THE FIRST AMENDMENT RELIGION CLAUSES AND ECONOMIC CRIME INVOLVING CHURCHES

A Research Project

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(for additional information contact
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Abstract

This project examines the First Amendment Religion Clauses and their influence on economic crime (i.e. fraud) involving churches. Our forefathers attempted to constitutionally guarantee two religious freedoms – absence of a national religion (Establishment Clause) and absence of interference in the free exercise of religion (Free Exercise Clause), collectively known as the Religion Clauses. However, judicial interpretation of the framers' intent has evolved from one of religious neutrality to where we now live in an environment of secularism in 21st century America, quite the contrary to the religion-friendly atmosphere that existed during colonial times. Based on a study of litigation involving churches and economic crime case studies, the project found that American jurisprudence has redirected interpretation of the religious freedoms to the point that a variety of questionable behaviors in the name of religion have found First Amendment protection. The Religion Clauses have become an American vulnerability. The Sarbanes Oxley Act of 2002 was designed to protect investors who trust corporations to use their funds conscientiously, yet no such protection exists for donors who trust churches with their contributions. A number of non-ecclesiastical methods for financial regulation of churches are presented. Donors are entitled to some assurance that their financial contributions are not misappropriated under the "cloak of religion."

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This paper is dedicated to my precious mother, who went to sleep in Jesus while this project was in process. I love you, Mom. You will always be in my heart.

The First Amendment Religion Clauses and Economic Crime Involving Churches

In the 18th century as our forefathers carefully laid the foundation of our great country, it was important to them that the newly formed federal government should not be provided the opportunity to establish a national religion, or the ability to interfere in the free exercise of religion. Many would argue that American jurisprudence has moved far beyond that original edict.

The purpose of this research project was to study the relationship between the First Amendment Religion Clauses, otherwise known as the Establishment Clause and the Free Exercise Clause, and economic crime, otherwise known as fraud, within the church sector. As the First Amendment precludes government interference with the free exercise of religion, the federal taxing authority is severely limited in its tax-exempt oversight role with regard to the financial activities of a church. Specifically, Congress has provided a mandatory tax-exemption from Internal Revenue Service (IRS) oversight for any entity organized as a church. Yet anyone can be ordained for a small fee and start a church. Within the framework of the wall of separation between church and state and its contribution to the evolution of internet churches, megachurches, televangelism, commercialized religion and economic crime in the name of God, this project will attempt to address the following questions:

1. How has the interpretation of the First Amendment Religion Clauses changed since the days of America's founding fathers?
2. What effect has this change had on economic crime involving churches?
    a. Does the current interpretation of the Religion Clauses enable the creation and survival of non-legitimate churches?

b. Does the current interpretation of the Religion Clauses enable misappropriation of funds within legitimate churches?

3. In relation to management of economic crime, should any action be taken to challenge the judicial re-interpretation of the Religion Clauses congressionally, or is the current environment acceptable?
4. What can legitimate churches do to protect themselves against economic crime?

It is anticipated that this research will substantiate the notion that an exploitable loophole exists in our country's efforts to protect our charitable donors and even our homeland security in light of the current church oversight and governance environment. It is not this writer's intent to challenge the concept of separation of church and state or to advocate for church regulation by the federal government but instead, to pursue increased church accountability.

Recent years have seen incredible case studies of greed and occupational fraud. From well known blue chip corporations to small companies, from the real estate industry to televangelism, no organization or industry can consider itself exempt from this growing societal issue, including churches. It is time for society to re-evaluate the current church governance environment, to question how easy it is to claim church status and begin collecting tax-free money, to wonder how a church really spends its money and who would know, or should know, if charitable contributions are being diverted. It is possible that our First Amendment religious protections are being exploited beyond acceptable measures. The evolution of church protectionism may need to be harnessed.

History and Background

According to statistics published by a popular charity watchdog group, charitable giving topped $300 billion in 2009 and a third of it went to religious organizations (Charity, 2010).

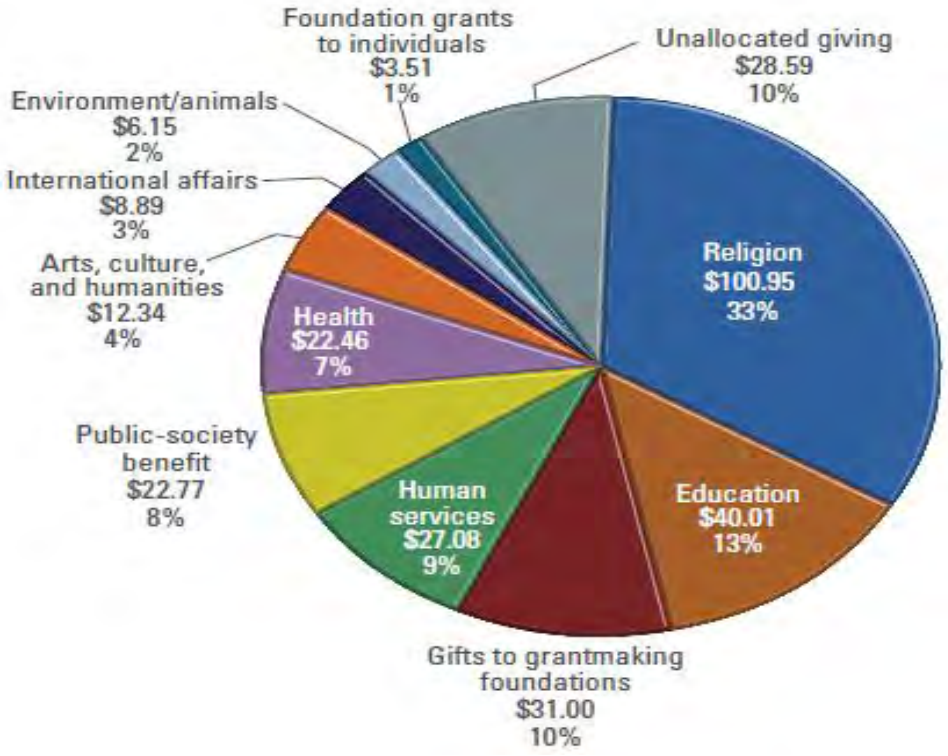


Figure 1. 2009 contributions: $303.75 billion by type of recipient organization. $ in billions – All figures are rounded. (Charity, 2010)

At first glance, this might bring to mind visions of altruism and unselfish congregational support for clergy, soup kitchens and orphanages. However, in our integrated global world where religion, politics, technology and tax law interact to form an intricate and complicated web, identification of the true beneficiaries of that $100 billion requires closer analysis.

Religious entities that fall within the umbrella definition of a church, according to the IRS, enjoy special protection under the law. An entity organized as a church is automatically recognized as tax-exempt by the IRS without even having to apply, making them also exempt from annual filing requirements (Section 508, 2007). The IRS must follow very strict guidelines when even attempting an inquiry into the financial affairs of a church (Section 7611, 2007). In the absence of any external oversight, the only governance must come from within. Corporate America's recent governance scandals were met with sweeping reform legislation known as the Sarbanes-Oxley (SOX) Act of 2002. Yet scandals in the name of God, Allah, and organized religion have been met with little response.

In November 2007, United States (U.S.) Senator Chuck Grassley of Iowa initiated an investigation into allegations of financial abuse by six televangelists and their church organizations. However, none of them were legally obligated to respond or cooperate with his queries (WDSU.com, 2007). Over three years later, the investigation was wrapped up without penalty or prosecution, even though four of the six televangelists refused to provide complete responses to the senator. Grassley's report raises questions about the lavish lifestyles of the televangelists and their families, and the hand-picked boards charged with governance. Grassley was accused of "oversight overstep" and even violating their religious freedoms, as they preach the "prosperity gospel" which teaches that God blesses the faithful with earthly riches. Grassley's report said the investigation was not pursued due to time and budgetary constraints (Zoll, 2011).

This fierce protection of religious freedoms has its roots in the Religion Clauses of the First Amendment to the U.S. Constitution which states in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. ("U.S. Constitution", 1791)

Recognizing that not all religious organizations are churches, this project will study only those that are or at least claim to be, and particularly the relationship between First Amendment religious protection and incidents of economic crime involving churches. Again, the intent is not to attack one of the dearly held foundations of our democracy. From an extremist perspective, if the war against terrorism is truly a holy war, or "jihad", maybe the logic behind the automatic church exemption should be revisited given that churches are held accountable to no one but themselves. America is hated for its democracy, capitalism and Christian roots, and the post-September 11 environment finds the world squarely in the middle of religious unrest.

Yet current federal tax law protects not only churches but chapels, missions, mosques, shrines, synagogues, tabernacles and temples from any external oversight (in subsequent discussion, the term "church" will be assumed to encompass all of the aforementioned and use of the term "God" is considered to be all inclusive of any Higher Powers). Thus any governance is internal, and for an entity organized under false pretenses in the first place, the possibilities are endless. On the other hand, the legitimate church entity left to self-policing is exceptionally vulnerable by default to economic crime, as it operates in an environment where everyone trusts each other and safeguards against misuse of resources often are not a priority. Relevant to this project are questionable church recipients and the questionable use of funds by legitimate churches.

Questionable Recipients

At the outset of this section it is important to note that the intent is not to point the finger of non-legitimacy at every subject organization or circumstance discussed herein, but to explore how tightly controlled "church" status really is. Conversely, even if only a portion of an organization is questionable, it could be included here. Of particular interest are the requirements for starting a church, the lifestyles of the televangelists and the business of Scientology.

In the U.S. today, anyone can start a church and claim tax exempt status. This policy creates a strong incentive for groups to declare a religious purpose, and can result in prolonged legal battles and court decisions over whether an organization is really a church or not. The "space alien cult of Scientology" is a case in point (Chenoweth, 2007). To make that determination, the judiciary must look to the legislature to set policy as to what constitutes a church. Yet, even the IRS cannot clearly define what a church is (Shaller, 1990), and jurisprudence struggles with the definition of a religion (Oldham, 2001). Increasingly, people are calling for elimination of the tax exempt status for churches, arguing that there would no longer be a need to fight over church status or its use as a tax strategy, and that no one's freedom of religion would be threatened…other than their imaginary right to do anything they want just because they are a church (Chenoweth, 2007).

Questionable Uses by Legitimate Recipients

The greatest challenge faced by legitimate churches in pursuit of fraud prevention is their culture – simply in getting the group to believe they might be at risk. A legitimate church tends to believe that its purposes are sufficient to protect it from

financial misconduct. By its pure nature, a legitimate church is both trusting and willing to forgive transgressors.

If that challenge cannot be overcome, the main struggle for legitimate churches in fraud prevention and detection will continue to be either a change to, or a work around of, organizational behaviors in an effort to address the ultimate question: "Who would steal from God" (Snyder and Clifton, 2005, p. 2)? In answer to that question, the words of an accountant and fraud examiner ring true: "White collar criminals rarely discriminate. Every stash of cash is a target" (Shedd, 1999, p. 1). Financial controls must be a high priority. Biblical cautions against an unhealthy desire for money should not be mistaken for approval of negligent financial stewardship. "Of 37 parables in the Bible…17 are concerned with money" (Snyder and Clifton, 2005, p. 3).

Literature Review

Given the legislative effort to protect churches from government interference, research is limited regarding their oversight and internal affairs. A substantial amount of background research for this paper came directly from IRS sources including the Internal Revenue Code (IRC) itself, publications, and continuing professional education updates on tax law changes.

A study of local church governance practices by the Academy of Accounting and Financial Studies Journal was published in 2007. A questionnaire was sent to 249 individual church organizations of varying denominations in the state of Georgia. The questionnaire sought answers to 28 yes or no questions on the topics of board practices and internal controls. The study's conclusion was that church governance was adequate

but left room for improvement. It also advised future researchers to sample a more diverse population and to include a more robust scale for answers (Corporate, 2007).

In 2001, the Texas Forum on Civil Liberties & Civil Rights published a study of the definition of religion, prompted by President George W. Bush's new program enabling federal funding to faith-based organizations for doing public good (i.e., disaster relief). As with any government program, criteria had to be set to determine who would qualify which, in this case, meant determining what constitutes a religion. The writer utilized a review of historical data, including judicial and scholarly attempts at defining religion. Several conclusions were drawn from the review of relevant litigation at all levels of the federal court system (Oldham, 2001):

- Courts are not willing to delve into determining the validity of religious beliefs, but the sincerity of the believers may be subject to judicial review.
- In recent decades, courts have moved away from a definition of religion that includes the traditional theistic belief system.
- Notwithstanding the perception that the Supreme Court has tried to avoid the issue, it appears to have accepted an over-inclusive, expansive definition which the lower courts have adhered to.
- The most common definitions are analogical, and include elements of both the functional and the content-based structures (defined below).
- There is little precedent regarding a specific definition.

The review of scholarly definitions yielded three major approaches:

- The functional approach, the most popular, defines religion based on the function it plays in one's life. The real beliefs and duties involved are irrelevant compared

to the role that they play in the lives of believers. A consequence of this approach is that any strongly held belief system can arguably find protection under the First Amendment.

- The content-based approach, more traditional, attempts to classify beliefs as "religious" based on specific features, or content. Of course the most traditional definition includes a belief in God – a theistic element. The existence of God is accepted regardless of the role He might play in one's life. However, the theistic requirement for an all-encompassing definition was clearly biased, so "theistic" was replaced with "supernatural assumptions". In response to the argument that even the expanded definition was exclusive, that was the idea. The First Amendment Religion Clauses were intended to prevent the establishment of a national religion and to protect the rights of individuals to exercise their religious beliefs freely. Thus, content-based approaches are narrower, more restrictive and quite biased toward traditional Western belief systems.
- The analogical approach, essentially a combination of the two, attempts to classify a belief system as religious depending on how it compares to a belief system popularly accepted as religious, such as Christianity, and if it addresses the same types of questions. This approach would automatically disregard many modern belief systems. It also gives a great degree of discretion to the judiciary.

The conclusions reached from the scholarly review were that scholars tended to lean away from a content-based definition and to lean toward an over-inclusive definition. A substantial minority of scholars, concerned with the sweeping changes made by the Supreme Court regarding interpretation of the Religion Clauses, believe that a

more limited protection was originally intended. The writer advocates returning to the more narrowly drawn content-based approach as being consistent with the Framers' original intent, and proposed this definition: "Religion is a faith-based system of beliefs and actions that makes reference to a supernatural reality that dictates the believers' perception of good and evil, and answers questions arising from the existence of such forces" (Oldham, 2001, p. 170). He concludes with the point that to protect religious rights and preserve their importance, it is necessary to adopt a definition that does not compromise the nature of religion by being so broad that everything qualifies.

The SOX Act of 2002 legislated corporate accountability requirements in the wake of several scandals involving publicly traded companies. Since then, federal and state lawmakers and regulators have started directing their attention to the non-profit sector in an effort to improve accountability, governance and transparency (Protiviti, 2005). Of course, churches are automatically exempt from scrutiny.

Churches and Terrorism

The events of September 11, 2001 are forever seared into our memories over 10 years later. As a nation, we had been exposed to media reports of other similar events born out of the same sick minds, but never on our own soil. We watched in horror for days, weeks and months while thousands waited desperately for word of their loved ones. Ultimately the news for some was joyful, but for the families of nearly 3,000 others that was not the case. In the name of Allah, our lives were forever changed that day. America faced a new kind of terrorist warfare which is often termed the holy war, or jihad. The threat was not new. On February 23, 1998 Osama bin Laden and his associates issued a fatwa, or religious ruling, in an Arabic newspaper calling on Muslims to kill Americans

in the name of Allah (World Islamic, 1998). And on May 28, 2001 less than four months before his supporters would follow his directions and attempt to fly four commercial airliners into U.S. targets, bin Laden confirmed the fatwa in an interview with an ABC news correspondent (Osama, 2009).

Nearly six years after September 11, 2001, the officers of the Holy Land Foundation (HLF), once America's largest Islamic charity, were on trial in what our government called the biggest terrorism-financing case in U.S. history. It is alleged that charity work was merely a cover for HLF, and that most of the $57 million it solicited between 1988 and 2001 (when it was closed by federal authorities) was distributed either to individuals associated with, or organizations controlled by, Hamas, a Palestinian militant organization. Not surprisingly, Muslim groups decry the closure of HLF, stating that Muslims are now afraid to donate to any religious organization for fear of repercussions under the USA Patriot Act, America's legislative response to the attacks of September 11. Also not surprising is the response of some Jewish groups to that argument. Their position is that there were many innocent people with a simply altruistic intent who thought they were giving to a legitimate charity. The HLF organizers, however, were clear on their "charitable" objective which was to support terrorists (Kovach, 2007).

While HLF did not claim church status and thus was required to apply for tax-exempt status and to file an annual information return with the IRS, the story of its demise is included here as an illustration of intentional charitable misuse under the guise of religion. If HLF had qualified as a church and not had to file its annual financial return

with the IRS, U.S. authorities might not have been successful in tracking its activities and shutting it down. The guise of religion has become a tool in the hands of jihadists.

The U.S. Department of the Treasury issued a set of guidelines in 2002 to assist the charitable sector in protecting themselves from terrorist abuse in response to President George W. Bush's order for a sustained and thorough campaign against terrorist financing. In December of 2005 the Treasury opened a public comment period and issued updated guidelines the following September. While the guidelines are voluntary and adherence to them does not guarantee protection, the first paragraph of the introduction states that "investigations have revealed terrorist abuse of charitable organizations, both in the U.S. and worldwide, to raise and move funds, provide logistical support, encourage terrorist recruitment or otherwise cultivate support for terrorist organizations and operations" (U.S. Department, 2006, p. 2). The guidelines are intended to assist charities with a risk-based approach to guard against diversion or exploitation of charitable funds or activities and are divided into five sections:

1. Fundamental principles, including adoption of policies and procedures and emphasis on the importance of the fiduciary roles, governance, accountability and fiscal responsibility.
2. Governance, accountability and transparency, including the importance of defining and governing documents, independent oversight, and selection of key employees.
3. Financial accountability and transparency, including the importance of a formal budget process, a means of accounting for receipt and disbursements of funds and

the ability to provide an annual report to the public upon request, and an independent audit for organizations with gross income in excess of $250,000.

4. Programmatic verification, including ongoing monitoring of grantee activity and program spending, and correction of any issues noted.
5. Best practices:
    a. Collect basic information about grantees, including their name in English and the language of origin, the jurisdiction in which they reside, any reasonably available historical information about the grantee, their postal, email and internet addresses and any telephone numbers of the grantee and any sub-grantees to the extent reasonable, a statement of their principal purpose, copies of any public filings or releases made, and their source of income.
    b. Conduct basic vetting, including a search of publicly available information about the grantee, learning a reasonable degree of background information about key employees, and ascertaining that it does not appear on any government watch list.

Megachurches and Televangelists

Hartford Seminary's Hartford Institute for Religion Research (HIRR) defines the term "megachurch" as any Protestant congregation with the following characteristics:

- an average, sustained weekly attendance of at least 2,000 individuals,
- an authoritative and charismatic senior minister,
- an active congregational community seven days a week,
- many social and outreach ministries and,
- a differentiated and complex organizational structure.

HIRR maintains a database of megachurches in the U.S. and Canada which is updated regularly. The database includes congregations at the 1,800 attendance mark to account for fluctuations throughout the year and the possibility the organization really did reach attendance of 2,000. As of this writing 1,413 church organizations were listed in the megachurch database. The ten largest are included in Table 1:

Table 1

Ten Largest Megachurches

Church Name	City	State	Average Attend.	Denom
Lakewood Church Joel Osteen	Houston	TX	43500	NONDENOM
LifeChurch Craig Groeschel	Edmond	OK	26776	EC
Fellowship Church Ed Young, Jr.	Grapevine	TX	24000	SBC
Willow Creek Community Church Bill Hybels	South Barrington	IL	23400	NONDENOM
North Point Community Church Andy Stanley	Alpharetta	GA	23377	NONDENOM
Second Baptist Church Edwin Young	Houston	TX	22723	SBC
Saddleback Valley Community Church Rick Warren	Lake Forest	CA	22418	SBC
West Angeles Church of God in Christ Charles Blake	Los Angeles	CA	20000	COGIC
Southeast Christian Church Dave Stone	Louisville	KY	17261	CHRISTIAN
Fellowship of the Woodlands Kerry Shook	The Woodlands	TX	17142	NONDENOM

Note. From Hartford, 2011

In November 2010, the U.S. Trustee in the Crystal Cathedral Chapter 11 bankruptcy proceeding filed objections and a request for an evidentiary hearing regarding the declared salaries for three employees – the chief financial officer (CFO) and the daughter and granddaughter of founder Robert Schuller. The megachurch filed for bankruptcy protection the previous month due to a series of financial problems. Yet according to court documents, the Schuller family members combined make a little over $1 million annually (Bharath, 2010).

