

Distributing the First Fruits: Statutory and Constitutional Implications of Tithing in Bankruptcy

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INTRODUCTION

Since the earliest recorded times, religious adherents of many faiths have regarded it as their sacred duty to give a preordained portion of their wealth to their God. Performance of this duty serves many purposes. It is a token of faith, a commitment to the service of others both within the religious community and beyond, and a potent symbol of the giver's fervent belief that *all* worldly wealth is actually the fruit of divine providence. In the past, this obligation to repay a Bountiful Provider occurred through gifts in kind. Thus, it was the obligation of the farmer to give the "first fruits" of the harvest, the obligation of the herder to give a portion of the flock, and so on.¹ But as economies have transformed, the obligation has transformed with them. Today most religious adherents holding this belief acquit their obligation through transfers of money to their church. Similarly, the

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¹ The term "first fruits" comes from the Judeo-Christian tradition. The Book of Exodus commands: "The first of the first fruits of your ground you shall bring into the house of the Lord your God." *Exodus* 23:19; *see also Deuteronomy* 26:1-11 (explaining procedures for offering first fruits). The exact relationship between the concept of "first fruits" and the concept of tithes is a matter of some dispute, although the two are mentioned together in the Bible and have often been linked in Jewish and Christian theology. *See* 6 *ENCYCLOPAEDIA JUDAICA* 1312-16 (1971).

obligation once thought of as a portion of the harvest is now regarded in terms of a portion of income. From Judeo-Christian Biblical sources, where the tradition dates back to the time of Jacob, we know of this belief as an obligation to “tithing.”²

Given the prominence of tithing in the Judeo-Christian heritage, the Framers of the Constitution surely knew of its existence. No doubt some who signed the Constitution or participated in the drafting and ratification of the Bill of Rights themselves followed this religious practice. That they would have regarded it as a form of religious “exercise” safeguarded by the Free Exercise Clause of the Constitution can scarcely be doubted. Yet for nearly two centuries after the adoption of the Bill of Rights, the spheres of government and religion remained sufficiently separate so that there was simply no occasion to consider the ticklish question of how, or when (if at all), government power could be

² A tithe is a “tenth part of one’s income, contributed for charitable or religious purposes.” BLACK’S LAW DICTIONARY 1484 (6th ed. 1990). Tithing finds its origins in various passages of the Bible, including this passage from the Book of Malachi:

Will man rob God? Yet you are robbing me. But you say, “How are we robbing thee?” In your tithes and offerings. You are cursed with a curse, for you are robbing me; the whole nation of you. Bring the full tithes into the storehouse, that there may be food in my house; and thereby put me to the test, says the Lord of hosts, if I will not open the windows of heaven for you and pour down for you an overflowing blessing. I will rebuke the devourer for you, so that it will not destroy the fruits of your soil; and your vine in the field shall not fail to bear, says the Lord of hosts. Then all nations will call you blessed, for you will be a land of delight, says the Lord of hosts.

Malachi 3:8-12; see also *In re Packham*, 126 B.R. 603, 604 n.2 (Bankr. D. Utah 1991) (explaining that all income of whatever nature is subject to tithing). The term “tithing” itself derives from a Christian religious practice of giving a specified percentage of one’s income—traditionally 10%—to the Church. See, e.g., *Genesis* 28:22 (“[A]nd this stone, which I have set for a pillar, shall be God’s house; and of all that thou givest me I will give the tenth to thee.”). From this source, the idea has made it into our language and law that a tithe is 10% of one’s income.

We have deliberately used the term much more broadly, however, to encompass any religiously compelled financial contribution, regardless of amount and irrespective of faith. We employ this broad definition on the premise that the standard practices of one faith (or family of faiths) should not control the meaning of the term for constitutional purposes. Indeed, if they did, such deference to the practices of a particular religious group might well constitute establishment of religion. See *infra* part II.B (discussing Establishment Clause concerns).

used to limit the practice of tithing. By common, unspoken consent, it was treated as a matter of individual conscience on which government had no proper occasion to take a position.

All that changed more or less by accident in 1984, when Congress amended the Bankruptcy Code (the Code) to create a new procedure (the 1984 Amendments) for the workout of consumer debt under Chapter 13.³ By requiring debtors to list, and obtain judicial approval for, their "necessary expenses," the new law required bankruptcy judges to determine the propriety of allowing consumer debtors seeking bankruptcy relief to tithe. Although this issue has produced a fairly broad range of responses and some conflict, it has seldom been analyzed in any detail.⁴

We believe the matter is of considerable interest, both because of where it falls within the interstices of Chapter 13's statutory scheme, and because of the complex constitutional issues it raises under the Free Exercise and Establishment Clauses of the First Amendment. We approach the issue of tithing in the bankruptcy context from both statutory and constitutional vantages. Part I of this Article addresses the statutory scheme, while Part II considers the constitutional questions. We reach three principal conclusions. First, allowing tithes is consistent with the approach bankruptcy courts have taken to other expenses.⁵ Second, the Free Exercise Clause generally requires allowances for tithes.⁶ Third, permitting debtors proceeding under Chapter 13 to tithe does not create an unconstitutional establishment of religion.⁷

I. STATUTORY IMPLICATIONS OF TITHING

A. Overview of Chapter 13

Bankruptcy, for various reasons, has the public's attention, and

³ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C. & 28 U.S.C.) [hereafter 1984 Amendments].

⁴ See *infra* notes 112-19 and accompanying text (outlining courts' conflicting approaches to deciding propriety of tithing as necessary expense).

⁵ See *infra* notes 127-29 and accompanying text (explaining why courts should treat tithing as reasonably necessary expense).

⁶ See *infra* part II.A.3 (summarizing reasons why Free Exercise Clause allows tithing as necessary expense).

⁷ See *infra* part II.B.2 (explaining why allowing debtors to tithe does not violate Establishment Clause).

considering the increasing number of filings,⁸ there is every reason to believe that it will remain front and center for the foreseeable future. There is an extensive body of literature dealing with almost every aspect of bankruptcy and its impact upon debtors, creditors, the economy, and society in general.⁹ Given bankruptcy's adaptability and debtors' abilities to both engineer new uses for it and create new issues within its traditional scope, bankruptcy should remain fertile ground for discourse for some time to come. Much of the important literature has focused on issues that Congress clearly did not foresee.¹⁰ This assertion is not so much a criticism of Congress as it is a testimonial to creative debtors working within a process which, although crafted for traditional debt relief, has proven amenable to other uses as well.¹¹

⁸ In one decade the number of bankruptcy cases filed almost tripled. Susan D. Kovac, *Judgment-Proof Debtors in Bankruptcy*, 65 AM. BANKR. L.J. 675, 675 n.4 (1991). Total filings rose from 227,881 in 1980 to 725,484 in 1990. *Id.*

⁹ See, e.g., THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986); LAWRENCE P. KING ET AL., *COLLIER ON BANKRUPTCY* (15th ed. 1992) [hereafter *COLLIER*]; WILLIAM L. NORTON, JR., *NORTON BANKRUPTCY LAW AND PRACTICE* (1992).

¹⁰ For example, Congress did not anticipate the use of Chapter 11 by corporations seeking to avoid mass tort claims. See, e.g., Lissa L. Broome, *Payments on Long-Term Debt as Voidable Preferences: The Impact of the 1984 Bankruptcy Amendments*, 1987 DUKE L.J. 78 (concluding that 1984 Amendments do not protect preferential payments on long-term debt); Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846 (1984) (arguing that reorganization under Code may aid firms' resolution of large tort claims); see also *In re Johns-Manville Corp.*, 36 B.R. 727 (Bankr. S.D.N.Y. 1984) (allowing debtor's petition to proceed even though reorganization sought due to proliferation of asbestos-related suits against debtor). Nor did Congress anticipate its use by solvent debtors. See, e.g., Carlos J. Cuevas, *Bankruptcy Code Section 544(a) and Constructive Trusts: The Trustee's Strong Arm Powers Should Prevail*, 21 SETON HALL L. REV. 678, 769-72 (1991) (arguing that trustee should not be able to use Code to avoid unperfected security interests or unrecorded interests in real property if estate is solvent); Timothy W. Hoffman, *Environmental Protection and Bankruptcy Rehabilitation: Toward a Better Compromise*, 11 ECOLOGY L.Q. 671 (1984) (proposing compromise that preserves early access to bankruptcy proceedings without allowing abuse by solvent debtors).

¹¹ See Mark J. Roe, *Corporate Strategic Reaction to Mass Tort*, 72 VA. L. REV. 1 (1986) (explaining use of bankruptcy as one of three methods that corporations may employ to deal with large tort claims); Susan S. Ford, Note, *Who Will Compensate the Victims of Asbestos-Related Diseases? Manville's Chapter 11 Fuels the Fire*, 14 ENVTL. L. 465 (1984) (discussing use of Code as

Nothing in the 1978 Reform Act¹² precludes debtors from such uses; in fact, Congress has implicitly blessed at least some of these adventures by not addressing them in the 1984 Amendments.¹³

Among those matters about which Congress was clear from the 1978 Reform Act's initial passage was its intention that Chapter 13, rather than Chapter 7, should be the chapter of choice for most consumer debtors.¹⁴ The reasons for this now-established bankruptcy folklore are well-documented; they include the historically meager return to creditors in a Chapter 7 liquidation,¹⁵ the preservation of the fresh start,¹⁶ and Chapter 13's focus upon payment, rather than discharge, of unsecured debt.¹⁷

Chapter 13 proved to be a very attractive alternative to the sur-

shield from liability for asbestos-related lawsuits); *supra* note 10 (citing sources discussing nontraditional uses of Code).

¹² Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified at 11 U.S.C.) (amended 1984, 1986) [hereafter 1978 Reform Act].

¹³ Congress did not address the abuse of Chapter 11 in the 1984 Amendments. *See supra* notes 10-11 and accompanying text (citing cases and articles which discuss unconventional uses of Code by businesses). Additionally, the 1992 National Bankruptcy Review Commission Act, S. 1985, 102d Cong., 2d Sess. (1992), fails to address the disparate interpretations of the reasonably necessary standard for the definition of disposable income. *See id.* § 205, *reprinted in* 138 CONG. REC. S8242-44 (daily ed. June 16, 1992) (suggesting amendments to sections of Code without defining "reasonably necessary").

¹⁴ The Commission on the Bankruptcy Laws of the United States concluded that the use of Chapter 13 should be encouraged as an alternative to Chapter 7. *Personal Bankruptcy: Oversight Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 182 (1981-82) [hereafter *Oversight Hearings*] (statement of Hon. Conrad K. Cyr, Bankruptcy Judge) (citing REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess., pt. 1, at 157-59 (1973)).

¹⁵ Data collected by Sullivan, Warren, and Westbrook revealed that 87% of the Chapter 7 debtors surveyed could pay nothing at all to unsecured creditors from the sale of assets. *See* TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS* 303-04 (1989) (explaining that consumer lenders account for 87% of debts listed on bankruptcy petitions).

¹⁶ *See* 5 COLLIER, *supra* note 9, ¶ 1300.02 (explaining that purpose of Chapter 13 is to give debtors fresh start); *see also* Robert S. Cooper, *A Statistical Analysis of Chapter 13 Usage Before and After the Bankruptcy Reform Act of 1978*, 1985 ANN. SURV. OF BANKR. L. 351, 355 (noting two advantages over Chapter 7 that should encourage more Chapter 13 filings: debtors retain all property and discharge not subject to many exceptions).

¹⁷ Chapter 13 "contemplates a substantial effort by the debtor to pay his debts." S. REP. NO. 65, 98th Cong., 1st Sess. 22 (1983).

rendering of assets required by liquidation primarily because of the low threshold requirements for its use. As originally enacted, section 1325(a) only required a debtor to file in good faith and to prove that unsecured creditors would receive more under the proposed plan than under a liquidation.¹⁸ Rarely did a court find

¹⁸ 11 U.S.C. § 1325(a) provides:

(a) [T]he court shall confirm a plan if—

- (1) [t]he plan complies with the provisions of this chapter and with the other applicable provisions of this title;
- (2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;
- (3) the plan has been proposed in good faith and not by any means forbidden by law;
- (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under [C]hapter 7 of this title on such date;
- (5) with respect to each allowed secured claim provided for by the plan—
 - (A) the holder of such claim has accepted the plan;
 - (B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and
 - (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
 - (C) the debtor surrenders the property securing such claim to such holder; and
- (6) the debtor will be able to make all payments under the plan and to comply with the plan.

11 U.S.C. § 1325(a) (1988). For a list of factors relevant to a determination of good faith, see, e.g., *Flygare v. Boulden*, 709 F.2d 1344 (10th Cir. 1983). The *Flygare* court identified the following factors as relevant to a determination of good faith:

- “(1) the amount of the proposed payments and the amount of the debtor’s surplus;
- (2) the debtor’s employment history, ability to earn and likelihood of future increases in income;
- (3) the probable or expected duration of the plan;
- (4) the accuracy of the plan’s statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
- (5) the extent of preferential treatment between classes of creditors;
- (6) the extent to which secured claims are modified;

a violation of the good faith standard,¹⁹ and even more rarely did a creditor show that the proposed payout under the plan would provide less than a straight liquidation.²⁰ Debtors so routinely met the “not less than” standard of section 1325(a)(4) that a court could deny confirmation of a plan only by concluding that the plan did not represent the debtor’s “best efforts.”²¹ Some courts did just that,²² although there is no basis in fact for doing so if the debtor meets the requirement of section 1325(a)(4).²³

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- (7) the type of debt sought to be discharged and whether any such debt is non-dischargeable in Chapter 7;
 - (8) the existence of special circumstances, such as inordinate medical expenses;
 - (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
 - (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; and
 - (11) the burden which the plan’s administration would place upon the trustee.”

Id. at 1347-48 (quoting *In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982)); *see also* *Public Fin. Corp. v. Freeman*, 712 F.2d 219, 221 (5th Cir. 1983) (stating that good faith standard does not mandate substantial repayment of unsecured claims but debtor’s good faith must be viewed in totality of circumstances surrounding confirmation of any Chapter 13 plan); *In re McBride*, 4 B.R. 389, 392 (Bankr. M.D. Ala. 1980) (concluding that when specific requirements of § 1325 are met, it is not court’s prerogative to apply additional tests under guise of interpreting and defining good faith requirement).

¹⁹ For an example of a case finding a violation of the good faith standard, *see In re Breckenridge*, 12 B.R. 159 (Bankr. S.D. Ohio 1980). Although the court concluded that the plan violated the Code’s standard of good faith, it based its conclusion upon a recently declared bankruptcy and the retention of imprudently purchased assets. *Id.* at 160. A low percentage of dividends to unsecured creditors was just one of several factors. *Id.*

²⁰ *See In re Williams*, 3 B.R. 728 (Bankr. N.D. Ill. 1980) (providing rare counterexample in which court denied application for confirmation because plan paid less than what would be paid in Chapter 7 liquidation). Denial of confirmation under these circumstances is mandatory and requires no trustee or creditor objection. Cases like *Williams* are the exception; most debtors have so few assets that a Chapter 7 liquidation would produce virtually no prospect of repayment.

²¹ Under the bona fide effort test of 11 U.S.C. § 1325(a), courts often look to factors such as the amount of substantial payments and the debtor’s best efforts. *In re Raburn*, 4 B.R. 624, 625 (Bankr. M.D. Ga. 1980).

²² *See, e.g., In re Steinhorn*, 27 B.R. 43 (Bankr. S.D. Fla. 1983); *In re Burrell*, 2 B.R. 650 (Bankr. N.D. Cal. 1980); *In re Iacovoni*, 2 B.R. 256 (Bankr. D. Utah 1980).

²³ *See supra* note 18 (setting forth text of 11 U.S.C. § 1325(a)). Several

This rather random quantification of the good faith requirement led, quite naturally, to wildly disparate results, ranging from confirmation denials of plans proposing 70% payouts to unsecured creditors²⁴ to confirmation approvals of plans proposing only 1% payouts.²⁵

While no one expected complete uniformity across jurisdictions, Congress neither intended nor anticipated such different treatment of similarly situated debtors.²⁶ The most unsettling aspect of this ad hoc approach is that the results were more likely dictated by judicial attitudes toward Chapter 13 as a debtor tool

courts refused to distort the good faith standard into an absolute requirement that a debtor propose a plan which represents her best efforts. *In re Raines*, 33 B.R. 379, 381 (Bankr. M.D. Tenn. 1983); see also *Georgia R.R. Bank & Trust v. Kull*, 12 B.R. 654, 659-60 (S.D. Ga. 1981) (limiting application of statute to specified good faith standard but allowing consideration of debtor's best efforts in confirmation hearings); *In re Long*, 10 B.R. 880, 881 (Bankr. D.S.D. 1981) (noting that good faith standard necessitates inquiry into all circumstances of case, including debtor's best efforts).

²⁴ The court in *Raburn* found that Congress had defined substantial as 70% and denied confirmation. *Raburn*, 4 B.R. at 625. The court's conclusion that a situation, as here, in which the debtor would dispose of \$13,904 of debt by payment of \$656 but yet complied fully with the literal requirements for confirmation, was firm proof that this could only result from congressional "oversight" and that Congress had legislated a 70% payment requirement. *Id.*

²⁵ See, e.g., *In re Garcia*, 6 B.R. 35, 38 (Bankr. D. Kan. 1980) (stating that because § 1325(a)(4) precludes fixing of any percentage or amount of money which must be paid to unsecured creditors, debtor's plan, which calls for payment to secured creditors and certain identified classes of unsecured creditors and no payment to remaining general class of unsecured creditors, complies with all other applicable sections of Title 11 and therefore, must be confirmed); *In re Johnson*, 6 B.R. 34, 35 (Bankr. N.D. Ill. 1980) (confirming plan which proposed 1% payout because debtors will be making "meaningful" and "substantial" payments and concluding that because payments to unsecured creditors are not crucial feature, debtors might just as well have proposed 0% payments).

²⁶ According to the 1978 Reform Act's legislative history:

Chapter XIII of the present Bankruptcy Act has been one of the least understood and most erratically applied of all federal statutes dealing with bankruptcy or social welfare. [Its] . . . results have been less than satisfactory. . . . A [major] difficulty has been the diversity of the individuals involved. . . . The new [C]hapter 13 will permit almost any individual with regular income to propose and have approved a reasonable plan for debt repayment based on that individual's exact circumstances.

1978 Reform Act, *supra* note 12, reprinted in 1978 U.S.C.C.A.N. 5798-99.

than by concern for congressional policy. Courts suspicious of the Chapter 13 approach tended more often to set a higher "best efforts" threshold than did sympathetic courts.²⁷

What gradually emerged were dissatisfied debtors and creditors; neither group was served well by a process whose purpose was reasonably to balance the interests of both.²⁸ Debtors in bankruptcy districts requiring substantial payment as a condition of confirmation were forced into liquidation, thereby losing the benefits of Chapter 13's more liberal discharge provisions.²⁹ This thwarted Congress' intention that reorganization, not liquidation, be the primary vehicle for the consumer debtor.³⁰ Conversely, creditors in jurisdictions permitting debtors to satisfy section 1325(a)(4) with only minimal payments³¹ felt, with some good reason, that those debtors were enjoying a free ride by retaining all assets, making only nominal payments to unsecured creditors, and obtaining a complete discharge of almost all debt.³² This

²⁷ Compare *In re Raburn*, 4 B.R. 624, 625 (Bankr. M.D. Ga. 1980) (requiring 70% payout before confirmation of plan granted) with *Johnson*, 6 B.R. at 35 (confirming plan with only 1% payout).

²⁸ *Traer v. Clews*, 115 U.S. 528, 541 (1885); *In re Hill*, 95 B.R. 293, 298 (Bankr. N.D.N.Y. 1988); Daniel J. Tyukody, Jr., *Good Faith Inquiries Under the Bankruptcy Code: Treating the Symptom, Not the Cause*, 52 U. CHI. L. REV. 795, 802 (1985).

²⁹ Chapter 13's major advantages over Chapter 7 are that it allows the debtor to keep nonexempt property subject to a security interest and allows for the discharge of more types of debts. See ELIZABETH E. WARREN & JAY L. WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS* 336-37 (1986). The few debts which are nondischargeable under 11 U.S.C. § 1328 include alimony, child support, educational loan or overpayment benefits, death or personal injury awards resulting from unlawful automobile operation, and restitution due as a result of a criminal judgment. See 11 U.S.C. § 1328(a)(2) (referring to debts listed in § 523(a)(5)).

³⁰ See *Oversight Hearings*, *supra* note 14, at 182 (statement of Hon. Conrad K. Cyr, Bankruptcy Judge) (stating that legislative reform effort sought to encourage reorganization as alternative to liquidation).

³¹ These jurisdictions included the states of Florida, Georgia, California, and Utah. For examples from each of the four jurisdictions where courts required only minimal payments, see *In re Steinhorn*, 27 B.R. 43 (Bankr. S.D. Fla. 1983); *Raburn*, 4 B.R. at 624; *In re Burrell*, 2 B.R. 650 (Bankr. N.D. Cal. 1980); *In re Iacovoni*, 2 B.R. 256 (Bankr. D. Utah 1980).

³² The credit industry voiced strong dissatisfaction with the 1978 Reform Act during the Oversight Hearings: "I am not alone among members, I am sure, in hearing that [C]hapter 13 is regarded by some as unfair to creditors in a variety of ways and needs to be amended." *Oversight Hearings*, *supra* note 14, at 2 (statement of Rep. McClory). "[T]he consumer credit sector [is]

group believed that nothing as beneficial as a financial fresh start should be so relatively cost free and that, if debtors could not pay out of income, they should pay out of assets. In other words, bankruptcy should change things; it should leave a mark. Historically, it had done so.³³

These protestations resonated with Congress even though no reasonable twist of statutory construction could support the creditors' position, for instance, that a 1% plan actually representing a debtor's honest "best efforts" did not comply with the 1978 Reform Act's provisions. Perhaps that was not what Congress meant in 1978, but that is what it legislated, provided that the 1% represented a greater payout than that possible through a liquidation.³⁴ What was lacking, therefore, was any semblance of uniformity in application of the Code,³⁵ a clearly articulated congressional policy,³⁶ and a class of generally satisfied creditors, conditions inherently necessary for the preservation of any consumer protection legislation, including bankruptcy.

. . . concerned about the magnitude, direction, and significance of recent bankruptcy trends." *Id.* at 614 (testimony of Fred M. Haden, General Counsel, National Association of Federal Credit Unions) (quoting letter from Robert H. Dugger, then Director of National Credit Union Administration's Office of Policy Analysis, to National Association of Federal Credit Unions).

³³ Prior to the 1978 Reform Act, there was no individual reorganizational capability. Hence, all personal bankruptcies were liquidations, requiring the sale of assets, a much more draconian and often publicly visible result. As an aside, the 1978 Reform Act does not refer to the word "bankrupt"; the more euphemistic "debtor" is the appellation of choice. *See* S. REP. NO. 989, 95th Cong., 2d Sess. 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5809 (noting change in terminology from pre-1978 bankruptcy law).

³⁴ *See* 11 U.S.C. § 1325(a)(4) (requiring that payout in reorganization be greater than that in liquidation).

