. No. 95−595, at 3−5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5965−66 (discussing dual goals of bankruptcy: (1) to provide debtor with fresh start and (2) to equally and efficiently distribute debtors assets); s*ee also* Barbara J. Houser, *Chapter 11 as a* Mass Tort Solution, 31 Loy. L.A. L. Rev. 451, 460 (1998) (stating dual goals of providing fresh start for debtor and ensuring equal treatment of creditors); Saul Levmore, Fables, Sagas and Laws, 33 Willamette L. Rev. 485, 488 (1997) (describing dual goals of bankruptcy).Back To Text

[20] *See* Michael T. Andrew, *Executory Contracts in* Bankruptcy: Understanding 'Rejection', 59 U. Colo. L. Rev. 845, 851−52 (1988) (discussing necessity of transferring debtors assets to estate to administer distribution and protect creditors of estate); Franck, supra note 18, at 994−95 (describing how trustees can use their avoidance powers, granted to them under Code, to bring assets back into bankruptcy estate).Back To Text

[21] *See* 11 U.S.C. § 544 (1994). The proponents of the legislation have an even stronger argument where the reach back provisions of state law apply. Under § 544(b) of the Code, a trustee may avoid fraudulent transfers that can be avoided under applicable state law provisions. *See* id. In some states, the statutes are similar to the Code provision in § 548(a)(2)(A), which has a one−year reach back period. However, the reach back period is generally longer. Additionally, states differ as to the statutory reach back periods (i.e., New York has a six year reach back period). *See* id.; *see also* James N. Duca, The Interaction Between Mechanic's Lien Law and the Bankruptcy Code, 53 Bus. Law 1283, 1291 (1998) (providing that under § 544, trustee (acting for estate) has right to invalidate any transfer that could be avoided under state law by any of debtors unsecured creditors).Back To Text

[22] Section 548 of the Code allows the trustee to reach back one year prior to bankruptcy to recoup fraudulent transfers. Section 544 allows the trustee to reach back as long as the state constitution allows, which varies according to state law. *See* Mary Jo Heston, The United States Trustee: The Missing Link of Bankruptcy Crime Prosecutions, 6 Am. Bankr. Inst. L. Rev. 359, 378 (1998) (stating that avoidance powers of trustee include avoiding certain statutory liens); Andrew Kall, *Restitution in Bankruptcy: Reclamation and Constructive Trust*, 72 Am. Bankr. Inst. L.J. 265, 269 (1998) (stating that § 544 permits avoidance powers of trustee to take property for estate free of what would otherwise be valid restitutionary claim).Back To Text

[23] *See* 4 Collier, supra note 8, ¶ 548.01, at 548−24 (asserting that purpose of fraudulent transfer law is to prevent debtors from transferring away valuable assets for less than adequate value); *see also* Bay Plastics, Inc. v. BT Commercial Corp. (In re Bay Plastics), 187 B.R. 315, 321 (Bankr. C.D. Cal. 1995) (illustrating powers that trustee may use to avoid variety of pre−petition transactions such as fraudulent transfers). There is also an additional avoidance power under section 550 of the Code, which states:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from−
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
>
> (2) any immediate or mediate transferee of such initial transferee . . . .

11 U.S.C. § 550 (1994).Back To Text

[24] *See* infra note 32 and accompanying text (noting when trustee may void transfers of property); *see also* Mary C. Camery, *Current Issues: Impact of Bankruptcy on Commercial Leases*, 433 PLI/Real 579, 586−87 (1998) (stating that § 548 allows trustee to take back assets within one year of filing if certain financial qualifications are met); Heston, supra note 22, at 379 (stating that § 548 provides for avoidance of certain transfers within one year of filing).Back To Text

[25] *See* 11 U.S.C. § 548(a)(2)(A) (1994) (stating one year time frame for trustee's avoidance power regarding debtors' pre−petition transfers); Neil Garfinkel, *No Way Out: Section 546(e) Is No Escape for the Public Shareholder of a* Failed LBO, 1991 Colum. Bus. L. Rev. 51, 54 (stating that Code only reaches transfers made within one year but § 544(b) allows trustees to use applicable state law, with less preclusive statute of limitations).Back To Text

[26] *See* supra note 21 and accompanying text.Back To Text

[27] *See* U.S. Const. amend. I (stating Congress "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").Back To Text

[28] Id.Back To Text

[29] *See* supra note 4 and accompanying text (illustrating cases where trustee was allowed to reach back and take contributions given to churches as donations).Back To Text

[30] *See* 11 U.S.C. § 548(a) (1994) (providing for one year time frame before date of petition must be filed). Section 548(a) must be read in conjunction with § 548(d)(1) articulating when a transfer is deemed made. Section 548(d)(1) states:

> [f]or the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

Id.Back To Text

[31] *See* 11 U.S.C. § 544(b) (1994). Section 544 states in pertinent part:

> (b) The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

Id.Back To Text

[32] *See* 11 U.S.C. § 548(a)(2) (1994). Section 548 states in pertinent part:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation . . . .

Id.Back To Text

[33] *See* Morris v. Midway Southern Baptist Church (In re Newman), 203 B.R. 468, 473 (D. Kan. 1996) (affirming bankruptcy court's decision and holding that tithe contributed by debtors could be recovered by trustee as fraudulent transfer, even though debtors believed they were fulfilling obligation of their religion); In re Packham, 126 B.R. 603, 610 (D. Utah 1991) (rejecting plan of debtors' to allow tithe of 10% of their income).Back To Text

[34] *See* H.R. Rep. No. 105−556, at 3, 1998 WL 285820, P.L. 105−183 − Religious Liberty and Charitable Donation Protection Act of 1997, 105th Cong., 2d Sess. (1998) (discussing how fraudulent transfer provisions may infringe on First Amendment rights); *see also* Mary Jo Newborn Wiggins, *A Statute of Disbelief?: Clashing Ethical Imperatives in* Fraudulent Transfer Law, 48 S.C. L. Rev. 771, 771−73 (1997) (arguing that trustee was in violation of debtors rights under Constitution when he tried to recapture tithes).Back To Text

[35] 11 U.S.C. § 548(a)(2)(A) (1994); *see also* BFP v. Resolution Trust Corp., 511 U.S. 531, 545 (1994), reh'g denied, 512 U.S. 1247 (1994) (holding that "reasonably equivalent value" under § 548(a)(2) means, in context of foreclosed property, "fair and proper price" or price actually received at foreclosure sale). In *BFP*, the Supreme Court held that the price received was one of reasonably equivalent value even though the fair market value of the property was $725,000 and the price received for the property was $433,000. *See* id. at 534. *Compare* 11 U.S.C. § 548(a)(1) (1994) (requiring actual intent to defraud to prove fraudulent transfer) *with* 11 U.S.C. § 548(a)(2)(A) (omitting actual intent to defraud requirement where debtor has received less than reasonably equivalent value). *See also* Christians v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407, 1414 (8th Cir. 1996), rev'd, 141 F.3d 854 (8th Cir. 1998) (stating that fraudulent intent not required to recover transfers made under § 548(a)(2)).Back To Text

[36] *See* Hill v. Little (In re Hill), No. 92−56358, 1994 WL 247081, at *1 (9th Cir. June 8, 1994) (ruling that reasonably equivalent value is term of art which means price received at properly conducted foreclosure sale); Cooper v. Ashley Communications, Inc. (In re Morris Communications), 914 F.2d 458, 466−67 (4th Cir. 1990) (creating benchmark used for determining reasonably equivalent value); Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201, 203 (5th Cir. 1980) (examining guidelines used to determine what constitutes reasonably equivalent value).Back To Text

[37] *See, e.g.*, Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 690 (1989), reh'g denied, 492 U.S. 933 (1989) (determining whether there was adequate consideration for charitable donation pledged); *cf.* Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 991 (2d Cir. 1981) (stating that fair consideration for purposes of bankruptcy is more than just consideration needed to support simple contract); In re Christian & Porter Aluminum Co., 584 F.2d 326, 337 (9th Cir. 1978) (providing that transfers made to benefit third parties are not made for fair consideration).Back To Text

[38] *See* Butler Aviation Int'l Inc. v. Whyte (In re Fairchild Aircraft Corp.), 6 F.3d 1119, 1125−26 (5th Cir. 1993) (providing that term "reasonably equivalent value" does not require debtor "to collect a dollar for dollar equivalent," but does expect reasonable percentage); Walker v. Treadwell (In re Treadwell), 699 F.2d 1050, 1051 (11th Cir. 1983) (stating that reasonably equivalent value does not include donee's "love and affection" because not direct economic benefit); Morris v. Midway Southern Baptist Church (In re Newman), 183 B.R. 239, 246 (Bankr. D. Kan. 1995), aff'd, 203 B.R. 468 (D. Kan. 1996) (stating that "reasonably equivalent value" in bankruptcy is measured traditionally by tangible or economic benefit, not merely by spiritual or religious value).Back To Text

[39] *See* Newman, 203 B.R. at 473 (holding that court cannot put value on religious services and support offered by churches because "spiritual value" cannot be measured in dollar value); First Nat'l Bank in Anoka v. Minnesota Utility Contracting, Inc. (In re Minnesota Utility Contracting, Inc.), 110 B.R. 414, 417 (D. Minn. 1990) (holding that while indirect benefits could constitute reasonably equivalent value under some circumstances, benefits received must be "fairly concrete"). Prior to this case, the court relied on the definition of reasonably equivalent value in *Ellenberg v. Chapel Hill Harvester Church, Inc.* (In re Moses), 59 B.R. 815 (Bankr. N.D. Ga. 1986). The court in *Ellenberg* looked to § 548(d)(2)(A) of the Code, which defines value as it is referred to in subsection (a)(2)(A) as "property." Id. at 818. Since the Code does not define property in a specific way, the court defined property as "every species of valuable right and interest." Id. Based on this definition, the court held that debtors received reasonably equivalent value from the church through 80 to 100 hours of counseling benefits the debtors received, access to religious services which the debtors attended three times a week, and heating, air conditioning and electrical services that the church supplied. Id. at 818−19. As discussed, supra, it appears that the *Ellenberg* holding has been superceded by more recent decisions.Back To Text

[40] *See Broadcast Morning Edition: Creditors Sue for Money Donated to Church*, (National Public Radio, Seg. No. 14 Show No. 1369, June 16, 1994) (on file with author). During a live broadcast a few months after the trustee in the *Christians* case recovered the money donated by the Young family to their church, Professor Jay Westbrook of University of Texas Law School, stated:

> [i]f you spend your money on something which represents value, even though it's of no use to your creditors, whether that value is sensible value − for example, food to put on your table, or clothes for your family − or, frivolous value, like prostitutes or gambling or whatever − it doesn't matter. As long as you got fair value for what you paid, then the trustee can't get that money back from the person you paid it to. But, if it's a gift, ordinarily the trustee can.

