Tithing in a Chapter 13 Plan: The Requirement of Reasonableness Under the Religious Liberty and Charitable Donation Protection Act

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TITHING IN A CHAPTER 13 PLAN: THE REQUIREMENT OF REASONABLENESS UNDER THE RELIGIOUS LIBERTY AND CHARITABLE DONATION PROTECTION ACT

Abstract: A recurring dilemma faced by bankruptcy courts occurs when a debtor makes religious donations while in bankruptcy. In these instances, bankruptcy courts must determine the best allocation of the bankruptcy estate to address both the debtor's interest in making religious donations and creditors' interest in receiving payment. This conflict arises because of the Religious Liberty and Charitable Donation Protection Act, which amends § 1325 of the Bankruptcy Code to permit a Chapter 13 debtor to include religious contributions not exceeding fifteen percent of gross annual income as a reasonable expense, thereby excluding such contributions from disposable income. Judicial interpretation of this provision is split as to whether a reasonableness inquiry must be undertaken in addition to consideration of the technical requirements of § 1325. This Note argues that courts must inquire into the reasonableness of any tithe, for doing so comports with Congressional intent and best serves the needs of creditors and debtors and the policies of the Bankruptcy Code.

INTRODUCTION

A contentious and unresolved issue in bankruptcy law is the role of an individual debtor's tithes—contributions to religious organizations—during bankruptcy. Bankruptcy courts often find themselves resolving disputes between creditors who want to be paid and debtors who want to exercise their religious convictions. This is especially true because the bankruptcy process is designed in part for unsecured creditors. Unsecured creditors have no property interest to secure

1 See Todd J. Zywicki, Rewrite the Bankruptcy Laws, Not the Scriptures: Protecting a Bankruptcy Debtor's Right to Tithe, 1998 Wis. L. Rev. 1223, 1224.
2 See id.
their repayment right. They are paid from the debtor's assets and thus rarely receive the full amount they are owed.

The conflict between debtor and creditor interests is significant, furthermore, because the Bankruptcy Code defines certain transfers as avoidable. If a transfer meets certain requirements, the trustee can avoid the transfer and thereby augment the pool of assets available for distribution to the unsecured creditors. This ability to avoid transfers is especially important in the tithing context. Under § 548 of the Bankruptcy Code, a trustee may avoid a debtor's constructively fraudulent transfers—transfers to which the debtor received less than reasonably equivalent value in exchange.

Before 1998, trustees used § 548 to recapture from the debtor's church tithes that the debtor made prepetition. Then, in June of 1998, Congress enacted the Religious Liberty and Charitable Donations Protection Act ("RLCDPA") to prevent a trustee from recovering a debtor's prepetition tithes. Congress enacted RLCDPA in response to pressure from concerned religious and charitable groups after the U.S. Supreme Court held in *City of Boerne v. Flores* that the Religious Freedom Restoration Act ("RFRA") was unconstitutional as applied to

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4 Id. at 11.
5 Id. at 251.
7 See Zywicki, supra note 1, at 1229-30. If a transfer is avoided, the transferee must pay the trustee the total amount transferred. Id. at 1229.
8 See Nimmer et al., supra note 5, at 277.
9 See Zywicki, supra note 1, at 1230.
10 See 11 U.S.C. § 548(a)(1)(B)(i); Collier on Bankruptcy ¶ 548.01[1] (15th ed. 2004). Section 548 provides: "the trustee may avoid any transfer . . . of an interest of the debtor in property . . . that was made . . . within 2 years before the date of the filing . . . if the debtor . . . received less than a reasonably equivalent value in exchange for such transfer." Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1402, 119 Stat. 214-15 [hereinafter BAPCPA] (to be codified at, and amending, 11 U.S.C. § 548(a)). BAPCPA extended the reach back period from one year to two years. Id.
state law. The Court’s decision concerned religious groups because the United States Court of Appeals for the Eighth Circuit previously held in Christians v. Crystal Evangelical Free Church that RFRA protected a debtor’s church tithes from trustee recovery. Although the Supreme Court did not determine whether RFRA was unconstitutional as applied to federal law including the Bankruptcy Code, religious groups persuaded Congress that the decision would impair a debtor’s right to donate money to religious organizations.

RLCDPA also amended other provisions of the Bankruptcy Code, including §1325, which governs confirmation of an individual debtor’s Chapter 13 plan. Under §1325, a trustee can object to a plan that does not apply all of the debtor’s disposable income (defined as income not reasonably necessary for the maintenance or support of the debtor) to repayment. RLCDPA allows a debtor to include religious contributions, not exceeding fifteen percent of gross annual income, as a reasonable expense, thereby excluding such contributions from disposable income. In applying this provision, courts have split on whether a donation of up to fifteen percent of the

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13 See 521 U.S. 507, 536 (1997); Dyer & Jones, supra note 11, at 267. RFRA prohibits the government from substantially burdening a person’s exercise of religious freedom unless the burden is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest. City of Boerne, 521 U.S. at 515–16.

14 See 82 F.3d 1407, 1417 (8th Cir. 1996). The Eighth Circuit reasoned that allowing the trustee to recover the contributions would substantially burden the debtor’s free exercise of religion under RFRA. See id.

15 See Dyer & Jones, supra note 11, at 267. It should be noted that the Eighth Circuit later held that RFRA was applicable to federal law. Christians v. Crystal Evangelical Free Church, 141 F.3d 854, 856 (8th Cir. 1998).

16 See RLCDPA § 4, 112 Stat. at 518 (codified as amended at 11 U.S.C. § 1325(b)(2)); Dyer & Jones, supra note 11, at 267. An individual who files for bankruptcy usually chooses between Chapter 7 and Chapter 13. Under Chapter 13, the debtor can keep all assets, nonexempt as well as exempt, in exchange for committing his or her disposable income to the payment of prepetition debt under a confirmed plan. Id. at 873 n.6. The debtor makes payments to the Chapter 13 trustee who then distributes those payments to the debtor’s creditors according to the terms of the plan. Id. Under Chapter 7, the debtor surrenders all nonexempt assets to a Chapter 7 trustee who then sells the assets and distributes the proceeds to the creditors. Id. at 873 n.5.


debtor's gross annual income is automatically allowed or whether it must also be reasonable.\textsuperscript{19}

This Note examines the effect of the RLCDPA on § 1325. Part I provides an overview of § 1325, focusing on the provision's first major revision in 1984.\textsuperscript{20} Part II describes RLCDPA's amendments to the Bankruptcy Code.\textsuperscript{21} Part III summarizes the impact on § 1325 of the latest overhaul to the Bankruptcy Code—the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").\textsuperscript{22} Part IV examines caselaw interpreting the requirements of § 1325 both before and after the RLCDPA.\textsuperscript{23} Part V argues in favor of imposing a reasonableness standard to a debtor's tithes, reasoning that it is more consistent with the purpose and goals of RLCDPA and the Bankruptcy Code.\textsuperscript{24}

\section*{I. The Bankruptcy Amendments and Federal Judgeship Act of 1984}

\subsection*{A. Overview}

The Bankruptcy Amendments and Federal Judgeship Act of 1984 ("Act" or "1984 Amendments") substantially revised the Bankruptcy Code.\textsuperscript{25} As part of these amendments, Congress first included the disposable income requirement as a condition for confirmation of a Chapter 13 plan.\textsuperscript{26} The history and background of these amendments shed light on Congress's original purposes for the disposable income test and consequently on how RLCDPA's modification to this test—allowing for tithes of up to fifteen percent of income—should be interpreted.\textsuperscript{27}

The 1984 Amendments was signed into law on July 10, 1984.\textsuperscript{28} The Act significantly revised the Bankruptcy Reform Act of 1978 (the

\textsuperscript{19} See In re Kirschner, 259 B.R 416, 422 (Bankr. M.D. Fla. 2001); Dyer & Jones, supra note 11, at 281–83.
\textsuperscript{20} See infra notes 25–75 and accompanying text.
\textsuperscript{21} See infra notes 76–118 and accompanying text.
\textsuperscript{22} See infra notes 119–29 and accompanying text.
\textsuperscript{23} See infra notes 130–68 and accompanying text.
\textsuperscript{24} See infra notes 169–323 and accompanying text.
\textsuperscript{26} See Kosub & Thompson, supra note 16, at 873–74.
\textsuperscript{27} See S. Rep No. 98-65, at 20 (1983); Kosub & Thompson, supra note 16, at 880; see also infra notes 175–99 and accompanying text.
"1978 Code"), which was itself the first major revision of bankruptcy law since the Bankruptcy Act of 1898. One of the 1984 Amendments' many purposes was stopping consumer abuse of the Bankruptcy Code. Critics of the 1978 Code believed that debtors abused the Code's liberal provisions to discharge payable debts.

