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A Statute of Disbelief?: Clashing Ethical Imperatives in Fraudulent Transfer Law

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A STATUTE OF DISBELIEF?: CLASHING ETHICAL IMPERATIVES IN FRAUDULENT TRANSFER LAW

Mary Jo Newborn Wiggins*

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"The first of your fruits of your ground you shall bring into
the house of the Lord your God."¹

but

"[I]t is the policy of the law that the debtor be just before he
be generous."²

I. INTRODUCTION

With the steadily increasing number of bankruptcy filings,³ bankruptcy law

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1. *Exodus* 23:19.

2. *Hearn 45 St. Corp. v. Jano*, 27 N.E.2d 814, 816 (N.Y. 1940).

3. See Fred R. Bleakley, *Personal-Bankruptcy Filings Are Soaring*, WALL ST. J., May 8, 1996, at A2 (reporting that the total number of bankruptcy filings rose 27% between January 1 and April 26, 1996, the largest four month rate of increase since 1986 and the biggest four-month total ever); Toddi Gutner, *Personal Bankruptcy: How to Slow the Stampede*, BUS. WK., Sept. 9, 1996, at 46 (noting that 1.1 million families are expected to file for bankruptcy in 1996, a 26%

finds itself entangled with new contentions, pitting law and social policy against one another. This interplay is especially evident in cases involving bankruptcy trustees who attempt to use the Bankruptcy Code's fraudulent transfer statute to recover donations to religious institutions.⁴

Consider the case of Bruce and Nancy Young and the Crystal Evangelical Free Church.⁵ The Youngs contributed or "tithed"⁶ \$13,450 to the church in the year before they filed a Chapter 7 bankruptcy petition. The bankruptcy trustee brought an action in the bankruptcy court seeking to recover this sum. The trustee's theory was based on constructive fraud.⁷ That is, the trustee

increase over 1995). The number of bankruptcy petitions filed nationwide has risen steadily since the late 1980s. See Karen Gross, *Re-Vision of the Bankruptcy System: New Images of Individual Debtors*, 88 MICH. L. REV. 1506, 1512 n.18 (1990) (reviewing TERESA A. SULLIVAN, ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA (1989)); see also Mary Josephine Newborn [Wiggins], *Undersecured Creditors in Bankruptcy: Dewsnap, Nobelman, and the Decline of Priority*, 25 ARIZ. ST. L.J. 547, 552 n.12 (1993) (citing the rising number of filings between 1988 and 1991).

4. See *Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3205 (U.S. Sept. 19, 1996) (No. 96-437); *Fitzgerald v. Magic Valley Evangelical Church, Inc. (In re Hodge)*, 200 B.R. 884 (Bankr. D. Idaho 1996); *Morris v. Midway S. Baptist Church (In re Newman)*, 183 B.R. 239 (Bankr. D. Kan. 1995), *aff'd*, 203 B.R. 468 (D. Kan. 1996); *Ellenberg v. Chapel Hill Harvester Church, Inc. (In re Moses)*, 59 B.R. 815 (Bankr. N.D. Ga. 1986); *Wilson v. Upreach Ministries (In re Missionary Baptist Found. of Am., Inc.)*, 24 B.R. 973 (Bankr. N.D. Tex. 1982).

In addition, many of the amendments to the Code in the recent Bankruptcy Reform Act of 1994 seem designed to respond to social problems, including child support enforcement, divorce obligations, and mass torts. See, e.g., 11 U.S.C. § 523(a)(5) (1994) (creating a new exception to discharge for any debt incurred in connection with a divorce or separation agreement); 11 U.S.C. § 547(c)(7) (1994) (preventing trustees from avoiding transfers made to former spouses or children for support or maintenance as preferential transfers); and 11 U.S.C.A. §§ 524(g), (h) (1994) (establishing a procedure for dealing, in a Chapter 11 reorganization case, with future personal injury claims against the debtor based on exposure to asbestos containing products). See generally Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended in scattered sections of 11 U.S.C.) (amending the above-mentioned Bankruptcy Code sections in response to social problems).

5. *Young*, 82 F.3d at 1407.

6. THE NEW MERRIAM WEBSTER DICTIONARY defines a "tithe" as "a 10th paid or given, esp. for the support of a church." THE NEW MERRIAM WEBSTER DICTIONARY 751 (1989). In the Judeo-Christian tradition, biblical support for the practice of tithing can be found in several passages of the Old and New testaments. See *Deuteronomy* 14:22-29; *Malachi* 3:8-10; *Hebrews* 7:8. The Islamic faith also observes a similar tradition, called the "zakat." RICHARD TAMES, *APPROACHES TO ISLAM* 39 (1982).

7. *Young*, 82 F.3d at 1410. 11 U.S.C. § 548(a)(2)(A) (1994) reads, in pertinent part: 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 . . . received less than a reasonably equivalent value in exchange for such transfer or obligation

argued that the debtors received "less than a reasonably equivalent value"⁸ in exchange for their contributions.⁹ In response, the church made two arguments: First, the church asserted that the debtors did receive reasonably equivalent value because they received, among other things, spiritual counseling.¹⁰ Second, the church urged that such an application of fraudulent transfer law would violate the Free Exercise and Establishment Clauses of the United States Constitution.¹¹ The church lost at the bankruptcy court and the district court levels but appealed to the Eighth Circuit Court of Appeals.¹²

After the district court decided the case, but before the Eighth Circuit heard oral argument, Congress passed the Religious Freedom Restoration Act of 1993 ("RFRA").¹³ The aim of RFRA was to overrule *Employment Division, Department of Human Resources v. Smith*,¹⁴ a case in which the United States Supreme Court ruled that facially neutral laws of general applicability that burden the exercise of religion require no special justification to satisfy First Amendment scrutiny.¹⁵ RFRA restored to free exercise jurisprudence what is known as the "compelling interest test"¹⁶ as set forth in *Sherbert v. Verner*¹⁷ and *Wisconsin v. Yoder*.¹⁸ Under this test, the government may substantially burden a person's exercise of religion only if it demonstrates that the application of the burden is in furtherance of a compelling governmental interest and that the burden is the least restrictive means of furthering that interest.¹⁹

To the delight of the bankruptcy trustee, the Clinton Administration filed an amicus brief in support of the trustee's position in *Young*.²⁰ However,

8. 11 U.S.C. § 548(a)(2)(A).

9. *Young*, 82 F.3d at 1410.

10. *Id.* at 1410, 1414.

11. *Id.* at 1411.

12. *Id.* at 1409-10.

13. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000 bb-4 (1994); *Young*, 82 F.3d at 1412.

14. 494 U.S. 872 (1990); 42 U.S.C. § 2000bb(a)(4).

15. *Smith*, 494 U.S. at 879-80.

