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Individuals, Institutions, and Religious Freedom A Response to Richard Garnett

Gregory Kalscheur, S.J.
Boston College

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Like Rick, I see institutional religious freedom as a foundational structural principle of our constitutional order, and the Supreme Court's decision last year in the *Hosanna-Tabor* case was an important affirmation of that principle, an affirmation of what John Courtney Murray called "the freedom of the church" to be the church. As Rick suggested, the principle of the freedom of the church finds its origins in a jurisdictional conflict – the 11th century fight between the pope and secular authorities over who would have the right to invest bishops with the symbols of their ecclesial authority. And Murray thought that the U.S. Constitution recognized a jurisdictional distinction between church and state that served to protect the freedom of the church.

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 in *Hosanna-Tabor* is a relatively easy case – governmental intervention in internal church disputes about who churches select to be their ministers strikes at the heart of a church’s spiritual mission and right to self-definition. The ministerial exception finds a home within the constitutionally protected sphere in which religious institutions function insulated from state control.

But can the law articulate principled, workable jurisdictional boundaries for this sphere? And does a workable understanding of religion’s sovereign sphere

provide adequate protection for the theological principle of the freedom of the church as it is understood by Murray and in the Vatican II *Declaration on Religious Freedom*?

A jurisdictional line that tries to draw a distinction between claims that implicate inherently religious activities and those that do not is not workable – for a theological reason. As Michael Buckley has argued, drawing on the Ignatian affirmation of God at work in all things, there is a “religious density” to all things. In the words of the most recent Jesuit General Congregation, there is no reality that is only profane for those who know how to look. It is, therefore, not possible to draw precise jurisdictional lines between the sacred and the secular, or between the spiritual and the temporal. *All* human activity can be understood as having an “inherently religious” dimension.

The constitutionally mandated jurisdictional line might be articulated in terms other than the “inherently religious.” The protected sphere of religion that is beyond the jurisdiction of civil authority might be defined as the realm of “uniquely religious” activities or the realm of exclusively religious activities. When religion is doing its own thing, its activities are off limits. But when religious institutions – as they must – embody their religious mission through temporal educational and social service activities that are not uniquely religious

(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

observed.” That assertion, of course, begs a critical question: who is to determine when regulation of the activity of the Church is a reasonable response to the just demands of public order, and how is that determination to be made? As Murray himself recognized, “the criterion of public order remains general, in need of further specification, *and subject to abuse.*”

Acknowledging the potential for abuse of the public order criterion, Murray argued that the state through law could restrict religious activity *only* when such activity *seriously* violates either the public peace or commonly accepted standards of public morality, or the rights of other citizens.” Murray recognized that a practical problem arises in trying to apply this general principle to particular cases – how to avoid arbitrary application of the public order principle by the public power? Murray responded to this problem by outlining four fundamental requirements that should be adhered to in the casuistry that necessarily develops as the principle is applied in practice: (1) that the violation of the public order be really serious; (2) that legal intervention be really necessary; (3) that regard be had for the privileged character of religious freedom, which is not simply to be equated with other civil rights; and (4) that the rule of jurisprudence of the free society be strictly observed, namely, as much freedom as possible, only as much coercion as necessary. Murray further explained that this casuistry “will call for a continual dialogue between the public powers and the personal and political consciousness of

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 James Boyd White has noted, how we talk about legal doctrine plays a role in making that doctrine real. White explains that we need to bring a certain set of attitudes to our conversation about legal protection of religious freedom: we need “a set of attitudes that will enable us to face and live with the problem [the First Amendment] insists upon putting before us, the impossible but necessary task of talking about religion in the language of the law. . . . [O]ur hope at the end might be that we could achieve a condition of ‘religious concord’ based not . . . upon contempt, credulity, or cynicism, but upon respect.”