

10-1-1997

## First Principles and Fair Consideration: The Developing Clash Between the First Amendment and the Constructive Fraudulent Conveyance Laws

Jonathan C. Lipson

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [First Amendment Commons](#)

---

### Recommended Citation

Jonathan C. Lipson, *First Principles and Fair Consideration: The Developing Clash Between the First Amendment and the Constructive Fraudulent Conveyance Laws*, 52 U. Miami L. Rev. 247 (1997)  
Available at: <https://repository.law.miami.edu/umlr/vol52/iss1/5>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# First Principles and Fair Consideration: The Developing Clash Between the First Amendment and the Constructive Fraudulent Conveyance Laws

JONATHAN C. LIPSON\*

I. INTRODUCTION .....	247
II. FRAUDULENT CONVEYANCE LAW—THEORIES OF CONSIDERATION .....	251
A. <i>Statutory Schemes</i> .....	251
B. <i>Theories of Consideration</i> .....	253
1. CONSIDERATION AS “ECONOMIC” VALUE .....	254
2. CONSIDERATION AS “NON-ECONOMIC” (“LEGAL”) VALUE .....	256
3. THE SPECIAL PROBLEM OF GIFTS .....	260
a. Religious Gifts .....	261
b. Political Gifts .....	269
III. CONSTITUTIONAL ISSUES—LEVELS OF SCRUTINY .....	272
A. <i>Free Exercise &amp; RFRA</i> .....	275
1. FREE EXERCISE AND STRICT SCRUTINY—“FEEBLE IN FACT” .....	276
a. Pre-Smith Free Exercise .....	277
b. <i>Smith</i> .....	278
c. Religion and Commerce .....	280
2. RFRA .....	283
a. <i>Newman</i> .....	285
b. <i>Bloch</i> .....	287
c. <i>Young</i> .....	287
B. <i>Political Speech, Political Spending</i> .....	291
1. BUCKLEY AND STRICT SCRUTINY .....	292
2. BUCKLEY: THE LOCHNERIAN PARADOX .....	297
3. LESS-THAN-HEIGHTENED SCRUTINY—CONTENT-NEUTRAL ECONOMIC LEGISLATION .....	299
IV. CHOICES .....	301
V. CONCLUSION .....	303

## I. INTRODUCTION

If, as some have suggested, spending money is a protected exercise

---

\* University of Wisconsin-Madison, B.A. (*cum laude*) 1986; J.D. 1990. The author is an attorney in Boston. He thanks for their comments, encouragement and/or good humor the following persons, none of whom should bear responsibility for any errors in this article: His many colleagues at Hill & Barlow, a Professional Corporation; his family; Judith Olans Brown and James Hackney; E. Gary Spitko; Patricia J. Williams; Martha E. Gaines; Paul T. Cappuccio, Esq.; Daniel T. Donovan; Pierce J. Reed, Esq.; and, most important, Kathleen G. Noonan, Esq., for the foregoing as well as her great judgment. For administrative support, the author is forever indebted to his secretary, Patricia Roworth.

of religious<sup>1</sup> or political freedom,<sup>2</sup> what should be done when the spender is insolvent?

Under established principles of commercial law, an insolvent person—one whose liabilities exceed one's assets—must receive fair economic value in exchange for transfers. A person cannot give gifts while insolvent because gifts reduce the liquid assets the donor has to pay creditors. Transfers made by an insolvent debtor for less than fair value, such as religious or political donations, should be avoidable and recoverable by creditors or a bankruptcy trustee under fraudulent conveyance laws. If, however, those transactions are determined to be a religious exercise or a form of political speech, the First Amendment should defeat application of these laws.

Although the definition of speech has expanded to encompass much more than merely the right to criticize the sovereign, the definition of free exercise has undergone a fairly summary contraction. In the case of free exercise rights, the trend has been to apply a "feeble" form of judicial scrutiny, leaving most laws of general application undisturbed when in conflict with free exercise claims. For this reason, Congress passed, and President Clinton signed into law, the Religious Freedom Restoration Act of 1993 ("RFRA"). RFRA provides that the government shall not "substantially burden" a person's exercise of religion, even if the burden results from a rule of general applicability, unless the burden furthers a "compelling governmental interest" in the "least restrictive" way possible.<sup>3</sup> Although RFRA was struck down as it applied to a state zoning law in *City of Boerne v. Flores*,<sup>4</sup> it has been used to defeat a fraudulent conveyance challenge to a religious gift arising under the federal Bankruptcy Code, which strongly suggests that spending money could be a form of religious exercise.<sup>5</sup> Because RFRA may still apply to federal laws such as the Bankruptcy Code, and because the political momentum that led to RFRA's passage continues, strict scrutiny of applicable laws that impair religious exercise remains a

---

1. See *Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, *reh'g en banc denied*, 89 F.3d 494 (8th Cir. 1996) (holding that the Religious Freedom Restoration Act of 1993 is a defense to a fraudulent conveyance action), *vacated and remanded*, *Christians v. Crystal Evangelical Church (In re Young)* 117 S. Ct. 2502 (1997) (vacating judgment and remanding in light of holding in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (striking RFRA as it applied to a state zoning law)).

2. See *Buckley v. Valeo*, 424 U.S. 1 (1976) (striking certain campaign expenditure limitations). See also J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1985) (noting that *Buckley* effectively treats spending money as protected speech).

3. Religious Freedom Restoration Act, S. REP. NO. 103-111, 103d Cong., 1st Sess. (1993) (codified at 42 U.S.C. §§ 2000bb-1 (a)-(c)), *reprinted in* 1993 U.S.C.C.A.N. 1892.

4. See *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), *rev'g City of Boerne, Texas v. Flores*, 73 F.3d 1352 (5th Cir. 1996).

5. See *In re Young*, 82 F.3d at 1407.

vital issue.<sup>6</sup>

By contrast, speech enjoys a consistently expanding empire. Protected speech now includes the rights to publish, and profit from, falsehoods,<sup>7</sup> parodies,<sup>8</sup> and liquor prices.<sup>9</sup> Some scholars argue that, to the extent our economy becomes more dependent upon information technologies, the First Amendment may expand beyond its role as protector of the right to express ideas, to shield the commercial transactions that facilitate the expression of those ideas.<sup>10</sup>

This article examines whether spending money is a form of religious exercise or speech through the lens of fraudulent conveyance laws. If religious donations or political expenditures are protected by the First Amendment, or statutes like RFRA, then fraudulent conveyance laws, like other laws that impinge upon constitutionally protected rights, would be subject to heightened judicial scrutiny and would survive only if supported by an important governmental interest. Regardless of whether the donor received any value in exchange for a gift, the economic concerns of the donor's creditors would be subordinate to the First Amendment rights of the donor.

Section II of this article evaluates constructive fraudulent conveyance laws and the distinction between economic value, which, if sufficient in amount, should immunize a transaction, and non-economic value (legal value), which may also constitute a defense to a fraudulent conveyance action. Section II argues that the Supreme Court's recent decision, *BFP v. Resolution Trust Corporation*,<sup>11</sup> is dangerous precisely because of the implication it has for First Amendment rights. *BFP* endorses the distinction between legal and economic value by holding that the economic value received by a debtor is irrelevant to a fraudulent conveyance challenge if a foreclosure on the debtor's property was procedurally proper. If, as *BFP* holds, the legal value inherent in the right to foreclose is fair value, or proxy therefor, then the legal value of First Amendment rights of a debtor-donor should also be a form of legal consideration. This conclusion, however, would do serious damage to the underlying purpose of fraudulent conveyance laws, which is to protect creditors. Section II concludes by noting that religious and political gifts should not always be found lacking in consideration. Such transactions

---

6. Similarly, the Michigan and New York legislatures appear to be considering state versions of RFRA. See Michigan H.R. No. 4376, introduced February 25, 1997 by Representative Profit; ALBANY TIMES UNION, July 10, 1997, at B2 (regarding the New York statute).

7. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

8. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

9. *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996).

10. See, e.g., Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992).

11. 511 U.S. 531 (1994).

should be viewed in light of the underlying creditor protection purpose of fraudulent conveyance laws. Where a debtor-donor actually receives economic value, the transaction should be immune from avoidance even if termed a gift.

Section III analyzes First Amendment protections for religious and political expenditures. Section III.A argues that religious giving should ordinarily be neither a protected form of worship under the First Amendment nor under RFRA, because free exercise should not encompass spending money as a protected religious exercise. Section III.B acknowledges *Buckley*'s restraint on governmental power to cap political spending, but argues that, because fraudulent conveyance laws are viewpoint and content neutral, they should be reviewed under less-than-heightened judicial scrutiny. Section III.B also analyzes the "*Lochnerian* paradox" that would result from using a *Buckley* defense in a fraudulent conveyance action. Unlike other forms of regulation forbidden by the *Lochnerian* underpinnings of *Buckley* (as in *Lochner v. New York*,<sup>12</sup> *Buckley* gives preference to the private right to spend money over the government's public right to limit such spending), fraudulent conveyance laws are essentially private, common law rights of action that *Lochner* respects. In other words, Section III.B. shows that *Buckley*'s reasoning would be internally inconsistent in the fraudulent conveyance context.<sup>13</sup>

Section IV discusses the judicial challenges in resolving this conflict and suggests a solution. First Amendment exceptions to fraudulent conveyance laws should ordinarily meet judicial skepticism because, if taken seriously, they would undermine the integrity of our commercial system. If commercial laws such as fraudulent conveyance laws warrant heightened judicial scrutiny, because religious donations or campaign contributions are protected worship or speech, then the First Amendment, in effect, could absorb and trump nearly every commercial law. This would be an absurd and dangerous result.

Among other problems, recognizing a First Amendment defense in a fraudulent conveyance challenge would result in inconsistent application of the First Amendment. If the First Amendment rights of the donor matter, then the First Amendment rights of the donor's creditors should also matter. Because, in a sense, the creditor's money is used by its debtor-donor, perhaps for causes the creditor finds repugnant, the First Amendment cannot be consistently applied for the benefit of both creditor and debtor-donor.

---

12. 198 U.S. 45 (1905).

13. This argument flows from the work of Professor Sunstein, among others. See, e.g., Sunstein, *supra* note 10, at 291-92.

## II. FRAUDULENT CONVEYANCE LAW—THEORIES OF CONSIDERATION

### A. Statutory Schemes

A transfer of property may be avoided as a fraudulent conveyance under any of four statutory schemes, depending on which state's law governs and whether the debtor-transferor is in bankruptcy. If the debtor is not in bankruptcy, the following three statutes may be used: (i) the Uniform Fraudulent Transfer Act ("UFTA"),<sup>14</sup> adopted in 36 states; (ii) the Uniform Fraudulent Conveyance Act ("UFCA"),<sup>15</sup> adopted in five states; and (iii) more current versions of the Statute of Elizabeth, the English antecedent to all fraudulent conveyance laws.<sup>16</sup> If the debtor is in bankruptcy, section 548 of the Bankruptcy Code may apply.<sup>17</sup> Although there are several variations of constructive fraudulent conveyance laws, each has the same essential goal of redistributing to creditors their pro rata share of the value of assets transferred for less than fair value by their insolvent debtor.<sup>18</sup>

Fraudulent conveyance laws were initially developed to deter intentional acts that hindered, delayed, or defrauded creditors. Intent, however, was notoriously difficult to prove.<sup>19</sup> As a result, courts developed, and modern statutes incorporated, certain presumptions based on badges of frauds, acts, or states of affairs that, regardless of intent, rendered a transaction presumptively fraudulent.<sup>20</sup>

The most common badge of fraud is a transfer for less than "fair consideration,"<sup>21</sup> or "reasonably equivalent value,"<sup>22</sup> by a debtor who is

14. As of June 1, 1997, the UFTA has been adopted by the following 36 states: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Washington, West Virginia, and Wisconsin.

15. As of June 1, 1997, the following five states, plus the U.S. Virgin Islands, operate under UFCA: Maryland, Michigan, New York, Tennessee, and Wyoming.

16. See, e.g., VA. CODE ANN. § 55-81 (Michie 1991); 13 Eliz., ch. 5 (1570) (Eng.).

17. 11 U.S.C. § 548 (1996).

18. See, e.g., Jack L. Williams, *Revisiting the Proper Limits of Fraudulent Transfer Law*, 8 BANKR. DEV. J. 55, 80 (1991) ("The purpose of fraudulent transfer law is the preservation of the debtor's estate for the benefit of its unsecured creditors.").

19. See, e.g., Barry L. Zaretsky, *Fraudulent Transfer Law as the Arbiter of Unreasonable Risk*, 46 S.C. L. REV. 1165, 1166 (1995).

20. Because intentionally fraudulent and criminal acts enjoy no First Amendment protection, this article considers only constructively fraudulent conveyances, where a transfer can be avoided, and money or assets recouped, regardless of the parties' intentions. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Scholes v. African Enter., Inc.*, 854 F. Supp. 1315, 1324 (N.D. Ill. 1994), *aff'd in part, rev'd in part sub nom.*, *Scholes v. Lehmann* 56 F.3d 750 (7th Cir. 1995).

21. Under the UFCA, this is known as a "fair equivalent" exchanged in "good faith." UNIF. FRAUDULENT CONVEYANCE ACT § 3(a), 7A U.L.A. 448 (1985).

22. Both the UFTA and the Bankruptcy Code define consideration for this purpose as

financially impaired. A debtor-transferor is financially impaired if, at the time of the transfer or the incurrence of an obligation, or as a result thereof, the debtor (i) was insolvent (i.e., had total debts that exceeded the "present fair salable value"<sup>23</sup> or "fair valuation"<sup>24</sup> of its property); (ii) was left with "unreasonably small"<sup>25</sup> capital or "assets"<sup>26</sup>; or (iii) intended, or believed (or, under the UFTA, "reasonably should have believed"<sup>27</sup>) it would incur debts beyond its ability to pay. In this context, the term "insolvent" describes this condition of material financial impairment.<sup>28</sup>

In simplest terms, fraudulent conveyance laws protect creditors by prohibiting a debtor who is insolvent from receiving less than fair value for transfers. The classic example of a fraudulent conveyance arises when a defendant makes a gift of all his or her assets to his or her spouse just before an unfavorable judgment is rendered.<sup>29</sup> While this example suggests an intent to defraud creditors, the transaction is also constructively fraudulent because the debtor-defendant received inadequate economic consideration. The debtor-defendant's asset base is diminished, thus impairing his or her ability to repay creditors in a timely way.

Constructive fraudulent conveyance laws protect creditors by forcing a debtor to maintain an adequate asset base, thus enhancing the likelihood of creditor repayment. The equitable maxim often invoked in fraudulent conveyance litigations, "be just before you are generous,"<sup>30</sup>

"reasonably equivalent value." UNIF. FRAUDULENT TRANSFER ACT § 4(a)(2), 7A U.L.A. 653 (1985 & Supp. 1991); 11 U.S.C. § 548(a)(2)(A) (1996).

23. UNIF. FRAUDULENT CONVEYANCE ACT § 2(a), 7A U.L.A. 442 (1985).

24. UNIF. FRAUDULENT TRANSFER ACT § 2(a), 7A U.L.A. 648 (1985 & Supp. 1991).

25. UNIF. FRAUDULENT CONVEYANCE ACT § 5, 7A U.L.A. 504 (1985); 11 U.S.C. § 548 (1)(2)(B)(ii)(1988).

26. UNIF. FRAUDULENT TRANSFER ACT § 4(a)(2)(i), 7A U.L.A. 653 (1985 & Supp. 1991).

27. *Id.* § 4(a)(2)(ii).

28. An issue that frequently arises in fraudulent conveyance litigation is whether a challenging creditor or bankruptcy trustee has standing to avoid the transaction. As a general rule, there must have been at least one unpaid creditor at the time of the allegedly fraudulent conveyance for a court to find that a trustee has standing to sue. See *Ohio Corrugating Co. v. Security Pac. Business Credit, Inc.* (*In re Ohio Corrugating Co.*), 70 B.R. 920 (Bankr. N.D. Ohio 1987); and *Ohio Corrugating Co. v. DPAC, Inc.* (*In re Ohio Corrugating Co.*), 91 B.R. 430 (Bankr. N.D. Ohio 1988). The standing issue is beyond the scope of this article. For the purposes of this article, the assumption is that a bankruptcy trustee challenging a religious or political donation has standing.

29. See, e.g., *Mannockes' Case*, 73 Eng. Rep. 661 (K.B. 1571).

30. In the context of fraudulent conveyances, this equitable maxim is widely cited by courts. E.g., *Boston Trading Group v. Burnazos*, 835 F.2d 1504, 1508 (1st Cir. 1987) (interpreting Massachusetts law); *Rudy v. Austin*, 19 S.W. 111, 113 (Ark. 1892); *Mercantile Nat'l Bank v. Aldridge*, 210 S.E.2d 791, 793 (Ga. 1974); *Birney v. Solomon*, 181 N.E. 318, 320 (Ill. 1932); *First Nat'l Bank in Fairfield v. Frescoln Farms, Ltd.*, 430 N.W.2d 432, 436 (Iowa 1988); *Lutherville Supply & Equip. Co. v. Dimon*, 192 A.2d 496, 498 (Md. 1963); *Lafayette Fin. Corp. v. Cunningham*, 143 A.2d 700, 702 (R.I. 1958); *Walker v. Loring*, 36 S.W. 246, 247 (Tex. 1896);

stems from the belief that creditors are the indirect victims of a debtor's bad deals. Even if no intent to harm creditors exists, the fact that the deal impairs the debtor's ability to repay debts is sufficient grounds to avoid the transaction.

### B. *Theories of Consideration*

The central non-constitutional legal issue in a fraudulent conveyance litigation involving a First Amendment defense is how to measure consideration the debtor-transferor receives.<sup>31</sup> If a debtor receives adequate consideration for a transfer, then, even if insolvent (and whether or not protected by the First Amendment), the transfer is not avoidable.<sup>32</sup> Although it seems that a religious donation or a political contribution should not, by definition, be supported by consideration, there are some constructions of consideration and some factual circumstances where consideration may be found for such transfers. This is true even under the more modern statutes, where the trend is toward recognizing consideration as being valuable only if it is economic in nature.<sup>33</sup>

A useful analysis of consideration recognizes the distinction between consideration having economic value and consideration having legal value. Economic value consists of cash, assets, or their equivalent. These preserve the debtor's asset base, liquidity, and ability to pay creditors in a timely manner. If sufficient, economic value received by a debtor-transferor protects a transfer from a constructive fraudulent conveyance attack.

