

NOTES

APPOINTING CHAPTER 11 TRUSTEES IN REORGANIZATIONS OF RELIGIOUS INSTITUTIONS

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INTRODUCTION

OVER the past decade, the bankruptcy filings of Roman Catholic dioceses have brought the previously underexamined possibility of church bankruptcies to the attention of scholars. At the same time, a large and growing number of less visible churches are resorting to chapter 11 reorganization, often as a last-ditch effort to keep faith communities together or to preserve ownership interests in the physical churches that serve as the anchors for those communities. However, the case law and scholarly literature treating the religious liberty implications of subjecting churches or other religious organizations to the provisions of the Bankruptcy Code remain limited in scope. This Note considers an important tool available to parties in interest in a chapter 11 reorganization: appointing a trustee to replace the existing management of a debtor. This mechanism allows for the replacement of bad actors in the leadership of a business so that the going concern value of the debtor's enterprise can be maximized to the benefit of creditors. Given the corporate governance concerns that attend many church bankruptcies, this represents a powerful and useful tool for implementing more effective internal controls, building credibility with creditors, and effecting reorganizations.

However, when the business in question is a religious institution, the appointment of a trustee raises concerns relating to the religious liberty interests of the debtor. I conclude that these concerns should not bar the appointment of a trustee in the chapter 11 reorganization of a religious institution. In Part I, I will describe the causes of church bankruptcies and the functioning of the chapter 11 trustee as a potential remedy in those cases. In Part II, I will articulate the potential bases of religious

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liberty objections to such an appointment. In Part III, I will sketch the contours of how the scope of a trustee's authority could be cabined so as to prevent infringing on the religious liberty interests of the debtor.

I. CHURCHES IN BANKRUPTCY

A. *Why Churches File for Bankruptcy*

On July 6, 2004, the Archdiocese of Portland filed for bankruptcy protection under chapter 11 of the Bankruptcy Code.¹ The Archdiocese of Portland was the first of twelve Roman Catholic dioceses to file for bankruptcy in response to the financial impact of lawsuits relating to allegations of child sexual abuse.² These bankruptcy filings took many bankruptcy scholars by surprise.³ One has described the bankruptcy of a religious organization as being previously “unfathomable.”⁴ However, these diocesan filings were not the first bankruptcy filings by religious organizations.⁵ Indeed, they represent only the most high-profile cases in the growing group of religious organizations seeking the protection of chapter 11 bankruptcy. A recent study found that, far from being uncommon or the exclusive province of large, hierarchical churches weighed down by mass torts, hundreds of smaller churches are increasingly resorting to bankruptcy. In the period between January 1, 2006, and December 31, 2011, 473 religious organizations filed for chapter 11 bankruptcy,⁶ with the number of such filings growing with each passing year even as the total number of chapter 11 filings nationwide began to taper off in 2010 with the easing of the Global Financial Crisis.⁷

Allowing religious institutions to reorganize in bankruptcy serves the public interest. As opposed to a fire sale or liquidation, reorganization is

¹ Michael Paulson, *Diocese in Ore. Files for Chap. 11*, *Bos. Globe* (July 7, 2004), http://www.boston.com/news/nation/articles/2004/07/07/diocese_in_ore_files_for_chap_11/.

² *Bankruptcy Protection in the Abuse Crisis*, BishopAccountability.org, <http://www.bishop-accountability.org/bankruptcy.htm>, archived at <http://perma.cc/PF85-FGVA> (last visited Sept. 8, 2015).

³ See, e.g., David A. Skeel, Jr., *Avoiding Moral Bankruptcy*, 44 *B.C. L. Rev.* 1181, 1181 (2003) (“[T]he rumors that the Archdiocese was considering filing for bankruptcy took me—and I suspect most bankruptcy scholars—completely by surprise. It had never dawned on me that a religious organization would ever file for bankruptcy.”).

⁴ Pamela Foohey, *Bankrupting the Faith*, 78 *Mo. L. Rev.* 719, 720 (2013).

⁵ See, e.g., *Pastor Gives Up Ranch House After Church Files Bankruptcy*, *Victoria Advocate*, Dec. 14, 1995, at 11-A (discussing the Church on the Rock's 1995 bankruptcy).

⁶ Foohey, *supra* note 4, at 730–31.

⁷ *Id.* at 732–33.

often an effective way to preserve enterprise value for creditors and other stakeholders.⁸ Furthermore, the reorganization of a religious institution protects important, nonfinancial social interests. Like other charities, churches “enrich society by providing cultural, civic, and social benefits that inure to the public as a whole but cannot be sold in a liquidation market.”⁹ One important common thread in bankruptcies of religious organizations is the motivation for filing. Businesses file for chapter 11 reorganization for diverse reasons. By contrast, in the particular context of religious organizations the decision to file under chapter 11 is overwhelmingly made in response to difficulty servicing mortgages on real property—typically a church.¹⁰ “They seek to reorganize primarily so that they may restructure their mortgage payments and retain their real property.”¹¹ A church that loses the physical locus of its community runs a very real risk of permanently breaking apart.¹² Chapter 11 can represent a lifeline to a financially distressed community of worshippers, providing time for negotiations and providing time and space for churches to address underlying financial problems, or at least helping the church to sell buildings for better than fire sale prices, preserving equity and enabling the rebuilding of the congregation.¹³

Many churches that file for bankruptcy cite problems with church leadership or governance, particularly with governance structures that allow one person to be the “driving force” of the church, “invit[ing] mismanagement” and “put[ting] undue strain on church finances.”¹⁴ Indeed, recent scholarship suggests that while problems of corporate governance, especially limited oversight, are pervasive in the nonprofit context, the prospect of insolvency can dramatically exacerbate these problems for charities and similar organizations.¹⁵ One strong indication that this is an issue in church bankruptcies is that church debtors in bankruptcy are disproportionately congregational churches and African American nondenominational churches, entities outside the control of

⁸ Reid K. Weisbord, *Charitable Insolvency and Corporate Governance in Bankruptcy Reorganization*, 10 *Berkeley Bus. L.J.* 305, 315 (2013).

⁹ *Id.*

¹⁰ Foohey, *supra* note 4, at 726.

¹¹ *Id.*

¹² Pamela Foohey, *When Churches Reorganize*, 88 *Am. Bankr. L.J.* 277, 293 (2014) (“The loss of a particular building may have equaled the loss of the congregation.”).

¹³ *Id.* at 293.

¹⁴ *Id.* at 287.

¹⁵ Weisbord, *supra* note 8, at 307.

“broad governing bodies that may monitor their finances.”¹⁶ In a bankruptcy case involving a secular debtor, such pervasive concerns would normally suggest the remedy of appointing a chapter 11 trustee.¹⁷

B. Chapter 11 Trustees and Examiners as Remedy

A chapter 11 reorganization leaves a debtor in possession of an insolvent going business concern. The debtor avoids liquidation, continuing to operate the business for the benefit of creditors under a payment plan.¹⁸ This obligation to creditors is essentially fiduciary in character.¹⁹ The judicially enforceable obligation to work for the best interests of creditors rather than for the debtor in possession’s own purposes is at the core of a chapter 11 proceeding.²⁰

Chapter 11 affords a unique tool unavailable under other chapters of the Bankruptcy Code: the appointment of a chapter 11 trustee. While there is a strong presumption that in chapter 11 the debtor is to remain in control of the bankruptcy estate,²¹ under certain circumstances the bankruptcy court may order the appointment of a trustee who is empowered to “operate the debtor’s business” in place of the debtor.²² In most cases, there is no need for a trustee, as the debtor in possession is already “a fiduciary of the creditors and, as a result, has an obligation to refrain from acting in a manner which could damage the estate, or hinder a successful

¹⁶ Foohey, *supra* note 4, at 737.

¹⁷ See 11 U.S.C. § 1104(e) (2012) (requiring the United States Trustee to move for appointment of a chapter 11 trustee where “there are reasonable grounds to suspect” dishonesty or gross mismanagement on the part of the debtor); Weisbord, *supra* note 8, at 361–62 (arguing that these issues are so pervasive in the nonprofit sector that a bankruptcy examiner should presumptively be appointed in all nonprofit bankruptcies).

¹⁸ 11 U.S.C. § 1129(a) (2012); see *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) (“The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.”).

¹⁹ *Wolf v. Weinstein*, 372 U.S. 633, 649–50 (1963); 5 *Collier Bankruptcy Practice Guide* ¶ 84.02[5] (Alan N. Resnick & Henry J. Sommer eds., 2015) (stating that “the fiduciary duties of a trustee . . . [or debtor in possession] will run primarily to the debtor’s creditors”); *id.* ¶ 84.03[1] (stating that the “debtor in possession becomes a fiduciary of the estate” and must “exercis[e] its powers in the best interest of creditors”).

²⁰ See *Bank of Am. Nat’l Trust & Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 435 (1999) (describing goals of chapter 11 as “preserving going concerns and maximizing property available to satisfy creditors”).

²¹ See 11 U.S.C. § 1107 (2012).

²² § 1108.

reorganization.”²³ Furthermore, the debtor’s “familiarity with the business it had already been managing at the time of the bankruptcy filing often mak[es] it the best party to conduct operations during the reorganization.”²⁴ Because the powers and obligations of the trustee and the debtor in possession are largely coextensive²⁵ and the appointment of a trustee frequently involves both significant delay in the administration of the bankruptcy case and expense to the bankruptcy estate, often appointment of a trustee would harm rather than serve the interests of creditors and other stakeholders. The appointment of a trustee is an extraordinary remedy available in those instances where, for one of a variety of reasons, the debtor can no longer be trusted to carry out their responsibilities as debtor in possession.

There are three ways that a trustee may be appointed in a chapter 11 reorganization. First, “after the commencement of the case but before confirmation of a plan,” the bankruptcy court may order the appointment of a trustee on the motion of a party in interest or of the United States Trustee “for cause.”²⁶ Cause includes but is not limited to “fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management.”²⁷ The United States Trustee is obligated to move that a trustee be appointed if there are reasonable grounds to believe that the management or governing body of the debtor participated “in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor’s public financial reporting.”²⁸

Second, the bankruptcy court may order appointment of a trustee on a similar motion, where appointment of a trustee would be in the best in-

²³ *In re Marvel Entm’t Grp.*, 140 F.3d 463, 471 (3d Cir. 1998) (quoting *Petit v. New Eng. Mortg. Servs.*, 182 B.R. 64, 69 (D. Me. 1995)).

