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Deliver Us From Evil: Why Bankruptcy Judges May Properly Rely on the Free Exercise Clause & RFRA To Protect Church Property From the Grasps of Tort-Creditors

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DELIVER US FROM EVIL: WHY BANKRUPTCY JUDGES MAY PROPERLY RELY ON THE FREE EXERCISE CLAUSE & RFRA TO PROTECT CHURCH PROPERTY FROM THE GRASPS OF TORT-CREDITORS

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I. INTRODUCTION

In January of 2002, the Boston Globe reported that the Boston Archdiocese of the Roman Catholic Church had knowingly transferred at least one sexually abusive priest between several parishes within the region.[1] This report lit a powder keg of sexual abuse allegations against Roman Catholic clergy throughout the country.[2] Reports have indicated that the Catholic Church has spent over a billion dollars to settle claims brought by alleged sexual abuse victims.[3] As a result of this unexpected

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1 Daniel J. Marcinak, Comment, *Separation of Church and Estate: On Excluding Parish Assets from the Bankruptcy Estate of a Diocese Organized as a Corporation Sole*, 55 CATH. U. L. REV. 583, 584 n.10 (2006) (citing Michael Rezendes, *Church Allowed Abuse by Priest for Years*, BOSTON GLOBE, Jan. 6, 2002, at A1). However, the genesis of parish closings in and around Boston actually antedates the scandal. *See* Kathy McCabe, *As Parishes Close, Survivors Plot Future*, BOSTON GLOBE, Apr. 5, 1998, at 4 (discussing, in 1998, the Archdiocesan plans to close several dozen parishes through "2008 because of declining attendance and shrinking numbers of clergy[]"); *see also* The Boston Globe, http://www.boston.com/globe/spotlight/abuse/ (last visited Nov. 14, 2008) (discussing relevant issues regarding the Catholic Church sex abuse scandal, including internal church documents, victim letters, financial cost analysis, and various links to news stories).

2 Marcinak, *supra* note 1, at 584.

3 *Id.* at n.12 (citing Rachel Zoll, *Sex Abuse-Related Costs Top $ 1 Billion*, MIAMI HERALD, June 10, 2005, at A1, 2005 WLNR 9200385) (explaining that between 2002 and mid-2005, the church spent at least $378 million defending against sex-abuse claims).

financial upheaval, several dioceses threatened to file for bankruptcy.[4] However, the first dioceses to actually file Chapter 11 bankruptcy petitions were the dioceses of Tucson, Arizona; Portland, Oregon; and Spokane, Washington.[5]

From a bankruptcy law perspective, "[b]ecause no American diocese had ever filed for bankruptcy protection, this area of the law involve[d] totally uncharted waters."[6] Therefore, when claims of clergy abuse arose in the states of Oregon and Washington,[7] bankruptcy courts in these jurisdictions were required to determine whether property titled in the name of the diocese, but held in trust for parishes within the dioceses, could be excluded from the bankruptcy estate of the diocese on First Amendment or Religious Freedom Restoration Act, ("RFRA"), grounds.[8] Both courts held that neither the First Amendment nor RFRA barred including parish property in the estate of the diocese.[9] In effect, the courts required churches to abide by secular principles of law when holding church property.[10]

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4 *Id.* at 585.

5 *Id. See also* 7-1100 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY § 1100.01 (15th ed. rev. 2006). Collier describes the basic Chapter 11 policies as follows:

> Chapter 11 of the Bankruptcy Code provides an opportunity for a debtor to reorganize its business or financial affairs or to engage in an orderly liquidation of its property. It is fashioned primarily for business debtors, although individuals who are not engaged in businesses qualify for relief under Chapter 11.
>
> Chapter 11 embodies a policy that it is generally preferable to enable a debtor to continue to operate and to reorganize its business rather than simply to liquidate a troubled business. Continued operation may enable the debtor to preserve any positive difference between the going concern value of the business and the liquidation value. Moreover, continued operation can save the jobs of employees, the tax base of communities, and generally reduce the upheaval that can result from termination of a business.

Id. (footnote omitted).

6 Marcinak, *supra* note 1, at 585 (citing Eli Sanders, *Catholics Puzzle over a Bankruptcy Filing*, N.Y. TIMES, July 8, 2004, at A17) (quoting Bud Bunce, communications director for the Archdiocese of Portland) (internal quotation marks omitted)).

7 *In re* Roman Catholic Archbishop of Portland in Or., 335 B.R. 842 (Bankr. D. Or. 2005); *In re* the Catholic Bishop of Spokane, 329 B.R. 304 (Bankr. E.D. Wash. 2005), *overruled by* Comm. of Tort Litigants v. Catholic Diocese of Spokane, 364 B.R. 81 (E.D. Wash. 2006)).

8 *In re Roman Catholic Archbishop of Portland*, 335 B.R. at 860; *In re the Catholic Bishop of Spokane*, 329 B.R. at 324.

9 *In re Roman Catholic Archbishop of Portland*, 335 B.R. 868; *In re the Catholic Bishop of Spokane*, 329 B.R. at 325.

10 *Id.; see also* Joseph A. Rohner IV, Comment, *Catholic Diocese Sexual Abuse Suits, Bankruptcy, and Property of the Bankruptcy Estate: Is the "Pot of Gold" Really Empty?*, 84 OR. L. REV. 1181 (2005) (detailing the civil law protections available to church entities).

This Article challenges the Oregon Bankruptcy Court's decision in *In re Roman Catholic Archbishop of Portland* and the Washington Bankruptcy Court's decision in *In re the Catholic Bishop of Spokane*. Specifically, it argues that there are two separate bases for bankruptcy judges to utilize a heightened level of scrutiny for the process of liquidation when they apply traditional legal principles to render decisions that will substantially affect church property. To logically reach this point, this Article is subdivided into several parts. First, Part II traces a line of Supreme Court decisions on church property disputes implicating Free Exercise Clause concerns in the context of religious practices.[11] Next, Part III explains basic principles of bankruptcy law and analyzes the decisions of the Oregon and Washington Bankruptcy Courts.[12] Part IV challenges the application of *Employment Division v. Smith*'s[13] general rule for the resolution of bankruptcy disputes; in particular, this Article asserts that the bankruptcy system is one of individualized exemptions, which requires bankruptcy courts to apply strict scrutiny to the process of liquidation when deciding matters affecting church property, and argues that RFRA does not apply to bankruptcy judges when making state law determinations.[14] Finally, this Article asserts that RFRA applies to bankruptcy judges based on Congress's power under the Bankruptcy Clause of Article I of the Constitution.

The authors hope this Article will provide an analytical framework for future cases in which bankruptcy judges are confronted with tort-creditor suits that have resulted in judgments against religious entities.

II. UNITED STATES SUPREME COURT PRECEDENT AND CONGRESSIONAL RESPONSE

Two lines of precedent must be examined before the decisions of the Washington and Oregon Bankruptcy Courts can be properly analyzed. Beginning with *Watson v. Jones*, Part II.A discusses what has been identified as the "church property" cases.[15] Next, Part II.B discusses the

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11 *See infra* Part II.

12 *See infra* Part III.

13 Employment Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 878 (1990) (holding that neutral laws of general applicability may be upheld despite an incidental burden on the practice of one's religion).

14 *See infra* Part IV.

15 *Watson v. Jones* and its progeny include: Watson v. Jones, 80 U.S. 679 (1871); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94 (1952); Jones v. Wolf, 443 U.S. 595 (1979).