16. 42 U.S.C. § 2000(b)(1).

17. 374 U.S. 398 (1963).

18. 406 U.S. 205 (1972).

19. 42 U.S.C. §§ 2000bb-1(a) to (b). A case challenging the constitutionality of RFRA is now before the United States Supreme Court. *See Flores v. City of Boerne, Tex.*, 73 F.3d 1352 (5th Cir.), *cert. granted*, 117 S. Ct. 293 (1996). One bankruptcy court, in a fraudulent transfer case factually similar to *Young*, has found RFRA unconstitutional. *See Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge)*, 200 B.R. 884 (Bankr. D. Idaho 1996).

20. *Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1413 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3205 (U.S. Sept. 19, 1996) (No. 96-437); *see Laurie Goodstein, Religious Groups Fight U.S. in Bankruptcy Case*, WASH. POST, May 23, 1994 at A1.

shortly before the Eighth Circuit heard oral argument, the Administration, relying in part on RFRA, withdrew its brief and its support.²¹

Some in the religious community reacted to the lower court opinions in *Young* with considerable displeasure.²² In their view, there was no convincing justification for the courts' holdings. Religious organizations argued that the money given to churches did purchase something of value in the form of intangible religious benefits.²³ By pursuing these tithes, they argued, the government was striking at the essence of constitutionally protected religious freedoms.²⁴ The Clinton campaign echoed this view in a campaign advertisement that began, "Protecting religious freedom. It's the foundation of our nation. When the Justice Department went after a church to gather the parishioners' tithing money, the government was stopped cold because President Clinton overturned the government policy and protected us."²⁵

Bankruptcy trustees reiterated that the Youngs and other similarly situated parishioners simply did not receive "reasonably equivalent value" for their donations as that term is defined in the Code.²⁶ Further and in response to the constitutional arguments offered by religious institutions, the trustees asserted that the government has a compelling interest in the payment of debts: protecting the property of creditors.²⁷

Perhaps not surprisingly, the rhetoric on both sides of this issue became heated. Religious organizations accused bankruptcy trustees of ushering in rampant religious repression.²⁸ Those supportive of trustees contended

21. *Young*, 82 F.3d at 1413; see *Religious Liberty in America: Hearings Before the Senate Judiciary Committee*, (1995) (statement of Orrin Hatch, Chairman, Senate Judiciary Committee); *Clinton Orders Withdrawal of Brief by Justice Agency*, WALL ST. J., Sept. 16, 1994, at B5; Sherrie Nackman, *Bill Clinton's Divine Intervention*, AM. LAW., Nov. 1994, at 15; Gustav Niebuhr, *Justice Department Withdraws Brief in Tithing Case*, N.Y. TIMES, Sept. 16, 1994, at B18.

22. See Tim Bryant, *Clinton Pulls U.S. Out of Tithe Case*, ST. LOUIS POST-DISPATCH, Sept. 16, 1994, at 1A.

23. See Nackman, *supra* note 19, at 15.

24. *Id.*

25. *Clinton 'Values' Ads Draw Sharp Criticism*, S. CAL. CHRISTIAN TIMES, Nov. 1996, at A1. The President also raised the issue in a televised debate with challenger Bob Dole when, in response to a question, the President stated as follows:

One of my proudest moments was signing the Religious Freedom Restoration Act, which says the government's got to bend over backwards before we interfere with religious practice. So I changed the Justice Department effort to get a church to pay back a man's tithe because he was bankrupt when he gave it.

Transcript of Second Televised Debate Between Clinton and Dole, N.Y. TIMES, Oct. 17, 1996, at B10.

26. Tim Bryant, *Court To Rule on Rendering unto Caesar*, ST. LOUIS POST-DISPATCH, Sept. 14, 1994, at 1A.

27. Lyle Denniston, *Justice Department Drops Church Case*, BALTIMORE SUN, Sept. 14, 1994, at 1A.

28. *Creditors Sue for Money Donated to Church* (National Public Radio Broadcast, June 16,

that church members ought to be more concerned about paying their bills than about trying to secure for themselves a special exemption from laws that apply to other citizens.²⁹

Approximately one year and eight months after it heard oral argument, the Eighth Circuit Court of Appeals reversed the district court. The court held that the debtors' contributions were fraudulent transfers under the Code.³⁰ The court also held, however, that the recovery of the contributions violated RFRA because it substantially burdened the debtors' free exercise of religion and was not in furtherance of a compelling governmental interest.³¹ The trustee has appealed the case to the United States Supreme Court.³²

Young and similar cases cannot be fully understood apart from larger social and political forces at work in this decade. First, the revamped "religious right" is staking a claim to greater political and legal prominence.³³ To this group, *Young* represents another in a long line of examples of the disrespect that secular society has for those of religious faith.³⁴ Second, religion and religious issues (such as abortion, euthanasia, prayer in schools) dominate newspaper headlines.³⁵ Public discussion of religious issues has focused renewed attention on the conflict between secular and religious values.³⁶

1994).

29. *Render unto Caesar: Religious Freedom Isn't an Escape Hatch for Bankruptcy*, PITTSBURGH POST-GAZETTE, June 2, 1994, at B2.

30. *Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1416 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3205 (U.S. Sept. 19, 1996) (No. 96-437).

31. *Id.* at 1420.

32. *Christians v. Crystal Evangelical Free Church (In re Young)*, 65 U.S.L.W. 3205 (U.S. Sept. 19, 1996) (No. 96-437).

33. See Don Feder, *Social Contract Written On Wind*, BOSTON HERALD, May 22, 1995, at 25; Norman Lear & David Ramage, *Look Behind Christian Coalition's Benign Face*, HOUSTON CHRONICLE, May 17, 1995, at A29; Norman Lear & David Ramage, *Perspective on the Christian Coalition: Is This a Make-Over or Is It a Cover-Up?*, L.A. TIMES, May 12, 1995, at B7. For examples of the religious right's foray into legal advocacy, see Gustav Niebuhr, *Conservatives New Frontier: Religious Liberty Law Firms*, N.Y. TIMES, July 8, 1995, at 1.

34. See Christine Wicker, *"Soul Freedom" Fighter; Leader of Baptist Advocacy Group Battles School Prayer Amendment*, DALLAS MORNING NEWS, Apr. 8, 1995, at 1G.

