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Bankrupt Tithers, the Eight Circuit & the Supreme Court: Still Praying for RFRA Relief from Bankruptcy Law

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Christians v. Crystal Evangelical Free Church (In re Young)[1]

I. INTRODUCTION

The enactment of the Religious Freedom Restoration Act (RFRA) is one of the most important and controversial congressional acts since Congress drafted the Free Exercise Clause.[2] RFRA greatly increases the likelihood that a free exercise of religion claim will succeed by restoring the compelling governmental interest test.[3] Prior to RFRA, the Supreme Court abandoned this test in *Employment Division v. Smith.*[4]

Until the decision of the Eighth Circuit in the instant case, many were cautious in predicting just how close RFRA would come to achieving its goal of increasing religious freedom.[5] Its success depended largely on the judicial response to the changes instituted by RFRA.

Due to the pressure President Clinton brought to bear on the Justice Department in the instant case,[6] it withdrew its brief, which denied that RFRA

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1. 82 F.3d 1407 (8th Cir. 1996), *cert. granted, vacated, and remanded*, 117 S. Ct. 2502 (1997).

2. 42 U.S.C. § 2000bb (1994). See *infra* note 33 for a discussion of the enactment of RFRA. For a discussion of the importance of RFRA, see Michael S. Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249 (1995).

3. *See* 42 U.S.C. § 2000bb (1994).

4. 494 U.S. 872 (1990). See *infra* note 111-14 and accompanying text for the reasons given by the Court for creating a new rule in *Smith.*

5. *See* Frederick M. Gedicks, *RFRA and the Possibility of Justice*, 56 MONT. L. REV. 95, 117 (1995) (maintaining that as a result of RFRA "there may be reason to hope" that the Supreme Court will protect religious liberty).

6. The pressure President Clinton exerted on the Justice Department was not done in isolation. The Clinton Administration did in fact originally support the creditors in this action, "prompting cries of betrayal from religious groups." Laurie Goodstein, *Religious Groups Fight U.S. In Bankruptcy Case*, WASH. POST, May 23, 1994, at A1. A White House spokesperson claimed that "[b]ecause the code applies to both religious and nonreligious organizations, we don't think there's an implication for the RFRA." *Id.*

President Clinton faced political pressure, as well as religious pressure. Senator Orrin Hatch took the Senate floor on May 3, 1994, requesting that President Clinton

applied to this bankruptcy case.[7] Without the Justice Department's input, the Eighth Circuit applied RFRA, found it satisfied, and gave RFRA the teeth that it needed.[8] However, questions remain as to how successfully the court applied RFRA.

Beyond these question regarding the application of RFRA, more immediate questions as to the constitutionality of RFRA have arisen due to the Supreme Court's recent decision in *City of Boerne v. Flores*, which purports to strike down RFRA as unconstitutional.[9] This Note takes the position that, because the Supreme Court based its decision upon the 14th Amendment and concepts of federalism, the Court declared RFRA unconsitutional only as applied to the States. Therefore, the Eighth Circuit's application of RFRA in the instant case, essentially a federal bankruptcy case, should remain undisturbed by the Supreme Court's decision in *Boerne*.[10]

II. FACTS AND HOLDING

Bruce and Nancy Young, the debtors in this action, filed a Chapter 7 bankruptcy petition on February 3, 1992.[11] As active church members, they

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order the Justice Department to "back off . . . and allow the Religious Freedom Restoration Act to have the widespread, broad coverage that we intended here in Congress in the first place." *Id.*

7. See *infra* note 33 for a discussion of the actions of President Clinton and the Justice Department in the instant case.

8. Christians v. Crystal Evangelical Free Church (*In re* Young), 82 F.3d 1407, 1417 (8th Cir. 1996), *cert. granted, vacated, and remanded*, 117 S. Ct. 1502 (1997).

9. City of Boerne v. Flores, No. 95-2074, 1997 WL 345322 (June 25, 1997), *rev'g* 73 F.3d 1352 (5th Cir. 1996).

In *Boerne*, the Fifth Circuit reversed the district court's ruling that RFRA was unconstitutional. In so holding, the Fifth Circuit stated that Congress had the authority to enact RFRA, and that RFRA did not violate the Establishment Clause, the Separation of Powers, or the 10th Amendment. *Id.*

The Supreme Court granted certiorari, 117 S. Ct. 293 (1996), and subsequently reversed the Fifth Circuit. *Boerne*, 1997 WL 345322, at *16. In a 6-3 decision, the Supreme Court held that RFRA was unconstitutional because it exceeded Congress' power under the 14th Amendment to "enforce" constitutional rights against the States. *Id.* at *7.

10. *See* American Bankruptcy Institute, *Court Strikes Down Religious Freedom Restoration Act*, Supreme Court Bulletin, Vol. VIII, No. 2 (July 1, 1997) [hereinafter Supreme Court Bulletin].

The question of the constitutionality of RFRA was not raised in the instant case. Nonetheless, the Supreme Court has granted certiorari, vacated judgment, and remanded the instant case to the Eighth Circuit for further consideration consistent with *Boerne*. Christians v. Crystal Evangelical Church (*In re* Young), 117 S. Ct. 2502 (1997).

11. *Christians*, 82 F.3d at 1410.

regularly tithed[12] funds to Crystal Evangelical Free Church (the Church).[13] Even though they were insolvent, the debtors persisted in donating $13,450 during the year leading up to their petition for bankruptcy.[14]

The bankruptcy trustee brought an action against the Church to recover the money the debtors donated to the Church.[15] For the trustee to recover the money, the court would have to find that the donation was a fraudulent transfer.[16] Both parties filed a motion for summary judgment.[17] The trustee claimed that the tithe was a fraudulent transfer because the debtors did not receive "reasonably equivalent value in exchange for" the contributions made to the Church.[18] The Church claimed that value was received in the form of indirect economic benefits such as: church membership, access to facilities, tax deductions, and spiritual counseling.[19]

The bankruptcy court granted the trustee's summary judgment motion, denied the Church's motion,[20] and held that "the debtors' contributions to the church were avoidable transfers."[21] The court reached this holding by applying 11 U.S.C. § 548(a)(2)(A),[22] and found that "the contributions were not economically beneficial" to the debtors.[23]

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12. Tithing is a practice dating back to the early Jewish religion which has been adopted by many Christians today. See Lev. 27:1, 30, 32. Tithing traditionally involves giving one tenth of household earnings to the Church. Although it is not required by all religions, members give in obedience to their faith to support the church that they attend. *Id.*

13. *Christians*, 82 F.3d at 1410 (1996).

14. *Id.*

15. *Id.*

16. *Id.* 11 U.S.C. § 548(a) (1994) provides in 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; 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.

17. *Christians*, 82 F.3d at 1410.