Supreme Court's decisions in *Sherbert v. Verner* and its progeny, which involved state-imposed burdens on the exercise of religious freedom.[16]

A. The "Church Property" Cases

The "church property" cases make it clear that the Court has often struggled to balance the needs of the secular and religious worlds when tasked with adjudicating church property disputes. The need to balance first arose in 1872 with *Watson v. Jones*.[17] *Watson* involved a divided Kentucky Presbyterian congregation that had battled over the ownership of church belongings.[18] Specifically, the division in the congregation stemmed from a disagreement over the treatment of individuals who had previously owned slaves or served in the Confederate army during the Civil War.[19] The General Assembly of the Presbyterian Church had officially disavowed slavery and declared that those members who still professed a belief in slavery did not reflect the "true Presbytery[.]"[20]

The Supreme Court held that the right of religious freedom included the right to organize religious bodies to decide questions of faith.[21] In addition, the Court held that once a hierarchical church body had decided a matter of internal faith, civil courts were bound to show deference to that decision.[22] Applying this rule to the dispute, the Court concluded that the General Assembly's decision was binding on civil courts.[23] Therefore, the property at issue belonged to the church congregants whom the General Assembly considered to be true members.[24]

Although "[t]he clear effect of *Watson* was to limit the role of the courts in the resolutions of disputes over church property"[25], when the opportunity arose in *Jones v. Wolf*,[26] the Court reconsidered the deference it had previously shown to the church decision-making body in *Watson* and suggested a second constitutionally permissible method for resolving intra-faith property disputes. This approach evolved from the

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16 *Sherbert v. Verner* and its progeny include: Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); and Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981).

17 *Watson,* 80 U.S. at 679.

18 *Id.* at 681.

19 *Id.* at 690–92.

20 *Id.* at 692.

21 *Id.* at 729.

22 *Id.*

23 *Id.* at 727.

24 *Id.* at 692.

25 Paul Finkelman, ed. Religion in American Law: An Encyclopedia, "Departure from Doctrine" by Davison M. Douglas & James K. Lehman, 135 (1999).

26 Jones v. Wolf, 443 U.S. 595 (1979).

seed planted by the Court just three years earlier in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[27] a case which actually affirmed many of the principles of *Watson* and held that the civil trial judge had overstepped his authority by charging the jury to draw interpretations and conclusions significantly interwoven with church doctrine.[28]

Jones involved an intra-congregational dispute regarding separation from a governing authority.[29] Members of the local congregation were divided over the decision to separate.[30] In response to the division, the congregation's higher authority enacted a commission that issued a written ruling declaring the minority faction, who favored continuing a relationship with the higher authority, the true congregation.[31] Following the ruling, the minority faction brought suit in federal court seeking exclusive possession of the disputed church property.[32]

To resolve this controversy, the *Jones* Court applied the "neutral-principles approach" which had been first mentioned in *Hull*.[33] Under this approach, secular courts are allowed to resolve internal church disputes by applying neutral principles of trust or property law.[34] Given this holding, courts can apply general legal principles to church deeds, charters, and constitutions.[35] Today, the *Jones* decision stands for the proposition that a civil court may set aside decisions made by a congregation with regard to its internal affairs if the decision affects church property and the court applies "neutral principles" of trust or property law in determining the distribution of church assets.[36] Today, the specific limitations from *Jones* remain undefined, as Justice Powell predicted in his dissent.[37] Nevertheless, it is important to keep these

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27 Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Hospital, 393 U.S. 440 (1969).

28 *Id.*

29 *Jones*, 443 U.S. at 597.

30 *Id.* at 598.

31 *Id.*

32 *Id.*

33 *Id.* at 604.

34 *Id.* at 603.

35 *Id.* at 604.

36 *Jones,* 443 U.S. at 610 (Powell, J., dissenting) ("Although the Court appears to accept established principles that I have thought would resolve this case, it superimposes on these principles a new structure of rules that will make the decision of these cases by civil courts more difficult. The new analysis also is more likely to invite intrusion into church polity forbidden by the First Amendment.").

37 *See* Jeffrey B. Hassler, Comment, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*, 35 PEPP. L. REV. 399, 428–29 (2008) (stating that "the neutral-principles doctrine may not be the

cases in mind as we contemplate the role of the bankruptcy judge in the context of tort-creditor claimants who demand the distribution of church property to satisfy a judgment.

B. Sherbert*: The Pinnacle of Free Exercise*

In addition to *Watson*, *Hull*, and *Jones*, *Sherbert v. Verner*[38] and its progeny provide other principles for consideration. In *Sherbert*, a Seventh-Day Adventist was fired from her job after refusing to work on Saturday, her Sabbath.[39] When Mrs. Sherbert applied for state unemployment compensation, her application was denied because her religious objection to working on Saturday did not create "good cause" for her refusal to work.[40] The Supreme Court disagreed with this denial and held that Mrs. Sherbert was entitled to unemployment compensation.[41] The Court reasoned that the government placed a substantial burden on Mrs. Sherbert's religious freedom by requiring her to make a choice between forfeiting government benefits and violating a central tenet of her faith.[42] In reaching this conclusion, the Court announced that the government had to meet the standard of strict scrutiny if it planned to deny applicants religious exemptions from facially-neutral laws.[43]

This standard, however, was substantially modified in *Employment Division v. Smith*.[44] Smith, a Native American, was seeking state unemployment compensation after being fired for ingesting peyote—a criminally banned substance in the state of Oregon—during a Native American religious ceremony.[45] The Supreme Court effectively overruled *Sherbert* in holding that Smith was not entitled to an exemption from the Oregon drug law because that law was a neutral law of general applicability and not subject to the exacting review of strict scrutiny.[46]

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panacea" of all church property issues as anticipated by the majority in *Jones*[]") (internal quotation marks omitted).

38 Sherbert v. Verner, 374 U.S. 398 (1963).

39 *Id.* at 399.

40 *Id.* at 401 (internal quotation marks omitted).

41 *Id.* at 402.

42 *Id.* at 406.

43 *Id.* at 406 ("We must next consider whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right."). A similar broad protection of religious freedom was recognized in *Yoder*, where the Court held that Amish children were not required to attend the ninth and tenth grade despite Wisconsin's compulsory attendance law. Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972).

44 Employment Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

45 *Id.* at 874.

46 *Id.* at 890.

In 1993, Congress responded to the *Smith* ruling by enacting the Religious Freedom Restoration Act, ("RFRA"), in an attempt to restore the *Sherbert* holding.[47] Under RFRA, in order for one to assert a valid free exercise claim, a plaintiff must demonstrate that a government regulation "substantially burden[s]" his or her religious practice.[48] Once the plaintiff satisfies this burden, the government must assert a compelling interest to support its regulation.[49] Despite this landmark congressional response, in the 1997 case of *City of Boerne v. Flores*, the Supreme Court declared RFRA unconstitutional as applied to state laws, based on federalism and separation of powers concerns.[50]

III. THE PRELUDE TO THE DECISIONS OF THE OREGON AND WASHINGTON BANKRUPTCY COURTS

This Part provides an overview of the traditional scope of the bankruptcy estate and briefly explains how church property is traditionally held by a Catholic diocese.[51] In light of this discussion, the decisions of *In re Roman Catholic Archbishop of Portland* and *In re the Catholic Bishop of Spokane* are then analyzed.[52]

A. The Bankruptcy Estate and the Trust Exception

Now that controlling precedent has been reviewed, it is appropriate to briefly review the recent decisions of the Washington and Oregon Bankruptcy Courts. At issue in both cases was the application of Section 541 of the Bankruptcy Code which governs the scope of the bankruptcy estate.[53] In fact, this provision embodies one of the basic principles supporting bankruptcy law.[54] In short, after a debtor files a petition, Section 541 creates a separate estate that holds the debtor's property interests during the administration of the bankruptcy case.[55] This provision serves to centralize the debtor's property interests by requiring creditors to receive satisfaction of their debts through a single court.[56] To

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47 42 U.S.C. § 2000bb (1993).
48 *Id.* § 2000bb-1(a).
49 *Id.* § 2000bb-1(b).
50 521 U.S. 507, 536 (1997).
51 *See infra* Parts III.A–B.
52 *See infra* Parts III.B.1–2
53 11 U.S.C. § 541 (2005).
54 RESNICK & SOMMER, *supra* note 5, at § 541.01 (declaring that "Section 541 embodies the essence of the Bankruptcy Code.").
55 51 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE § 51:3 (2d ed. 2006).
56 *Id.*

meet this end, Section 541 broadly defines the term "property of the estate[.]"[57] In relevant part, this section explicitly states: the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case . . . wherever located and by whomever held[.]"[58] In plain English, the estate includes any interest, wherever that interest is located.[59]

Section 541's scope, however, is not unlimited. In fact, the provision lists six categories of property that are excluded from a bankruptcy estate.[60] The particular exception at issue in both of the aforementioned church-property bankruptcy cases was § 541(d). This section excludes, from the bankruptcy estate, property in which the debtor "holds, as of the commencement of the case, only legal title and not an equitable interest[.]"[61] It was precisely this provision of the Bankruptcy Code that both the Oregon and Washington dioceses relied upon to support their position that church property should be excluded from the estate because the parish—not the diocese—was the equitable owner of the property.

