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Emerging Issue: State Jurisdiction Over Religious Organizations

Government Regulation of Religious Organizations: The Example of Religious Fraud

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INTRODUCTION

State regulation of religious organizations raises a number of conflicting concerns. On one side, religiously affiliated charitable organizations are subject to the same problems of fraud, mismanagement, self-dealing, and discrimination that plague non-religious charities. Excluding religiously-affiliated organizations from state purview, therefore, can seriously undercut many of the state's legitimate regulatory concerns. On the other side, constitutional and customary norms of church-separation call for special caution when the state attempts to investigate and oversee the activities of religiously-affiliated entities. Overly aggressive state efforts to regulate religious entities can be constitutionally problematic and, even when legally permissible, can create a troubling appearance of state abuse of power.

This paper discusses some of the constitutional and prudential concerns that are raised by state regulation of religiously affiliated charitable organizations. Part I makes a brief introductory point. Any search for clear constitutional standards in this area is likely to be frustrating. Because the principles and policies underlying the constitutional commitment to religious freedom are often themselves contradictory, the law in this area is always likely to be ambiguous and in flux. Understanding the constitutional issues then can take us only so far in determining how the state should approach its oversight and regulation. Part II then examines some of the prudential concerns that should apply when the state regulates religious organizations, focusing particularly on government investigations and prosecutions of religious organizations for fraud. Using United States v. Ballard[1] *as an illustration, the section examines why the government needs to be especially sensitive to religious freedom concerns when initiating such prosecutions even when its actions are otherwise fully constitutional. Part III then offers some possible guidelines that the states should consider when approaching religious fraud cases.*

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[1] 322 U.S. 78 (1944).

I. THE CONSTITUTIONAL BACKGROUND

The constitutional principles surrounding state regulation of religious organizations are anything but clear. In part this is because of the incoherent state of religion clause jurisprudence generally. In fact the area is so hopelessly confused that even the United States Supreme Court has conceded its own lack of clarity in this area.[2] The cases frequently conflict, often without mutual reference, and there is almost no argument that falls completely out of line with what has been previously decided. As I often tell my students, it is usually quite possible to find a case on all fours with virtually any position that one wants to take in the religion clause arena.

The roots of the doctrinal confusion in this area, moreover, run deep. Religion Clause jurisprudence is uniquely beset by a myriad of internal contradictions and paradoxes. To begin with, the governing provisions themselves are in serious tension. The Free Exercise Clause singles out religion for special protection. The Establishment Clause, in contrast, singles out religion for special disability. The two clauses thus exert, in the Court's own words, "conflicting pressures,"[3] with the result that the competing constitutional commands are not easily reconciled.

Inevitable conflicts also exist between the basic policies and principles underlying the case law. Consider *Everson v. Board of Education*,[4] the Court's first major Establishment Clause case. *Everson* addressed the question of whether a state could constitutionally provide bus transportation to children attending parochial schools. In reaching its decision, the Court, after reviewing the historical evidence, reached the conclusion that preventing state subsidies of religious activity lay at the heart of what the Establishment Clause was designed to achieve. But then, dramatically shifting course, the Court also determined that excluding religious organizations from benefits available to all others would suggest a hostility towards religion that was also constitutionally problematic. As such, *Everson* set the stage for the cases that followed. One central religion clause concern would inevitably have to give.[5]

The intractability of the conflicts underlying the religion clauses run so deep that even the term 'religion' cannot be defined without raising serious constitutional concerns. After all, providing an official constitutional definition of religion could easily be said to be the ultimate Establishment Clause violation. At the same time, excluding a particular set of beliefs from the status of religion could easily be fairly described as the definitive Free Exercise harm. There is no way out.