Id.Back To Text

[41] *See* Christians v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407, 1415 (8th Cir. 1996), rev'd, 141 F.3d 854 (8th Cir. 1998). In his opinion, Circuit Judge McMillian stated:

> [i]n [most]…case[s] the parties' stipulations are inconsistent with a quid pro quo. The debtors stipulated that they made the contributions out of a sense of religious obligation and not in order to attend church (or receive a tax deduction). The parties also [usually] stipulated that the church services were available to all regardless of whether any contributions were made. In other words, the debtors' contributions were purely voluntary and in no way linked to the availability of church services. Similarly, the church conducted worship services and provided other services independent of the debtors' contributions. Under the stipulated facts, there was no quid pro quo, no exchange of contributions for church services.

Id.; *see also* Newman, 183 B.R. at 248 (stating that church contributions are usually made irrespective of amount of services provided to parishioners); In re Lees, 192 B.R. 756, 758 (Bankr. D. Mont. 1994) (noting that church does not require donations in order for parishioners to continue attending).Back To Text

[42] *See* supra note 4 and accompanying text.Back To Text

[43] 82 F.3d 1407, 1416 (8th Cir. 1996), rev'd, 141 F.3d 854 (8th Cir. 1998) (discussing overlap of RFRA and Bankruptcy Code).Back To Text

[44] *See* Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb−1 (1994) [hereinafter RFRA]. The RFRA provides in part:

> (a) IN GENERAL − Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) EXCEPTION − Government shall not substantially burden a person's exercise of religion only if it demonstrates that application of the burden of the person−−
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

Id.; *see also* Young, 82 F.3d at 1416.Back To Text

[45] *See* Young, 82 F.3d at 1410.Back To Text

[46] *See* id.Back To Text

[47] *See* id.; *see also* Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge), 220 B.R. 386, 389 (D. Idaho 1998) (discussing recovery of donations made to debtor's church); Weinman v. The World of Life Christian Center (In re Bloch), 207 B.R. 944, 946 (D. Colo. 1997) (discussing trustee's attempt to void transfers to debtor's church).Back To Text

[48] *See* 11 U.S.C. § 548(a)(2)(A) (1994); *see also* supra note 32 and accompanying text.Back To Text

[49] *See* Christians v. Crystal Evangelical Free Church (In re Young), 148 B.R. 886, 890−93 (Bankr. D. Minn. 1992) (stating that benefits of attending church were not reasonably equivalent).Back To Text

[50] Christians v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407, 1410−11 (8th Cir. 1996), rev'd, 141 F.3d 854 (8th Cir. 1998) (quoting *Young*, 148 B.R. at 891, 895−96). The bankruptcy court's decision in *Christians* rejected the conclusions reached by other courts. *See, e.g.*, Ellenberg v. Chapel Hill Harvester Church, Inc. (In re Moses), 59 B.R. 815, 818 (Bankr. N.D. Ga. 1986) (holding that requirements of § 548 were met because court considered church services to be considered property); In re Missionary Baptist Foundation of America, 24 B.R. 973, 979 (Bankr. N.D. Tex. 1982) (holding good will constituted reasonably equivalent value in exchange for charitable contributions to church).Back To Text

[51] Young, 82 F.3d at 1410 (citations omitted). Section 170(c)(4) states:

> (4) In the case of a contribution or gift by an individual, a domestic fraternal society, order, or association, operating under the lodge system, but only if such contribution or gift is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

26 U.S.C. § 170(c)(4) (1986); *see also* Transamerica Corp. v. United States, 902 F.2d 1540, 1544 (Fed. Cir. 1990) (discussing that contributor may not expect substantial benefit in return for contribution to religious charity); Sedam v. United States, 518 F.2d 242, 245 (7th Cir. 1975) (stating payment is not contribution if some commensurate benefit is expected in return).Back To Text

[52] *See* Christians v. Crystal Evangelical Free Church (In re Young), 152 B.R. 939, 948 (D. Minn. 1993). The court expressly rejected In re Moses, 59 B.R. 815, 818 (N.D. Ga. 1986) (stating church services constitute property) and In re Missionary Baptist Found. of Am., 24 B.R. 973, 979 (N.D. Tex. 1982) (finding good will constituted reasonably equivalent value in exchange for charitable contribution to church).Back To Text

[53] *See* Young, 152 B.R. at 950−51; *see also* Young, 82 F.3d at 1411 (stating "[t]he district court exercised its discretion to consider the constitutional arguments and rejected them. The district court first held that the church had standing to raise the constitutional rights of the debtors in addition to its own").Back To Text

