

2006

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Recommended Citation

Daniel J. Marcinak, *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 (2006).

Available at: <https://scholarship.law.edu/lawreview/vol55/iss2/9>

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SEPARATION OF CHURCH AND ESTATE: ON EXCLUDING PARISH ASSETS FROM THE BANKRUPTCY ESTATE OF A DIOCESE ORGANIZED AS A CORPORATION SOLE

By Daniel J. Marcinak⁺

At the closing of St. Bridget's Catholic Church on Chicago's Southwest Side in July 1990, one man confessed, "When St. Bridget goes, a little of me is going, too."¹ The pastor of St. Bridget's, the church where Chicago's late Mayor Richard J. Daley wed in 1936, said, "I feel like I'm presiding over a huge family wake."² In the early 1990s, the pastor of St. Paul's in Noe Valley, California, concurred when he acknowledged, "The church is not just a building. It's an institution, a community—a family, really. So this is like a death. And if a parish dies—for whatever reason—it's demoralizing. It just zaps your energy."³ Mary Giorgio, ninety-one years old and a parishioner of St. Susanna's in Dedham, Massachusetts for forty-three years, was among that church's first parishioners.⁴ St. Susanna's hosted weekly dances, weddings, memorial Masses, and the funeral of Mary's late husband, Salvatore.⁵ Mary described her bond to the parish as "just part of me" and "a feeling of being complete . . . I get up in the morning, knowing I am going to St. Susanna's to start the day off right."⁶ Upon hearing that St. Susanna's would close, Mary recalls thinking "please God, if my time is coming, make it happen before the parish closes . . . I can have a Catholic funeral in any church. But I cannot conceive of myself having the last rites and leaving this world from another parish."⁷ The communities of St. Bridget's, St. Paul's, and St. Susanna's surely did not welcome these

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1. Isabel Wilkerson, *Catholic Parish Closings Bring Tears in Chicago*, N.Y. TIMES, July 9, 1990, at A10.

2. *Id.*

3. Don Lattin, *13 Catholic Parishes to Close*, S.F. CHRON., Nov. 15, 1993, at A1.

4. Elizabeth Mehren, *A Parish, and Its Faithful, in Limbo*, L.A. TIMES July 9, 2004, at A1.

5. *Id.*

6. *Id.*

7. *Id.*

closings, but a decline in parish enrollment in the 1980s and 1990s presented financial difficulties that made closures inevitable.⁸

Not nearly as inevitable are parish closings that may result from the sex-abuse scandal that has buffeted the American Roman Catholic Church (Church).⁹ That scandal unfolded when the *Boston Globe* reported in 2002 that the Boston Archdiocese knowingly transferred at least one abusive priest among several parishes over several years.¹⁰ This revelation spurred sex-abuse allegations against Church clergy throughout the country.¹¹ Between 1950 and mid-June 2005, sexual abuse claims had cost the Church in America \$1.06 billion.¹² Some

8. See Lattin, *supra* note 3; Mehren, *supra* note 4; Wilkerson, *supra* note 1.

9. Cf. Dene Moore, *Abuse Suit Forces Sale of Churches*, TORONTO STAR, May 10, 2005, at A1, 2005 WLNR 7324768 (describing parish closings in Newfoundland, Canada). After sixteen years of litigation over sex-abuse claims, the Supreme Court of Canada upheld rulings by lower courts against the Catholic Diocese of St. George's in Newfoundland. *Id.* To satisfy the judgment for \$13 million, "[a]ll of the churches, all of the parish houses, all the missions," approximately 150 properties, will be sold. *Id.*

10. See Michael Rezendes, *Church Allowed Abuse by Priest for Years*, BOSTON SUNDAY GLOBE, Jan. 6, 2002, at A1. However, the genesis of parish closings in and around Boston actually antedate the scandal. See Kathy McCabe, *As Parishes Close, Survivors Plot Future*, BOSTON SUNDAY GLOBE, Apr. 5, 1998, at 4 North (discussing in 1998 Archdiocesan plans to close several dozen parishes through "2008 because of declining attendance and shrinking numbers of clergy").

11. See Laurie Goodstein, *Boston Priests' Sex-Abuse Scandal Has Ripple Effect; Other Names Are Released*, N.Y. TIMES, Feb. 17, 2002, at A27. Of course, guilt does not fall on all priests or all bishops in the United States: incidents of sexual child abuse implicated four percent of Catholic priests in America from 1950 to 2002 (4392 of 109,694). JOHN JAY COLL. OF CRIMINAL JUSTICE, THE NATURE AND SCOPE OF THE PROBLEM OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 6, <http://www.usccb.org/nrb/johnjaystudy/exec.pdf> (last visited Oct. 26, 2005). In dioceses confronting charges of sexual abuse, it is fair to note that some of the bishops dealing with the fallout have often been handed these charges from their predecessors: Archbishop Seán O'Malley of Boston (appointed in 2003), The Most Reverend Seán Patrick O'Malley, OFM Cap, Archbishop of Boston, <http://www.rcab.org/People/cardinalOMalley.html> (last visited Sept. 30, 2005); Archbishop Timothy Dolan of Milwaukee (appointed in 2002), The Most Reverend Timothy M. Dolan; Archbishop of Milwaukee, <http://www.archmil.org/bishops/ArchbishopDolan.asp> (last visited Sept. 30, 2005); Bishop Gerald Kicanas of Tucson (appointed in 2001), Most Reverend Gerald F. Kicanas, Sixth Bishop of Tucson, <http://www.diocesetucson.org/bishop2.html> (last visited Sept. 30, 2005); and Bishop John Vlazny of Portland, Oregon (appointed in 1997), Archbishop John G. Vlazny, <http://www.archdpdx.org/abvlazny/abvlazny.htm> (last visited Sept. 30, 2005). For a question-and-answer presentation on the sex-abuse scandal, see Catholic Answers Staff, *Q&A: Understanding the Priest Scandal*, THIS ROCK, Nov. 2002, <http://www.catholic.com/thisrock/2002/0211fea2.asp>.

12. See Rachel Zoll, *Sex Abuse-Related Costs Top \$1 Billion*, MIAMI HERALD, June 10, 2005, at A1, 2005 WLNR 9200385. Between 2002 and mid-2005, the Church spent at least \$378 million defending against sex-abuse claims. See *id.*

Church dioceses managed to settle their claims.¹³ The Archdiocese of Boston was the first diocese to consider bankruptcy protection,¹⁴ but the Archdiocese of Portland, Oregon was the first diocese to file for bankruptcy protection on July 6, 2004.¹⁵ The Diocese of Tucson¹⁶ and the Diocese of Spokane¹⁷ soon followed, and more are expected.¹⁸ Because no American diocese had ever filed for bankruptcy protection, this area of the law involves “totally uncharted waters.”¹⁹

The uncertainty arises when determining whether a diocese, organized under state law as a corporation sole where a bishop holds legal title to all parish property, is required under bankruptcy law to include parish assets in the diocese’s bankruptcy estate in violation of Church law.²⁰

13. See, e.g., Kelly St. John, *San Francisco Archdiocese to Pay \$16 Million*, S.F. CHRON., July 10, 2005, at A21, 2005 WLNR 10801737 (reporting that the Archdiocese of San Francisco settled one dozen lawsuits); Bruce Schreiner, *Diocese OKs \$120 Million Fund for Abuse Victims*, COLUMBIAN (Vancouver, Wash.), June 4, 2005, at A5, 2005 WLNR 8960442 (reporting that the Diocese of Covington, Kentucky settled with more than one hundred alleged victims for \$120 million in what has become the largest settlement of sex-abuse claims); William Lobdell & Jean Guccione, *Diocese’s Deal Raises the Bar Across the U.S.*, L.A. TIMES, Dec. 4, 2004, at A1 tbl. (listing twenty settlements between 2002 and 2004).

14. See Stephen Kurkjian & Michael Rezendes, *Bankruptcy Filing Called Option for Archdiocese*, BOSTON GLOBE, Aug. 2, 2002, at A1; see also David A. Skeel, Jr., *Avoiding Moral Bankruptcy*, 44 B.C. L. REV., 1181, 1181-83 (2003) (exploring the implications of bankruptcy for the Boston Archdiocese).

15. See Laurie Goodstein, *Oregon Archdiocese Files for Bankruptcy Protection*, N.Y. TIMES, July 7, 2004, at A12. Filing for bankruptcy under Title 11 of the United States Code (Chapter 11) makes it less likely that creditors can seize parish assets such as churches and schools. See Skeel, *supra* note 14, at 1188. As long as a nonprofit organization, such as a diocese, remains in bankruptcy under Chapter 11, a bankruptcy court cannot order the liquidation of its assets. See 11 U.S.C. § 303(a) (2000) (protecting nonprofit organizations from forced liquidation of assets); Skeel, *supra* note 14, at 1189.

16. See Michael Clancy, *Diocese Files for Bankruptcy*, ARIZ. REPUBLIC, Sept. 21, 2004, at A1. On September 20, 2005, Tucson became the first diocese to emerge from bankruptcy litigation. See Arthur H. Rotstein, *Diocese Officially Free from Bankruptcy*, TUCSON CITIZEN (Ariz.), Sept. 21, 2005, at 4A (remarking that the dioceses of Portland and Spokane “remain mired in litigation and far from resolution of their cases”). As part of Tucson’s reorganization plan and settlement agreement, more than \$22 million will be made available to claimants. *Id.*

17. See Janet I. Tu, *Spokane Diocese Files Bankruptcy*, SEATTLE TIMES, Dec. 7, 2004, at B1.

18. See Zoll, *supra* note 12. Some scholars have offered advice to dioceses as they weigh their legal options. See, e.g., Skeel, *supra* note 14, at 1183 (suggesting possible scenarios and hypothetical situations a bankrupt diocese might face); see also Raymond C. O’Brien, *Clergy, Sex and the American Way*, 31 PEPP. L. REV., 363, 365-67 (2004) (cautioning the Church not to use canon law as an obstacle to transparency).

19. 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).

20. See *infra* Part II.A. Key to Tucson’s emergence from bankruptcy has been the plaintiffs’ willingness not to litigate this issue. Cf. Steve Woodward, *Background Check*,

Resolution of this quandary is far reaching because more than one-half of the 195 dioceses of the Church in the United States are corporations sole.²¹ In reality, however, the corporation sole structure does not approximate the Church's own organization.²² Whenever a bishop has mere legal title to parish assets, he "owns" those assets for the benefit of the parishes in his diocese; consequently, a diocese legally holds parish properties in trust for parishes.²³ Victims in the sex-abuse scandal who have sued dioceses eye these parish assets because their inclusion

OREGONIAN, July 12, 2005, at A6. Recognizing that litigation of this issue could have continued for years and "completely eviscerated" the value of a settlement, the bankruptcy judge in Tucson concluded that he "had no factual evidence that the creditors would be better off through litigation." Arthur H. Rotstein, *Bankruptcy Judge OKs Tucson Diocese Plan to Reorganize*, ARIZONA REPUBLIC, July 12, 2005. He also posed a rhetorical challenge: "What's a used church worth? . . . Who would want to buy it?" Sheryl Kornman, *Diocese to Pay \$10M Upfront as Plan OK'd*, TUCSON CITIZEN (ARIZ.), July 12, 2005, at 1A, 2005 WLNR 10963613.

21. See Francis Cardinal George, *The Cardinal I Never Knew: George Mundelein*, CATHOLIC NEW WORLD (Chi.), Mar. 5, 2000, http://www.catholicnewworld.com/archive/card_arch/card2000/030500_geo.html (commenting on a recent biography of the late Cardinal Mundelein entitled *Corporation Sole* and how widespread that form of incorporation is in the United States); see also DEP'T OF COMMC'NS, U.S. CONFERENCE OF CATHOLIC BISHOPS, CATHOLIC INFORMATION PROJECT 5 (2003), available at <http://www.usccb.org/comm/cipfinal.pdf> (describing the Church's presence in all fifty states, the District of Columbia, the U.S. Virgin Islands, and for U.S. military personnel).

22. See Affidavit of William S. Skylstad at 14, *Committee of Tort Litigants v. Catholic Bishop of Spokane (In re The Catholic Bishop of Spokane)*, Case No. 04-08822-PCW-11, Adv. Proc. No. 05-80038 (Bankr. E.D. Wash. May 27, 2005). The Bishop of Spokane explains:

It is important to note that the Roman Catholic Church does not understand its structures in terms of a corporation, but rather in terms of a government. Though we have a unique corporate form for civil purposes, the corporation sole, we are structured more in lines with a government in order to fulfill the mission of Jesus Christ through the three-fold ministries of sanctifying, teaching and governing. This system of governance predates the civil law of the United States by more than one thousand years and does not easily fit into its categories.

Id.

23. See Affidavit of William S. Skylstad, *supra* note 22, at 13, 26. Bishop Skylstad clarifies:

The assets strictly defined as property of the juridic person of the diocese and those assets belonging to the juridic persons of the parishes are not my assets and not subject to my control in an unfettered manner. When a bishop acts as the trustee, for example in the sale of parish property, he does not act as its owner. The parish is the owner and receives the benefit of the sale.

Id. at 26. In its Statement of Financial Affairs included within its bankruptcy petition, the Diocese of Spokane pleaded it "has no equitable beneficial or proprietary interest in [relevant] property but, in some cases, holds mere legal title. In addition, certain of the property is subject to a restriction imposed by the donor or grantor." Statement of Financial Affairs at question 14, *In re The Catholic Bishop of Spokane*, Case No. 04-08822-PCW11 (Bankr. E.D. Wash. Filed July 6, 2004).

deepens diocesan pockets.²⁴ In Portland, plaintiffs dispute Archdiocesan calculations of \$10 million to \$50 million in assets, contending that diocesan assets, with parish assets included, total between \$300 million and \$500 million.²⁵ In Spokane, Bankruptcy Judge Patricia Williams has already determined that parish properties—“churches, schools, cemeteries and other parcels”—belong in the diocese’s bankruptcy estate.²⁶ Bankruptcy Judge Elizabeth Perris ruled similarly for the Portland plaintiffs.²⁷

24. See Ashbel S. Green, *Records Detail Case Against Church*, SUNDAY OREGONIAN, July 11, 2004, at A1. Retribution also motivates victims. See Kevin Leininger, *Woman Seeks Restitution for Abuse*, NEWS-SENTINEL (FORT WAYNE, IND.), July 16, 2005, at A1, 2005 WLNR 11187156 (profiling a woman who revealed she would not have sought financial compensation save for the fact that lawyers told her “nothing hurts [the diocese] but money”).

25. Green, *supra* note 24. The Archdiocese of Portland listed this amount in its bankruptcy petition. Statement of Financial Affairs, *supra* note 23, at Information Regarding the Debtor. Plaintiffs are suing the Archdiocese of Portland for \$534 million. See *Court Weighs What Church Assets Are Vulnerable in Sex-Abuse Suits*, SEATTLE TIMES, Jan. 31, 2005, at B2. The Diocese of Spokane claims that without parish assets, its estate is worth approximately \$11 million plus about \$15 million in insurance; including parish property increases the estate to approximately \$80 million. See Nicholas K. Geranios, *Spokane Diocese, Struggling for Money, Could Close Parishes*, SEATTLE TIMES, July 10, 2005, at B5, 2005 WLNR 10824800. Because the diocese must pay attorneys’ fees for itself and plaintiffs, Spokane was at one point “bleeding” more than \$325,000 a month. See *id.* Low cash reserves have now forced the diocese to stop paying legal fees, a circumstance that prompted Bankruptcy Judge Patricia Williams to question “how many churches are we going to have to sell just because we can’t get to plan confirmation?” See John Stucke, *Diocese in Cash Crunch: Lawyers Last Paid Two Months Ago*, Spokesman-Rev. (Spokane, Wash.), Mar. 29, 2006, at 1A, 2006 WLNR 5307101.

26. See *Comm. of Tort Litigants v. Catholic Diocese of Spokane (In re The Catholic Bishop of Spokane)*, 329 B.R. 304, 311, 333 (Bankr. E.D. Wash. Aug. 26, 2005) (order denying motion to dismiss); *Shea v. Catholic Bishop of Spokane (In re The Catholic Bishop of Spokane)*, No. 04-08822-PCW11, Chapter 11, Adv. No. A04-00291-PCW, 2005 Bankr. LEXIS 1605, at *2-3, *9-10 (Bankr. E.D. Wash. Aug. 26, 2005) (denying the Diocese’s motion to dismiss). The Diocese filed its appeal with the United States District Court for the Eastern District of Washington on September 6, 2005. See Janet I. Tu, *Spokane Diocese Appeals Court Ruling*, SEATTLE TIMES, Sept. 7, 2005, at B7. While pursuing this appeal, the Diocese has proposed a settlement of \$45.7 million with seventy-five plaintiffs in addition to making several non-monetary concessions. Janet I. Tu, *Proposed Sex-Abuse Settlement More Than Just Money*, SEATTLE TIMES, Feb. 2, 2006, at A1. Though it is unclear how the Diocese will raise this money, it is expected that parishioners will “have to make a significant long-term sacrifice to make this settlement work” with the “possibility that some parish properties will be sold.” *Id.*

27. See Susan Palmer, *Judge Rules Parishes Don’t Own Property*, THE REGISTER-GUARD (Eugene, Or.), Dec. 31, 2005, at A1. The Archdiocese appealed to the United States District Court for the District of Oregon in January. See Matt Miller, *Portland Diocese Plans Battle*, DAILY DEAL (N.Y., N.Y.), Feb. 16, 2006, available at 2006 WLNR 2668846.