18. *Id.*

19. *Id.* at 1414.

20. *Id.* at 1410.

21. *Id.*

22. See *supra* note 16 for the text of the relevant Code provision.

23. *Christians*, 82 F.3d at 1411. In so holding, the court rejected *Ellenberg v. Chapel Hill Harvester Church, Inc. (In re Moses)*, 59 B.R. 815, 818 (Bankr. N.D. Ga.

On appeal, the district court affirmed the bankruptcy court's basic statutory application, including the finding that the debtors failed to receive reasonably equivalent value in exchange for their contributions.[24] However, for the first time, the Church maintained that application of section 548(a) "would violate the free exercise and establishment clause of the first amendment."[25] Exercising its discretion in consideration of the constitutional arguments,[26] the district court rejected these arguments on several grounds.[27] Using the *Smith* test,[28] the court held that the Bankruptcy Code is "a neutral law of general applicability which has only an incidental effect on religion."[29]

Alternatively, using the pre-*Smith* test,[30] the court held that the government had a compelling interest which did not "unfairly discriminate against religious contributions."[31] Finally, the court found that the Bankruptcy Code did not violate the Establishment Clause as the Code neither advances nor inhibits religion.[32] The Church appealed to the Eighth Circuit Court of Appeals. While the appeal was pending, the President signed the Religious Freedom Restoration Act[33] into law and the Eighth Circuit invited the United States to intervene.[34]

1986) (holding that church services constitute property), and *Wilson v. Upreach Ministries (In re Missionary Baptist Foundation of America)*, 24 B.R. 973, 979 (Bankr. N.D. Tex. 1982) (holding that good will connected with charitable giving constitutes reasonably equivalent value).

24. *Christians*, 82 F.3d at 1411.

25. *Id.*

26. Although this issue was raised for the first time on appeal, it can be reviewed by the court because purely legal issues are involved (and additional evidence and argument will not change the outcome). *Id.* at 1416 (citing Universal Title Ins. Co. v. United States, 942 F.2d 1311, 1314-15 (8th Cir. 1991)).

27. *Id.* at 1412.

28. Employment Div. v. Smith, 494 U.S. 872, 878-82 (1990). The Court held that even where there is a substantial burden on one's religion, laws which are neutral on their face and in general application, do not violate the Free Exercise Clause. *Id.*

29. *Christians*, 82 F.3d at 1411-12.

30. Before *Smith*, the Supreme Court applied a compelling governmental interest test where a substantial burden on the exercise of religion existed. *See* Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

31. *Id.* at 1412. The circuit court applied the *Smith* test. *See supra* note 28.

32. *Id.* The court applied the entanglement test cited in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

33. RFRA, 42 U.S.C. § 2000bb (1994), was signed by President Clinton on November 13, 1993. The Eighth Circuit found that certification under 28 U.S.C. § 2403(a) was required due to the fact that the appeal involved questions regarding the constitutionality of a section of the Bankruptcy Code. As a result, the Eighth Circuit invited the United States to intervene.

The Justice Department originally took the side of the trustee. However, President Clinton, in the face of much political and religious pressure, ordered the Attorney

The Eighth Circuit held that even though the donations constituted a fraudulent transfer, the decision of the lower courts should be reversed.[35] In so holding, the court relied on RFRA and held that allowing the trustee to recover the donations was not in furtherance of a compelling governmental interest and would substantially burden the Church.[36]

III. LEGAL BACKGROUND

A. Fraudulent Conveyance

England's Statute of XIII Elizabeth[37] provides the foundation for modern fraudulent conveyance law, but the doctrine can be traced back as far as Roman bankruptcy law.[38] *Twyne's Case*,[39] providing an early interpretation of the English statute, found that the transfer of sheep just prior to action by the debtor's creditors was a fraudulent conveyance as it had the "signs and marks of fraud."[40] This concern with actions bearing the "badges of fraud" has continued to influence the modern law of fraudulent transfers.[41]

General to withdraw her support. *See* Pierre Thomas, *Clinton Stops Justice Department From Seeking Forfeiture of Tithes; Church Contributions Protected Against Creditors, President Says*, WASH. POST, Sept. 16, 1994, at A8 (reporting that "[o]n September 14, 1994, Attorney General Janet Reno instructed the Justice Department to withdraw its brief, which was done half an hour before oral arguments began").

During oral argument, the lawyer for the trustee was understandably unprepared and when asked for authority for a particular point replied, "Your honor I had hoped to rely on the United States for case authority and I can't."

The Judge answered, "They haven't shown up."

The trustee's attorney explained, "They have run, for reasons unknown."

The Judge responded, "Someone spoke to them from on high."

The trustee's attorney confirmed the judge's response: "That's clearly correct." *See* Oliver B. Pollak, *"Be Just Before You're Generous": Tithing and Charitable Contributions in Bankruptcy*, 29 CREIGHTON L. REV. 527, 572 (1996) (quoting tape of oral arguments before the Eighth Circuit).

34. *Christians*, 82 F.3d at 1412.

35. *Id.* at 1413.

36. *Id.* at 1416, 1417, 1420.

37. *See* DANIEL R. COWANS, II COWANS BANKRUPTCY LAW AND PRACTICE § 10.9 (1987); Robert J. Bein, *Robbing Peter to Pay Paul: Charitable Donations as Fraudulent Transfers*, 100 DICK. L. REV. 103, 107 (1995).

38. *See* GARRARD GLENN, I FRAUDULENT CONVEYANCES AND PREFERENCES § 60 (rev. ed. 1940) for an in depth history of fraudulent conveyances.

39. DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 144 (1993).

40. *Id.*

41. *See* UNIFORM FRAUDULENT TRANSFER ACT § 4(b) (1984) [hereinafter UFTA].

The English Bankruptcy Act of 1603[42] expanded the definition of a fraudulent conveyance to include transfers made without valuable consideration.[43] In the subsequent two-hundred years, the law of constructive fraud developed in such a way that courts presumed all voluntary conveyances lacking adequate consideration to be fraudulent, rather than delve into the mind of the debtor.[44] Modern bankruptcy law has embraced this concept by ignoring the subjective intent of the debtor and focusing instead on the effect of the debtor's action on the creditor.[45]

In the United States, the Uniform Fraudulent Conveyance Act of 1918 (UFCA) caused transfers for less than fair consideration by insolvent debtors to be deemed fraudulent.[46] As a result, such transfers were considered to be on an equal level with transfers made with the intent to defraud.[47] However, there was a good faith component embodied in the definition of fair consideration.[48] Therefore, courts were required to look at the nature of the exchange and to some extent, the intent of the debtor.