³⁵ "The Code does not provide any target for the portion of debt which should be repaid, nor does the Code even provide that repayment of debt takes precedence over expenses for non-necessary or luxury items. . . . [I]t is necessary to have a definite standard for how much of the debtor's future income should be committed to the plan." *Oversight Hearings, supra* note 14, at 308-09 (statement of Robert B. Evans, Senior Vice President and General Counsel of National Consumer Finance Association).

³⁶ *See id.* at 181-83 (statement of Hon. Conrad K. Cyr, Bankruptcy Judge) (noting that bankruptcy policy seeks achievement of uniform application of bankruptcy laws).

B. *The 1984 Amendments—Emergence of the “Reasonably Necessary” Standard*

Whether the 1978 Reform Act was initially poorly thought through, at least with respect to Chapter 13's application, or whether Congress succumbed to purely external pressures for change, is an issue for another time. Once it became convinced that change was either necessary or desirable or both, Congress acted quickly on the 1984 Consumer Credit Amendments,³⁷ leaving behind a very unilluminating history. The defining issue was uniformity, but whether Congress meant by that more uniform treatment of debtors regardless of the payout, or a more uniform (higher) distribution to creditors, is unclear and the scant legislative history reveals little.³⁸

The legislative history does contain, however, rather interesting attempts by academics, legislators, the credit industry, and representatives of consumer groups to articulate why they deemed change necessary.³⁹ Others have chronicled these

³⁷ Subtitle A of title III of the 1984 Amendments is entitled the “Consumer Credit Amendments.” 1984 Amendments, *supra* note 3, 98 Stat. at 352. In addition to concerns about the individual bankruptcy chapters and plans housed in Article II, Congress was particularly concerned with the realigning of the bankruptcy districts and with the status of bankruptcy judges and trustees as expounded in Articles I and III. The need for an immediate response to these concerns is highlighted by the various statements of members of Congress found in the *Congressional Record*. “We have a tremendous need [for additional district and circuit court federal judges] in districts all across America. Not in a month, not in a year, right now.” 130 CONG. REC. H1797 (daily ed. Mar. 21, 1984) (statement of Rep. Lott). “Make no mistake about it, we have an emergency here. The bankruptcy courts in this country cease to be operative as of March 31 in the constitutional fashion.” *Id.* at H1799 (statement of Rep. Glickman). The emergency was prompted in part by the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion), in which the Court declared that the Code's expansion of bankruptcy judges' powers under the 1978 Reform Act violated Article III of the Constitution.

³⁸ Congress stated the goals of the 1984 Amendments generally. The first goal was elimination of the great disparities among the various judicial districts in the use made of Chapter 13. The second goal was achievement of uniform application of bankruptcy law provisions nationally. *Oversight Hearings*, *supra* note 14, at 181-83 (statement of Hon. Conrad K. Cyr, Bankruptcy Judge).

³⁹ *See, e.g., id.* at 1-2 (statement of Rep. Rodino), 2-8 (testimony of Vernon Countryman, Professor of Law, Harvard Law School), 47-50 (testimony of Walter Ray Phillips, Professor of Law and Associate Dean,

attempts.⁴⁰ They need no elaboration here beyond that needed to show that the common denominator was the lack of uniformity.⁴¹

Although, not surprisingly, credit lobbyists focused upon the minimal distributions to unsecured creditors, they were perhaps more distressed by the tremendous surge in consumer filings. This surge was prompted, as they saw it, by the liberal provisions of the 1978 Reform Act regarding exempt property, retention of nonexempt property subject to security interests, and restrictions on the reaffirmation of debts.⁴² According to the credit industry, these provisions encouraged consumers to file petitions that they would not have filed under the old Code.⁴³ The credit industry argued that “[t]he Bankruptcy Reform Act of 1978 is enticing a disturbingly large number of debtors into having their debts

University of Georgia), 385-98 (statements of Ellen Broadman, Counsel for Government Affairs, Consumer Union, and David I. Greenberg, Legislative Director, Consumer Federation of America), 611-16 (testimony of Fred M. Haden, General Counsel, National Association of Federal Credit Unions).

⁴⁰ “The Amendments were adopted in response to concerted pressure from the consumer credit industry, ostensibly to eliminate perceived abuses of the Bankruptcy Code and the bankruptcy process by individual debtors.” Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 61-62 (1986) (footnotes omitted); see also John B. Butler, III, *A Chapter 13 Trustee Looks at Section 1325(b) of the Bankruptcy Code*, 63 AM. BANKR. L.J. 401 (1989) (analyzing effect of 1984 Amendments); Jeffrey W. Morris, *Substantive Consumer Bankruptcy Reform in the Bankruptcy Amendments Act of 1984*, 27 WM. & MARY L. REV. 91, 137-63 (1985) (focusing on changes designed to eliminate perceived abuses of Chapter 13); Brian G. Smooke, Comment, *Section 1325(b) and Zero Payment Plans in Chapter 13*, 4 BANKR. DEV. J. 449 (1987) (examining amended section’s impact on ability of Chapter 13 debtor to obtain confirmation of zero payment plan).

⁴¹ Although Congress set out to simplify, expand, and make the provisions of Chapter 13 more flexible, the disparity in application among the jurisdictions remained a major obstacle to the full realization of that goal. *Oversight Hearings*, *supra* note 14, at 183-84 (statement of Hon. Conrad K. Cyr, Bankruptcy Judge). The good faith standard resulted in more litigation than any other issue since the enactment of the Code. *Id.* at 186. The major problem with § 1325 was its lack of a meaningful standard for establishing what portion of the debtor’s income she should devote to the plan. Bruce E. Kosub & Susan K. Thompson, *The Religious Debtor’s Conviction to Tithe as the Price of a Chapter 13 Discharge*, 66 TEX. L. REV. 873, 876 (1988).

⁴² *Bankruptcy Reform: Hearings Before the Senate Judiciary Comm.*, 98th Cong., 1st Sess. 486, 488 (1983) (prepared statement of the International Consumer Credit Association).

⁴³ *Id.*

avoided, often without the economic penalty of loss of assets being coupled to the economic benefit of avoidance of their debts."⁴⁴ The clear implication of this lament was that the cost of bankruptcy to one who could make only nominal payments should be a liquidation, with its attendant loss of assets. Chapter 13 was simply too attractive, leading to widespread debtor abuse, or more accurately, to unacceptably widespread use.

Critics asserted that the 1978 Reform Act lacked a mechanism for ensuring that debtors pay, as a cost of debt avoidance, as much as possible to the unsecured creditors.⁴⁵ Some jurisdictions were already functionally enforcing such a requirement, albeit with little predictability.⁴⁶ The crucible became the attitude of the specific court rather than the code under which the court operated. Hence, critics clamored for a standard that would ensure greater distributions which, in turn, would discourage Chapter 13 filings as a general vehicle for debt avoidance.

Congress considered other suggested standards, most notably and importantly, the minimum percentage test, a favorite of the credit industry.⁴⁷ Those other suggestions and the reasons for

⁴⁴ *Id.* at 488-89. As Judge Cyr has noted, "[C]hapter 13 emerged from its extended congressional incubation as a flexible rehabilitation procedure with far more universal appeal than was ever achieved under Chapter XIII." *Oversight Hearings, supra* note 14, at 183 (statement of Hon. Conrad K. Cyr, Bankruptcy Judge).

⁴⁵ See *Oversight Hearings, supra* note 14, at 669 (comments of American Retail Federation) (proposing minimum percentage repayment plan in H.R. 4786).

⁴⁶ In applying the bona fide effort test, courts implicitly require debtors to make minimal repayments. See, e.g., *In re Steinhorn*, 27 B.R. 43 (Bankr. S.D. Fla. 1983); *In re Raburn*, 4 B.R. 624 (Bankr. M.D. Ga. 1980); *In re Burrell*, 2 B.R. 650 (Bankr. N.D. Cal. 1980); *In re Iacovoni*, 2 B.R. 256 (Bankr. D. Utah 1980).

⁴⁷ The House proposed the "good faith" effort test, which can be best described as a reasonable effort consistent with the debtor's ability to pay in light of the primary obligation of the debtor to support herself and her dependents. *Oversight Hearings, supra* note 14, at 209 (statement of Hon. Conrad K. Cyr, Bankruptcy Judge). The Senate proposed the "bona fide" effort test with the intention of requiring that the plan proposed by the debtor is a real effort and not a half-hearted one by the debtor to repay her creditors. *Id.* at 211 (citing S. REP. No. 150, 97th Cong., 1st Sess. 18-19 (1981)). Various consumer finance groups proposed a minimum percentage repayment plan, which was introduced as H.R. 4786. *Id.* at 669 (comments of American Retail Federation).

their rejection are chronicled amply elsewhere.⁴⁸ Accordingly, this Article discusses only the composition of the enacted standard and its impact after nearly a decade of use.

The ability to pay standard of section 1325(b)(1), articulated and refined by the National Bankruptcy Conference and ultimately adopted by Congress, represented more of an objective test than either the House or Senate originally proposed. The House initially favored requiring a good faith effort; the Senate favored a bona fide effort.⁴⁹ Both of these proposals, while purporting to add elements of ability to pay, actually would have changed the existing Code very little since courts, under existing standards, were already reading one or both of these qualitative standards into the Code.⁵⁰ The course Congress ultimately favored was to introduce a more quantifiable component—income—into the determination. Congress preserved flexibility, however, by allowing debtors to deduct reasonably necessary expenses from future income in computing the amount available for payment to creditors.⁵¹ This test avoids practical and administrative concerns by requiring either an unsecured creditor or a trustee to object to a proposed plan before the court becomes involved. In routine, noncontroversial plans offered without objection, the court may, though it need not, confirm a plan without any comment upon the appropriateness or amount of the debtor's proposed distributions.⁵²

⁴⁸ See Kosub & Thompson, *supra* note 41, at 876-80 (discussing legislative intent behind adoption of ability to pay standard).

⁴⁹ See *supra* note 47 (explaining different proposals).

⁵⁰ For factors applied in the good faith test, see *supra* note 18; for factors used in the bona fide effort test, see *supra* note 21.

⁵¹ We should note here that while income is already "quantifiable," its use, a gesture to the credit industry, has not produced a quantitative standard. As we note later, bankruptcy courts have wide discretion to determine how much of the debtor's income is disposable. See *infra* notes 56-111 and accompanying text (explaining why courts have such wide discretion to determine amount of debtor's disposable income and explaining various standards and factors courts may look to in making determination).

⁵² As required by 11 U.S.C. § 1325(b)(1), an objection to the debtor's plan must be raised by the trustee or the holder of an allowed unsecured claim in order for the court to consider the reasonable necessity of a debtor's proposed expense. 11 U.S.C. § 1325(b)(1). In *In re Davis*, the court interpreted § 1325(b)(1) as precluding the court from, sua sponte, considering confirmation questions. *In re Davis*, 68 B.R. 205, 209-10 (Bankr. S.D. Ohio 1986). The court went on, however, to hold that a court

Some congressional explanation of why Congress chose the language it did would have been helpful, but Congress did not provide one. Although amended section 1325(b)(1)(B), requiring that all “disposable income” be used for creditor repayment, hints of a greater repayment obligation, it is clearly not dispositive of that issue.⁵³ One could argue that the disposition of that issue is not critical so long as courts produce a reasonably uniform, workable standard. However, therein lies the problem; no such general standard has emerged. Given the vagueness of the statutory framework, that is not surprising. Nonetheless, the courts consistently have struggled to discern congressional intent, and have provided, if not a uniform standard, at least some broad guidelines that work reasonably well.⁵⁴ The courts have managed despite congressional vagueness which, we suggest later, was probably deliberate.⁵⁵

The standard as enacted was the “projected disposable income,” or the ability to pay test, of section 1325(b)(1)(B) of the 1984 Amendments.⁵⁶ The Code defines disposable income as “income which is received by the debtor and which is not reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor”⁵⁷ Whatever else might be said about this test, it is, on its face, two

is authorized, *sua sponte*, to consider the standards of § 1325(b) in granting or denying confirmation pursuant to the good faith standard of 11 U.S.C. § 1325(a)(3). *Id.* at 215-16.

⁵³ 11 U.S.C. § 1325(b)(1)(B).

⁵⁴ See *infra* notes 95-111 and accompanying text (discussing cases in which courts developed guidelines for determining reasonable necessity of debtor expenses). 11 U.S.C. § 1325(b)(2) reads, in relevant part, as follows:

(2) For purposes of this subsection, “disposable income” means income which is received by the debtor and which is not reasonably necessary to be expended—

(A) for the maintenance or support of the debtor or a dependent of the debtor

11 U.S.C. § 1325(b)(2).

⁵⁵ See *infra* notes 93-94 and accompanying text (suggesting that Congress intentionally failed to define uniform standard).

⁵⁶ This test provides that if a trustee or unsecured creditor objects to the debtor’s plan, the court must deny confirmation of the plan unless it finds that the debtor will apply all of her projected “disposable income” for the next three years to plan payments. 11 U.S.C. § 1325(b)(1)(B).

⁵⁷ *Id.* § 1325(b)(2); see also *supra* note 54 (setting forth relevant part of 11 U.S.C. § 1325(b)(2)).

things: a tool giving courts wide latitude to work with idiosyncratic debtors, and a guarantee of continuing discord.

Nonetheless, by imposing a flexible standard and leaving its contours to the courts, Congress probably ensured Chapter 13's durability, even within varied constituencies with contradictory goals and competing interests.⁵⁸ The open texture of this standard is probably its genius, although it remains a continuing source of irritation. It is doubtful that a fixed minimum percentage could have survived the internecine debtor-creditor warfare, although, arguably, it would have provided, at a minimum, the certainty now said to be lacking.

Just what Congress meant by "reasonably necessary" within the context of projected disposable income is perhaps deliberately uncertain. One could conclude, as some courts have, that all expenditures a debtor incurs while maintaining herself and her dependents are necessary unless they are luxuries,⁵⁹ and that while a debtor can anticipate some lifestyle changes, she need not fear dramatic ones.⁶⁰ But one could also conclude that the obligation to devote "disposable income" to creditor repayment necessitates some suffering.

Yet a broader perspective on the development of the Code yields a clearer sense of direction. The history of Chapter 13, whether as originally enacted or as subsequently amended, rather clearly reveals that its use was never intended to penalize; instead, the protection of the family unit with minimal disruption to dependents was the vital concern.⁶¹ What, then, have the 1984

⁵⁸ See *supra* note 39 (citing statements and testimony in *Oversight Hearings* in which witnesses voice competing goals and interests).

⁵⁹ Bankruptcy courts commonly apply a two-prong analysis in determining whether a budgeted item of expense satisfies 11 U.S.C. § 1325(b). *In re Bien*, 95 B.R. 281, 282 (Bankr. D. Conn. 1989). First, the court determines whether a challenged expense serves an appropriate purpose. *Id.* If it does not, it is considered a luxury. *Id.* If it does, it is considered a necessity and then the amount of the expense is considered. *Id.* However, the *Bien* court, in deciding the propriety of a nondiscretionary obligation to tithe, only ruled on the first prong because it believed that the amount of expense was not a proper subject for judicial review. *Id.*

⁶⁰ The court in *In re Otero* indicated that the court may not "squeeze the last dollar" from debtors, nor was it intended to "take the last son." *In re Otero*, 48 B.R. 704, 708 (Bankr. E.D. Va. 1985). The court in *In re Navarro* further supported the interest of debtors when it refused to impose its values on debtors' spending habits. *In re Navarro*, 83 B.R. 348, 356-57 (Bankr. E.D. Pa. 1988).

⁶¹ See, e.g., *Navarro*, 83 B.R. at 356-57 (refusing to affect debtor's

Amendments changed? By focusing on income, they have changed the process by which courts deny or confirm plans; however, they have had little impact on the actual amounts paid to creditors.⁶² This is so because even prior to the 1984 Amendments, many courts routinely required all “projected disposable income” to be paid upon unsecured debt without specifically saying so.⁶³ However, an important, and a more dramatically noticeable change, is the level of scrutiny courts must apply to the debtor’s ability to pay, the concept behind the disposable income test.

Prior to the 1984 Amendments, there was no compelling need for the court to inquire into and, as now, sometimes intrude upon the debtor’s role as head of a household or otherwise as a provider for dependents. The 1984 Amendments now compel the courts to do both and necessarily, as we suggest later, bring with them their own set of values. Both of the existing tests of section 1325—best interests and good faith—remain, although the 1984 Amendments, in theory at least, restored good faith to its original role, that of assuring that the debtor has complied with the Code’s general provisions and that the filing is not frivolous.⁶⁴ Congress thereby removed good faith as a quantifiable determinative factor.⁶⁵

By specifically accepting the ability to pay test proposed by vari-

spending habits by imposing court’s values on debtor); 5 COLLIER, *supra* note 9, ¶ 1325.07 (noting that debtor’s primary obligation in Chapter 13 plan is to support dependents).

⁶² While continued efforts to force debtors into Chapter 13 may increase filing rates, they will not necessarily add up to creditor repayment. Chapter 13 debtors fail in large numbers, with fewer than a third still making payments an average of two years after confirmation. See SULLIVAN ET AL., *supra* note 15, at 222.

⁶³ See, e.g., *In re Steinhorn*, 27 B.R. 43, 45 (Bankr. S.D. Fla. 1983) (requiring that debtors must propose to pay as much as their earning capacity reasonably permits to satisfy good faith standard); cf. *In re Burrell*, 2 B.R. 650, 652-53 (Bankr. N.D. Cal. 1980) (denying confirmation of debtor’s plan because plan failed to propose substantial repayment even though it was debtor’s best effort).

⁶⁴ Historically, this test has merely required that the plan comport with the provisions, purposes, and spirit of the bankruptcy policy behind a particular chapter of relief. *Oversight Hearings*, *supra* note 14, at 190 n.17 (statement of Hon. Conrad K. Cyr, Bankruptcy Judge).

⁶⁵ Congress rejected credit industry proposals requiring minimum percentage payments and adopted the ability to pay test as its confirmation standard. 11 U.S.C. § 1325(b); see also Kosub & Thompson, *supra* note 41, at

ous groups, including the National Consumer Finance Association,⁶⁶ the National Bankruptcy Conference, and the National Conference of Bankruptcy Judges,⁶⁷ Congress properly refocused the inquiry from the proposed percentage of distribution, which the 1978 Reform Act never contemplated as a controlling factor, to the excess of income over a debtor's living expenses, the inquiry a lender routinely makes.⁶⁸ It is important to note that an ability to pay standard, of sorts, already existed under the 1978 Reform Act since a debtor, as a condition to confirmation, had to show she was able to pay the proposed amount.⁶⁹ Now, upon an

876-80 (discussing alternatives proposed prior to adoption of ability to pay test).

⁶⁶ "We would like to see as many people [as possible] using [C]hapter 13 . . . [and] . . . Judge Cyr's disposable income standard." *Oversight Hearings*, *supra* note 14, at 347 (statement of Robert B. Evans, Senior Vice President and General Counsel, National Consumer Finance Association).

⁶⁷ The ability to pay test, which was ultimately adopted and embodied in 11 U.S.C. § 1325(b), was proposed by Judge Conrad K. Cyr on behalf of the National Conference of Bankruptcy Judges and the National Bankruptcy Conference. *Id.* at 212 (statement of Hon. Conrad K. Cyr, Bankruptcy Judge).

⁶⁸ In the context of consumer credit, there was an increasing recognition that the value of "human capital" was more than an economic construct, since consumer lending was done largely in reliance on the debtor's earnings prospects and not on the basis of her tangible property. Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 76 (1986); see also SELWYN ENZER ET AL., SOME CONSIDERATIONS CONCERNING BANKRUPTCY REFORM 7 (1973) (stating that debtor's source of earnings is unaffected by bankruptcy); Homer Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 480 n.101 (1968) (discussing role of consumer credit in bankruptcy policy); James A. MacLachlan, *Puritanical Therapy for Wage Earners*, 68 COM. L.J. 87, 89 (1963) (explaining that parties in credit transaction contemplate that payments will be made from future earnings and therefore, bankruptcy should not change what was originally contemplated); William H. Meckling, *Financial Markets, Default and Bankruptcy: The Role of the State*, 41 LAW & CONTEMP. PROBS. 13, 28-29 (Autumn 1977) (stating that lenders and borrowers expect repayment out of future wages); Discussion, 41 LAW & CONTEMP. PROBS. 123, 156-58 (Autumn 1977) (discussing value of human capital); Note, *Discharge Provisions in Consumer Bankruptcy: The Need for a New Approach*, 45 N.Y.U. L. REV. 1251, 1265 (1970) (noting that ordinary course of credit transactions is for consumer to pay with earnings and profits).

⁶⁹ 11 U.S.C. § 1325(a)(6) established the ceiling on Chapter 13 plans by requiring that a debtor be able to make all proposed payments in order to receive confirmation. 11 U.S.C. § 1325(a)(6).

unsecured creditor's objection, she must also prove that she cannot pay more.⁷⁰

In any event, the 1984 Amendments sought to quiet the discord among entities with competing, contradictory interests by directing all expendable income to payment of unsecured debt. Congress' aim was to bring about more uniform treatment among creditors and debtors alike throughout the various bankruptcy districts, something notably absent in the decisions applying the 1978 Reform Act.⁷¹ To hope, however, that any such fact-specific standard could possibly guarantee totally uniform results would have been fanciful. Only the bright line minimum percentage test proposed by credit lobbies and rejected by Congress could ensure that.⁷² As noted above, however, Congress consciously chose judicial latitude over bright lines, thereby ensuring less than uniform results, albeit with a narrower set of variables.⁷³ As is so often the case, the final product represented a compromise, a balancing of competing interests, a standard sufficiently resilient to accommodate the varied goals of personal debt reorganization.⁷⁴

⁷⁰ While the trustee or holder of an unsecured claim has the initial burden of raising an objection to the debtor's plan, the proponent of a Chapter 13 plan has the ultimate burden of proof as to the requirements of its confirmation. *In re Packham*, 126 B.R. 603, 607 (Bankr. D. Utah 1991); *In re Lindsey*, 122 B.R. 157, 159 (Bankr. M.D. Fla. 1991); *In re Warner*, 115 B.R. 233, 236 (Bankr. C.D. Cal. 1989); *In re Girdaukas*, 92 B.R. 373, 376 (Bankr. E.D. Wis. 1988); *In re Navarro*, 83 B.R. 348, 355 (Bankr. E.D. Pa. 1988).

⁷¹ *Oversight Hearings*, *supra* note 14, at 181-83 (statement of Hon. Conrad K. Cyr, Bankruptcy Judge).

⁷² *See id.* at 669 (comments of American Retail Federation) (urging Congress to adopt minimum percentage test).

⁷³ Congress recognized that its standard did not provide specifics, but felt that judges could decide the type of expense and amount that is reasonably necessary for a debtor's support. *See Kosub & Thompson*, *supra* note 41, at 882 (footnote omitted).