Alexis de Tocqueville wrote that the judiciary nary fails to decide a political question in the United States.²⁸ The Archdiocese of Portland's filing for bankruptcy protection launched an epic that eventually could culminate in resolution by the United States Supreme Court.²⁹ Between the plaintiffs' bar and the Church are the victims of sexual abuse whose interests vary; current plaintiffs who wish to maximize their own recovery against a diocese have different interests from future claimants who may find all diocesan assets expended to satisfy the claims of those who filed suit earlier.³⁰ The parties are in no position to relent: the plaintiffs stand to collect millions of dollars through either their tort claims or federal bankruptcy courts, and dioceses are striving to retain their focus on the religious mission that cannot be accomplished without parish property. Often there is an unwillingness to compromise, precipitating a constitutional battle that could reverberate for years to come.³¹

28. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J.P. Mayer ed., George Lawrence trans., Perennial Library, Harper & Row 1988) (1835).

29. See Matt Miller, *Court Weighs in on Catholic Church's Financial Structure*, BROWARD DAILY BUSINESS REVIEW, Sept. 7, 2005, at 8 ("In theory, the appeal could move from district court to the 9th Circuit Court of Appeals and then to the Supreme Court."); see also Matt Miller, *Real Estate Key For Portland Church*, DAILY DEAL, Apr. 15, 2005, 2005 WLNR 5873667 (quoting an archdiocesan lawyer who said "[t]he [Portland bankruptcy] court's decision on the parish property issues will have far-reaching effect") (second alteration in original). Mitchell Garabedian, plaintiffs' attorney in Boston, predicted: "I think if the church doesn't get its way in the Bankruptcy Court, there will be a lot of aggressive litigation. . . ." Marie Beaudette, *Churches Weigh Going Bankrupt To Escape Suits*, LEGAL TIMES (Wash., D.C.), July 26, 2004, at 1. In Spokane, appealing the bankruptcy court's decision to the United States Supreme Court could take more than nine years. John Stucke & Virginia de Leon, *Decision May Cost Diocese*, SPOKESMAN-REV. (Spokane, Wash.), Aug. 27, 2005, at A1, 2005 WLNR 13812622.

30. See Letter from Most Reverend John G. Vlazny to the parishioners of the Archdiocese of Portland in Oregon (July 6, 2004), at <http://www.archdpdx.org/bankruptcy/bankruptcy-letter.html> (describing the conflicting interests of current and future plaintiffs). Archbishop Vlazny explained:

[Bankruptcy] is, in fact, the only way I can assure that other claimants can be offered fair compensation. . . .

. . . One plaintiff seeks more than \$130 million in compensatory and punitive damages, the other \$25 million. . . . With 60 other claims pending, I cannot in justice and prudence pay the demands of these two plaintiffs.

Id.; cf. Skeel, *supra* note 14, at 1197-98. One commentator notes:

One sometimes hears the argument that the Church needs to file for bankruptcy . . . so that it will have sufficient financial resources to help others who are in need elsewhere. The Church's continued capacity for ministry is crucially important, but the principal objective must be to minister to those who have been abused—the victims.

Skeel, *supra* note 14, at 1197-98 (citation omitted).

31. See, e.g., Sanders, *supra* note 19. Statements by plaintiffs' attorneys in Portland and Tucson leave no doubt that they would be willing to litigate as far as they can. See *id.*; Matt Miller, *Tucson Diocese Details Prepack*, DAILY DEAL (N.Y., N.Y.), Sept. 22, 2004,

This Comment explores the limits on assets of a Church diocese organized as a corporation sole that has filed for bankruptcy under Title 11 of the United States Code (Chapter 11). This Comment first describes the corporation sole's existence in the United States, the Church canon law that governs the relationship between a diocese and parishes, and the necessary elements for creating a trust to exclude certain property from the diocese's bankruptcy estate. Then, this Comment will explain the bankruptcy procedures that define the bankruptcy estate under Chapter 11 and the limits of the bankruptcy estate when property is held in trust. Next, this Comment discusses the effects under the First Amendment of compelling a diocese to liquidate parish properties. This Comment argues that a state's corporation sole statute both creates a statutory trust and incorporates canon law. Federal law contemplates this arrangement, and the Free Exercise Clause of the First Amendment forbids its disregard. This Comment concludes that a court infringes upon a diocese's free-exercise rights when the court applies a neutral law of general applicability, in a discriminatory manner, to the determination of a diocese's bankruptcy estate.

2004 WLNR 4656404 [hereinafter Miller, *Tucson Diocese*]. David Slader, lead attorney for a group of plaintiffs in Portland, described the Portland Archdiocese's filing for Chapter 11 protection as a "fraud on the bankruptcy court." Sanders, *supra* note 19. Another attorney for a group of plaintiffs in Tucson, Lynne Cadigan, once described the Tucson Diocese's filing under Chapter 11 as "a sham," further claiming that "[t]his turns [the bankruptcy] into a phone company fraud-recovery scheme." Miller, *Tucson Diocese* (second alteration in original). Cadigan was planning to litigate the bankruptcy "aggressively," *id.*, but the settlement in Tucson has "educated" her about the Diocese of Tucson's wish to use the bankruptcy route to seek an equitable solution. See Rotstein, *supra* note 20. Despite some measure of reconciliation, the litigation has been acrimonious. See Stephanie Innes, *Court May Toss Some Abuse Claims*, ARIZONA DAILY STAR, June 28, 2005, at B1, 2005 WLNR 10638427 (stating that one plaintiff's attorney likened the Diocese of Tucson's bishop to cult leader Jim Jones); Reply Brief by Mr. Shea and Brief in Opposition to Motion of Diocese for Summary Judgment at 13-15, Shear v. Catholic Bishop of Spokane, (*In re The Catholic Bishop of Spokane*), Case No. 04-08822-PCW11, Adv. No. 04-00291-PCW (Bankr. E.D. Wash. June 10, 2005) (arguing that nineteenth-century Popes had something in common with "bigotry," the "lunatic fringe," "prejudice," and "hate-mongers," and that explanations of certain papal pronouncements were "metaphysical, theosophical, and/or theological niceties [which] were lost upon the common patrons of taverns such as the proverbial Joe six pack"; apparently, the declaration of papal infallibility was so alarming that it "created a situation" Ulysses S. Grant could not ignore).

I. GOVERNING THE CHURCH WITH CIVIL AND CANON LAW

A. *The Use of the Corporation Sole Within the American Church*

A corporation sole is “a continuous legal personality that is attributed to successive holders of certain monarchical or ecclesiastical positions.”³² Originating in England,³³ the corporation sole first evolved to manage ecclesiastical ownership of property.³⁴ The corporation sole appeared in the American colonies to serve the same function,³⁵ but hierarchical administration was not very popular in the newly born republic.³⁶ America’s first Catholic bishop, John Carroll of Baltimore, eschewed the corporation sole for his episcopacy, endorsing instead a trustee arrangement with lay involvement “to accommodate Catholic ecclesiastical structures and practices to the democratic élan of the age.”³⁷ The Church might have abandoned the corporation sole entirely

32. BLACK’S LAW DICTIONARY 342 (7th ed. 1999); see also HOWARD L. OLECK, *NONPROFIT CORPORATIONS, ORGANIZATIONS, AND ASSOCIATIONS* 20 (5th ed. 1988) (describing the corporation sole as a “one-man corporation”).

33. Harold J. Laski, *The Early History of the Corporation in England*, 30 HARV. L. REV. 561, 573-78 (1917).

34. See James B. O’Hara, *The Modern Corporation Sole*, 93 DICK. L. REV. 23, 26 (1988) (tracing the origin of the corporation sole to ecclesiastical management of church property in the mid-fifteenth century). The corporation sole served a secular function as well, according to William Blackstone, as it defined the English monarchy. WILLIAM BLACKSTONE, *COMMENTARIES* *469 (“[T]he king is a sole corporation [and] so is a bishop. . . .”) (footnote omitted); see also Frederic Maitland, *The Crown As Corporation*, 17 LAW Q. REV. 131, 131-32 (1901) (marking the birth of the King of England’s corporation sole with Sir Edward Coke’s description of the “crown as corporation”). Despite the corporation sole’s English heritage, canon law was so pervasive an influence that recognition of the ecclesiastical origins of English law has been subdued. See Edward D. Re, *The Roman Contribution to the Common Law*, 29 FORDHAM L. REV. 447, 484 (1961). Professor Re writes:

It must be obvious that the failure to attribute a separate treatment to the canon law is not because it has not made a monumental contribution. Rather, since the canonical influence has been the sturdy thread that has given body and texture to the entire legal fabric, it has been impossible to separate its influence throughout the discussion of other areas.

Id.

35. Paul G. Kauper & Stephen C. Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1499, 1502, 1509-10 (1973).

36. *Id.* at 1509-11. The civil form exemplified by the king was in even worse shape after American independence. See O’Hara, *supra* note 34, at 28-29. O’Hara identifies only a few civil offices that remained corporation soles in the United States as late as 1847: some probate judges, some town supervisors, and the Governor of Tennessee. See *id.*

37. THOMAS W. SPALDING, *THE PREMIER SEE*, 19, 21 (1989) (quoting PATRICK W. CAREY, *PEOPLE, PRIESTS, AND PRELATES: ECCLESIASTICAL DEMOCRACY AND THE TENSIONS OF TRUSTEEISM* 17 (1987)). Additionally, anti-hierarchical sentiment influenced many states legislatures to enact laws requiring lay ownership of Church property. See Kauper & Ellis, *supra* note 35, at 1511, 1520-22.

were it not for lay abuse of Church property.³⁸ As a result, in 1832, the Maryland General Assembly agreed to incorporate the Archdiocese of Baltimore as a corporation sole.³⁹ Eventually, most dioceses across the United States organized as corporations sole.⁴⁰

About one-half of states provide by statute for the corporation sole as a form of incorporation for religious organizations.⁴¹ Some statutes, such as Washington State's, require adherence to the doctrine of the bishop's church in exchange for corporate powers:

Any person, being the bishop, overseer or presiding elder of any church or religious denomination in this state, may, in conformity with the constitution, canons, rules, regulations or discipline of such church or denomination, become a corporation sole, . . . and, thereupon, said [person] . . . together with his successors in office or position . . . shall be held and deemed to be a body corporate⁴²

Other statutes, like Colorado's, allow corporations sole to "hold and maintain real, personal, and mixed property . . . and perform all other acts in furtherance of the objects and purposes of the corporation not inconsistent with the statutes of [the] state."⁴³ Some state laws more

38. SPALDING, *supra* note 37, at 91-93; J.A. Chisholm, *Civil Incorporation of Church Property*, in CATHOLIC ENCYC., <http://www.newadvent.org/cathen/07719b.htm> (last visited Oct. 29, 2005). The First Provincial Council of Baltimore declared:

"Since lay trustees have too often abused the power given them by the civil law, to the great detriment of religion, we greatly desire that in the future no church shall be built or consecrated unless it shall have been assigned, by written instrument to the bishop in whose diocese it is to be built, wherever this can be done."

Id. (quoting the fifth decree of the First Provincial Council of Baltimore).

39. See SPALDING, *supra* note 37, at 116-17.

40. See *id.* at 117.

41. See Patty Gerstenblith, *Associational Structures of Religious Organizations*, 1995 BYU L. REV. 439, 456 (1995). Gerstenblith reports that as of 1995, twelve states explicitly permitted religious organizations to incorporate as corporations sole with some variation; nine states had, at one time or another, enacted special legislation granting the corporation sole to certain religious groups; three states had a form of corporation sole not explicitly described as such; and two states recognized only the common law corporation sole. *Id.* at 456-58.

42. WASH. REV. CODE § 24.12.010 (West 2005). The Oregon statute reads similarly. See OR. REV. STAT. § 65.067 (2003).

43. COLO. REV. STAT. § 7-52-103 (2004); see also ARIZ. REV. STAT. ANN. § 10-11901 (West 2004) ("Corporations may be formed to acquire, hold and dispose of church or religious society property for the benefit of religion, for works of charity and for public worship . . ."); HAW. REV. STAT. ANN. § 419-1 (LexisNexis 2004) (permitting Hawaiian corporations sole "for the purposes of administering and managing the affairs, property, and temporalities of the church"); NEV. REV. STAT. ANN. 84.050 (LexisNexis 1999) (declaring that in Nevada "[a] corporation sole shall have power . . . [t]o acquire and

specifically describe the powers of a corporation sole; for example, the Washington statute reads: "All property held in such official capacity by such bishop . . . shall be in trust for the use, purpose, benefit and behoof of his religious denomination, society or church."⁴⁴ The articles of incorporation for a corporation sole reflect this language of a trust.⁴⁵

B. *The Elements of a Trust*

A trust is "a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons."⁴⁶ Elementally, a trust requires only a trustee, beneficiary, property, and a settlor who creates the trust.⁴⁷ The settlor must properly manifest an

possess . . . and to hold and maintain property, real, personal and mixed . . . as may be necessary to carry on or promote the objects of the corporation").

44. WASH. REV. CODE ANN. § 24.12.030; *see also* MONT. CODE ANN. § 35-3-205 (2003) (stating that a corporation sole in Montana shall hold property "in trust for the use, purpose, and benefit" of the religious organization); GUAM CODE ANN. tit 18, § 10105 (1992) (declaring that all properties a bishop in Guam administers "shall be held in trust by him as a corporation sole for the use, purpose, behoof, and sole benefit of his religious denomination, society, or church, including hospitals, schools, colleges, orphan asylums, parsonages, and cemeteries thereof"). In Montana and Washington, the powers of a corporation sole operate "for the purpose of the trust." *See* MONT. CODE ANN. § 35-3-205; WASH. REV. CODE ANN. § 24.12.020.

45. *See, e.g.*, Affidavit of Nicholas P. Cafardi Exhibit E at art. I, Comm. of Tort Litigants v. Catholic Bishop of Spokane (*In re* The Catholic Bishop of Spokane) Case No. 04-08822-PCW11, Adv. Proc. No. 05-80038 (Bankr. E.D. Wash. May 27, 2005). The articles of incorporation for the Diocese of Spokane, adopted in 1915, specifically designate that they are "subscribed . . . in the manner prescribed" by Washington's corporation sole statute. *Id.* at art. IV.

46. RESTATEMENT (THIRD) OF TRUSTS § 2 (2003); *see also* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 1 (rev. 2d ed. 1984) (adopting the definition in the Restatement (Second) of Trusts: "a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another").

47. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 2 cmt. f, 3 (2003). A fuller definition elsewhere describes a trustee as

[o]ne who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary. Generally, a trustee's duties are . . . to protect and preserve the trust property, and to ensure that it is employed solely for the beneficiary, in accordance with the directions contained in the trust instrument.

BLACK'S LAW DICTIONARY 1519 (7th ed. 1999). A corporation may serve the role of the trustee provided that this capacity is consistent with the corporate purpose. *See* RESTATEMENT (THIRD) OF TRUSTS § 33(1) cmt. b (2003). Furthermore, "no policy of the trust law restricts the types of property interests a trustee may hold in that fiduciary capacity." *Id.* § 40 cmt. b.

intention to create the trust⁴⁸ and may be a trustee or a beneficiary.⁴⁹ Thus, so long as there exists an “external expression of intention,” neither insufficient language nor failure to hand over a trust instrument will defeat a trust relationship.⁵⁰ When the existence of a trust is doubtful, decisive are the “[a]cts or communications prior to and subsequent to, as well as those contemporaneous with, the transfer or other act that is claimed to create a trust.”⁵¹ If the trust concerns land, a writing is required.⁵² However, trusts also may be created by statute:

Some . . . American statutes . . . not only create or provide for the creation of trusts, but also give some details as to the method of execution of the trusts, such as the trustee’s duties as to the disposition of the funds, accountings, and termination. To this extent these statutory trusts are not normal trusts[]

. . . .⁵³

Whether a “normal” or statutory trust exists, the trustee ordinarily possesses legal title of the property while the beneficiary commands an equitable interest.⁵⁴

C. The Church’s Own Legal System: Canon Law

Much like the universality of basic trust elements, the Code of Canon Law applies universally to the Church.⁵⁵ The Code addresses the Church’s hierarchical constitution.⁵⁶ Canon law also addresses relationships with norms outside the Code; specifically, its subjects are

48. RESTATEMENT (THIRD) OF TRUSTS § 13 (2003).

49. *See id.* § 3 cmts. c, d.

50. *See id.* § 13 cmts. a, b, c.

51. *Id.* § 13 cmt. b.

52. *Id.* § 22, § 22 cmts. a, b. This requirement dates back to an English enactment in 1677 known as the Statute of Frauds. *See id.* § 13 cmt. a. Most jurisdictions in the United States have the same requirement. *Id.* Despite this requirement, an implication of trust with respect to a corporation sole arises without need of trust language on records or titles. *See* BOGERT & BOGERT, *supra* note 46, § 37 (“If the [corporation sole] is to be a trustee, and *there is no implication of a trust from the nature of the corporation sole*, it would seem that the Statute of Frauds . . . would require a trust of realty to appear on the face of the deed or will.” (emphasis added)).