35. See, e.g., Richard Berke, *Abortion Foes on a Roll, but Many Promise Not To Dictate GOP's Pick*, S.D. UNION-TRIB., July 2, 1995, at A10; Jerry Gray, *School Prayer Debate Opens with Everything but Silence*, N.Y. TIMES, June 9, 1995, at A20; *Healing Old Wounds—We All Should Have Choices in Preparing for Our Death*, SEATTLE TIMES, July 1, 1995, at A15; Scripps Howard, *Lawmaker Spells Out Prayer Bill*, ARIZ. REPUB., June 9, 1995, at A8; *Kervorkian Opens Clinic, Attends 24th Death*, L.A. TIMES, June 27, 1995, at A10; Michael Tackett, *Adamant Abortion Foes Look for a Candidate*, CHI. TRIB., July 2, 1995, § 1, at 11;

36. See W. Burlette Carter, *Can this Culture Be Saved: Another Affirmative Action Baby Reflects on Religious Freedom*, 95 COLUM. L. REV. 473, 473-474 nn.3-5 (1995) (reviewing STEPHEN CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993)).

Finally, the 1980's witnessed an unprecedented number of middle-class "baby boomers" filing bankruptcy petitions.³⁷ This phenomenon dovetailed with another equally intriguing development. Middle-class "baby boomers" seemed to be returning to the nation's church pews in large numbers.³⁸

Unfortunately, but perhaps predictably, the impassioned rhetoric used by both the secular and religious circles has created some vitally important underlying questions. How should bankruptcy law and policy interact with doctrines that have as their aim the protection of religious freedom? How broadly should RFRA be interpreted? Is it possible to find an accommodation between the two doctrines? If so, what should be the structure of that accommodation?

I attempt in this article to provide some answers to these questions and to reveal some fundamental tensions thus far overlooked. The article will not revisit the lower court opinions in *Young*. Those decisions have been analyzed elsewhere.³⁹ Instead, I center my critique on the Eighth Circuit's opinion, the most recent and authoritative precedent as of this writing. My critique reveals that although the *Young* court reached a result that is unassailable as a matter of bankruptcy policy, the court ultimately undermined the essence of that policy with a strikingly conclusory opinion on the RFRA issues in the case. In so doing, the court failed to address squarely what is genuinely at stake in these cases. I then illuminate this point by developing and analyzing three possible approaches to mediating the conflict between bankruptcy law and RFRA. I conclude with thoughts on an acceptable accommodation between bankruptcy's fraudulent transfer law and RFRA.

II. CHRISTIANS V. CRYSTAL FREE EVANGELICAL CHURCH (*IN RE YOUNG*)⁴⁰

The basic facts of *Young* were not in dispute. The Youngs were active members of the Crystal Free Evangelical Church in Minneapolis, Minnesota.

37. Wade Lambert, *The New Faces of Personal Bankruptcy: Baby Boomers*, WALL ST. J., Oct. 7, 1993, at B1.

38. See *Churchgoing Boomers Prove Reports of God's Death are Greatly Exaggerated*, BOOMER REP., July 15, 1991; Richard N. Ostlings, *The Church Search*, TIME, April 5, 1993, at 44, 45-46.

39. See, e.g., Michael M. Duclos, *A Debtor's Right to Tithe in Bankruptcy Under the Religious Freedom Restoration Act*, 11 BANKR. DEV. J. 665 (1995); Oliver B. Pollak, "Be Just Before You're Generous": *Tithing and Charitable Contributions in Bankruptcy*, 29 CREIGHTON L. REV. 527 (1996); Robert J. Bein, Comment, *Robbing Peter To Pay Paul: Charitable Donations as Fraudulent Transfers*, 100 DICK. L. REV. 103 (1995); Steven Hopkins, Comment, *Is God a Preferred Creditor? Tithing as an Avoidable Transfer in Chapter 7 Bankruptcies*, 62 U. CHI. L. REV. 1139 (1995).

40. 82 F.3d 1407 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3205 (U.S. Sept. 19, 1996) (No. 96-437).

They made regular contributions to the church, as a part of their religious beliefs. Tithing was not a condition of membership in the church, nor was it a condition for attendance. All parties agreed that the Youngs were sincere in their religious faith. In February 1992, the Youngs filed a joint petition under Chapter 7 of the Bankruptcy Code. During the year preceding the filing, they had contributed \$13,450.00 to the church. Also during this time, they were legally insolvent.⁴¹ The trustee brought an action in the bankruptcy court seeking to recover the money the debtors had given to the church, arguing that the debtors received "less than reasonably equivalent value in exchange for"⁴² their contributions.⁴³

The bankruptcy court ruled against the church and offered several reasons for finding that the debtors did not receive reasonably equivalent value in exchange for their contributions. First, the benefits they received were not physical or material.⁴⁴ Second, the contributions were strictly religious and thus did not contribute to the maximization of the bankruptcy estate.⁴⁵ Third, assuming the debtors received value, that value was not "in exchange for" their contributions because participation in the church was not conditioned on tithing.⁴⁶ The church appealed to the district court and the district court affirmed the bankruptcy court's analysis of § 548(a)(2)(A).⁴⁷ That is, the district court agreed that the debtors did not receive reasonably equivalent value in exchange for their contributions.⁴⁸ Reviewing the constitutional issues for the first time, the district court held that the trustee's actions did not violate the free exercise clause under *Employment Division, Department of Resources v. Smith*⁴⁹ because the Code was a neutral law of general applicability and the government had a compelling interest in the bankruptcy.⁵⁰ The district court also held that § 548 did not violate the establishment clause

41. *Id.* at 1410.

42. 11 U.S.C. § 548(a)(2)(A) (1994).

43. *Young*, 82 F.3d at 1410.

44. *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).

45. *Id.* at 893-94.

46. *Id.* at 895.

47. *Young*, 152 B.R. at 948. There were some subtle differences between the analysis of the bankruptcy court and district court on the issue of how the Code defines "value" in this context. The bankruptcy court defined value in terms of that which is tangible, financial, and marketable, from the creditors' point of view. *Young*, 148 B.R. at 894. The district court defined value by looking to both direct and indirect economic benefit, as long as the benefit is "fairly concrete." *Young*, 152 B.R. at 945 (quoting *First Nat'l Bank v. Minnesota Util. Contracting, Inc. (In re Minnesota Util. Contracting, Inc.)*, 110 B.R. 414, 420 (D. Minn. 1990)).

48. *Young*, 152 B.R. at 948.

49. 494 U.S. 872 (1990).