B. The Corporation Sole and Canon Law

Before evaluating the position of the dioceses, it is important to note that the exclusion proposition presented by the church had a legitimate basis in current church structure and Canon Law. Regarding church structure, Catholic dioceses are either modeled in corporation sole or corporation aggregate form.[62] Both the Oregon and Washington dioceses adopted the corporate sole structure.[63] This structure is unique because it consists of one individual and his or her successors, by virtue of an office position, assuming the legal capacity of a corporation.[64] The focus of this model is to fashion an "official trusteeship" whereby one central entity, such as a bishop or diocese, holds purely legal title to church property and several constituent entities, such as parishes, enjoy

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57 11 U.S.C. § 541 (2005).

58 *Id.* § 541(a)(1).

59 *See id.*; Norton, *supra* note 55, at § 51:1.

60 RESNICK & SOMMER, *supra* note 5, at § 541.01.

61 11 U.S.C. § 541(d) (2005).

62 Felicia Anne Nadborny, Note, *"Leap of Faith" into Bankruptcy: An Examination of the Issues Surrounding the Valuation of a Catholic Diocese's Bankruptcy Estate,* 13 AM. BANKR. INST. L. REV. 839, 848 (2005).

63 *In re* Roman Catholic Archbishop of Portland in Or., 335 B.R. 842, 860 (Bankr. D. Or. 2005); *In re* the Catholic Bishop of Spokane, 329 B.R. 304, 324 (Bankr. E.D. Wash. 2005), *overruled by* Comm. of Tort Litigants v. Catholic Diocese of Spokane, 364 B.R. 81 (E.D. Wash. 2006).

64 1 JAMES D. COX, COX & HAZEN ON CORPORATIONS § 1.19 (2d ed. 1995).

an equitable interest in that property.[65] In essence, this structure imposes a model whereby the central authority holds property on behalf of the constituency, and a trust is created for the benefit of the congregation's constituency.[66]

This is hardly a novel concept; the church often holds property in trust for its congregation. In fact, this concept is rooted in Canon Law and arises from a very pragmatic purpose. The corporate sole structure developed as a way for parishes to restrict the diocese from controlling property that the parish purchased separately.[67] Under this structure, if a diocese attempted to subrogate parish property, Canon Law would be violated.[68] Essentially, Canon Law recognizes each individual parish as a separate legal entity.[69] More importantly, however, Canon Law recognizes that once a parish acquires assets with separate funds and in a separate capacity, the diocese is required to respect this separate acquisition and restrain itself from claiming an interest in the acquired property.[70] Despite this recognition, neither the Washington nor the Oregon Bankruptcy Court was responsive to these acknowledgements during litigation.

In each case, a local archdiocese filed a voluntary bankruptcy petition under Chapter 11 of the Bankruptcy Code.[71] Both dioceses listed parish property as property held in trust for another entity, namely the parishes themselves.[72] In response to this listing, the Tort Claimants' Committee filed an adversary proceeding seeking a declaration that parish property was included within the diocese bankruptcy estate.[73] In both cases, the church, focusing on section 541(d), argued that the

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65 *Id.*

66 *Id.*

67 JAMES A. CORIDEN, AN INTRODUCTION TO CANON LAW (Revised) 175 (2004); *see also* CODE OF CANON LAW c.1255 (stating that "[t]he universal Church and the Apostolic See, the particular churches as well as any other juridic person, whether public or private, are capable of acquiring, retaining, administering[,] and alienating temporal goods in accord with the norm of law[]").

68 Coriden, *supra* note 67, at 175.

69 *Id.*

70 *Id.*; *see also* CODE OF CANON LAW C. 1256 (stating that "[t]he right of ownership over goods under the supreme authority of the Roman Pontiff belongs to that juridic person which has lawfully acquired them[]").

71 *In re* Roman Catholic Archbishop of Portland in Or., 335 B.R. 842, 848 (Bankr. D. Or. 2005); *In re* the Catholic Bishop of Spokane, 329 B.R. 304, 310 (Bankr. E.D. Wash. 2005), *overruled by* Comm. of Tort Litigants v. Catholic Diocese of Spokane, 364 B.R. 81 (E.D. Wash. 2006)).

72 *In re Roman Catholic Archbishop of Portland*, 335 B.R. at 848; *In re the Catholic Bishop of Spokane*, 329 B.R. at 310.

73 *In re Roman Catholic Archbishop of Portland*, 335 B.R. at 850; *In re the Catholic Bishop of Spokane*, 329 B.R. at 310.

parish—not the diocese—was the equitable owner of parish property.[74] Both courts rejected this argument, holding that parish property was included in the bankruptcy estate.[75] Furthermore, the courts rejected a religious freedom defense to the proceeding which was presented by the church in each respective case.[76]

1. The Oregon Bankruptcy Court Decision

In the Oregon litigation, the Portland diocese argued, based on a First Amendment claim, that the court should "apply internal church law to determine what is property of the bankruptcy estate."[77] The court, relying on *Jones*, held that neutral principles of state law could be applied to determine whether church property was included in the bankruptcy estate.[78] In so holding, the court clearly stated that "consistent with First Amendment jurisprudence and the Bankruptcy Code, [we] will apply neutral secular principles of state law[.]"[79]

However, the RFRA argument that the Portland diocese put forth garnered a lengthier discussion of applicable principles from the court. After stating the prevailing standards, the court asserted that RFRA did not apply to § 541 determinations.[80] In fact, the court's position was that bankruptcy judges are unrestrained by RFRA when making estate determinations because the reviewing judge applies state law to render those decisions.[81] However, the court, to further its analysis, assumed that RFRA would apply.[82]

In this decision, the court did not extend its holding beyond the initial hurdle which required that the church prove a substantial burden on its religious freedom. The court explicitly stated that "[i]t is hard to understand how the court's determination of what constitutes property of the bankruptcy estate under § 541 could impose a substantial burden on the exercise of religion."[83] In other words, as long as secular law provided the church an opportunity to hold property in a manner that

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74 Nadborny, *supra* note 62, at 850–53.

75 *In re Roman Catholic Archbishop of Portland, 335 B.R.* at 868; *In re the Catholic Bishop of Spokane*, 329 B.R. at 333.

76 *In re Roman Catholic Archbishop of Portland*, 335 B.R. at 850; *In re the Catholic Bishop of Spokane,* 329 B.R. at 310.

77 *In re Roman Catholic Archbishop of Portland*, 335 B.R. at 853.

78 *Id.* at 852.

79 *Id.* at 854.

80 *Id.* at 861.

81 *Id.* at 860.

82 *Id.* at 860–61.

83 *Id.* at 861.

honored its religious tenets, no burden on religious practice was imposed.[84]

2. The Washington Bankruptcy Court Decision

Like the Oregon court, the Washington Bankruptcy Court was unreceptive to the church's arguments. There, the church took the firm stance and argued that the application of civil law, to any extent, would interfere with the free exercise of religion.[85] To support this theory, the Spokane bishop first raised the "church property" line of cases. In response, the bankruptcy court noted the potential application of this precedent to the present dispute, but distinguished the cases.[86] First, the court reasoned that the "church property" cases involved intra-church disputes, and, by contrast, the instant case involved a dispute between the church and third-party tort victims.[87] Here, the court determined that deference to church autonomy was not warranted in a third-party creditor-church relationship.[88]

In addition, the Washington court considered the application of *Smith* and RFRA. In this portion of its analysis, the reviewing judge focused on determining whether the application of § 541 of the Bankruptcy Code imposed a substantial burden on the church's free exercise of religion—just as the Oregon court had done.[89] However, unlike the Oregon court, the Washington court emphasized that the church was engaging in a secular activity.[90] Based on this distinction, the Washington court explicitly noted that "[r]eligious organizations do not exist on some ethereal plane far removed from society[,]"[91] but that the church engages in secular activities, such as defaulting on a mortgage, like other non-religious debtors.[92] To the Washington court, a bankruptcy petition is a secular activity, regardless of whether it is filed by an individual or a church. Because this law would be applicable to any other similarly-situated debtor, the court explained that there is no

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84 *Id.* at 862.

