CHRISTIANS V. CRYSTAL EVANGELICAL FREE CHURCH (IN RE YOUNG): WHY WOULD "CHRISTIANS" TAKE MONEY OUT OF THE CHURCH OFFERING PLATE?

> Will a man rob God? Yet ye have robbed me. Yet ye say, Wherein have we robbed thee? In tithes and offerings. Ye are cursed with a curse: for ye have robbed me, even this whole nation. Bring ye all the tithes into the storehouse, that there may be meat in mine house, and prove me now herewith, saith the LORD of hosts, if I will not open you the windows of heaven, and pour you out a blessing, that there shall not be room enough to receive it. And I will rebuke the devourer for your sakes ....[1]

"I need to *give* — so I will give regardless of budgets ... or anything else. I cannot fulfill myself as a Christian unless I do give ...."[2]

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...."[3]

Section 548 of the Bankruptcy Code (Code) gives the trustee of a bankruptcy estate the right to void a transfer of money or other property from the estate to another person for "less than a reasonably equivalent value" made up to one year before the debtor files for bankruptcy.[4] In *Christians v. Crystal Evangelical Free Church (In re Young)*, the trustee of Bruce and Nancy Young's bankruptcy estate used section 548 to recover $13,450 in tithes and offerings given by the Youngs to Crystal Evangelical.[5]

This comment focuses on the *Young* court's analysis of section 548 as applied to tithes given out of a sincere religious conviction by church members, and on the First Amendment

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1. *Malachi* 3:8-10 (King James).
2. RICHARD BYFIELD & JAMES P. SHAW, YOUR MONEY AND YOUR CHURCH 41 (1959).
3. U.S. CONST. amend. I.
4. 11 U.S.C. § 548(a)(2)(A) (1988).
5. 152 B.R. 939 (D. Minn. 1993).

analysis of the court. It ends with a discussion of the Religious Freedom Restoration Act of 1993,[6] the culmination of efforts from many sides to thwart the free exercise standard announced in *Employment Division v. Smith.*[7]

In a Chapter 7 proceeding under the Code,[8] a debtor initiates the liquidation process by filing a petition with the clerk of the federal bankruptcy court.[9] The filing of this petition creates an automatic stay of actions against the debtor by creditors, relieving the financial pressure that caused the debtor to file for bankruptcy in the first place.[10] At the same time, an estate is created which is treated as a separate entity from the debtor.[11] The determination of which of the debtor's assets are included in the estate is very significant, because only the estate is reduced to cash for distribution to creditors.[12] After the petition for bankruptcy is filed under Chapter 7, the proceeding is usually just administrative. The court gives an order for relief, with no adjudication typically needed.[13] The court appoints an interim trustee to handle the liquidation of the debtor's estate.[14] This interim trustee will remain with the estate unless a new one is appointed at a creditor's meeting held after the filing of the petition.[15]

The Code grants to the trustee certain powers which are to be exercised for benefit of the estate's creditors.[16] One of these

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6. Pub. L. 103-141, 1994 U.S.C.C.A.N. (107 Stat.) 1488.

7. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

8. 11 U.S.C. §§ 701-766. This is typically called "straight bankruptcy" because it involves the selling of all the debtor's assets not exempted to satisfy and discharge the claims of creditors. *See* BENJAMIN WEINTRAUB & ALAN N. RESNICK, BANKRUPTCY LAW MANUAL 1-3 (1992). Five types of cases may be commenced under the Code: (1) Liquidation (ch. 7); (2) Municipal debt adjustment (ch. 9); (3) Reorganization (ch. 11); (4) Debt adjustment for an individual with regular income (ch. 13); and (5) Debt adjustment for a family farmer with regular annual income (ch.12). *See* WEINTRAUB & RESNICK, *supra,* at xxvii.

9. WEINTRAUB & RESNICK, *supra* note 8, at 1-25. Article I section 8 of the U.S. Constitution gives exclusive power over bankruptcy matters to the federal government. Congress has given exclusive jurisdiction over bankruptcy cases to the federal courts, and created bankruptcy courts as units of the U.S. district courts. 28 U.S.C. § 151 (1988); WEINTRAUB & RESNICK, *supra* note 8, at 1-18.

10. 11 U.S.C. § 362 (1988); WEINTRAUB & RESNICK, *supra* note 8, at 1-36.

11. 11 U.S.C. § 541(a) (1988); WEINTRAUB & RESNICK, *supra* note 8, at 6-48.

12. 11 U.S.C. § 541(a) (1988); 11 U.S.C. § 522(d) (1988) (listing property exempted by the Code; e.g. up to $7,500 of interest in a residence, up to $1,200 of interest in one motor vehicle). "An estate is comprised of all of the property in which the debtor has an interest on the date of the commencement of the bankruptcy case, by whomever held and wherever such property is located." WEINTRAUB & RESNICK, *supra* note 8, at 4-4.

13. WEINTRAUB & RESNICK, *supra* note 8, at 1-67; *see also* 11 U.S.C. § 301 (1988).

14. WEINTRAUB & RESNICK, *supra* note 8, at 1-68.

15. 11 U.S.C. § 702(d) (1988).

16. WEINTRAUB & RESNICK, *supra* note 8, at 7-3.

powers is the ability to avoid, under section 548 of the Code, certain fraudulent transfers and obligations made by the debtor.[17]

Section 548 provides the trustee with two means to attack a transfer made within one year before the petition for bankruptcy. First, a transfer made with actual intent to hinder, delay, or defraud a creditor may be avoided.[18] The state of mind of the debtor must obviously be examined under this provision, because it requires actual intent.[19] Second, a transfer for less than reasonably equivalent value is vulnerable.[20] This is often called constructive fraud.[21] The reasonably equivalent value standard enables the trier of fact to avoid the need to determine the subjective good faith of the transferor required under prior bankruptcy provisions.[22] Three types of transfers made for less than reasonably equivalent value are covered under section 548(a)(2): (1) transfers made while the debtor was insolvent or thereby became insolvent;[23] (2) transfers made when undercapitalized;[24] and (3) transfers made with the intent to incur debts beyond the ability to pay.[25]

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17. 11 U.S.C. § 548 (1988), Fraudulent Transfers and Obligations (in relevant 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, 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;
(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or
(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.
18. 11 U.S.C. § 548(a)(1).
19. WEINTRAUB & RESNICK, *supra* note 8, at 7-58.
20. 11 U.S.C. § 548(a)(2)(A).
21. *See, e.g.*, PETER A. ALCES, THE LAW OF FRAUDULENT TRANSACTION 5-27 (1989).
22. *Id.* at 5-13.
23. 11 U.S.C. § 548(a)(2)(B)(i).
24. 11 U.S.C. § 548(a)(2)(B)(ii).
25. 11 U.S.C. § 548(a)(2)(B)(iii). *See generally* WEINTRAUB & RESNICK, *supra* note 8, ¶ 7.06; Erica Stumvoll, *Avoidance of Transfer: Section 548*, 3 BANK. DEV. J. 389 (1986).

I. FACTS, PROCEDURAL HISTORY, AND BANKRUPTCY COURT OPINION

A. Facts

Bruce and Nancy Young lived in Minnesota, where they ran a family electrical contracting business[26] that began to experience financial problems because of the Gulf War and a recession in the area. This, of course, impacted their personal finances. They went to great lengths to pay off their creditors, including selling their home.[27]

At this same time, the Youngs were active members of Crystal Evangelical Free Church in New Hope, Minnesota. They held a variety of volunteer positions in the church.[28] As part of their Christian beliefs, they gave weekly monetary tithes to the church.[29] The Youngs had practiced tithing consistently for several years.[30] Crystal Evangelical did not require its members to tithe, but it did encourage it as a biblical practice.[31]

On February 3, 1992, Bruce and Nancy Young filed a joint Chapter 7 bankruptcy petition in the U.S. Bankruptcy Court for Minnesota. In the year immediately preceding their filing, they had contributed $13,450 to Crystal Evangelical. They were insolvent during the time these contributions were made.[32]

B. Procedural History and Bankruptcy Court Opinion

Julia A. Christians, trustee of the Young's estate, brought an adversarial proceeding against Crystal Evangelical to avoid

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26. David Peterson, *Bankrupt Couple's Giving Puts Church in a Bind: Order to Turn Over Thousands of Dollars Raises Constitutional Issues*, STAR TRIB., Jan., 10, 1993, at 1B.

27. *Does Uncle Sam's Hand Belong in the Church's Offering Plate?*, THE DEFENDER (Ctr. for Law and Religious Freedom, Annandale, Va.), Nov. 1993, at 2.

28. Christians v. Crystal Evangelical Free Church (*In re* Young), 152 B.R. 939, 943 (D. Minn. 1993).

29. *Id; Uncle Sam's Hand, supra* note 27, at 2. "Tithe" is defined as "A tenth part of one's income, contributed for charitable or religious purposes . . . ." BLACK'S LAW DICTIONARY 1484 (6th ed. 1990).