Under the 1978 Code, the interests of unsecured creditors were often neglected because § 1325(a)(4) established only a minimum standard for payment pursuant to a Chapter 13 plan that had no relationship to the debtor's income. The "best interests" test, used to determine that minimum, provided that the debtor pay unsecured creditors at least as much as they would have received had the debtor filed under Chapter 7. Yet often the debtor had no unencumbered nonexempt assets, in which case unsecured creditors would receive nothing in Chapter 7. Thus, the Chapter 13 plan did not need to provide anything for unsecured creditors. Before 1984, some bankruptcy courts applying the best interests test confirmed such zero-plans, whereas other bankruptcy courts avoided this result by extrapolating a feasibility test or a good faith test from §§ 1325(a)(6) and 1325(a)(3), respectively. These latter tests subjectively determined whether a plan proposed to pay enough to unsecured creditors. These subjective tests thus resulted in inconsistency among bankruptcy courts.

29 Snider et al., supra note 25, at 775.
30 Kosub & Thompson, supra note 16, at 873–74.
32 See Robert G. Drummond, Disposable Income Requirements Under Chapter 13 of the Bankruptcy Code, 57 Mont. L. Rev. 423, 425–26 (1996); Rodenberg, supra note 31, at 624. Section 1325(a)(4) provides, "the value … 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 Chapter 7 of this title on such date." 11 U.S.C. § 1325(a)(4) (2000).
33 Rodenberg, supra note 31, at 624 n.30.
35 See 11 U.S.C. § 1325(a)(6); House Hearings, supra note 34, at 19; Rodenberg, supra note 31, at 624 & nn.31, 33. Section 1325(a)(6) provides that a court will confirm a plan if "the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(6). Section 1325(a)(3) provides that a court will confirm a plan if "the plan has been proposed in good faith and not by any means forbidden by law." Id. § 1325(a)(3).
36 House Hearings, supra note 34, at 308 (statement of Robert B. Evans, Senior Vice President and General Counsel, National Consumer Finance Association); Rodenberg, supra note 31, at 624.
The most important change in the effort to curb consumer abuse was the addition of a disposable income requirement, also known as the "ability to pay" test, as a condition for confirmation of a Chapter 13 plan. This requirement, added to §1325(b) of the Bankruptcy Code, provided that if the trustee or an unsecured creditor objects to the debtor's Chapter 13 plan, the court must deny confirmation of the plan unless the plan provides that all of the debtor's projected disposable income will be applied for the next three years to make payments under the plan. Furthermore, disposable income is defined as income received by the debtor that is not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor. This more precise definition provided a solution to the courts' various interpretations of the confirmation requirements. Nevertheless, the 1984 Act and its disposable income requirement left courts, debtors, and creditors to ponder what exactly was meant by "reasonably necessary for the maintenance or support of the debtor."

The 1984 Act also added the substantial abuse provision in Chapter 7, which complimented the disposable income requirement of Chapter 13. This provision, located at §707(b), allowed a court to dismiss a debtor's Chapter 7 case if it found that granting relief would

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37 Kosub & Thompson, supra note 16, at 874.
40 See Kosub & Thompson, supra note 16, at 876, 878-79.
41 See id. at 880.
42 See 11 U.S.C. §707(b) (1994), amended by RLCDPA §4, 112 Stat. at 518, and by BAPCPA §102(a), 119 Stat. at 27-32; Drummond, supra note 32, at 429-30. After 1984, Section 707(b) provided:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee . . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter.

be a substantial abuse of Chapter 7.\textsuperscript{45} The "substantial abuse" language targeted debtors who had sufficient income to repay creditors under Chapter 13, but filed under Chapter 7 instead because they had few nonexempt assets that could be liquidated.\textsuperscript{44} The drafters intended section 707(b) to force debtors to file under Chapter 13 and to be subject to its disposable income requirement, thereby compelling debtors to pay more than a nominal amount to unsecured creditors.\textsuperscript{45}

\textbf{B. Legislative History of the 1984 Amendments}

The legislative history for the 1984 Amendments illustrates that Congress was eager to develop a more definite standard for plan confirmation.\textsuperscript{46} Congress proposed several standards before deciding on the disposable income test, which is also known as the "ability-to-pay" test.\textsuperscript{47} The first bill, S. 658, would have amended § 1325(a)(3) to read: "the plan has been proposed in good faith and not by any means forbidden by law, and is the debtor's good faith effort." Another bill proposed to require that a debtor's plan represented "the debtor's bona fide effort" to § 1325(a)(4). H.R. 4786 and other bills expanded this bona fide effort test by including in § 1325(a)(3) that "the plan represents a bona fide effort which is consistent with the debtor's ability to repay his debts, after providing support for himself and his dependents."\textsuperscript{49}

The current disposable income test articulated in H.R. 5174 was fashioned almost word-for-word from a proposal by the National Bankruptcy Conference (the "NBC"). Vern Countryman, Vice Chairman of the NBC, testified that the subjective language of prior tests only engendered confusion and inconsistency among the bankruptcy courts. Countryman rejected both the "good faith" and "bona fide effort" proposals because they were too vague, allowing courts to construe them to

\begin{footnotesize}
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\item \textsuperscript{45} 11 U.S.C. § 707(b).
\item \textsuperscript{44} Rodenberg, \textit{supra} note 31, at 628.
\item \textsuperscript{45} See id. at 628–29.
\item \textsuperscript{46} See S. Rep. No. 98-65, at 20 (1983); Kosub \& Thompson, \textit{supra} note 16, at 876.
\item \textsuperscript{47} See, e.g., S. 2000, 97th Cong. § 18(a) (1981); H.R. 4786, 97th Cong. § 19(1) (1981); S. 863, 97th Cong. § 128(b) (1981); Kosub \& Thompson, \textit{supra} note 16, at 878 n.34.
\item \textsuperscript{49} See S. 658, 96th Cong. § 128(b) (1979); Kosub \& Thompson, \textit{supra} note 16, at 878 n.34.
\item \textsuperscript{49} See S. 863; Kosub \& Thompson, \textit{supra} note 16, at 878 n.34.
\item \textsuperscript{49} See H.R. 4786; Kosub \& Thompson, \textit{supra} note 16, at 878 n.34.
\item \textsuperscript{49} Collier, \textit{supra} note 10, ¶ 1325.08[1]; Kosub \& Thompson \textit{supra} note 16, at 878 n.35.
\item \textsuperscript{49} See \textit{House Hearings}, \textit{supra} note 34, at 19–20.
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impose quantitative requirements on the amount of payment to unsecured creditors. What was required, Countryman believed, was a test more tailored to the debtor’s ability to satisfy claims from future income. Such a test would balance the needs of both creditors and debtors because it would lessen consumer abuse while providing relief to debtors with little income unable to meet minimum payment requirements or substantial payment standards.

Other commentators and members of Congress expressed similar goals and concerns as Countryman and raised other considerations as well. Most commentators lauded the ability-to-pay test as superior to the other proposed bills because it was more precise and consistent with the economic realities of the marketplace. Commentators believed the test would likely bring uniformity to an area plagued by inconsistency because of the lack of guidance provided by other tests, including the good faith test.

Despite the aforementioned advances, commentators recognized that the ability-to-pay test was not wholly objective because of its definition of disposable income. Unfortunately, the legislative history provides little explanation as to what is meant by “reasonably necessary” for the maintenance or support of the debtor. The congressional hearings suggest that the term should encompass the needs of the debtor or living expenses such as housing, child care, medical expenses, food and clothing. Robert Evans, General Counsel of the National Consumer Finance Association, suggested that the Labor Department’s Cost of Living Figures provide some guidance. In addition, Congress emphasized that a Chapter 13 plan should require some sacrifice on the debtor’s part. Congress believed a debtor would have to

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53 See id. at 6, 19–20, 308.
54 Id. at 52.
56 See House Hearings, supra note 34, at 192, 306, 531.
57 See id. at 211–12; Kosub & Thompson, supra note 16, at 878 n.38.
58 See Hearing Before the Subcommittee on Courts of the Committee on the judiciary, 98th Cong. 468 (1983) [hereinafter Senate Hearings]; Kosub & Thompson, supra note 16, at 878 n.38.
59 See House Hearings, supra note 34, at 214, 749; S. REP. No. 97-446, at 60 (1982).
60 COLLIER, supra note 10, ¶ 1325.08[4][b].
61 See House Hearings, supra note 34, at 305, 448; Kosub & Thompson, supra note 16, at 880.
62 House Hearings, supra note 34, at 310. During the hearings, Phillip Shuchman, Professor of Law at Rutgers School of Law, also recommended using Labor Department statistics. Id. at 159.
make adjustments in consumption and forego luxuries. Although courts should insist on debtors pursuing a more modest lifestyle, they should not require undue financial hardship.