In today's world of technology, it is not unusual for a megachurch to be home to a televangelist. An article on a private Christian website which has called attention to the affluent lifestyles of many popular televangelists begins with this quote:

> Christianity began as a personal relationship with Jesus Christ. When it went to Athens, it became a philosophy. When it went to Rome, it became an organization. When it went to Europe, it became a culture. When it came to America, it became a business. (Tele-Evangelist, 2007, p. 1)

Paul and Janice Crouch of Trinity Broadcasting Network recently reported combined income of $780,000. He works from an 8,000 square foot executive suite. The couple recently spent nearly $5 million on a three-story home with close to 9,500 square feet in Newport Beach, California. The mansion includes six bedrooms, nine bathrooms, a billiard room, an elevator, a climate controlled wine cellar, a six car garage, a tennis court and swimming pool, and a crystal chandelier. The Joyce Meyer Ministries in Fenton, Missouri is headquartered in a 158,000 square foot building with nearly $5.7 million of expensive artwork, furniture, glassware and equipment. Joyce Meyer, her husband and son each drive expensive cars and the ministry owns a private jet. $4 million in ministry funds have also gone to purchase five homes for Meyer and her children on a family compound (Tele-Evangelist, 2007).

Regulation of broadcasting dates back to the Communications Act of 1934 when Congress declared the electromagnetic spectrum a national resource rather than a tradable commodity. The Federal Communications Commission (FCC) was authorized to issue radio broadcast licenses, or the right to use the resource for a specific period of time with

the obligation to broadcast material considered to be "in the public interest." This included religious broadcasting (Fore, 2007).

The problem was in knowing which religious broadcasters to air. There were more requests than available airtime. The radio networks sold available time to broadcasters, but were not always pleased with some of the more outspoken and controversial clergy. So they decided not to sell the time but to give it to the largest representative bodies that could speak on behalf of all the religions – the national Council of Catholic Bishops, the Federal Council of Churches (Protestant) and a coalition of Jewish organizations (Fore, 2007).

When television came along in the 1950s each of the three representative groups were given time by the networks each week in exchange for FCC credit for broadcasting "in the public interest." The programs were representative of the country's cultural and religious diversity as a whole, but fundamentalist and evangelical groups were often excluded. Some televangelists resorted to paying for time, mainly on radio and non-network television stations. In 1960 the FCC changed its policy, allowing local stations to sell airtime for religious programming but still receive the designation of broadcasting "in the public interest". Airtime dedicated to religious broadcasting became a commodity again, selling to the highest bidder.

The new policy was devastating to programs that had been carried free. Prior to the FCC policy change, just over half of all religious broadcasting time was paid time. By 1977 that number had risen to 92%. This resulted in the large networks quickly buying up stations, essentially centralizing the airwave power in the hands of a few corporations. Televangelists diverted donations to buy up radio and television station licenses and to

create satellite-fed networks, often becoming multi-million dollar giants yet remaining tax free due to their religious affiliation (Fore, 2007). The simple act of worship has evolved into big business, legally protected from external oversight.

An article in Forbes likened churches to corporations and pastors to chief executive officers (CEOs). The entrepreneurial approach to religion has contributed substantially to the megabusiness of megachurches. The article acknowledges the role technology has played in the explosive growth of megachurches, and quotes Gene Jackson, CEO of a publicly traded company named Kingdom Ventures whose sole mission is to assist in the growth of faith-based organizations, as saying "we can help smaller churches become big with technology" (Kroll, 2003, p. 2). The media has also played a huge role in the megachurch industry. Joel Osteen's Lakewood Church analyzes its media strategy quarterly and has positioned itself with the television networks to where it is now available to 92% of the households in the country (Kroll, 2003). Perhaps this explains how his megachurch is the largest according to HIRR, and by a substantial margin.

According to Taylor (1982), churches are particularly vulnerable to fiscal abuse because there generally is no one, including members, donors or the government, who closely monitors the affairs because of a personal financial stake in the organization. If the government were not confined by constitutional roadblocks, it could be expected to regularly examine the financial affairs of churches. While many organized denominational entities have a recognized constituency such as a local church membership who have the benefit of proximity and can demand some degree of accountability, a televangelist is really only confined to the extent that the governing

body limits their behavior. If there is a cozy relationship anywhere, the probability of its detection will drop substantially if no one is compelled to watch for it.

The Church of Scientology's Business of Selling Religion

There have been several reports that L. Ron Hubbard, founder of the Church of Scientology, told his colleagues that "the way to get rich is to found a religion" (The Scientology, 1997, p. 1). Hubbard, a science fiction writer, founded Scientology in the early 1950s based on the concept that humans have repressed memories of a prior life which need to "cleared" through "auditing" with the help of a primitive version of the process of lie detection. Scientology "auditing" is performed according to a set fee schedule. Once "cleared" at one level, the individual is referred to the next level which comes with its own training and additional fees. From a former public relations insider, "It is a labyrinth of corporate shells that, like a hall of mirrors, was designed to baffle all but the initiated…I trained other Scientology [public relations personnel] on…how to appear to be a religion" (Young, 1993, p. 1).

Scientology was featured as the cover story on TIME magazine's May 6, 1991 edition in which the writer describes the church as "a hugely profitable global racket….busy attracting the unwary through a wide array of front groups" (Behar, 1991, p. 1). In the article, an industry insider described Scientology as probably the most ruthless, most litigious, most lucrative, and most classically terroristic cult the U.S. has ever seen. A former Scientology insider referred to the church as a criminal organization. The church has been known to buy huge quantities of its own books just to bump them onto best-seller lists. Scientology has many critics, and has spared no expense in trying to squelch them, either by bankrupting them or burying them with paper, including the IRS.

As of Behar's (1991) writing, Scientology had 71 active cases against that agency alone. By all appearances, Scientology is all about the money.

The long battle with the IRS began in 1967 when the agency revoked Scientology's tax-exempt status. It continued for over 25 years before the IRS mysteriously reversed its position in 1993, reinstating Scientology's tax-exempt status and refusing to offer a public explanation, claiming taxpayer confidentiality (The Scientology, 1997). The following is an abbreviated timeline of Scientology's history with the IRS (Owen, 1998):

- January 1950 — IRS granted tax exempt status.
- July 1967 — IRS revoked tax exempt status.
- April 1973 — Hubbard devised plan to root out and remove "false files" about Scientology; plan evolved to include infiltrating the IRS.
- November 1974 — IRS offices bugged by Scientology.
- December 1974 through July 1975 — Thousands of documents stolen from the IRS by Scientology.
- July 1977 — FBI raid on Scientology headquarters in Washington D.C. and Los Angeles (LA).
- October 1979 — Eleven Scientologists (including Hubbard's wife Mary) convicted of conspiracy and sentenced to between two and six years, and Hubbard goes into hiding.
- September 1984 — Scientology lost its appeal with the Tax Court.
- January 1986 — Hubbard died.
- Summer 1989 — Scientology hired investigators to dig in to the private lives of the senior IRS officials involved in the Scientology litigation.
- October 1991 — Unscheduled meeting alleged to have taken place between Scientology leaders and the IRS Commissioner during

which Scientology offered to drop all litigation against the IRS in exchange for reinstatement of their tax exemption.

- August 1993 — IRS agreed to grant tax exemption to all Scientology entities in the U.S.
- September 1993 — Two IRS analysts wrote internal memos describing how they had been instructed to ignore substantive issues while reviewing Scientology's new applications.
- October 1993 — Scientology's agreement with the IRS went into effect. Scientology paid $12.5 million in back taxes and dropped all of their pending litigation against the IRS. The IRS announced exemptions for about 150 Scientology entities, but declared the agreement with Scientology confidential.

Scientology is the only religion to charge a fee for everything related to its teachings. It assimilates the structure of a business, even a pyramid scheme, rather than a church. It is also the only church whose tax exempt status extends so far as to allow its members a deduction for "religious education" which includes the cost of Scientology training, "auditing", and even the purchase of Hubbard's books ("Tax the cult", 2010).

When a Jewish couple, the Sklars, tried to claim a deduction for their children's religious education based on the Scientology precedent, they were denied in Tax Court. This development takes the argument full circle back to the First Amendment which says that if one church is to receive a specific benefit then the same benefit must be given to all faiths as well. The apparent inequities between Scientology's tax-exempt benefits particularly in light of its perceived status as a commercial enterprise has prompted widespread debate, including several online petitions demanding an IRS review of Scientology's tax-exempt status and a congressional review of why it was ever granted in the first place ("Tax the cult", 2010).

During the course of the Sklar litigation, their attorney requested a copy of the 1993 IRS agreement with Scientology. The IRS refused, and a subpoena was quashed with no explanation other than that the agreement was confidential. The government's argument was simple – that the Sklars were not "similarly situated" to Scientologists whose education involved training unique to Scientology rather than basic education (Gerstein, 2008).

The Sklars appealed and received a "friendly reception", according to Gerstein (2008), after the appellate justices "expressed deep skepticism of the IRS's position" during arguments. He quoted Judge Kim Wardlaw asking the following question during a court session:

> The view of the IRS is it can unconstitutionally violate the Constitution by establishing religion, by treating one religion more favorably than other religions in terms of what is allowed as deductions, and there can never by any judicial review of that?....This does intrude into the Establishment Clause. (Gerstein, 2008, p. 1)

Interestingly, only ten months later, the Court of Appeals came back with a decision affirming that of the Tax Court. The following statement, included in the decision, helps shed some light on their thinking:

> To conclude otherwise would be tantamount to rewriting the Tax Code, disregarding Supreme Court precedent, only to reach a conclusion directly at odds with the Establishment Clause – all in the name of the Establishment Clause. The principle the Sklars advance does not stop with them and 1995 taxes; its logic would extend to all members of religious organizations who benefit from

educational services that are in whole or part religious in nature. (*Sklar v. Commissioner of Internal Revenue*, 2008, p. 14)

The Sklars appealed to the Supreme Court, but their petition for certiorari was denied on October 5, 2009 (The Supreme, 2009).

Occupational Fraud

Occupational fraud is defined by the Association of Certified Fraud Examiners (ACFE) as "the use of one's occupation for personal enrichment through the deliberate misuse or misapplication of the employing organization's resources or assets" (Association, 2008, 6).

Numerous studies and explanations exist as to what drives trusted employees to commit fraud against their employers. The term "white-collar crime" was coined by Edwin H. Sutherland, a well known sociologist in the mid-twentieth century, and defined as a violation of law in the course of one's occupation by a person of respectability or high social status. From his study of financial crimes and trust violations in 70 large U.S. corporations, Sutherland devised a fraud theory based on differential association: that criminal behavior is learned in association with those who define the behavior favorably and in isolation from those who do not. Sutherland's position was that there is a cozy relationship between persons in business and persons in government and that laws related to business behavior have little effect unless truly supported by the political administration. However, the impact of the political administration is minimal if the public supporting that administration is not intent on enforcement of the law (Clevenger, 2005).

To deal with fraud cases, Marshall Clinard and Peter Yeager were proponents of the "deterrence theory", a view that forceful criminal sanctions can be an effective deterrent to fraud (Clevenger, 2005).

Figure 2. Cressey's Fraud Triangle (Sacchetti, 2005)

One of the most widely accepted fraud theories is known as the Fraud Triangle as depicted in Figure 2. It was developed in the 1950's by criminologist Donald R. Cressey. The first leg is financial pressure, often the impetus for the fraudulent action(s). Generally private and very personal, issues such as gambling habits or living beyond one's means can cause gradual changes to an individual's value system. The second leg is raised when an opportunity is perceived such as weak internal controls, poor

organizational ethics, or a reputation for non-prosecution in previous incidents. The third leg completes the triangle when the fraudulent action can be somehow justified or non-criminalized in the individual's mind, such as feeling underpaid or unappreciated, or that the funds are only being borrowed and the money will be repaid (Sacchetti, 2005).

The firm Capin Crouse, LLP, accountants for many large ministries across the U.S., has issued a standard outline for fraud prevention, and makes the following observations regarding occupational fraud in ministries ("Legalized," 2006):

- There is a high probability that some level of fraud or abuse already exists,
- The real cost of fraud cannot be measured in terms of dollars lost,
- People and circumstances change over time which can increase the risk of fraud,
- Internal controls play a huge role in fraud deterrence, but they are a single facet in fraud prevention and detection,
- Reliance on an external audit for fraud detection is inadequate,
- Everyone in the organization has a role in fraud prevention and detection.

Surrounded by Trust

Sources referred to in this writing are generally agreed that churches are particularly vulnerable to misappropriation of resources because of their very nature of trust and forgiveness.

Church leaders would do well to remember that the best interests of an organization are not served by either denial or unfounded trust. Both may ultimately contribute to the failure to protect the people and assets for which one is a steward. The difficulty is in dealing with a culture which believes that their religious purposes are sufficient to protect them against financial misconduct. Changing or working around

organizational behaviors that increase fraud risk is easier than designing anti-fraud programs (Capin, 2006).

According to agents from the Federal Bureau of Investigations (FBI), an embezzler profile is an above-average performer who has been on the job five to six years, is highly motivated, valued and *trusted* [emphasis added] (Slaybaugh, 2005).

It is difficult for any church to acknowledge the likelihood of a crime by one of their employees or members ("Finances," 2006). Yet, authorities say that religious based scams are some of the fastest growing in America, mainly because of the trust. One expert was quoted as saying they had "seen more money stolen in the name of God than in any other way" (Kavanaugh and Caniglia, 2006, p. 1).

Smietana (2005) agrees that churches can be especially vulnerable to fraud simply because of the pervasive trust shown employees and volunteers coupled with the lack of oversight and internal controls. In the article, he quotes a Washington pastor, Kent Egging, who has studied church embezzlement during his doctoral work. According to Egging, congregations are often embarrassed when victimized and want to keep it quiet – "It's not about the money so much. It's about the trust" (Smietana, 2005, p. 1).

Snyder and Clifton (2005) believe churches are lucrative targets, and that their very nature puts them at greater risk of fraud. When it happens, churches are often quick to forgive transgressors and reluctant to prosecute. The biggest challenge is getting church leaders and congregations to recognize the risk, acknowledge that their religious purpose alone will not protect against fraud, and take adequate precautions. After all – would anyone really steal from God? However, management of the church's financial activity often falls to a single individual, eliminating the possibility of separation of

duties. An effective board would provide financial oversight, but members are often not aware of that role and do not make other financial controls a priority. In short, the nature of a church is *trust* and forgiveness.

Referring to the church offering plate and the use of donations, Shedd (1999) states that "it is one of the last places one would suspect foul play" (p. 1).

The response to the entire immunity argument is best summed up by a risk consulting firm: "There is one risk that renders all others moot – reputation risk…. Without good faith and public trust, an organization is not likely to be able to acquire or retain the resources necessary to achieve its mission" (Protiviti, 2005, p. 1).

At the 39th annual conference of the Risk and Insurance Management Society, one of the speakers, New York attorney Charles J. Adams, explained that many times the nonprofit fraud perpetrator is "someone that you know, like and *trust* [emphasis added]" (Herman, 2001, p. 1).

The following statement from the initial ACFE Report to the Nation has direct implications to the church realm: "*Trust* is the cornerstone of occupational fraud and abuse…The organization must seek a balance between *trusting* its employees too much and too little [emphasis added]" (Association, 1996, p. 18).

Church Embezzlement and Reputation Risk

GuideOne Insurance, with about 45,000 church clients in the U.S., says it has paid out almost $3 million on about 1,800 theft claims in each of the last five years (Smietana, 2005). Yet, inherent in any legitimate church there runs a basic trust and belief in the good intentions of individuals who have associated themselves with the organization.

However, the following non-inclusive list represents errors in judgment and misdirected trust by several churches:

- A church bookkeeper on an Indian reservation in Milwaukee had the ability to write checks on the church account, reconcile the church account and handle church collection deposits. Unfortunately she also had a gambling addiction and was discovered to have taken over $200,000 in the form of fraudulent check disbursements and additional funds in excess of $300,000 in the form of collection money not deposited ("Legalized," 2006).
- The California Board of Accountancy reported a 2001 CPA license revocation of a Seventh-day Adventist (SDA) church treasurer who took over $860,000 of church funds (California, 2006). Another source reports an embezzlement case at an SDA church in the western U.S., estimated to involve $170,000 - $200,000 (at the time), and the treasurer was facing prosecution (Oliver, 2003). Whether the two sources are referring to the same incident is unknown.
- A Chicago priest resigned in July 2004 after being caught with an alleged prostitute. Collections went up dramatically once he was gone, and the Archdiocese discovered the priest had skimmed over $1 million in five years (Smietana, 2005).
- A Morning Star Missionary Baptist Church pastor has been accused of stealing $494,000 in New York (Smietana, 2005).
- An Illinois volunteer financial secretary for the Second Congregational Church was sentenced to 18 months after stealing $140,000 (Smietana, 2005).

- The pastor for Campus Christian Services (CCS), a nondenominational college ministry supported by contributions, was found to have been funneling missing church funds into a second bank account; it was his personal lifestyle that prompted suspicions (Snyder and Clifton, 2005).
- The Wisconsin Conference of the United Methodist Church lost more than $158,000 to a former employee who was sentenced to two years in prison for the embezzlement (Snyder and Clifton, 2005).
- In New Hampshire, a man was sentenced to 46 months for embezzling over $1.6 million from the Church of Christ Scientist in Portsmouth (Snyder and Clifton, 2005).
- In 1999, Accounting Today reported that a $1.2 million, six-year fraud had been discovered at the Catholic Diocese in Brooklyn, New York. The perpetrator was the pension office manager, a church employee for over 30 years. The scheme was discovered when someone else opened the mail and found a check made out to an outside consulting company with the pension manager's signature and bank information on the back (Klein, 1999).

Every one of those perpetrators was trusted by their churches or they would have not held the position they did. Not only did they breach their fiduciary duties but their church ethics. The aftermath of the CCS case makes an interesting point about a different perspective on trust. If a church's financial function operates based only on faith and trust, there is little to fall back on if those are misplaced. While insurance coverage and other means may minimize the financial loss, a damaged reputation is harder to quantify. The CCS supporters withheld their donations until a new board was appointed and

financial oversight implemented. '"The trust of our sponsors is all we have"' stated a new CCS board member (Snyder and Clifton, 2005, p. 4).

According to Protiviti Inc. (2005), an independent risk consulting firm, an increasing number of non-profit organizations are realizing the importance of complying with the spirit of the SOX Act of 2002. Without good faith and public confidence, an organization's reputation is at risk and it becomes difficult for an organization to retain the resources it needs to meet its objectives. Reputation can be put at risk by any of the following, and one or any of these can cause irreparable damage to an organization's reputation:

- Failure to handle low-level crises sensitively and effectively,
- Adverse publicity about staff behavior,
- Allegations of poor management or criminal activity,
- Allegations of poor financial management.

Repeat cases of church theft or embezzlement have prompted North American leaders of the SDA church to address the fraud issue by creating an awareness of the problem, by encouraging local church audits, and by educating church and school treasurers and accountants, even publishing a video and guidebook entitled *Trustees of the Lord's Finances* to assist with local education efforts (Oliver, 2003).

Marion Fremont-Smith and Andras Kosaras (2003) published a paper entitled "Wrongdoing by Officers and Directors of Charities" wherein they note that there is minimal policing of charitable activities throughout the U.S. What policing does take place has fallen by default on the IRS. The methodology followed by these researchers was a survey review of press reports over the eight year period from 1995 through 2002.

Using LexisNexis, the powerful global provider of business information, the researchers searched using the key words "attorney general," "charity," "embezzlement," "fiduciary duty", "investigation," "nonprofit," "scandal," and "theft." The results of that search were then refined to include only those instances of alleged misbehavior by those with a fiduciary responsibility to the organization, thus eliminating the many reports of wrongdoing by charitable organization employees which would provide evidence of management failure rather than the abuse of a fiduciary role such as officer, director and trustee. The search yielded 152 incidents to be reviewed. The most common criminal activity found in the non-profit sector was theft of funds for personal use. While the Fremont-Smith/Kosaras project was not focused on churches, the information gleaned from it is certainly relevant to this project.

Taylor (1982) discusses the controversial issue of government intervention in a church embezzlement case. One argument is that the government has a legitimate interest to protect, whether it is protecting the church or the citizens who donate their money with a particular expectation as to its use. The opposing viewpoint is that such interference could be construed as an attempt to regulate how church officials spend church funds, a violation of the Establishment Clause. Effectively, church officials can sequester church financial information and conceal their misuse of church funds until their wrongdoing surfaces elsewhere. There is a price for religious freedom.

Taylor (1982) argues that it is precisely because of the lack of church accountability that the government should reasonably be expected to remedy church fraud without fear of constitutionality issues. He also points out that even society tends to downplay incidents of fraud in the case of religious leaders. When an embezzlement case

is detected in the secular world, we are quick to call it a theft. The same case in a church environment is more likely to be referred to as a diversion of church funds for personal use.

Internal Controls

Fallout from the recent sexual abuse scandal involving clergy of the U.S. Catholic Church brought a new focus on the financial transparency and accountability of the church, as it became apparent that payments associated with the scandal had been taking place for years in the form of victim settlements, perpetrator rehabilitation costs, and legal fees. Dr. Robert West and Dr. Charles Zech (2007) of Villanova University took the cue to perform a study of the effectiveness of ecclesiastical internal financial controls measured by the amount of recent diocesan embezzlements. In their introductory discussion of internal controls, the researchers emphasize separation of duties as a fundamental tenet of strong internal controls, particularly the separation of recordkeeping from those who have physical access to assets.

West and Zech (2007) sent a questionnaire to the CFOs of all U.S. Catholic dioceses - 174 at the time, and obtained a 45% response rate. Respondents were asked to rank risk factors and the top two were a lack of expertise and internal controls at the local church level. Of the respondents, 85% reported a case of embezzlement in their diocese within the past five years. Recommendations based on the study included written fraud policies, annual internal audits, frequent submission of financial results, uniform budgeting processes and anonymous communication channels for the reporting of suspicious activities.

