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Individuals, Institutions, and Religious Freedom

A Response to Richard Garnett

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In his book *We Hold These Truths: Catholic Reflections on the American Proposition*, Murray argued that the Constitution "imposes limits on government, which is confined to its own proper ends, those of temporal society. . . . [T]he American Constitution does not presume to define the Church or in any way to supervise her exercise of authority in pursuit of her own distinct ends. The Church is entirely free to define herself and to exercise her full spiritual jurisdiction. It is legally recognized that there is an area which lies outside the competence of government. This area coincides with the area of the divine mission of the Church, and within this area the Church is fully independent, immune from interference by political authority."

But what exactly is the extent of the area of "spiritual jurisdiction" that lies beyond the interference of political authority? In some ways, the ministerial exception dimension of the freedom of the church affirmed by the Supreme Court

(even though they *are* inherently religious), they are engaged in activity that the civil authority may have the jurisdiction to regulate for temporal reasons.

In order for the church to be the church, it must be able to engage in educational and social service activity in the world. As Murray noted nearly fifty years ago, the freedom of the church must include the freedom to fulfill her "spiritual mission of social justice and peace." The concrete human services provided by a Catholic university or a social service agency like Catholic Charities are inherently religious undertakings that expresses the "deepest nature" of the church. At the same time, while the church cannot simply leave this activity to others, there are a range of non-religious groups, as well as the government itself, that provide similar services for non-religious reasons. Thus, the church's inherently religious ministries of education and social welfare service falls outside the sphere of the uniquely or exclusively religious. Religious entities engaging in those activities may find themselves subject to civil regulation that applies generally to secular employers, and these regulations may be justified by governmental interests that provide a legitimate basis for governmental action.

The freedom that the church claims for itself, however, does not demand an absolute freedom from any sort of legal regulation. Article 4 of the Second Vatican Council's *Declaration on Religious Freedom* explains that religious bodies rightly claim freedom "provided the just requirements of public order are

the citizenry, with a view to finding equitable solutions. . . . What chiefly matters is that free exercise of religion should always be responsible. . . . What further matters is the spirit of tolerance, as a moral attitude, among the citizenry – a spirit of reverence and respect for others, which issues in an abhorrence of coercion in religious matters."

Given the religious density of *all* things, perhaps it may be asking too much to expect the legal principles that flow from the Constitution to provide a simple, clear-cut, easy-to-apply doctrinal rules protecting the theological principle of the freedom of the church. It may not be possible to translate completely that theological principle into the language of constitutional law. As 8o1h( )24 T4.0 1 matonaw.