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CHURCH PROPERTY:
The Unity of Law and Theology

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Legal Studies Research Paper No. 07-23

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CHAPTER THREE

CHURCH PROPERTY:

The Unity of Law and Theology

This Chapter explores the ownership of property in the Catholic Church. In the wake of plaintiffs' lawsuits against dioceses as a result of clerical sexual abuse, the decisions of several dioceses to enter into bankruptcy proceedings under United States federal law have called into question the relationship between the diocese and parish.[1] Specifically, the dioceses have asserted that parish property is not to be counted as part of the assets of a diocese in a federal bankruptcy proceeding.[2] This assertion has a certain technical validity in light of the fact that under the *1983 Code of Canon Law*, the parish is

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[1]By a conservative estimate, the cost of settlements of sex abuse cases to dioceses and religious communities in the United States has thus far been at least one billion dollars. *See* THE NATURE AND SCOPE OF THE PROBLEM OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES, A RESEARCH STUDY CONDUCTED BY THE JOHN JAY COLLEGE OF CRIMINAL JUSTICE, 6.1.1, 105 (2004) (stating the total costs paid by diocese and religious communities for compensation to victims, treatment of offenders, attorneys fees as $572,507,095.00); 2004 ANNUAL REPORT ON THE IMPLEMENTATION OF THE CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, 3, 9 (2005) (stating that in the year 2004, the total costs paid by diocese and religious communities for compensation to victims, treatment of offenders, attorneys fees as $157,802,811.00). These reports place the cost of the sexual abuse cases from 1950 to 2004 for the Catholic Church in the United States at $730,309,906. However, more recent accounts state that the total amount of settlements has exceeded the one billion dollars. *See* N.Y. TIMES, June 12, 2005, at Sec. 1, 33. In reality, the amount may be closer to the three billion dollar mark. *See* Stephen M. Brainbridge & Aaron H. Cole, *The Bishops Alter Ego: Enterprise Liability and the Catholic Priest Sex Abuse Scandal,* UCLA School of Law Research Paper No. 06-23, available at <<http:??papers.ssrn.com/sol3/papers.cfm?abstract_id=901663>>. At the time of writing this Chapter, five Roman Catholic dioceses had filed for bankruptcy protection. They are: the Archdiocese of Portland, Oregon, *see* N.Y. TIMES, July 7, 2004, at A12; the Diocese of Tuscon, Arizona, *see* N.Y. TIMES, September 21, 2004, at A18; the Diocese of Spokane, Washington, *see* N.Y. TIMES, December 7, 2004, at A24; the Diocese of Davenport, *see* N.Y. TIMES, October 11, 2006, A, 22; and the Diocese of San Diego, California, *see* N. Y. TIMES, February 27, 2007, at . *See* In re The Catholic Bishop of Spokane, United States Bankruptcy Court, Eastern District of Washington (August 26, 2005) (holding that the parish property belongs to the diocese for the purposes of a bankruptcy proceeding).

[2]*See e.g.*, Statement of Archbishop John Vlazny of Portland, Oregon, *Archdiocese Files for Bankruptcy Protection*, 34 ORIGINS 113, 113–115, (July 15, 2004) ("Under canon law, parish assets belong to the parish.").

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a distinct juridic person with the right to own ecclesiastical property.[3] As convenient as the assertion may be for the diocese at this time, however, I do not believe that it fully reflects the correct relationship between the diocese and its parishes with regard to the ownership, administration, regulation and alienation of parish assets.[4] The assertion carries multi-faceted consequences that transcend the significance of the diocese attempting to shield parish assets when the diocese files for bankruptcy relief in a federal court. The assertion may well prove detrimental to the interest of a diocese in a different kind of case in the secular courts where control of parish assets is contested. It certainly will not serve diocesan interests in a financing endeavor backed by diocesan assets as the equity. More importantly from an ecclesiastical perspective, the assertion dislocates canon law from the theology of the particular church expressed at Vatican II.

The confusion about the specific issue of the correct relationship between the diocese and parish raises a larger question. In exploring the question of the ownership of property within the Catholic Church, this Chapter consists of four sections. First, the Chapter compares several seminal elements in the understanding of property in canon law and the liberal political theory. Second, it examines the canonical and theological relationship between the diocese and the parish in terms of the ownership of property. Third, the Chapter recounts the nineteenth century struggle of the Catholic Church to secure its parish property in accord with the hierarchical structure required by canon law

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[3] *See* Canons 515 § 3 and 1256, *CIC-1983.*

[4] Please permit me to clarify that when I refer to parish property, I am addressing all the assets including but not limited to real property. Furthermore, I have in mind the normal relationship between the diocese and parish. In the long history of the Catholic Church, there are, of course, exceptions in which a religious order or some other canonically recognized entity owns specific property related to a parish ministry. Instead, I have in mind the more normative relation between the diocese and parish in which the parish property is under the authority of the bishop. *See* Canons 515 § 1 & 381 § 1, *CIC-1983.*

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in opposition to the then dominant congregational model embraced by Protestantism. Fourth, it discusses the relationship between canon law and state law with regard to ecclesiastical property.

I. Comparison of Two Theories of Property

As discussed in Chapter One, canon law reflects theological and legal elements which may be traced to the earliest Christian literature. Canon law's approach to property also reflects these elements. The theological ideal is evident in the gospel preference for poverty and common ownership of property. At the same time, certain church property rights have proved necessary to the continuity of the institutional Church through history. While both canon law and liberal theory embrace a right to private property, the right in canon law is tempered by the theological ideal. As discussed in the previous Chapters, canon law functions optimally when it balances theological and legal elements. However, the balance is prone to disruption. Antinomianism results when the role of law in the church is de-valued. Antinomianism questions the need for institutional structure, law, and property. In contrast, legalism overlooks the necessity of canon law's relation to philosophical and theological principles. Legalism would tend to see ownership of property as an end in itself, rather than as a means of serving the church's mission. Once the balance between theological and legal elements becomes skewed, antinomianism and legalism may well coincide to defeat the purpose of canon law in the life of the church.

A. Seminal Elements in Canon Law's Approach to Property

Consistent with skepticism about church law and structure, the theological element in canon law coincides with a negative view of private property. In the *Genesis*

creation myth, humanity is created in the image and likeness of God, and prior to the Fall, the first human beings have no need of private property.[5] The Gospels express a preference for poverty and common ownership of property as marks of discipleship.[6] This theological characteristic is evident in the *Acts of the Apostles* which records that the early Christian community:

> was united heart and soul; no one claimed for his own use anything that he had, as everything they owned was held in common. . . None of their members was ever in want, as those who owned land or houses would sell them, and bring the money from them, to present it to the apostles; it was then distributed to any members who might be in need.[7]

Patristic authorities such as Irenaeus, Ambrose, and John Chrysostom thought that private property was a result of original sin.[8] The Fathers hypothesized that there was no need for private property prior to original sin and the disorder of the human situation.

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[5]Gen. 1, 27-30. *See* Ambrose, *Expositionis in Evangelium secundum Lucam Libri X,* VII, 124, in 15 PL 1819. ("Consider the birds of the air! They rejoice in the abundance of nourishing food available to them without toil only because they have nothing of the presumption that would lay claim by a kind of private ownership to what is proffered as the common food of all.")

[6]Mark 10, 21.

[7]Acts 4, 32.

[8] *See* Irenaeus, *Contra Haereses Libri Quinque,* IV, 30, 1, in 7 PG, 1065; ("All of us receive a greater or smaller number of possessions from the mammon of injustice. Whence comes the house in which we dwell, the clothes we wear, the vessels we use, and everything else that serves us in our daily lives if not from that which we gained either through avarice while we were yet pagans or through inheritance of what was unjustly acquired by pagan parents, relatives, and friends?"); Ambrose, *In Psalmam CXVIII Expositio,* 8, 22; in 15 PL 1372 ("God our Lord wanted the earth to be the common possession of all men and to offer its fruits to all; but greed has fragmented the right of ownership."); John Chrysostom, *Homiliae XVIII in Epistolorum primam ad Timotheum,* XII, 4, in 4 PG, 562563. ("Tell me where you got your wealth? You owe it to another. And this other, to whom does he owe it? . . . Will you be able now, following the tree of genealogy, to give proof that this possession was acquired justly? You cannot. On the contrary, its beginning, its root, must lie in injustice. Why? Because God did not in the beginning create one man rich and another poor . .. but gave to all men the same earth as their possession."); *cited in* Hans Urs Von Balthasar, THE CHRISTIAN STATE OF LIFE 116–17 (San Francisco: Ignatius Press 1983) (Sister Mary Frances McCarthy, trans.), 105-119.

The theological ideal of the gospel existed in tension with the Church's institutional need for secure structures to enhance its mission. During the first several centuries of its existence, Christianity developed in a social context marked by governmental suspicion and intermittent persecution. The Eucharist was often celebrated secretly in private homes and the catacombs of the early martyrs. Christianity was illegal, and the church could not own property. By the year 251, the Church in Rome had, nonetheless, accumulated sufficient resources to support "not only the bishop, 48 presbyters, 7 deacons, 7 subdeacons, 42 acolytes, and 52 exorcists, readers and doorkeepers, but also more than 1,500 widows and needy persons . . ."[9] In 260, the Roman emperor Gallineus issued an edict granting toleration of Christianity. In response to petitions from bishops, the emperor restored churches and property which had been previously confiscated by the Roman government.[10] Starting after the year 312, the benefactions of Constantine to the church were on a large scale and included land, buildings, and a generous fixed proportion of provincial revenues for the support of the church's charitable activity. Government recognition of Christianity permitted the church to acquire property. Roman law distinguished between *possessio* and *dominium.* *Possessio* was a question of fact, while *dominium* meant that one had an enforceable legal title and ultimate right to the land. *Possessio* could be terminated by one who had *dominium* through a legal process.[11]

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[9] Henry Chadwick, THE EARLY CHURCH (New York: Penguin Books 1978), 57-58.

[10] *See id.*, 120.

[11] *See* W. W. Buckland, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 3rd ed. (rev. by Peter Stein) (University of Cambridge Press 1966), 186-199.

Some of the Constantinian era donations to the church were secured through a document known as *The Donation of Constantine*. Like many early title deeds it is spurious, probably having been forged in the eighth century. Forgeries of this type were common during late antiquity and the early middle ages and represented attempts to secure legal title to property based on accumulated oral tradition, legend, and the desire for a larger justice. In the words of one scholar:

> The forgeries, which are a conspicuous feature of the age, provided documentary proofs for claims which, in the minds of those who made them, scarcely needed to be justified. The pen corrected the corruptions of nature and restored the gross imperfections and injustices of the world to a primitive excellence. The falsehoods in these documents did indeed raise moral problems of which contemporaries were not unaware, but the authors believed that they enforced truths which could not be abandoned without grave danger to their souls. Forgeries . . . brought order into the confusions and deficiencies of the present. Such, among very many other documents, was the *Donation of Constantine*. [12]

Despite the apostolic ideal of poverty, ecclesiastical authorities drafted such documents in order to secure property through *dominium* of which they clearly had *possessio*. The "not of this world" needed to be reconciled to the "mission to the world."[13] Sacred worship, Christian education, and charitable causes such as care for widows, orphans, and the sick were enhanced by the ownership of property. The endowments of the church were retained to sustain a community, and the ownership of property within the ecclesiastical

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[12]R. W. Southern, WESTERN SOCIETY AND THE CHURCH IN THE MIDDLE AGES (New York: Penquin Books 1977), 93.