Members of Congress and witnesses at the congressional hearings expressed some concern regarding bankruptcy courts' ability to make such determinations regarding a debtor's lifestyle and reasonable expenses. Nevertheless, most agreed that courts could, and should, make such decisions. They reasoned that courts are capable of distinguishing between those who can and those who cannot pay, noting that courts made such judgments with regard to child support and alimony payments. More importantly, Congress recognized that fixed, bright-line rules are not conducive to the individualized nature of Chapter 13 plans. Strictly defining what is reasonable would not take into account the varied and unique familial needs of each debtor. In other words, bankruptcy courts played an important discretionary role that could not be achieved by exact definitions of reasonableness.

The legislative history of the 1984 Amendments also illustrates the concerns of members of Congress and experts in the bankruptcy field about debtor abuse and the risk that unsecured creditors would be cheated. The ability-to-pay test aimed to preclude debtors who could pay from discharging their debts. During Senate Hearings, Robert Evans observed that the lack of a workable standard in Chapter 13 plans resulted in one out of four bankruptcy debtors walking away from debts they could pay, thereby limiting the availability of

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64 See S. REP. No. 97-150, at 19.
65 Id.
66 See House Hearings, supra note 34, at 347 (statement of Rep. Butler) (observing that judges might be influenced by how much their wives spend); S. REP. No. 97-446, at 60 (1982).
67 See Senate Hearings, supra note 58, at 119; House Hearings, supra note 34, at 532, 749.
68 See Senate Hearings, supra note 58, at 119; House Hearings, supra note 34, at 532.
69 See Senate Hearings, supra note 58, at 119; House Hearings, supra note 34, at 532.
71 See House Hearings, supra note 34, at 531, 749.
72 See Senate Hearings, supra note 58, at 119; House Hearings, supra note 34, at 531, 749; S. REP. No. 97-150, at 19 (stating that no arbitrary payment levels should be required by judges because there must be room in Chapter 13 for the debtor on welfare or old age assistance who can pay only a nominal amount).
73 See Senate Hearings, supra note 58, at 119; House Hearings, supra note 34, at 20; S. REP. No. 98-65, at 20 (1983) (commenting that the absence of meaningful standards has an important impact on the ability of creditors to obtain meaningful recoveries in Chapter 13).
74 See Senate Hearings, supra note 58, at 119; House Hearings, supra note 34, at 32.
credit and transferring $1.5 billion onto other consumers in the form of higher prices and interest costs.\textsuperscript{75}

II. THE RELIGIOUS LIBERTY AND CHARITABLE DONATION PROTECTION ACT OF 1998

A. Overview

Congress passed RLCAPDA for two reasons: first, to enable debtors to make contributions to religious and charitable organizations during bankruptcy;\textsuperscript{76} and second, to prevent bankruptcy trustees from suing religious organizations to recover a debtor's prepetition donations.\textsuperscript{77} Pursuant to this purpose, RLCAPDA amended four provisions of the Code: sections 544, 548, 707, and 1325.\textsuperscript{78}

Section 548 allows a bankruptcy trustee to avoid a fraudulent transfer of property a debtor made within two years before filing for bankruptcy.\textsuperscript{79} The provision recognizes both transfers that were made with actual intent to hinder, delay, or defraud creditors under § 548(a) (1)(A) and those that are constructively fraudulent under § 548(a) (1)(B).\textsuperscript{80} Constructively fraudulent transfers are those that are made for less than reasonably equivalent value when the debtor is insolvent.\textsuperscript{81} RLCAPDA, however, excluded charitable and religious contributions from transfers that could be considered constructively fraudulent under § 548(a) (1)(B).\textsuperscript{82} Accordingly, a trustee cannot challenge a contribution as being constructively fraudulent that does not exceed fifteen percent of gross annual income or a contribution that exceeds fifteen percent of gross annual income but is consistent with the debtor's past practices.\textsuperscript{83} Notably, RLCAPDA did not, however, protect charitable contributions from avoidance as actually fraudulent under § 548(a) (1)(A).\textsuperscript{84}

\textsuperscript{75} Senate Hearings, supra note 58, at 119.
\textsuperscript{77} See id.
\textsuperscript{81} See Collier, supra note 10, ¶ 548.01[1].
\textsuperscript{82} See RLCAPDA § 3, 112 Stat. at 517–18 (codified as amended at 11 U.S.C. 548(a)(2)); see also Collier, supra note 10, ¶ 548.01[1].
\textsuperscript{83} See RLCAPDA § 3, 112 Stat. at 517–18 (codified as amended at 11 U.S.C. 548(a)(2)); see also Collier, supra note 10, ¶ 548.01[1].
Section 544(b) allows trustees to avoid transfers made by debtors in violation of nonbankruptcy or state law.\(^{85}\) This provision grants trustees a significant power because oftentimes state law allows a trustee to recover transfers made several years before the debtor filed for bankruptcy—as opposed to the two year limit under § 548.\(^{86}\) RLCDPA prevented trustees from avoiding under state law religious and charitable contributions that were otherwise protected under § 548.\(^{87}\)

Section 707 concerns dismissal of a Chapter 7 case.\(^{88}\) A court can dismiss a case for cause—such as unreasonable delay or nonpayment of fees—under §§ 707(a) or 707(b) if granting relief would be an abuse under Chapter 7.\(^{89}\) RLCDPA revised § 707(b) to prevent courts from considering a debtor's charitable donations when determining whether to dismiss a case for abuse.\(^{90}\) Regardless of a debtor's donations, however, a court may nevertheless dismiss a case for actual cause under § 707(a).\(^{91}\)

RLCDPA amended § 1325 to include religious contributions as reasonably necessary expenses.\(^{92}\) After the 1984 Amendments but before RLCDPA, § 1325(b) defined disposable income as income received by the debtor not reasonably necessary for the maintenance or support of the debtor or a dependent of the debtor.\(^{93}\) RLCDPA added to this definition, "including charitable contributions . . . to a qualified religious or charitable entity or organization . . . in an amount not to exceed 15 percent of the gross income of the debtor for the year in which the contributions are made."\(^{94}\) Thus, RLCDPA enabled debtors to include certain religious contributions as reasonable expenses.\(^{95}\)

\(^{85}\) 11 U.S.C. § 544(b); Collier, \textit{supra} note 10, ¶ 544.02; Dyer & Jones, \textit{supra} note 11, at 273.

\(^{86}\) Dyer & Jones, \textit{supra} note 11, at 273–74.


\(^{88}\) Collier, \textit{supra} note 10, ¶ 707.01.


\(^{90}\) See RLCDPA § 4, 112 Stat. at 518 (codified as amended at 11 U.S.C. § 707(b)).

\(^{91}\) 11 U.S.C. § 707(a).

\(^{92}\) See RLCDPA § 4, 112 Stat. at 518 (codified as amended at 11 U.S.C. § 1325(b)).


\(^{95}\) See \textit{id}.
RLCDPA also impacted provisions of the Bankruptcy Code that it did not amend.\textsuperscript{96} Under § 523, some types of debt cannot be discharged even if the debtor obtains relief under one of the Bankruptcy Code chapters.\textsuperscript{97} One such type delineated in § 523(a)(8) is student loans.\textsuperscript{98} Nonetheless, courts can make an exception, according to § 523(a)(8), if payment of the debt would be an "undue hardship" on the debtor.\textsuperscript{99} Debtors have attempted to use RLCDPA to protect their religious donations while also claiming that their student loans should be discharged because of undue hardship.\textsuperscript{100}

B. Legislative History of RLCDPA

The legislative history surrounding the passage of RLCDPA demonstrates that Congress primarily intended it to prevent the avoidance of prepetition charitable donations under § 548.\textsuperscript{101} Congress asserted that this was the bill's ultimate purpose and primary component.\textsuperscript{102} In fact, the amendments to § 1325 and § 707 are barely mentioned at all in the legislative history.\textsuperscript{103} Senator Grassley, who sponsored RLCDPA in the Senate, testified that bankruptcy trustees were suing churches around the country to recover debtors' prepetition tithes as fraudu-
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lent transfers. These baseless lawsuits, he further claimed, are par-
ticularly egregious in light of the charitable work churches perform
with donations and their inability to repay money already spent.

Thus, the drive behind enactment of RLCDPA was not to amend sec-
tions 1325 or 707 but to limit a bankruptcy trustee's avoidance powers
against religious and charitable organizations under § 548.

The legislative history also reflects that, despite revising the Code
to allow for religious donations, Congress was still wary of consumer
abuse of the Code's provisions. Representative Packard, who spon-
sored RLCDPA in the House of Representatives, testified that he
"tried desperately to craft language that would protect and avoid and
prevent fraud." He emphasized that he did not want the bill to en-
courage a debtor to use church donations fraudulently to avoid pay-
ing creditors.

Along the same lines, Senator Grassley emphasized
that the bill did not amend § 548(a)(1) of the Bankruptcy Code,
which allows a trustee to avoid a transfer as actually fraudulent.