30. Appellant's Brief at 3, Christians v. Crystal Evangelical Free Church (8th Cir. 1993) (No. 93-2267).

31. *Young*, 152 B.R. at 944. For clarity, the district court opinion (152 B.R. 939) is in the short citation form designated *Young*; and the bankruptcy court opinion (148 B.R. 886) is designated *"Christians."*

32. *Id.* at 943.

as fraudulent transfers under section 548(a)(2) the tithes given by the Young's, and to recover them under section 550(a),[33] arguing that the Youngs did not receive reasonably equivalent value for the contributions.[34] Both Crystal Evangelical and the trustee moved for summary judgment. The bankruptcy court granted the trustee's motion.[35] The church appealed, and the district court affirmed the bankruptcy court's order.[36] The case is currently on appeal to the Court of Appeals for the Eighth Circuit.[37]

The bankruptcy court applied Federal Rule of Civil Procedure 56(c) as the standard for summary judgment.[38] Under *Celotex Corp. v. Catrett,* summary judgment is appropriate under Rule 56(c) against a party who has failed to sufficiently show the existence of a material element of his case, upon which he bears the burden of proof at trial.[39] Initially, the burden is on the moving party to demonstrate the lack of evidence to substantiate the non-moving party's case.[40] Once the moving party has made this showing, the burden is upon the non-moving party to show there are "specific and genuine issues of material fact warranting a trial."[41] The parties in *Young* stipulated to all genuine issues of material fact and did not offer any additional evidence, so the bankruptcy court entered judgment as a matter of law.[42]

For the purpose of the motions for summary judgment before the bankruptcy court, the parties stipulated to the fact that the Youngs were insolvent at the time they made the contributions.[43]

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33. 11 U.S.C. § 550 (1988), Liability of Transferee of Avoided Transfer (in relevant part):

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section ... 548 ... of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property from—
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> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; ....

34. Christians v. Crystal Evangelical Free Church (*In re* Young), 148 B.R. 886, 888 (Bankr. D. Minn. 1992).

35. *Id.* at 897.

36. *Young,* 152 B.R. at 955.

37. Christians v. Crystal Evangelical Free Church (*In re* Young), 152 B.R. 939 (D. Minn. 1993), *appeal docketed,* No. 93-2267 (8th Cir. May 20, 1993).

38. *Christians,* 148 B.R. at 888-89 (quoting FED. R. CIV. P. 56(c)) ("[s]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law'.").

39. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

40. *Christians,* 148 B.R. at 889.

41. *Id.*

42. *Id.*

43. *Id.* at 887-88.

They also stipulated that there was a transfer of the debtor's interest made within one year of filing the bankruptcy petition.[44] Thus, the only issue left for the court under section 548(a)(2) was whether the Youngs had received reasonably equivalent value in exchange for their contributions. The court divided this issue into two parts. First, was there reasonably equivalent value? Second, was it given in exchange for the contributions?[45]

The court looked to the definition of "value" found in section 548, which requires either property or the satisfaction or securing of an antecedent debt of the debtor.[46] Because the contributions did not satisfy or secure a debt, the issue was whether the Youngs had received property. The Code does not define "property,"[47] so the court looked to *Black's Law Dictionary*, reaching the conclusion that it is made up of things and rights subject to ownership.[48]

The court then wove together the definitions of "things," "rights," and "ownership" found in *Webster's Third New International Dictionary* to come to the conclusion that the Youngs did not receive property in the form of programs, services, and access provided by the church because they "did not receive legal or equitable rights nor did they obtain any ownership interest from their contributions."[49] Under the court's analysis, to have received value from the church's provision of services and programs, the Youngs must have had a legally enforceable right to them. Because of the traditional role of churches as places open and shared by all, the court found it would be hard to imagine that the Youngs could gain such a right against Crystal Evangelical.[50]

Continuing its characterization of value, the court considered whether the Youngs may have received an executory promise from the church for services in the future in exchange for their contributions.[51] Executory promises require consideration to give

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44. *Id.* at 890.

45. *Id.*

46. 11 U.S.C. § 548(d)(2)(A) (1988) ("'value' means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor....").

47. *Christians*, 148 B.R. at 890.

48. *Id.* at 891.

49. *Id.*

50. *Id.*

51. *Id.* at 893-94. As a preliminary matter, the court determined that an executory promise constitutes property under § 548. *Id.* at 891-93.

rise to legal and equitable rights.[52] Focusing on the fact that the church would have allowed the Youngs to participate in activities regardless of their contributions, the court found a total lack of consideration for the services and no relationship between what the Youngs gave and the behavior of the church.[53] At best, the Youngs received unbargained for benefits. Subjective, emotional benefits cannot be bargained for and must be deemed valueless gratuities.[54] The Youngs did not receive any economic benefit from the church, and thus no value. "Strictly religious benefits are not economically valuable."[55]

In concluding its examination of value, the court had difficulty with the idea of a judge enforcing a legal executory promise by a church to perform services if such a promise could be found. There would be no way to value the loss the plaintiff/parishioner would suffer if the church did not fulfill its promise.[56] The court feared this would constitute the kind of entanglement with religion forbidden by the Constitution.[57] Thus, the court was left to conclude that charitable contributions cannot give rise to an enforceable executory promise.[58]

The second issue, whether value was given in exchange for the contributions, gave little difficulty to the court. No exchange took place because the church welcomed all members into its services regardless of their contribution. Nothing was given to the Youngs which was not given or offered to everyone.[59] The Internal Revenue Code (I.R.C.) provided further guidance. Because the Youngs received a tax deduction for their charitable

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52. *Id.* at 893. *See generally* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §§ 2.3-2.4 (2d ed. 1990).

53. *Christians,* 148 B.R. at 893.

54. *Id.* (citing Walker v. Treadwell (*In re* Treadwell) 699 F.2d 1050, 1051 (11th Cir. 1993)).

55. *Id.* at 894 (citing Hernandez v. Commissioner, 490 U.S. 680 (1989)).

56. *Id.* at 894-95. The court assumed that because it would be difficult to value the benefits, they must be treated as having no value.

57. *Id.* at 894. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). Surprisingly, this is the only mention of a constitutional issue in this case before the bankruptcy court. Neither party raised a constitutional question, *Christians,* 148 B.R. at 896 n.17, though there would seem to be such an issue whenever the government involves itself in the financial matters of a church. "Regardless of the way religious tithing is handled in bankruptcy, an encounter with the First Amendment's religion clauses is unavoidable." Donald R. Price & Mark C. Rahdert, *Distributing the First Fruits: Statutory and Constitutional Implications of Tithing in Bankruptcy,* 26 U. C. DAVIS L. REV. 853, 881 (1993).

58. *Christians,* 148 B.R. at 895.

59. *Id.*

contribution,[60] they could not have received anything in return from the church.[61] The Supreme Court held in *Hernandez v. Commissioner* that if there is a *quid pro quo* given for charitable contributions, then there cannot be a tax deduction under the I.R.C.[62] The bankruptcy court found that a debtor cannot receive a tax deduction and section 548 property at the same time.[63]

The court criticized *Ellenberg v. Chapel Hill Harvester Church, Inc. (In re Moses)*[64] and *Wilson v. Upreach Ministries (In re Missionary Baptist Foundation)*,[65] two cases in which courts did find value in tithes and charitable contributions given by debtors in challenges under section 548(a)(2).[66] Their most glaring weakness in the eyes of the court was that they ignored the plain meaning given to the fraudulent transfer statute by Congress. The *Moses* and *Missionary Baptist* courts may have felt they were doing the right thing, but they bent the statute and violated the policy set by Congress to meet the result they desired.[67]

The bankruptcy court's systematic and close analysis of section 548 demonstrated its fixation with following what it construed to be the "plain meaning" of the statute. It would not be persuaded by arguments that a parishioner could receive section 548 value from a church.[68] Because the church did not demonstrate that there was any issue as to whether the Youngs received reasonably equivalent value in exchange for their contributions, the court ordered summary judgment for the trustee and ordered the church to return $13,450, together with costs and $120 in interest.[69]

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60. 26 U.S.C. § 170 (1988) (providing for the deduction).

61. *Christians*, 148 B.R. at 895.

62. 490 U.S. 680, 691 (1989).

63. *Christians*, 148 B.R. at 895.

64. 59 B.R. 815 (Bankr. N.D. Ga. 1986).

65. 24 B.R. 973 (Bankr. N.D. Tex. 1982).

66. See the discussion of these two cases *infra* at parts II.A., IV.

67. *Christians*, 148 B.R. at 896. It seems that Congress did not consider bona fide churches and charitable institutions when it enacted § 548. Nothing is mentioned about these entities in the legislative history. Although § 548(a)(2) does not require bad faith, the very term "fraudulent transfer" would seem to indicate that Congress was concerned with instances in which there was no direct evidence of bad faith on the part of the debtor or transferee, but there were sufficient badges of fraud to warrant avoidance. It is difficult to agree with the bankruptcy court that Congress had effected a public policy that required the church to give back the tithes in this case. *See infra* text accompanying notes 106-14.

68. *Christians*, 148 B.R. at 896.

69. *Id.* at 897.