53. BOGERT & BOGERT, *supra* note 46, § 246; *see also* RESTATEMENT (THIRD) OF TRUSTS § 10 cmt. b (2003) (mentioning examples of statutory trusts such as a recovery in a wrongful-death action that goes to specially designated individuals and forced elective share proceeds that benefit a surviving but incapacitated spouse).

54. *See* RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. d.

55. *See* 1983 CODE c.12, § 1 (“All persons for whom universal laws were passed are bound by them everywhere.”). But there can be some slight variations among dioceses. *See id.* § 2 (“[A]ll persons who are actually present in a certain territory are exempted from the universal laws which do not have force in that territory.”).

56. *See id.* cc.330-572 (encompassing a section of canon law referred to as “The Hierarchical Constitution of the Church”).

required to obey canon law as much as civil law, insofar as the latter does not contravene the former.⁵⁷ Parallels of governance, for example, extend to canon law's incorporation of civil-law notions of contract,⁵⁸ a strict-scrutiny standard for reviewing laws that imperil the free exercise of rights,⁵⁹ and an interpretation of canon law primarily through the plain meaning of its text.⁶⁰

Both legal systems also share the notion of a fictitious legal person.⁶¹ Canon law prescribes that "[b]esides physical persons, there are also in the Church juridic persons, that is, subjects in canon law of obligations and rights which correspond to their nature."⁶² The purpose of a juridic person is to promote "works of piety, of the apostolate or of charity, whether spiritual or temporal."⁶³ Some juridic persons are "public," founded with a mission to serve the public good.⁶⁴ Availing themselves of the "innate right to acquire, retain, administer and alienate temporal goods . . . independently of civil power,"⁶⁵ public juridic persons may acquire property known as "ecclesiastical goods."⁶⁶ Dioceses⁶⁷ and

57. See *id.* c.22 ("Civil laws to which the law of the Church defers should be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless it is provided otherwise in canon law.").

58. See *id.* c.1290. Canon 1290 maintains:

Whatever general and specific regulations on contracts and payments are determined in civil law for a given territory are to be observed in canon law with the same effects in a matter which is subject to the governing power of the Church, unless the civil regulations are contrary to divine law or canon law makes some other provision

Id.

59. See *id.* c.18 ("Laws which establish a penalty or restrict the free exercise of rights or which contain an exception to the law are subject to a strict interpretation.").

60. See *id.* c.17 ("Ecclesiastical laws are to be understood in accord with the proper meaning of the words considered in their text and context.").

61. See HARRY G. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 11-12 (2d ed. 1970) (crediting the creation of the *persona ficta* in the thirteenth century to Pope Innocent IV).

62. 1983 CODE c.113, § 2.

63. *Id.* c.114, § 2.

64. See *id.* c.116, § 1.

65. *Id.* c.1254, § 1.

66. See *id.* c.1257, § 1. The designation of ecclesiastical goods has a twofold effect on the property owned by a public juridic person: "1) it recognizes the ecclesial value of such goods; 2) it declares such goods subject to the power of the competent ecclesiastical authority, remaining firm that the *property belongs to the single juridic persons.*" Affidavit of Nicholas P. Cafardi Exhibit D, *supra* note 45, at 1.

67. See 1983 CODE c.369. Canon 369 defines a diocese as

a portion of the people of God which is entrusted for pastoral care to a bishop with the cooperation of the presbyterate, so that, adhering to its pastor and gathered by him in the Holy Spirit through the gospel and the Eucharist, it

parishes⁶⁸ are some such juridic persons, each one juridically individual and separate.⁶⁹

Under canon 1256, “ownership over goods . . . belongs to that juridic person which has lawfully acquired them.”⁷⁰ These and other ecclesiastical goods are to be administered by the bishop for his diocese⁷¹ or by the pastor for his parish,⁷² but in all cases, they are “bound to fulfill their office with the diligence of a good householder.”⁷³ Among their primary duties are:

1° take care that none of the goods entrusted to their care is in any way lost or damaged . . . ;

2° take care that the ownership of ecclesiastical goods is safeguarded through civilly valid methods;

3° observe the prescriptions of both canon and civil law or those imposed by the founder, donor or legitimate authority; they must especially be on guard lest the Church be harmed through the non-observance of civil laws⁷⁴

constitutes a particular church in which the one, holy, catholic and apostolic Church of Christ is truly present and operative.

Id.

68. *See id.* c.515, § 1 (defining a parish as “a definite community of the Christian faithful established on a stable basis within a particular church; the pastoral care of the parish is entrusted to a pastor as its own shepherd under the authority of the diocesan bishop”).

69. *See id.* c.373 (“[O]nce [dioceses] have been legitimately erected [they] enjoy juridic personality by reason of the law itself.”); *id.* c.515, § 3 (“A legitimately erected parish has juridic personality by the law itself.”).

70. *Id.* c.1256.

71. *See id.* c.393 (“The diocesan bishop represents his diocese in all its juridic affairs.”). The bishop is required to administer his diocese with the assistance of a finance council. *Id.* c.492, §§ 1-3.

72. *Id.* c.532 (“The pastor represents the parish in all juridic affairs in accord with the norm of law”). A pastor must establish a finance council to assist him. *Id.* c.537.

73. *Id.* c.1284, § 1.

74. *Id.* § 2. Other duties admonish the householder to:

4° accurately collect the revenues and income of goods when they are legally due, safeguard them once collected, and apply them according to the intention of the founder or according to legitimate norms;

5° pay the interest on a loan or mortgage when it is due and take care that the capital debt itself is repaid in due time;

6° with the consent of the ordinary invest the money which is left over after expenses and which can be profitably allocated for the goals of the juridic person;

7° keep well ordered books of receipts and expenditures;

8° draw up a report on their administration at the end of each year;

9° duly arrange and keep in a suitable and safe archive the documents and deeds upon which are based the rights of the Church or the institution to its goods; deposit authentic copies of them in the archive of the curia when it can be done conveniently.

Additionally, administrators of Church property must observe the restriction on alienation of Church property by obtaining permission from the “competent authority according to the norm of law” whenever alienation of a juridic person’s “stable patrimony” exceeds the sum that canon law prescribes.⁷⁵

Should canon law require amplification, recourse is available through other interpretive principles such as “the mind of the legislator.”⁷⁶ To this end, Pontifical Council for the Interpretation of Legislative Texts “consists mainly in interpreting the laws of the Church” and “publish[ing] authentic interpretations confirmed by pontifical authority.”⁷⁷ Short of these authentic interpretations of canon law, the Code contains procedures for adjudging rights under it.⁷⁸ Ordinarily, the diocesan bishop is the adjudicator of canon law within his diocese.⁷⁹ However, if the disagreement involves the diocese itself, the Roman Rota—the Church’s highest court⁸⁰—hears the case.⁸¹

Id.

75. *Id.* c.1291; *see also id.* c.1292. The competent ecclesiastical authority is the diocesan bishop unless the sum exceeds \$500,000, at which amount a diocesan bishop in the United States must obtain permission from the United States Conference of Catholic Bishops. *See id.* c.1292, § 1; Robert T. Kennedy, *Title III: Contracts and Especially Alienation*, in *NEW COMMENTARY ON THE CODE OF CANON LAW*, 1492, 1496-98 (John P. Beal et al. eds., 2000). An amount greater than \$3 million requires approval by the Holy See. *See* 1983 CODE c.1292, § 2; Kennedy, *supra*, at 1497. “Stable patrimony” means “all property, real or personal, movable or immovable, tangible or intangible, that, either of its nature or by explicit designation, is destined to remain in the possession of its owner for a long or indefinite period of time to afford financial security for the future.” *Id.* at 1495.

76. *See* 1983 CODE c.17.

77. John Paul II, *APOSTOLIC CONSTITUTION PASTOR BONUS*, 25 JUNE 1988, arts. 154, 155 (Francis C.C.F. Kelly et al. trans., 1999) (1998).

78. *See* 1983 CODE cc.1400-1716.

79. *See id.* c.1419, § 1. When the case concerns the “temporal goods of a juridic person,” an appellate tribunal in the diocese has jurisdiction over the matter. *Id.* § 2. The bishop appoints judges, who are to be clerics, to the diocese’s tribunal. *Id.* c.1421, § 1. Adjudicating disputes over the use of diocesan property is part of the tribunal’s function. *See* Lawrence G. Wrenn, *Title II: Different Grades and Kinds of Tribunals*, in *NEW COMMENTARY ON THE CODE OF CANON LAW*, *supra* note 75, at 1622, 1622-23, 1649.

80. *See* Wrenn, *supra* note 79, at 1633; *see also* 1983 CODE cc.1442-43 (describing the Pope’s establishment of the Rota as the tribunal to receive appeals).

81. 1983 CODE c.1405, § 3. Under Canon 1296, the adversely affected juridic person must weigh its options carefully before it seeks restitution:

Whenever ecclesiastical goods have been alienated without the required canonical formalities but the alienation is civilly valid, it is the responsibility of the competent authority, after a thorough consideration of the situation, to decide whether and what type of action, that is, a personal or real action, is to be initiated to vindicate the rights of the Church as well as by whom and against whom such an action is to be initiated.

Id. c.1296.

D. The Bankruptcy Estate and Its Limits

1. Creating the Bankruptcy Estate

In the bankruptcy realm, cases are always heard by the courts constitutionally designated for this purpose.⁸² Congress enacted the Bankruptcy Reform Act of 1978⁸³ to provide for bankruptcy under several chapters, each with its own purpose and applicability.⁸⁴ Chapter 11 is designed to allow a debtor to reorganize its financial affairs while satisfying creditors.⁸⁵ The particular appeal of Chapter 11 is that it allows a debtor to continue its operations as it reorganizes.⁸⁶ After filing a petition with the United States Bankruptcy Court and obtaining an order of relief, the debtor will remain in possession of its assets during bankruptcy proceedings.⁸⁷ Furthermore, the debtor can play a large role in presenting a plan for reorganization.⁸⁸ The public policy behind bankruptcy—achieving an equitable balance between debtor and creditor—is advanced in this way.⁸⁹

Filing a bankruptcy petition creates an estate of the debtor's property, which includes under § 541(a) "all legal or equitable interests of the

82. U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . .").

83. Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C.).

84. See e.g., 11 U.S.C. §§ 1201-1231 (2000) (providing bankruptcy protection for "a family farmer with regular annual income"); *id.* §§ 1301-1330 (providing bankruptcy protection for an individual with regular income).

85. See *id.* §§ 1101-1174 note; see also S. REP. NO. 95-1106, at 1 (1978).

86. See 11 U.S.C. § 1108.

87. *Cf.* § 1104 (explaining the circumstances under which a trustee or examiner would take possession of the debtor's assets).

88. See *id.* § 1121.

89. See S. REP. NO. 95-1106, at 1 (1978) ("The overall objectives of [the Bankruptcy Reform Act of 1978] are to make bankruptcy procedures more efficient, to balance more equitably the interests of different creditors, to give greater recognition to the interests of general unsecured creditors who enjoy no priority in the distribution of the assets of the debtor's estate, and to give the debtor a less encumbered 'fresh start' after bankruptcy."); see also Veryl Victoria Miles, *Assessing Modern Bankruptcy Law: An Example of Justice*, 36 SANTA CLARA L. REV. 1025, 1035-36 (1996). Professor Miles writes:

Our current bankruptcy law . . . is a law of equity. As a law premised on equity and focused on balancing the interests of all affected parties, its purpose is not only to provide relief to the distressed debtor, but also to achieve a fair and just settlement of the various creditors' claims in any property of the debtor that is available to satisfy these claims. . . . This, in essence, is the justice of modern bankruptcy law. It is a law responding to the plea for relief of the bankrupt debtor, while resolving to treat all creditors fairly and equitably according to their claims of financial contribution from a once financially viable debtor.

Miles, *supra*, at 1035-36 (footnotes omitted).

debtor in property as of the commencement of the case.”⁹⁰ The debtor’s property is determined under state law in most instances,⁹¹ and accordingly, “the basic federal rule is that state law governs.”⁹² Only when there is a controlling federal interest will property fail to be defined by state law.⁹³

2. Limiting the Bankruptcy Estate

a. Section 541(d)

In its maiden consideration by the Supreme Court in *United States v. Whiting Pools, Inc.*,⁹⁴ § 541(a)(1) was defined broadly in accordance with Congress’ apparent wish to subsume into the bankruptcy estate a wide range of property.⁹⁵ Though affirming the expansive scope of the bankruptcy estate, the Court also noted its boundaries.⁹⁶ One such limit is § 541(d):

Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . .

90. 11 U.S.C. § 541(a)(1). Other property interests specified in 11 U.S.C. § 541(a) are: community property of a debtor and debtor spouse, *id.* § 541(a)(2); various interests recoverable by a trustee, *id.* § 541(a)(3); certain interests in property preserved for the benefit of the estate, *id.* § 541(a)(4); interests acquired by the debtor within 180 days after the commencement of the case that would have been part of the bankruptcy estate at the commencement of the case, *id.* § 541(a)(5); most proceeds, rents, or profits of the bankruptcy estate, *id.* § 541(a)(6); and any interest that the estate acquires after the commencement of the case, *id.* § 541(a)(7).

91. See *Butner v. United States*, 440 U.S. 48, 55 (1979), *superseded by statute*, Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 214(a), 108 Stat. 4126 (codified as amended at 11 U.S.C. § 552(b)(2) (2000)) (“Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.”). State courts have explicitly recognized this principle. See, e.g., *Am. States Ins. Co. v. Symes of Silverdale, Inc.*, 78 P.3d 1266, 1268 (Wash. 2003).

92. *Butner*, 440 U.S. at 57.

93. Cf. *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992); see, e.g., *Symes*, 78 P.3d at 1268 (acknowledging that state property interests control only to the extent that they are not contrary to federal law).

94. 462 U.S. 198 (1983).

95. *Id.* at 204-05 (“Both the congressional goal of encouraging reorganizations and Congress’ choice of methods to protect secured creditors suggest that Congress intended a broad range of property to be included in the estate.”). Why a unanimous Court, *id.* at 199, needed to undertake a review of legislative history to confirm Congress’ intent, despite the statute’s perspicuity, is curious. See Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court’s Bankruptcy Decisions*, 3 CHAP. L. REV. 173, 215 (2000) (“It is not immediately clear . . . why the Court considered structure, history and/or pre-Code practice to confirm an apparently clear meaning in . . . *Whiting Pools* . . .”).

96. *Whiting Pools*, 462 U.S. at 204 n.8 (discussing the congressional record pertaining to 11 U.S.C. § 541(a)(1) (2000)).

becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.⁹⁷

The legislative history reveals that in drafting § 541(d), Congress was concerned with the legal and equitable division of trust property: "Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another."⁹⁸ In such a situation, the legal interest belongs to the debtor but the beneficiary of the trust possesses the equitable interest, and so the bankruptcy estate can include the title, but not the beneficial interest.⁹⁹ Accordingly, if the debtor holds bare legal title and no equitable interest, the bankruptcy estate acquires only bare legal title:¹⁰⁰ "To the extent such an interest is limited in the hands of the debtor, it is equally limited in the hands of the estate"¹⁰¹

b. The Bankruptcy Estate Excludes Property Held in Statutory Trust

In *Begier v. IRS*,¹⁰² the Supreme Court used § 541(d) as a springboard to determine whether funds held by the debtor pursuant to a statutory trust belonged to the bankruptcy estate.¹⁰³ American International Airways (AIA) filed for Chapter 11 bankruptcy after failing, among other things, to collect and withhold employee and excise taxes for the Internal Revenue Service (IRS).¹⁰⁴ AIA could not comply with its "trust-fund" obligations, which by statute required that "the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States."¹⁰⁵ Right before filing for Chapter 11 bankruptcy, AIA had made payments from its general operating fund to try to meet its

97. 11 U.S.C. § 541(d); see *Whiting Pools*, 462 U.S. at 204 n.8.

98. S. REP. NO. 95-989, at 82 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5868.

99. See 124 CONG. REC. 24, 32,417 (1978) (statement of Rep. Don Edwards).

100. *Id.* at 32,399. Section 541 does not exclude bare legal title because title is still an interest. *Dewsnup v. Timm*, 502 U.S. 410, 431 n.4 (1992) (Scalia, J., dissenting) (emphasizing that property interests of a debtor with bare legal title belong in the bankruptcy estate); S. REP. NO. 95-989, at 82, reprinted in 1978 U.S.C.C.A.N. 5787, 5868.

101. 124 CONG. REC. 24, 32,399 (1978) (statement of Rep. Don Edwards).

102. 496 U.S. 53 (1990).

103. See *id.* at 58-62.

104. See *id.* at 55-56.

105. *Id.* at 56, 60 (quoting 26 U.S.C. § 7501). Trust-fund obligations exist at the state level as well. See, e.g., *State ex rel. Trenholm v. Yelle*, 25 P.2d 569, 570 (Wash. 1933) (holding that funds set aside pursuant to a state workmen's compensation act are "trust funds drawn from particular sources and devoted to special purposes"). Moreover, "[b]y the act itself" and without any further designation by the legislature, the fund is a statutory trust. See *id.*

trust-fund obligations.¹⁰⁶ Begier, the court-appointed trustee who managed AIA's bankruptcy estate, sought to retain for AIA's creditors as many of its assets as possible, including trust-fund payments to the IRS, by avoiding these transfers.¹⁰⁷

The Court rejected Begier's attempt to circumvent § 541(d).¹⁰⁸ Begier argued that because AIA neither sent the trust-fund amount to the IRS nor deposited this money in an account different than AIA's general operating fund, no trust existed.¹⁰⁹ The Court relied on the statutory language mandating that employers withhold and collect taxes for the IRS when employees are paid; the money became the property of the IRS and ceased to be AIA's "at the moment the relevant payments . . . were made."¹¹⁰ Moreover, according to the Court, the trust relationship does not require a segregation of those funds held for the IRS, deflecting Begier's argument that segregation was the prerequisite to a trust.¹¹¹ The Court held that "[t]he mere fact that AIA neither placed the taxes it collected in a segregated fund nor paid them to the IRS does not somehow mean that AIA never collected the taxes in the first place."¹¹²

106. *Begier*, 496 U.S. at 56.