[13]Von Balthasar, THE CHRISTIAN STATE OF LIFE, 115.

community was held in tension with the apostolic ideal of poverty and common ownership.

Recognizing the tension, Augustine acknowledged the existence of two approaches to property in a Christian society reflecting the heavenly and earthly cities.[14] Augustine thought that the heavenly treasury had its own rules of property in which one gave up private wealth for the sake of the heavenly city to the *dominium* of God. For Augustine, to endow God in this world meant to endow the church.[15] In contrast, secular rulers of the earthly city made human laws by which "a man says 'this is my villa, this is my house, this is my slave.'"[16] Augustine held that neither the state nor private ownership, even of slaves, was evil, arguing on the basis of Christ's command to respect political authority.[17] He was adamant, however, that all earthly goods belong to God, and that one possesses private property only by human law.[18] John Cassian explained how the pristine perfection of the apostolic church waned soon after Pentecost. In his view, even as the lukewarm and tepid joined the church, the original apostolic ideal was kept alive by early Christian monks.[19]

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[14] *See* David Ganz, *The Ideology of Sharing: Apostolic Community and Ecclesiastical Property in the Early Middle Ages* ,in PROPERTY AND POWER IN THE EARLY MIDDLE AGES (Cambridge University Press 1995) (Wendy Davies & Paul Fouracre, eds.), 18-20.

[15] *See* Augustine, *Errationes in Psalmos,* 38, 12, in 38 PL 327.

[16] Augustine, *In Ioannis Evangelium Tractatus CXXIV,* 6, 25-26, in 35 PL 1437.

[17] *See* Augustine, *De Moribus Ecclesiae Catholicae, et De Moribus Manichaeorum Libri II,* I, 35, in 32 PL 1342-1344.

[18] *See* Augustine, *In Ioannis Evangelium Tractatus CXXIV,* 6, 25, in 35 PL 1437.

[19] *See* John Cassian, *De Coenobiorum Institutis,* II, 5, in 49 PL 84-86.

In the sixth century, the Christian Emperor Justinian legislated that the private property of those who entered monastic communities passed to the monastery.[20] Justinian also enacted laws that prohibited the alienation of church property but permitted churches to exchange property with one another without either of them incurring liability. Such an exchange required the approval of the ecclesiastical authority who acted as "steward" of the property.[21] The legislation identified church property as including "churches, hospitals, monasteries, orphan asylums, old men's homes, foundling hospitals, insane asylums or any other establishment of this kind."[22] Justinian also legislated to protect the will of a person who wished to bequeath his estate, or a part thereof, to the church. In such instances the church beneficiary enjoyed the right to retain or sell the bequeathed property with the approval of the bishop and clergy.[23]

With the flourishing of monastic communities in the early Middle Ages, the tension between the theological ideal and institutional necessity expressed itself in the idea of shared property owned by the monastic community and governed by its communal authority.[24] The tension was reinforced by rediscovery of the sixth century Justinian *Digest,* a rediscovery that coincided with the renaissance in legal studies and law schools during the third quarter of the eleventh century. Scholars at the new centers

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[20]*See* Justinian, *Codex,* 1, 13; *Novellae,* 5, 5; & 123, 38, in THE CIVIL LAW INCLUDING THE TWELVE TABLETS, THE INSTITUTES OF GAIUS, THE RULES OF ULPIAN, THE OPINIONS OF PAULUS, THE ENACTMENTS OF JUSTINIAN, AND THE CONSTITUTIONS OF LEO (S. P. Scott ed., Cincinnati 1932), Vol. 12, 19; Vol. 16, 27-28; & Vol. 17, 101.

[21]*See* Justinian, *Codex,* 1, 14, in S. P. Scott, Vol. 12, 19 & 25.

[22]*See id.,* at 1, 18, in S. P. Scott, Vol. 12, 27.

[23]*See id.,* at 1, 14, 1, in S. P. Scott, Vol. 12, 19.

[24]*See* David Ganz, *The ideology of sharing: apostolic community and ecclesiastical property in the early middle ages,* in PROPERTY AND POWER IN THE EARLY MIDDLE AGES (Wendy Davies & Paul Fourace, eds.) (Cambridge University Press 1995), 17-30.

would discover in the *Digest* the assumption the natural law (*ius naturale)* contained no provision for private ownership. The Emperor Justinian's great compilation reinforced the view held from the earliest days of Christianity that private ownership was a provision of the law of nations *(ius gentium)*, that part of human legal systems which is both natural and positive, i.e., widely shared by many legal systems because its rationality is apparent.[25] Indeed, the medieval canonist Gratian regarded common ownership of property as in accord with natural law.[26]

Thomas Aquinas observed that worldly goods considered per se belong no more to one person than to another.[27] Thomas recognized private property (*proprietas)* as an example of something that derives from natural law and is established through human reason.[28] Like the Roman jurists, he distinguished between *possessio* and *proprietas. Possessio* embraces both collective and private ownership; it means the thing owned either by everyone or by some specific person.[29] *Proprietas* is the right to private property. It is a legal right established by positive law which was to be consistent with the natural right.[30] Thomas justified private property rights on the grounds that they are necessary to avoid quarreling, to provide an incentive for work, and to insure that

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[25]*See* Justinian, *Digest,* 41, 1, 1-13 in S. P. Scott, Vol. 9, 154-155..

[26]D 1, c.7, 3.

[27] *See* Thomas Aquinas, SUMMA THEOLOGICA, II-II, 57, 3 (Christian Classics, 1948) (trans. by the Fathers of the English Dominican Province) ("For if a particular piece of land be considered absolutely, it contains no reason why it should belong to one man more than to another . . .").

[28]*See id.,* at II-II, 66, 2 ("Hence the ownership of possessions is not contrary to natural law, but an addition thereto devised by human reason.").

[29]*See id,* at II-II, 66, 2, 2 ("A rich man does not act unlawfully if he anticipates someone in taking possession of something which at first was common property, and gives others a share: but he sins if he excludes others indiscriminately from using it.").

[30]*See id.,* at II-II, 57, 3.

property is cared for by the owner.[31] Consistent with the radical concept of the Gospels, Aquinas required that private property be possessed in such a way that it is always in readiness for the community.[32] Based upon the Thomistic analysis, the right to private property in the Catholic tradition is a qualified, and not absolute, right. The Thomistic theory of property affirms the legal right to private property while balancing the right against the common good and requirements of distributive justice.[33]

Hans Urs Von Balthasar argues that the Thomistic theory of private property reflected a change in the understanding of the natural law itself.[34] Up to Thomistic theory, Von Balthasar contends, the *ius naturale* represented the law of the human person in the state of nature prior to the Fall. The *ius gentium* was the law common to all persons after the Fall, and the *ius civile* was the specification of the *ius gentium* in the laws of specific nations. According to Von Balthasar, Thomas's approach represented a new way of thinking in which the *ius naturale* came to represent the law of human nature without regard to history, in other words, absent any notion of the Fall. Thomas described the *ius gentium* and the *ius civile* as being derived from the *ius naturale* in two ways: the *ius gentium* as generally applicable conclusions draw from the basic principles of *ius naturale*; and the *ius civile* as the specification of these conclusions in the law of particular states.[35] In Thomas description, the *ius gentium* is a bridge between the *ius*

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[31] *See id.*

[32] *See id.*, at II-II, 66, 2 ("In this respect man ought to possess external things, not as his own, but as common, so that, to wit, he is ready to communicate them to others in their need.').

[33] *See* Dennis P. McCann, *The Common Good in Catholic Social Teaching,* in IN SEARCH OF THE COMMON GOOD 121–146 (T & T Clark, 2005) (Patrick D. Miller & Dennis P. McCann, eds.).

[34] *See* Hans Urs Von Balthasar, THE CHRISTIAN STATE OF LIFE, 115-119.

naturale and *ius civile*. Von Balthasar thus sees the shift in the approach to the state of nature from the historical (focus on human nature prior to and after the Fall) to the unequivocal (without reference to history). The sharp distinction drawn by Von Balthasar between the historical and a-historical may be overstating the case. The general theory understands natural law as not confined to pre-lapsarian Paradise but more or less a universal law of reason. Thomas had plenty of predecessors in this view, not the least of whom was Gratian who ascribed to the theory that natural law was available to all persons through the use of reason.

When it concerns ownership to property, Von Balthasar may also be overstating the case. As already mentioned, Thomas justifies the division and legal regulation of property with the reservation that property remains fundamentally available to the community. John Finnis observes that the reservation involves a twofold theorem:

> (1) *everything* one has is 'held as common (or in common)' in the sense that it is morally available, as a matter of right and justice, to *anyone* who needs it to survive; (2) one's *superflua* are all 'held as common', in the sense that one has a duty *of justice* to dispose of them for the benefit of the poor.[36]

Thomas argues that for persons in extreme necessity all resources become common resources to the extent that the life-threatening condition requires.[37] Moreover, a person who is aware of another's extreme necessity has a duty to relieve it not just from *superflua* but through contributing resources up to the extent that the contribution does

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[35]*See* SUMMA THEOLOGICA, I-II, 95, 2.

[36]John Finnis, AQUINAS, MORAL, POLITICAL, AND LEGAL THEORY (Oxford University Press 1998), 191.

[37]*See* SUMMA THEOLOGICA, II-II, 32, 7, 3; and II-II, 187, 4c.

not reduce the donor and dependents themselves to extreme necessity.[38] Absent extreme necessity, the right of owners to keep property extends only so far as necessary to maintain oneself and dependents in a reasonable condition of life. All further resources are held in common, and are to be given to the poor.[39] These obligations, Finnis notes, were not simply from charity, but strict obligations in justice.[40] For this reason, Von Balthasar acknowledges that "the evangelical ethic was thus preserved" in the Thomistic theory of property rights.[41]

Even as the Dominican Thomas Aquinas developed his influential theory of property rights, an already existing dispute among the Franciscans reflected the continuing power of the theological ideal. Based upon his reading of the gospels and profound religious experience, Saint Francis of Assisi embraced a radical poverty forsaking ownership of material possessions.[42] From the time of Francis of Assisi, his followers fell into dispute about the meaning of poverty in the Franciscan Order.[43] In particular, the spiritualist wing of Franciscans repudiated the need for any material goods and property.[44] This was consistent in general with the spiritualists' antinomian approach

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[38]*See id.,* II, 32, 5c.

[39]*See id.,* II-II, 87, 1, 4; and II-II, 66, 7c.

[40]*See* John Finnis, AQUINAS, 192.

[41]Von Balthasar, THE CHRISTIAN STATE OF LIFE, 117.

[42]*Legenda maior,* 3, 3, in S. BONAVENTURA OPERA OMNIA, VIII, 504, 510. *See also* Lawrence D. Cunningham, FRANCIS OF ASSISI, PERFORMING THE GOSPEL LIFE (Grand Rapids, MI: Eerdmans Publishing 2004), 25.

[43]*See* C. H. Lawrence, THE FRIARS, THE IMPACT OF THE EARLY MENDICANT MOVEMENT ON WESTERN SOCIETY (London: Longman 1994), 39-42.