²⁴ *Id.* at 471; see also H.R. Rep. No. 95-595, at 233 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6192 (“[V]ery often the creditors will be benefitted by continuation of the debtor in possession, both because the expense of a trustee will not be required, and the debtor, who is familiar with his business, will be better able to operate it during the reorganization case.”).

²⁵ *In re Cybergenics Corp.*, 226 F.3d 237, 243 (3d Cir. 2000) (“When no trustee is appointed, the Bankruptcy Code gives a debtor in possession the powers and duties of a trustee.”).

²⁶ 11 U.S.C. § 1104(a) (2012). There is a split of authority as to whether the bankruptcy court is a party in interest for this purpose, and therefore whether it may appoint a trustee *sua sponte*. Compare *Cournoyer v. Town of Lincoln*, 53 B.R. 478, 486 (D.R.I. 1985) (holding that a bankruptcy court may not order an appointment of a trustee *sua sponte* under § 1104), *aff’d*, 790 F.2d 971 (1st Cir. 1986), with *In re U.S. Mineral Prods. Co.*, 105 F. App’x 428, 430–31 (3d Cir. 2004) (holding that court may order appointment of trustee *sua sponte*).

²⁷ § 1104(a)(1).

²⁸ § 1104(e).

terests of creditors, equity security holders, and other parties with interests in the bankruptcy estate.²⁹

Third, the bankruptcy court may order the appointment of a trustee in response to a motion of a party in interest to dismiss the chapter 11 case or to convert it to a chapter 7 proceeding for cause where the court determines that appointment of a trustee would be in the best interests of creditors and the bankruptcy estate.³⁰ The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 established this third trigger for appointment of a trustee in order “to provide the courts with additional flexibility in cases that otherwise would be subject to conversion or dismissal.”³¹

Regardless of the basis of the order to appoint a trustee, once the order is entered, the United States Trustee and the creditor committee carry out the selection of a trustee.³² Once appointed, the chapter 11 trustee—like the debtor in possession³³—has a fiduciary duty to maximize the value of the bankruptcy estate,³⁴ as well as duties of care, loyalty, and impartiality to creditors.³⁵ However, within these limits the trustee enjoys broad, discretionary authority to “operate the debtor’s business.”³⁶ The chapter 11 trustee may conduct all the affairs of the bankruptcy estate, limited only by the boundaries of good faith business judgment and the Bankruptcy Code.³⁷

II. RELIGIOUS LIBERTY OBJECTIONS

The religious liberty implications of appointing a chapter 11 trustee in a case where the debtor is a religious organization are not squarely treated in any reported cases. While the popular press raised the specter of churches and chapter 11 trustees as early as 2004 in the context of the

²⁹ § 1104(a)(2).

³⁰ § 1112(b)(1).

³¹ Clifford J. White III & Walter W. Theus, Jr., Chapter 11 Trustees and Examiners After BAPCPA, 80 Am. Bankr. L.J. 289, 301 (2006).

³² §§ 1104(b)(1), 702(a)–(c).

³³ *Wolf v. Weinstein*, 372 U.S. 633, 649–50 (1963).

³⁴ *CFTC v. Weintraub*, 471 U.S. 343, 352 (1985); see *In re Cent. Ice Cream Co.*, 836 F.2d 1068, 1072 (7th Cir. 1987); *In re Spielfogel*, 211 B.R. 133, 144 (Bankr. E.D.N.Y. 1997).

³⁵ See *In re Cochise Coll. Park, Inc.*, 703 F.2d 1339, 1357 (9th Cir. 1983).

³⁶ § 1108.

³⁷ *In re Consol. Auto Recyclers*, 123 B.R. 130, 140 (Bankr. D. Me. 1991); see *Bennett v. Williams*, 892 F.2d 822, 824 (9th Cir. 1989); *In re Curlew Valley Assocs.*, 14 B.R. 506, 513–14 (Bankr. D. Utah 1981).

bankruptcy of the Archdiocese of Portland,³⁸ the religious liberty implications of appointing a trustee in cases like these have thus far escaped extensive analysis in the scholarly literature. Professor David Skeel has noted the statutory possibility in chapter 11 of appointing a trustee for a church, but argues that this “demonstrate[s] nothing more than that the drafters of Chapter 11 never contemplated that a religious organization might file for bankruptcy.”³⁹ Jonathan Lipson has observed that “[i]t is not clear whether a bankruptcy court would have the constitutional power to appoint a Chapter 11 trustee for a religious entity debtor,” contrasting precedent limiting the ability of courts to control management of religious entities with actual, albeit sporadic, court practice of appointing trustees or receivers to manage or liquidate religious entities.⁴⁰ Several law student notes have also raised the prospect of such an appointment and suggested that there would be significant religious liberty hurdles.⁴¹ However, the bankruptcy courts’ direct engagement with the relevant religious liberty issues has been limited.

A bankruptcy court appointed a chapter 11 trustee in *In re United Church of the Ministers of God*, where the church had been under the exclusive control of a man accused of having imprisoned, raped, murdered, and dismembered a number of mentally disabled young girls in the basement of his home.⁴² This individual had “utilized the Church as a pawn in a gross and offensive fraudulent scheme to evade taxes.”⁴³ The court did not address the religious liberty implications of appointing a trustee here—likely because the church existed for no other purpose than “cloaking the financial support” of the debtor in possession’s criminal activities, “strictly for purposes of tax evasion rather than for any

³⁸ See, e.g., Alan Cooperman, Archdiocese of Portland, Ore., Declares Bankruptcy, Wash. Post, July 7, 2004, at A1 (noting dioceses’ concerns about being forced “to open [their] finances to outside scrutiny and risk turning over [their] operations to a court-appointed bankruptcy trustee”).

³⁹ Skeel, *supra* note 3, at 1193; see also David A. Skeel, Jr., “Sovereignty” Issues and the Church Bankruptcy Cases, 29 Seton Hall Legis. J. 345, 354 (2005) (“[I]t is almost inconceivable that a court would attempt to displace church decision makers in favor of a trustee.”).

⁴⁰ Jonathan C. Lipson, When Churches Fail: The Diocesan Debtor Dilemmas, 79 S. Cal. L. Rev. 363, 402 (2006).

⁴¹ See Ryan J. Donohue, Comment, Thou Shalt Not Reorganize: Sacraments for Sale, 22 Emory Bankr. Dev. J. 293, 324 (2005); 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, 843 (2005).

⁴² 74 B.R. 271, 273 (Bankr. E.D. Pa. 1987).

⁴³ *Id.* at 279.

cognizable religious motivation.”⁴⁴ A chapter 11 trustee was appointed in *In re Greater Ministries International*,⁴⁵ where the debtor was a church organization that had accumulated hundreds of millions of dollars in one of the largest Ponzi schemes in American history.⁴⁶ No case was published relating to the appointment, and it does not appear that religious liberty issues were raised in the bankruptcy, likely for similar reasons as in *Ministers of God*. The possibility of appointment of a trustee was explicitly raised in *In re Charles Street African Methodist Episcopal Church of Boston*, but an examiner with much more limited powers than a trustee’s was appointed instead.⁴⁷ The court found that “[t]hese limited duties would not require the examiner to cross boundaries protecting the religious liberty interests of [the Church],” and so obviated the need to engage with the religious liberty problems posed by appointment of a trustee.⁴⁸

An analogous issue to the chapter 11 trustee question was discussed in *People ex rel. Deukmejian v. Worldwide Church of God*.⁴⁹ In that case, a church had been forced into state receivership by the California attorney general following allegations of “malfeasance and misfeasance with respect to Church affairs” on the part of church officials.⁵⁰ The receiver proceeded to take control of all of the church’s assets, seize its records, and discharge some of its employees.⁵¹ The California legislature thereafter passed a statute expressly limiting the powers of the State of California over incorporated religious organizations and declaring that the mere act of incorporating in California did not waive any religious liberty interests of a church.⁵² The attorney general thereafter di-

⁴⁴ Id. at 275.

⁴⁵ *O’Halloran v. First Union Nat’l Bank of Fla.*, 350 F.3d 1197, 1200 (11th Cir. 2003) (“Kevin O’Halloran, a plaintiff in the present action, was appointed trustee of the bankruptcy estate.”).

⁴⁶ See Chuck Fager, Greater Ministries Leaders Get Lengthy Prison Terms, *Christianity Today*, Oct. 1, 2001, at 21, available at <http://www.christianitytoday.com/ct/2001/october1/15.21.html>, archived at <http://perma.cc/QT8A-YZVN>.

⁴⁷ 499 B.R. 66, 116–17 (Bankr. D. Mass. 2013).

⁴⁸ Id. at 116.

⁴⁹ 178 Cal. Rptr. 913, 914 (Cal. Ct. App. 1981).

⁵⁰ Id.

⁵¹ Id. at 915.

⁵² See Cal. Corp. Code § 9230 (Deering 2009); 1980 Cal. Stats. 4616 (“The Legislature hereby declares that . . . mere incorporation under the laws of California constitutes no waiver of the fundamental protections afforded religious bodies and individual freedom of worship.”).

rected dismissal of the underlying action.⁵³ While the reported case arose on the narrow issue of an application for attorney’s fees, the California Supreme Court took the occasion to discuss the theory of the receivership, under which “the Church’s property, assets and records were ‘public’ . . . always and ultimately in the custody of and subject to the supervision of the courts upon application of the Attorney General.”⁵⁴ In the view of the court:

To state the proposition is to expose its conflict with the constitutional prohibition against the governmental establishment or interference with the free exercise of religion. How the State, whether acting through the Attorney General or the courts, can control church property and the receipt and expenditure of church funds without necessarily becoming involved in the ecclesiastical functions of the church is difficult to conceive.⁵⁵

The appointment of a chapter 11 trustee raises similar concerns. The underlying basis of the trustee’s authority is, of course, very different from the rationale asserted for receivership in *Worldwide Church of God*—being grounded in the debtor’s invocation of the jurisdiction of the bankruptcy court by virtue of filing for bankruptcy rather than in a more far-reaching vision of churches as “public” in character and therefore “subject to the supervision of the courts.”⁵⁶ But the chapter 11 trustee for a religious institution will, like a receiver, “control church property and the receipt and expenditure of church funds.”⁵⁷ She therefore runs the risk of “becoming involved in the ecclesiastical functions of the church.”⁵⁸

The primary doctrinal bases of potential objections to the appointment of a chapter 11 trustee in the reorganization of a religious institution lie in the doctrine of church autonomy, the Religious Freedom Restoration Act,⁵⁹ and the excessive entanglement prong of the *Lemon* test’s articulation of the Establishment Clause.⁶⁰

⁵³ *Worldwide Church of God*, 178 Cal. Rptr. at 917–18.