[54] *See* Young, 152 B.R. at 951−53; *see also* Employment Div. Dep't of Human Servs. v. Smith, 494 U.S. 872, 873 (1990) (stating right of free exercise does not relieve individual of obligation to comply with valid or neutral law of general applicability).Back To Text

[55] *See* Young, 152 B.R. at 953−54 (discussing court's rationale for going against *Smith* decision).Back To Text

[56] 494 U.S. 872, 874−75 (1990) (discussing claimants right to use peyote for religious purpose).Back To Text

[57] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (stating if law is not neutral in general application it must undergo most rigorous scrutiny); Intercommunity Ctr. for Justice and Peace v. Naturalization Serv., 910 F.2d 42, 44 (2d Cir. 1990) (finding valid, neutral law of general application infringed on one's religious beliefs).Back To Text

[58] 374 U.S. 398, 405−06 (1963) (stating no showing of mere rational state interest would justify substantial infringement of party's constitutional right to free exercise of religion).Back To Text

[59] Christians v. Crystal Evangelical Free Church (In re Young), 152 B.R. 939, 954 (D. Minn. 1993) (finding purposes of Bankruptcy Code as compelling state interest); *see also* Hernandez v. Commission of I.R., 490 U.S. 680, 700 (1989) (finding Internal Revenue Code serves compelling governmental interest).Back To Text

[60] *See* Young, 152 B.R. at 954.Back To Text

[61] *See* supra note 44 and accompanying text; *see also* Christians v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407, 1418 (8th Cir. 1996) , rev'd, 141 F.3d 854 (8th Cir. 1998) (describing why this legislation was enacted).Back To Text

[62] The enactment of RFRA and the test established under this legislation made it more difficult for creditors to void charitable contributions. In *Smith*, the Supreme Court reviewed a Free Exercise claim brought by members of the Native American Church who were denied unemployment benefits when they lost their jobs because they used peyote. *See* Employment Div. Dep't of Human Servs. v. Smith, 494 U.S 872, 890 (1990). The practice of the Native American Church was to ingest peyote for sacramental purposes. Its members challenged an Oregon statute of general applicability which made use of the drug a criminal offense (Ore. Rev. Stat. § 475.992(4) (1987)) and prohibited the knowing or intentional possession of a "controlled substance" unless the substance had been prescribed by a medical practitioner. Id. at 874. In *Smith*, the Supreme Court declined to apply the balancing test set forth in *Sherbert* in determining whether the state statute that encroached on a religious freedom was unconstitutional. *See* Sherbert, 374 U.S. at 410. Instead, the only requirement that the state had to show was that the statute was one of general applicability and did not directly interfere with religion. *See* Smith, 494 U.S. at 872.Back To Text

[63] *See* 42 U.S.C. § 2000bb−1(a) (stating government shall not substantially burden person's exercise of religion); *see also* Hamilton v. Schriro, 74 F.3d 1545, 1552 (8th Cir. 1996) (stating governmental action must burden religious beliefs rather than philosophy or way of life); Franck, supra note 18, at 987.Back To Text

[64] *See* supra note 44 and accompanying text; *see also* Young, 82 F.3d at 1418 (discussing inquiry under RFRA); Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995) (stating in order to be substantial burden, action must significantly inhibit or constrain conduct that is central to person's religious belief).Back To Text

[65] *See* Young, 82 F.3d at 1420.Back To Text

[66] Young, 82 F.3d at 1418 (quoting Werner v. McCotter, 49 F.3d 1476, 1480, cert. denied, 515 U.S. 1166 (defining substantial burden as "significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person's] individual [religious] beliefs; must meaningfully curtail a [person's] ability to express adherence to his or her faith; or must deny a [person's] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion"); *see also* Morris v. Midway Southern Baptist Church (In re Newman), 183 B.R. 239, 251 (D. Kan. 1995) (stating that substantial burden is interference with tenet or belief that is central to religious doctrine).Back To Text

[67] Christians v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407, 1418−19 (8th Cir. 1996), rev'd, 141 F.3d 854 (8th Cir. 1998). *Compare* In re Tessier, 190 B.R. 396, 403−04 (D. Mont. 1995) (discussing debtor's testimony that even though church would not sanction them for failing to tithe, their faithful exercise of their religion is "contingent" upon their continuing to tithe) *with* In re Newman, 183 B.R. 239, 251 (D. Kan. 1995) (finding recovery of tithes already paid does not substantially burden free exercise because it does not prevent debtors, or any other member of church, from fulfilling their personally held religious obligation to tithe at any time).Back To Text

[68] Young, 82 F.3d at 1419 (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)) (defining compelling government interest as "interests of the highest order"); *see also* 42 U.S.C. § 2000bb(a)(3) (1994) (stating that government should not substantially burden religion without compelling justification).Back To Text

[69] *See* Young, 82 F.3d at 1419 (applying RFRA to case at hand); *see also* Hamilton v. Schriro, 74 F.3d 1545, 1552 (8th Cir. 1996) (stating these questions are to be determined *de novo*).Back To Text