The religion clause subtopic regarding state regulation of religious organizations with which we are concerned, moreover, may be even more opaque than religion clause jurisprudence generally. To begin with, it brings together a variety of religion clause issues, including such matters as corporate religious rights, church autonomy, and church-state entanglement that each

[2] Committee for Public Education and Religious Liberty v Regan, 444 U.S. 646, 662 (1980).
[3] Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).
[4] Everson v. Board of Education, 330 U.S. 1 (1947).
[5] The *Everson* Court eventually upheld the program but not before first proclaiming that the First Amendment erected a "wall of separation" between church and state and that the Establishment Clause meant that "[n]o tax in any amount, large or small, [could] be levied to support any religious activities." 330 U.S. at 16.

present their own sets of ambiguities and contradictions to the table. Combining them together is therefore unlikely to produce easily discernible standards.

The area is also particularly volatile at the moment because of last year's decision in *Hosanna-Tabor Evangelical Lutheran v. EEOC*,[6] addressing the question of whether a religious organization enjoyed a constitutionally-based "ministerial" exemption from anti-discrimination laws. To no one's surprise, the Court ruled that religious organizations held such a right.[7] What was less predictable about the opinion was its potential implications for future decisions. Most significantly in that respect is the fact that the case may have started the Court down the road to overturning or at least seriously limiting *Employment Division v. Smith*,[8] the landmark case that had previously held that religious organizations were not entitled to exemptions from neutral laws under the Free Exercise Clause. *Hosanna-Tabor* purported to distinguish *Smith* by drawing a line between state regulation of a religious organization's internal matters, such as its employment of ministers, from state regulation of the religious organization's external activities such as the ceremonial peyote smoking that was at issue in *Smith*.[9] As the Court explained:

> a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself.[10]

But it is unclear if this distinction can actually hold up. Is it really accurate to say that the manner in which a religion conducts its ceremonial rituals (the issue in *Smith*) is "an outward physical act"? Are there types of church decisions that are not "internal" and that do not "affect the faith and mission of the church itself," the criterion for constitutional protection set forth in *Hosanna-Tabor*? To be sure, *Hosanna-Tabor* may in the end prove to be little more than a minor and fully expected exception to *Smith's* general rule. But because *Smith* is undoubtedly the most important case governing state power to regulate religious organizations, any decision that suggests its continued vitality may be in jeopardy places the whole area of law into greater uncertainty.

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[6] 132 S. Ct. 694 (2012).

[7] What was surprising to some was that the exemption would be so broadly defined. The Court held that the ministerial exemption extended far down a church's hierarchy to include employees with relatively minimal ministerial duties. The employee in the case itself, for example, was a grade school teacher who taught primarily secular subjects (though she did teach some religious classes and led her students in devotional exercises). *Hosanna-Tabor* also left open whether the exemption would be confined to protecting religious organizations from anti-discrimination requirements or might also be extended to other actions brought against them by their employees, such as breach of contract or tort.

[8] 494 U.S. 872 (1990).

[9] *Hosanna-Tabor* is also possibly distinguishable from *Smith* in that it relied on the Free Exercise and Establishment Clauses acting in concert and not on the Free Exercise Clause alone, the provision that was at the center of the *Smith* decision: "[b]y imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." 132 S. Ct. at 706

[10] *Id.* at 707.

Given all this then, the short answer is that anyone seeking to find clear guidelines on the law governing state regulation of religious charitable organizations is likely to come away seriously disappointed. There are no clear standards to be had.

II. PRUDENTIAL CONSTRAINTS ON GOVERNMENT REGULATION OF RELIGIOUS ORGANIZATIONS

Even if the constitutional rules regarding state regulation of religious organizations were clear, however, our inquiry would not be at an end. The relationship between church and state is not governed solely by formal rules of constitutional law. There are non-legal norms of church-state separation based on custom, tradition and the perception of the appropriate role of both church and state in a democratic, secular society that also play a role in setting the parameters of this relationship. These norms set forth informal constrains as to how church and state should inter-react.