Legal consideration is more complex because it does not necessar-

---

Brimhall v. Grow, 480 F.2d 731, 734 (Utah 1971); Durham v. Blackard, 438 S.E.2d 259, 263 (S.C. Ct. App. 1993).

31. Insolvency, the other main question in a fraudulent conveyance action, is a question of fact. Consideration and how it is measured appear to be mixed questions of law and fact. Compare *Butler Aviation, Int'l v. Whyte (In re Fairchild Aircraft Corp.)*, 6 F.3d 1119, 1125 (5th Cir. 1993) (affirming that appellate courts review bankruptcy courts' findings of consideration *de novo*), with *In re Roco Corp.*, 701 F.2d 978, 981-82 (1st Cir. 1983) (holding that appellate courts review consideration determination only for clear error). See also *Bundles v. Baker (In re Bundles)*, 856 F.2d 815, 825 (7th Cir. 1988) (giving "great deference" to a trial court's finding of consideration).

32. This applies at least to the extent value was actually received by the debtor. See, e.g., 11 U.S.C. § 548(c); UNIF. FRAUDULENT TRANSFER ACT §§ 8(a), 9(2).

33. Compare *Wilson v. Upreach Ministries (In re Missionary Baptist Found. of Am.)*, 24 B.R. 973, 979 (Bankr. N.D. Tex. 1982) (holding that Bankruptcy Code section 548(a)(2)(A) "does not appear to require that 'reasonably equivalent value' be a monetary equivalent") with *Morris v. Midway S. Baptist Church (In re Newman)*, 183 B.R. 239, 247 (Bankr. D. Kan. 1995) (holding that under Bankruptcy Code section 548, a transfer "must result in some economic benefit flowing back to the debtor[s]"), *aff'd*, 203 B.R. 468, 473 (Bankr. D. Kan. 1996). See also *Wienman v. Word of Life Christian Center (In re Bloch)*, 207 B.R. 944, 948 (Bankr. D. Colo. 1997) (citing *In re Newman*) ("Contrary to the [d]efendant's assertions, the statute requires that the debtor must have been provided with something of economic, as opposed to religious or spiritual, value").



ily have economic value. Rather, it is a right conferred upon, or available to, the debtor. Although this can be adequate consideration for fraudulent conveyance purposes, it is unclear why this is so, since the purpose of the constructive fraudulent conveyance laws is to provide economic protection to creditors. Creditors will not usually benefit from the debtor's receipt of legal consideration in the same way they would if the debtor received economic consideration because, ordinarily, a right cannot be liquidated and distributed to creditors. Creditors cannot be paid in the currency of the debtor's rights. Nonetheless, as will be demonstrated, rights—or legal consideration—are often acceptable substitutes for economic consideration in defending a constructive fraudulent conveyance challenge. If the rights discussed below are adequate consideration, there is no apparent reason why First Amendment rights should not also be consideration for fraudulent conveyance purposes.

#### 1. CONSIDERATION AS "ECONOMIC" VALUE

Although fraudulent conveyance laws offer a variety of tests for measuring consideration, the majority rule requires that it have economic value to non-transferee creditors of the debtor in order to immunize a transfer.<sup>34</sup> "Only consideration of substantially equivalent [monetary] value leaves the debtor in a financially similar position after the conveyance."<sup>35</sup> The debtor's post-transfer financial position matters because a conveyance made for less than reasonably equivalent economic value presumably leaves the debtor financially weak and less likely to pay creditors.<sup>36</sup> This reflects the purpose of fraudulent conveyance laws—the protection of creditors by deterring or avoiding transactions that impair a debtor's ability to make repayment.

The majority view requires that courts measure consideration from the perspective of creditors of the debtor, rather than from the perspective of the debtor.<sup>37</sup> "Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition" of reasonably

---

34. *Scholes*, 854 F. Supp. at 1328 (finding religious gifts not supported by consideration). See also *First Nat'l Bank in Anoka v. Minnesota Util. Contracting (In re Minnesota Util. Contracting, Inc.)*, 110 B.R. 414, 420 (Bankr. D. Minn. 1990); *Zahra Spiritual Trust v. United States*, 910 F.2d 240, 249 (5th Cir. 1990); *Tcherepnin v. Franz*, 475 F. Supp. 92, 97 (N.D. Ill. 1979).

35. *Scholes*, 854 F. Supp. at 1328. See also *Zahra Spiritual Trust*, 910 F.2d at 240, 249.

36. *Scholes*, 854 F. Supp. at 1328 (citing *United States v. Kitsos*, 770 F. Supp. 1230, 1235-36 n.14 (N.D. Ill. 1991) ("relevant determination is whether *full* value has been given")) (emphasis in original).

37. See, e.g., *Harmon v. First Am. Bank of Md. (In re Jeffrey Bigelow Design Group, Inc.)*, 956 F.2d 479, 484 (4th Cir. 1992) ("The focus [under Bankruptcy Code section 548] is on the consideration received by the debtor, not on the value given by the transferee.") (quoting Jack F. Williams, *Revisiting the Proper Limits of Fraudulent Transfer Law*, 8 BANKR. DEV. J. 55, 80 (1991)). See also *Larrimer v. Geeney*, 192 A.2d 351, 354 (Pa. 1963).

equivalent value under UFTA.<sup>38</sup> From the creditor's standpoint, consideration must have a concrete, economic value to have any value at all. Consideration cannot be merely love and affection. Rather, it must materially enhance the debtor's asset base.<sup>39</sup>

Despite this general rule, it is obvious that many things have an economic value to a debtor that will not have value to a creditor of the debtor. For instance, personal services performed for a debtor-transferor,<sup>40</sup> a creditor-transferee's forbearance from pursuing a collection suit against the debtor,<sup>41</sup> the preservation of the debtor's goodwill,<sup>42</sup> country club dues,<sup>43</sup> the opportunity to gamble,<sup>44</sup> and the opportunity to speak to a psychic on a 900 line<sup>45</sup> have been accepted as consideration having economic value, even though the value could run only to the debtor.<sup>46</sup> Some courts have gone so far as to find economic value in spiritual services performed for the benefit of the debtor.<sup>47</sup> These decisions, however, appear limited to situations where there is an economic connection between the donation and the basis for the donor's gift, such

---

38. See UNIF. FRAUDULENT TRANSFER ACT § 3 cmt. 2, 7A U.L.A. 651 (1985).

39. See Zaretsky, *supra* note 19. Professor Zaretsky offers an interesting alternative approach to fraudulent conveyance problems including, by implication, those addressed by this article. Rather than focusing on the pleading requirements of the various constructive fraudulent conveyance laws with their residual trappings of intent-based speculation, he argues that fraudulent conveyance laws would more efficiently and effectively achieve their creditor-protection goal if viewed as arbiters of unreasonable risk. Transactions should be avoided, according to Professor Zaretsky, if, in retrospect, the insolvent transferor took an unreasonable risk with her assets.

40. See *Boyd v. Sachs (In re Auto Specialties, Mfg.)*, 153 B.R. 457, 499 (Bankr. W.D. Mich. 1993), *aff'd*, 153 B.R. 503 (W.D. Mich. 1994); *McColley v. Jacobs (In re North Am. Dealer Group, Inc.)*, 62 B.R. 423, 430 (Bankr. E.D.N.Y. 1986).

41. See *Ward v. Building Material Dist. (In re Ward)*, 36 B.R. 794, 799 (Bankr. D.S.D. 1984) (reasoning that under Bankruptcy Code section 548(d)(2)(A), value includes securing an antecedent debt).

42. See *Cofax, Inc. v. D'Agostino (In re J.K. Chemicals, Inc.)*, 7 B.R. 897, 898 (Bankr. D.R.I. 1981); see also *Pereira v. Checkmate Communications Co. (In re Checkmate Communications Co.)*, 9 B.R. 585, 616-17 (Bankr. E.D.N.Y. 1981), *aff'd in part, rev'd in part*, 21 B.R. 402 (E.D.N.Y. 1982).

43. See *Goldberger v. Bross (In re Complete Drywall Contracting, Inc.)*, 11 B.R. 697, 700 (Bankr. E.D. Pa. 1981).

44. See *Allard v. Flamingo Hilton (In re Chomakos)*, 170 B.R. 585, 593-94 (Bankr. E.D. Mich. 1993), *aff'd*, 69 F.3d 769, 771 (6th Cir. 1995).

45. See *Samson v. U.S. West Communications, Inc. (In re Grigonis)*, 208 B.R. 950, 955-56 (Bankr. D. Mont. 1997).

46. See Robert J. Bein, *Robbing Peter to Pay Paul: Charitable Donations as Fraudulent Transfers*, 100 DICK. L. REV. 103 (1996) (arguing that not all charitable donations should be found lacking in consideration).

47. See *Wilson v. Upreach Ministries (In re Missionary Baptist Found.)*, 24 B.R. 973, 979 (Bankr. N.D. Tex. 1982) (finding that goodwill constituted reasonably equivalent value in exchange for charitable contribution); *Ellenberg v. Chapel Hill Harvester Church, Inc. (In re Moses)*, 59 B.R. 815, 818 (Bankr. N.D. Ga. 1986) (finding that church services constituted property for purposes of Bankruptcy Code section 548). See discussion *infra* Section II.B.3.a.

as preserving goodwill where the debtor is also a religious organization.<sup>48</sup>

Thus, although fraudulent conveyance laws generally require consideration to be economic and "fairly concrete,"<sup>49</sup> it need not be equivalent to that which was conveyed or valuable to the debtor's creditors. These exceptional cases are not necessarily wrong. Courts must make the subtle determination whether the debtor-transferor received value in light of the creditor-protection purpose of the fraudulent conveyance laws.

## 2. CONSIDERATION AS NON-ECONOMIC (LEGAL) VALUE

Although the purpose and text of fraudulent conveyance statutes give great weight to the economic value a debtor-transferor receives, "value" takes myriad forms. Many of these forms are neither concrete nor especially valuable to the supposed beneficiaries of the law—the debtor's creditors. Several cases, most importantly, the recent Supreme Court *BFP* decision, go one step further and ignore the economics of a transaction entirely. These cases conclude that the language of the avoidance statute, the legal relationships of the transferor, or the procedural integrity of the transaction are proxy for economic value. In other words, legal value, not economic value, may constitute adequate consideration.

The simplest expression of legal value as adequate consideration in the fraudulent conveyance context is found in certain interpretations of the Statute of Elizabeth. Under these interpretations, transfers will be validated if supported by "consideration deemed valuable in law," which can be something less than reasonably equivalent value.<sup>50</sup> In these circumstances, the amount of consideration needed to immunize an allegedly fraudulent conveyance need only approximate the consideration required to create a binding contract (i.e., a "peppercorn"). There is no pretense of economic equivalence.<sup>51</sup>

A more complex expression of legal value is the indirect benefit defense. Under this theory, a debtor-transferor will be found to have received adequate consideration not by virtue of any economic value it received, but rather by virtue of the transferor's legal relationship to

---

48. See *In re Missionary Baptist Found.*, 24 B.R. at 979. Cf. *Scholes*, 56 F.3d at 759 (citing *Zahra Spiritual Trust v. United States*, 910 F.2d 240 (5th Cir. 1990)).

49. *In re Young*, 152 B.R. 939, 950 (Bankr. D. Minn. 1993).

50. See, e.g., VA. CODE ANN. §§ 55-81 (Michie 1991).

51. See, e.g., *C-T of Va. Inc. v. Euroshoe Assocs. Ltd. Partnership*, 762 F. Supp. 675 (W.D. Va. 1991), *aff'd*, 953 F.2d 637, 639 (4th Cir. 1992) ("We agree that [Virginia Code Annotated §§] 55-81 [do] not require [the transfer of] reasonably equivalent value."); *In re Springfield Furniture, Inc.*, 145 B.R. 520, 533 (Bankr. E.D. Va. 1993); *Hyman v. Porter*, 37 B.R. 56, 65 (Bankr. E.D. Va. 1984).

another entity (e.g., an affiliate) that received the economic equivalent of the bargain.<sup>52</sup> The indirect benefit defense typically arises in the context of corporate groups, where one corporation agrees to guarantee the obligations of its corporate affiliate, without receiving direct consideration itself. Although the economic benefit that the debtor-guarantor indirectly receives will be compared to the value of the property the debtor transfers, such value could have no value to the debtor's creditors, since creditors ordinarily benefit little, if at all, from the synergy of intercorporate relationships.<sup>53</sup> Nevertheless, courts find value in the legal relationship between the debtor-guarantor and the beneficiary of the guarantee.<sup>54</sup>

The most significant, and extreme, expression of the notion that legal value can be adequate consideration is found in *BFP v. Resolution Trust Corp.*<sup>55</sup> In *BFP*, the Supreme Court held that the inadequacy of the economic value received by a debtor in a foreclosure on property is irrelevant if the foreclosure is conducted properly. According to the Court, if the debtor's "rights" in the foreclosure are respected, then the foreclosure cannot be avoided, regardless of the economic consequences to the debtor or to creditors.

In *BFP*, the petitioners were partners in a partnership formed to purchase a house in California subject to a first deed of trust in favor of a bank that was subsequently taken into receivership by respondent, the Resolution Trust Corporation.<sup>56</sup> At the time of the purchase in 1987, the petitioners gave a first mortgage for \$356,250 to the bank, and a second mortgage to the sellers to secure payment of the purchase price. In July 1989, with the petitioners in default on their loan payments, the house sold for \$433,000 at a foreclosure sale conducted by the bank. This amount equalled the remaining indebtedness to the bank and to the sellers.<sup>57</sup>

In October 1989, petitioners filed bankruptcy under chapter 11 of the Bankruptcy Code and filed suit under section 548 to avoid the foreclosure as a fraudulent transfer claiming that the house at the time of the

---

52. See, e.g., *In re Fairchild Aircraft Corp.*, 6 F.3d 1119, 1127 (5th Cir. 1993); *In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d 479, 485 (4th Cir. 1992); *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 646-47 (3d Cir. 1991), *cert. denied*, 503 U.S. 937 (1992); *In re W.T. Grant Co.*, 699 F.2d 599, 609 (2d Cir.), *cert. denied*, 464 U.S. 822 (1983); *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 991-92 (2d Cir. 1981); *Telefast, Inc. v. VU-TV, Inc.*, 591 F. Supp. 1368, 1379-81 (D.N.J. 1984).

53. See *Rubin*, 661 F.2d at 993.

54. See *supra* note 52.

55. 511 U.S. 531, 542 (1994).

56. *Id.* at 533.

57. *Id.* at 534, 536.

foreclosure was worth \$725,000, not \$433,000.<sup>58</sup> The Bankruptcy Court dismissed the complaint as to the sellers, and granted summary judgment for the bank. A divided Bankruptcy Appellate Panel for the Ninth Circuit affirmed the entry of summary judgment for the bank,<sup>59</sup> reasoning that under the standard enunciated in *In re Madrid*,<sup>60</sup> a non-collusive and regularly conducted non-judicial foreclosure sale cannot be a fraudulent conveyance because the consideration received in such sale is—as a matter of law—reasonably equivalent value.<sup>61</sup> The Ninth Circuit Court of Appeals affirmed.<sup>62</sup>

Affirming the Ninth Circuit's decision, the Supreme Court held that, under section 548 of the Bankruptcy Code, reasonably equivalent value "is the price in fact received at the foreclosure sale, so long as all" applicable state foreclosure procedures have been complied with, regardless of the true economic value of the asset sold.<sup>63</sup> As a result, the Court established a foreclosure exception to the requirement that reasonably equivalent value be fair market value—or have *any* economic value at all.<sup>64</sup>

The Court held that, in the foreclosure context, procedural integrity, not economics, determines value. According to the Court, this is so because there is no market to refer to: "'fair market value' presumes market conditions that, by definition, simply do not obtain in the context of a forced sale. . . . Market value cannot be the criterion of equivalence in the foreclosure-sale context."<sup>65</sup> The Court reasoned that the legal

---

58. *Id.* at 534.

59. *In re BFP*, 132 B.R. 748 (B.A.P. 9th Cir. 1991).

60. 21 B.R. 424 (B.A.P. 9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), and *cert. denied*, 469 U.S. 83 (1984).

61. *In re BFP*, 132 B.R. 748 (B.A.P. 9th Cir. 1991).

62. *In re BFP*, 974 F.2d 1144 (9th Cir. 1992).

63. *In re BFP*, 511 U.S. 531, 545 (1994).

64. *Id.* at 545. "[T]he 'reasonably equivalent value' criterion will continue to have independent meaning (ordinarily a meaning similar to fair market value) outside the foreclosure context." *Id.* Compare Justice Souter's dissent, which notes that the Court was thereby holding that a "peppercorn" may constitute reasonably equivalent value. *Id.* at 555 (Souter, J. dissenting).

65. *Id.* at 538 (citations omitted). This is questionable, since one of the purposes of a foreclosure notice (notice being the most important procedural requirement) is to attempt to attract bidders to pay the foreclosing creditor and, if sufficient value is paid, to provide a return to the mortgagor. See, e.g., *Edry v. Rhode Island Hospital Trust Nat'l Bank (In re Edry)*, 201 B.R. 604, 607 (Bankr. D. Mass. 1996) (avoiding foreclosure as fraudulent transfer where sale, although conforming to the "bare notice requirement" of foreclosure statute, nevertheless was not advertised according to the "general practice" of display advertising in newspapers and resulted in sale price of 45% of fair market value of collateral). In turn, this creates the majority's missing market. Of course, it is true that, at some level, it is unfair to subject a foreclosing bank to a constructive fraudulent conveyance action, since it is merely exercising its remedies and not attempting to take advantage of the debtor. Constructive fraudulent conveyance laws, however, focus not on intent, but on the economic impact of a transfer on the debtor, permitting avoidance where an insolvent debtor receives less than reasonably equivalent value in a transaction. The

duress of foreclosure distorts whatever the market might otherwise be because "property that *must* be sold within [foreclosure] strictures is simply worth less."<sup>66</sup> The Court did not elaborate on what the property must be "worth less" than,<sup>67</sup> but noted that it would be no more realistic to ignore the legal characteristic of imminent foreclosure on the subject property than to "ignore other price-affecting characteristics (such as the fact that state zoning law permits the owner of the neighboring lot to open a gas station)."<sup>68</sup>

The radical nature of this conclusion should not be missed. While it may be true that the forced nature of a foreclosure sale affects value, if Congress wanted to create a foreclosure exception, it would have done so in the Bankruptcy Code. Indeed, rights almost always affect value. But that proves too much. The question, in the first instance, must be: What does the statute say? Since it speaks of value, reference must be to economics, not law.<sup>69</sup>

Consequently, the court's premise is out of touch with the law and economics of foreclosure. First, there is a fairly well-developed and profitable market for foreclosed properties.<sup>70</sup> Second, it defeats the purposes of the foreclosure rules and fraudulent conveyance laws, both of which are designed to protect not just a particular creditor (the foreclosing bank, for example), but the entire community of the debtor's creditors. The bank has no incentive to bid more than its debt (as in *BFP*) or to create the conditions for vigorous and open bidding, which benefit creditors as well as the debtor, by maximizing the price received at the foreclosure. As a consequence, it will gain the opportunity to retake the property and sell it for a profit (i.e., the difference between what the

---

Court's analysis in *BFP* precludes any judicial analysis of the consideration a debtor receives in a foreclosure, although it offers no persuasive reason for its position.