Internal controls may be only a single facet of fraud prevention, but an effective program of intertwined and complementary internal controls can play a significant role in deterring fraud. The Committee of Sponsoring Organizations of the Treadway Commission broadly defines internal control as a process designed to achieve three objectives: effective and efficient operations, reliable financial reporting, and legal and regulatory compliance. Internal control serves a fundamental business purpose and is most effective when built into an organization's infrastructure. A robust system of internal control has five elements ("Internal," 2006):

1. The control environment - the tone of an organization and the control consciousness of its people, specifically, the philosophy of management and the attentiveness of the board.
2. Risk assessment - the identification, analysis and plan to manage relevant risks.
3. Internal control activities - the specific policies and procedures such as separation of duties, approvals, authorizations, verifications, reconciliations, expense analysis and physical asset security.
4. Information and communication – ensuring pertinent information gets to the right people at the right time.
5. Continuous monitoring – ongoing assessment of the entire internal control system as the environment changes. Noted deficiencies should be reported upstream as necessary.

Brotherhood Mutual Insurance Company offers an outline of preventative measures for church leaders to follow to protect their organizations from internal threats ("Finances," 2006):

- Put it in writing
    - Develop a comprehensive, clear policy that governs the handing of the church's finances including access to the books and records, access to the financial accounts, and who is authorized to conduct church business. Written policies let everyone know what is expected, and written job descriptions eliminate confusion over who is expected to perform which duties.
    - Implement a financial system that records all transactions immediately and maintains records in a safe place. Documented financial procedures and records will enable quick detection of discrepancies, protect honest employees, and serve as evidence in the unfortunate event of a crime.
    - Establish a safe and easy way for employees and volunteers to report suspicious incidents. In many cases of fraud, at least one other person is aware or suspicious of the activity.
    - Create a system where responsibilities for receipting and depositing church funds, recording church transactions, and authorizing church transactions belong to different people (as the size of the organization permits) – separation of duties.
- Guard the offerings
    - Ask congregants to place their financial gifts in preprinted envelopes.
    - Always have two people present when offerings are counted.
    - Use a stamp with colored ink to endorse checks "for deposit only."
- Protect the physical property
    - Use a safe for important documents, small valuables and petty cash.

- Implement a key monitoring system so there is always a record of who has which keys. If there is a security system, control access to security codes and change them periodically.
- Keep an inventory of physical assets.

Auditors have commonly encountered three issues in their audits of non-profit organizations. First is insufficient staffing in the accounting/finance department which can increase the potential for fraud because personnel are forced to take on too many roles. Frugality in accounting/finance staffing can be devastating. Second, auditors often encounter weak internal communications which can lead to the potential for unrecorded transactions, non-compliance with regulations, inappropriate use of restricted funds, questionable transactions going unidentified or unusual transactions going unnoticed. The accounting/finance department must be informed of the nature and purpose of all transactions both written and oral. Third is the lack of existence or insufficient application of internal controls. Churches should seriously examine their internal control structures to ensure they have done all they can to protect against the risk of misappropriations (Burnette, 2004). The conclusion is quite simple and best stated as follows: The construction of a church's internal control structure is crucial in preventing destructive losses ("Trustees," 2002).

Role of the Church Governing Body

In a discussion of fraud risk assessment for churches, Capin (2006) says it is the responsibility of the church board and pastoral staff to create an environment that identifies misconduct and how allegations will be handled. He recommends a clear fraud policy that includes definitions of what constitutes misconduct and the basis for

disciplinary action(s). The policy should provide a method for workers to report any concerns, ie, an anonymous hotline. The specific job positions should be identified as responsible for investigating allegations, and it is important to include more than one person. Capin points to the guidance in Matthew 18 and recommends a church fraud policy refer and adhere to it (verses 15-17):

> If your brother sins against you, go and show him his fault, just between the two of you. If he listens to you, you have won your brother over. But if he will not listen, take one or two others along, so that every matter may be established by the testimony of two or three witnesses. If he refuses to listen to them, tell it to the church; and if he refuses to listen even to the church, treat him as you would a pagan or a tax collector. (The Holy, 1978, p. 901)

The Biblical guidance is clear, but it is not a binding law of the land. Fraud is a breach of secular law, and ultimately the church board must accept the responsibility for deciding how to proceed with a proven case of fraud. Capin (2006) suggests that churches not reject legal remedies as part of their policy. While a church's first instinct may be to forgive and forget, there may be a fiduciary responsibility to attempt to right the wrong done to the organization.

According to Protiviti (2005), a non-profit governing board is "expected to be accountable to the public trust in ensuring that the organization carries out the purposes for which it was established in a responsible, ethical and legal fashion" (p. 5). Members assume three legally required duties:

1. Duty of care – the level of competence expected, often expressed as "what would an ordinarily prudent person do under similar circumstances?"

2. Duty of loyalty – the fiduciary responsibility.
3. Duty of obedience – the dedication to the organization's mission.

Recent commercial and non-profit scandals have significantly raised the accountability bar. With the recent legislative interest in non-profit reform, Protiviti (2005) offers this caution - "act now or react later" (p. 6). It is the responsibility of the church board and leadership to permeate the organization with a commitment to risk management.

There are certain conditions that tend to occur more often in volunteer boards that make frauds easier to commit and harder to detect (Snyder and Clifton, 2005):

- Board members do not know that they are responsible for financial oversight;
- Board members are often not independent, often filled by friends and family;
- Board members have minimal, if any, financial background;
- Board member turnover can be high.

A major difference between non-profits who have not experienced fraud and those who have is that their boards had received training regarding their role as financial overseer. The best preventative techniques are of little value if those responsible for them do not understand them (Snyder and Clifton, 2005).

Research Design

American jurisprudence has taken the liberty of making profound changes to the interpretation of the First Amendment Religion Clauses over the course of American history. The intent of the founding fathers was simple - to prevent the establishment of a national religion and to prohibit government interference with an individual's right to the free exercise of their religious beliefs. The theistic element was assumed. Today,

religious protections are far from simple or theistic, often exploited for business purposes, income tax shelters and, most likely, terrorism.

This project will employ a combination of research methods designed to study the evolution of the relationship between church protectionism and economic crime involving churches. The research questions are reiterated below:

1. How has the interpretation of the First Amendment Religion Clauses changed since the days of America's founding fathers?
2. What effect has this change had on economic crime involving churches?
    a. Does the current interpretation of the Religion Clauses enable the creation and survival of non-legitimate churches?
    b. Does the current interpretation of the Religion Clauses enable misappropriation of funds within legitimate churches?
3. In relation to management of economic crime, should any action be taken to challenge the judicial re-interpretation of the Religion Clauses, or is the current environment acceptable?
4. What can legitimate churches do to protect themselves against economic crime?

Inherently there is little data available regarding this protected topic, contributing to the writer's decision to use a combination of research methods utilizing secondarily available data. Initially, a historical analysis of relevant federal litigation will be performed to gain an understanding of the influence the judicial system has had on the evolution of church protectionism as it relates to economic crime. Consideration was given to solicitation of views and opinions of clergy members. Given the delicacy of the topic, a questionnaire was deemed too impersonal and interviews would likely be biased.

Historical analysis offers the ability to study changes over time. It is unobtrusive with no researcher–subject interaction, and much more cost effective than methods that rely on collection of original data. Conversely, interpretation of collected data can be time consuming and biased and internal validity can be questioned as there is no control over external variables (Leming, 2011).

The litigation search will be performed using LexisNexis Academic, a premier research tool, to locate those legal cases that appear to involve church protectionism and economic crime. The specific search terms will be "First Amendment protection" (everywhere), "church" (at least five occurrences) and "fraud" (at least five occurrences). The cases will be reviewed, summarized, and categorized based on the nature of the dispute to detect any apparent trends. Without a time period limitation on the search parameters, all published cases throughout history will be included and the results presented chronologically. However, this review is obviously limited to those cases that are published on LexisNexis Academic. The study is also limited by the search population and terms. A relevant case that does not actually use the term "fraud" will be overlooked, and the search will only include federal court cases. Finally, a search for relevant litigation inherently excludes from consideration those potential cases that were never filed, as well as those that were filed but for which the litigation process was never completed.

Furthermore, there is a major case in the Maryland judicial system that is directly relevant to this research project. Brought in state court (Dennis, 2011), the dispute centered on church governance and economic crime The plaintiff, former head internal auditor for the church, was terminated under questionable circumstances after ruffling

some church leader feathers as he performed his whistleblower role a bit too effectively. He filed this suit against his former employer, but it was finally dismissed six years later after the church defendants' motion for summary judgment based on First Amendment protection was granted.

A study of this case is included here for two reasons. First, a primary issue related to church governance is the lack of scrutiny afforded churches and the lack of available information related to their financial activities. This lack of data is an obvious research impediment, so use of a complementary research method in search of an additional perspective is advantageous. Second, this case study provides a clear example of failed internal church governance, analysis of which can lend itself to the furtherance of best practices. As noted earlier, church governance can only come from inside, so when that fails the consequences can be costly. Multiple sources are available on the saga including articles published by the church's media outlets, mainstream media sources, the electronic case docket from the state of Maryland and the plaintiff's autobiography.

The case study methodology is useful in that it offers the opportunity for contextual analysis on a much more detailed level given the small number of subject situations being studied (only one in this case). On the other hand, the study of a small number of subject situations does not lend itself to establishment of reliability or generality of findings (Soy, 1996). By using a mixed method approach this writer hopes to reap the benefit of a single case study on the stage set by historical judicial opinion, but within the limitations created by sole reliance on secondary data.

Discussion of Findings

It is necessary to examine the historical context of the First Amendment Religion Clauses before one can fully grasp the role that legislation and judicial interpretation have played in re-directing the obvious intent of America's founding fathers. There are some prominent differences between Jefferson's comments regarding a metaphorical wall of separation between church and state (comments made years after the First Amendment was written) and the subsequent judicial interpretation of his comments. Furthermore, congressional attempts to protect churches have created a complex maze of opportunities for abuse.

Jefferson's Wall of Separation

On January 1, 1802, President Thomas Jefferson responded to a letter he received from a religious minority group in Connecticut, the Danbury Baptist Association, who had written him to complain about the perspective on religious liberties taken by their state legislature. In a portion of his carefully worded reply, Jefferson said (original capitalization and spelling):

> Believing with you that religion is a matter which lies solely between man & his god, that he owes account to none other for his faith or his worship that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make no law respecting an establishment of religion, or prohibiting the free exercise thereof, thus building a wall of separation between church and state. (Jefferson's, 2007)

An essential component to understanding Jefferson's intent when he wrote this lies in the circled portion which was to be deleted from the final draft actually sent to the Danbury Baptists, as well as his handwritten edits which indicate it was not a casual reply. A copy is included here at Appendix A. The obliterated portions were made available only recently with the aid of FBI restoration technology. In the deleted section, Jefferson explained why he refused to proclaim national days of prayer and thanksgiving as the first two presidents had done. The margin note visible in the manuscript states (original punctuation, capitalization and spelling) that "this paragraph was omitted on the suggestion that it might give uneasiness to some of our republican friends in the eastern states where the proclamation of thanksgivings etc. by their Executives is an antient habit & is respected" (Hutson, 1998, p. 5). The deleted section read as follows (original capitalization, punctuation and spelling):

> Congress thus inhibited from acts respecting religion, and the Executive authorised only to execute their acts, I have refrained from presenting even occasional performances of devotion presented indeed legally where an Executive is the legal head of a national church, but subject here, as religious exercises only to the voluntary regulations and discipline of each respective sect. (Jefferson's, 2007, p. 2)

Circumstances surrounding Jefferson's response to the Danbury Baptists indicate his objectives. He wanted to clarify his position on religion and government because his opponents in the election of 1800 tried to paint him as an atheist. He wanted the opportunity to explain his position on national days of thanksgiving and prayer to his party. Jefferson was not opposed to thanksgiving and prayer at all, but to any national

attempt to enforce such, as was the British custom of which he wanted no part. Jefferson's response to the Danbury Baptists did not address individual state policies on religion, but only his viewpoints on a national proclamation of such, even though the final version of his response did not reflect the distinction (Hutson, 1998).

Interpretation of "The Wall"

American history is full of examples of the deep religious values held by many of our founding fathers, including inscriptions on government buildings, monuments and memorials, on our currency, in historic speeches and addresses, etc. It is difficult to reconcile the idea that America's founders intended the hostile contempt toward religion and prayer that is apparent today.

Yet controversy swirls around what the true intent of the founding fathers was in drafting the First Amendment, even prompting a short documentary film on the subject by writer and filmmaker Brian Godawa entitled *Faith of our Fathers* (Godawa, 2007). With introductory remarks offered by 2012 presidential candidate Newt Gingrich, the film poses such questions as whether it was a violation of the Establishment Clause for President George W. Bush to attribute his 2004 Presidential victory in a large way to the evangelical voting contingent, or if it was a violation of Jefferson's wall of separation when former presidential candidate Al Gore stated that before he made any major policy decision he would ask himself what Jesus would do.

With references to God on our buildings, on our money, and in our oaths it is obvious that America's founders had some use for religion. The film highlights three distinct factions struggling for dominance in the church-state issue: those who feel that religion plays a vital role in government, those who are neutral and want to pursue a

fairer understanding of the intent of the First Amendment, and those with the strict separationist viewpoint who have prevailed thus far in America's history (Godawa, 2007).

The documentary depicts the existence of a great deal of debate with regard to the language of the First Amendment, and ironically, Jefferson had no part in its drafting or signing (Godawa, 2007). At the time, some state governments had already established state churches and it was this phenomenon that prompted the Danbury letter. They were a religious minority and were worried about the future of their religious liberties given the environment of state-sponsored churches (Jefferson's, 2007). There is some evidence that the Danbury's were a bit discomforted by Jefferson's reply to them, as the last thing they wanted was a complete separation of religion from public life. Many hold the view that Jefferson's wall is simply a metaphor, one that has been re-directed to impose an intended restriction on government to a restriction on people and communities of faith (Godawa, 2007).

James Madison drafted the First Amendment and presented it to the First Federal Congress in the spring of 1789. He included the general consensus to avoid a national religion (Religion, 2012), but he also tried to insert language that would impose the same restrictions on state governments which met with disapproval and resulted in significant discussion and rewriting before compromise and settlement on the final wording (Godawa, 2007).

However, the question remains as to whether it was our founders' intent to create a completely secular government. A view of their concurrent actions helps to shed some light on the question. The day after Congress approved the First Amendment, they

resolved in an overwhelming majority to petition President Washington to establish a national day of prayer and thanksgiving which he gladly accepted. James Madison headed a committee to appoint and compensate congressional chaplains. Prayer opened every legislative session. Religious services were held in the Capitol. The value of religion to the founding fathers is everywhere in our history. There is even a Bible buried in the cornerstone of the National Archives. Not all of the founding fathers were devoutly religious men, and there was a variety of heretical influences in play. The diversity of religious beliefs was within the context they intended to create (Godawa, 2007).

Our first national government was convinced of the need for vitality of religion, expending more energy than any subsequent government in encouraging its practice. Many believed that the success of a civil government depended on piety, religion and morality. The states were in a much better position to act on those convictions, as they were seen to possess general power as opposed to the limited powers of the federal government. During colonial times, Anglicans and Congregationalists had received public financial support and referred to their state benefactors as "nursing fathers" in accordance with the guidance of the prophet Isaiah (Religion, 2012):

> And kings shall be thy nursing fathers, and their queens thy nursing mothers: they shall bow down to thee with their face toward the earth, and lick up the dust of thy feet; and thou shalt know that I am the LORD: for they shall not be ashamed that wait for me. (Isaiah, 2012)

After the country's independence, the church recipients urged their state lawmakers to continue the state financial support. Knowing the public would not allow state support to be monopolized by single denominations, several state lawmakers came

up with "general assessment schemes" – a religious tax levied on all citizens, although each could designate the church beneficiary of their choosing. State sponsored financial support still sparked a good deal of debate in the early years of the new democracy and in formation of the states (Religion, 2012).

The U.S. Constitution was generally silent on religion for two reasons, the first being that many delegates believed, as committed federalists, that any power to legislate religion, if it existed, lay with the state governments but not the national government. Second, the topic was too politically controversial to be introduced in the Constitution (Religion, 2012).

As Massachusetts worked to draft its state constitution, state financial support of religion was one of the most contentious issues. Advocates were those members and ministers of churches established during the colonial period who were accustomed to receiving the public financial support. The Baptists were the main objectors arguing that the Divine Truth should be freely given since it was freely received. Ultimately, Massachusetts adopted the "nursing fathers" approach, and authorization of a general religious tax paid to the church of a taxpayers' choice was included in the state constitution in 1780 (Religion, 2012).

In 1783, Virginia petitioners urged their legislators not to think it beneath their dignity to become nursing fathers. Anglicans were the principal supporters of the general religious tax in Virginia, with opposition again led by the Baptists who argued that it was government support that had corrupted religion, along with the civil libertarian approach that government involvement in religion violated both civil and natural rights. Religious persecution broke out in Virginia, generally directed at the Baptists. It made a very

negative impression on many patriot leaders from the perspective of civil liberties, and aided in prompting libertarians James Madison and Thomas Jefferson to join the Baptists to defeat the effort to levy religious taxes there (Religion, 2012).

In the years following the Civil War as the country struggled to rebuild and adapt to life without slavery, Congress passed three constitutional amendments known collectively as the Reconstruction Amendments. The 13th and 15th Amendments abolished slavery and granted all men (including African Americans) the right to vote, respectively. The 14th Amendment granted citizenship to all those born or naturalized in the U.S. including recently freed slaves. It also imposed prohibitions on state governments, specifically against the denial of life, liberty or property, without due process of law or the equal protection of the laws (The Library, 2011). With respect to religion, the impact of the 14th Amendment was to extend the jurisdiction of the First Amendment protection to the state governments in addition to the federal government.

Church and State in the 1940s

In 1943, an anti-Catholic activist filed a lawsuit that would become pivotal in the church and state separation issue. Arch Everson filed suit against the state of New Jersey for paying the busing costs of children attending Catholic school. The case went to the Supreme Court, who concluded that the Establishment Clause did indeed apply to state government. According to Justice Hugo Black, "neither a state nor the federal government can set up a church…pass laws which aid one religion, aid all religions, or prefer one religion over another" (*Everson v. Board of Education*, 1947, p. 10). The court adopted Jefferson's words in their opinion, even though he had nothing to do with drafting the First Amendment, thus making his metaphor the central theme of their

analysis, and in effect, constitutionalizing it (Godawa, 2007). Ironically, the court found that New Jersey had NOT violated Jefferson's wall (*Everson v. Board of Education*, 1947), but the legal precedent was set for a systematic attack on the place of religion in public life (Godawa, 2007).

Another landmark case, *Abington School Dist. v. Schempp* (1963) contributed an additional brick to the "wall". In an attempt to neutralize religion in public education, the Supreme Court found Bible reading in public school unconstitutional. However, the dissenting opinion saw the decision not as the realization of state neutrality but instead the establishment of a religion of secularism. By excluding religion, neutrality was not gained but rather hostility (Godawa, 2007).

In *Wallace v. Jaffree* (1985), the Supreme Court established the endorsement test which made it unconstitutional for a statute to endorse religion in any way, effectively turning the "no establishment clause" into a "no endorsement clause". Diversity of opinion existed as penned by Justice William Rehnquist who said that there was simply no historical foundation that the founders intended a constitutionalized wall of separation such as what was set forth in *Everson*, and that the greatest injury to come from it was the diversion of judges from the true intentions of the drafters of the Bill of Rights. The diversity has continued as the Supreme Court contradicted itself in two cases involving public display of the Ten Commandments. Thomas Jefferson questioned whether a nation's liberties could be considered secure when the nation moves away from the belief that those liberties are the gift of God (Godawa, 2007).

In the opinion of unidentified critics, the Supreme Court has replaced the concept of a religious supreme being as the higher authority with the secular Supreme Court as

the higher authority (Godawa, 2007). According to William Penn, founder of the colony that became the state of Pennsylvania, "If thou wouldst rule well, thou must rule for God, and to do that, thou must be ruled by him…Those who will not be governed by God will be ruled by tyrants" (William, 2012, p. 1).

Internal Revenue Code Treatment of Churches

Our current system of federal income taxes is based on the Sixteenth Amendment to the Constitution, ratified in 1913, which gave Congress the power to tax incomes, both individual and corporate. The days of World War I were the first to see income tax as a significant source of revenue. Before that, customs duties were often the number one source of federal revenues, and attempts at federal income taxation were either repealed or held to be unconstitutional. From 1913-1939, 17 self-contained internal revenue acts were passed, each superseding the former. In 1939, the acts were codified as the IRC, an important first step in simplifying tax administration. The IRC has since been reorganized twice. Financing the Korean War prompted the need for an increase in tax rates, and numerous changes were enacted in the re-codified IRC of 1954. The Tax Reform Act of 1986 was a comprehensive revision and re-codification of the tax law intended to improve fairness, efficiency and simplicity by reducing tax rates, eliminating certain deductions and broadening the tax base (Talley, 2001).

Major tax law reform relating to non-profit organizations resulted from the enactment of the Tax Reform Act of 1969 (Talley, 2001). This Act established the general requirement that tax-exempt organizations be required not only to apply for their exempt status but they also must file an annual information return in an effort to ensure that the IRS has adequate information to enforce the tax laws. The same legislation,

however, immediately provided a mandatory exception for churches and their integrated auxiliaries along with conventions or associations of churches (Section 508, 2007). However, the legislation did not define the term "church" (Tax guide, 2008).