⁷⁴ The most recent cases have recognized the disparity which exists in favoring either the debtor or unsecured creditors and have tried to recognize the legitimate interests of both. "When determining whether certain expenses are reasonably necessary, courts must balance the interests of creditors against debtors' entitlement to determine the manner in which they should maintain and support themselves and their dependents." *In re McDaniel*, 126 B.R. 782, 784 (Bankr. D. Minn. 1991) (footnote omitted); *see also In re Jones*, 119 B.R. 996, 1000-01 (Bankr. N.D. Ind. 1990) (recognizing that § 1325(b) balances interests of debtor and creditors); *In re Reyes*, 106 B.R. 155, 157 (Bankr. N.D. Ill. 1989) (noting absence of bright line rule for

What is clear, notwithstanding any ambiguity of language or intent, is that Congress wanted debtors to pay more than they had been paying and, if not, to explain why not—hence the reasonably necessary provision.⁷⁵ This language serves that purpose as well as any other, and despite the meager history behind that phrase, a fairly solid body of case law has emerged telling us, if not what is reasonably necessary for family maintenance, then what is not. An appropriate generalization at this juncture, as suggested above, might be that if a proposed expenditure is not a luxury, then it is necessary,⁷⁶ a concept consistent with the general policy of minimal disruption to prior family lifestyle.⁷⁷

The 1984 Amendments have produced significant litigation, much of it centered around the interpretation and application of section 1325(b)(2)'s "reasonably necessary" standard.⁷⁸ Commentators have suggested various reasons why this is so.⁷⁹ Although the standard's subjective nature practically ensures con-

determining reasonably necessary expenses); *In re Sutliff*, 79 B.R. 151, 157 (Bankr. N.D.N.Y. 1987) (adopting reasonably necessary standard such that debtors do not continue pre-bankruptcy lifestyle at expense of creditors). Bankruptcy legislation reflects a longstanding struggle to reconcile the debtor's ability to retain future earnings with her creditors' legitimate desires to maximize their recoveries. "As a generalization, the bankruptcy law has two basic purposes: (1) to provide an equitable distribution to unsecured creditors of the proceeds from the debtor's nonexempt property; and, (2) to provide the honest debtor with a discharge from the debts. . . . Many cases have referred to this as the 'fresh start' doctrine." LAWRENCE P. KING & MICHAEL L. COOK, CREDITOR'S RIGHTS, DEBTORS' PROTECTION AND BANKRUPTCY 777 (1985); see also *supra* note 60 (citing cases in which courts attempted to protect debtors' interests).

⁷⁵ By simultaneously establishing both the floor and the ceiling on Chapter 13 payments, the ability to pay test seeks to tailor Chapter 13 relief with greater attention to the ability of the debtor to satisfy allowed claims from future income. The test when invoked by a holder of an allowed unsecured claim should serve as the standard for determining whether the debtor is reasonably capable of paying more than originally proposed. *Oversight Hearings*, *supra* note 14, at 212-13 (statement of Hon. Conrad K. Cyr, Bankruptcy Judge).

⁷⁶ *In re Bien*, 95 B.R. 281, 282 (Bankr. D. Conn. 1989).

⁷⁷ *Id.* at 283; see also *In re Navarro*, 83 B.R. 348, 356-57 (Bankr. E.D. Pa. 1988) (refusing to change debtor's spending habits by imposing court's values on debtor); 5 COLLIER, *supra* note 9, ¶ 1325.07 (noting that debtor's primary obligation in Chapter 13 plan is continued support of dependents).

⁷⁸ *Reyes*, 106 B.R. at 157 (stating that courts have not established definite reasonably necessary standard).

⁷⁹ See, e.g., Kosub & Thompson, *supra* note 41, at 882 (suggesting that judges must take account of each debtor's individual circumstances).

tradictory results, there is an apparent general consensus that this elastic standard is what Congress had in mind and is more workable than its predecessor.⁸⁰

Courts have used the wide latitude given, have made difficult choices, and have not hesitated to recharacterize a debtor's claimed necessary expense as a luxury. On the other hand, they also have permitted expenses for such clearly "unnecessary" items as newspapers,⁸¹ and have rarely required the "first born" as a cost of confirmation.⁸² Some courts, rather than basing decisions upon the necessary versus luxury distinction, instead have focused upon the distinction between absolutely necessary expenses and those that are "only" reasonably necessary, allowing only the former⁸³ while nonetheless agreeing that debt reorganization does not necessarily demand a radically altered lifestyle.⁸⁴ Either route requires hard choices as courts attempt to balance competing interests, and any choice will reflect, to some extent, the court's personal bias and philosophy on what expenses a debtor appropriately may incur.

The reasonably necessary component of the projected income test is unquestionably subjective and qualitative. It reflects, as noted earlier, a deliberate congressional preference over the completely objective and quantitative minimum percentage standard noted above.⁸⁵ Therefore, although wide disparity was the catalyst for reform,⁸⁶ the pendulum has not swung far in the other direction. Congress chose to sacrifice uniformity as a goal to the extent that it conflicted with the courts' ability to appreciate debtors' individual differences and to tailor results accordingly.⁸⁷

⁸⁰ *Id.*

⁸¹ The court in *In re Tinneberg* found a \$12 newspaper expenditure to be reasonably necessary and suggested that any standard which prevented debtors in bankruptcy from buying a newspaper would be inhumane. *In re Tinneberg*, 59 B.R. 634, 635 (Bankr. E.D.N.Y. 1986).

⁸² *In re Otero*, 48 B.R. 704, 708 (Bankr. E.D. Va. 1985).

⁸³ *In re McDaniel*, 126 B.R. 782, 784-85 (Bankr. D. Minn. 1991).

⁸⁴ In making the necessary factual determination, the court should not require drastic changes in the debtor's lifestyle or substitute its own values for those of the debtor regarding fundamental aspects of the debtor's life. *In re Bien*, 95 B.R. 281, 283 (Bankr. D. Conn. 1989).

⁸⁵ Kosub & Thompson, *supra* note 41, at 882.

⁸⁶ *Oversight Hearings*, *supra* note 14, at 181-83 (statement of Hon. Conrad K. Cyr, Bankruptcy Judge).

⁸⁷ See Kosub & Thompson, *supra* note 41, at 882 (noting that statute allows judges to tailor plan to debtor's individual circumstances).

As suggested earlier and as several courts and commentators have noted, neither the legislative history of the 1984 Amendments nor the language itself dictates what appropriate expenses might be in calculating projected disposable income.⁸⁸ One court, in an understated but persuasive way, captured the sense of things by referring to the legislative history of section 1325(b) as “singularly vague and unenlightening.”⁸⁹ The court in *In re Navarro*⁹⁰ appropriately inferred that the courts are free to seek guidance from other sections of the Code in deciding what is reasonably necessary, but are not free “to superimpose [their] values and substitute [their] judgment[s] for those of the debtor on basic choices about appropriate maintenance and support.”⁹¹ The same court cited Collier’s treatise on bankruptcy:

In short, the court cannot and should not order debtors to alter their lifestyles where there is no obvious indulgence in luxuries, even where one or more unsecured creditors demand such a change. To engage in such close judgments and supervision would be to contravene the intent of Congress. It would also place impossible burdens on the court in determining the absolute necessity of every expense in each debtor’s budget.⁹²

It is clear, therefore, that courts must search for this particular truth on a case by case basis. It is equally clear that Congress intentionally did not define either “reasonably necessary” or “expense”; indeed, it was wise not to. There is no suggestion, however, that these terms were to be separated from their commonly accepted meanings and usages simply because they were added to the Code. The language neither precludes nor includes

⁸⁸ The legislative history of the 1984 Amendments provides some guidance in defining the proper reach of the ability to pay test, but falls far short of giving any clear answers. Congress was in such a hurry to adopt H.R. 5174 that it failed to provide any official legislative reports explaining the new law. For evidence of Congress’ haste in adopting the legislation, see *supra* note 37. Additionally, courts have difficulty interpreting the vague terms in many of the Code provisions that limit the debtor’s fresh start. Kosub & Thompson, *supra* note 41, at 875. The statutory language fails to establish the appropriate scope of inquiry to determine when particular budgeted expenses are reasonably necessary for the maintenance and support of the debtor or the debtor’s family. *In re Navarro*, 83 B.R. 348, 354 (Bankr. E.D. Pa. 1988).

⁸⁹ *In re Jones*, 55 B.R. 462, 465 (Bankr. D. Minn. 1985).

⁹⁰ *Navarro*, 83 B.R. at 348.

⁹¹ *Id.* at 355 (footnote omitted).

⁹² *Id.* (citing 5 COLLIER, *supra* note 9, ¶¶ 1325-48 to -49); see also Gross, *supra* note 40, at 114-40 (analyzing § 1325(b)).

any specific or individual expense or the amount of that expense.⁹³ Thus, although the hope was that more debtors would pay more, the task of coping with the issue and deciding how much more rests squarely with the courts.⁹⁴

Of the two questions the court now has to answer—is the expense appropriate, and is the amount allocated to that expense proper—the latter is generally easier to answer. The amount is usually related to prior lifestyle, to future income, and in most cases, to other expenses.⁹⁵ Unless there is evidence of abuse or intention to avoid paying a creditor, the debtor's suggested figure should prevail and in most cases has. Whether an expense is appropriate, however, is much more problematic. For one thing, it need not be essential, merely reasonably necessary.⁹⁶ Furthermore, a past expense, regardless of how faithfully and sincerely incurred, is not necessarily appropriate now, when balanced against the competing claims of bankruptcy. While a "track record" of payment is evidence of a commitment—recently discovered needs are inherently suspicious—it is not dispositive of the issue.⁹⁷ In a forum the very nature of which ensures that the pie is not large enough for all, something must give, and frequently, it is the expense that does not fit readily into the archetypical mosaic of the Chapter 13 debtor.

After a decade of experience, one can set out a fair catalogue of expenses that bankruptcy courts have treated with suspicion, depending upon a court's view of the debtor's proposed distribution. These expenses include payments upon expensive

⁹³ It appears that courts have not established a bright line test for what is reasonably necessary. *In re Reyes*, 106 B.R. 155, 157 (Bankr. N.D. Ill. 1989).

⁹⁴ Kosub & Thompson, *supra* note 41, at 882.

⁹⁵ Courts focus upon the totality of circumstances of the individual debtor's case. *In re Bien*, 95 B.R. 281, 283 (Bankr. D. Conn. 1989); *In re Navarro*, 83 B.R. 348, 355 (Bankr. E.D. Pa. 1988).

⁹⁶ Expenses need not be absolutely essential to the maintenance and support of debtors but only "reasonably necessary" for such purposes. *In re McDaniel*, 126 B.R. 782, 784 (Bankr. D. Minn. 1991).

⁹⁷ See, e.g., *In re Packham*, 126 B.R. 603, 608 (Bankr. D. Utah 1991) (finding that tithing was not reasonably necessary expense despite it being a prior practice); *In re Curry*, 77 B.R. 969, 970 (Bankr. S.D. Fla. 1987) (concluding that tithing in form of payroll deduction in effect before bankruptcy was not reasonably necessary expense); *In re Sturgeon*, 51 B.R. 82, 83-84 (Bankr. S.D. Ind. 1985) (deciding that tithing was not required by church and therefore was not necessary living expense even though it was prior practice).

automobiles;⁹⁸ tuition for private school;⁹⁹ excessively high mortgage payments¹⁰⁰ (although these are generally rejected because of the amount rather than because they are not reasonably necessary); investment expenses;¹⁰¹ expenses for such recreational items as a camper,¹⁰² a recreational boat,¹⁰³ and a nonresidence motor home;¹⁰⁴ a payroll deduction savings account;¹⁰⁵ charitable gifts;¹⁰⁶ and tithing.¹⁰⁷ Some courts have found these to be, at least in some circumstances, luxuries, although perhaps all could have qualified as reasonably necessary under different circumstances.

This is precisely the kind of flexibility and fact-specific decision-making that Congress envisaged.¹⁰⁸ Although one commentator

⁹⁸ See, e.g., *In re Reyes*, 106 B.R. 155, 157-58 (Bankr. N.D. Ill. 1989) (finding that debtor purchased extravagant four-wheel drive vehicle as "obvious indulgence"); *In re Rogers*, 65 B.R. 1018, 1020 (Bankr. E.D. Mich. 1986) (denying confirmation of plan because debtor chose to retain sports car with large debt owed on it rather than retain domestic car with smaller unpaid balance).

⁹⁹ See, e.g., *Navarro*, 83 B.R. at 354 (refusing to conclude that tuition for religious education is per se unreasonable unless expense is excessive).

¹⁰⁰ See, e.g., *In re Lindsey*, 122 B.R. 157, 159 (Bankr. M.D. Fla. 1991) (refusing to confirm plan because substantial portion of first 12 payments was dedicated to mortgage).

¹⁰¹ See, e.g., *In re Festner*, 54 B.R. 532, 533 (Bankr. E.D.N.C. 1985) (deciding that investments are not necessary expenses even if financially prudent).

¹⁰² See, e.g., *In re Rybicki*, 138 B.R. 225, 228 (Bankr. S.D. Ill. 1992) (finding no independent reason why camper would constitute necessity when debtors failed to show that payments on camper are reasonably necessary expense).

¹⁰³ See, e.g., *In re Hedges*, 68 B.R. 18, 20 (Bankr. E.D. Va. 1986) (deciding that 1984 Chapparell boat constitutes luxury item which is not reasonably necessary because debtor's occupation does not require its use).

¹⁰⁴ See, e.g., *In re Struggs*, 71 B.R. 96, 98 (Bankr. E.D. Mich. 1987) (concluding that expenses for motor home are not reasonably necessary because motor home is luxury item).

¹⁰⁵ See, e.g., *In re Ward*, 129 B.R. 664, 668 (Bankr. W.D. Okla. 1991) (requiring debtor to apply amounts previously deducted from paycheck for deposit into savings account to make payments to creditors under plan).

¹⁰⁶ See, e.g., *In re Miles*, 96 B.R. 348, 350 (Bankr. N.D. Fla. 1989) (stating that church donations are not necessary for maintenance or support of debtor or dependent of debtor); *In re Red*, 60 B.R. 113, 116 (Bankr. E.D. Tenn. 1986) (finding that weekly \$1.50 United Way payments are not reasonably necessary).

¹⁰⁷ See discussion *infra* part I.C.

¹⁰⁸ Kosub & Thompson, *supra* note 41, at 882. Absent a bright line test,

has referred to this as an invitation to "paternalistic restructuring of the debtor's lifestyle,"¹⁰⁹ at this point, one cannot fairly charge that courts have generally engaged in any such systemic restructuring. In fact, on the whole, courts have been rather cautious. They have deferred to debtors and have questioned only the most obvious or egregious examples of unnecessary expenses. Even then, courts typically have questioned such expenses only when debtors propose quite meager returns or when the expense is disproportionately high relative to the percentage of payment proposed to the creditors.¹¹⁰ When debtors offer significant payment, courts generally side with debtors on controversial expenses, although of course, creditors are less likely to object in such situations.¹¹¹

The process, then, of winnowing out the expenses reasonably necessary in the context of bankruptcy from generally settled and complex familial obligations has been a surprisingly unremarkable one. The resulting litigation, though prodigious, has been generally routine. The notable exception to this cautious approach has been the courts' response to tithing.

C. *The Specific Case of Tithing*

Tithing is the act of giving a percentage of income to a religious

courts have focused upon a fact-specific, case by case analysis in order to determine the reasonable necessity of a given expense. Reasonably necessary is a question of fact and depends on the totality of circumstances of the individual debtor's case. *In re Bien*, 95 B.R. 281, 283 (Bankr. D. Conn. 1989); *In re Reynolds*, 83 B.R. 684, 685 (Bankr. W.D. Mo. 1988); *In re Navarro*, 83 B.R. 348, 355 (Bankr. E.D. Pa. 1988); *In re Easley*, 72 B.R. 948, 949 (Bankr. M.D. Tenn. 1987).

¹⁰⁹ Paul M. Black & Michael J. Herbert, *Bankcard's Revenge: A Critique of the 1984 Consumer Credit Amendments to the Bankruptcy Code*, 19 U. RICH. L. REV. 845, 866 (1985).

¹¹⁰ See, e.g., *In re McDaniel*, 126 B.R. 782, 785 (Bankr. D. Minn. 1991) (finding that \$540 tithing, nearly equal to the proposed payments to unsecured creditors, was excessive in plan that proposed to pay 30% of unsecured creditors' claims); see also *Reynolds*, 83 B.R. at 685 (requiring that church contribution only be nominal amount and deciding that contribution equal to approximately 25% of debtor's income was excessive); *In re Sturgeon*, 51 B.R. 82 (Bankr. S.D. Ind. 1985) (concluding that \$140 tithing which represented 10% of debtor's gross income was excessive because church law did not require donation).

¹¹¹ In these cases, creditors are less likely to object to the debtors' plans, although the creditor in *In re Green* did so despite being offered over 90% of its debt. *In re Green*, 103 B.R. 852, 853 (W.D. Mich. 1988).

organization, either voluntarily or as a condition to good standing in that organization.¹¹² Several courts have sustained creditor objections to such tithes, implicitly or explicitly finding that giving money to a religious organization is a luxury that debtors seeking the benefits of bankruptcy must sacrifice.¹¹³ When presented with the issue, most courts (though not all) have rejected the debtor's claim that such expenses are reasonably necessary for spiritual well-being.¹¹⁴

Given the urgency of other issues before Congress,¹¹⁵ the fact that tithing escaped its attention is not surprising, although it is interesting to speculate how Congress would have dealt with the attendant First Amendment issues within this statutory framework. Since the Code excludes no specific expenditure as a reasonably necessary expense,¹¹⁶ tithing has become an interesting conundrum, presenting courts with three choices. First, courts may declare tithing a proper expense, thereby raising a potential establishment argument.¹¹⁷ Second, courts may declare tithing either unreasonable or unnecessary, thereby raising a possible free exercise issue.¹¹⁸ Third, courts may permit some but not all of a tithing expense, thereby raising a combination of establishment and free exercise concerns.¹¹⁹ Forced to decide the ques-

¹¹² See, e.g., *McDaniel*, 126 B.R. at 784 (debtor felt strong moral obligation to tithe, but would not be denied full church participation if he failed to do so); *In re Packham*, 126 B.R. 603, 608 (Bankr. D. Utah 1991) (church requires monthly tithe to qualify for church recommend); *Bien*, 95 B.R. at 281-82 (Mormon church requires monthly tithe to qualify for church recommend).

¹¹³ See *infra* note 126 (analyzing results of court decisions regarding tithing issue).

¹¹⁴ See *infra* note 126 (noting that majority of courts disallows tithing as reasonably necessary expense).

¹¹⁵ See *supra* note 37 (explaining concerns of Congress when considering passage of 1984 Amendments).

¹¹⁶ 11 U.S.C. § 1325(b).

¹¹⁷ See, e.g., *In re Bien*, 95 B.R. 281, 282-83 & n.3 (Bankr. D. Conn. 1989) (allowing tithing as reasonably necessary expense, but not reaching potential Establishment Clause issue because of trustee's failure to raise argument); see also *In re Green*, 103 B.R. 852, 854-55 (W.D. Mich. 1988) (deciding that excluding tithe from disposable income does not violate Establishment Clause).

¹¹⁸ See, e.g., *In re McDaniel*, 126 B.R. 782, 784 (Bankr. D. Minn. 1991) (reasoning that it would be contrary to Free Exercise Clause to hold that tithing is not reasonably necessary expense per se if amount not excessive).

¹¹⁹ See, e.g., *In re Navarro*, 83 B.R. 348, 351-52 (Bankr. E.D. Pa. 1988)

tion in the vacuum of congressional silence and in the context of a process conferring broad judicial discretion, courts have, not surprisingly, reached divergent conclusions.¹²⁰

Of courts that have faced the issue of tithing,¹²¹ some have concluded, as the court did in *In re Navarro*,¹²² that neither confirmation nor rejection of a plan listing tithing as a debtor expense violates either of the parties' First Amendment rights regarding free exercise or establishment issues. In this view, only the reasonable necessity of the proponent's tithe need be resolved.¹²³ Other courts have decided the necessity issue without commenting on the constitutional issues at all,¹²⁴ while still others have met the constitutional issues head on as a precursor to the necessity issue.¹²⁵ At this point, a majority of those courts facing the issue of tithing under Chapter 13 has ultimately concluded that tithing is not a reasonably necessary expense.¹²⁶ Therefore,

(dismissing in dictum debtor's arguments based on Free Exercise Clause and creditor's arguments based on Establishment Clause).

¹²⁰ The Supreme Court has expounded its preference for the general practice of avoiding the unnecessary resolution of constitutional issues. See, e.g., *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2411 (1990).

¹²¹ See, e.g., *Bungert v. Fort Eustis Fed. Credit Union*, No. 90-2354, 1992 U.S. App. LEXIS 2739 (4th Cir. Feb. 27, 1992) (per curiam); *McDaniel*, 126 B.R. at 782; *In re Packham*, 126 B.R. 603 (Bankr. D. Utah 1991); *In re Tamez*, 110 B.R. 9 (Bankr. S.D. Cal. 1990); *In re Green*, 103 B.R. 852 (Bankr. W.D. Mich. 1988); *In re Tucker*, 102 B.R. 219 (Bankr. D.N.M. 1989); *In re Miles*, 96 B.R. 348 (Bankr. N.D. Fla. 1989); *Bien*, 95 B.R. at 281; *In re Reynolds*, 83 B.R. 684 (Bankr. W.D. Mo. 1988); *Navarro*, 83 B.R. at 348; *In re Curry*, 77 B.R. 969 (Bankr. S.D. Fla. 1987); *In re Gaukler*, 63 B.R. 224 (Bankr. D.N.D. 1986); *In re Sturgeon*, 51 B.R. 82 (Bankr. S.D. Ind. 1985); *In re Breckenridge*, 12 B.R. 159 (Bankr. S.D. Ohio 1980); *In re Cadogan*, 4 B.R. 598 (Bankr. W.D. La. 1980).

¹²² *Navarro*, 83 B.R. at 354.

¹²³ *Id.*

¹²⁴ See, e.g., *Bungert*, 1992 U.S. App. LEXIS 2739, at *1 (4th Cir. Feb. 27, 1992) (making no mention of constitutional issues); *Packham*, 126 B.R. at 609 (rejecting constitutional analysis); *Miles*, 96 B.R. at 348 (failing to follow prior cases dealing with constitutional issues).

¹²⁵ See, e.g., *In re McDaniel*, 126 B.R. 782 (Bankr. D. Minn. 1991); *Green*, 103 B.R. at 852; *Reynolds*, 83 B.R. at 684; *In re Navarro*, 83 B.R. 348 (Bankr. E.D. Pa. 1988); cf. *In re Bien*, 95 B.R. 281, 282 n.3 (Bankr. D. Conn. 1989) (declining to consider constitutional issues because trustee failed to raise argument).

¹²⁶ In the most recent decision addressing the "reasonable necessity" of tithing, the court in *Bungert* recognized that a majority of bankruptcy courts have refused to confirm Chapter 13 plans when unsecured creditors have objected to debtor's *high* charitable contributions. *Bungert v. Fort Eustis*

amounts that a debtor has proposed to give to her church must be included in her projected disposable income and paid to creditors instead. Those courts that have concluded that tithing, in a specific factual situation, is a reasonably necessary expense, are split on the constitutional issues. There is little accord among courts trying to reconcile the tensions existing within the overarching bankruptcy policy that requires debtors and creditors harmoniously to resolve their differences with resources insufficient to accomplish that task.