107. *Id.* at 56-57. Section 547(b) authorizes a trustee to exercise avoidance power to prevent certain payments, dispersed ninety days prior to the bankruptcy petition, from going to certain creditors in derogation of the pro rata share of the bankruptcy estate belonging to all creditors. See 11 U.S.C. § 547(b) (2000).

108. See *Begier*, 496 U.S. at 60.

109. *Id.*

110. *Id.* at 60-62; see also *Trenholm*, 25 P.2d at 570 ("These funds are therefore not subject to appropriation by the Legislature for purposes other than those contemplated by the act, nor by methods that run counter to the effective operation of the act.").

111. *Begier*, 496 U.S. at 61.

112. *Id.* at 60. The Court then pursued its determination of what "*particular dollars*" belonged to the IRS. *Id.* at 62. The Court began this discussion by observing, "[i]n the absence of specific statutory guidance . . . , we might naturally begin with the common-law rules that have been created to answer such questions about other varieties of trusts." *Id.* at 62. The Court further explained that "[u]nder common-law principles, a trust is created *in property*; a trust therefore does not come into existence until the settlor identifies an ascertainable interest in property to be the trust res." *Id.* But then, upon deciding that the statutory trust is "radically different" from common-law trusts, the Court abandoned its common-law examination. *Id.* The Court resorted to scant legislative history to determine that the general operating funds AIA transferred to the IRS amounted to trust property within the meaning of the bankruptcy code. *Id.* at 63-67. In his concurring opinion, Justice Scalia dismissed the need for divining Congress's intention and stuck to the common-law approach: "A trust without a res can no more be created by legislative decree than can a pink rock-candy mountain." *Id.* at 70 (Scalia, J., concurring in the judgment). Justice Scalia argued that IRS regulations by themselves could be read to infer the trust relationship. *Id.*

E. Churches and the First Amendment

1. Introduction

The First Amendment declares: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" ¹¹³ Since at least 1972 in *Wisconsin v. Yoder*, ¹¹⁴ modern First Amendment jurisprudence has maintained a "requirement for governmental neutrality." ¹¹⁵ In 1990, the Supreme Court reexamined its jurisprudence on the Free Exercise Clause in *Employment Division, Department of Human Resources v. Smith*. ¹¹⁶ Rejecting a requirement that the government must show a compelling justification for all burdens to free exercise, ¹¹⁷ the Court in *Smith* announced that incidental burdens on free exercise, if occasioned by laws that are religion-neutral and generally applicable, do not offend the First Amendment. ¹¹⁸ The Supreme Court revisited its interpretation of the Free Exercise Clause in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, ¹¹⁹ holding that burdens to religion that are neither neutral nor generally applied are subject to "the most rigorous of scrutiny." ¹²⁰ Dissatisfied with the Supreme Court's interpretation of the Free Exercise Clause, Congress restored the stricter standard that antedated *Smith* by passing the Religious Freedom Restoration Act of 1993 (RFRA). ¹²¹ Though unconstitutional when applied to state laws, ¹²² RFRA is still law in the

113. U.S. CONST. amend. I.

114. 406 U.S. 205 (1972).

115. *Cf. id.* at 220.

116. 494 U.S. 872 (1990).

117. *Id.* at 888-89. The "compelling governmental interest," *id.* at 883, or "compelling state interest" test originated in *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). *Cf. id.* at 882-83. The *Sherbert* Court defined a compelling governmental interest as one where "no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Id.* at 406 (alteration in original) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). *Wisconsin v. Yoder*, 406 U.S. 205 (1972), provides another formulation of compelling state interest. ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.")

118. *See Smith*, 494 U.S. at 878 ("[I]f prohibiting the exercise of religion . . . is not the object of the [law to which citizens object] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.")

119. 508 U.S. 520 (1993).

120. *Id.* at 546.

121. *See Religious Freedom Restoration Act of 1993*, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)).

122. *City of Boerne v. Flores*, 521 U.S. 507, 534, 536 (1997).

federal sphere.¹²³ *Smith* has likewise been parsed; some court opinions, concerned about free-exercise infringement, have held that *Smith* applies only to individuals, not churches.¹²⁴

2. *Smith*: Shielding the State from Free Exercise Claims

In *Smith*, in which two Oregonians challenged the constitutionality of prohibiting peyote use despite its religious purposes,¹²⁵ Justice Scalia noted for the Court that in all its decisions on the Free Exercise Clause,

[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. . . . "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."

. . . [T]he right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."¹²⁶

In dismissing the compelling-interest formula of *Sherbert v. Verner*,¹²⁷ Justice Scalia opined that the *Sherbert* test was created "in a context that lent itself to individualized governmental assessment of the reasons for

123. See *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2118 n.2 (2005); *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 400-01 (7th Cir. 2003); *Guam v. Guerrero*, 290 F.3d 1210, 1219-22 (9th Cir. 2002); *Kikumura v. Hurley*, 242 F.3d 950, 958-60 (10th Cir. 2001); *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854, 863 (8th Cir. 1998).

124. See, e.g., *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1303-04 (11th Cir. 2000); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 349-50 (5th Cir. 1999); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462-63, 467-68 (D.C. Cir. 1996).

125. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 874-76 (1990). Having lost their jobs for ingesting peyote, which was illegal under Oregon law, the petitioners subsequently were denied unemployment benefits because they were fired for work-related misconduct. *Id.* at 874. They sued the state claiming infringement of their First Amendment right to free exercise of religion because they used peyote as part of their membership in the Native American Church. See *id.* Because the criminal prohibition made no exception for religious use of peyote, the Oregon Supreme Court ruled that the law violated the First Amendment. *Id.* at 876. The Supreme Court reversed. *Id.* at 890. The First Amendment, despite its language prohibiting only Congress' actions, applies to the states by incorporation through the Fourteenth Amendment. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

126. *Id.* at 878-79 (citations omitted) (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879); *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

127. 374 U.S. 398, 403, 406-07 (1963); see *supra* note 117 (stating formulations of *Sherbert* and other courts).

the relevant conduct.”¹²⁸ Moving forward, *Sherbert* would not be available to challenge, on the basis of free exercise, “[t]he government’s ability to enforce generally applicable prohibitions of socially harmful conduct [and] other aspects of public policy.”¹²⁹ Despite this limitation on free-exercise claims, the government’s free hand can be tempered by the political process: “[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation”¹³⁰

3. *Lukumi: Unsheathing the Sword of Free Exercise Protection*

Hialeah, Florida was not so solicitous, according to the Supreme Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.¹³¹ The Court found that a city ordinance outlawing animal killing was discriminatory toward the Santeria religion because the law required a case-by-case evaluation of the reasons for the killing and, thus, under *Smith*, “represent[ed] a system of ‘individualized governmental assessment of the reasons for the relevant conduct.’”¹³² Any individualized exemptions to the general prohibition of animal killing, such as those exemptions for non-Santeria animal killings, required the government to extend those exemptions to cases of “‘religious hardship’” unless it could show compelling reasons not to do so.¹³³ Without a compelling reason, this type of government action is not neutral and generally applicable and thus offends the First Amendment.¹³⁴ Any law “failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”¹³⁵ Justice Kennedy, writing for the majority, warned that the

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

129. *Id.* at 885 (citing *Lyng v. Nw. Indian Protective Ass’n*, 485 U.S. 439, 451 (1988)).

130. *Id.* at 890. In recommending this approach, Justice Scalia points out that “[j]ust as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word,” the same society “can be expected” to protect freedom of religion through negative legislative protections. *See id.*

131. 508 U.S. 520 (1993).

132. *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884); *see id.* at 524-28, 537-38.

133. *See id.* at 537 (quoting *Smith*, 494 U.S. at 884).

134. *Id.* at 531-32.

135. *Id.* With respect to the first requirement, neutrality, the Court observed that the Free Exercise Clause “‘forbids subtle departures from neutrality.’” *Id.* at 534 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)). As to the second requirement, general applicability, it “‘protect[s] religious observers against unequal treatment.’” *Id.* at 542 (alteration in original) (quoting *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in the judgment)). In his concurring opinion, Justice Scalia described the latter requirement as one that “‘applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement

Court would not be satisfied with superficial observance of the First Amendment: “Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt.”¹³⁶ Not even the pursuit of legitimate interests justifies the selective application of the law with respect to free-exercise rights.¹³⁷ Justice Kennedy ended the opinion with an overture to religious tolerance, refrain from the suspicions of animosity or distrust, and a call that “all officials must pause to remember their own high duty to the Constitution and to the rights it secures.”¹³⁸

4. In Need of a Bigger Sword: Legislative and Judicial Attempts to Keep Free Exercise Rights Broad

In 1993 Congress took the next crack at defining free-exercise rights by passing RFRA¹³⁹ which provides: “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”¹⁴⁰ In 1997, the Supreme Court in *City of Boerne v. Flores* invalidated RFRA with respect to state laws.¹⁴¹ The Court declared that Congress, when it sought to extend RFRA to state governments, exceeded its powers under the Fourteenth Amendment.¹⁴² Though now unconstitutional with respect to state laws,

target the practices of a particular religion for discriminatory treatment.” *Id.* at 557 (Scalia, J., concurring).

136. *Id.* at 534 (majority opinion).

137. *See id.* at 543 (“The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause.”).

138. *Id.* at 547.

139. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)).

140. 42 U.S.C. § 2000bb-1(b), 1(b)(1), 1(b)(2) (2000). Congress’ declared purpose in enacting RFRA was

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Id. § 2000bb(b)(1)-(2).

141. 521 U.S. 507 (1997).

142. *Id.* at 536. Section 5 of the Fourteenth Amendment allows Congress to “enforce by appropriate legislation,” prohibitions against “any State depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, §§ 1, 5. The

RFRA's constitutionality in the federal realm is widely recognized.¹⁴³ The rationale for this recognition is that Congress' authority to enact federal legislation "rests securely on Art. I. § 8 cl. 18," unlike Congress' remedial power under Section 5 of the Fourteenth Amendment.¹⁴⁴ Courts have held that when acting pursuant to this power, Congress has both the ability and duty to interpret the Constitution in its own way.¹⁴⁵

Boerne's invalidation of RFRA as applied to state laws, according to one court of appeals, "does not alter the structure of RFRA, it simply prevents the application of the statute to a certain class of defendants."¹⁴⁶ In *Christians v. Crystal Evangelical Free Church (In re Young)*,¹⁴⁷ the first challenge to RFRA's federal-law application after *Boerne* in the Eighth Circuit, that court flatly rejected the argument that *Boerne* made RFRA "a 'dead-letter.'"¹⁴⁸ Looking to both the Bankruptcy Clause and the Necessary and Proper Clause to uphold RFRA's constitutionality regarding federal laws,¹⁴⁹ the court sought to resolve whether Congress exceeded its authority by applying RFRA to the Bankruptcy Code.¹⁵⁰ The court noted that Congress had the power to enact both RFRA and bankruptcy laws; therefore Congress "effectively amended the Bankruptcy Code" with RFRA.¹⁵¹ Accordingly, the court held that although a trustee in bankruptcy could ordinarily avoid debtors' transactions during insolvency, RFRA prevented the trustee from avoiding over thirteen thousand dollars in tithes two debtors made to their church.¹⁵² To recover this amount both "substantially burden[ed]

Supreme Court opposed and countered Congress' end-run around *Smith*. See *Boerne*, 521 U.S. at 512-16, 536 ("[I]t is this Court's precedent, not RFRA, which must control.").

143. See, e.g., *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2118 n.2 (2005) ("RFRA, Courts of Appeals have held, remains operative as to the Federal Government and federal territories and possessions.").

144. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003).

145. See, e.g., *Guam v. Guerrero*, 290 F.3d 1210, 1221 (9th Cir. 2002) ("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.") (citing *Boerne*, 521 U.S. at 535).

146. *Kikumura v. Hurley*, 242 F.3d 950, 959-60 (10th Cir. 2001).

147. 141 F.3d 854 (8th Cir. 1998).

148. *Id.* at 856, 859.

149. *Id.* at 856. The Necessary and Proper Clause reads, "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," which includes the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, clis. 1, 4, 18.

150. *Id.* at 860.

151. *Young*, 141 F.3d at 861.

152. See *id.* at 857, 863.

the debtors' free exercise of their religion and [was] not in furtherance of a compelling governmental interest."¹⁵³

Other reinforcement of *Smith*'s broad effects stems from uncertainty about whether *Smith* was intended to be an across-the-board reversal of the compelling-interest test.¹⁵⁴ In one such examination, the D.C. Circuit in *EEOC v. Catholic University of America*,¹⁵⁵ found that where the University's School of Canon Law denied tenure to a nun allegedly because of her gender,¹⁵⁶ the court was confronted with "a collision between two interests of the highest order: the Government's interest in eradicating discrimination in employment and the constitutional right of a church to manage its own affairs free from governmental interference."¹⁵⁷ The court noted that Supreme Court decisions described burdens to religion in "two quite different ways": interference with an individual's beliefs or encroachment on church autonomy.¹⁵⁸ The D.C. Circuit concluded that *Smith* applied only to the former category.¹⁵⁹

153. *Id.* at 857 (quoting its earlier opinion in *Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1417 (8th Cir. 1996)). Another potentially substantial burden on free exercise under RFRA is a prohibition by the Bureau of Prisons on "casting of spells/curses," an impediment for adherents of Wicca. *See O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 400-02 (7th Cir. 2003) (reasoning that despite concerns about disruptions should a curse become revealed, "relying on other inmates' reactions to a religious practice is a form of hecklers' veto. The RFRA does not allow governments to defeat claims so easily."). Without seeing any proof of disruption in the prison system that would flow from permitting curses/spells, the court could not determine whether there existed a compelling governmental interest and, accordingly, remanded for further findings. *Id.* at 401.

Similarly, in *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001), the court held that if a prisoner could prove he was denied access to "a Christian minister who is also familiar with the spiritual culture of Japan, Plaintiff's homeland," then, under RFRA, the denial would be a substantial burden to his free exercise of religion. *Id.* at 961.

154. *See, e.g., Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento Co.*, 85 P.3d 67, 98-100 (Cal. 2004) (Brown, J., dissenting); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1303-04 (11th Cir. 2000); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 349-50 (5th Cir. 1999); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461-62 (D.C. Cir. 1996).

155. 83 F.3d 455 (D.C. Cir. 1996).

156. *Id.* at 458-59.

157. *Id.* at 460; *accord Combs*, 173 F.3d at 351 (appreciating that the case before the court "involve[d] the interrelationship between two important government directives—the congressional mandate to eliminate discrimination in the workplace and the constitutional mandate to preserve the separation of church and state").

158. *Catholic Univ.*, 83 F.3d at 460.

159. *See id.* at 462-63 ("[W]e cannot believe that the Supreme Court in *Smith* intended to qualify this century-old affirmation of a church's sovereignty over its own affairs."); *accord Gellington*, 203 F.3d at 1303 ("The *Smith* decision focused on the first type of government infringement on the right of free exercise of religion—infringement on an individual's ability to observe the practices of his or her religion."); *Combs*, 173 F.3d at 349 ("*Smith*'s language is clearly directed at the first strand of free exercise law, where an

The court reasoned that questions of Church autonomy encompass a “fundamentally different character” than individuals’ beliefs¹⁶⁰ and none of the dangers against which *Smith* intoned are present when the Church exercises its authority to hire ministers or their equivalent.¹⁶¹ Moreover, a “long line of Supreme Court cases” have affirmed church sovereignty to “decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”¹⁶²

The scope of civil involvement in determining ownership of church property reached the Supreme Court as early as 1872 in *Watson v. Jones*.¹⁶³ The Court observed that, more often than not, these intrachurch disputes concerning the proper ownership of church property involve a hierarchical church.¹⁶⁴ In such an instance, the religious “body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control . . . in some supreme judicatory over the whole membership of that general organization.”¹⁶⁵ Accordingly, civil courts must defer to ecclesiastical authority on a

individual contends that, because of his religious beliefs, he should not be required to conform with generally applicable laws.”). Indeed, *Smith* approvingly cited cases that involved church autonomy. See *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 877 (1990) (“The government may not . . . lend its power to one or the other side in controversies over religious authority or dogma.” (citations omitted)).

160. *Catholic Univ.*, 83 F.3d at 462.

161. *Id.* Specifically, the court failed to see how a church member became “a law unto himself” when the church exercised its authority to hire its own ministers. *Id.* (quoting *Smith*, 494 U.S. at 885). Similarly, use of a compelling-interest analysis would not require the determination of central religious beliefs to uphold church authority. *Id.*; see also *id.* at 461 (explaining that numerous courts have “long held that the Free Exercise Clause . . . precludes civil courts from adjudicating employment discrimination suits by ministers against the church or religious institution employing them”). The aggrieved employee in *Catholic University of America* came within the ministerial exception by its extension to other “ministerial function[s].” *Id.* at 461 (citing *EEOC v. Catholic Univ. of Am.*, 856 F. Supp. 1, 10-11 (D.D.C. 1994)).