The Deficit Reduction Act of 1984 (DRA) furthered the protection of churches by imposing special limitations on how, when and why the IRS might even initiate a church tax inquiry. Prior to enactment of the DRA, the IRC recognized only general restrictions on examinations of churches, as set forth in Section 7605(c) (2007). In summary, the limited guidance included three main points:

- The regional IRS commissioner must notify the organization prior to the examination.
- No examination will extend beyond the purpose of determining whether the organization is a church convention or association of churches.
- No examination of the books of a church organization shall extend beyond the extent necessary to determine the amount of tax to be imposed.

The DRA added an entire section, IRC 7611 entitled "Restrictions on church tax inquiries and examinations" (Section 7611, 2007), also known as the "Church Audit Procedures Act" (Hoff, 1991). The existing limitations as set forth in IRC 7605 were vague and relied heavily on internal IRS procedures to protect the church's rights. Additionally, Congress was dealing with two competing considerations in amending the tax law as it pertained to church reviews. The separation of church and state issue was being complicated by the increasing cases of intentional misuse of the protected church structure as a tax-avoidance scheme. In an attempted resolution of the conflict, the new code section IRC 7611 was intended to protect churches against undue IRS influence

while providing the IRS unhindered ability to pursue those whose proclaimed church endeavors are less than holy (Deficit, 1985).

The DRA also provided protection to a new category of religious organizations. The new audit rules encompassed not only "any convention or association of churches", but also "any organization claiming to be a church." So now a religious organization claiming to be a church can only be examined to the degree necessary to determine if it is indeed a church (Hoff, 1991).

Thus in protecting the constitutional concept of separation of church and state, the IRS is prohibited from any regulation or oversight activity of an entity that simply claims to meet its 14-point definition of a church. According to IRC 7611, the following requirements must be met for an inquiry (Deficit, 1985):

- Approval by an IRS regional commissioner before an inquiry can be initiated,
- Notice before beginning the exam,
- An offer of a pre-examination conference and,
- Completion of the audit within two years of the notice of examination.

In 2009, the IRS lost a legal battle with a Minnesota church organization that claimed it did not have to comply with an IRS summons because the summons was not issued by a government official of sufficient rank. The IRS was reorganized in 1998 and the regional commissioner position, just one reporting level below the IRS commissioner, was eliminated. The new organizational structure was separated by taxpayer category such as individuals, small businesses or tax-exempt organizations. The IRS gave the church audit authority to the director of exempt organizations, now four reporting levels below the IRS commissioner. The appellate judge in the Minnesota case agreed with the

trial court that the designation of authority by the IRS did not carry the force of law. Some experts are now discussing the necessity of a formal rule-making process by the IRS in order to determine the lawful level of authority required for initiation of a church finance investigation (Williams, 2009).

Even the Pension Protection Act of 2006 (PPA), the most recent legislation to make numerous changes to the tax law provisions affecting tax-exempt organizations (and the only one since September 11, 2001), leaves the automatic church exemption practice intact. Beginning in 2008, the tax-exempt entities whose gross receipts are less than $25,000 must file an "electronic postcard" with the IRS, but the requirement still does not apply to churches ("New," 2007).

What is a Church?

The IRS has been given oversight responsibility in regard to charitable organizations and has codified the qualifications for the granting of tax-exempt status in Section 501(c)(3) of the tax code (Section 501(c)(3), 2007). As previously noted, tax-exempt organizations with receipts in excess of $25,000 are required to file Form 990 with the IRS, with the exception of churches. Special tax rules apply to churches which are defined by certain characteristics generally attributed to churches. These 14 attributes of a church have been developed by the IRS and by court decisions, according to IRS Publication 1828 ("Tax guide," 2008). They include:

1. Distinct legal existence
2. Recognized creed and form of worship
3. Definite and distinct ecclesiastical government
4. Formal code of doctrine and discipline

5. Distinct religious history
6. Membership not associated with any other church or denomination
7. Organization of ordained ministers
8. Ordained ministers selected after completing prescribed courses of study
9. Literature of its own
10. Established places of worship
11. Regular congregations
12. Regular religious services
13. Sunday schools for the religious instruction of the young
14. Schools for the preparation of its ministers

The IRS generally uses a combination of these characteristics together with other facts and circumstances to determine whether an organization is considered a church for federal tax purposes ("Tax guide," 2008). According to the website of Thompson and Thompson, a law firm that caters to non-profit organizations, not all of the criteria must be met by every individual church since allowance must be made for independent churches as opposed to large denominations. Additionally, the Tax Court has a separate list consisting of the same key criteria but packaged into fewer points. The view held by this law firm is that Congress has never defined the term "church", and there is a substantial degree of interpretative license displayed by the IRS and the judiciary in what actually constitutes a "church" (Thompson, 2009).

Shaller (1990) argued the constitutionality of the enviable tax status afforded churches. If a church was to receive preferential tax treatment, Shaller believed the IRS should be able to adequately define a church, which it cannot do. Instead, the agency

relies on the 14 criteria noted above to determine whether an organization qualifies as a church. The agency added an additional catch-all criterion encompassing all relevant facts and circumstances with regard to an organization, enabling the IRS to look specifically for the existence of private benefit or private inurement to an individual(s). In *Texas Monthly, Inc. v. Bullock* (1989), the Supreme Court ruled that in order for a tax benefit to be allowed to a religious organization by a state statute, it must also benefit nonreligious organizations or it would be in violation of the Establishment Clause of the First Amendment. The mandatory filing exemption set aside for churches and religious organizations does not pass the *Texas Monthly* test as it obviously provides no benefit to nonreligious organizations, thus bringing into question its constitutionality.

Who Can Start a Church?

A quick internet search yields a plethora of on-line resources for starting a church or becoming ordained. An organization called World Christianship Ministries (WCM) offers a clergy package, complete with ordination certificate, for only $85 and a processing time of "generally 1-3 business days" (World Christianship, 2009). WCM's Ordination Application is included here as Appendix B. The following disclaimer is provided at the bottom of the WCM internet homepage:

> World Christianship Ministries is not an internet church but rather an outreach ministry. Our purpose is to empower you with the authority of ordination and the authority to do all Christian services and begin your own independent church or ministry. We are an incorporated ministry and were granted 2 Federal Trademarks by the US Government, as such we consider this ministry to be regularly established. We do make ordination quick and simple but we do not ordain

> directly on the internet. Once ordained by this ministry we consider you regularly established due to our requirement that a signed application is required by WCM in order for us to ordain you. WCM reserves the right to approve or not approve all applications. Our Doctrine is the Holy Christian Bible, with the Words of Christ being the most important part of the doctrine we believe in. By signing our application you acknowledge that you agree with this doctrine. If you live in Pennsylvania we recommend that you formally establish your church or ministry by filing a DBA (Doing Business As) name with your County Clerk's office. Some states may call this a Fictitious Business Name or Assumed Business Name. We also recommend that you have a congregation (size does not seem to be important) or that one of the people in any wedding you do be a member or your church, ministry or society. You may call us at any time for more information. (World Christianship, 2009)

Another website, Rose Ministries (Rose, 2009), offers a basic ordination package for only $29.95 including official ordination, an imprinted ordination certificate, wallet identification cards and a presentation folder to protect the new credentials. For just $10 more the applicant can get the premium package which includes everything in the basic package plus a clip-on clergy badge, a clergy parking placard and a supply of wedding and baptism certificates along with customizable ceremonies. For only another $8, the applicant can obtain the certificates and ceremonies on a CD-ROM for easier customizability.

For the entrepreneur who wants to go all out, Rose Ministries offers the Wedding Business Premium Ordination Package for only $89.95, marketed to include "everything

you need to start your own Wedding Consultant Business, whether full or part-time. This is an ideal home-based business" (Rose, 2009). The same website includes a link to a page regarding the legality of their ordinations. The reader is referred to a 1974 court decision deemed a landmark case on the issue of mail order ordination, *Universal Life Church, Inc. v. United States* (1974), where the judge ruled for the plaintiff, stating in part that:

> Neither this Court, nor any branch of this Government, will consider the merits or fallacies of a religion. Nor will the Court compare the beliefs, dogmas, and practices of a newly organized religion with those of an older, more established religion. Nor will the Court praise or condemn a religion, however excellent or fanatical or preposterous it may seem. Were the Court to do so, it would impinge upon the guarantees of the First Amendment. (*Universal Life Church, Inc. v. United States*, 1974, p. 8)

Relying on the decision in the *Universal* case, the Rose Ministries website goes on to discuss the role of the IRS in determining the legitimacy of a ministry and its ordinations, pointing out that the IRS does not have the authority to determine the right to ordain (Rose, 2009). On April 12, 2009, this writer applied for the basic ordination package and paid the $29.95 fee plus $5 for shipping (the least expensive option) to follow the process through to fruition. In placing the on-line order, there was no mention of any educational requirements or recommended courses of study. Two weeks later, a Certificate of Ordination arrived in the mail, no questions asked and is included here as Appendix C.

Historical Analysis of Relevant Litigation

A search of the LexisNexis Academic database for federal litigation using the terms "First Amendment protection" (everywhere), "church" (at least five occurrences) and "fraud" (at least five occurrences), yielded 20 legal cases for review as of December 2, 2011: one Supreme Court case, eight appellate court cases, 10 district court cases and one bankruptcy case listed below in that order. Initial review of those 20 cases identified several related Supreme Court landmark cases which are included to lend context to the discussion:

- United States Supreme Court
    - *Watchtower Bible & Tract Society of New York, Inc., et al v. Village of Stratton* (2002)
    - Additional landmark cases not identified through the search criteria:
        - *Cantwell v. Connecticut* (1940)
        - *Murdock v. Pennsylvania* (1943)
        - *United States v. Ballard* (1944)
- United States Courts of Appeal
    - *The Founding Church of Scientology of Washington, D.C. v. United States* (1969)
    - *ISKCON, Inc. v. Barber* (1981)
    - *ISKCON of Houston, Inc. v. City of Houston, Texas* (1982)
    - *Scott v. Rosenberg* (1983)
    - *In re Grand Jury Matter, Antoni Grocowicz* (1985)

- *Church of Scientology Flag Services Org., Inc. v. City of Clearwater* (1993)
- *Petruska v. Gannon University* (2006)
- *Doe v. Holy See* (2009)

- United States District Courts
  - *Fernandes v. Limmer* (1979)
  - *McRae v. Califano* (1980)
  - *Van Schaick v. Church of Scientology of California, Inc.* (1982)
  - *The Bible Speaks v. Dovydenas* (1988)
  - *Church of Scientology Flag Services Org., Inc. v. City of Clearwater* (1991)
  - *Snyder v. Murray City Corp*oration (1995)
  - *Idema v. Dreamworks, Inc.* (2001)
  - *Dunn v. Board of Incorporators of the African Methodist Episcopal Church* (2002)
  - *Snyder v. Phelps* (2008)
  - *Klouda v. Southwestern Baptist Theological Seminary* (2008)
- United States Bankruptcy Courts
  - *In re The Bible Speaks*, Debtor (1987)

Five of the cases identified by the search were deemed to be not relevant to this project and have been excluded from study:

1. *McRae v. Califano* (1980) which involved the use of tax dollars to fund abortion costs.

2. *Snyder v. Murray City Corporation* (1995) which involved the issue of prayer at city council meetings.
3. *Idema v. Dreamworks, Inc*. (2001) which involved a work of fiction staged in a church.
4. *Snyder v. Phelps* (2008) which involved a protest at the funeral of a homosexual soldier killed in action.
5. *Doe v. Holy See* (2009) which involved allegations of sexual molestation by clergy.

The remaining 15 cases span 5 decades as depicted in Table 2 and will be reviewed chronologically:

Table 2

Relevant Litigation Search Results by Decade

Decade	Number of Cases
1960 - 1969	1
1970 - 1979	1
1980 - 1989	7
1990 - 1999	2
2000 - 2009	4

Landmark cases. *Cantwell v. Connecticut* (1940) involved a dispute over proselytizing and solicitation of charitable contributions. Newton Cantwell and his two sons, all members of the Jehovah's Witnesses, were arrested in New Haven, Connecticut as they were going from house to house with books, pamphlets and recordings of their beliefs. The recordings actually described the books. The defendants would ask

permission to play the recordings, and if granted, would then encourage the listener to purchase the book or at least make a contribution to the cause. The Cantwells were in a predominantly Roman Catholic neighborhood when they were arrested, and one of the books they were promoting included an attack on the Catholic faith which incited some antagonism. All three Cantwells were indicted on charges under the following statute as quoted in the opinion:

> No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect. Such certificate may be revoked at any time… (*Cantwell v. Connecticut*, 1940, p7)

The appellate court upheld the conviction on the grounds that the solicitation of funds brought the Cantwells' activities under the purview of the statute, so they appealed to the Supreme Court where the convictions were overturned. The opinion states in part:

> The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom

> to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts - freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right in their insistence that the Act in question is not such a regulation. If a certificate is procured, solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited. (*Cantwell v. Connecticut*, 1940, p. 8)

Murdock v. Pennsylvania (1943) is another case involving charitable solicitation. The City of Jeannette, Pennsylvania had an ordinance providing that all persons canvassing or soliciting orders for merchandise of any kind must procure a license and

pay a tax to transact business in an amount based on the length of the licensing period. Petitioners, members of the Jehovah's Witnesses, challenged the constitutionality of the ordinance after being arrested, convicted and fined for solicitation of purchasers for their books and tracts without the required license. They follow the Apostle Paul's example of Acts 20:20, teaching publicly and from house to house (The Holy, 1978). In its opinion, the Supreme Court made the following observation:

> The hand distribution of religious tracts is an age-old form of missionary evangelism – as old as the history of printing presses. It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. (*Murdock v. Pennsylvania*, 1943, p. 2)

The Court also recognized that not just any conduct could be deemed a religious rite and thus be deserving of protection under the First Amendment, polygamy for example, simply due to the sincerity and zeal of the practitioners. In that regard, the opinion noted that "the manner in which it [religion] is practiced *at times gives rise to special problems with which the police power of the states is competent to deal*" [emphasis added] (*Murdock v. Pennsylvania*, 1943, p. 2). Selling rather than donating religious literature does not transform the evangelism effort into a commercial

transaction, any less than does passing the collection plate during a church service. In the words of the Court:

> If it did, then the passing of the collection plate in church would make the church service a commercial project….It is plain that a religious organization needs funds to remain a going concern….Freedom of religion [is] available to all, not merely to those who can pay their own way….Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse….A state may not impose a charge for the enjoyment of a right granted by the federal constitution….If the formula of this type of ordinance is approved, a new device for the suppression of religious minorities will have been found. (*Murdock v. Pennsylvania*, 1943 p3-5)

The Supreme Court noted that Jehovah's Witnesses are not above the law, but also that the disputed ordinance did not address problems which fell within the purview of the police power of the state, and reversed the judgments (*Murdock v. Pennsylvania*, 1943).

United States v. Ballard (1944) is a prime example of the limitations of this study. It deals directly with the concept of economic crime (fraud) involving a church. However, since the phrase "First Amendment protection" does not appear in the case, it did not originally appear in the search results.

The defendants, three members of the Ballard family, were indicted for trying to promote their "I am" movement through the mail system using false pretenses and promises, including claims such as being divine messengers and possessing the power to heal and cure any disease by reason of supernatural attainments. The jury, advised not to

judge the truth or falsity of the defendants' beliefs but rather the defendants' good faith and sincerity in their beliefs, convicted the defendants. On appeal, the conviction was reversed and a new trial granted under the argument that in order to prove the defendants devised the scheme it was necessary to prove at least some of their representations to be false.

The Supreme Court disagreed, citing the dual aspect of the First Amendment noted in *Cantwell v. Connecticut* (1940), freedom to believe and freedom to act, and expounding with the following:

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of

> the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position. (*United States v. Ballard*, 1944, p6)

No interference can be permitted between man's relations to his Maker, the perceived obligations or the manner of expression of such, as long as the peace, prosperity, morals and laws of the people are not interfered with, and the District Court was correct in withholding from the jury the determination of the truth or falsity of the defendants' beliefs (*United States v. Ballard*, 1944).

With these Supreme Court landmark opinions in mind, the 15 remaining federal court cases are discussed below.

***The Founding Church of Scientology of Washington, D.C. v. United States* (1969).** This was an appeals case involving Scientology. Originally, the United States brought suit against the Founding Church of Scientology of Washington D.C., alleging that Scientology's Hubbard Electrometer (e-meter) qualified as a "device" and that its associated literature was false and misleading under the Food, Drug and Cosmetic Act. Scientology ignored evidence that the e-meter served no medical purpose and instead defended the claim on the grounds that auditing is a religious process, used to diagnose

the subject's mental and spiritual condition, and thus protected under the First Amendment. Scientology compared their auditing process to a Catholic confession. They provided evidence of their incorporation as a church and that their ministers are qualified to perform marriages and funerals. The government did not argue the legitimacy of Scientology as a religion. Instead, they argued that religious beliefs are absolutely protected but that actions are susceptible to legal regulation just as any secular activity would be. The case was tried before a jury who returned a verdict for the defense.

The Court of Appeals decision began by citing *Cantwell v. Connecticut* (1940): "The First Amendment embraces two concepts, - freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society" (p. 8). This is the position on which the prohibition of polygamy has been upheld. The Supreme Court has noted that only the gravest of abuses that endanger issues of paramount importance can provide the occasion for "permissible limitation of religious practices." The *Cantwell* opinion also stated that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom" (p. 8). In *United States v. Ballard* (1944), the Supreme Court reversed a Court of Appeals decision, holding that trial of the truth or falsity of religious beliefs, even if they appear preposterous to most people, was prohibited by the First Amendment.

In the instant case, the Court of Appeals observed that the U.S. did not dispute Scientology's claim to religious status, so to question the e-meter literature and auditing process was to find their religious doctrines to be false. The court noted that even though certain passages within Scientology literature could be deemed fraudulent healing claims,

Scientology's books and writings are considered its scriptures and noted again that the government did not challenge Scientology as a religion. In an attempt to answer that question anyway, the court noted that the fact that Scientology does not postulate a deity in the conventional sense does not preclude Scientology from claiming religious status. Dwelling on Scientology's status as a religion, the court appeared to almost chastise the government for not raising the question:

> Not every enterprise cloaking itself in the name of religion can claim the constitutional protection conferred by that status. It might be possible to show that a self-proclaimed religion was merely a commercial enterprise, without the underlying theories of man's nature or his place in the Universe which characterize recognized religions. Though litigation of the question whether a given group or set of beliefs is or is not religious is a delicate business, our legal system sometimes requires it so that secular enterprises may not unjustly enjoy the immunities granted to the sacred.…The law has provided doctrines and definitions, unsatisfactory as they may be, to deal with such disputes. (p. 15)

As the jury's attention may have been directed to the truth or falsity of the theories of Scientology however, the verdict was set aside. In summarizing its position, the Court of Appeals held that Scientology provided evidence to prove its status as a religion which went undisputed, and that Scientology claimed that auditing is part of its religious doctrine, which also went undisputed. The court also noted that it did not necessarily find Scientology to be a bona fide religion for legal purposes (albeit they were not asked to), and that any assertion of religious status could be contradicted by a showing of bad faith and the purpose of hiding a secular enterprise behind religious

protection. The opinion could almost be interpreted as offering guidance on how to argue against Scientology in the future.

***Fernandes v. Limmer* (1979).** Plaintiff Fernandes was a member of the International Society of Krishna Consciousness (ISKCON) and sued to prevent city officials from enforcing a resolution to regulate solicitation in a public forum. The District Court granted the permanent injunction, finding that those parts of the airport not leased to others were in fact a public forum and that the resolution prohibiting solicitation in those areas was indeed unconstitutional under the religious protections of the First Amendment. The decision cites *Murdock v. Pennsylvania*, (1943) where the Supreme Court held that solicitation of charitable contributions was incidental to the objective of preaching and propagating religious doctrines and thus a protected activity. In *Murdock*, the Supreme Court ruled that the sale of religious literature rather than the donation of said literature did not transform the act of charitable solicitation into a commercial enterprise anymore than the passing of a collection plate at church makes the service a commercial project.

This court also cited the *Cantwell v. Connecticut* (1940) opinion as saying "Nothing we have said is intended to even remotely imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct" (p. 9). The court quoted another Supreme Court case, one that involved the First Amendment but did not hinge on the Religion Clauses:

> A municipality cannot…require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion to

> the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. (*Schneider v. State of New Jersey*, 1939, p. 4)

The District Court found the provision unconstitutional, noting that there are other means, including the penal code, to prevent the perpetration of fraud on the public.

***ISKCON, Inc. v. Barber (*1981*) and ISKCON of Houston, Inc. v. City of Houston, Texas* (1982).** Two more ISKCON cases were appealed in the 1980s, and both involved attempts to regulate charitable solicitation. In *ISKCON, Inc. v. Barber* (1981) the dispute involved the New York state fair and the ordinance against solicitation of charitable contributions by individuals other than fair booth licensees. A tenet of the Krishna movement is the practice of sankirtan, which requires members to rove amongst the uninitiated to teach and to solicit financial aid, but the state's rule prohibited the practice. After evidence was presented showing instances of fraudulent sankirtan and testimony heard from a former ISKCON member who recalled being taught to lie and deceive while engaging in sankirtan in the interest of transferring material wealth to the Lord, the District Court found for the defendants.

