

5-1-1998

## In re Young: A Correct but Unnecessary Constitutional Decision

David Lynn Mortensen

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Bankruptcy Law Commons](#)

---

### Recommended Citation

David Lynn Mortensen, *In re Young: A Correct but Unnecessary Constitutional Decision*, 1998 BYU L. Rev. 647 (1998).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1998/iss2/12>

This Note is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

## *In re Young*: A Correct but Unnecessary Constitutional Decision

### I. INTRODUCTION

In recent years, the tension between bankruptcy trustees and charitable religious organizations has become a continuous source of litigation.<sup>1</sup> Courts have become battlegrounds where wars are waged over money donated to churches by debtors who subsequently file for bankruptcy. These wars have forced courts to weigh religious and moral values against the economic rights of creditors. By enacting the Religious Freedom Restoration Act (RFRA),<sup>2</sup> Congress joined this war and attempted to protect the conventional understanding that laws should give way to the freedom of religion in the absence of a compelling state interest that could not be addressed in a less burdensome manner. While the Supreme Court has invalidated RFRA in its application to states and state and municipal laws, the question as to its residual validity in federal settings, such as federal bankruptcy law, remains open.<sup>3</sup>

*In re Young*<sup>4</sup> was the first case at the federal appellate level to consider the application of RFRA to a debtor's prebankruptcy petition (prepetition) donations to religious organizations. The *Young* court held that RFRA was constitutional and that bankruptcy trustees could not void charitable contributions to religious organizations.<sup>5</sup> Recently RFRA's constitutionality in its application to federal laws has been questioned and the Supreme Court vacated and remanded the Eighth Circuit *Young* decision to be reviewed in light of the *Flores* decision.<sup>6</sup> Already

---

1. See Oliver B. Pollak, "Be Just Before You're Generous": *Tithing and Charitable Contributions in Bankruptcy*, 29 CREIGHTON L. REV. 527, 534-36 (1996) (tracing the history and evolution of cases between the trustee and religious organizations).

2. 42 U.S.C. § 2000bb (1996).

3. See *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

4. 82 F.3d 1407 (8th Cir. 1996), *vacated and remanded for consideration sub nom.* *Christians v. Crystal Evangelical Free Church*, 117 S. Ct. 2502 (1997).

5. See *id.* at 1420.

6. See *Christians v. Crystal Evangelical Free Church*, 117 S. Ct. 2502 (1997). Although the Supreme Court held that RFRA is unconstitutional as it relates to state

## 648 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

some courts, without analyzing the scope of the *Flores* decision, have rejected RFRA as completely unconstitutional even in its application to federal bankruptcy law.<sup>7</sup> However, this Note argues that *Flores* does not compel a different outcome in the *Young* case on remand than the decision originally reached by the Eighth Circuit Court of Appeals. Additionally, RFRA remains viable federal law and the *Young* court correctly analyzed the issues raised by RFRA and its application to prepetition charitable donations. Furthermore, the conflict between the debtor's desire to exercise religious beliefs and the trustee's legal obligations to protect creditors will not be resolved until (1) Congress remedies the "constructive fraud" provision of 11 U.S.C. § 548(a)(2) (hereafter "§ 548")<sup>8</sup> and (2) courts find a way to simultaneously protect creditors from fraudulent attempts by some debtors to avoid paying their debts while recognizing an individual's need to fulfill sincere, good-faith religious convictions.

This Note will discuss the *Young* decision and RFRA's impact on conflicts between the sincere religious donor who becomes a debtor in bankruptcy, and the bankruptcy trustee. Section II will discuss the background and legal events that set the stage for the *Young*'s bankruptcy. Section III explains the facts of *Young* and the reasoning used by the Eighth Circuit Court of Appeals in reaching its decision. Section IV focuses on the application of RFRA to § 548 and offers a solution to the conflict between sincere religious donors who become bankruptcy debtors and bankruptcy trustees. This Note suggests that the *Young* court correctly applied RFRA and the First Amendment to § 548. However, even if the *Young* court incorrectly analyzed RFRA, the same result could be achieved by reading a good-faith test into § 548. Finally, this Note concludes that Congress needs to address the § 548 problems

---

law, RFRA remains constitutional as it applies to federal law. *See infra* notes 86-117 and accompanying text.

7. *See In re Rivera*, 214 B.R. 101, 106 (Bankr. S.D.N.Y. 1997) ("However, given that RFRA was held unconstitutional by the Supreme Court in *Boerne*, the Church is left solely with the argument that permitting recovery of the contributions violates the Debtors' First Amendment rights to free exercise of their religious beliefs."); *In re Gates Community Chapel of Rochester, Inc.*, 212 B.R. 220, 226 (Bankr. W.D.N.Y. 1997) (holding that the debtor's RFRA arguments are moot because of the *Flores* decision).

8. *See infra* note 45.

647] *IN RE YOUNG*: CORRECT BUT UNNECESSARY 649

outlined in this Note, and amend § 548 to protect charitable contributions absent actual fraud.

## II. BACKGROUND

The First Amendment provides in relevant part that: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>9</sup> In interpreting the Free Exercise clause in the First Amendment, the Supreme Court, in a line of cases including *Sherbert v. Verner*<sup>10</sup> and *Wisconsin v. Yoder*,<sup>11</sup> created and applied the strict scrutiny standard to any government regulation that burdened the free exercise of religion. The strict scrutiny standard required that any government regulation that burdens First Amendment religious freedoms (1) advance a compelling government interest and (2) be the least restrictive means possible.<sup>12</sup> This strict scrutiny requirement was intended to protect religious beliefs from governmental infringement.

After *Sherbert*, however, the Supreme Court began carving out exceptions to the *Sherbert/Yoder* rule. In some instances the *Sherbert/Yoder* rule was ignored, overlooked, or distinguished.<sup>13</sup> Including *Yoder*, there were seventeen Free Exercise cases decided by the Supreme Court after *Sherbert* and before *Sherbert* was overruled in *Employment Division*,

---

9. U.S. CONST. amend. I.

10. 374 U.S. 398, 402 (1963) (holding that a state could not deny a person employment insurance based upon religious beliefs that prevented her from working on Saturdays and caused her to be fired because “[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such”).

11. 406 U.S. 205, 215 (1972) (“The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”).

12. See *Sherbert*, 374 U.S. at 406-07; *Yoder*, 406 U.S. at 215.

13. See *Employment Div., Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872, 883-85 (1990) (holding that *Sherbert* has never been used to invalidate a law that was challenged under the Free Exercise clause); see also James R. Mason, Comment, *Smith’s Free-Exercise “Hybrids” Rooted in Non-Free-Exercise Soil*, 6 REGENT U. L. REV. 201, 206-07 (1995) (noting that in thirteen of the seventeen Free Exercise cases brought before the Supreme Court after *Sherbert* the religious objector lost because the Supreme Court distinguished those cases from *Sherbert*). But see *Yoder*, 406 U.S. at 227 (holding that the state interest in educating its citizens did not justify violating the Free Exercise Clause by requiring Amish children to attend school after the eighth grade).

## 650 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

*Department of Human Resources of Oregon, v. Smith*.<sup>14</sup> Of those seventeen, the Supreme Court found that the Free Exercise Clause did not apply in thirteen of the cases; three of the remaining four were unemployment cases.<sup>15</sup> Essentially, the Supreme Court created a rule granting enormous strength to religious freedoms, but strictly narrowed its application to employment cases.

Eventually, the *Sherbert/Yoder* line of cases was limited strictly to their facts by the Supreme Court in *Smith*.<sup>16</sup> In *Smith*, the Supreme Court addressed whether Oregon could deny unemployment benefits to Native Americans who had been discharged for work-related misconduct stemming from their use of peyote in religious ceremonies.<sup>17</sup> The Native Americans argued that denying them unemployment benefits for using peyote was a substantial burden on the free exercise of their religion and therefore the government had to satisfy the strict scrutiny standard.<sup>18</sup> The Supreme Court refused to apply the strict scrutiny standard and instead held that generally applicable and neutral laws override religious liberty claims.<sup>19</sup>

*Smith*'s "generally applicable and neutral law" test provides that if the government's action was generally applicable, neutrally applied, and only incidentally burdened the exercise of religious belief, then "the First Amendment has not been offended."<sup>20</sup> Specifically, the Court held that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"<sup>21</sup> Rather than holding that the prevention of drug abuse was a compelling state interest that satisfied the least restrictive means, the Supreme Court reduced the

---

14. See Mason, *supra* note 13.

15. See *id.*

16. 494 U.S. 872 (1990).

17. See *id.* at 874.

18. See *id.* at 882-83. This idea was first developed in *Sherbert v. Verner*, 374 U.S. 398 (1963). See discussion *supra* note 10 and accompanying text.

19. See *id.* at 877-78.

20. *Id.*

21. *Id.* at 885 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988)).

647] *IN RE YOUNG*: CORRECT BUT UNNECESSARY 651

protection for fundamental religious beliefs.<sup>22</sup> *Smith*'s holding severely limited the *Sherbert/ Yoder* line of cases and ended the application of the strict scrutiny test to cases in which the free exercise of religion was burdened.<sup>23</sup>

Consequently, and in direct response to the *Smith* decision, Congress, by an overwhelming majority in both houses, passed RFRA in 1993.<sup>24</sup> In RFRA, Congress rejected the *Smith* holding and made specific findings that even generally applicable neutral laws can substantially burden the free exercise of religion.<sup>25</sup> Congress' animosity toward the *Smith* decision was explicit, and RFRA openly declares that its purpose is:

- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
- (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.<sup>26</sup>

RFRA reinstates the strict scrutiny test for any law that substantially burdens the free exercise of religion.<sup>27</sup> If a party proves that the statute being enforced substantially burdens the exercise of his or her religion, then that statute must pass a strict scrutiny standard or be deemed unconstitutional.