85 *In re* the Catholic Bishop of Spokane, 329 B.R. 304, 322 (Bankr. E.D. Wash. 2005), *overruled by* Comm. of Tort Litigants v. Catholic Diocese of Spokane, 364 B.R. 81 (E.D. Wash. 2006)).

86 *Id.* at 322–23.

87 *Id.* at 323.

88 *Id.*

89 *Id.* at 324.

90 *Id.*

91 *Id.*

92 *Id.*

burden that would give rise to a RFRA claim by the application of this particular law to the church.[93]

IV. WHY THE FREE EXERCISE CLAUSE AND RFRA APPLY TO BANKRUPTCY

Consideration of both the Oregon and Washington cases makes it clear that both dioceses were unsuccessful in persuading the bankruptcy court to adopt either the church-property or free exercise line of precedent; ipso facto, both courts were unreceptive to the argument that decisions issued by bankruptcy judges which allocate church property as the result of civil misconduct must be subjected to heightened scrutiny. Thus, Part IV argues that both decisions were incorrect for the reasons explained below.

A. Bankruptcy Is a System of Individualized Exemptions

First, *Smith*'s various holdings may provide a basis for heightening the level of scrutiny involved in estate determinations. While *Smith* has been referred to as the "death of free exercise[,]"[94] commentators often forget that *Smith* recognized two exceptions to its otherwise infamous holding.[95]

The first exception, often referred to as the hybrid rights claim, occurs when a plaintiff can connect a religious liberty claim to another constitutional right.[96] The second exception provides a heightened level

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93 *Id.* at 325.

94 Stephen L. Carter, Essay, *The Free Exercise Thereof,* 38 WILLIAM & MARY L. REV. 1627, 1628 n.5 (1997) ("[S]ome scholars have pessimistically declared the death of free exercise of religion.") (citing Rodney J. Blackman, *Showing the Fly the Way Out of the Fly-Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U. KAN. L. REV. 285, 407 (1994) (arguing that further application of the reasoning in recent Supreme Court cases would "render the Free Exercise Clause virtually judicially dead" for minority religious practices); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 140 (1992) (arguing that the neutrality principle incorrectly places "the freedom of citizens to exercise their faith . . . [at the mercy of the] vagaries of democratic politics . . . ."); Karen T. White, *The Court-Created Conflict of the First Amendment: Marginalizing Religion and Undermining the Law*, 6 U. FLA. J.L. & PUB. POL'Y 181, 186 (1994) ("In an effort to enforce government neutrality, the Court has rendered the Free Exercise Clause almost meaningless.")).

95 The holding in *Smith* was qualified by the United States Supreme Court in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The *Lukumi* decision narrowed the *Smith* holding to the extent that neutral laws of general applicability, *not enacted with hostility or malice towards a particular religious group*, will be upheld regardless of the severity of the burden imposed on one's religious practice. Evidence of such hostility or malice employed by a legislative body toward a particular group of believers would need to be supported by evidence in the record.

96 Employment Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 881 (1990). In *Smith*, the Court cited *Yoder* as an example of a parental right claim being combined with a free exercise claim to satisfy the 'hybrid rights' exception to *Smith*. *Id.*

of scrutiny when "a system of individual exemptions[]" has been created to determine whether a particular individual is entitled to a secular benefit.[97] To explain the meaning of this exception, the Court cited *Sherbert* as a perfect example of one such system.[98] Similarly, the authors of this Article believe that the bankruptcy system is another example of a system of individualized exemptions.

1. Defining a System of Individualized Exemptions

As a preliminary matter, one must first determine what qualifies as a system of individualized exemptions. The Supreme Court, with the exception of the *Sherbert* reference in *Smith*, has not defined this term.[99] In the absence of Supreme Court guidance, but with *Smith* clearly in mind, a pair of recent federal courts of appeals cases have provided guidance on the issue.

The first of these two opinions was issued by the United States Court of Appeals for the Third Circuit in the case of *Blackhawk v. Pennsylvania*.[100] There, the court was faced with the question of whether the Pennsylvania Game and Wildlife Code, which allowed the Game Commission to grant exemptions from a permit fee necessary to keep wild animals in captivity, satisfied the definition of a system of individualized exemptions.[101] Based on relevant portions of the Pennsylvania statute at issue, the Game Commission was provided the power to refrain from charging a permit fee to an applicant when the applicant's posited activity provided "some other tangible benefit for the welfare and survival of Pennsylvania's existing wildlife population[,]"[102] and when the purported use was "consistent with . . . the intent of [the Game and Wildlife Code][.]"[103]

After reviewing this language, the court determined that the Pennsylvania Game and Wildlife Code created a system of individualized exemptions.[104] Specifically, the court was persuaded by the fact that the language of the Game and Wildlife Code permitted exemptions when the purported use facilitated some benefit for Pennsylvania's existing wildlife.[105] The court concluded that the

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97 *Id.* at 884.
98 *Id.*
99 *Id.*
100 381 F.3d 202 (3d Cir. 2004).
101 *Id.* at 209.
102 *Id.* at 210 (internal quotation marks omitted) (emphasis omitted).
103 *Id.* (internal quotation marks omitted).
104 *Id.*
105 *Id.*

regulation vested game officers with broad discretion to waive permit requirements.[106] Armed with this discretion, the Game and Wildlife Code fostered "the opportunity" for a facially-neutral and generally-applicable law to be applied in a discriminatory manner.[107] Under such circumstances, *Smith*'s general rule did not apply.[108]

The United States Court of Appeals for the Tenth Circuit has also confronted a similar scenario. In *Axson-Flynn v. Johnson*,[109] Christiana Axson-Flynn, a member of the Church of Jesus Christ of Latter-day Saints, sought an exemption from the University of Utah's Actor Training Program ("ATP").[110] As part of the program, Axson-Flynn was asked to take roles that required her to say "'goddamn'" and "'fucking[,]'" words that she found religiously objectionable.[111] At first, her instructors seemed receptive to her religiously-motivated objections, but eventually pressured her to abandon them.[112] Based on this continued pressure, Axson-Flynn decided to withdraw from the program because she believed it was only a matter of time before she would be asked to leave.[113] After her withdrawal from the program, Axson-Flynn brought suit against the university, alleging an infringement of her religious liberty.[114]

In addressing her claim, the court considered the application of the individualized exemption doctrine to the ATP. Specifically, it found that instructors in the program had previously granted exemptions from specific scenes to Axson-Flynn and another student on religious grounds.[115] Based upon this, the court concluded that a question of fact was raised as to whether the ad hoc nature of ATP's grants of exemptions created a system of individualized exemptions.[116]

With this background in perspective, we contend that when the exception recognized in *Smith* is read together with the examples set forth in *Blackhawk* and *Axson-Flynn*, it becomes clear that these opinions accurately depict the proper criteria for a system of individualized exemptions. In light of these facts, we propose the following simple, two-part test:

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106 *Id.*
107 *Id.* at 209.
108 *Id.* at 210.
109 Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004).
110 *Id.* at 1281–83.
111 *Id.* at 1281–82.
112 *Id.* at 1282.
113 *Id.* at 1283.
114 *Id.*
115 *Id.* at 1298–99.
116 *Id.* at 1299.