The Court of Appeals reversed the decision. In spite of the evidences of fraudulent activity, the state failed to prove that other less restrictive methods of addressing the problem were ineffective. Thus, the state's anti-solicitation rule unconstitutionally interfered with ISKCON's religious rituals. The court recognized that to reach a decision, it must first determine whether Krishna and sankirtan qualified as sufficiently religious to warrant First Amendment protection. Earlier attempts to define religion began with the concept of one's views of, and relations to, his Creator. However,

society has moved to a more subjective definition that examines an individual's attitude toward a particular belief system which may or may not include the traditional view of "God" or some other "Supreme Being".

This decision referred to *United States v. Ballard* (1944) in holding that emphasis should be on the adherent's sincerity and good faith toward those beliefs rather than on trying the truth or falsity of the beliefs. The elimination of "God" from the definition of religion was supported by the existence of several non-theistic belief systems such as Buddhism. Referring to *United States v. Seeger* (1965), a Supreme Court case involving the definition of "Supreme Being", the truth or falsity of a given belief, sincere and meaningful, which occupies a place in one's life parallel to that filled by an orthodox belief in God should not be questioned by a civil court. Here, the Court of Appeals determined it was clear that the life of a Krishna devotee was governed by a religious philosophy, and that the Krishna faith had an articulate and elaborate body of religious doctrine. The District Court ruling was reversed in favor of the church.

In *ISKCON of Houston, Inc. v. City of Houston, Texas* (1982), the City of Houston appealed the District Court's permanent injunction against enforcement of an ordinance that allegedly violated plaintiffs' First Amendment rights. Specifically, a Houston city law required all individuals who wanted to solicit charitable contributions to apply for and obtain a license to do so. The application process included furnishing extensive information, and the licensor must refuse a license if any fraudulent statement was made in the application process. During the litigation process, the city made major revisions to the ordinance including substitution of a "certificate of registration" instead of a license, and a duty to collect information only to inform the public rather than to

exercise discretionary authority. Again, the court relied on *Cantwell v. Connecticut* (1940):

> The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise….Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury. Without doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. (p. 2, 9)

This language supports a municipality's authority to protect its citizens from crime and undue annoyance with a narrowly drawn ordinance, one that does not vest in officials the power to regulate what messages residents will or will not hear, without breaching First Amendment protection.

The Court of Appeals took the view that the revised city ordinance was the least intrusive alternative that could be adopted and that it was sufficiently narrowly drawn. The District Court's decision that the ordinance violated ISKCON's First Amendment protection was reversed. ISKCON also claimed that compliance with the ordinance would be burdensome, but offered no evidence as to what about the ordinance was burdensome or the extent of the burden imposed. This substantive question was

remanded for an evidentiary hearing to determine whether the express design of the ordinance was to favor or burden a specific religion in direct violation of the First Amendment.

***Van Schaick v. Church of Scientology of California, Inc.* (1982).** Plaintiff Van Schaick was an ex-member of the Church of Scientology and, among other claims, alleged fraud, breach of contract and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). The church responded with a motion to dismiss arguing that their First Amendment protection prohibited inquiry into the subject matter of the plaintiff's complaint.

In 1971, a Scientology agent represented to the plaintiff that Scientology's auditing practice was scientifically guaranteed to have beneficial mental, physical and social consequences, claims supported by Scientology literature written by founder Hubbard. The agent also claimed that auditing is confidential, that Scientology is a "law-abiding, religious, scientific organization," and that Hubbard was a nuclear physicist. Scientology's auditing process was explained in the opinion:

> Auditing is a process during which a Scientology employee or agent (Auditor) uses a set of questions and drills, in conjunction with a mechanical device similar to a lie detector (the Hubbard E-meter) to elicit personal information from the subject, for the alleged purpose of psychotherapy. In order to obtain auditing, the subject signs a contract with the Church. The auditor asks questions which locate "Buttons" – a conscious or subconscious indication or response. To help locate "buttons", the auditor uses a Hubbard E-meter, a device which measures skin voltage. During auditing, the auditor pursues lines of questioning on highly

personal subjects ("rundowns") to locate the subject's "buttons". The auditor then makes a written record of the disclosures made. (p. 6)

Based on these representations, the plaintiff accumulated Scientology books and purchased auditing services from 1971 – 1974, when she left Scientology. In 1975 the plaintiff was contacted by her former Scientology auditor with a warning of harassment unless she returned to Scientology. The plaintiff was held against her will at the Scientology offices for two weeks while being audited for alleged crimes against Scientology. The successful intimidation resulted in the plaintiff's return to Scientology and her compliance with an order to "disconnect" from her husband. She invested in more books and auditing, remaining with Scientology until 1979. She was declared a "suppressive person" and fled in fear of additional harassment. Hubbard and Scientology responded by disclosing her confidential auditing information and continuing the threats and harassment.

Scientology argued that the plaintiff's complaint should be dismissed because the subject matter qualified as religious beliefs and practices. Conversely, the plaintiff argued that Scientology was nothing more than an organized commercial and criminal enterprise, claiming to be a religion but actually engaged in fraud and thus not entitled to First Amendment protection. This opinion also referred to *Cantwell v. Connecticut* (1940) and the Supreme Court's recognition that First Amendment protection embraces two concepts – the absolute protection of freedom to believe and the freedom to act which is subject to regulation for the good of society. So, even a church is not immunized against civil tortious liability or exempt from all regulatory statutes.

Another reference to *Cantwell v. Connecticut* (1940) also highlights the importance of whether the regulation achieves some compelling state interest via the least restrictive means possible. So causes of action can withstand a motion to dismiss even if the action is based on a religious belief. In the instant case when Scientology represented that results from auditing were "scientifically guaranteed", it offered a non-religious source of belief, potentially encroaching on any perceived religious protection.

The District Court noted significant deficiencies in the alleged RICO violations and dismissed those claims noting that the RICO statute is not broad enough to cover every fraud allegation. Plaintiff claimed that Scientology's promises of a variety of benefits after her period of auditing were actually fraudulent representations. While the court found these allegations to be purely secular and that adjudicating them would not force a consideration of truth or falsity of religious doctrine, it also noted that the claim was not pled with sufficient particularity to support a fraud allegation. A fraud claim inherently must include proof that the defendant knowingly made a false statement. Proof of such is difficult when it relates to the truth or falsity of religious doctrine. In *United States v. Ballard* (1944), benefit of the doubt goes to the side of religious protection:

> Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. (*United States v. Ballard*, 1944, p. 6)

The District Court looked to prior litigation to establish Scientology's claim to religious status, specifically *The Founding Church of Scientology of Washington, D.C. v. United States* (1969) discussed above. Scientology maintained a formal external appearance of being a religion including incorporation as such, clergy with the authority to marry and bury, and literature containing a general account of the nature of man. The 1969 court also emphasized that while the defendants did not challenge Scientology's status as a religion, it did not hold that Scientology was for all purposes a religion and that any claim of religious status can be challenged by showing that the asserted beliefs are not held in good faith but rather for the sole purpose of "cloaking a secular enterprise with the legal protections of religion" (p. 16).

The District Court's decision cites *ISKCON, Inc. v. Barber* (1981) in that a court may require a newer faith to demonstrate its entitlement to First Amendment protection, contrary to Scientology's claim that the court could not favor one religion over another. From *The Founding Church of Scientology of Washington, D.C. v. United States* (1969), "not every enterprise cloaking itself in the name of religion can claim the constitutional protection conferred by that status" (p. 15). The bare assertion of religion was not sufficient to establish First Amendment protection in those cases, and is not here either. The court recognized this dilemma and directed the parties to submit argument as to whether the defendant was truly entitled to First Amendment protection as a religion. Presentation of facial proof would entitle a subject religion to protection unless effective rebuttal was offered, excluding the investigation or determination of truth or falsity of beliefs. The court dismissed the RICO claims, granted the defendants' motion to dismiss and granted the plaintiff leave to file a second amended complaint.

***Scott v. Rosenberg* (1983). T**he pastor and president of Faith Center Church brought suit against employees of the Federal Communications Commission (FCC) alleging violation of his First Amendment rights during an FCC investigation of the church's radio and television stations. The District Court granted summary judgment to the FCC employees.

The FCC investigation came in response to allegations by a former employee that airwave solicitations were made to fund church projects which never happened but instead were diverted to Scott's personal gain. Two FCC employees made an unannounced visit to the church asking for access to certain church records including station logs and Scott's salary and donation records. When only some of the requested materials were made available, the FCC listed the station's license renewal application for a hearing and potential forfeiture.

The church sought its own relief but the status of its situation was not before this court. The plaintiff brought this action individually and not even in a representative capacity. He claimed violation of his First Amendment religious protection in that his religious belief required confidentiality of donations if God were to receive them as sacrifices. So the court was faced with making a decision as to whether the plaintiff had a legitimate First Amendment claim and what the appropriate remedy might be.

The situation was complicated by the existence of an integral third party, yet not a party to the instant case – the church and its broadcast media. The court noted that historically broadcast frequencies have enjoyed a more tolerant arena with regard to First Amendment protection than traditional cases. So with regard to regulation of broadcast media, the court held that the FCC was not required to be held to a different standard

while investigating religious broadcasters as opposed to secular broadcasters. Requiring the FCC to justify their actions in response to fraud allegations by one of its secular or religious licensees is impractical and unsupported, but neither does it justify a broad and open ended investigation.

The plaintiff claimed that his church donations were sacrifices, disclosure of which would violate their sacred nature, and the FCC employees did not dispute his sincerity. The court held that the FCC demand did indeed interfere with the plaintiff's First Amendment rights, while also holding that not all such interference is necessarily unconstitutional, such as accomplishment of an overriding governmental interest to investigate and prevent fraudulent practices. On the other hand, the Supreme Court has repeatedly looked to penal law to punish and deter religious frauds rather than involving First Amendment protection.

In the instant case, the Court of Appeals had to decide whether alleged fraud connected with the exercise of sincerely held religious beliefs overrode an individual's right to religious freedom. The conclusion was that it depends in part on the nature of the alleged fraud. Here, the plaintiff was using church broadcast media to solicit contributions that would be used for any purpose plaintiff determined to be "the will of the Lord". The court found that prevention of the diversion of solicited funds qualified as a compelling government interest and affirmed the District Court's ruling.

The church made the decision to utilize broadcast media, availing themselves to operate in the regulated public interest where rights of listeners trump those of broadcasters. Where an allegation of fraudulent solicitations in a church service would most likely not be upheld, the same allegation could justify an investigation into

broadcast solicitations. The FCC investigation came only in response to a complaint filed by a former employee who was in a position to have personal knowledge of his allegations and who could face liability if his complaint was knowingly based on false information.

***In re Grand Jury Matter, Antoni Gronowicz* (1985).** Appellant author Gronowicz challenged an order holding him in civil contempt for refusing to comply with a subpoena for documents relating to a book he wrote about the life of Pope John Paul entitled *God's Broker*. The author claimed First Amendment protection on the grounds that examination of those documents would involve a discussion of the truth or falsity of the contents of his book. The case was before a grand jury in the first place based on allegations by the publisher that the author fraudulently misstated the manuscript contents. The court ruled the subpoena to be issued pursuant to a proper grand jury investigation, and the order compelling him to comply valid.

The allegations of fraudulent misrepresentation stemmed from the author's claims that the book portrayed the life of the Pope as told in the reminiscences of the Pope himself, cardinals, bishops, and friends. After the publisher obtained information alleging Gronowicz never interviewed the Pope and concluded the book was a fraud, a civil fraud suit was filed against the author.

The Court of Appeals noted that while the requirements of scienter do not apply to innocent errors of fact, false statements made intentionally to induce reliance and action on the part of another do indeed meet the requirements of scienter and are not entitled to First Amendment protection. In upholding the District Court's order, *United States v. Ballard* (1944) was cited again where a jury was given permission to convict if

it found the defendants did not actually believe their claims of spiritual healing but made them simply to get money. In the instant case, intentional fraudulent misrepresentations regarding non-existent sources for a book were deemed to be an actionable offense.

***In re The Bible Speaks* (1987) *and The Bible Speaks v. Dovydenas* (1988).** The next two cases involve a church organization known as The Bible Speaks (TBS), a debtor in a Chapter 11 bankruptcy filing that occurred in Massachusetts in 1986. The bankruptcy proceeding stemmed from the claim of former donor Elizabeth Dovydenas for the return of over $6.5 million of contributions she made to TBS in response to alleged fraudulent misrepresentations and solicitations. After extensive discovery revealed clerical deceit, greed and subjugation on the part of church founder Carl Stevens, the Bankruptcy Court granted Dovydenas' claim.

Stevens had no formal education but held an honorary degree from a theological seminary, with the processing fee paid by the church. Dovydenas, married to a free lance photographer, was a descendant of a department store owner with a net worth of approximately $19 million before getting involved with the church. Together, the couple was attracted to the church because of the enthusiastic crowds and relative youth of the parishioners. They left a $600 check in the offering plate after attending several services. Soon after that, two church ministers showed up uninvited at the Dovydenas home and asked whether Stevens could visit them, to which they agreed.

The claimant was drawn in and began spending more time with church activities. Stevens began planting seeds of doubt about the spiritual state of Dovydenas' husband, and she began to look at her husband as being controlled by the devil, thereafter increasing the time she spent with Stevens in private counseling sessions and in church

activities. Stevens convinced her she was special in that she had the ability to release material benefits from God by giving to the church. Despite her husband's objections, Dovydenas decided to give $1 million to the church in 1984 in hopes of curing Stevens' wife's migraine condition. Thereafter, the Stevens' falsely claimed the migraines had been cured.

In April, 1985 just before leaving for a Florida vacation with her family, Dovydenas told Stevens that God had instructed her to donate another $5 million in June. Stevens wanted to become a televangelist, and this gift would make it possible. It also enabled his plan to have the church purchase a condominium in Palm Beach, Florida for his personal use, of which Dovydenas was unaware. While in Florida, Dovydenas got a call from Mrs. Stevens who told her that one of the church's ministers was imprisoned in Romania and asked for prayers on the man's behalf. In reality he had been detained for only 24 hours and then released. The same day, Dovydenas decided to make the gift immediately rather than wait until June hoping to affect the minister's release and encouraged by Stevens that her gift had the power to make it happen. When she returned from Florida and learned of the minister's release, she was convinced of the power of her gift. In December, she gave another $500,000.

Her family grew increasingly concerned and finally organized an intervention under the pretext of a family reunion. Counselors were available to discuss the psychological aspects of organizational memberships including cults. The effort was successful and Dovydenas regained some degree of objectivity with regard to the Stevens and the church.

Subsequently, Dovydenas brought suit seeking damages and rescission based on undue influence and fraud. The church responded with this Chapter 11 bankruptcy filing, and Dovydenas filed a claim. The church argued that resolution of the dispute would require inquiry into religious concepts and intra-church doctrinal differences and was entitled to First Amendment protection. The Bankruptcy Court disagreed, drawing an important distinction. The First Amendment protects only religious beliefs and practices, and Dovydenas did not take issue with church beliefs or practices. Rather, her claim was that she had been manipulated, alienated from her family, and unduly influenced by Stevens. Evidence presented showed that Stevens' statements did not represent church practices or beliefs or even Stevens' personal religious beliefs. Stevens' insincerity and lack of good faith effectively invalidated any claim of First Amendment protection. Again citing *Cantwell v. Connecticut* (1940), the court ruled that "the church cannot, under the cloak of religion, commit wrongs upon the public" (*In re The Bible Speaks*, 1987, p. 17) and allowed Dovydenas' $6.5 million claim.

TBS appealed the Bankruptcy Court's order to the U.S. District Court of Massachusetts. At the outset of that discussion, the court noted that the dispute was purely secular despite the fact that one of the parties was a church, thus the basis of their opinion made no inquiry into the truth or falsity of religious doctrine. In its analysis of the element of undue influence, the court stated that "*the law recognizes the danger of undue influence in the pastor/parishioner relationship because of the trust instilled"* [emphasis added] (*The Bible Speaks v. Dovydenas*, 1988, p. 9).

As the First Amendment protects religious beliefs, the narrow question here was whether Stevens' statements to Dovydenas were based on his sincerely held religious

beliefs. According to his previous testimony, they were not. The court went on to note the distinction between the absolute protection afforded religious beliefs and the less-than-absolute protection afforded conduct in the name of religion. In order to be afforded First Amendment protection, a religious belief must be sincerely held. Quoting *Cantwell v. Connecticut* (1940), "nothing we have said is intended even remotely to imply that, under cloak of religion, persons may, with impunity commit frauds upon the public" (p. 9). Status as a church or member of the clergy does not grant immunity from judicial scrutiny, however, as penned by Justice Rehnquist in a Supreme Court denial of a defendant church's request for certiorari in a class action case alleging breach of contract, fraud and violations of state securities laws:

> There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastic cognizance and policy in adjudicating intra-church disputes. But this court never has suggested that those constraints similarly apply outside the context of such intra-organization disputes. Thus, [cases regarding intra-church disputes] are not in point. Those cases are premised on a perceived danger that in resolving intra-church disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged. (*The Bible Speaks v. Dovydenas*, 1988, p. 12)

The District Court also quoted the *Van Schaick v. Church of Scientology of California, Inc.* (1982) decision in its opinion affirming the Bankruptcy Court ruling:

> Even if we were to find that the California Church is a religious institution, the free exercise clause of the First Amendment would not immunize it from all common-law causes of action alleging tortious activity….Causes of action based upon some proscribed conduct may, thus, withstand a motion to dismiss even if the alleged wrongdoer acts upon a religious belief or is organized for a religious purpose. (p. 8-9)

***Church of Scientology Flag Services Org., Inc. v. City of Clearwater* (1991/1993).** This was another case involving regulation of the solicitation of charitable contributions. The plaintiff was a worldwide training center for Scientology. In response to community complaints about the center's activities, including allegations of fraud that auditing sessions failed to meet promised results and promised refunds not made, the city held a series of legislative hearings in 1982 to decide whether any action should be initiated.

In 1983, the city enacted an ordinance that would require charitable organizations to register annually with the city before they could solicit funds. The registration statement was to be a public document and required disclosure of the names, addresses, telephone numbers and a description of the organization, the person in charge, the person authorized to disburse the funds, methods of solicitation, use of funds, time period of the solicitation, an estimate of salaries, fees and costs to incurred to conduct the solicitation, names of officials or solicitors who had been convicted of serious crimes in the last five years, names of other Florida cities where solicitations took place and a statement that

records and documents are maintained to support the statement. Sixty days after the end of each year, the organization must file a statement disclosing the amount collected, costs incurred including wages, advertising and other expenses, and an estimate of how the funds will be used. Fraudulent solicitations were strictly prohibited, and after ten or more individual complaints the city would be authorized to investigate the organization's activities. The ordinance was similar to that enacted in Houston and the subject of the dispute in *ISKCON of Houston, Inc. v. City of Houston, Texas* (1982) discussed above.

In addressing Scientology's standing as a religion, the District Court noted that American jurisprudence has adopted a broad definition of religion. Determinants include the existence of a fundamental belief system that addresses issues of ultimate concern, and formal or external signs of similarity to a recognized religion such as clergy, services, ceremonial functions and attempts to propagate, and Scientology appears to meet all of these.

In spite of the broad definition of religion, an organization must be able to prove its status as a religion if challenged. When determining if First Amendment protection applies, there is nothing to prohibit a ruling as to whether a set of beliefs constitutes a religion. The city claimed that Scientology had not proven itself as a religion. However, the court found that Scientology fulfilled the modern definition of a religion, noting that non-theistic beliefs can qualify for First Amendment protection.

Religion aside, the city alleged that the actions at issue were commercial and sometimes criminal in nature. The court recognized the municipality's interest in prohibiting fraudulent solicitation albeit using the least restrictive means necessary without enabling excessive discretion on the part of city officials. Disclosure is less

restrictive than prohibition. Again referencing *Cantwell v. Connecticut* (1940), the court in the instant case said:

> The state can protect its citizens from fraudulent solicitation and insure that funds raised actually find their way to the organization for which the solicitation was given by requiring a stranger in the community to establish his identity and his authority to act for the cause he purports to represent before permitting him to publicly solicit funds for any purpose. (p19)

The District Court found that the ordinance did not violate Scientology's First Amendment rights. No surveillance or inspection was required, and the city could only investigate an organization after ten bona fide sworn complaints had been filed. No inquiry into religious doctrine was required. Scientology also claimed that the recordkeeping and disclosure requirements of the ordinance violated the Establishment Clause in that they fostered excessive entanglement with religion. The court disagreed with this argument as well, noting that specific actions like on-going surveillance and daily on-site inspections constituted entanglement but not disclosure requirements. Scientology appealed.

The Court of Appeals noted at the outset that Scientology's history, doctrine, organization and practices have been recounted thoroughly in numerous court decisions, none of which have yielded findings to support the position that Scientology is not a religion for First Amendment purposes. Furthermore, upon review of materials submitted to the District Court, the Court of Appeals found explicit evidence that the city's legislative process in this matter was designed with the intention of singling out Scientology for burdensome regulation in hopes of driving the church out of the city. In

fact, the city hired attorney Michael Flynn to coordinate the publicly televised 1982 legislative hearings that led to the disputed ordinance, a man who had dedicated a good deal of his career to fighting Scientology. The disputed ordinance was actually Flynn's suggestion, the primary purpose being collection of data to disprove Scientology as a religion.