II. DISTRICT COURT ANALYSIS, HOLDING, AND RATIONALE

A. Section 548 Fraudulent Transfer and Applicable Law

The district court reviewed *de novo* the bankruptcy court's grant of summary judgment.[70] The court began with an analysis under section 548(a)(2) and applicable law.[71] As in the bankruptcy court, the only issue under the statute was whether the Youngs had received reasonably equivalent value in exchange for their tithes, a determination made under a facts and circumstances analysis.[72]

The district court adopted the same two-step analysis of section 548.[73] In finding no reasonably equivalent value, it honed in on the fact that Crystal Evangelical did not require its members to tithe. Thus, the Youngs donated out of a "sense of religious obligation."[74] *Whitlock v. Hause (In re Hause)*[75] and *Walker v. Treadwell (Matter of Treadwell)*[76] provided grounds to find that no reasonably equivalent value was given.[77] In *Hause*, a transfer from the debtor to his wife of his interest in their house was voided as a fraudulent transfer.[78] The debtor claimed to be repaying an antecedent debt, which would have met the "fair consideration" standard of the fraudulent conveyance statute of Massachusetts state law.[79] Although he did not legally owe her anything, the debtor claimed to feel he owed her something for the work she had done at his office and for helping with the down payment on their house.[80] The court found that a moral obligation does not give rise to a legal liability for purposes of fraudulent conveyance law.[81] The court in *Young* used *Hause* to find that a payment made out of a moral obligation rather than a legal obligation cannot give rise to reasonably equivalent value.[82]

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70. Christians v. Crystal Evangelical Free Church (*In re* Young), 152 B.R. 939, 944 (D. Minn. 1993).
71. *Id.* at 944-45.
72. *Id.* at 945.
73. *Id.* at 948.
74. *Id.*
75. 13 B.R. 75 (Bankr. D. Mass. 1981).
76. 699 F.2d 1050 (11th Cir. 1983).
77. *Young*, 152 B.R. at 948-49.
78. *Hause*, 13 B.R. at 80.
79. *Id.* at 78.
80. *Id.* at 79.
81. *Id.*
82. 152 B.R. at 948.

Moreover, emotional support received in exchange for the transfer cannot be reasonably equivalent value according to *Treadwell*, a case in which the court voided a transfer by a debtor father to his daughters where the only consideration was familial love and affection.[83] Strictly on grounds of statutory interpretation, the *Young* court found no justification for treating a transfer to a church any differently than the transfer to family members in these two cases.[84]

The court agreed with the bankruptcy court's use of *Hernandez*.[85] Using the holding in that case, the *Young* court reasoned that if the Youngs received a tax deduction under the I.R.C., they could not have received a *quid pro quo*, and thus no reasonably equivalent value.[86]

A related issue dealt with by the court was whether the tax deduction itself was reasonably equivalent value for the donations. With little analysis, it concluded that the ability to deduct from gross income a percentage of the donation cannot in economic terms be reasonably equivalent to the same amount in cash transferred from the estate.[87]

On the question of whether there was value given in exchange for the donation, the court reiterated that the church welcomed all members, regardless of any donations. This stipulated fact precluded any finding that the Youngs received anything from the church in exchange for their donations.[88]

The court joined the bankruptcy court's criticism of *Missionary Baptist* and *Moses*.[89] These are the only other reported cases dealing with the interaction of section 548(a)(2) and religious contributions.[90] The trustee in *Missionary Baptist* sought to avoid

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83. Walker v. Treadwell (*In re* Treadwell), 699 F.2d 1050, 1051 (11th Cir. 1983).

84. *Young*, 152 B.R. at 949. A religious obligation under § 548, was thus on the same level as a moral or emotional obligation. This is disturbing in light of the specific Constitutional protection for the free exercise of religion, which includes the fulfillment of religious obligations.

85. *Id.* See discussion of *Hernandez infra* part II.B.2.

86. *Young*, 152 B.R. at 949.

87. *Id.*

88. *Id.* Crystal Evangelical would have been in a better position before this court if they had charged an annual membership fee or charged for admission.

89. *Id.*

90. Appellant's Brief at 12, Christians v. Crystal Evangelical Free Church (8th Cir. 1993) (No. 93-2267). Another case dealing with fraudulent conveyance law and religious contributions is Stein v. Zarling (*In re* Zarling), 70 B.R. 402 (Bankr. E.D. Wis. 1987). *In re Zarling* involved an actual intent to defraud on the part of the debtor. 70 B.R. at 404. He made a transfer of his farm to a "church" that was not incorporated and was found to be his alter ego. The debtor and his family had continued to live at the farm, operate it, and pay real estate taxes on it. 70 B.R. at 403.

the transfer by a corporate debtor of $17,000 made to a religious charity within the year before the corporation filed for bankruptcy. The debtor's corporate purpose was to solicit gifts of property from donors and manage them to provide income for religious missions in the Baptist Church.[91] When the corporation fell on financially troubled times, it continued to give monthly gifts to Upreach Ministries, in fulfilling its corporate purpose.[92] The *Missionary Baptist* court found that prior cases voiding transfers under section 548(a)(2) were based primarily upon "badges of fraud" being readily apparent, even though no evidence of actual intent to defraud was available to void the transfer under section 548(a)(1).[93] These past cases were not very enlightening as to what constituted reasonably equivalent value because the courts decided the issue with little or no discussion.[94] Although the debtor had not received a monetary equivalent for its donations, the court found that the Code does not require reasonably equivalent value to be a monetary equivalent.[95] *Missionary Baptist* held that the debtor received reasonably equivalent value for its charitable contributions in the "good will" generated for its employees and the corporation as a whole in fulfilling the mandate of its incorporators.[96] The *Young* court declined to follow *Upreach Ministries* because it was at odds with the district's precedent requiring that the benefits received must be "fairly concrete,"[97] and because the case did not deal with whether the value was given in exchange for the transfer.[98]

In *Moses*, the trustee sought to recover tithes and offerings of $4,733.50 given by a church member.[99] The court held that services provided by the church could constitute property reasonably equivalent in value to the donations given.[100] The *Moses* court looked to the *Black's Law Dictionary* definition of property

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91. Wilson v. Upreach Ministries (*In re* Missionary Baptist Found.) 24 B.R. 973, 974 (Bankr. N.D. Tex. 1982).

92. *Id.* at 976.

93. *Id.* at 978 ("In most of those cases, however, a clear inference of fraudulent conduct can be made.").

94. *Id.*

95. *Id.* at 979. *But see* Christians v. Crystal Evangelical Free Church (*In re* Young), 148 B.R. 886, 893 (Bankr. D. Minn. 1992) (requiring an economic benefit).

96. *Missionary Baptist*, 24 B.R. at 979.

97. First Nat'l Bank in Anoka v. Minnesota Util. Contracting, Inc. (*In re* Minnesota Util. Contracting, Inc), 110 B.R. 414, 420 (D. Minn. 1990).

98. *Young*, 152 B.R. at 950.

99. Ellenberg v. Chapel Hill Harvester Church, Inc. (*In re* Moses), 59 B.R. 815, 816 (Bankr. N.D. Ga. 1986).

100. *Id.* at 818-19.

as referred to in *Young*, but found that services could meet that definition.[101] The debtors received counseling and religious training for which other institutions could and often did charge. The tithes and offerings went to pay the utilities of the church, items which do have an exchangeable value.[102] The court found that "[s]ervices provided to the Debtors in the case at bar clearly constitute reasonably equivalent value."[103] The *Young* court, in discussing this case, focused on the fact that the debtor was required to tithe to maintain his position as a deacon of the church. It viewed this requirement as the tie between his donations and the benefits he received from the church.[104] This reading of the case is flawed. The debtor received no formal compensation for his service as a deacon, and he, like the Youngs, would have received the benefits of church membership without tithing.[105]

The variance between the decisions reached in *Moses* and *Young* demonstrates the wide latitude given to, or perhaps taken by, courts to decide, under section 548, when reasonably equivalent value is given. It is a facts and circumstances analysis under which the judge can look at all elements of the transfer.[106] The two courts looked to the same definition of property, but reached different conclusions.[107] The benefits and services received by the Youngs and the debtors in *Moses* were substantially the same.[108] The difference in the decisions lies in the fact that the court in *Moses* was willing to recognize that while the church could have charged for the services it provided, it did not. Rather, it relied on the contributions of its members.[109] The *Young* court focused intensely on the fact that the church did not charge the Youngs,[110] not recognizing that the services could not be provided by the church unless people like the Youngs were willing to give. The court had difficulty putting a value on the services provided, so it assumed that they must have no economic value.[111]

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101. *Id.* at 818.

102. *Id.*

103. *Id.* at 819.

104. *Young*, 152 B.R. at 950.

105. *Moses*, 59 B.R. at 816 (the church did not require a tithe or any other payment).

106. *Young*, 152 B.R. at 945.

107. *Compare Moses*, 59 B.R. at 818, *with* Christians v. Crystal Evangelical Free Church (*In re* Young), 148 B.R. 886, 890-91 (Bankr. D. Minn. 1992).

108. There is more detail given in the *Moses* opinion about the specific benefits received (e.g. 3 church services per week, 80 to 100 hours of counseling). 59 B.R. at 816.

109. *Id.*

110. 152 B.R. at 948.

111. *See id.* at 948-49.

The difficulties arose because section 548(a)(2) was not intended to be applied to bona fide charities. Both the *Missionary Baptist* and *Moses* courts claimed that the majority of cases finding constructive fraud in a transfer had obvious badges of fraud.[112] The *Young* court seemed to ignore this. Unfortunately, the legislative history of section 548 is not enlightening on this point. The short legislative history given when this section was passed under the Bankruptcy Reform Act of 1978 states that the section "permits the trustee to avoid transfers by the debtor in fraud of his creditors."[113] While transfers for less than reasonably equivalent value can be avoided without a showing of intent to defraud, it would seem that by saying the section permits the trustee to void transfers in defraud of creditors, Congress was concerned with instances where actual intent could not be proved, but sufficient circumstancial evidence indicating actual intent to defraud was present to justify the avoidance. The Code necessarily gives courts leeway in making this determination, including the lack of clear guidance as to what constitutes property and reasonably equivalent value. The court in *Young* felt compelled by Congress to find that a fraudulent conveyance had taken place because of a supposed public policy.[114] Yet, the court failed to accept that the reason for fraudulent conveyance law is to deal with situations where the debtor is trying to put assets out of the reach of creditors in order to defraud them.