66. *Id.* at 539 (emphasis in original).

67. The implication is that property not under the legal duress of imminent foreclosure may be worth more, because the owner could bide time and sell at leisure. This seems to be a fact-specific determination, unique to each case, and not a requirement of law in all cases of foreclosure. For example, although subject to foreclosure today, the bottom could drop out of the real property market tomorrow. The person who sells at leisure tomorrow may, therefore, get less than the judgment debtor subject to foreclosure today. Moreover, many things can have an effect on value; for example, the sudden need to move to a different city or a change in personal circumstances. It is not clear why the Court viewed the legal duress of impending foreclosure by the bank as somehow different in the valuation analysis. As Justice Souter's dissent notes, the Court's treatment of value is ultimately problematic because it begs the question of how value is determined. "If a property's 'value' is conclusively presumed to be whatever it is sold for, the 'less than reasonabl[e] equivalen[ce]' question will never be worth asking. . . ." *Id.* at 555 (Souter, J., dissenting).

68. *Id.* at 539.

69. See also *id.* at 555 (Souter, J., dissenting).

70. See, e.g., *France's Suez Sells Distressed Loans to Goldman Sachs*, WALL ST. J., Jan. 28, 1997, at A12 (discussing "vulture funds" that purchase defaulted real estate debt).

bank bid in and the fair market value it later receives). Fraudulent conveyance laws impose the most meaningful barrier to this kind of wind-fall to banks or other foreclosing secured creditors. Why the Court ignored these concerns and established a foreclosure exception to the fraudulent conveyance laws is, quite simply, unclear.

The Court probably did not anticipate the effect *BFP* could have in the First Amendment context. Yet, the reasoning of *BFP* may prove powerful in the hands of a religious or political debtor-donor, since it is unclear why a First Amendment right should matter any less than a foreclosure right. In other words, if *BFP* is correct, why should a court *not* ignore the legal and price affecting characteristics of transactions allegedly protected by the First Amendment?

The answer lies partly in the First Amendment itself, which, as will be argued,<sup>71</sup> ordinarily should not act as a defense to a fraudulent conveyance action. The more basic question, discussed immediately below, is whether transactions that appear to be gifts (i.e., religious or political donations) actually lack consideration. As discussed in the following subsection, courts should pay close attention to the consideration actually received by a debtor, even if the transaction is denominated a gift. Although gifts create special fraudulent conveyance problems because they are the classic form of fraudulent conveyance, the language and policy of fraudulent conveyance laws suggest that not all religious or political gifts lack real, economic value. In other words, not all such gifts lack consideration sufficient to constitute a fraudulent conveyance.

### 3. THE SPECIAL PROBLEM OF GIFTS

Because religious contributions and political expenditures usually appear to be gifts, it is important to understand exactly what renders a transaction a gift as opposed to a bargained-for exchange. Gifts pose special problems in constructive fraudulent conveyance law because, as a matter of law, they are considered to lack consideration, while, as a matter of fact, they may be supported by consideration of a concrete, economic nature, thus having value from the perspective of a debtor's creditors.

It would seem that a gift, by its very nature, could never be made

---

71. See discussion *infra* Section III.A.

for consideration.<sup>72</sup> Otherwise, it would not be a gift, but an exchange.<sup>73</sup> And yet, as the Supreme Court stressed in *Hernandez v. Commissioner*,<sup>74</sup> the structure of a transaction may well convert what purports to be a gift, such as donations to a church for religious services, into a bargained-for exchange.<sup>75</sup> Moreover, as the Court of Appeals for the Eighth Circuit noted in *In re Young*,<sup>76</sup> all aspects of a transaction must be considered, so that merely labeling a transfer a gift or tithe, should not inexorably lead to the conclusion that the transfer lacked consideration.<sup>77</sup> By analogy, in the context of political expenditures, the result should be the same, since certain political expenditures may well be reasonable economic risks, like gambling or investing. In either case, courts should not summarily conclude that, because a transaction is termed a gift, the transferor necessarily received inadequate economic value in the exchange.<sup>78</sup> Instead, they should carefully examine if *anything* of economic value was received for the gift.

#### a. Religious Gifts

Courts take a variety of approaches when valuing services or benefits provided by religious organizations from the more religious (attending Mass or High Holy Day services) to the more secular (counseling or daycare services). The cases with the most expansive view of value, *Hernandez v. Commissioner*<sup>79</sup> and *In re Young*,<sup>80</sup> suggest that religious donors may, under certain circumstances, receive economic consideration for their gifts, thereby converting what purports to be a gift into a bargained-for exchange. Other courts take a much narrower view, purportedly allying themselves with the majority approach to questions of consideration. In these instances, intangible value received by the donor offers no protection for creditors of the debtor-transferor, and therefore, is not adequate consideration for fraudulent conveyance purposes; only

---

72. See *United States v. American Bar Endowment*, 477 U.S. 105, 118 (1986) ("The *sine qua non* of a charitable contribution is a transfer of money or property without adequate consideration."). See also *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173 (N.Y. 1927) (Cardozo, J.); *King v. Trustees of Boston Univ.*, 647 N.E.2d 1196 (Mass. 1995); 1 E. ALLAN FARNSWORTH, CONTRACTS § 2.19 (1990).

73. See *American Bar Endowment*, 477 U.S. at 118; *Zahra Spiritual Trust v. United States*, 910 F.2d 240, 248-49 (5th Cir. 1990).

74. 490 U.S. 680 (1988), *aff'd* 819 F.2d 1212 (1st Cir. 1987), and 822 F.2d 844 (9th Cir. 1987).

75. *Id.* at 690-91.

76. See *In re Young*, 82 F.3d at 1407.

77. See, e.g., *In re Young*, 152 B.R. 939, 945 (Bankr. D. Minn. 1993).

78. See Bein, *supra* note 46.

79. 490 U.S. 680, 690-91 (1988).

80. See *supra* note 1.



economic value will do.<sup>81</sup> Thus, while religious services ordinarily will not be adequate consideration, courts should not hastily conclude that a transaction involving a religious donation necessarily lacks consideration. It depends on what economic value the debtor, in fact, received.

An extreme example of religious services as consideration is *Hernandez v. Commissioner*, wherein the Supreme Court determined that contributions to the Church of Scientology were not deductible under section 170 of the Internal Revenue Code.<sup>82</sup> The petitioners were members of the Church of Scientology, which charged its members a fixed "donation" to gain access to auditing and training sessions.<sup>83</sup> The mandatory charges for these sessions varied according to the length and sophistication of the session and could not be reduced except by prepayment.<sup>84</sup> These "mandatory fixed charges [were] based on a central tenet of Scientology known as the 'doctrine of exchange,' according to which any time a person receives something he must pay something back."<sup>85</sup> The proceeds of these fixed donations were the Church's primary source of income.

As members of the Church, the petitioners sought to deduct auditing and training session payments to the Church as charitable contributions under section 170 of the Internal Revenue Code.<sup>86</sup> Although the Commissioner of Internal Revenue stipulated that the Church was a religious organization entitled to receive tax-deductible contributions,<sup>87</sup> the Commissioner challenged whether the payments made were, in fact, "contributions or gifts" entitled to deduction under section 170 of the Internal Revenue Code.<sup>88</sup>

---

81. See, e.g., *In re Bloch*, 207 B.R. at 948 (noting that "the statute requires that the debtor must have been provided with something of economic, as opposed to religious or spiritual, value"); *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge)*, 200 B.R. 884 (Bankr. D. Idaho 1996).

82. *Hernandez v. Commissioner*, 490 U.S. 680 (1988). Section 170 of the Internal Revenue Code provides that a taxpayer may deduct from taxable income any "contribution or gift to or for the use of . . . [a] corporation, trust or community chest, fund, or foundation . . . organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . ." 26 U.S.C. § 170(c) (1997).

83. *Hernandez*, 490 U.S. at 685. According to the Court, auditing is the process in Scientology by which a person becomes aware of their immortal spiritual dimension. *Id.* at 684.

84. *Id.* at 685-86, 692.

85. *Id.* at 685.

86. *Id.* at 686.

87. *Id.* In a separate case, however, decided while *Hernandez* was pending, the Tax Court held that the Church of Scientology's mother church did not qualify as a tax exempt organization for years 1970 through 1972 because, among other things, it had diverted profits to its founders and others, and had conducted almost all of its activities for a commercial purpose. *Id.* at 686 n.4 (citing *Church of Scientology of Cal. v. Commissioner*, 83 T.C. 381 (1984), *aff'd*, 823 F.2d 1310 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988)).

88. *Id.*

The lower courts held that, because the exchange between the petitioners and the Church was a *quid pro quo*, the petitioners received consideration in the form of a “measurable, specific return.”<sup>89</sup> The “external features” of the transactions, these courts held, dictated that the petitioners had received consideration. “It is the structure of the transaction, and not the type of benefit received, that controls.”<sup>90</sup>

Affirming the lower courts’ decisions, the Supreme Court concluded that the petitioners’ expectation of services in the form of auditing and training sessions stripped the payments of their contribution or gift status. “Congress intended to differentiate between unrequited payments to qualified recipients and payments made to such recipients *in return for goods or services*.”<sup>91</sup> “[G]ifts,” the Court explained, relying on the legislative history of the Internal Revenue Code of 1954, are “made with no expectation of a financial return commensurate with the amount of the gift.”<sup>92</sup> “[T]hese payments were part of a quintessential *quid pro quo* exchange: in return for their money, petitioners received an identifiable benefit, namely, auditing and training sessions.”<sup>93</sup>

In dissent, Justice O’Connor criticized the illogical inconsistency of the IRS’ method of valuing religious services.<sup>94</sup> Justice O’Connor explained that the IRS denied deductibility in *Hernandez* solely because it viewed the exchange as a *quid pro quo*. As a result, she argued, the IRS should also deprive a variety of more mainstream religious transactions of their exempt status, including payments for pew rents, the purchase of High Holy Day admission tickets, or a tithe to obtain a temple recommend (the right to be admitted to the Mormon temple), since all are *quids pro quo*.<sup>95</sup> Moreover, she noted, treating religious transactions as *quids pro quo* made no economic sense where “the *quid* is

---

89. *Id.* at 688 (citations omitted). But for the price the church placed on the auditing and training sessions, it is unclear how the value of these services could be measured. Certainly, to the creditors of the petitioners, they would have had no value.

90. *Id.* (citations omitted).

91. *Id.* at 690 (emphasis added).

92. *Id.* (quoting S. REP. NO. 83-1622, 83d Cong., 2d Sess., 196 (1954); H.R. REP. NO. 83-1337, 83d Cong., 2d Sess., A44 (1954)).

93. *Id.* at 691. Why the Court agreed with the IRS that this benefit had economic value is unclear. The majority opinion cited cases where deductions had been denied for parochial school tuition. *Id.* at 693 (citing *Foley v. Commissioner*, 844 F.2d 94, 98 (2d Cir. 1988) and *Winters v. Commissioner*, 468 F.2d 778 (2d Cir. 1972)). Yet, these cases seem facially distinguishable, since an education may be purchased on the open market or obtained through the public school system. The value of an education is more readily quantified, and therefore educational payments are not as readily characterized as a contribution or gift. Purely religious services, by contrast, seem not to have the same sort of market value, as Justice O’Connor noted in her *Hernandez* dissent. *Hernandez*, 490 U.S. at 709-10.

94. *Id.* at 709-10.

95. *Id.*

exclusively of spiritual or religious worth.”<sup>96</sup> It would be impossible to compute the value of “an intangible (or, for that matter a tangible) that is not bought and sold except in donative contexts . . . .”<sup>97</sup>

Justice O'Connor was right about the valuation problem and the fraudulent conveyance problem demonstrates why. If the majority was correct—that religious services constitute consideration for tax purposes—then these services should also constitute consideration for fraudulent conveyance purposes. Yet, if the creditor-protection policy has any force, and consideration is measured from the perspective of the donor's creditors, then it is difficult to see how economic consideration existed or how it could be measured. It is unlikely that a debtor's attending church could materially protect the interests of his or her debtor's creditors.<sup>98</sup>

Moreover, the Court's reliance on the structure rather than the substance of the transaction encourages anomalous results. Churches that consider *Hernandez* carefully should impose external features on transactions that will ensure that donations are treated as *quid pro quo* exchanges should the donors become insolvent. It seems contrary to the mission of many religious institutions, however, to foist a *quid pro quo* on an adherent at the time the adherent needs the institution's services. Should churches be forced to make borrowers of beggars?

Arguably, because *Hernandez* is a tax case, its holding should be limited to that arena.<sup>99</sup> However, since the tax code is designed to recognize and tax income-producing transactions, and to provide deductions for certain other transactions, a transactional approach that is appropriate in the tax context should be equally appropriate in the fraudulent conveyance context. This is particularly so because both bodies of law ordinarily give great weight to the economic substance of a transaction notwithstanding its form.<sup>100</sup>

---

96. *Id.* at 705.

97. *Id.* at 706. The Scientologists were undeterred by the decision. In 1993, following a “campaign orchestrated by Scientology against the [IRS] and people who work there,” the IRS capitulated to the church's demand that it be given full tax exempt status. *Scientology's Puzzling Journey from Tax Rebel to Tax Exempt*, N.Y. TIMES, Mar. 9, 1997, at 1, 30-31.

98. There are exceptional cases. See *Wilson v. Upreach Ministries (In re Missionary Baptist Found.)*, 24 B.R. 973, 979 (Bankr. N.D. Tex. 1982) (holding that goodwill constituted reasonably equivalent value in exchange for a charitable religious contribution). In *In re Missionary Baptist Foundation*, because both debtor-donor and the donee were religious institutions, it made good business sense for the debtor to donate, or invest in, a counterpart religious institution. *Id.* at 979.

99. Both the *Young* district court and the *Newman* bankruptcy court effectively did this, rejecting the application of *Hernandez* to the fraudulent conveyance challenges in those cases. *In re Young*, 152 B.R. 938; *In re Newman*, 183 B.R. at 247. See also *In re Bloch*, 207 B.R. at 948 (“Contrary to the [d]efendant's assertions, the statute requires that the debtor must have been provided with something of economic, as opposed to religious or spiritual, value.”).

100. See *Ericsson Screw Mach. Prods. Co. v. Commissioner*, 14 T.C. 757, 764 (1950) (holding

Even if the form, or external features, should not control, a debtor may nonetheless be found to have received consideration for a gift, if "all aspects of the transaction" indicate that the debtor received either direct or indirect economic consideration.<sup>101</sup> Although not the holding of *In re Young*, the most recent federal appellate decision on religious donations as fraudulent conveyances, this dicta suggests that in the religious gift-giving context, an all-facts-and-circumstances modification to the majority approach to consideration is appropriate. For different reasons, *Young*, as *Hernandez*, found that religious services, like other services, *could* have economic value.

In *Young*, the spousal debtors, Bruce and Nancy Young, decided that the failure of their business would not deter them from continuing to give ten percent of their annual income to their church as they had done for many years.<sup>102</sup> During the year preceding the filing of their bankruptcy petition, and while insolvent, they contributed a total of \$13,450 to the Crystal Evangelical Free Church.<sup>103</sup>

The Youngs' bankruptcy trustee sued under section 548(a)(2)(A) of the Bankruptcy Code to recover these payments as constructive fraudulent conveyances. On cross-motions for summary judgment, the parties stipulated that the only significant issue to resolve was whether the Youngs received reasonably equivalent value in exchange for their donations.<sup>104</sup>

The bankruptcy court granted the trustee's motion and denied the Youngs' motion, holding that the debtors had received no economic value for their tithe.<sup>105</sup> Any benefit the Youngs received was religious in nature, and had benefited them personally. Their bankruptcy estate (i.e., their asset base) had not benefited in any way (i.e., such benefits could not be liquidated for the benefit of creditors).<sup>106</sup> The bankruptcy court noted that, even if the Youngs had received any value, it was, by definition, not in exchange for their tithe, since the church's worship services and religious programs were available to all church members,

---

that tax consequences flow from "the result which the parties sought when they began their transactions" regardless of the form taken); *Commissioner v. Ashland Oil & Ref. Co.*, 99 F.2d 588, 592 (6th Cir. 1938), *cert. denied*, 306 U.S. 661 (1939). See also Randolph Paul & Philip Zimet, *Step Transactions*, in *SELECTED STUDIES IN FEDERAL TAXATION* 200 (2d Series 1938); Sydney A. Gutkin, *Step Transactions*, 9 N.Y.U. INST. ON FED. TAX'N 1219 (1951).

101. See *In re Young*, 82 F.3d 1407.

102. *Id.* at 1410. See also Pierre Thomas, *Clinton Stops Justice Department from Seeking Forfeiture of Tithes*, WASH. POST, Sept. 16, 1994, at A8; Laurie Goodstein, *Religious Groups Fight U.S. in Bankruptcy Case*, WASH. POST, May 23, 1994, at A1.

103. *In re Young*, 82 F.3d 1407.

104. *Id.*

105. *In re Young*, 148 B.R. 886, 890-91, 895-96 (Bankr. D. Minn. 1992).