50. *Young*, 152 B.R. at 953-54.

because it had a secular purpose, it neither advanced nor inhibited religion, and it did not threaten excessive religious entanglements.⁵¹ In the interim between the district court decision and oral argument before the Eighth Circuit Court of Appeals, Congress passed RFRA.⁵²

In its appeal to the Eighth Circuit Court of Appeals, the church made three arguments. First, the church posited that the district court should not have applied § 548. Second, assuming § 548 to be applicable, the church claimed it was error to find that the debtors did not receive reasonably equivalent value in exchange for contributions to the church. Third, the petitioners argued that requiring the return of contributions in such circumstances violates the free exercise clause of the constitution because it substantially burdens religion and is not in furtherance of a compelling governmental interest.⁵³

More precisely, the church's first argument was that the district court should not have applied § 548 because the statute is labeled "fraudulent transfers and obligations."⁵⁴ The church contended that application of the statute was improper because in this case there was no evidence of fraudulent intent.⁵⁵ The church seemed concerned that fixing such an ominous-sounding label morally impugned the debtors and, at least indirectly, the church.⁵⁶ The court's handling of this argument provides an early indication of its conflicting attitudes about this case. On one hand, the court seemed to go out of its way to soothe the church's wounded pride. The court noted that it would prefer to call the debtors' contributions "avoidable transfers."⁵⁷ As a matter of bankruptcy law, that designation is not wholly correct, since avoidable transfer is a broad term under the Code. Properly understood, the term refers to a variety of avoidance actions, some of which are completely unrelated to fraudulent transfers.⁵⁸ The court then reminded us that the trustee did not accuse the church or the debtors of any "improper conduct, much less actual fraud."⁵⁹ On the other hand, the court firmly rejected the core of the church's argument. The court noted correctly that the trustee did not have to prove

51. *Id.* at 955.

52. *See supra* notes 14-17 and accompanying text.

53. *Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1406, 1413 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3205 (U.S. Sept. 19, 1996) (No. 96-437).

54. *Id.* at 1413 (quoting 11 U.S.C. § 548).

55. *Id.* at 1414.

56. *Id.* at 1413-14. In its argument to the district court, the church noted that it was "offended at the characterization of the transfers as 'fraudulent.'" *Christians v. Crystal Evangelical Free Church (In re Young)* 152 B.R. 939, 950 (D. Minn. 1993), *rev'd*, 82 F.3d 1407 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3205 (U.S. Sept. 19, 1996) (No. 96-437).

57. *Young*, 82 F.3d at 1414.

58. *See, e.g.*, 11 U.S.C. §§ 544, 547 (1994) (providing for avoidable transfers under bankruptcy's strong arm clause and preference provisions).

59. *Young*, 82 F.3d at 1414.

actual fraud since § 548(a)(2)(a) is a constructive fraud provision.⁶⁰ Additionally, the court characterized this argument as “preliminary”⁶¹ (as if to suggest its lack of weight) and the church’s second argument as “substantive.”⁶²

The court next considered the church’s argument that the district court erred in finding that the debtors did not receive “reasonably equivalent value in exchange for”⁶³ their contributions to the church. The church argued that the district court improperly defined “value” in a way that excluded indirect economic benefits the debtors received, such as tax deductions, church membership and spiritual counseling. Moreover, the church contended that the contributions were made “in exchange for” indirect services received around the same time the contributions were made, thereby creating a nexus between the contributions and the services.⁶⁴

The court responded by affirming, at least in part, the district court’s analysis. First, the court noted that the district court did not define “value” narrowly to include only tangible property. Instead, the district court allowed for the possibility of indirect benefits as long as those benefits were “fairly concrete.”⁶⁵ The court did not offer a definition of the term fairly concrete, but it did endorse the district court’s analysis to the extent that the district court chose not to define “indirect economic benefit” solely in terms of legal, equitable, or ownership interests.⁶⁶ The court did not, however, endorse the district court’s finding on the ultimate issue of whether the debtors received any economic benefit from the church services. In fact, the court chose not to rule on that question, curiously deeming it only tangential.⁶⁷

60. *Id.*

61. *Id.* at 1413.

As a preliminary matter, the church argues that this caption is not merely “unfortunate” but significant because the purpose of the section is to avoid transfers made with fraudulent intent or at least under circumstances under which a transfer may be considered fraudulent. . . . We next consider the church’s substantive statutory argument. *Id.* at 1413-14.

62. *Id.* at 1414.

63. 11 U.S.C. § 548(a)(2)(A) (1994).

64. *Young*, 82 F.3d at 1414.

65. *Id.* at 1415 (citing *Christians v. Crystal Evangelical Free Church (In re Young)* 152 B.R. 939, 945 (D. Minn. 1993), *rev’d*, 82 F.3d 1407 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3205 (U.S. Sept. 19, 1996) (No. 96-437)).

66. *Id.*

67. *Id.* “In any event, in the present case, whether the debtors received any economic benefit from the church services is beside the point.” *Id.* “For purposes of analysis, we have also assumed that the contributions and the church services were reasonably equivalent and thus need not take up the constitutionally suspect and difficult task of attempting to value the church services.” *Id.* at 1415, n.4.

In the view of the court, the main weakness with the church's argument was that the debtors did not make their contributions in exchange for the church services.⁶⁸ The debtors stipulated that they did not give the money with the expectation that they would receive a "quid pro quo"⁶⁹ in the form of tangible benefits. Moreover, church services and activities would have been available to them even if they had given nothing. As such, the court adopted completely the reasoning of the district court and the bankruptcy court—§ 548 called for return of the contributions.⁷⁰

Although the court's failure to adequately address the reasonably equivalent value issue undermines the logical force of the opinion, the ultimate result is unassailable as a matter of bankruptcy policy. At the heart of bankruptcy's fraudulent transfer law lies the notion that creditors should be protected from attempts (actually or constructively fraudulent) to deplete assets that would have otherwise gone to deserving creditors. Because of this notion, even innocent actions that would be permissible outside of bankruptcy are not permissible inside of bankruptcy, or when a bankruptcy is likely.⁷¹

Having concluded that the debtor's contributions were avoidable transfers⁷² and recoverable by the trustee under § 548(a)(2), the court turned to the church's free exercise claim. The church argued that the debtors' free exercise of their religion was substantially burdened and that the trustee's action was not in furtherance of a compelling governmental interest.⁷³ After discussing the history and purpose of RFRA, the court concluded that the church was right. Recovery of these contributions substantially burdened the debtors' free exercise of religion and was not in furtherance of a compelling governmental interest.⁷⁴

The court's treatment of the substantial burden issue is glaringly sparse, consisting of one paragraph. Oddly, that paragraph began with the court stating that it would assume that recovery of these contributions would represent a substantial burden.⁷⁵ The court then reasoned in support of that conclusion, noting first that the tithing was religiously motivated. Second, the court opined that permitting the trustee, as a representative of the government, to recover the contributions would effectively prevent the debtors

68. *Young*, 82 F.3d at 1415.

