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THE DELICATE BALANCE BETWEEN RELIGIOUS FREEDOMS AND LEGAL ACCOUNTABILITY IN AN INCREASINGLY LITIGIOUS SOCIETY

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INTRODUCTION

In recent decades, the Roman Catholic Church (“RCC”) has faced a steadily increasing number of lawsuits accusing its priests of sexual abuse.¹ Typically, the diocese to which the priest-offender was assigned is a key defendant in these cases.² The diocese itself can be held liable under various theories, including vicarious liability, or negligent hiring or supervision of priests.³ Many of these cases result in large monetary settlements or judgments for the plaintiff. However, as these settlements and judgments accumulate, some dioceses are simply unable to pay.⁴

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¹ See Stephen M. Bainbridge & Aaron H. Cole, *The Bishop’s Alter Ego: Enterprise Liability and the Catholic Priest Sex Abuse Scandal*, 46 J. CATH. LEGAL STUD. 65, 67 (2007) (noting that over 11,500 sex abuse claims have been filed since 1950); Patrick J. Schiltz, *The Impact of Clergy Misconduct Litigation on Religious Liberty*, 44 B.C. L. REV. 949, 952–53 (2003) (stating that litigation involving sexual misconduct by clergymen increased drastically in 1983, sparked by the publicity surrounding Gilbert Gauthé, a Roman Catholic priest accused of abuse).

² See Bainbridge & Cole, *supra* note 1, at 68 (“The key institutional defendant in most of these cases is the diocese to which the priest-offender was assigned.”); Wendy N. Davis, *Church and Chapter 11: Dioceses Faced with Sex-Abuse Scandal Now Confront Issues in Bankruptcy Court*, 91 A.B.A. J. 14, 14 (2005) (explaining that in July 2003, Tucson, Arizona became one of many large Roman Catholic dioceses defendants settling a clergy sex abuse lawsuit).

³ See Bainbridge & Cole, *supra* note 1, at 68 (“Typically, the diocese is held directly liable for negligent hiring or supervision of priests; more rarely, the diocese may be held vicariously liable for a priest’s sexual misconduct.”); David L. Gregory, *Some Reflections on Labor and Employment Ramifications of Diocesan Bankruptcy Filings*, 47 J. CATH. LEGAL STUD. 97, 120 (2008) (suggesting that negligence is the main cause of action in clergy abuse cases because the Churches who employ the accused priests bear the responsibility of, among other things, hiring and training the clergy).

⁴ See Bainbridge & Cole, *supra* note 1, at 67 (estimating that fifty significant cases pending in Los Angeles, California as of 2007 could result \$5 million payouts each); *id.* (“The total direct costs to the Catholic Church of the priest abuse litigation are predicted to range from \$2 to \$3 billion.”); Lynne D. Wardle, *Adult Sexuality, the Best Interests of Children, and Placement Liability of Foster-Care and Adoption Agencies*, 6 J. L. FAM. STUD. 59, 90 (2004) (suggesting that as of 2003, the dioceses of Boston alone has paid or agreed to pay more than \$106 million over a span of less than ten years and the

Consequently, some dioceses have filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, which allows a business to financially reorganize.⁵ In adjudicating such proceedings, bankruptcy courts are having difficulty ascertaining whether certain parish assets and property ("disputed property") are included in the diocesan estate.⁶ This disputed property typically consists of the parishes' churches, cemeteries, and schools.

Many United States dioceses incorporate themselves under state law, typically by becoming a corporation sole.⁷ In a corporation sole, all church assets are owned by a single corporation, and state law views the local bishop as the legal titleholder of all Church-affiliated property in the diocese.⁸ This includes the disputed property of the parishes because, unless they are incorporated under state law, the parishes are not viewed as separate legal entities from the diocese.⁹ Lacking any legal recognition as a separate entity, a parish cannot hold legal title to property.¹⁰ Therefore, all

Roman Catholic Church as a whole has paid or agreed to pay more than \$1 billion over a span of twenty years as a result of clergy sex abuse claims).

⁵ 11 U.S.C. § 101 (2008). See Steven Kropp, *Collective Bargaining in Bankruptcy: Toward an Analytical Framework for Section 1113*, 66 TEMP. L. REV. 697, 704 (1993). "Chapter 11 reorganization has twin goals – to salvage or create a viable entity . . . and to pay the creditors what they are entitled to, or at least what they are promised . . ."

⁶ See Kathleen M. Boozang, *Bankruptcy in the Religious Non-Profit Context*, 29 SETON HALL LEGIS. J. 341, 341 (2005) (stating that as recently as 2004, "the bankruptcy code neither mention[ed] nor anticipated bankruptcies by church entities"); Davis, *supra* note 2, at 14 (describing the determination of whether a diocese or its parishes and parishioners own individual parish assets as a "point of contention").

⁷ See Bainbridge & Cole, *supra* note 1, at 69 (noting that for over a century the corporation sole has remained a standard legal structure under which many Catholic dioceses are organized); see also Melanie DiPietro, *The Relevance of Canon Law in a Bankruptcy Proceeding*, 29 SETON HALL LEGIS. J. 399, 399–401 (2005) (stating that the dioceses of Portland, Oregon and Tuscan, Arizona are listed as corporation soles in their bankruptcy petitions).

⁸ See Bainbridge & Cole, *supra* note 1, at 68–9 ("For example, the Catholic Archbishop of Boston, a corporation sole, holds title to all Church-related property, including parishes, schools and churches, in about eighty-eight cities and towns."); Felicia Anne Nadborny, Note, *"Leap of Faith" Into Bankruptcy: An Examination of the Issues Surrounding the Valuation of a Catholic Diocese's Bankruptcy Estate*, 13 AM. BANKR. INST. L. REV. 839, 849 (2005) ("Corporation soles are just what their names suggest: one person corporations providing for a succession of office holders with no board of directors, no shares, no bylaws and no other officers.").

⁹ See Ryan J. Donohue, Comment, *Thou Shalt Not Reorganize: Sacraments for Sale, First Amendment Prohibitions and Other Complications of Chapter 11 Reorganization for Religion*, 22 EMORY BANKR. DEV. J. 293, 300 (2005) (noting that a corporation sole diocese may pool "all of its assets under one corporate umbrella," thereby eliminating the notion of separate entities); Sarah J. Hastings, Note, *Cinderella's New Dress: A Better Organizational Option for Churches and Other Small Nonprofits*, 55 DRAKE L. REV. 813, 823 (2007) (stating that a corporation sole is a property-owning structure utilized by the Catholic Church in which the presiding officer has executive control over all matters and property within the Church).

¹⁰ See *In re Roman Catholic Archbishop of Portland*, 335 B.R. 842, 866 (Bankr. D. Or. 2005) ("Because the parishes are not separately incorporated . . . they cannot hold title to real property. They are not separate from, but are merely a part of debtor."); Daniel J. Marcinak, Comment, *Separation of Church and Estate: On Excluding Parish Assets from the Bankruptcy Estate of Diocese Organized as a*

assets and property owned by the diocesan corporation, including the disputed parish property, can be used to satisfy tort judgments against the corporation.¹¹

Chapter 11 provides that a bankruptcy court should apply state property law under 11 U.S.C. § 541 to define the parameters of the estate.¹² However, bankruptcy courts are realizing that applying state law in these instances may violate the Free Exercise clause of the First Amendment.¹³ Application of state law could potentially provide tort creditors with the ability to completely deplete parishes of their assets, thus placing a substantial burden on parishioners' free exercise of religion.¹⁴ Consequently, to avoid infringing upon individuals' First Amendment rights, church actors contend that the bankruptcy courts should apply the RCC Code of Canon Law to resolve the issue.¹⁵ However, the Code of Canon Law ("canon law") provides a different view of church property ownership from that of state law. Under canon law the parishes are viewed as separate entities from the diocese.¹⁶ Therefore, the parishes, as separate entities, have ownership over their own property.¹⁷

In these disputes, the dioceses contend that canon law should be applied, rendering their possession of parish property, at most, a possession in trust

Corporation Sole, 55 CATH. U. L. REV. 583, 586 (2006) (proposing that where a bishop, as corporation sole, has legal title to assets of a parish, he owns such assets and therefore precludes parishes from holding title).

¹¹ *Portland*, 335 B.R. at 857, n.15 ("[T]he corporation sole is viewed by [some] as highly undesirable from the viewpoint of liability, exposing as it does all parochial and other church-related assets within a diocese to satisfy creditors' claims against any individual parish or institution . . .") (citing Robert T. Kennedy, *Introduction: Book V, The Temporal Gods of the Church*, in NEW COMMENTARY ON THE CODE OF CANON LAW 1451, 1457 (John P. Beal, et al., 2000)); Donohue, *supra* note 9, at 300 (stating that a diocese which organizes itself as a corporation sole may allow all its assets to be "subject to bankruptcy court jurisdiction for use in satisfying outstanding creditors").

¹² 11 U.S.C. § 541 (2008). See Nadborny, *supra* note 8, at 889 (noting that the Supreme Court has previously required bankruptcy courts to apply state property law).

¹³ See *infra* notes 140–48 and accompanying text (noting that state civil law might burden free religious exercise, thus violating the First Amendment).

¹⁴ See *infra* notes 140–48 and accompanying text (explaining how the ability of tort creditors to deplete the property of a parish could burden the parishioners' ability to worship).

¹⁵ See Elizabeth Ehrlich, Note, *Taking Religion out of Religious Property Disputes*, 46 B.C. L. REV. 1069, 1073–75 (2005) (indicating the importance of applying church law for First Amendment purposes); see also Nadborny, *supra* note 8, at 875 (asserting that including parish assets in the diocese's bankruptcy estate violates the First Amendment).

¹⁶ See *In re The Catholic Bishop of Spokane*, 329 B.R. 304, 321, 325 (Bankr. E.D. Wash. 2005) (applying state civil law, the court held the parishes of the Archdiocese of Spokane were not separate legal entities from the Archdiocese as a whole); see also *Portland*, 335 B.R. at 868 (holding that applying canon law is improper and thus, the separate parishes of the Archdiocese of Portland were not separate legal entities from the Archdiocese).

¹⁷ See 1983 CODE c.515 § 3 ("A legitimately erected parish possesses juridic personality by the law itself."); see also 1983 CODE c.1256 ("[O]wnership of goods belongs to that juridic person which has acquired them legitimately.").

for the separate parish entities.¹⁸ Since a parish is a separate entity capable of holding title to property under canon law, the diocese is capable of acting as a beneficiary of a trust.¹⁹ Therefore, if canon law is applied and the disputed property is held in trust by the diocese for the parishes, the disputed property will not be included as property of the diocesan estate, since property held in trust for another is unable to be reached by tort creditors.²⁰ However, under state law, unincorporated parishes are not separate entities and thus cannot hold title to real property.²¹ Therefore, since most of the local parishes are not separately incorporated under state law, they are unable to hold title to property or to be beneficiaries of a trust.²² Consequently, which law the bankruptcy court chooses to apply will largely determine the property that is included in the diocesan estate.