[44]*See* David Burr, THE SPRITUAL FRANCSCANS, FROM PROTEST TO PERSECTUION IN THE CENTURY AFTER SAINT FRANCIS (Pennsylvania State University Press 2001), 2-41.

to the Franciscan Order and the institutional Church.[45] In 1230, Pope Gregory IX attempted to resolve the dispute over Franciscan poverty with the decree *Quo elongati*.[46] The decree permitted the Franciscan Order to possess and enjoy the use of property while the Holy See held title to the property. The attempted papal resolution thus recognized the need for institutional structure and property while granting pontifical approval to the Franciscan desire to live the gospel ideal.[47] A contemporary of Thomas Aquinas in the faculty of theology at Paris, Bonaventure, who was elected General of the Franciscan Order, remained an apologist of evangelical poverty while checking the antinomianism of his spiritualist brethren.[48] The expression *usus pauper* (use as a poor person) gained currency among the spiritualist Franciscans who held that renunciation of ownership was insufficient. They argued that Gospel poverty required restricting possession within the church to the barest minimum.[49] Neither Pope Gregory's decree nor Bonaventure's governance quelled the dispute over Franciscan poverty which continued to weaken the unity of the Order and trouble the life of the church well into the fourteenth century.[50]

The Franciscan dispute highlights the difficulty faced by canon law in maintaining a healthy tension between the theological ideal and human needs. From the

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[45]For a discussion of the antinomian effects of the theology of Joachim of Fiore on the Franciscan spiritualist, see Chapter One, pp. ___-___.

[46]*See* John Moorman, A HISTORY OF THE FRANCISCAN ORDER (Oxford: Clarendon Press 1968), 89-91.

[47]*See* Rosalind B. Brooke, EARLY FRANCISCAN GOVERNMENT, ELIAS TO BONAVENTURE (Cambridge University Press 1959), 74.

[48]*See* C. H. Lawrence, THE FRIARS, 57-60.

[49]*See* David Burr, OLIVI AND FRANCISCAN POVERTY. THE ORIGINS OF THE *USUS PAUPER* CONTROVERSY (University of Pennsylvania Press 1989).

[50]*See id*., at 60-64; and Moorman, A HISTORY OF THE FRANCISCAN ORDER, 307-319.

theological perspective, humanity had no need for private property in the pristine time prior to the fall. Ownership of private property was linked to the disorder of human nature in the post-lapsarian human situation. The Gospels responded to the idea of the fall with the redemptive antidotes of common ownership and apostolic poverty. In heralding the evangelical antidotes, the Franciscan spiritualist went to an antinomian extreme. Thomas Aquinas attempted to synthesize the theological view with a more philosophical perspective based upon the then recently re-discovered thought of Aristotle. Although Thomas accepted the theological notion of the fall and corresponding need for redemption, his discussion of property and ownership, according to Von Balthasar, adopted the Aristotelian abstract concept of human nature that did not depend on the idea of a fall in human history. For Thomas, reason reveals the necessity of private property as a means of securing the individual and common good.[51] As mentioned, Thomas advanced a three fold justification for private property: it avoided arguments, encouraged individual work, and acted as an incentive for care by the owner. Von Balthasar's theoretical criticism and Franciscan history notwithstanding, when applied to the ownership of property within the church, the Thomistic theory represents an attempt to balance the theological and philosophical perspectives.

The Thomistic theory, of course, has a generally applicability, and it is not limited to the question of the ownership of property within the Catholic Church. The Thomistic theory serves as the foundation for the right to private property recognized in twentieth century Catholic social thought. Starting with Pope Leo XIII's encyclical, *Rerum Novarum*, in 1891, Catholic social teaching would recognize the right to private property

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[51] *See* Von Balthasar, THE CHRISTIAN STATE OF LIFE, 115.

in accord with the Thomistic synthesis.[52] According to the social teaching, the right to private property is not based on "indiscriminate ownership" and must "serve the common interest of all" even as the compensation for individual labor justifies private property as "clearly in accord with nature."[53] Vatican II affirmed that social principle that the goods of this world are originally meant for all and sated that the necessity of private property does not nullify this principle.[54] This teaching was re-enforced by Pope John Paul II in *Soliticitudo Rei Socialis,* in which the Pontiff criticized communism for its collective ownership for the means of all production and liberal capitalism for its inequitable distribution of material resources.[55] In John Paul II's words: "Private property, in fact, is under a 'social mortgage', which means that it has an intrinsically social function, based upon and justified precisely by the principle of the universal destination of goods."[56] On the one hundredth anniversary of *Rerum Novarum*, Pope John Paul II in *Centesimus Annus,* extolled the right to private property which must be understood in light of the principle of the "universal destination of the earth's goods."[57] In fidelity to the Thomistic tradition, Catholic social teaching attempts to balance the gospel ideal of common ownership with the human reality of need for private property.

B. Property in Liberal Political Theory

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[52]Pope Leo XIII, Encyclical Letter *Rerum Novarum,* 10-17, May 15, 1891.

[53]*Id.* at 14-15.

[54]*See Gaudium et Spes* ,69, in VATICAN COUNCIL II, THE CONCILIAR AND POST CONCILIAR DOCUMENTS (Austin Flannery, O.P., ed.) (New York: Costello Publishing 1992).

[55]*See* Pope John Paul II, *Solicitudo Rei Socialis,* 20, 21, 41 & 42, December 30, 1987.

[56] *Id.* at 42.

[57]Pope John Paul II, *Centesimus Annus,* 6.2, May 1, 1991

Liberal political theory developed in separation from divine revelation, and consequently, the political theory was not concerned with the theological ideal of gospel poverty and common ownership. The philosophical justification for the law of private property rights in the United States traces its roots to theorists such as Thomas Hobbes, John Locke, and David Hume. Writing in seventeenth century England, Hobbes rejected the idea that ownership of property derived from nature. He envisioned nature as a state in which property belonged to no one, and competition among persons to acquire property produced a "war of all against all."[58] The desire of self preservation led the individual to surrender self-governance to the state. Prior to the state, there was no society, and only warring individuals. Private property is the invention of the state to protect the owner from encroachments from other individuals.[59] In contrast to Hobbes, Locke depicted the state of nature not as one of constant strife, but of freedom and equality. In Locke's view, the self-sufficient individual in the state of nature consents to enter society in order to obtain certain advantages.[60] These advantages include, *inter alia*, increased personal security, the right to private property and the state's protection of it, the specialization of work, availability of capital, the market economy and opportunities to maximize individual wealth. For Locke, the supreme responsibility of the state is to set the rules that protect the individual's right to own private property.

Hobbes and Locke shared the underlying assumption that the individual agrees to forego the state of nature in order to gain the benefits of private property which is

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[58]*See* Thomas Hobbes, *De Cive,* 6-7, in 2 THE ENGLISH WORKS OF THOMAS HOBBES (W. Molesworth, ed.) (London 1841).

[59]*See* Thomas Hobbes, LEVIATHAN, 165, Part II, Chap. 21.

[60]*See* John Locke, *Second Essay Concerning Civil Government*, §§ 15, 21, 87, 95 in LOCKE, TWO TREATISES OF GOVERNMENT 278, 282, 324, 330–31 (Peter Laslet ed.) (Cambridge University Press 1988).

protected by the state. This "contractarian individualism" focuses on the human being as autonomous, ceding the minimum amount of autonomy to the state in order to gain these advantages. Private property plays a critical role in both protecting individual autonomy and maximizing wealth. Freedom is defined as the absence of government constraint on the individual. The economic goal of the individual is to acquire as much private property as possible in accord with the minimal constraints placed on individual freedom by the government. Writing in the eighteenth century, Hume thought of private property as a mere convention that people respected because it set the conditions for general economic prosperity. Viewing the human person as filled with various gradations of vices and virtues, Hume stipulated that the individual owned private property in an individual and exclusive way. He stated: "'tis certain, that rights, and obligation, and property, admit of no such insensible gradation, but that a man either has a full and perfect property, or none at all."[61] Consistent with these elements of liberal political theory, the fee simple absolute is the most unrestricted form of holding property known to Anglo-American law. It is of infinite duration and permits the title holder to use the property in accord with subjective preferences with few restrictions. It testifies to the sovereignty of individual autonomy in Anglo-American property law.

An early United States Supreme Court case, *Johnson v. M'Intosh*[62] has been termed "the unofficial beginning of American property law."[63] The 1823 case turned on a title dispute to real property. The plaintiff Johnson had first possession in the land

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[61]David Hume, A TREATISE ON HUMAN NATURE (David Fate Norton & Mary Jane Norton, eds.) (Oxford University Press 2001), 3.2.6, 339.

[62] 21 U.S. 543, 8 Wheat. 543 (1823).

[63]Note, *The Myth of Johnson v. M'Instosh,* 52 UCLA L. REV. 289, 290 (2004).

originally purchased from native Americans. The defendant M'Intosh had acquired a later title to the same land in a chain of ownership that could be traced to the grant of the English Crown. Chief Justice Marshall reasoned that, although the plaintiff's title was first in time as to its origin, it did not come through the United Sates government, and therefore could not be recognized by the Court.[64] Marshal based the Supreme Court's decision on the 1783 Treaty of Paris which brought an end to the Revolutionary War. Pursuant to the Treaty, any rights in land that the English sovereign had granted prior to the Revolution were to be respected and enforced. The defendant's right to the disputed property fell clearly within the term of the Treaty. In Marshall's view, the plaintiff's title was based on rights in property which, although they may have possessed some validity among Indian nations, could not be recognized by a court of the United States. The Court therefore held for the defendant.

The Chief Justice attempted to bolster the Supreme Court's ruling in *Johnson v. M'Intosh* with additional arguments. First, Marshall argued that the law of discovery entitled the nation which discovered a particular territory first to occupy and control the property, subject to limited rights of occupancy in the aboriginals. He analogized the law of discovery to the law of conquest in which the spoils of war belong to the victor. Second, Marshall seemed to believe that the law of discovery applied only to the nations of Europe on account of the "superior genius" that they contributed to aboriginals.[65] Marshal's line of argument has, of course, been the subject of a much deserved critique

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[64]21 U.S. at 572.

[65]*Id.* at 573.

not the least of which considers the reasoning to be racist.[66] The problems of Marshall's reasoning notwithstanding, *Johnson v. M'Intosh* affirmed the understanding of private property held by the liberal theorists that the individual has an absolute right to property to the extent that the title to the property is recognized by the government. The idea of property in Anglo-American law has gone through many developments in the course of its history. Not the least of which has been the development of the modern corporation, financial markets, income taxation, the rise of the welfare state, entitlements, the regulatory state, and environmental protection. While many of these developments have tended to weaken property rights, the idea that an individual enjoys the right to private property contingent on state approval has perdured as characteristic of liberal theory.

C. Comparison of Catholic and Liberal Theories of Property

The juxtaposition of approaches to property in canon law and liberal theory suggest that the theological element endows canon law with a meaning that is not present in liberal theory. First, while it recognizes the right to private property, canon law also embraces the gospel ideal of common ownership. In regulating ecclesiastical property, canon law espouses the communitarian value that ecclesiastical property should reflect the apostolic church in which all things were held in common. In contrast, liberal theory's approach to property focuses on the ability of the individual to acquire, possess, use, and alienate property in accord with particular preferences and subject to the minimum necessary government regulation. Certainly, Thomas Aquinas's three justifications for private property are just as applicable to the Church as to any other

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[66] *See e.g.,* Robert A. Williams, Jr., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 317 (Oxford University Press 1990); and Richard A. Epstein, *Property Rights Claims of Indigenous Populations: The View from the Common Law,* 31 U. TOL. L. REV. 1 (1999).

human community comprised of fallen individuals. Because it wants to establish an ecclesial order for property that offers incentives for human productivity, care of property, and the avoidance of property disputes, canon law incorporates rules for the regulation of property in the church. Absent such regulation, antinomianism would breed confusion and disorder in the life of the church. However, regulation without the theological meaning would yield legalism that contravenes the religious meaning for which the church exists. While recognizing the reality of the human situation, canon law aspires to serve as a reminder of the theological ideal of common ownership.