69. *Id.*

70. *Id.*

71. Both the law of fraudulent transfers and preference law provide examples of this idea.

72. See *supra* text accompanying notes 59-60.

73. *Young*, 82 F.3d at 1417. The church argued that the substantial burden took the form of unfair discrimination against religions in general; more specifically religions that rely on donations; and most specifically, religions that encourage tithing at the 10% level. *Id.*

74. *Id.*

75. *Id.* at 1418.

from tithing.⁷⁶ The court then announced: "It is sufficient that the governmental action in question meaningfully curtails, albeit retroactively, a religious practice of more than minimal significance in a way that is not merely incidental."⁷⁷

The court did not explain the concept of meaningful curtailment, nor did it explain fully how that concept applied to these facts. The court merely cited to one case that supports its basic reasoning⁷⁸ and one that does not.⁷⁹ Moreover, the court completely dismissed, without analysis, the retroactive nature of the trustee's action. As the dissenting opinion noted, the substantial burden issue deserves a more detailed analysis than that offered by the court.⁸⁰

In fact, the opinion of the dissenting judge seems more persuasive on this point, in part at least, because it contains a more extensive application of the substantial burden standard to the facts in the case. The dissent did not question the debtors' sincerity, nor did it question that tithing was essential to their religious practice.⁸¹ The dissent noted, however, three facts entered into evidence (and uncontroverted) which led it to the conclusion that the trustee's action did not violate the substantial burden test. First, the debtors had an opportunity to tithe and express their commitment to their faith.⁸² Second, § 548 did not prevent them from tithing because the funds had already been tithed.⁸³ Third, tithing is not required to participate in church services and the debtors can continue to tithe, assuming they do not file for bankruptcy again.⁸⁴

After examining the substantial burden issue, the court in the majority opinion then turned its attention to the compelling governmental interest analysis. The court's analysis of this issue is also remarkably slim. The trustee argued that the Code and § 548 further compelling governmental interests because they allow debtors to obtain a fresh start and they promote creditor collection through estate maximization.⁸⁵ In response, the bankruptcy court

76. *Id.*

77. *Id.* at 1418-19.

78. *Id.* at 1419 (citing *In re Tessier*, 190 B.R. 396 (Bankr. D. Mont. 1995)).

79. *Id.* at 1419 (citing *Morris v. Midway S. Baptist Church (In re Newman)*, 183 B.R. 239 (Bankr. D. Kan. 1995)).

80. *Id.* at 1421 (Bogue, J., dissenting).

[I]t is important that the substantial burden step in the RFRA analysis is not reduced to a perfunctory determination or foregone conclusion. A searching inquiry is required to "protect the government from having to justify its regulations under a compelling interest standard if the burden on the asserted practice is incidental or de minimis."

Id. (quoting *Sasnett v. Sullivan*, 908 F. Supp. 1429, 1444 (W.D. Wis. 1995)).

81. *Id.* at 1421.

82. *Id.*

83. *Id.* at 1422.

84. *Id.*

85. *Id.* at 1419. The court also cited to the bankruptcy case of *Morris v. Midway S. Baptist*

and the Eighth Circuit Court of Appeals cited the bankruptcy case of *In re Tessier*⁸⁶, in which a bankruptcy court interpreted the compelling governmental interest requirement as relating *directly* to the “survival of the republic or the physical safety of its citizens.”⁸⁷ The *Young* court concluded that the interests cited by the trustee and those mentioned by the bankruptcy court in *Newman* did not rise to the level of national security or public safety.⁸⁸

There are two problems with the court’s analysis of the compelling governmental interest issue. First, the court did not reveal precisely what standard it was applying. The court suggested that the *Tessier* standard might be too narrow,⁸⁹ but it failed to offer any clear alternative. Second, the court’s analysis of the issue seems woefully conclusory.⁹⁰ The court simply asserted, without explanation, that bankruptcy is not like the tax or social security systems that have been recognized by courts as serving compelling governmental interests.⁹¹ The court was also dismissive in considering the effects that a free exercise exemption from fraudulent transfer actions might have on the bankruptcy system.⁹² As the dissenting judge pointed out, the decision may have the effect of fundamentally altering the way some creditor transactions are structured, since now creditors will have an incentive to ask potential borrowers about their past and present patterns of religious giving.⁹³

Church (In re Newman), 183 B.R. 239 (Bankr. D. Kan. 1995). The *Newman* court cited two other compelling interests: administration of the bankruptcy system and recovery of fraudulent transfers. *Id.* at 252.

86. 190 B.R. 396 (Bankr. D. Mont. 1995).

87. *Id.* at 405.

88. *Young*, 82 F.3d at 1420.

89. *Id.*

90. *Id.*

We also agree that allowing debtors to get a fresh start or protecting the interests of creditors is not comparable to the collection of revenue through the tax system or the fiscal integrity of the social security system, which have been recognized as compelling governmental interests in the face of a religious exercise claim.

Id.

91. *But see In re Turner*, 193 B.R. 548, 555-56 (Bankr. N.D. Cal. 1996) (holding that § 110(c) of the Bankruptcy Code, which requires petition preparers to place their social security numbers on documents for filing, did not violate RFRA, in part, because it was supported by a compelling governmental interest in preventing the widespread fraud and abuse by petition preparers who prey on the poor and the unsophisticated).

92. *Young*, 82 F.3d at 1420.

Moreover, we cannot see how the recognition of what is in effect a free exercise exception to the avoidance of fraudulent transfers can undermine the integrity of the bankruptcy system as a whole; its effect will necessarily be limited to the debtor’s creditors, who will as a result have fewer assets available to apply to the outstanding liabilities, and not all creditors or even all debtors.

Id.

93. *Id.* at 1423 (Bogue, J., dissenting).

After such a long wait, the Eighth Circuit's opinion seems a major disappointment. The court probably reached the right result as a matter of bankruptcy law and policy. Yet, the court's conclusory treatment of the RFRA issues ultimately undermines the core of that law and that policy. Furthermore, the decision will not provide much in the way of helpful guidance to lower courts on the RFRA issues because the court neither adequately defined nor fully addressed those issues. At bottom, the court failed to confront squarely what is at stake in cases like *Young*, and as a result, the opinion obscures more than it clarifies. In the next part of this article, I will analyze three approaches to mediating the conflict between bankruptcy's fraudulent transfer law and RFRA and, in so doing, illustrate the hard choices among competing, legitimate interests that these cases present.

III. THREE APPROACHES TO MEDIATING THE CONFLICT BETWEEN FRAUDULENT TRANSFER LAW AND THE RELIGIOUS FREEDOM RESTORATION ACT

A. Standardizing "Value"

One way to resolve the conflict presented by *Young* is to apply § 548(a)-(2)(A) on its terms and treat religious donations as we would any other transfer. We could call this approach "standardizing value" because it embodies two assumptions: First, the competing conceptions of what constitutes "reasonably equivalent value" (the Code's and the church's) should be compared.⁹⁴ Second, the frame of reference for the comparison should be external to religious faith. In this case, the external reference is the term reasonably equivalent value, as that term has been interpreted by most courts. Under this approach, the church's conception of reasonably equivalent value is necessarily subordinated to an alternative standard. This approach best describes the one taken by the bankruptcy court and the district court in *Young*. As a jurisprudential matter, this approach assumes that an application of the statute's plain language best addresses the interpretive problem.