---

22. The reduction in the standard and protection of First Amendment Freedom of Religion rights was unnecessary, because even the compelling interest test would have protected against anarchy. There is a compelling state interest in avoiding anarchy. For a more in-depth discussion of the harms of reducing the protections of the compelling interest test, see James D. Gordon III, *The New Free Exercise Clause*, 26 CAP. U. L. REV. 65 (1997).

23. See Michael M. Duclos, *A Debtor's Right to Tithe in Bankruptcy Under the Religious Freedom Restoration Act*, 11 BANKR. DEV. J. 665, 670 (1995); see, e.g., *In re Young*, 82 F.3d 1407, 1418-19 (8th Cir. 1996).

24. See 42 U.S.C. § 2000bb (1996); see also 139 CONG. REC. H2363 (daily ed. May 11, 1993); 139 CONG. REC. S14471 (daily ed. Oct. 27, 1993); 139 CONG. REC. H8713-15 (daily ed. Nov. 3, 1993); see also Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 161 (1997).

25. See 42 U.S.C. § 2000bb(a)(4) (1996).

26. 42 U.S.C. § 2000bb(b) (1996).

27. See Duclos, *supra* note 23 at 665-66; see, e.g., *Young*, 82 F.3d at 1407, 1418-19 (1996), *vacated and remanded for consideration sub nom. Christians v. Crystal Evangelical Free Church*, 117 S. Ct. 2502 (1997).

## 652 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

Immediately after Congress passed RFRA, questions about its constitutionality were raised. In *City of Boerne v. Flores*,<sup>28</sup> Boerne denied the Catholic Church a permit to enlarge a church inside city limits.<sup>29</sup> The Archbishop sued, claiming that the zoning restrictions were a substantial burden on the free exercise of religion and therefore violated RFRA.<sup>30</sup> The city of Boerne argued that RFRA was unconstitutional,<sup>31</sup> claiming that Congress abused its power under section 5 of the Fourteenth Amendment to impose RFRA requirements on the states.<sup>32</sup> Noting that section 5 of the Fourteenth Amendment power is limited to remedial measures,<sup>33</sup> the Supreme Court held that RFRA was an improper use of Congress' enforcement power under section 5 of the Fourteenth Amendment.<sup>34</sup> Specifically, the Supreme Court held that RFRA attempts to create a substantive change in constitutional law and is not remedial legislation.<sup>35</sup> Although RFRA has been declared unconstitutional in its application to states, RFRA's constitutionality in its application to the federal government and federal laws has not been decided by the Supreme Court.<sup>36</sup>

Pending final resolution of the issues by the Supreme Court, the judiciary will continue to be forced to assess the constitutionality of RFRA in the bankruptcy context. Thus, the key issues bankruptcy judges will continue to wrestle with are (1) whether RFRA is constitutional, (2) whether the strict scrutiny test applies, and (3) whether a creditor's claims are sufficiently compelling to justify burdening religious freedoms. Bankruptcy courts are split on whether RFRA is constitutional, and those that have found it constitutional have struggled to

---

28. 117 S. Ct. 2157 (1997).

29. *See id.* at 2160.

30. *See id.*

31. *See id.*

32. *See id.* at 2162.

33. *See id.* at 2163 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.") (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

34. *See id.* at 2171.

35. *See id.* at 2170.

36. *But see id.* at 2172 (Stevens, J., concurring) ("In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a 'law respecting an establishment of religion' that violates the First Amendment to the Constitution.").

647] *IN RE YOUNG*: CORRECT BUT UNNECESSARY 653

apply the strict scrutiny standard.<sup>37</sup> Bankruptcy courts have also reached different conclusions on whether § 548 substantially burdens the free exercise of religious beliefs, and whether a compelling state interest justifies the burden.<sup>38</sup> In the wake of the turmoil created by the division in the courts over these issues, *Young* was decided.

III. *IN RE YOUNG*A. *Facts*

Bruce Young and his family were active members of the Crystal Evangelical Free Church and had, for several years, diligently paid approximately one-tenth of their income to their church as tithing.<sup>39</sup> The money was used to support the church and its work.<sup>40</sup> Although the church encouraged its members to pay tithing, payment was not compulsory and the Youngs would not have been denied access to any church functions or benefits had they refused to pay tithing.<sup>41</sup> However, it was undisputed that the Youngs were sincere in their religious belief and felt obligated to pay tithing as a commandment of God.<sup>42</sup> In February 1992, the Youngs filed for Chapter 7 bankruptcy. It was determined that during the year prior to their filing, at a time when the Youngs were insolvent,<sup>43</sup> they

---

37. See Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 591-96 (1996) (discussing the Court's problem of having to decide whether RFR is sustainable or not).

38. See *In re Newman*, 183 B.R. 239, 252 (Bankr. D. Kan. 1995) (holding that voiding conveyances to religious organizations is not a substantial burden on the free exercise of religion and that even if it is a substantial burden the bankruptcy code is a compelling government interest), *judgment affirmed*, 203 B.R. 239 (Bank. D. Kan. 1996). But see *In re Tessier*, 190 B.R. 396, 405 (Bankr. D. Mont. 1995) (holding that preventing a debtor from paying tithing is a substantial burden on the debtor's free exercise of religion and that the bankruptcy code was not a compelling government interest), *appeal dismissed*, 127 F.3d 1106 (9th Cir. 1997).

39. See *In re Young*, 82 F.3d 1407, 1410 (8th Cir. 1996) (noting that *Leviticus* 27:30, 32 (New International Version of the Bible), states that "[a] tithing of everything from the land, whether grain from the soil or fruit from the trees, belongs to the Lord; it is holy to the Lord"), *vacated and remanded for consideration sub nom. Christians v. Crystal Evangelical Free Church*, 117 S.Ct. 2502 (1997).

40. See *id.*

41. See *id.*

42. See *id.*

43. See 11 U.S.C. § 101(32)(A) (1996) (" '[I]nsolvent' means, with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair



## 654 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

had contributed \$13,450.00 to their church.<sup>44</sup> The trustee filed an adversary proceeding under § 548<sup>45</sup> to recover the money from the church as a fraudulent transfer.<sup>46</sup> Under § 548 and absent actual intent to defraud the creditors, the bankruptcy trustee must prove that “(1) there was a transfer of the debtor’s interest in property (2) made on or within one year preceding the filing of the petition (3) while the debtors were insolvent (4) in exchange for which the debtors received less than a reasonably equivalent value.”<sup>47</sup> The parties stipulated to the first three factors and the bankruptcy court was left to decide whether the debtors had received reasonably equivalent value for their transfers.<sup>48</sup> The bankruptcy court held that “any benefit was strictly religious and thus merely incidental.”<sup>49</sup> The court concluded that religious benefits are judicially unrecognizable and therefore the debtors did not receive reasonably equivalent value and each tithing donation therefore constituted a fraudulent transfer.<sup>50</sup> Moreover, the bankruptcy court held that even if a benefit was conferred on the Youngs by the church, it was not contingent upon their payment of tithing and was therefore not received “in exchange for” the tithing.<sup>51</sup>

The Youngs appealed to a federal district court where, for the first time, the debtors argued that § 548 was an

---

valuation . . . .”).

44. *See Young*, 82 F.3d at 1410.

45. 11 U.S.C. § 548 provides in pertinent part:

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

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, or indebted; or

(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 . . . .

46. *See Young*, 82 F.3d at 1410.

47. *See id.*

48. *See id.*

49. *Id.* at 1411.

50. *See id.* The court did not find any actual fraud, but imputed fraud under the provisions of § 548(a)(2). *See id.* at 1411-13.

51. *Id.*

647] *IN RE YOUNG*: CORRECT BUT UNNECESSARY 655

unconstitutional burden on their free exercise of religion.<sup>52</sup> The district court, however, agreed with the bankruptcy court's determination that the Youngs did not receive reasonably equivalent value for their money, and that the disputed tithing constituted a voidable fraudulent transfer.<sup>53</sup> The court then turned to the issue of constitutionality and held that the bankruptcy code was neutral in application, its effect upon religion was incidental, and that § 548 met the *Smith* requirements and was, therefore, constitutional.<sup>54</sup> The Youngs appealed the district court holding to the Eighth Circuit Court of Appeals.

*B. Reasoning*

While the Young's appeal to the Eighth Circuit Court of Appeals was pending, Congress passed RFRA.<sup>55</sup> Because RFRA has retroactive effect,<sup>56</sup> the court allowed both parties to file supplemental briefs evaluating how RFRA affected the lower court's decision.<sup>57</sup> After hearing oral arguments, the circuit court agreed with the district court and held that absent RFRA the transfers were voidable under § 548.<sup>58</sup> The circuit court then turned to the issue of how RFRA effected § 548.<sup>59</sup>

As previously explained,<sup>60</sup> RFRA requires courts to employ the *Sherbert/Yoder* strict scrutiny standard to determine whether or not a restriction on religion is constitutional.<sup>61</sup> Using this analysis, the first question is whether the statute in question, in this case § 548, substantially burdens a person's

---

52. *See In re Young*, 152 B.R. 939, 950-51 (Bank. D. Minn. 1993).

53. *See id.* at 948-49. The district court also held that even if the services of the church were of reasonably equal value they were not received "in exchange for" the tithing and therefore voidable. *See id.*

54. *See id.*

55. *See Young*, 82 F.3d at 1412.

56. 42 U.S.C. § 2000bb-3(a) (1996) ("This chapter [RFRA] applies to all Federal and State Law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.")

57. *See id.* The Justice Department intervened, filing a brief supporting the trustee, but immediately before oral arguments, the Justice Department withdrew from the case. The trustee was substituted for the Justice Department and, according to the court, ably presented oral arguments. *See id.* at 1413.

58. *See id.* at 1416.

59. *See id.* at 1417.

60. *See supra* notes 24-27 and accompanying text.

61. *See* 42 U.S.C. § 2000bb (1996); *Young*, 82 F.3d at 1416.