> *To prove that a system of individualized exemptions exists, a plaintiff must demonstrate that: (1) there is a high level of discretion vested in the government officer at issue, and (2) there is some level of individualized inquiry into the reasoning behind the applicant's exemption request.*

To understand the origins of the first part of this test, one should review the issue before the *Blackhawk* court. In particular, the reader should carefully review the Third Circuit's critique of the broad discretion granted to game officers whereby those officers could exempt anyone from the Game Code if the proposed animal use was consistent with the purposes of the Code.[117]

In addition, in order to understand the second prong of the test, the reader should review the practices of the ATP in *Axson-Flynn*. In that case, the program instructors questioned Axson-Flynn and the other student who sought an exemption from the program on religious grounds about the religious nature of that request. After reviewing the nature of the exemption requests, the instructor had the authority to grant or deny these requests. To the Court of Appeals for the Tenth Circuit, this was a persuasive fact that supported its conclusion that a question of fact was created by the ad hoc nature of ATP's grants of exemptions.[118]

2. Applying Our Two-Part Test to Bankruptcy

In the context of bankruptcy proceedings, courts should adopt a three-step analysis. First, they should determine the identity of the government official making the exemption determinations. Second, they should determine the level of discretion that the identified official possesses. Third, they should consider the individualized nature of the inquiry that the official undertakes when rendering decisions. We will address each step in turn.

In bankruptcy, the government decision makers are bankruptcy judges.[119] After all, the judges are the individuals who apply the necessary body of law and reach what they consider to be a just outcome in each case.[120] Although bankruptcy judges are not the typical

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117 Blackhawk v. Pennsylvania, 381 F.3d 202, 210 (3d Cir. 2004).

118 *Axson-Flynn*, 356 F.3d at 1281–83 (noting that during the admission process, potential students were asked about possible objections to assigned coursework).

119 Judge Patricia C. Williams decided the Washington case. Judge Elizabeth Perris decided the Oregon case.

120 Young v. United States, 535 U.S. 43, 50 (2002) (upholding a bankruptcy court's exercise of equitable power to toll the statute of limitations on a tax debt).

governmental decision maker under a traditional Free Exercise analysis, the landmark case of *Shelley v. Kraemer* reminds us that judges are not new subjects of constitutional scrutiny and can properly be labeled as joint participants with the government to satisfy the requirement of governmental action under the First Amendment.[121]

3. The Question of Discretion: Bankruptcy Courts Are Courts of Equity but What Does That Mean When the Debtor Is a Religious Entity?

In the second step of our analysis, a review of the bankruptcy system and past decisions demonstrates that bankruptcy judges possess a high level of discretion. This discretion appears historically justified in view of the fact it has long been a maxim of bankruptcy law that bankruptcy courts are courts of equity.[122] Although the equitable powers of the bankruptcy court have never been precisely defined, an early illustration of the broad interpretation of this phrase is presented in *Pepper v. Litton*.[123]

In *Pepper,* the Court addressed a controlling stockholder's attempt to defraud his corporation's creditors through a scheme to have his judgment lien paid first from the corporation's assets.[124] The bankruptcy court directly disallowed this scheme by subordinating the stockholder's claim to that of other creditors.[125] The controlling stockholder appealed.[126]

In writing for a unanimous court, Justice Douglas broadly declared that "for many purposes 'courts of bankruptcy are essentially courts of equity, and their proceedings [are] inherently proceedings in equity.'"[127] Continuing, Justice Douglas wrote

> Among the granted powers are the allowance and disallowance of claims; the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto; the rejection in whole or in part "according to the equities of the case" of claims previously allowed; and the entering of such

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121 Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding that where a judicial officer enforced a private, racially-restrictive covenant there was a denial of equal protection).

122 Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1 (2006).

123 308 U.S. 295 (1939).

124 *Id.* at 297–99.

125 *Id.* at 296.

126 *Id.* at 302.

127 *Id.* at 304 (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934).

> judgments "as may be necessary for the enforcement of the provisions" of the act.[128]

Furthermore, he urged that "substance will not give way to form[.] . . . [T]echnical considerations will not prevent substantial justice from being done."[129] Essentially, Justice Douglas supported carte blanche power for bankruptcy courts to do "substantial justice[.]"[130] After applying those principles to the case before him, Justice Douglas upheld the bankruptcy court's practice of equitable subordination.[131] In strong language, Justice Douglas called it "the duty of the bankruptcy court" to undo the scheme that the controlling stockholder created.[132] Thus, within the context of these principles, he approved the bankruptcy court's practice of undoing a fully-perfected lien without having any express authority to do so.[133] This example shows that bankruptcy courts not only have the authority to deny a particular governmental benefit, but also possess the power to redefine a party's pre-existing rights. This breadth of discretion far exceeds that which was exercised in either *Blackhawk* or *Axson-Flynn*.

4. What About Individualized Inquiry: How Personal Do Bankruptcy Courts Get?

In addressing the third part of the inquiry, it would be intellectually dishonest to argue that bankruptcy judges do not engage in a significant level of individualized inquiry prior to rendering decisions. There are several provisions of the Bankruptcy Code, particularly in Chapter 11, that require a court to review the reasons behind the actor's proposed course of conduct.[134] As announced in *Smith*, the controlling test requires that the government assess "the reasons for the relevant conduct[]" and that a "good cause" standard is sufficient to "create[] a mechanism for individualized exemptions."[135]

Proponents of applying a similar standard to bankruptcy decisions need not search any further than section 105 of the Bankruptcy Code to

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128 *Id.* (footnotes omitted).
129 *Id.* at 305.
130 *Id.*
131 *Id.* at 312.
132 *Id.*
133 *Id.*
134 7 RESNICK & SOMMER, *supra* note 5, at § 1100.01 (noting bankruptcy courts' considerable discretion in evaluating a debtor's use of property, borrowing of funds, and other business decisions).
135 Employment Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 878, 884 (1990) (internal quotation marks omitted).

find government inquiries that mirror the good cause standard.[136] One illustration of such an inquiry occurs under the necessity of payment doctrine—which is supported by the bankruptcy court's section 105 powers.[137] In short, this doctrine requires a plaintiff to demonstrate the existence of a "compelling business justification, other than mere appeasement of a major creditor[]" to validate pre-plan payment of a pre-petition obligation.[138]

For instance, in *In re NVR L.P.*, a Chapter 11 debtor wanted to make early payments to a former employee and highly-regarded consultant.[139] As a basis for its proposed action, the debtor stated that it feared that the former employee would no longer recognize his obligation under the non-solicitation clause, which was part of the parties' original employment contract.[140] To address this concern, the debtor proposed to pay the former employee an overdue bonus, but general creditors objected to this payment.[141]

In reviewing the parties' dispute, the court concluded that the threat posed by the former employee's potential dishonor of the non-solicitation agreement was not a serious impediment to the Chapter 11 process.[142] In so holding, it noted that the debtor's claim was "too remote and speculative to justify" payment under the above-mentioned doctrine.[143] Simply stated, the court found an inadequate business basis to justify immediate payment.[144]

In comparison to the good cause standard, the analysis under the necessity of payment doctrine is nearly identical. The only difference between the standards employed is the exact wording of the inquiry. In *Smith*, the Court conceded that the good cause standard invites a system of "individualized exemptions."[145] In *In re NVR L.P.*, the court utilized a similar standard that can be characterized as a "good business reason" test.[146] Despite the different wording, these tests ultimately focus on the same point. In essence, the government wants to determine whether

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136 *See* 11 U.S.C. § 105(a) (2005) (stating that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title[]").

137 NORTON, *supra* note 55, at § 13.8 (citing Miltenberger v. Logansport C. & S.W.R. Co., 106 U.S. 286 (1882)).

138 *In re* NVR L.P., 147 B.R. 126, 128 (Bankr. E.D. Va. 1992).

139 *Id.* at 127.

140 *Id.* at 128.

141 *Id.*

142 *Id.* at 128.

143 *Id.*

144 *Id.*

145 Employment Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 884 (1990) (internal quotation marks omitted).

146 *In re NVR L.P.*, 127 B.R. at 128.

there is a good reason for the private party's proposed conduct.[147] Under either test, the third step of our proposed analysis is satisfied. Because bankruptcy is a system of individualized exemptions, strict scrutiny should be applied to the process of liquidation when bankruptcy courts consider church property issues.

B. City of Boerne v. Flores*: RFRA's Application to Bankruptcy Is Constitutional Even When State Law Standards Are Applied*

This portion of the article is subdivided in several categories. First, Part IV.B reviews the relevant post-*Flores* decisions. Second, the *Flores* rationales are examined and applied to bankruptcy. Finally, Part IV.B discusses the source of Congress's extended power in bankruptcy to make religious freedom decisions.