B. Constitutional Issues

Crystal Evangelical raised First Amendment free exercise and establishment clause challenges to the application of section 548 for the first time in its appeal to the district court. The decision whether to allow the constitutional issues to be raised for the first time on appeal was within the court's discretion,[115] and it allowed the issues to be raised because they involved

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112. Wilson v. Upreach Ministries (*In re* Missionary Baptist Found.) 24 B.R. 973, 978 (Bankr. N.D. Tex. 1982); *Moses*, 59 B.R. at 819.

113. S. Rep. No. 989, 95th Cong., 2d Sess. 89 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5875.

114. Christians v. Crystal Evangelical Free Church (*In re* Young), 148 B.R. 886, 896 (Bankr. D. Minn. 1992).

115. Christians v. Crystal Evangelical Free Church (*In re* Young) 152 B.R. 939, 950 (D. Minn. 1993) (citing Singleton v. Wulff, 428 U.S. 106 (1976)).

purely legal arguments on which no additional evidence would affect the decision.[116] The church was granted standing to raise the free exercise issues on behalf of the Youngs under the principles of third-party standing, because the Youngs could not effectively assert those rights themselves.[117]

1. Free Exercise Clause

The church's first argument was that the bankruptcy court's interpretation of the Code discriminated against religion. The Code treats certain property with more favor than other property. For example, section 522 provides for property exemptions from the bankruptcy estate.[118] The church argued that it is unconstitutional to not include religious expenditures among the items exempted from the Chapter 7 proceeding.[119] Tithing is just as much a matter of necessity as food, clothing, or other items exempted from the estate under Chapter 7 and allowed as expenditures in a Chapter 13 plan.[120] In support of its argument, the church cited Chapter 13 cases that allowed tithes and other religious expenditures as part of the debtor's proposed budget under the reasonably necessary expenditure standard of section 1325.[121] The court did not accept this argument because the purposes of section 522 and the reasonable and necessary standard of section 1325 differ from the purpose of section 548. Sections 522 and 1325 are attempts to treat the debtor fairly, while section 548 attempts to treat the creditors fairly, demonstrating complementary goals of the Code. The court concluded section 548 did not unfairly discriminate against religion.[122]

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116. *Id.* at 951.

117. *Id.* The Youngs were not directly involved in this adversarial proceeding. The principle for allowing the church standing on the free exercise issues is found in McGowan v. Maryland, 366 U.S. 420, 430 (1961) and Corey v. City of Dallas, 492 F.2d 496, 497 (5th Cir. 1974).

118. 11 U.S.C. § 522 (1988).

119. *Young*, 152 B.R. at 952.

120. *Id.* Under Chapter 13, the debtor submits to the court a plan of reorganization in which he lists "reasonable and necessary" expenditures. The court then determines if the expenditures meet that standard, and whether to approve the debtor's plan. All of the debtor's income not needed to cover these reasonable and necessary expenditures must be used to pay off creditors. 11 U.S.C. ch. 13 (1988).

121. *Young*, 152 B.R. at 952. The church cited *In re* McDaniel, 126 B.R. 782, 784-85 (Bankr. D. Minn. 1991); *In re* Bien, 95 B.R. 281, 283 (Bankr. D. Conn. 1989); *In re* Navarro, 83 B.R. 348 (Bankr. E.D. Pa. 1988); and *In re* Green, 73 B.R. 893 (Bankr. W.D. Mich. 1987), *aff'd*, 103 B.R. 852 (W.D. Mich. 1988). *See also* Price & Rahdert, *supra* note 57, at 879.

122. *Young*, 152 B.R. at 954.

The remainder of the opinion on free exercise issues was an analysis of section 548 under the *Smith*[123] framework for dealing with free exercise challenges. It was an understatement when the *Young* court claimed that the Supreme Court's controversial decision in *Smith* "dramatically altered the manner in which we must evaluate free exercise complaints."[124] In the view of some members of the Supreme Court and numerous commentators since the decision was handed down, the *Smith* decision departed from well-settled First Amendment jurisprudence,[125] abandoning for all but a small class of free exercise cases the compelling government interest/least restrictive means test established in *Sherbert v. Verner*[126] and *Wisconsin v. Yoder*.[127]

Smith held that a valid and neutral law of general applicability is constitutional if its burden on the free exercise of religion is merely incidental.[128] The *Young* court concluded that section 548 is a neutral statute of general applicability because it was not designed to regulate religious beliefs or conduct.[129] The remaining issue under *Smith* was whether the effect of the statute on the Young's rights was merely incidental. The court found no evidence that section 548 had any more than an incidental effect on religion in carrying out its purpose of recovering funds for creditors. Other laws clearly apply to religious institutions and their individual members. The Code fits within this category of laws. Thus, section 548 had only an incidental effect on religion.[130]

The *Smith* decision has had an undeniable impact on the analysis, and perhaps on the outcome, of free exercise cases.[131] In *Smith*, the Supreme Court had to decide whether Oregon could

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123. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

124. 152 B.R. at 952 (quoting American Friends Serv. Comm. v. Thornburgh, 961 F.2d 1405, 1407 (9th Cir. 1991)).

125. *Smith*, 494 U.S. at 897 (O'Connor, J., concurring in judgment). A strong argument can be made that this jurisprudence was more settled in its language than its application. *See* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1109-11 (1990); Price & Rahdert, *supra* note 57, at 886-92.

126. 374 U.S. 398 (1963).

127. 406 U.S. 205 (1972).

128. 494 U.S. at 878-79.

129. 152 B.R. at 953.

130. *Id.* at 953-54. In making this conclusion, the court did not mention that the Code calls for many inquiries into specific facts, a point argued by the church. *Smith* differentiated between generally applicable laws and laws that called for individualized determinations. It seems the latter category was to undergo the compelling interest analysis, for the Court stated that it was within this context that the compelling interest test developed. *Smith*, 494 U.S. at 884.

131. *See generally* McConnell, *supra* note 125; Price & Rahdert, *supra* note 57.

constitutionally make illegal the ingestion of peyote for sacramental purposes.[132] The respondents in *Smith* ingested peyote as part of a sacrament of the Native American Church.[133] The Oregon Supreme Court held that Oregon law prohibited any use of peyote.[134] Justice Scalia wrote for five members of the Court, beginning with a discussion on whether the respondents should receive an automatic exemption from the law because their acts were motivated by religious belief.[135] In defining the free exercise of religion, Scalia included not only the right to profess and believe, but to perform or abstain from physical acts.[136] He then stated that if prohibiting the free exercise of religion is not the object of a generally applicable and valid provision, the First Amendment is not offended.[137] He viewed this as the correct reading, for "[the Court has] never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[138]

Scalia went on to eschew the application of the compelling interest test to a criminal statute, and arguably limited the application of the test to "hybrid" claims, in which a claim under the free exercise clause is combined with another Constitutional protection;[139] to contexts which call for governmental assessment of reasons for relevant conduct;[140] and to laws that directly regulate religious conduct.[141]

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132. 494 U.S. at 876.

133. *Id.* at 874.

134. *Id.* at 876.

135. *Id.*

136. *Id.* at 877.

137. *Id.* at 878.

138. *Id.* at 878-79. This conclusion and the precedent relied upon to reach it have been thoroughly criticized. *See, e.g.*, McConnell, *supra* note 125, *passim*. Dr. Herbert W. Titus, former dean of Regent University School of Law, argued in a paper entitled *In Defense of Smith II: The Free Exercise Clause is Alive and Well* that Scalia looked to a free exercise standard that predated the compelling interest test and was a more formidable barrier to state interference with free exercise. Titus, *supra*, at 25. This "jurisdictional" analysis determined whether the duty commanded by the state was one owed to the state or one owed exclusively to God. These two spheres, Titus argued, are constitutionally separate. The state cannot intrude upon the church's domain no matter what interest it may have. Titus, *supra*, at 10. Note in the quote above that Scalia was talking about conduct *that the state is free to regulate*, very likely indicating there are areas of conduct the state is not free to regulate. However, it seems the predominate view of *Smith* is that it was a devastating blow for the free exercise of religion.

139. *Smith*, 494 U.S. at 881.

140. *Id.* at 884. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hiahleah, 113 S. Ct. 2217, 2229 (1993) (reiterating that the compelling interest test applies in circumstances in which individualized exemptions from a general requirement are available).

141. *See Smith*, 494 U.S. at 877-78; *Lukumi, 113 S. Ct. at 2227 ("if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not*

The majority was sharply criticized in Justice O'Connor's concurring opinion, which accused the Court of departing dramatically from well-settled First Amendment jurisprudence.[142] O'Connor concurred because the respondent's claims failed under her application of the compelling interest balance approach.

The *Smith* decision has been assailed on many sides and on many bases.[143] The seemingly deferential approach taken by the Court toward government actions, according to some observers, has been used by courts throughout the country to allow governmental infringement on the religious exercise of individuals.[144] Applying *Smith*, the vast majority of laws are valid and religiously neutral, leaving no basis for a First Amendment attack. Like section 548, most laws make no mention of religion, nor take religious exercise into account at all.[145]

Shortly after *Young* was decided, the Supreme Court held that a group of city ordinances violated the free exercise clause in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.*[146] In *Lukumi*, the city of Hialeah passed city ordinances at an emergency public meeting to curtail the religious practices of the church, which had plans to build in Hialeah. Specifically, the city was opposed to the church's practice of animal sacrifice. Ordinances passed at later meetings made animal sacrifices illegal within the city limits.[147] The ordinances were obviously targeted directly at the rituals of the church, practices which the city council and much of the public found disturbing.[148] The district court found that the ordinances had an effect on the church's

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neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.").