## 656 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

ability to exercise his religion.<sup>62</sup> If the court is satisfied that the party seeking to invoke the protection of RFRA has proven that the statute in question substantially burdens the exercise of his religion, the government is then required to prove that the statute satisfies a strict scrutiny standard—that the statute (1) advances a compelling government interest, and (2) it is the least restrictive means by which to fulfill that compelling government interest.<sup>63</sup>

On the issue of whether § 548 substantially burdened the Young's ability to exercise their religion, the court held that

[i]n order to be considered a 'substantial' burden, the

governmental 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."<sup>64</sup>

The court believed that RFRA required that this rule be viewed broadly and that it should include "religiously motivated as well as religiously compelled conduct."<sup>65</sup> Using this rule, the court held that § 548 substantially burdened religiously motivated conduct by voiding transfers to churches.<sup>66</sup> Voiding tithing contributions prevents church members from following the dictates of their sincere religious convictions and paying tithing for at least a year before they petition for bankruptcy.<sup>67</sup> The trustee asserted, and the dissent agreed, that the only burden from the application of § 548 was voiding contributions to churches for one year immediately preceding the petition for bankruptcy. The Youngs were able to tithe before and after bankruptcy and could find other ways to exercise their religious beliefs.<sup>68</sup> The majority rejected this argument and instead decided that § 548 is a substantial burden and found that

---

62. See *Young*, 82 F.3d at 1418; *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963).

63. See 42 U.S.C. § 2000bb (1996); *Young*, 82 F.3d at 1416, 1419.

64. *Young*, 82 F.3d at 1418 (alterations in original) (quoting *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995), *cert. denied*, 117 S.Ct. 1852 (1997)).

65. *Id.*

66. See *id.*

67. See *id.*

68. See *id.* at 1421-22 (Bogue, J., dissenting).

647] *IN RE YOUNG*: CORRECT BUT UNNECESSARY 657

voiding contributions is almost a per se burden upon the exercise of religious freedom.<sup>69</sup> After accepting the Young's argument that the exercise of their religion would be substantially burdened by voiding some of their religious contributions, the court shifted the burden to the trustee to prove that § 548 satisfies the strict scrutiny standard.<sup>70</sup>

In order to meet the first prong of strict scrutiny, the trustee argued that § 548 advanced a compelling state interest.<sup>71</sup> The trustee offered two compelling government interests that were advanced by § 548: (1) allowing debtors to get a fresh start, and (2) protecting the creditors from fraudulent transfers.<sup>72</sup> The court, referring to *In re Tessier*,<sup>73</sup> agreed that allowing debtors to get a fresh start and protecting creditors from fraudulent transfers were government interests.<sup>74</sup> However, the court distinguished these interests from compelling interests such as national security and held that providing debtors with a fresh start and protecting creditors did not justify an infringement on First Amendment rights.<sup>75</sup> The majority found that nullifying § 548 as it relates to charitable contributions made to religious organizations would have such a minor effect on the integrity of the bankruptcy system that there was no real threat to any government interest.<sup>76</sup> Because the court held that § 548 did not advance a compelling state interest, it did not reach a decision on whether it would meet the least restrictive means test. Finally, the court held that because § 548 put a substantial burden upon the exercise of religious freedoms and failed to advance a substantial state interest, it violated RFRA and consequently, the circuit court reversed the district court's decision.<sup>77</sup>

---

69. *See id.* at 1418-19.

70. *See id.* at 1419.

71. *See id.*

72. *See id.* The court looked at the conflicting opinions on whether the bankruptcy code advanced a compelling governmental interest in *In re Newman*, 183 B.R. 239, 251 (Bankr. D. Kan. 1995) and *In re Tessier*, 190 B.R. 396, 405 (Bankr. D. Mont. 1995) and finally agreed with the *Tessier* court. *See Young*, 82 F.3d at 1419.

73. 190 B.R. 396, 405 (Bankr. D. Mont. 1995).

74. *See Young*, 82 F.3d at 1420. However, the *Young* court refused to define national security as narrowly as the *Tessier* court. *Id.*

75. *See id.*

76. *See id.*

77. *See id.*

## IV. ANALYSIS

Recent cases, including *Young*, have chosen to look at religious contributions and § 548 in terms of constitutional rights.<sup>78</sup> The arguments hinge on interpretations of Supreme Court decisions discussing the Establishment Clause and the Free Exercise Clause.<sup>79</sup> Debtors and religious organizations have cited the Free Exercise Clause and claimed that their First Amendment right to freedom of religion has been infringed upon by being denied the opportunity to support their various religions and follow what they believe to be a commandment of God. Conversely, creditors and trustees have argued that allowing money owed to them to be used to support religion is tantamount to government support of religion and violates the Establishment Clause.

Since the *Young* decision, RFRA has been declared unconstitutional as applied to states and state laws.<sup>80</sup> After the *Flores* decision, the Supreme Court vacated and remanded the *Young* decision for reconsideration in light of the *Flores* decision. Additionally, bankruptcy courts, without addressing the scope of the *Flores* decision, have refused to address RFRA arguments by churches and religious debtors.<sup>81</sup> This Note

---

78. See *Tessier*, 190 B.R. at 405 (“[N]ot allowing the Tessiers to tithe in their Chapter 13 Plan imposes upon their exercise of religion a substantial burden in which the Trustee has failed to show the government has a compelling interest . . . .”); *In re Newman*, 183 B.R. 239, 248 (Bankr. D. Kan. 1995) (holding that fraudulent transfer statute does not substantially burden free exercise of religion); *In re Lees*, 192 B.R. 756 (Bank. D. Mont. 1994) (determining that the fraudulent transfer statute is a generally applicable law and does not violate the free exercise clause). *But see*, *In re Packham*, 126 B.R. 603 (Bankr. D. Utah 1991) (holding that tithing did not satisfy the reasonably equivalent value standard and is therefore voidable); *In re Navarro*, 83 B.R. 348 (Bankr. E.D. Pa. 1988) (concluding that the court can either affirm or refuse to confirm the tithing payments without violating the constitution); *In re Reynolds*, 83 B.R. 684 (Bankr. W.D. Mo. 1988) (holding that churches serve and satisfy a deep need and that some level of tithing is acceptable); *Ellenberg v. Chapel Hill Harvester Church, Inc.*, 59 B.R. 815 (Bankr. N.D. Ga. 1986) (holding that transfer to religious organization satisfies the reasonably equivalent value standard and is therefore not voidable); *In re Sturgeon*, 51 B.R. 82 (Bankr. S.D. Ind. 1985) (refusing to allow confirmation of a plan that proposed donation to a church).

79. See *In re Saunders*, 215 B.R. 800, 803-04 (Bankr. D. Mass. 1997); *Tessier*, 190 B.R. at 405; *Newman*, 183 B.R. at 248; *Lees*, 192 B.R. at 756.

80. See *supra* notes 28-36 and accompanying text.

81. See, e.g., *In re Rivera*, 214 B.R. 101, 106 (Bankr. S.D.N.Y. 1997); *In re Gates Community Chapel of Rochester, Inc.*, 212 B.R. 220, 226 (Bankr. W.D.N.Y. 1997).

647] *IN RE YOUNG*: CORRECT BUT UNNECESSARY 659

argues that the *Young* court correctly analyzed the constitutionality of RFRA and its application to the bankruptcy laws. However, even if the *Young* court incorrectly analyzed the constitutional issues, and strict scrutiny protection is unavailable, the same result could be reached by adopting a “good-faith” test in relation to prepetition charitable contributions to religious organizations.<sup>82</sup> Adopting a good-faith test would satisfy § 548’s intent to prevent fraudulent conveyances while protecting the exercise of sincere religious beliefs. Although this Note advocates a good-faith test, and such a test satisfies the intent of the Fraudulent Conveyances Act, a good-faith test might violate the clear meaning of the statute, and ultimately Congress will be required to review § 548 and the constructive fraud provision.<sup>83</sup>

A. *The Young Court Correctly Analyzed the Constitutional Issues*

Since Congress passed RFRA, courts have split over whether RFRA is constitutional and whether RFRA can be used to protect prepetition contributions to religious organizations. These were the issues the *Young* court correctly addressed. Initially, the *Young* court found that RFRA was constitutional as it applies to federal laws and then applied the strict scrutiny standard, established by the *Sherbert/Yoder* line of cases, to the Bankruptcy Code.<sup>84</sup>

---

82. Occasionally a court has escaped the First Amendment Constitutional quagmire and used a good-faith test to decide the issues raised by prepetition charitable donations to a religious organization. *See, e.g., Packham*, 126 B.R. at 603; *Navarro*, 83 B.R. at 348; *Reynolds*, 83 B.R. at 684; *Ellenberg*, 59 B.R. at 815; *Sturgeon*, 51 B.R. at 82.

83. There are currently a number of proposed bills in congress that would protect religious contributions from being voided by the trustee. *See* The Religious Liberty and Charitable Donations Protection Act, S. 1244, 105th Cong. (1997); The Religious Liberty and Charitable Donations Protection Act, H.R. 2604, 105th Cong. (1997); Religious Fairness in Bankruptcy Act of 1997, H.R. 2611, 105th Cong. (1997). Although these bills provide the protection for Religious Liberties advocated by this Note, two of the three bills fail to protect creditors from bad-faith contributions to churches in an attempt to defraud the creditors. *See infra* notes 192-95 and accompanying text.

84. *See supra* notes 55-77 and accompanying text.