RFRA applies to bankruptcy decisions even when state law provides the governing standard.[148] The Oregon Bankruptcy Court directly questioned the validity of this theory based on the notion that in order to decide section 541 issues, bankruptcy judges have to apply state law, and RFRA is void as to those laws.[149] Implicitly, the court raised a constitutional objection to the application of RFRA to state law determinations.[150] A proper review of *Flores*, post-*Flores* decisions, and the special features of the Bankruptcy Clause, suggest that this conclusion is in error.

From the outset, the circumstances under which a constitutional challenge to RFRA's application in bankruptcy could arise must be set forth. To properly understand this context, one must reconsider the role of the bankruptcy judge in these proceedings. Recall that a bankruptcy judge applies both federal and state law in rendering his or her

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147 *Compare In re NVR L.P.*, 127 B.R. at 128, *with Smith,* 494 U.S. at 884.

148 Vill. of Bensenville v. Fed. Aviation Admin., 457 F.3d 52, 60 (D.C. Cir. 2006) ("RFRA's compelling interest test remained in effect as to the federal government."); O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003) ("We have in the past left open the question whether the RFRA may be applied to the internal operations of the national government. Today we join the other circuits and hold that it may be so applied.") (citation omitted); Guam v. Guerrero, 290 F.3d 1210, 1221 (9th Cir. 2002) (holding that RFRA was applicable in the "federal realm."); Kikumura v. Hurley, 242 F.3d 950, 959–60 (10th Cir. 2001) ("The invalid portion of RFRA does not alter the structure of RFRA, it simply prevents the application of the statute to a certain class of defendants."); *In re* Young, 141 F.3d 854, 861 (8th Cir. 1998) (holding RFRA constitutional as applied to bankruptcy law).

149 *In re* Roman Catholic Archbishop of Portland in Or., 335 B.R. 842, 860–61 (Bankr. D. Or. 2005).

150 *Id.* at 861.

decisions.[151] In fact, the Bankruptcy Code instructs a judge to review state law in a number of core bankruptcy areas.[152]

On the other hand, a closer examination of the duty to apply both state and federal law reveals a potential conflict. One should recall that *Flores* invalidated RFRA as applied to state actors applying state law.[153] In view of the United States Supreme Court's 2006 decision in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[154] it is clear that the post-*Flores* RFRA decisions which held RFRA enforceable against federal actors applying federal law[155] were rightly decided. Therefore, a conflict is apparent because a federal actor—the bankruptcy judge—must apply state law in the discharge of his federal duties.[156] This point strikes a balance between *Flores* and post-*Flores* decisions.[157]

1. Post-*Flores* Case Law

This conflict, however, can be resolved in examining the rationale underlying *In re Young*,[158] the first United States Court of Appeals decision to be issued in the wake of *Flores*.[159] In *Young*, two religious adherents tithed ten percent of their annual income to their church.[160] This practice continued when the two filed for protection under Chapter

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151 Thomas E. Plank, *The Erie Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 635–36 (2004) (stating that the Bankruptcy Code in over fifty locations refers to non-bankruptcy law, applicable law, state law, or local law; in addition, noting that the two most important terms in the Bankruptcy Code, "'property of the estate'" and "'creditor[,]'" are defined by nonbankruptcy law).

152 *Id.*

153 City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

154 546 U.S. 418 (2006) (upholding RFRA against federal actors applying federal law).

155 Vill. of Bensenville v. Fed. Aviation Admin., 457 F.3d 52, 60 (D.C. Cir. 2006); O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003); Guam v. Guerrero, 290 F.3d 1210, 1221 (9th Cir. 2002); Kikumura v. Hurley, 242 F.3d 950, 959–60 (10th Cir. 2001); *In re* Young, 141 F.3d 854, 861 (8th Cir. 1998).

156 Plank, *supra* note 151, at 635–36.

157 *See id.* at 635–36.

158 *In re Young*, 141 F.3d at 854.

159 *See* Susan D. Franck, Comment, *Christians v. Chrystal Evangelical Free Church: Interpreting RFRA in the Battle Among God, the Government, and the Bankruptcy Code*, 81 MINN. L. REV. 981, 983 (1997) ("The Eighth Circuit is the first circuit court to evaluate the application of RFRA in relation to tithing, bankruptcy, and fraudulent conveyance law.") (citing *In re* Young, 82 F.3d 1407, 1416 (8th Cir. 1996)). *See* Iru C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 587–588 n.90 (1990) ("Bankruptcy legislation enacted in 1998 provides religion-neutral protection for gifts by insolvent debtors to charitable institutions, including religious entities.") (citing 11 U.S.C. § 548(a)(2)(1994)). While the tithing question has since been resolved, the RFRA considerations at issue have not. *Id.*

160 *In re Young*, 141 F.3d. at 857.

7 of the Bankruptcy Code.[161] At that point, the bankruptcy trustee sought to avoid the Youngs's pre-petition tithes under 11 U.S.C. § 548(a)(2)(A), the fraudulent-conveyance provision of the Code.[162] In response, the church that received the tithes, and was now being sued, raised a defense to such action based on RFRA.[163] The Court of Appeals for the Eighth Circuit held that RFRA applied to this federal law.[164]

In attempting to understand this holding, some emphasis should be placed on the court's conclusion.[165] The court explicitly declared "we conclude that, under the Bankruptcy Clause and the Necessary and Proper Clause of Article I of the Constitution, RFRA is constitutional as applied to *federal law*."[166] Despite this broad statement, the *Young* court did not openly address the issue of whether its holding would extend to Code provisions that apply state law.[167] Nevertheless, this opinion clearly demonstrates the foresight of several circuits in enforcing RFRA against the federal government prior to the *Gonzalez* decision.[168]

In reaching its decision, the *Young* court first noted the distinct holding of *Flores* in comparison with the precise issue before it.[169] On this point, the court stated that *Flores* dealt with Congress's remedial powers under Section 5 of the Fourteenth Amendment, not Congress's

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161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.* at 861 ("We conclude that RFRA is an appropriate means by Congress to modify the United States bankruptcy laws. . . . RFRA, however, has effectively amended the Bankruptcy Code, and has engrafted the additional clause to § 548(a)(2)(A) that a recovery that places a substantial burden on a debtor's exercise of religion will not be allowed unless it is the least restrictive means to satisfy a compelling governmental interest.") (citation omitted).

165 For example, the Court stated that "[t]he key to the separation of powers issue [here] is . . . not whether Congress disagreed with the Supreme Court's constitutional analysis, but whether Congress acted beyond the scope of its constitutional authority in applying RFRA to federal law." *Id.* at 860.

166 *Id.* at 856.

167 *Id.*

168 *Id.* at 860; Guam v. Guerrero, 290 F.3d 1210, 1221 (9th Cir. 2002) ("Likewise, we do not see how, by enacting RFRA for the federal sphere, Congress violates the separation of powers doctrine. The sweeping language used in *Boerne* derived from the Court's discussion of Congress's exercise of its Fourteenth Amendment enforcement authority, but when Congress is acting pursuant to its plenary power, it has the ability, and duty, to legislate according to its own interpretation of the Constitution.") (citation omitted); Kikumura v. Hurley, 242 F.3d 950, 959 (10th Cir. 2001) ("These separation of powers concerns the Court expressed in *Flores*, however, do not apply to RFRA as applied to the federal government. Congress'[s] power to apply RFRA to the federal government comes not from its ability to enforce the Fourteenth Amendment but rather from its Article I powers.").

169 *In re Young*, 141 F.3d at 858–59.

bankruptcy power.[170] More importantly, the court stated that *Flores* positively reflected the conclusion that Congress had its own spheres of authority where it maintained dominion to determine controlling constitutional principles.[171]

In addition, the *Young* court also focused on Congress's broad intent in protecting religious liberty when it enacted RFRA.[172] Here, the court stated that such broad intent demonstrates that Congress wanted to maintain RFRA's validity as to the federal government, even if it did not apply to state governments.[173] To the *Young* court, the combination of Congress's broad intent and its bankruptcy power provided a basis to conclude that RFRA still applied to the federal government;[174] *Gonzalez* later confirmed the *Young* court's prescient intuition.