[70] Young, 82 F.3d at 1419.Back To Text

[71] *Cf.* Simon J. Santiago, Comment, *Zoning and Religion: Will the Religious Freedom Restoration Act of 1993 Shift the Line Toward Religious Liberty?*, 45 Am. U. L. Rev. 199, 238 (1995) (concluding that RFRA was intended to restore scope of religious freedom which was damaged before *Smith* and not restored by RFRA).Back To Text

[72] *See* Young, 82 F.3d at 1419; *see also* Morris v. Midway Southern Baptist Church (In re Newman), 183 B.R. 239, 252 (Bankr. D. Kan. 1995), aff'd, 203 B.R. 468 (D. Kan. 1996) (finding 11 U.S.C. § 548 served compelling governmental interest); In re Tessier, 190 B.R. 396, 405 (Bankr. D. Mont. 1995) (asserting bankruptcy system does not serve compelling governmental interest when balanced against free exercise of religion).Back To Text

[73] 190 B.R. 396, 407 (Bankr. D. Mont. 1995) (holding RFRA unconstitutional).Back To Text

[74] Christians v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407, 1420 (8th Cir. 1996), rev'd, 141 F.3d 854 (8th Cir. 1998) (quoting *In re* Tessier, 190 B.R. at 405); *see also* Gillette v. United States, 401 U.S. 437, 461 (1971) (recognizing compelling governmental interest in maintaining public safety and national security); Sherbert v. Verner, 374 U.S. 398, 406−07 (1963) (confining compelling governmental interest to gravest abuses endangering paramount interests).Back To Text

[75] *See* Young, 82 F.3d at 1420.*Back To Text*

[76] *See* id.*; see also* United States v. Lee, 455 U.S. 252, 259−60 (1982) (claiming government had compelling interest in maintaining integrity of Social Security system); Droz v. Commissioner, 48 F.3d 1120, 1123 (9th Cir. 1995) (stating interference with free exercise rights is not unconstitutional by virtue of government's compelling interest in collecting revenue through taxes).Back To Text

[77] *See* Young, 82 F.3d at 1420.Back To Text

[78] *See* Young, 82 F.3d at 1419.Back To Text

[79] *See* id. at 1420.Back To Text

[80] Christians v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407, 1420 (8th Cir. 1996), rev'd, 141 F.3d 854 (8th Cir. 1998).Back To Text

[81] *See* id.Back To Text

[82] 117 S. Ct. 2157 (1997).Back To Text

[83] *See* id. at 2160.Back To Text

[84] *See* id.Back To Text

[85] *See* id.Back To Text

[86] *See* id.Back To Text

[87] *See* Boerne v. Flores, 117 S. Ct. 2157, 2160−61 (1997).Back To Text

[88] *See* id. at 2160.Back To Text

[89] *See* id.Back To Text

[90] *See* id. at 2171.Back To Text

[91] *See Hearing Statement of Steven T. McFarland, supra* note 6, at 17 (stating that in recent case, First Baptist Church of Klamath Falls, Oregon received demand letter from non−lawyer bankruptcy trustee, incorrectly stated that RFRA had been overturned and church must pay past years tithes of bankrupt parishioner).Back To Text

[92] In In re Tessier, 190 B.R. 396 (Bankr. D. Mont. 1995), the District Court reasoned that under *In re Lee* the chapter 13 debtor's plan could not be approved because it included tithing. It then concluded that RFRA overruled *Lee* but stated that RFRA was unconstitutional. Therefore, Tessier's plan under chapter 13 was denied. *See* Id. at 398−99.

In the same year that the Supreme Court handed down its *Flores* decision, the Bankruptcy Court for the Southern District of New York stated "[t]his is not a burden on religion. It is a burden on choice. If individuals choose to donate part of their income to charity, whether religious or secular, they must adjust their expenditures accordingly to live within the confines of their available income." Geltzer v. Crossroads Tabernacle (In re Rivera), 214 B.R. 101, 108 (Bankr. S.D.N.Y. 1997). *Cf.* Lynn v. Diversified Collection Serv. (In re Lynn), 168 B.R. 693, 700 (D. Ariz. 1994) (stating that debtor failed to prove that student debt should be discharged for undue hardship and why donations to church should be considered in this context since her church allows her to stop tithing under certain conditions, including impoverishment). *But see* In re Seager, 211 B.R. 81, 83 (Bankr. M.D. Fla. 1997) (stating that family who had sufficient funds to tithe to their church, Church of Latter−Day Saints, and enough money to meet debts when due was guilty of "substantial abuse" under § 707(b) of Code); In re Faulkner, 165 B.R. 644, 648−49 (Bankr. W.D. Miss. 1994) (intimating when deciding whether there is substantial abuse courts may look at whether debtor tithes).Back To Text

[93] *See Hearing Statement of Steven T. McFarland, supra* note 6, at 14−23 (stating that Christian Legal Society, thirty−six year old organization with 4,000 members, supports proposed legislation and has submitted amicus briefs in several cases dealing with this topic, i.e., *Christians*). *See also* American Bankruptcy Institute, *Today's Bankruptcy Headlines: Broad Support for Tithing Bill Seen at House Hearing* (visited Feb. 12, 1998) <http://www.abiworld.org/headlines/98feb12.html> (stating that coalition of religious leaders came to Congressional hearings to support Religious Liberty & Charitable Donation Protection Act of 1997).Back To Text