A common example of such norms is the limitation on the involvement of churches in the political processes. Religious organizations have a clear first amendment speech right to directly involve themselves in unvarnished, partisan political activity if they so choose. But there also exists a non-constitutional norm that suggests that hyper-partisan political activity by churches is inappropriate. On this basis, many churches will not engage in overtly political activity even though they have the right to do so; and, correspondingly, churches that violate this norm will be subject to trenchant criticism (and ideally to social or political fallout) for so doing.[11]

An analogous respect for the norm of church-state separation constrains the state. Like religious organizations, the state needs to be wary about being seen as overreaching its bounds. Thus, that states may have the constitutional authority to investigate and prosecute religious organizations does not mean that they *should* do so without restraint any more than religious organizations' speech rights means that those groups should involve themselves in partisan political activity without self-restraint. Rather, church-state norms might suggest, for example, that the state needs to be particularly concerned with maintaining both the appearance and reality of strict neutrality in how it treats religious organizations and that it must avoid any semblance of hostility towards a particular religion or towards a set of religious beliefs. Further, the concern with church-state separation means the state must also be especially respectful of the need for religious group autonomy. The remainder of this section, therefore, examines the need for, and the application of, these norms in the context of state prosecution of religious organizations for criminal fraud.

A. Prosecuting Religious Fraud and United States v. Ballard

Perhaps no case better introduces the genesis of, and the need for, prudential constraints on government prosecution of religious organizations than *United States v. Ballard*.[12] The *Ballard* litigation grew out of the activities of a religious group known as the "I Am" movement,

[11] To be clear, the criticism is not be that these religious groups have acted illegally (other than perhaps violating their tax exempt status); rather, the claim is that the group has acted outside its appropriate sphere of authority.
[12] 322 U.S. 78 (1944).

a group that achieved a substantial numerical following during the 1930's.[13] The leader of the group, a former mining engineer named Guy Ballard, claimed among other things that he was divinely connected to Saint Germain and that he was a reincarnation of a number of historical figures including George Washington, Richard the Lionheart, and Alexander the Great. Ballard also averred, along with his wife Edna and son Donald, that their divine connections vested them with certain supernatural powers, including the power to heal the sick. They further asserted that they had actually cured hundreds of persons with serious ailments and diseases. The Ballards ran into trouble with the federal government, however, when they solicited funds through the mail based on these representations.[14]

The government prosecuted Edna and Donald Ballard (Guy having died in the interim) for mail fraud and conspiracy. The two were convicted by a jury and the case eventually wound its way to the United States Supreme Court. The issue before the Court was whether the truth of the defendants' religious beliefs could be considered by the jury as part of its fraud determination. The Court ruled that they could not. As the Court explained, granting the jury (and thereby the state) the authority to evaluate the validity of religious claims would gravely threaten religious liberty guarantees. According to the Court:

> [The First Amendment] embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. 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

[13] The "I Am" movement continues to exist. *See* Saint Germain Foundation, http://www.saintgermainfoundation.org (last visited Jan. 10, 2013).

[14] The actual indictment in the case alleged the fraudulent representations included the following:

> that Guy W. Ballard, now deceased, alias Saint Germain, Jesus, George Washington, and Godfre Ray King, had been selected and thereby designated by the alleged "ascertained masters," Saint Germain, as a divine messenger; and that the words of "ascended masters" and the words of the alleged divine entity, Saint Germain, would be transmitted to mankind through the medium of the said Guy W. Ballard.
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> that Guy W. Ballard, during his lifetime, and Edna W. Ballard, and Donald Ballard, by reason of their alleged high spiritual attainments and righteous conduct, had been selected as divine messengers through which the words of the alleged "ascended masters," including the alleged Saint Germain, would be communicated to mankind under the teachings commonly known as the "I Am" movement;
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> that Guy W. Ballard, during his lifetime, and Edna W. Ballard and Donald Ballard had, by reason of supernatural attainments, the power to heal persons of ailments and diseases and to make well persons afflicted with any diseases, injuries, or ailments, and did falsely represent to persons intended to be defrauded that the three designated persons had the ability and power to cure persons of those diseases normally classified as curable and also of diseases which are ordinarily classified by the medical profession as being incurable diseases; and did further represent that the three designated persons had in fact cured either by the activity of one, either, or all of said persons, hundreds of persons afflicted with diseases and ailments.