In applying this reasoning, the *Young* court eluded to the *Flores* Court's separation of powers rationale by asserting that the true issue in separation of powers cases is not that Congress's opinion of Free Exercise differed from the Court's, but that Congress had constitutional authority to enact RFRA as to the federal government.[175] In dealing with *Flores,* based on this distinction, the court held that Congress had full authority to apply RFRA to bankruptcy proceedings.[176]

In sum, the *Young* court articulated two points. First, it stated that *Flores*' separation of powers rationale did not extend to areas in which Congress had final constitutional authority.[177] Second, it reasoned that Congress's plenary power over bankruptcy provided it with the requisite authority to amend bankruptcy law by passing RFRA without actually amending the Bankruptcy Code.[178]

In viewing the second rationale, it may appear that its natural extension is the untenable proposition that Congress, upon taking broad remedial action, effectively amends every area of federal law controlled under the scope of its Article I powers.[179] Initially, this assertion may seem contradictory considering Congress's purported source of authority for RFRA and the intrinsic nature of Federalism which mandates that Congress operate as a creature constrained by the

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170 *Id.*

171 City of Boerne v. Flores, 521 U.S. 507, 535 (1997) ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.").

172 *In re Young*, 141 F.3d at 859.

173 *Id.*

174 *Id.*

175 *Id.* at 860.

176 *Id.* at 861.

177 *Id.* at 860.

178 *Id.* at 861.

179 *See id.*

principles of limited government.[180] It is this Article's position, however, that this apparent contradiction is resolved when one reconciles *Young* with other relevant case law.

For example, the case of *In re Hodge*[181] arises from the same factual circumstance as *Young*. In *Hodge*, a Chapter 7 trustee attempted to avoid pre-petition tithes to the debtor's church as fraudulent conveyances.[182] Again, the court rejected this argument.[183] In its opinion, the court reasoned that Congress had the authority to amend the Bankruptcy Code and other specific areas of federal law.[184] It stated that no one would challenge the assertion that Congress could individually amend each federal statute if it so desired.[185] In respect of that power, the court found no justification to prevent Congress from accomplishing, in a comprehensive manner, what it could effectuate on a per-statute basis.[186] Thus, the *Hodge* court augmented *Young*'s holding by adding the principle that Congress can fail to state certain authority to support its enactment of legislation and still apply that legislation in the exercise of its enumerated Article I powers.[187]

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180 H.R. Rep. No. 103-88, at 9 (1993) (stating that Congress has the constitutional authority to enact H.R. 1308 [RFRA]. Pursuant to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause embodied in Article I, Section 8 of the Constitution, the legislative branch has been given the authority to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority). In reviewing the above language, one should notice that the only Article I clause cited as support for RFRA's enactment is the Necessary and Proper Clause. Perhaps, Congress might have been better positioned to enact RFRA if they had identified the specific Article I powers involved. If Congress had done so, an argument would exist that the result in *Boerne* should mirror the result in *McCulloch v. Maryland*. In that case, the congressional action of establishing national banks was declared constitutional because the litigants could relate the subject legislation to additional Article I powers besides the Necessary and Proper Clause. The powers involved were: the taxing power, the borrowing power, the spending power, and the power to raise and support an army. McCulloch v. Maryland, 17 U.S. 316, 364 (1819).

181 220 B.R. 386, 389 (D. Idaho 1998).

182 *Id.* at 389.

183 *Id.* at 398 ("The question of constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise. Regardless of the absence of such recitals in a statute's legislative history, it will be upheld so long as Congress had authority as an objective matter to enact it.") (citation omitted) (internal quotation marks omitted).

184 *Id.*

185 *Id.*

186 *Id.*

187 *Id.* Under these standards, it is certainly within the power of Congress under the Bankruptcy Clause to amend the Bankruptcy Code to ensure that it provides the level of protection th[at] Congress deems adequate for free-exercise rights. *Id*. Accordingly, the Court holds that RFRA, as applied in this instance, is a proper exercise of Congress's power under the Bankruptcy Clause. *Id*.

2. The Attack on *Flores*

Apart from the post-*Flores* decisions cited above, a proper factual perspective, a proper reading of *Flores*, and thoughtful consideration of the unique nature of the Bankruptcy Clause support the application of RFRA to bankruptcy law. First, it cannot be disputed that as a matter of fact, a bankruptcy judge is a federal actor, regardless of whether the court is charged with the task of applying federal or state law.[188] To accept the idea that a bankruptcy judge somehow transforms from a federal to state actor by applying state law is to basically accept the argument that a traditional Article III judge becomes a non-federal actor when he or she applies state law in diversity cases.[189] Instead, it is easier to concede that the judge is a federal actor who is just facilitating federal duties through the use of state law.[190]

This conclusion is supported by consideration of *Flores* and its potential application to bankruptcy. In *Flores*, Justice Kennedy focused both on federalism and separation of powers issues.[191] Justice Kennedy briefly expressed concern about the burden that RFRA would place on the state actor's inherent right to regulate its citizens, and that Congress had essentially abrogated the *Marbury* power by creating a statutory cause of action.[192] However, our assertion is that these two rationales do not present the same problem in bankruptcy.

First, federalism does not bar RFRA's application. In reaching this conclusion, Justice Kennedy's articulated federalism protest to RFRA must be considered. On this point, he wrote that RFRA "would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate . . . their citizens."[193] A fair reading of this passage reveals that Justice Kennedy's

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188 *See* Plank, *supra* note 151, at 633–36.

189 32 AM. JUR. 2D *Federal Courts* § 398 (2006) (articulating the Erie doctrine, which holds that a federal judge is required to apply substantive rights provided by state law when deciding state-law claims).

190 A perfect example of this principle is found in further examination of the Erie Doctrine. For instance, if a case involves a federal interest of the highest order, an Article III judge is required to apply federal substantive law when deciding diversity cases—even if the cause of action involved is based solely on state law. *Id.* Similar to Article III judges, the bankruptcy court often uses its equitable powers to craft supreme federal law. Levitin, *supra* note 122, at 78–82 (collecting examples of the bankruptcy court using its equitable power to create federal common law).

191 City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

192 *Id.* at 533–36.

193 *Id.* at 534.

main concern was the administrative burden that RFRA places on state regulatory schemes.[194]

However, this concern does not extend to bankruptcy because Congress's regulatory scheme is burdened by RFRA, not the scheme of a particular state.[195] Section 541 is a perfect example of this principle because, under that section, if a debtor successfully excludes property from the bankruptcy estate, the Bankruptcy Code's fundamental aim of centralizing the debtor's property interests, rather than a state's interest, is undermined.[196] Therefore, RFRA poses no threat to state regulatory schemes.

In addition, separation of powers does not present an obstacle to the application of RFRA to bankruptcy cases. This assertion derives from Congress's unique powers over bankruptcy law.[197] Just as the *Young* court noted, Congress has plenary authority over this matter and can dictate controlling standards within it.[198]

Further, there is a unique history behind the Bankruptcy Power that supports the construction of a different relationship between Congress and the judiciary.[199] Thus, the final pages of this Article articulate the significant reasons why bankruptcy proceedings present this unique relationship.

3. Constitutional Support for Considering Congress More Powerful Under the Bankruptcy Clause

The investigation into constitutional support for this altered relationship begins at the relevant constitutional text. Article I, § 8, cl. 4 of the United States Constitution provides: "Congress shall have power . . . [t]o establish . . . uniform laws on the subject of bankruptcies throughout the United States[.]"[200] In reviewing this provision, it is important to note the exact language used and how that language implicates a powerful congressional status. Specifically, the reader

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194 *See id.*

195 *See* U.S. CONST. art. I, § 8, cl. 4.

196 RESNICK & SOMMER, *supra* note 5, at § 541.01.

197 Int'l Shoe Co. v. Pinkus, 278 U.S. 261, 265 (1929) ("The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount.").

198 *In Re* Young, 141 F.3d 854, 860 (8th Cir. 1998) (quoting I.N.S. v. Chadha, 462 U.S. 919, 941 (1983)).