Transfers intended to hinder, delay or defraud, he noted, are still
prohibited. Congress clearly intended that § 548(a)(1) would re-
main a very important safeguard.

In determining whether a tithe was actually fraudulent under
§ 548(a)(1), the House Judiciary Committee maintained that a court
should examine the totality of the circumstances for indications of
fraud. For example, the Committee hypothesized that a court
would have reason to question a debtor who historically donated $5 a
week to the church and then suddenly before filing for bankruptcy
donated fifteen percent of last year's income to the church.

In that case, the Committee suggested that a court should consider the tim-
ing, the amount, the circumstances, and the change in pattern to de-
termine if the transfer was actually fraudulent.
Finally, the legislative history reveals Congress's frustration that the Code allowed for recreational spending but not tithing; in so noting, Congress hoped that RLCDPA would place religious contributions on equal footing with entertainment expenses. Representative Packard in particular was outraged that a Chapter 13 debtor could go to a bar, gamble, and get advice on a "1-900" psychic advice line but could not contribute to a church. Other members of Congress were appalled that some courts still did not allow debtors to tithe even after foregoing allowable entertainment expenses. Viewed in this context, RLCDPA thus served primarily to modify the perceived unfair treatment prepetition tithing could receive in bankruptcy.

III. THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

BAPCPA was signed into law on April 20, 2005. This act made the most significant changes to the Bankruptcy Code since the Bankruptcy Reform Act of 1978. For the most part, BAPCPA did not significantly impact the provisions most relevant to tithing.

BAPCPA did not amend § 544 and only changed § 548 by increasing the reach back period from 1 year to 2 years. Congress did, however, substantially rewrite § 707(b) to include "means testing." The means test limits judicial discretion and denies access to Chapter 7 to those individuals whose future earnings are sufficient to repay the debtor's prepetition debts. If the debtor fails this test, a presumption of an abusive filing arises and the Chapter 7 case is either dismissed or

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116 See 144 Cong. Rec. 10,846 (1998); id. at 8941; 143 Cong. Rec. 22,399 (1997); id. at 20,976.
118 See id. at 8942.
121 See BAPCPA §§ 102(a), 102(h), 318(2), 1402, 119 Stat. at 27-32, 93-94, 93, 214-15 (to be codified at, and amending, 11 U.S.C. §§ 548(a), 707(b), 1325(b)).
123 See BAPCPA § 102(a), 119 Stat. at 27-32 (to be codified at, and amending, 11 U.S.C. § 707(b)); Crocker & Simoni, supra note 120, at 54.
124 Crocker & Simoni, supra note 120, at 54; Singer & Warren, supra note 42, at 20-21.
converted to Chapter 11 or 13 with the debtor’s consent.\textsuperscript{125} Nonetheless, Congress did not change those provisions of § 707(b), added by RLCDPA, that prevented the court from considering the debtor’s charitable donations in deciding whether to dismiss a Chapter 7 case.\textsuperscript{126}

Finally, BAPCPA made a minor change to § 1325(b)(2).\textsuperscript{127} Congress placed the religious contributions exception into a separate subsection, separate from the “maintenance or support of the debtor” language.\textsuperscript{128} Although a separate subsection, religious contributions are still modified by the “reasonably necessary to be expended” language of § 1325(b)(2).\textsuperscript{129}

IV. CASELAW REGARDING SECTION 1325

A. Before RLCDPA

Prior to the enactment of RLCDPA, courts generally held that religious donations were not reasonably necessary expenses under § 1325.\textsuperscript{130} In fact, some courts found tithing per se unreasonable.\textsuperscript{131} In 1991, in \textit{In re Packham}, the United States Bankruptcy Court for the


\textsuperscript{126} See BAPCPA § 102(a), 119 Stat. at 27-32 (to be codified at, and amending, 11 U.S.C. § 707(b)).

\textsuperscript{127} See id. § 102(h)(2), 119 Stat. at 33-34 (to be codified at, and amending, 11 U.S.C. § 1325(b)(2)(A)).

\textsuperscript{128} See id.

\textsuperscript{129} See id. 11 U.S.C. § 1325(b)(2) now reads in pertinent part:

\begin{quote}
For purposes of this subsection, the term “disposable income” means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended—

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of “charitable contribution” under section 548(d)(3) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made . . . .
\end{quote}


\textsuperscript{130} Dyer & Jones, supra note 11, at 290.

District of Utah reasoned that church donations may be a source of inner strength, but are not necessary for the maintenance or support of the debtor or dependent of the debtor.\textsuperscript{132} In that case, the debtors proposed to make a monthly payment of $285 to the bankruptcy trustee but withheld a monthly tithe of $217, which the debtors claimed as a reasonably necessary expense.\textsuperscript{133} The court denied confirmation of the plan, emphasizing that the purpose of Chapter 13 is to provide the maximum recovery to creditors and not to force creditors to be de facto donors to the debtor's church.\textsuperscript{134} In addition, the debtors had not sufficiently demonstrated that they would be denied full participation in the church if they failed to tithe.\textsuperscript{135}

Other courts did not hold tithing per se unreasonable under § 1325(b), but instead concluded that tithing would be allowed only under certain circumstances.\textsuperscript{136} In 1998, in \textit{In re Reynolds}, the United States Bankruptcy Court for the Western District of Missouri denied confirmation of a debtor's plan that paid $80 a month to his church but concluded that nominal amounts below three percent of his income would be permissible.\textsuperscript{137} Similarly, in 1991, in \textit{In re McDaniel}, the United States Bankruptcy Court for the District of Minnesota found the debtor's tithe of $540 a month excessive but permitted the debtor to file an amended plan that reduced the tithing figure to a more reasonable amount.\textsuperscript{138}

A minority of courts prior to the enactment of RLCDPA, however, concluded a debtor's tithes were reasonably necessary expenses.\textsuperscript{139} In 1988, in \textit{In re Navarro}, the United States Bankruptcy Court for the Eastern District of Pennsylvania confirmed the debtor's plan in which $135 was paid to creditors and $120 was tithed to the debtor's church.\textsuperscript{140} The court reasoned that it should not order debtors to alter their lifestyle when there is "no obvious indulgence in luxuries."\textsuperscript{141} Instead, it should "proceed on a case by case basis, evaluating in each case the totality of

\textsuperscript{132} 126 B.R. at 608.
\textsuperscript{133} \textit{Id.} at 605.
\textsuperscript{134} \textit{Id.} at 610.
\textsuperscript{135} \textit{Id.} at 608.
\textsuperscript{137} 83 B.R. at 684-85.
\textsuperscript{138} 126 B.R. at 783, 785.
\textsuperscript{140} 83 B.R. at 350, 357.
\textsuperscript{141} \textit{Id.} at 355.
the circumstances." In this case, the court found that the debtor’s monthly tithe was not a luxury because the debtor did not receive any tangible benefit or increased standard of living in return.

Overall, before RLCDPA, the majority of courts held that tithes were not reasonably necessary expenses under § 1325(b). These courts applied particularly strict scrutiny with some courts finding tithes to be per se unreasonable.

B. After RLCDPA

The enactment of RLCDPA did not resolve whether tithes were reasonably necessary expenses under § 1325(b). Bankruptcy courts disagreed whether the religious contribution exemption that RLCDPA imposed still had to undergo reasonably necessary scrutiny. When Congress drafted the statute, it did not place the religious contribution exemption in a stand-alone subsection; rather it placed it in § 1325(b)(2)(A), which is modified by the phrase “reasonably necessary to be expended.” Consequently, courts differed over whether religious contributions must also be reasonably necessary. In 2001, in In re Kirschner, the United States Bankruptcy Court for the Middle District of Florida joined the other courts that held that religious contributions should not be scrutinized for reasonableness. In that case, the court confirmed a plan in which the debtors allocated $674 a month to charitable contributions. The court reasoned that to impose a reasonableness standard would be to obstruct the purpose of RLCDPA, which protected a debtor’s ability to make

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142 Id.

143 Id. at 356.

144 See e.g., In re Lees, 192 B.R. at 759; In re Packham, 126 B.R. at 608; In re Reynolds, 83 B.R. at 685.

145 See In re Packham, 126 B.R. at 608.

146 See In re Kirschner, 259 B.R. 416, 422 (Bankr. M.D. Fla. 2001); Dyer & Jones, supra note 11, at 281–83. This question remains even after enactment of BAPCPA because the religious contribution exception is still modified by the “reasonably necessary to be expended” language. BAPCPA, Pub. L. No. 109-8, § 102(h)(2), 119 Stat. 23, 33-34 (to be codified at, and amending, 11 U.S.C. § 1325(b)(2)). In addition, a review of caselaw after enactment of BAPCPA uncovers no resolution to this question.