[94] *See* supra note 2 and accompanying text (describing Religious Liberty Act).Back To Text

[95] *See* Christians v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407, 1414 (8th Cir. 1996), rev'd, 141 F.3d 854 (8th Cir. 1998).Back To Text

[96] *See* Young, 82 F.3d at 1410−11.Back To Text

[97] *See* supra notes 27−29 and accompanying text.Back To Text

[98] 494 U.S. 872, 881 (1990).Back To Text

[99] Employment Div. Dep't of Human Servs. vs. Smith, 494 U.S. 872, 881 (1990). *See* Franck, *supra* note 18, at 988−89 n.47 (discussing whether RFRA was overruled by *Smith* decision). The *Smith* decision has been highly criticized. There has been a split in the circuit courts as to whether RFRA actually overruled the Supreme Court's decision in *Smith*. The Court resolved the circuit split in the recent decision in *Flores*. Therein, the Court held RFRA unconstitutional as applied to state law. Therefore, the doctrine remains uncertain and depends on how the circuit courts interpret *Flores* in the future. *See also* Steve France, Free Exercise Gives Courts a Workout, Appeals Panel Protects Bankrupts' Tithes and Resurrects Religious Freedom Act, 84 A.B.A.J. 18, 18 (July 1998) (noting constitutional seesaw concerning judicial interpretation of RFRA).Back To Text

[100] *See* 7 No. 5 Cons. Bankr. News, *Senator Grassley Moves to Protect Tithes*, (Oct. 23, 1997) (citing National Bankruptcy Conference's opposition to Senator Grassley's bill).Back To Text

[101] *Sen. Grassley Introduces Religious Liberty and Charitable Donation Protection Act of 1997* (visited Oct. 2, 1997) <http://www.abiworld.org/legis/updates/97oct2.html>.Back To Text

[102] *Broad Support for Tithing Bill Seen at House Hearing* (visited Feb. 12, 1998) <http://www.abiworld.org/headlines/98feb12.html>.Back To Text

[103] *See* id.Back To Text

[104] *See Sen. Grassley Introduces Religious Liberty and Charitable Donation Protection Act of 1997* (visited Oct. 2, 1997) <http://www.abiworld.org/legis/updates/97oct2.html> (noting how National Bankruptcy Conference was only party to oppose Religious Liberty Act due to loopholes they believed bill created in bankruptcy code and opining that 15% granted to debtors by bill was too excessive).Back To Text

[105] *See* Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105−183, 112 Stat. 517. The Religious Liberty Act reads in pertinent part:

> Sec.2. DEFINITIONS
>
> Section 548(d) of title 11, United States Code, is amended by adding at the end of the following:
>
> (3) In this section, the term ‘charitable contribution' means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution—
>
> (A) is made by a natural person; and
>
> (B) consists of—
>
> (I) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or
>
> (ii) cash.
>
> (4) In this section, the term ‘qualified religious or charitable entity or organization' means—
>
> (A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or
>
> (B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.
>
> Sec.3. TREATMENT OF PRE−PETITION QUALIFIED CHARITABLE CONTRIBUTIONS.
>
> (A) IN GENERAL− Section 548(a) of title 11, United States Code is amended—
>
> (1) by inserting (1) after (a);
>
> (2) by striking (1) made and inserting (a) made;
>
> (3) by striking (2)(A) and inserting (B)(i);
>
> (4) by striking (B)(i) and inserting (ii)(I);
>
> (5) by striking (ii) and inserting (II) was;

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

(7) by adding at the end of the following:

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

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

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

Id.Back To Text

[106] *See* infra notes 107−115 and accompanying text.Back To Text

[107] *See* Virginia Hodgkinson & Murray Weitzman, *Independent Sector, Giving & Volunteering in the U.S., Findings from a National Survey* (1996 ed.) (visited Sept. 11, 1998) <http://www.indepsec.org/media/gv_summary.html> (noting that 1996 edition of survey is reflection of statistics generated from survey conducted throughout country in 1995).Back To Text

[108] *See* id.Back To Text

[109] *See* Pollack, supra note 15, at 536 n.51 (citing to *Independent Sector, Giving & Volunteering in the United States, Findings from a National Survey* (1992 ed.); Hodgkinson & Weitzman, supra note 107, at 1−2, 16−17, Tab 2:2−3.Back To Text

[110] *See* Hodgkinson & Weitzman, supra note 107, at 1−2, 16−17, Tab. 2:2−3.Back To Text

[111] *See* Dean Hoge et al., Money Matters − Personal Giving in American Churches 12 (1996) (listing results of General Social Survey, which was comprehensive study of average percentages of gross income that members gave to their religious denomination). The Survey consisted of twenty−three different religious denominations and the results were compiled over a three−year time period, 1987−1989. Id.Back To Text

[112] *See* id. at 11.Back To Text

[113] *See* id. at 13.Back To Text

[114] 82 F.3d 1407, 1417 (8th Cir. 1996).Back To Text

[115] *See* Christians v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407, 1417 (8th Cir. 1996), rev'd, 141 F.3d 854 (8th Cir. 1998) (discussing appellant's brief, which listed average percentage of household income donated to religious organizations by denominations as between 1.3% to 3.8%, which is much less than true tithe of 10%).Back To Text