With the massive amount of litigation the RCC is facing, if courts include parish property as part of the bankruptcy estate, the financial stability of parishes around the country could be seriously jeopardized. While it would seem that the solution is for the RCC to separately incorporate its numerous parishes, it is not that simple.²³ Consequently, in resolving this delicate property dispute, courts are finding it difficult to

¹⁸ See Marcinak, *supra* note 10, at 627 (discussing the Church's argument that parish property in trust is excluded from the debtor's estate); see also Nadborny, *supra* note 8, at 851 (clarifying the diocese's argument that the bishops hold the parishes' assets in a trust relationship).

¹⁹ See Nadborny, *supra* note 8, at 850–51 (elaborating on the notion that the parishes are separate entities and that the bishops hold parish assets in trust); see also Joseph Rohner IV, Comment, *Catholic Diocese Sexual Abuse Suits, Bankruptcy, and Property of the Bankruptcy Estate: Is the "Pot of Gold" Really Empty?*, 84 OR. L. REV. 1181, 1199 (2005) (concluding that under canon law, parishes are separate entities that can acquire property).

²⁰ See 11 U.S.C. § 541(d) (2008) (setting forth that a bankruptcy debtor's estate does not include property in which the debtor holds bare legal title but no equitable interest); see also *Portland*, 335 B.R. at 848 (detailing the fact that most of the property held in title by the Archdiocese is held in trust and not subject to claims of creditors).

²¹ See *Portland*, 335 B.R. at 866 (providing that where the parishes are not separately incorporated under Oregon religious corporations law, they are not separate entities and thus are incapable of holding title to property); see also Rohner, *supra* note 19, at 1201 (stating that under civil law, the parishes of the Tucson Diocese are like unincorporated associations, incapable of holding title to real property).

²² See *Trs. of Phila. Baptist Ass'n v. Hart's Ex'rs*, 17 U.S. 1, 35–36 (1819) (holding an unincorporated association is without capacity to hold title to real property); see also Nadborny, *supra* note 8, at 861 (describing how as separately incorporated entities, each parish would be able to take title to property or be a beneficiary to a trust).

²³ Many parishes in the RCC are not incorporated. While incorporation would be beneficial in preventing diocesan bankruptcy creditors from touching the assets of an incorporated parish, there are many detrimental consequences of parish incorporation. An incorporated parish could be sued. Therefore, tort creditors could reach parish assets by suing parishes themselves for their wrongdoings, and would no longer have to go through the dioceses. By providing tort creditors with the ability to sue the parishes individually, it also gives them the ability to deplete them of their assets. As is the problem with applying state law to the conflict this article addresses, depletion of parish assets to the point where the parish would have to shut down could be in violation of the First Amendment. See *infra* notes 140–48, which explain how applying state civil law could substantially burden the free exercise of religion. This is especially so in less-populated areas which could have only one parish to serve the entire area. Consequently, simply incorporating the parishes is not the proper solution.

ascertain whether it is proper to apply canon law or state civil law.²⁴ Neither law provides the proper balance between the three important interests involved: (1) protecting First Amendment rights; (2) ensuring that the RCC is held legally accountable for its wrongdoings; and, (3) providing proper tort judgment satisfaction for harmed plaintiffs.²⁵

Application of neither state law nor canon law provides a proper balance between the three interests stated above. State law should not be applied because it could be substantially burdensome to First Amendment rights.²⁶ Application of state law gives bankruptcy courts the power to deplete the diocese and its parishes of all of their assets, essentially destroying the church.²⁷ Parishes are vital to the Roman Catholic religion, and thus, if they were to close down, leaving parishioners with no place to worship, it would necessarily be substantially burdensome to religion.²⁸ However, applying canon law does not provide a better alternative. As an initial matter, past case law provides that a court should apply the law of a religious organization only to disputes that pertain to ecclesiastical doctrine, which this dispute does not.²⁹ Further, applying canon law would leave the RCC

²⁴ See *Portland*, 335 B.R. at 853. The Portland archdiocese claimed to operate under canon law. Thus, the court in *Portland* was required to ascertain whether canon law or state civil law should be applied. *Id.* See also Nadborny, *supra* note 8, at 893. At times, the courts struggle to both respect United States law and permit the Church to follow its canon laws. *Id.*

²⁵ See generally *Portland*, 335 B.R. at 842; *Phila. Baptist Ass'n*, 17 U.S. at 1. In these important RCC cases, neither state nor canon law provided a proper balance for certain important issues.

²⁶ If applying state law would have an undue or substantial burden on the exercise of religion, further inquiry into its application must be made. See *In re The Catholic Bishop of Spokane*, 329 B.R. 304, 323–24 (Bankr. E.D. Wash. 2005). If a substantial burden exists, it must arise as a result of compelling governmental interest and be the least restrictive means of furthering that interest. *Id.* at 325. If no such interest exists, applying the state law is inappropriate and in violation of the First Amendment. *Id.* “Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47 (1993).

²⁷ If all church assets are depleted, the church will be forced to close, as it will not have the proper funding to run. A loss of all parish church and Archdiocesan school properties titled in would impose a substantial burden on the parishioners’ exercise of religion. See *Portland*, 335 B.R. at 863.

²⁸ See *id.* (stating that applying the Bankruptcy law could “impose a substantial burden if the ultimate result were the use of all of the real property titled in debtor’s name to satisfy the claims of debtor’s creditors, thereby making those properties unavailable for worship and other church purposes.”); *Id.* at 864 (arguing that “if application of the statute leaves the parishioners and school children with no place to worship and study, because no facilities are available, and if they establish that worship and study are central to religious doctrine, the burden could be substantial”); see also Nadborny, *supra* note 8, at 872 (discussing how the Bankruptcy Code could shut down the Church, without any warning to parishioners, based on the actions of a few priests).

²⁹ U.S. CONST. amend. I. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” *Id.* A consequence of the First Amendment requires civil courts, in adjudicating intra-church matters, to refrain from deciding the issue, and instead to defer to the decision of the organization’s highest authority. See *Spokane*, 329 B.R. at 321–22. To allow civil courts to adjudicate on such matters by

unaccountable for the wrongdoings of its priests and provide for the possibility of unsatisfied judgments.³⁰ Therefore, as is evident, neither application of state law nor canon law seems to be the correct way to resolve the issue.

This article examines the contending sides of the issue and, in light of the various consequences each holding would cause, seeks federal legislative response. Such response would guarantee the RCC is held accountable for its wrongdoings, while ensuring that the dioceses and parishes are not dissolved due to complete asset depletion. Further, it would provide for tort judgment to the fullest extent possible, stopping only at where doing so would substantially burden parishioners' free exercise of religion.

I. BACKGROUND

A. Roman Catholic Church Structure

The RCC is organized as an authoritative hierarchy, headed by the Pope, the Bishop of Rome. The Pope is the sole authority in the Church regarding clarification of matters involving faith and morals.³¹ The RCC is divided into jurisdictional areas called dioceses.³² Dioceses are the "fundamental units of organization in the Roman Catholic Church," and are each headed by a bishop who is named by the Pope.³³ Each diocese is made

applying state law could result in the court defining religious beliefs and doctrine, which is prohibited by the First Amendment. However, the court has every right to resolve church property disputes that do not involve questions of ecclesiastical doctrine. *Portland*, 335 B.R. at 850–51. In such disputes, courts will apply state law. This is known as the "neutral principles of law" approach. *Spokane*, 329 B.R. at 323.

³⁰ See Richard W. Garnett, *Church, State, and the Practice of Love*, 52 VILL. L. REV. 281, 292 (2007) (explaining the autonomy of the Church often gives the uncomfortable impression that it will not be held accountable for its actions); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 B.Y.U. L. REV. 1099, 1174–76 (2004) (arguing all actors in society must be held accountable for their wrongdoings and allowing the Church to be unaccountable to the public reduces both deterrence and punishment for religious institutions and, as a result, increases the potential and likely harm to others).

³¹ See 1983 CODE c.331 ("The bishop of the Roman Catholic Church, in whom continues the office given by the Lord uniquely to Peter, the first of the Apostles, and to be transmitted to his successors . . . possesses supreme, full, immediate and universal power in the Church, which he is able to exercise freely.").

³² 1983 CODE c.515 § 1. "A parish is a certain community of the Christian faithful stably constituted in a particular church, whose pastoral care is entrusted to a pastor (*parochus*) as its proper pastor (*pastor*) under the authority of the diocesan bishop." *Id.*

³³ John W. O'Malley, *Roman Catholic Church*, MICROSOFT ENCARTA ONLINE ENCYCLOPEDIA (Nov. 20, 2000); John Bourdeau & Thomas Muskus, *Religious Societies*, 77 C.J.S. § 6 (2008). "A diocese is the circuit or extent of a bishop's jurisdiction; the district in which a bishop exercises ecclesiastical authority." *Id.*

up of all the Catholic parishes and related facilities within its territorial jurisdiction.³⁴ The bishop of each particular diocese possesses full judicial, legislative, and executive power in the region.³⁵ He is required to oversee the governance of the diocese and ensure that its parishes, which are run by priests, are being managed according to Church doctrine.³⁶ Each parish operates independently from the diocese's other parishes. Further, in each parish, the priest is responsible for administering the parish's respective temporal goods in accordance with canon law.³⁷

The canon law is the ecclesiastical law of the RCC.³⁸ It is a fully developed legal system with courts, lawyers, judges, a fully articulated legal code and principles of legal interpretation.³⁹ The Code of Canon Law "contains sections on procedural law, governmental structure, rights and duties of office holders, and penal law."⁴⁰ Bishops abide by the canon law in their diocesan governance. According to canon law, both a diocese and its individual parishes are distinct juridic persons.⁴¹ Parishes have a "juridical personality," which provides them with "obligations and rights,"

³⁴ See *Equal Employment Opportunity Comm'n v. St. Francis Xavier Parochial Sch. and St. Francis Xavier Church*, 77 F. Supp. 2d 71, 74 (D.D.C. 1999) (stating the "Archdiocese is made up of all the Catholic parishes and related facilities within its territorial jurisdiction, which encompasses the District of Columbia and five surrounding Maryland counties."); see also Nadborny, note 8, at 846 (describing dioceses as "comprised of a number of parishes that are either under the control of a bishop, or, in certain important dioceses called 'archdioceses,' by archbishops").

³⁵ 1983 CODE c.391. "A bishop or archbishop heads each geographic division of the Church, known as a diocese or archdiocese. In his diocese the bishop possesses full judicial, legislative, and executive power." Thomas P. Doyle & Stephen C. Rubino, *Catholic Clergy Sexual Abuse Meets The Civil Law*, 31 FORDHAM URB. L.J. 549, 559 (2004).