⁵⁴ *Id.* at 915.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2012).

⁶⁰ See *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971).

A. Church Autonomy

The church autonomy doctrine establishes limits on the degree to which the state may intrude upon on the fundamental right of churches to “decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”⁶¹ This right does not prevent *all* interference in the affairs of churches. But in those areas in which it applies, in the “narrowly defined spheres of autonomous conduct” of “dogma, authority, and the church-minister relationship,”⁶² it applies as an absolute bar to judicial intervention:

[A] balancing test is [not] appropriate to determine to what extent judicial scrutiny of [the plaintiff’s] claims would offend the defendants’ religious freedoms under either the establishment clause, or the free exercise clause of the First Amendment. The application of First Amendment principles, in circumstances such as these, involves no balancing test. If adjudication of the plaintiff’s claims would implicate matters of ecclesiastical relationships, the courts should not intrude.⁶³

The absence of a balancing-of-interests analysis analogous to the compelling governmental interest analysis in the free exercise context⁶⁴ or the purpose and effect prongs of the *Lemon* test⁶⁵ is in line with some commentators’ description of the church autonomy doctrine as being fundamentally a jurisdictional rule, withdrawing questions relating to the internal affairs of religious institutions from the judicial competence of the civil court system.⁶⁶

⁶¹ EEOC v. Catholic Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996) (quoting *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)).

⁶² Andrew Soukup, Reformulating Church Autonomy: How *Employment Division v. Smith* Provides a Framework for Fixing the Neutral Principles Approach, 82 *Notre Dame L. Rev.* 1679, 1684 (2007).

⁶³ *Id.* at 1685 (quoting *Williams v. Episcopal Diocese of Mass.*, 766 N.E.2d 820, 825 (Mass. 2002) (alterations in original)).

⁶⁴ See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

⁶⁵ See *Lemon*, 403 U.S. at 612.

⁶⁶ See, e.g., Carl H. Esbeck, The Establishment Clause as a Structural Restraint on Governmental Power, 84 *Iowa L. Rev.* 1, 57–58 (1998); Ira C. Lupu & Robert Tuttle, The Distinctive Place of Religious Entities in Our Constitutional Order, 47 *Vill. L. Rev.* 37, 92 (2002). But see *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 n.4 (2012) (describing the ministerial exception as an “affirmative defense to an otherwise cognizable claim, not a jurisdictional bar”).

The church autonomy doctrine's distinctive focus on the institutional dimension of religious liberty makes it particularly apt for considering the issue of the appointment of a chapter 11 trustee in the reorganization of a religious organization. However, properly considered, the doctrine is not a bar to the appointment of a chapter 11 trustee for such an organization.

The origins of the Supreme Court's church autonomy jurisprudence lie in the 1871 case *Watson v. Jones*.⁶⁷ That case concerned a dispute over church property between two schismatic Presbyterian factions, divided essentially into proslavery and abolitionist camps.⁶⁸ The Court held that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories . . . the legal tribunals must accept such decisions as final, and as binding on them."⁶⁹ The case was dismissed for want of subject matter jurisdiction, as being "strictly and purely ecclesiastical in its character" and therefore within the competence of church authorities rather than the civil courts.⁷⁰ The concerns articulated by the Court relating to the risk that the civil courts might be drawn into adjudicating questions of "doctrinal theology"⁷¹ have continued to animate the development of the church autonomy doctrine.

In *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America*, the Court made explicit the constitutional underpinnings of church autonomy.⁷² There, the New York legislature had attempted to transfer, by statute, control of New York's Russian Orthodox churches from the Patriarch of Moscow to the Russian Church in America.⁷³ The Supreme Court reaffirmed that religious organizations are entitled to "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."⁷⁴ Grounding its reasoning in the Free Exercise Clause, the Court found that the Constitution prohibited "[l]egislation that regulates church administration, the operation of the churches, the appointment of clergy"

⁶⁷ 80 U.S. (13 Wall.) 679, 713–14 (1871).

⁶⁸ *Id.* at 681, 684.

⁶⁹ *Id.* at 727.

⁷⁰ *Id.* at 733.

⁷¹ *Id.*

⁷² 344 U.S. 94, 107 (1952).

⁷³ *Id.* at 97–99.

⁷⁴ *Id.* at 116.

or other areas “strictly a matter of ecclesiastical government.”⁷⁵ The New York law was struck down as an unconstitutional attempt to intrude on the autonomy of the church.⁷⁶

In addition to its invocation in disputes over church property, the church autonomy doctrine has been given force by the Supreme Court in the context of church administration. In *Serbian Eastern Orthodox Diocese v. Milivojevich*, the Serbian Eastern Orthodox Holy Assembly of Bishops and Holy Synod had suspended, removed, and ultimately defrocked the bishop of the Diocese for the United States and Canada.⁷⁷ The Assembly and Synod then reorganized the Diocese into three dioceses.⁷⁸ The former bishop filed suit alleging that his defrockment was defective under the regulations of the church, seeking an injunction declaring himself the true diocesan bishop, and attempting to invalidate the reorganization of the diocese.⁷⁹ The Illinois Supreme Court held that the bishop’s removal and defrocking were arbitrary and contrary to the Church’s constitution, and that the reorganization was invalid because it exceeded the scope of the Holy Assembly’s authority over the diocese.⁸⁰ The U.S. Supreme Court reversed.⁸¹ The Court held that the Illinois Supreme Court had impermissibly substituted “its own inquiry into church polity” for the “decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute.”⁸² The Court thus extended the principle developed in the church property cases, holding that civil courts should not undertake to resolve controversies over religious doctrine and practice, finding that they apply “with equal force to church disputes over church polity and church administration.”⁸³

The Supreme Court most recently treated this dimension of church autonomy as protecting the administration of the church from judicial review in the landmark case *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.⁸⁴ Here, a teacher at a religious school filed

⁷⁵ Id. at 107, 115.

⁷⁶ Id. at 126 (“These considerations undermine the validity of the New York legislation in that it enters the domain of religious control barred to the States by the Fourteenth Amendment.”).

⁷⁷ 426 U.S. 696, 697–98 (1976).

⁷⁸ Id.

⁷⁹ Id. at 698, 706–07.

⁸⁰ Id. at 708.

⁸¹ Id. at 724–25.

⁸² Id. at 708.

⁸³ Id. at 710.

⁸⁴ 132 S. Ct. 694, 710 (2012).

a complaint with the EEOC against the school and its affiliated church under the Americans with Disabilities Act, alleging that her employment had been illegally terminated in retaliation for claiming rights under the Act.⁸⁵ The Court held that both the Establishment and Free Exercise Clauses “bar the government from interfering with the decision of a religious group to fire one of its ministers.”⁸⁶ On the Free Exercise Clause side, “imposing an unwanted minister” violates “a religious group’s right to shape its own faith and mission through its appointments.”⁸⁷ On the Establishment Clause side, “[a]ccording the state the power to determine which individuals will minister to the faithful” violates the prohibition on government involvement in ecclesiastical decisions.⁸⁸ Consequently, the Court found that there exists a “ministerial exception” precluding the application of employment discrimination legislation to religious institutions with respect to the “selection of those who will personify its beliefs” in ministerial roles.⁸⁹

The doctrine of church autonomy is directly implicated by the appointment of a trustee in the reorganization of a religious institution. A trustee, with its broad power to operate the debtor’s business, could potentially take actions that would threaten a religious institution’s interests in shaping its faith and mission. For the sake of a flagrant example, a trustee appointed to manage a parish church might attempt to terminate the employment of the church’s pastor. Authority to reject pre-petition employment contracts is squarely within the power of the chapter 11 trustee.⁹⁰ But an exercise of that authority would run up directly against the church autonomy doctrine as expressed in the ministerial exception.

The difficulty in pinning down the boundaries of church autonomy has occasioned significant scholarly debate. Some commentators couch the doctrine of church autonomy within a broader theory of freedom of the church or church sovereignty.⁹¹ These scholars argue for a “robust

⁸⁵ *Id.* at 699–701.

⁸⁶ *Id.* at 702.

⁸⁷ *Id.* at 706.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ 11 U.S.C. § 365(a) (2012) (stating that the trustee “may assume or reject any executory contract or unexpired lease of the debtor”).

⁹¹ See, e.g., Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 *Nw. U. L. Rev. Colloquy* 175, 175–76 (2011); Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 *Geo. J.L. & Pub. Pol’y* 165, 177 (2009); Esbeck, *supra* note 66, at 3–4 (1998); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 *Vill.*

church autonomy doctrine” which imbues religious institutions with a “right to direct their own internal affairs free from government interference” and instructs the courts “to stay out of religious disputes for fear of encroaching on the jurisdiction of religious institutions.”⁹² These writers adduce different normative foundations for the broad conception of the freedom of the church that they endorse. Some appeal to a grounding of the religion clauses in inherited, millennium-old historical commitments to the unique competence of religious institutions in their area of authority,⁹³ others to the function of religious organizations as a check against the overbearing power of the state,⁹⁴ and still others to the natural, organic, and prelegal character of religious institutions.⁹⁵ These views share a commitment to an account of churches as enjoying an independence from the state analogous to that of a coequal sovereign, endowed with their own areas of exclusive jurisdiction and subject to uniquely deferential treatment.