142. *Smith*, 494 U.S. at 891.

143. *See, e.g.*, McConnell, *supra* note 125, *passim*.

144. "The effect of the *Smith* decision has been to hold laws of general applicability that operate to burden religious practices to the lowest level of scrutiny employed by the courts: the 'rational relationship test,' which requires only that the law must be rationally related to a legitimate state interest." S. Rep. No. 111, 103rd Cong., 1st Sess. 7 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897. In a committee hearing on the Religious Freedom Restoration Act, the Reverend Oliver S. Thomas testified: "Since *Smith* was decided, governments throughout the U.S. have run roughshod over religious conviction." S. Rep., *supra*, at 8.

145. *Cf. Lukumi*, 113 S. Ct. at 2240-42 (Souter, J., concurring in part and concurring in the judgment). According to Souter, *Smith* does not require substantive neutrality, but rather only formal neutrality, which provides protection only from deliberate discrimination. The majority of laws do not deliberately discriminate against religion, because they would quite obviously and rightfully be open to attack.

146. 113 S. Ct. 2217 (1993).

147. *Id.* at 2224.

148. *Id.* at 2223.

religious conduct that was only incidental to their purpose of protecting the public health and welfare.[149] It also found for the city under a compelling interest balancing test.[150] The court of appeals affirmed the district court in a one paragraph *per curiam* decision.[151] Though the city argued that the ordinances were facially neutral, the Supreme Court found that they were neither neutral nor generally applicable, and that the governmental interest assertedly advanced did not justify the targeting of religious activity. Facial neutrality of a statute is not determinative under *Smith*.[152] While *Lukumi* does clarify *Smith*'s application by making facial neutrality only a threshold question, even under the deferential approach in *Smith*, this was a simple case for the Court. The ordinances themselves, the circumstances involved in their passage, and Hialeah's application of them clearly indicated an intent on the part of the city to stop the Santeria religious practices of the church.[153] Indeed, this is one of the rare instances referred to by Justice O'Connor's *Smith* concurrence in which a city was "so naive as to enact a law directly prohibiting or burdening a religious practice as such."[154] The ordinances as interpreted by the city council of Hialeah violated a constitutional principle that has never been doubted — government may not enact laws that suppress religious belief or practice.[155] In fact, the *Lukumi* decision may not have involved a question under *Smith* at all, because the laws were not neutral or generally applicable.[156] The fact that the *Lukumi* case made it to the Supreme Court demonstrates the deferential approach federal courts feel they must take toward goverment actions after *Smith*.[157] The ordinances clearly involved a direct suppression of religious exercise, yet both the district and appeals courts upheld them.

In the years preceding *Smith*, the constitutional grid used by the Court in examining free exercise claims was the test announced in *Sherbert v. Verner* and *Wisconsin v.Yoder*.[158] The

149. *Id.* at 2224.

150. *Id.* at 2225.

151. *Id.*

152. *Id.* at 2227.

153. *Id.* at 2228 (a "religious gerrymander").

154. 494 U.S. 872, 894 (1990) (O'Connor, J., concurring).

155. *Lukumi*, 113 S. Ct. at 2222.

156. *Id.* at 2240 (Souter, J., concurring in part and concurring in the judgment) ("I write separately to explain why the *Smith* rule is not germane to this case....").

157. *See* discussion on the effect of *Smith infra* part III.

158. *See Lukumi*, 113 S. Ct. at 2244 (Souter, J. concurring in part and concurring in the judgment) (listing cases in which the Court applied heightened scrutiny to the

balancing test required that once a substantial burden on an individual's free exercise of religion existed, then a compelling governmental interest carried out by the least restrictive means must be shown to justify the burden.[159] Although the *Sherbert* test was traditionally called a strict scrutiny test, in application of it was not strict.[160] In *Smith*, Justice Scalia stated that although the Court had at times used the *Sherbert* test to analyze free exercise challenges to an "across-the-board criminal prohibition on a particular form of conduct," it had never applied the test to invalidate one.[161] Scalia went on in the same paragraph to equate these criminal prohibitions with all generally applicable laws.[162] Although the Court applied the strict scrutiny standard, or used the language of the standard in its decisions before *Smith*, "[i]n practice, the Court applied the *Sherbert* standard in a fashion that frequently allowed the government to prevail, so long as the government regulation of religious conduct was solidly based in legitimate secular ends."[163] The *Sherbert* standard as applied by the courts allowed the government to regulate religious practice in more cases than it did not.[164]

There are at minimum two inherent weaknesses in the *Sherbert* balancing test which have lessened its protection against free exercise infringements. The first is the Court's commitment to not determine the centrality of religious beliefs when applying the test.[165] While it is not the province of the judiciary to pass on details of religious faiths, it is difficult to determine how much weight to give the burden on the individual in making the balance without determining how central the practice is to the individual's religous beliefs. The second weakness involves the choice of the level of generality to use in determining the state's interest. The level of generality will nearly determine whether the individual's claim will be upheld.[166] This was demonstrated in Justice O'Con-

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enforcement of a formally neutral, generally applicable law that burdened religious exercise).

159. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 907 (1990) (Blackmun, J., dissenting).

160. *See* McConnell, *supra* note 125, at 1109-10; Price & Rahdert, *supra* note 57, at 886-92.

161. 494 U.S. at 884-85.

162. *Id.* at 885.

163. Price & Rahdert, *supra* note 57, at 891.

164. *Cf.* Price & Rahdert, *supra* note 57, at 891 n.161 (list of cases decided under *Sherbert*).

165. *See Smith*, 494 U.S. at 886-87 (Scalia, J.) and at 906 (O'Connor, J., concurring in the judgment).

166. *See id.* at 910 (Blackmun, J., dissenting).

nor's concurring opinion and Justice Blackmun's dissent in *Smith*. O'Connor found the state's interest to be preventing the physical harm caused by the use of drugs,[167] while Blackmun balanced the more narrow state interest in refusing to make an exception for the religious use of peyote.[168] Predictably, Blackmun found that the respondent's claim outweighed that of the state, while O'Connor found it did not.

Crystal Evangelical argued that the Code is not a neutral law of general applicability because it has many provisions that call for the judge to exercise discretion and make decisions based on the particular facts and circumstances involved in each case. Thus, the *Sherbert* test should apply; and the state's interest in enlarging the estate for distribution to the creditors is not a compelling state interest that justifies the burden on the Young's free exercise.[169] The *Young* court held that section 548 was a neutral and generally applicable law, and concluded that even if an interest need be shown, the Code is designed to advance a compelling government interest.[170]

The *Smith* case *did* involve a neutral and generally applicable law — a criminal statute that applied to every citizen in Oregon. In discussing the *Sherbert* test, Justice Scalia in *Smith* said:

> Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct.[171]

The court in *Young* did not discuss the fact that the Code calls for many individualized decisions.[172] It simply said that section 548 was generally applicable. Assuming that it is not generally applicable, then *Sherbert* would apply.[173] The *Young* court gave

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167. *Smith*, 494 U.S. at 905.

168. *Id.* at 909-10.

169. Christians v. Crystal Evangelical Free Church (*In re* Young) 152 B.R. 939, 952 (D. Minn. 1993).

170. *Id.* at 954.

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

172. For example, the court must determine whether to grant each debtor's petition for bankruptcy. The trustee exercises discretion in determining whether to sue a party under § 548. If a suit is brought, the court must then look at all the facts and circumstances of each situation to determine if reasonably equivalent value is given under § 548.

173. *Young*, 152 B.R. at 952-53.

two government interests. The first, which it called "compelling," was allowing debtors to get a fresh start while at the same time treating creditors as fairly as possible.[174] The second, which the court called "significant," was maximizing the amount creditors are allowed to recover.[175] While these are government interests in bankruptcy, the question of whether they are compelling enough to overcome a free exercise claim is not clear. Courts have allowed debtors in Chapter 13 cases to give tithes and offerings as reasonable and necessary expenses.[176] In Chapter 13 bankruptcies, the government has these same two interests given in *Young*. The best argument that these are not compelling interests is given by the church in its brief to the Court of Appeals for the 8th Circuit. If treating creditors fairly and maximizing the amount creditors can recover is truly a compelling government interest, then there would not be a bankruptcy system. Debtors who file for bankruptcy do not have to pay creditors the same amount or in the same time frame.[177]

The church's other argument that the *Sherbert* test should apply is that the Youngs had a hybrid free exercise/free speech right to support their religion because the contributions were made for the dissemination of a particular message. The Youngs supported the spread of the Christian Gospel through their tithes and offerings.[178] The court found that there were no free speech rights violated.[179] Citing *Buckley v. Valeo*,[180] it stated that a limitation on the amount that a person may contribute to a cause "entails only a marginal restriction upon the contributor's ability to engage in free communication;"[181] and "contributions are symbolic acts of support, rather than expository acts of advocacy."[182] *Buckley* involved a challenge to the Federal Election Campaign Act of 1971, which placed numerous restrictions on the amount

174. *Id.* at 954.

175. *Id.*

176. However, there is a split of opinion, with more courts tending to not allow the tithe. Price and Rahdert, *supra* note 57, at 879 n.126.

177. Appellant's Brief, Christians v. Crystal Evangelical Free Church (8th Cir. 1993) (No. 93-2267).

178. *Young*, 152 B.R. at 953.

179. *Id.* at 954.

180. 424 U.S. 1 (1975) (per curiam).

181. *Young*, 152 B.R. at 954 (quoting *Buckley*, 424 U.S. at 20-21).