Second, the comparison of the approaches to property in canon law and liberal theory demonstrates that each has its own substantive definition of freedom. The theological element in canon law includes the gospel preference for poverty. Canon law reflects the theological view that paucity of possessions facilitates freedom. According to the theological view, the more one is detached from material possession, the more one experiences inner freedom. Not endowed with the theological meaning, liberal theory maintains a close nexus between the right to own private property and individual freedom. The state functions to insure that each individual is afforded an equal opportunity to acquire a fair share of property defined broadly as any right, benefit, or entitlement that enhances individual well being. Liberal theory has no interest in propagating the theological view that true free depends on detachment form material goods.

Third, canon law justifies ecclesiastical property on the ground of the mission of the Church, and that mission is discerned and interpreted by ecclesiastical authority. In light of the gospel ideals of common ownership and poverty, canon law accepts the need

for the Church to possess property because the ownership facilitates continuity of the Church and its mission. The Church is a human institution which does not float in time of itself, but depends on the ordinary structures of human communities. Pursuant to canon law, it belongs to the proper hierarchical authority in the Church to establish the positive law which enables the institution's continuity in history while maintaining fidelity to the gospel ideal. Liberal theory, of course, neither shares the church's mission nor recognizes an ecclesiastical office vested by divine authority to discern how best to implement that mission. A central feature of liberal theory values a minimal level of government regulation on the individual's right to private property. While canon law establishes a trust in ecclesiastical authority with regard to the regulation of ecclesiastical property in accord with the Church's mission, liberal theory establishes a rule of suspicion of the exercise of government power lest it infringe on the freedom of the individual to employ the property right.

Finally, the comparison of the fundamental approaches to property in canon law and liberal theory reflects different anthropological conceptions. Canon law assumes an understanding of the human person as one who is essentially social in nature and who discovers fulfillment through participation and solidarity with others.[67] This anthropological understanding differs from the image of the autonomous individual in the pristine version of liberal theory. According to Locke's articulation of the pristine version, the individual cedes a degree of autonomy to enter the social contract in order to optimize the opportunities to acquire material wealth in accord with subjective choices.

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[67]*See Lumen Gentium*, 18–29, in VATICAN COUNCIL II, THE CONCILIAR AND POST CONCILIAR DOCUMENTS (Austin Flannery, O.P., ed.) (New York: Costello Publishing 1992). *See also* John J. Coughlin, *Canon Law and the Human Person*, 19 J. L. & RELIGION 1, 53 (2003–2004).

In a more recent version of the liberal tradition, John Rawls described society as a cooperative venture of individual citizens based upon a theory of justice.[68] For Rawls, justice depends on the distribution of societal goods to each individual in accord with legitimate need. Although not antithetical to Rawls' theory of distributive justice, Catholic tradition considers justice in human society to be more than that of the Rawlsian description.[69] With the focus on individual need, Rawls' account may be criticized in that it places a diminished value on communities that are distinct from political society, such as family, church, and non-political associations. From the Catholic perspective, these communities naturally constitute the person as a social being, and foster the conditions for participation and solidarity. If these communities are to prosper, Catholic social theory holds that it is not sufficient for the government to simply secure the protection of individual property rights, a market economy, and an ever-increasing subjective consumerism.

II. Canonical and Theological Considerations

Given the theoretical differences, it would be an ill fit to super-impose the liberal theory of property onto canon law. Such an imposition would disturb the careful balance canon law attempts to produce between the theological ideal derived from the Gospels and the legal reality based upon legitimate human need as well as the institutional stability and continuity of the Church. Imposition of secular legal theory onto the question of the ownership of property in the Catholic Church fosters legalism. Legalism renounces the proper role played by theology in affording the inner meaning or

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[68] *See* John Rawls, A THEORY OF JUSTICE 515–20 (Harvard University Belknap Press 1971).

[69] *See* Jean Porter, *The Common Good in Thomas Aquinas*, in IN SEARCH OF THE COMMON GOOD 106-120 (New York: T & T Clark 2005) (Patrick D. Miller & Dennis P. McCann, eds.).

intellectus of canon law. Absent this *intellectus,* canon law fails to function as a life giving force in the Church. Two approaches to ecclesiastical property among twentieth century canonists seem to reflect the problem of legalism.

The first approach to ecclesiastical property tends to dismiss the legitimate theological element in canon law as, in the words of Robert T. Kennedy, a "fundamentalist interpretation."[70] According to Kennedy, a distinction must be drawn "between a laudable observance of evangelical poverty in pursuit of spiritual perfection . . . and the practice of ordinary virtue necessary for salvation." As previously mentioned, Augustine intended his distinction between spiritual perfection and ordinary virtue to pertain to the ownership of property under the regime of the secular authority. In regards to the ownership of property within the church, the distinction does not relieve the canon law from the requirements of the Gospel and patristic tradition. To the extent that this approach denies the applicability of the gospel texts on common ownership and apostolic poverty to the church's ownership of property, it may border on legalism. It would represent an approach to canon law absent its proper theological component based on divine revelation and the tradition.

A second and even more clearly legalistic approach to church property was advocated by the American canonist John J. McGrath. In the years immediately following Vatican II, McGrath argued that a great deal of ecclesiastical property in the United States was not in fact ecclesiastical property subject to the provisions of canon law.[71] He based his argument on the theory that many institutions such as colleges,

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[70]*See* Robert T. Kennedy, CLSA-2000, 1451.

universities, and hospitals, which were originally founded by Catholic religious communities and dioceses, were intended to fulfill a primarily secular purpose, and therefore ought no to be regarded as ecclesiastical property. Other canonists including Adam Maida and Nicholas Carfardi have responded that there can be no question that such institutions, even if they may have served secular purposes, were originally intended as primarily religious in nature and a direct manifestation of the Church's apostolic activity.[72] Pursuant to the McGrath thesis, the theological element of canon law remains obscure or irrelevant in the determination of the ownership of many institutions founded under church auspices. McGrath did not extend his approach to parishes. There can be little question that parishes continue as a direct manifestation and integral part of the diocese and its apostolic mission. In light of the McGrath approach, however, it is not surprising that the relationship between the diocese and parish property has now been called into question.

A. The Unity of Canon Law and Theology

A correct analysis of the relation between the diocese and the parish reflects the unity of law and theology. With regards to the relationship between the diocese and parish, one aspect of the theological element in canon law has been described on the basis of the gospel preference for common ownership and poverty. Another aspect of the

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[71]*See* John J. McGrath, CATHOLIC INSTITUTIONS IN THE UNITED STATES: CANONICAL AND CIVIL LAW STATUS (Washington, D.C.: Catholic University Press, 1968). *See also* Robert T. Kennedy, *McGrath, Maida, Michiels: Introduction to a Study of the Canonical and Civil Law Status of Church Related Institutions in the United States,* 50 JURIST 351-401 (1990).

[72]*See* Adam J. Maida, *Canonical and Legal Fallacies of the McGrath Thesis on the Reorganization of Church Entities,* 19 THE CATHOLIC LAWYER 275-286 (1973); Adam J. Maida & Nicolas P. Cafardi, CHURCH PROPERTY, CHURCH FINANCES, AND CHURCH-RELATED CORPORATIONS 271-271 (CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES 1984). *See also* James A. Coriden & Frederick R. McManus, in CHURCH AND CAMPUS: LEGAL ISSUES IN RELIGIOUSLY AFFILIATED HIGHER EDUCATION (Notre Dame, IN.: University of Notre Dame Press, 1979), 145-46.

theology of canon law remains the Catholic Church's self understanding as a hierarchical institution. Specifically, this aspect of the theology of canon law depends on the notion of the particular church. Because the theology of the particular church articulated at Vatic II is indispensable to a correct analysis of the canonical relation between the diocese and parish, what follows is intended as a brief theological description. An interpretation of the canon law that regulates parish property which fails to incorporate the theological element would likely result in the imposition of a secular theory of property that belies the unity of law and theology.

The documents of Vatican II use the term "particular church" in a variety of ways. First, it means the autonomous ritual churches of the East.[73] The term also refers to patriarchal and major archiepiscopal churches as well as to the churches that comprise a certain cultural and/or geographic region.[74] Canon 368 of the *CIC-1983* incorporates a third meaning derived from Vatican II in which the particular church includes the diocese and similar juridical structures such as territorial prelature, territorial abbacy, apostolic vicariate, apostolic prefecture and an apostolic administration which has been erected on a stable basis.[75] All of these meanings share the sense of the autonomy of the particular church. The particular church is not a mere administrative unit of the Roman Church.

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[73]*See generally Orientalium Ecclesiarum* in VATICAN COUNCIL II, THE CONCILIAR AND POST CONCILIAR DOCUMENTS (Austin Flannery, O.P., ed.) (New York: Costello Publishing 1992), 441.

[74]*Lumen Gentium*, 13. *See also Codex Canonum Ecclesiarium Orientalim auctoritate Ioannis Pauli II promulgatus (Die 18 m. octobris a. 1990)," AAS,* 82 (1990), 1033-1363 (herinafter "*CCEO"*), Canon 55 (recognizing the ancient tradition of the Patriarchal Church); and Gianfranco Ghirlanda, S.J., IL DIRITTO NELLA CHIESA MISTERO DI COMUNIONE (Milano: Editrice Paoline 1990), 42.

[75]*CIC-1983,* Can. 368. There was no parallel definition in the 1917 Code. The *CCEO,* Can. 177 § 1 identifies the eparchy as a particular church.

An influential theologian at Vatican II, Henri Du Lubac explains that each particular church is considered to constitute the Body of Christ and contains within itself all that is necessary for salvation.[76] At the same time, the *communio* of the particular churches with the Successor to Peter at its head is viewed as more than a federation. Rather, in words of DeLubac, the *communio* is "organic and mystical."[77] The relationship between the universal church and the particular churches is one of "mutual interiority."[78] The universal church, Du Lubac states, remains always a reality ontologically prior, from which the all particular churches take their origin.[79]

The diocese is the most common canonical manifestation of the particular church.[80] A definition of the diocese may be found in *Christus Dominus*: "A diocese is a section of the people of God entrusted to a Bishop to be guided by him with the assistance of his clergy so that, loyal to its pastor and formed by him into one community in the Holy Spirit through the Gospel and the Eucharist, it constitutes one particular Church in which the One, Holy, Catholic and Apostolic Church of Christ is truly present and

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[76] *See* Henri De Lubac, *Particular Churches in the Universal Church*, in THE MOTHERHOOD OF THE CHURCH (San Francisco: Ignatius Press 1982) (Sergia Englund, trans.),191-211.

[77] *See* De Lubac, *Particular Churches in the Universal Church,* 191-211. *See also* Joseph Ratzinger, "The Pastoral Implications of Episcopal Collegiality," 1 CONCILLIUM 37-38 (1975).

[78] De Lubac, *Particular Churches in the Universal Church,* THE MOTHERHOOD OF THE CHURCH, 201, citing Yves Congar, *La collégialité de l'épiscopat,* I: "*Avant le milieu du IV° siècle.*"

[79] *Lumen Gentium*, 26. *See also* Wilhelm Bertrams, S.J., "De analogia quoad structuram hierarchicam inter Ecclesiam universalem ac Ecclesiam particularem," 56 PERIODICA, 267-308 (1967).

[80] As the particular church is more than a mere administrative unit, one must be careful that the canonical word "diocese" means more than the idea evoked by the ancient diocese of the Roman Empire. *See* De Lubac, *Particular Churches in the Universal Church,* 200-201.

active."[81] The diocese then is an autonomous church in ecclesial communion with the universal church.