It was no secret that city officials had been looking for a legal route to encourage Scientologists to leave. One referred to Scientology as a cancer first requiring arrest of its growth and then removal, another that "Scientologists lie, steal and cheat…the community must work to destroy the organization at the top" (p. 17). One made it his campaign platform – forcing Scientology to leave town, and another campaigned on his position that every legal means available should be used to show that Scientology is a fraud. At one point the city even considered the possibility of employing its power of eminent domain to condemn property owned by Scientology. Such proposals were ultimately rejected for several reasons including cost and the fact that the action would not guarantee the desired result.

The Court of Appeals found that sufficient evidence existed to shift the burden of proof to the city to show that it would have enacted the same ordinance if the existence of Scientology were not a factor, and remanded that claim back to the District Court.

Regarding the question of excessive entanglement due to recordkeeping requirements, the court noted that administrative and recordkeeping regulations that do not question religious doctrine do not generally pose an entanglement violation. In this case, Scientology argued that the disclosure requirements were so broad as to require disclosure of their entire operation, while the city argued that the ordinance was narrowly

tailored to prevent fraud. Problematic was that the city ordinance empowered the city clerk to assess adequacy of disclosures, that they were made available to the public, and that the criminal courts were involved in enforcement. Quoting *Everson v. Board of Education* (1947), the court found the city law violated the command that "neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa" (p. 10). The Court of Appeals found that the current issue did indeed involve an ecclesiastic dispute, referring to a 1974 Fifth Circuit case that included issues of freedom from state interference in the definition of "ecclesiastical".

Here, the court found that the public disclosure of private information effectively interposed the city into matters of church governance and organization, and reversed the District Court's ruling with regard to the public disclosure aspect of the ordinance. The city argued its compelling government interest in preventing fraud and its concerns about Scientology's continued alleged activities including intimidation, blackmail and illicit surveillance of dissident members and political adversaries. The court recognized the prevention of such behavior as a legitimate concern.

The Supreme Court has never expressly ruled that a state's interest in protecting its citizens from church-sponsored fraudulent solicitation is considered a compelling government interest. Here, the court concluded that the state does have a compelling interest to protect church members (not just the public) from material misrepresentations and again quoted *Cantwell v. Connecticut* (1940) which states that "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish

such conduct" (p. 9). The state's interest is not diminished by the fact that a voluntary member of the religion might also be a victim.

The court found that the ordinance's identifying disclosure requirements were sufficiently narrowly tailored so as not to violate the First Amendment. Even if Scientology finances and operations were misrepresented, the court noted it would not justify the far-reaching ordinance in its totality as currently written. Far less intrusive means were available for dealing with such fraud, yet the city offered no explanation as to why less restrictive alternatives such as the penal code were inadequate to address alleged illegal behaviors. The city did argue the sincerity of Scientology's deceased founder L. Ron Hubbard, but the Supreme Court has held that a regulatory scheme requiring inquiry into the beliefs of an entire religion might itself pose a First Amendment violation.

***Dunn v. Board of Incorporators of the African Methodist Episcopal Church* (2002).** This was an employment case where plaintiff minister by the name of Dunn brought suit against his church in Dallas, Texas for alleged fraudulent collection of donations from church members that were being diverted to support lavish lifestyles of some church bishops. He also claimed that the church withheld from assigning him to a local church in retaliation for his lawsuit. The minister brought a RICO charge and a breach of contract charge.

The RICO charge was dismissed on standing, as individuals who suffer damage from reporting a RICO violation are not entitled to bring a RICO suit against their employers. The breach of contract claim was dismissed based on First Amendment protection, as decisions regarding the employment of ministers including salary and duty

station falls under the ecclesiastical umbrella, not to be questioned by civil courts. In its ruling for a summary judgment in favor of the church, the District Court noted that matters of church governance are not purely secular and that unless the church requests help from the civil courts, such disputes should be resolved internally.

***Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton* (2002).** In this Supreme Court case, a village in Ohio attempted to regulate door-to-door canvassing to promote or explain any cause without first obtaining a permit from the mayor's office. A local Jehovah's Witness congregation brought suit, as their religion mandates door-to-door proselytizing. The District Court for the Southern District of Ohio required reconstruction of some of the provisions, but otherwise upheld the ordinance as "content-neutral". The Court of Appeals for the Sixth Circuit affirmed, concluding the ordinance was adequately narrowly tailored to serve the government's interest in preventing fraud, and not unconstitutionally vague or overbroad. The Supreme Court disagreed however, and remanded the case for further proceedings, ruling that the ordinance violated the First Amendment for five reasons:

1. It applied to commercial and noncommercial canvassers promoting a variety of causes including religion and political activity, covering so much speech as to raise constitutional concerns.
2. It resulted in a surrender of one's right to canvass anonymously, as the permit applications were made available to public inspection.
3. It required a permit as a prior condition of one's right to speak.
4. It banned a significant amount of spontaneous speech.

5. It was not sufficiently narrowly tailored to meet the stated interests of protecting the privacy of residents and preventing fraud.

The Supreme Court noted that it had upheld First Amendment claims by Jehovah's Witnesses against restrictions on door-to-door pamphleteering and canvassing by for over 50 years, as door-to-door witnessing is an integral part of their belief system in accordance with the example of Paul from Acts 20:20 which states "You know that I have not hesitated to preach anything that would be helpful to you but have taught you publicly and from house to house" (The Holy, 1978, p. 1020). In considering the instant case, the Supreme Court noted several themes that emerged from the earlier cases regarding door-to-door pamphleteering and canvassing:

1. It is a long-time accepted form of evangelism entitled to protection just as worship in churches and preaching from pulpits.
2. It has played an important and historical role in the dissemination of ideas and opinions.
3. It is essential to the "little people" whose causes are not well funded.

The Supreme Court found that this ordinance effectively imposed censorship which "strikes at the very heart of the constitutional guarantees" (p. 11). It also recognized a town has an interest in some form of regulation especially if solicitation of money is involved. Quoting its *Cantwell v. Connecticut* (1940) opinion where it ruled a licensing ordinance invalid because issuance of the license relied on the discretion of a city official:

> A State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any

purpose, to establish his identity and his authority to act for the cause which he purports to represent. (p. 9)

There must remain a balance between the legitimate state interest of protecting its citizens from fraud and the effect of any such regulation on First Amendment rights. In the instant case, the Supreme Court found the ordinance to be overbroad in that it covered "any cause" including girl scouts and trick-or-treaters, petitioners and campaigners rather than applying only to commercial activities and solicitation of money. In fact, the ordinance covered so much speech as to raise facial constitutional concerns, compelling the Supreme Court to list three pernicious effects in its ruling:

1. Anonymity is often a major factor in the support of a variety of causes, but the ordinance provision making the permit applications available to public inspection forces the surrender of anonymity.
2. The ordinance requires a permit prior to the exercise of the right to speak, and there are many whose religious belief system will prevent their applying for such a license.
3. The ordinance effectively banned a significant amount of spontaneous speech.

The Supreme Court noted that not even the unprecedented nature and breadth of the ordinance alone rendered it invalid. The regulation was not tailored to meet the Village's stated interests of preventing fraud and other crime and protecting the privacy of residents. An uninvited knock at one's door will carry the same degree of annoyance regardless of the existence of a permit, and the absence of a permit will not stop a criminal from knocking on doors. No evidence was presented of a particular crime problem related to door-to-door solicitation, and the ordinance had no provision for

verification of the information provided in the permit application such as the identity of the applicant or their organizational credentials.

***Petruska v. Gannon University* (2006).** This is another employment case where plaintiff Petruska served as a chaplain for a Catholic university and, the first female to hold the position, filed suit after her job was effectively eliminated as part of a restructuring initiative. Her allegations were that she was terminated due to her gender in spite of the fact that she had specifically sought and obtained assurances from then-President David Rubino that she would not merely be replaced when a qualified male candidate became available, and due to her outspoken opposition to internal cases of sexual harassment. She asserted six claims including gender discrimination, retaliatory discrimination, fraudulent misrepresentation, civil conspiracy, breach of contract, and negligent supervision and retention. The District Court dismissed the entire action based on the ministerial exception, a doctrine with roots in the First Amendment Religion Clauses that protects a church's personnel decisions regarding its ministers. The plaintiff appealed.

Several months after plaintiff was appointed to the role of chaplain, allegations surfaced against the university president that he was involved sexually with a female subordinate. Within months another female employee accused him of sexual harassment. Plaintiff was instrumental in bringing the allegations to administration. Soon after, the president resigned and attempts were made to cover up the scandal, to which plaintiff strenuously objected. Two years earlier, plaintiff sat on the school's Sexual Harassment Committee where she made a name for herself as an advocate of victim's rights. Subsequent to the president's resignation she was appointed Chair of the school's

Institutional Integrity Committee where she was critical of the university's policies and procedures on discrimination and harassment. The following year under a new president, plaintiff was informed of a restructuring and that she would no longer report to the president. Some of her responsibilities were reassigned, and she was asked to limit her comments at school events. The student body, faculty and staff were told of her demotion. Believing she was about to be fired, plaintiff resigned and filed this suit.

The Court of Appeals noted it had not previously been faced with the viability or scope of the ministerial exception but acknowledged that it should apply to any claim which would limit a religious institution's right to select those who are expected to perform spiritual functions. Thus, the court agreed that the plaintiff's claims of discrimination and retaliation along with the civil conspiracy and negligent retention were barred by the First Amendment. The court disagreed with the same application to plaintiff's fraudulent misrepresentation and breach of contract claims. However, the fraudulent misrepresentation claim was not pled with sufficient particularity, so its dismissal was upheld as well. The breach of contract claim did not facially appear to involve church doctrine and was remanded back to the District Court for further consideration. Contracts are entirely voluntary. A church can obligate itself via a contract which will be fully enforceable, unless the resolution of a dispute would require the court's entanglement in religious doctrine.

While the Court of Appeals agreed with the application of the ministerial exception to the facts of this case, it noted that the doctrine should be viewed as a challenge to the sufficiency of a stated claim rather than as a jurisdictional bar. In determining to whom the exception should apply, courts have looked to the function of

the position. Looking to an earlier case involving the ministerial exception, this court noted that an individual will generally be considered a minister if their primary duties include teaching or spreading the faith, supervision of a religious order or of participation in religious ritual and worship, or church governance (*Rayburn v. General Conference of Seventh-day Adventists*, 1985).

The protection exists even if a clergy involved employment action is not based on ecclesiastical issues or church doctrine, a key point that speaks directly to the premise of this paper. The role of church governance is considered ministerial by our judicial system so any related employment action, regardless of the involvement of church doctrine, would be protected by the First Amendment. So in essence, a corrupt church administration, hampered by conscientious church governance, can simply restructure the governance function with those more cooperative, all with constitutional protection. The case of church auditor David Dennis, which will be discussed later in this project, explores this phenomenon in greater detail.

***Klouda v. Southwestern Baptist Theological Seminary* (2008).** This is another employment case which involved a female instructor of Old Testament languages at a religious institution of higher education. When a new president was hired, he declined to renew plaintiff's contract or recommend her for tenure because she was a woman – the only woman, in fact, to teach at the school. Plaintiff filed suit claiming breach of contract, fraud, defamation (based on claims that she was referred to as a "mistake that needed to be fixed") and sex discrimination. The defendants claimed the action was ecclesiastical and thus protected by the First Amendment. The plaintiff disagreed, stating that she was

not a minister, did not teach or spread faith, nor was she involved with church governance.

The court disagreed, finding that the seminary, clearly an extension of the Baptist Church, qualified as a "church" and its faculty as "ministers". In reaching their decision, the court looked to several relevant cases heard by the Fifth Circuit Court of Appeals, including one that also involved the Baptist Seminary (*Equal Employment Opportunity Commission v. Southwestern Baptist Theological Seminary*, 1981) where the court held that the school's executive officers, deans, the chaplain and faculty should be considered ministers but the support staff such as finance, maintenance and other non-academic departments did not qualify as such. The court noted that when churches expand beyond the traditional means of propagating their doctrine, the employees hired to perform those non-ecclesiastical tasks are not considered ministers. In another Fifth Circuit case, the court penned this distinction:

> This case involves the interrelationship between two important governmental directives – the congressional mandate to eliminate discrimination in the workplace and the constitutional mandate to preserve the separation of church and state. As this Court previously observed…both of these mandates cannot always be followed. In such circumstances, the constitutional mandate must override the mandate that is merely congressional. (*Combs v. Central Texas Annual Conference of the United Methodist Church*, 1999, p. 10)

In the instant case, the District Court noted that the Fifth Circuit has generally embraced the fairly broad concept known as the "ecclesiastical abstention doctrine" and the more narrowly defined "ministerial exception" in challenges related to a religious

institution's employment decisions. Ecclesiastical disputes concern issues such as theological controversy, church government and discipline, or the conformity of members to the expected standard of morals. A challenge to a church's employment decision will rest on whether the employee served a ministerial function. In the instant case, prohibited procedural entanglements would most certainly result if the case were allowed to proceed through the normal judicial process. The court determined the employment decision to be religiously motivated and granted the defendants' motion for summary judgment on First Amendment grounds.

Findings from the review of historical litigation. The 15 cases reviewed are summarized by cause and by church as shown in Table 3:

Table 3

Summary of Litigation Findings

	Scientology	ISKCON	Catholic Methodist Baptist	Jehovah's Witness	Other
Regulation of Charitable Solicitation	2	3		1	1
Fraudulent Misrepresentation	2		1		2
Employment Discrimination			2		1

Nearly half of the cases reviewed involved various attempts to regulate the solicitation of charitable contributions in the interest of preventing fraud, including the Jehovah's Witness Supreme Court case and all three ISKCON cases. Courts were in

agreement that regulations must be sufficiently narrowly tailored to address the compelling government interests behind them. In finding for the church, the Supreme Court noted that house-to-house proselytizing and solicitation have played a historical role in the dissemination of ideas, having long been recognized as a form of evangelism entitled to protection, and found the ordinance to be unconstitutional as it was overbroad and not sufficiently narrowly tailored.

Key findings from these seven cases include the following:

- A state does have a compelling government interest to protect its citizens from fraud, but any attempt to regulate solicitation must be sufficiently narrowly tailored to address it.
- Collection of data with regard to the solicitor's identity and organizational credentials is acceptable, but public disclosure of that information interferes with matters of church governance and organization.
- There is nothing unconstitutional about requiring a stranger in the community to establish his identity and organizational credentials prior to being permitted to solicit funds for a cause. Even the cause of religion can withstand some inconvenience to that end.
- The state should not be empowered to regulate what messages residents will or will not hear by enabling officials to approve or disapprove an applicant according to the official's assessment of the adequacy of the disclosures.
- Regulation should be accomplished by the least restrictive or intrusive means available and cannot be designed to single out a particular religion.

- There are other means for preventing and controlling fraud including the penal code.
- Religion has previously been defined as one's views of and relation to his Creator, but society and American jurisprudence have broadened the definition to more of a fundamental belief system including those with sincerely held non-theistic beliefs.
- Truth or falsity of a belief system is not a matter to be determined by the courts.

Some of the same themes were found in the five cases involving fraudulent misrepresentation. Additional findings include:

- The First Amendment embraces two concepts – the freedom to believe and the freedom to act. The first carries absolute protection, but conduct remains subject to regulation for the protection of society. However, only the gravest of abuses will give rise to permissible limitations on religious practices (i.e., polygamy or murder).
- Truth or falsity of beliefs cannot be determined by a court, regardless of how preposterous they might appear to most people whether it is a Catholic confession or Scientology auditing. Truth or falsity of the e-meter compares to truth or falsity of the New Testament from where many take their gospel.
- A fraud claim inherently must include proof of a false statement which may be difficult given the prohibition on determining truth or falsity of religious doctrine. Benefit of the doubt goes to religious protection.
- Not every enterprise cloaking itself in the name of religion is entitled to First Amendment protection, as some may simply be commercial enterprises without

the fundamental belief systems regarding man's nature or his place in the universe. An assertion of religious status can be contradicted by a showing of bad faith and the purpose of hiding a secular enterprise behind religious protection.

- A newer faith may be asked to demonstrate its entitlement to First Amendment protection.
- False statements made intentionally to induce reliance and action on the part of another are not entitled to First Amendment protection.
- The law recognizes the trust instilled in a pastor/parishioner relationship.
- A purely secular claim can be adjudicated even if one of the parties is a church. Status as a church or clergy does not grant immunity from judicial scrutiny or from common-law causes of action alleging tortious activity. A church cannot commit wrongs on the public under the cloak of religion.

Interestingly, findings from the three cases involving employment appear to provide an exception to the last bullet point discussed above:

- Matters of church governance are not purely secular and should be resolved internally unless the church requests help from the civil courts.
- The ministerial exception protects a church's personnel decisions regarding its ministers, even decisions involving gender. The constitutional mandate to preserve the separation of church and state overrides the congressional mandate to eliminate discrimination in the workplace.
- Courts look to the function held to determine if the individual qualifies as a minister, including teaching, spreading the faith, church governance, supervision of a religious order, religious ritual or worship.

- When churches expand their activities beyond the traditional means of propagating their doctrine, those support staff employees hired to perform non-ecclesiastical tasks such as finance, maintenance and other non-academic departments are not considered ministers.
- The protection provided by the ministerial exception exists even if the employment dispute is not based on ecclesiastical issues or church doctrine.
- Contracts are entirely voluntary. A church can obligate itself with an agreement that will be entirely enforceable unless its resolution would require the court's entanglement in religious doctrine.

Internal Church Auditor Dennis – A Case Study

A discussion of this case is included here for two reasons. First, it is directly relevant to the topic of church related economic crime and the internal workings of a church's system of internal governance. As we saw in *Petruska v. Gannon University* (2006), our judicial system has identified the role of church governance as ministerial, thus protecting any related employment action regardless of whether issues of church doctrine are involved. Such a judicial stance basically enables a corrupt church administration to restructure its system of internal governance to serve its own purpose. The case of David Dennis is the story of a man who not only was fired by the church he had served all of his professional career, but who also endured a church-backed attack on his reputation for being too effective in his role as internal auditor. The latter is a perfect segue to the second reason for including a discussion of the case here. It is a prime example of a church's successful use of the "cloak of religion" to legally defend against allegations of fraud and misbehavior.

In August 1998, the LA Times ran a feature article on the growing turmoil within the SDA church, noting grass-roots rebellions, questionable use of international relief funds, and allegations of fraud and financial abuses against church leaders which then President Robert Folkenberg dismissed as baseless griping by a few disgruntled members. The church has a reputation for quiet conflict resolution. When former head auditor David Dennis, fired in 1994, filed his wrongful termination suit a variety of allegations of ethical and financial church misconduct became a matter of public record including (Gorman and Lichtblau, 1998):

- Misuse of millions of dollars of international relief money including government funds,
- Unauthorized "perks",
- Assigned powerful positions in exchange for internal support,
- Authorized pastoral titles, and the associated income tax breaks, to non-ministerial administrators.

The church retained a number of high-powered attorneys in its defense, claiming that Dennis was fired for having an adulterous relationship with a young woman who as a teenager had lived with his family for a time overseas. Years later, after Dennis had started questioning church financial dealings in his role as head auditor, the woman interestingly was able to uncover "suppressed memories" during a period of psychotherapy of an alleged sexual encounter with Dennis. The church also claimed that Dennis was given a fair disciplinary hearing but there were some participants who question its fairness, one referring to the tribunal as a "kangaroo court" that forced

Dennis out because he was doing too good a job as whistle-blower (Gorman and Lichtblau, 1998).

For some church members, the Dennis lawsuit brought back unhappy memories of other financial controversies in their church's history. In the 1980s, several church organizations and congregants lost millions of dollars after investing in deals of member real estate developer Donald Davenport whose holdings had certain deceptive underpinnings and ultimately collapsed in bankruptcy. Members later discovered some church leaders were being compensated for bringing business to Davenport.

In the early 1990s and the first year of his presidency, the wives of Folkenberg and another church official were given phantom jobs so that they could be free to travel with their husbands on church business. According to Folkenberg, he sought the approval of other elders to alleviate any potential ethical concerns. The payments were funded by an anonymous donor and funneled through a local worthy student fund so the donor could claim the money as a charitable deduction.

In the late 1990s after unaccounted for losses of $3.4 million, the church shut down an in-house publishing effort whose charter was to produce video Bibles for kids. Pastors who questioned the hierarchical status quo regarding tithe payments were relieved of their responsibilities. One was quoted in the article with his interpretation of the message coming from church leadership was to "pay, pray and shut up", while two others shared the opinion that the issue was one of control (Gorman and Lichtblau, 1998).

In January 1999, the LA Times again reported on SDA governance activities as leaders from around the world were flying into town for an emergency meeting to discuss Folkenberg's involvement with James Moore, a Sacramento businessman who recently

filed an $8 million lawsuit against Folkenberg and the church for financial misdealing (Lichtblau, January 1999). In a follow-up article the next month, the Times reported Folkenberg's resignation as President of the General Conference (GC) of SDAs after details of his partnership with Moore were revealed...details such as Folkenberg's expression of remorse and ways he might repay the debt, including options that would pose a conflict of interest with his church responsibilities (Lichtblau, February 1999). Clearly this is a case of failed church governance that requires further analysis in the search for information related to economic crime involving churches.