182. *Id.* (quoting *Buckley*, 424 U.S. at 21).

that could be contributed to political campaigns and the total amount that could be expended on campaigns. The Supreme Court found that while the limitations on the amount that could be contributed to a campaign or political committee involved only a marginal restriction upon the contributor's free speech rights,[183] the limitations on the amount that could be expended in a campaign violated the First Amendment free speech clause.[184] Applying this contribution/expenditure distinction to *Young*, one could argue that the Young's tithe is an *expenditure* for spreading the gospel, and thus a limit on the total amount the Youngs can *expend* on the spreading of the message is involved, not just a limit on the amount they can contribute. The primary vehicle for spreading the gospel message is local churches like Crystal Evangelical. This is one of the the primary purposes of the church. As members of Crystal Evangelical, the Youngs were intimately involved with its mission to proclaim the gospel, and any money they would expend on spreading this message would be given to the church or another religious organization. Under the court's analysis of section 548(a)(2), potentially all these funds could be recovered by the trustee. Thus, the entire amount expended by the Youngs could be recovered, and the amount they could expend on this form of speech would be limited in violation of the First Amendment under *Buckley*.[185]

2. Establishment Clause

The parties took opposite views of the establishment clause question. The church argued that recovering the funds interfered with its autonomy, entangling the government in the operations of the church and violating the separation of church and state.[186] The trustee responded that the case raised no establishment clause issue, unless the court accepted the church's argument and did not allow the funds to be recovered.[187]

The court used the *Lemon* test[188] to analyze the bankruptcy court's interpretation of section 548. Under *Lemon*, the establishment clause is not violated if a statute has a secular purpose,

183. *Buckley*, 424 U.S. at 20-21.

184. *Id.* at 51.

185. See Price & Rahdert, *supra* note 57, at 902-03, for further discussion of the free speech hybrid. The article also discusses a hybrid based upon free association and free exercise rights when tithes are involved in bankruptcy.

186. *Young*, 152 B.R. at 955.

187. *Id.*

188. Lemon v. Kurtzman, 403 U.S. 602 (1971).

neither advances nor inhibits religion, and does not foster excessive entanglement with religion.[189] The court found that all three prongs were met. First, section 548 has a secular purpose, maximizing the estate for the sake of creditors. Second, the primary effect of the statute was neither to advance nor inhibit religion. The court stated that "[t]he mere fact that the government brings suit to enforce a religious entity's compliance with a statute does not elevate the primary effect of the statute to one that inhibits religion."[190] The court looked to *Hernandez v. Commissioner* and *United States v. Lee* to derive that principle.[191] That characterization of *Hernandez* and *Lee* is flawed. Both cases involved taxpayers seeking tax refunds which were denied.[192] The *Young* court described *Hernandez* as a "suit brought to enforce [the] Internal Revenue Code" and *Lee* as one brought to enforce "social security."[193] Yet, neither of those cases were suits brought by the government to force a religious institution to comply with a statute. The *Young* case is very distinct from these cases. The government is asking a church to give back money it received, a situation in which the government inhibits and causes detriment to religion to an extent far beyond *Hernandez* and *Lee*. In *Hernandez* and *Lee*, the taxpayers brought suit to recover money from the government. A religious organization was not a party to the suits as Crystal Evangelical is here.

The court found the third prong of Lemon, nonentanglement, by relying on *Hernandez* and *Jimmy Swaggart Ministries v. Board of Equalization*.[194] The I.R.S. disallowed a charitable deduction by the taxpayer in *Hernandez*.[195] The petitioner sought to deduct payments made to the Church of Scientology for services called "auditing," in which an electronic device called an "E-meter" is used to determine areas of spiritual weakness in a church member.[196] The petitioner also sought to deduct payments made to the church for "training," doctrinal courses that eventually lead the participant to the qualifications necessary to become an "auditor." The Church of Scientolgy charged a fixed donation or

189. *Young*, 152 B.R. at 955 (citing *Lemon*, 403 U.S. at 612-13).
190. *Id.*
191. *Id.*
192. United States v. Lee, 455 U.S. 252, 254 (1982); Hernandez v. Commissioner, 490 U.S. 680, 683-84 (1989).
193. *Young*, 152 B.R. at 955.
194. 493 U.S. 378 (1990).
195. 490 U.S. at 686.
196. *Id.* at 684-86.

price for these services.[197] The tax court found that these payments were not gifts or contributions within the I.R.C., and the Supreme Court agreed.[198] It found the payments to be part of a "quintessential *quid pro quo* exchange: in return for their money, petitioners received an identifiable benefit, namely, auditing and training sessions."[199] The Court found that it is essential that there be no adequate consideration given in exchange for a transfer of money to qualify the transfer as a gift or contribution under the I.R.C.[200] Further, the Court found that "routine regulatory interaction which involves no inquiries into religious doctrine" does not create excessive entanglement.[201]

That principle of nonentanglement was relied on by the *Young* court. It restated the principle to apply to the facts at hand as "[t]he routine enforcement of statutes which involves no inquiry into religious doctrine does not violate the nonentanglement command."[202] Aside from the fact that the enforcement of section 548 could not reasonably be called as routine as the enforcement of the I.R.C., *Hernandez* is distinguishable. As stated above, the petitioner in *Hernandez* was seeking a charitable deduction refund from the taxes he had paid. Here, the government is seeking to force a church to turn over funds. The entanglement is obviously much greater in this case, despite what the court says.

In *Jimmy Swaggart Ministries*, the religious organization brought suit for a refund of taxes it had paid under protest to California.[203] The ministry held several crusades in the state at which it sold books, tapes, records and other materials. It also sold similar materials to California residents through order forms provided in its monthly magazine and through the offering of the items on radio and television broadcasts.[204] The California Board of Equalization required the ministry to pay sales and use taxes on the materials sold.[205] The Supreme Court found that the

197. *Id.* at 685.

198. *Id.* at 687, 691.

199. *Id.* at 691. The continued validity of the *Hernandez* holding is in some doubt. In Rev. Rul. 93-79, 1993-94 IRB 7, the I.R.S. announced that it had "obsoleted" Rev. Rul. 78-189, 1978-1 CB 68, upon which the I.R.S. had previously relied in denying the deduction to the Scientologists.

200. *Hernandez*, 490 U.S. at 691.

201. *Id.* at 696-97.

202. *Young*, 152 B.R. at 955.

203. 493 U.S. 378, 383-84 (1990).

204. *Id.* at 382.

205. *Id.* at 382-83.

imposition of these generally applicable taxes did not violate the free exercise clause,[206] nor the establishment clause.[207] The *Young* court relied on this case for the principle that "the fact that the government is forcing the church to disburse funds does not result in excessive entanglement."[208] *Jimmy Swaggart Ministries* is quite different from *Young*. In *Swaggart*, the religious organization had to pay a generally applicable sales tax out of the proceeds from the sale of merchandise. Section 548 is not as generally applicable as a sales tax because the very nature of the statute requires discretion on the part of the court to determine in each specific situation brought before it by the bankruptcy trustee if reasonably equivalent value has been given.[209] It is not automatically enforced. There is no such discretion in a sales tax. Every sale is taxed. An entity selling merchandise makes a conscious decision to engage in such activity and thus subjects itself to the tax. Crystal Evangelical did not make such a choice, yet it will be required to turn over funds from its treasury if the district court is affirmed. In *Young*, the government is reaching directly into the funds of the church derived from charitable contributions.

The court accepted the trustee's establishment clause argument. It feared that if it did find value was given by the church, it would then need to quantify the value given. Such an inquiry would be fraught with excessive government entanglement.[210]

III. THE RELIGIOUS FREEDOM RESTORATION ACT

The *Young* decision is an outgrowth of the deferential approach to governmental actions emanating from *Smith*. The *Young* court relied almost entirely on *Smith* for its analysis of the free exercise question, its first finding on the issue being that section 548 is a neutral statute of general applicability.[211] This finding decided the free exercise issue for the court.

The *Smith* decision "gutted the First Amendment's free exercise of religion guarantee" according to some commentators.[212] *Smith* and its progeny have concerned enough people to

206. *Id.* at 392.
207. *Id.* at 397.
208. 152 B.R. at 955.
209. *See* 11 U.S.C. § 548 (1988).
210. *Young*, 152 B.R. at 955.
211. *Id.* at 953.
212. *See, e.g., Center Briefs Defend Against Absurd Claims*, BRIEFLY (Christian Legal Society, Annandale, Va.), Aug. 1993, at 2.

bring about Congressional action to change the course of free exercise jurisprudence. On November 6, 1993, President Clinton signed into law the Religious Freedom Restoration Act of 1993 (RFRA).[213] At least sixty-eight religious and civil liberties groups supported RFRA,[214] including the National Association of Evangelicals, the American Civil Liberties Union, the Southern Baptist Convention, the American Jewish Congress, the Mormon Church, People for the American Way, the National Conference of Catholic Bishops, the American Muslim Council, and the Traditional Values Coalition.[215]

The purpose of RFRA is "(1) to restore the compelling interest test as set forth in Sherbert v. Verner, and Wisconsin v. Yoder, ... 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."[216] It establishes the compelling interest/least restrictive means test of *Sherbert* and *Yoder* as the statutory standard for analyzing free exercise claims against federal and state governments. The range of government activities covered is meant to be all inclusive,[217] including government actions before and after its passage.[218] It provides for the award of attorney's fees to plaintiffs who are successful in their challenges.[219] The establishment clause is to be unaffected by the Act.[220]

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213. Pub. L. 103-141, 1994 U.S.C.C.A.N. (107 Stat.) 1488.