In contrast, the parish does not constitute an autonomous church.[82] Section 1 of Canon 515 of the *CIC-1983*describes the parish as "a certain community of Christ's faithful stably established within a particular church, whose pastoral care is entrusted to a priest as its proper pastor under the authority of the diocesan bishop." For the purpose of this discussion, this description contains three significant elements. First, the parish is a *community of the Christian faithful*. The element of the description reflects a return to the ancient understanding of the term "parish" which finds its etymological roots in the Greek word *paroikia,* meaning a pilgrim people.[83] It is perhaps at the local level that the *communio* of the church may be experienced in its most intimate form. In the words of *Lumen Gentium:* "In these communities, though frequently small and poor, or living far from any other, Christ is present."[84] Second, the parish is *established within a particular church.* Defining the parish in relation to the diocese, *Christus Dominus* states that the parish is a part of the diocese.[85] It is only by analogy to the communion of the particular churches that one may speak of *communio* in the relationship between the diocese and the

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[81]*Christus Dominus*, 11, in VATICAN COUNCIL II, THE CONCILIAR AND POST CONCILIAR DOCUMENTS (Austin Flannery, O.P., ed.) (New York: Costello Publishing 1992), 569. Canon 369 of the *CIC-1983* contains a similar definition of the diocese.

[82]*See* Louis Boyer, L'ÉGLISE DE DIEU (Cerf: 1970), 488.

[83]*See* Ludwig F. von Hertling, COMMUNIO: CHURCH AND PAPACY IN EARLY CHRISTIANITY, (Chicago: Loyola University Press 1972) (Jared Wicks, S.J., trans.), 102.

[84]"In his communitatibus, licet saepe exiguis et pauperibus, vel in dispersione degentibus, praesens est Christus . . ." *Lumen Gentium*, 26. *See* Francesco Coccopalmerio, *De Paroecia* (Roma: Editrice Pontificia Università Gregoriana, 1991), 8.

[85]*Chiritus Dominus,* 30, 1. *See* John A. Renken, *Parishes and Pastors* in CLSA-2000, ("The parish is part of the particular church, not an autonomous entity."). *See also* James A. Coriden, THE PARISH IN CATHOLIC TRADITION, HISTORY, THEOLOGY, AND CANON LAW (New Jersey: Paulist Press 1997), 101-103 (discussing the parish as part of the diocese).

parishes that comprise it.[86] Third, the care of the parish is *entrusted to a priest under the authority of the diocesan bishop*. The parish is the communion of the baptized presided over by the priest who is appointed by and collaborates in the pastoral ministry of the bishop.[87] Not only is the priest appointed pastor by the bishop, canon law establishes the diocesan bishop's right to remove or transfer him under certain conditions and procedural safeguards.[88] Although the bishops form one college with the Roman Pontiff at its head, the pastor of a parish is in a hierarchical relation to the diocesan bishop. The parish is of its nature dependent on the bishop as head of the diocese. Section 2 of Canon 529 requires the priest to foster among the faithful an authentic sense of communion with the diocesan bishop and the Roman Pontiff. The hierarchical relationship between the diocesan bishop and the pastor of the parish reflects the theological belief that the bishop is a successor to the Apostles and that the priest co-operates in this apostolic ministry.[89]

In accord with the apostolic tradition, the governing role exercised by the diocesan bishop remains primarily pastoral. Canon 383 of the *CIC-1983* urges that the diocesan bishop is: to "function as a pastor;" "show concern for all;" "extend an apostolic spirit;" "provide for spiritual needs;" "act with humanity and charity;" and "shine the charity of Christ as a witness before all people." The governing power of the bishop over the parish remains distinct from a secular notion of governance which

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[86] *See* Joseph Cardinal Ratzinger in the "*Congregatio pro Doctrina Fidei, Litterae ad Catholicae Ecclesiae Episcopos de aliquibus aspectibus Ecclesiae prout est Communio (Die 28 m. maii a. 1992),"* in 85 *AAS* 838-850 (1993) (explicating the dogmatic implications of *communio*).

[87] *See* Francesco Coccopalmerio, "Il concetto di parrocchia nel Vaticano II," 106 LA SCUOLA CATTOLICA 123-142 (1978).

[88] *See* Canons 1732-1752, *CIC-1983*.

[89] *See Canon* 375 § 1, *CIC-1983*.

focuses on coercive power. This theological justification for the careful and consultative nature of the bishop's ministry is re-enforced by the natural law principle of subsidiarity. Pope Pius XI formulated a description of the principle as an integral aspect of the Church's social teaching: "it is an injustice . . . to transfer to the larger and higher collectively functions which can be performed and provided for by the lesser and subordinate bodies."[90] Consistent with the principle of subsidiarity, the parish structure enables a local congregation of the faithful to engage in activities that foster a community of faith among the members. Just as the specific traditions and customs of the particular church do not detract but enhance the universal Church, the local churches also enjoy a legitimate right to develop special practices that express the unity of the one faith of the universal church. The natural law principle of subsidiarity, however, is not intended to detract from the hierarchical relation between the diocesan bishop and the parish. In the exercise of his pastoral leadership, the bishop is always to be respectful of the life of the local community. This is no way abrogates the bishop's responsibility and right to exercise pastoral governance over his diocese and the parishes which are part of it.

Canon 330 reflects the ecclesiological claim that Christ instituted the church as a hierarchical communion of the Apostles and their successors with Saint Peter and his successors at the head of the College of Bishops. At the same time, Canon 208 recognizes the fundamental equality of all the baptized as members of the People of God. These canons are based upon the idea that the church is at once a communion in which holiness is equally available to all, and at the same time, one in which the members of the College of Bishops function with hierarchical office. The theological understanding of

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[90]Pope Pius XI, *Quadragesimo Anno* (1931), in SEVEN GREAT ENCYCLICALS (William J. Gibbons, ed.) (New Jersey: Paulist Press 1963), 147.

the church as *communio* is at odds with competition between individual baptized persons or groups to acquire exclusive property rights over the church's temporal goods. An approach to canon law that neglects to take account of this theological claim amounts to legalism. It approaches the law as separate from the theology of the church.

B. Parish Property in Canon Law

While recognizing that the Thomistic approach to property remained rooted in the "evangelical ethic," Von Balthasar sees Thomas' adoption of Aristoltle's unequivocal concept of nature in favor of the historical concept as "laying the foundation for the canonization of private ownership."[91] Von Balthasar's use of the term canonization seems to mean not the legitimate recognition of the right to private property but a legal approach that displaces the essential theological meaning. It is this later sense of the term canonization that raises concern about the proper relationship between the diocese and parish in what pertains to the ownership of parish property. My discussion of the ownership of parish property focuses on several theological concerns including Von Balthasar's about the gospel ideal of common ownership and poverty, as well as concerns about the hierarchical nature of the particular church in relation to the parish, and the dedication of all ecclesiastical property to the mission of the Church. A canonical approach to parish property which disregards any of the theological concerns would represent legalism.

In their respective commentaries on church property, Francis G. Morrisey and Robert T. Kennedy concur that "property legitimately acquired by a parish . . . is owned

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[91]Von Balthasar, THE CHRISTIAN STATE OF LIFE, 115.

by the parish, not by the diocese."[92] Morrisey describes the parish ownership as "exclusive."[93] He explicates his opinion by stating that a diocese that seeks to appropriate parish property must purchase or lease the property from the parish in question.[94] The purported justification for this opinion may be found in Section 3 of Canon 515 of the 1983 Code of Canon Law which recognizes the parish as a juridic person. Kennedy provides a description of a juridic person. For Kennedy, the juridic person is "an artificial person, distinct from all natural persons or material goods, constituted by competent ecclesiastical authority for an apostolic purpose, with a capacity for continuous existence and canonical rights and duties like those of a natural person . . ."[95] Canon 1256 establishes that "[u]nder the supreme authority of the Roman Pontiff, ownership of goods belongs to that juridic person which has legitimately acquired them." It seems to follow that the parish owns the property which it has legitimately acquired. To end the inquiry at this point of the analysis, however, would be incomplete. In regard to the ownership of parish property, several other specific provisions of the canon law need to be considered. These canonical provisions reflect the theological concerns for the gospel ideal of common ownership and poverty, the hierarchical relation between the diocese and the parish, and the dedication of ecclesiastical property to the mission of the Church. The essential issue is that the juridic person of the parish in canon law is

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[92]Robert T. Kennedy, CLSA-2000, 1457; *see also* Francis G. Morrisey, THE CANON LAW LETTER & SPIRIT (Collegeville, Minnesota: Liturgical Press 1995), 709.

[93]Francis G. Morrisey, THE CANON LAW LETTER & SPIRIT, 709.

[94]*See id.,* at 709.

[95] Robert T. Kennedy, CLSA-2000, 155.

different from the corporation in secular legal theory on account of the three theological concerns.

First, recognition of the parish as a distinct juridic person in canon law does not relieve it from requirements of the Gospel. Rather, the canonical ownership of all church property including that of parishes reflects the gospel ideal of common ownership and poverty. No one individual or group--neither the bishop nor the pastor nor the parishioners--owns the parish property in an absolute sense. Rather, church property is held with an openness to the needs of other ecclesiastical communities and the universal Church. The canonical provisions about the relationship between the diocese and parish represent an attempt to maintain the balance between the theological and legal elements in canon law's approach to parish property. Respect for the relative autonomy of the parish as a juridic person in canon law requires that the parish exercises a limited right to own private property. Regulation of parish property by the diocesan bishop and the Holy See is intended to insure that parish property remains available to secure the common good of the diocese and the universal church. The present version of canon law, the *CIC-1983,* uses the terms *dominium* and *proprietas* interchangeably to signify the ownership of property within the Catholic Church.[96] Kennedy himself indicates that the interchangeable use of the terms in the *CIC-1983* means that they are different in meaning from the ancient Roman jurists' use of *dominium,* which signified an undivided and absolute ownership.[97]

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[96]*See e.g.,* Canon 1256 (*dominium)* and Canon 1284 § 2, 2° (*proprietas).*

[97]*See also* Robert T. Kennedy, CLSA-2000, 1458.

Second, the recognition of an entity as a juridic person pursuant to canon law does not abrogate the principle of hierarchy. Although the parish is a separate juridic person, it remains part of the diocese and subject to the authority of the diocesan bishop. Section 1 of Canon 1276 requires that the "Ordinaries must carefully supervise the administration of all the goods which belong to the public juridic persons subject to them . . ." As the Ordinary of the diocese, the bishop incurs the obligation to supervise the administration of all the assets of the parishes and other juridic persons under his authority. Consistent with Vatican II's theology of the particular church, the juridic personality of the parish does not constitute it as an autonomous unit which may acquire, administer or alienate its property without regard to the authority of the diocesan bishop. The parish is a part of the diocese, and the bishop has both the responsibility and right to exercise the power of governance over it. Section 1 of Canon 381 recognizes that the bishop exercises ordinary, proper and immediate power with the jurisdiction of his diocese. This includes power over any of the temporal goods that belong to the parish.

Several additional canonical provisions are helpful in clarifying hierarchical relation between the diocese and parish with regard to the ownership of parish property. Canon 532 establishes that the parish priest acts in the name of the parish as a juridic person. Section 1 of Canon 1279 vests the administration of ecclesiastical goods in one who "exercises the direct power of governance" over the juridic person. Pursuant to Canon 531, the parish priest exercises the direct power of governance over the parish property. However, within his diocese the bishop sets the limits for ordinary and extraordinary administration. A priest, who is pastor of a parish has the right to engage in the ordinary administration of the parish which includes, *inter alia*, control of its

temporal goods. Beyond what the bishop has declared for ordinary administration in his diocese, any act of extraordinary administration by a pastor in the absence of the bishop's permission would constitute an invalid alienation of ecclesiastical property. Canon 1291 sets the requirement for valid alienation, and Canon 1296 deals with an invalid alienation under canon law which might be valid under civil law.