Counterintuitively, conceptualizing church autonomy interests in this robust way cuts against a vigorous application of the doctrine of church autonomy in the bankruptcy context. Bankruptcy law is hostile to exceptions based in sovereignty concerns. Congress has specifically abrogated sovereign immunity with respect to governmental units in the application of broad swaths of the Bankruptcy Code.⁹⁶ In *Central Virginia*

L. Rev. 273, 288 (2008); Paul Horwitz, Act III of the Ministerial Exception, 106 Nw. U. L. Rev. Colloquy 156, 161–62 (2011) [hereinafter Horwitz, Act III]; Paul Horwitz, Churches as First Amendment Institutions: Of Sovereignty and Spheres, 44 Harv. C.R.-C.L. L. Rev. 79, 87 (2009) [hereinafter Horwitz, First Amendment Institutions]; Gregory A. Kalscheur, Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church, 17 Wm. & Mary Bill Rts. J. 43, 48–50 (2008).

⁹² Michael A. Helfand, Religion’s Footnote Four: Church Autonomy as Arbitration, 97 Minn. L. Rev. 1891, 1893–94 (2013) (citation omitted) (internal quotation marks omitted).

⁹³ See, e.g., Steven D. Smith, Freedom of Religion or Freedom of the Church? 26–27 (Aug. 2011) (unpublished manuscript, available at <http://ssrn.com/abstract=1911412>).

⁹⁴ See John H. Garvey, What Are Freedoms For? 153 (1996) (“Religious groups are one of the most important of those associations that stand intermediate between the individual and the state, and provide a buffer that is the best protection for personal freedom . . .”); see also *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring) (“[T]he autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws.”).

⁹⁵ See, e.g., Horwitz, First Amendment Institutions, *supra* note 91, at 87.

⁹⁶ 11 U.S.C. § 106(a) (2012). Courts have reached differing conclusions as to whether this waiver of sovereign immunity applies to foreign states as well as to domestic governmental units. Compare *In re EAL (Delaware) Corp.*, No. 93-578-SLR, 1994 WL 828320, at *12 (D. Del. Aug. 3 1994) (finding that § 106 does not abrogate foreign sovereign immunity), with

Community College v. Katz,⁹⁷ the Supreme Court upheld a broad bankruptcy exception to the general rule of *Seminole Tribe of Florida v. Florida*,⁹⁸ that Congress lacks the authority to abrogate states' Eleventh Amendment sovereign immunity under its Article I powers.⁹⁹ The *Katz* Court determined that "Congress may, at its option, either treat States in the same way as other creditors insofar as concerns 'Laws on the subject of Bankruptcies' or exempt them from operation of such laws."¹⁰⁰ One line of justification for this holding offered in *Katz* is that "[b]ankruptcy jurisdiction, at its core, is *in rem*."¹⁰¹ In a bankruptcy case, the bankruptcy court has "exclusive jurisdiction over a debtor's property, wherever located, and over the estate."¹⁰² Such jurisdiction "does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction,"¹⁰³ as it is restricted in scope to the *res* of the bankruptcy estate rather than being *in personam* in character. Likewise, in the case of a religious institution, being subjected to the jurisdiction of a bankruptcy court does not implicate its sovereign interests in the same way as a criminal or civil action against the organization. The court's power extends to the property of the church swept into the bankruptcy estate rather than to the church qua religious institution.¹⁰⁴

But even so, concerns about the sovereign dignity of churches still arise in the bankruptcy setting.¹⁰⁵ Of particular relevance, the Roman Catholic diocesan bankruptcy filings "had highly negative effects on the dioceses' dignity."¹⁰⁶ They have been perceived by many as shamefully avoiding their moral obligations to the victims of the sex abuse scandals that gave rise to the tort claims, which consequently triggered the bank-

In re Tuli, 172 F.3d 707, 712 (9th Cir. 1999) (holding Iraq to be a governmental unit subject to abrogation of sovereign immunity under § 106).

⁹⁷ 546 U.S. 356, 375–77, 379 (2006).

⁹⁸ 517 U.S. 44 (1996).

⁹⁹ See *id.* at 64–66 (holding that Congress could not override Eleventh Amendment sovereign immunity on the basis of the Interstate Commerce Clause or Indian Commerce Clause).

¹⁰⁰ *Katz*, 546 U.S. at 379.

¹⁰¹ *Id.* at 362.

¹⁰² *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004).

¹⁰³ *Katz*, 546 U.S. at 362.

¹⁰⁴ The other basis of the *Katz* Court's holding, that the states consented to the abrogation of their sovereign immunity in the bankruptcy setting, is discussed below. See *infra* Section III.A.

¹⁰⁵ David A. Skeel, Jr., When Should Bankruptcy Be an Option (for People, Places or Things?), 55 *Wm. & Mary L. Rev.* 2217, 2238 (2014).

¹⁰⁶ *Id.* at 2238.

ruptcy filings.¹⁰⁷ But bankruptcy can also be dignity enhancing for sovereigns. For instance, “a bankruptcy framework for countries . . . could enhance dignity if it removed the threat of perpetual harassment” that Argentina has faced from holders of repudiated bond debt, who, in the absence of a sovereign bankruptcy system, have pursued Argentinian assets from jurisdiction to jurisdiction around the world.¹⁰⁸ Likewise, in the context of the bankruptcy of a religious institution, appointment of a trustee could enhance the dignity of the church by providing credibility in the wake of malfeasance or gross incompetence on the part of the leadership. That credibility could be key to securing credit moving forward or bringing creditors to the table for good faith negotiation in the process of reorganization.¹⁰⁹

Consequently, while church autonomy interests are certainly still implicated by the appointment of a trustee, they are likely to receive reduced weight in the bankruptcy setting. Somewhat perversely, the very considerations that militate in favor of the most active conceptions of the church autonomy doctrine suggest its limited applicability in this sphere. Church autonomy will impose meaningful restrictions on the scope of a trustee’s power, but it is no bar to appointment of a trustee in itself.¹¹⁰

B. The Religious Freedom Restoration Act

It could be argued that the appointment of a trustee to operate a religious organization under chapter 11 of the Bankruptcy Code violates either the Free Exercise Clause of the First Amendment to the U.S. Constitution or the Religious Freedom Restoration Act (“RFRA”). The Free Exercise Clause provides that Congress shall make no law prohibiting the free exercise of religion.¹¹¹ However, the Supreme Court’s landmark decision in *Employment Division v. Smith* held that “if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally

¹⁰⁷ See, e.g., Crocker Stephenson, Abuse Survivors Group Insulted by Archdiocesan Bankruptcy Plan, Milwaukee J. Sentinel (Feb. 12, 2014), <http://www.jsonline.com/news/religion/abuse-survivors-group-insulted-by-archdiocesan-bankruptcy-plan-b99204764z1-245294311.html>.

¹⁰⁸ Skeel, *supra* note 106, at 2238.

¹⁰⁹ See, e.g., *In re Parker Grande Dev.*, 64 B.R. 557, 562 (Bankr. S.D. Ind. 1986) (“A general restoration of debtor corporation’s credibility can only be ensured with the greatest degree of success by the removal of the debtor-in-possession and the appointment of a Trustee.”).

¹¹⁰ For discussion on the precise contours of the restrictions imposed by church autonomy on such trustees, see *infra* Section III.B.

¹¹¹ U.S. Const. amend. I.

applicable and otherwise valid provision, the First Amendment has not been offended.”¹¹² Given this understanding of the Free Exercise Clause, the appointment of a chapter 11 trustee in the bankruptcy of a religious organization is likely constitutional. Any impact of the appointment of a trustee under the Bankruptcy Code would merely be an incidental effect of a generally applicable provision, either Section 1104 or 1108 of Title 11 of the United States Code, each of which lacks any religious animus. However, in response to *Smith*, Congress passed the Religious Freedom Restoration Act of 1993, which provides in relevant part:

(a) In general

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.¹¹³

This functionally overturned the central holding of *Smith*, at least in the context of federal law.¹¹⁴ The analysis of whether a burden placed upon the free exercise of religion by federal law violates the right of free exercise of religion as enshrined in RFRA is therefore a two-step inquiry: (1) whether such a burden is substantial; and (2) if it is substantial, whether it constitutes the least restrictive means of furthering a compelling governmental interest and therefore falls within the carve-out under Subsection (b).

The RFRA analysis with respect to appointment of a chapter 11 trustee for a religious institution necessarily centers on particular applications of the trustee’s authority rather than the appointment itself. While incorporated churches are persons for the purposes of RFRA and there-

¹¹² 494 U.S. 872, 878 (1990).

¹¹³ Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2012).

¹¹⁴ While RFRA still applies to federal laws and agencies, see, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014), the Supreme Court held RFRA unconstitutional as applied to state laws, see *City of Boerne v. Flores* 521 U.S. 507, 536 (1997).

fore qualify for its protection,¹¹⁵ mere appointment of a chapter 11 trustee would not—in and of itself—impose a substantial burden on the free exercise of religion by a church debtor at all. Debtors in possession operate under the same set of fiduciary duties to creditors as a trustee,¹¹⁶ and they enjoy largely the same sets of powers and rights as outlined in the Bankruptcy Code.¹¹⁷ A court appoints a trustee because it finds that there is cause not to trust the debtor in possession to exercise those powers in furtherance of those duties. The appointment of a trustee, however, does not impose any new duties on the debtor that did not exist before.¹¹⁸ Appointment alone therefore imposes no additional burdens on a debtor. Consequently, to the extent that appointment of a chapter 11 trustee will burden the religious beliefs of the debtor, the burden will stem from some particular post-appointment exercise of the trustee's authority.

This is particularly clear in light of the statutory language describing the powers of the trustee: “Unless the court . . . orders otherwise, the trustee *may* operate the debtor's business.”¹¹⁹ The trustee *may* operate the business, but is under no obligation to do so. She are also empowered to modify operation of the business to as great or small an extent as is in keeping with the best interests of creditors, to wind up the business entirely and cease operations, or to allow the operations of the business to continue without interference.¹²⁰ Appointing a trustee cannot burden anyone's religious beliefs until the trustee actually exerts her authority in

¹¹⁵ See 1 U.S.C. § 1 (2012) (“[T]he words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . .”).

¹¹⁶ *Wolf v. Weinstein*, 372 U.S. 633, 649–50 (1963).

¹¹⁷ 11 U.S.C. § 1107 (2012).

¹¹⁸ See S. Rep. No. 95-989, at 116 (1978); H.R. Rep. No. 95-595, at 404 (1977) (“[The Bankruptcy Code] places a debtor in possession in the shoes of a trustee in every way. The debtor is given the rights and powers of a chapter 11 trustee. He is required to perform the functions and duties of a chapter 11 trustee (except the investigative duties). He is also subject to any limitations on a chapter 11 trustee, and to such other limitations and conditions as the court prescribes.”).