³⁶ 1983 CODE c.375 § 1 ("Bishops, by divine institution succeed the Apostles through the Holy Spirit who is given to them, are constituted Pastors in the Church, so that they are teachers of doctrine, priests of sacred worship and ministers of governance.").

³⁷ See Bainbridge & Cole, *supra* note 1, at 73 (noting further that the parish is entrusted to the care of a pastor, who carries out the functions of sanctifying and governing); see also *State v. Burckhard*, 579 N.W.2d 194, 204 (N.D. 1998) (quoting a letter written by a bishop that explains the parish priest's responsibility in deciding the proper use of the goods of the parish).

³⁸ See *In re The Catholic Bishop of Spokane*, 329 B.R. 304, 321 (Bankr. E.D. Wash. 2005) (highlighting the debtor's position that the "internal law of the Roman Catholic Church, i.e., its canon law," is the applicable law to be applied in the 11 U.S.C. § 541 analysis); see also *Equal Employment Opportunity Comm'n v. Catholic Univ. of Am.*, 83 F.3d 455, 457 (D.C. Cir. 1995) (claiming that the fundamental body of ecclesiastical laws of the RCC is canon law).

³⁹ See 1983 CODE c.1400-1500 (setting forth the rules governing trials within the RCC); 1983 CODE c.1501-1655 (articulating the legal process to be followed in RCC trials).

⁴⁰ See Doyle & Rubino, *supra* note 35, at 555 (noting further that the various canons provide the clergy with a standard of care to be followed in dealing with members of the church). See generally 1983 CODE (providing a clear explanation of the all the legal and administrative processes to be followed).

⁴¹ See 1983 CODE c.515 § 3 (stating the parish "has juridical personality"); see also Bainbridge & Cole, *supra* note 1, at 73 (explaining that the commentary to Canon 393 confirms that a diocese possesses juridic personality once it is legitimately erected); Jonathon C. Lipson, *When Churches Fail: The Diocesan Debtor Dilemmas*, 79 S. CAL. L. REV. 363, 385 (2006) (opining that canon law provides that parishes are "separate juridic persons" that own property independently of the diocese (citing 1983 CODE c.1256)).

just as any other entity would possess.⁴² Further, canon law provides that “ownership of goods belongs to that juridical person which has lawfully acquired them.”⁴³ Consequently, each parish has rights, including rights of ownership under canon law. Thus, canon law views the assets of a parish as the property of the parish itself, and not the property of the diocese.⁴⁴ These assets are administered by the priest who governs the particular parish, not the diocesan bishop.⁴⁵ Pursuant to canon law, the bishop only administers the assets of the diocese, not those of other public juridic persons that reside within the diocese, such as parishes.⁴⁶ As a result, if the structure of the RCC is determined by canon law, the parish assets will not be available to tort creditors seeking to satisfy a judgment against the diocese, as it is not diocesan property.⁴⁷

Most RCC dioceses incorporate themselves under state civil law, becoming a corporation sole.⁴⁸ In a corporation sole, “all, or nearly all,

⁴² See 1983 CODE c. 515 § 3 (“A lawfully established parish has juridical personality by virtue of the law itself.”); 1983 CODE c.113 § 2 (“In the Church . . . there are also juridical persons . . . subjects of obligations and rights which accord with their nature.”).

⁴³ 1983 CODE c.1256.

⁴⁴ See THE CANON LAW SOCIETY OF AMERICA, NEW COMMENTARY ON THE CODE OF CANON LAW 435, 1457 (John P. Beal et al. ed., 2000) (“Thus, property 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.”); see also Nicholas P. Cafardi, *The Availability of Parish Assets for Diocesan Debt: A Canonical Analysis*, 29 SETON HALL LEGIS. J. 361, 364 (2005) (“According to the Code, parish property is parish property. It belongs to the public juridic person of the parish and not to another public juridic person. Similarly, diocesan property is diocesan property. . . . [T]he property of the two is not to be confused or co-mingled. Their property autonomy is to be respected.”).

⁴⁵ See THE CANON LAW SOCIETY OF AMERICA, *supra* note 44, at 1477 (indicating that “[t]he administrator of ecclesiastical goods is ordinarily the person who directly governs the public juridic person to whom the goods belong.”); see also Bainbridge & Cole, *supra* note 1, at 73–4 (explaining that it is the bishop’s job to exercise vigilance over ecclesiastical goods – not to administer the assets of the parish and other public juridic persons).

⁴⁶ See Bainbridge & Cole, *supra* note 1, at 74 n.50 (“This understanding of the principle of separate administration by public juridic persons of their own goods is implied by Canon 1279, which provides for the bishop to intervene in cases of a negligent administrator, and to appoint administrators for a ‘public juridic person which does not have its own administrators by law.’ Such a provision would be unnecessary if the bishop was the administrator of the goods of all public juridic persons within the diocese.” (quoting 1983 CODE c.1279)); see also Lawrence E. Singer, *The Role of Religion in Health Law and Policy Symposium: Does Mission Matter?*, 6 HOUS. J. HEALTH L. & POL’Y 347, 355 (2006) (noting that in addition to overseeing all matters concerning the Church, bishops are also responsible for directing activities dealing with the administration of properties and institutions within the diocese).

⁴⁷ Note that another consequence of viewing the structure of the RCC under canon law is that the separate parishes are able to be individually sued, and do not share the protection of being an entity of the diocese.

⁴⁸ See, e.g., *In re Roman Catholic Archbishop of Portland*, 335 B.R. 842, 849 (Bankr. D. Or. 2005). In *Portland*, the debtor diocese is a corporation sole under Oregon corporation law. *Id.* “The word ‘sole’ refers to the fact that an individual, the Archbishop, has the capacity of a corporation. When the Archbishop is replaced by his successor, the corporation remains unaffected because the 1948 act of Congress extends incorporation status to the Archbishop’s successors, and states that the corporation shall have ‘perpetual succession.’” *Equal Employment Opportunity Comm’n v. St. Francis Xavier Parochial Sch. and St. Francis Xavier Church*, 77 F. Supp. 2d 71, 75 (D.D.C. 1999).

church-related assets are civilly owned by a single corporation whose sole member is the diocesan bishop.”⁴⁹ The incorporated diocese “possesses traditional corporate attributes, such as the powers to contract, to acquire property, and to sue and be sued.”⁵⁰ Individual parishes within the diocese, however, are often left unincorporated under state civil law.⁵¹ As a result, under state law, parishes are viewed as unincorporated divisions of a corporation.⁵² This view of the parish conflicts with the canon law view, creating significant consequences for an unincorporated parish. An unincorporated division of a corporation is not a distinct legal entity under state law, and thus lacks any legal capacity to sue, be sued, or hold property.⁵³ Under state law, the corporation is deemed to own all of the unincorporated division’s assets.⁵⁴

B. Applicable Bankruptcy Law

Pursuant to 11 U.S.C. § 541, which governs Chapter 11 Bankruptcy filings, bankruptcy courts “shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.”⁵⁵ Under 11 U.S.C. § 541, the filing of a bankruptcy petition creates an estate, which is comprised of “all legal or equitable interests of the debtor in property as of the commencement of the

⁴⁹ THE CANON LAW SOCIETY OF AMERICA, *supra* note 44, at 1457. The corporation sole was developed as a vehicle for ownership of ecclesiastical property, designed to prevent church property from being treated as personal property of the bishop by state civil law. *Id.* See also, EDWARD JENKS, THE BOOK OF ENGLISH LAW 118–19 (1967). Every diocese bishop and rector parish are corporation soles that can acquire and hold land.

⁵⁰ See *St. Francis Xavier*, 77 F. Supp. at 74 (noting defendants’ argument articulating the various powers of the Archdiocese). See generally *F.E.L. Publ’n, Ltd. v. Catholic Bishop of Chicago*, 754 F.2d 216, 221 (7th Cir. 1985) (discussing the legal status of parishes within the Archdiocese).

⁵¹ See, e.g., *Portland*, 335 B.R. at 849–50 (stating that within the Archdiocese of Portland are 124 parishes, and only one of those parishes is separately incorporated). See generally CATHARINE P. WELLS, RESEARCH PAPER 85, WHO OWNS THE LOCAL CHURCH? A PRESSING ISSUE FOR DIOCESES IN BANKRUPTCY 14 (Boston College Law 2005), available at <http://ssrn.com/abstract=845624> (discussing a parish’s status as an unincorporated association).

⁵² See *Portland*, 335 B.R. at 866 (holding that because the parishes are not separately incorporated under Oregon state law, they are not separate from, but are merely a part of the debtor). See generally *F.E.L. Publ’n*, 754 F.2d at 221 (discussing the legal status of parishes within the Archdiocese).

⁵³ See *St. Francis Xavier*, 77 F. Supp. 2d at 75 (citing *United States v. ITT Blackburn Co.*, 824 F.2d 628, 631 (8th Cir. 1987) (accepting as a valid concession that an “unincorporated division cannot be sued or indicted, as it is not a legal entity”); see generally *Griffith v. Keystone Steel and Wire*, 887 F. Supp. 1133, 1138 (C.D. Ill. 1995) (discussing how all assets of an unincorporated division are owned by the corporation of which it is a part).

⁵⁴ See *St. Francis Xavier*, 77 F. Supp. 2d at 76 (providing a long list of precedent holding that an unincorporated division of a parent corporation cannot be sued to bolster the notion that an unincorporated division does not possess separate assets, but rather all of its assets are owned by the larger corporation); see generally *Griffith*, 887 F. Supp. at 1138 (discussing how all assets of an unincorporated division are owned by the corporation of which it is a part).

⁵⁵ 28 U.S.C. § 1334(e)(1) (2008).

case,” as well as any interests in property that the trustee may recover.⁵⁶ Thus, the bankruptcy court has the exclusive jurisdiction to determine the parameters of the estate.⁵⁷ However, a bankruptcy debtor’s estate does not include property in which the debtor holds “only legal title and not an equitable interest.”⁵⁸ Ordinarily, the bankruptcy court applies state law in conjunction with 11 U.S.C. § 541 to ascertain what is included in the estate.⁵⁹ It is at this point in the bankruptcy proceedings that dioceses and tort creditors are in conflict. Rather than applying state law, dioceses are contending that canon law should be the applicable non-bankruptcy law applied in the 11 U.S.C. § 541 analysis.⁶⁰

C. Precedent

In the past few years, several bankruptcy courts have wrestled with whether to apply state law or canon law to determine the breadth of the diocesan bankruptcy estate; however, they have failed to reach a consensus. The arguments of the dioceses and those of the tort claimants are exhibited in *In re Roman Catholic Archbishop of Portland* (“Portland”).⁶¹ In *Portland*, the debtor, the Diocese of Portland in Oregon, filed bankruptcy under Chapter 11 of the Bankruptcy Code.⁶² The diocese was organized under Oregon’s nonprofit corporation laws as a corporation sole.⁶³ Within the diocese were 124 parishes and three high schools, all of which operated with relative autonomy.⁶⁴ However, only some of the parishes were separately incorporated as nonprofit organizations and none of the schools were.⁶⁵ The diocese filed for bankruptcy, contending that the parishes and schools (“Portland disputed property”) were not part of the estate.⁶⁶ The tort claimants created a Tort Claimant Committee (“TCC”) and sought to

⁵⁶ 11 U.S.C. §§ 541(a)(1), (3) (2008); 11 U.S.C. § 550 (2008).