162. *Id.* at 462-63 (quoting *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). In *Kedroff*, the Supreme Court invalidated a New York statute declaring that St. Nicholas Cathedral belonged to a particular bishop and that all Russian Orthodox Churches in New York must “in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession.” *Kedroff*, 344 U.S. at 99, 121. The Court commented that the church’s “conformity is by legislative fiat and subject to legislative will. Should the state assert power to change the statute requiring conformity to ancient faith and doctrine to one establishing a different doctrine, the invalidity would be unmistakable.” *Id.* at 108. *Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church of N. Am.*, 363 U.S. 190, 191 (1960), extends *Kedroff* to judicial actions.

163. 80 U.S. (13 Wall.) 679 (1872).

164. See *id.* at 722-23, 726 (observing that cases involving a church hierarchy are the most common types of church property disputes).

165. *Id.* at 722-23.

question of the ownership of church property “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried.”¹⁶⁶ No matter their ability, civil judges cannot unpack ecclesiastical law.¹⁶⁷ Similarly, regardless of its divine authority, a church court cannot adjudicate rights of real or personal property if “the right in no sense depends on ecclesiastical questions.”¹⁶⁸

In *Serbian Eastern Orthodox Diocese v. Milivojevich*,¹⁶⁹ the Illinois Supreme Court’s detailed review of church law involved an attempted reconciliation of internal church procedures.¹⁷⁰ The court first considered, and then dismissed, interpretations of canon law made by the highest tribunals of the Serbian Orthodox Church.¹⁷¹ In writing the Supreme Court’s opinion, Justice Brennan rejected this approach:

The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church

166. *Id.* at 727. Some states continue to employ this approach. See, e.g., *Diocese of Newark v. Burns*, 417 A.2d 31, 33-34 (N.J. 1980); *Presbytery of Seattle, Inc. v. Rohrbaugh*, 485 P.2d 615, 618-19 (Wash. 1971).

167. *Cf. Watson*, 80 U.S. at 729. The majority in *Watson* implored for judicial restraint: It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.

Id.

168. *Id.* at 733. In a closer case, the Court also recognized that a church court is not the proper tribunal for trying an alleged murderer. See *id.* at 732-33 (“[I]t may very well be conceded that if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else.”).

169. 426 U.S. 696 (1976). Bishop Milivojevich sued in Illinois state court to contest his removal from office and prevent reorganization of his diocese. See *id.* at 706-07. The Illinois Supreme Court held that the proceedings to remove Milivojevich were arbitrary according to the court’s understanding of the church constitution and its penal code. *Id.* at 708. The Illinois Supreme Court modified its opinion after denying a rehearing and held that under church law, Milivojevich was to be reinstated because he was not tried within one year of his indictment. *Id.* Furthermore, the court found that the Serbian Orthodox Church exceeded its authority under church law by reorganizing without the American-Canadian Diocese’s approval. *Id.* The Serbian Eastern Orthodox Diocese for the United States and Canada and the other petitioners then appealed to the United States Supreme Court. *Id.* at 698-99.

170. See *id.* at 717-18.

171. *Id.* at 718. According to the Supreme Court, the Illinois court should not have rejected testimony by five expert witnesses on behalf of the Serbian Orthodox Church explaining why canon law supported the church’s decision. *Cf. id.* at 708, 718, 720. The court further erred when it accepted testimony by Bishop Milivojevich’s expert witness on his interpretation of canon law. *Id.* at 718-19.

upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes.¹⁷²

This, Justice Brennan stressed, no civil court could do whenever there are “quintessentially religious controversies.”¹⁷³ Even though the Serbian Orthodox Church canonically stripped Bishop Milivojevich of his legal control over church property, this was an “incidental effect of an ecclesiastical determination” that civil courts must necessarily accept.¹⁷⁴ Church administration and distribution of property, as illustrated by the reorganization of a diocese, “involves a matter of internal church government, an issue at the core of ecclesiastical affairs.”¹⁷⁵

The Supreme Court announced another constitutionally permissible approach to resolving church property disputes in *Jones v. Wolf*.¹⁷⁶ After a Presbyterian church in Macon, Georgia, separated from the larger Presbyterian Church of the United States and claimed the church building, the Georgia Supreme Court advanced the “neutral principles of law” approach.¹⁷⁷ Endorsing this analysis, Justice Blackmun explained that a state civil court could examine deeds, charters, state statutes, and the church constitution

for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a

172. *Id.* at 708.

173. *Id.* at 720.

174. *See id.*; *see also* *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 120-21 (1952) (“Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. This under our Constitution necessarily follows in order that there may be free exercise of religion.”).

175. *Milivojevich*, 426 U.S. at 721.

176. 443 U.S. 595 (1979).

177. *Id.* at 597-99. The Supreme Court first recognized the neutral principles of law analysis with *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). *See also* *Wolf*, 443 U.S. at 599. The Court in *Wolf* framed the case thus:

This case involves a dispute over the ownership of church property following a schism in a local church affiliated with a hierarchical church organization. The question for decision is whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the dispute on the basis of “neutral principles of law,” or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church.

Id. at 597. The neutral principles of law analysis is the preferred approach in some states. *See, e.g.*, *Skelton v. Word Chapel, Inc.*, 637 P.2d 753, 755-56 (Ariz. Ct. App. 1981); *Decker v. Berean Baptist Church*, 624 P.2d 1094, 1097-98 (Or. Ct. App. 1981).

trust. In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.¹⁷⁸

In the Supreme Court's view, applying neutral principles of law to trust and property disputes provides courts with the freedom to determine the private rights and obligations that reflect the parties' intentions without entanglement in religious doctrine.¹⁷⁹

II. IN GOD WE TRUST

A. *Understanding the Trust Created by the Corporation Sole*

Arguments for a trust relationship between a diocese and its parishes that would exclude parish property from a diocese's bankruptcy estate have not persuaded everyone.¹⁸⁰ Plaintiffs' attorneys have argued that some diocesan deeds of real property fail to mention the existence of a trust; the only interest evident on those and other documents is that of the diocese.¹⁸¹ Moreover, according to some plaintiffs in the Spokane bankruptcy litigation, "[e]very material aspect of the relationship between the Diocese and the Parishes illustrates the Diocese's complete control and domination."¹⁸² Specifically, plaintiffs' attorneys have questioned how this could not be the case, because the diocese is responsible for appointing priests, paying the priests' retirement benefits,

178. *Wolf*, 443 U.S. at 602-04.

179. *Id.* at 603-05. The majority and dissent disagreed on whether church documents that do no more than exude doctrine may or may not curtail civil involvement in church governance. Compare *id.* at 609 & n.7 (hinting that if a state wants to adjudicate a church property dispute in which a church Book describes communing members as "those admitted to the Lord's Table," only neutral principles of law permit civil consideration of that document) with *id.* at 612-13 (Powell, J., dissenting) ("The constitutional documents of churches tend to be drawn in terms of religious precepts. Attempting to read them 'in purely secular terms' is more likely to promote confusion than understanding.").

180. See, e.g., Committee of Tort Litigants' Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment at 31, (Committee of Tort Litigants v. Catholic Bishop of Spokane) (*In re* The Catholic Bishop of Spokane), Case No. 04-08822-PCW11 Adv. Case No. 05-80038 (Bankr. E.D. Wash. April 7, 2005) ("Since this bankruptcy began, the Bishop has been playing a shell game with the bulk of the real property in the Diocese.").

181. See, e.g., *id.* at 8.

182. *Id.* at 20.

coordinating medical benefits, and authorizing the purchases and sales of Church property in the diocese.¹⁸³

Any serious attempt to understand the diocese-parish relationship established by a corporation sole statute should begin with an examination of the statute itself:

[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: “judicial inquiry is complete.”¹⁸⁴

The meaning behind any statute should also begin with its language.¹⁸⁵ Therefore, exclusive reliance on historical accounts surrounding certain dioceses’ preferences for the corporation sole is misplaced.¹⁸⁶

A typical corporation sole statute that arguably creates a trust for parish property reads: “All property held in such official capacity by such bishop . . . shall be in trust for the use, purpose, benefit and behoof of his religious denomination, society or church.”¹⁸⁷ One reading of this statute posits that the trust exists only to restrict a bishop’s personal interest, not

183. *See id.* at 20-21.

184. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). In Washington State, where two dioceses have filed for bankruptcy and where property will be defined by state law, the Supreme Court of Washington has seized this logic:

The court’s fundamental objective is to ascertain and carry out the Legislature’s intent, and if the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. . . .

. . . [T]hat meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. . . . [This approach] is more likely to carry out legislative intent. Of course, if, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history.

State v. Campbell & Gwinn, L.L.C., 43 P.3d 4, 9-10 (Wash. 2002).

185. *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

186. *But see Comm. of Tort Litigants v. Catholic Diocese of Spokane (In re The Catholic Bishop of Spokane)*, 329 B.R. 304, 326-27 (Bankr. E.D. Wash. Aug. 26, 2005) (order denying motion to dismiss) (relying on “the historical context”); Reply Brief by Mr. Shea and Brief in Opposition to Motion of Diocese for Summary Judgment, *supra* note 31, at 6-7. Despite the historical circumstances that might have encouraged the use of the corporation sole, the Vatican expressed concern over its use as early as 1911. *See Letter from the Sacred Congregation of the Council to the Ordinaries of the U.S. (July 29, 1911)*, reprinted in 2 T. BOUSCAREN, *THE CANON LAW DIGEST, OFFICIALLY PUBLISHED DOCUMENTS AFFECTING THE CODE OF CANON LAW, 1933-1942*, at 443, 443-45 (1943).

187. WASH. REV. CODE ANN. § 24.12.030 (West 2005).

that of his diocese.¹⁸⁸ But if the bishop “as officeholder” and as “corporation sole” exist as one personality,¹⁸⁹ there is no separating the interest of the bishop as officeholder from the bishop as corporation sole.¹⁹⁰ If the corporation sole is the diocese,¹⁹¹ the diocese likewise cannot be separated from the bishop.¹⁹² Official capacity of the bishop then equally describes the bishop, the corporation sole, or the diocese.¹⁹³ Because there is no mention of the bishop’s “personal interest” in the corporation sole statute,¹⁹⁴ it is an interest that can be eliminated from the equation.¹⁹⁵ Therefore, it is the diocese, or bishop, or corporation sole that holds property “in trust for the use, purpose, benefit and behoof” for the rest of the Church.¹⁹⁶ This relationship, provided by the statutory trust, is conditioned on “conformity” with Church law.¹⁹⁷

Corporation sole statutes that refer to canon law can be deemed to have incorporated it to one degree or another.¹⁹⁸ Incorporation by the legislature limits the corporate uses of property for which the corporation sole exists; consequently, despite broad corporate powers ordinarily conferred on any other corporation, the corporation sole’s powers “can only be exercised validly within the capacity and purpose of the corporation sole.”¹⁹⁹ This statutory restriction to observe canon law seemingly bars *ultra vires* actions that contravene the statutorily permitted trust relationship.²⁰⁰

188. See, e.g., *In re The Catholic Bishop of Spokane*, 329 B.R. at 326; Committee of Tort Litigants’ Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment, *supra* note 180, at 10.

189. See WASH. REV. CODE ANN. § 24.12.010 (West 2005) (“[S]aid bishop . . . together with his successors in office or position . . . shall be . . . deemed to be a body corporate . . .”).

190. *Cf. id.*

191. *Cf. id.*

192. *Cf. id.*

193. *Cf. id.*

194. *See id.*

195. *Cf. Comm. of Tort Litigants v. Catholic Diocese of Spokane (In re The Catholic Bishop of Spokane)*, 329 B.R. 304, 326-27 (Bankr. E.D. Wash. Aug. 26, 2005) (order denying motion to dismiss) (describing the statutory trust as an arrangement whereby the bishop holds property only for the purposes of keeping it separate from his personal interest).

196. WASH. REV. CODE ANN. § 24.12.030 (West 2005).

197. *Id.* § 24.12.010.

198. Melanie DiPietro, *The Relevancy of Canon Law*, 29 SETON HALL LEGIS. J. 399, 406 (2005) (“[C]anon law is relevant because it is incorporated by the state legislature in the statutory language creating a corporate sole.”).

199. *Id.*

200. See e.g., COLO. REV. STAT. § 7-52-103 (2004) (stating that a corporation sole may “perform all other acts in furtherance of the objects and purposes of the corporation sole

Consistent with the statutory mandate, an administrator of Church property is duty-bound under canon law to act as “good householder.”²⁰¹ Canon law scholars have likened these duties to those governing a civil-law trust²⁰² and compared the steward of Church property to a trustee.²⁰³ Additionally, all valid transfers of Church property must adhere to the Church’s canon law requirements on alienation.²⁰⁴ This is especially vital for public juridic persons, whose ownership and administration of ecclesiastical goods is protected by the universal Church.²⁰⁵ Finally, public juridic persons are canonically endowed to pursue their pious and

not inconsistent with the statutes of [the] state”). Articles of corporation further limit the corporate powers of a corporation sole. *See supra* note 45.

201. *See supra* text accompanying notes 71-74.

202. *See, e.g.*, ADAM J. MAIDA & NICHOLAS P. CAFARDI, CHURCH PROPERTY, CHURCH FINANCES, AND CHURCH-RELATED CORPORATIONS 56 (1984). Cardinal Maida and Professor Cafardi explain:

[This] duty attaches to the assets, as the canon law perceives them, of the public juridic person in much the same way that the *res* or *corpus* of a civil law trust . . . carries with it the obligation of the civil law trust. These assets are so marked, so dedicated by the public juridic person [because of the] person’s prior acceptance of the Church’s teaching authority.

Id. (citation omitted). Good householders must also “protect [the juridic person’s] existence, provide for its longterm [sic] well-being,” and observe canonical procedures. *Id.* at 58. These duties also carry a faith dimension to them, further encouraging obedience. *See id.* at 65 (“Although the importance of canonical accountability cannot be denied, it pales in comparison to these duties that the canonical steward has in conscience to the Lord, his faithful, his servants, and his poor.”).

203. *See, e.g., id.* at 62 (“A steward is one who stands in a confidential position, a position of trust, toward the object of his or her stewardship. Human agents who act on behalf of public juridic persons do so in a relationship of trust toward the juridic person.”). This canonically established relationship requires that “[p]roperty held by the steward is not the steward’s own. It belongs to others, but the steward will hold, manage, and make the best of it for the true owner” so that “stewardship connotes that one has been charged by a higher authority to look after the affairs of someone who cannot do so for himself or herself.” *Id.*

204. *See supra* note 75 and accompanying text.

205. *See supra* notes 65-66, 70, 75, 78-81 and accompanying text. The Pontifical Council for the Interpretation of Legislative Texts explains that this ownership “is conditioned and justified by their destination for the accomplishment of the mission of the Church and, in that sense, is subject to the *administrative controls* established by canonical legislation.” Affidavit of Nicholas P. Cafardi Exhibit D, *supra* note 45, at 2. Yet ownership remains exclusively that of the individual public juridic person. *Id.* In describing this distinction, the Pontifical Council for the Interpretation of Legislative Texts elaborates:

The necessity of greater control is determined from the nature of the ecclesiastical goods itself [sic] and from their public character and thus should not be conceived as a limitation of the autonomy of the entities but as a *guarantee* of that autonomy, also in respect to eventual conflicts of interest between the entity and the one who acts in its name.

Id. at 3.

charitable ends through this ownership.²⁰⁶ Ardent protection of this property aims not only to guard against civil actors, but Church actors as well.²⁰⁷ Were a diocese to snatch parish properties to satisfy the diocese's debts, it would almost certainly precipitate parishes' enforcement of their canonical rights within the Church.²⁰⁸

Despite the explicit statutory recognition of a diocese's relationship with its parishes, a corporation sole is an imperfect representation of that relationship.²⁰⁹ Unlike what one would expect under other corporate forms of organization,²¹⁰ "[p]arishes do not exist as 'profit centers' for the Diocese."²¹¹ Instead, parishes fund diocesan-wide services that facilitate

206. See *supra* notes 62-64 and accompanying text. A juridic person resembles "a civil-law corporation [because] it is a legal construct which can and must be conceived of apart from the natural persons who constitute it, administer it, or for whose benefit it exists." Robert T. Kennedy, *Juridic Persons*, in NEW COMMENTARY ON THE CODE OF CANON LAW, *supra* note 75, at 154, 155. Just as a civil corporation requires the drafting of articles of incorporation and bylaws, so a juridic person requires the drafting and ratification of statutes to govern it. *Id.* at 157.

207. Robert T. Kennedy, *The Temporal Goods of the Church*, in NEW COMMENTARY ON THE CODE OF CANON LAW, *supra* note 75, at 1451, 1457 ("[P]roperty legitimately acquired by a parish—which, by law, is a juridic person—is owned by the parish, not by the diocese, which is a distinct juridic person." (citation omitted)); Kennedy, *supra* note 206, at 154 (observing that juridic persons possess "the right to own property, the right to enter into contracts, and the right to sue"). Juridic persons who find their rights adversely affected, within or outside the Church, must vindicate them. See *supra* notes 73-74, 202 and accompanying text (describing the duties attendant to the stewardship of Church property); see also 1983 CODE c.1282 ("All clerics or lay persons who through a legitimate title take part in the administration of ecclesiastical goods are bound to fulfill their duties in the name of the Church and in accord with the norm of law.").