[116] *See* supra notes 107−115 and accompanying text.Back To Text

[117] *See* Pollack, *supra* note 15, at 537 n.54 (citing Christians v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407, 1417 (8th Cir. 1996), rev'd, 141 F.3d 854 (8th Cir. 1998)) (noting appellant's reply brief revealed percentage of true tithers giving 10% of their gross income to their religious denomination is between 4%−5%).Back To Text

[118] 11 U.S.C. § 548(a)(2) (1998) (emphasis added); *see also* H.R. Rep. No. 105−556, at 8, 1998 WL 285820, P.L. 105−183 − Religious Liberty and Charitable Donation Protection Act of 1997, 105th Cong., 2d Sess. 1998 (exhibiting amended section of 11 U.S.C. § 548).Back To Text

[119] *See* supra note 118 and accompanying text.Back To Text

[120] *See Bankruptcy Issues in Review: The Bankruptcy Code's Effect on Religious Freedom and a Review of the Need for Additional Bankruptcy Judgeships: Hearing Before the Subcommittee on Administrative Oversight and the Courts of the Committee on the Judiciary United States Senate*, 105th Cong. at 43 (Sept. 22, 1997) [hereinafter *Hearing Statement of Donald S. Bernstein, Esq.*] (statement of Donald S. Bernstein, Esq., member of the Executive Committee of the National Bankruptcy Conference).Back To Text

[121] *Senate Vote of the Religious Liberty and Charitable Donation Protection Act of 1998*, (May 13, 1998) <http://thomas.loc.gov/cgi−bin/query/C?r105:./temp/~ r105B3N69Z>.Back To Text

[122] The National Bankruptcy Conference is a voluntary organization, composed of persons from twenty−two different states interested in the improvement of the Bankruptcy Code and its administration. It is a sixty−plus−year−old organization and includes sixty−five of the nation's leading bankruptcy practitioners, judges and law professors as its members.Back To Text

[123] *See* Hearing Statement of Donald S. Bernstein, Esq., supra note 120, at 43.Back To Text

[124] *See* id.Back To Text

[125] *See* H.R. Rep. No. 105−556, at 8, 1998 WL 285820, P.L. 105−183 − Religious Liberty and Charitable Donation Protection Act of 1997, 105th Cong., 2d Sess. 1998. By looking at the Legislative History of the Religious Liberty Act, it appears that the drafters intended that the statute would "apply to transfers that a debtor makes on an aggregate basis during the one year reach back period preceding the filing of the debtor's bankruptcy case. Thus, the safe harbor protects annual aggregate contributions up to 15 percent of the debtor's gross annual income." Id. However, they did not accomplish this task when they drafted the final amended provisions of § 548 (a)(2) of the Code.Back To Text

[126] *See* supra note 118 and accompanying text.Back To Text

[127] *See* supra notes 17−19 and accompanying text.Back To Text

[128] *See* 11 U.S.C. § 522(d)(1) (1994). Section 522(d) states:

> The following property may be exempted under subsection(b)(1) of this section:
>
> (1) The debtor's aggregate interest, not to exceed $15,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses a residence . . .
>
> (2) The debtor's interest, not to exceed $2,400 in value, in one motor vehicle
>
> (3) The debtor's interest, not to exceed $400 in value in any particular item or $8,000 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments . . .
>
> (4) The debtor's aggregate interest, not to exceed $1,000 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor . . . . Id.Back To Text

[129] *See* 11 U.S.C. § 522(d)(1) (describing amount to be exempted for real or personal property).Back To Text

[130] *See* Bay Plastics, Inc. v. BT Commercial Corp. (In re Bay Plastics, Inc.), 187 B.R. 315, 322 (Bankr. C.D. Cal. 1995) (recognizing fraudulent transfer law as protection for creditors); Pajaro Dunes Rental Agency, Inc., v. Spitters (In re Pajaro Dunes Rental Agency), 174 B.R. 557, 571 (Bankr. N.D. Cal. 1994) (asserting fraudulent conveyance statutes aid in prevention of transfers that would leave insufficient funds to compensate creditors); In re Parkway Calabasas LTD., 89 B.R. 832, 838 (Bankr. C.D.Cal. 1988) (stating purpose of fraudulent transfer law is to prevent debtor from giving away assets that would imperil his ability to pay back creditors).Back To Text

[131] *See Religious Liberty and Charitable Donation Protections Act of 1997; and Religious Fairness in Bankruptcy Act of 1997, 2604 & 2611: Hearing Before the Subcomm. on Commercial and Administrative Law of the Comm. on the Judiciary House of Representatives*, 105th Cong. at 51 (1998) [hereinafter *Hearing Statement of Stephen H. Case, Esq.*] (statement of Stephen H. Case, Esq., member of National Bankruptcy Conference); *see also* Brown v. Smart, 145 U.S. 454, 454−55 (1892) (stating that debtor who is insolvent loses all rights and powers over any part of his property).Back To Text