⁵⁷ 28 U.S.C. § 1334(e) (2008).

⁵⁸ 11 U.S.C. § 541(d) (2008).

⁵⁹ See, e.g., *Raleigh v. Ill. Dep’t of Revenue*, 530 U.S. 15, 16 (2000) (noting that “the basic federal rule of bankruptcy is that state law governs the substance of claims.”); *Butner v. United States*, 440 U.S. 48, 55 (1979) (asserting that “property interests are created and defined by state law”).

⁶⁰ See *In re Roman Catholic Archbishop of Portland*, 335 B.R. 842, 849 (Bankr. D. Or. 2005) (describing how the Archdiocese was seeking summary judgment on whether or not the Court must consider canon law in determining whether the Parishes are separate entities); see generally WELLS, *supra* note 51, at 12 (discussing how under canon law the diocese and an individual parish are recognized as two separate entities).

⁶¹ 335 B.R. 842 (Bankr. D. Or. 2005).

⁶² *Id.* at 848.

⁶³ *Id.* at 849.

⁶⁴ *Id.*

⁶⁵ *Id.* at 849–50.

⁶⁶ *Id.* at 848.

obtain a determination of whether the Portland disputed property was part of the bankruptcy estate.⁶⁷

The TCC contended that the bankruptcy court should apply neutral state civil law when ascertaining whether the Portland disputed property is part of the diocesan estate.⁶⁸ It argued that doing so would not violate the rights granted to the RCC by the First Amendment, but rather, the amendment would be violated if canon law was applied.⁶⁹ A parish is capable of being incorporated under state civil law. Additionally, “although a corporation sole is authorized by state law to organize its affairs pursuant to canon law, it is the corporation’s organization and structure as implemented under civil law that governs the corporation’s relationship with the secular world.”⁷⁰ Therefore, the TCC argued that the parishes’ failure to take advantage of their ability to incorporate under state civil law prevents them from being now viewed as separate entities in the state civil law, regardless of how they are viewed under canon law.⁷¹ As a result, the TCC contended that the unincorporated parishes, incapable of taking title to real property, “are not separate from, but merely a part of the debtor.”⁷²

The diocese premised its argument on the powers granted by the First Amendment as well as the applicable state law. The diocese noted that the First Amendment guarantees that religious institutions have the power to decide for themselves, free from state interference, matters of church government, faith, and doctrine.⁷³ Thus, the RCC has the power to define and create ecclesiastical entities, like Catholic parishes, and empower

⁶⁷ *Portland*, 335 B.R. at 848.

⁶⁸ *Id.* at 853. The TCC sought a determination that the Portland disputed property is property of debtor’s bankruptcy estate, a conclusion that can only be brought about by applying state civil law. *See id.* at 848.

⁶⁹ *See id.* at 855. The TCC’s argument was likely based on the holding in *Jones v. Wolf*, prohibiting civil courts from resolving church property disputes on the basis of religious doctrine and practice. 443 U.S. 595, 602 (1979). The *Portland* court does not determine whether applying canon law would violate the First Amendment. *Portland*, 335 B.R. at 855. However, the court does analyze whether applying state civil law would violate the amendment by “substantially burdening” the parishioners’ religion, and finds that a violation may arise. *Id.* at 863–64.

⁷⁰ *Portland*, 335 B.R. at 857–58. “Even debtor’s own canon law expert acknowledges that being a separate juridic person under canon law does not give that juridic person a civil law identity. . . . Thus, although canon law gives parishes separate canonical existence, it does not give them civil law existence.” *Id.* at 865–66.

⁷¹ *See id.* at 857–58 (stating where the ability to structure a religious organization in accordance with its internal religious rules exists under state law, the religious organization’s failure to do so prevents it from later relying on its internal laws to set forth its structure in a state legal proceeding).

⁷² *See id.* at 866 (explaining that unincorporated religious associations are not legal persons that may take title to real property in their names).

⁷³ *See id.* at n.4 (noting that the First Amendment provides that the Church should govern itself in regards to religious matters).

church officials to pastor and administer such parishes and their property.⁷⁴ The RCC executes this power through canon law. The diocese additionally contended that, under Oregon law and the diocese's Articles of Incorporation, the diocese was required to "function and govern its affairs in accordance with the constitution, canons, rules, regulations, disciplines, doctrine, and practice of the Roman Catholic Church."⁷⁵ Canon law requires the bishop to conduct his entire ministry and administration as a bishop in accordance with such canon law.⁷⁶ Consequently, since the state law requires the diocese to be governed in accordance with canon law, it contended that canon law must also be applied in ascertaining whether the parishes are separate entities from the diocese.⁷⁷ Further, failure to apply it, the diocese contended, would be in violation of the First Amendment.⁷⁸ However, the court disagreed with the diocese's arguments, holding that applying canon law was improper.⁷⁹ Instead, it applied state law, finding it was not against the First Amendment to do so.⁸⁰

In Washington and Massachusetts, courts took an approach similar to the court in *Portland*. In *In re the Catholic Bishop of Spokane* ("*Spokane*"),⁸¹ the debtor, the Diocese of Spokane in Washington, filed bankruptcy under Chapter 11 of the bankruptcy law contending that parish property was not part of the diocesan estate.⁸² Although the debtor was a religious

⁷⁴ *Id.* (explaining that state interference in the internal decisions of religious institutions is prohibited by the First Amendment).

⁷⁵ *Id.* The court, however, later notes that "it is apparent that religious organizations, including the Roman Catholic Church, recognized the need to conduct church affairs in accordance with state law, at least insofar as protecting the property interests of the church was concerned." *Id.* at 857.

⁷⁶ *Portland*, 335 B.R. at 849, n.4.

⁷⁷ *Id.*

⁷⁸ *See id.* at 853. "Debtor argues that, if this court does not apply the church's canon law view of property ownership in the civil law bankruptcy arena, the result will be a rearrangement of the church's polity in violation of the First Amendment." *Id.*

⁷⁹ *See id.* at 854 (holding that, consistent with First Amendment jurisprudence and the Bankruptcy Code, the court will apply neutral secular principles of state law to the proceeding, which do not require sacred principles); *id.* at 858 (finding that "Oregon's corporation sole statutes do not require application of canon law in determining interests in church property under state law."); *id.* at 859 (noting the "debtor's articles of incorporation allow the corporation sole to be operated according to canon and other internal church law," but do not "provide that canon law governs property ownership in the secular world.").

⁸⁰ *Id.* at 854. "Courts also may resolve disputes involving church property by applying neutral secular principles of property, trust and corporate law when the instruments upon which those principles operate are at hand. Thus, no First Amendment issue arises when a court resolves a church property dispute by relying on state statutes concerning the holding of property, the language in the relevant deeds, and the terms of corporate charters of religious organizations." *Id.* (citing *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244 (9th Cir. 1999)). Further, the *Portland* court notes that "[t]here are situations in which a court needs to consider a church's internal law in deciding a secular dispute . . . [although] [t]his case does not present such an issue." *Portland*, 355 B.R. at 854.

⁸¹ 329 B.R. 304, 309 (Bankr. E.D. Wash. 2005).

⁸² *Id.* at 310 (arguing that the property of the individual parishes of the diocese were owned by

organization, the *Spokane* court applied state civil law and federal bankruptcy law to identify and define the property of the bankruptcy estate.⁸³ Similar to the court in *Portland*, the *Spokane* court held that, because application of state law did not substantially burden the practice of religion, it was not a violation of the First Amendment to apply such law in defining the parameters of the debtor's bankruptcy estate.⁸⁴

Additionally, two Massachusetts courts were required to ascertain whether church parish assets were part of the diocesan estate in cases not involving bankruptcy. Both courts, like in *Portland* and *Spokane*, found that the parish assets were part of the larger diocesan estate through application of state law.⁸⁵ In *Akoury v. Roman Catholic Archbishop of Boston*, the court refused to apply canon law to the proceeding, highlighting that the archbishop controlled the property at issue.⁸⁶ In *Akoury*, the archbishop wanted to close down several parishes because the Archdiocese was having financial trouble.⁸⁷ The parishioners of the several parishes sought an injunction to prevent the Archdiocese from doing this.⁸⁸ The underlying issue was whether the bishop had the authority to use the parish property in a way he saw fit.⁸⁹ The parishioners argued that the

those parishes and thus "those assets do not constitute property of the estate and are not available for repayment of creditors.").

⁸³ See *id.* at 323–24. The court considered the First Amendment, stating that since it was not an intra-church property dispute, this First Amendment requires only that application of the state law is proper so long as it does not have a substantial burden or effect on the exercise of religion. *Id.* Finding that applying state law here did not have such an effect on the exercise of religion, the court applied state law in conjunction with federal bankruptcy law. *Id.* at 324.

⁸⁴ See *id.* at 324 (holding that applying state law to the resolution of disputes involving a religious organizations is proper as, so long as liability is predicated on secular conduct and does not involve the interpretation of church doctrine or religious beliefs, it does not "generally impose an impermissible burden on the practice of religion").

⁸⁵ See *Akoury v. Roman Catholic Archbishop of Boston*, 2004 Mass. Super. LEXIS 349, *5–6 (Super. Ct. 2004) (holding that the land, church building, and bank accounts of the local parish are a part of the Archdiocese of Boston); *Taura v. O'Malley*, 2005 Mass. Super. LEXIS 582, *4, *5–7 (2005) (denying parishioners' claim that the real and personal assets of the local parish are held, through express or statutory trust, for the benefit of its parishioners).

⁸⁶ See *Akoury*, 2004 Mass. Super. LEXIS 349 at *6 (explaining that all property and funds of the parish belong to the Archdiocese of Boston because the parish is part of the Archdiocese, and is not a separate entity).

⁸⁷ *Id.* at *4–5 (adding that other factors, such as lack of priests and lower attendance at Mass were also part of the Archdiocese's decision to close many of its churches).

⁸⁸ *Id.* at *2. The bishop in *Akoury*, claiming he had the authority to reconfigure the disputed property to best fit the needs of the diocese, used the opposite argument from the bishops in *Spokane* and *Portland*. *Id.* at *5. However, inconsistent arguments of bishops throughout the nation is not at issue for this article. The *Akoury* court reads canon law to provide that the disputed property is of such that is held in trust by a diocese for its several parishes. See Bainbridge & Cole, *supra* note 1, at 74 n.50. Despite inconsistent arguments, this is the view of canon law followed for the purposes of this article.