Although courts have not reached a consensus on whether tithing is a reasonably necessary expense, we believe that it is. Such a conclusion is consistent with bankruptcy policy that, although primarily a balancing of interests, undeniably gives first priority to family needs over debt obligation. Only after a debtor meets demonstrated needs are creditors considered.¹²⁷ Should there be no income above those needs, creditors receive nothing.¹²⁸ These expenses are peculiar to the debtor and her dependents and, as we suggest below, to the extent these are integral to the maintenance of the family unit, the court must accept them. Otherwise, as the *Navarro* court suggested, the court will be imposing its own values upon the debtor.¹²⁹

Under this approach, tithing pursuant to sincerely held religious convictions should be regarded as a reasonably necessary expense, qualitatively equivalent to the payment of a mortgage or a fuel oil bill. Spiritual needs are just as important to family wel-

Fed. Credit Union, No. 90-2354, 1992 U.S. App. LEXIS 2739, at *3 (4th Cir. Feb. 27, 1992) (per curiam). In dicta, however, the court stated that it did not hold religious contributions per se precluded as an approved expenditure under a proposed plan. *Id.* at *4. Our survey of thirteen other Chapter 13 cases (cited *supra* note 121, excluding the Chapter 7 case, *Gaukler*) addressing the "reasonable necessity" of tithing or religious contributions revealed three cases allowing the expense, eight cases disallowing the expense, and two cases not reaching the ultimate issue. Of those eight cases disallowing the expense, four were qualified by the possibility of confirmation upon some reduction of the proposed amount.

¹²⁷ The Code grants the creditor repayment from the debtor's disposable income, which excludes those funds reasonably necessary for the support and maintenance of debtor and her dependents. 11 U.S.C. § 1325(b).

¹²⁸ Some courts, however, have refused to confirm these zero payment plans. See, e.g., *In re Slater*, 49 B.R. 501, 503 (Bankr. D. Del. 1985) (deciding that confirmation of zero payment plan is inconsistent with Chapter 13 policy of encouraging repayment of debts). For a complete discussion of Chapter 13 and zero payment plans, see Smooke, *supra* note 40.

¹²⁹ *Navarro*, 83 B.R. at 357.

fare as these more material concerns. If one set of needs may not be sacrificed to creditor interests, then the other should not be sacrificed either. At the very least, no interpretation of the Code or reading of the legislative history supports the conclusion that tithing, as a matter of law, cannot be a legitimate expense. To hold otherwise is to do what the structure of Chapter 13 commands bankruptcy courts not to do—namely, to intrude into the debtor's personal financial arrangements and to substitute, by fiat, the court's ranking of relative needs for that of the debtor.

II. CONSTITUTIONAL IMPLICATIONS OF TITHING

Regardless of the way religious tithing is handled in bankruptcy, an encounter with the First Amendment's religion clauses is unavoidable. Some courts dealing with the issue have recognized this reality,¹³⁰ although few have given the constitutional questions anything more than cursory treatment.¹³¹ Nevertheless, a decision either way on the statutory issue raises significant constitutional concerns. If a bankruptcy court refuses to treat religious tithes as a necessary expense, or if the court refuses to give such treatment to the entire amount of the tithe, the debtor may argue that the court's decision prohibits her free exercise of religion. If, on the other hand, a court allows religious tithing as a necessary expense, objecting creditors may claim that the allowance constitutes an establishment of religion. Either way, one must ultimately square the commands of the Code with those of the Constitution.

We have argued above that as a matter of bankruptcy policy it makes better sense to treat tithes as a necessary expense under the statute. In our view, this conclusion not only represents the better reading of the statute, it is also required under the Free Exercise Clause of the First Amendment. It is consistent with both the Constitution and the Code, however, for bankruptcy courts in some cases to limit the amount of the tithe in question

¹³⁰ See, e.g., *In re McDaniel*, 126 B.R. 782 (Bankr. D. Minn. 1991); *In re Packham*, 126 B.R. 603 (Bankr. D. Utah 1991); *In re Green*, 103 B.R. 852 (Bankr. W.D. Mich. 1988); *In re Miles*, 96 B.R. 348 (Bankr. N.D. Fla. 1989); *In re Reynolds*, 83 B.R. 684 (Bankr. W.D. Mo. 1988).

¹³¹ Curiously, one of the few cases to give freedom of religion issues careful consideration, *Navarro*, concluded that the constitutional questions had no impact on the outcome. "In sum, I conclude that I can either confirm or refuse to confirm the debtor's plan without violating the [C]onstitution." *In re Navarro*, 83 B.R. 348, 354 (Bankr. E.D. Pa. 1988).

and to lengthen the repayment period. Furthermore, allowance of tithes as a necessary expense in a Chapter 13 proceeding does not offend the Establishment Clause's command of separation of church and state.

A. Free Exercise Considerations

1. Initial Assumptions

To begin analysis of the free exercise issues, we must make some initial limiting assumptions. We shall assume for purposes of this discussion that the debtor can demonstrate a sincere religious belief that tithing is a requirement of her faith. The Supreme Court long has recognized that preliminary determination of the sincerity of religious belief is an essential component of free exercise analysis.¹³² Otherwise, claiming a religious exemption from a legal obligation would provide a convenient pretext for those who wish to avoid the obligation for other reasons. To prevent this from happening, a court must inquire into the nature of the belief to a degree sufficient to establish that it is genuine.¹³³

¹³² For a discussion of the sincerity issue, see Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part I: The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1417-18 (1967); cf. *United States v. Ballard*, 322 U.S. 78, 86 (1944) (allowing jury to determine sincerity but not veracity of religious belief).

But at the same time, the Court has staunchly rejected inquiries into the "centrality" of a given practice or belief. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990) ("Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'" (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1983) (Stevens, J., concurring)); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) ("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' interpretation of those creeds."). For cases in which the Court has also rejected inquiring into the plausibility of a religious claim, see *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981); *Jones v. Wolf*, 443 U.S. 595, 602-06 (1979); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969); *Ballard*, 322 U.S. at 84-88. A bankruptcy judge does not need to make forbidden judgments regarding centrality or plausibility of a debtor's belief in order to determine that it is sincere.

¹³³ Some critics of the Supreme Court's traditional approach to free exercise cases argue that a preliminary determination of sincere religious belief is, at best, an awkward one for the court, and at worst, an impermissible intrusion into religious affairs. See, e.g., William P. Marshall,

A court must conduct such an inquiry when a debtor seeks an allowance for tithing in bankruptcy. An individual seeking relief from debt under Chapter 13 is under a statutory obligation to repay as much of the previously incurred debt as possible under the plan.¹³⁴ When a debtor claims a religious obligation to tithe, she is, effectively, asking for a *pro tanto* reduction in the extent of that repayment obligation. That she might prefer, even without any sense of religious obligation, to pay the money in question to her church—a supportive and familiar group—rather than to the often impersonal creditors who are (in her view) making her financial situation miserable, is certainly a foreseeable possibility. Although the motives for seeking exemption under a pretext may not be as strong here as, for example, in the case of persons claiming exemption from military service, the possibility is sufficient at least to raise the specter of insincere claims. To guard against this, courts must make an initial inquiry into the sincerity of the belief in question.¹³⁵

Solving the Free Exercise Dilemma: Free Exercise as Expression, 67 MINN. L. REV. 545, 555-57 (1983) [hereafter Marshall, *Solving the Free Exercise Dilemma*]; William P. Marshall, "We Know it When We See It": *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 512 (1986) [hereafter Marshall, *We Know It When We See It*]. These critics argue that courts lack competence to assess sincerity in a religious context, and that defining "religion" for purposes of constitutional adjudication poses dangers of impermissible content judgments regarding what is and is not a "proper" religious conviction. They point out that such inquiries in the past have tended to favor mainstream religions and those minority sects that share significant points in common with mainstream beliefs. The more "bizarre" the belief in question, the more likely it is to be labeled "nonreligious" or "insincere." See *id.* (posing possible "religions"); see also Mark Tushnet, "Of Church and State and the Supreme Court": *Kurland Revisited*, 1989 SUP. CT. REV. 373, 382 (explaining that insincerity is assumed in unconventional beliefs); Jonathan Weiss, *Privilege, Posture, and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 604 (1964) (noting that "religion" is undefined concept).

As Professor McConnell has observed, however, the task of distinguishing religious from nonreligious beliefs is compelled by the structure of the First Amendment, which singles out religion for both protective (under the Free Exercise Clause) and restrictive (under the Establishment Clause) treatment. Thus, defining "religion" and the "exercise" of religion is as inevitable a task in the development of constitutional law as defining "speech," "property," or "commerce." Determining whether a debtor has demonstrated a sincere religious belief is an unavoidable outgrowth of that process of constitutional definition. Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329, 330 (1991).

¹³⁴ 11 U.S.C. § 1325(b).

¹³⁵ The court must also take care to ascertain that the belief is religious

In addition, to implicate the protections of free exercise, the belief in question must be more than one of mere preference; it must amount to a religious obligation. Otherwise, a contrary civil duty would not impose a burden on religious expression that was sufficiently significant to trigger free exercise concerns. This does not mean that, in all cases, the individual must be able to point to a specific, absolute command in the credo of a particular religious sect. That might be the strongest evidence of religious obligation, but the courts have expanded the notion of religious obligation well beyond this core.¹³⁶ The question must be, does this *particular* religious adherent subjectively regard tithing as a religious obligation? If so, and if that belief is sincere, it is entitled to respect under the Free Exercise Clause.¹³⁷

It is not difficult to understand why the inquiry into the question of religious obligation to tithe must operate at this personal and subjective level. First, not all religions have a tight corporate structure, with its attendant positive set of rules and regulations. Many of the most common and widely adhered to Judeo-Christian religions, of course, have that sort of organization. But religions that do not share the Judeo-Christian heritage, as well as some smaller sects within that heritage, may not. Since the Free Exercise Clause exists to protect mainstream and nonmainstream religions alike, beliefs about tithing within these nonmainstream sects should be entitled to equivalent free exercise protection.¹³⁸

in nature. Although the Supreme Court has often endeavored to take a flexible view of what constitutes religion, it has always insisted that the Free Exercise Clause protects only religious, not secular, beliefs. *Thomas*, 450 U.S. at 715; *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

¹³⁶ See, e.g., *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829 (1989); *Thomas*, 450 U.S. at 707; *Gillette v. United States*, 401 U.S. 437 (1971); *United States v. Seeger*, 380 U.S. 163 (1965).

¹³⁷ For an example of the Court's flexibility and willingness to accept subjectively based religious beliefs, see *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981). In *Thomas*, even though the individual claimant's beliefs were inconsistent with those of other members of his faith, and even though the beliefs themselves were imperfect and illogical, the Court concluded that the free exercise doctrine applied. *Id.*; see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1243 (2d ed. 1988) (discussing *Thomas* decision).

¹³⁸ For cases that particularly stress the importance of protecting the beliefs of religious minorities, see *Yoder*, 406 U.S. at 205 (Old Order Amish); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Seventh Day Adventists); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (Jehovah's Witnesses); see also *Employment Div. v. Smith*, 494 U.S. 872, 902-03 (1990)

To recognize tithing ordained by one kind of religious structure or set of beliefs but to deny tithing that emanates from an alternative structure or belief system—or indeed from a religious culture that repudiates *any* structure—is to effect the kind of discriminatory treatment among religious beliefs that the religion clauses of the First Amendment were intended to prevent.¹³⁹

We shall also assume that the tithing claim in question lacks any evidence of a fraudulent conveyance.¹⁴⁰ There is, of course, always a risk in bankruptcy that a debtor, faced with the prospect of reduced circumstances that bankruptcy usually entails, will attempt to divert assets away from creditors. The debtor may intend either to reclaim the assets after the creditors' claims are eliminated, or to play personal preferences among creditors by paying off some in full at the expense of others. Obviously, a religious tithing claim that bears the earmarks of such a fraudulent conveyance lacks the essential ingredients of sincerity and religious obligation discussed above.

In this pervasively religious society, it is clear that there will be many religious tithing claims which fit these assumptions. Many Christian sects interpret the Bible to require that adherents give a specific portion of their income to the church.¹⁴¹ In other sects,

(O'Connor, J., concurring in the judgment) (stating that First Amendment should protect religious minorities).

¹³⁹ *Smith*, 494 U.S. at 902-03 (O'Connor, J., concurring in the judgment); see also *Larson v. Valente*, 456 U.S. 228, 244-45 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another. . . . This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause."); *United States v. Ballard*, 322 U.S. 78, 87 (1944) ("The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views.").

¹⁴⁰ The Code, of course, specifically forbids fraudulent conveyances. 11 U.S.C. §§ 547, 548.

¹⁴¹ According to one bankruptcy court, for example, the Church of Jesus Christ of the Latter Day Saints, better known as the Mormon Church, requires its members to tithe in order to remain in good standing within the church. The Mormons found this obligation on an Old Testament passage from Malachi 3:8-12, quoted *supra* note 2, in which the prophet declares that a failure to tithe is the equivalent of robbing the Lord. *In re Packham*, 126 B.R. 603, 604 n.2 (Bankr. D. Utah 1991). The Supreme Court has specifically afforded some legal protection to the tithing practices of the Mormons in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327

although the church itself may not specifically require giving a certain portion of one's income, individual adherents embrace the obligation to tithe as an article of their personal faith. Beyond the Judeo-Christian tradition, moreover, the notion that sharing one's wealth and possessions with others is a component of religious inspiration has a wide, indeed nearly universal, appeal.¹⁴² One can readily imagine that adherents of many of this nation's hundreds of religious sects, as well as others whose religious persuasions are not counted as separate sects in the official tallies, could demonstrate the kind of sincere religious belief in an obligation to tithe that would trigger free exercise values.

2. The Supreme Court's Free Exercise Clause Jurisprudence: from *Reynolds* to *Sherbert* to *Smith*

Given a sincere belief in a religious obligation to tithe, the question becomes whether a refusal to treat the tithe as a necessary expense in a Chapter 13 proceeding would prohibit the free exercise of religion and thus violate the First Amendment. Answering that question is no easy task, given the uncertainty of the Supreme Court's precedent on the meaning of the Free Exercise Clause.

It is beyond the scope of this Article to examine the Supreme Court's treatment of free exercise issues in exhaustive detail.¹⁴³

(1987). In *Amos*, the Court upheld under the Establishment Clause a statutory exemption from federal civil rights laws that permitted the Church to require certain employees to qualify for a "temple recommend" as a condition of employment. The Court acknowledged that one prerequisite for a "temple recommend" is tithing to the Church. *Amos*, 483 U.S. at 330 n.4.

¹⁴² See, e.g., ABDEL H. MAHMUD, *THE CREED OF ISLAM* 21 & n.10 (1978) (defining Islamic concept of *zakāh*, or alms-tax, as "statutory portion of one's wealth given each year for the use of the needy and other services"); MELFORD E. SPIRO, *BUDDHISM AND SOCIETY: A GREAT TRADITION AND ITS BURMESE VICISSITUDES* 108-11 (1970) (describing Buddhist belief that one-fourth of one's income should be devoted to *dāna*, or religious giving).

¹⁴³ For more extensive recent discussions of free exercise issues, see Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943 (1986); Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651 (1991) [hereafter Choper, *Rise and Decline*]; Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 83-96 (1990); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free*

As many commentators have recognized, however, the Court's precedent on free exercise sends confusing signals, especially on the degree to which it exempts religious adherents from secular obligations that conflict with religious precepts.¹⁴⁴ Much of the difficulty arises from the Court's inconsistent treatment of the standard for judicial review of governmental action that impinges on religious activity. The Supreme Court has vacillated between standards that show substantial deference to legislative judgment and standards that place exacting limits on legislative choice. An abbreviated review of these developments will help place the present issue in perspective.

The Court's earliest free exercise jurisprudence was marked by extreme deference to legislative commands, at least when they regulated religious conduct rather than belief. In *Reynolds v. United States*,¹⁴⁵ a famous nineteenth century case involving a Mormon's claim of religious exemption from federal criminal laws prohibiting polygamy, the Court held that government possessed plenary power to regulate religious conduct for legitimate secular ends.¹⁴⁶ In this early view, the Free Exercise Clause existed only to protect aspects of religious belief. Religiously motivated conduct, in contrast, was at the mercy of the state.¹⁴⁷ Indeed, in *Davis*

Exercise of Religion, 102 HARV. L. REV. 933 (1989); Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); David E. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77 (1991); Geoffrey R. Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 WM. & MARY L. REV. 985 (1986).

¹⁴⁴ See, e.g., Steinberg, *supra* note 143, at 81 ("Whether the Supreme Court will grant or deny a particular religious exemption claim is almost entirely unpredictable.").

¹⁴⁵ 98 U.S. 145 (1878).

¹⁴⁶ *Id.* at 166.

¹⁴⁷ The Court reasoned that:

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Id. at 166-67.

v. Beason,¹⁴⁸ another polygamy case, the Court extended *Reynolds*' rationale to permit punishment for the teaching of religious conduct at odds with the secular commands of the state.¹⁴⁹ *Reynolds*' view that religiously motivated conduct received no protection from the Free Exercise Clause held sway for over sixty years, although Supreme Court case law on free exercise during that period was fairly sparse.

In the 1940s, the Court applied the Free Exercise Clause to the states through incorporation into the Fourteenth Amendment.¹⁵⁰ At the same time, it also extended the Clause's protection to encompass conduct as well as belief.¹⁵¹ But the Court vacillated between deference and stricter scrutiny, with the outcome in indi-

¹⁴⁸ 133 U.S. 333 (1890).

¹⁴⁹ *Id.* at 343-47.

¹⁵⁰ Although the decision was presaged in some earlier cases, the incorporation of the Free Exercise Clause was officially announced in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

¹⁵¹ Justice Roberts wrote for the Court: "[T]he Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection." *Id.* at 303-04.

In subsequent periods, the Court has continued to adhere to the view that religiously motivated conduct is entitled to less protection than religious belief. *See* *United States v. Lee*, 455 U.S. 252, 258-61 (1982) (requiring Amish employer to pay Social Security taxes against his belief); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion) (upholding Sunday closing laws against claim of religious burden upon persons whose religion compelled them to be closed on another day as well); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (prohibiting a Jehovah's Witness mother from using her children to distribute literature on the streets). Nevertheless, the view that religious conduct must receive some protection remains well-represented on the Court. *See, e.g.*, *Employment Div. v. Smith*, 494 U.S. 872, 893-94 (1990) (O'Connor, J., concurring in the judgment). Justice O'Connor reasoned:

A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons. It is difficult to deny that a law that prohibits religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns.

Id.

vidual cases depending as much on factual context and the composition of the Court as it did on constitutional principle. On two issues—compulsory flag salutes and religious solicitation—the Court reversed its own position, issuing contradictory decisions on virtually identical questions within the space of only a few years.¹⁵² Often during this period, the Court cast its decisions on free exercise questions in opaque language that left its standard of review draped in uncertainty.¹⁵³

During this period of the Free Exercise Clause's jurisprudential history, the Court proceeded in an unorganized fashion marked by extreme doctrinal fluidity. It was either unable or unwilling to formulate a coherent set of standards by which to evaluate free exercise concerns. Indeed, as late as *Braunfeld v. Brown*,¹⁵⁴ the

¹⁵² Compare *Jones v. Opelika*, 316 U.S. 584 (1942) (upholding municipal license fees for religious solicitation) and *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) (upholding compulsory flag salute over religious objection) with *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (requiring exemption for religious objectors to compulsory flag salute and overruling *Gobitis*) and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (striking down license fees for religious solicitation and vacating judgment in *Jones*).

¹⁵³ A good example is *Prince v. Massachusetts*, 321 U.S. 158 (1944), where the Court upheld state laws prohibiting the use of child labor as applied to a Jehovah's Witness mother who took her daughter with her to sell her sect's religious tract, *The Watchtower*. The Court acknowledged that issues of religious freedom were at stake, and that "[t]o make accommodation between these freedoms and an exercise of state authority always is delicate." *Id.* at 165. After observing that the "interests of society to protect the welfare of children, and the state's assertion of authority to that end" were "made here in a manner conceded valid if only secular things were involved," *id.*, the Court concluded that the presence of religious belief did not require a different judgment.

We think that with reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the case of other freedoms, and the rightful boundary of its power has not been crossed in this case.

Id. at 170. The Court never described the standard of review it employed in making that determination.

¹⁵⁴ 366 U.S. 599 (1961) (plurality opinion). In *Braunfeld*, which rejected a free exercise challenge to Sunday closing laws brought by Orthodox Jews, a plurality of the Court did make a significant attempt to develop a controlling standard. The plurality opinion by Chief Justice Warren argued:

If the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even

Court had failed to formulate any consistent approach to free exercise inquiry. Its opinions, though sometimes long on rhetoric, were remarkably short on substance, and they failed to establish any consistent framework or approach.

During the Warren years, the Court finally emerged from this doctrinal mist. In *Sherbert v. Verner*, a case involving a Sabbatarian's claim of exemption from a Saturday work requirement under state unemployment compensation law, the Court established a version of strict scrutiny as the prevailing standard for free exercise exemption claims.¹⁵⁵ *Sherbert* thus incorporated into free exercise law the relatively familiar standard for limiting interference with fundamental rights that had evolved from Justice Stone's famous *Carolene Products* footnote.¹⁵⁶

As adapted to free exercise, this approach involved a two-step inquiry. First, the Court would determine whether the regulation in question imposed a substantial burden on a claimant's religious belief.¹⁵⁷ Second, if such a burden were established, the Court would consider whether "some compelling state interest . . . justifies the substantial infringement of [the claimant's] First Amendment right."¹⁵⁸ As presented in *Sherbert*, the idea was that this standard would apply across the board, to all regulations of religious conduct.¹⁵⁹ Considerations that had figured prominently in earlier cases, such as the distinction between direct and indirect burdens on religion, became factors to be considered in application of the test.

Subsequent cases demonstrate that *Sherbert's* strict scrutiny standard is highly contextual and not nearly as determinative of outcomes as semantically similar standards have been in other areas of constitutional law. Far from being " 'strict' in theory and

though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

Id. at 607.

¹⁵⁵ 374 U.S. 398 (1963).

¹⁵⁶ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁵⁷ *Sherbert*, 374 U.S. at 403.

¹⁵⁸ *Id.* at 406.

¹⁵⁹ The Court continued to maintain that "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such." *Id.* at 402 (emphasis in original).

fatal in fact,"¹⁶⁰ as the compelling interest standard sometimes has been in other spheres, this standard has produced more instances in which the Court upheld state regulation of religious practices than cases in which the Court struck down such regulations.¹⁶¹ In practice, the Court applied the *Sherbert* standard in a fashion that frequently allowed the government to prevail, so long as the government regulation of religious conduct was solidly based in legitimate secular ends.