The Bankruptcy Reform Act of 1978[49] dispensed with the UFCA's good faith component of fair consideration in an attempt to make more objective the law concerning fraudulent conveyances. Now, according to section 548 of the Bankruptcy Code, a trustee may avoid a transfer made in the year prior to bankruptcy by an insolvent debtor who "receive[d] less than a reasonably equivalent value in exchange."[50] The Uniform Fraudulent Transfer Act (UFTA) of 1985[51] employs a similar definition of constructive fraud.[52]

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42. GLENN, *supra* note 38, at § 61e.

43. GLENN, *supra* note 38, at § 61e.

44. Bein, *supra* note 37, at 109 n.34-35 (citing Colville v. Parker, CRO. JAC. 158, 79 ENG. REP. 138 (K.B. 1608)); *see also* Lord Townshend v. Windham, 2 VES. SEN. 1, 28 ENG. REP. 1 (Ch. 1750).

45. UNIFORM FRAUDULENT CONVEYANCE ACT § 4 (1918) (cases of constructive fraud receive similar treatment as cases of actual fraud) [hereinafter UFCA].

46. UFCA §§ 4-7 (1918).

47. *Id.*

48. *Id.* at § 3(a) provides that fair consideration exists "when in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied."

49. Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. § 548).

50. 11 U.S.C. § 548(a)(2)(A) (1994).

51. UFTA § 5(a) (1985). *See* BAIRD, *supra* note 39, at 137 ("The UFTA tracks § 548 of the Bankruptcy Code more closely than does the UFCA."). UFTA is currently the law of over 20 states. See Robert J. Bein, *Robbing Peter To PayPaul: Charitable Donations As Fraudulent Transfers*, 100 DICK. L. REV. 103, 112 n.53 (1995), for a list of states which have adopted UFTA.

52. *See* Michael L. Cool & Richard E. Mendales, *The Uniform Fraudulent Transfer Act: An Introductory Critique*, 62 AM. BANKR. L.J. 87 (1988).

The issue of defining what constitutes value has been the primary focus of litigation concerning constructively fraudulent conveyances.[53] Neither the UFTA nor the Bankruptcy Code gives a definition of "reasonably equivalent value."[54] However, section 548 of the Bankruptcy Code attempts to define value as property received or debt satisfied.[55] The modern statutes dealing with constructive fraud[56] tend to regard value from the viewpoint of the creditor in order to be as objective as possible.[57] However, as there is no simple definition of property, and hence value, parties continue to argue for their own subjective definition with varying degrees of success.[58]

That courts consider value from the viewpoint of the creditors does not mean that something must be available for the creditors to claim in satisfaction of the debt.[59] In *In re Ottaviano*,[60] the debtor's wife waived an alimony claim in exchange for real estate transferred to her by her insolvent ex-husband.[61] The court found that the waiver constituted consideration, thus, the transfer of property by the debtor was not a fraudulent conveyance.[62] In such instances, the limitations of analyzing value solely from the viewpoint of the creditor become apparent.

Allard v. Flamingo Hilton (In re Chomakos)[63] criticized this narrow analysis and found that there are certain commercially reasonable, arms-length

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53. Michael M. Duclos, *A Debtor's Right to Tithe in Bankruptcy Under the Religious Freedom Restoration Act*, 11 BANKR. DEV. J. 665, 678 (1995).

54. See BAIRD, *supra* note 39, at 148 n.5.

55. Section 548(d)(2)(A) provides that "value means 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 of the debtor."

56. UFCA, UFTA and Section 548 of the Bankruptcy Code.

57. *See* UFTA § 3 cmt. 2 (1985); Clearwater v. Skyline Constr. Co. 835 P.2d 257, 267 (Wash. Ct. App. 1992), *cert. denied*, 848 P.2d 1263 (Wash. 1993) (UFTA); First Nat'l Bank v. Minnesota Util. Contracting, Inc. (*In re* Minnesota Util. Contracting), 110 B.R. 414, 420 (Bankr. D. Minn. 1990) (§ 548).

58. *Contrast* Pereira v. Checkmate Communications Co. (*In re* Checkmate Stereo & Elec., Inc.), 9 B.R. 585 (Bankr. E.D.N.Y. 1981) (where no consideration was given in return for debtor's transfer, good will is insufficient and transfer is void as a matter of law), *aff'd*, 21 B.R. 402 (E.D.N.Y. 1982) *with* Wilson v. Upreach Ministries (*In re* Missionary Baptist Found. of America), 24 B.R. 973, 979 (Bankr. N.D. Tex. 1982) (in exchange for charitable donations, good will constitutes reasonably equivalent value).

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

60. 63 B.R. 338 (Bankr. D. Conn. 1986).

61. *Id.* at 339.

62. *Id.* at 342.

63. Allard v. Flamingo Hilton (*In re* Chomakos), 170 B.R. 585 (Bankr. E.D. Mich. 1993), *aff'd* 69 F.3d 769 (6th Cir. 1995), *cert. denied*, 116 S. Ct 1568 (1996).

transactions that yield valuable consideration unavailable to a creditor.[64] In *Allard*, the trustee attempted to recover the debtor's gambling losses, claiming that the debtor did not receive anything of value in exchange.[65] However, the court found that the value received was entertainment for which the debtor paid a fair price.[66] Although it may seem unfair to the creditors, the court reasoned that ruling differently would place an unreasonable burden on the transferee.[67]

Outside of commercial transactions, courts view voluntary transfers more suspiciously, especially where there is a close relationship between the donor and the donee.[68] When it comes to charitable giving, to show what value the debtor has actually received is still difficult, even if one does not focus on value from the viewpoint of the creditor.[69] However, the Supreme Court has held that "[t]he sine qua non of a charitable donation is a transfer of money or property without adequate consideration."[70]

From the creditor's point of view, a charitable donation may seem little different from the gambling debt in *Allard*.[71] In both instances, the debtor may maintain that he received something intangible in return. However, the courts have chosen to make a distinction:[72] entertainment activities possess a commercial nature—the sense of bargaining for something in exchange for a benefit[73]—while charitable donations lack this quality.

In the instance of religious donations, courts have rejected the claim that donations in exchange for spiritual benefits constitutes valuable consideration.[74]

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64. *Id.* at 592.

65. *Id.* at 587.

66. *Id.* at 584.

67. *Id.* at 595. The court found that this was an arms-length transaction in the ordinary course of the casino's business. Thus "to conclude that [the casino] is liable in this case would be, in this Court's view, to conclude that each casino and lottery operator . . . is in reality a protector of the creditors of its customers, to the point that to protect themselves they must continuously inquire . . . [into] the financial circumstances of each of its patrons . . . . As a general proposition, that would tip the scales inordinately in favor of creditors . . . ." *Id.* at 595-96. *See also* BFP v. Resolution Trust Corp. (*In re* BFP), 114 S. Ct. 1757 (1994).