147 See In re Kirschner, 259 B.R. at 422.


149 See In re Kirschner, 259 B.R. at 422; Dyer & Jones, supra note 11, at 281–83.

150 In re Kirschner, 259 B.R. at 422.

151 See In re Kirschner, 259 B.R. at 422.
donations during bankruptcy.152 In addition, the Court noted that other limitations on abuse existed, including the fifteen percent statutory limit and the good faith test found in § 1325(a)(3).153

In 2000, in In re Cavanagh, the Bankruptcy Appellate Panel of the Ninth Circuit followed similar reasoning when it confirmed the debtors' plan which included a $234 tithe to their church.154 The statutory language, the court reasoned, clearly and unambiguously stated that as long as a debtor's donation did not exceed fifteen percent of annual income, it was a reasonably necessary expense.155 To engage in a separate analysis for reasonableness would be contrary to congressional will.156 The Cavanagh court echoed the Kirschner court in finding that the good faith test of § 1325(a)(3) adequately serves to limit consumer abuse of the statute.157

In contrast, in 1999, in In re Buxton, the United States Bankruptcy Court for the Western District of Louisiana concluded that a debtor's tithes still had to be reasonable in light of the totality of the circumstances.158 In support of this view, the court noted that the definition of disposable income in the statute still contained the "reasonably necessary" restriction.159 Thus, according to the court, RLCDPA overturned those cases that totally prohibited religious donations and instead made clear that certain religious contributions may be reasonably necessary expenses.160 The court also noted that if Congress intended a more expansive interpretation, it could have more forcefully pronounced such intentions as it did in revising § 707(b), which states that "the court may not take into consideration whether a debtor has made . . . charitable contributions."161

In 2001, in In re Davis, the United States Bankruptcy Court for the District of Wyoming held, similar to the Buxton court, that RLCDPA did not impose a rigid rule qualifying an automatic fifteen percent allowance for religious donations, but instead intended a more fluid rule under which the donation would also have to be reasonably neces-

152 See id. at 422.
153 Id. at 423.
154 See 250 B.R. 107, 109, 113 (B.A.P. 9th Cir. 2000).
155 Id. at 112.
156 Id. at 113.
157 See id. at 115; In re Kirschner, 259 B.R. at 423.
159 Id.
160 Id.
161 In re Buxton, 228 B.R. at 610 (quoting 11 U.S.C. § 707(b) (2000)).
The court also reasoned that Congress did not place the donation provision in a stand-alone subsection but rather placed it as part of the "reasonably necessary" provision. Thus, for a charitable contribution to qualify as a reasonably necessary expense, it could not exceed fifteen percent of the debtor's gross income and it had to be reasonable. The court mentioned a few relevant factors in determining reasonableness—such as the debtor's past donation practices and overall actions during the case.

After RLCDPA, courts have divided over whether religious donations must also undergo a reasonableness test. Some courts interpret the fifteen percent ceiling as an automatic exemption that is guaranteed regardless of the circumstances. Other courts reason that the debtor's tithes must also be reasonable.

V. ANALYSIS: A REASONABLENESS INQUIRY MUST BE INCORPORATED INTO ALL SECTION 1325 ANALYSES

Courts should not infer that Congress intended to promulgate a rigid, categorical rule that automatically allowed for tithes not exceeding fifteen percent of gross income when amending § 1325(b) through RLCDPA. Instead, Congress intended that such contributions must also be deemed reasonable. For several reasons, further court review ought to be required to ensure that the tithe is reasonable in light of the circumstances. Section A of this Part illustrates how a reasonableness inquiry is more consistent with the purpose behind § 1325(b) as reflected in the legislative history of the 1984 Amendments, RLCDPA, BAPCPA, and the caselaw. Section B then argues that § 1325(b) requires more flexibility when compared with courts' and Congress's unambiguous treatment of tithes under other Code provisions.
sions impacted by RLCDPA.\textsuperscript{173} Finally, Section C explains that without the operation of some reasonableness scrutiny, Chapter 13 plan confirmation will continue to be vulnerable to debtor abuse.\textsuperscript{174}

A. The Purpose of Section 1325(b)

1. The Reasonableness Inquiry and the Legislative History of the 1984 Amendments

Courts should engage in a separate reasonableness inquiry regarding a debtor's tithes because such an inquiry is consistent with the purpose behind § 1325(b) as reflected in the legislative history of the 1984 Amendments.\textsuperscript{175} When Congress created the disposable income test as part of the 1984 Amendments, its objective was to create a more clearly defined test that would reflect the needs of each debtor and curb debtor abuse.\textsuperscript{176} An additional analysis into the reasonableness of a debtor's tithes, rather than an automatic allowance for any tithe that is less than fifteen percent of income, is more conducive to achieving this objective.\textsuperscript{177}

The disposable income test was aimed in part at ensuring that debtors who could pay did pay.\textsuperscript{178} The subjective, toothless standards in effect before the 1984 Amendments enabled many debtors to cheat their creditors out of a meaningful payment on their claims.\textsuperscript{179} The vagueness of the prior tests also forced many judges to invoke minimum payment percentages, which Congress opposed.\textsuperscript{180} These pre-1984 standards were ineffective because they tied confirmation of a debtor's repayment plan to criteria such as good faith, feasibility, and best interests, none of which ascertained the debtor's ability to pay.\textsuperscript{181} Congress regarded the disposable income test as a solution because it

\textsuperscript{173} See infra notes 236-74 and accompanying text.
\textsuperscript{174} See infra notes 275-923 and accompanying text.
\textsuperscript{177} See e.g., Senate Hearings, supra note 58, at 119; House Hearings, supra note 34, at 32; S. Rep. No. 97-150, at 19.
\textsuperscript{178} See Senate Hearings, supra note 58, at 119; House Hearings, supra note 34, at 32.
\textsuperscript{179} See House Hearings, supra note 34, at 306-07; Rodenberg, supra note 31, at 626.
\textsuperscript{180} See House Hearings, supra note 34, at 308-09, 749; S. Rep. No. 97-150, at 19; Rodenberg, supra note 31, at 624-25.
pegged confirmation of a Chapter 13 plan to the debtor's income—a criterion that was more reflective of a debtor's ability to pay.182

In essence, Congress abandoned broad, imprecise standards in favor of a more debtor-specific standard.183 The disposable income test sought to check consumer abuse and ensure greater fairness by forcing courts to examine closely a debtor's finances.184 Most members of Congress and bankruptcy experts agreed that bankruptcy courts were capable of making such determinations.185

A reasonableness inquiry into a debtor's tithes is more consistent with the notion that greater judicial scrutiny is an effective means to promote fairness and curb consumer abuse.186 By interpreting § 1325(b) as automatically allowing any tithe that does not exceed fifteen percent of income, a court risks using the same general standards that Congress abandoned when it created the disposable income test in 1984.187 Submitting a debtor's tithes to a reasonableness inquiry enables a court to make any necessary modifications to adapt more effectively the plan to the specific needs of the debtor and creditors.188

Conversely, under an automatic allowance interpretation, all debtors—including those who have never tithed in the past—can donate money to a religious institution.189 Consequently, creditors' needs are not met and the plan is not adequately customized to the genuine needs of the debtor.190 The potential for abuse can be substantial in light of the hundreds of dollars debtors can donate to their churches each month.191

185 See Senate Hearings, supra note 58, at 119 (testimony of Robert Evans) (remarking that such determinations are the function of the courts exercised every day both in the bankruptcy courts and elsewhere); House Hearings, supra note 34, at 532, 749.
190 See House Hearings, supra note 34, at 531, 749; Klee, supra note 12, at 185-86.
191 See e.g., In re Cavanagh, 250 B.R. 107, 109 (B.A.P. 9th Cir. 2000) (donating $234 a month); In re Kirschner, 259 B.R. 416, 420 (Bankr. M.D. Fla. 2001) (donating $674 a month).
Furthermore, a fifteen percent automatic allowance contravenes Congress’s intention to sacrifice some definiteness for flexibility. By injecting a quantitative standard into plan confirmation, the fifteen percent automatic allowance acts as a minimum payment percentage, which both Congress and the NBC opposed. In creating the disposable income test, Congress created a single standard that was guided by objective criteria, not quantitative requirements. Legislators and bankruptcy experts found that tailoring Chapter 13 relief to the debtor’s needs and income outweighed any uniformity gained by quantitative requirements. As a result, Congress codified the flexible disposable income test rather than any quantitative requirements imposed by bankruptcy courts pre-1984.

In implementing the disposable income test, Congress wanted courts to examine a debtor’s housing costs, living expenses, taxes, medical expenses, child care expenses, and the like to ensure that such expenses were reasonable and that creditors were receiving meaningful payments. Similarly, courts should examine the amount of a debtor’s monthly tithe, the necessity of tithing for participation in church activities, and the debtor’s tithing history to ensure that the monthly tithe is reasonable and that creditors will receive adequate returns on their claims. In order to limit consumer abuse and promote fairness in the facilitation of a Chapter 13 plan, tithes must be treated like any other debtor expense—carefully scrutinized by the court for reasonableness.