214. Gustav Niebuhr, *Disparate Groups Unite Behind Civil Rights Bill on Religious Freedom*, WASH. POST, Oct. 16, 1993, at A7.

215. Peter Steinfels, *Clinton Signs Boost for Religious Freedom; Liberals, Conservatives Back New Law*, HOUS. CHRON., Nov. 17, 1993, at A6; *The Right to Rites*, BOSTON GLOBE, Nov. 7, 1993, at A6.

216. Pub. L. 103-141, § 2(b), 1994 U.S.C.C.A.N. (107 Stat.), at 1488 (citations omitted).

217. H.R. Rep. No. 88, 103d Cong., 1st Sess. 6 (1993).

218. Pub. L. 103-141, § 6(a), 1994 U.S.C.C.A.N. (107 Stat.), at 1489.

219. Pub. L. 103-141, § 4, 1994 U.S.C.C.A.N. (107 Stat.), at 1489.

220. The Religious Freedom Restoration Act of 1993 provides in relevant part:

Sec 1. [omitted]

Sec. 2. Congressional Findings and Declaration of Purposes.

(a) Findings. — The Congress finds that —

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court

Congress found that the Supreme Court in *Smith* had "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward

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virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interest.
(b) Purposes. — The purposes of this Act are —
(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.
Sec. 3. Free Exercise of Religion Protected.
(a) In General. — Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
(b) Exception. — Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.
(c) Judicial Relief. — A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.
Sec. 4. Attorneys Fees. [omitted]
Sec. 5. Definitions.
As used in this Act —
(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;
(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;
(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and
(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.
Sec. 6. Applicability.
(a) In General. — This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.
(b) Rule of Construction. — Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.
(c) Religious Belief Unaffected. — Nothing in this Act shall be construed to authorize any government to burden any religious belief.
Sec. 7. Establishment Clause Unaffected. [omitted].

religion. . . ."[221] The Act "responds" to *Smith*, and while it is not meant to overrule the decision, it is meant to overcome it.[222]

The House and Senate Reports on RFRA list several cases in which courts allowed the government to violate the free exercise rights of citizens.[223] Among those listed are a decision rejecting a religious objection to an autopsy,[224] a case using *Smith* to apply landmarking ordinances to church-owned buildings,[225] a case citing *Smith* to uphold the dismissal of an FBI employee who refused on religious grounds to investigate two pacifist groups,[226] and a decision in which the Supreme Court of Minnesota relied on its state constitution rather than the Federal Constitution to grant the Amish an exemption from displaying florescent emblems on their horse-drawn buggies, because the court believed that using the Federal Constitution under *Smith*[227] would require it to decide against the exemption.

As constitutional grounds for enacting RFRA, Congress looked to section 5 of the Fourteenth Amendment,[228] which gives it the power to enforce appropriate legislation to carry out the command that no state shall "deprive any person of . . . liberty . . . without due process of law."[229] This concept of liberty includes the free exercise rights of the First Amendment.[230] Because Congress found that *Smith* deprived citizens of their free exercise rights, it claimed the Constitutional power to pass a statute to restore and protect those rights.

RFRA raises the issue of the separation of powers. Is this not Congress telling the Supreme Court what standard to use in analyzing free exercise cases? Congress does not have the power to tell the Supreme Court how to decide cases. The First Amendment provides protection against acts by Congress. Thus, it may be an oddity that Congress is seeking to define what the First Amendment requires.[231] Perhaps RFRA can be seen as just an-

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221. Pub. L. 103-141, § 2(a)(4), 1994 U.S.C.C.A.N. (107 Stat.), at 1488.

222. H.R. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993).

223. *Id.* at 6-9.

224. You Vang Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990).

225. Saint Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d Cir. 1990).

226. Ryan v. United States Dep't of Justice, 950 F.2d 458, 461 (7th Cir. 1991).

227. Minnesota v. Hershberger, 462 N.W.2d 393, 396-97 (Minn. 1990).

228. S. Rep. No. 111, 103rd Cong., 1st Sess. 14 (1993), *reprinted in* 1993 U.S.C.C.A.N., at 1892, 1903.

229. U. S. CONST. amend. XIV, § 1.

230. S. Rep. No. 111, 103d Cong., 1st Sess. 14 (1993), *reprinted in* 1993 U.S.C.C.A.N., at 1892, 1903 (citing Cantwell v. Connecticut, 310 U.S. 296 (1940)).

231. *But see* Matt Pawa, *When the Supreme Court Restricts Constitutional Rights,*

other statute that must be applied by the courts. It is another question whether Congress can direct the courts in this manner. It is not clear how the Court will treat RFRA.

As noted above, the application of the compelling interest/least restrictive means standard was not as strict as the language in cases decided before *Smith* might suggest.[232] The Senate Report for RFRA stated that generally applicable laws had been upheld despite their substantial burden on citizens' free exercise of religion before "[m]eaningful constitutional protection against these abuses began 30 years ago, with the Supreme Court's landmark decision in *Sherbert v. Verner*."[233] RFRA is not meant, however, to reinstate the "high water mark" hit in *Sherbert* and *Yoder*, but merely to return free exercise scrutiny to the level that existed prior to *Smith*.[234] In a House Report section entitled "Will the RFRA Work?," its congressional sponsors demonstrated that RFRA will not be the panacea that some religious observers may hope.[235] Even though supporters of RFRA point to cases decided against citizens under *Smith*, the report states that "it is well known that the 'compelling state interest' test [has] proven an unsatisfactory means of providing protection for individuals trying to exercise their religion in the face of government regulations."[236] It was felt that in the end, restoration of the pre-*Smith* standard would prove to be an insufficient remedy.[237] However, RFRA will give citizens "a chance to fight,"[238] some-

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Can Congress Save Us?, An Examination of Section 5 of the Fourteenth Amendment, 141 U. PA. L. REV. 1029 (1993) (arguing RFRA is well within the power of Congress).

232. *See supra* notes 160-164 and accompanying text. The test may have caused the courts to consider more closely the free exercise claims in the balancing than the seeming fully deferential approach in *Smith*. An unfortunate recent indication of how ineffective the compelling interest test has become is the district court decision in Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993). The district court applied the test to the ordinances involved and still found for the city, *Lukumi*, 113 S. Ct. at 2225, despite the fact that the Supreme Court found the ordinances were not neutral or generally applicable, but were in fact directed specifically at the Santeria church. *Lukumi*, 113 S. Ct. at 2227. This strict scrutiny test didn't help the church at all in either the district court or the appeals court.

233. S. Rep. No. 111, 103d Cong., 1st Sess. 5 (1993), *reprinted in* 1993 U.S.C.C.A.N., at 1892, 1894.

234. H.R. Rep. No. 88, 103d Cong., 1st Sess. 15 (1993).

235. *See, e.g.*, Letter from Christian Legal Society (Nov. 16, 1993) ("Religious freedom is restored!").

236. H.R. Rep. No. 88, 103d Cong., 1st Sess. 16 (1993).

237. *Id.* The House Report cited to the dissenting opinion in EEOC v. Townley Engineering, 859 F.2d 610, 625-29 (9th Cir. 1988) (Noonan, J., dissenting), in which it was noted that in sixty-five of the seventy-two decisions in federal circuit courts of appeals involving free exercise challenges to federal statutes, the religious claimants had lost.

238. H.R. Rep. No. 88, 103d Cong., 1st Sess. 16 (1993).

thing that religious adherents did not have in a practical sense after *Smith*.

IV. CONCLUSION

The district court decided *Young* incorrectly in its analysis of section 548 and the constitutional issues involved. Crystal Evangelical argued that the court disregarded the well-known canon of statutory interpretation requiring that whenever possible a statute be construed in a way that does not raise constitutional issues.[239] The district court avoided this argument by claiming that there was only one way to read section 548 as it applied. It is clear, however, that courts have used various means and tests in determining whether reasonably equivalent value has been given.[240] The *Young* court had other avenues open to it, and it violated this canon of interpretation known to every law student.

While the legislative history of the Code and of section 548 is not illuminating in this context, the district court wrongly assumed that because religious contributions were not exempted from the provisions of the statute, it was compelled to decided against Crystal Evangelical. The court was critical of *Moses*[241] and *Missionary Baptist*[242] because both of the opinions mention badges of fraud even though section 548 does not require an inquiry into good faith. The district court believed those courts reached decisions they thought were "right"[243] in spite of the clear command of section 548.[244] The *Young* court missed the

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239. Christians v. Crystal Evangelical Free Church (*In re* Young), 152 B.R. 939, 947 (D. Minn. 1993). This principle is stated in Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trade Council, 485 U.S. 568, 588 (1988).

240. *See* Stumvoll, *supra* note 25, at 390 ("courts continue to apply different standards regarding what constitutes reasonably equivalent value under [§ 548] subsection (a) (2)."); Wilson v. Upreach Ministries (*In re* Missionary Baptist Found.), 24 B.R. 973, 979 (Bankr. N.D. Tex. 1982) ("The cases decided under § 548(a)(2) of the Code are not very enlightening regarding the requirement of 'reasonably equivalent value.' That is, the courts, with little if any discussion as to what is meant by the term, merely concluded that reasonably equivalent value exists or does not exist.").

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

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

243. *Young*, 152 B.R. at 949.