## 660 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

*1. RFRA is constitutional*

The constitutionality of RFRA has been hotly contested since the bill passed in 1993.<sup>85</sup> As previously explained,<sup>86</sup> in *City of Boerne v. Flores*,<sup>87</sup> the Supreme Court held that RFRA was unconstitutional in its application to states and state law.<sup>88</sup> Specifically, the court held that RFRA was not a proper use of Congress' enforcement power under section five of the Fourteenth Amendment because RFRA is not remedial, preventive legislation.<sup>89</sup> Consequently, the Supreme Court invalidated application of RFRA to zoning and other state law issues.<sup>90</sup> Although the Supreme Court has declared that RFRA is unconstitutional in its application to state law, that holding does not invalidate the entire act; invalid portions of a statute can be severed to avoid invalidating the entire statute.<sup>91</sup>

Although the nature of the case, a dispute over zoning restrictions, did not give the Supreme Court an opportunity to review the constitutionality of RFRA as it applies to federal law, and specifically bankruptcy, other courts have found RFRA to be an unconstitutional violation of the Establishment Clause and the Separation of Powers.<sup>92</sup> The constitutionality of RFRA in the federal context has been questioned and no doubt will

---

85. See *City of Boerne v. Flores*, 117 S.Ct. 2157, 2170 (1997); *Equal Employment Opportunity Comm'n v. Catholic Univ.*, 83 F.3d 455, 469-70 (D.C. Cir. 1996); *In re Saunders*, 215 B.R. 800, 805-06 (Bankr. D. Mass. 1997); *Hodge v. Magic Valley Evangelical Free Church*, 200 B.R. 884, (Bankr. D. Idaho 1996); *In re Tessier*, 190 B.R. 396, 407 (Bankr. D. Mont. (1995); see also McConnell, *supra* note 24.

86. See *supra* notes 28-36 and accompanying text.

87. 117 S. Ct. 2157 (1997).

88. See *id.* at 2170. For a critical analysis of the *Flores* decision, see generally McConnell, *supra* note 24.

89. See *id.* at 2170-71.

90. See *id.* at 2172. The exact application of the Supreme Court's decision is now being contested. See *supra* note 85 and accompanying text.

91. See *INS v. Chadha*, 462 U.S. 919, 934 (1983); see also *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1983) (holding that "a court should refrain from invalidating more of the statute than is necessary").

92. See *In re Saunders*, 215 B.R. 800, 806 (Bankr. D. Mass. 1997) (holding that RFRA creates private benefits that violate the Establishment Clause); *Hodge v. Magic Valley Evangelical Free Church, Inc.*, 200 B.R. 884, 899-902 (Bankr. D. Idaho 1996) (arguing that RFRA violates the Separation of Powers by usurping judicial power); *In re Tessier*, 190 B.R. 396, 399 (Bankr. D. Mont. 1995) (holding that RFRA violates the Separation of Powers by trying to force courts to use a "judicially unmanageable test").

647] *IN RE YOUNG*: CORRECT BUT UNNECESSARY 661

soon be the topic of a Supreme Court decision.<sup>93</sup> However, unlike its application to state law, RFRA should be found constitutional in its application to federal law, including bankruptcy.

*a. RFRA does not violate the Establishment Clause.* Creditors of debtors who have donated to religious organizations argue that not allowing recovery under § 548 of the Bankruptcy Code violates their first amendment constitutional rights.<sup>94</sup> Creditors argue that allowing the church to keep money owed them is tantamount to forcing the creditors to contribute to the debtor's church, which is a violation of the Establishment Clause.<sup>95</sup>

The critical test for Establishment Clause violations was initiated in *Lemon v. Kurtzman*.<sup>96</sup> In *Lemon*, the Court held that in order to survive an Establishment Clause attack, a law must (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) must not foster excessive entanglement of the government into religion.<sup>97</sup> Creditors argue that creating an exception to § 548 is, in effect, supporting the advancement of religion and devoid of a secular purpose.<sup>98</sup>

Creditors' Establishment Clause arguments should fail for two reasons. First, RFRA's effect of protecting prepetition donations involves no government action.<sup>99</sup> A creditor has a right to repayment of a debt, but not a general right to have the government direct and be responsible for other financial transactions in the debtor's life. The debtor determines where

---

93. The Supreme Court granted certiorari on the *Young* case, then vacated and remanded for review in light of the *Flores* decision. See *Christians v. Crystal Evangelical Free Church*, 117 S. Ct. 2502 (1997).

94. See *In re Navarro*, 83 B.R. 348, 351-52 (Bankr. E.D. Pa. 1988).

95. U.S. CONST. amend I.

96. 403 U.S. 602 (1970).

97. See *id.*

98. See *Navarro*, 83 B.R. at 351-52.

99. See *id.* at 348, 353-54; *In re Green*, 73 B.R. 893, 894-95 (Bankr. W.D. Mich. 1987) ("To the extent that the debtor's church is benefited [sic], it is as a result of the private choice of the individual debtor interposed between the court and the church. Such an attenuated benefit cannot be deemed to confer the imprimatur of state approval on any particular religion or upon religion as a whole."); see also *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1971) (holding that indirect contribution to religious contributions is not unconstitutional).



## 662 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

the money is spent or to whom it is to be given.<sup>100</sup> The debtor decides whether and how much money to give the church.<sup>101</sup> Second, creditors only have a claim against the debtor, and not a possessory interest in the money.<sup>102</sup> Therefore, the government is not forcing creditors to donate to the church, but instead leaving them without an unsatisfied claim.<sup>103</sup> Ultimately, it is clear that the money is not government funds, nor is it money taken directly from the creditor and given to the church and therefore does not violate the Establishment Clause.<sup>104</sup>

Although in a concurring opinion in *Flores*, Justice Stevens would have found RFRA unconstitutional based on the Establishment Clause,<sup>105</sup> he was not joined by any of the other Justices. Despite Justice Stevens' argument, RFRA is not a violation of the Establishment Clause, but is a constitutional accommodation of religious practice.<sup>106</sup> The government has a long history of providing accommodations for the free exercise of religion.<sup>107</sup> Congress has granted tax exemptions to religious organizations and has exempted religious organizations from Title VII prohibition against discrimination in employment on the basis of religion.<sup>108</sup> Such accommodations are not unconstitutional, but provide a legitimate government purpose

---

100. See *Navarro*, 83 B.R. at 351-52.

101. See *id.*

102. See *id.*

103. See *id.* at 353-54; *In re Green*, 73 B.R. 893, 894-95 (Bankr. W.D. Mich. 1987) ("If these funds did not go to the church, they would go toward the debtors' other living expenses or toward paying their creditors, but not to the United States.").

104. See *Navarro*, 83 B.R. at 353-54; see also *Walz*, 397 U.S. 664 (upholding tax breaks for people who donate to charitable organizations as constitutional and not a violation of the Establishment Clause).

105. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2171 (1997) (Stevens, J., concurring).

106. See *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 470 (D.C. Cir. 1996) (holding that RFRA does not violate the Establishment Clause, but is a "legislatively mandated accommodation of the exercise of religion").

107. See generally *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987) (holding that granting unemployment benefits to an employee who was fired for refusing to work on her Sabbath is not a violation of the Establishment Clause); *Walz*, 397 U.S. at 675-76 (upholding tax breaks for people who donate to religious organizations); see also *McConnell*, *supra* note 24, at 169.

108. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 329 (1987) (holding that 42 U.S.C. § 2000e-1, which exempts religious organizations from Title VII's prohibition against discrimination in employment based on religion, does not violate the Establishment Clause).

647] *IN RE YOUNG*: CORRECT BUT UNNECESSARY 663

of avoiding unnecessary governmental entanglement in religious activities.<sup>109</sup> RFRA, particularly in the bankruptcy context, simply provides a constitutional accommodation to the Bankruptcy Code to protect religious freedoms and prevent the unnecessary burdening of the free exercise of sincere religious beliefs.

The Establishment Clause does not require that the government sever all contact with religious organizations, but requires only that Congress must not advocate a particular point of view or religion.<sup>110</sup> In passing RFRA, Congress has not provided support for any particular religion or denomination. RFRA protections apply to all religious organizations and their members. As long as Congress is neutral and refuses to promote any particular religion or point of view, the Establishment Clause is not violated.<sup>111</sup>

Finally, it is important to remember that RFRA only returns to the rule espoused in *Sherbert*. If applying the strict scrutiny standard to laws that burdened the exercise of religion did not violate the constitution for the approximately fifty years *Sherbert* was the law, it seems counterintuitive to believe that the same standard suddenly violates the Establishment Clause when statutorily mandated by Congress. If *Sherbert* did not violate the Establishment Clause then neither does RFRA.

*b. RFRA does not violate Separation of Powers principles.* Courts that have found RFRA to be an unconstitutional violation of the separation of powers have characterized RFRA as an unconstitutional attempt by Congress to define First Amendment protections.<sup>112</sup> These decisions misconstrue the intent of RFRA.<sup>113</sup> There is no question that Congress did not support the *Smith* decision.<sup>114</sup>

---

109. *Id.*

110. *See id.* at 335 (“Under the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.”).

111. *See id.*

112. *See* Hodge v. Magic Valley Evangelical Free Church, Inc., 200 B.R. 884, 901 (Bankr. D. Idaho 1996); *In re Tessier*, 190 B.R. 396, 406-07 (Bankr. D. Mont. 1995).

113. *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 469 (D.C. Cir. 1996) (holding that “the more natural reading of the Act’s provisions leads us to conclude that Congress’s objective in enacting the statute was to overturn the effects of the *Smith* decision, not the decision itself”).

114. *See* 42 U.S.C. § 2000bb(a)(4) (1996).

## 664 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

However, that does not mean that Congress has usurped judicial power. Unlike the Fourteenth Amendment, which limits congressional power over states to remedial or enforcement power, in areas of federal concern Congress has the power to make substantive changes in the law. If Congress had the power to create the Bankruptcy Code, it should have the power to amend or limit the Bankruptcy Code to protect First Amendment freedoms. Moreover, if Congress can engage in piecemeal revision of federal legislation, it can also take a global approach seeking to safeguard against all encroachments on religious freedoms.