2. The Reasonableness Inquiry and RLCDPA’s Legislative History

A separate reasonableness inquiry, rather than an automatic fifteen percent allowance, is also more consistent with the purpose of § 1325(b) as reflected in RLCDPA’s legislative history. Sponsors of

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197 See House Hearings, supra note 34, at 531–32; Kosub & Thompson, supra note 16, at 880.
199 See In re Buxton, 228 B.R. at 610; Senate Hearings, supra note 58, at 119; House Hearings, supra note 34, at 347, 531.
RLCDPA wanted to place religious contributions on equal footing with a debtor’s secular expenses. This goal of treating religious donations and secular expenses equally necessitates a reasonableness inquiry concerning a debtor’s tithes under § 1325(b).

Under § 548, a trustee may avoid any transfer made by the debtor if the debtor was insolvent and received less than a reasonably equivalent value in exchange for such transfer. Before RLCDPA, trustees used this provision to avoid a debtor’s prepetition religious donations because the debtor did not receive reasonably equivalent value. On the other hand, an exchange of inventory for cash, money spent on expensive vacations, or gambling would be protected because the debtor received reasonably equivalent value. Giving religious donations similar treatment would require a distinct, automatic exemption. It would be nearly impossible for courts to shoehorn religious donations into the market exchange paradigm of § 548. Furthermore, a more liberal judicial interpretation of “value” would effectively gut fraudulent conveyance law. Thus, an automatic exemption was the only means by which prepetition religious donations could achieve parity with marketplace transfers.

In contrast, under § 1325(b), comparable treatment for religious donations requires a reasonableness inquiry. Where a court’s approach under § 548 is more clear-cut—the debtor either did or did not receive reasonably equivalent value in exchange for the transfer—its approach under § 1325 is more individualized and tailored to the circumstances. In confirming a Chapter 13 plan, a court aims to meet the debtor’s personal needs and ensure that creditors receive meaning-

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201 See 144 CONG. REC. 8941 (1998); 143 CONG. REC. 22,399 (1997).
204 See H.R. Rep. No. 105-556, at 2; Zywicki, supra note 1, at 1230.
205 See Allard v. Flamingo Hilton (In re Chomakos), 69 F.3d 769, 772 (6th Cir. 1995); Zywicki, supra note 1, at 1234–35.
208 See Zywicki, supra note 1, at 1238.
209 See H.R. Rep. No. 105-556, at 3; Zywicki, supra note 1, at 1238, 1241–43.
ful payments. To this end, a court must find that all of a debtor’s expenses are reasonable. Consequently, religious donations, just like any other expense, must be deemed reasonable. If religious donations were automatically allowed under § 1325(b), they would not simply be on par with secular expenses, but in fact would have achieved higher status. Congress intended that RLCDPA would level the playing field, not give religious donations an unfair advantage.

3. The Reasonableness Inquiry and BAPCPA

BAPCPA was enacted seven years after RLCDPA. During those seven years, bankruptcy courts disagreed over whether religious contributions had to be reasonably necessary under § 1325. When Congress revisited § 1325(b) with BAPCPA, Congress could have made its intent clear. It could have amended the statute to state clearly that religious contributions were automatically exempted from disposable income so long as they constituted less than fifteen percent of annual income. Congress, however, simply placed the religious contribution exemption in a separate subsection still modified by the “reasonably necessary to be expended” language. Because Congress’s failure to take corrective action when a statute has been interpreted by the courts

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213 See BAPCPA § 102(h) (2), 119 Stat. at 33–34 (to be codified at, and amending, 11 U.S.C. § 1325(b)(2)).
214 See id.; In re Buxton, 228 B.R. at 610; House Hearings, supra note 34, at 749; 144 Cong. Rec. 8941 (1998).
218 See In re Kirschner, 259 B.R. at 422.
219 See N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535 (1982) (“Where an agency’s statutory construction has been “fully brought to the attention of the public and the Congress,” and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.”) (quoting United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979) (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940))).
220 See id.
221 See BAPCPA § 102(h)(2), 119 Stat. at 33–34 (to be codified at, and amending, 11 U.S.C. § 1325(b)(2)).
in one fashion can indicate that it tacitly approves of that interpre-
tation, the inclusion of a reasonableness inquiry here is sensible.222

4. The Reasonableness Inquiry and Section 1325(b) Caselaw

A separate reasonableness inquiry, rather than an automatic
fifteen percent allowance, is also more consistent with the purpose of
§ 1325(b) as reflected in the caselaw.223 Before the enactment of
RLCDPA, bankruptcy courts imposed some reasonableness scrutiny
regarding a debtor’s tithes.224 The level of scrutiny regarding tithes was
often more rigorous as many courts deemed them unreasonable.225 A
few courts, however, held that a debtor’s tithes were reasonably neces-
sary in light of the totality of the circumstances.226 Some courts, adher-
ing to Congress’s goal that Chapter 13 plan confirmation be tailored to
the debtor’s needs, allowed the debtor to tithe in exchange for some
modifications.227

After RLCDPA’s enactment, courts are split on whether the stat-
ute imposed a reasonableness requirement.228 Nonetheless, even
those courts opposed to a reasonableness inquiry concluded that the
court still needed to determine whether a plan was proposed in good
faith under § 1325(a)(3).229 For example, in 2000 in In re Cavanagh,
the United States Bankruptcy Appellate Panel of the Ninth Circuit
stated that a court should consider factors such as the timing of the
tithe and the amount when looking at the totality of the circum-
stances to determine whether the debtor has proposed a plan in good
faith.230 The United States Bankruptcy Court for the Western District
of Louisiana used the same factors in In re Buxton when determining

224 See In re McDaniel, 126 B.R. 782, 785 (Bankr. D. Minn. 1991); In re Reynolds, 83 B.R. at 685.
227 See In re Ivy, No. 88-3769, 1990 WL 198634, at *1 (9th Cir. Dec. 10, 1990) (suggesting
the debtor extend the plan an additional 18 months); In re McDaniel, 126 B.R. at 785 (of-
fering to confirm the plan if the debtor reduced the tithing figure).
228 Compare In re Cavanagh, 250 B.R. at 112, with In re Buxton, 228 B.R. at 610.
229 See In re Cavanagh, 250 B.R. at 114; In re Kirschner, 259 B.R. at 423.
230 250 B.R. at 114.
whether a tithe was a reasonably necessary expense.231 Similarly, in 2001 the United States Bankruptcy Court for the Middle District of Florida in In re Kirschner; opposed the reasonableness inquiry articulated by the Buxton court but nevertheless looked at the totality of the circumstances surrounding the tithe and the debtor’s motivations to conclude that the debtor proposed the plan in good faith.232

The good faith analysis applied by those courts that support an automatic fifteen percent exemption serves the same purpose as a reasonableness inquiry.233 Although the scrutiny is less rigorous, the function is essentially the same—to ensure that a Chapter 13 plan adequately reflects the debtor’s genuine needs and allows for meaningful payments to creditors.234 Thus, even those courts that oppose a reasonableness inquiry functionally carry out Congress’s intent through the disposable income test.235

B. The Treatment of Tithes and Other Code Provisions Impacted by RLCDPA

RLCDPA amended not only § 1325, but also other provisions of the Bankruptcy Code to allow for a debtor’s tithes.236 Yet unlike its drafting of § 1325, Congress’s intent regarding these other provisions is unambiguous.237 The relatively unequivocal wording of these other provisions suggests that Congress intended a more flexible approach for § 1325.238 In addition, the judicial treatment of tithes in other bankruptcy contexts, notably the discharge of student loans, supports a reasonableness inquiry under § 1325(b).239

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231 See 228 B.R. at 611.
233 See In re Cavanagh, 250 B.R. at 114; In re Kirschner, 259 B.R. at 424–25; In re Buxton, 228 B.R. at 611.
234 See In re Cavanagh, 250 B.R. at 114; In re Buxton, 228 B.R. at 611; Senate Hearings, supra note 58, at 119; House Hearings, supra note 34, at 347, 749.
1. RLCDPA's Exclusion of Tithes in Sections 544, 548, and 707

Sections 544 and 548, which concern the fraudulent transfer of funds, explicitly exclude religious donations. Section 548(a)(1) outlines the two types of transfers that a trustee may avoid as fraudulent: actually fraudulent transfers made with the actual intent to hinder or defraud creditors, and constructively fraudulent transfers in which the debtor received less than reasonably equivalent value in exchange. Section 548(a)(2) states that a transfer of a charitable contribution “shall not be considered” to be a constructively fraudulent transfer if the amount of the contribution does not exceed fifteen percent of the debtor’s gross annual income or if the contribution exceeds fifteen percent of gross annual income but is consistent with the debtor’s past practices. The use of the language “shall not be considered” clarifies Congress’s intent that certain religious donations are not per se fraudulent transfers. Furthermore, this intention becomes all the more apparent in the placement of the exception in a stand-alone subsection.