A timeline of events during the Dennis era of church employment. The timeline of events depicted in Table 4 was compiled from data obtained from three sources: Collision Course (Ferrell, 1995), Filthy Lucre (Hackleman, 2008) and The Kanaka Valley Tragedy (1999). It chronicles key events during the nearly 35 years that Dennis was employed by the SDA church, contemporaneously with Folkenberg.

Table 4

Timeline of Events

	David Dennis, Accountant and Auditor	Robert Folkenberg (acting in various church capacities)	James Moore, Real Estate Developer
1976	Became head auditor after over 16 years of work with SDA finances much of which was spent overseas.	Folkenberg, then President of the Central American Union (CAU) of SDAs, and Moore met during philanthropy efforts in the aftermath of the Guatemala City earthquake.	

	David Dennis, Accountant and Auditor	Robert Folkenberg (acting in various church capacities)	James Moore, Real Estate Developer
1978		Held a seat on the Inter-American Division (IAD) Executive Committee by virtue of his position as CAU President.	Created a Cayman Islands entity called Southern Equipment Corporation (SEC) and conveyed the stock to the SDA IAD of which CAU was a member.
1979			IAD, via its SEC investment, joined Moore in an investment partnership known as Kanaka Valley Investors, Ltd.
1980		Became IAD Field Secretary.	Formed Kanaka Valley Associates (KVA) to develop a parcel of real estate with $250,000 from a private investor who did not know the same land had already been pledged as collateral three times. This agreement gave Moore 67.5% of the profits from the prospective profits.

	David Dennis, Accountant and Auditor	Robert Folkenberg (acting in various church capacities)	James Moore, Real Estate Developer
1981	His repeated but unheeded warnings about the affairs of Davenport's post office ponzi scheme resulted in denominational losses in excess of $20 million when Davenport filed for bankruptcy.		
1983		Moore transferred close to half of his interest in KVA to SEC and most of the other half to Taverners Investment, Ltd., a Catholic charitable foundation of which he was an officer. These transfers were deemed "fraudulent conveyances" in Moore's subsequent bankruptcy filing.	
1984			Forced into bankruptcy in March. Convicted in Sacramento on eight counts of grand theft in June.
1986		Moore, the only KVA general partner, filed a Chapter 11 bankruptcy on behalf of KVA after Northern Equipment Corporation (NEC) attempted to foreclose on the Kanaka Valley property under one of the other agreements. His filing was denied as his interest in the property was under the control of his personal bankruptcy trustee. SEC also attempted to file on behalf of KVA for Chapter 11 protection but failed due to lack of general partner status.	

	David Dennis, Accountant and Auditor	Robert Folkenberg (acting in various church capacities)	James Moore, Real Estate Developer
1987		Became President of the SDA Carolina Conference and of Sharing International (SI), a Tennessee non-profit corporation chartered in 1974 by a group of SDA laymen to help with charitable endeavors throughout the world.	The court placed KVA under bankruptcy protection on its own and took charge of its reorganization.
1988		A businessman linked to Moore purchased an interest in KVA from the bankruptcy trustee and filed a revitalization plan which was accepted by the court. He became general partner and majority owner in exchange for settling the NEC note, paying unsecured creditors and a cash infusion. Moore became Catholic and suggested SI fund Catholic charities. SI did not wish to have a direct relationship with the Catholics, so the compromise was for Moore to convey his KVA interest to a for-profit corporation whose stock would be divided between SI and the Catholics.	

	David Dennis, Accountant and Auditor	Robert Folkenberg (acting in various church capacities)	James Moore, Real Estate Developer
1989	Openly opposed a denominational proposal that would institute substantial, un-matched salary increases for the church's health care sector.	IAD was uncomfortable dealing with Moore and the Catholics so SI created a for-profit entity called Sharing International Barbados (SIB) to acquire full ownership of stock in SEC and Taverners and deal directly with the Catholic entities. SIB's officers were Folkenberg as President, Duane McBride as Secretary (Professor of Sociology at the SDA Andrews University in Michigan) and Terry Carson (GC Attorney Walter Carson's brother) as Treasurer. Ben Kochenower was the organization's Certified Public Accountant. The stock was transferred to SIB in November. Moore began his four year prison term in December.	
Early 1990	Dennis published a cost-benefit analysis on the hierarchical level of the SDA church known as a union thus raising the ire of the union presidents. The Adventist Disaster Relief Agency (ADRA) was also not fond of Dennis due to his reputation for transparency and disclosure. ADRA obtained a significant portion of funding from national governments around the world and preferred to keep its dirty laundry under wraps.	In March, Folkenberg offered $53,000 to Moore to assist with restitution to try to reduce Moore's sentence. Evidently the gesture failed. In April, Moore's defense attorney petitioned the court to explain the offer by claiming there were obligations due Moore, and to point out there had been a $250,000 penalty for accepting the fraudulent conveyance earlier.	

	David Dennis, Accountant and Auditor	Robert Folkenberg (acting in various church capacities)	James Moore, Real Estate Developer
July 1990	Folkenberg was voted in as GC President and Alfred McClure as President of the GC's North American Division, both for a five-year term. Folkenberg immediately tried to block Dennis' re-election to the same five-year term but was unsuccessful. To avoid perceived conflict of interest, Folkenberg resigned his presidencies of both SI and SIB.		Another third party developer invested in KVA with a $2 million loan.
August 1990		Wives of Folkenberg and McClure began receiving laundered "donations" and McClure received $140,000 interest free loan, all arranged by the President of the SDA's Columbia Union Conference (CUC).	
Winter 1991	In January, Dennis' audit team discovered the spousal compensation and the interest free loan, and he insisted on disclosure to the CUC Executive Committee stating that his audit report could not be completed until the proper procedures were followed. A meeting was called in February and the members were told. They were shocked but felt compelled to approve the transactions after the fact.		

	David Dennis, Accountant and Auditor	Robert Folkenberg (acting in various church capacities)	James Moore, Real Estate Developer
Spring 1991	The next confrontation involved the level of detail to be shared at the upcoming CUC constituency meeting in May. Wisbey successfully exerted pressure such that the report referred to the recipients as "wives of employees" rather than by name, and no one questioned the anonymous gifts.		
Summer 1991	In early June, Dennis' office mailed a written report to each CUC Executive Committee member stating that the transactions did not conform to denominational policy and could present legal problems including endangering the organization's tax-exempt status. The consternation caused by that report resulted in disclosure of the transactions to the GC. On June 20, a letter from Folkenberg was presented to the GC Executive Committee surrendering his wife's monthly stipend and blaming the auditors for painting with sinister hues that which was done in the light of day. Interestingly, neither the issue or its resolution was recorded in the meeting minutes.		
Early 1992	Folkenberg imposed an "operating board" over Dennis' auditing department.		
1992			Moore was released from prison and claimed an ownership interest in KVA. GC Attorney Carson and Moore conspired to create a trust to supplement Folkenberg's GC income. Carson was careful to design the trust to not be easily discovered. Funding for the trust may be the reason for the $739,000 loan to SIB the following year from the newest KVA investor.

	David Dennis, Accountant and Auditor	Robert Folkenberg (acting in various church capacities)	James Moore, Real Estate Developer
1993		KVA agreed to a complicated settlement in October which included SIB yielding its interest back to KVA in exchange for two nonrecourse secured promissory notes for $2 million and $6 million to be paid from future proceeds.	
February 1994			Moore and other creditors tried to force the KVA general partner into bankruptcy, allegedly so that Moore could restore his KVA ownership rights by purchasing them from the bankruptcy trustee. The general partner filed voluntarily for personal bankruptcy protection under Chapter 7, but in June the court converted it to a Chapter 11 case.
September 1994	A troubled young woman who had once lived with the Dennis family for a short time in Singapore underwent psychological therapy in a fight against depression. This therapy enabled her "recovered memories" which resulted in her allegations of sexual improprieties against Dennis, news of which reached the GC.		

	David Dennis, Accountant and Auditor	Robert Folkenberg (acting in various church capacities)	James Moore, Real Estate Developer
October 1994	Dennis was presented with an eight-page affidavit of allegations of sexual misconduct against him, and asked to resign. He was interrogated repeatedly, accused of improper financial dealings, threatened with having his reputation destroyed, and told that documentary proof existed to back up every allegation against him.		
December 1994	An ad hoc disciplinary committee was convened on the 12th. Dennis was summoned but was not allowed to bring his attorney, as it would supposedly be a non-adversarial, fact-finding ecclesiastical exercise. He was then accused of being a child molester, an adulterer and a liar with a long history of sexual misconduct. The committee voted to recommend termination of Dennis' employment with the GC. The GC Administrative Committee met on the 19th and endorsed the recommendation, adding that strong action should be taken. The following day, the full GC Executive Committee voted to terminate Dennis effective on the 29th of the month.		

The chronological view offers an interesting perspective. Clearly Folkenberg was involved in some questionable business dealings which originated in the early years of his church employment and accompanied him into the office of the presidency of the GC. Dennis, the outspoken advocate of transparency and accountability in church finance was an obstacle that had to be removed. When the opportunity arose, Folkenberg jumped at it and led the effort to have Dennis terminated. The problem here was that individuals subject to governance were in a position to influence those charged with governance, a

conflict of interest so pervasive as to render any perceived governance entirely ineffective.

In an apparent effort to save face in the eyes of the brethren, church leaders set out on a carefully orchestrated plan to destroy Dennis' reputation within the church. A written message was sent to department heads who were instructed to share it with employees, a message was broadcast over the GC's employee and subscriber electronic network, an announcement was placed in an electronic newsletter, and efforts were even made to reach workers in the field to let everyone know of the terrible things that Dennis had allegedly done (Ferrell, 1995).

***Dennis v. Folkenberg* (2002).** As noted by the LA Times articles referred to above, Dennis filed a lawsuit against Folkenberg, the GC and several other church leaders in Montgomery County, Maryland in February 1995. A visit to Montgomery County, Maryland was not feasible for this project, rendering inaccessible the actual documents associated with the case (although a good portion of the legal record has been reproduced elsewhere and is referred to herein). However, the plaintiff has penned his perspective in an autobiography entitled *Fatal Accounts* (Dennis, 2009) to which this writer will turn to supplement the version of events as reported by the media.

Dennis (2009) recalled that day in October 1994 when he was summoned to the office of GC Attorney Carson where Carson and GC Vice President Ken Mittleider (formerly involved with ADRA) confronted him with the allegations of sexual misconduct by the young woman the Dennis family knew well after taking her in to their home in Singapore as a teenager for several months during the 1974-75 school year. Dennis was stunned and denied the allegations, yet he was pushed to resign immediately.

When he refused, he was told that if he chose to fight the charges, it would get nasty, so Dennis retained legal counsel. Recognizing the potential expense of protracted litigation, Dennis and his attorney shared with the GC the legal brief they were prepared to file but proposed what they felt to be a fair and just settlement. Instead, the GC engaged three large Washington D.C. law firms in defense and encouraged the filing.

When the time came for pre-trial discovery, the GC attorneys convinced Dennis' attorney to have Dennis depositions taken first. Dennis was questioned for several days by the GC attorneys as well as Carson and Mittleider who apparently hoped to gain a confession or at least discourage his pursuit of justice. Gaining nothing useful from Dennis, his wife and two adult children were summoned for deposition as well in an effort to pit his family against him. Immediately upon completion of the Dennis depositions, the GC filed a motion requesting a stay of the proceedings and an unusual appeal for dismissal directly to the state's high court on the grounds that First Amendment excessive entanglement issues would result if the court were to allow any secular review of that which took place in an ecclesiastical setting. The Maryland State Supreme Court denied the request and remanded the case back to the lower court. However, over the course of the seven-year litigation, Dennis never obtained a single deposition or document in the discovery process (Dennis, 2009).

Losing the appeal for dismissal to the state high court, the GC attorneys changed legal strategy and presented the position of head auditor as a high level elective church office, convincing the District Court judge to hold a trial within a trial to determine whether the ecclesiastical nature of the dispute overrode the civil law questions presented. Over the objections of Dennis' attorney, a three-day hearing on the question

was held in September 2000 where the GC alleged that the head auditor was required to be ordained as a minister, portraying the role as ecclesiastical in nature (Dennis, 2009). In response, Dennis' attorney made this statement in his opposition:

> Plaintiff brings this action claiming that the defendants trumped up charges of sexual misconduct, defamed him and forced him from his position as auditor for the Seventh-day Adventist Church in order to retaliate against him for attempting to prevent the individual defendants from converting church funds for their personal use. ("David", 1996, p. 3)

In an affidavit signed by Dennis and filed with the court the same day, Dennis made this statement:

> The job as auditor was a secular position. My predecessor was not ordained and there was no requirement for me to be ordained when I held the position. My duties were to see that the church officials complied with federal and local law as well as church financial policy in utilizing the funds entrusted to us by God and our members. I am certain that the reason behind my being removed and publicly disgraced was my refusal to compromise or be compromised in my performance of my duties as an auditor. ("David", 1996, p. 3)

However, the District Court judge was not convinced and ruled a year later that the GC and its officers were indeed protected under the First Amendment from the Dennis charges, declaring the Dennis termination ecclesiastical in nature. Dennis dropped the case once only his accuser remained as a defendant. The District Court judge died a few weeks later of natural causes (Dennis, 2009). According to Hackleman (2008), the

church spent $6 million on their defense. In this case even the tort of defamation found protection under the First Amendment Religion Clauses.

Seventh-day Adventist President Folkenberg's fall from grace. As head of the world church, Folkenberg had successfully managed to not only remove the one outspoken whistleblower standing between him and his illicit business affairs, but to ecclesiastically douse any opportunity for that whistleblower to obtain justice, certainly leaving a lasting impression on any future auditor or governance seeker who dared to question church leadership. Folkenberg was re-elected as GC President in July 2005 (Hackleman, 2008), but his real problems were soon to emerge.

In September 2005, Folkenberg (both individually and in his capacity as GC President), Moore and others were named as defendants in a $100 million RICO action filed by Huston Environmental Systems. Dolan's (former KVA general partner) bankruptcy trustee, reaching the conclusion that Dolan had been a victim of bad faith, was preparing to file suit "against Folkenberg, Moore and the Sharing Group 'for breach of contract, conversion, negligent representation, fraud, restitution, rescission, and an accounting, seeking damages, punitive damages, and injunctive relief'" (Hackleman, 2008, p. 255). GC Attorney Carson encouraged Folkenberg to counter-claim the Huston charges. Under the additional threat of Dolan's pending claims, Folkenberg instead persuaded Sharing to relinquish its entire KVA interest to Dolan's estate in a settlement agreement. Moore objected, but his motion to set aside the agreement was denied by the court. A flowchart of the path of the KVA shares is included here as Appendix D.

A key learning for Moore, however, was that Folkenberg and the Sharing Group would give up a great deal to avoid the publicity of a lawsuit, and Moore capitalized on

that knowledge by demanding an income stream from Folkenberg to replace what he felt deprived of in the KVA deal. Moore managed to collect close to $250,000 from Folkenberg and friends before that source of funding started to dry up. Under pressure from Moore's threat of litigation, Folkenberg influenced ADRA to join with Moore in a telecommunications venture involving long-distance telephone service, with ADRA, Folkenberg and Moore all benefiting financially when church members were convinced to transfer their service to the new venture. The statute of limitations for fraud gave Moore two years from August 21, 1996 to file a complaint regarding the relinquishment of KVA shares, giving him essentially the same amount of time to extort Folkenberg. Moore filed his $8 million fraud complaint in Sacramento on August 21, 1998 against Folkenberg, the GC, Carson, IAD and others (Hackleman, 2008).

Service was belated, so the other GC officers did not learn of the litigation until January 1999. The Sacramento attorney retained by the GC to respond to the complaint uncovered a substantial amount of documentation that raised significant ecclesiastical concerns about Folkenberg's business dealings with Moore. A GC ad hoc committee was appointed to investigate the allegations and assess their attorney's findings. Their findings included a widespread pattern of activities by Folkenberg giving rise to issues of ethics, including conflicts of interest, inappropriate business associations and misuse of his position as GC President for personal business advantage. The group also recommended that a meeting of the full GC Executive Committee be convened as soon as possible to hear the matter. A confidential settlement was reached with Moore on February 26, and Folkenberg's February 7 letter of resignation as President of the GC became effective on March 1, 1999 (Hackleman, 2008).

Several key lessons can be learned from the Dennis case, but the first returns to the basic but pervasive issue of unquestioning trust and the consequences of misdirected trust. The SDA world church placed their collective trust in President Folkenberg as their leader, yet his executive presence made the church vulnerable to extortion and legal liability given his illicit business dealings. Curiously, that trust apparently still remains as Folkenberg is currently listed as the Director of Share Him Ministries under the Carolina Conference of SDAs according to the church's annual on-line yearbook (Seventh-day, 2002). The logic and reasoning behind that decision is beyond the scope of this paper.

The Dennis case also illustrates that fraud can and does exist anywhere – even at the highest level of a highly respected world church with the perception of a strong internal system of governance. The problem was that the perpetrator of the fraud was in a position to directly influence the continued employment of the whistleblower. Internal governance is the only human protection donors have against misuse and abuse of their donated funds, but it is ineffective if not structured properly.

The SOX Act of 2002 demands that publicly traded companies not only have a system of internal controls, but that their executive management provide an assessment of the effectiveness of those controls, and that the auditors attest to management's assessment. It does not seem unreasonable that church donors should be entitled to similar financial protections as are investors. Another interesting lesson is that the alleged tort of defamation was successfully defended and protected under the First Amendment Religion Clauses. There is little doubt that our country's founders would not condone the treatment of Dennis by either the SDA church or the American judiciary within the parameters of their original intent regarding religious freedoms.

Conclusions and Recommendations

To draw any conclusions we must apply the research findings to the original research questions. Given the protected nature of the topic in general, it is not surprising that more definitive answers could not be obtained.

Conclusions Drawn from Findings as Applied to Research Questions

The original research questions are re-stated below, followed by a discussion of the conclusions derived from the research performed.

1. How has the interpretation of the First Amendment Religion Clauses changed since the days of America's founding fathers?
2. What effect has this change had on economic crime involving churches?
    a. Does the current interpretation of the Religion Clauses enable the creation and survival of non-legitimate churches?
    b. Does the current interpretation of the Religion Clauses enable misappropriation of funds within legitimate churches?
3. In relation to management of economic crime, should any action be taken to challenge the judicial re-interpretation of the Religion Clauses congressionally, or is the current environment acceptable?
4. What can legitimate churches do to protect themselves against economic crime?

Obviously we cannot converse with our country's founding fathers to obtain first-hand their opinions on the current interpretation of the wall of separation between church and state. With the religion-friendly atmosphere of the fledgling democracy, and references to God built in to our oaths, on our money and on our government buildings (Godawa, 2007), one must wonder if they would not be horrified at the direction the

judicial interpretations of their First Amendment intent has taken. Certainly they would not condone the defamatory behaviors directed at David Dennis, behaviors which were ultimately judicially protected as ecclesiastical after the church spent over $6 million of parishioner funds simply to keep the case from being heard.

Judicial interpretation of the metaphorical wall of separation changed drastically when Supreme Court Justice Hugo Black in *Everson v. Board of Education* (1947) single-handedly transferred the federal prohibitions against both the establishment of a national religion and interference with free exercise of religion to the state governments as well. This single judicial act forever changed the environment of religious protection in America, enabling misuse and abuse of the status of being a church. The effect of this judicial re-assignment of federal prohibitions was to effectively eliminate ANY external oversight of church affairs, leaving governance and policing of activities entirely internal without any external accountability whatsoever.

We cannot determine for certain the impact on the creation and survival of non-legitimate churches because we are prohibited from passing judgment on the truth or falsity of any given set of religious beliefs. With regard to the misappropriation of funds within legitimate churches, one can easily adopt the view that just about any crime can be defended under the Religion Clauses as long as the behavior can be successfully assigned the term “ecclesiastical”. An interesting side study evolving from this research project might be an investigation in to just what illicit activities carried out under the guise of religion would receive constitutional religious protection as opposed to those that would immediately be labeled and treated criminal or tortious behavior. We know that murder and polygamy are prohibited under any circumstances. The Dennis case is undoubtedly a

perfect example of protected tortious activity, so where that line is drawn remains uncertain.

As the Supreme Court of the United States is the highest court in the land, their decisions are binding and cannot be overturned. The only ways to change a Supreme Court decision is to change the law or to change the opinion of the justices. In recalling *Everson v. Board of Education* (1947), Justice Black's comments regarding the separation of church and state were made as part of a decision finding that New Jersey had NOT encroached on the wall of separation by busing children to private schools. Thus a change in the ruling would have no impact on the existence of Justice Black's remarks. With the legal precedent set for a systematic attack on religion, the entire American judicial system from local to federal courts was quickly enabled to destroy and eliminate any possible reference to any possible religion anywhere in public life, except, ironically, for those references rooted in the days of our founders – the ones on our money, in our oaths and on our buildings.

America should return quickly to the religious environment obviously advocated by her founding fathers – one where there is no national government church and no interference with the free exercise of religious beliefs by her citizens, AND where the activities of churches are not entirely exempt from oversight, but instead must be bound by the laws of the 50 states, particularly in the area of financial management.