Additionally, Congress has regularly responded to Supreme Court decisions by creating a higher threshold protection for individual rights than the Constitution requires.<sup>115</sup> By ruling on a constitutional issue, the Supreme Court establishes the rights constitutionally mandated. However, the Constitution does not prohibit Congress from granting more protection for freedoms. The *Smith* holding allows the government to infringe on religious freedoms as long as the burdening of the religious activity "is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision."<sup>116</sup> The *Smith* decision does not prohibit the federal government from granting greater protection for religious rights. Congress is certainly free to set the standard for federal law higher and require any law burdening religious freedoms to satisfy a strict scrutiny standard.<sup>117</sup> Self-restrictive guidelines providing more protection do not violate the separation of powers.

---

115. See *Zurder v. Stanford Daily*, 436 U.S. 547 (1978) (holding that the First, Fourth and Fourteenth Amendments failed to provide added protection from search by police officers); cf. 42 U.S.C. 2000aa ("Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication . . .").

116. See *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990).

117. For other examples of where Congress has responded to a Supreme Court decision by providing greater protection for fundamental rights, see *United States v. Bauer*, 75 F.3d 1366, 1375 (9th Cir. 1996), cert. denied, 117 S.Ct. 995 (1997).

647] *IN RE YOUNG*: CORRECT BUT UNNECESSARY 6652. *RFRA and the Sherbert/Yoder line of cases protects perpetuation religious donations*

After correctly determining that RFRA was constitutional in its application to federal law, the *Young* court was required by RFRA to return to the *Sherbert/Yoder* line of cases to determine whether the charitable contributions could be voided by the bankruptcy trustee. Applying the *Sherbert/Yoder* rule to the *Young* case requires that the court apply the strict scrutiny standard to the Bankruptcy Code, specifically § 548. The strict scrutiny standard requires the court to determine (1) whether voiding charitable contributions to a religious organization is a substantial burden on an individual's exercise of religion, and if it is a substantial burden on the exercise of religion then (2) whether the Bankruptcy Code and specifically § 548 advances a compelling government interest and is the least restrictive means for achieving that compelling government interest. One of the difficulties in applying RFRA to protect perpetuation charitable donations is that RFRA, like *Sherbert*, fails to define "substantially burden" or "compelling state interest."

*a. Preventing religious contributions is a substantial burden on the free exercise of religious freedoms.* Since RFRA was passed, courts have split over whether voiding contributions to religious organizations constitutes a substantial burden on their exercise of religious freedoms.<sup>118</sup> In *Young*, the church claimed that the Youngs were devout members of their church and that paying tithing or making contributions is a fundamental activity in exercising their religious rights.<sup>119</sup> Consequently, the church asserted that forcing the church to return the donated money to the trustee would in effect be denying the Youngs the opportunity to practice the requirements of their religious beliefs.<sup>120</sup> Although the majority accepted these arguments as constituting a

---

118. See, e.g., *Hodge v. Magic Valley Evangelical Free Church*, 200 B.R. 884, 895-96 (Bankr. D. Idaho 1996); *In re Tessier*, 190 B.R. 396, 405 (Bankr. D. Mont. 1995); *In re Faulkner*, 165 B.R. 644, 648 (W.D. Mo. 1994); *In re Newman*, 183 B.R. 239, 251 (Bankr. D. Kan. 1995); *In re Green*, 73 B.R. 893, 895 (Bankr. W.D. Mich. 1987).

119. See *In re Young*, 82 F.3d 1407, 1414 (8th Cir. 1996).

120. See *id.* at 1416-17. This argument has been used and is more applicable in a Chapter 13 petition for bankruptcy, where the trustee objects to the approval of a payment plan that includes making contributions to religious organizations. See *Tessier*, 190 B.R. at 397, 405.

## 666 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

substantial burden, the dissent and other courts contend that the burden is minor.<sup>121</sup> Those courts assert that debtors are still able to contribute before and after bankruptcy and that they can find other ways to exercise religious freedoms that do not defraud their creditors.<sup>122</sup>

In *Hodge v. Magic Valley Evangelical Free Church*,<sup>123</sup> the court held that "a substantial burden upon religion exists when the statute: (1) requires an individual to refrain from doing something required by his or her religious beliefs, or; (2) forces an individual to choose between following the precepts of his religion or her religion and forfeiting benefits, . . ."<sup>124</sup> A regulation that substantially burdens the exercise of religion will prohibit an individual from exercising religious beliefs or force the individual to choose between participation in a government program or the exercise of his rights and the practice of his religion.<sup>125</sup>

As the *Young* court correctly found, § 548 substantially burdens the free exercise of religion in two ways. First, § 548 prevents a debtor from following religious dictates. Sincere religious believers see tithing not as an option, but as a commandment from God, and a requirement of their religion.<sup>126</sup> By forcing the church to return the money to the trustee, the effect is as if the debtor had never made the donation. The court would therefore be nullifying religious activity.<sup>127</sup> Second, § 548 imposes a substantial burden on religious debtors by forcing them to choose between protecting their church and the donations they made to the church and the relief provided for all debtors under the Bankruptcy Code. If trustees are allowed

---

121. See *Young*, 82 F.3d at 1421-22 (Bogue, J., dissenting); see also *In re Bloch*, 207 B.R. 944, 951 (Bankr. D. Colo. 1997); *Newman*, 183 B.R. at 251.

122. See *Young*, 82 F.3d at 1421-22; *Newman*, 183 B.R. at 251.

123. 200 B.R. 884 (Bankr. D. Idaho 1996).

124. *Id.* at 895 (citing *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 140-41 (1987); see *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)); see also *Duclos*, *supra* note 23, at 693-95.

125. See *Hodge*, 200 B.R. at 895.

126. See, e.g., *Young*, 83 F.3d at 1410; *Hodge*, 200 B.R. at 895-96; *In re Tessier*, 190 B.R. 396, 405 (Bankr. D. Mont. 1995); *In re Newman*, 183 B.R. 239, 251 (Bankr. D. Kan. 1995); *In re Faulkner*, 165 B.R. 644, 648 (Bank. W.D. Mo. 1994); *In re Green*, 73 B.R. 893, 895 (Bankr. W.D. Mich. 1987).

127. This would be especially true in a Chapter 13 case where the court refused to approve a payment plan because it included religious contributions. See, e.g., *Tessier*, 190 B.R. at 405.

647] *IN RE YOUNG*: CORRECT BUT UNNECESSARY 667

to void conveyances to religious organizations, some religious debtors would refuse to file for bankruptcy.<sup>128</sup> Section 548 therefore denies religious debtors participation in, and the benefits of, bankruptcy. As the *Hodge* court held, “financially strapped debtors should not be subjected to the substantial pressure of choosing between either debt relief on the one hand, or generating a law suit against their church for a money judgment on the other.”<sup>129</sup> Requiring debtors to make such a choice is a substantial burden on the free exercise of religion.

*b. The Bankruptcy Code is not a compelling government interest.* Since voiding religious contributions is a substantial burden on the free exercise of religion, trustees must show that § 548 advances a compelling government interest and is the least restrictive means for achieving that governmental purpose. Creditors have offered several government interests as compelling in an attempt to justify the Bankruptcy Code and its burden on the free exercise of religion.<sup>130</sup> These include (1) preserving the bankruptcy system, (2) allowing debtors to escape repressive debt and start over, and (3) protecting creditors from economic loss.<sup>131</sup> Courts are split on whether these interests justify burdening religious freedoms by voiding charitable contributions.<sup>132</sup>

The flaw in the arguments by creditors who suggest that the Bankruptcy Code satisfies a compelling government interest is that those arguments focus on the Bankruptcy Code as a whole, and not specifically on § 548. Moreover, creditors do not weigh the impact of § 548 on all religious debtors, but limit the impact to the individual debtor. Certainly the Bankruptcy Code, the relief it provides debtors, and the protection it provides creditors, is a government interest. However, protecting contributions to religious organizations made by sincere religious debtors would not threaten the purposes of the

---

128. See *Hodge*, 200 B.R. at 895-96 (recognizing that the Hodges “would not have filed for bankruptcy relief had they known that Plaintiff [the trustee] would seek to avoid their religious tithes”).

129. *Id.* at 896.

130. See *id.* at 897; *Newman*, 183 B.R. at 252; *Tessier*, 190 B.R. at 405; *In re Navarro*, 83 B.R. 348, 353 (Bankr. E.D. Pa. 1988).

131. See *supra* note 130; see also *Duclos*, *supra* note 23, at 698-99.

132. See *Hodge*, 200 B.R. at 897; see, e.g., *Newman*, 183 B.R. at 252; *Tessier*, 190 B.R. at 405; *Navarro*, 83 B.R. at 353.

## 668 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

Bankruptcy Code.<sup>133</sup> Allowing religious contributions would not substantially reduce the amount of money recoverable by creditors.<sup>134</sup> The Bankruptcy Code would continue to provide needed relief and would provide only slightly reduced protection for creditors. Even if § 548 satisfied a compelling government interest, it is not the least restrictive means of satisfying that government interest.<sup>135</sup> Congress has created numerous exceptions to the Bankruptcy Code avoidance statutes.<sup>136</sup> Section 548 could and should provide an exception for sincere religious believers who act in good faith without fraudulent intent.<sup>137</sup> The only substantial change to the Bankruptcy Code would be that it would protect the free exercise of religion.

### 3. RFRA's good-faith test prevents abuse

Since RFRA is constitutional as it applies to federal issues,<sup>138</sup> it reverts the free exercise debate back to the *Sherbert/Yoder* law.<sup>139</sup> The *Sherbert/Yoder* line of cases made any law that burdened the free exercise of religious freedoms unconstitutional unless it satisfied the compelling interest test.<sup>140</sup> The rule in *Sherbert*, however, does not provide a blanket protection for all religious beliefs. Rather, the *Sherbert*

---

133. See *Hodge*, 200 B.R. at 898 (“[T]he interests advanced by the bankruptcy system are not compelling as that term has been developed under First Amendment and RFRA jurisprudence. . . . Moreover, denying recovery of this class of transfers, when no actual fraud is shown, will have little discernable effect on the integrity of the bankruptcy system, or on the amounts received by most creditors through that system.”).