[132] Hearing Statement of Donald S. Bernstein, Esq., supra note 120, at 43; *see also* 13 Eliz., ch.5 (1571) (holding creditors could recapture fraudulent transfers of money and property that were transferred prior to bankruptcy for inadequate value by insolvent debtors).Back To Text

[133] *See* supra notes 17−19 and accompanying text; *see also* In re Ethanol Pacific, Inc., 166 B.R. 928, 931 (Bankr. D. Idaho 1994) (stating purpose of corporate bankruptcy is to marshal corporate assets to creditors); In re Jack Campbell May, 12 B.R. 618, 620−21 (Bankr. N.D.Fla. 1980) (noting twofold purpose of bankruptcy in providing equitable distribution of debtor's assets to creditors as well as giving debtor fresh start).Back To Text

[134] Hearing Statement of Stephen H. Case, Esq., supra note 131, at 52.Back To Text

[135] *See* In re Buxton, 228 B.R. 606, 610−11 (Bankr. W.D. La. 1999) (stating that Religious Liberty Act protects charitable contributions from attack by trustee); In re Norris, 225 B.R. 329, 331 n.5 (Bankr. E.D. Va. 1998) (observing that Religious Liberty Act prohibits courts from considering debtor's charitable donations). *Compare* Newman v. Midway Southern Baptist Church (In re Newman), 203 B.R. 468, 473 (Bankr. D. Kan. 1996). *Newman* was decided before the enactment of the Religious Liberty Act and found that charitable donations were, in fact, avoidable under § 548(a)(2) of the Code.Back To Text

[136] *See Hearing Statement of Donald S. Bernstein, Esq. supra*, note 120, at 43. Mr. Bernstein states:

> By creating favored treatment − albeit for worthy organizations...encourages and indeed may oblige bankruptcy lawyers to advise their clients to ‘take advantage' of the loophole the Section offers. If Religious Liberty Act is passed in its current form, we will, I fear, be faced with the frequent spectacle of purportedly impoverished debtors using our bankruptcy system to avoid their creditors while bestowing largesse through charitable giving. This type of behavior will be a target of public ridicule and will undermine the credibility of our bankruptcy system.

Id.Back To Text

[137] *See* 8 Norton Bankruptcy Law & Practice, 29 11 U.S.C. § 546 (William L. Norton, Jr. et al. eds., 2d ed. 1997) (listing all sections of § 548 of Code that were amended, excluding § 548 (a)(1)); *see also* In re Buxton, 228 B.R. at 609 (stating that Religious Liberty Act amended certain parts of § 548 including 548(a)(2) and (a)(2)(b)); Steven J. McCardell & Julie I. Valdes, The Religious Liberty and Charitable Donation Protection Act of 1998, 1998 No. 9 Norton Bankr. L. Adviser 8, 8 (1998) (stating that new sections of 1998 act begin with § 548(a)(2)).Back To Text

[138] 11 U.S.C. § 548(a)(1) (1994).Back To Text

[139] *See* McCardell & Valdes, supra note 137, at 8 (stating that Religious Liberty Act does not protect contributions made with actual intent to hinder, delay or defraud creditors); C. Scott Pryor, *Tension Between the Trustee and the Tithe: Is P.L. 105−183 Absolution?,* Am. Bankr. Inst. J. Dec.−Jan. 1999, at 10, 10 (noting that elimination of trustee's power to avoid charitable contributions is not absolute).Back To Text

[140] *Senate Vote of the Religious Liberty and Charitable Donation Protection Act of 1998*, (May 13, 1998) at S4769 <http://thomas.loc.gov/cgi−bin/query/C?r105:./temp/~ r105B3N69Z>.Back To Text

[141] *See* Hearing Statement of Donald S. Bernstein, Esq., supra note 120, at 44 (discussing how definitive cap at much lower than 15% should be established for charitable giving, as well as "bright−line test" to determine whether debtor has history of giving to that organization in past). Mr. Bernstein suggests that the "bright−line test" to establish the debtors pattern of giving and to determine if a fraudulent transfer has been made, should cover or two a three year look−back period.Back To Text

[142] *See* Section 544 − Trustee as Lien Creditor and as Successor to Certain Creditors and Purchasers: Section 544(b) of title 11, United States Code, as amended−−

> (b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.
>
> (2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case. Id.

The language of section 544 was amended in two ways:

> (1) by striking ‘(b) The trustee' and inserting ‘(b)(1) Except as provided in paragraph (2), the trustee'...; and
>
> (2) by adding at the end the following:
>
> (2) Paragraph (1) shall not apply to a transfer of a charitable contribution . . . .

*Senate Vote of the Religious Liberty and Charitable Donation Protection Act of 1998*, (May 13, 1998) at S4769 <http://thomas.loc.gov/cgi−bin/query/C?r105:./temp/~ r105B3N69Z>.Back To Text

[143] 11 U.S.C. § 544(b) (1998).Back To Text

[144] *See, e.g.*, N.Y. C.P.L.R. § 213 (8) (McKinney 1998) (providing six year statute of limitations for fraud).Back To Text

[145] *See* 11 U.S.C. § 548(d)(3) (1994).Back To Text

[146] *See* Hearing Statement of Donald S. Bernstein, Esq., supra note 120, at 44.Back To Text

[147] Id.Back To Text