⁸⁹ *Akoury*, 2004 Mass. Super. LEXIS 349 at *5 (concluding that the Court cannot question the Archbishop's decision, but the plaintiffs are free to appeal to a higher authority within the Church).

bishop had merely legal title in the parish property, and thus, lacking equitable title, he had no authority to individually alter the property.⁹⁰ The court, in ascertaining the plaintiffs' and defendant's chances of success on the merits, stated that the Archbishop owned the land and church building.⁹¹ Since the parish was not a separate corporation, but was a part of the Archdiocese of Boston, a corporation sole, all property was therefore in control of the bishop.⁹² However, the court refused to resolve the issue.⁹³ The court noted that the states are constitutionally entitled to adopt "neutral principles of law" to resolve church property disputes.⁹⁴ However, where, as was the case in the dispute, both parties to litigation were members of the church, it was improper for the court to apply such neutral principles of law.⁹⁵ In refusing to resolve the dispute, the court stated, "The plaintiffs now have the opportunity to appeal further under Canon Law to the higher authority within the Church."⁹⁶ Simply stated, the court refused to apply canon law to the proceeding, even though it felt the dispute could only be resolved by such law.

In *Taura v. O'Malley*, the plaintiff parishioners brought suit alleging that the defendant, The Roman Catholic Archbishop of Boston, held all real and personal property of their parish in trust, for the benefit of, the parish.⁹⁷ Consequently, the parishioners sought a preliminary injunction, seeking to enjoin the bishop from using the property in a way that was detrimental to the parish.⁹⁸ The court, after acknowledging *Portland*, *Spokane*, and *Akoury*, held that the parishioners had no title to the disputed property.⁹⁹

⁹⁰ *Id.* at *6 (stating that equitable interest to the property belonged to the parishioners, and the property, held by the Archdiocese through legal title, was for the parishioners' benefit).

⁹¹ *Id.* at *5 (concluding that the "land and the church building are owned by the . . . Archbishop.").

⁹² *Id.* at *6 (stating that "the parish is not a separate corporation, but is a part of the Archdiocese . . . cooperation sole."); see *Episcopal Diocese of Mass. v. Deidre Devine*, 2000 Mass. Super. LEXIS 706, at *33-4 (2000), *aff'd*, 2003 Mass. App. LEXIS 1124 (2003) (applying the 'hierarchical theory' and the 'neutral principles of law' approach in finding that a local church, a religious corporation organized under Massachusetts state law, is free to subject itself to a greater organization's rules for settling property disputes).

⁹³ *Akoury*, 2004 Mass. Super. LEXIS 349 at *10 (finding that the First Amendment to the United States Constitution prevented the Court from resolving disputes between Church members).

⁹⁴ *Id.* at *8 (stating that the "neutral principles of law" can be utilized by civil courts to decide matters in which religious matters are not at issue).

⁹⁵ See *id.* at *10, n.1 (holding that the court is "simply prohibited by the First Amendment of the United States Constitution from involving itself in such a dispute between members of the Church.").

⁹⁶ *Id.* at *5.

⁹⁷ *Taura v. O'Malley*, 2005 Mass. Super. LEXIS 582, *1 (2005).

⁹⁸ *Id.* a *1.

⁹⁹ *Id.* at *4 n.1, *5 (holding that the cases submitted by parishioners, *Spokane*, *Portland*, and *Akoury*, fail to increase their likelihood of success on the merits, as those cases rejected the parishioner arguments that the parish had title to the disputed property).

Conversely, in the case of *In re The Roman Catholic Church of the Diocese of Tucson*, the court approved a reorganization plan that applied the law differently than all the prior cases.¹⁰⁰ In addressing the complaints of tort creditors, this court approved a reorganization plan that largely followed canon law.¹⁰¹ In fact, the disclosure even acknowledged that the reorganization was based, in part, on canon law:¹⁰²

[T]he Diocese of Tucson is a juridic person under Canon Law. Similarly, each Parish is a juridic person separate from the Diocese. A juridic person is an artificial person, distinct from all natural persons or material goods, constituted by competent ecclesiastical authority for an apostolic purpose, with a capacity for continuous existence and with canonical rights and duties like those of a natural person. . . . Once a Parish has been established, it becomes a juridic person separate and distinct from the Diocese.¹⁰³

Following canon law, the proposed arrangement protected parish real property, excluding it from the plan.¹⁰⁴ However, it required each parish to contribute \$2 million into the fund, in addition to requiring them to incorporate themselves.¹⁰⁵ The plan, drafted and proposed by the Tucson diocese, was even approved by many critics, including a large majority of the claimants.¹⁰⁶

As is apparent, the courts are not ascertaining what constitutes a diocesan bankruptcy estate in a uniform way. While some courts are applying canon law to reach the result, others are holding that to do so is improper, even unconstitutional. A careful analysis of the implications of applying canon law as opposed to state civil law, and the constitutional

¹⁰⁰ See *In re The Roman Catholic Church of the Diocese of Tucson, Debtor's Plan of Reorg.* (Diocese of Tucson), 2005 WL 1978432, at *7 (Bankr. D. Ariz. 2004) (setting forth the Diocese of Tucson's Chapter 11 reorganization plan); KVOA.com, Experts: Tucson diocese settlement a bankruptcy model (July 13, 2005), available at <http://kvoa.com/Global/story.asp?S=3592405> (last visited Oct. 15, 2008) (stating that a federal bankruptcy judge approved the Tucson Reorganization plan that used canon law to ascertain ownership of its assets) [hereinafter KVOA].

¹⁰¹ *Diocese of Tucson*, 2005 WL 1978432, at *7.

¹⁰² *Id.* At *21

¹⁰³ *Id.*

¹⁰⁴ See KVOA, *supra* note 100 (stating the "Tucson plan protected parishes").

¹⁰⁵ See *id.* ("In Tucson, a compromise was reached with parishes agreeing to contribute \$2 million toward the diocese's \$22.2 million settlement, in exchange for not being subject to claimants suing them individually.").

¹⁰⁶ See *Judge confirms Tucson Diocese Reorganization Plan to Settle Suits*, NEWSPAPER CATH. ARCHDIOCESE ATLANTA, available at <http://georgiabulletin.com/world/2005/07/12/US-1/> (July 12, 2005) (revealing that the reorganization plan had been approved by the majority of the claimants); see also Stephanie Innes, *Diocese Abuse Victims Speak as Bankruptcy Case Nears End*, ARIZONA DAILY STAR, July 10, 2005, available at http://www.bishop-accountability.org/news/2005_07_12/2005_07_10_Innes_DioceseAbuse.htm (confirming that the "majority of the creditors approved the diocese's bankruptcy plan").

issues it creates, is required in order to resolve this issue properly.

II. ANALYSIS

While this particular issue concerning tort creditors and diocesan debtors in bankruptcy has come to light in recent years, courts have been dealing with whether and when to defer to canon law, as opposed to state civil law, for over a century.¹⁰⁷ At the forefront in deciding which law should be applied is whether or not the court is even constitutionally allowed to decide the case.¹⁰⁸

A. *The First Amendment*

The First Amendment of the United States Constitution prevents courts from adjudicating cases involving certain religious matters.¹⁰⁹ The Amendment prohibits any government from making any law “respecting an establishment of religion, or prohibiting the free exercise thereof.”¹¹⁰ As a result, the government, through the legislature or the courts, may not require a person to practice any form of religion or worship, nor may it prevent a person’s right to exercise his freely chosen form of religion.¹¹¹ Further, religious organizations must also have the freedom to decide how

¹⁰⁷ Even as far back as 1872, the Supreme Court was required to resolve an intra-church property dispute, and thus was required to ascertain whether state law or canon law should be applied to the dispute. *Watson v. Jones*, 80 U.S. 679, 681 (1872). The Court has since held that the First Amendment “requires the civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.” *Jones v. Wolf*, 443 U.S. 595, 602 (1979).

¹⁰⁸ See *In re Roman Catholic Archbishop of Portland*, 335 B.R. 842, 851 (Bankr. D. Or. 2005). The court noted that the First Amendment, prohibiting the law from requiring a person to accept any particular creed or form of worship or from restricting a person’s right to exercise a chosen form of religion, places restrictions on courts in adjudicating on religious matters. *Id.* These restrictions prevent the court from applying state law to decide issues that pertain to purely ecclesiastical doctrine. *Id.* See generally *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952). *In Kedroff*, the Court held that a New York statute violated the Constitution by attempting to regulate how the church administrated itself. *Id.*

¹⁰⁹ See *Kreshik v. St. Nicholas Cathedral of the Russian Orthodox Church of N. Am.*, 363 U.S. 190, 191 (1960) (holding the First Amendment’s limitations on government extend to its judicial as well as its legislative branch); see also Laura L. Coon, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481, 482–84 (2001) (explaining when state interference in church matters is permissible and when it is prohibited by the First Amendment).

¹¹⁰ U.S. CONST. amend. I. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” *Id.*

¹¹¹ See *Portland*, 335 B.R. at 851 (noting that government may not require, nor prevent, free exercise of religious worship); see also Jamie Alan Cole, Comment, *A New Category of Free Exercise Claims: Protection for Individuals Objecting to Governmental Actions That Impede Their Religions*, 135 U. PA. L. REV. 1557, 1557 (1987) (explaining the Constitutional protection of freedom to exercise religious beliefs).

to govern themselves, free from state interference.¹¹² However, it does not follow that courts are prohibited from hearing a dispute simply because it touches on a religious matter, or because a party is a religious organization.¹¹³

Although the First Amendment protects religious organizations and religious beliefs to an extent, it by no means confers immunity upon religious organizations to engage in tortious conduct.¹¹⁴ “Religious organizations do not exist on some ethereal plane far removed from society.”¹¹⁵ Just like any other entity or person, religious organizations are capable of harming others. All actors in society, whether religious entities or not, must be held accountable for their wrongdoings.¹¹⁶ Consequently, when a third party is harmed by a religious organization, that party must be allowed to bring the organization to court to have his or her wrong redressed. Allowing religious organizations to harm society with impunity would be contrary to the very essence of our government. Consequently,

¹¹² See *Kedroff*, 344 U.S. at 115–16 (holding that religious organizations have the freedom “to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine”); see also Mark E. Chopko & Michael F. Moses, *Freedom to be a Church: Confronting Challenges to the Right of Church Autonomy*, 3 GEO. J.L. & PUB. POL’Y 387, 388 (2005) (discussing a Constitutional right of self-governance for religious organizations).

¹¹³ See *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969).

It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. . . . [T]he Amendment [simply] commands civil courts to decide property disputes without resolving underlying controversies over religious doctrine.