¹¹⁹ § 1108 (emphasis added).

¹²⁰ *In re Thrifty Liquors, Inc.*, 26 B.R. 26, 28 (Bankr. D. Mass. 1982) (“[A] trustee is not required to operate the debtor's business and . . . [may] modify the operation of the business on such grounds as he deems appropriate under the circumstances. The Court cannot order the Trustee to continue operation of the Debtor's business and, absent a showing that the proposed termination or modification is an abuse of discretion unsupported by any factual basis and/or not in the best interests of creditors, the Trustee's good faith business judgment . . . should not be disturbed.” (citations omitted)).

some particular way, and, even then, the RFRA inquiry would ask whether the trustee's direction burdened the debtor's exercise of religion and whether the direction fell within the compelling governmental interest carve-out.¹²¹ RFRA would impose certain statutory limits on the scope of the authority of a chapter 11 trustee in reorganizations of religious institutions that would not be applicable in the case of secular debtors. But RFRA still leaves room for such an appointment.

B. Entanglement

The Establishment Clause of the First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion."¹²² This simply stated prohibition has given rise to a body of "doctrine and theory [that] is a hopeless muddle at every level of analysis."¹²³ The Supreme Court held in *Lemon v. Kurtzman* that "[e]very analysis" of whether a statute is constitutionally valid under the Establishment Clause must begin with what is now called the *Lemon* test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."¹²⁴ While the *Lemon* test has been criticized for its opacity and unworkability by judges and scholars,¹²⁵ it

¹²¹ Even if one takes the view that appointment itself could constitute a burden on free exercise of religion under RFRA under certain circumstances, there would still be space for such an appointment when it would be the least restrictive means of furthering a compelling governmental interest. In particular, in cases of fraud or dishonesty on the part of the debtor, such a view of RFRA's application would still need to yield to the compelling governmental interest in maintaining the integrity of the reorganization process. See *infra* Section III.C.

¹²² U.S. Const. amend. I.

¹²³ Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. Pa. J. Const. L. 725, 728 (2006).

¹²⁴ 403 U.S. 602, 612–13 (1971) (citations omitted) (internal quotation marks omitted).

¹²⁵ *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) ("The three-part test has simply not provided adequate standards for deciding Establishment Clause cases."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment) ("For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.") (citing Robert L. Cord, *Separation of Church and State* 203–04 (1982)); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 Calif. L. Rev. 5, 5–6, 13–14 (1987); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 673–74, 683–84 (1980); Philip B. Kurland, *Commentary, The Religion Clauses and the Burger Court*, 34 Cath. U. L. Rev. 1 (1984); William P. Marshall, "We

continues to be the jumping-off point for analysis of Establishment Clause questions.¹²⁶

The provisions of chapter 11 relating to the appointment of and the powers inhering in trustees fall afoul of neither the purpose nor the effect prong of the *Lemon* test. The legislative purposes of the provisions of chapter 11 relating to the appointment and powers of trustees are plainly secular in character. The legislative history includes no discussion of the impact of the trustee mechanism on religious institutions. (Indeed, it is likely that Congress never specifically contemplated the difficulties raised by the reorganization of a religious institution). The burden for establishing secular purpose under the *Lemon* test is quite low, and courts are typically deferential to legislative articulations of secular purpose.¹²⁷ Likewise, the primary effects of the provisions of chapter 11 relating to the appointment and powers of trustees are neither to advance nor to inhibit religion. The number of chapter 11 bankruptcy

Know It When We See It”: The Supreme Court and Establishment, 59 S. Cal. L. Rev. 495, 495–98 (1986); Michael W. McConnell, Accommodation of Religion, 1985 S. Ct. Rev. 1, 1–3); David W. Cook, The Un-Established Establishment Clause: A Circumstantial Approach to Establishment Clause Jurisprudence, 11 Tex. Wesleyan L. Rev. 71, 87 (2004) (stating that “one could easily fill volumes with nothing but stark criticism of the *Lemon* test”); see, e.g., Scott C. Idleman, Religious Premises, Legislative Judgments, and the Establishment Clause, 12 Cornell J.L. & Pub. Pol’y 1, 10 (2002) (arguing that the *Lemon* test’s reliance on legislative intent gives rise to insoluble interpretive problems); Michael Stokes Paulsen, *Lemon* is Dead, 43 Case W. Res. L. Rev. 795, 797 (1993) (claiming that *Lemon* has been so undermined by confusion it has given rise to that the test is effectively dead).

¹²⁶ See *McCreary Cnty. v. ACLU*, 545 U.S. 844, 859–60 (2005) (applying the purpose prong of *Lemon* to Establishment Clause analysis of courthouse Ten Commandments display); *Lamb’s Chapel*, 508 U.S. at 398 (Scalia, J., concurring in the judgment) (“Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . .”). While it is true that the Supreme Court has indicated decreasing reliance on *Lemon*, see *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (“Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected . . .”), lower courts have continued to extensively rely on *Lemon* in the absence of the Supreme Court either explicitly abandoning the three prong test or providing clear alternative guidance, see *ACLU of Ohio Found. v. DeWeese*, 633 F.3d 424, 430–31 (6th Cir. 2011) (applying *Lemon*); *Green v. Haskell Cnty. Bd. of Comm’rs*, 568 F.3d 784, 797–98 & n.8 (10th Cir. 2009) (same). But see *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 n.8 (8th Cir. 2005) (en banc) (“Taking our cue from Chief Justice Rehnquist’s opinion for the Court and Justice Breyer’s concurring opinion in *Van Orden*, we do not apply the *Lemon* test”). See also *Card v. Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008) (“[C]ourts have described the current state of the law as both ‘Establishment Clause purgatory’ and ‘Limbo.’” (citations omitted)).

¹²⁷ Idleman, *supra* note 125, at 11–12.

filings involving religious organization debtors is quite small.¹²⁸ And of religious organizations closing each year, very few ever avail themselves of chapter 11 bankruptcy.¹²⁹

However, the question of whether the provisions of chapter 11 relating to appointment of trustees involve excessive government entanglement with religion is more fraught. In *Lemon*, the Supreme Court held that “comprehensive, discriminating, and continuing state surveillance” of religious affairs (in that case, to ensure that state-subsidized teachers in Catholic schools did not inculcate religion) “involve[d] excessive and enduring entanglement between state and church” in violation of the Establishment Clause.¹³⁰ Of course, mere “[i]nteraction between church and state is inevitable, and [the Court has] always tolerated some level of involvement between the two.”¹³¹ Consequently, entanglement analysis “is a question of kind and degree.”¹³²

One could argue that the appointment of a trustee nominated by a Department of Justice official to operate a church at the order of a bankruptcy court places the federal government in the position of being engaged in comprehensive and continuing surveillance of the internal affairs of a church. Indeed, it looks very much like “government direction . . . of churches,” precisely the danger that the *Lemon* Court specified that preventing excessive entanglement was meant to forestall.¹³³ But the trustee issue is not analogous to the kind of surveillance treated by the Court’s entanglement jurisprudence. Importantly, appointment of a trustee is not a form of government aid. A church temporarily operated by a court appointee, perhaps against the will of the church-debtor, does not raise the specter of the progression to a government-endorsed church, an official church backed by the authority of the state.

Furthermore, chapter 11 reorganization already places a debtor in the position of making extensive disclosures to the bankruptcy court and

¹²⁸ Foohey, *supra* note 4, at 730–34 (finding that only 497 of 61,260 total chapter 11 petitioners from 2006 through 2011 were religious organizations).

¹²⁹ *Id.* at 733–34 (finding that approximately 1% of religious organizations “close their doors each year” and that of these organizations, only 2.6% “file under Chapter 11”).

¹³⁰ *Lemon*, 403 U.S. at 619; see also *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 675 (1970) (finding that the tax exemptions for religious institutions under review did not unconstitutionally entangle church and state, using the following, similar analysis: “the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement”).

¹³¹ *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (citations omitted).

¹³² *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984).

¹³³ See *Lemon*, 403 U.S. at 620.

opening up its internal affairs to inspection by interested parties.¹³⁴ If appointment of a trustee is excessively entangling, then participation in the chapter 11 process is itself excessively entangling—the entanglement objection proves too much. At least one commentator has taken this position and argued that chapter 11 bankruptcy is inappropriate for religious organizations.¹³⁵ But a judicial exclusion of religious organizations from chapter 11, full stop, would be flagrantly discriminatory in character. It would withhold the government benefit of reorganization under the Bankruptcy Code merely on the basis of the religious status of the debtor. A narrower approach, holding that the appointment of a trustee would cross the excessive entanglement line but that filing for bankruptcy would not, would be an unprincipled distinction. Moreover, it would uniquely privilege religious debtors relative to similarly situated secular debtors by exempting them from the possibility of the loss of autonomy that attends filing for bankruptcy, raising Establishment Clause concerns running in the exact opposite direction.¹³⁶

III. THE SCOPE OF A TRUSTEE'S AUTHORITY

While these religious liberty objections do not bar the appointment of a chapter 11 trustee for a religious organization generally, they do impose limits on particular exercises of a trustee's power. In this Part, I consider three different approaches to articulating the scope of those limits. First, I evaluate and reject in part the argument that a church in bankruptcy has waived any opportunity to raise religious liberty objections to such exercises of a trustee's authority. Second, I appeal to the neutral-principles-of-law approach developed in the Supreme Court's church property jurisprudence to develop an account of how a trustee's powers can be appropriately cabined to avoid infringing on the valid religious liberty interests of religious institutions. And third, I consider the special cases of trustees appointed for reasons of fraud or dishonesty on the part of the debtor and the trustee's powers to prevent fraud, where

¹³⁴ See 11 U.S.C. § 1125 (2012).

¹³⁵ Donohue, *supra* note 41, at 293–97.

¹³⁶ For discussion of the reverse Establishment Clause concerns created by religious exemptions, see, for example, Angela C. Carmella, Exemptions and the Establishment Clause, 32 *Cardozo L. Rev.* 1731, 1731–35 (2011) (arguing religious exemptions are constitutionally permissible and facilitate democratic pluralism); Jonathan C. Lipson, Debt and Democracy: Towards a Constitutional Theory of Bankruptcy, 83 *Notre Dame L. Rev.* 605, 672–75 (2008).

the religious liberty interests of the church receive the least weight and trustees are entitled to commensurately unrestricted action.