106. *Id.* at 893-94 & n.10.

whether or not they were active donors.<sup>107</sup>

On appeal, the district court agreed and upheld the bankruptcy court's finding that the debtors received inadequate consideration.<sup>108</sup> Good will and church services, the district court held, were not the sort of fairly concrete benefits that constitute reasonably equivalent value for fraudulent conveyance purposes.<sup>109</sup> The district court took a broader approach to value, reasoning that "all benefits and burdens to the debtor[s], direct or indirect," should be considered,<sup>110</sup> not merely those with "marketable financial value or economic utility from a creditor's view,"<sup>111</sup> as the bankruptcy court held. On this more expansive definition, the district court still concluded that the Youngs received inadequate consideration.<sup>112</sup>

As discussed in Section III.A.2.c., *infra*, the Eighth Circuit subsequently viewed the question quasi-constitutionally rather than as an issue of fraudulent conveyance law and found that RFRA prohibited avoidance of the donations.<sup>113</sup> The Eighth Circuit, nonetheless, approved the district court's more expansive view of consideration, stating that "[t]he district court correctly examined 'all aspects of the transaction and carefully measure[d] the value of all benefits and burdens to the debtor, direct or indirect' including 'indirect economic benefits.'"<sup>114</sup> The Court of Appeals later emphasized this sentiment in an opinion denying rehearing *en banc*, noting that there may be value in a variety of religious benefits and services. "Our inability to assign a precise dollar amount to these [religious] benefits . . . does not mean that no value is received."<sup>115</sup> For support, the Eighth Circuit cited Justice O'Connor's dissent in *Hernandez*, and noted that purchasing tickets for Jewish High Holy Day services or paying for a Mormon temple recommend would be instances where "religious contributions are directly linked to certain benefits."<sup>116</sup>

The views expressed by the district court and the Eighth Circuit in *Young* echo the holdings of *In re Missionary Baptist Foundation of*

---

107. *Id.* at 895-96.

108. *In re Young*, 152 B.R. 939, 948-49 (Bankr. D. Minn. 1993).

109. *Id.* at 950. The *Young* district court noted that the *Moses* case (discussed *infra* note 118 and accompanying text) was distinguishable on the grounds that the debtor in that case was required to make donations in order to maintain a position as deacon. *Id.*

110. *Id.* at 945.

111. *In re Young*, 148 B.R. at 894.

112. *In re Young*, 152 B.R. at 948-49.

113. *In re Young*, 82 F.3d at 1415 (noting that "whether the debtors received any economic benefit . . . is beside the point").

114. *Id.* at 1415 (quoting *In re Young*, 152 B.R. 939, 945 (Bankr. D. Minn. 1993)).

115. *In re Young*, 89 F.3d at 495.

116. *Id.* (citing *Hernandez v. Commissioner*, 490 U.S. 680, 691 (O'Connor, J., dissenting)). The question of whether these benefits have economic value is left unanswered.

*America, Inc.*,<sup>117</sup> and *In re Moses*.<sup>118</sup> These cases held that the economic value to the religious donor of religious and secular services were adequate consideration for religious donations. Moreover, a donor can receive economic benefit from religious and secular services, and the proper focus is economic, not religious.

In *Missionary Baptist*, for example, the court found that religious services preserved goodwill, and thus, yielded adequate consideration.<sup>119</sup> Presumably this finding relied on the fact that the debtor, like the church, was a religious organization.

Equally illustrative is the finding of the *Moses* court, that, in addition to such benefits as daycare and counseling,

access to religious services which Debtors attended at least three times a week also possessed exchangeable value. Although pure economic exchange which takes place between religious institutions and those who use their facilities is understandably downplayed so as to preserve the pious nature of such places of worship, such an exchange nevertheless exists. Many religious institutions require their congregation to pay dues to cover expenses of operation. Heating, air conditioning and electrical services, as well as other costs of operation are not provided to churches cost-free. . . . While this Court does not intend to value the amount of spiritual enrichment Debtors gained by engaging in worship, this Court does find that certain facilities and services provided by [the church], *i.e.*, access to the church which provided heating, air conditioning and electricity, do possess an exchangeable value.<sup>120</sup>

These courts were not necessarily wrong. Consideration requires a case-by-case analysis. Similarly, the many courts that reached opposite conclusions are not necessarily wrong. For instance, *Zahra Spiritual Trust*,<sup>121</sup> *Hodge*,<sup>122</sup> *Newman*,<sup>123</sup> and *Bloch*<sup>124</sup> are all decisions which held that a wide range of services provided to a debtor-donor, including "spiritual fulfillment,"<sup>125</sup> counseling,<sup>126</sup> occasional transportation, and

---

117. 24 B.R. 973, 979 (Bankr. N.D. Tex. 1982) (finding that goodwill constituted reasonably equivalent value in exchange for a charitable contribution).

118. *In re Moses*, 59 B.R. 815, 818 (Bankr. N.D. Ga. 1986) (noting that church services constituted property for purposes of Bankruptcy Code section 548).

119. *In re Missionary Baptist Found.*, 24 B.R. at 979.

120. *In re Moses*, 59 B.R. at 818-19.

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

122. *Fitzgerald v. Magic Valley Evangelical Free Church, Inc.* (*In re Hodge*), 200 B.R. 884 (Bankr. D. Idaho 1996).

123. *Morris v. Midway S. Baptist Church* (*In re Newman*), 183 B.R. 239 (Bankr. D. Kans. 1995), *aff'd*, 203 B.R. 468 (D. Kan. 1996).

124. *Wienman v. Word of Life Christian Center* (*In re Bloch*), 207 B.R. 944 (D. Colo. 1997).

125. *Id.* at 948.

126. *In re Newman*, 183 B.R. at 247-48.

minor home and auto repair services,<sup>127</sup> lacked the value necessary to immunize the religious donations from avoidance.

Courts face two kinds of problems when attempting to place an economic value on services or benefits provided by a religious organizations. First, courts should not ignore the economic value of services or benefits received by a debtor-donor simply because the provider of the service or benefit happens to be a religious institution. For instance, the *Hodge* and *Newman* courts held that church-provided services, such as counseling and auto repairs, lacked monetary value, and were therefore, inadequate consideration for fraudulent conveyance purposes.<sup>128</sup> This appears facially incorrect. If the debtor did not obtain these services from the church, the debtor would presumably have obtained them from a non-church entity, and may have paid more than the amount donated. Under such circumstances, the debtor's asset base would have been more significantly diminished than it was by the transaction with the church.<sup>129</sup> In light of the overriding creditor-protection purpose of the fraudulent conveyance laws, *Hodge's* and *Newman's* conclusions, that benefits lack value if provided by a church, appear incorrect.

The second problem courts face is the spiritual valuation issue identified by Justice O'Connor in *Hernandez*.<sup>130</sup> Essentially, the problem is how to value that to which a dollar value cannot be assigned.<sup>131</sup> Courts

---

127. *Id.*

128. The *Hodge* and *Newman* courts justify their holdings by focusing not on the value actually received, but on whether the value was received in exchange for the donation. See, e.g., *Fitzgerald v. Magic Valley Evangelical Free Church (In re Hodge)*, 200 B.R. 884 (Bankr. D. Idaho 1996) (holding that because church-donor's services were made available to all church members, no consideration was received by debtor-donor). See also *In re Tessier*, 190 B.R. 396, 399 (Bankr. D. Mont. 1995) (noting that church accepted debtors with or without tithing); *In re Newman*, 183 B.R. at 248 (finding no economic nexus between the services provided and the level of tithing by donor-debtor); *In re Lees*, 192 B.R. 756, 758 (Bankr. D. Mont. 1994) (finding no loss of privileges if tithing is reduced or eliminated); *In re Packham*, 126 B.R. 603, 608 (Bankr. D. Utah 1991). See also *In re Bloch*, 207 B.R. at 948 ("Contrary to the [d]efendant's assertions, the statute requires that the debtor must have been provided with something of economic, as opposed to religious or spiritual, value.").

One could argue that the phrase "in exchange for" need not require a direct link between transaction components (i.e., a *quid pro quo* exchange). Indeed, the indirect benefit defense, discussed in Section II.B.2., *supra*, would appear to be either a very broad interpretation of "in exchange for," or an exception to it. Moreover, because the primary goal of fraudulent conveyance law is to preserve the value of a debtor's estate for the benefit of creditors, the construction of the phrase "in exchange for" should be a secondary concern. Indeed, the phrase does not appear in the UFCA or the Statutes of Elizabeth.

129. See *In re Moses*, 59 B.R. at 818 (noting the higher cost of obtaining counseling and daycare services from a nonreligious provider).

130. See *supra* notes 79-100 and accompanying text.

131. *Hernandez*, 490 U.S. at 705-06 (stating that where "the *quid* [in a *quid pro quo*] is exclusively of spiritual or religious worth," it would be impossible to compute the value of "an intangible (or, for that matter a tangible) that is not bought and sold except in donative contexts . . .") (O'Connor, J., dissenting).

that attempt to do so should tread lightly since it is unclear how courts could ever assign a dollar value to spiritual services. Such services not only lack economic value due to their pious nature,<sup>132</sup> but they also have a value that is inherently subjective. Courts could not assign a dollar value to these services without inquiring into the sincerity and depth of the religious values held by the donor. Inevitably, an entanglement problem would result.<sup>133</sup> It is equally unclear how courts could perform such a valuation in a neutral manner across religious lines as required by the Free Exercise Clause or, to the extent still applicable, the RFRA. In short, although there may be cases where it is possible to value the spiritual, it seems that the highly problematic task is best avoided by the courts. Rather, as the *Young* and *Moses* courts did, courts should look carefully at the measurable economic value the debtor received and determine whether that value was reasonably equivalent to the debtor-donor's gift.

In short, it is not readily apparent that religiously-motivated gifts always lack consideration for fraudulent conveyance purposes. The hardest cases, such as pew rents and High Holy Day tickets, must be viewed for fraudulent conveyance purposes through the same lens as all other transactions. If a court finds that there is a market for these services, it should be able to find that the debtor-donor received economic value for the gift, without having to inquire into the sincerity of the donor's beliefs. The mere fact that the transaction is termed a gift, or results in the purchase of a religious item, such as a seat in a church or a non-religious item from a church such as counseling, however, should not lead to the conclusion that the debtor-transferor received inadequate consideration.

#### b. Political Gifts

In contrast to the broad range of approaches courts have used to determine whether consideration exists in the religious giving context, there is considerably less case law in the political-giving context. Although one case, *1992 Republican Senate-House Dinner Committee v. Carolina's Pride Seafood, Inc.*,<sup>134</sup> considered the issue, the court summarily dismissed the prospect that the donor could have received economic or legal value in exchange for a political contribution. Yet, it is unclear whether, in every instance, a political contribution or expenditure should be determined to be lacking consideration. If, as some courts have held, gambling or investing while insolvent are not *per se*

---

132. See *In re Moses*, 59 B.R. at 818.

133. See discussion *infra* Section III.A.1.

134. 858 F. Supp. 243 (D.D.C. 1994).



fraudulent conveyances,<sup>135</sup> why would contributing to the re-election of a candidate whose policies may yield an improved business climate not also be considered as such? Would the result be different if the insolvent donor were also the candidate?

In *Carolina's Pride*, the debtor and his corporation, International Marketing Bureau, Inc. ("IMB"), donated \$500,000 to the 1992 Republican Senate-House Dinner Committee (the "Committee"), an unincorporated association registered with the Federal Election Commission.<sup>136</sup> In of March 1992, Kojima caused IMB to contribute \$400,000 to the Committee, an exchange which entitled Kojima to sit at a Committee dinner with the then-Vice President of the United States.<sup>137</sup> Hoping to dine with the President, Kojima contributed another \$100,000 of his own funds, for which he gained a seat with the President.<sup>138</sup>

Although a strong supporter of the Republican party, Kojima apparently showed less support for his creditors. The media, covering the dinner characterized Kojima as a deadbeat dad, who allegedly owed more than \$100,000 in unpaid child support.<sup>139</sup> In May of 1992, following creditor suits to avoid Kojima's donations, the Committee filed an interpleader action against Kojima's creditors, asserting its entitlement to retain the \$500,000 contributed by Kojima and IMB.<sup>140</sup>

Applying California's UFTA, the District Court for the District of Columbia considered only the tangible economic value Kojima received, not the intangible value of the opportunity he purchased.<sup>141</sup> The court found that Kojima received less than reasonably equivalent value because, when measured monetarily, he received only minimal consideration for his contributions (probably, a mere chicken dinner).<sup>142</sup> Dismissing the Committee's claim in derisive terms, the court held that the intangible value Kojima received for his contribution excluded "the value that comes from supporting sound government policies,' invitations to various events, and the opportunity to sit at the head table."<sup>143</sup>

---

135. See *Allard v. Flamingo Hilton (In re Chomakos)*, 170 B.R. 585, 595 (Bankr. E.D. Mich. 1993), *aff'd*, 69 F.3d 769 (6th Cir. 1995) (holding that insolvent debtor received reasonably equivalent value for opportunity to gamble). Cf. *In re Morris Communications NC, Inc.*, 914 F.2d 458, 460, 475 (4th Cir. 1990) (finding investment in non-wireline cellular phone license lottery unreasonably risky, and therefore, not reasonably equivalent value). See also Bein, *supra* note 46.

136. *Carolina's Pride*, 858 F. Supp. at 245.

137. *Id.*

138. *Id.*

139. *Id.* at 245-46.

140. *Id.* at 246 n.6.

141. *Id.* at 248. The court declined to answer the question as to IMB, since it believed more discovery was necessary to determine whether defendants were entitled to bring a claim against IMB under a theory of "reverse veil-piercing." *Id.* at 250-51.

142. *Id.* at 249.

143. *Id.*

Citing the district court holding in *Young*, the *Carolina's Pride* court reasoned that, from a creditor's perspective, "donations may cause the rapid dissipation of assets which could render the debtor insolvent."<sup>144</sup> Consequently, the court concluded that no reasonable jury could find that Kojima received reasonably equivalent value for his contributions.<sup>145</sup>

Should the court have so readily dismissed the opportunity value Kojima purchased? If, as other courts have held, gambling, investing, or calls to a telephone psychic<sup>146</sup> are opportunities that have value to a debtor, it is hasty to assume that "investing" in a political campaign is any less prudent. For instance, in *In re Chomakos*, the Bankruptcy Court for the Eastern District of Michigan concluded that insolvent debtors that gambled received reasonably equivalent value for their expenditures because they purchased the opportunity to win more than they invested.<sup>147</sup> The risk was not unreasonable because the debtors were regular gamblers who frequently won. Although gambling may not have been the debtors' business, it was not an activity "so abnormal, unforeseeable or outrageous as to require" a finding that the gambling payments should be avoided.<sup>148</sup>

As Professor Zaretsky noted, perhaps the real issue in fraudulent conveyance litigation is the reasonableness of the risk undertaken by the insolvent debtor. "Fraudulent transfer law does not bar debtors from taking risks with their creditors' funds. It does, however, regulate the permissible degree of risk."<sup>149</sup> Under this theory, a campaign expenditure may be a sound investment, particularly if it aids one's own campaign.

Consider a scenario where President Clinton lost his bid for re-election, and thereafter, financially exhausted from his legal crises, filed personal bankruptcy. Would a bankruptcy trustee appointed for President Clinton be able to avoid expenditures made in aid of his own candidacy? What about his expenditures in aid of important Congressional allies? All such expenditures may be considered reasonable investments, since from a purely commercial perspective, they would be similar to the kinds of capital risks undertaken every day. It is not clear why a lower risk threshold should apply to candidates for elected office.

Because it is unclear whether consideration must always be money

---

144. *Carolina's Pride*, 858 F. Supp. at 249.

145. *Id.*

146. See *Samson v. U.S. West Communications, Inc. (In re Grigonis)*, 208 B.R. 950, 955-56 (Bankr. D. Mont. 1997).

147. *In re Chomakos*, 170 B.R. at 593.

148. *Id.* at 595.

149. See, e.g., Zaretsky, *supra* note 19, at 1173 (1995).

or its equivalent, a broad approach to consideration is appropriate in the context of religious or political giving, consistent with the creditor-protection purpose of fraudulent conveyance laws. At the very least, courts should not assume that simply because a transaction is characterized as a donation, the donor *ipso facto* received inadequate consideration.

More importantly, there is the possibility that those types of transactions are protected by the First Amendment, or by statute, either of which may constitute an independent defense. Alternatively, by application of the principle enunciated in *BFP*, the availability of such rights may be legal consideration. Because, as discussed below, this reasoning could wreak havoc on commercial laws, and because spending money should not be deemed to be worship or speech, fraudulent conveyance laws should not be subject to heightened judicial scrutiny under the First Amendment.

### III. CONSTITUTIONAL ISSUES AND LEVELS OF SCRUTINY

The Supreme Court assesses the constitutionality of statutes by determining the level of scrutiny it should apply to the challenged statute. The Court then weighs the state's need for the statute against the individual's right to an exemption from it in light of the chosen level of scrutiny.<sup>150</sup> The Religious Freedom Restoration Act ("RFRA") attempted to impose strict scrutiny on courts reviewing laws that substantially burdened religious exercise, and further attempted to remove the authority from the judiciary to determine which standard applied. Theoretically, the essential inquiry is the same for all purposes: If a

---

150. See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943-44 (1987). The levels-of-scrutiny approach was first suggested in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), where the Court recognized that certain rights would receive increased judicial protection in the form of a "more searching judicial inquiry." See also Daniel J. Solove, *The Faith Profaned: The Religious Freedom Restoration Act and Religion in Prisons*, 106 YALE L.J. 459, 460, n.9 (1996) (citing 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 20.7, at 19 (2d ed. 1992)). Although the Court and commentators have attempted to categorize the levels of scrutiny applied, the Court's precedent is not consistent. It is generally assumed that the Court reviews statutes under one of the following three levels of scrutiny: strict, intermediate, or rational basis review. However, Justice Stevens' point in *City of Cleburne, Texas v. Cleburne Living Center, Inc.* seems correct: "[O]ur cases have not delineated three—or even one or two—such well-defined standards. Rather, our cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other." 473 U.S. 432, 451 (1984) (Stevens, J., concurring).