134. See *id.*

135. This Note suggests that a good-faith test for voiding charitable contributions donated with actual intent to defraud creditors could be a less restrictive means for achieving the bankruptcy purposes and still protect the free exercise of sincere religious beliefs.

136. See *Hodge*, 200 B.R. at 898; see, e.g., 11 U.S.C. § 547(c) (1996).

137. See *Hodge*, 200 B.R. at 898.

138. See *supra* Part IV.A.1.

139. RFRA specifically reverts back to the *Sherbert* rule. See *supra* note 26 and accompanying text.

140. See *Sherbert v. Verner*, 374 U.S. 398, 398 (1963). This line of cases also includes *Hobbie v. Unemployment Appeals Commission of Florida*, 107 S. Ct. 1046 (1987) (holding that it was unconstitutional to deny unemployment benefits to plaintiff who had lost her job because she refused to work on Saturday, her Sabbath) and *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981) (concluding that the Free Exercise clause prohibits denying unemployment benefits based upon religious beliefs). This is also the rule that RFRA attempts to recreate. See 42 U.S.C. § 2000bb (1996).

647] *IN RE YOUNG*: CORRECT BUT UNNECESSARY 669

test attempts to protect only sincere religious beliefs. In applying *Sherbert*, courts consider the following:

- (1) whether a defendant's belief, or conduct motivated by belief, is sincerely held; (2) whether a defendant's belief, or conduct motivated by belief, is religious in nature; (3) whether a state regulation imposes a burden upon a defendant's belief or conduct; (4) whether there is a less obtrusive form of regulation available to the state.<sup>141</sup>

*Sherbert's* sincerity requirement would protect creditors from bad-faith conveyances to religious organizations and would provide the needed protection for religious freedoms. RFRA and *Sherbert* would fulfill the intent of § 548, avoiding fraudulent conveyances.

*B. A Possible Solution*

If there is a flaw in the *Young* decision it is not in its analysis of RFRA, but rather in its analysis of § 548. Even if *Young* was wrongly decided and the Supreme Court decides that RFRA does not protect prepetition religious donations, the *Young* court could still reach its original conclusion by employing a more religiously sensitive interpretation of § 548.<sup>142</sup> This Note suggests that a good-faith test should be read into § 548, and that the *Young* court could have reached the same result of protecting religious freedoms by using a good-faith test adopted by other courts.<sup>143</sup> Indeed, some courts might decide to predicate their decision on the religiously sensitive interpretation of § 548 suggested herein.

---

141. Mason, *supra* note 13, at 206-07.

142. Additionally, courts can and should abstain from answering the constitutional questions and search for a resolution of the issues without resorting to constitutional questions. The Supreme Court has held that the constitutionality of an issue should not be addressed unless there is no other solution. See *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (holding that it is a cardinal principle guiding federal courts that constitutional issues should not be reached unless absolutely necessary); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.");

143. See, e.g., *In re Andrade*, 213 B.R. 765, 772 (Bankr. E.D. Cal. 1997); *In re Navarro*, 83 B.R. 348, 357 (Bankr. E.D. Pa. 1988); *Ellenberg v. Chapel Hill Harvester Church, Inc.*, 59 B.R. 815, 819 (Bankr. N.D. Ga. 1986); *Wilson v. Upreach Ministries*, 24 B.R. 973, 978 (Bankr. N.D. Tex. 1982).



## 670 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

*1. Recognizing that § 548 should not be applied to charitable donations*

The two subsections of § 548(a) are distinguished by the culpability they require. Subsection one requires that the debtor maintain an “actual intent to hinder, delay, or defraud any entity . . .”<sup>144</sup> Conversely, subsection two does not require any level of culpability, but instead finds “constructive fraud” if (1) the debtor was insolvent and (2) received “less than a reasonably equivalent value in exchange for such transfer . . .”<sup>145</sup> In many cases where conveyances were voided under subsection two, there was some evidence of actual fraud.<sup>146</sup>

Under § 548(a)(2), the threshold issue in *Young* and in most charitable donations cases is whether the transfer was made in exchange for reasonably equivalent value.<sup>147</sup> This question generally resolves itself into two subissues: (1) whether there was an “exchange” and (2) whether the exchange was for “reasonably equivalent value.” Section 548 defines value as “property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor; . . .”<sup>148</sup> Although religious organizations have been very creative in trying to justify the money they receive and explain the benefit they confer in terms of the § 548 definition,<sup>149</sup> the

---

144. 11 U.S.C. § 548(a)(1) (1996).

145. 11 U.S.C. § 548(a)(2) (1996).

146. *See Upreach Ministries*, 24 B.R. at 978 (Bankr. N.D. Tex. 1982).

147. *See In re Young*, 82 F.3d 1407, 1414 (8th Cir. 1996).

148. 11 U.S.C. § 548(d)(2)(a) (1996).

149. *See Young*, 82 F.3d at 1414 (“The church argues that ‘value’ includes indirect economic benefits and that the debtors received ‘value’ in the form of tax deductions for charitable contributions, church membership and spiritual counseling, and, more concretely, access to church facilities because contributions from the debtors and others helped pay for the church’s operating expenses.”); *In re Newman*, 183 B.R. 239, 246-47 (Bankr. D. Kan. 1995) (holding that an exchange of value does not have to be dollar for dollar exchange, but that fulfilling a deep felt religious obligation is not reasonably equivalent value); *In re Packham*, 126 B.R. 603, 606-07 (Bankr. D. Utah 1991) (deciding that the denial of a temple recommend is not burden enough to overrule objection of bankruptcy trustee); *In re Navarro*, 83 B.R. 348, 356 (Bankr. E.D. Pa. 1988) (“Our Society recognizes and some might say encourages religious affiliation and participation in religious activities. Many persons of various dominations believe that religious endeavors are very much a part of the activities necessary for the maintenance and support of an individual and his or her family.”);

647] *IN RE YOUNG*: CORRECT BUT UNNECESSARY 671

*Young* court, and most other courts, refuse to recognize the kind of benefits a church confers upon its members.<sup>150</sup> Even if the courts found that the services offered by the church were of reasonably equivalent value, many courts refuse to find that the transfer was “in exchange for” those services because churches usually offer their services regardless of whether the members contribute to the church or not.<sup>151</sup>

Other courts have looked at the issue of value and held that the services provided by religious organizations are of real value.<sup>152</sup> In *Wilson v. Upreach Ministries*,<sup>153</sup> the court held that value includes things other than tangible goods, and that good will and providing a service were of reasonably equivalent value.<sup>154</sup> Still other courts have held that the counseling and support provided by the church met the value requirements.<sup>155</sup> Some courts have held that religions provide counseling and support that is of real value just like psychiatrists, who charge substantial rates to provide answers to troubling questions.<sup>156</sup> Indeed, it is illogical to argue that mental, emotional, and spiritual support is valuable when provided by a doctor, but not when provided by a church. However, it is still the case that value provided by religious organizations is impossible to define

---

*In re Reynolds*, 83 B.R. 684, 685 (Bankr. W.D. Mo. 1988) (“There is no doubt that, to many, churches (or religions) serve and satisfy a deep and abiding need that exists somewhere in either the consciousness or unconsciousness of homo sapiens. By whatever name or rite, man has and will seek some entity or institution that answers the unanswerable questions and assuages the unassuageable doubts and concerns of our human existence.”); *Ellenberg v. Chapel Hill Harvester Church, Inc.*, 59 B.R. 815, 818-19 (Bankr. N.D. Ga. 1986) (holding that counseling services and access to religious services satisfy the reasonably equivalent value standard and are therefore not voidable); *Upreach Ministries*, 24 B.R. at 979 (“The morale of the employees and the good will of all of those people with whom MBFA dealt was reasonably enhanced by the continuation of the charitable contributions. Whether it is called ‘good will’ or whether some other term is applied the compliance with the mandate from the incorporators in making the charitable contributions each month, notwithstanding its insolvency during a portion of the period, establishes that a reasonably equivalent value was received by MBFA in exchange for the challenged transfers.”).

150. *See Young*, 82 F.3d at 1414-15.

151. *See id.*

152. *See Navarro*, 83 B.R. at 356-57; *Reynolds*, 83 B.R. at 685; *Ellenberg*, 59 B.R. at 818-19; *Upreach Ministries*, 24 B.R. at 979.

153. 24 B.R. 973 (Bankr. N.D. Tex. 1982).

154. *See id.* at 979.

155. *See Ellenberg*, 59 B.R. at 818-19.

156. *See id.*; *Reynolds*, 83 B.R. at 685.

## 672 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

and does not satisfy the definition of value in the Bankruptcy Code.<sup>157</sup>

Even if the services provided by the religious organizations are valuable, they are rarely, if ever, provided in exchange for the charitable donations. Inherent in the concept of charitable organizations, like religions, is that they provide their services free of charge, regardless of whether the believer contributes financially to the organization. Some courts have held that if contributing money is mandatory, or if the failure to make contributions would deny the debtor benefits of the church, then the money was paid in exchange for reasonable value.<sup>158</sup> However, even this distinction is tenuous at best. It makes little sense to say that if a church charges admission, the money donated as tithing was exchanged for value, but if the church does not require donations, the same services are valueless. The services are the same, the requirements are the same, and any distinction is one of form and not of substance. Moreover, sincere religious believers consider paying tithing a commandment of God. Consequently, even if the church does not specifically restrict participation in religious activities to contributing members, sincere believers can only feel good about taking advantage of the benefits if they are satisfying the requirements of their convictions. Therefore, even if the church does not specifically dictate it, for sincere believers, contributing tithes is mandatory.