244. Christians v. Crystal Evangelical Free Church (*In re* Young), 148 B.R. 886, 896 (Bankr. D. Minn. 1992) ("the voice of Congress is loud; property is value, charitable contributions are not.").

principle underlying *Moses* and *Missionary Baptist.* Section 548 is a codification of the well-established law of fraudulent transfers. The concern of section 548(a)(2) is to prevent constructively fraudulent transfers from taking place; that is, transfers which are deemed fraudulent by law. The *Moses* and *Missionary Baptist* courts mentioned that their cases involved no badges of fraud because the purpose for allowing the court to avoid constructively fraudulent transfers was to give it a means to reach transfers in which actual intent could not be proved, but the facts and circumstances of the case smacked of fraud.[245] *Moses* and *Missionary Baptist* did not go into the systematic and narrow reading of section 548(a)(2) engaged in by the *Young* court. This is because courts are seemingly granted great latitude in deciding whether reasonably equivalent value has been given,[246] and because they realized that transfers to religious organizations involving no question of the sincerity of the transferor and transferee do not present situations in which there is a need to search for a fraudulent conveyance. Turning to a dictionary definition as the *Young* court did to work its interpretation of property, "fraudulent" is defined as "[b]ased on fraud; proceeding from or characterized by fraud; tainted by fraud . . . ."[247] A "fraudulent conveyance" is defined as "[a] conveyance or transfer of property, the object of which is to defraud a creditor, or hinder or delay him, or to put such property beyond his reach."[248] The trustee in *Young* never questioned whether the Youngs were tithing to Crystal Evangelical out of anything other than sincere religious conviction.

If the *Smith* standard did apply to the free exercise question, then the court decided the issue correctly. In deciding whether *Smith* applied, the court found that section 548 was a neutral statute of general applicability.[249] The church in its arguments focused on the Code as a whole.[250] The Code in its entirety is not nearly as generally applicable as a single section alone may be. It calls for many individualized determinations. Indeed, section 548 calls for a facts and circumstances analysis which is not generally applicable and clear-cut in the sense of a criminal statute, which is the prototype for generally applicable laws under *Smith.* The bankruptcy trustee, as a representative of the

245. *Cf.* discussion of *In re Zarling, supra* note 90.
246. *Young,* 152 B.R. at 945.
247. BLACK'S LAW DICTIONARY 662 (6th edition 1990).
248. *Id.*
249. *Young,* 152 B.R at 953.
250. *Id.* at 952.

government, exercises discretion in deciding whether to sue under the statute, adding to the individualized factual determinations necessary to the process. Like the granting of unemployment benefits involved in *Sherbert*, the application of section 548 calls for individualized determinations. The district court should have applied the *Sherbert* test under the window left for its application stated in *Smith*.[251]

The court glossed over the free speech/free exercise hybrid for which the church argued. The local church, through its members, is the primary vehicle for spreading the gospel. The decision here may have unconstitutionally limited the entire amount that the Young's could expend on this form of speech.

Even if section 548 is generally applicable and there were no free speech rights involved, RFRA will now require that the compelling interest test be applied to this case in the court of appeals.[252] The district court found that the Code itself was designed to advance a compelling government interest, a policy of allowing debtors to get a fresh start while treating creditors as fairly as possible.[253] Because the court believed a *Sherbert* test analysis was unnecessary, it did not consider the remainder of the test: was this compelling interest being carried out by the least restrictive means? Assuming that there is a compelling government interest, which is questionable in light of the allowance for tithes in some Chapter 13 cases, and assuming that it is what the district court claimed it to be, forcing the church to return the tithes given to it by the Youngs heavily restricts their free exercise of religion. It invalidates retroactively the observance of a religious conviction. Future debtors in the Young's position who believe they may find it necessary to file for bankruptcy will be forced to stop tithing out of a fear that their church will have to give the money back. The churches themselves will have to be wary of receiving tithes from members who are having financial difficulty.[254] The least restrictive means to carry out the government interest of giving debtors a fresh

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251. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 884 (1990).

252. The attorney for the church asked the court for permission to amend in light of the enactment of RFRA. Telephone Interview with Kenneth Corey-Edstrom, Counsel for Crystal Evangelical (Nov. 1, 1993).

253. *Young*, 152 B.R. at 954. In discussing whether the generally applicable standard was met, the court looked specifically at § 548; yet, when looking for a compelling interest, the court considered the Code as a whole. *Id.* What is the central statute in this case — § 548 alone, or the entire Code? The court must decide.

254. *Center Briefs*, *supra* note 212, at 2.

start while treating creditors fairly is far short of forcing Crystal Evangelical to return the entire tithe given by the Youngs. The court allowed the Youngs to take advantage of the bankruptcy system, but only at the cost of the violation of their free exercise rights.

On the establishment clause issues, the court was faced with a common dilemma. If it ordered the church to return the tithe, it would entangle itself in religion and violate the doctrine of the separation of church and state. If it allowed the church to keep the tithes, the trustee and the creditors argued that it would favor the church and violate the establishment clause. The trustee's argument loses force in light of the fact that Congress allows churches an exemption from taxes. Tax exemption is not an establishment of religion.[255] Allowing the church to keep the tithes is not the same as giving the church money, just as allowing an exemption from taxes is not direct government funding of religion. Unfortunately, the district court decided to entangle itself in the affairs and finances of the church, protecting its action from the establishment clause by saying that placing a value on the church services, instead of assuming they had no value, would entangle it with religion.[256]

Some may question why the Youngs, or debtors in similar circumstances, would continue to give money to their church when they were insolvent. Tithing is a vital part of Christian living. As the passage from Malachi quoted at the beginning of this comment reveals, God expects his people to tithe. When they do, He is then able to shower blessings upon them and keep them safe from the devourer, because they obeyed his law. A theological study on tithing is not within the scope of this article, but this much may be said — the Youngs felt they could not afford to *not* tithe to their church. The Bible speaks often about tithing.[257] It is full of references in which God promises blessings, spiritual and material, to those who obey His command. Tithing is a recognition that all we have comes from God. Tithing should receive the full protection of the First Amendment.[258] It is a duty

255. *See* Walz v. Tax Commission, 397 U.S. 664 (1970) (property tax exemption).

256. *Young*, 152 B.R. at 955.

257. *See, e. g.*, *Genesis* 14:17-20; 28:20-22; *Exodus* 23:19; 30:12; *Leviticus* 27:30-33; *Numbers* 18:21, 28; *Deuteronomy* 14:22-29; *Proverbs* 3:9-10; *Malachi* 3:8-10; *Matthew* 23:23; *II Corinthians* 9:6-7.

258. *See generally* Price & Rahdert, *supra* note 57.

owed to God which the government has no right to infringe upon, even in the granting of a privilege like bankruptcy. Congress, in enacting the Bankruptcy Code, did not expect section 548 to be used to clearly violate the free exercise clause and the establishment clause as it was in this case.

At the very least, the district court should not have upheld the grant of summary judgment for the trustee. There were issues to be resolved under both section 548 and the Constitution. Whether reasonably equivalent value has been given is a question of fact.[259] In *Granfinanciera, SA v. Nordberg*, the Supreme Court held that a person who has not filed a claim of proof in a bankruptcy case has a right to a trial by jury under the Seventh Amendment in an adversary proceeding brought against him by a trustee under section 548.[260] While the court still has the perogative to grant summary judgment, the court in *Young* should not have precluded Crystal Evangelical's right to a trial by jury when there were several issues which were not resolved. The case was by no means as clear-cut as the court painted it to be.

Young gives insight into the current view our society has toward churches. The court's overly-strict analysis under section 548 reveals that it was not about to give the church any advantage. In fact, it placed the church at an unnecessary disadvantage. Church members at a minimum receive intangibles from the church they attend. The Youngs did not give away their money, receiving nothing in return. They were not seeking to place their funds beyond the reach of their creditors. They were fulfilling an obligation to their Creator. While placing a value on the services and other intangibles given to the Youngs by Crystal Evangelical and including them within "property"[261] might have raised establishment clause issues and other difficulties for the court, assuming that they had a value of zero placed the church and the Youngs at a definite disadvantage. The court may even have had a duty under section 548 to place a value on them.[262] If the court needed a comparison to use to find some basis for placing value on the church services, it could have looked to any number of organizations to which people pay dues and give donations in return for teaching, camaraderie, and a sense of

259. *Young*, 152 B.R. at 945.

260. 492 U.S. 33 (1989). It is not yet settled whether the bankruptcy court has the power to conduct the jury trial. Courts disagree on the issue. *See* WEINTRAUB & RESNICK, *supra* note 8, ¶ 6.06.

261. A term with no definition in the Code.

262. Appellant's Brief at 33, Christians v. Crystal Evangelical Free Church (8th Cir. 1993) (No. 93-2267).

belonging. The attitude of the court sheds light on the resentment some feel toward churches, especially toward their tax-exempt status.[263] The court felt that churches were already given enough breaks, and they were not about to get another one.

Young reveals the difficulties faced by individuals in raising free exercise claims. The church could not fight for the Young's free exercise rights because the court had already concluded that section 548 was a neutral and generally applicable law. Once that was determined, there were no arguments the court would listen to. The Religious Freedom Restoration Act is intended to give people like the Youngs a chance to fight.[264] I hope it does. *Christians v. Crystal Evangelical Free Church (In re Young)* should be reversed.

TROY S. ANDERSON

263. *See. e. g.*, Randall Palmer, *Churches Should Tread Lightly on Tax-Exempt Issue*, OREGONIAN, Feb. 27, 1993, at C7 (concluding that Crystal Evangelical should not appeal the court's order, because it risks inviting the wrath of opponents to the tax-exempt status of churches).

264. Assuming, of course, that the Supreme Court doesn't find it constitutionally invalid.