Finally, in 1990, the Court apparently reversed field. In *Employment Division v. Smith*,¹⁶² a controversial decision that upheld government power to punish the religious use of peyote, the Court departed from the *Sherbert* approach and announced a return to deference for cases involving secular regulation of religious conduct. The Court took a strongly deferential stance toward secular regulation of religious conduct that intimated a virtual full-circle

¹⁶⁰ Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). For a discussion of the Court's traditional application of strict scrutiny, see TRIBE, *supra* note 137, at 1451-54.

¹⁶¹ Examples include *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990) (imposing sales and use tax on distribution of religious materials does not violate Free Exercise Clause); *Hernandez v. Commissioner*, 490 U.S. 680 (1989) (denying of tax deduction for religious payment does not violate Free Exercise Clause); *Bowen v. Roy*, 476 U.S. 693 (1986) (plurality opinion) (requiring use of Social Security number against sincere religious objections does not violate Free Exercise Clause); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (prohibiting Orthodox Jew from wearing yarmulke during military duty does not violate Free Exercise Clause); *Gillette v. United States*, 401 U.S. 437 (1971) (concluding that requiring military conscription of persons religiously opposed to particular wars, as opposed to all wars, does not violate Free Exercise Clause). Many commentators have recognized this dissonance between the Court's statement of doctrine and its actual practice. See, e.g., Robert D. Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 CONST. COMMENTARY 147, 154 (1987) (stating that Court "has shown little enthusiasm for strict review in post-*Sherbert* and *Yoder* decisions").

¹⁶² 494 U.S. 872 (1990). The decision of a bare majority of Justices to alter the standards for free exercise claims elicited sharp opposition. Justice O'Connor, though she agreed with the Court on the outcome, sharply criticized the Court's deferential approach as one that offered scant protection to religious minorities. *Id.* at 902-03 (O'Connor, J., concurring in the judgment). Justices Blackmun, Brennan, and Marshall dissented. *Id.* at 907 (Blackmun, J., dissenting).

return to the judicial passivity with which it had begun its free exercise odyssey in *Reynolds*, more than a century before.¹⁶³

This thumbnail description of the Court's precedent necessarily overlooks many rich complexities of its free exercise jurisprudence. Even so, one can elicit from the Court's decisions some themes and concerns that run more or less consistently through the cases. These themes set the contours of discussion of tithing in bankruptcy, although they do not by any means determine the outcome under the Code.

First, ever since *Reynolds*, the Court has struck a sharp distinction between matters of belief and matters of conduct.¹⁶⁴ The Court has fairly steadfastly maintained that matters of belief are entitled to a high level of protection under the Free Exercise Clause. Thus, state interference with belief is subject to extremely stringent scrutiny. Indeed, the Court has sometimes stated that the freedom of religious belief is absolute.¹⁶⁵ At the same time, while the Court generally has recognized that the Free Exercise Clause also protects religiously motivated conduct, it has been much less demanding of the state when regulation affects religious conduct alone. Conduct, the Court has observed, is much more likely than belief to conflict with either the state's legitimate secular interests or the rights of other individuals.¹⁶⁶ Accordingly, the Court consistently has allowed state regulation of religiously motivated conduct much broader scope than regulation of belief.¹⁶⁷

Second, the Court frequently has distinguished between direct

¹⁶³ *Id.* at 884-90.

¹⁶⁴ *E.g., id.* at 877-84; *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963); *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (plurality opinion); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878).

¹⁶⁵ *E.g., Cantwell*, 310 U.S. at 303.

¹⁶⁶ *See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988); *Braunfeld*, 366 U.S. at 603-04; *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *Cantwell*, 310 U.S. at 303-04.

¹⁶⁷ Part of the reason for this distinction, and for the occasional assertions of "absolute" protection for belief, may well be an underlying conviction that governmental regulation of religious belief is almost certain to lack a legitimate *secular* purpose. As the Court observed in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the danger of regulating belief is the danger that government will impose orthodoxy. *Id.* at 642. Where religious belief is concerned, the danger translates into the establishment of religion, which the First Amendment explicitly proscribes.

and indirect burdens on religion.¹⁶⁸ Although the Court has acknowledged that both kinds of burdens potentially implicate free exercise concerns, it has usually given the state greater latitude when its laws only indirectly implicate religious interests. Occasionally, the Court has suggested that indirect burdens on religion may not implicate constitutional concerns because they do not “prohibit” the free exercise of religion within the meaning of the First Amendment.¹⁶⁹ In any event, when the burden on religion is the incidental result of a broad secular command, the Court has been willing to tolerate state restrictions on religious freedom.¹⁷⁰

Third, the Court, at least periodically, has emphasized the degree to which state regulation of religion has a “coercive” impact or effect.¹⁷¹ The Court has attempted to assess the likelihood that the regulation in question might force individuals to forsake a particular belief or require them to affirm a belief antithetical to their own persuasions.

Fourth, the Court has eschewed categorical protections in favor of an ad hoc balancing approach that measures the impact of state regulation on religion in a particular case against the secular interests served by the regulation in question. There has been continuing uncertainty over the level at which to pitch the balance—strict scrutiny, mere rationality, or perhaps some place in

¹⁶⁸ *E.g.*, *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990); *Lyng*, 485 U.S. at 450-52; *Bowen v. Roy*, 476 U.S. 693, 702-03 (1986) (plurality opinion).

¹⁶⁹ *Lyng*, 485 U.S. at 450-51.

¹⁷⁰ *E.g.*, *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 392 (1990) (applying “generally applicable” tax to religious articles does not violate Free Exercise Clause).

¹⁷¹ *E.g.*, *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449 (1988) (explaining that construction of government road through sacred territory would not “coerce” Native Americans “into violating their own beliefs”); *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972) (“[Since] education is inseparable from and a part of the basic tenets of their religion . . . [just as] baptism, the confessional, or a sabbath may be for others,” enforcement of state’s compulsory education law would “gravely endanger if not destroy the free exercise of respondents’ religious beliefs”); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (denying unemployment compensation to a Sabbatarian puts “pressure upon her to forego that practice” and “forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand”).

between. Nonetheless, the preference for evaluating each religious claim in its own peculiar context has remained clear.

Finally, unless and until the Court revisits the issue, any current free exercise analysis must involve a careful examination of *Smith*, especially in terms of its reaction to and departure from the *Sherbert* framework for judicial review. In any free exercise case, a critical first question is whether a court must follow *Smith*'s deferential approach, or whether there is still some occasion for applying *Sherbert*'s more searching standard of review. This inquiry into the appropriate standard of review is not merely a matter of semantics, since in constitutional law the determination of the standard of review often effectively controls the outcome.

Smith upheld the constitutionality of Oregon's criminal sanction against the ingestion of peyote, a controlled substance, as applied to members of the Native American Church.¹⁷² The members

¹⁷² The case actually involved a denial of unemployment benefits to the affected individuals. That denial, however, was based on a conclusion that they had been fired from their jobs for engaging in criminal activity, which disqualified them from receiving unemployment benefits under Oregon law. The Court concluded that it should accordingly treat the issue as involving the constitutionality of Oregon's criminal punishment of sacramental peyote use. *Smith*, 494 U.S. at 882-84.

The use of peyote by the Native American Church is extremely limited. Use of peyote outside of the ritual is considered sacrilegious. Furthermore, the church forbids the sale of peyote other than to the church for sacramental purposes. Most anthropological studies conclude that Peyoteism promotes a positive, ego-strengthening perception of the self, as well as of the community as a whole, advocating self-reliance, familial responsibility, and abstinence from alcohol. Indeed, the four parts of the church's "ethical creed" are brotherly love, care of family, self-reliance, and avoidance of alcohol. Additionally, peyote is an extremely bitter plant, and eating it often produces violent nausea. Thus, the potential for casual or recreational abuse of this drug is probably very small. For discussions of the use of peyote, see generally EDWARD F. ANDERSON, *PEYOTE: THE DIVINE CACTUS* (1980); ROBERT M. JULIEN, *A PRIMER OF DRUG ACTION* (3d ed. 1981); Robert L. Bergman, *Navajo Peyote Use: Its Apparent Safety*, 128 *AM. J. PSYCHIATRY* 695 (1971); J.S. Slotkin, *The Peyote Way*, in *TEACHINGS FROM THE AMERICAN EARTH* (Dennis Tedlock & Barbara Tedlock eds., 1975).

The federal government, which created the classifications of unlawful drugs, apparently does not view the use of peyote in a religious context as dangerous, as it has expressly included an exemption for such use within its classifications. 21 C.F.R. § 1307.31 (1989) states: "The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church,

had ingested peyote during the church's religious ceremonies.¹⁷³ The Court used the occasion of this clash between a religious sacrament and the criminal law to announce a fundamental departure from the analytic approach established in *Sherbert*.

After embarking on an ambitious restructuring of the history of free exercise jurisprudence, the Court drew the surprising conclusion that *Sherbert's* strict scrutiny standard represented an aberrant deviation from true free exercise principles.¹⁷⁴ It replaced that standard with a general rule of deference to legislative judgment in cases in which neutral governmental regulation only incidentally casts burdens on religious conduct.¹⁷⁵ With only a few exceptions, the Court concluded that generally applicable regulations which affect religious practices should be upheld so long as they serve a neutral—that is, nonreligious—governmental purpose.¹⁷⁶ In other words, for cases involving regulation of religious conduct, the Court announced a general retreat from strict scrutiny to a highly deferential “mere rationality” standard of review.

While *Smith's* antipathy to the idea of strict scrutiny for incidental governmental regulation of religion is unmistakable, the exact scope of its holding is considerably less clear. *Smith* did not overrule *Sherbert*.¹⁷⁷ Furthermore, *Smith* intimated that even neutral,

and members of the Native American Church so using peyote are exempt from registration.”

Prior to *Smith*, some lower courts had concluded that sacramental use of peyote should be exempt from criminal prosecution. *E.g.*, *People v. Woody*, 394 P.2d 813 (Cal. 1964).

¹⁷³ *Smith*, 494 U.S. at 874.

¹⁷⁴ *Id.* at 882-84. For a discussion of *Smith's* reconstruction of the Court's free exercise cases, see Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

¹⁷⁵ *Smith*, 494 U.S. at 885. Justice Scalia went on to state for the Court that the “appropriate occasions” for the creation of exemptions to these neutral laws cannot be delineated by courts; rather, it is the province of the political process to decide when exemptions should be allowed, even though minority religions might be disadvantaged. *Id.* at 890.

¹⁷⁶ *Id.* at 881-85.

¹⁷⁷ The Court did reveal considerable hostility toward *Sherbert*, however, as for example when it stated: “Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.” *Id.* at 884. The obvious premise of this statement is that *Sherbert* is being treated, beyond its own limited context, as a generally moribund precedent. This treatment contrasts sharply with Justice Scalia's extensive and

indirect government regulation of religion could sometimes be subject to more exacting review. By the way it explained precedent, the Court apparently identified at least two sets of exceptional circumstances in which more exacting review might be needed. The first set involves “hybrid” cases which couple the religious claim with another constitutional claim—usually free speech, freedom of privacy, or freedom of association—for which strict review already would be required under distinct constitutional principles.¹⁷⁸ The second set involves cases in which special exceptions from a statutory duty are common, so that an additional exception to accommodate religious adherents could be easily added.¹⁷⁹ Except for what can be gleaned by its classification of precedent, the Court did not explain *why* these situations should receive different treatment. But it did leave open the distinct possibility that its general rule of deference might not apply in every circumstance.

It is still too early to determine whether *Smith* can be formalized into a “general-rule-with-exceptions” format. Some lower courts have read *Smith* theoretically in this fashion, although they have been largely unwilling in practice actually to find exceptions to

sympathetic quotation from *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), a case that had advocated extreme deference to the legislature in free exercise cases. *Smith*, 494 U.S. at 879. In what seems a rather revealing omission, Justice Scalia failed to note anywhere in his opinion for the Court that *Gobitis* had been overruled 47 years before, in 1943, by *Barnette*. See *supra* note 152 and accompanying text (citing *Barnette*'s and *Gobitis*' contrary results); cf. McConnell, *supra* note 174, at 1124 (criticizing *Smith*'s reliance on *Gobitis*).

¹⁷⁸ *Smith*, 494 U.S. at 881-82.

¹⁷⁹ *Id.* at 882-84. For a discussion of *Smith*'s “exceptions” to its rule of deference, see Stephen L. Mikochik, *Caesar's Coin: Federal Funds, Civil Rights, and Churches*, 9 J.L. & RELIGION 193 (1991).

Smith.¹⁸⁰ *Smith* itself did not specifically embrace this formal structure, and the Supreme Court has yet to revisit the issue.¹⁸¹

Beyond a search for rules and exceptions, one route toward understanding *Smith* is to consider it in the context of a fairly broad array of other recent decisions in which the Rehnquist Court has debated or reevaluated existing constitutional standards of review.¹⁸² Viewed from this perspective, *Smith* appears to reflect two central concerns about the structure of constitutional adjudication. First, it stresses the theme that there should be a significant difference for purposes of judicial review between intent and effect—that is, between purposive and incidental

¹⁸⁰ Lower courts have, however, generally given *Smith* a broad reading, even when hybrid claims or individualized exemptions are alleged. See, e.g., *American Friends Serv. Comm. v. Thornburgh*, 941 F.2d 808, 810-11 (9th Cir. 1991) (refusing to treat substantive due process right to employment as hybrid claim under *Smith* and finding “individualized exemption” exception to *Smith* inapplicable); *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1306 (9th Cir. 1991) (refusing to find individualized exceptions but recognizing broad standard of *Smith*), *cert. denied*, 112 S. Ct. 2965 (1992); *Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927, 932-33 (6th Cir. 1991) (recognizing exceptions to *Smith* for hybrid claims and individualized exemptions but reading exceptions narrowly); *Salvation Army v. New Jersey Dep’t of Community Affairs*, 919 F.2d 183, 194-201 (3d Cir. 1990) (extending *Smith* to both civil and criminal laws; refusing to find hybrid claim); *Rector, Wardens and Members of the Vestry of St. Bartholomew’s Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990) (refusing to find claim of religious discrimination in application of city’s landmark preservation law as exception to *Smith*), *cert. denied*, 111 S. Ct. 1103 (1991).

¹⁸¹ The Supreme Court will have before it at least two cases in the October 1992 Term which may shed further light on *Smith*. In *Lamb’s Chapel v. Center Moriches Union Free School District*, 959 F.2d 381 (2d Cir. 1992), *cert. granted*, 113 S. Ct. 51 (1992) (No. 91-2024), the Court will decide whether it violates the First Amendment to deny a church group access to school facilities during nonschool hours. In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 723 F. Supp. 1467 (S.D. Fla. 1989), *cert. granted*, 112 S. Ct. 1472 (1992) (No. 91-948), the Court will consider the constitutionality of a municipal ordinance barring the slaughter of animals, as applied to a church that practices ritual animal sacrifice. In the latter case, the significance of *Smith* is directly addressed in the questions presented to the Court.

¹⁸² See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (reconsidering standards of review for constitutionality of laws regulating abortion); *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (reconsidering standards of review for constitutionality of legislation regulating “fighting words”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (setting standard of review for constitutionality of state and local affirmative action legislation).

restraints on constitutionally protected interests. Second, *Smith* represents an effort by the Court to harmonize its review of free exercise cases with the standards it uses to protect other constitutional interests under the Bill of Rights or the Fourteenth Amendment.

The Court was quite explicit about the first of these aims in *Smith*. In his opinion for the Court, Justice Scalia castigated *Sherbert* for treating direct and indirect restraints on religion under a common standard. He explicitly alluded to the sharp distinction between purpose and effect that the Court has drawn in other contexts, most notably under the Equal Protection Clause, and he asserted that judicial review under the Free Exercise Clause should be guided by a similar distinction.¹⁸³ Thus, direct restraints on religion, which are roughly analogous to purposeful discrimination, should provoke greater skepticism and more searching review than indirect restraints, which are simply the effect of neutral secular legislation.¹⁸⁴

The second aim of *Smith* arises by inference from its discussion of precedent. The Court was at pains to show both that *Sherbert* had misread the cases on which it relied for establishment of a strict scrutiny standard, and that cases which in turn relied on *Sherbert* did not in fact establish a broad consensus in favor of its strict scrutiny approach. To do this, the Court had to explain why these cases employed a strict scrutiny standard.

Justice Scalia reasoned that the cases in question did not support a general *free exercise* strict scrutiny standard because they in fact involved more than mere religious claims. He described them as “hybrid” cases in which free exercise claims were linked

¹⁸³ *Smith*, 494 U.S. at 885-87. For a discussion and criticism of this aspect of *Smith*, see McConnell, *supra* note 174, at 1130-36.

¹⁸⁴ For a critique of Justice Scalia's emphasis on purposeful discrimination under the religion clauses, see Timothy L. Hall, *Religion, Equality, and Difference*, 65 *TEMPLE L. REV.* 1, 76 (1992). Hall argues that:

The Court quenched its thirst for doctrinal neatness at the expense of twisting the Free Exercise and Equal Protection Clauses into clones of one another. Because the Religion Clauses represent, in part, unique judgments concerning religious difference while at the same time occasionally reflecting themes common to equal protection jurisprudence, we should expect both similarity and anomaly when comparing the Religion Clauses with the Equal Protection Clause.

Id.

with other constitutionally protected rights.¹⁸⁵ Thus, for example, he treated *West Virginia State Board of Education v. Barnette*¹⁸⁶ (one of the cases on which *Sherbert* had relied) as a case that linked free exercise of religion with freedom of speech.¹⁸⁷ In addition, he treated *Wisconsin v. Yoder*¹⁸⁸ (which had relied on *Sherbert*) as a case that involved not only religion, but constitutional rights of privacy with respect to the upbringing of children.¹⁸⁹ In each instance, Justice Scalia argued, because the Court was faced with a hybrid claim that joined religious freedom with other constitutional rights, its use of a stricter standard of review was dictated by the *other* constitutional right involved. Hence, the Court's use of strict scrutiny in such instances did not establish a general standard applicable to all free exercise situations. To the contrary, Justice Scalia observed that when free exercise claims were not linked with other constitutional interests, the Court had effectively employed a much more deferential review.¹⁹⁰

Exactly how the Court sought to effectuate these two aims in *Smith* remains uncertain. *Smith* appears to give the protection of the Free Exercise Clause a chameleon-like character, in which the degree of protection for religious interests varies substantially according to their surroundings. Overt attempts by the state to regulate religious belief directly are virtually prohibited. Religious interests linked with highly valued freedoms like speech or racial equality receive comparatively high protection, even from incidental regulation.¹⁹¹ Interests in religiously motivated conduct lacking the coloration of such other fundamental values, however, receive considerably less protection. Many such claims would receive no more protection than the Constitution affords to ordinary, garden-variety economic liberty interests. But the Court's exception for cases involving exemption-laden statutory schemes suggests that judicial review of even "pure" (that is,

¹⁸⁵ *Smith*, 494 U.S. at 881-82.

¹⁸⁶ 319 U.S. 624 (1943).

¹⁸⁷ *Smith*, 494 U.S. at 882.

¹⁸⁸ 406 U.S. 205 (1972).

¹⁸⁹ *Smith*, 494 U.S. at 881.

¹⁹⁰ *Id.* at 882-83.

¹⁹¹ It bears noting, however, that these interests would receive substantial protection anyway, even if they were not religious in nature. As to them, the Free Exercise Clause becomes mere surplusage.

nonhybrid) free exercise claims, though deferential, might not be wholly toothless.¹⁹²

One can certainly question whether *Smith* accurately explained the development of free exercise doctrine.¹⁹³ And some commentators have argued persuasively that *Smith* shortchanges the constitutional principle of free exercise of religion.¹⁹⁴ Indeed, it seems almost to strip the Free Exercise Clause of any content that is not duplicative of other constitutionally guaranteed rights.¹⁹⁵

¹⁹² One of the troubling curiosities of *Smith* is why the Court failed to find the exceptions it putatively recognized implicated in the case before it. Celebration of a religious sacrament with a congregation of other adherents seems at least to involve associational interests, and perhaps symbolic speech as well. And after all, the individuals in *Smith* were only claiming exemption from a qualification for unemployment benefits, not freedom from criminal prosecution (none had been instituted by the state). Thus, on its facts, *Smith* would seem to present, on two distinct grounds, a good case for exception from its own rule.

¹⁹³ For a particularly trenchant critique of *Smith*'s use of precedent, see McConnell, *supra* note 174, at 1120-28.

¹⁹⁴ *E.g.*, Milner S. Ball, *The Unfree Exercise of Religion*, 20 CAP. U. L. REV. 39 (1991); Choper, *supra* note 143; Theresa Cook, *The Peyote Case: A Return to Reynolds*, 68 DENV. U. L. REV. 91 (1991); Hall, *supra* note 184; Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992); McConnell, *supra* note 174; Richard K. Sherwin, *Rhetorical Pluralism and the Discourse Ideal: Countering Division of Employment v. Smith, A Parable of Pagans, Politics, and Majoritarian Rule*, 85 NW. U. L. REV. 388 (1991); Karin M. Rebesch, Note, *The Illusory Enforcement of First Amendment Freedom: Employment Division, Department of Human Resources v. Smith and the Abandonment of the Compelling Governmental Interest Test*, 69 N.C. L. REV. 1332 (1991). *But see* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

¹⁹⁵ Protection for religious belief is no broader than the protection afforded other beliefs under the Free Speech Clause of the First Amendment. Hybrid claims get the same level of review they would receive even if a religious element were not present. And nonhybrid conduct claims are relegated to the mere rationality review applicable to all governmental action, unless they: 1) arise in the context of a statutory scheme that easily accommodates exemptions; or 2) contain invidious classifications that would violate either the Equal Protection Clause of the Fourteenth Amendment, or the Establishment Clause, or both. *See* Laycock, *supra* note 194, at 11 (noting that Court applies Equal Protection rule); *see also* Hall, *supra* note 184, at 75-77 (explaining difference between Free Exercise and Equal Protection Clauses); McConnell, *supra* note 174, at 1121-22, 1129-41 (explaining theory of *Smith* decision).

But unless the Court reframes its position, any analysis of free exercise claims under the bankruptcy laws must proceed in accordance with the doctrine established by *Smith*.

3. The Specific Case of Tithing

On the surface, application of the Code to religious tithes seems to be precisely the kind of situation *Smith* had in mind as a candidate for deferential review. The Code clearly does not involve any attempt by Congress to regulate matters of religious belief. To the contrary, the language of Chapter 13 and its legislative history reveal an absence of any explicit consideration of religion.¹⁹⁶ Congress simply had other issues than religion in mind when it drafted Chapter 13. The effect of the Code on religious interests in tithing is an incidental effect of Congress' general strategy for securing partial repayment of creditors. This seems to be the archetype of neutral, secular legislation that has at most only an indirect effect on religious conduct.

Initial impressions, however, can sometimes be deceiving, and this is such a case. Closer examination of the bankruptcy scheme as applied to religious tithes reveals a purposive element to the enforcement mechanism that deprives congressional regulation of its ostensibly neutral character. Beyond that, religious tithing fits into *Smith's* incipient exceptions to deferential review. Religious tithing links religion with speech; it may well also entail associational freedoms. Furthermore, the process of determining "necessary expenses" under the Code comfortably allows room to accommodate religion without damage to the statutory scheme. Thus, the deference to legislative fiat that *Smith* prefers as the constitutional norm would be inappropriate in the Chapter 13 setting.