A. Waiver

It might be argued that a debtor waives his right to object on religious liberty grounds to particular exercises of the chapter 11 trustee's authority by virtue of his bankruptcy filing. If this were true, restrictions on the authority of a bankruptcy trustee would be quite limited. But this claim goes too far. Not only is implied waiver of fundamental rights heavily disfavored, but this line of argument also would impermissibly coerce churches into waiving fundamental rights by threatening refusal of government benefits.

While it is true that "[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights,"¹³⁷ the choice to file for chapter 11 protection appears to rebut this presumption. To be an effective waiver of fundamental rights, the waiving party must perform "ordinarily an intentional relinquishment or abandonment of a known right or privilege,"¹³⁸ and that abandonment must be a "knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences."¹³⁹ Filing for bankruptcy under chapter 11 is such an act.

In contrast to the position of for-profit corporations and individuals, who can be forced into bankruptcy, a church's decision to file for chapter 11 is always voluntary and intentional in character. The Bankruptcy Code provides that involuntary bankruptcy proceedings may not be initiated against a nonprofit organization (such as a church), and that a nonprofit's chapter 11 bankruptcy may not be converted to a chapter 7 liquidation proceeding without the consent of the debtor.¹⁴⁰ A nonprofit bankruptcy debtor has therefore always knowingly submitted himself to the jurisdiction of the bankruptcy court and the Code, making a calculated choice that the benefits of continued operation as a debtor in possession under chapter 11 outweigh the costs of reorganization under the Code.

¹³⁷ *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)) (internal quotation marks omitted).

¹³⁸ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

¹³⁹ *Brady v. United States*, 397 U.S. 742, 748 (1970).

¹⁴⁰ See 11 U.S.C. §§ 303(a), 1112(c) (2012).

It is true that a particular religious debtor may not be able to predict prior to filing whether a bankruptcy judge will find cause for appointment of a trustee in his case.¹⁴¹ But this fact alone does not render the waiver ineffective or suggest that the debtor lacked the appropriate level of awareness of the potential consequences of filing for bankruptcy.¹⁴² The Supreme Court has observed that a debtor who invokes the Bankruptcy Code does so “risking all of the disadvantages which may flow to him as a consequence, as well as gaining all of the benefits.”¹⁴³ In particular, the Court stated that “[t]he right to remain in unmolested dominion and control over the property [is] necessarily waived or abandoned on invoking the jurisdiction of the federal courts in these proceedings.”¹⁴⁴ The context of these statements was not that of the appointment of a trustee. However, they go to the proposition that a debtor who files for bankruptcy does so with full knowledge that his ability to exercise exclusive control over the bankruptcy estate is subject to limitations provided for by the Bankruptcy Code.

Several bankruptcy courts have given support to a view of religious liberty interests in chapter 11 that tracks this line of argument, holding that when religious debtors engage in secular activities that lead to a bankruptcy filing, they must treat their creditors in the same manner as any other debtor and cannot seek special exception on religious grounds.¹⁴⁵ More broadly, the Supreme Court has held that “[w]hen fol-

¹⁴¹ See Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 *BYU L. Rev.* 1633, 1687 (“[C]ourts may have difficulty determining whether government regulations burden group beliefs or practices because the religious group itself may be unaware of potential conflicts. Conflicts between religious doctrine and secular law may exist, but they may not be visible at the outset to either the church or the courts.”).

¹⁴² See *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972).

¹⁴³ *Case v. L.A. Lumber Prods. Co.*, 308 U.S. 106, 127 (1939); see also *United States v. Lee*, 455 U.S. 252, 261 (1982) (arguing that Amish persons who participate in employment must also accept responsibility of paying social security).

¹⁴⁴ *Case*, 308 U.S. at 127.

¹⁴⁵ *In re Catholic Bishop of Spokane*, 329 B.R. 304, 325 (Bankr. E.D. Wash. 2005) (“It is not a burden on a religious organization which voluntarily seeks the protection of the bankruptcy laws to require it to treat its creditors in the same manner as any other debtor.”); *In re Navarro*, 83 B.R. 348, 352 (Bankr. E.D. Pa. 1988) (“When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.” (quoting *United States v. Lee*, 455 U.S. 252, 261) (internal quotation marks omitted)); see *In re Roman Catholic Archbishop of Portland*, 335 B.R. 842, 861–62 (Bankr. D. Or. 2005). The bankruptcy courts have suggested that even if

application of a particular Code section would constitute a substantial burden on religion, the appropriate remedy would be dismissal of the bankruptcy case. The Code is

lowers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others.”¹⁴⁶

Recent Supreme Court jurisprudence suggests that church autonomy is a waivable right. Prior to *Hosanna Tabor*, a split had developed in the circuit courts as to whether the ministerial exception, an expression of church autonomy, was a jurisdictional bar to judicial intervention in employment disputes relating to ministers or whether the exception constituted a defense on the merits to claims in such cases.¹⁴⁷ In footnote four of *Hosanna Tabor*, the Court “conclude[d] that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar . . . because the issue presented by the exception is whether the allegations the plaintiff makes entitle him to relief, not whether the court has power to hear [the] case.”¹⁴⁸ This is significant because the conception of church autonomy as jurisdictional would imply that the doctrine represents a nonwaivable structural incapacity of the judiciary rather than a right to be asserted by a religious institution.¹⁴⁹ Characterizing it as an affirmative defense to otherwise valid claims instead indicates that church autonomy is subject to waiver by a contesting party.¹⁵⁰ Several lower courts have already adopted this latter view, “holding the ministerial exception defense [is] waived when the defendant has failed to

an integrated statutory scheme. Bankruptcy debtors who voluntarily choose to participate in that statutory scheme, even those of a religious nature, should not be able to “pick and choose” among Code sections. Dismissal would alleviate any undue burden suffered by the debtor in the application of any particular Code section.

In re Catholic Bishop of Spokane, 329 B.R. at 324 n.5; accord *In re Roman Catholic Archbishop of Portland*, 335 B.R. at 853 n.9.

¹⁴⁶ *Lee*, 455 U.S. at 261.

¹⁴⁷ Compare *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007) (stating that the ministerial exception precludes judicial jurisdiction), and *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1038 (7th Cir. 2006) (same), with *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006) (characterizing the ministerial exception as an affirmative defense, but not a jurisdictional bar), and *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 (10th Cir. 2002) (same), and *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 951 (9th Cir. 1999) (same).

¹⁴⁸ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 n.4 (2012) (alteration in original) (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 257, 254 (2010)) (internal quotation marks omitted).

¹⁴⁹ See Esbeck, *supra* note 66, at 455 (“[R]ights, because they are personal, can be waived by the rights-holder. Whereas structure, because it is there to benefit the entire body politic, cannot be waived.”); Horwitz, Act III, *supra* note 91, at 161–62.

¹⁵⁰ Helfand, *supra* note 92, at 1899.

raise it before the trial court.”¹⁵¹ If church autonomy were a waivable interest, then the same considerations relating to waiver in free exercise analysis of appointing a chapter 11 trustee in the reorganization of a religious institution would apply with equal force under a church autonomy analysis.¹⁵² Filing for chapter 11 bankruptcy would constitute a knowing waiver of the church’s autonomy interests insofar as those interests conflict with the Bankruptcy Code.

One response to the waiver argument might be that a church debtor’s waiver is ineffective because the Supreme Court’s free exercise jurisprudence indicates that government-provided benefits may not be conditioned on waiving fundamental religious liberty interests.¹⁵³ The concern motivating this line of argument is a fear that the government will use the indirect means of denying benefits to compel the same result as an impermissible coercive violation of fundamental constitutional rights:

[E]ven though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which [it] could not command directly.¹⁵⁴

If government could deny a benefit to an individual based on the exercise of his or her constitutional rights, the “exercise of those freedoms

¹⁵¹ *Id.* (citing *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318 (11th Cir. 2012); *Petschonek v. Catholic Diocese of Memphis*, No. W2011-022160COA-R9-CV, at *7–8 (Tenn. Ct. App. May 23, 2012), available at <https://www.tncourts.gov/sites/default/files/petschonekcon.pdf>).

¹⁵² See *supra* Section III.A.

¹⁵³ *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 72 (1990); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (“[T]o condition the availability of benefits upon [an] appellant’s willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.”); *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 2 F.3d 1514, 1538 (11th Cir. 1993) (“An unconstitutional entanglement may not be excused on the ground that it is imposed only as . . . a prerequisite to receiving a valuable privilege.”).

¹⁵⁴ *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (internal quotation marks omitted).

would in effect be penalized and inhibited.”¹⁵⁵ Applying these principles to bankruptcy indicates that the benefits of reorganization or discharge through chapter 11 bankruptcy may not be made contingent on a church electing to waive its religious liberties. The government may not use the carrot of the Bankruptcy Code’s protections to pry apart the protections of church autonomy or RFRA.

B. Neutral Principles of Law

Given, then, that there are religious liberty interests to be protected in defining the powers of a chapter 11 trustee for a religious organization, the question then turns to how the scope of those powers should be drawn. The best guide comes from the neutral-principles-of-law doctrine developed in the church property cases. The key insight driving these cases is that a church’s autonomy interests are not imperiled when settling its disputes with other entities according to secular, neutral principles of law. This suggests that permissible exercises of the authority of a bankruptcy trustee could be cabined along similar lines, thereby avoiding religious liberty problems.

The Supreme Court has emphasized that it is the ecclesiastical character of the determinations required in the church property cases that drove the application of church autonomy doctrine there. Where church property disputes can be resolved through the application of secular principles of property law, church autonomy is not implicated. *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* was a church property case arising from the attempt of two churches to withdraw from the Presbyterian Church in the United States, a hierarchical church organization.¹⁵⁶ The Court found that awarding church property on the basis of interpretation of religious doctrine was unconstitutional.¹⁵⁷ However, in dicta, the Court described the proper role for civil courts in disputes involving religious organizations:

It is obvious . . . that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by

¹⁵⁵ *Id.*

¹⁵⁶ 393 U.S. 440, 441–42 (1969).