Id. See also Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 B.Y.U. L. REV. 1633, 1636 (2004). Some jurisdictions find that “religious organizations do not have a broad right of autonomy over all internal affairs, but they are entitled to exemptions from laws that burden religious practice.” *Id.*

¹¹⁴ See Hamilton, *supra* note 30, at 1102. “There is one condition attached to all exercises of freedom: that the use of the freedom will not breach minimal responsibilities owed to the larger society as those responsibilities are embodied in legitimate laws.” *Id.* See also Christopher L. Barbaruolo, Note, *Malicki v. Doe: Defining a Split of Authority Based on the State Tort Claims of Negligent Hiring and Supervision of Roman Catholic Clergy and the First Amendment Conflict*, 32 HOFSTRA L. REV. 423, 460 (2003).

Clerical sexual misconduct and the resulting consequences from such misconduct continue to be the subject of much fiercely disputed litigation. . . . [T]he First Amendment does not expressly insulate ecclesiastical relationships from judicial inquiry since doing so would certainly ‘extend constitutional protection to the secular components of these relationships.’ . . . Following this reasoning, the courts that do not permit the First Amendment as a defense for . . . tort claims . . .

Id.

¹¹⁵ *Spokane*, 329 B.R. at 324.

¹¹⁶ See Hamilton, *supra* note 30, at 1175–76 (explaining that allowing the Church to be unaccountable to the public good reduces both deterrence and punishment for religious institutions and, as a result, increases the potential and likely harm to others); *id.* (stating further that “self-policing is never a successful gambit for securing the public good . . . group[s] ha[ve] strong incentives to protect their own, and institutions in particular operate to perpetuate themselves. There must be both internal and external checks on the natural inclination to abuse power.”).

despite the religious protections granted by the First Amendment, state courts do, and actually must, have the ability to hear disputes involving religious organizations.¹¹⁷

States have a legitimate interest in church property disputes.¹¹⁸ In most cases, the proper forum for resolving such disputes is a civil court.¹¹⁹ However, in balancing the need for accountability with First Amendment protections, civil courts have never had a role in determining ecclesiastical questions when resolving property disputes.¹²⁰ The civil court role was defined further in *Kedroff v. St. Nicholas Cathedral*,¹²¹ where the Court stated that the *Watson* opinion “radiates . . . a spirit of freedom for religious organization, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”¹²² Therefore, as is apparent, while the states do have an interest in church property disputes, the First Amendment largely limits state courts from deciding them. However, this does not mean that civil courts are wholly precluded from adjudicating church property decisions.

¹¹⁷ See *id.* at 1178–79.

“Churches may ‘govern themselves according to their own norms . . . [and] have the right not to be hindered, either by legal measures or by administrative action on the part of government, in the selection, training, appointment, and transfer of their own ministers.’” But this principle of liberty is limited in turn by a principle of social responsibility: “All freedoms enjoyed by churches are subject to restriction whenever religious conduct violates the public order.”

Id. See also Ira C. Lupu & Robert W. Tuttle, *Church Autonomy and Religious Group Liability: Sexual Misconduct and Ecclesiastical Immunity*, 2004 B.Y.U. L. REV. 1789, 1801–04 (2004). This commentary discusses how the previously stringent First Amendment protections from state interference for religious organizations have been eroded by the Court to allow for actions against such organizations. *Id.*

¹¹⁸ See *In re Church of St. James the Less*, 585 Pa. 428, 443–44 (2005) (articulating the two approaches in resolving church property disputes: the “polity approach” and the “neutral principles of law approach,” and further stating that, despite the First Amendment, state courts are allowed to resolve such disputes, as they have a legitimate interest in resolving them); see also Nathan Clay Belzer, *Deference in the Judicial Resolution of Intrachurch Disputes: The Lesser of Two Constitutional Evils*, 11 ST. THOMAS L. REV. 109, 112 (1998) (noting that while courts use the polity approach and the neutral approach are “[b]oth . . . fraught with constitutional infirmities”).

¹¹⁹ See *St. James*, 585 Pa. at 444 (mentioning that a civil court is a proper place for resolving church property disputes because the Church must be accountable to the public good); see also Hamilton, *supra* note 30, at 1175–76 (stating that property disputes could be properly decided in civil courts as long as the neutral principles of law approach was properly utilized).

¹²⁰ See *Watson*, 80 U.S. at 714 (discussing a property dispute and doctrinal controversy between a national Presbyterian organization and local church within that organization); see also Marianne Perciaccante, *The Courts and Canon Law*, 6 CORNELL J. L. & PUB. POL’Y 171, 171 (1996) (explaining that the First Amendment and relevant case law bars civil courts from determining and interfering with ecclesiastical decisions).

¹²¹ Compare *Kedroff*, 344 U.S. at 116 (citing a case where the Court deferred to churches’ ecclesiastical autonomy) with *St. Michael and Archangel Russian Orthodox Greek Catholic Church v. Uhniat*, 436 Pa. 222, 238 (1969) (repeating the Court’s precedent to prior canon law cases wherein the involved churches could retain their hierarchical structure and rule-making).

¹²² *Kedroff*, 344 U.S. at 116.

The First Amendment is not violated simply because a civil court rules on an issue involving church property.¹²³ So long as the dispute does not require a civil court to resolve controversies over religious doctrine and practice, the court can properly decide the dispute without violating the First Amendment.¹²⁴ Therefore, courts have adjudicated upon church property issues without violating the First Amendment by refusing to decide issues that pertain to church doctrine.

B. Dependent on Parties to Litigation Approach

Courts have steered clear of resolving issues pertaining to church doctrine by following two different analyses, dependent on the parties to litigation: the “polity approach” and the “neutral principles of law approach.”¹²⁵ The polity approach requires state courts to defer to the “decision of the organization’s highest authority in matters of ecclesiastical policy including doctrine, organization, discipline or moral standards or rules.”¹²⁶ When the dispute is between members of, or groups within, a religious organization, asserting different viewpoints on doctrinal matters, state courts follow the polity approach.¹²⁷ In such disputes, the parties to the dispute had “voluntarily associated together under the umbrella of the religious organization with all its internal doctrines, practices and beliefs.”¹²⁸ Therefore, the rules and doctrine of that organization should be what governs a dispute between those parties.¹²⁹ Further, in most intra-

¹²³ See *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969) (stating that “[c]ivil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property.”); see also *St. Michael*, 436 Pa. at 231 (referencing the canonical structure of the church as the ultimate ruling authority regarding church property and internal hierarchy).

¹²⁴ See *Mary Elizabeth Blue Hull*, 393 U.S. at 449 (holding that while the court had a legitimate interest in the dispute, the First Amendment did not permit it to award church property on the basis of the court’s own interpretation of church doctrine); see also Belzer, *supra* note 118, at 109 (echoing the First Amendment’s directive that religious organizations’ hierarchy, rules, and structure is strictly governed by the religious entity).

¹²⁵ See *St. James*, 585 Pa. at 442–43 (explaining the two distinct approaches set forth by the Supreme Court in precedent); see also Ashley Alderman, Note, *Where’s the Wall?: Church Property Disputes within the Civil Courts and the Need for Consistent Application of the Law*, 39 GA. L. REV. 1027, 1038 (noting that utilizing the neutral approach allows the Court to circumvent analysis about church polity and internal organization).

¹²⁶ *In re The Catholic Bishop of Spokane*, 329 B.R. 304, 323 (Bankr. E.D. Wash. 2005).

¹²⁷ See *id.* 322 (citing *Watson v. Jones*, 80 U.S. 679 (1872) and *Jones v. Wolf*, 443 U.S. 595 (1979) as the two major intra-church disputes decided by the Supreme Court); see also *Serbian E. Orthodox Diocese v. Dionisije Milivojevic*, 426 U.S. 696, 709 (1976) (asserting that the case is properly handled by church tribunals because it is an intra-church property dispute).

¹²⁸ *Spokane*, 329 B.R. at 323.

¹²⁹ *Id.* (The parties to the dispute should be bound by the church’s authority because, “By that association [with the church], [the parties to the dispute] subjected themselves to the doctrines, matters of belief, organizational structure, rules and ecclesiastical authority of that organization.”); Natalie L.

church disputes, the court must defer to the internal law of the church since such disputes involve ecclesiastical questions, which a court is prohibited from resolving under the First Amendment.¹³⁰ Consequently, in RCC intra-church disputes, canon law controls.¹³¹

When deciding a dispute between the church and a third party, however, the legal analysis differs. State laws and internal religious laws are bound to differ in some aspects between what is right and wrong.¹³² Thus, if a court were forced to apply the internal laws of a religious organization in adjudicating a dispute between the organization and a third party, it may be forced to dismiss a valid claim under state law if there was no internal religious law naming that claim as a crime.¹³³ The third party, who in no way agreed to be bound by the internal laws of the religious organization, would be left with no form of redressability for the wrong he or she incurred. For example, it would be unjust to adjudicate a dispute pursuant to the beliefs of fundamentalist religious groups such as the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS), which promotes

Yaw, *Cross Fire: Judicial Intervention in Church Property Disputes after Rasmussen v. Bunyan*, 2006 MICH. ST. L. REV. 813, 827 (2006) ("The hierarchical approach, or polity approach, gives great deference to the highest body in an ecclesiastical tribunal.").

¹³⁰ See *In re Roman Catholic Archbishop of Portland*, 335 B.R. 842, 854 (Bankr. D. Or. 2005) (noting that the protections of religious freedom have created a restriction on the jurisdiction of the courts to decide certain disputes touching on religious matters, and thus, civil courts are prohibited from resolving church property disputes on the basis of religious doctrine and practice); see also Jonathon C. Lipson, *When Churches Fail: The Diocesan Debtor Dilemmas*, 79 S. CAL. L. REV. 363, 395-96 (discussing various case law that requires a court to defer to a bishop's determination of what constitutes estate property).

¹³¹ See Hamilton, *supra* note 30, at 1113-14 ("Religious individuals and institutions are absolutely protected in the creation and observance of their beliefs, including self-governance that is driven by ecclesiology. Following this principle, the Court has declined jurisdiction over 'solely' ecclesiastical disputes, that is, intraorganizational disputes over belief."); see also *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 447 (1969) ("In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.").

¹³² See CNN, *With 'Prophet' in Prison, Child Bride Can Heal*, available at <http://www.cnn.com/2007/US/law/11/21/child.bride.ap/index.html> (last visited October 1, 2008) (discussing how although it is a crime in the United States, the FLDS supports polygamy, and as a result, Warren Jeffs, the self proclaimed prophet of FLDS, was sentenced to jail on two counts of accomplice to rape based on polygamist activities), see also Chris Francescani, *Alleged Rape Victim Testifies to Suicide Attempt*, ABC NEWS LAW & JUSTICE UNIT, Sept. 16, 2007, available at <http://abcnews.go.com/TheLaw/story?id=3609411&page=1> (detailing that in direct contrast to state law, Jeffs coerced young girls to marry and have sexual relations with husbands he chose for them, and encouraged men to have many wives based on the teachings of sect law).