Despite the above arguments, most courts agree that the value of the services provided by religious organizations is undefinable.<sup>159</sup> Although churches provide friendship, support, answers to questions, feelings of peace, and counseling, the value of these services is incalculable.<sup>160</sup> This inability to place

---

157. See Mary Jo Newborn Wiggins, *A Statute of Disbelief?: Clashing Ethical Imperatives in Fraudulent Transfer Law*, 48 S.C. L. REV. 771, 785 (1997) ("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."). Churches are also in a catch-22, where in order to maintain their tax-exempt and write-off status they must not confer a benefit, but if they fail to confer a benefit donations made to them are potentially voidable. See *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 690-94 (1989).

158. See, e.g., *In re Packham*, 126 B.R. 603, 606-08 (Bankr. D. Utah 1991).

159. See *supra* note 149.

160. In fact, many churches agree that it is impossible to place a value on

647] *IN RE YOUNG*: CORRECT BUT UNNECESSARY 673

a value on the services provided by churches and the fact that those services are not provided in exchange for a charitable contribution or donation makes contributions to those organizations “charitable contributions.” Religious organizations probably do provide a valuable service in terms of support, fellowship, and comfort. However, those services do not satisfy the requirements for § 548.<sup>161</sup>

This inability to place a value on services provided by churches created the problem addressed in *Young*. Section 548 was intended to void conveyances that were made in an attempt to defraud creditors.<sup>162</sup> The typical situation was where debtors would transfer all of their property to a close friend or family member shortly before bankruptcy. In order to avoid having to prove actual fraud, the legislature included in § 548 a clause for imputing fraud where the debtor did not receive equivalent value for her transfer.<sup>163</sup> This constructive fraud serves a bona fide purpose and protects creditors from having to prove that every transfer was done in bad faith. However, it is important to remember that it is still fraud that the statute was intended to prevent.

The trouble in the statute arises when it is applied to charitable contributions. As explained above, it is impossible to place a value on these contributions. However, that does not mean that the transfers were made in an attempt to defraud creditors. In fact, as in *Young*, the opposite is true. Most debtors, like the Youngs, had no intention of defrauding their creditors, but were exercising good-faith religious beliefs. In these situations, the constructive fraud provision of § 548 does not prevent fraud, but instead yields an inappropriate result where despite actual good faith the code declares the

---

services provided for tax purposes.

161. *But see In re Navarro*, 83 B.R. 348, 357 (Bankr. E.D. Pa. 1988); *Ellenberg v. Chapel Hill Harvester Church, Inc.*, 59 B.R. 815, 819 (Bank. N.D. Ga. 1986); *Wilson v. Upreach Ministries*, 24 B.R. 973, 978 (Bankr. N.D. Tex. 1982).

162. *See In re Treadwell*, 699 F.2d 1050, 1051 (11th Cir. 1983) (holding that the object of § 548 “is to prevent the debtor from depleting the resources available to creditors through gratuitous transfers of the debtor’s property”). For a historical development of the fraudulent conveyances, see Robert J. Bein, *Robbing Peter to Pay Paul: Charitable Donations as Fraudulent Transfers*, 100 DICK. L. REV. 103, 107-17 (1995).

163. *See* 11 U.S.C. § 548(a)(2) (1996). For a historical development of the fraudulent conveyances, see Bein, *supra* note 162, at 107-17.

## 674 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

conveyance fraudulent. This is the inherent problem in the Bankruptcy Code that the *Young* court struggled to resolve.

2. *Give religious organizations the same benefit of the doubt as casinos*

The trustee in the *Young* case never charged the Youngs with having any intent to defraud their creditors.<sup>164</sup> In fact, the trustee did not accuse the Youngs of any improper conduct and the court noted that the Youngs had not changed the frequency or the amount of their contributions to the church.<sup>165</sup> Certainly, if the Youngs had an intention to defraud the creditors they would have contributed more money, or their fraudulent intent would have manifested itself in their suddenly starting to contribute money to the church.

The purpose of § 548 is to prevent persons who realize that they are going bankrupt from giving everything they own to someone, then declaring bankruptcy, and leaving their creditors with little or no assets to recover.<sup>166</sup> The framers of the statute never intended for it to be used to force charitable institutions and religious organizations to refund money given to them by their members in good faith.<sup>167</sup> It could be argued that the statute is devoid of intent because the legislature wanted to strictly preserve funds for the creditors. However, the effect of the statute interpreted that way is to pay creditors by harming the honest. The absurdity that can result from such an application of the statute can be seen in *In re Chomakos*.<sup>168</sup> In *Chomakos*, the trustee attempted to force gambling casinos to

---

164. See *In re Young*, 82 F.3d 1407, 1414 (8th Cir. 1996).

165. See *id.*

166. See *Treadwell*, 699 F.2d at 1051 (“The object of [§] 548 is to prevent the debtor from depleting the resources available to creditors through gratuitous transfers of the debtor’s property.”); Bein, *supra* note 162, at 107-17.

167. See generally Bein, *supra* note 162, at 107-17 (tracing the history and background of § 548).

168. 170 B.R. 585 (Bankr. E.D. Mich. 1993), *cert. denied sub nom.* Allard v. Hilton, 116 S.Ct. 1568 (1996); see also *In re Grigonis*, 208 B.R. 950, 955 (Bankr. D. Mont. 1997); (recognizing that there are “an array of consumer transactions that result in absolutely no benefit to the purchasers’ creditors—from tickets to Broadway shows and exclusive sporting events, to hourly charges for music, sports or language lessons, to any and all forms of recreational travel, to name a few”); Duclos, *supra* note 23, at 686-87 (noting that bankruptcy code creates absurd results when applied to religious contributions).

647] *IN RE YOUNG*: CORRECT BUT UNNECESSARY 675

refund money that the debtor had lost there shortly before filing bankruptcy.<sup>169</sup> The court held that

[t]o conclude that Flamingo [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 and be sufficiently knowledgeable as to the financial circumstances of each of its patrons so that they can, in light of the knowledge thus obtained, refuse access to certain of those patrons.<sup>170</sup>

The court took special care to explain that the casino acted in good faith.<sup>171</sup> This decision was appealed to the Sixth Circuit Court of Appeals and, in denying the suggestion for rehearing, the court held that gambling was an investment that went wrong and then compared gambling to an expensive meal, where the creditor would not be able to void a \$7,000 meal at an expensive restaurant.<sup>172</sup> The same arguments could be applied to justify charitable donations.

This absurd result is created by a court that stretches the wording of § 548 to protect debtors who gamble away all their money or spend it frivolously on extravagant meals or trips, but voids good-faith donations to religious organizations. Absent bad faith by the restaurant or the casino, no court would void the debtor's frivolous waste of money on gambling or meals, even where the debtor knows that bankruptcy is inevitable and is only having one last fling. If courts can find an exception for casinos that act in good faith and restaurants that charge \$7,000 for a meal,<sup>173</sup> then there should be an exception for religious organizations that act in good faith.

In the early cases, courts recognized a benefit from religious donations and did not void such contributions.<sup>174</sup> Some courts have continued that rule and found that, absent a showing of fraudulent intent by a debtor, the church should not be

---

169. See *Chomakos*, 170 B.R. at 587.

170. *Id.* at 595-96.

171. See *id.*

172. See *In re Chomakos*, 69 F.3d 769, 771-72 (6th Cir. 1995); see also *Grigonis*, 208 B.R. at 958 (holding that psychic hotlines provide reasonably equivalent value and therefore transfers to them could not be voided by the bankruptcy trustee).

173. See *supra* note 172.

174. See *Pollak*, *supra* note 1, at 544.

## 676 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

required to refund the money.<sup>175</sup> Courts looked at the intent of the debtor as manifested by his actions to determine if there was any fraud to evaluate the claims of the trustee.<sup>176</sup> Moreover, courts should not force debtors to end life-long traditions of paying tithing because of bankruptcy. Finally, forcing churches, especially small churches, to refund money donated to them up to a year earlier places an undue burden on those churches. Such a result would force churches to either investigate the financial standing of its members, or set aside donated money for one year before spending it. This would severely restrict the work and progress of individual churches, particularly those organized on a congregation basis, where donations must be used immediately to cover clergy salaries and other operating expenses.

Rather than burden the good-faith expression of religious convictions, courts should at least treat religious organizations the same as casinos and only void contributions where charitable contributions were made in a bad-faith attempt to avoid creditors. The first step would be to determine if the debtor intended to defraud his creditors. Courts have been determining fraud and intent to defraud since courts began and this would create no additional burden. The court could consider factors originally used in *Sherbert*:

- (1) [w]hether a defendant's belief, or conduct motivated by belief, is sincerely held;
- (2) whether a defendant's belief, or conduct motivated by belief, is religious in nature;
- (3) whether a state regulation imposes a burden on the exercise of such belief or conduct;
- (4) whether a compelling state interest justifies the burden imposed upon a defendant's belief or

---

175. See *In re Navarro*, 83 B.R. 348, 357 (Bankr. E.D. Pa. 1988) ("My resolution of this contested matter might be different if there were evidence that these debtors were making religious contributions or sending their son to parochial school as part of a conscious choice to presently favor their religious belief over unsecured creditors. If the evidence, for example, showed that tithing was a relatively recent decision made by the debtors it might be inferred that the religious contributions are made in contemplation of bankruptcy."); *Ellenberg v. Chapel Hill Harvester Church, Inc.*, 59 B.R. 815, 819 (Bankr. N.D. Ga. 1986) (recognizing that even though fraudulent intent is not necessary under § 548(a)(2)(A), in many cases the courts have decided the issue on whether or not there existed fraudulent intent); *Wilson v. Upreach Ministries*, 24 B.R. 973, 978 (Bankr. N.D. Tex. 1982) (stating that many of the courts that have imputed fraudulent intent did so because there were independent indications of fraudulent intent.).