322 U.S. 79-80.

> 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 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.[15]

So far as it goes then, the *Ballard* decision is undoubtedly well-taken. Religious beliefs, almost by definition, may be incredulous and governments, including our own, have at times persecuted unpopular religions by attacking the validity of their doctrines.[16] Allowing the state to levy criminal sanctions on the basis of the believability of an adherent's tenets, therefore, is an invitation to abuse.[17]

Ballard's conclusion that the state could not inquire into the validity of religious belief, however, did not end the federal prosecution. Rather, the Court held that the government could still prove fraud by reference to the Ballards' sincerity (or lack thereof) in maintaining those beliefs.[18] If it were shown that the Ballards did not believe their own assertions, the fraud convictions against them could be sustained.[19]

B. Justice Jackson's Ballard Dissent and the Need for Prudential Limitations on State Prosecutions

The opening left by the *Ballard* majority allowing the state to maintain the fraud convictions triggered a dissent by Justice Jackson. Although characterizing the Ballards' teachings as "nothing but humbug, untainted by any trace of truth,"[20] Jackson would have overturned their convictions. To Jackson, prohibiting the courts from inquiring into the validity

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[15] *Id.* at 86-87.

[16] For specific accounts of anti-religious animus in the United States see, for example, PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002) (anti-Catholicism); ANTI-SEMITISM IN AMERICA (Jeffrey S. Gurock ed., 1998) (anti-Semitism); TERRYL L. GIVENS, THE LATTER-DAY SAINT EXPERIENCE IN AMERICA 59-89 (2004) (anti-Mormonism).

More recently, hostility towards an unpopular religion led to the enactment of the laws prohibiting animal sacrifice that were struck down in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

[17] *But see* Jorge O. Elorza, *Secularism and the Constitution: Can Government Be Too Secular*, 72 U. PITT. L. REV. 53, 110 (2010) (arguing that the *Ballard* rule overly protects religious fraud).

[18] 322 U.S. at 83 (approving the trial court's jury instruction that the jury could convict if it found that the defendants did not act in good faith).

[19] The Ballards' convictions were eventually overturned but not because their beliefs were determined to be sincere. Rather, after the case was remanded to the Court of Appeals, it returned to the Supreme Court where the convictions were reversed because women had been improperly excluded from the jury. Ballard v. United States, 329 U.S. 187 (1946**).**

[20] *Id.* at 92 (Jackson, J. dissenting).

of the Ballards' beliefs was not protection enough. Inquiring into the defendants' sincerity was equally problematic because it was not feasible to "separate an issue as to what is believed from considerations as to what is believable."[21] Submitting the sincerity of the defendants' beliefs to the courts thus raised the same concerns as allowing the courts to measure the validity of the defendants' beliefs because, to Jackson, the two inquiries were essentially inextricable. Jackson's bottom line solution, then, was that religious fraud committed would need to be left unpunished on grounds that "[p]rosecutions of this character easily could degenerate into religious persecution."[22]

There is much to say on behalf of Jackson's dissent. How does one who does not share another's belief determine if that person's belief is sincere?[23] The likely answer is that the closer the contested belief is to the fact-finder's own faith traditions, the more likely it will be that the fact-finder will accept the believer's assertions. But that is a recipe for protecting those religions whose tenets run parallel to majoritarian belief systems. It is not a formula for protecting diverse religious beliefs. And it is not a formula for protecting against government prosecution of unpopular religious beliefs.