This article does not seek to break new ground in divining the Court's tiered-scrutiny analysis, especially given the confusion surrounding free exercise jurisprudence. See, e.g., Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1213 n.167 (1996) ("pre-Smith case law is hardly coherent or definitive"). Rather, it seems that the more important the right at issue, the more severe the Court's scrutiny of the statute that allegedly interferes with that right.

statute, such as the fraudulent conveyance statute, is subject to heightened scrutiny, the government must show that the statute satisfies a compelling governmental interest. The viability of fraudulent conveyance laws, as applied to religious or political gift-giving, therefore, depends on the level of scrutiny applied and the relative importance of the fraudulent conveyance statutes.

Strict, or heightened, scrutiny is "the most rigid"<sup>151</sup> and "exact-ing"<sup>152</sup> judicial examination a statute can undergo. Among others, the Court has applied strict scrutiny analysis to cases involving content-based restrictions on speech,<sup>153</sup> and laws that are said to impair fundamental rights.<sup>154</sup> Under the strict scrutiny analysis, the government must show that the interests protected by the statute are "compelling,"<sup>155</sup> "par-amount,"<sup>156</sup> "overriding,"<sup>157</sup> or "of the highest order."<sup>158</sup> Moreover, the government must show that the law is the least intrusive means of fur-thering those compelling interests.<sup>159</sup> This discussion focuses on cases such as *Sherbert*,<sup>160</sup> *Yoder*,<sup>161</sup> and *Buckley*,<sup>162</sup> which have subjected facially neutral statutes to strict scrutiny because of their affect on wor-ship or political spending.

Few laws are subject to strict scrutiny. The vast majority of laws are subject to either intermediate or minimal levels of scrutiny. Interme-diate scrutiny is reserved for governmental interests that a court consid-

---

151. *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (holding that the internment of Japanese citizens did not violate the Equal Protection Clause).

152. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (holding that admissions policy with racial quotas violates the Equal Protection Clause).

153. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (holding that a ban on "electioneering" within 100 feet of polling sites satisfies strict scrutiny).

154. See *U.S. v. Virginia*, 116 S. Ct. 2264, 2286-87 (1996) (finding that establishing an all-female military academy to preserve adversative all-male military academy is not supported by "exceedingly persuasive justification").

155. *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (holding that a total ban on indecent dial-a-porn services was invalid under strict scrutiny).

156. *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (holding that statute requiring labor union organizers to register with state before soliciting membership, as applied to unregistered union organizer who gave public speech, violated the First Amendment).

157. *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (holding that the denial of tax-exempt status to a religious university that refused to admit interracial married applicants satisfied strict scrutiny).

158. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (holding that the Free Exercise Clause mandated that the Amish be exempt from mandatory schooling laws).

159. *Sable Communications*, 492 U.S. at 126.

160. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

161. *Wisconsin v. Yoder*, 406 U.S. 205 (1992).

162. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

ers "important"<sup>163</sup> or "substantial,"<sup>164</sup> but not necessarily of the highest order. Courts apply intermediate scrutiny in cases involving gender-based classifications,<sup>165</sup> content-neutral restrictions on speech in public fora, including those governing time, place, and manner,<sup>166</sup> and restrictions on commercial speech.<sup>167</sup>

Minimal scrutiny, often referred to as rational-basis review,<sup>168</sup> is the least stringent form of constitutional scrutiny. When applying minimal scrutiny, courts uphold the law if it bears a rational relation<sup>169</sup> to a legitimate governmental purpose.<sup>170</sup> The Court has provided various interpretations of minimum scrutiny, ranging from rational-review-with-bite, as in *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>171</sup> to cases that sustain a law even if it is "based on rational speculation unsupported by evidence or empirical data."<sup>172</sup> Minimal scrutiny is used when reviewing restrictions of access to nonpublic fora,<sup>173</sup> nonsuspect classifi-

---

163. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) (holding that workers' compensation statute that treated widows differently from widowers violated the Equal Protection Clause).

164. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (upholding conviction of a defendant who burned his draft registration certificate in order to express antiwar beliefs).

165. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (affirming that nursing school's women-only admissions policy was unconstitutional). *But see United States v. Virginia*, 116 S. Ct. 2264, 2286-87 (1996) (finding that establishing an all-female military academy to preserve adversative all-male military academy is not supported by "exceedingly persuasive justification").

166. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (upholding Cable Television Consumer Protection Act of 1992 under intermediate scrutiny as content-neutral economic legislation); *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (upholding city's requirement that performers in public parks must use city-provided sound equipment and technicians).

167. *See, e.g., Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557, 546-66 (1980) (holding that ban on promotional advertising by electric utilities was more extensive than necessary to further state's interest in energy conservation and fair rate structure). *But see 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996) (holding that the First Amendment protects right to advertise liquor prices).

168. *See Heller v. Doe*, 509 U.S. 312, 319 (1993) (holding that involuntary commitment of mentally retarded individuals did not violate equal protection or due process rights).

169. *See id.* at 320.

170. *See id.*

171. 473 U.S. 432, 448 (1984) (holding that requiring special use permit for proposed group home for retarded persons failed to pass muster because "the record does not reveal any rational basis for believing the [group] home would pose any special threat to the city's legitimate interests").

172. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (holding that statute's distinction between separately and commonly owned buildings for purposes of franchise requirement had a rational basis).

173. *See, e.g., International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992) (upholding ban on face-to-face solicitation in airports, but striking ban on distribution of literature).

cations,<sup>174</sup> and infringements on nonfundamental rights.<sup>175</sup>

Whether fraudulent conveyance laws violate the First Amendment also requires a determination of whether a fraudulent conveyance lawsuit constitutes state action, because the First Amendment only precludes state interference with religious or political freedoms.<sup>176</sup> If a fraudulent conveyance lawsuit is merely a private action, then First Amendment rights are not implicated. This is not a simple issue, since the rights asserted in a fraudulent conveyance action are usually private rights, such as claims arising from contracts or torts. If, however, *New York Times v. Sullivan*<sup>177</sup> and *Fuentes v. Shevin*<sup>178</sup> are correct, and libel or foreclosures, respectively, are state actions, then arguably, a constructive fraudulent conveyance action, frequently termed a quasi-contract action, is also state action.<sup>179</sup> In this article, I treat a fraudulent conveyance action as state action involving the enforcement of private rights.

#### A. *Free Exercise & RFRA*

The First Amendment provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."<sup>180</sup> Although the Court recently interpreted the Free Exercise Clause to mean that "[a]bsent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits,"<sup>181</sup> Congress attempted, through RFRA, to reverse the presumption implicit in the Court's interpretation. In RFRA, Congress sought to subject neutral laws of general application to heightened scrutiny if they substantially burdened religious practice. Further, Congress directed courts to strike such laws unless supported by a compelling

---

174. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 470-71 (1991) (upholding requirement that state judges retire at age of 70).

175. See, e.g., *id.* at 471.

176. See, e.g., *Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972).

177. 376 U.S. 254, 265 (1964). See also Sunstein, *supra* note 10, at 269 (discussing state action doctrine).

178. 407 U.S. 67, 70-71 (1972).

179. See, e.g., *United States v. Neidorf*, 522 F.2d 916, 918 (9th Cir. 1975). It appears the issue has not been addressed in any published fraudulent conveyance/First Amendment decision. One may argue that, unless a state actor is involved in the fraudulent conveyance action—a sheriff to execute, a trustee in bankruptcy to prosecute an action—then a simple fraudulent conveyance action prosecuted by a contract creditor involves no state action. See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-6, at 17-11-1713 (2d ed. 1988) (discussing *Flagg Brothers v. Brooks*, 436 U.S. 149, 157 (1978) (finding no state action for purposes of 42 U.S.C. § 1983 where assets sold at privately conducted foreclosure, even though state marshals seized assets for transfer to auctioneer)).

180. U.S. CONST. amend. I. This provision applies to the states through the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

181. *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

state interest and a showing that the law is the least restrictive means of furthering such interest.<sup>182</sup> Although RFRA has since been struck down as it applies to state law,<sup>183</sup> *Young* held that RFRA defeats a fraudulent conveyance challenge under the Bankruptcy Code to a religious gift.<sup>184</sup> Since RFRA may continue to apply to federal laws such as the Bankruptcy Code, and a number of states may adopt similar versions of RFRA, it is entirely possible that statutory strict scrutiny could continue to be applied to fraudulent conveyance laws when used to recover religious donations.<sup>185</sup>

Heightened scrutiny should not ordinarily be applied to a fraudulent conveyance attack on a religious donation, because fraudulent conveyance laws are facially neutral, commercial laws of general application. Unless aimed at a particular religious group or practice, or applied in an uneven or discriminatory manner, fraudulent conveyance laws should be reviewed under less-than-heightened scrutiny, like other economic regulations that compete with the Free Exercise Clause.

#### 1. FREE EXERCISE AND STRICT SCRUTINY—"FEEBLE IN FACT"

In order to understand what RFRA sought to restore, it is necessary to understand the Court's free exercise jurisprudence prior to *Smith*,<sup>186</sup> the case Congress sought to overrule through enactment of RFRA. Unlike the application of strict scrutiny in other fields, characterized as a "barrier [that is] strict in theory and fatal in fact,"<sup>187</sup> in pre-*Smith* religious exemption cases, the test has been characterized as "strict in theory but feeble in fact."<sup>188</sup> Outside of the employment context, the Court

182. Religious Freedom Restoration Act, S. Rep. No. 103-111, 103d Cong., 1st Sess. (1993) (codified at 42 U.S.C. §§ 2000bb-1 (a)-(c) (1997)), reprinted in 1993 U.S.C.C.A.N. 1892.

183. See *City of Boerne v. Flores*, 117 S. Ct. 762 (1997), rev'g *City of Boerne, Texas v. Flores*, 73 F.3d 1352 (5th Cir. 1996). As discussed in Section III.A.2., it appears to matter little for purposes of this article that the Court struck RFRA as applied to state law since, among other reasons, the Bankruptcy Code is federal law.

184. See *In re Young*, 82 F.3d 1407.

185. As to the continued viability of RFRA against federal laws, see Linda Greenhouse, *Laws Are Urged to Protect Religion*, N.Y. TIMES, July 15, 1997, at A8 (indicating that scholars view RFRA as having survived *Boerne* as against federal laws). In addition, some states are contemplating state versions of RFRA. For example, Michigan appears destined to be among the first, with House Bill No. 4376, introduced February 25, 1997 by Representative Profit. It passed the Michigan House but had not, as of July 1997, been considered by Michigan's Senate. The New York State Assembly may introduce a similar bill. See ALBANY TIMES UNION, July 10, 1997, at B2.

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

187. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

188. Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 446-47 (quoting Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994) and Gunther, *supra* note 187, at 8.

has never used that standard to shelter religious conduct from a facially neutral law of general application, at least where no other protected constitutional interest was at issue.

a. *Pre-Smith* Free Exercise

Prior to *Smith*, free exercise jurisprudence was governed by *Sherbert v. Verner*,<sup>189</sup> which held that the belief-versus-practice distinction, used for approximately 100 years, no longer applied.<sup>190</sup> Rather, the state was required to show a compelling interest in denying unemployment benefits to a Seventh Day Adventist church member ineligible for work due to religious observance requirements.<sup>191</sup> The First Amendment claimant argued that denying her unemployment benefits violated her free exercise rights. The Court agreed.

The Court reasoned that denying benefits impermissibly burdened the claimant's free exercise rights by causing her to forego a benefit if she chose to follow the dictates of her religion.<sup>192</sup> The fact that the unemployment benefits involved were a privilege instead of a right was insufficient to overcome the constitutional problems arising from denial of these benefits, particularly when the ultimate reason was the claimant's religious beliefs.<sup>193</sup> To the contrary, "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."<sup>194</sup>

The effect of *Sherbert* was to treat religious practice as a substantive right beyond regulation in matters that are very important to the individual.<sup>195</sup> Almost a decade later, in *Wisconsin v. Yoder*, the Supreme Court upheld this point of view.<sup>196</sup> In *Yoder*, Amish parents challenged a law that required their children to attend school up to the age of sixteen.<sup>197</sup> The Court found that the Wisconsin law violated the Amish parents' free exercise rights in that it "affirmatively compell[ed] them, under threat of criminal sanction, to perform acts undeniably at

---

189. 374 U.S. 398 (1963).

190. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1879).

191. *Sherbert*, 374 U.S. at 406-09.

192. *Id.* at 404.

193. *Id.* at 404, 406.

194. *Id.* at 404. This analogy seems strained in light of the fact that unemployment benefits were in question. A fine implies that the state took something from *Sherbert* for exercising her right to worship. But the state provided benefits to which she was entitled notwithstanding the observance requirements of her religion.

195. See Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 *FORDHAM L. REV.* 883, 885 (1994).

196. 406 U.S. 205 (1972).

197. *Id.* at 207.



odds with fundamental tenets of their religious beliefs.”<sup>198</sup> This right, coupled with the parental right to control the religious upbringing and education of minor children,<sup>199</sup> created a personal liberty greater than the state’s interest in providing compulsory education for children.<sup>200</sup>

b. *Smith*

*Smith* was the death of heightened scrutiny in contests between the Free Exercise Clause and neutral laws of general applicability.<sup>201</sup> The claimants in *Smith* were fired from their jobs at a private drug rehabilitation center because they ingested the hallucinogenic drug peyote while attending a religious ceremony of the Native American Church in violation of Oregon law.<sup>202</sup> When they applied for unemployment compensation benefits, the state denied their request, on the grounds that they had lost their jobs because of work-related misconduct.<sup>203</sup> The claimants sued, alleging that the Oregon law denying their claim violated their free exercise rights.

Although the Oregon Supreme Court agreed with the claimants,<sup>204</sup> the U.S. Supreme Court did not. Instead, it held that the right to free exercise did not relieve an individual of the duty to comply with an otherwise valid law of general application.<sup>205</sup>

To make an individual’s obligation to obey such a [facially neutral] law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is “compelling”—permitting him, by virtue of his beliefs, “to become a law unto himself,”—contradicts both constitutional tradition and common sense.<sup>206</sup>

The *Smith* Court justified its conclusion by referring to the erratic application of the compelling interest test in the free exercise context. The Court reasoned that there was little, outside the employment context as it applied to the free exercise of religion, that was *not* considered a compelling state interest.<sup>207</sup> Thus, notwithstanding the complaints of religious adherents to the contrary, the Court has found compelling gov-

---

198. *Id.* at 218. The parents had been subject to a fine for failure to comply. *Id.* at 207, 218.

199. *Id.* at 231-32. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (discussing the rights of parents to provide religious education for children).

200. *Yoder*, 406 U.S. at 234.

201. *Smith*, 494 U.S. at 885.

202. *Id.* at 874. The drug rehabilitation center where the claimants worked had a no-tolerance rule for its employees. During the state court proceedings, one of their supervisors testified that employees would similarly have been dismissed had they taken wine during Catholic Mass.

203. *Id.*

204. *Smith v. Employment Div., Dep’t of Human Resources*, 721 P.2d 445 (Or. 1986).

205. *Id.* at 879.

206. *Id.* at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)).

207. *Id.* at 877-79. The Court did not explain why or whether this distinction mattered. Nor did it explain, given that *Smith* was also an employment case, why the Court should not be bound

ernment interests in maintaining the tax system,<sup>208</sup> preserving national security,<sup>209</sup> ensuring public safety,<sup>210</sup> providing public education,<sup>211</sup> and enforcing participation in the social security system.<sup>212</sup> Except in the employment context,<sup>213</sup> the compelling interest test was always applied in conjunction with some other constitutionally protected right, such as freedom of speech or freedom of the press.<sup>214</sup>

*Smith*'s critics rallied around its central defect: "[T]he Free Exercise Clause," Justice O'Connor recently explained, "is not simply an antidiscrimination principle that protects only against those laws that single out religious practice for unfavorable treatment."<sup>215</sup> Rather, the Free Exercise Clause "is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law."<sup>216</sup> Professor McConnell has similarly argued that free exercise exemptions are not a special preference for religious minorities. They simply reflect the requirement of state neutrality toward all religions.<sup>217</sup>

The reach of the Free Exercise Clause is beyond the scope of this article. Nevertheless, a few general observations are in order. First, both *Sherbert* and *Smith* are problematic—*Sherbert* because it goes too far, and *Smith* because it does not go far enough. The holding of *Sherbert* appears wholly inconsistent with the bulk of free exercise cases, which have found matters no more compelling than employment benefits sufficiently important to defeat religious exemption claims. While *Sherbert* could have enunciated a perfectly appropriate test for free exercise claims, it nevertheless came to the wrong result. *Sherbert* imposed

---

by its precedent in that area. Presumably, the illegality of ingesting peyote justified the distinction.

208. See *Hernandez*, 490 U.S. at 699.

209. See *Gillette v. United States*, 401 U.S. 437, 461 (1971).

210. See *Prince v. Massachusetts*, 321 U.S. 158, 168-69 (1944).

211. See *Yoder*, 406 U.S. at 213.

212. See *United States v. Lee*, 455 U.S. 252, 258 (1982).

213. The Court found no compelling interest in three other unemployment-free exercise cases. See *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 835 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 140-41 (1987); *Thomas v. Review Board of Ind. Employment Sec. Div.*, 450 U.S. 707, 719 (1981).

214. See *Smith*, 494 U.S. at 881-82. Professor McConnell has noted that this may have been a rather disingenuous statement by the Court. On this logic, *Wisconsin v. Yoder* would have been wrong, since the adherents in that case had no independent constitutional right to withhold their children from school. See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1120-21 (1990).

215. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2177 (1997) (O'Connor, J., dissenting) (citing *Smith*, 494 U.S. at 892-903 (O'Connor, J., concurring in judgment)).

216. *Id.*

217. See McConnell, *supra* note 214, at 1130.

contorted results onto a series of successor cases that found "compelling" state interests in order to prevent the free exercise trump.

Likewise, *Smith* appears to be an act of judicial exasperation that reflects an accumulated frustration with the inconsistency of post-*Sherbert* free exercise jurisprudence. Yet *Smith*'s critics are correct in that the Free Exercise Clause is more than a prohibition on government discrimination against religion. The essential question is: How *much* more? As discussed in Section III.A.2., *infra*, RFRA is Congress' attempt to answer the question by reference to *Sherbert* and *Yoder*, but it seems to beg the question posed by the shortcomings of those decisions. What is clear is that when laws involving commerce conflict with religious concerns, the laws can, and should, trump.