176. See *supra* note 175.

647] *IN RE YOUNG*: CORRECT BUT UNNECESSARY 677

conduct; (5) whether there is a less obtrusive form of regulation available to the state.<sup>177</sup>

In bankruptcy cases, the courts could balance certain factors including: (1) how long the debtor has been a member of the church, (2) how long he had been donating to the church, (3) how much the debtor had been donating and whether that amount suddenly increased before bankruptcy,<sup>178</sup> and (4) whether the debtor actively took part in and advantage of the benefits offered by the church and its programs. These factors would not be difficult to evaluate. In fact, in almost all of the cases dealing with tithing and bankruptcy trustees, the courts mention how active the debtor had been in his church and how long he had been paying tithing.<sup>179</sup> Moreover, if the debtor is accepting the privileges and benefits of his membership, he is probably receiving value for his money. Absent a showing of fraud, the court should not force the churches to refund the money.

Using the good-faith test and the above factors, the *Young* court could have reached the same result, protected religious freedoms, and not had to further complicate the constitutionality issue. The Youngs were sincere in their beliefs and there was no indication of any intent to defraud. Consequently, the decision would be the same and the rule would be easier to apply.

Even if there is some demonstration of intent to defraud on behalf of the debtor, there is probably no intent to defraud on behalf of the church. Rather than force religious organizations to repay the trustee, courts could allow creditors to keep their claim against the bad-faith debtor.<sup>180</sup> This would actually be

---

177. Mason, *supra* note 13, at 206-07.

178. It may be necessary to look not at the amount of money donated, but the percentage of the income donated, because many churches require a percentage of income and not a fixed amount. See BLACK'S LAW DICTIONARY 1654 (4th ed. 1968) (defining "tithes" as the "tenth part of the increase"); Duclos, *supra* note 23, at 676 (noting that "tithing" refers to the practice of contributing a portion of one's income, usually one tenth, for religious purposes"). These factors are not an exhaustive list, but offer ideas of factors that could be looked at to determine if the debtor was actually intending to defraud his creditors when he made the contributions.

179. See *supra* note 175 and accompanying text.

180. See Bein, *supra* note 162, at 148-49 ("In theory, a debtor comes out of bankruptcy with no assets left for creditors, but in actuality, most creditors would regard a preservation of their claims as preferable to discharge. Many state



## 678 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

preferable to creditors who, over time, would be able to receive the entire amount owed to them, rather than a percentage of the small amount contributed to religious organizations.<sup>181</sup> In a Chapter 13 situation, the court could choose to extend the payback period to the maximum time of five years to make up for the amount being directed to tithing payments.<sup>182</sup> These options would allow truly diligent religious debtors to maintain their religious beliefs and not subject creditors to unnecessary burdens or greater risks of financial loss.

As the *Young* court held, the goals of the Bankruptcy Code are to allow debtors to maintain their dignity, to get a fresh start, and at the same time protect the creditors from unnecessary losses.<sup>183</sup> A good-faith test promotes all of these goals. The *Young* court could have more effectively protected the free exercise of religion and protected the creditors had it chosen to implement the good-faith test. Moreover, if the purpose of § 548 is to prevent “fraudulent transfers,” then the *Young* court could have and should have looked for fraudulent intent.

### 3. A good-faith test would not violate the First Amendment

As previously explained, the Constitution, under the Establishment Clause, prohibits the government from advancing or inhibiting any specific religious organization or belief.<sup>184</sup> Adopting a good-faith test for voiding fraudulent conveyances would not be establishing any particular religion. As explained above, courts that have evaluated creditors claims of violating the Establishment Clause have failed because the government is not forcing the creditors to contribute to the religion.<sup>185</sup> Nor would evaluating the sincerity of the debtor's beliefs violate the Free Exercise Clause. In *United States v.*

---

exemption statutes are less generous than the bankruptcy exemptions, so it is possible for a debtor to emerge from bankruptcy with assets that potentially would be subject to attachment or levy under state law. Further, if the debtor's circumstances subsequently improve, the creditors can pursue their claims via attachment of wages or levy of newly obtained property.”)

181. *See id.*

182. *See, e.g., In re Andrade*, 213 B.R. 765, 772 (Bankr. E.D. Cal. 1997).

183. *See Young*, 82 F.3d at 1419-20.

184. *See supra* notes 94-111 and accompanying text.

185. *See id.*

647] *IN RE YOUNG*: CORRECT BUT UNNECESSARY 679

*Ballard*,<sup>186</sup> the Court held that although it is unconstitutional to question a person's belief, it is not unconstitutional to question a person's sincerity in those beliefs.<sup>187</sup> In reality, courts regularly evaluate the sincerity of a person's beliefs. Courts often evaluate whether a buyer was a bona fide purchaser for UCC article nine purposes and for property law; whether a person acted in good or bad faith in contracts; and, as previously explained, both criminal fraud and intentional torts all evaluate the sincerity and culpability of a person. Finally, some courts have long been evaluating the sincerity of debtors' beliefs.<sup>188</sup> Courts have established tests for good faith proposals under Chapter 13 petitions for reorganization,<sup>189</sup> and courts have looked at fraudulent intent under § 548.<sup>190</sup> There is nothing inherently unconstitutional about using the same analysis in a § 548 situation.

4. *A good-faith test would protect both religious freedoms and creditors*

Section 548 creates a rule that is not only too harsh, but devoid of any rational basis. It fails to prevent the real fraud that could be found in a person gambling away his last dollars or spending those dollars on expensive dinners or trips to Europe, and instead takes the money back from good-faith recipients of charitable donations.<sup>191</sup> In reality, it offers little, if any, protection to creditors and serves only to prevent a person from receiving the comfort and joy that accompanies donating to a charitable organization and replaces it with the embarrassment and pain that is inherent in having a church be forced to refund donated money. Certainly, § 548 was intended

---

186. 322 U.S. 78 (1944) (determining that a jury, in a fraudulently soliciting donations criminal case, could decide whether self-professed "faith healers" sincerely believed in their abilities).

187. *See id.* at 87-88 (holding that a jury should not be allowed to determine the "truth or falsity of the religious beliefs or doctrines" but not finding error in allowing the jury to assess the sincerity of those beliefs).

188. *See supra* note 175 and accompanying text.

189. *See id.*

190. 11 U.S.C. § 548(a)(1) reads in part: "(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted . . . ."

191. *See In re Chomakos*, 170 B.R. 585, 587-90 (Bankr. E.D. Mich. 1993).

## 680 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

to protect creditors from “fraudulent transfers” and not to degrade and disgrace the debtor and punish the good-faith recipient.

Conversely, a good-faith test would protect the exercise of sincere religious freedoms and prevent debtors from being harmed by fraudulent transfers to religious organizations. Although creditors would not be able to void good-faith religious donations, this minor reduction in their power is justified by the need to protect the free exercise of religious rights.

*C. Congress Needs to Act*

The good-faith test advocated by this Note and used by numerous courts constitutes a reasonable construction of § 548 as it applies in the uniquely sensitive context of religious donations. However, Congress could put this interpretation on more solid footing by expressly recognizing it. There are currently three bills under consideration in Congress that would amend 11 U.S.C. § 548 to provide protection for charitable contributions to religious organizations.<sup>192</sup> Two of the three bills propose to make contributions to charitable religious organizations exempt from § 548(a)(2).<sup>193</sup> Although those two bills would provide the necessary support and protection for sincere religious beliefs, they fail to provide for a good-faith test, and therefore subject creditors to bad-faith conveyances to religious organizations. Rather than creating a blanket exception for religious organizations, Congress could protect the rights of creditors, and avoid constitutional claims under the Establishment Clause, by treating religious organizations like any other legal entity and looking for actual fraudulent conveyances.

One of the proposed bills provides for the good-faith test advocated in this Note. House resolution 2611 states in pertinent parts that “a transfer of a donation to a religious group or entity, made by a debtor from a sense of religious

---

192. See H.R. 2604, 105th Cong. (1997) (adding a subsection (3) that exempts contributions to charitable organizations from 11 U.S.C. § 548(1)(B)); S. 1244, 105th Cong. (1997) (proposing to exempt charitable contributions from avoidance under 11 U.S.C. § 548); H.R. 2611, 105th Cong. (1997) (establishing protection for sincere religious donations).

193. See H.R. 2604, 105th Cong. (1997); S. 1244, 105th Cong. (1997).

647] *IN RE YOUNG*: CORRECT BUT UNNECESSARY 681

obligation, such as tithes, shall be considered to have been made in exchange for a reasonably equivalent value.”<sup>194</sup> House Resolution 2611 requires that the contribution be made from a “sense of religious obligation.”<sup>195</sup> Under H.R. 2611, courts would be required to evaluate the sincerity of a debtor’s religious beliefs before granting protection from a bankruptcy. As advocated in this Note, that would provide the optimal support for religious freedoms and creditors. This approach simultaneously protects legitimate interests, while preventing abuse.

## V. CONCLUSION

The *Young* court correctly applied RFRA in the bankruptcy context. As the *Young* court concluded, RFRA is constitutional in federal law, specifically bankruptcy. Voiding religious contributions, therefore, unjustifiably burdens the free exercise of religion. However, the *Young* court could have reached the same result without analyzing RFRA by reading a good-faith test into § 548. As currently interpreted, § 548 prevents the exercise of sincere religious beliefs; additionally, the current interpretation creates the absurd result where religious organizations are forced to refund prepetition donations but casinos are not. The most viable option to protect both sincere religious believers and creditors of bankrupt persons is to look for actual fraud and remove the “constructive fraud” provision created by § 548(a)(2) in the context of religious contributions. When deciding whether to void religious contributions where value of services provided, although real, can not be defined, courts should not impute fraud, but should look for actual fraud by reviewing the debtor’s history. Only when RFRA and § 548 are reconciled and courts are allowed to search for fraud and offer less degrading solutions to protect creditors can this quagmire of religious and constitutional debate be resolved.

*David Lynn Mortensen*

---

194. H.R. 2611, 105th Cong. (1997).

195. *Id.*