68. *See* Harris v. Burrell (*In re* Burrell), 159 B.R. 365 (Bankr. M.D. Ga. 1993) (transfer between family member in exchange for no consideration is a voidable transfer).

69. *See, e.g.*, Republican Senate-House Dinner Comm. v. Carolina's Pride Seafood, 858 F. Supp. 243, 249 (D.D.C. 1994).

70. Unites States v. American Bar Endowment, 447 U.S. 105, 118 (1986).

71. *See* Bein, *supra* note 37, at 124.

72. *Id.*

73. *Compare* Allard v. Flamingo Hilton (*In re* Chomakos), 69 F.3d 769 (6th Cir. 1995), *cert. denied*, 116 S. Ct 1568 (1996), *with* Carolina's Pride Seafood, 858 F. Supp. at 249 (D.D.C. 1994) (charitable donation as a fraudulent transfer).

74. Zahra Spiritual Trust v. United States, 910 F.2d 240 (5th Cir. 1990).

These courts focus on "monetary, not spiritual consideration."[75] Where the debtor receives more than merely spiritual fulfillment, the issue becomes more complex.

In *Wilson v. Upreach Ministries (In re Missionary Baptist Foundation of America, Inc.)*,[76] the debtor, a charitable foundation, gave money to a church, which the trustee sought to avoid as fraudulent transfers.[77] While agreeing that there was no tangible consideration or some other monetary equivalent, the court ruled that the church had given reasonably equivalent value in exchange for the debtor's donations.[78] The court held that section 548(a)(2)(A) of the Bankruptcy Code "does not appear to require that 'reasonably equivalent value' be a monetary equivalent."[79] Thus, employee morale, good will, and compliance with the charitable foundation's incorporation mandate could constitute value.[80]

In *Ellenberg v. Chapel Hill Harvester Church, Inc. (In re Moses)*,[81] the debtors made a donation to their church, and the court held that the debtors received reasonably equivalent value such as personal contacts, counseling, and utilities during church services.[82] These services, according to the court, constitute property received.[83]

Ellenberg appears to be an exception as a majority of tithing cases have held that the debtor did not receive reasonably equivalent value in exchange for contributions.[84] For example, in *Morris v. Midway Southern Baptist Church (In re Newman)*,[85] the trustee sued to recover money tithed to a church by an insolvent debtor.[86] The court found that the debtor did not receive reasonably equivalent value as there was no tangible economic benefit.[87] The court refused

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75. *Id.* at 249.

76. Wilson v. Upreach Ministries (*In re* Missionary Baptist Found. of America), 24 B.R. 973 (Bankr. N.D. Tex 1982).

77. *Id.* at 974-75.

78. *Id.* at 979.

79. *Id.*

80. *Id.*

81. Ellenberg v. Chapel Hill Harvester Church, Inc. (*In re* Moses), 59 B.R. 815 (Bankr. N.D. Ga. 1986).

82. *Id.* at 818-20.

83. *Id.* at 818.

84. The main reason for this is that there is little connection between paying one's tithe and being allowed to attend a church service. *See In re* Packham, 126 B.R. 603, 608 (Bankr. D. Utah 1991); *In re* Lees, 192 B.R. 756, 758 (Bankr. D. Mont. 1994); Morris v. Midway S. Baptist Church (*In re* Newman), 183 B.R. 239, 248 (Bankr. D. Kan. 1995); and *In re* Tessier, 190 B.R. 396, 399 (Bankr. D. Mont. 1995).

85. 183 B.R. 239 (Bankr. D. Kan. 1995).

86. *Id.* at 243.

87. *Id.* at 247. The court found that the debtors did not receive a property right, a contract right, or an equitable right to attend the church services. *Id.*

to place a value on the "intangible support" offered by the church.[88] Furthermore, the court held that any spiritual value received by the debtor was not given in exchange for the tithes.[89] As a result, the court held that the tithes constituted a fraudulent transfer.[90]

B. RFRA

The First Amendment to the United States Constitution restricts governmental interference in religious matters by stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[91] The Free Exercise Clause has been the subject of litigation almost from its inception. In one of the first cases to address this issue, *Reynolds v. United States*,[92] the Court held that the Free Exercise Clause does not prohibit government regulation of religious practices, even though it does prohibit the regulation of religious beliefs.[93] The Court maintained this approach until *Sherbert v. Verner*.[94]

In *Sherbert*, the claimant was denied unemployment benefits because she refused to accept jobs that would require her to work on her religion's Sabbath day.[95] Sherbert claimed that it was a violation of her free exercise rights to deny her unemployment benefits.[96] The Court found that disqualifying her from the benefits imposed a burden on the free exercise of her religion,[97] and that there was not a "compelling state interest" in so burdening her.[98] This was true despite that the unemployment compensation was a benefit and not a right.[99]

The Court later upheld this view in *Wisconsin v. Yoder*.[100] In *Yoder*, a state law compelled children to attend school until the age of sixteen.[101] The plaintiff, an Amish man, resisted the law, claiming that attendance in school was contrary

88. *Id.* at 247.

89. *Id.* at 248. This is due in part to the fact that access to services would not be denied were the debtor to stop tithing. *Id.*

90. *Id.*

91. U.S. CONST. amend. I.

92. 98 U.S. 145 (1879).

93. *Id.* at 166.

94. 374 U.S. 398 (1963).

95. *Id.* at 401.

96. *Id.*

97. *Id.* at 403.

98. *Id.* at 406-09.

99. *Id.* at 404.

100. 406 U.S. 205, 214 (1972).

101. *Id.* at 207.

to his family's religious beliefs and violated their free exercise of religion.[102] The Court agreed that the law burdened the Amish family's free exercise of religion and the right of Amish parents to control their children's upbringing.[103] Because this liberty interest was greater than the state's interest in providing education, the Court struck down the statute.[104]

Together, *Sherbert* and *Yoder* establish that when government regulation infringes on the free exercise of religion, there must be a compelling governmental interest.[105] As a result, "no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"[106] The use of the compelling governmental interest test remained unquestioned until *Employment Division v. Smith.*[107]

In *Smith*, two members of a Native American church in Oregon were fired and denied unemployment benefits because they used peyote[108] in religious ceremonies.[109] Oregon law prohibits possession of controlled substances, including peyote.[110] The Court departed from the language of *Sherbert* and *Yoder*, holding that even where there is a substantial burden on one's religion, laws that are neutral on their face and in their general application do not violate the Free Exercise Clause.[111]

There are several possible reasons why the Court in *Smith* departed from the compelling interest test when dealing with religious expression, such as the fear of appearing to condone a criminal act.[112] The Court expressed its concern that individuals will use the Free Exercise Clause to avoid laws applicable to the general population.[113] In addition, the Court wished to avoid having to look into

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102. *Id.* at 208-09.

103. *Id.* at 281, 232-33.