The hierarchical principle is also evident in Section 2 of Canon 515 establishing that only the diocesan bishop may erect, suppress or alter parishes. When a parish is entirely suppressed, Canon 123 requires that the property of the now extinct juridic person be distributed in accord with the suppressed parish's statutes. Presumably, the parish statutes and by-laws have been drawn in such a way as to insure that the property passes to the diocese.[98] In the case that the parish statutes do not make provision for the distribution of its property upon extinction, Canon 123 provides that the property reverts to the diocese. The merging of two or more parishes into one presents a different case. Canon 122 states that "the first obligation is to observe the wishes of the founders and benefactors, the demands of acquired rights, and in accord with the approved statutes." Generally speaking, when the juridic person of one parish is to be altered by combining it with the juridic person of another parish, the property of the first parish is transferred to the remaining juridic person with which it is combined.[99] This is accomplished through the canonical authority of the diocesan bishop. Such a transfer is also consistent with the exercise of the bishop's pastoral care for the members of the parish. In light of the

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[98]Canon 117 requires that the statutes of the juridic person be approved by the competent ecclesiastical authority. In the case of the approval of the statutes of the parish, the competent ecclesiastical authority would be the bishop.

[99]*See* Dario Cardinal Castrillon, *Letter to United States Bishops Concerning the Assets of Merged Parishes,* in 36 ORIGINS 190 (August 31, 2006).

canonical aspects of the hierarchical relation between the diocese and the parish, it is misleading to sate that parish exercises an "exclusive right of control" over its own property.

Third, the ecclesiastical property of a juridic person remains an integral part of the mission of the Church. All ecclesiastical property is dedicated to the mission of the Church, and serves communities by advancing the mission of the Church under the supervision of the appropriate hierarchical figure.[100] Parish property is part of the mission of the diocese as the particular church within the universal church. The ultimate authority in the diocese with regard to the church's mission is vested in the diocesan bishop. Based on Vatican II's theology of the particular church, the diocesan bishop retains the right to direct the property under his canonical jurisdiction in accord with what he discerns best advances the mission of the Church. It would be an error about canon law if a pastor, parishioner, or group of persons concluded that the diocesan bishop lacked the authority to direct parish property in accord with the Church's mission. Such an error would deny the theological element that forms the *intellectus* of canon law yielding legalism rather than the unity of law and theology. In the words of Von Balthasar, it would result in a "canonization of private ownership" as an absolute right distinct from the particular and universal church.

III. Congregationalist v. Hierarchical Forms of Church Governance

The nineteenth century historical experience of the United States Catholic bishops to organize parish property in accord with church teaching demonstrates the importance of the unity of law and theology. During the eighteenth century, the United States had

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[100]*See* Canon 1254 §§ 1 & 2, *CIC-1983*.

emerged as a Protestant nation. While the various denominations maintained their independence, a commonality of habits, customs, and mores resulted in a *de facto* Protestant establishment. Only those who shared Protestant culture could claim to be authentically American. Starting in the 1820s, the dominant Protestant ethos would be challenged by massive waves of Catholic immigrants from Ireland and Germany. By 1850, Roman Catholics constituted the single largest Christian denomination in the United States. The arrival of the new immigrants who did not share in the ethos of the dominant religious culture posed a threat not only to the *de facto* establishment but to the self identity of the United States as a Protestant nation. Due to their numbers, Catholics could not be ignored and opposition to their religion soon produced a virulent anti-Catholicism.[101]

According to Philip Hamburger, the anti-Catholicism could be attributed in no small part to the growth of the liberal Protestant emphasis on individual freedom. Consistent with attitudes formed in post-Reformation and Enlightenment Europe, nineteenth century American liberalism saw Catholicism's adherence to a unified creed enforced by a central ecclesial governance as a threat to the primacy of individual conscience.[102] John T. McGreevy states that throughout the nineteenth century the American "focus on individual autonomy . . . continued to nurture a concomitant anti-Catholicism."[103] Anti-Catholic hostility was embodied by the Know Nothings of the 1850s. Philip Jenkins has examined how this hostility was spurned in anti-Catholic

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[101] *See* Thomas J. Curry, FAREWELL TO CHRISTENDOM, THE FUTURE OF CHURCH AND STATE IN AMERICA (Oxford 2001), 18, 53-56.

[102] *See* Philip Hamburger, SEPARATION OF CHURCH AND STATE (Harvard 2002), 194-202.

[103] John T. McGreevy, CATHOLICISM AND AMERICAN FREEDOM (Norton, 2003), 94-95.

literature by unfavorable depictions of Catholic priests and by antagonism to hierarchical forms of church governance. One strain of the literature portrayed Catholic priests as lecherous criminals who raped virgins and seduced married woman even as they ruled their flocks with iron fists.[104] Another strain ascribed "authoritarianism, ostentatious wealth, theatricality, and all the flamboyant trappings of 'popery,'" that "implied effeminacy and secret homosexuality" to the Catholic clergy.[105] Jenkins suggests that the nineteenth century literature presented Catholicism as an "emotional, irrational, effeminate" religion in contrast to the "virile" nature of liberal Protestantism with emphasis on individual autonomy.

Given the hostility toward Catholicism during the nineteenth century, it is not surprising that the Catholic bishop's efforts to organize ecclesiastical property conflicted with widely held notions about church property in the United States.[106] In nineteenth century America, the accepted approach to church property was Protestant. It focused on local democratic control by lay men. Church property was viewed as part of a trustee corporation through which the elected lay trustees exercised physical control over it.[107] Legislators, judges and other public servants were largely Protestant and tended to view the Catholic Church's claim that its temporal goods were under the control of its hierarchy as nothing less than an attempt to impose government by a foreign

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[104]*See* Mark Twain, LETTERS FROM THE EARTH (Perennial, Bernard DeVoto, ed., 1974), 53.

[105] *See* Philip Jenkins, PEDOPHILES AND PRIESTS (Oxford, 1996), 23.

[106]*See* Patrick J. Dignan, A HISTORY OF THE LEGAL IN-CORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES (1784–1932) 51 (Washington, D.C., Catholic University of America, 1933).

[107]*See* Note, *Judicial Intervention in Disputes Over Church Property*, 75 HARV. L. REV. 1142, 1149–1154 (1962).

sovereignty.[108] Eager to adapt to the American way of life, some Catholics were also attracted to the concept of local democratic control of church property by the laity.[109]

The lay trustee controversy presented a significant challenge to the Catholic Church's understanding of itself and regulation of its temporal goods in the United States. During the nineteenth century, some states, such as Pennsylvania, adopted statutes that required control of church property be vested in the lay members of the various congregations.[110] This kind of statute set the stage for bitter disputes between lay members of Catholic parishes and the bishop over title to parish property. During these disputes, the laity often also sought to exercise control over the hiring and discharge of the pastor and all other significant administration of the parish. In certain instances, bishops were left with no alternative but to resort to strong canonical penalties against the laity.

On occasion these conflicts over lay trustees in Catholic parishes were litigated in the courts. The verdicts of various state courts during this time period must be described as mixed and fact specific. No clear pattern in favor of either side can be said to have carried the day. In a Pennsylvania case, for example, the highest court of the state held that canon law could not predominate over civil law and that the state simply did not recognize any temporal power of the bishop.[111] While in states such as Missouri,

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[108]*See* Paul G. Kauper & Stephen C. Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1499, 1521 (1973).

[109]*See* Dignan, A HISTORY OF THE LEGAL IN-CORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES, at 72.

[110]*See* 2 Pa. Digest of Laws (1860) (12th ed. 1895), as amended, PA. STAT. ANN. tit. 10, § 81 (1965).

precedent was established that recognized the hierarchical nature of the Catholic Church and vested control over church property in the diocesan bishop.[112]

In response to this confusion, the Catholic bishops asserted the Church's rights pursuant to canon law in a series of provincial and plenary councils at Baltimore. As early as 1829, while assembled for the First Provincial Council of Baltimore, the American bishops expressed their position that:

> Since lay trustees have frequently abused the right given to them by the civil power to the great detriment of religion and not without scandal to the faithful, we most earnestly [maxime optamus] desire that in the future no church shall be erected or consecrated, unless it shall be assigned by written instrument to the Bishop in whose diocese it is to be erected, wherever this can be done . . .[113]

The aversion of the American bishops to utilize state statutory provisions that regarded church property as held by lay trustees was evident at the Fourth Provincial Council of Baltimore of 1840. When necessary to secure ecclesiastical property, movable and immovable, the Council decreed that the property was to be held in the bishop's name and passed to his successor through the provisions of civil law, such as wills and testaments.[114] In 1843, the First Decree of the Fifth Provincial Council required that the

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[111] *See* Krauczunas v. Hoban, 70 A. 740 (1908).

[112] *See* Klix v. Polish Roman Catholic St. Stanislaus Parish, 137 Mo.App. 347 (1909).

[113] CONCILIA PROVINCIALIA BALTIMORI HABITA AB ANNO 1829 USQUE AD ANNUM 1849, V, 74 (Baltimore, Joannem Murphy et Socium, 1851). The above translation of the quoted portion of the Fifth Decree of the First Provincial Council of Baltimore appears in Dignan, A HISTORY OF THE LEGAL INCORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES, at 145.

[114] *See* CONCILIA PROVINCIALIA BALTIMORI HABITA AB ANNO 1829 USQUE AD ANNUM 1849, *supra* note 14, at VIII, 172. This portion of the Eighth Decree of the Fourth Provincial Council of Baltimore is quoted in Dignan, *supra* note 7, at 162 ("We advise all prelates sedulously to look after the security of

diocesan bishop, within three months of his taking possession of the diocese, execute a written will securing ecclesiastical property in accord with state law.[115] The Seventh Decree of the same council admonished that no church property was to be alienated (sold, mortgaged or leased) without the bishop's approval.[116] The First and Second Plenary Councils of Baltimore affirmed the necessity of holding title to property in accord with the canon law of the church and whatever appropriate provisions of the civil law to insure that the rights of the bishop are respected.[117] In 1866, the Third Plenary Council permitted the bishop to hold title under three different legal theories: as corporation sole, as trustee for the diocese, or as an individual with title in fee simple absolute.[118]

A notorious case in 1888 involving the Archbishop of Cincinnati, John Baptist Purcell, exposed the dangers of allowing bishops to hold title to diocesan property in fee simple.[119] The Vicar General of the Archdiocese, who was the brother of the Archbishop, had been accepting deposits of money from individual Catholics and then lending to others at interest. The Archbishop had guaranteed to insure the deposits with

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ecclesiastical goods by every means in their power; therefore they are to seek the protection of the laws or of the civil authority, wherever it can be had, the safety of the rights of the bishop, however, being guaranteed."); Peter Guilday, A HISTORY OF THE COUNCILS OF BALTIMORE, 1791-1884 (Arno Press 1969), 138.

[115]CONCILIA PROVINCIALIA BALTIMORI HABITA AB ANNO 1829 USQUE AD ANNUM 1849, *supra* note 14, at I, 216. *See* Guilday, A HISTORY OF THE COUNCILS OF BALTIMORE, at 138 (The will was to be deposited with the Archbishop or, in the case of the Archbishop's will, with the senior suffragan bishop).