¹³³ See *Watson v. Jones*, 80 U.S. 679, 730-31 (1872) (noting that the judgments of religious organizations pertaining to their own members are not reviewable in courts outside of the ecclesiastical courts); see also *Mary Elizabeth Blue Hull*, 393 U.S. at 445 (stating that the main reason religious organizations have the right to establish tribunals is to allow them to decide disputes arising among themselves; therefore, their decisions should be binding and only subject to appeals that the church itself allows for).

controversial practices including arranged marriages and polygamy, when a party to the dispute is unaffiliated and completely disagrees with such FLDS beliefs.¹³⁴ Therefore, the court will then apply the “neutral principles of law approach” to the dispute.¹³⁵ Under this approach, the court simply applies “neutral principles of law,” developed for use in all types of property disputes.¹³⁶ When neutral principles of law are applied, they are applied only to resolve issues that do not pertain to the beliefs or doctrine of the church. As a result, religious beliefs are absolutely protected, and there is no violation of the First Amendment. However, if applying state civil law would have an undue or substantial burden on the exercise of religion, the court must further ascertain whether a compelling governmental interest exists in applying the state law.¹³⁷

1. Problems in Applying this Approach

This “dependent on the parties to litigation” approach has provided the courts with a clear path to follow, ensuring no constitutional violation, while formulating consistent decisions. Further, the approach recognizes “an absolute right to believe in anything, but demand[s] accountability of religious institutions to society” when they harm third parties.¹³⁸ The dispute this article addresses is between the church and a third party, namely a group of tort creditors.¹³⁹ Therefore, in following this approach, it seems appropriate for the court to follow the “neutral principles of law” approach and thus apply state civil law. However, applying state law could potentially force dioceses to close down, which could violate the First

¹³⁴ See Francescani, *supra* note 132 (describing how sect leader Warren Jeffs forced girls in the FLDS community to marry the men he thought God revealed to him that they should be married to); see also *Polygamous-Sect Custody Cases Dropped*, CHARLESTON GAZETTE, Aug. 16, 2008 at P7C (explaining that the FLDS is a breakaway sect of the mainstream Mormon church which has denounced polygamy, and believes that polygamy brings glory in heaven).

¹³⁵ See *Mary Elizabeth Blue Hull*, 393 U.S. at 449 (explaining that “neutral principles of law” is the approach followed when the dispute is not among intra-church members); see also Hamilton, *supra* note 30, at 1114 (stating that cases involving the “conduct of religious institutions or individuals that harm innocent and unconsenting third parties . . . are properly governed by ‘neutral principles of law’”).

¹³⁶ See *Watson*, 443 U.S. at 603 (1979) (detailing that the neutral-principles approach “relies exclusively on objective, well-established concepts of trust and property law” and thus “promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice”).

¹³⁷ See *In re The Catholic Bishop of Spokane*, 329 B.R. 304, 323–24 (Bankr. E.D. Wash. 2005). (citing *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, (1990)) (stating that when a court applies state civil law, it must ensure that such application does not substantially burden religion, because if it does, applying state law would then be a violation of the First Amendment), see also *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) (explaining that even when a regulation seems neutral on its face, it may still burden the free exercise of religion, and therefore be invalid).

¹³⁸ Hamilton, *supra* note 30, at 1115.

¹³⁹ See *Spokane*, 329 B.R. at 323 (stating “[t]his is a purely secular dispute between creditors and a bankruptcy debtor, albeit one which is a religious organization.”).

Amendment.

a. Substantially Burdensome to the Free Exercise of Religion

If, in determining the property of the diocesan bankruptcy estate under 11 U.S.C. § 541, the bankruptcy court applies state civil law, the court would consequently fail to recognize any separation of diocesan assets from assets of the parishes, as is required by canon law.¹⁴⁰ However, failing to recognize such a separation could place a substantial burden on religious exercise.¹⁴¹ A parish church plays an extremely important role in an individual parishioner's life.¹⁴² It is a place of worship and a place to receive the sacraments¹⁴³ of central religious significance for Catholics, including baptism, reconciliation, and marriage.¹⁴⁴ A parish and a church are more than just a piece of property, they play an important role in "the life of [their] parishioners, spiritually, intellectually, and emotionally."¹⁴⁵ These parishes would be lost if they were used to satisfy judgments of tort creditors. The loss of these parishes, depending on how substantial the loss is, could considerably burden the local parishioners' exercise of religion.¹⁴⁶ The parishioners would be left with no place to worship or receive their sacraments.¹⁴⁷ Consequently, applying state civil law may be

¹⁴⁰ See *supra* notes 7–11 and accompanying text (explaining how the diocese and parishes would be viewed under state law).

¹⁴¹ See *In re Roman Catholic Archbishop of Portland*, 335 B.R. 842, 863 (Bankr. D. Or. 2005) (noting that the First Amendment expert for the TCC acknowledged that a substantial burden could be imposed if the ultimate result were to deplete all of the debtor's real property to satisfy the claims of debtor's creditors); see also Nadborny, *supra* note 8, at 880–81 (stating that a church can be substantially burdened by Section 541 because the statute fails to properly differentiate between the assets of the parish and the assets of the diocese).

¹⁴² See *Akoury v. Roman Catholic Archbishop of Boston*, 2004 Mass. Super. LEXIS 349, at *5–6 (holding that the closing of a church and parish constitutes as great irreparable harm for purposes of a preliminary injunction); see also Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 113 (discussing the various social ways in which a parishioner is tightly bound to the church).

¹⁴³ See The Seven Catholic Sacraments, <http://www.americancatholic.org/Features/Sacraments/default.asp> (last visited Oct. 2, 2008) ("The seven sacraments are ceremonies that point to what is sacred, significant and important for Christians. They are special occasions for experiencing God's saving presence."); Holy Spirit Interactive: The Catholic Sacraments, <http://www.holyspiritinteractive.net/features/sacraments/> (last visited Oct. 4, 2008) ("[A] sacrament is one of the means God has chosen to influence our life in the direction of his purpose for giving us life.").

¹⁴⁴ *Portland*, 335 B.R. at 863 (stating the diocese's argument which acknowledges the importance of parish churches and schools); *Akoury*, 2004 Mass. Super. LEXIS 349 at *4 (describing the role a parish plays in the important events of its parishioner's lives).

¹⁴⁵ *Akoury*, 2004 Mass. Super. LEXIS 349 at *4.

¹⁴⁶ While this is important to point out, actually ascertaining whether or not the loss of parishes would substantially burden the local parishioners' free exercise of religion is not an issue this article seeks to determine.

¹⁴⁷ A distinction must be made between densely populated areas and areas of low-density populations. In densely populated areas, there is likely to be several RCC's through the entire area.

unconstitutional, as its application may be substantially burdensome to the free exercise of religion.¹⁴⁸

b. Inconsistent Holdings

Applying this “dependent to the parties of litigation” approach would create inconsistent holdings with respect to the disputed property. The holding would vary as the parties to litigation differ between intra-church members and third parties. At all times, courts seek to avoid inconsistent holdings, especially when the holdings concern property.¹⁴⁹ Such inconsistent holdings can be shown by comparing *Akoury v. Roman Catholic Archbishop of Boston*¹⁵⁰ with the bankruptcy case in *Portland*.¹⁵¹

In *Akoury*, plaintiffs were a group of parishioners who sought to stop “the ‘suppression’ (i.e., its closure) of their Church and parish by the Diocesan Archbishop . . . [who] is attempting to accomplish a ‘reconfiguration of the Archdiocese,’ due to numerous serious problems that the Archdiocese is now facing.”¹⁵² The court held that while, under *Jones v. Wolf*, it was constitutionally entitled to adopt “neutral principle of laws” to resolve church property disputes,¹⁵³ it was “simply prohibited by the First Amendment to the United States Constitution from involving itself in such a dispute between members of the Church.”¹⁵⁴ Consequently, the plaintiffs in *Akoury* were left with no state remedy in their dispute with the Church. Rather, the plaintiffs were required to resort to the canon law, and

Thus, if one church shut down, the parishioners could simply go to a nearby church to worship. However, in areas of low density population, there is likely to be only one church throughout the entire area. Therefore, if that single church is eliminated, the parishioners would be left with absolutely no church to worship.

¹⁴⁸ See *supra* note 129 and accompanying text.

¹⁴⁹ See Fed. R. Civ. P. 13(a) (stating that the compulsory counterclaim rule is to prevent creating inconsistent results); see also 28 U.S.C. §1738 (2007) (regarding issue preclusion, the risk of inconsistent judgments is a consideration in ascertaining whether using offensive issue preclusion is unfair).

¹⁵⁰ *Akoury*, 2004 Mass. Super. LEXIS 349 at *8–10 (finding that the First Amendment prevents extensive intervention by civil authority in church disputes).

¹⁵¹ See *Portland*, 335 B.R. at 868 (holding that the parishes and school are not separate legal entities with capacity to sue or be sued and that there is no First Amendment impediment to the court’s jurisdiction to determine whether property in which title is held by debtor belongs to the bankruptcy estate or to others).

¹⁵² *Akoury*, 2004 Mass. Super. LEXIS 349 at *1. Plaintiffs were seeking a preliminary injunction to prohibit the defendant from selling the church grounds, the church, the items of furniture, the religious items, and the money raised by the Parish. *Id.*

¹⁵³ 443 U.S. 595, 602 (1979) (holding that the “neutral principles of law” approach does not violate the First Amendment and that a state may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters).

¹⁵⁴ *Akoury*, 2004 Mass. Super. LEXIS 349 at *10. The First Amendment prohibits civil courts from intervening in disputes concerning religious doctrine, discipline, faith or internal organization. *Alberts v. Devine*, 479 N.E.2d 113, 122 (Mass. 1985).

seek remedy there. Since under canon law such property as the church grounds and the church building are held in trust for the parishes, the diocese would be unable to use that property to solve problems the diocese was facing.¹⁵⁵ To permit the diocese to use the property held in trust to ameliorate its own problems would violate the very essence of the trust itself.¹⁵⁶

In *Portland*, defendant debtor was the Bishop and Diocese of Spokane and plaintiffs were a group of tort creditors; therefore, because it was a property dispute between the church and a third party, and it did not involve questions of ecclesiastical doctrine, the court applied state civil law.¹⁵⁷ Under state law, the parishes were not separate legal entities that had the capacity to sue and be sued or to be beneficiaries of trusts.¹⁵⁸ Accordingly, the property would be included in the property of the estate and the tort creditors would be able to use that property to satisfy their judgments.¹⁵⁹

Comparing the *Akoury* court's holding with the *Portland* court's holding exhibits how a court, adjudicating on two very similar types of property, will apply different law, depending on who the parties to the particular dispute are. Hypothetically, assume a court had to adjudicate on two different bankruptcy cases. One case is between a debtor diocese and a church member, where the church member contends the diocese cannot use the parish property to satisfy the judgments of tort creditors. The other

¹⁵⁵ See Bainbridge & Cole, *supra* note 1, at 73–4.