208. See *supra* notes 70-75, 78-81 and accompanying text (discussing the rights and remedies that accrue from juridic ownership of property). In the Boston Archdiocese, these challenges have already materialized. See *Vatican Bars Boston Archdiocese Seizure of Parish Assets*, CATHOLIC WORLD NEWS, Aug. 11, 2005, <http://www.cwnews.com/news/viewstory.cfm?recnum=38964> (relating that parishioners have successfully lodged canonical protests against the Boston Archdiocese's unilateral acquisition of assets from parishes it closes). According to the Congregation for the Clergy at the Vatican, the assets of a closed parish do not automatically become the property of the Archdiocese. See *id.* Instead, property of the closed parish becomes property of the new parish into which the old one was merged. See *id.* For the Archdiocese to claim assets of the old parish, the Archdiocese must obtain permission from the pastor and parish finance council. See *id.*

209. See *supra* note 22.

210. See Catholic Bishop of Spokane's Memorandum of Authorities in Opposition to Tort Litigant Committee's Motion for Partial Summary Judgment at 31, Committee of Tort Litigants v. Catholic Bishop of Spokane (*In re* The Catholic Bishop of Spokane), Case No. 04-08822-PCW11, Adv. Proc. No. 05-80038 (Bankr. E.D. Wash. May 27, 2005) ("Underlying the Litigant[s]' position is the mistaken notion that the Catholic Church and General Motors have the same corporate governance structures and theories of liability apply equally to organizations that feed souls and make cars.").

211. See Affidavit of William S. Skylstad, *supra* note 22, at 20.

the parishes' mission.²¹² Moreover, it is a false comparison to other corporate organizations to insist that there is a chain of command from the Pope to pastor.²¹³ Though there are arguments that the diocese has newly discovered this trust relationship to defend itself in litigation,²¹⁴ dioceses organized as corporations sole have long relied on the availability of statutory trusts created by state corporation sole statutes.²¹⁵

Indeed, the requisites for a trust do not require as demanding a showing of evidence as has been contended.²¹⁶ At a minimum, assuming the satisfaction of the other elements of a trust, the proffer of an "external expression of intention" obviates need for an ironclad documentation of the trust relationship.²¹⁷ Yet when a diocese incorporates pursuant to a corporation sole statute, one would expect less skepticism because statutory trusts, in the acts themselves, make evident the existence of the trusts.²¹⁸ Where the trust is defined by statute, the trust comes into being at the legislative will.²¹⁹ Such legislation can be the nub of all nonbankruptcy law on which the bankruptcy code relies.²²⁰

212. *Id.*

213. *Id.* at 30.

214. See Committee of Tort Litigants' Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment, *supra* note 180, at 11 ("If the Diocese's trust theory is correct, the Diocese can injure people and damage property, and simply walk away claiming that it is judgment proof because its property is held in trust for the Catholic Church.").

215. Cf. *supra* text accompanying notes 37-40, 45.

216. See *supra* Part I.B.

217. See *supra* text accompanying note 50. Moreover, a diocese could look to extrinsic evidence where the existence of the trust relationship is in doubt. See *supra* text accompanying note 51.

218. See, e.g., *Begier v. IRS*, 496 U.S. 53, 61-62 (1990) (finding that statutory language supported the Court's view that a trust was created for the benefit of the IRS); *State ex rel. Trenholm v. Yelle*, 25 P.2d 569, 570 (Wash. 1933) ("By the act itself, the fund is impressed with a trust.").

219. See *BOGERT supra* note 46 and accompanying text; see, e.g., WASH. REV. CODE ANN. § 49.52.010 (2005) ("All moneys collected by any employer from his or its employees and all money to be paid by any employer as his contribution for furnishing, either directly, or through contract, or arrangement . . . or any or all of the above enumerated services, or any other necessary service, contingent upon sickness, accident or death, are hereby declared to be a trust fund for the purposes for which the same are collected.").

220. See Thomas E. Plank, *Bankruptcy and Federalism*, 71 *FORDHAM L. REV.* 1063, 1075-76 (2002) ("Because the bulk of nonbankruptcy law is state law, the Code expressly and impliedly depends on state law. Thus, the Code specifically embraces the federalism of our system of government. As a matter of statutory command, federal courts must in many instances follow and apply state law."). This dependence is especially acute with respect to § 541(a)'s "interests of the debtor in property" and § 541(d)'s "legal and equitable interests" because both provisions are defined by state law, not bankruptcy law. See *id.* at 1072-74.

Statutory trusts are not easily evaded.²²¹ As a preliminary matter, the trust exists because of an explicit, statutory directive.²²² Easy though it may be to plot the various trust relationships according to one's own observations,²²³ a plain reading of the statutory trust reveals the proper relationship.²²⁴ Once the statutory trust is defined, there is no condition that the trust property must remain segregated merely for the ease of defining the bankruptcy estate.²²⁵ Before a trust is excludable from the bankruptcy estate, it does not have to meet conditions that are not imposed by law; indeed, trusts have been excluded from the bankruptcy estate even though they were not declared trusts before bankruptcy litigation.²²⁶ Surely, then, § 541(d) excludes statutory trusts from the bankruptcy estate.²²⁷ In the case of a statutory trust created by a corporation sole statute, the relationship between a diocese and parishes is informed by the statutory scheme itself when it declares that the trust exists "in conformity" with or "in furtherance" of the Church.²²⁸

221. See, e.g., *Begier*, 496 U.S. at 60 (1990) (noting that the trust of funds is created once "collecting" occurs without any need for sending them to the IRS or segregating them).

222. See BOGERT *supra* note 46 and accompanying text.

223. See *Comm. of Tort Litigants v. Catholic Diocese of Spokane (In re The Catholic Bishop of Spokane)*, 329 B.R. 304, 326 (Bankr. E.D. Wash. Aug. 26, 2005) (order denying motion to dismiss) ("[Washington's corporate sole statute] does not designate any particular beneficiary but merely identifies the nature or character of the possible beneficiaries. The beneficiary must be a religious organization. The statute does not establish a trust for any specific religious organization or for a congregation or a synod or parish or any component or subgroup or member of any religious organization."); see also John Stucke, *Fate of Diocese Could Rest on Property Ruling*, SPOKESMAN-REVIEW (Spokane, Wash.), June 28, 2005, at 1B 2005 WLNR 10285343 (quoting Judge Williams as saying, "It sure sounds to me like the diocese is the beneficiary of the trust").

224. See, e.g., *supra* text accompanying notes 187-197.

225. See *supra* text accompanying notes 111-112. The Supreme Court in *Begier* remarked on the shortcoming inherent to implying a segregation prerequisite in a statutory trust: a trustee's refusal to segregate would avoid creating the trust. *Begier*, 496 U.S. at 61.

226. See, e.g., *In re Poffenbarger*, 281 B.R. 379, 390 (Bankr. S.D. Ala. 2002) (agreeing with several other courts that a trust for child support funds exists for the purposes of excluding them from the debtor's bankruptcy estate); *Martinson v. James (In re James)*, 186 B.R. 262, 266 (Bankr. D. Mont. 1995) (finding that "no formal trust entity" is necessary where the requirements of a non-business trust are otherwise met); *Gabelhart v. Gabelhart (In re The Carriage House, Inc.)*, 146 B.R. 352, 357 (Bankr. D. Vt. 1992) (holding that a trust, though lacking proper characterization as a private or business trust under Vermont law, is still "something" of an "entity" entitled to classification as a trust under the Bankruptcy Code).

227. See 11 U.S.C. § 541(d) (2000); see also *supra* Part I.D.2.b.

228. See *supra* notes 42-43 and accompanying text.

B. Ceding No Ground to State-Sponsored Religious Discrimination

One scholar has noted that although the Supreme Court uses broad language to protect religious liberty, it actually upholds relatively few free-exercise rights.²²⁹ A successful free-exercise challenge, therefore, is *not* founded on an articulation of the burden on religious beliefs in the face of an important state interest.²³⁰ Rather, *Smith* and its progeny require that free-exercise claimants convince a court that an intentional discrimination against religion has occurred.²³¹ Moreover, a proper understanding of the religious activity at issue should be thoroughly characterized,²³² thereby avoiding a judicial gloss that comes dangerously close to violating the First Amendment.²³³ Although the central tenet of the First Amendment is that religious discrimination is forbidden, the Supreme Court will uphold a legal “distinction” unless it fails to bear rational relation to the goals it pursues.²³⁴

229. Robert A. Destro, *Developments in Liability Theories and Defenses*, 37 CATH. LAW. 83, 85-86 (1996). This does not mean that lower courts are unwilling to read Supreme Court precedent generously to broaden free-exercise rights. See Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 203 (2004) (acknowledging ambiguities in interpreting *Smith* but concluding that “Lukumi and the trend of lower court opinions read *Smith* in a way that provides substantial protection to religious liberty”).

230. See Destro, *supra* note 229, at 87 (“Counsel [in *Smith*] made a significant error by failing to recognize that most parties raising free exercise claims *lost* whenever the state was able to articulate an important state interest which supported the regulation of the conduct at issue, and, somehow, counsel erroneously concluded that by arguing that the religious interest was *important enough* to the individuals involved, they could win their case.”). The majority in *Smith* feared that if counsel’s rule prevailed, it would “open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.” *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 888-89 (1990). In *Locke v. Davey*, 540 U.S. 712 (2004), the majority validated Professor Destro’s observation: “The State’s interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars.” *Id.* at 725.

231. Destro, *supra* note 229, at 94.

232. See *id.* at 104 (“Defense counsel should not permit opposing counsel, or the court, to characterize religious conduct as secular without making a record which demonstrates beyond cavil that the characterization is wrong.”).

233. See *id.* at 104-05 (“Pastoral counseling and the Sacrament of Confession do not become mere counseling by judicial fiat, nor does the canonical relationship between priest and bishop become a simple agency relationship because there is some degree of supervision. If the act of ordination is hiring and the laying-on of hands or baptism is merely a touching, the neutral principles doctrine has ceased to function as a mechanism to protect First Amendment rights. It has instead become a mechanism for permitting the state to supervise the internal operations of the church.”).

234. *Id.* at 94-95.

An analysis of the majority and dissenting opinions in *Locke v. Davey*²³⁵ is particularly helpful for understanding a “distinction” in the bankrupt diocese context because they sharply differ between upholding the state action and declaring it unconstitutional.²³⁶ Joshua Davey was awarded a Promise Scholarship and after enrolling at an eligible institution, attempted to use his scholarship to study devotional theology despite such a prohibition under Washington State’s law and constitution.²³⁷ Writing for the majority, Chief Justice Rehnquist noted that “the State’s disfavor of religion . . . is of a far milder kind” than “requir[ing] students to choose between their religious beliefs and receiving a government benefit.”²³⁸ Washington State, thought also to be “solicitous in ensuring that its constitution is not hostile toward religion,”²³⁹ merely continued the prohibitions against public funding for the clergy that existed at the time of the nation’s founding.²⁴⁰ According to the majority, the “historic and substantial state interest at issue” weighs in favor of the proscription’s constitutionality.²⁴¹ In a vigorous dissent, Justice Scalia accused the Court of excusing discrimination because the majority concluded the discrimination was not motivated by any religious animus.²⁴² Justice Scalia framed the scenario as one in which the state offered a public benefit but “withh[eld] that benefit from some individuals solely on the basis of religion.”²⁴³ He opined that any publicly available allowance “becomes part of the baseline against which burdens on religion are measured.”²⁴⁴ Davey sought only equal treatment under the law, not “a special benefit to which others were not entitled.”²⁴⁵

235. 540 U.S. 712 (2004).

236. Compare *id.* at 725 (holding for the majority that nothing in Washington’s constitution or in the Promise Scholarship Program’s prohibition against devotional theology study “suggests animus toward religion”) with *id.* at 733 (Scalia, J., dissenting) (“Let there be no doubt: This case is about discrimination against a religious minority.”).

237. *Id.* at 715-17.

238. *Id.* at 720-21.

239. *Id.* at 724 n.8.

240. Cf. *id.* at 722-23.

241. *Id.* at 725. The dissent criticizes the majority for deferring to a state interest that amounts to “the State’s opinion that it would violate taxpayers’ freedom of conscience *not* to discriminate against candidates for the ministry.” *Id.* at 730 (Scalia, J., dissenting).

242. *Id.* at 732 (Scalia, J., dissenting). Justice Scalia failed to see why legislative motive mattered, writing: “If a State deprives a citizen of trial by jury or passes an *ex post facto* law, we do not pause to investigate whether it was actually trying to accomplish the evil the Constitution prohibits. It is sufficient that the citizen’s rights have been infringed.” *Id.*

243. *Id.* at 726-27.

244. *Id.* at 726.

245. *Id.* at 727.

Locke may have upset the apple cart of government neutrality, but not by much.²⁴⁶ Perhaps unsurprisingly, *Locke* has been criticized for its departure from *Lukumi* because Washington State was relieved of showing a compelling interest for its discrimination against religion.²⁴⁷ *Locke*'s holding, however, should not be construed as an endorsement of state-sponsored religious discrimination, especially in light of the limited facts on which the case rests.²⁴⁸ Although it is an important part of *Smith-Lukumi* jurisprudence, *Locke* stands for the limited proposition that the nondiscrimination scheme does not embrace discriminatory funding.²⁴⁹ Moreover, *Locke* is simply not broad enough to require that every free-exercise claim include proof of an "anti-religious motive."²⁵⁰ *Smith-Lukumi* jurisprudence, unmodified by *Locke* except in its particularized context, thus continues to control any evaluation of burdens to Free Exercise by the state.²⁵¹ Accordingly, a helpful restatement of Free Exercise Clause jurisprudence is: "The state . . . is free to regulate conduct as long as it does not target religion for discriminatory treatment. If the field of law involved are those . . . that are *entirely neutral in their general application*, religious exemptions are not constitutionally required."²⁵²

Free-exercise protection should apply everywhere, with no distinction between the halls of the Hialeah City Council or the bankruptcy court in

246. See Laycock, *supra* note 229, at 218-19 ("The Court rejects the attempt to transport *Lukumi* wholesale from the regulation cases to the funding cases. But it does not rewrite the regulation cases.").

247. See, e.g., *id.* at 171 ("From the perspective of the Court's cases on discrimination against religion, [*Locke*'s holding] is remarkable. The Court had never before held that the state can discriminate against religion."). Although it is not altogether clear in the majority opinion, one could infer that the standard in *Locke* is one requiring a compelling state interest. See *Locke*, 540 U.S. at 725 ("The State's interest in not funding the pursuit of devotional degrees is *substantial* and the exclusion of such funding places a relatively *minor burden* on Promise Scholars.") (emphasis added); but cf. *id.* at 730 (Scalia, J., dissenting) (remarking that "[t]he [majority] opinion is devoid of any mention of standard of review").

248. Laycock, *supra* note 229, at 162.

249. *Id.* at 200. After *Locke*, funding has become an exception to the otherwise broad protections afforded to religious liberty by *Lukumi*. See *id.* at 178 ("Funding is now an exception to the rule of government neutrality toward religion.").

250. *Id.* at 214, 216-18. Professor Laycock recognizes that bad motive is evidence of discrimination, but not a requirement for it. See *id.* at 210 ("Bad motive may be one way to prove a violation, but first and foremost, *Smith-Lukumi* is about objectively unequal treatment of religion and analogous secular activities.").

251. *Id.* 216-18 ("Davey's claim relied on *Lukumi*, the leading regulation case, but his goal was to extend the *Lukumi* rules from regulation to funding. That effort failed; *Lukumi* does not apply to funding. But neither was *Lukumi* rolled back as applied to regulation.").

252. Destro, *supra* note 229, at 88 (emphasis added) (footnotes omitted).

Spokane.²⁵³ Nonetheless, great efforts are and have been made to limit the Church's basic protections under the First Amendment; for example, one attorney's opinion of the relevance of canon law is, "If it's inconsistent with the law of the land, it goes in the garbage can."²⁵⁴ The difficulty with such a shortsighted analysis is that the Federal Rules of Evidence readily admit "[a]ll relevant evidence."²⁵⁵ Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence."²⁵⁶ A federal judge has discretion to admit relevant evidence,²⁵⁷ when considering the admissibility of the evidence, the judge is not subject to the Federal Rules of Evidence.²⁵⁸ When deciding the admissibility of evidence, a federal judge, naturally, cannot avoid compliance with the Constitution or congressional enactments.²⁵⁹ Thus, the First Amendment matters as much to a bankruptcy proceeding as does the determination of the bankruptcy estate under § 541.²⁶⁰ Canon law is further protected in that it can be neither interpreted nor challenged by a court.²⁶¹ The mistake of rejecting the testimony of five canon law experts doomed the Illinois Supreme Court in *Serbian*.²⁶² The uneasiness of a trial judge considering evidence on canon law sufficiently impressed the appellate court in *Catholic University of America*.²⁶³

253. See *Locke v. Davey*, 540 U.S. 712, 728 (2004) (Scalia, J., dissenting) ("If the Religion Clauses demand neutrality, we must enforce them, in hard cases as well as easy ones.").