[116] CONCILIA PROVINCIALIA BALTIMORI HABITA AB ANNO 1829 USQUE AD ANNUM 1849, at VII, 217. *See* Guilday, A HISTORY OF THE COUNCILS OF BALTIMORE, at 139.

[117]*See* Dignan, A HISTORY OF THE LEGAL IN-CORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES, at 189, 210–11.

[118]*See* ACTA ET DECRETA CONCILII PLENARII BALTIMORENSIS TERTII, 153–54, 267–69, (Baltimore, Joannis Murphy et Sociorum, 1886). English translation in John D. M. Barrett, A COMPARTIVE STUDY OF THE COUNCILS OF BALTIMORE AND THE CODE OF CANON LAW 186–87 (Washington, D.C., The Catholic University of America, 1932).

[119]*See* Dignan, A HISTORY OF THE LEGAL IN-CORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES, at 219–22.

his personally owned property, which included all the diocesan property that he held in fee simple. When the credit scheme failed, an assignee of the original investors sued the Archbishop and the Archdiocese for recovery. In *Mannix v. Purcell,* the Ohio courts denied the requested relief, holding that the bishop had no power under canon law to bind church property for his personal debts.[120] This holding was significant in that it deferred to the provisions of canon law. Although the Archdiocese was saved by the civil courts from financial ruin, the American bishops and the Holy See were deeply concerned that an individual bishop, who held ecclesiastical property in fee simple, might be able to jeopardize or even pillage church property.[121] In 1911, the Sacred Congregation for the Council issued a decree that required the bishop to hold title to church property either through the method of religious corporation or corporation sole. The Sacred Congregation also decreed that "[t]he method which is called *in Fee Simple* is totally to be abolished."[122] In situations where the civil law did not permit the religious corporation or corporation sole, canonical commentators at the time suggested that the bishop was permitted to hold the property as a trustee but not in fee simple.[123]

Starting at the end of the Civil War and continuing through the first half of the twentieth century, the hostility of civil law jurisdictions in the United States to the Catholic hierarchy's claims about church property gradually subsided. A variety of state

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[120]*See* Mannix v. Purcell, 24 N.E. 595 (1888).

[121]*See* Dignan, A HISTORY OF THE LEGAL IN-CORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES, at 235.

[122]An English translation of the decree appeared in 45 AMERICAN ECCLESIASTICAL REV. 585–86 (1911). *See also* A HISTORY OF THE LEGAL IN-CORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES, at 239–40.

[123]*See* Dignan, A HISTORY OF THE LEGAL IN-CORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES, at ___.

arrangements emerged under which the rights of the church were recognized.[124] A proto-typical statute was adopted in New York State at the end of the nineteenth century that allowed the acts of incorporation to be drawn so that the control of church personal and real property was left in the hands of the bishop.[125] In the statute, the corporation is composed of the bishop, the Vicar General and two other trustees who serve at the bishop's will.[126] The New York law functioned as the basis for the Congregation of the Council's 1911 decree.[127] That decree expressed a preference for the parish corporation over the corporation sole.[128] As a result of the changes to civil law during the twentieth century, dioceses throughout the United Sates were able to secure title to diocesan property, including that of the parishes. The history of the long, difficult, and ultimately successful effort of the Catholic bishops in the United States to obtain state law recognition of the hierarchical nature of parish property should not be overlooked.

IV. Canon Law and State Law

In addition to the unity of law and theology, canon law further contemplates that the canonical status of ecclesial property will be in accord with state law. Section 1 of Canon 1254 claims that the Church enjoys the right to acquire, retain, administer, and alienate temporal goods independent from any state government. This is not to suggest

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[124]*See id.*, at 214–44

[125]*See Act Supplementary to the Act entitled An Act to provide for the Incorporation of Religious Societies, passed April 5, 1813*, in *Laws of New York State passed at the Eighty-Sixth Session of the Legislature* (Albany 1863).

[126]*See* GEN. LAWS OF N.Y., I, 499 (1895).

[127]*See* 45 AMERICAN ECCLESIASTICAL REV. 585-86 (1911) (translating 1° of The Sacred Congregation's 1911 decree as: "Of the methods which now exist in the United States, for possessing and administering the possessions of the Church, that is to be preferred, which is popularly called the *Parish Corporation*, with however, those conditions and precautions, which are in use in the State of New York.").

[128]*See id.*

that the church intends to exercise its rights over temporal goods independent of the state law. To the contrary, Canon 1290, *83 CIC,* specifically recognizes the importance of securing the rights of the Church through respect for, and use of, the provision of state law. Canon 22, *83 CIC,* recognizes that canon law yields to state law in certain instances. This is known as the "canonization" of the state law. To mention but one example, section one of Canon 1282, *83 CIC,* requires that state statutes of labor law and policy be meticulously observed together with the Church's own social teaching in the Church's employment policies. The Church employer is thus bond by canon law to follow the state legislation that might for example establish a minimum wage or social security. Of course, it may well be the case that the social teaching of the Church requires even greater benefits that the state law requires. Canon does not yield to state law in general, but only in certain matters defined by the canon law itself. When the state law conflicts with either divine or canon law, the canon law prevails over the state law. Canon 22 requires that the effects of state law be observed in canon law with the same effects, and in this sense, the effects of the state law are canonized. In other words, the effects of the specific state law become part of the canon law. However, the canon law sometimes defers to the effects of state law without incorporating the state law into canon law. For example, Canon 1762, *83 CIC,* requires canon law to respect the merely state effects of marriage including matters such as custody of children, child support, and distribution of marital assets following divorce or separation. Although recognizing that a divorce in state law may be necessary to protect certain legal rights of one of the spouses or children, the canon law is not incorporating the state law on divorce into the law of the Church.

Sixteen states now provide special corporate forms for specific religious denominations, and nine of those states expressly identify the Catholic Church.[129] Many states also generally permit the establishment of some type of a religious corporation for other religious denominations.[130] At least seventeen states and the District of Columbia permit the corporation sole, which, as its name implies, is a one-person incorporation.[131] In hierarchical churches such as the Catholic Church, the office holder of this corporate form is the diocesan bishop. All of the states have some form of statutory recognition of

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[129]They are: Connecticut, CONN. GEN. STAT. ANN. §§ 33-265 to -281a (West 1997); Delaware, DEL. CODE ANN. tit. 27, §§ 114–18 (2004); Illinois, 805 ILL. COMP. STAT. ANN. 110/50 (West 2004); Louisiana, LA. REV. STAT. ANN. §§ 12:481–:483 (West 2004); Maine, ME. REV. STAT. ANN. tit. 13, § 2986 (West 2003); Maryland, MD. CODE ANN., CORPS. & ASS'NS § 5-314 to -338 (2004); Massachusetts, MASS. GEN. LAWS ANN. ch. 67, §§ 39–46, 55 (West 2001); Michigan, MICH. COMP. LAWS ANN. §§ 458.1–.535 (West 2002); New Hampshire, N.H. REV. STAT. ANN. §§ 292:15–:17 (2004); New Jersey, N.J. STAT. ANN. §§ 16:2-1 to :20-7 (West 2004); New York, N.Y. RELIG. CORP. LAW §§ 40–455 (McKinney 2003); Vermont, VT. STAT. ANN. tit. 27 §§ 861–66 (2003); and Wisconsin, WIS. STAT. ANN. §§ 187.04, .10–.11, .15, .17–.19 (West 2004). Eight of these thirteen state statutes—Connecticut, Delaware, Massachusetts, Michigan, New Jersey, New York, and Wisconsin—specifically mention the Roman Catholic Church. It should also be noted that the state constitutions of Virginia and West Virginia expressly forbid the granting of a charter of incorporation to any church or religious entity. *See* VA. CONST. art. IV, § 14; W. VA. CONST. art. VI, § 47. At least one court, however has found such a provision unconstitutional under the free exercise clause of the First and Fourteenth Amendments of the United States Constitution. *See* Falwell v. Miller, 203 F. Supp. 2d 624 (W.D. Va. 2002).

[130]They are: Alabama, ALA CODE § 10-4-20, -4-40 (2003); Colorado, COLO REV. STAT. ANN. § 7-51-113 (West 1998); Connecticut, CONN GEN. STAT. ANN. § 33-264a (West 1997); Delaware, DEL. CODE ANN. tit. 27, § 101 (2004); Washington, D.C., D.C. CODE ANN. § 29-801 to -806 (2004); Georgia, GA. CODE ANN. §§ 14-5-43 to -51 (2004); Kansas, KAN. STAT. ANN. § 17-1701 (2003); Illinois, 805 ILL. COMP. STAT. ANN. 110/35 (West 2004); Maine, ME. REV. STAT. ANN. tit. 13, §§ 2861 (West 2003); Maryland, MD. CODE ANN., CORPS. & ASS'NS § 5-301 to -313 (2004); Massachusetts, MASS. GEN. LAWS ANN. ch. 67, §§ 21–23, 47–54 (West. 2001); Minnesota, MINN. STAT. ANN. §§ 315.01–.51 (West 2004); New Jersey, N.J. STAT. ANN. § 16:1-1 to -39 (West 2004); Ohio, OHIO REV. CODE ANN. §§ 1715.01-.22 (West 2005); Vermont, VT. STAT. ANN. tit. 27 §§ 701–706 (2003); and Wisconsin, WIS. STAT. ANN. § 187.01 (West 2004).

[131]They are: Alabama, ALA. CODE § 10-4-1 (2003); Alaska, ALASKA STAT. §§ 10.40.010-.150 (Michie 2003); Arizona, ARIZ. REV. STAT. ANN §§ 10-11901 to -11908 (West 2004); California, CAL. CORP. CODE §§ 10000–15 (West 2004); Colorado, COLO REV. STAT. ANN. §§ 7-52-101 to -106 (West 1998); Hawaii, HAWAII REV. STAT. §§ 419-1 to -9 (2002); Indiana, IND. CODE ANN. § 23-17-2-12 (West 2005); Mississippi, MISS. CODE ANN. §§ 79-11-127 (2004); Montana, MONT. CODE ANN. §§ 35-3-101 to -103 (2003); Nebraska, NEB. REV. STAT. § 21-1914 (2004); Nevada, NEV. REV. STAT. 84.002–.150 (2003); Oregon, OR. REV. STAT. § 65.067 (2003); South Carolina, S.C. CODE ANN. § 33-31-140 (Law. Co-op. 2004); Utah, UTAH CODE ANN. §§ 16-7-1 to -16 (2004) (but note that according to § 16-7-16 a corporation sole cannot be formed in Utah after May 3, 2004); Washington, WASH. REV. CODE ANN. §§ 24.12.010–.060 (West 2004); and Wyoming, WYO. STAT. ANN. §§ 17-8-101 to -117 (Michie 2004).

non-profit incorporations, which include not only religious organizations but also other kinds of educational, social, and charitable organizations. Some twenty-five states have statutes that recognize unincorporated voluntary religious associations.[132] Numerous states allow a church to elect one or more of the above types of organization.

The structures of organization that a particular diocese adopts to secure its temporal goods in state law reflect the hierarchical relationship between the diocese and parish. In instances where parishes are separately incorporated from the diocese in state law, the statutes and by-laws of the parish corporations are carefully drawn to insure that the bishop retains ordinary and immediate power over the temporal goods of the parish. This can be accomplished in a variety of ways, such as the bishop's power to appoint and remove the trustees of the parish corporation and/or reserving certain powers to the bishop with regard to the acquisition, use and sale of parish property. The same is true for dioceses that elect to form religious associations under a particular state's statutory scheme. In the alternative, the bishop may be recognized under state law as a corporation sole with the power over the property of the diocese and all its parishes.