Although it might be fair to assert that Chapter 13 is neutral with respect to religion on its face, the statute loses that neutrality in application. It calls for bankruptcy judges to make case-specific determinations of an individual debtor's "necessary expenses." When a debtor lists religious tithing as a proposed expense, the bankruptcy judge must decide whether that expense is "necessary" or not. A judgment to deny the expense thus functionally labels it as unnecessary. Such a decision involves a value judgment that entails explicit denigration of the individual's religious belief. It puts the state directly behind the notion that the indi-

¹⁹⁶ See *supra* part I.B (discussing legislative history and intent).

vidual's expenses for spiritual welfare—for her relationship with her church and her God, as she understands it—are more easily forgone than, for example, such probably allowable expenses as her food, her clothing, her shelter, her transportation costs, her medical expenses, or her children's schooling.¹⁹⁷ Inevitably, a decision to exclude tithing as an allowable expense requires a deliberate governmental decision to burden religiously compelled tithing, and to place it well down on the scale of relative human values.

Moreover, tithing is not merely religious conduct; it is also speech. The act of paying money to someone, of course, is usually conduct that falls well outside the ambit of speech and is fully subject to state regulatory authority. But in *Buckley v. Valeo*¹⁹⁸ and a series of subsequent cases,¹⁹⁹ the Court has treated the donation of money to political campaigns as more than mere conduct. Because “virtually every means of communicating ideas in today's mass society requires the expenditure of money,” the Court concluded that “[a] restriction on the amount of money a person or group can spend on political communication . . . necessarily reduces the quantity of expression” and thus abridges freedom of speech.²⁰⁰ In these cases, the Court has recognized that political financing involves the attributes of speech, so that governmental attempts to regulate such activities implicate fundamental constitutional rights. As a consequence, the Court has insisted that governmental restraints on such financial contributions must be subject to relatively exacting judicial review.²⁰¹

What is true of financial contributions in the political arena is true of similar contributions in the religious arena. When one gives money to a church, one advocates and supports, in a very explicit and immediate way, the expression and dissemination of that church's spiritual message. The church usually depends

¹⁹⁷ See *supra* part I.B (discussing bankruptcy courts' treatment of necessary expense).

¹⁹⁸ 424 U.S. 1 (1976) (per curiam).

¹⁹⁹ E.g., *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978). But see *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) (upholding limits on spending by corporations for political advertising).

²⁰⁰ *Buckley*, 424 U.S. at 19.

²⁰¹ *Bellotti*, 435 U.S. at 788-95 (requiring exacting scrutiny of state-imposed restriction of freedom of speech); *Buckley*, 424 U.S. at 64-65 (recognizing that state interests must survive exacting scrutiny).

upon such individual contributions to make its ministry possible. The donation, in turn, enables the individual to communicate her religious beliefs through a broader and more effective range of means than if such a donation were impossible. A restriction on spending to support religion is thus a restriction on religious speech in precisely the same way that a restriction on a campaign contribution is a restriction on political discourse.²⁰² Hence, a governmental restraint on tithes is, in the lexicon of *Smith*, a hybrid situation that implicates freedom of speech along with freedom of religion. Under *Smith*, review of the religious claim consequently should take on the color of more exacting review afforded to monetary political speech.²⁰³

²⁰² In the campaign contribution cases, the Court has often emphasized that speech on political issues—issues of self-government—lies at the core of First Amendment freedoms. See *Bellotti*, 435 U.S. at 776; *Buckley*, 424 U.S. at 14. Religious speech may lack the immediate link to issues of self-government that the Court has so often stressed with political speech. Yet one could hardly argue that religious speech is *less* important than political speech for this reason. Religion, after all, is specifically treated in the First Amendment, while political debate is swept into the general category of “speech.” And the drafting history of the Bill of Rights strongly suggests that securing freedom of religious expression was of paramount importance to the Framers. For a discussion of the Framers’ debates regarding religious freedom, see LÉONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986).

²⁰³ The similarity to political contributions would be even more apparent if we were dealing with a general government regulation prohibiting, say, the act of “tithing” to all eleemosynary institutions. One could, of course, assert that such generalized measures implicate different constitutional concerns than the sort of individualized mechanism involved under Chapter 13. But such a distinction does not hold up. For the individual and her religious speech, an individual restraint no less effectively prohibits her speech through contribution than would a general law prohibiting the same thing. And we would find equally constitutionally offensive a system that, for some class of individuals, sought to subject their decisions about charitable contribution to advance governmental supervision and approval. See *Follett v. Town of McCormick*, 321 U.S. 573, 575-77 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105, 108-10 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938). Indeed, such a system comes perilously close to censorship, and the most stringent of all First Amendment doctrines—the doctrine of prior restraint. For a discussion of this issue, see THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 506 (1970); Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981); Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72

In addition to being a constitutionally protected form of speech, religious tithing also implicates freedom of association. The Court first recognized a constitutionally protected freedom of association in a case that involved association by membership and financial contribution.²⁰⁴ Building on this idea, *Buckley* recognized that associational interests are an important component of political contributions.²⁰⁵

Again, religious contributions present a strong analogy. A person who contributes to a religious sect thereby establishes her personal spiritual union with the sect. The contribution both symbolizes and establishes identity between the individual and the sect's mission. What we have recognized as a fundamental associational interest in the political arena we must also recognize, under the parallelism principle of *Smith*, as at least equally fundamental in the religious context. Since "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny,"²⁰⁶ restraints on religious association through tithing must receive searching review.

What has been said thus far applies to any religious contribution.²⁰⁷ Religious *tithing* adds an extra dimension to the speech and associational characteristics of religious spending. For a person whose religious belief includes an obligation to tithe, the contribution carries a very specific message: it affirms the spiritual importance of a specific religious command. With respect to such a command, there is simply no other means of affirmation. Tithing evinces, in a manner that mere linguistic assertion cannot, a

YALE L.J. 877 (1963); John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983); cf. Mark C. Rahdert, *The First Amendment and Media Rights During Wartime: Some Thoughts After Operation Desert Storm*, 36 VILL. L. REV. 1513, 1518-20 (1991) (discussing censorship of press).

²⁰⁴ NAACP v. Alabama, 357 U.S. 449, 466 (1958).

²⁰⁵ Buckley v. Valeo, 424 U.S. 1, 22-23 (1976) (per curiam).

²⁰⁶ NAACP, 357 U.S. at 460-61.

²⁰⁷ Indeed, the analysis in the text suggests that a bankruptcy judge's denial of political or charitable contributions that an individual listed as necessary expenses in a Chapter 13 proceeding might also implicate fundamental rights and require searching review. Presumably, however, most individuals do not regard such expenses as "necessary" to their well-being and are therefore more able to forgo them when in difficult financial straits. But one can certainly imagine circumstances in which an individual might be able to present a persuasive case that her political or charitable donations were necessary to preserve critical associational or speech interests.

way of life, one in which a preordained portion of all one receives is set aside for return to one's God, from whom it came. Government denial of tithing is a direct, content-specific assault on the validity of that message.

For many religious adherents, the inability to tithe may also cause substantial harm to associational interests. In some religions, tithing is a specific precondition for membership in the congregation.²⁰⁸ One who does not tithe loses her standing as a member of the church. She is no longer part of the community of saints, and she may be denied religiously important rights and benefits of membership.

In addition to the characteristics of religious tithing that bring it within *Smith's* exception for hybrid claims, the structure of Chapter 13 also places this issue outside *Smith's* general rule of legislative deference. Chapter 13 easily allows for individual exceptions. Indeed, Chapter 13 calls for individualized, case by case determination of a debtor's allowable expenses. Bankruptcy judges have substantial discretion to vary their determinations of allowable expenses according to the needs of particular debtors.²⁰⁹ Expenses allowed in one case need not be treated as such in the next, if the circumstances of the debtors are different. In the context of such a highly flexible and individualized process, it does not impair governmental interests to allow individualized treatment of religious tithes. Consequently, government refusal to accommodate religion as part of its legislative scheme raises significant constitutional doubts. *Smith's* reading of *Sherbert* as requiring more searching review for religious claims under statutory schemes that already permit individual exceptions thus applies to Chapter 13 as well.

These observations suggest that the treatment of tithes under Chapter 13 should qualify for exception from *Smith's* general rule of deference to legislative judgments regarding the burdening of religious interests. This conclusion, moreover, comports with *Smith's* desire to preserve the distinction between purpose and effect, and to strike a rough parity between free exercise doctrine and other principles of constitutional law. Because there is a purposive element in a bankruptcy judge's treatment of religious expenses under Chapter 13, and because the religious interests

²⁰⁸ See *supra* note 141 (describing role of tithing in Mormon church).

²⁰⁹ 11 U.S.C. §§ 105 (power of court), 1324 (confirmation hearing), 1325 (confirmation of plan), 1329 (modification of plan after confirmation).

are similar in character to other kinds of constitutional claims, raw deference to legislative judgment is inappropriate. Rather, courts must independently strike a balance between freedom of religion and the purposes of Chapter 13 under a more searching standard.

Because *Smith* does not clearly delineate the potential exceptions to its rule of deference, it also does not say precisely what standard of review applies to such cases. Since the Court stopped short of overruling *Sherbert*, however, one can infer that *Sherbert*'s version of strict scrutiny remains at least a starting point for evaluating free exercise claims that fall into one or both of *Smith*'s exceptional categories. Accordingly, we must examine two questions: whether denial of religious tithing to Chapter 13 debtors would substantially burden their religion, and if so, whether the government's refusal to allow tithes is necessary to support a compelling governmental interest.²¹⁰

Denial of a sincere religious obligation to tithe does place a substantial burden on the bankruptcy debtor. We have already described how the inability to tithe might deprive the individual of important religious expression, religious association, and the benefits of membership in a church.²¹¹ These effects alone are sufficient to create a substantial burden. But the impact of being forbidden to tithe runs even deeper. To someone who believes in a religious obligation to tithe, a failure to tithe is sinful. It creates a sharp dissonance between profession and practice in at least two important areas of religious belief—one's dedication to the church, and one's dedication to the service of others. Such a dissonance can produce substantial mental and spiritual anguish. In the eyes of some, it might threaten salvation.²¹²

²¹⁰ *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

²¹¹ See *supra* notes 197-207 and accompanying text (explaining burdens imposed by denying tithing in bankruptcy).

²¹² One possible response to this assertion might be to argue that it is the *court*, not the individual, which is deciding to omit tithing, and that this should relieve the individual of personal responsibility. Whether that is so, however, is a matter of the individual's subjective belief; in evaluating the impact of a prohibition on tithing on an individual's religion, we may not impose our own version of personal responsibility, which may well be at odds with that of the individual's religion. Moreover, the response, even if true, does not remove the burden, as a few simple examples will demonstrate. Imagine a law that prohibited prayer, or group worship, or religious confession. No one would deny that such a law imposed a substantial burden on religious expression, even though it was the state that was preventing the religious individual from meeting her religious

Furthermore, a bankruptcy judge's refusal to allow tithing is undoubtedly coercive. An individual seeking Chapter 13 relief has no option but to abide by the court's final ruling regarding allowable expenses. By definition, the individual cannot find some substitute way of tithing, since all the debtor's finances are subject to bankruptcy court control, and a Chapter 13 budget provides for no discretionary funds.²¹³ One must either adhere to the budget set by the court, or give up the opportunity to work out one's debt.²¹⁴ Accepting the judge's determination that tithing to one's church does not represent a necessary expense thus becomes the price of obtaining a financial fresh start.²¹⁵

Although theoretically the debtor would be free to withdraw her Chapter 13 petition, that option is not very attractive. The only other courses left would be liquidation under Chapter 7, in which many assets protected from creditors under Chapter 13 would be sacrificed, or trying to survive without bankruptcy court protection, which would be practically impossible. Hence, the pressure to submit to the bankruptcy court's judgment and forsake the obligation to tithe would be intense. The pressure would at least equal the pressure in *Sherbert* to give up Saturday worship in order to obtain unemployment benefits.

An adverse decision by a bankruptcy court on religious tithing thus does effectively prohibit the debtor's free exercise of her religious obligations. Consequently, under the free exercise strict

obligations, and even if her personal religion might absolve her from eternal responsibility for those omissions because of the state's interference.

²¹³ 11 U.S.C. § 1322. The Code does not prohibit an individual from selling protected assets to meet her religious obligations. But forcing the individual to do so is undoubtedly coercive; moreover, it frustrates the purpose of Chapter 13, which is to allow such assets to remain intact. In effect, to rely on the individual's ability to sell protected assets in order to tithe is to require her to undergo a partial liquidation.

²¹⁴ *Id.* § 1307(c)(4), (6).

²¹⁵ It might be possible for some debtors to obtain the funds for tithing by spending less on some of the other budget items than the amount the bankruptcy judge approved. While this may be a real possibility, it does not eliminate the burden on religion. Since the other allowed amounts have been pared down to the level of "necessity," achieving savings in any other expense category will inevitably require some privation, some personal sacrifice. To the extent this sacrifice comes about because of the bankruptcy judge's refusal to allow tithing, it is attributable to the government's choice against religion. A choice between adequate medical care, or adequate schooling for one's children, or the like, and meeting tithing obligations is also coercive.

scrutiny standard applied by *Sherbert* and its progeny, the government may prohibit tithing by Chapter 13 debtors only to the degree necessary to serve a compelling government interest.²¹⁶ The question thus becomes whether the governmental interests behind Chapter 13 can be regarded as compelling within the meaning of *Sherbert* and its progeny, and whether refusal to allow tithes narrowly serves those interests.

Before applying this exacting standard, however, we must take a closer look at the way strict scrutiny has been applied under *Sherbert*. Clearly, the “compelling interest” analysis of free exercise law has been considerably more deferential than similarly worded standards have been in other contexts; that reality was one of the chief motivating factors behind *Smith*.²¹⁷ In the past, the Court has been willing to accept as “compelling” for purposes of free exercise scrutiny governmental interests that probably would not be treated that way under other branches of constitutional law.²¹⁸

After *Bowen v. Roy*²¹⁹ in particular, one cannot place too much weight on the notion that government may pursue only its most important interests at the expense of religion. In that case, a Native American objected to the Social Security Administration’s

²¹⁶ In its pre-*Smith* decisions, the Supreme Court has used a variety of phrases to describe the strict scrutiny standard used for free exercise claims. See, e.g., *Bowen v. Roy*, 476 U.S. 693, 727 (1986) (plurality opinion) (“especially important interest”); *United States v. Lee*, 455 U.S. 252, 257-58 (1982) (“overriding governmental interest”); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (“compelling state interest”); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“interests of the highest order”). All the formulations, however, have in common the notion that the governmental interest involved must be one of more than routine importance, and that the burden on religious freedom must be essential to achieving that interest.

²¹⁷ See *supra* notes 182-90 and accompanying text (reviewing concerns in *Smith* regarding constitutional standards of review).

²¹⁸ For example, the Court has found state interests in securing military uniformity of dress, raising tax revenues, and providing a day of rest sufficient to override free exercise claims. *Goldman v. Weinberger*, 475 U.S. 503 (1986) (military dress); *Lee*, 455 U.S. at 252 (raising taxes); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion) (day of rest case predating *Sherbert*). One doubts that the Court would have treated these same interests as sufficiently compelling to override other fundamental rights, such as freedom of speech or freedom from racial discrimination. For an extensive discussion of the inherent difficulties in the Court’s application of the *Sherbert* standard, see generally Lupu, *supra* note 143, at 933.

²¹⁹ *Roy*, 476 U.S. at 693.

use of a Social Security number in connection with welfare benefits for his daughter.²²⁰ The Court accepted at face value his claim that use of the number would, according to his Abenaki religious beliefs, rob his daughter of her spirit—an undeniably substantial burden on religion.²²¹ But a majority of the Justices nonetheless ruled for the government. Although the Court split over the reasons for its decision, a majority accepted the government's claim that its need to use Social Security numbers for administrative efficiency and control of fraud was enough to override this presumptively heavy religious burden.²²²

Governmental interests such as efficiency and prevention of fraud, though surely significant, are not what one typically regards as government concerns of the highest rank. They are not of an importance equal to such concerns as the elimination of racial discrimination, national security, the fair administration of justice, or protection from physical violence—interests that have been treated as compelling in other areas of constitutional law.²²³ Indeed, if administrative efficiency is a compelling interest for

²²⁰ *Id.* at 695.

²²¹ *Id.* at 696.

²²² *Id.* at 709. Five Justices in *Roy*, however, agreed with Justice O'Connor's assertion in her separate partial concurrence that it would violate the Free Exercise Clause to require Roy's daughter to furnish the government with a Social Security number for use in connection with welfare benefits. *Id.* at 726-27 (O'Connor, J., concurring in part and dissenting in part). Justices O'Connor, Brennan, and Marshall drew a distinction between the government's internal *use* of the number, which they concluded satisfied the *Sherbert* standard, and its requirement that the applicant for welfare benefits *supply* such a number, which they found violated the *Sherbert* standard. *Id.* Justice White, dissenting, found either use of or furnishing the number to violate *Sherbert*. *Id.* at 733 (White, J., dissenting). Justice Blackmun, while agreeing in principle with Justice O'Connor's position, found that the issue of the requirement to furnish the number need not be reached, since it turned out that in fact a Social Security number for Roy's daughter had been obtained. *Id.* at 714-16 (Blackmun, J., concurring in part) (stating that district court should determine if case is moot).

²²³ *See, e.g.,* *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (stating that eradication of racial discrimination is compelling government interest); *Haig v. Agee*, 453 U.S. 280, 307 (1981) (finding that national security is compelling government interest); *Cox v. Louisiana*, 379 U.S. 559, 562 (1965) (acknowledging that fair administration of justice is compelling government interest); *San Diego Bldg. & Traders Council v. Garmon*, 359 U.S. 236, 247 (1959) (recognizing that maintenance of domestic peace is compelling government interest).

purposes of free exercise analysis, one would be hard-pressed to find a government program that would not meet this part of the test. It is *always* less efficient for government to accommodate religion in the administration of its programs, because there is always some marginal cost associated with deciding who qualifies for a religious exemption.²²⁴

Accordingly, the critical question under the *Sherbert* standard as it has been applied is not whether the interest is compelling, but the degree to which allowing a religious exemption would actually impair legitimate governmental concerns. In the past, when the Court has required religious exemptions, it has always stressed the lack of any threat to governmental interests posed by accommodation.²²⁵ In the bankruptcy context, that question is answered by determining the degree to which allowing religious tithes as a necessary expense impairs the purposes behind Chapter 13.

We have already argued that, far from impairing statutory purposes, permitting religious tithes as a necessary expense is fully consistent with Chapter 13's aims.²²⁶ Chapter 13 does not reflect a single-minded pursuit of one particular social value. Rather, it

²²⁴ For discussions of the Court's difficulties in applying the *Sherbert* standard, see Marshall, *Solving the Free Exercise Dilemma*, *supra* note 133; Steinberg, *supra* note 143; Stone, *supra* note 143. Professor McConnell has commented that in the free exercise area the Justices have in fact applied "a far more relaxed standard," and that "[t]he 'compelling interest' standard is a misnomer." McConnell, *supra* note 174, at 1127. Professor Glendon and Mr. Yanes have gone so far as to suggest that the Court's approach under *Sherbert* might actually be more accurately characterized as intermediate scrutiny. Glendon & Yanes, *supra* note 143, at 523.

²²⁵ See, e.g., *Bowen v. Roy*, 476 U.S. 693, 726-27 (1986) (O'Connor, J., concurring in part and dissenting in part) (arguing that government interest in prohibiting fraud and operating efficient welfare system can be served by means other than Social Security number); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that state interest in facilitating identification and conveying patriotic message on automobile license plates not endangered by permitting individual with religious objections to obliterate message on his license plates); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that state interests in preparing children for adult life through education not endangered by exemption for Amish children, in view of substitute preparation they receive in the home); *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that state interest in protecting against fraud not endangered by exception to Saturday work requirement for individual with Sabbatarian religious convictions).

²²⁶ See *supra* part I.C (discussing tithing as reasonably necessary expense consistent with purpose of Chapter 13).

reflects an interplay of competing concerns. The purpose of Chapter 13 is *not* simply to maximize repayment of creditors, but to strike a balance between creditor demands and the debtor's personal and financial welfare, with the latter taking priority. Just as allowing the debtor to obtain medical treatment, continue her children's schooling, or own a car she can use to drive to work serves the aims of the statute, so does permitting her to retain her spiritual welfare and dignity by tithing to her church.

Nor does permitting a religious exemption impose any significant administrative burdens. The process of bankruptcy court review of the debtor's budget, and the individualized determinations regarding necessary expenses that process entails, are already built into the statutory scheme. Adding one more item for review might add some marginal cost to the process, but it should be fairly minimal—not the sort of major disruption of administrative practice some members of the Court envisaged in *Bowen v. Roy*.²²⁷

Creditors challenging a religious tithe might argue that this analysis conflicts with the Supreme Court's handling of tax cases under the *Sherbert v. Verner* standard. For example, in *United States v. Lee*²²⁸ and *Hernandez v. Commissioner*,²²⁹ the Court rejected free exercise challenges to the application of federal tax laws. The Amish respondents in *Lee* claimed that paying the tax violated their religious belief in personal responsibility to care for members of their religious community.²³⁰ The Court held that the government's interest in "maintaining a sound tax system" that was free of "myriad exceptions flowing from a wide variety of religious beliefs" overrode a claim for religious exemption from Social Security taxes by Amish employers and employees.²³¹ *Hernandez* relied on *Lee* to hold that denial of charitable income tax deductions for payments to the Church of Scientology similarly did not prohibit free exercise of religion. The Court observed that "the contention that an incrementally larger tax burden interferes with . . . religious activities . . . knows no limitation."²³² In each instance, rather than addressing the question of whether the tax substantially burdened religion, the Court was

²²⁷ *Roy*, 476 U.S. at 709-12.

²²⁸ 455 U.S. 252 (1982).

²²⁹ 490 U.S. 680 (1989).

²³⁰ *Lee*, 455 U.S. at 257.

²³¹ *Id.* at 260.

²³² *Hernandez*, 490 U.S. at 700.

content to hold that the obligation was essential to achieve an overriding governmental interest.

At first blush, there is an analogy between these tax cases and the Chapter 13 situation. In both contexts, the burden on religion comes from governmentally imposed financial obligations. In both contexts, the claim of interference with religion comes from the effect that meeting the governmental obligation will have on the religious adherent's ability to use her money for religious purposes. Thus, on the surface, rejection of the religious claim in one context suggests that it should be rejected in the other as well.

But there is a fundamental difference between tax and bankruptcy which defeats the apparent analogy. In the case of a tax, the government does not assume total control over personal finances. It demands that one "pay unto Caesar" first, but it leaves the individual free to determine what should be done with funds left over after taxes have been paid. The individual still may choose to give them to the church, or to make them available for others within the religious community who are in need. The effect of the tax may be to make observing those other religious obligations more difficult, but it does not preclude them outright.