254. Marie Beaudette, *Churches Weigh Going Bankrupt to Escape Suits*, LEGAL TIMES (Wash., D.C.), July 26, 2004, at 1 (quoting David Slader, the plaintiffs' attorney in Portland); see also Wendy N. Davis, *Church and Chapter 11*, A.B.A. J., Oct. 2005, at 14, 16 (quoting Marci Hamilton, who represents plaintiffs in both Spokane and Portland, as saying, "No American judge would take [canon law] as evidence").

255. See FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States [or] by Act of Congress . . ."). The Federal Rules of Evidence govern bankruptcy proceedings. FED. R. EVID. 101 ("These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges . . .").

256. FED. R. EVID. 401 (emphasis added).

257. See FED. R. EVID. 104(a).

258. See *id.*

259. See FED. R. EVID. 402.

260. See *id.*

261. See, e.g., *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999) ("Having a civil court determine the merits of canon law scholarship would be in violent opposition to the constitutional principle of the separation of church and state.").

262. See *Serbian E. Orthodox Diocese for the United States of Am. and Can. v. Milivojevich*, 426 U.S. 696, 718 (1976).

263. See *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 459 (D.C. Cir. 1996) (relating the trial judge's concern "that the line of inquiry was 'getting awful[ly] close to entangling the government and the judiciary in religious matters'" and became problematic when he

Accordingly, not only is evidence that is relevant to the determination of the bankruptcy estate admissible, but no constitutional rights may be infringed during that determination.²⁶⁴

Plaintiffs have argued that the inclusion of parish properties in the bankruptcy estate of a diocese organized as a corporation sole does not implicate the First Amendment because secular, tortious conduct is what is at issue, and therefore no free-exercise freedoms attach.²⁶⁵ Proponents of this view—though correct in their initial analysis that a diocesan bankruptcy “is a purely secular dispute between creditors and a bankruptcy debtor, albeit one which is a religious organization”²⁶⁶—are mistaken when they subsequently characterize the Church’s position as an attempt to govern ordinary civil law by internal ecclesiastical doctrine.²⁶⁷ Plaintiffs’ attorneys protest too much when they argue that *Wolf* applies instead of *Serbian*, sounding as if plaintiffs have conceded that the matter before the court is an “intra-church dispute.”²⁶⁸

It is true that the Supreme Court has never explicitly extended church autonomy reasoning outside the intrachurch context.²⁶⁹ This does not mean that the church autonomy cases cannot inform the discussion.²⁷⁰ On the one hand, the Court has sketched an upper boundary where controversies arising in church tribunals about real or personal property

heard “aggressive examination of a priest about what is at least partly his clerical duties”) (alteration in original) (citations omitted) (quoting Nov. 4, 1993 Trial Transcript at 9-10, Nov. 5, 1993 Trial Transcript at 147).

264. See *supra* notes 255, 259 and accompanying text.

265. See Committee of Tort Litigants’ Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment, *supra* note 180, at 24-25.

266. See, e.g., Comm. of Tort Litigants v. Catholic Diocese of Spokane (*In re The Catholic Bishop of Spokane*), 329 B.R. 304, 323 (Bankr. E.D. Wash. Aug. 26, 2005) (order denying motion to dismiss).

267. See, e.g., *id.* at 325 (“This argument by the debtor and the defendants is in essence a request to impose internal ecclesiastical rules upon third parties who deal with the debtor in secular transactions.”).

268. See, e.g., Catholic Bishop of Spokane’s Memorandum of Authorities in Opposition to Tort Litigant Committee’s Motion for Partial Summary Judgment, *supra* note 210, at 39-41 (reasoning that the Committee’s attempt to persuade the court to consider neutral principles of law instead of deference has conceded the notion that the estate property issue “in substance and reality is an intra-church dispute”).

269. See Marianne Perciaccante, Note, *The Courts and Canon Law*, 6 CORNELL J.L. & PUB. POL’Y 171, 171 (1996); see also Gerstenblith, *supra* note 41, at 514-15 (classifying free-exercise cases before the Supreme Court into intrachurch and non-intrachurch disputes); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998) (referring to these cases as “internal problems of religious bodies”).

270. See Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Cases of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1397 (1981) (“The [Supreme] Court has consistently extended the right of church autonomy as far as necessary to include the cases before it.”).

could “in no sense depend on ecclesiastical questions.”²⁷¹ On the other hand, the Court has also observed that “[s]pecial problems arise . . . when [property] disputes implicate controversies over church doctrine,” but without identifying the limits on those special problems.²⁷² In *General Council on Finance & Administration, United Methodist Church v. California Superior Court*,²⁷³ an authority upon which proponents of a circumscribed reading of church autonomy cases rely,²⁷⁴ Justice Rehnquist did not articulate a position adopted by the whole Court.²⁷⁵ Moreover, he did not illuminate the field between what is essentially religious and what is purely secular.²⁷⁶ More recently, federal circuit court opinions have also loosely articulated the limits of church autonomy jurisprudence.²⁷⁷ In keeping with this imprecision, some state courts have been even less circumspect than federal courts of appeals.²⁷⁸

271. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872).

272. *See Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445 (1969). The Court refused to elaborate, writing instead, “The logic of this language leaves the civil courts *no* role in determining ecclesiastical questions in the process of resolving property disputes.” *Id.* at 447.

273. 439 U.S. 1369 (1978) (Rehnquist, Circuit Justice 1978).

274. *See, e.g., supra* text accompanying note 265. Then Justice Rehnquist’s opinion held:

There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes. But this Court never has suggested that those constraints similarly apply outside the context of such intraorganization disputes. Thus, *Serbian Eastern Orthodox Diocese* and the other cases cited by applicant are not in point. Those cases are premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged.

Gen. Council on Fin. & Admin., 439 U.S. at 1372-73 (citations omitted).

275. *See id.* at 1374.

276. *See id.* at 1372-73.

277. *See, e.g., Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000) (explaining that the court’s decision “only continues a long-standing tradition that churches are to be free from government interference in matters of church governance and administration”); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996) (“[T]he Free Exercise Clause *precludes* governmental interference with ecclesiastical hierarchies”) (emphasis in original) (citation omitted) (quoting *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990)).

278. *See Perciaccante, supra* note 269, at 173 (analyzing the *interpretations* of canon law by state courts in non-intrachurch contexts). Those cases include:

[A] bishop’s vicarious liability for a priest’s tortious actions; ownership of a deceased monk’s property when that monk has taken a vow of poverty; necessity

Some jurists have suggested that relieving courts of rigid limitations on free exercise is not unwelcome.²⁷⁹

Perhaps the reluctance to extend church autonomy jurisprudence to diocesan bankruptcies is that the judicial result would be a foregone conclusion.²⁸⁰ Under either the church autonomy or neutral principles approach, the bankrupt diocese could win.²⁸¹ Were a court to defer to church polity, the Church's position is unmistakably clear: given notions of juridic persons, the nature of ecclesiastical goods, duties of a good householder, restrictions on alienation, and canonical remedies for violations of canon law, a diocese is without canonical authority to include a parish in its bankruptcy estate.²⁸² Perhaps sensing this conclusion, attorneys who seek inclusion of parish assets in a diocesan bankruptcy estate instead prefer an analysis of neutral principles of law.²⁸³ Sitting in "purely secular" judgment of the Church, *Wolf* requires

of payment of federal income taxes when the priest or nun employee has taken a vow of poverty; ownership of church property in an action for trespassing; and the secular legal validity of an antenuptial agreement requiring that a couple raise their children Catholic.

Id.

279. See, e.g., *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 100 (Cal. 2004) (Brown, J., dissenting) ("The logic of [the ministerial exception and church autonomy] cases suggests that the constitutionally protected space for religious organizations is actually broader than these obvious categories. In short, the ministerial exception and the church autonomy doctrine are ways of describing spheres of constitutionally required protection, but these categories are not exhaustive."). Justice Brown further suggested that "[i]nstead of applying *Smith*, we might view it as effectively returning free exercises questions to the states." *Id.* at 107.

280. See MAIDA & CAFARDI, *supra* note 202, at 109. Cardinal Maida and Professor Cafardi explain:

It can still be expected that on such internal matters as Church discipline, faith, internal organization and ecclesiastical rule, custom, or law, *Serbian's* nonreviewable, or deferential, approach will be the case and church judicatories will be granted constitutional protection on such matters. In other words, on matters of internal polity, courts will allow church law to be final.

Id. (footnote omitted); see also Greenawalt, *supra* note 269, at 1865 (finding that a neutral principles of law analysis of church documents facilitates deference by a court); cf. *id.* at 1902 (suggesting that the law is more predictable for the "rigorously hierarchical [] Roman Catholic Church" than for some other religious groups); Francis Helminski, *Neutral-Principles and Triumphant Hierarchies: Trusts of Property in the Episcopal Church, in THE ADMINISTRATION OF CHURCH PROPERTY* 25, 25, 45 (Joseph Fox ed., 2001) ("Using the hierarchical approach, of course, means the diocese will win.").

281. Cf. Helminski, *supra* note 280, at 45.

282. See *supra* Part I.C.

283. Cf. Committee of Tort Litigants' Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment, *supra* note 180, at 24. Dioceses do not always need to fear the use of neutral principles of law. See Helminski, *supra* note 280, at 45 ("[U]sing the neutral-principles analysis does not necessarily mean the diocese will lose.").

only that a court is “not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust.”²⁸⁴ But the documents for review would include articles of incorporation and “state statutes governing the holding of church property”²⁸⁵ as well as “provisions in the constitution of the general church concerning the ownership and control of church property.”²⁸⁶ A “secular” reading of the documents directed by *Wolf* still supports the conclusion that a trustee-diocese cannot include beneficiary-parish in its bankruptcy estate.²⁸⁷

Intrachurch analyses for resolving secular disputes with third parties are useful still because they have become prevalent as courts have expanded the use of the neutral principles of law analysis.²⁸⁸ Courts use the neutral principles of law analysis to garner jurisdiction in civil matters over essentially religious activity.²⁸⁹ What results is an abuse of the neutral principles of law approach, which rather than defining the limits of a court’s jurisdiction, becomes the basis for resolving the controversy itself.²⁹⁰ If courts continue to insist on employing the neutral principles of law approach to separate religious and secular activities in disputes with parties not governed by intrachurch doctrine, the court should at least base its separation on: “1) the intent of the [religious] parties; 2) the character and setting of their relationship; and 3) the content of the evidence necessary to establish the claims and defenses in the case.”²⁹¹ Without recourse to these factors, a court almost certainly will mischaracterize religious conduct as secular to the further detriment of a faithful observation of the neutral principles of law.²⁹²

Some courts that have confronted the separation of religious conduct from secular conduct have remarked on *Smith*’s applicability to individuals but not to churches, thereby preserving the essence of church autonomy rationales.²⁹³ Church autonomy cases, like *Smith*, essentially revolve around the judiciary’s unwillingness to inquire into religious tenets.²⁹⁴ The fears relayed in *Smith* about assessing religious belief are heightened when a court must address, among competing parties, the

284. *Jones v. Wolf*, 443 U.S. 595, 604 (1979).

285. *Id.* at 602-03.

286. *Id.* at 603.

287. *See supra* notes 42-45 and accompanying text, *supra* Part I.C.

288. *Cf. Destro, supra* note 229, at 102-04 (discussing civil courts’ increasing use of neutral principles of law to separate “secular” activities from “religious” ones).

289. *See id.*

290. *See id.* at 102-05 (describing the flawed outcome that ensues).

291. *See id.* at 104.

292. *Id.* at 104-05.

293. *See supra* Parts I.E.2, I.E.4.

294. Greenawalt, *supra* note 269, at 1906.

ownership of church property which relies in part on free-exercise claims.²⁹⁵ Accordingly, any post-*Smith* authority that upholds church autonomy rationales is enhanced because these rationales remain faithful to the heart of *Smith*'s message; they "avoid[] for the most part judicial assessment of religious matters" and maintain "the Court's proclivities towards not having special constitutional rights for religious claimants."²⁹⁶

Above and beyond any religious claimant's expectation that it can rely on *Smith-Lukumi*'s guarantee of the neutral enforcement of a generally applicable law,²⁹⁷ RFRA further insulates claimants from federal laws that substantially burden religion.²⁹⁸ The legal reality of RFRA's viability in the federal realm has its opponents.²⁹⁹ Critics argue that RFRA is ultra vires because there is no enumeration of an "Article I power [to] justifi[y

295. *See id.*

296. *Id.*

297. *See supra* notes 229-34, 249-52 and accompanying text (discussing *Smith-Lukumi* jurisprudence).

298. *See supra* notes 140-53 and accompanying text (explaining RFRA's continued applicability with respect to federal law); *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2118 n.2 (2005) (acknowledging that RFRA remains constitutional in the federal sphere).

299. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (Stevens, J., concurring) ("In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a 'law respecting an establishment of religion' that violates the First Amendment to the Constitution."). Justice Stevens decries "governmental preference for religion, as opposed to irreligion" through "a legal weapon that no atheist or agnostic can obtain." *Id.* at 537. *See Marci A. Hamilton, The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 1 (1998) (insisting that *Boerne* was "straightforward" about RFRA's unconstitutionality under both state and federal law). Professor Hamilton believes that the enactment of RFRA proceeded from "manifest disrespect for the Supreme Court as an institution, and has done so in the most unobtrusive fashion imaginable." *Id.* at 5. Professor Hamilton quotes James Madison at length in defense of her proposition that government and religious collaboration is dangerous. *See id.* at 10 n.50 ("Religion itself may become a motive to persecution & oppression.") (quoting JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 428 (Adrienne Koch ed., Ohio Univ. Press 1966) (1787)). What Madison would think of RFRA is unknown, but, at the very least, he championed government that was sensitive to burdens on religion. *See* JAMES MADISON, A MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, reprinted in GREAT QUOTATIONS ON RELIGIOUS FREEDOM app. 2, at 209, 210 (Albert J. Menendez & Edd Doerr eds., Prometheus Books 2002) (1785). Madison wrote:

Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.

Id.

RFRA's] application to federal law."³⁰⁰ According to this criticism, recourse to the Necessary and Proper Clause is insufficient.³⁰¹ Critics also condemn what they see as a usurpation of the Supreme Court's province to "say what the law is,"³⁰² a violation of the separation of powers doctrine.³⁰³

United States Courts of Appeals have disagreed with these contentions.³⁰⁴ Even *Boerne* suggests that congressional authority to apply RFRA to federal law is well founded.³⁰⁵ It is imperative, therefore, that the separation of powers argument is read "in the context of the entire opinion and the question being considered," namely, RFRA's application to state laws.³⁰⁶ Thus there is practically no obstacle to RFRA's falling within "Congress' power to apply RFRA to the federal government . . . [under] its Article I powers."³⁰⁷ Furthermore, the Supreme Court has recognized Congress' authority to legislate beyond the liberties guaranteed by the Court's interpretation of the Constitution.³⁰⁸ This authority does not diminish when bankruptcy is the federal law Congress modifies through RFRA.³⁰⁹ Undeniably one of Congress' enumerated powers allows it to fashion law on bankruptcies, so there is less reason to rely solely on the Necessary and Proper Clause—the so-called "last, best hope."³¹⁰

300. See, e.g., Hamilton, *supra* note 299, at 14.

301. See *id.* at 16 (emphasizing that the Necessary and Proper Clause is "the last, best hope of those who defend *ultra vires* congressional action") (quoting *Printz v. United States*, 521 U.S. 898, 923 (1997)).

302. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); Hamilton, *supra* note 299, at 2-8.

303. See, e.g., Hamilton, *supra* note 299, at 2-8.

304. See e.g., *Guam v. Guerrero*, 290 F.3d 1210, 1221 (9th Cir. 2002); *Kikumura v. Hurley*, 242 F.3d 950, 958-60 (10th Cir. 2001); *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854, 859-61 (8th Cir. 1998).

305. Cf. *Boerne*, 521 U.S. at 534-35 ("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. This has been clear from the early days of the Republic.").

306. *Kikumura*, 242 F.3d at 959.

307. *Id.*

308. See *In re Young*, 141 F.3d at 860 (enumerating instances of legislation beyond the Supreme Court's minimum protections). The Eighth Circuit further noted that there is no condition that Congress and the Supreme Court must agree "in order for its legislation to pass constitutional muster." *Id.*

309. *Id.* at 860-61. The Eighth Circuit concluded that "RFRA is an appropriate means by Congress to modify the United States bankruptcy laws." *Id.* at 861.

310. *Printz v. United States*, 521 U.S. 898, 923 (1997); see *supra* notes 149-53 and accompanying text.

III. THE READING OF STATE AND BANKRUPTCY LAWS AS NEUTRAL LAWS OF GENERAL APPLICABILITY EXCLUDES PARISH PROPERTY FROM THE BANKRUPTCY ESTATE

There are some demands for justice that cannot be met by even the most cooperative bankrupt diocese.³¹¹ In litigation where so much money is at stake, the Church—like any other citizen or corporation—is entitled to pursue a defense.³¹² Perhaps entitlement to defend oneself is lost on those who accuse the Church of perpetrating a fraud through bankruptcy laws.³¹³ Detractors dismiss the Church for a variety of reasons, one of which is its failure to entertain a utilitarian calculus—seemingly, greater good can come from ransoming diocesan debts with parish property.³¹⁴

In reality, there is nothing dilatory, deceptive, or unrealistic about the arguments the Church makes: unquestionably, a diocese organized as a corporation sole has legitimate arrows in its quiver to protect parish assets from inclusion in the diocese's bankruptcy estate. Dioceses have long acted under the auspices of the state to keep parish property in trust.³¹⁵ Bankruptcy law automatically excludes from the debtor's estate any property held in a statutory trust.³¹⁶ Any deviant application of neutral bankruptcy and state laws of general applicability requires a compelling interest narrowly tailored to achieve that deviant application's purpose.³¹⁷ If the state fails to guarantee the equal application of the laws, and does not have a compelling interest that justifies its discriminatory application of the laws, the state is engaging in forbidden discrimination against religion.³¹⁸

Independent of canon law, statutory language requiring property to be held "in trust" directs a corporation sole to hold its property for "for the use, purpose, benefit and behoof" of other persons within the Church.³¹⁹

311. See *supra* note 30 and accompanying text (describing lawsuits so large that a handful would financially destroy the entire diocese).