104. *Id.* at 236.

105. *Id.* at 215 (only compelling governmental interests "not otherwise served can overbalance legitimate claims to the free exercise of religion").

106. Sherbert v. Verner, 374 U.S. 398, 406 (1963) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

107. 494 U.S. 872, 885 (1990).

108. *Id.* at 874. Peyote is a hallucinogenic drug.

109. *Id.*

110. *Id.*

111. *Id.* at 882-85. For a more in depth analysis of *Smith* and its effect on subsequent religious claims, see Steven Hopkins, *Is God A Preferred Creditor? Tithing As An Avoidable Transfer in Chapter 7 Bankruptcies*, 62 U. CHI. L. REV. 1139 (1995).

112. *Smith*, 494 U.S. at 884.

113. *Id.* at 885-86.

the "centrality" of someone's religious beliefs in order to determine the necessity of employing the compelling interest test.[114]

The *Smith* Court, however, limited its decision, stating that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without a compelling reason."[115] The Bankruptcy Code is one such law which some have argued should fall outside of the *Smith* rule, as it contains numerous individual exemptions.[116] In cases since *Smith*, where facially neutral statutes have had multiple exceptions, the Court has deemed that the *Smith* rule is not applicable and has used the compelling interest test instead.[117] Nonetheless, this exception to the *Smith* rule was little consolation to those who had relied for years on the compelling governmental interest test. Thus, in 1993, facing much political and religious pressure,[118] President Clinton signed the Religious Freedom Restoration Act into law.[119]

The purpose of RFRA, is "to restore the compelling interest test as set forth in [*Sherbert* and *Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened."[120] As a result, RFRA is basically "a legislative veto of the Supreme Court's decision in *Smith*."[121] The three main

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114. *Id.* at 886-87. The Court stated "[i]t is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field .... Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'" *Id.* (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)).

115. *Id.* at 884 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

116. *See* Hopkins, *supra* note 111, at 1149 n.56 (citing *Amici Curiae* Brief for Christian Legal Society, et al. at 6, Christians v. Crystal Evangelical Free Church (*In re* Young), 82 F.3d.1407 (D. Minn. 1993)).

117. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

118. *See supra* note 6 for a discussion on the pressure placed on the Clinton Administration.

119. 42 U.S.C. § 2000bb (1994).

120. 42 U.S.C. § 2000bb(b)(1) (1994).

121. *See* Hopkins, *supra* note 111, at 1151.

elements of RFRA are:[122] (i) a religious act,[123] (ii) a substantial burden,[124] and (iii) a compelling governmental interest.[125]

In *Morris*,[126] a case almost identical to the instant case, the court applied RFRA after finding that the debtor's tithes to the church represented a fraudulent transfer.[127] The court found that the trustee could recover, as there was not a substantial burden on the debtors' exercise of religion and the government had a compelling interest.[128] In reaching its decision regarding the substantial burden, the court noted that the debtor was not prevented from tithing based on section 548(a), the debtor had already tithed when this action commenced, and

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122. RFRA § 2000bb-1 provides that:

(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 may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

123. To qualify, an act must be the result of a sincerely held religious belief. Wisconsin v. Yoder, 406 U.S. at 215-19. *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 229-35 (1994) (discussing what has historically been regarded as an act of religious expression).

124. To meet this element, government action "must 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] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion." Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 2625 (1995). *See* Sasnett v. Sullivan, 908 F. Supp. 1429, 1440-45 (W.D. Wis. 1995) (discussion of substantial burden).

125. Post-Smith, "compelling governmental interests" has been interpreted to mean "interests of the highest order." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)). Cases applying RFRA have held the following interests compelling: enforcement of the Social Security system, *Droz v. Commissioner*, 48 F.3d 1120, 1122-23 (9th Cir. 1995); the safety of prisons, *Hamilton v. Schriro*, 74 F.3d 1545, 1554 (8th Cir. 1996); and the safety of schools, *Cheema v. Thompson*, 67 F.3d 883, 885 (9th Cir. 1995). For further discussion of what constitutes a compelling interest, see Laycock, *supra* note 123, at 222-28. *See also* Paulsen, *supra* note 2.

126. 183 B.R. 239 (Bankr. D. Kan. 1995).

127. *Id.* at 250-51.

128. *Id.* at 251-52.

the debtor would more than likely continue to tithe in the future.[129] Alternatively, the court held that the government had a compelling interest in protecting the administration of the Bankruptcy Code as a whole.[130] In *In re Tessier*,[131] the debtor contested the court's refusal to approve its plan for reorganization.[132] The court refused to approve the plan because it included amounts set aside for tithing, which the court found were not reasonable living expenses.[133] In applying RFRA, the court held that not allowing debtors money to tithe is a substantial burden on their religious expression.[134] In addition, the court, defining "compelling governmental interests"as interests "of the highest order," found that the trustee failed to meet this standard.[135] However, the court then analyzed RFRA and found that it was unconstitutional in that it violated the Separation of Powers.[136]

Finally, in *Flores v. City of Boerne*,[137] the Fifth Circuit reversed the district court's ruling that RFRA was unconstitutional. In so holding, the Fifth Circuit held that Congress had the authority, under the 14th Amendment, to enact RFRA, and that RFRA did not violate the Establishment Clause, Separation of Powers, or the 10th Amendment.[138]

The Supreme Court granted certiorari[139] and, in turn, reversed the Fifth Circuit.[140] In a 6-3 decision, the Supreme Court held that RFRA was unconstitutional because it exceeded Congress' power under the 14th Amendment to "enforce" constitutional rights against the States.[141]

However, due to the fact that the *Boerne* Court based its decision upon the 14th Amendment and concepts of federalism, RFRA may remain constitutional

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129. *Id.* at 251.

130. *Id.* at 252. The court states that "[t]he compelling nature of the interest is reflected in the fact that recovery of fraudulent transfers has been a basic tenet of bankruptcy law for 400 years." *Id.*

131. 190 B.R. 396 (Bankr. D. Mont. 1995).

132. *Id.* at 397-98.

133. *Id.* at 403.

134. *Id.* at 398.

135. *Id.* at 405.

136. *Id.* at 406-07.

137. Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996), *rev'd*, No. 95-2074, 1997 WL 345322 (June 25, 1997).

138. *Id.* at 1364.

139. Flores v. City of Boerne, 117 S. Ct. 293 (1996).

140. City of Boerne v. Flores, No. 95-2074, 1997 WL 345322, at *16 (June 25, 1997), *rev'g* 73 F.3d 1352 (5th Cir. 1996).