A standardization also allows the legal meaning of the term reasonably equivalent value to maintain some measure of consistency across different factual settings in bankruptcy law. This consistency becomes apparent when one observes that courts usually have been quite rigorous when scrutinizing the value received by debtors in fraudulent transfer litigation.⁹⁵ Under this

94. I would characterize the Code's conception of reasonably equivalent value as anchored in economics, with an emphasis on that which is tangible, marketable, or material. I would characterize the church's conception of reasonably equivalent value as rooted largely in the non-economic—emphasizing spiritual, personal, and even community gains that are not quantifiable in a market sense.

95. See *Covey v. Commercial Nat'l Bank*, 960 F.2d 657, 662 (7th Cir. 1992) (rejecting

proposal, reasonably equivalent value is not highly situational, at least as a legal concept. It does not carry one meaning for religion cases and a different meaning for others. Perhaps this is the way it should be unless and until Congress drafts a specific exemption for religious donations. Of course, the term reasonably equivalent value contains its own ambiguities. But having bankruptcy judges interpret that term seems easier, by comparison, than having those same judges administer a blanket statutory exemption for religious donations.⁹⁶ The latter option would inevitably lead bankruptcy judges into the thicket of determining what constitutes a bona fide religion and what constitutes a sincere belief within that religion. Identifying a bonafide religion is certainly not a simple inquiry and not one with which bankruptcy judges have traditionally had expertise. In contrast, bankruptcy judges do have a certain measure of expertise in generally making valuation determinations and in specifically assessing reasonably equivalent value.

This proposal also derives strength from its consistency with bankruptcy policy in the area of fraudulent transfer law and with the spirit of avoiding powers generally. One of the underlying notions of avoiding powers is the idea that private agreements that might be good for the debtor and a single creditor (in this case, the church) might not be good for creditors as a whole. Advocates for churches sometimes seem to forget that the money recovered by the trustee is intended for unsecured creditors whom, after all, the debtor has also promised to repay.

This method of resolving the conflict between fraudulent transfer law and RFRA will not necessarily lead to disaster for churches. Charities can at least

creditor's claim that resale price may be presumed to be reasonably equivalent value when that creditor "seize[s] an asset and sell[s] it for just enough to cover its loan (even if it would have been worth substantially more as part of an ongoing enterprise)"; *Cooper v. Ashley Communications, Inc.* (*In re Morris Communications NC, Inc.*), 914 F.2d 458, 469 (4th Cir. 1990) (holding that for purposes of determining reasonably equivalent value, the worth of an entry in a cellular phone license lottery should be discounted to reflect probability of winning); *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 991-92 (2d Cir. 1981) (recognizing that debtors may have received reasonably equivalent value in exchange for incurring obligations even if benefit was indirect, but holding that benefit had to be quantified and compared to the amount of the obligation incurred); *Wells Fargo Bank v. Desert View Bldg. Supplies, Inc.* (*In re Desert View Bldg. Supplies, Inc.*), 475 F. Supp. 693, 696 (D. Nev. 1978), *aff'd without opinion*, 633 F.2d 221 (9th Cir. 1980) (holding that a \$250,000 loan transaction was without fair consideration because, even though the debtor received proceeds from a loan, the transaction ultimately did not benefit the debtor). *But see Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 647-48 (3d Cir. 1991) (holding that the synergistic relationship between the parent company and the debtor constituted a reasonably equivalent value and that precise quantification of the benefit was not necessary); *Jones v. National City Bank* (*In re Greenbrook Carpet Co., Inc.*), 722 F.2d 659, 660 (11th Cir. 1984) (*per curiam*) (holding that a loan made to the debtor for the benefit of the stockholders constituted reasonably equivalent value, even though the debtor received in return only worthless collateral in the form of stock).

96. See proposal discussed *infra* Part III.B.

be assured that the same rules which apply to other creditors (including other churches with a tradition of tithing) will apply to them. Moreover, churches often face the risk that promised financial pledges will not materialize, due to factors such as job loss, divorce, or transfer of membership. Churches, like other entities to whom debtors make promises, are simply accommodating another contingency: the bankruptcy of a regular contributor.

Of course, before one is prepared to endorse this proposal, its two guiding assumptions mentioned above must be accepted: (1) that the competing conceptions of value should be compared and (2) that an external frame of reference should serve as the baseline. Both of these assumptions are open to challenge. For example, one might ask how the competing conceptions of reasonably equivalent value can be compared when one (the Code's) is secular and the other (the church's) is spiritual. The "value" contemplated by the Code is economic, and that contemplated by the church is non-economic. The value gained from tithing comes from the spiritual satisfaction one receives from being faithful to God and keeping God's commandments.⁹⁷ Understood this way, the conflict between the two competing conceptions of reasonably equivalent value seems fundamentally irreconcilable. It is impossible to conclude the debtor received less than reasonably equivalent value or to conclude the opposite because this conflict simply does not fit into the Code's existing analytical framework.

This criticism suggests a problem with the second assumption undergirding the standardization proposal. It presumes that a baseline derived from secular notions should serve as the sole reference point for the comparison. This prompts one to ask why the reference point should be wholly external. Should not our selection of the reference point account for the internal, spiritual dimensions of the debtor's life? The basic normative claim is that bankruptcy's fraudulent transfer law should adjust, in some measure, to the practices and patterns of everyday life, when those patterns and practices arise out of deeply felt personal convictions. To the extent that fraudulent transfer law cannot integrate such convictions, it risks seeming myopic and insular to many. Under this view, the proper approach might be to discard reasonably equivalent value as the reference point and exempt altogether most religious donations from the

97. See *Malachi* 3:8-10:

Will a man rob God? Yet ye have robbed me. But ye say, Wherein have we robbed thee? In tithes and offerings. Ye are cursed with a curse; for ye have robbed me, even this whole nation. Bring ye all the tithes into the storehouse, that there may be meat in mine house, and prove me now herewith, saith the Lord of hosts, if I will not open you the windows of heaven, and pour you out a blessing, that there shall not be room enough to receive it.

Of course, this argument has not been accepted by most courts, so churches have argued that they did receive an indirect economic benefit for their donations in the form of, among other things, spiritual counseling and tax deductions. See *supra* text accompanying note 64.

reach of § 548(a)(2)(A).⁹⁸ This aptly describes the position taken by the Court of Appeals in *Young*.

On the other hand, a law that, to some, seems myopic and insular may, to others, seem useful precisely because of its confines. Analytical markers such as reasonably equivalent value make it possible to resolve specific allocational and distributive choices in bankruptcy. Congress has determined that bankruptcy's regulatory agenda should advance certain goals, among them creditor collections. Congress has built into the Code concepts that it believed would advance these priorities. Courts should interpret the Code in ways that vindicate, not undermine, Congressional aims. The best way for courts to do this, the argument goes, is to apply § 548(a)(2)(A) on its terms and treat religious donations as we would any other transfer.