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[132]They are: Alaska, ALASKA STAT. § 10.40.120 (Michie 2003); Arkansas, ARK. CODE. ANN. §§ 18-11-201 to -202 (Michie 2002); Connecticut, CONN. GEN. STAT. ANN. § 33-264a (West 1997); Washington, D.C., D.C. CODE ANN. § 29-701 to -712 (2004); Florida, FLA. STAT. ANN.. §§ 617.2004–2005 (West 2001); Kansas, KAN. STAT. ANN. §§ 17-1711 to -1758 (2003); Kentucky, KY. REV. STAT. ANN. §§ 273.090–.140 (Banks-Baldwin 2003); Massachusetts, MASS. GEN. LAWS ANN. ch. 67, § 2 (West 2001); Mississippi, MISS. CODE ANN. §§ 79-11-31 to -47 (2004); Nebraska, NEB. REV. STAT. §§ 21-2801 to -2803 (2004); New Hampshire, N.H. REV. STAT. ANN. §§ 306:1–:12 (2004); New Jersey, N.J. STAT. ANN. § 16:1-39 (West 2004); North Carolina, N.C. GEN. STAT. §§ 61-1 to -6 (2004); Oklahoma, OKLA. STAT. ANN. tit. 18, § 562 (West 1998); Pennsylvania, PA. STAT. ANN. tit. 10, §§ 21, 81 (West 1998); Tennessee, TENN. CODE. ANN. §§ 66-2-201 to -203 (2003); Utah, UTAH CODE ANN. §§ 16-7-10 (2003); Vermont, VT. STAT. ANN. tit. 27, §§ 781–944 (2003); Virginia, VA. CODE. ANN. §§ 57-1 to -17 (Michie 2003); West Virginia, W. VA. CODE ANN. §§35-1-1 to -13 (Michie 2004); Wisconsin, WIS. STAT. ANN. § 187.07 (West 2002); and Wyoming, WYO. STAT. ANN. § 1-32-121 (Michie 2004). While not specifically religious, New Mexico and Texas do allow for unincorporated associations formed for nonprofit reasons, and thus including religious associations. N.M. STAT. ANN. §§ 53-10-1 to -7 (Michie 2004); TEX. CORPS. & ASS'NS CODE ANN. §§ 252.001–.017 (Vernon 2004).

Lawsuits against dioceses for clergy sexual abuse have prompted some dioceses to form parish corporations which are nominally distinct from the diocese under state law.[133] Whether or not separate incorporation of diocesan units such as parishes, hospitals, and schools will shield them from liability in a child abuse case against the diocese is open to debate. The secular legal doctrines of piercing the corporate veil and enterprise liability apply when a court concludes that the separate incorporation must yield to a functional unity between it and some other legal or real person on account of ownership and/or control. The idea that the separate incorporations function as the "alter ego" of the bishop remains critical to piercing the corporate veil, a finding of enterprise liability, or some other legal means for reaching the assets of the separate corporations. Stephen M. Bainbridge and Aaron H. Cole argue that the alter ego principle does not apply to the diocesan-parish relationship.[134] An entity such as a parish corporation is considered to be the alter ego of another person or entity such as a bishop or diocese when two requirements are met. First, one entity exercises such a high degree of control over the other that the entities have lost a separate existence. As evident from the relationship between the diocese and parish as discussed in this Chapter, the parish enjoys a significant amount of autonomy although the bishop has ultimate responsibility for its governance and continued existence. Second, the control of one entity over the other must involve an abuse of the power of control. In evaluating the second requirement, courts may take into account the ability of an innocent party to fulfill it legitimate

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[133]*See* Kennedy, CLSA-2000, 1457.

[134] *See* Stephen M. Brainbridge & Aaron H. Cole, *The Bishops Alter Ego: Enterprise Liability and the Catholic Priest Sex Abuse Scandal,* 16-35.

corporate ends. As discussed in the next Chapter, the free-exercise and religion clauses of the United States Constitution protect the ends of the parish corporation.

In any event, the separate incorporation of parishes should not be understood as meaning that the bishop intends to forsake his hierarchical authority in favor of self rule by the parish corporation. As discussed in the previous section, the separate incorporation of Catholic parishes in the United States in not a new phenomena. During the nineteenth century, the United States Catholic bishops engaged in an arduous battle to secure state law recognition of their church's hierarchical form of government. From the perspective of the Catholic Church, the preferential organizational form for the diocese pursuant to state law remains separate parish incorporations. Typically, the bylaws for each of the parish corporations establish the bishop as the sole member with power to appoint and remove directors at will. They also identify the bishop as one of the directors. Characteristic bylaws require that all actions of the board of directors must have approval of the bishop. The bishop may exercise control over the parish corporation through his veto power and appointment power of the vicar general and pastor as directors. The state's corporation law thus provides a legal method for the Catholic bishop to fulfill his responsibility under canon law to govern the diocese and its parishes.

In canon law, the canonization of state law is intended to secure the right of the Catholic Church to the possession and use of property in accord with the Church's theological self-understanding. The Church defines itself as an institution with communal and hierarchical characteristics that are intended to foster certain religious and charitable objectives. The Reformation in England serves as a reminder of what may happen to religious and charitable objectives when the state disrespects a church's right

to own private property. A popular interpretation of the Protestant Reformation stresses an institutional medieval church which had become so corrupt that it collapsed once a more credible Christian alternative appeared.[135] As the work of Eamon Duffy's has shown, this interpretation fails to do justice to the culture of religious belief and practice in pre-Reformation England.[136] In particular, English parishes during the early 1530s were generally neither dysfunctional nor decayed but vigorous and vibrant.[137] Starting with Henry VIII and culminating in the Elizabethan state, devoted religious communities witnessed the seizure and diversion of their earthly goods. Not only did it dissolve the great monasteries, but the Crown also used its power in such a way that local communities no longer revolved around the religious life of the parish but the secular demands of the state. Pre-Reformation ecclesiastical corporations may have possessed too much property and wealth for the health of the state. At the same time, the Protestant sovereigns more often than not diverted monastic and parish endowments from charitable ends such as schools, hospitals and care for the poor to secular purposes such as the need to finance armies and other national interests.[138] With the notable exception of John Fisher, most of the English hierarchy acquiesced to government control of church property.[139]

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[135]*See* Owen Chadwick, THE REFORMATION (New York: Penguin Books 1978), 22.

[136]*See* Eamon Dufy, THE STRIPPING OF THE ALTARS, TRADITIONAL RELIGION IN ENGLAND 1400-1580, 2d ed. (Yale University Press 2005).

[137]*See e.g.* Eamon Duffy, THE VOICES OF MOREBATH, REFORMATION AND REBELLION IN AN ENGLISH VILLAGE (Yale University Press 2003).

[138]*See* Chadwick, *supra* note 1, at 109.

[139]*See* Duffy, THE STRIPPING OF THE ALTARS, 591-592.

The situation with regards to the ownership of church property in the United States at the start of the twenty-first century is, of course, far removed from that of Reformation England. Nonetheless, an approach to church property that denies the theological emphasis on common ownership, apostolic poverty, and the church's mission represents legalism. This legalism yields an approach to canon law that does not comport with the church's theological self-understanding as a divine instrument of salvation in human history. At the same time, the approach also fosters antinomianism repudiating the validity of the legal element in canon law. In a pristine version espoused by the Franciscan spiritualists, antinomianism viewed all church property as held in common. The spiritualist version devalued the ownership of property to the continuity of the church's mission. The Reformation also fostered a version of antinomianism which rejected canon law as opposed to the spirit of the gospel. In denying the legitimate function of canon law, this version held that church property is owned simply in accord with the secular law. Given the Reformation emphasis on the centrality of sacred scripture, the denial of the validity of canon law yielded a paradoxical effect. In deferring to the secular law, the denial diminished the importance of the theological ideal of common ownership and use of ecclesiastical goods in accord with apostolic poverty. It severed the unity of law and theology abrogating the balance between the theological and legal element of canon law in favor of the property theory of the secular state.

Conclusion

The tension between theological and legal claims in early Christianity has shaped the way in which the church views its own property. On the one hand, property within the church was always to be held for the community and with an eye toward apostolic

poverty. On the other hand, the continuity of the mission of the church was so attached to property that ecclesiastical authorities developed pseudo-historical records to justify the church's endowment. The compilation of Justinian contains legislation protective of the church's right to own property in accord with the gospel ideal under the stewardship of the bishop and clergy. The growth of monasticism helped to secure a notion of common ownership under the direction of ecclesiastical authorities as a hallmark of ownership of property within the church. Although thinkers such as Augustine and Thomas Aquinas recognized the need for private property in secular society, their respective theories maintained fidelity to the gospel ideal.

The church's understanding of its temporal goods as reflected in canon law differs from the way that the liberal state understands the nature of private property. Liberal theory focuses on the protection of private property rights vested in individuals who may exercise control over property in accord with subjective preferences as long as they are lawful. In contrast, the church does not understand its temporal goods as owned by any particular individual with an unqualified dominion. Rather, the church's tradition and canon law highlight the communal dimension and purpose of property that is held in the church's name. As with any individual right, canon law requires that the right to private property be exercised in harmony with the common good. In canon law, there is no absolute right to private property.

Theologically, the Catholic Church considers itself to constitute an organic whole and a universal community governed by the College of Bishops with the Successor to Peter at its head. Vatican II's focus on the autonomy of the particular church within the universal church is instructive about the canonical relation between the diocese and the

parish. The diocese as a particular church is much more than an administrative unit of the universal church. In contrast, the parish is not an autonomous or self-sustaining church, but rather a part of the diocese. In the canon law, the parish as juridic person has the right to acquire, administer and alienate property, but that right is always exercised under the hierarchical authority of the diocesan bishop. It is true that parish owns the temporal goods entrusted to it, but in accord with the gospel, it is not an absolute ownership. Canon law contemplates that parish property is owned in accord with the theological principles of the gospel preference for common ownership and poverty, the hierarchical relation between the diocese and parish, and the mission of the Church as discerned by the diocesan bishop.

In the United States, the history of the Catholic Church's nineteenth struggle to secure its temporal goods under the authority of the diocesan bishop in accord with canon law suggests that the successful efforts in this regard ought not to be forsaken. By the mid-point of the twentieth century, the church's efforts were successful. The law of each of the fifty states affords provisions, such as the religious corporation, corporation sole and religious association, which permit the diocese to secure the mission and purpose of ecclesiastical property in accord with the hierarchical structure of the Catholic Church. Given the philosophical, theological, and canonical considerations, it would be ironic if at the start of the twenty first century the Catholic bishops of the United States relinquished the hard won victor of their nineteenth century predecessors.

The present confusion over the ownership of parish property is illustrative of a misunderstanding of the proper function of canon law. When a bishop repudiates canonical authority over parish property, it yields both legalism and antinomianism.

Legalism diminishes the theological emphasis on common ownership, apostolic property, and the church's mission in canon law. By severing the unity of law and theology, legalism fosters confusion about the proper relationship between church property and the communal nature of the Catholic Church. Antinomianism rejects the necessity of an ecclesiastical legal element in the regulation of church property. Rejecting the function of canon law in regulating church property, antinomianism fosters confusion about the hierarchical nature of the Catholic Church. Both types of confusion favor a congregationalist approach in which the parish owns property irrespective of the Church's communal and hierarchical nature. The confusion disrupts the careful balance that canon law attempts to maintain between theological and legal elements that comprise the understanding by which the Catholic Church holds its own property.