141. *Boerne*, 1997 WL 345322, at *7. Members of Congress have expressed disappointment in the Supreme Court's decision in *Boerne*, and immediately announced plans for new legislation to meet the Court's objections. Supreme Court Bulletin, *supra* note 10.

in its application to federal, as opposed to state, law. Therefore, the Eighth Circuit's application of RFRA in the instant federal bankruptcy case should remain undisturbed by the *Boerne* decision.[142]

Nonetheless, and despite that the question of the constitutionality of RFRA was not raised in the instant case, the Supreme Court has granted certiorari, vacated judgment, and remanded the instant case to the Eighth Circuit for further consideration consistent with *Boerne*.[143] The Eighth Circuit's decision on remand is awaited.

IV. INSTANT DECISION

In *Christians v. Crystal Evangelical Free Church (In re Young)*, the Eighth Circuit Court of Appeals began by discussing fraudulent transfers under 11 U.S.C. § 548(a)(2). The court stated that the term "fraudulent transfers" may be better replaced by the term "avoidable transfers" because the statute does not require fraudulent intent for a transfer to be voidable.[144] The court considered the elements necessary to find a transaction fraudulent,[145] stipulating that the only element in dispute in this case was the question of reasonably equivalent value.[146]

In the discussion of value, the court outlined the district court's holding that the debtor did not receive any value and that no exchange took place.[147] Next, the court explored the Church's argument that the definition of value included indirect economic benefits.[148] The court agreed that value can include intangible

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142. *See* Supreme Court Bulletin, *supra* note 10 ("Although *Boerne* appears to conflict with *Christians*, note that the decision was based on Congress' power under . . . the 14th Amendment. Since Congress did not need to rely on the 14th Amendment to apply RFRA to federal laws, the Act's application in bankruptcy cases may remain an open question.").

143. Christians v. Crystal Evangelical Free Church (*In re* Young), 117 S. Ct. 2502 (1997), *granting cert., vacating, and remanding* 82 F.3d 1407 (8th Cir. 1996).

144. *Christians*, 82 F.3d at 1414. The court is responding to the assertion by the Church that, as drafted, the Code section applies to actual fraud.

145. For a trustee to avoid a transfer under 11 U.S.C. § 548(a)(2) (1994), she must "prove by a preponderance of the evidence that (1) there was a transfer of an interest of the debtor in property, (2) the transfer was made within one year before the date of the filing of the petition, (3) the debtor was insolvent on the date the transfer was made, and (4) the debtor received less than a reasonable equivalent value in exchange for the transfer." *Id.*

146. *Christians*, 82 F.3d at 414.

147. *Id.*

148. *Id.* The church maintained that as "value" includes indirect economic benefits, the debtors received "value" in the form of "tax deductions for charitable contributions, church membership and spiritual counseling, and, more concretely, access

property, but found that the district court correctly analyzed the transaction, measured the value received, and reached the correct result.[149] Thus, the court held that the debtors did not receive value.[150]

In dealing with whether there had been an exchange, the court stated that, even if the debtors had received value, there still must be a *quid pro quo* exchange of value.[151] The court reviewed the facts surrounding the transfers and found that there was not a true exchange because the Church services were free and were not provided soley in exchange for the debtor's contributions.[152] Thus, the transfers were voidable.[153]

The court then turned to the Church's free exercise of religion argument.[154] However, the court stated that, because the Church would succeed under RFRA, there was no need to discuss the merits of the Church's constitutional claim.[155] The court also noted that the district court did not abuse its discretion in reviewing the constitutional issue.[156]

The court stated that RFRA applies retroactively[157] and then turned to the issue of whether requiring the Church to return the tithed money would "unfairly discriminate against religion."[158] The court detailed the Church's arguments, but declined to apply the *Smith* test because RFRA is more protective.[159] Instead, the court stated that RFRA restores the compelling governmental interest test.[160]

The first part of the RFRA test examined by the court was the "substantial burden" requirement.[161] The court surveyed various cases for a more detailed definition of "substantial burden."[162] It then looked at the practice of tithing and

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to church facilities because contributions from the debtors and others help pay for the Church's operating expenses." *Id.*

149. *Id.* at 1415.

150. *Id.* The court relied on Morris v. Midway S. Baptist Church (*In re* Newman), 183 B.R. 239, 247 (Bankr. D. Kan. 1995) (by tithing, a debtor does not receive an enforceable property, contract, or equitable right to be involved in church services).

151. *Christians*, 82 F.3d at 1415.

152. *Id.*

153. *Id.* at 1416.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 1417. *See supra* notes 28-31, 111-17 and accompanying text.

159. *Christians*, 82 F.3d at 1417.

160. *Id.*

161. *Id.* at 1418. *See supra* notes 108-11 and accompanying text.

162. *Id.* For a definition of substantial burden, the court relied on *Wisconsin v. Yoder*, 406 U.S. 205, 215-19 (1972), and *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 2625 (1995).

how it would be effected by allowing the government to recover.[163] The court noted the arguments in support of the government, but found them insignificant, holding that "it is sufficient that the governmental action in question meaningfully curtails, albeit retroactively, a religious practice."[164] Thus, the court held that the burden was substantial in this case.[165]

The next issue examined by the court was whether a compelling governmental interest existed.[166] The court surveyed pre-*Smith* case law to find a better definition of "compelling."[167] It then compared the interests of the government and the policy issues raised by the trustee to other compelling interests.[168] The court agreed with prior cases stating that bankruptcy interests are not compelling under RFRA.[169] Thus, the court did not get to the issue of least restrictive means because it held that the government's interest in protecting creditors in the instant case was not compelling.[170]

The dissenting judge agreed with the majority that the debtors did not receive reasonably equivalent value, but disagreed with the majority's application of RFRA.[171] The dissent looked at the practice of tithing, the fact that it was not required or restrained during the year of insolvency, and concluded that the practice would not be substantially burdened.[172] Furthermore, the dissent maintained that the government's interest was compelling and that section 548(a)(2) employed the least restrictive means.[173] Therefore, the dissent would have held that the trustee satisfied the governmental exception in the RFRA test and that the district court should have been affirmed.[174]

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163. *Christians*, 82 F.3d at 1418-19. The court contrasted *Morris v. Midway Southern Baptist Church (In re Newman)*, 183 B.R. 239 (Bankr. D. Kan. 1995), with *In re Tessier*, 190 B.R. 396 (Bankr. D. Mont. 1995).

164. *Christians*, 82 F.3d at 1418.

165. *Id.*

166. *Id.* at 1419.

167. *Id.* The court reviewed *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *United States v. Lee*, 455 U.S. 252, 258-59 (1982); *Gillette v. United States*, 401 U.S. 437 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *Sherbert v. Verner*, 374 U.S. 398 (1963).

168. *Christians*, 82 F.3d at 1419-20.

169. *Id.* at 1420.

170. *Id.* The court agreed with the *Tessier* decision which held that the government did not have a compelling government interest in enforcing the Bankruptcy Code over the interests of the debtors. *Id.*

171. *Id.* at 1421.