199 Randolph J. Haines, *The Uniformity Power: Why Bankruptcy is Different*, 77 AM. BANKR. L.J. 129, 129 (2003) (arguing that Congress has a broader power under the Bankruptcy Clause to abrogate sovereign immunity than other Article I powers).

200 U.S. CONST. art. I, § 8, cl. 4.

should pay attention to words such as "to establish" and "uniform[.]"[201] Together, these words suggest that the Constitution contemplates Congress's role in bankruptcy to be more active than that of a mere regulator; rather, the Constitution imbues Congress with express rule-making power.[202]

A review of the language of the Commerce Clause supports this assertion. This Clause, located just one provision above the Bankruptcy Clause, provides: Congress shall "regulate Commerce with foreign Nations, and among the several States[.]"[203] Comparing this text with the Bankruptcy Clause, there is an obvious difference between the two.[204] In dealing with commerce, the Framers stated a clear intention that Congress act as a regulator by using the word "regulate[,]"[205] while the Framers used much stronger language when defining the Congressional Bankruptcy Power.[206] To disregard this contrast, in light of the reality that the Framers contemporaneously constructed both powers,[207] is to accept the proposition that powers located only a clause apart from each other, with markedly different language, grant the same scope of authority.[208]

In addition to the constitutional text, further support for a broad bankruptcy power can be located in the unique purpose and history of bankruptcy law. Unlike other Article I powers, bankruptcy was intended to be an exclusively federal field.[209] In part, this exclusivity was

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201 *Id.*

202 Haines, *supra* note 199, at 166–67.

203 U.S. CONST. art. I, § 8, cl. 3.

204 *See* U.S. CONST. art. I, § 8, cl. 3–4.

205 U.S. CONST. art. I, § 8, cl. 3.

206 U.S. CONST. art. I, § 8, cl. 4.

207 *See* THE FEDERALIST NO. 42, at 221 (James Madison) (Gideon ed. 2001). James Madison stated that

> [t]he power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie, or be removed into different states, that the expediency of it seems not likely to be drawn into question.

Id. As the Madison passage demonstrates, the Founder's understanding of the relationship between the bankruptcy and commerce powers, in addition to their choice of different language in defining these powers, signifies that the two powers are to be interpreted differently. Naturally, given the powerful language of the Bankruptcy Clause, our argument is that this clause be subject to a broad interpretation.

208 Even the father of judicial review, John Marshall, noted the distinctive text of the Bankruptcy Clause. *See* Sturges v. Crowninshield, 17 U.S. 122, 193–94 (1819) ("The peculiar terms of the [bankruptcy clause] certainly deserve notice. Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States.").

209 Levitin, *supra* note 122, at 71–72.

necessary where the Framer's could not garner enough full faith and credit to ensure that the colonies would respect one another's insolvency laws.[210] This conflict arose when one colony granted a debtor a discharge from his obligations and another colony would imprison the discharged debtor for failure to pay debts to its citizens.[211] To provide uniformity, the Framers, through the Constitution, empowered Congress, via the Bankruptcy Clause, to pave the way for matters of insolvency to be decided exclusively in the federal courts.[212]

Early on, Congress used this power in a unique manner. For example, immediately after the Constitution was adopted, Congress granted federal courts the authority to issue writs of habeas corpus to release debtors from state prisons.[213] In comparison, the habeas right was not offered to other state prisoners for another half century.[214] This historical point is important because it demonstrates the flexibility that Congress possesses in exercising its bankruptcy power.[215]

As a final point, the United States Supreme Court has recognized a stronger congressional role in bankruptcy law. For instance, in *Central Virginia Community College v. Katz*,[216] the Court deferred a valuable constitutional question to congressional discretion. In *Katz*, various state institutions were sued for receiving preferential transfers from an insolvent debtor.[217] Later, when that same debtor filed for bankruptcy, the United State's Trustee initiated a suit to recover the payments already distributed.[218] The state institutions raised a sovereign immunity defense.[219] However, the Court rejected this defense.[220]

In reviewing the Court's decision, the final paragraph of the majority's opinion is worthy of discussion. There, Justice Stevens stated:

> Congress may, at its option, either treat States in the same way as other creditors insofar as concerns "Laws on the subject of Bankruptcies" or exempt them from

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210 *See* Haines, *supra* note 199, at 152–57.

211 *Id.* at 155.

212 *Id.* at 156.

213 Central Virginia. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1002–03 (2006) ("[I]t [America's bankruptcy law] specifically granted federal courts the authority to issue writs of habeas corpus effective to release debtors from state prisons.").

214 *Id.* at 1003.

215 *See* Haines, *supra* note 199, at 152–57.

216 *Katz*, 126 S. Ct. at 1005 (holding that the Bankruptcy Clause of Article I abrogates state sovereign immunity).

217 *Id.* at 994.

218 *Id.*

219 *Id.* at 995.

220 *Id.* at 1002.

> operation of such laws. Its power to do so arises from the Bankruptcy Clause itself; the relevant "abrogation" is the one effected in the plan of the Convention, not by statute.[221]

A thorough reading of this passage reveals that the Court deferred the sovereign immunity question, one traditionally determined by the judiciary,[222] to Congressional discretion.[223] This deference to Congress demonstrates that the Court was receptive to the position that Congress has the power to decide matters of constitutional law in the bankruptcy setting.[224]

Second, it is also significant that the Court derived its decision from the construction of the Constitution.[225] The Court implied that the founding document vests Congress with controlling constitutional authority in this area.[226] In other words, the Court recognized that Congress is the constitutional head of matters concerning bankruptcy law.[227]

V. CONCLUSION

In summation, there are two cognizable grounds to support the assertion that bankruptcy judges must apply heightened scrutiny to church property decisions. First, the bankruptcy court itself is a system of individualized exemptions in which a governmental decision maker, the bankruptcy judge, is vested with wide discretion to grant exemptions to certain individuals. Second, RFRA is valid in its application to the federal government even when a judge utilizes state law in the effectuation of federal duties. The fact that federal judges may be called

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221 *Id.* at 1005.

222 Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 n.7 (1996) (citations omitted) (citing the origins of the Court's sovereign immunity doctrine).

223 *See Katz*, 126 S. Ct. at 1005.

224 *Id.*

225 *Id.* ("[Congress's] power to [abrogate sovereign immunity] arises from the Bankruptcy Clause itself; the relevant 'abrogation' is the one effected in the plan of the Convention, not by statute.").

226 *See id.*

227 *See Katz*, 126 S. Ct. at 1002. As additional support for its holding, the *Katz* Court relied on the core nature of a preference action to bankruptcy proceedings stating, "Petitioners do not dispute that that authority[, power of bankruptcy courts to avoid preferences,] has been a core aspect of the administration of bankrupt estates since at least the 18th century." *Id.* The authors would assert that this statement buttresses the theory that decisions in other core areas of bankruptcy, such as what interests of the debtor are included in the estate property under 11 U.S.C. § 541, must also be within Congress's final constitutional discretion.

upon to apply state law is not a compelling reason to prevent the application of RFRA to bankruptcy judges. Arguments to the contrary negate the very nature of Congress's broad powers under the Bankruptcy Clause.

In closing, the authors recognize that some people may be reluctant to extend strong protection to the Roman Catholic Church—or any religious entity—in view of the circumstances that surround the entity's bankruptcy proceedings. However, the factual predicate of this case must not confuse our legal thought. Here, bankruptcy courts have been presented with *bona fide* debtors constrained by the mistakes of their past. This is exactly the type of case the bankruptcy system was designed to address.

Ultimately, the aforementioned proposal is preferable because it allows the entity to attain the benefits of this system without requiring it to sacrifice all semblances of internal autonomy. In any event, if dioceses are forced to cease operations, it is not the entity that will be most harshly affected; rather, it is the entity's congregation who will no longer be able to fulfill the mission of that organization which will bear the brunt of these potential distributions. Considering the number of people who would be affected if a diocese was required to distribute all its assets to satisfy debts, it makes sense for a tort-creditor to bear the burden of proving a compelling justification for enforcing the debt before he or she holds a great number of innocent individuals responsible for the harm caused by a few.