¹⁵⁷ *Id.* at 451–52.

the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without “establishing” churches to which property is awarded.¹⁵⁸

While courts cannot decide disputes by “resolving underlying controversies over religious doctrine,”¹⁵⁹ that does not mean that religious organizations are simply outside the jurisdiction of the civil court system. Courts can apply “neutral principles of law” developed for use in all property disputes without running afoul of the religion clauses.

The Court put these dicta into practice in *Jones v. Wolf*.¹⁶⁰ *Jones* involved another attempt to withdraw from the Presbyterian Church in the United States. The Court held that the trial court and Supreme Court of Georgia were constitutionally permitted to employ the neutral principles of law approach,¹⁶¹ resolving disputes over church property so long as they reached their decision on the basis of “objective, well-established concepts of trust and property law”¹⁶² rather than through the “consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.”¹⁶³ The Court also reiterated its statement in *Presbyterian Church* that it is “the obligation of States, religious organizations, and individuals [to] structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.”¹⁶⁴ Both the appointment of a trustee and her subsequent exercise of authority over the bankruptcy estate can be conducted on the basis of neutral principles of law. Trustees are empowered to exercise good faith business judgment upon a reasonable basis and within the scope of their authority under the Code.¹⁶⁵ So long as these principles and their evalua-

¹⁵⁸ Id. at 449.

¹⁵⁹ Id.

¹⁶⁰ 443 U.S. 595, 604 (1979).

¹⁶¹ Id. at 604.

¹⁶² Id. at 603.

¹⁶³ Id. at 602 (quoting *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg*, 396 U.S. 367, 368 (1970) (Brennan, J., concurring)) (internal quotation marks omitted).

¹⁶⁴ Id. at 604 (alteration in original) (quoting *Presbyterian Church*, 393 U.S. at 449) (internal quotation marks omitted).

¹⁶⁵ *In re Consol. Auto Recyclers*, 123 B.R. 130, 140 (Bankr. D. Me. 1991); *In re Curlew Valley Assocs.*, 14 B.R. 506, 513–14 (Bankr. D. Utah 1981); cf. *Bennett v. Williams*, 892 F.2d 822, 824 (9th Cir. 1989) (identifying business judgment rule as standard for evaluating actions of trustee).

tion do not turn on the evaluation of doctrinal questions, they fall within the scope of this exception.

The precedents arising from the church property cases are clear that these zones are “strictly a matter of ecclesiastical government” in which churches are entitled to autonomous operation free of any state control.¹⁶⁶ Churches are not above the law. “Although the church autonomy doctrine provides a shield against excessive government incursion on internal church management, it clearly cannot be applied blindly to all disputes involving church conduct or decisions. The doctrine is implicated only in those situations where the alleged misconduct is rooted in religious belief.”¹⁶⁷ For instance, churches are still liable for their torts and breaches of their valid contracts.¹⁶⁸ Churches in the bankruptcy setting are no more immune from their legal obligations to creditors than they are when those creditors pursue their claims in other fora. Consequently, insofar as a trustee could refrain from interfering in the ecclesiastical dimensions of church life, the church could not raise an objection to the trustee’s activities on church autonomy grounds.

This line of argument has been raised in the context of state receiverships for churches.¹⁶⁹ Court appointment of a receiver is an equitable remedy available outside the bankruptcy context to safeguard “property that is the subject of diverse claims.”¹⁷⁰ Like a chapter 11 trustee, a receiver has broad powers of custody and control over the property to “preserve it pending litigation, and to dispose of it in accordance with [the] relief ordered.”¹⁷¹ In this setting, one commentator has termed the view that the life of a religious organization is divided into secular and religious spheres the “dual-separate entity theory.”¹⁷² On this theory, a state receiver of a church is “purely an overseer of the secular life of the

¹⁶⁶ *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 115 (1952).

¹⁶⁷ *McKelvey v. Pierce*, 800 A.2d 840, 851 (N.J. 2002) (citations omitted) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)) (internal quotation marks omitted).

¹⁶⁸ *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985).

¹⁶⁹ See, e.g., *People ex rel. Deukmejian v. Worldwide Church of God*, 178 Cal. Rptr. 913, 914 (Cal. Ct. App. 1981); *Barr v. United Methodist Church*, 153 Cal. Rptr. 322, 332–33 (Cal. Ct. App. 1979).

¹⁷⁰ *Black’s Law Dictionary* 1460 (10th ed. 2014).

¹⁷¹ Dewey Roscoe Jones, *Federal Court Remedies: The Creative Use of Potential Remedies Can Produce Institutional Change*, 27 *How. L.J.* 879, 890 (1984).

¹⁷² Darrell R. Shepard, *Receivers, Churches and Nonprofit Corporations: A First Amendment Analysis*, 56 *Ind. L.J.* 175, 189 (1980).

church corporation,” and consequently, “state involvement would seem very slight.”¹⁷³ Of course, there are serious questions about the workability of such a divide. The reality of the practice of religious institutions is not so simple. “[T]he power to control the disposition or use of [church] property is the power to further or to frustrate religious purposes”¹⁷⁴ because religious corporations exist precisely to use property for religious purposes. Determining whether a particular decision or area of control is ecclesial or secular in character could be difficult.

But despite these difficulties, the “dual-separate entity” approach does suggest how to respect church autonomy while still accessing the benefits of the trusteeship mechanism. There is some precedent in secular contexts for the appointment of a chapter 11 trustee with “specific” and “limited” powers.¹⁷⁵ For instance, the court in *In re Nartron Corp.* appointed a trustee with powers to “oversee financial management of the [debtor], to investigate and prosecute all estate causes of action, and to estimate” creditors’ claims, as well as responsibilities over “all matters such as financial management and accountability, expenditure of estate assets, and ongoing payments, if any, to insiders, and the investigation and litigation of all estate causes of action against insiders or third parties . . . and if feasible, the filing of a Disclosure Statement and Plan of Reorganization.”¹⁷⁶ The existing manager and debtor in possession was left in an operational role because of the need for his expertise in product development, manufacture, and sales.¹⁷⁷ The court viewed this as an appropriate remedy for the manager’s mismanagement and dishonesty. It recognized the necessity of the manager’s involvement in a successful plan of reorganization and found broad statutory authority “to tailor and define the rights of a debtor-in-possession or a trustee if one is appointed to operate the debtor’s business.”¹⁷⁸ Similar approaches have been followed in a number of other bankruptcy courts.¹⁷⁹

While the division between secular and ecclesiastical matters in an incorporated religious institution is perhaps less clear-cut than the dis-

¹⁷³ *Id.* at 190.

¹⁷⁴ *Id.*

¹⁷⁵ 330 B.R. 573, 594 (Bankr. W.D. Mich. 2005).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (citing 11 U.S.C. §§ 1107–08 (2012)).

¹⁷⁹ *In re G & G Transp., Inc.*, No. 98-30860DWS, 1998 WL 898835, at *5 (Bankr. E.D. Pa. Dec. 22, 1998); *In re N. Am. Commc’ns, Inc.*, 138 B.R. 175, 176 (Bankr. W.D. Pa. 1992); *In re Madison Mgmt. Grp.*, 137 B.R. 275, 282 (Bankr. N.D. Ill. 1992).

inction between financial management and operational control of a business, there is certainly some room for the trustee to exert authority without becoming embroiled in questions of doctrine. There is a close analogy between the resolution of property disputes on the basis of neutral principles of law and the application of good faith business judgment on the part of a chapter 11 trustee. Both involve purely secular principles, which—while their application can impact religious communities—do not involve taking a position on the substance of “a religious group’s . . . faith and mission.”¹⁸⁰ A chapter 11 trustee could be appointed to operate a religious institution under a *Nartron*-style mandate, carefully limiting the scope of her authority so as to avoid triggering church autonomy concerns.¹⁸¹ Overseeing payments and access to estate assets, investigating causes of action held by the estate and claims against it, liquidating discrete pieces of church property, evaluating the financial position of the church vis-à-vis effecting a reorganization, managing rental of church spaces to community groups, filing a plan of reorganization, and adopting best practices in the areas of administration and accounting could all be undertaken by a trustee without implicating any ecclesiastical questions of doctrine, dogma, or ministry.

Decisions implicating these questions would fall outside the scope of the authority of a trustee. For instance, a chapter 11 trustee would be forbidden from making decisions about the selection of ministers for the church. A chapter 11 trustee would also be unable to make decisions about eligibility to receive sacraments, exercise prior restraint over sermons and homilies, determine the liturgical content of services, or alter the substance of educational programs run by the church. There would, of course, be borderline cases. For example, what if a trustee were to say that in their business judgment a church was incapable of supporting its current number of paid ministers, a certain level of weekly liturgical offerings, or an overseas missionary trip or pilgrimage? These sorts of de-

¹⁸⁰ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

¹⁸¹ Jonathan Lipson has suggested that choice of law principles might militate in favor of a sliding scale for the burden on a movant seeking appointment of a chapter 11 trustee for a religious institution. A more limited role for the trustee would be attended by a commensurately lighter burden on the movant. Lipson, *supra* note 40, at 443–44.

terminations might directly impact the ministry of the church despite being grounded in neutral principles.

These cases are not cleanly resolvable. Prudence would counsel in favor of resolving such conflicts in a consensus-based manner. The effectiveness of a trustee in a situation like this would hinge on her credibility and perception of good faith and fair dealing with stakeholders of the church. But one important function of a trustee in such an instance could be to impress upon the church the importance of their obligations to their creditors. The critical point here is that just as the interests in church autonomy do not license churches to commit torts or disregard their valid contracts, they do not permit them to disregard their obligations to creditors. Even without a trustee, those obligations would still attach.

But even if one were to take a stronger view of church autonomy here and identify many of these border cases as prohibited exercises of a trustee's power, a broad zone of free action for a trustee would remain. Many issues important to the success of a reorganization, including honesty in filings, assessment of the church's financial trajectory, and robust financial and accounting controls, fall well outside any possible conflict with church autonomy interests. A trustee's powers could be cabined in a *Nartron*-like way—limited so as to prevent their exercise from interfering in ecclesial dimensions of church operation—while still fulfilling the core interests served by the chapter 11 trustee mechanism: preventing malfeasance or mismanagement that could imperil the interests of creditors or the integrity of the bankruptcy system.