### c. Religion and Commerce

Whatever else heightened scrutiny may mean in free exercise cases, it has had little force in cases involving a clash of commercial and religious concerns. In such cases, the Court gives little weight to the religious concerns of the religious claimant, and instead takes a transactional approach, emphasizing neither the beliefs nor the motivations of the parties, but rather the transaction that occurred. The Court has generally held that the mere fact that religious exercise directly or indirectly results in greater transaction costs to the adherent is not grounds for a religious exemption from a neutral law of general application. This approach has been justified by concerns similar to the concerns expressed in *Smith*—that religious exemptions to commercial obligations could lead to wholesale systemic disruption.

For example, in *Braunfield v. Brown*, the Court refused to void Sunday closing laws as excessively burdensome to Jews, who were forced to close for two days rather than one because they observe Sabbath on Saturday.<sup>218</sup> Although the law resulted in no excessive cost of worship, it deprived Jews of an extra day of income. Similarly, in *United States v. Lee*, the Court refused to exempt, on free exercise grounds, an Amish farmer from paying his share of social security taxes, even though the Amish oppose the national social security system.<sup>219</sup>

---

218. 366 U.S. 599, 601, 609 (1961).

219. 455 U.S. 252, 254-55 (1982). *Lee* contains the Court's best articulation of this transactional approach: "When followers of a particular sect enter into a commercial transaction as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 216. Some may argue that tithing, a form of religious giving, is not voluntary but compulsory, and that this dictum should not apply to insolvent religious donors who tithe. However, because it appears that religious donors who are compelled to tithe may nevertheless choose the form of the tithe (cash, goods or services), this dictum should apply even in the instance of tithing.

Again, this exacted a non-worship-related cost for complying with religious dictates.

The Court even upholds added costs when they apply directly to religious worship. Thus, in *Hernandez v. Commissioner*, the Court rejected the Scientologists' free exercise claim that denial of an income tax deduction for "auditing and training sessions (which are part of Scientology's religious practice), placed a heavy burden on a central practice of Scientology by deterring adherents from attending the prescribed sessions."<sup>220</sup> The Court, focusing on the transaction, reasoned that the only burden section 170 of the Internal Revenue Code imposed was economic, not religious, since "[a]ny burden . . . derives solely from the fact that, as a result of the deduction denial, adherents have less money available to gain access to [auditing and training] sessions."<sup>221</sup>

Perhaps the rule to extract from these cases, as suggested by Professor McConnell and Judge Posner, is that laws that increased costs to religious adherents are not constitutionally infirm if they also apply to the non-religious.<sup>222</sup> Increased cost is incidental and, therefore, constitutionally tolerable, if free exercise is not the sole reason for the cost.<sup>223</sup> In dicta, *Sherbert* comments that the denial of employment benefits operates as a fine. This seems wrong. Anyone who refused to work on Sunday, whether for religious or secular reasons, would lose their benefits under the law at issue in *Sherbert*.

The history behind the Free Exercise Clause supports this interpretation. Free exercise, as it was understood both before and shortly after ratification of the Constitution, may well have tolerated a greater range of religious exemption than envisioned in *Smith*, but religious rights would never be permitted to trump private rights. Thus, the Charter of Rhode Island of 1663, cited by Justice O'Connor in her *Boerne* dissent, still limited freedom of worship to cases where adherents did not use their religious liberty to "licentiousness and profaneness; nor to the civil injury, or outward disturbance of others."<sup>224</sup> Even Professor McConnell

---

220. *Hernandez*, 490 U.S. at 698 (quoting Petitioners' Brief). The Court was apparently also persuaded by the fact that the petitioners' deductions required no IRS inquiry into valuation, since the church set its own fees. *Id.* at 698 n.12.

221. *Id.* at 699. This approach was soon followed in *Jimmy Swaggart Ministries v. Board of Equalization of Cal.*, 493 U.S. 378, 389-90 (1990), where the Court determined that the levying and collection of generally applicable sales and use taxes imposed no constitutionally significant burden on appellants (evangelists).

222. Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 35 (1989) ("a regulation is not neutral in an economic sense if, whatever its normal scope or its intentions, it arbitrarily imposes greater costs on religious than on comparable nonreligious activities.").

223. See *supra* notes 189-94 and accompanying text.

224. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2179 (1997) (citations omitted). Justice Scalia pointed out that, at the time the proviso in the Rhode Island charter was enacted, the licentiousness

believes that the stopping point for religious exemptions should come when free exercise claims interfere with private rights: "Free exercise should be protected 'in every case where it does not trespass on private rights or the public peace.'"<sup>225</sup>

Every case in which a religious donation is challenged as a fraudulent conveyance involves a choice between the right of free exercise and a trespass on private rights, because the purpose of avoiding a constructively fraudulent conveyance is the payment of creditors holding allowable claims against the debtor.<sup>226</sup> In paying the church rather than creditors, the debtor will have trespassed on the private rights of her creditors to repayment. The obligation to pay valid claims is a central part of the facially neutral commercial law. Because even the broadest understanding of free exercise would not sanction a debtor's failure to pay creditors, fraudulent conveyance laws should not ordinarily fail through implementation of a free exercise exemption.

A free exercise challenge, however, is not inconceivable. One can imagine circumstances where fraudulent conveyance laws may be applied unconstitutionally, in a "widespread pattern" of discrimination.<sup>227</sup> If, for example, Jewish debtors' purchases of High Holy Day tickets are found to be supported by consideration but tithes are not, there may be an impermissible application of fraudulent conveyance laws.<sup>228</sup> Where to draw the boundary properly is not always clear and should be left to the court on a case-by-case basis. As a general matter, it is difficult to conceive of a circumstance where an insolvent religious donor would be permitted to assert free exercise grounds in order to prevent avoidance of a religious donation.

Given these principles, it is difficult to see how a fraudulent conveyance claim should be foiled. Yet, that is exactly what happened in *Young*, where the Eighth Circuit refused to permit a bankruptcy trustee to avoid a religious donation as a constructive fraudulent conveyance

---

in question meant disobedience to general laws. *Id.* at 2173 (citing *Queen v. Lane*, 6 Mod. 128, 87 Eng. Rep. 884, 885 (Q.B. 1704)). Ironically, Professor McConnell's own scholarship indicates that the earliest contests between the free exercise principle and laws of general application went in favor of laws of general application, as in *Stansbury v. Marks*, where a Jew was fined for refusing to testify on his Sabbath. McConnell, *supra* note 214, at 1133.

225. McConnell, *supra* note 214, at 1109, 1127 (quoting 1822 letter from James Madison to Edward Livingston).

226. 11 U.S.C. §§ 501, 541 (1995).

227. *Flores*, 117 S. Ct. at 2169.

228. Note, however, that such a result would not imply a different level of scrutiny, but simply, as in the *Lukumi* case, a sense that the government violated its obligation to remain neutral across religions. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534-35 (1993) (holding a facially neutral city ordinance forbidding ritual slaughter impermissible targeted at Santeria religion).

under the Bankruptcy Code.<sup>229</sup> Since it is unclear whether RFRA still applies to federal law, and a number of states appear committed to passing their own versions, there are likely to be more, rather than fewer, uses of a free exercise-type defense to a fraudulent conveyance action.

## 2. RFRA

Troubled by *Smith*, Congress passed RFRA in an attempt to restore the pre-*Smith* level of judicial scrutiny of free exercise-type claims. The operative provisions of RFRA are expressed in section 3, which provides:

(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.<sup>230</sup>

RFRA's stated purposes are: "(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."<sup>231</sup> Assuming religion has been identified,<sup>232</sup> the key inquiries under RFRA are (i) whether the governmental action in question substantially burdens a person's religious practice, and (ii) if so, whether the statute's burdens further a compelling government interest in the least restrictive manner possible.<sup>233</sup> At least as applied to state law, the Court, in *Boerne v. City of Flores*, held that RFRA was not good law.

In *Boerne*, the Catholic Archbishop of San Antonio applied for a building permit to enlarge a church in Boerne, Texas. When local zoning authorities denied the permit, relying on an ordinance governing his-

---

229. See *In re Young*, 82 F.3d 1407.

230. 42 U.S.C. § 2000bb-1 (1997).

231. *Id.* § 2000bb(b).

232. This article assumes that insolvent religious donors are actually adherents of a religion. It is worth noting, however, that the Court's approach to defining religion has been subject to some debate, which will certainly spill over to the debate on the legitimacy of statutes like RFRA, since RFRA merely defers to First Amendment precedent on the exercise of religion. See 42 U.S.C. § 2000bb-2(4) (defining exercise of religion to mean the exercise of religion under the First Amendment). See TRIBE, *supra* note 179, § 14-6, at 1179 (discussing developing definition of religion under the First Amendment).

233. 42 U.S.C. § 2000bb-1(a).

toric preservation in a district which, they argued, included the church, the Archbishop brought suit challenging the permit denial under RFRA. The district court concluded that, by enacting RFRA, Congress exceeded the scope of its enforcement power under section 5 of the Fourteenth Amendment. The Fifth Circuit reversed, finding RFRA to be constitutional.<sup>234</sup> The Supreme Court reversed the Fifth Circuit, holding that RFRA exceeded Congress' remedial powers under section 5 of the Fourteenth Amendment.

Writing for the majority, Justice Kennedy acknowledged that section 5 of the Fourteenth Amendment empowers Congress to enforce, by appropriate legislation, the guarantee that no state shall make or enforce any law depriving any person of "life, liberty, or property, without due process of law," including, by incorporation, the free exercise rights of the First Amendment. RFRA, however, was a substantive change to free exercise jurisprudence that exceeded Congress' remedial powers. "Congress does not enforce a constitutional right by changing what the right is."<sup>235</sup> Although acknowledging that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies," the Court determined that RFRA crossed that line because the injury to be prevented or remedied lacked sufficient congruence and proportionality to the means adopted.<sup>236</sup>

There are three important aspects to *Boerne's* holding. First, it implicitly reaffirms *Smith's* limitation of the Free Exercise Clause to cases where the state intentionally discriminates on the basis of religion, either because a law was aimed at stifling a religious practice,<sup>237</sup> or because a widespread pattern of discrimination was shown.<sup>238</sup> In other words, the Court continues to believe that the Free Exercise Clause does not "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"<sup>239</sup>

Second, the basis for this conclusion is founded in the systemic

---

234. *Flores v. City of Boerne, Texas*, 73 F.3d 1352, 1364 (5th Cir. 1996).

235. *Flores*, 117 S. Ct. at 2164.

236. *Id.* ("RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections."). *Id.* at 2170.

237. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible.").

238. *Flores*, 117 S. Ct. at 2169.

239. *Id.* at 2172 (Scalia J., concurring) (quoting *Smith*, 494 U.S. at 879 and *Lee*, 455 U.S. at 263 n.3).

disruption concerns of *Smith*.<sup>240</sup> The sweeping coverage of RFRA “ensure[d] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter,” and exacting a significant litigation cost from the states.<sup>241</sup>

Third, the opinion affirmed the Court’s growing appreciation for states’ rights, noting that RFRA was a “considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.”<sup>242</sup> Indeed, it appears that the holding of the case struck RFRA *only* as it applied to state laws, since no federal law was in issue in *Boerne*.

Although *Boerne* will prevent the application of RFRA to state fraudulent conveyance claims, there is no reason to believe that it may not continue to apply to the fraudulent conveyance provision of the federal Bankruptcy Code. So far, it has been invoked in three separate cases as a defense to a fraudulent conveyance attack under the Bankruptcy Code. Twice, it was held to be inadequate (*Newman* and *Bloch*), and once it was held to be a viable defense (*Young*).

a. *Newman*

In *Newman*, the bankruptcy court for the district of Kansas held that the fraudulent conveyance provisions of the Bankruptcy Code violated neither the Free Exercise Clause nor RFRA. The debtors, Paula and Myrtle Newman donated approximately \$2,400 to their church, Midway Southern Baptist Church. This donation was made during the year prior to their filing a bankruptcy petition and reflected their regular practice of tithing.<sup>243</sup> It was undisputed that the debtors were insolvent during that year, that they had a sincere and firmly held belief in tithing, and that they had no fraudulent intent in making their donations.<sup>244</sup>

After determining that the debtors did not receive reasonably equivalent value for their tithes and that section 548 of the Bankruptcy Code was constitutional, the bankruptcy court considered whether Bankruptcy Code section 548 violated RFRA.<sup>245</sup> The court applied the three-

---

240. See *supra* notes 201-16 and accompanying text.

241. *Flores*, 117 S. Ct. at 2170.

242. *Id.* at 2171. This trend appears to have its roots in *Lopez v. United States*, 115 S. Ct. 1624 (1995) (limiting the reach of the Commerce Clause).

243. *In re Newman*, 203 B.R. at 472. The amounts donated were in excess of ten percent of the debtors’ annual income. *Id.*

244. *Id.* The Newmans transferred \$2,457.72 to their church during the year prior to their bankruptcy, but the trustee sought to recover only \$2,442.22. The debtors’ transfers of \$5.50 for meals and \$10.00 for hymnals were considered to have been made for reasonably equivalent value, which the trustee appears not to have attempted to recover. *Id.* at 472.

245. *In re Newman*, 183 B.R. at 251.



prong test developed in *Werner v. McCotter*,<sup>246</sup> which construed a substantial burden as being a law, rule, or regulation that (i) "significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person's] individual beliefs"; (ii) "meaningfully curtail[s]" the ability to express adherence to a person's faith; or (iii) deny[s] a person "reasonable opportunities to engage in those activities that are fundamental" to the person's religion.<sup>247</sup>

Using the *Werner* three-prong test, the bankruptcy court concluded that, although tithing was a central tenet of the Newmans' religious practice, there was no evidence that section 548 of the Bankruptcy Code prevented them from tithing because the Newmans had, in fact, paid the tithe.<sup>248</sup> "The statute, by its own operation, does nothing to prevent the debtors' fulfillment of their personally held religious obligation to tithe and, therefore, does not place a 'substantial burden' on the debtors' practice of their religion."<sup>249</sup> The bankruptcy court did not, however, consider the second or third prongs, namely, whether section 548 meaningfully curtailed the Newmans' ability to express adherence to their faith, or denied them a reasonable opportunity to engage in activities fundamental to their faith.<sup>250</sup>

The bankruptcy court also concluded that, even if section 548 did substantially burden the Newmans' religious practice, it serves a compelling governmental interest because "recovery of fraudulent transfers has been a basic tenet of bankruptcy law for 400 years."<sup>251</sup> Noting that Congress could have exempted tithes from the fraudulent conveyance statute, the *Newman* court concluded that section 548 was sufficiently narrow to survive a challenge under RFRA since "[c]learly, the statute was drawn in such a way as to balance the ability of the debtor[s] to

---

246. 49 F.3d 1476, 1480 (10th Cir. 1995).

247. *In re Newman*, 183 B.R. at 251 (citing *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (citations omitted)).

248. *In re Newman*, 203 B.R. at 476. Although affirming the bankruptcy court's holding, the district court disagreed with this finding, noting that "tithing involves not only the act of sacrificing a portion of one's income; it also encompasses giving the church the economic benefit of the tithe in order to support the church's mission." *Id.*

249. *In re Newman*, 183 B.R. at 251.

250. *Id.* See also *Werner*, 49 F.3d at 1480. It appears that tithing would not have satisfied either the second or third *Werner* prongs since avoidance of the tithes would not have meaningfully curtailed the Newmans' ability to express adherence to their faith because it was already expressed in the donations. Further, avoidance would not have denied them a reasonable opportunity to engage in activities fundamental to their faith, since they were not denied the opportunity, and there is no apparent reason to believe that tithing is fundamental to any faith or must take the form of cash payments. *Id.*

251. *In re Newman*, 183 B.R. at 251-52. The *Newman* bankruptcy court cited the *Young* district court, which was subsequently reversed by the Eighth Circuit Court of Appeals.

dispose of property with the need to protect unsecured creditors.”<sup>252</sup>

b. *Bloch*

In *Bloch*, the debtors made a contribution of \$6,328 in 1992 to their church. In 1993, the same year they filed for bankruptcy relief, they contributed \$5,205.<sup>253</sup> Their bankruptcy trustee sued the church, the Word of Life Christian Center, claiming these donations were constructive fraudulent conveyances under section 548 of the Bankruptcy Code and under Colorado’s version of the Uniform Fraudulent Transfer Act. There was no dispute that the debtors were sincere in their religious faith or that they usually attended church between one and four times a week.<sup>254</sup>

In addition to finding that these donations lacked consideration, the District Court for the District of Colorado<sup>255</sup> also held that RFRA offered no defense. Like *Newman*, the *Bloch* court applied the *Werner* test to determine that fraudulent conveyance laws imposed no substantial burden because “[s]ection 548 interferes minimally with the debtors’ ability to tithe,” and “did not constrain the [d]ebtors’ conduct nor their ability to express their adherence to their faith.”<sup>256</sup> The *Bloch* court further echoed the *Newman* court, holding that if fraudulent conveyance laws constituted a substantial burden on free exercise, then they were supported by a compelling governmental interest.<sup>257</sup>

c. *Young*

In *Young*, the Eighth Circuit Court of Appeals arrived at an essentially opposite conclusion from the *Newman* and *Bloch* courts, although it did so with little discussion. RFRA was therefore found an effective defense to transfers that were otherwise considered voidable fraudulent conveyances.

In *Young*, the church argued in the district court, before RFRA was enacted, that applying section 548(a) would violate the free exercise and establishment clauses of the First Amendment. The district court first applied *Smith*, and held that the church’s free exercise claim failed on the merits because the Bankruptcy Code was a neutral law of general

---

252. *In re Newman*, 183 B.R. at 252. Whether Congress could, or should, exempt religious obligations or donations raises interesting issues, including entanglement problems.

253. *In re Bloch*, 207 B.R. at 946.

254. *Id.*

255. It is unclear why this adversary proceeding was heard by the district court. Ordinarily, such matters are heard by the bankruptcy court and are subject to ordinary appellate review by the district court for the district in which the bankruptcy court sits. See 28 U.S.C. § 1334.

256. *In re Bloch*, 207 B.R. at 946 (citing *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995)).