312. See *supra* notes 30-31 (detailing the fiscal threat of lawsuits brought by uncompromising plaintiffs).

313. See *supra* note 31.

314. See, e.g., Committee of Tort Litigants' Memorandum of Authorities in Response to Oppositions and Cross Motion for Summary Judgment at 24, *Comm. of Tort Litigants v. Catholic Bishop of Spokane (In re The Catholic Bishop of Spokane)*, Case No. 04-08822-PCW11, Adv. Case. No. 05-80038 (Bankr. E.D. Wash. June 13, 2005) ("The very worst that can be said is that a few parishioners will be disappointed if the Diocese is required to pay its debts.").

315. See *supra* notes 37-40 and accompanying text.

316. See *supra* Part I.D.2.a-b.

317. See *supra* notes 117-20, 134 and accompanying text.

318. See *supra* text accompanying notes 115, 120, 134-36136.

319. See *supra* Part I.A. Even though some diocesan property exists for the benefit of parishes, see *supra* note 211-12 and accompanying text, bankrupt dioceses have made

That use, purpose, benefit, or behoof is not defined by a court or by an overzealous attorney.³²⁰ At legislative behest,³²¹ the contours of the statutory trust become defined by canon law, a stricter norm than a garden-variety fiduciary duty familiar to other trusts.³²² Opponents dismiss this construction, choosing instead to cast the decision to incorporate under a corporation sole statute as an ignoble power grab.³²³ The history behind corporation sole statutes is irrelevant to the obligation to interpret the statute as written.³²⁴ Where statutory language

much diocesan property available to the bankruptcy estates. *See, e.g.*, Catholic Bishop of Spokane's Memorandum of Authorities in Opposition to Tort Litigant Committee's Motion for Partial Summary Judgment, *supra* note 210, at 47 (detailing Spokane's effort to cooperate by making available \$25 million in undisputed diocesan assets and insurance).

320. *But see* Comm. of Tort Litigants' Memorandum of Authorities in Response to Oppositions and Cross Motion for Summary Judgment, *supra* note 314, at 22. Plaintiffs' attorneys reason:

The payment of damages to the survivors of this abuse, who once were the children of this Diocese, is an appropriate *use* of the corporation's property and is part of fulfilling the Diocese's self-professed *purpose* to compensate the survivors. In purely legalistic terms, reduction of the Diocese's liability is for the *benefit and behoof* of the Diocese and the Roman Catholic Church in the Diocese of Spokane. In moral terms, it is a necessity.

Id.

321. *See supra* text accompanying notes 39, 53.

322. *See supra* Parts I.C, II.A.

323. *See, e.g.*, Reply Brief by Mr. Shea and Brief in Opposition to Motion of Diocese for Summary Judgment, *supra* note 31, at 3; Comm. of Tort Litigants v. Catholic Diocese of Spokane (*In re* The Catholic Bishop of Spokane), 329 B.R. 304, 326 (Bankr. E.D. Wash. Aug. 26, 2005) (order denying motion to dismiss). The bankruptcy court in Spokane resorted to extrinsic evidence to determine the plain meaning of the statute, namely, historical accounts of why a statutory trust was created in the first place. *Id.* at 326-27. If courts are willing to depart from the plain statutory language, it is unfair that they refuse to acknowledge the diocese's own understanding of the trust as evinced by articles of incorporation, *see supra* note 45 and accompanying text, and, more significantly, abundant canonical corroboration, *see supra* Part I.C; *see also* MAIDA & CAFARDI, *supra* note 202, at 103-04 (1984). Cardinal Maida and Professor Cafardi believe that:

[t]here is reason to manifest a justifiable pride in the canon law. It is the oldest, continually functioning legal system in the world. The next oldest legal system, which is our own Anglo-American common law system, is younger by a good 800 to 1,000 years. The common law had its genesis in the canon law, and the canon law was the means by which many concepts of Roman law (e.g., corporations) entered the common law. When William the Conqueror invaded England from Normandy, he brought with him his first chancellor, Maurice, who was a cleric and canon lawyer. In establishing the legal system for the conquered territories, he made use of the canonical and Roman legal concepts with which he was familiar as a canon lawyer. The common law has developed from this system.

Id. (footnotes omitted).

324. *See supra* notes 184-86 and accompanying text; *see, e.g.*, Wash. State Coal. for the Homeless v. Dep't of Soc. & Health Servs., 949 P.2d 1291, 1297 (Wash. 1997) ("The duty of the court in interpreting a statute is to ascertain and give effect to the intent and purpose of the Legislature, as expressed in the statute as a whole. If a statute is

requires a trust, canon law is a useful and necessary instrument, describing with specificity enforceable duties.³²⁵

A duty required under the statutory trust is that the diocese act “in conformity with the constitution, canons, rules, regulations or disciplines of such church or denomination”³²⁶ or “in furtherance of the objects and purposes of the corporation.”³²⁷ When canon law is brought to bear on a corporation sole’s treatment of property, there are rights, duties, and remedies of canon law that rush in to define the relationship of dioceses and parishes.³²⁸ That relationship—announcing the enforceable right of each juridic person to possess and protect its own property and further instructing each administrator of property to observe strict fiduciary duties—can only lead to the conclusion that property must be held in trust when the property of one juridic person is owned civilly by another juridic person.³²⁹ The authentic interpretation of this section of canon law by the Pontifical Council for the Interpretation of Legislative Texts, the Church authority on canon law, confirms this understanding.³³⁰

If state law is settled as to the existence of the statutory trust, it is automatically incorporated into bankruptcy law.³³¹ Only where there is a supervening federal interest will state law not control,³³² but the laws on bankruptcy do not evince any such federal interest that trumps state property law.³³³ In fact, through RFRA, Congress articulated a large federal interest in avoiding substantial burdens to religion.³³⁴ Further federal guidance is provided by *Begier*, wherein the Supreme Court upbraided an attempt to dismiss the existence of a statutory trust.³³⁵

unambiguous, its meaning is to be derived from the language of the statute alone. An unambiguous statute is not subject to judicial construction, and [a court] will not add language to a clear statute even if [it] believe[s] the Legislature intended something else but failed to express it adequately.” (citations omitted).

325. See *supra* notes 198-208 and accompanying text (describing both state and canonical requirements for administering a statutory trust).

326. WASH. REV. CODE ANN. § 24.12.010 (West 2005).

327. COLO. REV. STAT. ANN. § 7-52-103 (West 2004); see also *supra* note 43 and accompanying text (describing other similar state statutes).

328. See *supra* Part I.C.

329. See *supra* Part I.C.

330. See *supra* Part I.C and note 205.

331. See *supra* notes 91-92 and accompanying text. It could be said further that because bankruptcy law incorporates state law, and state law incorporates canon law, bankruptcy law also incorporates canon law. See *id.*

332. See *supra* note 93 and accompanying text.

333. Cf. *supra* note 220 and accompanying text.

334. See *supra* notes 140, 147-53, 298 and accompanying text.

335. See *supra* Part I.D.2.b.

When a statutory trust is found, § 541(d) plainly excludes it from the bankruptcy estate.³³⁶

To misapply state law and bankruptcy law to achieve a different result than one that would flow from the neutral application of a generally applicable law discriminates against a bankrupt diocese's free-exercise rights.³³⁷ The relationship of dioceses and parishes is, by plaintiffs' attorneys' own admissions, the "very heart" of bankruptcy litigation.³³⁸ Bankruptcy courts may not sacrifice the free-exercise rights of debtor dioceses on the altar of advancing recovery from tortious conduct.³³⁹ Although bankruptcy courts may weigh creditors' rights in its analysis,³⁴⁰ religious discrimination by a state requires more than a minor state interest such as creditor satisfaction.³⁴¹ Indeed, a determination of the bankruptcy estate precedes any discussion of creditors' equitable rights.³⁴² In the end, any departure from neutrally applying generally applicable state and federal laws must be justified by a compelling governmental interest.³⁴³ This holds true under either *Smith-Lukumi* or RFRA.³⁴⁴

Critics, ignoring the importance of *Smith-Lukumi's* bearing on the determination of a diocese's bankruptcy estate, expect that RFRA portends *the* great challenge to concluding that there are no First

336. *Cf. supra* Part I.D.2.b.

337. *Cf. supra* text accompanying notes 252, 260.

338. Committee of Tort Litigants' Opposition to Defendant Parishes' Motion to Dismiss at 2, Comm. of Tort Litigants v. Catholic Bishop of Spokane (*In re* The Catholic Bishop of Spokane), No. 04-08822-PCW11, Adv. Case No. 05-80038 (Bankr. E.D. Wash. May 26, 2005) ("The question of [parishes'] relationship to the Diocese is at the very heart of the Complaint as the Court determines what is property of the estate.").

339. *See, e.g.*, Comm. of Tort Litigants v. Catholic Diocese of Spokane (*In re* The Catholic Bishop of Spokane), 329 B.R. 304, 325 (Bankr. E.D. Wash. Aug. 26, 2005) (order denying motion to dismiss) ("The majority of claims in this bankruptcy proceeding are based upon personal injuries suffered as a result of sex abuse by members of the clergy. One is a personal injury claim arising from negligence, not sex abuse.").

340. *See id.* at 332 ("[A] Bankruptcy Court must balance not just the equities between the entity which holds legal title to the property against the entity which holds the beneficial interest, but those interests against the equities in favor of the creditors.").

341. *Cf. Locke v. Davey*, 540 U.S. 712, 730 n.2 (2004) (Scalia, J., dissenting) ("If religious discrimination required only a rational basis, the Free Exercise Clause would impose no constraints other than those the Constitution already imposes on all government action.").

342. *See, e.g.*, *In re* The Catholic Bishop of Spokane, 329 B.R. at 325 ("Fair and equitable treatment of all creditors requires application of civil law not only to determine their rights to recover from assets of the debtor, but to first define the interest of the debtor in those assets.").

343. *See supra* notes 140, 151-53, 251-52 and accompanying text.

344. *See supra* text accompanying notes 140, 251-52.

Amendment violations involved.³⁴⁵ However, RFRA is still a valid means of promulgating and clarifying bankruptcy law.³⁴⁶ Whether Congress amends § 541 specifically to ensure that it complies with a showing of compelling government interest, or amends § 541 through RFRA, congressional power to act is not impaired.³⁴⁷ Through RFRA, Congress has expressed a concern for substantial burdens to free exercise.³⁴⁸ *In re Young* found a substantial burden by including in the bankruptcy estate thirteen thousand dollars in tithes that debtors claimed no longer belonged to them.³⁴⁹ By any measurement, the burden would be much more substantial where a bankrupt diocese would be forced to turn over several hundred million dollars in parish properties that it argues does not belong to it.³⁵⁰ Civil lawsuits are only one burden for a bankrupt diocese; canonical proceedings will also arise out of this kind of bankruptcy litigation.³⁵¹ Moreover, this observation of canon law—millennial in maturity and universal in scope—is at least as entitled to a consideration under RFRA as is the right of a prison inmate to cast spells.³⁵² The compelling government interest that is required under both constitutional and statutory laws must amount to more than the maximization of the debtor's estate.³⁵³

345. See, e.g., Marci Hamilton, *Did the Portland Catholic Archdiocese Declare Bankruptcy to Avoid or Delay Clergy Abuse Suits?*, FINDLAW'S LEGAL COMMENT, July 13, 2004, <http://writ.news.findlaw.com/hamilton/20040713.html> ("RFRA . . . would permit [the Church] to take advantage of the Chapter 11 procedures it likes while it resists the portions it does not like. And even if the Church ultimately loses such arguments—as it should—it will doubtless succeed, at least, in interposing tremendous delay.").

346. See *supra* notes 151-53, 298 and accompanying text.

347. See *supra* text accompanying notes 146-153; see also *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1562 (11th Cir. 1984) ("[C]ongressional disapproval of a Supreme Court decision does not impair the power of Congress to legislate a different result, as long as Congress had that power in the first place.").

348. See *supra* note 140. Commentators who could be considered hostile to a bankrupt diocese's legal position have at least recognized that it is desirable to defer to a legislature's explicit enunciation of religious burdens to particular laws. See, e.g., Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1174 ("[E]xemptions are the task of the legislatures, which have the institutional capacity to consider whether exempting religious institutions burdened by particular laws is consistent with the public good."). Cf. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 890 (1990) (encouraging legislatures to take the lead in crafting religious protections).

349. See *supra* text accompanying notes 147-153.

350. See *supra* notes 25-26 and accompanying text.

351. See *supra* note 208 and accompanying text.

352. See *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 400-01 (7th Cir. 2003) ("We cannot tell whether a limit on casting spells would 'substantially' burden O'Bryan's religious activities . . . Thus it is premature to apply the RFRA's standard to O'Bryan's claims; that is a task for the district court in the first instance, and on a suitable record.").

353. See cases cited *supra* notes 117, 153.

Undeniably, the First Amendment does not protect tortious conduct,³⁵⁴ but tortious conduct is not at issue in a bankruptcy court's determination of the extent of a debtor's estate.³⁵⁵ By defending this truism, a debtor-diocese is not shirking its liability by arguing that the bankruptcy estate is more limited than plaintiffs would like, despite what plaintiffs' attorneys believe.³⁵⁶ Rather than swallowing as much as possible into the bankruptcy estate, the grand goals of Chapter 11 should be to allow a debtor to recover from bankruptcy *and* satisfy creditors.³⁵⁷ Bishops' statements documenting their decision to file for bankruptcy evince an earnest desire to satisfy creditors, within the limits of justice and fairness to past, present, and future victims and to the diocese itself.³⁵⁸ However, plaintiffs demand enlargement of the bankruptcy estate by invading the rights of other juridic persons, which entities the Church vigorously defends³⁵⁹ and which, in the final analysis, the First Amendment forbids.³⁶⁰ Some people might agree that the plaintiffs' objective is nonetheless a just one, but justice is a two-way street begging consideration of the far-reaching consequences for Roman Catholics who are wholly guiltless and unconnected to the sins of the sex-abuse scandal; in the words of one Spokane parishioner, "Do 90,000 innocent people deserve to be punished for the sins of those few[?]"³⁶¹

354. See case cited *supra* note 118 (describing how widely applicable laws obviously do not offend the First Amendment); *cf. supra* text accompanying note 265 (indicating plaintiffs' views of the applicability of tort laws to religious organizations in these bankruptcy proceedings).

355. See *supra* text accompanying notes 340-343 (emphasizing the primacy of bankruptcy principles and that tort victims' needs should not outweigh all other considerations).

356. See Comm. of Tort Litigants' Memorandum of Authorities in Response to Oppositions and Cross Motion for Summary Judgment, *supra* note 314, at 57 ("If this Court were to find that the Diocese can unilaterally dictate the scope of its property through canon law, and thereby reduce the likelihood victims will be compensated for their injuries fairly, it would have turned the Bankruptcy Code into [sic] a haven for criminals.").

357. See *supra* note 89 and accompanying text (describing Congressional and fundamental bankruptcy goals).

358. See *supra* note 30; see also Nicholas K. Geranios, *Judge Rules Diocese Can Sell Property*, COLUMBIAN, (Vancouver, Wash.), Aug. 27, 2005, at C2, 2005 WLNR 13545662 (quoting Bishop Skylstad's pledge to "appeal [Judge Williams'] decision because we have a responsibility, not only to victims, but to the generations of parishioners . . . who have given so generously of themselves in order to build up the work of the Catholic Church in Eastern Washington"); Catholic Bishop of Spokane's Memorandum of Authorities in Opposition to Tort Litigant Committee's Motion for Partial Summary Judgment, *supra* note 210, at 47.

359. See *supra* Part I.C.

360. See *supra* Part II.B.

361. See Geranios, *supra* note 25 (quoting parishioner Robert Hailey).

IV. CONCLUSION

A diocese organized as a corporation sole owns mere legal title to the assets of its parishes, but that does not mean that these assets belong in the bankruptcy estate of a diocese when it has filed for Chapter 11 bankruptcy protection. These assets are held in trust by the diocese for its parishes in accordance with both statutory trusts and canon law. Accordingly, courts should recognize this trust relationship to exclude these assets from the bankruptcy estate under a provision that excludes trust property. To disregard this relationship—to discriminate against neutral, generally applicable laws—infringes the right to free exercise enjoyed by dioceses and parishes. The recognition of this position hardly involves a novel machination to avoid tort liability, but rather a comprehensive and apposite understanding of state law, bankruptcy law, and the First Amendment. This appreciation requires courts to conclude that the assets of parishes are excludable from the bankruptcy estate of a debtor-diocese, and to hold otherwise is unconstitutional.