At the same time, there are sound reasons to reject Jackson's solution of abdicating state responsibility to prosecute fraud by religious organizations. To begin with, the problem of religious fraud is not a minor concern. Fraud in the name of religion is a multi-billion dollar criminal enterprise. One study, for example, (notably by a Christian organization), estimated that world-wide fraud by Christian organizations alone amounted to over thirty-four billion dollars in 2011, a number exceeding the thirty-one billion dollars that Christian organizations devoted to global ministries.[24]

Fraud in the name of religion, moreover, can be a particularly heinous offense because it often exploits individuals when they are at their most vulnerable. The many individuals who donated to the "I Am" movement believing that their ailments and diseases would be cured could have spent their funds instead on treatments that might have worked. Removing religious fraud from criminal oversight does not do justice for its victims.[25]

Further, policing fraudulent actors also serves to promote public confidence in the charities that are legitimate. Leaving religious fraud unpunished not only allows criminals to flourish, it may also discourage people from donating to legitimate causes. Protecting against

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[21] *Id.*

[22] *Id.* at 95. Judge John Noonan has, more recently, echoed Justice Jackson's sentiments, arguing that the government should not prosecute religious fraud precisely because of the dangers of government persecution. *See* John T. Noonan, *How Sincere Do You Have To Be To Be Religious?*, 1988 U. ILL L. REV. 713, 720-724. Judge Noonan acknowledges, however, that his approach would allow "pseudo-religionists" to obtain money by false pretenses.

[23] Indeed the problem becomes even more complicated when one also takes into account the First Amendment prohibition against the state's determining the definition of a particular belief. *See, e.g.*, Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Watson v. Jones, 80 U.S. 679 (1872). After all, how can a fact-finder be able to determine an individual's sincerity of belief if the fact-finder is not even sure as to the definition of the belief in question?

[24] *See An Overview of Religious Financial Fraud*, CHRISTIAN HEADLINES BLOG, Jan. 8, 2011, http://christianheadlines.com/blog/2011/01/08/an-overview-of-religious-financial-fraud.

[25] Justice Jackson might disagree. As he stated in his dissent, "[i]f the members of the sect get comfort from the celestial guidance of their 'Saint Germain,' however doubtful it seems to me, it is hard to say that they do not get what they pay for." 322 U.S. at 94 (Jackson, J. dissenting).

charitable fraud, then, no matter what its source, is necessary for protecting the integrity of the system.

Finally, Jackson's solution does not truly eliminate the sincerity problem because at some point the need for the state to inquire into the legitimacy of religious claims is virtually unavoidable. Even if the state were to cease prosecuting religious frauds of the kind at issue in *Ballard*, it would still have to determine whether a claim of religiosity was sincere when brought by an individual or organization seeking a benefit for which religious status is a qualification, such as a religious property tax exemption or parsonage status for a residential dwelling. And it would also have to determine, at some point, whether the potential target of its investigation is or is not religious.

Nevertheless, although not persuasive in its assertion that the state should forego prosecuting religious fraud entirely, Justice Jackson's *Ballard* dissent is persuasive in demonstrating that even if that state prosecution of purported religious fraud is constitutional, it still raises serious issues regarding the relationship of church and state. As such, it provides strong support for the proposition that the state should at least pause before proceeding when it targets alleged malfeasance by religious organizations. The next section, therefore, will attempt to build from Justice Jackson's insights and from the norms of church-state separation noted earlier, and offer some specific guidelines as to how the state should proceed in approaching possible prosecutions for religious fraud.

III. GUIDELINES FOR PROSECUTION

A. Be Absolutely Sure That Any Prosecution is Legitimately Motivated

First and foremost, the state needs to be absolutely sure that Jackson's fears are not realized and that any prosecution against a religious organization has nothing to do with that religion's unpopularity. The state, in short, has to be carefully circumspect about its own reasons for pursuing a particular religious organization. Is the reason because that organization's religious assertions seem outrageous to majoritarian sensibilities or is it based on more objective indications that the organization's activities are fraudulent?