172. *Id.* at 1421-22.

173. *Id.* at 1423.

174. *Id.*

V. COMMENT

The fraudulent conveyance issue is one which will face the least resistance from other courts. Although there are cases which state that goodwill and other such intangibles constitute value,[175] most courts find otherwise,[176] or at least have required a proper exchange to have taken place. The court's analysis of value in the instant case[177] reveals a willingness to look at value from more than just the creditor's viewpoint.[178]

However, even assuming that the debtors received reasonably equivalent value, there must be an exchange. Where there is no exchange, a detailed analysis of value is unnecessary. This exchange element is important, not just because the Bankruptcy Code requires it,[179] but because it makes a transaction seem more commercial and less like a gift.[180] To make an exception for debtors giving to a church is to depart from hundreds of years of statutory law.[181] The law of fraudulent conveyances was enacted to protect creditors, and it cannot be said that just because the debtor happens to be giving to a church, the creditor deserves less protection.

Despite this, some courts have declined to classify tithes as fraudulent conveyances. In *Ellenberg*,[182] the court held that the services received had a value which could be ascertained.[183] However, in so finding the court ignored the exchange element. One way in which *Ellenberg* can be distinguished from the instant case is that, in *Ellenberg*, the church "required the contributions as a condition of the debtor's employment as a deacon." [184] There was no such requirement present in *Christians*.[185]

In the instant case, as well as *Morris*,[186] the court reached a more reasonable result by including the 'in exchange for' element in its analysis. As the court failed to find the element of exchange, the court was justified in holding that the

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175. *See supra* notes 58-80 and accompanying text.

176. *See supra* notes 58, 84-90 and accompanying text.

177. *Christians*, 82 F.3d at 1415.

178. *See supra* notes 44-48, 56-67 and accompanying text for a discussion of viewpoints regarding the process of assessing value.

179. 11 U.S.C. § 548(a)(2)(A) (1994).

180. *See supra* notes 68-73 and accompanying text.

181. *See supra* notes 37-52 and accompanying text.

182. 59 B.R. 815, 818 (Bankr. N.D. Ga. 1986).

183. Ellenberg v. Chapel Hill Harvester Church, Inc. (*In re* Moses), 59 B.R. 815 (Bankr. N.D. Ga. 1986).

184. Christians v. Crystal Evangelical Free Church (*In re* Young), 82 F.3d 1407, 1411 (8th Cir. 1996) (citing *Ellenberg*, 59 B.R. at 950.).

185. *Id.*

186. 183 B.R. 239 (Bankr. D. Kan. 1995).

tithes constituted fraudulent transfers. One could conclude that this should be the end of the trustee's case because fraudulent transfers are voidable under law as it has existed for hundreds of years.[187] However, the issue is not as simple as this because the Free Exercise Clause is just as deeply rooted in the history of the United States.

The Free Exercise Clause has, as a matter of course, been expanded and retracted as the Supreme Court has confronted the issues surrounding the practice of religion. The movement of the Court away from the compelling governmental interest test to the less restrictive *Smith* test was perceived by some as a blatant encroachment on the Church's ever-decreasing freedom.[188] Thus, RFRA was enacted in an attempt to restore churches to their position prior to *Smith*.[189] However, questions exist regarding RFRA's application and constitutionality.[190]

Embedded in RFRA are political and religious concerns which highlight the delicate balance between the church and the state, as well as the various branches of government. In this instance, religious groups put pressure on President Clinton and Congress, which in turn affected the Eighth Circuit's decision. Senator Orrin G. Hatch argued that, had the President not directed the Justice Department to withdraw its brief from the Eighth Circuit's consideration, the result in the instant case "would have largely gutted the Act of its protections for religious Americans."[191] The Senator added "[i]t should not have taken the President's own last-minute intervention to save [RFRA] from being gutted by his own Administration."[192] This indicates, at least to some extent, that the President had an effect on the outcome of *Christians*. Indeed, the absence of the Justice Department at such short notice was duly noted by the Eighth Circuit.[193]

The court's analysis of RFRA in the instant case, while not surprising given the external pressure on the court, is open to criticism. The court assumed that the practice of tithing is truly a religious exercise. Although tithing may be relatively easy to document as a valid religious activity, only the debtor knows his intent at the time of the tithe. Thus, there will always be significant room for error in this subjective area. In addition, as tithing normally involves the giving

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187. *See supra* notes 37-52 and accompanying text.

188. *See* Troy S. Anderson, Christians v. Crystal Evangelical Free Church (*In re* Young): *Why Would "Christians" Take Money Out Of the Church Offering Plate?* 4 REGENT U. L. REV. 177 (1994).

189. *See* Laycock, *supra* note 123, at 213-14 (discussing the need for RFRA).

190. The issue of RFRA's constitutionality in relation to federal law appears to be undecided. *See supra* notes 9, 137-143 and accompanying text.

191. Prepared statement of Senator Orrin G. Hatch, Fed. News Serv. Cong. Hearing Testimonies, 1995 WL 10888441 (Oct. 25, 1995).

192. *Id.*

193. *See supra* note 33.

of ten percent of one's income, questions arise regarding what a court is to do in the event a debtor tithes twenty or thirty percent. May the trustee claim the surplus to be beyond the protected religious practice of tithing? This question remains unanswered.

Unfortunately, no definition of "substantial burden" is provided in RFRA. In *Sherbert*,[194] the court stated that "the pressure upon [the plaintiff] to forego that practice is unmistakable."[195] Following this definition of substantial burden, courts have split on whether section 548 places a substantial burden on debtors.[196] Understandably, the burden on churches is great, but many courts have chosen to focus on the effect of the law on the individual debtor alone.[197]

In the instant case, the court gave a variety of definitions of substantial burden and ultimately held that the test was met because allowing the government to recover "would effectively prevent the debtors from tithing, at least for the year immediately preceding" filing for bankruptcy.[198] However, this is not clearly the case. As the dissent pointed out, the debtors had already tithed during that year, and thus, were not prevented from doing so. Furthermore, recovery by the trustee does not take away from the debtors' practice of tithing.[199] In addition, assuming they do not become bankrupt in the future, section 548 does not prohibit debtors from continuing to tithe.[200]

The majority, dismissing the dissent's argument, stated that "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."[201] Vague language such as this is a significant reason behind the continued split in the courts. Furthermore, instead of focusing solely on the burden placed on the individual debtor, the court should have expanded its focus to include the burden placed on the church itself.[202] That this was the

194. 374 U.S. 398 (1963).

195. *Id.* at 403.

196. *Contrast In re* Tessier, 190 B.R. 396 (Bankr. D. Mont. 1995) (finding a substantial burden on the debtor), *with* Morris v. Midway S. Baptist Church (*In re* Newman), 183 B.R. 239 (Bankr. D. Kan. 1995).