257. *Id.* at 951 (citing *In re Newman*, 203 B.R. at 477).

applicability which has only an incidental effect on religion.<sup>258</sup> In the alternative, the district court held that, even if the pre-*Smith* free exercise test applied, "[t]he government's policy of allowing debtors to get a fresh start while at the same time treating creditors as fairly as possible qualifies as a compelling [governmental] interest."<sup>259</sup>

The district court further held that section 548(a) did not unfairly discriminate against religious contributions, and that the debtors' hybrid right to free speech and free exercise was not impaired, because limiting the amount an individual may contribute to a cause or organization only marginally restricts the contributor's ability to communicate that particular message.<sup>260</sup> The district court noted that section 548(a)(2)(A) was narrowly drawn, content-neutral, protected an important governmental interest in maximizing the debtors' estate, and did not violate the doctrine of separation of church and state.<sup>261</sup>

On November 13, 1993, after the district court rendered its decision and while the appeal was pending in the Eighth Circuit, President Clinton signed RFRA into law.<sup>262</sup> Concluding that it could apply RFRA retroactively,<sup>263</sup> the Eighth Circuit reversed the district court, finding that, because RFRA is more protective of the right of free exercise than *Smith*, recovery of the Youngs' tithes substantially burdened their free exercise of religion, was not in furtherance of a compelling governmental interest, and therefore violated RFRA.<sup>264</sup>

The *Young* court began its analysis by acknowledging that, in order to be a substantial burden, "'the governmental action must burden a religious belief rather than a philosophy or a way of life. [T]he burdened belief must be sincerely held by the [person].'"<sup>265</sup> Although the *Young* court recited the *Werner* three-part test used to determine a substantial

---

258. *In re Young*, 152 B.R. at 953-54 (citations omitted).

259. *Id.* at 954.

260. *Id.*

261. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1975)).

262. 42 U.S.C. § 2000bb (1997).

263. *In re Young*, 82 F.3d at 1416-17.

264. *Id.* at 1413, 1417. Whether RFRA is more protective of the free exercise right than *Smith* is less interesting than whether, assuming RFRA is constitutional, it is more protective than *Sherbert* and its progeny. *Id.* at 1418.

265. *Id.* (quoting *Werner*, 49 F.3d at 1480 n.1). This statement poses several problems. First, it is unclear what distinction a court could draw between a religious belief and a philosophy or way of life. It is difficult to understand how, as the *Young* court concluded, spending money (tithing) is the former rather than the latter. Similarly, it is also difficult to understand how a court using the *Werner* formulation could ever determine the sincerity of belief if, as the *Hernandez* court noted: "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez*, 490 U.S. at 699. See also *Smith*, 494 U.S. at 886-87 ("It is no more appropriate for judges to determine the centrality of religious beliefs before applying a compelling interest test in the free exercise field, than it would be for them to determine the importance of ideas before

burden, it placed little significance on the test and "assume[d] that the recovery of these contributions would substantially burden the debtors' free exercise of religion."<sup>266</sup> The *Young* court summarily concluded that "[p]ermitting the government to recover these contributions would effectively prevent the debtors from tithing, at least for the year immediately preceding the filing of the bankruptcy petitions."<sup>267</sup>

The court dismissed as irrelevant the trustee's arguments that the Youngs could continue to tithe, that there were other ways in which the Youngs could express their religious beliefs, or that the retroactive nature of the fraudulent conveyance laws (only payments already made can be avoided) meant that their right to tithe was *not* impaired. "It is sufficient that the governmental action in question meaningfully curtails, albeit retroactively, a religious practice of more than minimal significance in a way that is not merely incidental."<sup>268</sup>

The court then considered whether the fraudulent conveyance provisions of the Bankruptcy Code were compelling governmental interests. The *Young* court compared the reasoning of the *Newman* court<sup>269</sup> with the reasoning of *In re Tessier*, a case under chapter 13 of the Bankruptcy Code,<sup>270</sup> where the trustee objected to the debtor's reorganization plan which included a provision for the payment of \$100 per month in tithes to the debtor's church.<sup>271</sup> Acknowledging that the *Tessier* court argua-

---

applying the compelling interest test in the free speech field.") (internal quotations omitted). The *Young* court addressed none of these issues.

266. *In re Young*, 82 F.3d at 1418. Other tests could be used to determine whether a law imposes a substantial burden. For example, the Ninth Circuit considers whether a religious practice is mandated by the adherent's religion. See *Bryant v. Gomez*, 46 F.3d 348, 949 (9th Cir. 1995) (quoting *Graham v. Commissioner*, 822 F.2d 844, 850-51 (9th Cir. 1987), *aff'd sub nom*, *Hernandez v. Commissioner*, 490 U.S. 680, 689 (1989) ("The religious adherent . . . has the obligation to prove that a governmental [action] burdens the adherent's practice of his or her religion . . . by preventing him or her from engaging in conduct . . . which the faith mandates. This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.")). Although tithing, or other forms of religious spending, may be strongly encouraged, it is unclear whether they are mandated. Even if tithing is mandated by certain faiths, it seems highly unlikely that any faith would mandate the manner in which the tithe is to be made (cash, goods or services), a choice which would have obvious implications for creditors of the insolvent religious donor. Interestingly, the *Gomez* court cites *Hernandez* for this proposition, suggesting that the obligation to spend money will *not* be considered a mandatory religious activity.

267. *In re Young*, 82 F.3d at 1418.

268. *Id.* at 1418-19 (citing *In re Tessier*, 190 B.R. at 403-04).

269. See discussion *supra* Section III.A.2.a.

270. 11 U.S.C. § 1330 (a), (b) (1994). Although chapter 13 reorganizations are available only to individuals of somewhat limited means who have a regular income, it is similar to chapter 11 of the Bankruptcy Code in that its goal is reorganization rather than liquidation.

271. *In re Young*, 82 F.3d at 1420 (citing *In re Tessier*, 190 B.R. at 405). The *Tessier* court also found RFRA unconstitutional as applied to the Bankruptcy Code. 190 B.R. 396 (Bankr. D. Mont. 1995), *aff'd*, 1997 WL 650968 (9th Cir. Oct. 17, 1997). The procedural context of *Tessier* was quite different from *Young* or *Newman*, as it involved confirmation of a reorganization plan,

bly used a narrower test than *Newman* by holding that compelling governmental interests are "only those interests pertaining to survival of the republic or the physical safety of its citizens,"<sup>272</sup> the *Young* court, nonetheless, considered *Tessier* "substantively similar" to the *Youngs'* case.<sup>273</sup>

Although *Tessier* acknowledged that "the government clearly has interests in . . . providing the debtor with a fresh start, efficiently administering bankruptcy cases, [and] protecting the interests of creditors," such interests fell "short of direct national security and public safety concerns."<sup>274</sup> The *Tessier* court concluded that these interests, although "rational, and even important," were "not sufficiently grave to deserve the 'compelling' label when balanced against a parishioner's free exercise of religion."<sup>275</sup> Agreeing with *Tessier*, the *Young* court concluded that "the interests advanced by the bankruptcy system are not compelling under RFRA."<sup>276</sup>

The reasoning of the court of appeals in *Young* is not persuasive for three reasons. First, the court failed to carefully consider whether fraudulent conveyance laws substantially burden religious exercise, or even whether tithing is a form of religious exercise. It is difficult to see how spending money was, in that case, an exercise of religion that was substantially burdened by application of fraudulent conveyance laws. The donors made the donations, even if they were later taken away from the church.<sup>277</sup>

Moreover, although a discussion of the nature of tithing is beyond the scope of this article, there is no apparent reason why the tithe in *Young* had to be in the form of cash. If the *Youngs* had instead given

---

which required the debtor to pay all of its projected disposable income for three years to creditors. Charitable contributions were found not to be "reasonable living expenses," or disposable income for purposes of this calculation. *Id.* at 403.

272. *In re Young*, 82 F.3d at 1420 (citing *In re Tessier*, 190 B.R. at 405). It is unclear how the *Tessier* court developed this test.

273. In opposition to the *Young* court, one may argue that *Tessier* was not substantively similar to the *Youngs'* case. For example, the *Tessier* trustee's success would directly prevent a future religious exercise, whereas the *Young* trustee sought to undo that which the *Youngs'* had already accomplished.

274. *In re Young*, 82 F.3d at 1420 (quoting *In re Tessier*, 190 B.R. at 405).

275. *Id.* (citations omitted).

276. *Id.*

277. One may argue, similar to *Young*, that exercise does not simply require that the act be permitted, but that the act not be later disturbed by law. This is an odd approach because it gives a potentially enormous deference to religious exercise. Theoretically, under this atemporal interpretation of exercise, religious adherents or institutions could claim, retroactively or prospectively, that all types of actions are forms of exercise which preclude state interference. While *Smith* may be a flawed opinion, it nonetheless properly recognizes that individual conscience should not ordinarily permit one to become a law unto oneself in order to defeat private rights. The exercise itself must be the stopping point.

services or goods, the liquidity of their asset base would not have been diminished and, for the reasons discussed in Section II.B.1, *supra*, there would have been no constructive fraudulent conveyance to begin with.

Finally, the court used a home-made compelling interest test that ignored free exercise precedent that finds a variety of state laws compelling when balanced against individual free exercise claims.<sup>278</sup> As discussed above when free exercise claims compete with commercial laws of general application, enhanced cost to an adherent or religious institution is not a constitutional basis to strike such laws.<sup>279</sup>

After the *Boerne* decision, the Supreme Court granted certiorari, vacated the judgment, and remanded the case for reconsideration.<sup>280</sup> In *Young*, it is unclear how the Eighth Circuit will proceed in light of *Boerne*. On the one hand, the Eighth Circuit may decide that *Boerne* dealt only with state law, that RFRA continues to apply to federal law, and that its substantial burden analysis survives. On the other hand, the court may decide *Boerne* went beyond state law, based on concerns expressed in *Boerne* about the sweeping coverage of RFRA.<sup>281</sup> If the Eighth Circuit views this separation of powers-like concern as part of the holding of *Boerne*, it may find that RFRA does not trump the Bankruptcy Code's fraudulent conveyance provision.

As noted, I believe a fraudulent conveyance action ordinarily imposes no substantial burden because constructive fraudulent conveyance laws are facially neutral, commercial laws of general application that protect private rights. The laws burden only the recipients of economically unfair bargains from insolvent transferors, whether or not religiously motivated or compelled. The First Amendment should not alter this formulation. The next section examines why the same should be true in cases involving political spending should reach the same result.

### B. *Political Speech, Political Spending*

Like religious donations, contributions or expenditures on behalf of political candidates or causes by an insolvent donor implicate the First Amendment and fraudulent conveyance laws. As in religious donations, the exercise of political rights in the form of spending could arguably

---

278. See *supra* notes 218-23 and accompanying text.

279. See discussion *supra* Section III.A.1.

280. *In re Young*, 117 S. Ct. 2502 (1997) (vacating judgment and remanding in light of holding in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997)).

281. *Flores*, 117 S. Ct. at 2170 (the breadth of RFRA "ensure[d] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.").

enjoy the strictest level of judicial protection.<sup>282</sup> Unlike First Amendment protections of religious practices, however, the Court remains steadfast in applying the strictest scrutiny to the regulation of political speech. Ever since *Buckley v. Valeo*, the Court has consistently held that restrictions on campaign expenditures "necessarily reduce[ ] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."<sup>283</sup> This section of the article discusses whether fraudulent conveyance laws should be considered such a restriction.

### 1. *BUCKLEY* AND STRICT SCRUTINY

The Free Speech Clause of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."<sup>284</sup> The Court has used three different tests for speech cases: (i) the incidental regulation test;<sup>285</sup> (ii) the content-based regulation test;<sup>286</sup> and (iii) the time, place, and manner test in regulating the physical form of protected speech.<sup>287</sup> Scholars have distilled these three tests to two tracks: a "higher" track, involving direct, content-regulating burdens, and a "lower" track, involving incidental, content-neutral burdens.<sup>288</sup>

Prior to the Court's landmark First Amendment analysis in *Buckley*, the Court's political speech jurisprudence was reflected in cases such as *United States v. O'Brien*, which affirmed the conviction of a war protester under a statute that proscribed the burning of draft cards.<sup>289</sup> The *O'Brien* Court recognized a dichotomy between regulation of pure speech, upheld only upon a showing of dire necessity, and regulation of non-speech harms arising from speech-related conduct, held to a considerably less exacting scrutiny.<sup>290</sup> *Buckley* stretched the *O'Brien* dichot-

---

282. See *Buckley*, 424 U.S. at 39.

283. *Id.* at 19.

284. U.S. CONST. amend. I. The free speech guarantee applies to the states through the Fourteenth Amendment. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

285. See *Arcara v. Cloud Books, Inc.*, 106 S. Ct. 3172, 3177-78 (1986); *United States v. Albertini*, 472 U.S. 675, 687-89 (1985); *United States v. O'Brien*, 391 U.S. 367, 376 (1968). See also David S. Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491 (1988).

286. See *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). See also Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48 (1987).

287. See *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981).

288. Day, *supra* note 285, at 493-96; see also Dorf, *supra* note 150, at 1177. TRIBE, *supra* note 179, § 12-2, at 789-94 (2d ed. 1988).

289. See *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the Court expressly rejected the contention that draft card burning was tantamount to pure speech, since the statute banning draft card burning was directed at a harm unrelated to the message that a card-burner might seek to convey. Its incidental effect upon speech was justified as the least restrictive way to secure the governmental interest in avoiding the harm caused by draft card burning.

290. *O'Brien* established the following four-part test to determine whether a content-neutral regulation violates free speech: (i) the regulation must be "within the constitutional power of the

omy to the breaking point, and held that spending money was more like pure speech than speech-related conduct, and was, therefore, subject to the strictest scrutiny.<sup>291</sup>

In *Buckley*, the Court considered constitutional challenges to key provisions of the Federal Election Campaign Act of 1971 ("FECA"), which (i) limited individual political contributions to \$1,000 to any single candidate per election, with an overall annual limitation of \$25,000 by any contributor; and (ii) limited independent expenditures by individuals and groups "relative to a clearly identified candidate" to \$1,000 per year.<sup>292</sup>

After certain fact-finding procedures conducted in the District Court for the District of Columbia, the Federal Circuit Court, on plenary review, rejected most of the plaintiffs' challenges to the statute. The court, instead, found a clear and compelling interest in preserving the integrity of the electoral process.<sup>293</sup> On that basis, the court upheld the substantive provisions of FECA with respect to campaign contributions and expenditures. Arguing before the Supreme Court, the appellants alleged that the appellate court had failed to give FECA the critical scrutiny required under accepted First Amendment principles. They claimed that limiting the use of money for political purposes constituted a "restriction on communication" that violated the First Amendment, since "virtually all meaningful political communications in the modern setting involve the expenditure of money."<sup>294</sup> The Court agreed.

---

government"; (ii) it must further "an important or substantial governmental interest"; (iii) that interest must be "unrelated to the suppression of free expression"; and (iv) the incidental restriction must be "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. Given the inability of this test to reach true free expression harms, but to create litigation, it has been characterized as the "worst of all possible worlds." Dorf, *supra* note 150, at 1204.

291. *Buckley*, 424 U.S. at 6 (citing Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263).

292. *Id.* at 10 (citations omitted).

293. *Id.*

294. *Id.* at 19. The Court noted that:

By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.

*Id.* at 20-21. Whether the distinction between expenditures and contributions makes constitutional sense is debatable. The distinction should also have little bearing on a fraudulent conveyance challenge to a political donation, since the focus of such a litigation is on the value, if any,



Recognizing a constitutional distinction between campaign contributions and campaign expenditures, the Court held that expenditure limitations "represent substantial rather than merely theoretical restraints on the quantity and diversity of speech."<sup>295</sup> Such limitations "operate in an area of the most fundamental First Amendment activities." In this context, the First Amendment "affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"<sup>296</sup> "This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"<sup>297</sup>

Two important elements were articulated in *Buckley*'s holding. First, the Court observed that the presence of a non-speech element, the expenditure of money, did not strip political speech of its First Amendment protection.

Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.<sup>298</sup>

Second, the Court noted that in *O'Brien*, and in other time, place, and manner restriction cases,<sup>299</sup> the government had not sought to justify its statute in terms of any interests predicated on suppressing communication. FECA, by contrast, was designed, among other things, to restrict both the political voice of the affluent and excessive campaign speech by limiting campaign spending.

The critical difference between this case and those time, place, and

---

received by the donor for the donation, regardless of the characterization of the donor's donation. This distinction continues in the Court's political spending jurisprudence. "[T]he Court's cases have found a 'fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign.'" *Colorado Republican Fed. Election Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309, 2315 (1996) (quoting *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)).

295. *Buckley*, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

296. *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

297. *Id.* at 16 (citations omitted). While that may be true, the statement is a double negative that merely avoids the main question. Was spending money, as regulated by FECA, speech? The Court's answer did not garner absolute support. As Judge Wright emphatically explained, "[m]oney . . . may be related to speech, but *money itself is not speech*." J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1019 (1985) (emphasis in original).

298. *Buckley*, 424 U.S. at 17-18 (citing *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Kovacs v. Cooper*, 336 U.S. 77 (1949)).

299. *Id.* at 18-19.

manner cases is that [FECA]'s contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner regulations otherwise imposed . . . . A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.<sup>300</sup>

The Court rejected the legitimacy of FECA's goal of "equalizing the relative ability of individuals and groups to influence the outcome of elections."<sup>301</sup> The Court explained that "the concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"<sup>302</sup>

In so stating, the Court established two key principles for purposes of considering the legitimacy of a fraudulent conveyance attack on a campaign expenditure. First, any reduction in the quantity of spending on political campaigns impermissibly reduces the quantity of speech and the size of the audience reached. Second, equalizing the quantity of speech by regulation is simply not a sufficiently compelling state interest to defeat the unfettered right to spend money on political candidates.

Since *Buckley*, the Court has consistently affirmed, or at least has declined to modify, the holding of that case—that limitations on political expenditures violate the First Amendment. Most recently, the Court in *Colorado Republican Federal Election Campaign Committee v. Federal Election Commission*,<sup>303</sup> held that the phrase "expenditure[s] in connection with,"<sup>304</sup> as used in FECA, must be interpreted broadly. "[R]estrictions on independent expenditures significantly impair the ability of individuals and groups to engage in direct political advocacy,"

---

300. *Id.* at 48.

301. *Id.* at 49 (internal quotations omitted). The Court also rejected the contention that FECA prevented corruption or its appearance since, "[i]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." *Id.* at 45. It is unclear why attempts to stem the obvious abuses that result from unregulated campaign spending are impermissible, even if "naive."