B. Take Extra Care That the Prosecution is Meritorious

Even when the government has legitimate grounds for prosecuting a religious organization, the difficulty of the sincerity inquiry means the fact-finder may not get it right. As Justice Jackson noted in *Ballard*, the jury often will not be able to distinguish between what the defendant believes and what the jury perceives to be believable. But if the jury cannot fully understand or appreciate the nature of the defendant's beliefs (as will often happen when the religious belief in question comes from outside the jury's traditional frame of reference), it will not now be in a suitable position to determine whether a fraud has actually occurred. Rather its conclusions are more likely to be based on its affinity to the defendant's beliefs than upon an objective appraisal of insincerity. The state, therefore, has to be especially careful in submitting a religious fraud case to the jury because the jury cannot be counted on to be as much of a protection for the defendant in such cases as in other matters.

C. Consider the Extent That The Process of Proving a Violation May Itself Compromise Church-State Values

The state should also take into account whether the process of proving a violation will itself compromise church-state values. In order to prove that a defendant is insincere in her beliefs, for example, it must first be determined what those beliefs are. Inquiring into religious belief, however, is perilous on a number of counts. To begin with, the state is forbidden under the first amendment from determining the definition of a religious belief;[26] so the state will have to depend, in large part, on how the belief in question is articulated by the defendant. But, from the perspective of respecting the appropriate bounds between church and state, any attempt by the state to inquire into the nature of the religious belief in question or even more problematically to attempt to impeach the defendant on this issue is very risky business. The specter of a state prosecutor cross-examining the defendant (or her followers if the defendant does not testify) to explain or justify her beliefs is unseemly at best and the state's probing a religious believer for theological inconsistencies in church doctrine in order to impeach is even more troubling. Few religions represent tight exercises in logic and showing discrepancies in doctrine can easily take on the appearance of ridicule.[27] Even attempting to prove that someone is insincere in her beliefs by providing examples of that individual deviating from those beliefs in her own personal conduct is an uncertain undertaking. While that strategy can be effective, it may also miss the mark. Is evidence that one has committed adultery proof that one does not believe that adultery wrong? Given the religious liberty concerns at stake, the state should be particularly careful to make sure that any conviction is based on actual criminal malfeasance and not upon a person's failure to live up to her principles.

D. Consider Whether the Purported Victims of the Fraud Are Internal or External to the Organization.

Finally, and perhaps more controversially, the state should also take into account who are the victims of the purported fraud and consider being less aggressive in cases where the harm is directed at insiders than where the harm directed at outsiders. I say controversially because there are undoubtedly problems with such an approach. The first is definitional. Determining who is an insider and who is an outsider will not always be easy.[28] Are regular viewers of a broadcast ministry insiders or outsiders? Are contributors to particular organizations thereby members? Nevertheless in cases where the lines are clear, the distinction may make some sense. Although certainly the church member who has contributed to his pastor's sham building project is as much a victim as the person who has contributed to a religious organization's non-existent hunger relief project advertised on television, the church member will likely have some direct recourse available. More importantly for our purposes state intercession into a purely internal fraud raises a church-state separation concern in the way state interference into an externally directed deception does not. The line between internal and external may never be fully

[26] *See* note 23, *supra* and accompanying text.

[27] I am aware that ridicule of religion at trial has a vaunted historical pedigree in that it was used by Clarence Darrow in his cross examination of Williams Jennings Bryan in the Scopes trial. *See* EDWARD L. LARSON, SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION (1997). Nevertheless, it is one thing for ridicule to be used by a defendant as a defense to a criminal prosecution and another for it to be used by the state to prove criminal charges against a defendant.

[28] As we saw in our discussion of *Hosanna-Tabor*, the line between internal and external is never likely to be fully distinct. *See* notes 9-10, *supra* and accompanying text.

satisfactory but, like the other guidelines suggested in this section, it may provide a helpful starting point for discussion as to whether state involvement is warranted.

CONCLUSION

The appropriate role of the state in policing the actions of religious organizations is defined by more than just constitutional doctrine and includes non-legal norms of church-state intersection that also needs to be taken into account. Having constitutional authority to regulate religious organizations does not necessarily translate into exercising that authority to its fullest extent. The example of state prosecution of religious fraud may provide some helpful insights into how and when that authority should be employed.