Similarly, § 544(b), which allows trustees to avoid transfers made in violation of nonbankruptcy or state law, expressly excludes religious donations as fraudulent transfers. Specifically, § 544(b)(2) states that the trustee’s avoidance powers “shall not apply to a transfer of a charitable contribution.” Like § 548, Congress placed the religious donation exclusion in a stand-alone subsection.

Section 707(b), also amended by RLCDPA, excludes religious donations from having any impact on a court’s decision to dismiss a case for abuse. Congress explicitly excluded religious donations under § 707(b). Congress crafted the language to read: “in making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or

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242 See id.
243 See id.
244 See id.
245 See 11 U.S.C. § 544(a)(1)(A), (a)(1)(B)(i); COLLIER, supra note 10, ¶ 548.01[1].
246 See id.
247 See id.
248 See id.
249 See id.
251 See id.
252 See id.
253 See id.
continues to make, charitable contributions . . . to any qualified religious or charitable entity." Like the words "shall not" in sections 544 and 548, the use of the language "may not take into consideration" establishes an unambiguous, automatic exclusion for religious donations.

Section 1325(b) is thus the only provision amended by RLCDPA that does not contain strong, unambiguous language concerning religious donations. Section 1325(b) (2) (A) states that disposable income is "income received by the debtor . . . less amounts reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor . . . and for charitable contributions . . . to a qualified religious or charitable entity . . . in an amount not to exceed 15 percent of gross income of the debtor." Similar to the other provisions amended by RLCDPA, Congress could have drafted a stand-alone subsection that stated that charitable contributions to a qualified religious or charitable entity not exceeding fifteen percent of income shall not be considered to be disposable income. Instead, Congress placed the tithing exclusion in subsection (b)(2)(A), ensuring that it could be qualified by the phrase "reasonably necessary to be expended." This absence of forceful language in the tithing exception as compared with the other provisions suggests that Congress intended a different treatment for religious donations under § 1325(b). This difference was even noted by the court in *Buxton* when it applied a reasonableness scrutiny to the debtor’s tithes. The court there noted that, had Congress wanted an automatic exclusion for religious donations, surely it would have stated so with the same force in which it restricted other Bankruptcy Code provisions affected by RLCDPA.

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250 Id.
252 See BAPCPA § 102(h)(2), 119 Stat. at 33-34 (to be codified at, and amending, 11 U.S.C. § 1325(b)(2)).
253 Id. This wording reflects § 1325(b)(2) after it was slightly rewritten by BAPCPA.
257 See *In re Buxton*, 228 B.R. at 610.
258 See id.
2. An Analogy to Section 523(a)(8)

RLCDPA also impacted § 523(a)(8) even though RLCDPA did not specifically amend that provision.\(^{259}\) As mentioned previously, debtors have attempted to use RLCDPA to protect their religious donations while also claiming that their student loans should be discharged because of undue hardship under § 523(a)(8).\(^{260}\) It is the courts’ handling of such cases that further supports the contention that courts should apply a reasonableness scrutiny to tithes under § 1325(b).\(^{261}\)

The most widely used test to determine if a debtor meets the undue hardship exception was first set forth in 1982 by the Second Circuit Court of Appeals in *Brunner v. New York State Higher Education Services Corp.*\(^{262}\) Under the *Brunner* test, the court considers three factors:

1. [whether] the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living . . . if forced to repay the loans;
2. [whether] additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
3. [whether] the debtor has made good faith efforts to repay the loans.\(^{263}\)

The first prong implicates § 1325(b).\(^{264}\) Most courts use the same disposable income test that is used in Chapter 13 in order to analyze this first prong.\(^{265}\) In other words, courts scrutinize a debtor’s monthly income and reasonably necessary expenses to determine if the remaining disposable income is sufficient to make loan payments.\(^{266}\)

In applying the disposable income test in the student loan context, the vast majority of courts adopt a reasonableness inquiry regarding a debtor’s tithes.\(^{267}\) Both before and after RLCDPA, these courts exam-

\(^{259}\) See Dyer & Jones, *supra* note 11, at 276.

\(^{260}\) Id.

\(^{261}\) See *In re McLaney*, 314 B.R. at 237; *In re Meting*, 263 B.R. at 279; *In re McLeroy*, 250 B.R. at 879.

\(^{262}\) See 831 F.2d 395, 396 (2d Cir. 1987); *Collier, supra* note 10, ¶ 523.14[2].

\(^{263}\) 831 F.2d at 396; *Collier, supra* note 10, ¶ 523.14[2].


\(^{266}\) See *Collier, supra* note 10, ¶ 523.14[2].

\(^{267}\) See *In re McLaney*, 314 B.R. at 237; *In re Meting*, 263 B.R. at 279; *In re McLeroy*, 250 B.R. at 879. One court has adopted a per se rule holding that the RLCDPA’s failure to amend § 523(a)(8) means that charitable contributions are never an allowable expense in
ined the same reasonableness factors courts used under § 1325(b). In 1994, the United States Bankruptcy Court for the District of Arizona, in *In re Lynn*, held that the debtor’s tithes were not a reasonably necessary expense because failure to tithe did not preclude the debtor from engaging in church activities. In 2001, the United States Bankruptcy Court for the Northern District of Iowa in *In re Meling* reasoned that the amount and timing of the tithe were important factors in determining a debtor’s ability to repay student loans. Finally, in 2004, the United States Bankruptcy Court for the Middle District of North Carolina in *In re Perkins* found that the debtor’s past tithing practice was an important factor in the undue hardship analysis.

If courts use a reasonableness approach as part of a disposable income test under one Code provision, they should use the same approach for another Code provision involving the same disposable income test. Given that an important goal of American bankruptcy law is uniform application of its provisions, courts should subject a debtor’s tithes under § 1325(b) to a reasonableness inquiry as they do under § 523(a)(8).

C. The Necessity of the Reasonableness Inquiry for Adequate Abuse Protections

Creditors are not protected from debtor abuse if § 1325(b) does not involve a reasonableness inquiry. When Congress enacted RLCDPA, it ensured that adequate abuse protections remained under other amended provisions. Similarly, a reasonableness inquiry should remain as part of § 1325(b) to adequately curb abuse. The only re-

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268 Compare *In re Meling*, 263 B.R. at 279 (taking into consideration debtor’s past tithing practice), and *In re Lynn*, 168 B.R. at 700 (noting that debtor’s tithes were not necessary to receipt of church services), with *In re Buxton*, 228 B.R. at 611 (looking at the tithe amount and the debtor’s past tithing practices).

269 *In re Lynn*, 168 B.R. at 700.

270 See 263 B.R. at 279.

271 See 318 B.R. at 309.

272 See *In re McLeroy*, 250 B.R. at 879; *In re Buxton*, 228 B.R. at 610; *Collier*, supra note 10, ¶ 523.14(2).

273 See U.S. CONST. art. I, § 8, cl. 4; *House Hearings*, supra note 34, at 183.

274 See *In re Meling*, 263 B.R. at 279; *In re McLeroy*, 250 B.R. at 879; *In re Buxton*, 228 B.R. at 610; *Lynn*, 168 B.R. at 697.


277 See *House Hearings*, supra note 34, at 192-93; 144 CONG. REC. 8941 (1998); *Collier*, supra note 10, ¶ 1325.04(1).
maining protection under § 1325 would be the good faith requirement articulated in § 1325(a)(3). The good faith clause alone is insufficient to prevent consumer abuse of tithing exemptions.

1. Other Code Provisions Amended by RLCDPA Retained Specific Abuse Protections

Other Code provisions, despite being amended by RLCDPA, still contain specific prohibitions against abuse. Section 548(a)(1)(A) allows a trustee to avoid any transfer made with actual intent to hinder, delay, or defraud any entity. Senator Grassley, sponsor of RLCDPA, emphasized that by not amending § 548(a)(1)(A), the bill only protected genuine tithes. Professor Douglas Laycock, from the University of Texas Law School, asserted during congressional hearings that leaving § 548(a)(1)(A) untouched was a very important safeguard of the bill. In fact, he recommended that courts consider the timing, the amount, and the change in pattern to determine if the transfer was actually fraudulent. Such factors are similar to those used by courts in a reasonableness inquiry under § 1325(b).