C. Compelling Governmental Interests

Insofar as they act to prevent fraud, a trustee would be largely untrammelled by any religious liberty limitations. While this would not be applicable to every trustee for a religious institution nor every exercise of the trustee's authority, one purpose of the appointment of a trustee can be as a remedy for past fraud and a prophylactic measure against future fraud.¹⁸² Consequently, this potential area of trustee activity warrants special attention.

¹⁸² See 11 U.S.C. § 1104(a)(1) (2012).

The Supreme Court has indicated that “there might be some circumstances in which marginal civil court review of ecclesiastical determinations would be appropriate”¹⁸³ and pleas to church autonomy would be unavailing. In *Gonzalez v. Roman Catholic Archbishop of Manila*, the plaintiff sought to be appointed to a chaplaincy in the Roman Catholic Church pursuant to the terms of a will, over the refusal of the Archbishop of Manila.¹⁸⁴ The Court sided with the Archbishop, stating that “[i]n 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.”¹⁸⁵ This suggests that an exception to the principle of church autonomy is available where the church’s decision on an ecclesiastical matter involved fraud. The Court has termed this statement regarding a “fraud, collusion, or arbitrariness”¹⁸⁶ exception dictum, and has, in fact, subsequently explicitly rejected an arbitrariness exception.¹⁸⁷ But it suggested again in *Jones v. Wolf* that the deference owed to the decisions of the highest ecclesiastical tribunal within a church would not be controlling if that decision were the product of “fraud” or “collusion.”¹⁸⁸

The fraud exception to church autonomy is admittedly narrow in scope. The exception to church autonomy applies only to those ecclesiastical decisions that themselves involve fraud.¹⁸⁹ A single fraudulent act

¹⁸³ *Presbyterian Church*, 393 U.S. at 447 (citing *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131 (1872); *Brundage v. Deardorf*, 55 F. 839 (C.C.N.D. Ohio 1893)).

¹⁸⁴ 280 U.S. 1, 11–12 (1929).

¹⁸⁵ *Id.* at 16.

¹⁸⁶ *Id.*

¹⁸⁷ *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976); see *Hutchison v. Thomas*, 789 F.2d 392, 395 (6th Cir. 1986) (“[T]he only exception to strict deference apparently left open by [Milivojevich] was ‘marginal review’ for fraud or collusion and the possibility of such review was not endorsed, but merely left for later consideration.” (quoting Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 *Calif. L. Rev.* 1378, 1397 (1981))); Roger W. Bennett, Note, *Church Property Disputes in the Age of “Common-Core Protestantism”: A Legislative Facts Rationale for Neutral Principles of Law*, 57 *Ind. L.J.* 163, 175–76 (1982) (“Although the Court did not expressly invalidate judicial review for ecclesiastical fraud or collusion, it may have done so by implication.”).

¹⁸⁸ 443 U.S. 595, 609 n.8 (1979).

¹⁸⁹ *Id.* (“In the absence of [fraud or collusion] . . . the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal

by the church could trigger appointment of a trustee but would not give carte blanche to the trustee to run roughshod over ecclesiastical decisions unrelated to fraud. For instance, fraudulent financial reporting by a church would not place unrelated decisions about, say, to whom sacraments will be administered outside the protections of church autonomy. On the other hand, forward-looking measures that could be taken by a trustee to prevent future fraud would be justifiable interferences with church autonomy under this exception (for example, implementing accounting controls, restricting certain persons' access to bank accounts or other assets, investigating the past conduct of the church, and making appropriate disclosures to parties with interests in the bankruptcy estate).

RFRA-based objections to trustee activities aimed at preventing fraud would also be ineffective. RFRA permits even substantial burdening of religious exercise where such a burden is the least restrictive means of furthering a compelling governmental interest. Generally speaking, interests sufficient to warrant a substantial burden on religious exercise have been found in a variety of spheres, including in maintaining the tax system,¹⁹⁰ preserving national security,¹⁹¹ ensuring safety of children,¹⁹² preserving endangered eagle populations,¹⁹³ and enforcing participation in the Social Security system.¹⁹⁴ Ensuring accountability and preventing fraud in the administration of bankruptcy and government benefits have been held to be compelling governmental interests by a number of courts, including a plurality of the Supreme Court.¹⁹⁵ The cases that come closest to considering the relevant governmental interests at issue

within a church of hierarchical polity" (internal quotation marks omitted) (quoting *Serbian E. Orthodox Diocese*, 426 U.S. at 713)).

¹⁹⁰ *Hernandez v. Comm'r*, 490 U.S. 680, 699–700 (1989).

¹⁹¹ See *Gillette v. United States*, 401 U.S. 437, 462 (1971).

¹⁹² *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

¹⁹³ *United States v. Lundquist*, 932 F. Supp. 1237, 1242 (D. Or. 1996).

¹⁹⁴ *United States v. Lee*, 455 U.S. 252, 258–59 (1982).

¹⁹⁵ *In re Turner*, 193 B.R. 548, 556 (Bankr. N.D. Cal. 1996); see *Bowen v. Roy*, 476 U.S. 693, 709 (1986) (plurality opinion). But cf. *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963) (declining to find preventing fraud in the unemployment system to be a compelling state interest). While some courts have characterized *Sherbert* as holding that preventing fraud in the unemployment system was *not* a compelling governmental interest, see, e.g., *Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1419 (8th Cir. 1996), it should be noted that the *Sherbert* Court actually declined to reach the question, as it was not raised in the court below. *Sherbert*, 374 U.S. at 407 (“[W]e are unwilling to assess the importance of an asserted state interest without the views of the state court.”).

in the appointment of a chapter 11 trustee for a religious institution are the church tithing cases. In those cases, a split of authority developed over whether the clawback of preferential transfers of money donated by bankruptcy debtors to their churches violated RFRA. Courts finding a violation emphasized a narrow construction of compelling governmental interests, including only those interests comparable in magnitude to national security or public safety.¹⁹⁶ Courts siding against the tithers cited the historical importance in bankruptcy of preventing fraud and treating creditors fairly.¹⁹⁷

The split of authority was mooted by subsequent congressional legislation,¹⁹⁸ but in any event, the interests at stake in the appointment of a trustee are of an even higher order. Unlike religious tithing, which need not involve “actual fraud”¹⁹⁹ or malfeasance, appointment of a trustee for cause is a check against and a remedy for the perpetration of fraud by a debtor in possession. Creating an exception for religious institution debtors would weaken the integrity of the bankruptcy process as applied to those entities. The importance of trusteeship to the broader integrity of chapter 11 is suggested by the absence of a system of individualized exceptions to its applicability, in contrast to preferential transfer, which allows for individualized exceptions in cases where transfers were justified by other considerations (such as for payments in the ordinary course of business or to satisfy child support obligations).²⁰⁰ Excepting an entire class of debtors from the possibility of trusteeship would undermine the bargain that is at the core of chapter 11, the exchange of organizational autonomy for the protections of the Bankruptcy Code.

The high bar for the appointment of a trustee suggests that it is the least restrictive means for furthering these interests. Appointment of a trustee is an extraordinary remedy provided only in those limited circumstances where the interests of the estate and the creditors are so

¹⁹⁶ See, e.g., *In re Young*, 82 F.3d at 1419–20; *In re Tessier*, 190 B.R. 396, 405 (Bankr. D. Mont. 1995).

¹⁹⁷ See, e.g., *Weinman v. Word of Life Christian Ctr. (In re Bloch)*, 207 B.R. 944, 951 (D. Colo. 1997); *In re Navarro*, 83 B.R. 348, 353 (Bankr. E.D. Pa. 1988).

¹⁹⁸ See Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, 112 Stat. 517 (codified as amended in scattered sections of 11 U.S.C.).

¹⁹⁹ *Fitzgerald v. Magic Valley Evangelical Free Church (In re Hodge)*, 200 B.R. 884, 898 (Bankr. D. Idaho 1996).

²⁰⁰ See 11 U.S.C. § 547(c) (2012).

threatened by the leadership of the debtor in possession that they cannot be trusted to remain in operational control of the business.²⁰¹ The chapter 11 trustee is viewed by some judges as a “nuclear option.”²⁰² This ensures that the trusteeship mechanism is employed only where no other tool can safeguard the interests of preventing fraud and maintaining the integrity of the reorganization process.

CONCLUSION

While church bankruptcies once represented a surprising and even unthinkable event, financially distressed religious organizations are increasingly turning to chapter 11 bankruptcy for protection. Driven by a desire to protect church property—particularly church real estate—from creditors, they are voluntarily placing themselves within the jurisdiction of the bankruptcy courts. These institutions are entitled to a special solicitude from the bankruptcy courts. But that principle should not be extended so far as to place churches outside the scope of the applicability of sections of the Bankruptcy Code that are essential to the Code’s operation and fundamental integrity.

Furthermore, given the corporate governance problems that explain the financial distress of many religious bankruptcy debtors, bankruptcy courts should not shy away from appointing chapter 11 trustees to ensure that those corporate governance problems do not undermine the fiduciary obligations of the debtor to its creditors or, worse, harm the chance that a congregation might have for a successful reorganization that would allow them to retain their place of worship. The religious liberty concerns raised by such an appointment are real, but they are not insurmountable or dispositive. Courts can appropriately cabin the role of a trustee to exclude ecclesiastical affairs from her authority, fairly admin-

²⁰¹ See *In re Sharon Steel Corp.*, 871 F.2d 1217, 1225–26 (3d Cir. 1989) (collecting cases) (“It is settled that appointment of a trustee should be the exception, rather than the rule.”); *In re Euro-Am. Lodging Corp.*, 365 B.R. 421, 426 (Bankr. S.D.N.Y. 2007) (“The appointment of a § 1104 trustee is an extraordinary remedy.”).

²⁰² Lawrence V. Gelber & Aaron Wernick, *Ousting the Debtor in Possession: The Good, the Bad, and the Ugly of Replacing a Debtor’s Management with a Chapter 11 Trustee*, *Com. Bankr. Litig.* (Oct. 3, 2013), <http://commercialbankruptcylitigation.com/articles/ousting-the-debtor-in-possession-the-good-the-bad-and-the-ugly-of-replacing-a-debtors-management-with-a-chapter-11-trustee>, archived at <https://perma.cc/YM39-KSXZ?type=source>.

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istering the Bankruptcy Code while properly protecting the religious liberty interests of church debtors.