This proposal rests on the assumption that the Code and § 548 advance compelling governmental interests. While the bankruptcy system might not be directly comparable to the tax or the social security systems, that alone does not negate the possibility that the bankruptcy system can serve compelling governmental interests. The economic vibrancy of the nation depends upon maintaining a workable system for settling debts in the context of multiple defaults. Having such a system encourages people and institutions to risk human and financial capital in ways that stimulate economic growth. This is particularly true as more and more individuals and institutions interact with the bankruptcy system due to the steadily increasing number of filings.⁹⁹

B. Exempting Religious Transfers

A second response to *Young* would involve amending the Code to include a specific statutory exemption for religious donations. Presumably, advocates for churches would not be completely happy with an exemption that was judicially crafted and enforced. Maximum protection could come only from a blanket, statutory exemption directed solely at protecting religious donations. This is essentially what the Appeals Court did in *Young*, except that the court derived the exemption from RFRA, not the Code.

This proposal honors, in an affirmative way, the intangible of spiritual gain. It recognizes honestly that spiritual gain is not reducible to secular notions of value. It readily admits that these cases do not fit into the present analytical framework and suggests, therefore, that we ought to take them out. The idea that certain types of cases are not appropriate for the reasonably equivalent value analysis of § 548(a)(2)(A) is hardly revolutionary. For example, commentators and some courts have argued that, absent actual fraud,

98. Presumably, religious donations would not be safe from attack if the trustee could prove actual fraud.

99. See *supra* note 3.

leveraged buy-outs should not be subject to constructive fraud analysis. The argument is that highly leveraged corporate transactions, in the main, represent more of a benefit to society than a detriment because they are economically efficient.¹⁰⁰ In the same way, one who advocates exempting religious donations might argue that we as a society have more to gain from leaving these donations with the churches to which they were pledged.

At the same time, this approach recognizes that some debtors who tithe arguably receive an economic benefit, albeit indirect. Many of today's churches, particularly those in suburban areas, operate in an increasingly competitive market when it comes to attracting and retaining members.¹⁰¹ As a result, many offer more services to church members than were offered in the past.¹⁰² Churches are now more likely than ever before to offer child care, psychological counseling, and exercise programs. To the extent that these programs make church members better employees, spouses or parents, they can be viewed as offering indirect benefits. For example, these programs might help the debtor's other creditors by increasing the debtor's personal and professional productivity. According to some courts, indirect benefits count toward reasonably equivalent value and do not necessarily have to be quantifiable.¹⁰³

One problem with this approach is that it has the effect of diverting value that would otherwise go to creditors, but for the exemption. Because this exemption covers only religious transfers, private and public creditors are being forced to subsidize the churches of bankrupt debtors. This raises the issue of whether an exemption of this nature violates the Establishment Clause of the Constitution. Of course, some private, consensual creditors can protect themselves, to a certain extent, by asking questions about their debtor's giving habits prior to making loans. This is not, however, cost-effective for many creditors and it is impossible for non-consensual creditors like the IRS and tort claimants. Moreover, no other charitable institutions get this kind of special treatment. It is unclear, strictly as an economic matter, why other charitable institutions such as the Red Cross or the United Way should not be entitled to a similar subsidy.

100. See *Kupetz v. Wolf*, 845 F.2d 842, 847 n.10 (9th Cir. 1988) (noting that fraudulent transfer law should not be used to force selling shareholders to disgorge payments); Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 854 (1985).

101. See *supra* note 36.

102. See *supra* note 36.

103. See, e.g., *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 646-47 (3d Cir. 1991) (holding that the synergistic relationship between parent company and debtor constituted reasonably equivalent value and that precise quantification of benefit was not necessary).

The diversion of value problem is enhanced when one considers that this exception applies to all religious donations no matter how large, as long as they are not given under circumstances which suggest actual fraud. This makes a mockery of the longstanding idea that debtors hold their property in trust for their creditors.¹⁰⁴ It also distorts giving habits and thus creates two problems. First, more charitable funds go to churches than is societally optimal, given that other needy causes exist. Second, as private creditors adjust for the increased risk, they might become more intrusive when gathering information about a potential debtor prior to lending. Creditors can be expected to ask loan applicants if they have a pattern or practice of religious giving. This raises another potent issue: if the creditor denies the loan based upon information in response to these questions, does the creditor commit unlawful discrimination based on religion?

Additionally, there are theological complications. No doubt one who relies on the Bible to organize one's beliefs and practices can find passages in scripture that support the practice of tithing; however, there are ambiguities. A person could heed Romans 13:6-7 wherein the Apostle Paul states, "For because of this you also pay taxes, for they are God's ministers attending continually to this very thing. Render therefore to all their due, customs to whom customs, fear to whom fear, honor to whom honor."¹⁰⁵ That same person might also find guidance in Mark 12:17 wherein Jesus commands, "Render to Caesar the things that are Caesar's and to God the things that are God's."¹⁰⁶ This should not be construed as suggesting that tithing is somehow less important than meeting one's worldly obligations. When it comes to proper stewardship of resources, however, difficult value choices seem inevitable. These value choices seem best left to individual prayer and reflection. Crafting a broad statutory exemption based on the selective use of scripture seems unwise.

Given the problems that might result from an indiscriminating statutory exemption, churches should bear the burden of showing that recovery of the contributions represents a substantial burden on the free exercise of their member-debtors' religion. The holding in *Young* notwithstanding, churches have not yet made a persuasive case.¹⁰⁷ In none of the cases currently before

104. See *Twyne's Case*, 76 Eng. Rep. 809, 813 (K.B. 1601) (noting that there was a "trust between the parties, for the [debtor] possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud"); Robert Charles Clark, *The Duties of the Corporate Debtor to Its Creditors*, 90 HARV. L. REV. 505, 510-11 (1977).

105. *Romans* 13:1-7. In the passages immediately before these, Paul discusses a Christian's responsibilities toward government authorities.

106. *Mark* 12:17. In surrounding passages, Jesus is responding to Pharisees and Herodians who try to trap Jesus by asking him, "Is it lawful to pay taxes to Caesar, or not? Shall we pay or shall we not pay?" *Mark* 12:14-15.

107. See criticisms of *Young* court's perfunctory analysis of the substantial burden issue *supra*

the courts were the debtors denied the opportunity to tithe. There was no limit placed by the government or anyone else on the amount or frequency of tithing. No debtor has been expelled from his church (or threatened with expulsion) as a result of a trustee filing or winning one of these cases. Thus, the debtors in these cases have the opportunity to practice their religious faith without interference. The only function that § 548 serves is to retroactively protect other creditors in situations where the debtor is insolvent. If this function represents a “substantial burden,” then that concept seems to have all but lost its meaning.