Under Chapter 13, in contrast, the individual is left with no room for financial choice. The government decides how every dollar of the individual's income is to be spent. It leaves nothing to personal discretion. As a practical matter, it thus cuts off *entirely* the individual's ability to set aside a specified amount of her income in order to meet her financial religious obligations.

Moreover, the administrative burden of accommodating "myriad exceptions flowing from a wide variety of religious beliefs" is nowhere near as great in bankruptcy as the Court imagined it to be in the case of a tax. The tax systems the Court was reviewing in *Hernandez* and *Lee* had no built-in mechanism for individualized exceptions. Chapter 13, in contrast, already requires that *every* plan be individually reviewed and approved in advance. As we have noted, in a system that already contemplates and provides for potentially "myriad" variations in personal financial need, setting one more criterion under which to assess that need should not cause major disruptions.²³³ These considerations demon-

²³³ See *supra* notes 78-87 and accompanying text (explaining congressional intent to give courts discretion in deciding reasonable necessity of expense).

strate that outright refusal by bankruptcy courts to allow religious tithes as necessary expenses contradicts not only the policies of Chapter 13, but the commands of the Constitution as well. Avoidance of such a constitutional infirmity becomes another reason—a controlling one²³⁴—for construing Chapter 13 to allow religious tithes.

What has been said thus far treats the issue in a binary fashion, as a choice between allowing tithes or prohibiting them. In fact, however, the issue is further complicated by the question of amount. Once a bankruptcy court has decided that religious tithing is an allowable expense, it may confront a range of claims running from very modest tithes to extremely large ones.²³⁵ The court thus must determine whether the same constitutional principles that require accommodation of the obligation to tithe itself also require the court to honor the individual's sincere religious belief regarding the appropriate amount of the tithe.

In most cases, the court should accommodate not only the individual's decision to tithe, but also her decision regarding the amount. As we have noted previously, this has been the general approach under Chapter 13 with respect to most other forms of necessary expense. Here, moreover, both decisions reflect sincere religious beliefs. Furthermore, the burdens on religion that can result from failure to contribute anything to the church can also result from failure to give as much as one's religion commands. This is especially true if the church conditions full participation in the life of the church on the act of tithing a specified amount, as some religions do.²³⁶

Nevertheless, in a few instances the amount of the tithe may require regulation in order to preserve the basic function of a Chapter 13 proceeding. This would occur when honoring the debtor's decision as to amount would prevent significant repayment of creditors, while scaling down the amount would permit such repayment. In this limited circumstance—one which courts should only rarely encounter—we believe that it will not contra-

²³⁴ See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-01 (1979) (explaining that absent clearly expressed intentions to the contrary, courts should interpret congressional statutes to avoid potential conflict with religion clauses).

²³⁵ See *supra* note 2 (defining tithe and discussing amounts).

²³⁶ See *supra* note 141 and accompanying text (describing role of tithing in Mormon church).

vene the Constitution for a bankruptcy judge to place reasonable limitations on the amount of the tithe.²³⁷

Religious beliefs necessarily will vary on the issue of what amount of income must be given to the church. For some debtors, a symbolic tithe—the religious adherent’s counterpart to the lawyer’s proverbial peppercorn—might suffice; for others, the tithe might amount to a vow of poverty and consume nearly all available income. As the amount of the tithe the debtor claims as a necessary expense increases, it consumes a progressively larger portion of her income. This obviously reduces the amount that is available for repayment of creditors. If the reduction becomes too great, the opportunity to effect partial repayment itself becomes frustrated. When this happens, the whole point of having a Chapter 13 procedure in the first place is lost.²³⁸ The statutory balance between the interests of creditors and debtor would be better served by outright liquidation under Chapter 7.²³⁹ Consequently, while it would violate the free exercise of religion completely to deny tithing in all cases, regulating the amount of the tithe may be necessary in a few cases to serve the overriding government interest in maintaining a balance between debtor protection and creditor repayment.²⁴⁰

²³⁷ We intentionally avoid defining the term “reasonable.” What is reasonable may vary greatly depending on context. Among factors that may bear on the determination are the size of the debtor’s debt, the size of her income, the amount of her other necessary expenses, and the degree to which limitations on amount will burden her subjectively sincere religious beliefs. With respect to the last of these factors, it will be of particular importance to determine the effect that failing to tithe in a particular amount would have on her participation in her religious community.

²³⁸ See *supra* notes 14-17 and accompanying text (comparing purpose of Chapter 13 with purpose of Chapter 7).

²³⁹ See 11 U.S.C. § 1325(a)(4) (requiring that payments under Chapter 13 at least equal payments under Chapter 7).

²⁴⁰ Regulation of the amount of a tithe may be a more serious burden upon a person for whom a minimum tithe is required in order to obtain privileges of participation in her sect. In such a case, the court may well be faced with a choice between either approving the tithe *in toto*, or requiring the debtor to liquidate under Chapter 7. For individuals for whom tithing is not a precondition to church membership, more flexibility in adjusting the amount of the tithe may be permissible. Even for such individuals, however, the court should not alter the amount unless doing so is necessary to obtain *some* repayment of creditors; limits on the amount of tithing simply to *maximize* creditor repayment should be impermissible, both as a misreading of the statute, see *supra* part I, and as a violation of the Constitution.

This conclusion is buttressed by the roughly analogous reasoning the Court has employed with respect to government regulation of political contributions. The Court held in *Buckley v. Valeo*²⁴¹ that outright prohibition of political contributions would violate the First Amendment, but in *Buckley* and its progeny the Court has permitted some governmental regulation of the amount of campaign contributions.²⁴² A similar distinction between outright prohibition and regulation of amount should be available under Chapter 13, although we repeat that it should operate only in rare circumstances.²⁴³

Indeed, for similar reasons, it does not violate the Free Exercise

²⁴¹ 424 U.S. 1 (1976) (per curiam).

²⁴² *Id.* at 143-44.

²⁴³ One way of handling the question of what sort of tithe is "reasonable" might be for Congress to specify, in terms of either a percentage of available income or proportional relationship to the amount of debt, a maximum permissible amount. The same concerns that kept Congress from adopting such an approach generally, however, might well prevent it from doing so on the specific issue of tithes. *See supra* notes 78-87 and accompanying text (explaining purpose of Congress' failure to define standard). In the absence of such a legislative solution, the matter would have to be determined by a bankruptcy court on a case by case basis. In each instance, the court should endeavor to provide for the maximum amount of an allowable tithe that 1) is consistent with the debtor's religious convictions, 2) does not threaten her ability to meet current fiscal obligations, and 3) allows sufficient partial repayment of creditors to warrant use of Chapter 13 instead of liquidation.

Adherents of religions that require especially large tithes might complain that such an approach discriminates against their religious beliefs, and that such discrimination itself violates the Free Exercise Clause. This argument might have merit if a bankruptcy judge (or Congress) employed *religious* considerations (for example, reference to Biblical injunctions regarding the amount of the tithe, or paying regard to historic practices within some particular religious sects) in making the judgment. But if the court (or legislature) holds strictly to nonreligious factors focused on the debtor's ability to accomplish the objectives of Chapter 13, there should be no constitutional difficulty. The Supreme Court has observed on several occasions that secular choices which happen to coincide with some religious practices but not others are not unconstitutional solely by reason of that differential impact. *See, e.g.,* *Hernandez v. Commissioner*, 490 U.S. 680, 688 (1989) (rejecting constitutional argument because statute permitting tax deductions for some but not all religious expenses had no denominational preference); *McGowan v. Maryland*, 366 U.S. 420, 450-53 (1961) (explaining that state's decision to declare Sunday as uniform day of rest had primary secular purpose despite its coincidence with religious practices of most Christian denominations).

Clause for bankruptcy judges to take other steps within their authority to ensure that religious tithing does not frustrate the goal of partial repayment of creditors. In particular, judges may use their statutory authority under the Code to require tithing debtors to extend their repayment plan from three to five years.²⁴⁴ This approach allows the court to honor the debtor's religious claim, but to minimize its impact on creditors' interests. Although lengthening the repayment period may impose some burden on religion, the burden is not nearly as severe as outright denial of a tithe, and it is justified by the need to prevent tithing from impairing competing governmental interests.

In summary, under *Smith's* recasting of free exercise review, denial of a religious adherent's tithe under Chapter 13 should be subject to exacting scrutiny for three reasons. First, denial of tithing involves purposeful burdening of religion. Second, tithing entails speech and associational interests as well as religious ones. Third, accommodation should be easily accomplished within Chapter 13's structure of individualized budget determinations. Under *Sherbert's* traditional test for free exercise strict scrutiny, denial of tithing imposes a substantial burden on religion. Such a denial is not necessary to achieve the purposes of Chapter 13, since those involve striking a balance between individual welfare and repayment of creditors, and respecting religious financial obligations is fully consistent with that balance. It may be necessary in a few cases, however, for bankruptcy judges to regulate the amount of the tithe, and to lengthen the repayment period to the statutory maximum to minimize the impact of religious accommodation on the repayment process.

B. Establishment Concerns

The previous discussion has addressed the constitutional implications of *denying* religious tithes under the necessary expense provisions of Chapter 13. But because of the structure of the First Amendment religion clauses, *allowing* religious tithes as a necessary expense also poses a constitutional issue. In this instance, the question is whether the bankruptcy judge's decision to permit tithing breaches the constitutional principle of separation of church and state, thus impermissibly establishing religion.

The possibility that allowing a tithe establishes religion probably appears most starkly from the vantage of the creditor. The

²⁴⁴ 11 U.S.C. § 1322(c).

creditor regards Chapter 13 as a mechanism for securing orderly repayment of previous contractual debts on which the debtor has already defaulted. From this perspective, the gross income of the debtor—all of it, and more—is already subject to existing legal obligations. None of it “belongs” to the debtor in the sense that she should be free to do with it as she wishes. All of it “belongs” to the creditors, in the sense that under traditional contract law (assuming there were no bankruptcy protection) the creditors could sue for default, obtain judgment in their favor, and execute that judgment against the debtor’s assets. The creditor, of course, does not yet “own” the debtor’s income, but the creditor has legal means of compelling the debtor to pay it over.

Accordingly, in the creditor’s view, when a bankruptcy court allows a debtor to claim a religious tithe as a necessary expense, thereby reducing by an equivalent amount the fund available for repayment of creditors, the court is honoring the debtor’s religious claim with what should properly be regarded as the creditor’s money. The court thus seems to be “taxing” the creditor (by reducing the collectible amount of the debt) and using the proceeds of the “tax” to “subsidize” religion at the expense of (creditor) nonadherents. To the creditor, this looks as much like establishment of religion as if the government had charged a tax on the payments of the original loan and sent the money directly to the debtor’s church. Of course, the two situations are significantly different in formal respects, but to the creditor they seem identical in function.

1. The Supreme Court’s Establishment Clause Jurisprudence: of *Lemon*, *Allegheny*, and *Lee*

To determine whether or not this creditor perspective is legally justified requires entry into the murky world of the Supreme Court’s Establishment Clause jurisprudence. Even more than under the Free Exercise Clause, the Court has been in disarray on Establishment Clause issues. Since at least the mid-1980s, in particular, the Court has been locked in a sharp debate over the Establishment Clause’s central meaning.

This Article is not an appropriate forum for an exhaustive discussion of the points and counterpoints of the Court’s establishment debate.²⁴⁵ However, a brief description of the major

²⁴⁵ There has been extensive recent commentary on the Court’s establishment doctrine. See, e.g., Jesse H. Choper, *The Establishment Clause*

positions is necessary. As matters presently stand, there are essentially two competing factions among the justices.

One group prefers to apply a substantially modified version of the test for Establishment Clause violations that the Court advanced two decades ago in *Lemon v. Kurtzman*²⁴⁶ and has used in most establishment cases since. That familiar test sets three requirements for a law to survive an Establishment Clause challenge. First, the law in question must have a “secular legislative purpose.”²⁴⁷ Second, its primary effect must be “one that neither advances nor inhibits religion.”²⁴⁸ Third, it must not “‘foster an excessive government entanglement’” between religion and government.²⁴⁹ In *County of Allegheny v. ACLU*,²⁵⁰ which concerned the constitutionality of public display of religious symbols in connection with Christmas and Chanukah holidays, the Justices following the *Lemon* approach modified this test along lines first proposed by Justice O’Connor. Especially in the application of the second *Lemon* prong, the *Allegheny* court focused on the further question of whether the state’s action constitutes an “endorsement” of religion—either of one sect over another, or of religion over nonreligion.²⁵¹

and Aid to Parochial Schools—An Update, 75 CAL. L. REV. 5 (1987); Gey, *supra* note 143, at 96-119; Hall, *supra* note 184; Lupu, *supra* note 194; Marshall, *We Know It When We See It*, *supra* note 133; Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989); Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court’s Approach*, 72 CORNELL L. REV. 905 (1987); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266 (1987); William Van Alstyne, *A Judicial Postscript to the Church-State Debates of 1989: How Porous the Wall, How Civil the State?*, 4 NOTRE DAME J.L. ETHICS & PUB. POL’Y 559 (1990); Jonathan E. Nuechterlein, Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127 (1990).

²⁴⁶ 403 U.S. 602 (1971).

²⁴⁷ *Id.* at 612.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 613 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

In his separate opinion in *Lee v. Weisman*, 112 S. Ct. 2649 (1992), Justice Blackmun catalogued over 30 separate decisions in which the Court has applied the *Lemon* test. *See id.* at 2661-67 (Blackmun, J., concurring).

²⁵⁰ 492 U.S. 573 (1989).

²⁵¹ *Id.* at 589-97. The endorsement approach has been a consistent theme of Justice O’Connor’s jurisprudence on the Establishment Clause. She first proposed this approach in her separate opinion in *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O’Connor, J., concurring), and has utilized it in most subsequent establishment cases. *E.g.*, *Allegheny*, 492 U.S.

In *Allegheny*, a bare majority of the Justices then sitting on the Court subscribed to this *Lemon*-plus-endorsement approach, although they did not agree completely on its application to the facts.²⁵² The four remaining Justices, in a partial dissent by Justice Kennedy, continued the attack on the *Lemon* test as an approach that had proved unworkable and had produced unnecessary confusion.²⁵³ They proposed replacing the test with a new standard stressing the degree to which government action “coerce[s] anyone to support or participate in any religion or its exercise” or “give[s] direct benefits to religion in such a degree that it in fact ‘establishes a [state] religion or religious faith, or tends to do so.’ ”²⁵⁴

Two of the Justices who supported the *Lemon* approach in *Alle-*

at 625; *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 28 (1989) (Blackmun, J., concurring in the judgment, with whom Justice O'Connor joined); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 608 (1987) (Powell, J., concurring, with whom Justice O'Connor joined); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring in the judgment). The endorsement approach was utilized by the Court in *School District of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985). It was formally adopted by a majority of the Court as an amendment of the *Lemon* test in *Allegheny*, 492 U.S. at 589-97.

²⁵² Justice Blackmun announced the judgment of the Court but Justices Stevens, O'Connor, Brennan, and Marshall only joined in portions of the opinion. Justice O'Connor filed a concurring opinion, portions of which Justices Brennan and Stevens joined. Justices Brennan and Stevens filed opinions concurring in part and dissenting in part. Finally, Justice Kennedy filed an opinion concurring in the judgment in part and dissenting in part. Chief Justice Rehnquist and Justices White and Scalia joined in Justice Kennedy's opinion.

²⁵³ *Allegheny*, 492 U.S. at 655. Justice Kennedy's opinion noted that “[p]ersuasive criticism of *Lemon* has emerged” and concluded that “[s]ubstantial revision of our Establishment Clause doctrine may be in order.” *Id.* at 655-56. Justice Kennedy also argued, however, that “it is unnecessary to undertake that task today, for even the *Lemon* test, when applied with proper sensitivity to our traditions and our case law, supports the conclusion that both the crèche and the menorah are permissible displays in the context of the holiday season.” *Id.* at 656. Nevertheless, Justice Kennedy also proposed an alternative to the *Lemon* test, which is developed more fully in the text. See *infra* text accompanying note 254; see also *Board of Educ. v. Mergens*, 496 U.S. 226, 258 (1990) (Kennedy, J., concurring) (opposing continued use of *Lemon*-plus-endorsement approach).

²⁵⁴ *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in

gheny—Justices Brennan and Marshall—have since retired from the Court. Their departure, and their replacement by Justices Souter and Thomas, have raised serious questions about *Lemon*'s continued vitality. In its October 1991 Term, however, the Supreme Court dodged an opportunity to reconsider this approach. In *Lee v. Weisman*,²⁵⁵ the Court addressed the constitutionality of religious invocations at a public high school graduation ceremony. Both the petitioner and the Solicitor General as *amicus curiae* asked the Court to abandon the *Lemon* approach.

In *Lee*, however, the Court rejected this invitation to depart from the *Lemon* framework, although it did so in a manner that leaves the future vitality of *Lemon* under a continuing cloud of doubt. The Court held that the graduation prayer did violate the Establishment Clause. In an opinion by Justice Kennedy (who had also authored the *Allegheny* partial dissent), the Court ruled that it was unnecessary to reconsider *Lemon*, since in any event the graduation prayer compelled religious observance by nonadherents.²⁵⁶ Four dissenting Justices, however, would have overturned *Lemon* and upheld the ceremony.²⁵⁷ The two newest members of the Court split on the issue. Justice Souter joined Justice Kennedy's majority opinion,²⁵⁸ while Justice Thomas joined Justice Scalia's dissent.²⁵⁹

What *Lee* signifies regarding the future of the *Lemon* test is difficult to predict. On one hand, the Court's specific rejection of the offer to jettison the *Lemon* test suggests that the test still retains some vitality. On the other hand, the fact that the majority opinion in *Lee* was written by the very Justice who led the attack on

part and dissenting in part) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (plurality opinion)) (brackets in original).

²⁵⁵ 112 S. Ct. 2649 (1992).

²⁵⁶ *Id.* at 2655.

²⁵⁷ *Id.* at 2678 (Scalia, J., dissenting, joined by Chief Justice Rehnquist and Justices White and Thomas).

²⁵⁸ *Id.* at 2652. Justice Souter also filed a concurring opinion joined by Justices Stevens and O'Connor. Although he agreed that prayers at public school graduation ceremonies indirectly coerced religious observance, he further asserted that coercion need not be present to find a violation of the Establishment Clause. *Id.* at 2667 (Souter, J., concurring).

²⁵⁹ *Id.* at 2678 (Scalia, J., dissenting). Justice Scalia, relying heavily on original intent and historical analysis, argued that prayers such as these are noncoercive given the option of graduates not to attend the ceremony, and that the generally ecumenical nature of the prayer was enough to avoid both a free exercise and an establishment claim. *Id.* at 2678-86.

Lemon in *Allegheny* raises doubts about the strength of the Court's long-term commitment to the *Lemon* approach. It may be that Justice Kennedy will join with the *Lee* dissenters and vote to overrule *Lemon* in a case in which coercion, in his view, is absent. Alternatively, the other members of the *Lee* majority may find a way of incorporating his critique of *Lemon* into a revision of the standard, much as it did in *Allegheny* with Justice O'Connor's endorsement approach.

The challenge to *Lemon* now evident in the Court quite openly proceeds from the view that the *Lemon* test, even as modified to focus on endorsement, leaves government too little room to accommodate religion. Time and time again, Justices objecting to the implications of the *Lemon* test have asserted that it places too high a value on strict separation of church and state, thereby forcing government, in the name of neutrality, into a position of functional hostility toward religion.²⁶⁰ In their view, the empirical reality that "we are a religious people"²⁶¹ makes it inevitable that a government which serves the needs of its people will sometimes act in ways that benefit religion. Such a benefit to religion itself does not create establishment, they assert, so long as it does

²⁶⁰ *Id.* at 2686 (Scalia, J., dissenting) (arguing that Court's decision "deprecate[s] and deride[s]" majority belief in the value of public prayer); *County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., dissenting in part) ("Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious."); *Wallace v. Jaffree*, 472 U.S. 38, 90 (1985) (Burger, C.J., dissenting) ("If the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the 'benevolent neutrality' that we have long considered the correct constitutional standard will quickly translate into . . . 'callous indifference' . . ."); *Stone v. Graham*, 449 U.S. 39, 45-46 (1980) (Rehnquist, J., dissenting) ("The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin."). The claim of hostility was a familiar refrain even before *Lemon*. See *Engel v. Vitale*, 370 U.S. 421, 445 (1962) (Stewart, J., dissenting) ("I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation."); *McCollum v. Board of Educ.*, 333 U.S. 203, 255-56 (1948) (Reed, J., dissenting) ("The prohibition of enactments respecting the establishment of religion do[es] not bar every friendly gesture between church and state.")

²⁶¹ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

not reflect coercive preference for religion, a tendency toward creation of a state religion, or pressure for conversion.²⁶²

2. The Specific Case of Tithing

Because we cannot yet predict which of these two competing schools of thought will prevail on the Court, we must examine the establishment implications of allowing religious tithes in bankruptcy from both perspectives. Does allowance of religious tithes satisfy the criteria of the *Lemon* test and the endorsement approach? Does it satisfy the “coercion” or “direct aid” alternative advanced by Justice Kennedy in *Allegheny*? We shall examine these questions in turn.

Allowance of religious tithes under Chapter 13 meets the criteria of the *Lemon* test. The necessary expense provision of the statute has the obviously secular purpose of allowing debtors to take care of their immediate financial needs while effecting a partial workout of their debt.²⁶³ Its application to religious tithes entangles government with religion only to the limited extent of a bankruptcy court’s determination of the sincerity of the adherent’s claim regarding religious obligation.²⁶⁴ Such determinations long have been treated as permissible in other contexts, most notably in providing exemptions for conscientious objectors to military service.²⁶⁵ The inquiry involves neither symbolic nor

²⁶² *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part) (stating principle that government may not coerce preference for or against religion).

²⁶³ Although the necessary expense provision, when it is viewed generally, obviously has a secular purpose, it would be difficult to maintain that an allowance for tithing under that provision, viewed in isolation, also has a secular purpose. But as Justice O’Connor has argued, the secular purpose prong of the *Lemon* test applies differently when state action lifts a government-imposed burden on the free exercise of religion. . . . It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause.

Wallace, 472 U.S. at 83 (O’Connor, J., concurring in the judgment).

²⁶⁴ The determination the bankruptcy court must make does not require it to assess the *validity* of the debtor’s belief, any more than the courts had to assess the validity of the petitioner’s beliefs about work on Saturday in *Sherbert*.

²⁶⁵ *Cf. Gillette v. United States*, 401 U.S. 437 (1971) (disallowing

functional governmental union with religion, it does not involve delegation of government functions to a religious body, and it does not require any government oversight of religious affairs. Thus, the first and third *Lemon* criteria are relatively easily satisfied.