302. 116 S. Ct. 2309 (1996).

303. Federal Election Campaign Act, 2 U.S.C. § 441a(d)(3) (1994).

304. *Colorado Republican Fed. Comm.*, 116 S. Ct. at 2315 (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)).

the Court explained, and “‘represent substantial . . . restraints on the quantity and diversity of political speech.’”<sup>305</sup>

Moreover, the Court has extended its *Buckley* reasoning to the corporate-donor context, albeit with certain limitations. For example, in *First National Bank of Boston v. Belotti*,<sup>306</sup> the Court held that a Massachusetts statute that prohibited certain business corporations from making contributions or expenditures in order to influence the outcome of any ballot referendum “other than one materially affecting any of the property, business or assets of the corporation” was unconstitutional.<sup>307</sup> The Court rejected the argument that “speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation,”<sup>308</sup> and instead found that “the speech proposed by the [bank was] at the heart of the First Amendment’s protection.”<sup>309</sup>

In light of the principles established by *Buckley* and its progeny, one should question the summary manner in which the District Court for the District of Columbia in *Carolina’s Pride*<sup>310</sup> dismissed the defendant’s asserted First Amendment defense. In *Carolina’s Pride*, the insolvent donor’s judgment creditors attacked as a fraudulent transfer campaign contributions he had made to the 1992 Republican Senate-House Dinner Committee. The 1992 Committee defended its position by arguing that, because its fundraising activities were designed to support political candidates, “[t]he First Amendment has its ‘fullest and most urgent application’”<sup>311</sup>

While the court recognized that fundraising is needed for the “effective dissemination of a political message,” the court, nonetheless, reasoned that fraudulent conveyance statutes “do not significantly impinge on the right to free speech.”<sup>312</sup> It concluded that “no heightened showing” was required under the First Amendment. Although the Committee raised an interesting issue, its claims under the First Amendment were “completely irrelevant”<sup>313</sup> to application of the fraudulent

---

305. 435 U.S. 765 (1978).

306. *Id.* at 768.

307. *Id.* at 784.

308. *Id.* at 776. The power of *Buckley* to defeat a fraudulent conveyance challenge to a political expenditure is even more troubling in the corporate context than in the individual context, since corporations generally incur greater indebtedness than individuals (thus they have a greater body of creditors who would be harmed by a political donation), yet also undoubtedly feel greater business pressure to make political donations than do individuals.

309. 858 F. Supp. 243 (D.D.C. 1994).

310. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 15 (1976)).

311. *Id.* at 246-47.

312. *Id.* at 247.

313. *Id.* (quoting *Jimmy Swaggart Ministries v. California Board of Equalization*, 493 U.S. 378 (1990)) (noting that sales and use taxes on religious articles, in common with other merchandise,

conveyance statutes. According to the *Carolina's Pride* court, the government may impose content neutral limitations on the right to free expression.<sup>314</sup> Because the fraudulent conveyance statutes "apply to all entities, charitable, political, or private," they are content neutral, and "any effect these regulations might have on expressive activity is incidental."<sup>315</sup>

If, as *Buckley* held, "a restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached,"<sup>316</sup> how can fraudulent conveyance laws pass constitutional muster? It is difficult to imagine that the Court would consider repayment of creditors a *more* compelling government interest than the prevention of campaign corruption or equalization of access to political debate.

Yet this is exactly what a court would have to hold in order to prevent the First Amendment from defeating a fraudulent conveyance challenge to a campaign expenditure. This, however, would seem to distort the relative importance of these two different policy goals. The public purpose of preserving the integrity of the electoral system has to be more important than application of the fraudulent conveyance laws.

This distortion is made even more apparent by considering the private nature of the rights at issue in a fraudulent conveyance action which should be even less compelling than the public right to regulate campaign spending. In turn, this raises the specter of *Lochner v. New York*,<sup>317</sup> which gave great privilege to private rights over and above legislative attempts to exercise police and regulatory powers for the public welfare.

## 2. *BUCKLEY*: THE *LOCHNERIAN* PARADOX

According to Professor Sunstein, *Lochner v. New York* has not been entirely overruled.<sup>318</sup> It lives on, Professor Sunstein argues, in cases

---

do not offend the First Amendment). See also *Common Cause v. Bolger*, 574 F. Supp. 672, 681 (D.D.C. 1982)).

314. *Carolina's Pride*, 858 F. Supp. at 247 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). To hold otherwise would improperly provide political organizations with fundraising avenues otherwise proscribed. See *There to Care, Inc. v. Commission of Ind. Dep't of Revenue*, 19 F.3d 1165, 1168 (7th Cir. 1994). Ironically, the *Carolina's Pride* court cited the *Young* district court as support.

315. *Buckley*, 424 U.S. at 17.

316. 198 U.S. 45 (1905).

317. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

318. *Id.* at 884.

such as *Buckley*, which he terms "a direct heir to *Lochner*."<sup>319</sup> According to Professor Sunstein, *Lochner* was not wrong simply because it reflected judicial activism. More importantly, *Lochner* was wrong because it rested on an erroneous assumption about the relationship of the state and the common law, and incorrectly held that the Constitution requires legislative passivity in the face of conflicting common law.

As is familiar, in *Lochner*, the Court struck New York's maximum hour law, reasoning that the right to enter into contracts was a "liberty" interest protected by the Fourteenth Amendment, with which the state could not interfere.<sup>320</sup> The majority reasoned that "the limit of the police power has been reached and passed in this case"<sup>321</sup> because the law was not supported by a sufficiently compelling state interest: The health of bakers was not sufficiently (important and/or) threatened by unregulated hours as to require state interference with the employer-employee contract.

*Lochner*, therefore, viewed the status quo—the private right to enter into contracts—as a "neutral" condition with which the state could not interfere absent a compelling reason. Although *Lochner* has been subject to much criticism, and is generally considered to have been *de facto* overruled, Professor Sunstein has argued persuasively that contemporary decisions, such as *Buckley*, that rest heavily on concepts of "neutrality," harken back to *Lochner*. "For the *Lochner* Court, neutrality, understood in a particular way, was a constitutional requirement."<sup>322</sup>

Chief among the requirements of neutrality was legislative deference to the common law, the "natural" source of legal and economic order. Under the *Lochnerian* view reflected in *Buckley*, "the existing distribution of wealth is seen as natural, and [legislative] failure to act is seen as no decision at all . . . . *Buckley*, like *Lochner*, grew out of an understanding that for constitutional purposes, the existing distribution of wealth must be taken as simply 'there,' and that efforts to change that distribution are impermissible."<sup>323</sup>

---

319. *Lochner*, 198 U.S. at 57-58.

320. *Id.* at 58.

321. See Sunstein, *supra* note 317, at 874.

322. *Id.* This seems overstated. FECA would not have changed the distribution of wealth, since no amount of money could have purchased an exemption. It imposed no higher costs on the wealthy, or whomever sought to make impermissible expenditures, but properly attempted to equalize access to certain rights, such as the right to purchase finite advertising time or space. This may indirectly have had a redistributive affect, but it was not redistributive per se. It is also worth noting that there is nothing inherently neutral about the marketplace. It simply reflects the common law's preferences for the existing distribution of wealth and rights. In our system, this particular distribution can perpetuate itself thanks largely to *Buckley* and its *Lochnerian* underpinnings.

323. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (upholding Cable Television

If *Buckley* creates a First Amendment defense to a fraudulent conveyance action, it also creates a *Lochnerian* paradox. The common law rights sanctified by *Lochner* would have included fraudulent conveyance actions, which have been a fixture of the common law since well before 1789. Although fraudulent conveyance actions may redistribute wealth and unsettle expectations arising from contract and property rights (a result forbidden by *Lochner* and *Buckley*), the power to do so has long been in the hands of creditors and court-appointed fiduciaries. Paradoxically, the common law that *Lochner* exalted would create the very redistributive right that *Buckley* prohibits.

The only way out of this paradox is to recognize that constructive fraudulent conveyance laws, even as applied to political spending, are nothing more than content-neutral economic legislation subject to less than heightened scrutiny.

### 3. LESS-THAN-HEIGHTENED SCRUTINY—CONTENT-NEUTRAL ECONOMIC LEGISLATION

Courts should view fraudulent conveyance laws as content-neutral economic legislation subject to less-than-heightened scrutiny, rather than as an intrusion on First Amendment rights subject to heightened scrutiny. In order to do so, the Court has to limit *Buckley*'s reach. One approach would be to focus on the purpose of the fraudulent conveyance statutes, rather than on the purpose of the spending. For example, by analogy to its recent decision in *Turner v. FCC*,<sup>324</sup> the Court could conclude that the purpose of fraudulent conveyance laws is merely to regulate the distribution of scarce economic resources, not to constrain speech. Consequently, the Court may be able to limit *Buckley*'s force and review fraudulent conveyance laws under a more relaxed standard of scrutiny as a "lower-track" law.

In *Turner*, certain cable programmers and operators challenged the "must carry" requirements of the Cable Television Consumer Protection Act of 1992 (the "Cable Act"), which requires that cable operators carry the signals of a specified number of local broadcast television stations. The Court began its analysis by noting that "not every interference with speech triggers the same degree of scrutiny under the First Amendment."<sup>325</sup> In the context of broadcast regulation, the Court has histori-

---

Consumer Protection Act of 1992 under intermediate scrutiny as content-neutral economic legislation).

324. *Id.* at 637.

325. *Id.* Speech-regulating rules have been tolerated where the speech-conveying medium was physically limited in the following cases: *See* *Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781 (1988) (personal solicitation); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (print); *Red Lion Broad.*

cally tolerated greater governmental limitations on speech than in other media due to the "physical limitations of the broadcast medium."<sup>326</sup> In *Turner*, the basic question was whether this more relaxed level of scrutiny involving broadcast regulation would apply to the regulation of cable television transmissions. The Court held that it did not, because there was no "practical limitation on the number of cable speakers who may use the cable TV medium."<sup>327</sup>

In order to determine which level of scrutiny to apply, the Court considered the extent to which the Cable Act was content-based regulation of speech.<sup>328</sup> Citing *Ward v. Rock Against Racism*, a lower-track time, place, and manner case, the Court noted that the "'principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech *because of* [agreement or] disagreement with the message it conveys.'"<sup>329</sup> A law that "confer[s] benefits or impose[s] burdens on speech without reference to the ideas or views expressed" would most likely be found content neutral.<sup>330</sup>

Concluding that the Cable Act was content-neutral, the *Turner* Court noted that the burdens imposed and the privileges conferred by the legislation were unrelated to the content of the plaintiffs' cable program-

---

Co. v. FCC, 395 U.S. 367, 388-89 (1969) (television); *National Broad. Co. v. United States*, 319 U.S. 190, 226 (1943) (radio).

326. *Turner Broad. Sys.*, 512 U.S. at 642. Whether a law is content-neutral or content-based is difficult to discern. In *Buckley*, FECA was arguably content neutral, since it limited only the quantity of money spent and did not differentiate based on the views of the spender. Yet it is fairly clear that the *Buckley* Court viewed FECA as the equivalent of a content-based law, in that the Court concluded that restrictions on the *quantity* of speech somehow affected the *quality* of speech.

327. *Id.* at 639. The Court has subsequently distinguished *Turner*, and used heightened scrutiny to strike, among others, the "segregate and block" provisions of the Cable Act in *Denver Area Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2391-2392 (1996) and certain provisions of the Communications Decency Act. *Reno v. American Civil Liberties Union*, 117 S. Ct. 2392, 2343 (1997) (noting that strict scrutiny should apply to content-based regulation of a communicative medium which, like the Internet and unlike broadcast airwaves, is effectively unlimited). These distinctions do not dilute the general proposition for which *Turner* stands in this context—content-neutral regulation of a scarce, speech-conveying medium should be reviewed under less-than-heightened scrutiny.

328. *Id.* at 642 (emphasis added) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

329. *Id.* at 643 (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (holding that an ordinance that prohibits the posting of signs on public property "is neutral—indeed it is silent—concerning any speaker's point of view") and (citing *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981) (State Fair regulation requiring that sales and solicitations take place at designated locations "applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds."))).

330. *Id.* at 640. It is not entirely clear that the Cable Act was content-neutral, as Congress expressed a preference for local interests in enacting the legislation. Because local content is going to be different from regional, national, or international content, it is difficult to see how the law was content-neutral.

ming, because they applied equally to all operators with 300 or more subscribers.<sup>331</sup> Nor was the Cable Act's manifest purpose to regulate speech based on the message conveyed.<sup>332</sup> Rather, "Congress' overriding objective in enacting [the] must-carry [provision of the Cable Act] was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming."<sup>333</sup> This purpose was "unrelated to the content of expression disseminated by cable and broadcast speakers."<sup>334</sup>

For purposes of assessing statutory goals, *Turner* provides analogies that would be useful to permit the application of the fraudulent conveyance statutes to avoid political expenditures by insolvent donors notwithstanding *Buckley*'s construction of the First Amendment. First, *Turner* affirms the propriety of "lower-track" scrutiny for laws regulating the distribution of scarce communicative resources, such as broadcast frequencies or a debtor's limited asset base. Second, *Turner* affirms the distinction between laws directed *at* speech from laws that have only an incidental effect on speech. Like many commercial laws, there can be no serious argument that fraudulent conveyance laws—which have existed for more than 400 years—were not passed "because of agreement or disagreement with" a message conveyed by money spent by an insolvent donor.

In short, if the Court focuses on fraudulent conveyance laws for their purpose, which is to preserve an insolvent debtor's asset base for the benefit of her creditors, it could limit *Buckley*'s sweeping restrictions on the regulation of campaign spending.

#### IV. CHOICES

Regardless of how courts view the normative aspects of religious or political giving, they will likely have to make certain choices about the relationship that commercial rules, such as fraudulent conveyance laws, have with constitutional rules. In jurisprudential terms, the choices will be about choosing the level of scrutiny to apply and what kinds of consideration to deem adequate. In more fundamental terms, the choices will undoubtedly reflect normative views about the implications the sub-

---

331. *Id.* at 645 (quoting *United States v. Eichman*, 496 U.S. 310, 315 (1990) (internal quotations omitted) ("Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is related to the suppression of free expression.")). See also *Ward*, 491 U.S. at 791-92.

332. *Turner Broad. Sys.*, 512 U.S. at 646.

333. *Id.*

334. See, e.g., *Hollins v. Brierfield Coal & Iron Co.*, 150 U.S. 371, 382 (1893) (holding that assets of insolvent debtor are held in trust for creditors).



ject laws hold for the ongoing debate about the proper boundary between that which is public and that which is private. Similarly, the choices will include subsidiary debates about the state's role in restricting or promoting religious or political freedoms.

In the religious context, these choices will be about the extent to which a court is willing to recognize the economic component of consideration received by an insolvent donor as well as the extent to which spending money—making religious donations—should be considered the “free exercise of religion.” As argued in Section II.B.3.a., *supra*, sometimes a religious donor will have received “consideration” in connection with her religious donation that may have meaningful economic value to the donor, and thus to her creditors. Courts should not ignore such value merely because the transaction is denominated a religious gift.

Nevertheless, where an insolvent religious donor receives no consideration (or receives consideration having no economic value), the gift should not ordinarily be protected on First Amendment or RFRA grounds. To extend strict scrutiny to facially neutral commercial statutes of general application would threaten the systemic disruption the *Smith* Court properly feared, and would contradict established precedent regarding the relationship between the Free Exercise Clause and neutral commercial laws of general application.

In the political context, courts will have to choose the extent to which they are willing to recognize economic value in the “opportunity” purchased by an insolvent political donor as well as the extent to which spending money on political candidates is a form of protected political “speech.” Although the opportunity purchased by a political donor may have to be downplayed for federal election law purposes (bribes are forbidden, after all), it need not be disregarded in the fraudulent conveyance context. To do so would ignore the economic and business realities of political spending.

Nevertheless, where a court concludes that an insolvent political donor received inadequate economic consideration, it will then have to choose whether to focus on the medium (spending money) or the message (political support for a candidate). In the fraudulent conveyance context, courts should focus on the medium, and recognize that spending money while insolvent (i.e., to the detriment of creditors) should not be considered a form of political speech entitled to strict scrutiny. To hold otherwise would threaten the same sort of systemic disruption the Court has frowned upon in the religious context and would contravene the Court's precedent on content-neutral regulation of scarce, speech-conveying mediums.

In addition, recognizing a First Amendment defense to a fraudulent conveyance action in any context creates a collateral problem for creditors. Essentially, the insolvent debtor is not spending her own money, but her creditors' money.<sup>335</sup> If that is so—and spending money is protected by the First Amendment—why should the free exercise or political speech rights of the debtor's creditors also not matter? Should they be forced to finance religious or political causes they find repugnant? It is difficult to answer this question in an affirmative, yet principled, manner.

Moreover, by subordinating the fraudulent conveyance laws to the First Amendment or RFRA, courts will take another step toward using what is supposed to be the public purpose of the First Amendment—government neutrality toward religion and tolerance of diverse political views—for private ends. Although this would probably make little economic difference to debtors and their religious or political donees, it will be another step in the *Lochner*ization, or privatization, of that which is supposed to be public, the First Amendment. It would, in other words, be another small step toward private control of public rights—even when the private actors exercising such rights would be trampling the private repayment rights of creditors in doing so.

## V. CONCLUSION

Fraudulent conveyance laws are commercial laws, neutrally enacted, generally applicable, and only minimally burdensome on religious exercise or political expenditures. As shown, the First Amendment rights embodied in the right to worship and the right to express support for a political candidate may, under certain circumstances, include the right to spend money on behalf of those causes, but not over the complaints of creditors. Although courts should carefully assess whether a religious or political donor actually receives economic consideration for a donation, and ratify transactions where appropriate, even if termed a gift, courts should not ordinarily view the First Amendment or RFRA as trumping the orderly, equal payment of creditors with valid claims against the donor. In sum, fraudulent conveyance laws should not fall victim to the First Amendment. To hold otherwise would treat spending money as protected worship or political speech, a fairly severe distortion of both the First Amendment and the fraudulent conveyance laws.

---

335. John Dewey, *The Future of Liberalism*, in JOHN DEWEY, 11 *LATER WORKS* 291 (1987), quoted in Sunstein, *supra* note 10, at 256.