[C]anon law exhorts the bishop to “exercise careful vigilance” over ecclesiastical good within his diocese to foster observance of the laws of the Church regarding the administration of temporal goods. This responsibility flows from the bishop’s general duty to “protect unity of the universal Church” by promoting “common discipline” and urging the “observance of all ecclesiastical laws.” Even so, however, the bishop only administers the ecclesiastical good of the diocese, not the ecclesiastical good of other public juridic persons, such as parishes, that reside within the diocese.

Id. See also WELLS, *supra* note 51, at 15. The courts have recognized that the diocese does not hold the property, that it is held in a trust for the benefit of the parish, which is sufficient to take parish property out of the diocesan debtor’s estate. *Id.*

¹⁵⁶ See 11 U.S.C. § 541(d) (2008). When one holds property in trust for another, he holds merely legal title over the property, and thus, lacking equitable title, he is unable to use that property for his own needs. It is for this very reason property held in trust for another cannot be included in a debtor’s bankruptcy estate. *Id.*

¹⁵⁷ See *Portland*, 335 B.R. at 868 (holding there is no religious protection requiring application of the canon law to the determination of whether the disputed property is property of the bankruptcy estate).

¹⁵⁸ See *id.* (explaining that, although canon law gives parishes separate canonical existence, it goes not give them separate legal existence, and thus the parishes do not have a separate legal entity from the diocese).

¹⁵⁹ See *Portland*, 335 B.R. at 889. The TCC, on its third motion for summary judgment, was granted judgment as a matter of law and a declaration that debtor held both legal and equitable title to those property, making them property of the debtor’s bankruptcy estate. *Id.*

case is between the same debtor diocese and a third party tort creditor, where the third party contends the diocese should use the parish property to satisfy tort judgments. In the intra-church case, the court, in applying the “parties to litigation” approach, would defer to canon law in ascertaining the parameters of the diocesan estate; the diocese could not include parish property as part of the diocesan estate to help satisfy judgments against it.¹⁶⁰ Alternatively, in the case involving a non-parishioner third party, the court, in applying the “parties to litigation” approach, would apply state civil law; under state law, the parish property would be included as part of the diocesan estate.¹⁶¹ Consequently, both the third party and the church member would seek to use the parish property differently, and each would have a judicial decision supporting their claim. A conflict results, as a single piece of property cannot be used in two completely conflicting ways. Courts seek consistency in judgments to avoid creating conflicts such as this.¹⁶² However, this is precisely what the courts are doing in resolving the issue this article addresses. Therefore, it is apparent that the courts need a clear rule to follow in resolving the issue.

CONCLUSION

In deciding whether to apply canon or state civil law, courts must find a proper balance between three important interests: (1) religious belief must be absolutely protected, (2) tort creditors must be able to satisfy their successful judgments to the greatest extent possible, and (3) religious entities must be held accountable for their wrongdoings.¹⁶³

Essentially, neither applying canon law nor applying state civil law will provide balance between protecting First Amendment rights, satisfying judgments, and ensuring that the RCC is held legally accountable for the

¹⁶⁰ See Marcinak, *supra* note 10, at 607–08 (explaining that in a hierarchical church, civil courts must defer to ecclesiastical authority on a question of the ownership of church property whether questions of discipline, faith, custom or law have been decided by the highest of these church jurisdictions); see also Perciaccante, *supra* note 120, at 184 (highlighting that there is a substantial body of law that dealt with intra-church property disputes by accepting the highest church body that had a judgment on the case).

¹⁶¹ See Bainbridge & Cole, *supra* note 1, at 86 (noting the distinction between intra-church disputes, where courts must defer to canon law, and disputes between the Church and some third party, where courts need not do so); see also Hamilton, *supra* note 30, at 1114 (stating that Church harm upon a third party is governed by the “neutral principles of law” of approach and is thus governed by civil law).

¹⁶² See *Portland*, 335 B.R. at 863 (providing examples to exhibit the doctrine that a court should seek consistency in its holdings).

¹⁶³ See Hamilton, *supra* note 30, at 1103 (describing situations in which courts have found actions against religious organizations to be permissible and when they have found actions against churches to be unconstitutional).

wrongdoings of its priests.¹⁶⁴ Although the RCC is a religious entity, our government requires that all actors in society be held accountable for their wrongdoings, including those of their agents.¹⁶⁵ By applying canon law, the church would be able to funnel all its assets into the parishes and consequently be able to escape liability. Further, the church would be able to shield those assets from tort creditors, leaving creditors unable to satisfy the judgments in their favor. However, by applying state civil law, the church is faced with the practical possibility of dissolution, because tort creditors are given the opportunity to reach and deplete all church assets. Asset depletion would strip the church of all its property, essentially shutting down all churches. As a result, there would be no place for the local parishioners to worship, which would be a substantial burden on their free exercise of religion.¹⁶⁶ This would especially be true in less-populated areas that have only one church for the entire area. If these single parishes were shut down, the parishioners would have no church in which to worship or receive sacraments. They could be forced to travel long distances to engage in such worship or practices, and thus their free exercise of religion would be substantially burdened. Further, as was noted by the *Spokane* court, there is no compelling governmental interest¹⁶⁷ to deplete diocesan and parish assets in order to maximize the bankruptcy estate under the Bankruptcy Code, if doing so would impose a substantial burden on religion. As a result, applying state law could easily infringe upon First Amendment rights.

Federal legislation pertaining to the issue is necessary to prevent the

¹⁶⁴ See *id.* at 1107 (noting that the “United States [has come] to the understanding that the public good requires the deterrence and punishment of harmful actions, regardless of the identity of the actor); see also *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878–79 (upholding denial of claimant’s unemployment benefits and denying claimant’s use of peyote, a controlled substance, was protected by their rights to free exercise of religion).

¹⁶⁵ See Hamilton, *supra* note 30, at 1100–01.

[R]eligious entities, like all other human institutions, are capable of great harm to others, and the fact that their conduct is religiously motivated does not alter the fact of the harm. Like every other human institution, they are capable of being tempted to abuse their power. . . . When it comes to the public good, the rule of law needs to govern religious institutions, just as it does other private entities.

Id. See also *Smith*, 494 U.S. at 878–79. The Supreme Court has “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.” *Id.*

¹⁶⁶ See *Portland*, 335 B.R. at 863–64 (noting that if the TCC is able to reach all of the diocesan assets, depleting it of all parish property and the like, the parishioners would have a valid claim that the holding is substantially burdensome of their religion); see also *Spokane*, 329 B.R. at 324–25 (explaining that if the government puts a substantial burden on a religion then there is a violation of First Amendment rights).

¹⁶⁷ See *Portland*, 335 B.R. at 864 (citing *In re Young*, 82 F.3d 1407, 1420 (8th Cir. 1996)). “The interests advanced by the bankruptcy system are not compelling under the RFRA,” and the RFRA is essentially Congress’ attempt to solidify the judicially created test through legislation. *Id.*

problems flowing from the application of state law or canon law. One possible solution is for the legislation to place a tort cap on the amount of damages an aggrieved plaintiff can recover.¹⁶⁸ A tort cap would place a limit on the amount of money harmed plaintiffs can win in a suit against the RCC. This would provide some financial protection to the RCC, which would aid in ensuring that churches are not depleted of their assets and forced to shut down. However, a tort cap negatively affects other important interests: the RCC would be liable only up to a certain amount, thus it would not be required to completely answer for the wrongdoings of its priests through financial compensation.¹⁶⁹ Furthermore, one purpose of significant punishment is to deter unlawful conduct. If the RCC is aware that it can only be held liable up to a certain cap, it may be less likely to prevent and deter the wrongful conduct of its priests. Additionally, for those plaintiffs who would otherwise receive a judgment above the tort cap's limit, the plaintiff would not receive full or proper rectification for his harm. Thus, the tort cap is not a sound solution to the issue because, although it would protect religious interests, it would jeopardize the other interests involved.

An appropriate legislative solution would be to carve an exception in the applicable bankruptcy law. The exception would enable a court to apply state law to the proceeding without violating the First Amendment by allowing tort creditors to reach all diocese and unincorporated parish assets, excepting the church structure.¹⁷⁰ Allowing the tort creditor to reach all of the diocesan assets (including the unincorporated parishes' assets), but not the church structure itself, is similar to the primary home exception in the Florida state constitution.¹⁷¹

This carve-out would provide balance between all the interests at stake. It provides for accountability by holding religious organizations liable. Additionally, it provides for proper judgment satisfaction, allowing a

¹⁶⁸ A tort cap is an upper limit on the amount of damages a plaintiff can receive in a legal proceeding. See Jonathan D. Glater, *To the Trenches: The Tort War is Raging On*, N. Y. TIMES, June 22, 2008, at BU (discussing tort reform and upper limits on tort damages recovery); see also Adam Liptak, *Shot in the Arm for Tort Overhaul*, N.Y. TIMES, November 17, 2002, at 3 (suggesting that legislation limiting the possibly recovery of tort victims could be passed).

¹⁶⁹ See Jonathan D. Glater, *Pressure Increases for Tighter Limits on Injury Lawsuits*, N. Y. TIMES, May 28, 2003, at A (stating that caps on tort recovery could negatively effect victims of wrongdoing); see also Adam Liptak, *supra* note 168 (discussing the potential negative effects that tort caps could have on victims who have been harmed).

¹⁷⁰ Regarding religions other than the RCC, the building unable to be reached by tort creditors would be the organization's primary place of worship, such as a synagogue or mosque.

¹⁷¹ FLA. CONST. art. 10, § 4(a). The Florida Constitution provides that a homestead shall be "exempt from forced sale under process of any court." This exemption allows a bankruptcy court to reach all of the debtor's assets, with the exception of the debtor's primary residence.

creditor to reach every asset the religious organization owns, with the sole exception of the bare structure of the primary place of worship.¹⁷² Retention of a location to congregate and worship ensures that an asset-depleted religious organization is given the opportunity to continue exercising its religion as a group. It also provides a place to assemble to formulate a plan to financially rebuild itself. Thus, the carve-out would guarantee that the courts would not render a tort judgment of such magnitude that First Amendment free exercise rights would be violated.

Such a carve-out in the applicable bankruptcy law provides courts with a concrete rule to follow that will ensure they strike the proper balance in satisfaction of judgments, RCC accountability, and protection of RCC parishioners' free exercise of religion.

¹⁷² See Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C. § 2000bb-1 (2000) (articulating the test under which government can permissively place a burden upon religious freedom).