One way to accomplish such oversight would be to implement a version of the SOX Act of 2002 for churches and religious organizations at the state level. The SOX Act of 2002 was America's legislative response to the very public and very painful collapse of Enron Corporation after a series of creative accounting manipulations caused

the company's implosion less than a year earlier. It has been widely criticized as overly broad and cumbersome, and obviously the entire legislation would not apply to churches. However, sections of that law could easily be adapted to a church environment, lending a degree of regulation and donor protection not currently available, without compromising issues of ecclesiastical importance. The SOX Act of 2002 is comprised of four subchapters (Sarbanes, 2002):

I. Public Company Accounting Oversight Board (§§ 7211-7219)

II. Auditor Independence (§§ 7231-7234)

III. Corporate Responsibility (§§ 7241-7246)

IV. Enhanced Financial Disclosures (§§ 7261-7266)

The first subsection established an entirely new oversight board to regulate the accounting for publicly traded companies, including registration requirements for public accountants who audit publicly traded companies, audit requirements including a concurring partner review, a description of the scope of testing of the entity's internal control environment, and the auditor's quality control requirements with respect to audit reports, authorization to establish independence standards, and protocol for investigations and disciplinary proceedings (Sarbanes, 2002). In the church environment, we could call this organization The Church Accounting Oversight Board.

The second subsection of the SOX Act of 2002 calls for auditor independence and commissioned a study on the impact of a mandatory audit firm rotation requirement, while the third subsection deals with corporate responsibility. A good portion of the third subsection pertains only to for-profit corporations, but the first two sub-topics, corporate responsibility for financial reports and improper influence on conduct of audits, can be

directly applied to the church environment. It is in this subsection where we find the requirement that both the principal executive officer (the CEO of a corporation) and the principal financial officer (the CFO of a corporation) certify under penalty of perjury that they have read the report, that the report does not contain any untrue fact or material omission or is otherwise misleading, that the financial statements are materially accurate to the best of their knowledge, that they are responsible for the entity's internal control environment and that they have disclosed to the auditors all significant deficiencies in internal control and any instances of fraud, whether or not material, involving management or other employees involved in internal control. Furthermore, this subsection prohibits "for the protection of investors" any internal attempt to influence or manipulate an audit of the financial statements (Sarbanes, 2002).

The final subsection relates to financial statements and enhanced disclosures therein. This is the portion of the SOX Act of 2002 that has created the most controversy, as it requires not only an acknowledgement by management that internal controls are their responsibility along with their assessment of the effectiveness of those controls, but also a requirement that the entity's auditors attest to and report on management's assessment of those internal controls. Furthermore, the subsection imposes disclosures of whether the corporation has adopted a code of ethics for its senior financial officers and whether it has ensured that its audit committee includes at least one member considered to be a financial expert (Sarbanes, 2002). There is no apparent ecclesiastical reason why a modified version of these regulations could not be applied to churches…for the protection of donors rather than investors, recalling the $6 million of parishioner funds spent by the SDA church to keep Dennis out of court.

A legitimate church can take steps to protect itself against economic crime, but the very first milestone in that process is to recognize the necessity of fighting the propensity to trust everyone unconditionally. Just as an alcoholic must first recognize their problem before they can seek help, a church must accept the reality that fraud exists everywhere and seek help to protect itself. Criminals do not discriminate. An independent and informed governing body along with a documented comprehensive fraud policy and annual independent audits can go a long way in the fight against fraud. If the church relies on a system of governance such as an internal audit department, it must be structured such that those charged with that governance are entirely isolated from the influence of those they are auditing. Otherwise those auditors are rendered entirely ineffective, as we saw with the Dennis case.

It has been over 10 years since Dennis was removed from his position as head auditor for the SDA church, and a brief review of the current structure of the church's financial governance seems appropriate. From the website of the General Conference Auditing Service (GCAS), the SDA church's internal auditing group, is this statement: "The General Conference Auditing Service Board is accountable to the General Conference Executive Committee and provides administrative oversight for the General Conference Auditing Service" (General, 2012). This does not lend itself to the appearance of auditor isolation from the influence of those subject to audit, much less auditor independence. Additionally, a review of the list of 18 members of the GCAS governing body indicates that the GC President, Vice-President, Secretary and Treasurer are all members. So, almost a quarter of the GCAS board is NOT independent. To put it another way, four of 18 members of the oversight board are officers of the headquarters

organization subject to oversight. From practical appearances, this might leave one with the perception that the same type of financial scandals could rock that church again.

The topic of church employment discrimination of any type remains controversial as evidenced by the Supreme Court's very recent ruling in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012). A church school teacher, who had completed a theological course of study and thus earned designation as a commissioned minister, filed a disability discrimination complaint with the Equal Employment Opportunity Commission (EEOC) upon learning that her teaching position had been filled while she was absent due to an extended illness. The EEOC filed the instant case but the District Court dismissed it on First Amendment grounds. The Sixth Court of Appeals reversed the ruling, as they were not convinced the plaintiff qualified for the ministerial exception. The church appealed that ruling, and the Supreme Court found unanimously for the church, citing three major flaws in the appellate court ruling regarding the respondent's status as a minister:

1. Failure to place any relevance on the designation of commissioned minister. Title alone is not a determinant, but it is certainly relevant.
2. Too much emphasis placed on the fact that lay teachers performed the same religious duties as the respondent. Again, not alone a determinant, but particularly important here because the church allowed it only because of a lack of availability of commissioned ministers.
3. Too much weight placed on the secular duties performed by the respondent. Even the role of a minister includes a mix of secular duties including facility upkeep,

> supervision of purely secular employees and *assistance with financial management* [emphasis added].

In the unanimous opinion of the Supreme Court overturning the Sixth Circuit authored by Chief Justice Roberts, the following statement bears significant relevance to this project:

> The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise. (*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 2012, p. 21)

Yet we saw with the Dennis case that those circumstances *have already arisen*. The opportunity "to address the applicability of the exception" was what Dennis wanted - what he tried unsuccessfully to pursue via civil litigation. Inherently by current design and enhanced by this ruling, it is highly unlikely that the Supreme Court will ever be given that opportunity. As long as the readily available religious cloak can be thrown over tortious church behavior, such a complaint will continue to be shut down under the First Amendment Religion Clauses at the lowest levels of our judicial system.

Recommendations for Future Study

As noted in the research design section above, the litigation review portion of this project was limited to legal cases filed in the federal court system. A similar study of

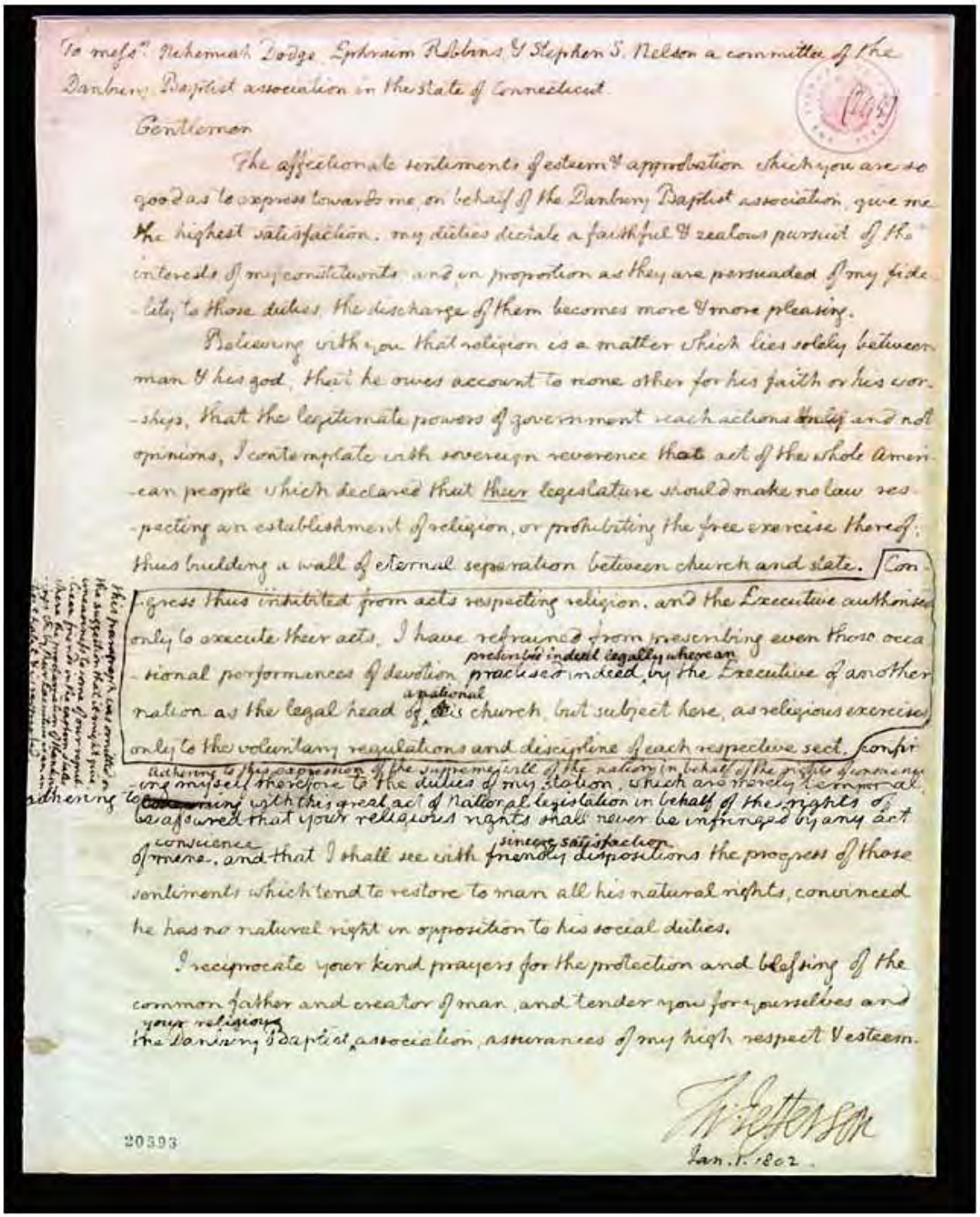
state court cases would be interesting to compare and contrast the findings. Changing the search terms slightly would most likely yield different results as well.

To gain a different perspective, solicitation of direct feedback from pastors and church financial officers could uncover valuable first-hand experiences. Another interesting project might study the governance structures of the largest church organizations in the country to compare and contrast the various forms of governance employed and the degree of effectiveness achieved.

Regardless of the undertaking of any future studies on the topic, this writer is convinced that misuse and abuse of church status in furtherance of economic crime will continue unchecked until Americans can agree on steps toward some regulatory degree of financial transparency and accountability.

Appendix A

Draft of Jefferson's Letter to the Danbury Baptist Association (*The Thomas, 2009)*



To messrs. Nehemiah Dodge, Ephraim Robbins & Stephen S. Nelson a committee of the Danbury Baptist association in the State of Connecticut

Gentlemen

The affectionate sentiments of esteem & approbation which you are so good as to express towards me, on behalf of the Danbury Baptist association, give me the highest satisfaction. my duties dictate a faithful & zealous pursuit of the interests of my constituents: and in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more & more pleasing.

Believing with you that religion is a matter which lies solely between man & his god, that he owes account to none other for his faith or his worships, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make no law respecting an establishment of religion, or prohibiting the free exercise thereof: thus building a wall of eternal separation between church and state. Congress thus inhibited from acts respecting religion, and the Executive authorised only to execute their acts, I have refrained from prescribing even those occasional performances of devotion, practised indeed, by the Executive of another nation as the legal head of a national church, but subject here, as religious exercises only to the voluntary regulations and discipline of each respective sect. confiding myself therefore to the duties of my station, which are merely between myself and my maker, & adhering to the suppression of the supremacy of the nation in behalf of the rights of conscience, I shall see with friendly dispositions the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

I reciprocate your kind prayers for the protection and blessing of the common father and creator of man, and tender you for yourselves and your religious association, assurances of my high respect & esteem.

Th Jefferson

Jan. 1. 1802.

20393

Appendix B

World Christianship Ministries Ordination Application (World Christianship, 2009)

Ordination Application

World Christianship Ministries, P.O. Box 8041, Fresno, CA. 93747-8041

Select the title you wish:

☐ Reverend ☐ Minister ☐ Pastor ☐ Evangelist ☐ Chaplain ☐ Apostle
☐ Missionary ☐ Elder ☐ Deacon ☐ Preacher ☐ Bishop ☐ Prophet

Print my name on the certificates using the following *Lettering*

☐Old English ☐Centurion Old ☐*Zurich Caligraphic* ☐*Signet*
☐*Majestic* ☐Southern ☐Prodigal ☐*Script*

PLEASE PRINT CLEARLY

Name: _____ _____ _____ **Age:** _____
First Middle (or) Initial Last

Mailing Address: _____ **Apt. #**_____

City: _____ **State:** _____ **Zip:** _____ **Country:** _____
If outside the USA

I am requesting ordination from World Christianship Ministries as independent clergy and hereby affirm my belief In Christ (Acts 15:11), the Gospel (2 Timothy 3:16) and the spreading of the Christian Faith (Mark 16:15).

➡ *Your Signature* _____ **Date** _____

My offering of $_____ is enclosed by:

☐**Check or Money Order** ☐**Credit Card** (complete the information below)

World Christianship Ministries is authorized to charge the above offering to my credit card as listed below.

Charge my offering to: ☐**Visa** ☐**Master Card** ☐**Discover** ☐**American Express**

Card Number ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

Card Expiration Date: ☐☐/☐☐ **Your Home Phone Number** (____) _____
Month Year **Name on Credit Card:** _____

Complete the following only if you are applying for the Charter or honorary Doctor of Divinity

_____
(If you are applying for the Church Charter, what name do you wish to give your church or ministry?)

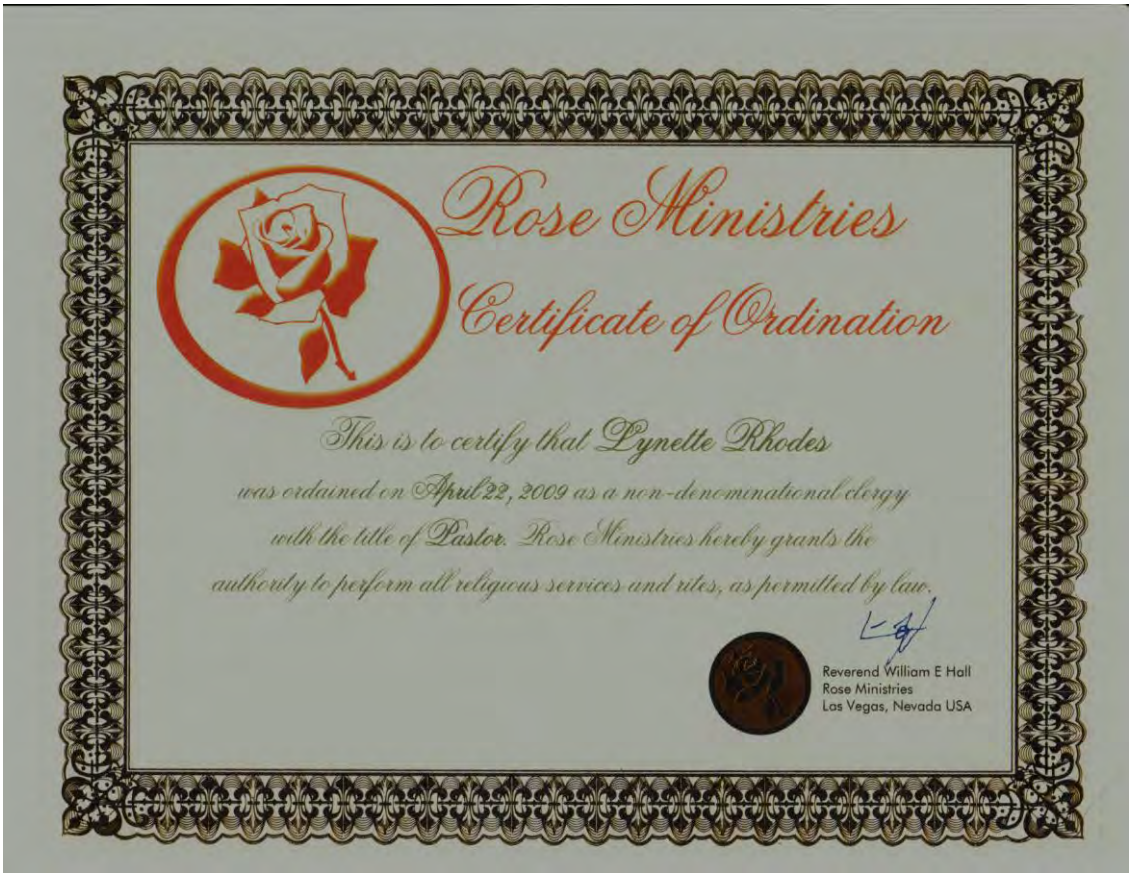
_____
(Print your name above as you wish it to appear on the Charter or D.D. certificate)

Applications with credit card information may be mailed to the address at the top of this page, or FAXED to (831) 763-0217, or called in to (559) 297-4271 Check and Money Order applications should be mailed to the address at the top of this page.

If you have a question, feel free to call us. We are happy to answer your questions.

MINISTRY PHONE: (559) 297-4271 **FAX NUMBER: (831) 763-0217** ©1996-2007

Appendix C



Rose Ministries

Certificate of Ordination

This is to certify that Lynette Rhodes

was ordained on April 22, 2009 as a non-denominational clergy

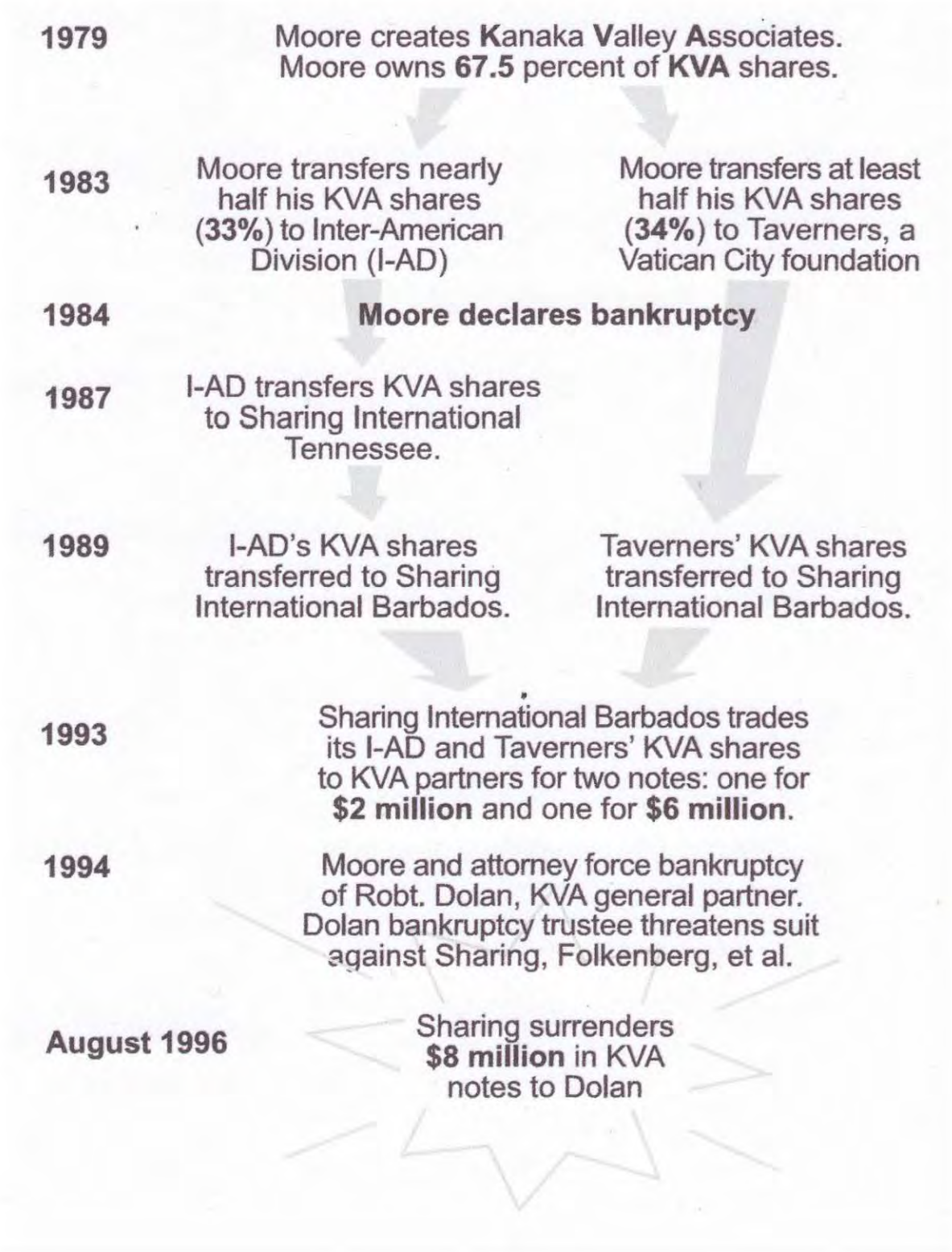
with the title of Pastor. Rose Ministries hereby grants the

authority to perform all religious services and rites, as permitted by law.

Reverend William E Hall
Rose Ministries
Las Vegas, Nevada USA

Appendix D

Path of KVA shares (Hackleman, 2008).



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