197. *See supra* note 196.

198. Christians v. Crystal Evangelical Free Church (*In re* Young), 82 F.3d 1407, 1418 (8th Cir. 1996), *cert. granted, vacated, and remanded*, 117 S. Ct. 2502 (1997).

199. *Id.* at 1421-22.

200. *Id.* at 1422.

201. *Id.* at 1418-19.

202. The individual rights contemplated by RFRA are not just the rights of a single individual. Instead, these rights encompass the associational rights of a church or other religious group where such an association has "organizational standing" to assert a right on behalf of its collective membership under the three-part test set out in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 103-04 (2d ed. 1994).

intent of the Eighth Circuit is possible. However, to avoid misinterpretation, the Eighth Circuit should have stated its reasoning more clearly.

The issue of a compelling governmental interest has also created a split in the courts.[203] Once again RFRA does not define "compelling governmental interest," nor does case law provide much help.[204] The court in the instant case used the definition, "interests of the highest order."[205] Despite the split in authority, however, the court held that the government's interest in protecting creditors was not compelling.

The court also compared *Tessier*[206] and *Morris*,[207] ultimately siding with *Tessier* as it held that there was a substantial burden with no compelling governmental interest. However, there are important differences in *Tessier* which the court in the instant case failed to address. *Tessier* is a Chapter 13, rather than a Chapter 7, bankruptcy case. This makes a critical difference because the debtors in *Tessier* were not allowed to set aside money with which to tithe. The *Tessier* court correctly held that this was a substantial burden because the debtors were effectively prevented from tithing. In the instant case, as in *Morris*, the debtors were not prevented from tithing; they had already tithed and could continue to do so.[208] However, had the court noted that the Church's burden, not just that of the individual debtor, was a primary focus, this distinction between *Tessier* and *Morris* would not be as significant.[209]

The issue of a compelling governmental interest would not be reached were the court to fail to find a substantial burden. However, this court did reach the issue of compelling governmental interest and found, consistent with *Tessier*, that the government did not have a compelling interest in protecting the rights of creditors.[210] Certainly, while there is a valid interest in voiding fraudulent

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203. *Christians*, 82 F.3d at 1419.

204. *See supra* notes 122, 125 and accompanying text.

205. Christians v. Crystal Evangelical Free Church (*In re* Young), 82 F.3d 1407, 1419 (8th Cir. 1996), *cert. granted, vacated, and remanded*, 117 S. Ct. 2502 (1997).

206. 190 B.R. 396 (Bankr. D. Mont. 1995).

207. 183 B.R. 239 (Bankr. D. Kan. 1995).

208. Morris v. Midway S. Baptist Church (*In re* Newman), 183 B.R. 239 (Bankr. D. Kan. 1995) (facts are most similar to that of the instant case and the court held that there was not a substantial burden on the debtor's exercise of religion).

209. *See supra* note 202 and accompanying text.

210. It is of interest that *Tessier*, after applying RFRA and finding the debtor to have satisfied the test, ruled that RFRA is unconstitutional. This fact is glossed over by the instant court, which chooses to ignore the implications. It is possible that the court in *Tessier* was less rigorous in applying RFRA because they considered it to be unconstitutional. As a result, regardless of how they applied the test, they knew that they were going to find for the trustee.

transfers, as evidenced by hundreds of years of case law, this interest is not necessarily an interest of the highest order.[211]

Furthermore, in light of the *Boerne* decision, the future of *Christians* may be in doubt.[212] However, as *Boerne* found that Congress had exceeded its power under the 14th Amendment, RFRA likely remains good law as applied to federal law.[213] This means that plaintiffs challenging federal law may continue to rely on RFRA for additional protection of their religious rights.[214] Thus, when *Christians* is reheard by the Eigth Circuit on remand from the Supreme Court, its initial decision may very well remain intact.

RFRA's likely survival as applied to federal law means that concerns regarding RFRA expressed in the past remain valid concerns.[215] One immediate concern with RFRA is that it will open the door to multiple claims of obscure religious practices which are nearly impossible to verify. This concern was voiced in *Smith*.[216] Even in the case of tithing, we do not necessarily know the debtor's intent and sincerity of practice. To avoid being misled, the court may need to hear testimony from the debtor, view the consistency of his past giving, and evaluate the position of the religious institution to which the debtor tithed.[217]

Another related concern is that RFRA will be used to avoid responsibility, providing a way around the law. Already free exercise claims brought under RFRA are prevalent in prisons. Inmates claim all manner of religious practices as fundamental to their faith. While many of these claims fail because the government has a compelling interest in prison security, the claims at the very least waste taxpayers' money.[218]

Senator Hatch maintains that "if the bankruptcy code trumps the First Amendment guarantees protected by [RFRA], then there is not much government action that would not do so."[219] However, the more government action that RFRA trumps, the less accountability there is to the law. Free exercise of religion is a vital part of the separation of the Church and State, but

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211. However, the court in *Morris* held that the government does have a compelling interest in enforcing the Bankruptcy Code. Morris v. Midway S. Baptist Church (*In re* Newman), 183 B.R. 239 (Bankr. D. Kan. 1995).

212. *See supra* note 9, 137-43 and accompanying text.

213. *See supra* note 142-43 and accompanying text.

214. *See supra* note 122.

215. *See* Laycock, *supra* note 123, at 236-43 (concerns raised include effect on abortion law and tax exempt status of religious institutions).

216. *See supra* notes 112-14 and accompanying text.

217. *See* Michael M. Duclos, *A Debtor's Right to Tithe In Bankruptcy Under the Religious Freedom Restoration Act*, 11 BANKR. DEV. J. 665, 690 (1995).

218. *Id.*

219. Hatch, *supra* note 191.

there must be limits placed on the free exercise of religion, lest every law breaker form a religion of his own.

VI. CONCLUSION

In *Christians*, the analysis by the Eighth Circuit in relation to the fraudulent transfer issue seems logical and well supported. However, the court's analysis of RFRA and its application to the current case is open to criticism. Although the court likely reached the correct result under RFRA, there are several steps missing in its analysis which may lead to future abuse. In particular, the court failed to expand upon the Church's organizational standing to raise a claim where the substantial burden complained of is not on an individual so much as on the collective church. Furthermore, the court's application of RFRA is disturbing in that the court chose to follow *Tessier*'s reasoning while ignoring the existence of significant distinctions.

By missing steps in its analysis and failing to make important distinctions, the Eighth Circuit, in its decision of the instant case, may cause subsequent courts to misapply RFRA. Nonetheless, the Eighth Circuit's analysis in *Christians* likely will remain intact upon remand from the Supreme Court for reconsideration consistent with *Boerne*.

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