Similarly, RLCDPA did not amend § 707(a), which still allows a court to dismiss a case for cause including unreasonable debtor delay and nonpayment of fees. In addition, if a transfer is actually fraudulent under § 548(a)(1)(A), a court may consider that transfer as part of its ability-to-pay analysis under § 707(b). For example, if a religious donation constitutes an actually fraudulent transfer, it becomes part of the debtor's disposable income that the court may consider under § 707(b). Consequently, if the debtor's disposable income is sufficient enough to pay creditors under Chapter 13, the court may

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279 See Senate Hearings, supra note 58, at 468; House Hearings, supra note 34, at 409; Collier, supra note 10, ¶ 1325.04[1].
284 See id.
285 See In re Davis, 2001 WL 1740000 at *2; In re Buxton, 228 B.R. at 611.
288 See In re Smihula, 234 B.R. at 243; Dyer & Jones, supra note 11, at 284.
dismiss the case under § 707(b) because granting relief would be a substantial abuse of the Bankruptcy Code.\textsuperscript{289}

Congress thus ensured that certain abuse protections would remain despite RLCDPA's amendments.\textsuperscript{290} In this sense, § 1325(b) should be treated no differently than the other amended provisions.\textsuperscript{291} Congress intended that a reasonableness inquiry would be an analogous, adequate safeguard against consumer abuse.\textsuperscript{292}

2. The Good Faith Provision Alone Does Not Adequately Curb Debtor Abuse

Section 1325(b) contains no adequate safeguard against abuse in the absence of a reasonableness inquiry.\textsuperscript{293} Even the good faith provision of § 1325(a)(3) offers little defense.\textsuperscript{294} For one, after enactment of the disposable income test as part of the 1984 Amendments, Congress intended that the good faith provision would play a smaller role in the confirmation of Chapter 13 plans.\textsuperscript{295} Before 1984, courts used the good faith clause to establish minimum repayment percentages.\textsuperscript{296} During congressional hearings for the 1984 Amendments, members of Congress and bankruptcy experts emphasized that the disposable income test should return the good faith clause back to its historical meaning.\textsuperscript{297} In other words, good faith merely meant that the plan conformed to the provisions, purposes, and spirit of Chapter 13.\textsuperscript{298}

If the good faith provision functions as the only check on tithes, it risks acquiring the same broad meaning and application that was so objectionable pre-1984.\textsuperscript{299} Furthermore, neither the Act itself nor its legislative history suggests that the amendment expanded the narrow

\textsuperscript{289} See In re Smihula, 234 B.R. at 243; Dyer & Jones, supra note 11, at 284.
\textsuperscript{293} See Senate Hearings, supra note 58, at 468; House Hearings, supra note 34, at 408-09; S. Rep. No. 98-65, at 21.
\textsuperscript{294} See Senate Hearings, supra note 58, at 468; S. Rep. No. 98-65, at 21; Collier, supra note 10, ¶ 1325.04[1].
\textsuperscript{295} See House Hearings, supra note 34, at 32, 192-93; Collier, supra note 10, ¶ 1325.04[1].
\textsuperscript{296} See House Hearings, supra note 34, at 308-09; Rodenberg, supra note 31, at 624-25.
\textsuperscript{297} See House Hearings, supra note 34, at 32; Collier, supra note 10, ¶ 1325.04[1].
\textsuperscript{298} See House Hearings, supra note 34, at 32.
\textsuperscript{299} See House Hearings, supra note 34, at 192-93, 308-09, 408-09; Collier, supra note 10, ¶ 1325.08[1]; Kosub & Thompson, supra note 16, at 877.
meaning that Congress intended for good faith in 1984. In fact, the legislative history of RLCDPA illustrates that Congress was concerned about maintaining defined Code provisions that curbed abuse.

Second, a good faith test is insufficient to restrain consumer abuse because it is too vague. Before the 1984 Amendments, bankruptcy experts criticized the good faith clause as a vague and ineffective standard. RLCDPA did little to clarify the good faith test. If the good faith clause was too vague to provide meaningful guidance to courts and adequate recoveries to creditors pre-1984, it alone should not regulate tithes today.

Furthermore, even though courts have identified factors to consider in deciding whether to dismiss a case because of a lack of good faith, these factors differ across circuits and courts. Some courts analyze a laundry list of eleven to twelve factors, although no list is prescriptive or exclusive. Other courts conduct a more narrow focus and examine only a few elements. There are also courts that do not depend on a list of factors but instead look at whether the plan was proposed with honest intentions. Finally, there are courts that simply determine whether under the circumstances there has been an abuse of the provisions, purpose, or spirit of Chapter 13.

As a result of these inconsistent standards, the good faith provision is not an adequate safeguard against consumer abuse of tithing exemptions. The subjective and discretionary nature of the good faith clause undermines the ability of creditors to obtain meaningful

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301 See H.R. REP. No. 105-556, at 5; 144 CONG. REC. 8941 (1998).
303 See Senate Hearings, supra note 58, at 468; House Hearings, supra note 34, at 19, 186, 306-08.
304 See generally RLCDPA, 112 Stat. 517.
305 See Senate Hearings, supra note 58, at 468; S. REP. No. 98-65, at 21.
307 Elbein, supra note 306, at 454. Such factors include attorney's fees, duration of the plan, sincerity of the debtor, degree of effort, and debtor's ability to earn income. Id.
309 See In re Johnson, 708 F.2d 865, 868 (2d Cir. 1983); In re Kourtakis, 75 B.R. at 187.
311 See Senate Hearings, supra note 58, at 468; Elbein, supra note 306, at 454-55; Kosub & Thompson, supra note 16, at 877.
recoveries in Chapter 13. Although some judges may use the good faith clause to modify or exclude unreasonable tithes, many will not. Instead, a reasonableness inquiry must remain a part of the § 1325(b) analysis to prevent abuse. The good faith clause was not a sufficient check on abuse before the 1984 Amendments and it remains inadequate today.

Finally, the good faith provision is not adequately rigorous to check consumer abuse of the Code’s tithing provisions. Only if there is serious debtor misconduct should courts find a Chapter 13 plan to be lacking in good faith. In the case of tithing, the debtor’s conduct may not be egregious but could still constitute an abuse of the Bankruptcy Code.

The factors that courts consider as part of their good faith analysis are too broad to target religious donations adequately. Such factors include the debtor’s sincerity in seeking relief, degree of effort, attorney’s fees, history of filings, and manipulation of the Code. These factors oftentimes will not implicate a debtor’s tithes, especially if the debtor’s conduct is not particularly egregious. In contrast, a reasonableness inquiry applied uniformly to all of a debtor’s expenses, including tithes, is more precise in preventing abuse. This more definite standard compels courts to scrutinize religious donations, making certain that they are necessary, reasonable, and consistent with a debtor’s past practices.

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312 See House Hearings, supra note 34, at 306–07; Elbein, supra note 306, at 454–55; Kosub & Thompson, supra note 16, at 877.

313 See Senate Hearings, supra note 58, at 468; Elbein, supra note 306, at 454–55.

314 See Senate Hearings, supra note 58, at 468; House Hearings, supra note 34, at 306–07, 347.

315 See House Hearings, supra note 34, at 308; S. REP. No. 98-65, at 21 (1983); Kosub & Thompson, supra note 16, at 877.

316 See Collier, supra note 10, ¶ 1325.04[1]; see also In re Cavanagh, 250 B.R. at 114; In re Kirschner, 259 B.R. at 425; In re Thomas, 118 B.R. at 423.

317 Collier, supra note 10, ¶ 1325.04[1].

318 See In re Cavanagh, 250 B.R. at 110, 114 (finding that the debtor’s plan was proposed in good faith despite a lack of tithing in the year preceding the bankruptcy filing); In re Kirschner, 259 B.R. at 420, 426 (finding that the debtor’s large tithes of $674 did not justify a finding of lack of good faith); Collier, supra note 10, ¶ 1325.04[1].

319 See In re Cavanagh, 250 B.R. at 114; In re Thomas, 118 B.R. at 423; Collier, supra note 10, ¶ 1325.04[1]; Elbein, supra note 306, at 454.

320 See Elbein, supra note 306, at 454.

321 See Collier, supra note 10, ¶ 1325.04[1]; Elbein, supra note 306, at 454.

322 See In re Buxton, 228 B.R. at 611; Senate Hearings, supra note 58, at 468; House Hearings, supra note 34, at 347.

323 See In re Davis, 2001 WL 1740000 at *2, *3; In re Buxton, 228 B.R. at 611; House Hearings, supra note 34, at 310.
CONCLUSION

The Bankruptcy Code can accommodate the religious interests of debtors and ensure fairness for creditors. To achieve this objective, courts must interpret the Code in harmony with the goals and purposes of bankruptcy law. To this end, a debtor's tithes under § 1325(b) must be less than fifteen percent of the debtor's income and be reasonable, a standard which is more consistent with the purpose of § 1325(b), the interpretation of other provisions of the Code, and the goal of restraining consumer abuse. By employing a reasonableness inquiry, courts will more effectively tailor a Chapter 13 plan to the genuine needs of the debtor and enable greater fairness to creditors.

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