Those who advocate an exemption might respond by noting that courts face the problems of subsidization and theological difficulties anytime religious liberty is at issue. Admittedly, the exemption issue presents those problems in no greater or lesser scale. It need not be accepted, however, that religious liberty is such a cherished value that we should surrender ourselves to these problems and *blindly* forge ahead in the name of liberty or protection. As for the claim that the substantial burden seems tenuous, exemption advocates might respond that, although these cases might not present the kind of imminent threat to religious practice presented by other laws, they remain important, if only as a symbol of religious liberty and the importance of remaining vigilant against threats to it. But to the extent that law is understood to be derived from facts, not symbols, the victory that churches secured in *Young* may itself prove tenuous.

C. Adopting a Standard of “Reasonableness”

The final alternative involves adopting a standard of “reasonableness” for religious donations. Section 548(a)(2)(A) would be amended to include this explicit exception. A reasonableness approach would also constitute the greatest effort to accommodate the conflicting demands of the Code and RFRA. Its accommodating character is a source of strength as well as weakness.

The strength of this proposal lies both in its form and substance. As a formal matter, including the exception in the text of § 548 provides some degree of uniformity because all courts would have a statutory duty to exempt any religious donations that are reasonable. Substantively, this method would protect those who in good faith contribute regular amounts to a church over a long period of time. Thus, the proposal strives to uphold the spirit of fraudulent transfer law. If the debtor is consistently giving amounts over a long period, the debtor will less likely engage in side-dealing with the church in a way that is harmful to other creditors. At the same time, this approach injects into bankruptcy’s fraudulent transfer law more sensitivity to strongly

held, personal notions of what seems just and fair. It attempts to temper bankruptcy law's hard edges with a "fuzziness" that seems appropriate in many of these cases.

The downside of this approach is its frustrating vagueness. This makes it difficult to apply the standard and to predict outcomes. The reasonableness approach may significantly impair the values of spirituality and individuality discussed earlier by not providing enough protection for churches. On the other hand, this approach could greatly weaken the goals of precision and certainty that we expect from the Code by providing too much protection for churches. In addition, there are several practical problems. What does it mean to tithe "consistently" or "regularly?" How will reasonableness be determined? Will we use a general "balancing of the equities" test or a multi-factor test? If Congress provides no standard, then one will have to be developed on a case-by-case basis, with the inevitability of confusing variations. Who would bear the burden of proof, the church, the debtor, or the trustee? Should this exception apply to fraudulent transfer actions brought under the Uniform Fraudulent Transfer Act,¹⁰⁸ the Uniform Fraudulent Conveyance Act,¹⁰⁹ or under the common law governing avoidance of fraudulent conveyances?

Additionally, this proposal may weaken the objective nature of the constructive fraud inquiry in § 548(a)(2)(A). This proposal injects subjective indicators into the § 548(a)(2)(A) analysis. Courts will have to find a way to integrate these objective and subjective components. Will the "reasonableness exception" constitute an affirmative defense? Can the donation be partially avoidable if the court finds that the debtor's contribution was only "partially reasonable?"

IV. CONCLUSION: THOUGHTS ON ACCOMMODATION

In *Young*, the equitable protection of creditors through fraudulent transfer law clashes with the perceived need to accommodate ordinary life practices. The value received from these life practices is difficult to quantify in traditional terms. The mere presence of this tension suggests that bankruptcy law is continuing to evolve from an insular sub-specialty into a more expansive body of law that penetrates domains of life from which we previously thought it largely absent.

One implication of the preceding analysis is that bankruptcy law and jurisprudence must adjust to this continuing transformation. Bankruptcy law should break free from excessive policy myopia¹¹⁰ but at the same time

108. UNIF. FRAUDULENT TRANSFER ACT, 7A U.L.A. 643 (1985).

109. UNIF. FRAUDULENT CONVEYANCE ACT, 7A U.L.A. 430 (1985).

110. See Mary Jo Newborn Wiggins, *Testing the Limits of Congressional Intent: Divorce Obligations in Bankruptcy After the 1994 Reform Act*, 6 J. BANKR. L. & PRAC. 181, 193 (1997)

strive to remain true to its core policy commitments. This is a tricky but necessary balancing act that demands a healthy degree of subtlety and nuance in our analysis of many bankruptcy issues.

How do the proposals discussed in this article fare under this jurisprudential standard? Both the *Young* decision, which creates a RFRA exemption for religious donations, and the proposal to exempt religious donations (discussed in part III.B) by way of a Code-based exemption do not fare well. Both approaches create broad and unwieldy exceptions for religious donations that undermine the essence of fraudulent transfer bankruptcy policy. They both divert value and might otherwise affect patterns of charitable giving in negative ways. Adopting a standard of reasonableness (discussed in part III.C), on the other hand, seems to leave us with a standard that is too amorphous and indeterminate.

The preceding analysis suggests that the best approach would be to adopt a hybrid of the “standardizing value” proposal (discussed in part III.A) and the reasonableness proposal. Under this approach, we treat religious donations as we would any other transfer, as subject to avoidance under § 548(a)(2)(A). Instead of amending the Code to include an explicit exemption for donations that are reasonable, we leave to the trustee¹¹¹ the judgment as to whether a donation (or series of donations) is reasonable. The trustee can make the determination on a case-by-case basis. Were the debtor’s actions reasonable? An insolvent debtor who tithes large amounts to a church may sincerely believe that he is fulfilling his religious obligations, but to the extent that a debtor tithes, while creditors go unpaid, he is not acting in the best interests of creditors as a whole. A practice of systematic giving at modest levels, however, may have such a negligible impact on creditors so that fraudulent transfer law should not be invoked. Those closest to the facts and the evidence should make the decision. There is no reason to believe that trustees will use their discretion unwisely. The cost of bringing fraudulent transfer cases suggest that trustees do not file these actions unless there is a reasonable likelihood of a substantial recovery.

This proposal for a “hybrid approach” will frustrate many advocates for religious groups who favor a blanket exemption for all religious transfers. This proposal will also frustrate those bankruptcy purists who do not believe it is appropriate to conduct an inquiry into intent in what is, after all, a constructive fraud statute. As this hybrid approach represents a compromise, it will attract its share of detractors from both sides, and yet, that might just represent the highest testament to its merits.

(noting that a kind of policy myopia sometimes affects our analysis of dischargeability issues in bankruptcy).

111. Since most of these cases involve individual Chapter 7 or Chapter 13 filings, the trustee will usually be the one who makes this decision. There is, however, no reason why a debtor-in-possession could not function similarly.