As is often the case, the closest question comes with the second criterion: whether treating religious tithes as a necessary expense has the primary effect of aiding religion.²⁶⁶ As reconstructed in *Allegheny*, this question involves two subsidiary inquiries: whether the statute does in fact primarily aid religion; and, if so, whether the aid sends a message of endorsement to nonadherents of the aided religion.²⁶⁷

If one looks only at the allowance of a tithe and nothing else, it seems that the government is in fact aiding religion through the operation of the statute. With government approval, money is going to a religious group that would otherwise not receive it. Through the auspices of the bankruptcy court, the government seems to be funding religion. If the government were spending its own tax dollars in this way, the offense to the Establishment Clause would be clear. What the government may not do in such a direct fashion, the argument goes, it should not be able to accomplish by more indirect means.

Once again, however, initial appearances are deceiving. The effect of allowing tithing as a necessary expense must be viewed from a broader perspective encompassing the entirety of Chapter 13. So viewed, the ostensible aid to religion disappears. What seems at the margin like a benefit to religion turns out to be a mechanism for avoiding a disability. Instead of affording a preference, it is a means of securing what Professor Laycock has

exemption to conscientious objector); *United States v. Seeger*, 380 U.S. 163 (1965) (affirming conviction for failing to report for induction).

²⁶⁶ The primary effect criterion of *Lemon* is often the determinative inquiry. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (stating that nativity scene holiday display has unconstitutional effect of advancing religion); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (holding that government provision of teachers and materials for remedial and enrichment courses in parochial schools impermissibly advances religion); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding that salary supplements for nonpublic school teachers have primary effect of advancing religion).

²⁶⁷ *Allegheny*, 492 U.S. at 620 (opinion of Blackmun, J.) (presence or absence of endorsement should be examined from standpoint of "reasonable observer," including the "reasonable nonadherent").

termed "substantive neutrality" to adherents of tithing religions.²⁶⁸

The Court has treated government action that operates to remove a burden to free exercise of religion as permissible, even when it entails singling out adherents of one or more particular religions for special treatment.²⁶⁹ Indeed, this conclusion often has seemed so obvious as to require little if any discussion. Thus, for example, in *West Virginia State Board of Education v. Barnette*,²⁷⁰ the Court required a public school to excuse Jehovah's Witness schoolchildren from flag salute ceremonies without even imagining the possibility that this step might be regarded as an unconstitutional aid to religion. Similarly, exempting Amish schoolchildren from mandatory education laws did not violate the Establishment Clause in *Yoder*,²⁷¹ nor did exempting Sabbatarians from a Saturday work requirement in *Sherbert*.²⁷² In these

²⁶⁸ Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990). Professor Laycock states:

My basic formulation of substantive neutrality is this: the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance. If I have to stand or fall on a single formulation of neutrality, I will stand or fall on that one. But I must elaborate on what I mean by minimizing encouragement and discouragement. I mean that religion is to be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible.

Id. at 1001-02 (footnote omitted).

²⁶⁹ *E.g.*, *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (allowing statutory exemption for religion from Title VII prohibitions on religious discrimination because exemption does not "advance" religion within meaning of *Lemon* test); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987) (rejecting Establishment Clause challenge to claimed religious exemption because "[t]his Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause"); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (finding that legislative exemption of religion from property taxes does not violate Establishment Clause); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (stating that Sabbatarian's exemption from Saturday work requirement for unemployment compensation does not violate Establishment Clause, because it "reflects nothing more than the governmental obligation of neutrality in the face of religious differences").

²⁷⁰ 319 U.S. 624 (1943).

²⁷¹ 406 U.S. 205 (1972).

²⁷² 374 U.S. at 398.

instances the Court rather abruptly dismissed the possibility that allowing an exemption to afford free exercise might result in an unconstitutional establishment.

Justice Stewart took the question more seriously in his separate *Sherbert* concurrence.²⁷³ He argued that there is an inherent tension between Establishment Clause values and free exercise values, and that in a clash between them free exercise values should prevail.²⁷⁴ The full Court has never explicitly endorsed that sentiment in the precise way Justice Stewart framed it. Nonetheless, the Court has reflected the view that removing a burden on free exercise does not pose any risk of establishing religion. This is so even though the state is explicitly taking religion into account by excusing adherents from a secular duty that others must observe.

The Court has never elaborated a full rationale for this conclusion.²⁷⁵ Nevertheless, reflection suggests that an exemption to remove a potential governmental burden on free exercise, though it does involve special treatment, does not involve any true *benefit* to the affected religion. Rather, it merely retains for the religion

²⁷³ *Id.* at 413-18 (Stewart, J., concurring in the result). For an extensive favorable discussion of Justice Stewart's position, see Glendon & Yanes, *supra* note 143, at 493-95.

²⁷⁴ *Sherbert*, 374 U.S. at 415-16 (arguing that "the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief").

²⁷⁵ Rather, it has more often been content with broad statements, such as "it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.'" *Gillette v. United States*, 401 U.S. 437, 453 (1971) (quoting *United States v. Macintosh*, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting)).

Some commentators have objected to free exercise exemption analysis in part because it requires the government to "favor" a particular religious group. *E.g.*, William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 388-94 (1989-90); Marshall, *supra* note 194, at 319-23. But if the obligation to provide exemptions derives from explicit constitutional language safeguarding the "free exercise of religion," it operates as a constitutionally necessary qualification on the Establishment Clause's principle of separation of church and state. For commentators arguing this issue, see Hall, *supra* note 184, at 39-40; Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 9; *see also* John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779 (1986) (analyzing foundations of free exercise jurisprudence); Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83 (examining role of religion under Free Exercise and Establishment Clauses of Constitution).

the position of equality with other religions that existed *prior* to enactment of the legislative burden. What the government would have taken away with its regulation it “gives back” through exemption, producing a zero sum outcome. Thus, such an exemption is actually consistent—not in conflict—with the principle of neutrality toward religion that lies at the core of the Establishment Clause.²⁷⁶

Interpreting the necessary expense provision of Chapter 13 to allow religious tithing does not have the primary effect of aiding religion for the same reason. Allowing the bankruptcy debtor to continue to tithe maintains a governmental neutrality that refusing the tithe would disturb. By removing a potential burden on the free exercise of a debtor whose beliefs include an obligation to tithe, the bankruptcy court avoids placing the debtor’s religion at a relative disadvantage. Permission to tithe does not in fact aid that religion, since it merely leaves it in the condition it would have been in but for governmental supervision of the debtor’s budget.

Similar considerations also support the conclusion that allowing tithes under Chapter 13 does not constitute an impermissible endorsement of religion. The Court has yet to work out in any detail exactly how the endorsement inquiry should proceed.²⁷⁷ Much like the negligence inquiry of tort law, however, it

²⁷⁶ Professor Hall argues that such an exemption represents “difference-regarding accommodation,” rather than favoritism. Hall, *supra* note 184, at 83; see also Laycock, *supra* note 268, at 1005 (“substantive neutrality requires a baseline from which to measure encouragement and discouragement,” so that what seems like a preference from one vantage may turn out to reflect neutrality from another); Nuechterlein, *supra* note 245, at 1135 (“religious purpose” is not the same as “purpose of accommodating religious beliefs”; the latter may reflect no more than secular respect for individual’s right to choose her way of life). For a similar argument dealing with the issue of religious exemptions under tax law, see Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285, 1288 (1969) (formal exemption of religious organizations from tax does not automatically prove establishment of religion, since exemption may simply be means of “specifying the ambit of [the] tax”).

²⁷⁷ The endorsement approach has received a fair degree of scholarly attention. See, e.g., Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O’Connor*, 62 NOTRE DAME L. REV. 151 (1987); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O’Connor’s Insight*, 64 N.C. L. REV. 1049 (1986); Marshall, *We Know It When We See It*, *supra* note 133; Smith, *supra* note 245.

requires the Court to construct an objective point of reference, that of the hypothetical “reasonable observer”—who is surely at least a first cousin (if not an identical twin) of tort’s “reasonable person”—from whose perspective the content and force of potential endorsement can be determined. A key difficulty with the test involves identifying the religious attitudes of this hypothetical individual. Should she be a “reasonably religious adherent” of the allegedly favored faith? A “reasonably religious nonadherent”? A “reasonably nonreligious nonadherent”? A person who is “reasonably indifferent to religion”? Or some amalgam of these various perspectives? The answer to this inquiry may often determine the outcome of the test itself, since variations in the religiosity and religious preference of the observer can sensitize or desensitize her to the potential for endorsement in a governmental act. In particular, one is much more likely to regard as neutral an action that comports with her own religious preferences than an action that goes strongly against what she personally believes.²⁷⁸

However one resolves these quandaries, the kinship between the endorsement inquiry and the reasonable person standard of torts highlights another attribute of establishment theory: its inherent relativism. Professor McConnell and Judge Posner have argued provocatively for an economic approach to freedom of religion questions.²⁷⁹ The adoption of the endorsement inquiry

²⁷⁸ See Marshall, *We Know It When We See It*, *supra* note 133, at 537 (“Is the objective observer (or average person) a religious person, an agnostic, a separationist, a person sharing the predominate religious sensibility of the community, or one holding a minority view? Is there any ‘correct’ perception?”). In *Allegheny*, Justice Blackmun apparently took the view that the issue of endorsement should be examined from the perspective of the reasonable nonadherent, although even this particularization leaves unanswered many questions about the extent of the nonadherent’s disagreement with the allegedly “endorsed” religion’s beliefs. This could be important. For example, an Episcopalian might have a different view of the potential for “endorsement” in a law that gave some benefits to Roman Catholics than would a Jew, and an Islamic observer’s reactions would probably differ even further. All are nonadherents of the allegedly favored religion, yet their potential for perceiving endorsement will be colored by the variance of their beliefs from those of the allegedly favored group, as well as the extent to which they perceive themselves as “competing” with that group for adherents. Their judgment might also be colored by their desire to attain similar benefits, and by the degree of confidence they have in their ability to extract such benefits from government.

²⁷⁹ See McConnell & Posner, *supra* note 245.

lends additional credence to their proposal. Just as in tort, one may assess the degree of reasonable prudence by cost-benefit analysis, so under the Establishment Clause one may determine endorsement by a comparable technique.

In tort, the inquiry proceeds from Judge Learned Hand's famous *Carroll Towing* formula—whether the burden on the defendant of avoiding the injury is less than the amount of the loss, discounted by the probability of its occurrence.²⁸⁰ Under the Establishment Clause, one may adapt this formula to ask whether the burden on government of avoiding the use of religious means to accomplish its secular ends is less than the cost to society of religious favoritism, discounted by the probability of its occurrence.²⁸¹ The cost to society of religious favoritism is measured in terms of the degree to which the government, by endorsing religion or a particular faith, conveys a message of exclusion or nonparticipation to nonadherents. The burden of avoiding such favoritism is measured in terms of the availability of other, non-religious means for accomplishing the government's secular objective. Thus, this cost-benefit version of the endorsement approach has three steps. First, one should determine how powerful a message of endorsement (and thus of exclusion of nonadherents) a particular governmental act sends. Second, one should consider how likely it is that the message will be so received. Third, one should balance these considerations against the ease or difficulty with which the government could accomplish its objectives in other ways that avoid sending that message. Although he did not frame it in these particular terms, this is essentially the approach Justice Blackmun used in *Allegheny*.²⁸²

²⁸⁰ *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); see also Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32-33 (1972) (discussing *Carroll Towing* formula).

²⁸¹ Adaptation of the *Carroll Towing* formula to First Amendment issues is not without precedent. The Court has employed a variant of the rule in some cases involving issues of freedom of speech. *E.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Dennis v. United States*, 341 U.S. 494 (1951) (plurality opinion). We take no position on the validity of those other applications. Our argument is confined to the proposition that, if the endorsement approach remains the law on establishment, it makes sense to make the inquiry in terms of a religious "cost-benefit" calculus that is comparable to the safety cost-benefit calculus in *Carroll Towing*.

²⁸² Thus, for example, in evaluating whether a display that included a Christmas tree, a menorah, and a sign saluting liberty endorsed religion, Justice Blackmun explicitly considered the likelihood that various elements

In the case of tithing under Chapter 13, there is no message of endorsement of any particular faith or sect for reasons that have already been canvassed. Because the government is acting to prevent potentially disfavoring a particular religion (one that includes tithing obligations), it is actually preserving equality among religious beliefs. Thus, even an observer from a sect that received no benefit because it did not require tithes could not reasonably perceive a message of government favoritism for a sect that did.

Whether a nonreligious observer could reasonably perceive a message of endorsement is a considerably closer question. Certainly, recognizing tithing as a necessary expense implies that, within the belief system of the individual at least, tithing serves some value. But honoring an individual's decision regarding the importance of a tithe under the Free Exercise Clause carries no more endorsement of her theology than honoring an individual's desire to speak out against the government under the Free Speech Clause carries an endorsement of her opinions. What is endorsed is neither more nor less than the constitutional norm of free choice in matters of religion.²⁸³

Justice O'Connor, the author and leading advocate of the endorsement test, has often made clear that the test is not intended to preclude government from acknowledging the existence of religion.²⁸⁴ Nor does it require government to ignore the ways in which American society is deeply rooted in religious traditions.²⁸⁵ When government avoids imposing a burden on reli-

in the display communicated a religious message, and whether the city had "reasonable alternatives that are less religious in nature," but that would convey its secular celebratory message in equally effective ways. "Where the government's secular message can be conveyed by two symbols, only one of which carries religious meaning, an observer reasonably might infer from the fact that the government has chosen to use the religious symbol that the government means to promote religious faith." *County of Allegheny v. ACLU*, 492 U.S. 573, 618 (1989) (opinion of Blackmun, J.).

²⁸³ See Nuechterlein, *supra* note 245, at 1135-37 (accommodating religious beliefs sends a message of "secular respect" that is not equivalent to endorsement).

²⁸⁴ See, e.g., *Allegheny*, 492 U.S. at 625; *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (1984) (O'Connor, J., concurring).

²⁸⁵ The Court has often recognized that our society's religious roots prevent an absolutist interpretation of the Establishment Clause. See, e.g., *Lynch*, 465 U.S. at 678; *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970); *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

gion by creating a statutory exemption, it acts within our “best traditions” of recognizing and fostering religious liberty. As long as the government does so in an evenhanded fashion—one that extends the same exemption to all religions that otherwise would be burdened—it does not, at least in the Court’s lexicon, “endorse” either religion in general or a particular faith.²⁸⁶

Moreover, it is not government, but the debtor, who chooses to tithe. Even assuming that allowance of tithing as a necessary expense confers a benefit on religion, government does not either mandate or initiate that benefit. It merely allows the benefit at the discretion of the individual bankruptcy debtor. The debtor’s independent choice to tithe severs the connection between the ultimate benefit to religion and governmental decisionmaking. In other words, it reduces the likelihood that any benefit will be perceived as flowing from the government itself.

In several cases, this distinction between governmental and individual choice has been an important factor in upholding legislation against constitutional attack.²⁸⁷ Perhaps the most notewor-

²⁸⁶ The conclusion that such an exemption does not “endorse” religion is more difficult to maintain when the comparison is between religion and nonreligion. A nonreligious bankruptcy debtor might argue, for example, that the system discriminates in favor of religion if it allows tithing to churches but does not allow “tithing” to nonreligious beneficiaries. Suppose a nonreligious debtor seeks to “tithe” to some other private association—perhaps a fraternal society, an educational *alma mater*, or a charitable organization. If that person’s “tithe” does not receive equal treatment in a Chapter 13 proceeding, then arguably religion is being favored by government over nonreligion. Government, to the nonadherent, appears to be sending a message of special treatment for religious interests and a message of exclusion to those whose tithing has a purely secular focus.

There are at least two responses to this argument. First, one could argue that the treatment accorded to religious tithes simply flows from a recognition that tithing to the religious adherent is “necessary” for spiritual welfare in a way that other sorts of charitable contributions and private associations seldom are. Thus, from a purely secular viewpoint, in terms of the secular objectives of the “necessary expense” provisions, the secular contributions of the nonreligious debtor are not similarly situated, and there is no real inequality of treatment. Second, one could respond by pointing out that, when the exemption is necessitated by the Free Exercise Clause, the “special treatment” for religion arises from the constitutional plan itself. Religious exercise is protected from governmental interference in ways that nonreligious activities are not. Whatever else the Establishment Clause may mean, it cannot prohibit governmental action that the Free Exercise Clause commands.

²⁸⁷ *Mueller v. Allen*, 463 U.S. 388, 399 (1983); *Board of Educ. v. Allen*,

thy recent example is *Mueller v. Allen*.²⁸⁸ The case involved Minnesota's provision of a tax deduction for expenses incurred in children's schooling. The deduction was attacked on the ground that it effectively subsidized the cost of parochial education in the state. In upholding the deduction, the Court declared that:

by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject. . . . Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no "imprimatur of state approval" . . . can be deemed to have been conferred on any particular religion, or on religion generally.²⁸⁹

Chapter 13's necessary expense provision similarly channels any benefit it confers on religion through individual debtors as a result of their individual decisions.

Finally, there is no other method readily available by which the government could, with any less message of endorsement, achieve its twin purposes of securing partial repayment of creditors and allowing the debtor to meet necessary expenses. Because the tithe is a necessary expense, denying it fails one governmental purpose. But surrendering authority over the debtor's budget (thus allowing the tithe without any specific government participation) would threaten the other objective of assuring partial repayment. The only way to achieve both objectives is to allow the expense at the individual debtor's initiative, but to retain bankruptcy court oversight of the debtor's plan.²⁹⁰

For these reasons, one may conclude that allowing religious tithes as a necessary expense neither has the primary effect of aiding religion nor constitutes an endorsement of religion for purposes of Establishment Clause analysis. It does not in fact send a very powerful message of endorsement; any such message is

392 U.S. 236, 243-44 (1968); *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947).

²⁸⁸ *Mueller*, 463 U.S. at 399.

²⁸⁹ *Id.* (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)).

²⁹⁰ Congress could, of course, simply allow a flat standard allowance for all necessary expenses, framed as a percentage of income. But as we have already pointed out, Congress rejected such mechanical approaches, principally because it favored a highly flexible and discretionary process that would accommodate wide variations in individual need. *See supra* notes 78-87 and accompanying text (explaining background behind flexible standard). Consequently, such a flat allowance would not in fact serve Congress' purpose of providing for potential individual variation.

mented by the intervention of individual choice. In addition, the government lacks alternative means for accomplishing Chapter 13's objectives that would avoid the issue. Accordingly, allowance of tithing as a necessary expense satisfies both the endorsement inquiry and the primary effect prong of the *Lemon* test.

It remains to determine whether a Chapter 13 allowance for tithes also survives the alternative approach offered by Justice Kennedy in *Allegheny*. Since Justice Kennedy's test was intended to be more accommodating toward religion than *Lemon*, satisfaction of *Lemon* strongly suggests that a Chapter 13 allowance for tithes should pass muster under Justice Kennedy's approach as well. And indeed this is the case.

Clearly, an allowance for tithes does not fall into the category of a direct benefit to religion. The government itself gives religion nothing. It simply permits the individual debtor, on her own initiative, to benefit religion with funds that she has earned. The attenuation of a nexus to government through the intervention of individual choice renders the benefit indirect. Since the benefit is indirect, the question becomes whether the government is either coercing others to supply the benefit, or using it to proselytize in favor of a particular faith. Under Chapter 13, neither phenomenon occurs.

There is obviously no coercion from the debtor's perspective, because the debtor herself seeks to make the tithe. And although the creditor might well feel coerced, it is not in fact the creditor who supplies the pecuniary benefit to religion. The money, after all, comes from the debtor's income. Thus, the creditor no more pays the money to the debtor's church than it does to such other recipients of necessary expenses as doctors, grocery stores, or landlords. The only true creditor coercion comes at the end of the Chapter 13 process, when the creditor's remaining claims against the debtor are extinguished. This is too far attenuated from the debtor's tithe to raise significant establishment concerns.

The concept of proselytization seems remarkably similar to the concept of endorsement discussed above.²⁹¹ Indeed, one of the curiosities of Justice Kennedy's opinion in *Allegheny* is that, while

²⁹¹ See *supra* notes 246-54 and accompanying text (explaining two variants of endorsement test).

subjecting the endorsement test to fairly intense criticism,²⁹² it ends up turning to a concept, proselytization, which at the very least overlaps with endorsement and which necessarily shares many of its difficulties. As a purely linguistic matter, “endorsement” and “proselytization” both denote forms of advocacy.²⁹³ They are means of registering favoritism and support for a particular viewpoint, and of asking others to do the same. There may be some difference of degree between them; proselytization does seem to suggest a more aggressive form of favoritism. But they are in many respects closely related.

In particular, both are relative concepts that share the common problems of requiring the court to select an objective point of reference and to engage in a balancing or cost-benefit analysis. As with endorsement, one must ask with proselytization from whose point of view it should be determined. And once again, the choice of perspective, be it adherent, nonadherent, religious individual, or nonreligious individual, will have a substantial impact on the outcome. What appears to be a fairly bland and neutral governmental response to the adherent of a particular faith may well seem like proselytization to a nonadherent. This is especially true if one accepts the general idea that in religion, as in advertising, the “soft sell” often can be just as effective, or even more effective, than more aggressive tactics of evangelism. Thus, Justice Kennedy’s proposal seems to lead to many of the same inquiries that were the grist of his critique of the standard employed by the *Allegheny* court.

For our purposes, the analytical similarities between endorsement and proselytization simplify this final inquiry. Since proselytization is effectively a subset of endorsement, a governmental act that does not endorse religion under Justice O’Connor’s approach surely does not proselytize under Justice Kennedy’s. The reasonable observer who found no endorsement in the situation would be even less inclined to find proselytization. Thus, the same considerations that militate against establishment under one regime are equally, if not more, determinative under the other. Consequently, no matter which direction the Court takes on the standard for reviewing Establishment Clause issues,

²⁹² *County of Allegheny v. ACLU*, 492 U.S. 573, 668-77 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

²⁹³ “Endorsement” indicates recommendation or approval. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 749 (1969). “Proselytization” denotes conversion. *Id.* at 1821.

one can say with fair assurance that an allowance of tithing as a necessary expense under Chapter 13 does not establish religion within the contemporary meaning of that clause.

CONCLUSION

Our analysis yields three principal conclusions. First, although the Code and its legislative history do not specifically touch on the treatment of tithes, the structure of the necessary expense provision, Congress' general intent regarding individual treatment, and the working distinction between necessities and luxuries that bankruptcy courts have developed under it all suggest that tithes are a necessary expense within the meaning of the statute. Second, even if this were not true as a statutory matter, allowance for tithing is required in order to avoid an unconstitutional burden on the free exercise of religion. Third, whether such an allowance arises from the statute or from constitutional mandate, permitting debtors who seek Chapter 13 relief to tithe while they attempt to work out their debt does not violate the Establishment Clause's requirement of separation between church and state. Accordingly, debtors who seek to tithe should be allowed to do so, without having to sacrifice the advantages of a financial fresh start.

Although some courts have resolved the matter as we do, a majority have not, and it appears that the trend, to the extent there is one, is running toward prohibiting tithing.²⁹⁴ This trend should be reversed. It represents an unwarranted governmental invasion into freedom of religion, one that is not necessary to achieve the purposes behind the provisions of Chapter 13, and one that is forbidden by the religion clauses of the First Amendment.

²⁹⁴ See *supra* note 126 (detailing results of cases in which courts have faced tithing issue).